

LEAKERS, BLOGGERS, AND FOURTH ESTATE INMATES:
THE MISGUIDED PURSUIT OF A REPORTER'S PRIVILEGE

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On September 29, 2005, *New York Times* reporter Judith Miller was released from jail in Alexandria, Virginia. Miller had served eighty-five days for contempt of court after defying a judge's order directing her to testify before a federal grand jury in what has become known as the "CIA leak case." Miller based her refusal to testify on a claim of reporter's privilege: the right of journalists to refuse to reveal the identity of their confidential sources or other information gathered in the course of their work.

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The CIA leak investigation is only one of several recent high-profile cases that have rekindled the debate over the existence and scope of the reporter's privilege and have led to renewed calls for a federal reporter's privilege statute. Supporters argue that such a law is needed to respond to a changing legal environment in which subpoenas to journalists are on the rise. In the absence of a privilege, they claim, confidential sources will no longer speak to journalists for fear of having their identities revealed. As a result, the flow of information to the public through our vigorous and free press will be constricted.

Virtually all judicial and academic discussions of the reporter's privilege accept as a given the truth of the privilege's principal rationale: that the lack of a privilege will have a "chilling effect" on confidential sources, who will be reluctant to provide important information to the press. Closer examination, however, reveals that there is reason to doubt this underlying premise. Considering the purpose and necessary limits of any promise of "confidentiality" that a reporter can make, the presence or absence of a reporter's privilege is unlikely to be the deciding factor for a potential source considering whether to come forward. The social utility of, and need for, a reporter's privilege are open to serious question.

An additional challenge facing those who favor a federal reporter's privilege law is the explosion of different forms of journalism in our modern information age, particularly on the Internet. The rapid rise of on-line reporting and Internet "blogs" has fundamentally altered our notions of both journalists and journalism. The old lines between reporting by the media and general free speech in the public marketplace of ideas are breaking down. The rapid technological changes in both the nature and quantity of information regularly made available to the public suggest that a reporter's privilege may soon have to be considered a relic of a simpler era—a relic that now is neither workable nor necessary.

Privilege advocates also argue that the reporter's privilege is necessary so that we may avoid the image of journalists such as Judith Miller being jailed to protect their sources. They urge that the United States, with its cherished history of a free and robust press, should not be sending members of the Fourth Estate to prison. Passage of a federal privilege law, however, will not achieve this goal. Even with a federal privilege, a journalist will still be jailed if a court determines that the privilege does not apply in a given case and the journalist refuses to abide by that court order. Journalists such as Miller go to jail not because of

what they wrote, but because they refuse to recognize the authority of the courts to determine what the law and the Constitution require. Solving that problem does not require a new privilege statute; it requires a cultural change within journalism and a recognition that reporters are not above the law.

I. BACKGROUND: THE CIA LEAK CASE

The CIA leak case began with President George W. Bush's State of the Union Address on January 28, 2003.¹ In that speech, as part of his argument in support of taking action against Iraq, President Bush uttered what became known as the "sixteen words": "The British government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa."² The President cited these alleged efforts as evidence that Hussein was trying to produce nuclear weapons. In the months that followed, considerable controversy arose over whether the "sixteen words" were true.

In the spring of 2003, news reports began to appear stating that the Bush administration had sent a representative to Niger to investigate the uranium allegations sometime in 2002. The news reports claimed that although the representative had concluded there was no evidence that Iraq had, in fact, sought uranium from Africa, the administration continued to make this assertion regarding Iraq in the State of the Union Address and elsewhere.³

These stories culminated in an Op-Ed column published in the July 6, 2003, issue of the *New York Times*, written by former ambassador Joseph Wilson.⁴ In his Op-Ed piece, Wilson revealed that he had been sent to Niger by the CIA in 2002, to investigate reports that Iraq had sought to purchase from Niger a form of uranium known as yellowcake.⁵ Wilson reported that he had found these claims to be untrue, and that he presented his

¹ President George W. Bush, State of the Union Address (Jan. 28, 2003), <http://www.whitehouse.gov/news/releases/2003/01/20030128-19.html>.

² *Id.*

³ See Nicholas D. Kristof, Op-Ed., *Missing in Action: Truth*, N.Y. TIMES, May 6, 2003, at A1; Walter Pincus, *CIA Did Not Share Doubt on Iraq Data*, WASH. POST, June 12, 2003, at A01.

⁴ Joseph C. Wilson, Op-Ed., *What I Didn't Find in Africa*, N.Y. TIMES, July 6, 2003, § 4, at 9. Wilson is a former career foreign service officer and diplomat with extensive experience in Africa. His diplomatic postings included Niger, Togo, South Africa, Burundi, and Iraq. He served as deputy chief of station in Iraq, was United States Ambassador to Gabon from 1992 to 1995, and helped direct African policy for the National Security Council. See *id.*; Vicky Ward, *Double Exposure*, VANITY FAIR, Jan. 2004; Greater Talent Network Inc., *Biography of Joseph Wilson*, <http://www.greatertalent.com/biography.php?id=258> (last visited Sept. 23, 2006).

⁵ "Yellowcake" is a form of milled uranium oxide. Processing uranium ore into yellowcake is the first step in producing enriched uranium that can then be used to make nuclear weapons. See Brendan Koerner, *What is Yellowcake, Anyway?*, July 18, 2003, SLATE, <http://www.slate.com/id/2085848/>.

findings to the CIA and the State Department in March of 2002. Wilson continued that he was surprised when, months after his report, the administration began to repeat the claims about Iraqi attempts to buy uranium in Africa, culminating in the “sixteen words” spoken by the President during the State of the Union. Wilson concluded that, based on his experience, he had “little choice but to conclude that some of the intelligence related to Iraq’s nuclear weapons program was twisted to exaggerate the Iraqi threat.”⁶

Wilson’s article resulted in a classic Washington political firestorm. Shortly after the article appeared, the Bush administration admitted that the claims about Iraq seeking uranium from Africa could not be substantiated, and that they should not have been included in the State of the Union.⁷ At the same time, however, administration officials apparently were engaged in a campaign to try to discredit Wilson and his conclusions.

On July 14, 2003, syndicated columnist Robert Novak published a piece entitled *The Mission to Niger*.⁸ In his article, Novak claimed that the decision to send Wilson to Africa had been made at a low level within the CIA, and that CIA director George Tenet and President Bush likely never knew about Wilson’s trip or his conclusions.⁹ Novak’s column also included this fateful passage:

Wilson never worked for the CIA, but his wife, Valerie Plame, is an Agency operative on weapons of mass destruction. Two senior administration officials told me Wilson’s wife suggested sending him to Niger to investigate [the uranium allegations].¹⁰

Following the publication of Novak’s column, other news accounts revealed that a number of other reporters had also been told, by unnamed administration officials, that Wilson’s wife worked for the CIA and had been involved in the selection of Wilson for the

⁶ Wilson, *supra* note 4.

⁷ See Press Release, Statement by George J. Tenet, Director of Central Intelligence Agency (July 11, 2003), http://www.cia.gov/cia/public_affairs/press_release/2003/pr07112003.html; Press Release, White House, Office of the Press Secretary, Press Gaggle with Ari Fleischer (July 12, 2003), <http://www.whitehouse.gov/news/releases/2003/07/20030712-11.html>.

The allegations about Iraq seeking yellowcake uranium from Niger have been traced to a series of forged documents purporting to be from the Nigerian embassy, which then made their way into the hands of various intelligence agencies. For a detailed study of the forged Nigerian yellowcake documents and the events leading up to the exposure of Valerie Plame’s identity, see MICHAEL ISIKOFF & DAVID CORN, *HUBRIS: THE INSIDE STORY OF SPIN, SCANDAL, AND THE SELLING OF THE IRAQ WAR* (2006).

⁸ Robert Novak, Op-Ed, *The Mission to Niger*, CHI. SUN-TIMES, July 14, 2003, at 31.

⁹ *Id.*

¹⁰ *Id.*

trip to Niger.¹¹ The apparent implication by these officials was that Wilson's trip was nothing more than a boondoggle arranged by his wife, and that his conclusions should not be taken seriously.

A few months after Novak's column appeared, and at the request of the CIA, the Department of Justice ("DOJ") launched a criminal investigation into the "outing" of Valerie Plame as a CIA operative. The focus was on administration officials who may have improperly disclosed Plame's status to reporters.¹² The primary criminal statute in question was the Intelligence Identities Protection Act, which criminalizes, under certain circumstances, the disclosure of the identity of a covert CIA agent by those with access to classified information.¹³ In December 2003, Attorney General John Ashcroft recused himself from the matter, and Patrick Fitzgerald, the United States Attorney in Chicago, was appointed as a Special Counsel to conduct the investigation.¹⁴

The principal crime being investigated by Fitzgerald was the potentially illegal disclosure of a CIA agent's identity to various reporters. Thus it was not surprising when Fitzgerald found it necessary to seek the testimony of those reporters as the primary—and perhaps the only—witnesses to a possible criminal offense. Fitzgerald subpoenaed a number of journalists to the grand jury, seeking information about administration officials who may have disclosed Plame's identity to them. It was likewise not surprising when the subpoenaed journalists resisted these attempts to compel them to testify about their conversations with individuals whom they considered to be confidential sources. Fitzgerald was able to reach an accommodation with some journalists, including *Meet the Press's* Tim Russert and two reporters from *The Washington*

¹¹ According to one article, "two top White House officials called at least six Washington journalists and disclosed the identity and occupation of Wilson's wife." Mike Allen & Dana Priest, *Bush Administration is Focus of Inquiry; CIA Agent's Identity Was Leaked to Media*, WASH. POST, Sept. 28, 2003, at A01.

¹² It was recently revealed that Novak's first source for the information about Ms. Plame's CIA employment was then-Deputy Secretary of State Richard L. Armitage. Novak then received confirmation from his second source, White House political strategist Karl Rove. Armitage has not been charged with a crime, and has said he was not aware that Ms. Plame's CIA status was classified. See R. Jeffrey Smith, *Armitage Says He Was Source of CIA Leak*, WASH. POST, Sept. 8, 2006, at A03; R. Jeffrey Smith, *Ex-Colleague Says Armitage Was Source of CIA Leak*, WASH. POST, Aug. 29, 2006, at A06. See also ISIKOFF & CORN, *supra* note 7, at 263-64 (discussing Armitage's role in the leak).

¹³ 50 U.S.C. § 421 (2006).

¹⁴ In the letters appointing Fitzgerald, Deputy Attorney General James Comey specified that Fitzgerald was empowered to investigate not only the alleged unauthorized disclosure of Valerie Plame's CIA employment but also any other crimes committed during the course of the investigation, such as perjury or obstruction of justice. See Letter from James B. Comey, Acting Attorney General, to Patrick J. Fitzgerald, United States Attorney (Dec. 30, 2003), http://www.usdoj.gov/usao/iln/osc/documents/ag_letter_december_30_2003.pdf; Letter from James B. Comey, Acting Attorney General, to Patrick J. Fitzgerald, United States Attorney (Feb. 6, 2004), http://www.usdoj.gov/usao/iln/osc/documents/ag_letter_february_06_2004.pdf.

Post, by agreeing to limit their testimony in certain respects. With other journalists, however, the attempts to broker a compromise were unsuccessful.

On August 12 and 14, 2004, the grand jury issued subpoenas to *New York Times* reporter Judith Miller, seeking documents and testimony concerning any conversations she had with a government official in early July, 2003, concerning Valerie Plame or Iraqi attempts to obtain uranium from Africa. Although Miller had never written an article about Plame, her name had surfaced during the investigation as one of the journalists who may have received the allegedly unlawful leaks.¹⁵ In September, 2004, the grand jury subpoenaed Matthew Cooper of *Time* magazine, as well as Time Inc. itself, for testimony and records concerning the same events. After Novak's column had appeared, Cooper had written articles for *Time* magazine's on-line and print editions concerning the controversy and the administration's apparent attempts to discredit Wilson.¹⁶

Miller, Cooper, and Time Inc. all moved to quash the subpoenas, arguing that journalists have a privilege, under both the First Amendment and the common law, to refuse to testify about their confidential sources. Chief Judge Hogan of the United States District Court for the District of Columbia denied their motions and ordered the reporters to testify. When they refused, Chief Judge Hogan found them in contempt of court.¹⁷ The United States Court of Appeals for the District of Columbia Circuit unanimously affirmed the district court's order,¹⁸ and the

¹⁵ Critics of the investigation frequently point to the fact that Miller never wrote an article about Plame, to suggest that the Special Prosecutor had no reason to pursue her testimony so vigorously. See, e.g., Bob Dole, Op-Ed., *The Underprivileged Press*, N.Y. TIMES, Aug. 16, 2005, at A15 ("The incarceration of Ms. Miller is all the more baffling because she has never written a word about the C.I.A. flap."). This criticism misapprehends the nature of the investigation. The reporters were not being questioned based on anything that they had or had not written. The potential crime being investigated was the leak of Plame's name to reporters, and any reporters who received such a leak were potentially critical witnesses, regardless of whether they had ever written an article based on the leak.

¹⁶ Cooper and Time had received subpoenas earlier, in May of 2004, had initially refused to comply, and been held in contempt. Following negotiations with the Special Counsel, however, an agreement was reached whereby Cooper would provide information about a specific source who had said he had no objection to Cooper testifying. This compromise resolved the dispute over the first subpoenas, but a second round of subpoenas to Cooper and Time then followed. See *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1144-45 (D.C. Cir. 2006) [hereinafter Miller GJ Subpoena].

¹⁷ *Id.*

¹⁸ *Id.* The opinion was originally issued on February 15, 2005. See *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D.C. Cir.), cert. denied, 125 S. Ct. 2977 (2005). The opinion was then re-issued on February 3, 2006, after the Court unsealed some portions of Judge Tatel's concurring opinion that had originally been placed under seal because they dealt with grand jury matters. The court's order unsealing portions of the original opinion appears at 438 F.3d 1138. The re-issued opinion appears at 438 F.3d 1141. See Miller GJ Subpoena, *supra* note 16.

United States Supreme Court declined to review the case.¹⁹

Once the Supreme Court failed to intervene, Time Inc. concluded that its legal options were exhausted and that it should comply with the subpoena. Over Cooper's objections, Time Inc. turned Cooper's notes and records over to the grand jury. Cooper continued to refuse to testify, but on the day he was to be jailed for contempt he announced that his source—senior presidential advisor Karl Rove—had just released Cooper from his promise of confidentiality. Cooper therefore agreed to comply with the subpoena, and testified before the grand jury.²⁰ Judith Miller continued to refuse to testify, and on July 6, 2005, was sent to jail.²¹ As in all such cases, Miller held the keys to her own jail cell: she would be released if and when she agreed to comply with the court's order. After serving eighty-five days in prison, Miller agreed to testify, saying that her confidential source—now known to be Vice Presidential Chief of Staff, I. Lewis "Scooter" Libby—had finally given her a personal and unambiguous release from her promise of confidentiality.²²

On October 28, 2005, a month after Miller testified, the grand jury indicted Libby on five counts of perjury, false statements, and obstruction of justice.²³ The indictment alleges that Libby lied to the FBI and later to the grand jury about his conversations with reporters concerning Valerie Plame and her CIA employment.²⁴ Libby's conversations with Judith Miller play a central role in the indictment's allegations. Libby's trial is scheduled for early 2007. More privilege battles loom, as the defense has indicated that it plans to subpoena a number of journalists for the trial.²⁵

¹⁹ *Miller v. United States*, 125 S. Ct. 2977 (2005).

²⁰ See Adam Liptak, *A Reporter Jailed: The Overview; Reporter Jailed After Refusing to Name Source*, N.Y. TIMES, July 7, 2005, at A1.

²¹ See *id.*

²² See Susan Schmidt & Jim VandeHei, *N.Y. Times Reporter Released from Jail*, WASH. POST, Sept. 30, 2005, at A01.

²³ *United States v. I. Lewis Libby, a/k/a/ "Scooter Libby"*, Cr. No. 05-394 (D.D.C. Oct. 28, 2005).

²⁴ *Id.*; see *United States v. Libby*, 432 F. Supp. 2d 26, 28-29 (D.D.C. 2006).

²⁵ The trial judge has already issued one pre-trial ruling finding that no reporter's privilege protects certain documents held by reporters Judith Miller, Matt Cooper and Tim Russert, that have been subpoenaed by the defense in preparation for trial. See *Libby*, 432 F. Supp. 2d at 46-47.

In addition, Joseph Wilson and Valerie Plame recently filed a civil suit against Vice President Cheney, Karl Rove, Scooter Libby, and other administration officials, alleging that Wilson and Plame's constitutional rights were violated by the defendants, who were retaliating against Wilson for speaking out against the administration. See Eric M. Weiss & Charles Lane, *Vice President Sued by Plame and Husband; Ex-CIA Officer Alleges Leak of Her Name Was Retaliatory*, WASH. POST, July 14, 2006, at A03. If the suit proceeds, additional privilege battles are likely to arise as Wilson and Plame seek testimony from reporters about the actions taken by administration officials.

II. THE STATE OF THE LAW ON REPORTER'S PRIVILEGE

A. *Federal Case Law*

To understand how Judith Miller ended up behind bars, it is necessary to review the law concerning a reporter's privilege to refuse to testify when asked to reveal confidential sources or information. The logical starting point for this review is the 1972 Supreme Court case of *Branzburg v. Hayes*.²⁶ Paul Branzburg was a reporter with the Louisville, Kentucky *Courier-Journal*.²⁷ In 1969 and 1971, he wrote articles describing the manufacturing of hashish, use of marijuana, and other drug activities he had witnessed in different parts of Kentucky.²⁸ Branzburg was subpoenaed by two different grand juries to provide testimony concerning the drug-related activities he had observed and the identities of the individuals involved.²⁹ He refused to comply, claiming a reporter's privilege under the United States and Kentucky constitutions and Kentucky state law.

Branzburg's argument was the one typically made in support of a reporter's privilege: confidentiality is essential to the freedom of the press. If reporters can be compelled to identify their sources or otherwise reveal information received in confidence, there will be a chilling effect on confidential sources, who will no longer provide information to the press for fear of having their identities revealed. Without the ability to guarantee confidentiality, Branzburg argued, reporters would be greatly hindered in their ability to gather news, and society's interest in a free and robust press would suffer. The First Amendment's guarantee of a free press, he urged, can therefore be fully realized only if the courts recognize a reporter's privilege.³⁰ When the Kentucky courts denied his claims, Branzburg's cases, and two others raising similar issues, were consolidated and argued before the U.S. Supreme Court.

In a five-four decision, the Supreme Court seemed unequivocal on the First Amendment question:

The issue in these cases is whether requiring newsmen to

²⁶ *Branzburg v. Hayes*, 408 U.S. 665 (1972). There is a tremendous amount of academic writing concerning the privilege both pre- and post-*Branzburg*, and *Branzburg* itself has been extensively analyzed, dissected, and deconstructed. For purposes of this article, I will attempt to provide no more than a relatively brief overview of the current law. For one listing of some of the extensive literature on the privilege, see 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE* § 5426, at 712 n.5 (1980 & 2006 Supp.).

²⁷ *Branzburg*, 408 U.S. at 667.

²⁸ *Id.* at 667-70.

²⁹ *Id.*

³⁰ *Id.* at 679-81.

appear and testify before state or federal grand juries abridges the freedom of speech and press guaranteed by the First Amendment. We hold that it does not.³¹

The Court noted that historically, at common law, no reporter's privilege was recognized.³² It further observed that compelling a reporter to testify placed no direct restrictions on the press, because the papers were still free to rely on anonymous sources, to seek out the news, and to publish whatever they chose.³³ The claimed injury to the press was less direct: if reporters were compelled to testify, the ability of the press to gather information from potentially reluctant sources would be hampered. Therefore the issue, as the Court framed it, was whether the First Amendment required an evidentiary privilege in order to ensure that this feared burden on newsgathering would not take place.³⁴

The *Branzburg* majority was skeptical of the underlying factual premise of the privilege; namely that in the absence of a privilege sources would be deterred from coming forward. In response to this claim, the Court argued that "this is not the lesson history teaches us," because the press had flourished since the founding of the country without the existence of such a privilege.³⁵ Estimates concerning the effect of a privilege on newsgathering, the Court noted, were largely speculative and consisted primarily of opinions of reporters themselves, which "must be viewed in the light of the professional self-interest" of the journalists making the claims.³⁶ The Court also argued that "the relationship of many informants to the press is a symbiotic one which is unlikely to be greatly inhibited by the threat of a subpoena"³⁷ Overall, the Court concluded, it was "unclear how often and to what extent informers are actually deterred from furnishing information when newsmen are forced to testify before a grand jury."³⁸

The Court continued that, even assuming there was some risk of deterring some sources without the recognition of a reporter's privilege, judicial creation of a privilege grounded in the First Amendment would not be justified. The grand jury's historic right to every person's evidence when investigating a crime, the Court found, overcame the "consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters,

³¹ *Id.* at 667.

³² *Id.* at 685-86.

³³ *Id.* at 681-82.

³⁴ *Id.*

³⁵ *Id.* at 698-99.

³⁶ *Id.* at 694.

³⁷ *Id.*

³⁸ *Id.* at 693.

like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.”³⁹

The Court’s rejection of a First Amendment privilege applied equally to confidential sources who were engaged in criminal conduct and those who were not. Sources who were committing criminal acts, the Court said, no doubt sought confidentiality in order to avoid detection and prosecution, but that preference, “while understandable, is hardly deserving of constitutional protection.”⁴⁰ To sustain a privilege in such circumstances, the Court argued, would be to adopt a theory that “it is better to write about crime than to do something about it.”⁴¹

As to sources who were merely reporting possible criminal conduct by others, the Court, as noted above, expressed some doubts that such sources would truly be deterred from coming forward in the absence of a privilege. Even assuming, however, that some such sources would in fact remain silent, this would not justify the creation of a privilege:

[W]e 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 reported to the press by informants and in thus deterring the commission of such crimes in the future.⁴²

The majority thus appeared quite clear in rejecting the First Amendment claim. However, in what was described by his dissenting colleagues as an “enigmatic” concurring opinion,⁴³ Justice Powell—who also joined the majority opinion—muddied the waters a bit. In his concurrence, Justice Powell noted the “limited nature of the Court’s holding” and that the press was not completely without First Amendment protection.⁴⁴ He argued that in appropriate cases, such as a bad faith grand jury investigation or a case in which the reporter’s testimony was not really needed, a reporter could still seek a court’s protection. In such cases, he wrote, any “asserted claim to privilege 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.”⁴⁵ Therefore, although he had joined the majority opinion rejecting the privilege, Justice Powell’s

³⁹ *Id.* at 690-91.

⁴⁰ *Id.* at 691.

⁴¹ *Id.* at 692.

⁴² *Id.* at 695.

⁴³ *Id.* at 725 (Stewart, J., dissenting).

⁴⁴ *Id.* at 709. (Powell, J., concurring).

⁴⁵ *Id.* at 710.

concurrence suggested that claims of a privilege could properly be entertained by the courts under the right circumstances—although exactly what those circumstances could be was far from clear.

The waters that were originally muddied by Justice Powell in *Branzburg* have remained murky for more than thirty years. Despite *Branzburg*'s apparent rejection of a constitutional reporter's privilege, most federal courts have limited *Branzburg* to its facts and have recognized a qualified federal reporter's privilege in at least some cases, often relying on Justice Powell's concurrence for support.⁴⁶ In particular, *Branzburg* has often been limited to cases involving grand jury investigations, and courts have felt more at liberty to recognize some form of the reporter's privilege in other contexts. The Circuit Courts of Appeal are in disarray, however, over the extent to which a privilege exists.⁴⁷ Four circuits—the First, Second, Third, and Eleventh—have each upheld the privilege in both civil cases and criminal trials.⁴⁸ Four circuits—the Fourth, Fifth, Ninth, and the D.C. Circuit—have held that a reporter's privilege exists in civil cases, but not in criminal

⁴⁶ For collections of cases involving the privilege, see generally Romualdo P. Eclavea, *Privilege of Newsgatherer Against Disclosure of Confidential Sources or Information*, 99 A.L.R. 3d 37 (2006); C. THOMAS DIENES, LEE LEVINE, & ROBERT C. LIND, *NEWSGATHERING AND THE LAW* § 16 (2d ed. 1999) (discussing evolution of constitutional and common law privilege).

⁴⁷ In an influential 2003 opinion, *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003), Judge Posner questioned the rationale of many federal cases recognizing a reporter's privilege. Reviewing the decisions in other circuits, Judge Posner noted that a "large number of cases conclude, rather surprisingly in light of *Branzburg*, that there is a reporter's privilege, though they do not agree on its scope." *Id.* at 532 (citations omitted). Judge Posner questioned the reasoning and rationale of those cases, noting that many appeared to be "skating on thin ice." *Id.* at 533. He concluded that, rather than recognize a privilege, courts should simply scrutinize a subpoena to the media to ensure that it is reasonable under the circumstances. *Id.* This is the standard test for evaluating subpoenas, and Judge Posner wrote that the court did "not see why there need to be special criteria merely because the possessor of the documents or other evidence sought is a journalist." *Id.* (citations omitted). Evaluating the subpoena for reasonableness, he said, will allow the court to fulfill the role envisioned by *Branzburg* of safeguarding First Amendment concerns and ensuring that members of the media are not being harassed by a bad-faith investigation. *Id.*

⁴⁸ See First Circuit: *United States v. LaRouche Campaign*, 841 F.2d 1176, 1181-82 (1st Cir. 1988); *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 595-98 (1st Cir. 1980); Second Circuit: *Gonzalez v. Nat'l Broad. Co.*, 194 F.3d 29, 35-36 (2d Cir. 1998); *United States v. Burke*, 700 F.2d 70, 77-78 (2d Cir. 1983); *Baker v. F&F Inv.*, 470 F.2d 778, 783-85 (2d Cir. 1972); Third Circuit: *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980); *Riley v. Mayor of Chester*, 612 F.2d 708, 715 (3d Cir. 1979); Eleventh Circuit: *Price v. Time, Inc.*, 416 F.3d 1327, 1343 (11th Cir. 2005); *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986).

The First Circuit has suggested that it does not recognize a "privilege" as such, but that it simply treats subpoenas to journalists with heightened sensitivity in light of the First Amendment concerns. As the Court has noted, however, this is "largely a question of semantics," because the effect of the standard applied by the court is the same. See *Bruno & Stillman*, 633 F.2d at 595; *In re Special Proceedings*, 373 F.3d 37, 45 (1st Cir. 2004).

cases.⁴⁹ The Tenth Circuit has recognized the privilege in civil cases but has not considered whether it applies to criminal cases,⁵⁰ while the Eighth Circuit has yet to definitively resolve the issue for either civil or criminal proceedings.⁵¹ The Sixth and Seventh Circuits, on the other hand, have held that there is no privilege in *either* criminal or civil cases.⁵² No Circuit Court of Appeals, however, has recognized a privilege in the context of a grand jury proceeding—the facts presented by *Branzburg*.⁵³

⁴⁹ See Fourth Circuit: *United States v. Long*, 978 F.2d 850, 853 (4th Cir. 1992); *LaRouche v. Nat'l Broad. Co.*, 780 F.2d 1134, 1139 (4th Cir. 1986); Fifth Circuit: *United States v. Smith*, 135 F.3d 963, 969 (5th Cir. 1998); *In re Selcraig*, 705 F.2d 789, 792 (5th Cir. 1983); Ninth Circuit: *In re Grand Jury Proceedings (Scarce)*, 5 F.3d 397, 401-03 (9th Cir. 1993); *Shoen v. Shoen*, 5 F.3d 1289, 1295-96 (9th Cir. 1993); D.C. Circuit: *Miller GJ Subpoena*, *supra* note 16; *Zerilli v. Smith*, 656 F.2d 705, 710-12 (D.C. Cir. 1981). The cases of *United States v. Ahn*, 231 F.3d 26 (D.C. Cir. 2000) and *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975), are occasionally incorrectly cited for the proposition that the D.C. Circuit and the Ninth Circuit have recognized the privilege in criminal cases. *Ahn* involved an assertion of the reporter's privilege in connection with a defendant's appeal of the denial of his motion to withdraw his guilty plea. *Ahn*, 231 F.3d at 29. Although this was connected to a criminal guilty plea proceeding, the defendant's motion was in the nature of a civil claim, that the government had breached its contract embodied in the plea agreement. *Farr* involved an assertion of the privilege in response to a show cause order from a trial judge that was issued months after a criminal trial was completed, as the judge sought to investigate who had violated the gag order issued during the trial. *Farr*, 522 F.2d at 466. Again, although this was a proceeding related to a criminal trial, it was not itself a criminal proceeding.

The door may still be open in these two circuits for a litigant to argue that a privilege should be recognized in a criminal trial, even though it has been rejected in the grand jury context. See *United States v. Pretzinger*, 542 F.2d 517 (9th Cir. 1976) (post-*Branzburg* case holding, with no analysis, that it was not error for the trial court to balance the interest of a reporter in confidentiality against a criminal defendant's need for the information and to refuse to order the reporter to reveal his source); *United States v. Libby*, 432 F. Supp. 26, 45 (D.D.C. 2006) (noting that no D.C. Circuit case conclusively resolves the question of whether there is a privilege in criminal trials, as opposed to grand jury proceedings).

⁵⁰ See, e.g., *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977).

⁵¹ The case of *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972), is sometimes cited for the proposition that the Eighth Circuit has recognized the privilege in civil cases. See, e.g., *Shoen v. Shoen*, 5 F.3d 1289, 1292 n.5 (9th Cir. 1993). *Cervantes*, however, discussed the issue in the context of a ruling on a motion for summary judgment, but did not actually decide the privilege question, as the Eighth Circuit itself has noted. See *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 918 n.8 (8th Cir. 1997) ("Although the Ninth Circuit in *Shoen* cited our opinion in *Cervantes* for support [of the finding of a qualified privilege], we believe this question is an open one in this Circuit."); see also *Richardson v. Sugg*, 220 F.R.D. 343, 346 (E.D. Ark. 2004) ("It is an open question in the Eighth Circuit whether there is a qualified reporter's privilege in either civil or criminal cases.").

⁵² See *McKevitt*, 339 F.3d at 530; *In re Grand Jury Proceedings (Storer Commc'ns, Inc.)*, 810 F.2d 580, 584 (6th Cir. 1987). Although the Sixth Circuit's decision in *Storer* dealt only with a grand jury matter, the court expressly rejected the reasoning of those circuits that had interpreted *Branzburg* to allow a privilege in civil cases. See *Storer Commc'ns Inc.*, 810 F.2d at 584-85 & n.6. Accordingly, it seems safe to conclude that the Sixth Circuit would not recognize the privilege in a civil case.

⁵³ See *N.Y. Times Co. v. Gonzales*, 459 F.3d 160 (2d Cir. 2006) (rejecting the privilege in a grand jury investigation); *Miller GJ Subpoena*, *supra* note 16 (same); *In re Grand Jury Proceedings (Scarce)*, 5 F.3d 397, 402-03 (9th Cir. 1993) (same); *Storer Commc'ns, Inc.*, 810 F.2d at 584-85 (same). See also *Special Proceedings*, 373 F.3d at 44-45 (rejecting the privilege in the context of a special prosecutor's investigation, which the court found analogous to a grand jury investigation).

Federal courts that recognize the privilege have uniformly held that it is not absolute, and that it may be overridden in certain circumstances. When evaluating a claim of reporter's privilege, courts generally engage in a balancing test, weighing factors such as: 1) the relevance and admissibility of the evidence sought; 2) the importance of the evidence to the case; and 3) whether the party seeking the evidence has made all reasonable efforts to obtain the information from other sources.⁵⁴ The exact formulation of the balancing test varies from court to court.

B. *Rules and Statutes*

In 1975, three years after *Branzburg*, Congress enacted the Federal Rules of Evidence. Privileges in federal cases are governed by Rule 501, which directs the courts to apply the law of evidentiary privileges "governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."⁵⁵ As originally drafted, Article V of the Federal Rules contained a list of specific privileges to apply in federal cases; a reporter's privilege, however, was not among them.⁵⁶ This is consistent with *Branzburg's* observation that no such privilege was recognized at common law.⁵⁷ The proposed list of specific privileges was rejected by Congress in favor of the more flexible and open-ended Rule 501.⁵⁸ That Rule, in turn, has left courts with the flexibility to create a common law reporter's privilege where they find that such a privilege would be appropriate in the light of "reason and experience." Because *Branzburg* was principally a First Amendment decision, courts that believe *Branzburg* forecloses a reporter's privilege on First Amendment grounds may still conclude that a common law privilege should be recognized under Rule 501.⁵⁹

A district court in the Third Circuit ruled that the privilege did apply in the grand jury in *In re Williams*, 766 F. Supp. 358 (W.D. Pa. 1991). This decision was affirmed by an equally divided *en banc* court, an opinion that thus lacks precedential value. *In re Williams*, 963 F.2d 567 (3d Cir. 1992); *see also* *Rutledge v. United States*, 517 U.S. 292, 304 (1996).

⁵⁴ *See, e.g.*, *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986); *LaRouche*, 780 F.2d at 1139; *United States v. Burke*, 700 F.2d 70, 76-77 (2d Cir. 1983); *Zerilli*, 656 F.2d at 713-14; *Riley v. Mayor of Chester*, 612 F.2d 708, 716-17 (3d Cir. 1979).

⁵⁵ FED. R. EVID. 501.

⁵⁶ *See id.* at advisory committee's note; *Rules of Evidence for United States Courts and Magistrates*, 56 F.R.D. 183, 230-35 (1972).

⁵⁷ *Cf.* *United States v. Gillock*, 445 U.S. 360, 367-68 (1980) (declining to recognize a state legislative privilege not contained in the Advisory Committee draft of Article V, and noting that the absence suggests the privilege was not recognized at common law).

⁵⁸ *See Jaffee v. Redmond*, 518 U.S. 1, 8 n.7 (1996).

⁵⁹ *See, e.g.*, *Miller GJ Subpoena*, *supra* note 16, at 1171 (Tatel, J., concurring) (arguing that *Branzburg* forecloses a First Amendment privilege but that "the common law issue . . . remains open"). *But see id.* at 1154-55 (Sentelle, J., concurring) (arguing that *Branzburg* forecloses recognition of a common law privilege as well). *See also Cuthbertson*, 630 F.2d

Although there is no federal reporter's privilege statute, the Department of Justice has long had internal rules governing when DOJ attorneys—criminal or civil—may issue subpoenas for a journalist's testimony or records.⁶⁰ Although not required by any statute, the rules are intended to guide and limit the discretion of DOJ attorneys in this area, given the First Amendment sensitivities involved.⁶¹ The DOJ guidelines essentially provide that such subpoenas to the media may be sought only as a last resort, and DOJ attorneys are required to obtain approval from senior Department officials before issuing any subpoena to the media. To obtain such approval, an attorney must demonstrate that the subpoenaed information is essential to the case, that the government has sought unsuccessfully to obtain the information from other sources or through negotiations with the media, and that the subpoena is as narrowly tailored as possible.⁶²

Of course, the law on reporter's privilege is not confined to the federal system. At the time *Branzburg* was decided, seventeen states provided some statutory protection for the confidentiality of a reporter's sources and information.⁶³ Today, forty-nine states and the District of Columbia provide at least some limited form of a reporter's privilege. Thirty-two states and D.C. have enacted a reporter's privilege statute or "shield law;" the remaining states have recognized the privilege by judicial decision.⁶⁴ The state statutes vary widely. Virtually all of the statutes protect the identity of a reporter's confidential sources, either absolutely or in some qualified manner. Some statutes also protect a reporter's notes,

139, 146 (3d. Cir. 1980) (recognizing a common law reporter's privilege under Rule 501); *N.Y. Times Co. v. Gonzales*, 382 F. Supp. 2d 457 (S.D.N.Y. 2005), *vacated and remanded*, 459 F.3d 160 (2d Cir. 2006) (finding privilege under Rule 501).

⁶⁰ See 28 C.F.R. § 50.10 (2006); UNITED STATES ATTORNEY'S MANUAL §§ 9-11.255, 9-13.400 (2006).

⁶¹ It is generally recognized that these internal rules do not provide any enforceable rights to criminal defendants or other parties. A journalist, for example, may not successfully move to quash a subpoena by arguing that a DOJ attorney failed to follow the guidelines. See *Miller GJ Subpoena*, *supra* note 16, at 1152-53; 28 C.F.R. § 50.10(n).

⁶² The Securities and Exchange Commission (SEC) recently issued its own policy concerning SEC subpoenas to members of the media. The policy closely tracks the DOJ Guidelines and, according to the SEC, is designed to "ensure that vigorous enforcement of the federal securities laws is conducted completely consistently with the principles of the First Amendment's guarantee of freedom of the press." See Press Release, SEC, Policy Statement of the Securities and Exchange Commission Concerning Subpoenas to Members of the News Media (Apr. 12, 2006), <http://www.sec.gov/news/press/2006/2006-55.htm>.

⁶³ See *Branzburg v. Hayes*, 408 U.S. 665, 688 n.27 (1972).

⁶⁴ See *Miller GJ Subpoena*, *supra* note 16, at 1170 (Tatel, J., concurring); *Gonzales*, 382 F. Supp. 2d at 502 n.34. The most recent state to pass a shield law is Connecticut. See 2006 CONN. ACT No. 06-140 (effective Oct. 1, 2006). The only state that has not recognized the privilege in any form is Wyoming.

For a collection of the various state reporter's privilege statutes, see ULAN C. PRACENE, *JOURNALISTS, SHIELD LAWS, AND THE FIRST AMENDMENT: IS THE FOURTH ESTATE UNDER ATTACK?* (2005); DIENES ET AL., *supra* note 46, § 15 and app. B.

outtakes, other work product, and even the reporter's personal observations.⁶⁵

III. RECENT DEVELOPMENTS IN THE REPORTER'S PRIVILEGE

A. *The Privilege Rulings in the CIA Leak Case*

When subpoenaed in the CIA leak case, Miller, Cooper, and Time Inc. moved to quash the subpoenas based on reporter's privilege. Chief Judge Hogan ruled that because these were grand jury subpoenas issued in a good-faith criminal investigation, *Branzburg* was directly controlling: "Whatever extent lower courts around the country have eroded the periphery of the *Branzburg* opinion, the core of the opinion stands strong. The facts of this case fall entirely within that core"⁶⁶ The Chief Judge further held that, even if he were to find that journalists did have a qualified privilege, the grand jury materials submitted under seal by the Special Counsel were sufficient to overcome any privilege under "even the most stringent of balancing tests."⁶⁷ The Chief Judge therefore rejected the privilege claims, ordered the reporters to testify, and ordered Time Inc. to turn over Cooper's notes and materials. When Time Inc., Cooper and Miller continued to refuse, Chief Judge Hogan held them in contempt.

The United States Court of Appeals for the District of Columbia Circuit unanimously affirmed Chief Judge Hogan's opinion on February 15, 2005.⁶⁸ With respect to the claim of a reporter's privilege under the First Amendment, all three judges agreed that *Branzburg* was squarely on point and that there was no such privilege, at least in the context of a grand jury investigation:

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. The Highest Court has spoken and never revisited the question. Without doubt, that is the end of the matter.⁶⁹

⁶⁵ On the variations in the scope and coverage of the state privilege statutes, see DIENES ET AL., *supra* note 46, § 15-2(d).

⁶⁶ *In re* Special Counsel Investigation, 332 F. Supp. 2d 26, 31 (D.D.C. 2004). Chief Judge Hogan rejected the reporters' argument that Justice Powell's concurrence in *Branzburg* meant there was a qualified privilege and that the court must apply a balancing test. *Id.* at 29-30. Judge Hogan held that the balancing test referred to by Justice Powell applied only in cases where there was an abuse of the grand jury process or no legitimate need for the information. *Id.*

⁶⁷ *Id.* at 32.

⁶⁸ Miller GJ Subpoena, *supra* note 16.

⁶⁹ *Id.* at 1147.

Because the reporters were unable to distinguish *Branzburg* in any meaningful way, the court found their First Amendment claim could not succeed.⁷⁰

The journalists also argued that the court should recognize a privilege under the common law and Federal Rule of Evidence 501.⁷¹ On this question the three judges split over their approach, although they all agreed on the final outcome. Judge Sentelle believed the court should find that there was no common law privilege. He argued first that the holding of *Branzburg* was not limited to the First Amendment, and that the Supreme Court had also rejected the notion of a common law privilege, at least implicitly.⁷² Even if *Branzburg* did not foreclose recognition of a common law privilege, Judge Sentelle further argued, any privilege should be created by the legislature, not by the judiciary.⁷³ Noting the complicated issues involved in fashioning a privilege and the wide variation among the different state statutes, Judge Sentelle argued that judicial restraint counseled against judges discovering such a privilege in the common law and effectively legislating its terms.⁷⁴

Judge Henderson argued that the court should not decide whether there was a common law privilege.⁷⁵ She noted that all three judges on the panel agreed that, even if there were such a privilege, it would not be absolute and the Special Counsel had made a sufficient showing to override it.⁷⁶ As such, she wrote, judicial restraint would best be served if the court declined to reach the privilege question, given the difficult issues that it raised.⁷⁷ Rather, she argued, the court should simply assume, for the sake of argument, that there was a common law privilege, and then hold that whatever the parameters of that privilege, on the facts of this case it was overcome by the compelling need for the information.⁷⁸

Finally, Judge Tatel, relying primarily on Federal Rule of Evidence 501 and the wide acceptance of a reporter's privilege in the various states, concluded that there was indeed a common law reporter's privilege.⁷⁹ He argued that developments since *Branzburg*, including the broad grant of authority given to the

⁷⁰ *Id.* at 1147-49.

⁷¹ *Id.* at 1149-50.

⁷² *Id.* at 1154-55 (Sentelle, J., concurring).

⁷³ *Id.* at 1155-59.

⁷⁴ *Id.*

⁷⁵ *Id.* at 1159-63 (Henderson, J., concurring).

⁷⁶ *Id.* at 1159.

⁷⁷ *Id.* at 1159-63.

⁷⁸ *Id.* at 1159.

⁷⁹ *Id.* at 1163 (Tatel, J., concurring).

federal courts in Rule 501, justified finding the privilege in the common law.⁸⁰ Citing the usual policy concerns about the chilling effects on confidential sources and resulting damage to the freedom of the press,⁸¹ Judge Tatel argued that “reason and experience” supported the judicial creation of a privilege.⁸² The privilege could not, however, be absolute, even when invoked to protect a source’s identity. Rather, he argued, a court must balance several factors in deciding whether the privilege could be overridden in a given case. These factors included not only the need for the information and the exhaustion of alternative sources, but also the “newsworthiness” of the leak to the press and any harm that it caused.⁸³ Applying this standard, and citing extensively to the grand jury materials submitted under seal by the Special Counsel, Judge Tatel concluded that the need for the information was compelling, the damage caused by the leak was potentially severe, and the news value of the leaked information had been relatively low. Therefore, under his balancing test, the privilege would have to give way.⁸⁴

Despite their disagreement over the proper approach to the common law issue, all three judges concluded that the reporters must testify and that the contempt citations were proper. The Supreme Court denied *certiorari* on June 27, 2005,⁸⁵ and on July 6, 2005, Chief Judge Hogan sent Judith Miller to jail. As noted above, although Miller has now been released and has testified before the grand jury, additional privilege battles are likely as the parties prepare for the criminal trial of Scooter Libby in early 2007.

B. *The Wen Ho Lee Case*

The recently-resolved case involving Dr. Wen Ho Lee provides an interesting example of the different way in which the same court may treat reporter’s privilege issues, depending upon the type of proceeding involved. Lee is a scientist who was employed by the Department of Energy.⁸⁶ From 1996 through 1999, Lee was investigated by the FBI on suspicion of spying for China. He was ultimately indicted on fifty-nine counts of mishandling classified information, but was later allowed to plead

⁸⁰ *Id.* at 1166.

⁸¹ *Id.* at 1168-69.

⁸² *Id.* at 1172.

⁸³ *Id.* at 1173-75.

⁸⁴ *Id.* at 1173-83.

⁸⁵ *Miller v. United States*, 125 S. Ct. 2977 (2005).

⁸⁶ *Lee v. Dep’t of Justice*, 413 F.3d 53, 55 (D.C. Cir. 2005), *cert. denied sub nom.* Thomas v. Lee, 126 S. Ct. 2373 (2006).

guilty to a single count.⁸⁷ After his indictment, Lee filed a Privacy Act case against a number of federal officials, claiming that these officials had unlawfully leaked personal information about Lee to the news media.⁸⁸

In connection with his civil case, Lee subpoenaed a number of journalists for information about who in the government may have leaked information about Lee. The journalists fought the subpoenas by asserting the reporter's privilege to protect their confidential sources. The district court denied the privilege, and held the journalists in contempt when they refused to testify.⁸⁹ The case was appealed to the D.C. Circuit, the same court that just a few months earlier had ruled there was no privilege for grand jury proceedings in the CIA leak case. The opinion in the *Lee* case was written by Judge Sentelle, the same judge who had written the panel opinion in the CIA leak case. In *Lee*, however, the D.C. Circuit held, based on circuit precedent, that there *is* a qualified reporter's privilege when a reporter is subpoenaed in a *civil* case.⁹⁰ To overcome the privilege, the court said, a litigant must show that the information sought goes "to the heart of the matter," and the litigant must exhaust "every reasonable alternative source of information" before seeking the information from the reporters.⁹¹ The Court of Appeals ruled that the district court had not abused its discretion in finding that Lee had met this burden. Accordingly, the contempt orders were affirmed for all but one of the reporters.⁹²

The journalists petitioned the Supreme Court to grant *certiorari* in order to resolve the issues surrounding the applicability of *Branzburg* to civil cases.⁹³ While the petition for

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Lee v. United States Dep't of Justice*, 327 F. Supp. 2d 26, 33 (D.D.C.) *aff'd in part and vacated in part* by 413 F.3d 53 (D.C. Cir. 2005), *cert. denied sub nom. Thomas v. Lee*, 126 S. Ct. 2373 (2006).

⁹⁰ *Lee*, 413 F.3d at 58 (citing *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981)).

⁹¹ *Id.* at 59 (citations omitted).

⁹² *Id.* at 64. As to one reporter, Jeff Gerth, the Court of Appeals found there was insufficient evidence that he had actually defied the court's order, because he had claimed ignorance of the matters about which Lee sought to question him. *Id.* at 63-64. Accordingly, the contempt order as to Gerth was vacated. *Id.* at 64.

The reporters petitioned the D.C. Circuit for rehearing *en banc*, which was denied on November 2, 2005. *Lee v. Dep't of Justice*, 428 F.3d 299 (D.C. Cir. 2005). Judges Tatel and Garland dissented from the denial of an *en banc* hearing. They argued that the panel decision was flawed because it considered only the litigant's need for the information and the exhaustion of alternatives, while failing to balance these factors against the public interest in allowing reporters to maintain confidences and gather information on sensitive matters. *Id.* at 301. The panel's two-pronged test, they argued, meant that even the most trivial interests of a private litigant could trump First Amendment values if there was no other source for the information. *See id.* at 301-03 (Tatel, J., and Garland, J., dissenting).

⁹³ *Lee v. Dep't of Justice*, 413 F.3d 53 (D.C. Cir. 2005), *petition for cert. filed sub nom. Thomas v. Lee*, 74 U.S.L.W. 3677 (No. 05-1114), *cert. denied*, 126 S. Ct. 2373 (2006).

certiorari was pending, however, the case was settled and Dr. Lee was paid more than \$1.6 million. The federal government paid Lee \$895,000 to drop his lawsuit and, in what may be an unprecedented step, the five media organizations whose reporters were cited for contempt agreed to pay a total of \$750,000 towards the settlement.⁹⁴ None of the media organizations were defendants in the case, but they agreed to contribute to the settlement in order to avoid the likelihood that their reporters would either have to reveal their sources or be jailed for contempt.⁹⁵ Shortly after the settlement was reached, the Supreme Court announced that it had denied the petition for *certiorari*.⁹⁶

C. New York Times Co. v. Gonzalez

Another significant pending privilege case, *New York Times Co. v. Gonzales*,⁹⁷ involves a second battle between Chicago U.S. Attorney Patrick Fitzgerald and former New York Times reporter Judith Miller. During late 2001, the federal government was scrutinizing various Islamic nonprofit organizations suspected of providing support for terrorist activities.⁹⁸ During that investigation, the government developed plans to freeze the assets and/or search the offices of two different organizations. Miller and another *Times* reporter, Philip Shenon, apparently learned of the government's intentions from confidential sources.⁹⁹ On the eve of the government's actions, and in connection with articles they were preparing, the reporters called the organizations seeking their comments on the government's plans.¹⁰⁰ FBI agents executed search warrants at the organizations shortly thereafter. Fitzgerald has alleged that, by contacting the organizations, the reporters tipped off the targets of the upcoming searches, increasing the risks to the FBI when executing the search warrants and enhancing the likelihood of destruction of evidence or

⁹⁴ See Paul Farhi, *U.S., Media Settle with Wen Ho Lee, News Organizations Pay to Keep Sources Secret*, WASH. POST, June 3, 2006, at A01.

⁹⁵ *Id.*

⁹⁶ *Thomas v. Lee*, 126 S. Ct. 2373 (2006).

⁹⁷ *N.Y. Times Co. v. Gonzales*, 382 F. Supp. 2d 457 (S.D.N.Y. 2005), *vacated and remanded*, 459 F.3d 160 (2d Cir. 2006).

⁹⁸ *Id.* at 462.

⁹⁹ *Id.* at 466-67.

¹⁰⁰ *Id.* at 466. Miller and Shenon wrote articles for the *New York Times* about the impending searches and the government's plans to block the organization's assets. Miller's article appeared the day before one of the searches, and Shenon's article appeared the day after the second search. The reporters' telephone calls to the organizations, however, preceded both searches. See *N.Y. Times Co. v. Gonzales*, 459 F.3d 160, 163-64 (2d Cir. 2006).

concealment of assets.¹⁰¹

After the articles appeared, Fitzgerald's office began an investigation into whether any government officials had committed a crime by leaking to reporters the confidential information about the upcoming searches. As part of that investigation, Fitzgerald notified the *New York Times* that he was prepared to subpoena the telephone records of Miller and Shenon from third-party providers, in an attempt to uncover the identity of any government official who may have leaked the information to them.¹⁰² To head off the subpoenas, the *Times* filed a lawsuit in federal district court in New York, seeking a declaratory judgment that obtaining the telephone records would violate the reporter's privilege under the First Amendment and the common law.¹⁰³

On February 24, 2005, Judge Robert Sweet of the Southern District of New York granted the *New York Times*' motion for a declaratory judgment and barred the subpoenas.¹⁰⁴ In an exhaustive opinion, Judge Sweet concluded that, under the Second Circuit precedents interpreting *Branzburg*, there was a qualified reporter's privilege grounded in the First Amendment that applied in both civil and criminal cases.¹⁰⁵ Although the judge acknowledged that the Second Circuit had not expressly approved the privilege in a grand jury setting, he found that "the government has not offered a principled basis for concluding that the qualified First Amendment reporter's privilege applies in the context of a criminal trial but not in the context of a grand jury investigation."¹⁰⁶ Judge Sweet concluded that it might be easier to overcome the privilege in a criminal or grand jury case, but that the privilege nonetheless exists: "[t]he scope of the reporter's privilege may vary depending on the context, but whether there is a qualified privilege rooted in the First Amendment is not dependent on the nature of the case."¹⁰⁷

In addition to the First Amendment holding, Judge Sweet ruled that there is also a qualified reporter's privilege under the

¹⁰¹ *N.Y. Times*, 382 F. Supp. 2d at 465-67.

¹⁰² *Id.* at 467-68. Such notice is required by the DOJ guidelines governing subpoenas to the media. See 28 C.F.R. § 50.10(g)(2) (2006).

¹⁰³ *N.Y. Times*, 382 F. Supp. 2d at 464-71.

¹⁰⁴ In addition to its privilege holdings, the opinion also deals with questions concerning whether it was proper for the *New York Times* to bring a declaratory judgment action in New York concerning a potential subpoena from a grand jury in Chicago, *id.* at 473-80 (yes), and whether the Department of Justice Guidelines for subpoenas to the media provide any enforceable rights to those challenging a subpoena, *id.* at 480-84 (no).

¹⁰⁵ *Id.* at 484-92.

¹⁰⁶ *Id.* at 492.

¹⁰⁷ *Id.*

common law.¹⁰⁸ Judge Sweet's reasoning on the common law privilege was similar to that of Judge Tatel of the D.C. Circuit in the CIA leak case, which had been issued just nine days earlier. Judge Sweet argued that Federal Rule of Evidence 501 was a declaration by Congress that the federal courts were to develop the law of privilege in the light of "reason and experience."¹⁰⁹ He noted the wide acceptance of the privilege by the states, and the recognition by many courts in the Second Circuit and elsewhere that a reporter's privilege may be found in the common law. Applying the Rule 501 analysis set forth by the Supreme Court in *Jaffee v. Redmond*,¹¹⁰ Judge Sweet concluded that a qualified reporter's privilege should be recognized under federal common law.¹¹¹

The government had also argued that, even if the court were to recognize a privilege, the privilege could not extend to subpoenas that sought to obtain telephone records from third parties rather than subpoenas seeking to compel testimony from the reporters themselves.¹¹² Judge Sweet also rejected this argument, although with relatively little analysis.¹¹³ The judge concluded that the policies justifying the reporter's privilege were the same whether the government seeks to compel testimony from the reporters themselves concerning their sources, or whether it seeks to compel production of documents from third parties that may reveal the identity of those sources.

Having found that the privilege exists, that it applies in a grand jury investigation, and that the government had failed to make a showing sufficient to overcome the privilege, Judge Sweet granted the motion for a declaratory judgment and ruled that the journalists' telephone records could not be subpoenaed. The government appealed, and on August 1, 2006, the Second Circuit, in a 2-1 decision, vacated Judge Sweet's ruling.¹¹⁴ On appeal, the parties had strongly disagreed over the proper interpretation of the Second Circuit precedents¹¹⁵ and whether Judge Sweet was correct in holding that those precedents justified the recognition of the privilege in a grand jury investigation. While reversing

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 492-94.

¹¹⁰ *Jaffee v. Redmond*, 518 U.S. 1 (1996). In *Jaffee*, the Supreme Court relied on Federal Rule of Evidence 501 to find that under federal common law there is a privilege that protects communications between a psychotherapist and his or her patient. *Id.* at 35.

¹¹¹ *N.Y. Times*, 382 F. Supp. 2d at 495-508.

¹¹² *Id.* at 508-09.

¹¹³ *Id.* at 509.

¹¹⁴ *N.Y. Times Co. v. Gonzales*, 459 F.3d 160 (2d Cir. 2006).

¹¹⁵ See *Gonzales v. Nat'l Broad. Co.*, 194 F.3d 29 (2d Cir. 1999); *United States v. Cutler*, 6 F.3d 67 (2d Cir. 1993); *United States v. Burke*, 700 F.2d 70 (2d Cir. 1983); *In re Petroleum Prods. Antitrust Litig.*, 680 F.2d 5 (2d Cir. 1982).

Judge Sweet's decision, the Second Circuit declined the opportunity to shed any real light on that subject.

With respect to the privilege issue,¹¹⁶ the Second Circuit first agreed with Judge Sweet that, to whatever extent a reporter's privilege did exist, that privilege extended to telephone records of a reporter that are held by a third party. Citing what it said was "a dispositive precedent of this court," the panel held that whenever a third party plays an "integral role" in reporters' work, the records held by that third party and related to that work are covered by the same privilege that protects the reporters themselves.¹¹⁷

Turning to the question of a common law privilege, the Second Circuit essentially adopted the approach that had been suggested by Judge Henderson of the D.C. Circuit in the CIA leak case: assuming there is a privilege, it must yield in this case.¹¹⁸ The court agreed with Judge Sweet that any privilege, if one indeed existed, would necessarily be qualified, noting that every federal court to recognize the privilege under Rule 501 had so held and that most state statutes provide only a qualified privilege.¹¹⁹ The court then concluded that no matter how any such common law privilege was framed, it would have to give way in this case because the reporters were critical, direct witnesses in an important criminal investigation. Accordingly, the court held that it need not decide whether there was a common law privilege that applied in a grand jury investigation, because even if there were, the government's compelling need for this information would overcome the privilege.¹²⁰

On the issue of a First Amendment privilege, the court stated:

We see no need to add a detailed analysis of our precedents. None involved a grand jury subpoena or the compelling law enforcement interests that exist when there is probable cause to believe that the press served as a conduit to alert the targets of an asset freeze and/or searches. *Branzburg* itself involved a grand jury subpoena, is concededly the governing precedent, and none of the opinions of the Court, save that of Justice Douglas, adopts a test that would afford protection against the present investigation.¹²¹

¹¹⁶ Before addressing the privilege claims, the Second Circuit upheld Judge Sweet's conclusion that the Declaratory Judgment Act was properly available to the *New York Times* to seek to block the grand jury subpoenas. See *N.Y. Times*, 459 F.3d at 165-67.

¹¹⁷ *Id.* at 167-68 (citing *Local 1814, Int'l Longshoremen's Ass'n v. Waterfront Comm'n*, 667 F.2d 267 (2d Cir. 1981)).

¹¹⁸ *Miller GJ Subpoena*, *supra* note 16, at 1159 (Henderson, J., concurring).

¹¹⁹ *N.Y. Times*, 459 F.3d at 169.

¹²⁰ *Id.* at 169-72.

¹²¹ *Id.* at 173-74 (footnotes omitted).

Unlike the D.C. Circuit in the CIA leak case, therefore, the Second Circuit did not issue a definitive holding that there simply is no First Amendment privilege in the context of a grand jury investigation. Instead, the court held that, regardless of how *Branzburg* is interpreted, in this case the government's need for the information was sufficiently compelling that any First Amendment privilege that might exist would be overcome.¹²²

The decision in *Gonzales* is very fact-specific and does little to clarify the state of the law in the Second Circuit.¹²³ The door still appears to be open for a litigant in that Circuit to argue that a common law privilege, or even a First Amendment privilege, should be recognized in a grand jury investigation in a case where the government's need for the information is less compelling than it was in *Gonzales*.

One of the most intriguing aspects of the Second Circuit's decision is its *dicta* that if there were a privilege, the court would extend that privilege to cover telephone records held by third parties.¹²⁴ As the government had argued, this holding seems to expand the scope of the privilege dramatically, far beyond anything contemplated even by the dissenters in *Branzburg*.¹²⁵ Taken to its logical conclusion, it would bar the government from seeking to identify a reporter's confidential source by *any* means, including subpoenaing relevant documents from any third parties or even interviewing witnesses who may have knowledge of a source's identity.¹²⁶ The court's conclusion directly conflicts with

¹²² Judge Sack dissented from the panel decision in *Gonzales*. Judge Sack argued that the court should recognize a privilege that applies in the grand jury, under the common law and perhaps even under the First Amendment. *Id.* at 179-83 (Sack, J. dissenting). He agreed with much of Judge Tatel's opinion in the CIA leak case concerning the common law privilege. *Id.* He also argued that the government had failed to make a sufficient showing to override the privilege because it had not disclosed to the court what efforts it had undertaken to obtain the information from other sources. *Id.*

¹²³ On September 1, 2006, the *New York Times* petitioned the Second Circuit to rehear the *Gonzales* case *en banc*. See *N.Y. Times Co. v. Gonzales*, No. 05-2639, Petition for Rehearing En Banc of Appellee The New York Times Company (2d Cir. Sept. 1, 2006). As of this writing, it remains to be seen whether that petition will be granted and, if not, whether the *Times* will seek *certiorari* to the Supreme Court.

¹²⁴ *N.Y. Times*, 459 F.3d at 163.

¹²⁵ The legislative trend may be to extend the privilege to records held by third parties such as telephone companies and internet service providers. The proposed federal legislation expressly protects such records. See Free Flow of Information Act of 2006, S. 2831, 109th Cong. (2d Sess. 2006). The recently enacted Connecticut shield law also protects third-party records. See 2006 CONN. ACT No. 06-140 (effective Oct. 1, 2006). Of course, a legislative body extending the privilege to such records as a policy matter is one thing; a court doing so as a matter of First Amendment interpretation or common law is quite another.

¹²⁶ This would also seem to put the government in a Catch-22 situation. In order to overcome the privilege and compel a reporter to testify, the government is required to show that it has exhausted every other reasonable means of obtaining the information. However, under the privilege as interpreted by the Second Circuit, the government would not be allowed to pursue many other means of obtaining the information because the

the holding of the only other Circuit Court of Appeals to address such a claim.¹²⁷ If adopted by other courts, this would represent a dramatic expansion of the reporter's privilege.¹²⁸

D. O'Grady v. Superior Court

In a case with far-reaching implications for the future of the privilege, a California appeals court recently applied that state's privilege law to the operators of two Internet news sites, or "blogs."¹²⁹ *O'Grady v. Superior Court* involved a civil suit filed by the Apple Computer company, alleging that its trade secret information had been stolen and wrongfully published on the Internet.¹³⁰ In November, 2004, two Internet websites devoted to issues involving Apple computers, *O'Grady's PowerPage* and *Apple Insider*, posted several articles concerning a rumored new product that Apple was about to release which would facilitate the recording of digital live sound on Apple computers. Apple alleged that the information contained in the articles constituted Apple's confidential trade secrets that had been wrongfully taken from the company, and filed suit seeking damages.¹³¹

As part of the lawsuit, Apple sought to identify the individuals responsible for providing its confidential information to the proprietors of the websites. To that end, Apple sought and obtained permission to serve subpoenas on the operators of the websites to force them to identify their sources.¹³² The website operators moved for a protective order barring the subpoenas on the grounds that they were protected from revealing their sources

privilege would bar those efforts.

¹²⁷ See Reporters Comm. for Freedom of the Press v. Am. Tel. & Tel. Co., 593 F.2d 1030, 1053 (D.C. Cir. 1978) ("Government inspection of third-party records, while it may inhibit plaintiffs' news-gathering activity, does not impermissibly abridge such activity.").

¹²⁸ There are several reasons to question the Second Circuit's conclusion on this point. The "dispositive precedent" on which the court relied was a First Amendment freedom of association case, and not a reporter's privilege case. See *N.Y. Times*, 459 F.3d at 167-68 (citing *Local 1814, Int'l Longshoremen's Ass'n v. Waterfront Comm'n*, 667 F.2d 267 (2d Cir. 1981)). It is not clear how well the reasoning of a case involving membership lists and associational rights applies to the question of privilege. Normally, in the law of privilege, if outside third parties are voluntarily brought into the relationship, the privilege is deemed to be waived. In addition, such an argument would appear to depend upon a finding that the reporter's privilege is grounded in the First Amendment rather than the common law—the more difficult argument to make after *Branzburg*.

¹²⁹ *O'Grady v. Superior Court*, 44 Cal. Rptr. 3d 72 (Cal. Ct. App. 2006). As the *O'Grady* court itself noted, the definitions of "blog" and "blogger" are not completely clear or settled. *Id.* at 102 n.21. The term "blog" apparently originated as a shortened version of "web log," which initially referred primarily to a sort of on-line, individual diary. *Id.* Now the term is used more broadly to refer to a wide variety of Internet sites, including many news and politics-oriented sites that are perhaps more properly considered on-line magazines or "e-zines" rather than true "blogs." *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 76.

¹³² *Id.*

by the reporter's privilege provided in the California state constitution, as well as by the First Amendment.¹³³ The trial court denied the website operators' motion.¹³⁴ The court assumed that the website operators qualified as journalists, but held there was no privilege because the operators had engaged in potentially criminal conduct by publishing the information, which the court found was not in the public interest.¹³⁵

On May 26, 2006, the California Sixth District Court of Appeal reversed the trial court and ruled that the website operators could assert a valid reporter's privilege to resist the subpoenas. The court first considered the California state privilege, which is contained in the state constitution as well as in the state evidence code. That privilege provides that a "publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication" may not be held in contempt for refusing to identify a confidential source or to reveal any unpublished information that was obtained while preparing information to be communicated to the public.¹³⁶

Apple argued that the website operators could not claim the privilege because they were not engaged in "legitimate" journalism but only in the misappropriation of trade secrets.¹³⁷ The court rejected this claim:

We decline the implicit invitation to embroil ourselves in questions of what constitutes "legitimate journalis[m]." The shield law is intended to protect the gathering and dissemination of *news*, and that is what petitioners did here. We can think of no workable test or principle that would distinguish "legitimate" from "illegitimate" news. Any attempt by courts to draw such a distinction would imperil a fundamental purpose of the First Amendment, which is to identify the best, most important, and most valuable ideas not by any sociological or economic formula, rule of law, or process of government, but through the rough and tumble competition of the . . . marketplace.¹³⁸

Apple next argued that the website operators were not covered by the terms of the California privilege law, which, as already noted, applies to a "publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication."¹³⁹ The court, however,

¹³³ *Id.* at 81.

¹³⁴ *Id.* at 82.

¹³⁵ *Id.*

¹³⁶ *Id.* at 96 (quoting CAL. CONST. art. 1, § 2, subdiv. (b)).

¹³⁷ *Id.*

¹³⁸ *Id.* at 97.

¹³⁹ *Id.* at 96 (quoting CAL. CONST. art. 1, § 2, subdiv. (b)).

concluded that this language did encompass these website operators.¹⁴⁰ The court argued that posting information on a website is “conceptually indistinguishable from publishing a newspaper” and there was no reason to treat it differently.¹⁴¹ It concluded that “the operator of a public website is a ‘publisher’ for purposes of this language,” because the “core meaning of ‘to publish’” was to make information “publicly or generally known” and available, which is exactly what the bloggers were doing.¹⁴²

Turning to what it considered “the difficult issue,” the court next considered whether a website could constitute a “newspaper, magazine, or other periodical publication” under the privilege law.¹⁴³ After analyzing the definitions of the terms and the purposes underlying the privilege, the court concluded that it was fair to characterize the on-line news sites as electronic “magazines” for purposes of the privilege, and that in any event the regularly-updated sites easily fell within the definition of “periodical publications.”¹⁴⁴ Given the core purpose of the law—which the court said was to facilitate the dissemination of information to the public—no rational purpose would be served by limiting the application of the law only to traditional print media.¹⁴⁵ Therefore, the court held, the bloggers were entitled to the protection of the California state privilege law.

The court next addressed the federal constitutional privilege. The California state courts recognize a qualified reporter’s privilege in civil cases emanating from the First Amendment.¹⁴⁶ The issue, the court said, was whether that constitutional privilege applied to the bloggers and, if so, whether Apple had made a sufficient showing to overcome the privilege. The first question was largely answered by the court’s analysis of the state privilege law question: “we can see no sustainable basis to distinguish petitioners from the reporters, editors, and publishers who provide news to the public through traditional print and broadcast media.”¹⁴⁷ Accordingly, the court concluded that the website operators were “reporters, editors, or publishers entitled to the protections of the constitutional privilege.”¹⁴⁸

The court then considered a number of factors to determine whether Apple had made a sufficient showing to overcome the

¹⁴⁰ *Id.* at 102 n.21.

¹⁴¹ *Id.* at 101.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 100-02.

¹⁴⁵ *Id.* at 97-98.

¹⁴⁶ *Id.* at 105-06 (citing *Mitchell v. Superior Court*, 690 P.2d 625 (Cal. 1984)).

¹⁴⁷ *Id.* at 106.

¹⁴⁸ *Id.*

qualified First Amendment privilege. Particularly significant, in the court's view, was Apple's apparent failure to exhaust other possible means of obtaining the information.¹⁴⁹ The court noted that "Apple had made no attempt to question . . . its [own] employees under oath" in order to discover the source of the leaked information.¹⁵⁰ There was also evidence that Apple may have had the ability to search e-mail servers and other electronic records in order to discover the source of the leaks, and that these investigative avenues had not been pursued.¹⁵¹ In short, Apple failed to demonstrate that it was unable to obtain the information that it needed without resorting to subpoenas to the website operators. The court found that this failure, coupled with other factors, made it impossible for Apple to overcome the constitutional privilege.¹⁵²

In sum, the *O'Grady* court concluded that there was no legitimate basis to treat the operators of the websites any differently from other journalists, and that the website operators were, therefore, entitled to the protections of the privilege under both California law and the First Amendment. The *O'Grady* case is particularly significant for the future of the law of reporter's privilege. As the Internet continues to grow, and on-line news sites flourish and multiply, more and more operators of these sites will claim a right to the same legal protections afforded to more traditional journalists. *O'Grady* is a powerful holding supporting equal treatment of the new electronic media.¹⁵³

¹⁴⁹ *Id.* at 109-12.

¹⁵⁰ *Id.* at 109.

¹⁵¹ *Id.* at 110-11.

¹⁵² *Id.* at 112.

¹⁵³ There are at least two other cases pending at the time of this writing that also have attracted considerable attention. The first involves Internet blogger and freelance journalist Josh Wolf, who was jailed on August 1, 2006, for refusing to provide a grand jury with video footage that he shot during a protest rally in San Francisco. *See infra* note 235 (discussing the *Wolf* case).

The second case involves two reporters for the *San Francisco Chronicle* who wrote a series of articles about the Bay Area Laboratory Co-Operative ("BALCO") and the government's investigation into the use and distribution of illegal steroids in professional sports. The articles reported on and quoted grand jury testimony that apparently was leaked to the reporters in violation of a protective order. A grand jury investigating the leaks has subpoenaed the reporters to testify concerning the identity of their sources, and the reporters have refused. On August 15, 2006, a federal judge ruled that there was no applicable privilege and that the reporters must comply with the subpoenas. *See In re Grand Jury Subpoenas, Mark Fainaru-Wada and Lance Williams*, 438 F. Supp. 2d 1111 (N.D. Cal. 2006).

IV. EVALUATING THE NEED FOR A FEDERAL REPORTER'S PRIVILEGE¹⁵⁴A. *The Proposed Federal Legislation*

During the CIA leak investigation, particularly once Matt Cooper and Judith Miller were held in contempt, the Special Prosecutor was widely attacked by many in the media as being

¹⁵⁴ This section relates primarily to cases in which a reporter is being asked to reveal either the identity of a confidential source, or information that will inevitably lead to the discovery of a source's identity. Protection of source identities is the main battleground for the privilege, and is the issue involved in most of the recent high-profile privilege disputes. A number of state statutes provide a privilege *only* for the identity of a source, and not for other information gathered by a reporter. *See, e.g.*, ALA. CODE § 12-21-142 (2005); ALASKA STAT. § 09.25.300 (2006); ARK. CODE ANN. § 16-85-510 (2006); 735 ILL. COMP. STAT. ANN. 5/8-901(2006); IND. CODE § 34-46-4-2 (2006); KY. REV. STAT. ANN. § 421.100 (LexisNexis 2006); OHIO REV. CODE ANN. §§ 2739.04, 2739.12 (LexisNexis 2006); 42 PA. CONS. STAT. ANN. §5942 (West 2006). Other statutes provide a greater level of protection, or absolute protection, for a source's identity but lesser protection for other information. *See, e.g.*, DEL. CODE ANN. tit. 10 § 4323 (2006); D.C. CODE § 16-4703 (2006); MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (LexisNexis 2006). References to the privilege as a "journalist-source" privilege also recognize that the primary rationale for the privilege is the alleged promotion of communications between journalists and confidential sources. *See, e.g.*, Geoffrey R. Stone, *Why We Need a Federal Reporter's Privilege*, 34 HOFSTRA L. REV. 39 (2005).

Different issues arise when the question is whether reporters may be compelled to turn over other confidential information that they have gathered during the course of their work, or when information is sought that does not reveal a source and is not subject to any promise of confidentiality. *See* DIENES ET AL., *supra* note 46, §§ 15-2(d), 16-2(d). Arguments in favor of a privilege that discuss the alleged "chilling effect" on communications to the press, of course, make sense only in the context of attempts to compel reporters to identify their confidential sources. No sources would be deterred from coming forward if a reporter were merely compelled to disclose information that would not reveal those sources. No communications to the press would be inhibited, and thus no information would be lost to the public.

Proponents of a broad privilege that goes beyond the protection of source information argue not merely for the protection of privileged communications (as with attorney-client, doctor-patient, and clergy privileges), but for a general immunity for reporters from testifying. Some courts have held that the privilege does indeed apply to materials gathered by a reporter that would not reveal confidential sources. *See, e.g.*, *Shoen v. Shoen*, 5 F.3d 1289, 1294-95 (9th Cir. 1993); *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980). The arguments in favor of a broader privilege that protects information beyond source identities, however, are even less compelling than the arguments in favor of protecting sources. The apparent rationale is that *reporters themselves* will be somehow deterred from doing their jobs as vigorously or as thoroughly as they otherwise might, if they think they may someday be subpoenaed for information they have gathered. *See* *United States v. LaRouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988). But there is little apparent reason why this would be the case. As long as revealing that information does not compromise any sources and, therefore, does not restrict the flow of information to the reporter, then being subpoenaed for that information should have no significant impact on the press or on a reporter's ability to do her job.

Given the highly competitive nature of today's media, it seems very unlikely that reporters would voluntarily hold back and fail to pursue a story aggressively based on the remote possibility that the reporters may someday receive a subpoena for some of the materials they have gathered. Although there is some incidental burden on the press when a reporter must take the time to respond to a subpoena, this is a burden borne by many other businesses and individuals in society, and cannot justify a special immunity for the press. *See* *United States v. Smith*, 135 F.3d 963, 971 (5th Cir. 1998). Proponents of a broad privilege seem to suggest that there is some inherent harm to the First Amendment any time a reporter is on the stand for any reason. It is not at all clear why this would be true.

overzealous or out of control.¹⁵⁵ In fact, however, Fitzgerald's actions were not really all that remarkable, but for their taking place in a remarkably high-profile and politically-charged investigation. When a conversation with reporters may itself be a crime, the reporters are not merely newsgatherers: they are critical witnesses.¹⁵⁶ Investigating the CIA leak case without the reporters' testimony would have been akin to investigating a bank robbery without talking to anyone who was in the bank at the time. Fitzgerald's actions complied with the DOJ guidelines and were those that would be taken by any thorough and conscientious prosecutor.¹⁵⁷ Indeed, if he had *not* sought the reporters' testimony, Fitzgerald—who is, after all, a Bush Department of Justice appointee—no doubt would have been attacked by a different chorus of critics who would have accused him of covering up for the administration.

Nevertheless, Fitzgerald's battles with the media—along with the other recent high-profile cases involving subpoenas to reporters¹⁵⁸—have led to renewed calls for a federal reporter's privilege statute. Privilege legislation has been introduced in both Houses of Congress.¹⁵⁹ The leading bill, the Free Flow of

¹⁵⁵ The *New York Times* wrote repeated editorials supporting Miller and chastising Fitzgerald, charging, for example, that Fitzgerald's investigation had "veered off course" and threatened "grievous harm to freedom of the press." Editorial, *Press Freedom on the Precipice*, N.Y. TIMES, Oct. 16, 2004, at A16. For just a small sample of similar commentary, see Editorial, *Respecting Sources*, WASH. POST, Nov. 15, 2004, at A24; Editorial, *The Plame Case; Justice Should Go After the Leaker, Not the Press*, PITTSBURGH POST-GAZETTE, Oct. 28, 2004, at A-18; Editorial, *Locking Up Reporters For 'National Security'*, BALT. SUN, Oct. 14, 2004, at 21A; Editorial, *Punishing the Wrong Messengers; Refocus Investigation of White House Leak*, SARASOTA HERALD-TRIBUNE, Oct. 30, 2004, at A16; Editorial, *Leak Probe Threatens First Amendment*, BIRMINGHAM POST-HERALD, Oct. 25, 2004; Editorial, *Fitzgerald's Plame Probe Just Plain Obsessive*, CHI. SUN-TIMES, July 7, 2005, at 39. See also Clarence Page, Op-Ed., *Free Press Under Attack*, CHI. TRIBUNE, Oct. 13, 2004, at C23 (charging that the investigation was "out of control"); Nicholas D. Kristof, Op-Ed., *Our Not-So-Free Press*, N.Y. TIMES, Nov. 10, 2004, at A25 (arguing that Fitzgerald was "overzealous" and comparing him to "Inspector Javert").

¹⁵⁶ Cf. *N.Y. Times Co. v. Gonzales*, 459 F.3d 160, 170 (2d Cir. 2006) (noting that the reporters were the only witnesses, other than the sources themselves, able to identify the source of the leaks).

¹⁵⁷ See Randall D. Eliason, Op-Ed., *Plame and Unjust Blame*, WASH. POST, Mar. 9, 2005, at A21.

¹⁵⁸ In addition to the Wen Ho Lee case and *New York Times Co. v. Gonzalez*, much attention has been focused on a case in Rhode Island where reporter Jim Taricani was sentenced to six months home confinement after refusing a court order to answer questions and turn over a videotape received from a confidential source. See *In re Special Proceedings*, 373 F.3d 37 (1st Cir. 2004). See also *supra* note 153 (discussing the BALCO case); *infra* note 235 (discussing the *Wolf* case).

¹⁵⁹ There have been many prior attempts to enact a federal reporter's privilege statute, all of them unsuccessful. According to one study, in the six years following the *Branzburg* decision, ninety-nine proposals for a federal reporter's privilege law were introduced in Congress, but none was enacted into law. See Monica Dias, *Leggett's Case Revives Talk about Shield Law*, NEWS MEDIA & THE LAW, Mar. 31, 2002, at 7. See also Sam J. Ervin, Jr., *In Pursuit of a Press Privilege*, 11 HARV. J. ON LEGIS. 233 (1974) (discussing congressional efforts to enact a privilege after the *Branzburg* decision).

Information Act, was first introduced in July, 2005, by Senator Lugar in the Senate and Congressman Pence in the House.¹⁶⁰ On May 18, 2006, Senator Lugar introduced a substantially modified version of his bill.¹⁶¹ That version provides for a qualified reporter's privilege, with a number of different balancing tests to be applied in different circumstances. In a criminal case, for example, the government could override the privilege if it could show that the information sought is critical to its investigation, other means of obtaining the information have been exhausted, and that the subpoena is as narrowly-tailored as possible. Criminal defendants and civil litigants would be able to override the privilege if similar conditions are met.¹⁶² Still other tests would apply if the journalist is an eyewitness to a crime or tort, if the evidence is necessary to prevent death or substantial injury, or if disclosure is necessary to prevent an act of terrorism or significant harm to national security.¹⁶³

The pending House version of the bill contains fewer qualifications and thus is more favorable to journalists than Senator Lugar's bill. Under the House bill, a journalist could be compelled to reveal the identity of a source only in cases where it was necessary to prevent an "imminent and actual harm to national security."¹⁶⁴ Information other than a source's identity could be obtained subject to a balancing test similar to that in the Senate bill.

Several days of hearings have been held in the Senate, but at this writing the future of the federal privilege bills appears uncertain.¹⁶⁵ In the wake of other recent disclosures in the press,

¹⁶⁰ Free Flow of Information Act of 2005, S. 1419, 109th Cong. (1st Sess. 2005); Free Flow of Information Act of 2005, H.R. 3323, 109th Cong. (1st Sess. 2005). The bills were referred to the House and Senate Judiciary Committees in July of 2005. Senator Dodd also introduced a separate bill, the Free Speech Protection Act of 2005, S. 369, 109th Cong. (1st Sess. 2005). However, Senator Dodd has now signed on as a co-sponsor of Senator Lugar's modified bill and appears to have abandoned his own version.

For detailed analysis of the original proposed federal legislation, see Anthony L. Fargo, *Analyzing Federal Shield Law Proposals: What Congress Can Learn from the States*, 11 COMM. L. & POL'Y 35 (2006); Robert D. Lystad, *Anatomy of a Federal Shield Law: The Legislative and Lobbying Process*, 23 COMM. LAW 3 (2005).

¹⁶¹ Free Flow of Information Act of 2006, S. 2831, 109th Cong. (2d Sess. 2006). The modified bill was referred to the Senate Judiciary Committee on May 18, 2006.

¹⁶² *Id.* §§ 4-6. Interestingly, under Senator Lugar's bill the proposed privilege applies only to proceedings before the executive and judicial branches. Congress would exempt itself and, presumably, would be able to subpoena information from journalists and compel them to testify at congressional hearings unhindered by the statutory privilege.

¹⁶³ *Id.* §§ 7-9.

¹⁶⁴ Free Flow of Information Act of 2005, H.R. 3323, 109th Cong. (1st Sess. 2005) § 2(a)(3)(A).

¹⁶⁵ The Senate Judiciary Committee held hearings on the Free Flow of Information Act of 2005 on July 20 and October 19, 2005. One of the witnesses on October 19 was the recently-released Judith Miller. See *Reporter's Privilege Legislation: An Additional Investigation of Issues and Implications: Hearing Before the Senate Judiciary Committee* (2005) (statement of

some members of Congress have been issuing calls for certain journalists to be investigated for treason. The present mood on Capitol Hill, therefore, may not be particularly hospitable for those who are seeking to enact into law a new protection for journalists.¹⁶⁶ If, as seems likely, the legislation is not acted upon before the end of the 109th Congress, the bills may of course be re-introduced when the new Congress convenes in 2007.

B. *Examining the Empirical Case*

Proponents of a federal privilege argue that the United States is in the midst of a crisis involving an unprecedented number of attempts to compel journalists to reveal their sources.¹⁶⁷ Interestingly, privilege advocates made the same kind of argument more than thirty years ago in *Branzburg*.¹⁶⁸ As a practical matter, it

Judith Miller, Senior Writer, The New York Times) [hereinafter Miller Testimony]. Matt Cooper was a witness on July 20. See *Reporter's Shield Legislation: Issues and Implications: Hearing Before the Senate Judiciary Committee* (2005) (statement of Matthew Cooper, White House Correspondent, Time Magazine).

On September 20, 2006, the Senate Judiciary Committee held another hearing, this time on the modified 2006 version of Senator Lugar's Bill. See *Reporter's Privilege Legislation: Preserving Effective Law Enforcement: Hearing Before the Senate Judiciary Committee* (2006). Following this hearing, the Committee announced that it was postponing consideration of the legislation until at least after the November elections, in light of strong new objections from the Justice Department. See Walter Pincus, *Senate Panel Freezes Bill on Legal Protection for Reporters*, WASH. POST, Sept. 24, 2006, at A13.

¹⁶⁶ In June of 2006, the *New York Times* published a story disclosing a government program that uses a private international financial database to review transactions involving American citizens, as a way to combat terrorism. Eric Lichtblau & James Risén, *Bank Data Sifted in Secret by U.S. to Block Terror*, N.Y. TIMES, June 23, 2006, at A1. After this disclosure, Representative J.D. Hayworth (R-AZ), called for withdrawal of the congressional press credentials of the *New York Times*, Senator Jim Bunning (R-KY) accused the paper of treason, and Representative Peter King (R-NY) called for the Justice Department to investigate the paper for espionage. See Robert M. O'Neil, Op-Ed., *Press Must Tell the Truth*, CINCINNATI POST, July 7, 2006, at A13; Delvin Barrett, *NY Lawmaker Seeks Criminal Probe of NY Times*, ASSOCIATED PRESS, June 25, 2006. After the *New York Times* story revealed the program, the House of Representatives passed a resolution "condemning the disclosure and publication of classified information that impairs the international fight against terrorism." Mara Lee, *Shield Law Still Mired in Congress*, EVANSVILLE COURIER & PRESS, July 26, 2006, at B5. Representative Mike Pence, who introduced the Free Flow of Information Act in the House, voted in favor of the resolution. See *id.* According to Senator Lugar, this incident has made the potential passage of the shield law more difficult. See *id.*; Michael J. Sniffen, *Sponsors Hold Out for Press Shield Law*, ASSOCIATED PRESS, July 25, 2006.

¹⁶⁷ For example, nearly every witness who testified before the Senate Judiciary Committee in support of the federal reporter's privilege argued that there has been a recent dramatic increase in the number of subpoenas to journalists. See *Reporter's Shield Legislation: Issues and Implications: Hearing Before the Senate Judiciary Committee* (2005) (statements of Matthew Cooper, White House Correspondent, Time Magazine; William Safire, Political Columnist, The New York Times; Floyd Abrams, Partner, Cahill Gordon & Reindel LLP; Norman Pearlstine, Editor-in-Chief, Time Inc.; Lee Levine, Partner, Levine, Sullivan, Koch & Schultz, LLP); *Reporter's Privilege Legislation: An Additional Investigation of Issues and Implications: Hearing Before the Senate Judiciary Committee* (2005) (statements of Anne Gordon, Managing Editor, Philadelphia Inquirer; Judith Miller, Senior Writer, The New York Times; David Westin, President, ABC News; Dale Davenport, Editor-in-Chief, The Patriot-News, Harrisburg PA).

¹⁶⁸ *Branzburg v. Hayes*, 408 U.S. 665, 699 (1972).

is difficult to gauge whether there really has been a fundamental change in the way subpoenas to reporters are approached by litigants or the courts. We now live in a media-saturated era of twenty-four-hour cable news, Internet blogs, and instant on-line reporting. Stories that, a generation ago, would have merited only a few local headlines may now result in seemingly endless attention—witness the national obsession over the Laci Peterson murder case,¹⁶⁹ or over the disappearance of a single teenage girl in Aruba.¹⁷⁰ The media today are more intertwined with our lives than ever before. Thus, it would not be surprising if the number of subpoenas to the media was increasing in absolute terms. The more media outlets and journalists there are, and the more pervasive the media presence in society, the more likely it is that some member of the media will have information deemed important to the resolution of any given case.

The Reporters Committee for Freedom of the Press, which tracks cases involving subpoenas to the media, currently lists a grand total of four pending or recent cases—including the CIA leak case—where journalists have either been held in contempt or are currently facing possible court sanctions over privilege claims.¹⁷¹ They also report that, in the past twenty years, about sixteen journalists have been jailed—most for a few hours or a few days—for refusing to comply with court orders to reveal their sources.¹⁷² An article in *American Journalism Review* recently reported that “[m]ore than two dozen subpoenas have been issued over the past two-and-a-half years to obtain reporters’ sources, notes, or other materials.”¹⁷³ According to the Justice Department, under its guidelines, only twelve subpoenas to the media for confidential source information have been issued since 1991.¹⁷⁴ Given the enormous number of journalists working, and

¹⁶⁹ Laci Peterson was a young, pregnant woman living in Modesto, California who was last seen alive on December 23, 2002. Her husband, Scott Peterson, was eventually convicted of murdering her. The missing person case and subsequent criminal trial generated enormous media attention. See Wikipedia, Laci Peterson, http://en.wikipedia.org/wiki/Laci_Peterson (last visited Sept. 23, 2006); see also Official Site of Laci Peterson, <http://www.Lacipeterson.com/> (last visited Sept. 23, 2006).

¹⁷⁰ Alabama teenager Natalee Holloway disappeared in May 2005 while on a graduating class trip to Aruba with more than one hundred other students. See Missing Person Alert, Natalee Holloway, http://www.allpointsbulletin.org/Natalee_Holloway.html (last visited Sept. 23, 2006). The case remains unsolved. Holloway’s disappearance has generated a tremendous amount of media coverage.

¹⁷¹ See Reporters Committee for Freedom of the Press, www.RCFP.org (last visited Sept. 23, 2006).

¹⁷² See *id.*

¹⁷³ Rachel Smolkin, *Under Fire*, 27 AM. JOURNALISM REV. 18 (2005).

¹⁷⁴ *Reporter’s Privilege Legislation: An Additional Investigation of Issues and Implications: Hearing Before the Senate Judiciary Committee* (2005) (statement of Chuck Rosenberg, United States Attorney, Southern District of Texas, United States Department of Justice).

the countless number of print, broadcast, and on-line reports that are filed every day, it is fair to ask whether this relative handful of cases really constitutes a crisis in need of Congressional intervention. 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.

Every evidentiary privilege results in some potentially important information being kept from a finder of fact. Privileges represent a judgment that society's interest in encouraging the communications or relationship at issue—between, for example, spouses, a doctor and patient, or an attorney and client—outweighs the harm that may result from having admittedly relevant evidence concealed. The cost of every such rule is that, occasionally, injustice will result as decisions are rendered with incomplete or inaccurate information.¹⁷⁵ All privileges are in “derogation of the search for truth” and are not to be created lightly.¹⁷⁶ To justify creating a federal reporter's privilege, therefore, it is not sufficient simply to say that reporters would prefer not to testify, or feel it is unseemly or contrary to their obligations for them to do so. If relevant evidence is going to be shielded from consideration, there must be an identifiable societal benefit that outweighs the harm caused by that loss.

The principal argument advanced in support of a reporter's privilege is that if journalists can be compelled to testify, the information flow from confidential sources will dry up, resulting in damage to the critically-important free press.¹⁷⁷ In fact, virtually every judicial and academic discussion concerning the privilege proceeds from the assumption that this “chilling effect” exists;

¹⁷⁵ See *Jaffee v. Redmond*, 518 U.S. 1, 18-19 (1996) (Scalia, J., dissenting).

¹⁷⁶ *United States v. Nixon*, 418 U.S. 683, 710 (1974).

¹⁷⁷ This “chilling effect” argument is by far the most common and forceful argument used in favor of the privilege. Occasionally one sees an argument that the privilege is appropriate because the press needs to be free from the burden of the time and expense that it would take to respond to routine subpoenas. This rationale, however, would be difficult to square with the long line of Supreme Court precedent establishing that generally applicable laws do not violate the First Amendment merely because the enforcement of these laws against the press has some incidental effect on newsgathering. See 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, 1255-56 (2005). Financial institutions and telecommunications companies receive enormous numbers of subpoenas; no doubt they too would like to be relieved of the burden of responding to them. This desire alone cannot justify a privilege for the press that other institutions do not enjoy. See also *United States v. Smith*, 135 F.3d 963, 971 (5th Cir. 1998) (“*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.”); *McKevitt v. Pallasch*, 339 F.3d 530, 532 (7th Cir. 2003) (arguing that, in light of *Branzburg*, courts upholding a privilege in order to shield the media from burden or expense “may be skating on thin ice”). See also *supra* note 154.

rarely is the claim held up to any critical scrutiny. But although this mantra is repeated as a basic article of faith among proponents of a privilege, it is impossible to prove empirically.¹⁷⁸ No one can say for certain whether any significant number of confidential sources will be deterred from coming forward in the absence of a privilege.¹⁷⁹

Proponents of a privilege argue that empirical proof concerning the privilege's effect on sources should not and cannot be required, and that the lack of such proof does not undercut their arguments.¹⁸⁰ After all, they argue, the same may be said of other recognized privileges: no one really knows how many (if any) communications with a spouse, attorney, or priest would not take place in the absence of a privilege. Analogies to these other privileges, however, provide only limited support for the reporter's privilege, for two reasons.

First, these other privileges have a long common law history and tradition; our legal system developed in a framework that incorporated and accepted them. The reporter's privilege, on the other hand, has no such common law pedigree.¹⁸¹ For most of our history, the press has operated without any such privilege. Accordingly, proponents of a reporter's privilege bear a heavier burden of justification, because they seek to establish an exception—one that the common law did not recognize—to another venerable common law tradition: the duty of every citizen to provide information necessary to the pursuit of justice.

Second, other privileges such as the attorney-client, spousal,

¹⁷⁸ The Court in *Branzburg* noted the difficulty of establishing that the presence or absence of a privilege would actually have an impact on communications to reporters, and noted that claims of reporters on this topic must be viewed in light of their professional self-interest in the outcome of the privilege debate. See *Branzburg v. Hayes*, 408 U.S. 665, 693-95 (1972). But see Miller GJ Subpoena, *supra* note 16, at 1169 (Tatel, J., concurring) (arguing that the courts should simply rely on "common sense" to assume that the absence of a privilege would have an impact on confidential sources, even if this cannot be proven).

¹⁷⁹ Attempts to demonstrate empirically the need for a reporter's privilege generally consist of affidavits from journalists (usually submitted in connection with litigation) arguing about the importance of confidentiality to their work. See, e.g., Steven D. Zansberg, *The Empirical Case: Proving the Need for the Privilege*, 2 MEDIA L. RESOURCE CENTER BULL. 145 (2004); Miller GJ Subpoena, *supra* note 16, at 1168-69 (Tatel, J., concurring); *In re Grand Jury Subpoenas, Mark Fainaru-Wada and Lance Williams*, 438 F. Supp. 2d 1111, 1114 (N.D. Cal. 2006); *New York Times Co. v. Gonzales*, 382 F. Supp. 2d 457, 465 (S.D.N.Y. 2005), *vacated and remanded*, 459 F.3d 160 (2d Cir. 2006).

¹⁸⁰ See, e.g., Miller GJ Subpoena, *supra* note 16, at 1169 (Tatel, J., concurring) (arguing that the "Supreme Court has never required proponents of a privilege to adduce scientific studies demonstrating the privilege's benefits"); Jeffrey S. Nestler, *The Underprivileged Profession: The Case for Supreme Court Recognition of the Journalist's Privilege*, 154 U. PA. L. REV. 201, 248-50 (2005) (arguing that demands for empirical proof are "without merit").

¹⁸¹ See *Branzburg*, 408 U.S. at 685-86. See also 23 WRIGHT & GRAHAM, *supra* note 26, § 5426, at 716 ("It is now universally conceded that there was no journalist's privilege at common law.").

and clergy privileges, are at least partly rooted in notions of personal liberty and privacy. There is a kind of Fifth Amendment quality to these privileges: compelling testimony from one's priest, spouse, or attorney is seen as analogous to compelling testimony from the individual herself. Intruding on these relationships is also seen, to some extent, as simply morally wrong. The privileges avoid the specter of the state compelling a spouse, or spiritual or legal advisor, to take the stand against those who have entrusted them with the most intimate details of their lives. Even if we lack empirical proof that these communications would be stifled absent a privilege, the privileges may be justified in part because they protect from government intrusion those communications and relationships deemed particularly important to preserving a zone of personal privacy and dignity.¹⁸²

The relationship between a source and a reporter is not of this ilk. The reporter's privilege purports not to protect the personal rights or privacy of an individual, but to safeguard an important institution: the free press. This distinction between other privileges and the reporter's privilege is highlighted by the fact that, unlike other privileges, the reporter's privilege generally is deemed to be held and controlled by the reporter—the representative of the institution—not by the individual who made the communication.¹⁸³ The arguments in favor of the reporter's privilege are not based on notions of individual liberty or privacy, they are purely functional. The evidence is excluded only because the benefit to society from a more vigorous free press supposedly outweighs the cost of any evidence that is lost to the justice system. When the arguments in favor of a privilege are strictly utilitarian, it is more appropriate to demand that there be at least some evidence that the benefits claimed are actually being achieved.

Privilege supporters often argue that the true cost of a reporter's privilege is minimal, because if there were no privilege many communications to a reporter would not take place. Therefore, they argue, the privilege does not result in much relevant information being withheld from the courts, because in the absence of a privilege the information would not exist.¹⁸⁴ This, however, is a bootstrap argument: it assumes the truth of the

¹⁸² See 23 WRIGHT & GRAHAM, *supra* note 26, § 5422, at 671-72.

¹⁸³ See, e.g., Miller GJ Subpoena, *supra* note 16, at 1177 (Tatel, J., concurring) (collecting cases for the proposition that "only reporters, not sources, may waive the privilege"). But see Stone, *supra* note 154, at 57 (arguing that the privilege should belong to the source, not the reporter).

¹⁸⁴ See, e.g., Stone, *supra* note 154, at 48-50; see also Miller GJ Subpoena, *supra* note 16, at 1168 (Tatel, J., concurring); N.Y. Times Co. v. Gonzales, 382 F. Supp. 2d 457, 501 (S.D.N.Y. 2005), *vacated and remanded*, 459 F.3d 160 (2d Cir. 2006).

underlying assumption that most sources will not come forward absent the guarantee of a privilege. If the opposite is true and most sources would still come forward anyway, then the privilege does indeed result in the loss of a significant amount of relevant evidence. This argument therefore provides no independent support for the proponents of a privilege.¹⁸⁵ The issue still boils down to whether or not the claimed “chilling effect” really takes place.

In the thirty-plus years since *Branzburg*, there has been no federal privilege statute. Nevertheless, during that time—as well as during the nearly 200 years prior to the *Branzburg* decision—the country has been blessed with a vigorous free press, with considerable ability to ferret out and publish information from confidential informants and other sources. The examples are legion: from the Watergate scandal, which exploded in the media around the time *Branzburg* was decided, to recent press revelations concerning the Abu Ghraib prison scandal,¹⁸⁶ potentially unlawful domestic surveillance by the government,¹⁸⁷ and secret overseas CIA prisons.¹⁸⁸ Indeed, the latter stories were recently published by journalists who apparently received confidential information even while the highly-publicized CIA leak case was going on and journalists were being compelled to reveal their sources. These examples would appear to undercut the widespread assumptions about the alleged “chilling effect” of the failure to adopt a reporter’s privilege. Proponents of a privilege often refer to the importance of confidential sources to the reporting of such historic events as Watergate, the Pentagon papers, or the Iran-Contra scandal; what they usually fail to acknowledge is that those stories all were reported *despite* the lack of any federal reporter’s privilege law.¹⁸⁹

It may be unreasonable to expect privilege proponents to provide empirical proof of the privilege’s benefits. At the same time, however, we should not simply accept uncritically the

¹⁸⁵ See also *Jaffee v. Redmond*, 518 U.S. 1, 24 (Scalia, J., dissenting) (criticizing the majority’s argument that without a psychotherapist privilege the evidence protected by the privilege would likely not come into being: “If that is so, how come psychotherapy got to be a thriving practice before the ‘psychotherapist privilege’ was invented?”).

¹⁸⁶ See Seymour S. Hersh, *Torture at Abu Ghraib*, NEW YORKER, May 10, 2004, at 42.

¹⁸⁷ See James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1; Leslie Cauley, *NSA Has Massive Database of American’s Phone Calls*, USA TODAY, May 11, 2006, at A1.

¹⁸⁸ See Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A01.

¹⁸⁹ See, e.g., Judith Miller, *Why Confidential Sources Are Important and Why I Would Go to Jail to Protect Them*, 22 WTR COMMS. LAW 4 (2005) [hereinafter Miller, *Why Confidential Sources Are Important*] (discussing importance of confidential sources to the reporting of Watergate and the Iran-Contra scandal); Zansberg, *supra* note 179 (discussing importance of confidential sources to Watergate, the Pentagon Papers, and Iran-Contra).

widespread assumption that a privilege is in fact necessary to encourage sources to come forward. The costs of a privilege are real and identifiable; the benefits are theoretical and somewhat speculative. The burden at least of persuasion, if not of proof, must fall on those arguing that a privilege is needed. It's not clear that this burden can be met. Even if we assume for argument's sake that confidential sources are, as Judith Miller claims, the "life's blood of journalism,"¹⁹⁰ the question remains whether the presence or absence of a reporter's privilege has any effect on the blood flow.

C. *The Meaning and Limits of Confidentiality*

Reporters and other privilege advocates maintain that reporters must be able to promise confidentiality in order to encourage some reluctant sources to share what they know.¹⁹¹ There is little doubt that this proposition is true; it is clear that many sources do request anonymity, and presumably they request it for a reason. Reporters also maintain that use of confidential sources is critical to their ability to do their jobs. This may be true as well, although in recent years some journalists and media organizations have argued that reliance on confidential sources has become excessive.¹⁹²

But granting that reporters need to be able to promise "confidentiality" leaves unanswered the question of exactly what that means. Privilege proponents argue that, in the absence of a privilege, reporters will be unable to promise confidentiality and thus their craft will suffer. The corollary to the argument is that *with* a privilege, reporters will be able to assure confidentiality and the problem will be solved. But these claims are misleading for two different and perhaps seemingly contradictory reasons: first, a reporter can promise a great deal of confidentiality even in the absence of a privilege law; and second, even with an ironclad privilege law, a reporter cannot really promise confidentiality. Therefore, even assuming that reporters do need to promise confidentiality and that confidential sources are essential to journalism, it does not follow that a reporter's privilege is

¹⁹⁰ Miller Testimony, *supra* note 165.

¹⁹¹ See, e.g., Miller, *Why Confidential Sources Are Important*, *supra* note 189; Zansberg, *supra* note 179; Editorial, *Judith Miller Goes to Jail*, N.Y. TIMES, July 7, 2005, at A22; Miller GJ Subpoena, *supra* note 16, at 1168-69 (Tatel, J., concurring); *New York Times Co. v. Gonzales*, 382 F. Supp. 2d 457, 465 (S.D.N.Y. 2005), *vacated and remanded*, 459 F.3d 160 (2d Cir. 2006).

¹⁹² For example, Geneva Overholser of the Missouri School of Journalism has argued that journalists have overused or abused reliance on anonymous sources, bringing some of their current legal problems upon themselves. See Smolkin, *supra* note 173; Geneva Overholser, Op-Ed., *The Journalist and the Whistle-Blower*, N.Y. TIMES, Feb. 6, 2004, at A27.

necessary or even particularly important.

There are many different degrees and types of confidentiality. Presumably the true and most pressing concern for any confidential source is that he not be named in an article that the reporter writes tomorrow, not what a judge may rule in a privilege dispute in some hypothetical case months, or even years, in the future.¹⁹³ Typically, a journalist is speaking with a source for the purpose of preparing a story that will appear fairly soon. The first and foremost meaning of a guarantee of confidentiality is that, in any story that the journalist writes and publishes, the source will not be identified. In the overwhelming majority of cases, in fact, that is the end of the matter: the information is relayed, the story is reported, and confidentiality is maintained.

By simply promising never voluntarily to reveal the source's name, therefore, a reporter can assure a high degree of confidentiality, with or without a privilege law. In the absence of any privilege statute, a reporter may honestly and lawfully tell a source: "I will do all I can to protect your identity. I will not publish it, will not reveal it to anyone else voluntarily, and if I am ever subpoenaed I will fight as far and as hard as I can to avoid having to divulge it. Only if I'm compelled to do so by a valid court order after exhausting all of my appeals would I reveal your name." A source given these assurances knows that his identity will be revealed only if: 1) the reporter actually writes a story that includes the source's information; *and* 2) the story results in a lawsuit or investigation; *and* 3) a party to that case actually subpoenas the reporter; *and* 4) the reporter and the party are unable to reach some compromise that would still shield the source's identity; *and* 5) the party chooses to pursue the matter to the bitter end and not simply give it up in light of the reporter's refusal; *and* 6) all relevant trial and appellate courts eventually agree there is no basis for the reporter to withhold the information. The chance of all of this happening is extremely remote. Relative to the total number of press reports involving confidential sources, the number of cases in which a reporter is actually compelled to testify is vanishingly small. Even if a reporter is ultimately compelled to testify, it likely will take a year or two

¹⁹³ Even a strong supporter of the privilege such as the *New York Times* may recognize, at least implicitly, that most confidential sources have more immediate concerns than whether a reporter might be compelled to testify some time well off in the future. When Judith Miller was sent to jail, the *Times* argued in an editorial that "[t]he most important articles tend to be the ones that upset people in high places, and many could not be reported if those who risked their jobs or even their liberty to talk to reporters *knew that they might be identified the next day.*" Editorial, *Judith Miller Goes to Jail*, N.Y. TIMES, July 7, 2005, at A22 (emphasis added).

from the time the article is written until the revelation of the confidential source occurs.¹⁹⁴ Thus, for the vast majority of sources, the reporter's simple promise not to reveal the source's name voluntarily can satisfy any reasonable concern for confidentiality, quite independent of the existence of a privilege law.

Equally important, it is false to suggest that a privilege statute allows a reporter to promise "confidentiality"—i.e., to guarantee a source that her identity will remain a secret. Even if there were an ironclad, absolute privilege law, a reporter could not truly guarantee confidentiality, and a source could hardly breathe easily. A potential leaker faces many risks of exposure if she decides to pass information along to a reporter, even under the reporter's absolute guarantee of confidentiality. Court-ordered compulsion of the reporter is only one way that the source's identity may be revealed, and it is probably one of the least likely avenues.

First, the leaker's identity may be discovered through investigative methods that do not involve compelling the reporter to testify. Perhaps the most significant risk is that the source's company or agency will conduct an internal investigation to discover the source of the leaks. Such an investigation may include taking employee statements under oath, examining e-mail or telephone records, and other methods. For example, in one recent case, a career intelligence officer was fired by the Central Intelligence Agency for leaking classified information to reporters. Her identity was discovered through an internal CIA investigation that included the administration of polygraph examinations to employees. The investigation began following press reports that disclosed the existence of secret overseas CIA prisons. As a result of the investigation, the alleged leaker was discovered and fired, with no need to seek to compel the reporter to reveal her sources.¹⁹⁵

In addition to internal investigations, there may be investigations of the leak launched by outside parties. If a reporter's article results in civil litigation or a criminal investigation, that may lead to discovery of the source's identity through many means other than subpoenaing the reporter. Civil

¹⁹⁴ For example, Robert Novak's article exposing Valerie Plame was published on July 14, 2003; almost exactly two years passed before the investigation was launched, privilege battles with the reporters were complete, all appeals were exhausted, and Miller and Cooper were faced with the choice of divulging their sources or going to jail. *See supra* text accompanying notes 8-21.

¹⁹⁵ *See* Dafna Linzer, *CIA Officer Is Fired for Media Leaks; The Post Was Among Outlets that Gained Classified Data*, WASH. POST, Apr. 22, 2006, at A01.

discovery or a grand jury investigation may uncover e-mails, computer files, or other documents that identify the source. The source may be deposed, or subpoenaed to testify in the grand jury, and will then be forced to admit her role in the leak (unless she is willing to commit perjury).

In any serious case, a thorough investigation of the leak is almost guaranteed. Companies and agencies concerned with safeguarding their secrets will have a great incentive to track down the source of any leaks.¹⁹⁶ In addition, courts that do recognize the privilege, as well as the Department of Justice guidelines, require a party to exhaust all reasonable efforts to obtain the information from other sources before seeking to compel testimony from a reporter. In the *O'Grady* case, for example, Apple's request to subpoena the website operators was denied in large part because the court found that Apple had failed to seek the information through internal investigations such as examining employees under oath and reviewing internal computer records.¹⁹⁷ A potential leaker can therefore be almost certain that before any issue of subpoenaing the reporter will even arise, the organization from which confidential information has been leaked or other party investigating the matter will exhaust every other reasonable means to discover the leaker's identity. This creates a substantial risk that the leaker will be discovered without any reporter's testimony.¹⁹⁸

A potential leaker faces other significant risks as well. The reporter may not keep his word, and may expose the source's identity, either deliberately or inadvertently.¹⁹⁹ A journalist may

¹⁹⁶ A recent extreme example of the lengths to which companies will go to investigate sources of leaks is provided by the incident involving the Hewlett-Packard Company. After information about confidential board of directors deliberations appeared in the media, the company hired a private investigator to track down the source of the leaks. By reviewing telephone records, the investigator identified the leaker as board member George A. Keyworth II, and the company announced that as a result Keyworth would not be re-nominated to the board. Apparently, the telephone records obtained also included those of nine journalists who covered the company. The state of California is now investigating whether the methods used to obtain the telephone records were illegal. See Ellen Nakashima, *HP Investigators Got Reporters' Phone Records*, WASH. POST, Sept. 8, 2006, at D01; Ellen Nakashima, *Calif. Examining HP's Media-Leak Probe, Firm Says*, WASH. POST, Sept. 7, 2006, at D01.

¹⁹⁷ *O'Grady v. Superior Court*, 44 Cal. Rptr. 3d 72, 109-11 (Cal. Ct. App. 2006).

¹⁹⁸ In fact, if there were an absolute privilege law, one would expect these other investigations to intensify. Employers, agencies or prosecutors would have an incentive to pursue alternative avenues even more vigorously, knowing that there was no hope of getting the information from a reporter. The result of a strong privilege law, therefore, may simply be that the source will be less likely to be discovered through the reporter's compelled testimony but more likely to be discovered by some alternate investigative means.

¹⁹⁹ See generally Kathryn M. Kase, *When a Promise Is Not a Promise: The Legal Consequences for Journalists Who Break Promises of Confidentiality to Sources*, 12 HASTINGS COMM. & ENT. L.J. 565 (1990) (discussing cases where journalists chose to break their promises of

decide that the public interest requires her to reveal the source after all, or her desire not to reveal a source may be overridden by her editors.²⁰⁰ It is also possible for a reporter inadvertently to reveal a source's identity, or to waive the privilege by disclosing the source's identity to a third party.²⁰¹ For example, in a recent, highly-publicized case in Rhode Island, reporter Jim Taricani was sentenced to six months home confinement after being convicted of criminal contempt for refusing to identify a confidential source who illegally provided him with an FBI videotape from a corruption probe. Shortly before he was convicted, however, Taricani made an inadvertent comment to an FBI agent about a document he had seen, which allowed the agent to deduce the identity of Taricani's source. After learning that he was about to be subpoenaed by prosecutors, the source, attorney Joseph Bevilacqua, Jr., finally came forward and admitted leaking the videotape to Taricani.²⁰²

There are other risks of exposure as well. Details in the reporter's article may make it possible for others to deduce the source's identity.²⁰³ Other individuals may overhear the source's conversations with the reporter, or may stumble across an e-mail or document revealing the conversations. The source's colleagues may be contacted by a reporter who is trying to investigate further, and may deduce from those contacts the identity of the reporter's source.

All of these risks exist whether or not there is a privilege, and whether or not a reporter is ever subpoenaed. A reporter therefore cannot really guarantee a source that her identity will

confidentiality and expose their sources).

²⁰⁰ See WRIGHT & GRAHAM, *supra* note 26, § 5426, at 724 (noting that newspapers occasionally identify informants when they think it appropriate); *cf.* Cohen v. Cowles Media Co., 501 U.S. 663 (1991) (upholding a civil lawsuit brought by a source against newspaper publishers who promised to keep a source's identity confidential but, nevertheless, published his name in their story).

²⁰¹ See Larsen, *supra* note 177, at 1255-56 (discussing cases where journalists have been found to have waived the privilege through disclosures to editors or other third parties).

²⁰² See Associated Press, *Prosecutors Eye Contempt Charge Against Reporter's Lawyer*, BOSTON GLOBE, Dec. 11, 2004, at B4; *In re Special Proceedings*, 373 F.3d 37 (1st Cir. 2004).

²⁰³ A recent and somewhat amusing example does not involve "leaks" per se, but does illustrate the limits of confidentiality. On July 25, 2006, the *Washington Post* reported on an interview with an individual who asked to be identified only as a "Republican candidate for the Senate." During the interview, the anonymous candidate criticized President Bush's record, suggested he would not ask the President to campaign with him, and said that running as a Republican was like wearing a scarlet letter "R" on his chest. Dana Milbank, *For One Candidate, the 'R' Is a 'Scarlet Letter'*, WASH. POST., July 25, 2006, at A02. Within twenty-four hours, a flurry of investigations by political reporters and bloggers had discovered that the anonymous candidate was Michael Steele, the Republican Senate candidate from Maryland, and Steele was forced to admit he was the source. See John Wagner & Robert Barnes, *Steele Admits He Criticized GOP in Interview*, WASH. POST., July 26, 2006, at B02. Clearly, the reporters' promises of confidentiality did candidate Steele little good.

remain a secret. There are far too many ways for a source's identity to be revealed that are simply out of the reporter's hands. A reporter can promise that *he* will never knowingly reveal the source's identity, but he most definitely cannot promise that the source's identity will in fact not be revealed.

An individual who has decided to leak confidential information to the press has therefore decided to assume a significant risk that she may be exposed in any number of ways. Presumably she has also decided that the public good she believes will result from bringing the information to light outweighs those personal risks. Proponents of a reporter's privilege, therefore, necessarily argue that some substantial number of confidential sources, having otherwise decided to assume all of these more immediate and concrete risks of exposure, would be dissuaded from coming forward *solely* by the slight, incremental additional risk that the reporter might be compelled to testify in some hypothetical litigation sometime well off in the future. Again, empirical proof may be impossible, but if we assume that sources are rational actors this does not seem very likely.

It is also reasonable to assume that those potential sources who are most likely to be deterred by the small additional risk resulting from the absence of a privilege would be those sources with the most to fear personally from having their identities revealed. This presumably would be those who fear not merely embarrassment, opprobrium in the eyes of their colleagues, or loss of a job, but criminal prosecution. The sources who are apt to be most concerned about even the slightest additional risk of being exposed will be those who either have engaged in prior criminal conduct or are committing a potential criminal act by disclosing the information to the reporter. Yet these are the types of sources that society has the least interest in protecting. To shield leaks by those who have been involved in past criminal conduct is to argue, as the Supreme Court said in *Branzburg*, that it is "better to write about crime than to do something about it."²⁰⁴ As the Court noted, the desire of such sources to maintain confidentiality, "while understandable, is hardly deserving of constitutional protection."²⁰⁵ Similarly, there is usually little societal interest in protecting those who are violating the law by, for example, leaking national security information to a reporter. As Judge Tatel observed in the CIA leak case, deterring those types of leaks "is precisely what the public interest requires."²⁰⁶ Accordingly, there

²⁰⁴ *Branzburg v. Hayes*, 408 U.S. 665, 692 (1972).

²⁰⁵ *Id.* at 691.

²⁰⁶ *Miller GJ subpoena*, *supra* note 16, at 1183 (Tatel, J., concurring).

is a real likelihood that a reporter's privilege will have the perverse effect of being most likely to encourage the types of communications that society has the least interest in encouraging or shielding from disclosure.

A final factor that suggests that the reporter's privilege may be unnecessary is the availability of anonymous tips. It is impossible to have an anonymous communication with your spouse, doctor, or attorney, or in other relationships traditionally protected by privilege. By contrast, a source who wants to leak information to a reporter but is worried about being identified always has the option of making an anonymous phone call.

Reporters presumably would argue that an anonymous tip is not as useful or reliable as a known source, and that is probably true. Nevertheless, once the information is in their hands, diligent journalists may start digging to confirm the veracity of an anonymous tip. Reporters may contact other potential sources, some of whom may not have the same hesitation about speaking out. They may conduct additional research to attempt to verify the anonymous information through documents, public records, and the like. Even when a confidential source's identity is known, responsible journalists will rarely run a story without doing some additional investigation to corroborate the source. The same investigation may be done even when the initial source has chosen to remain anonymous.

Any potential confidential sources who are truly "chilled" by the absence of a privilege statute, therefore, can always slip their documents over the proverbial transom. Given a choice between not revealing the information at all and doing so anonymously, most sources who are eager to see the information made public presumably will choose the latter. The public interest in giving the press access to the information is still fulfilled, and the source need not worry about having her identity revealed—at least by the reporter—because the reporter does not know it. This alternative, which is unavailable for any of the more traditional privileged relationships, further undercuts the argument that a reporter's privilege is essential to encourage these particular communications.

In sum, the argument in support of the privilege boils down to the following: potential confidential sources are willing to assume all of the more substantial and immediate risks that their identity will be discovered, and would otherwise be ready to come forward, but will be dissuaded from providing information to a reporter solely because of the most unlikely and remote risk of all: that the reporter will someday be compelled by a court to identify

them. What's more, none of these sources will avail themselves of the option of anonymously leaking the information, and so the potential news will be lost to the public forever. One can, of course, posit hypotheticals where this would happen, but the conclusion seems inescapable that only a very small subset of potential confidential sources would fall into the group of those for whom the presence or absence of a privilege would be the dispositive issue—and many of those may be sources engaged in criminal conduct who should not be protected. The widespread assumptions about the benefits of a reporter's privilege, therefore, appear to rest on an extremely shaky foundation.

V. CHALLENGES IN CRAFTING A FEDERAL PRIVILEGE LAW

For the reasons discussed in the preceding section, privilege advocates are unlikely to be able to demonstrate a real likelihood that the privilege actually provides the benefits that they claim. Putting to one side these empirical weaknesses, proponents of a federal privilege law still face significant hurdles. The rapid technological changes that have taken place in the last decade alone have fundamentally altered and expanded our concepts of journalism, newsgathering, and the media. These changes suggest that even if a privilege law were thought to be desirable, the practical and constitutional challenges involved in crafting a workable statute may be insurmountable.²⁰⁷

A. *Who Is a Journalist?*

One of the most vexing challenges facing those who seek to enact a privilege in our media-saturated age is deciding to whom the privilege should apply.²⁰⁸ Even more than thirty years ago in *Branzburg*, the Supreme Court noted that trying to define who was a “newsman” deserving of the privilege “would present practical and conceptual difficulties of a high order.”²⁰⁹ The *Branzburg*

²⁰⁷ If there is to be a federal reporter's privilege, it should be created by Congress and not by the courts. Determining the appropriate contours of a privilege involves difficult policy choices, which are best left to the legislative branch. See William E. Lee, *The Priestly Class: Reflections on a Journalist's Privilege*, 23 CARDOZO ARTS & ENT. L.J. 635, 676-78 (2006) [hereinafter Lee, *The Priestly Class*] (arguing that Congress, not the courts, should craft any privilege); Stone, *supra* note 154, at 47-48 (same); Miller GJ Subpoena, *supra* note 16, at 1155-58 (Sentelle, J., concurring) (arguing that crafting a privilege is a legislative, not judicial, task). See also *Univ. of Penn. v. EEOC*, 493 U.S. 182, 189 (1990) (noting that under Federal Rule of Evidence 501, the Court is “especially reluctant to recognize a privilege” where Congress has considered the issue but failed to act; “[t]he balancing of conflicting interests of this type is particularly a legislative function.”).

²⁰⁸ On the problems of applying the journalist privilege to the ever-expanding media world, see Linda L. Berger, *Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist's Privilege in an Infinite Universe of Publication*, 39 HOUS. L. REV. 1371 (2003).

²⁰⁹ *Branzburg*, 408 U.S. at 703-04. Judge Sentelle also discussed these issues in his

Court observed that the First Amendment was designed to protect not only the large newspaper publisher but also the person handing out leaflets on the street corner, and pondered how or whether a privilege could legitimately distinguish between the two.²¹⁰ In the age of the Internet, satellite communications, and cable television, that question is exponentially more complicated: “[t]he Internet has converted ‘the lonely pamphleteer’ from a romantic ideal to a powerful reality.”²¹¹

Questions about the appropriate scope of the privilege are myriad and obvious. Should the privilege apply only to the so-called “mainstream media?” What about those who report the news on Internet blogs? It is not unusual today for bloggers to be the first to break a story;²¹² cable news shows now run features on what the blogs are saying, and many blogs have hundreds of thousands of readers.²¹³ As the *O’Grady* court recognized, there is no apparent legitimate basis to conclude that the operators of at least some blogs are not “journalists” entitled to the protections of any applicable privilege.²¹⁴ Additional challenges involve the question of the privilege’s applicability to book authors,²¹⁵ documentary filmmakers,²¹⁶ and others in the “information age” who work to gather and provide information to the public.

With other evidentiary privileges, it is generally not difficult

concurring opinion in the *Judith Miller* case. See *Miller GJ Subpoena*, *supra* note 16, at 1156-58 (Sentelle, J., concurring).

²¹⁰ See *Branzburg*, 408 U.S. at 703-04; see also *Mills v. Alabama*, 384 U.S. 214, 219 (1966) (noting that the press includes “not only newspapers, books, and magazines, but also humble leaflets and circulars”).

²¹¹ David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 434 (2002) (footnote omitted).

²¹² For example, Internet reporter/gossip monger Matt Drudge is generally credited with first breaking the story about President Clinton’s affair with Monica Lewinsky. More recently, it was conservative bloggers who first questioned the authenticity of documents relied upon by Dan Rather and CBS News in a controversial 2004 *60 Minutes* episode concerning President Bush’s record in the National Guard.

²¹³ See Eugene Volokh, *You Can Blog, but You Can’t Hide*, N.Y. TIMES, Dec. 2, 2004, at A39. See also Anne Marie Squeo, *Politics & Economics: Rove’s Camp Confronts Internet Storm*, WALL ST. J., May 16, 2006, at A4 (discussing the impact of bloggers on the story over whether Karl Rove would be indicted in the CIA leak case; “With more people turning to the Internet for news, bloggers have blurred the lines with traditional media and changed both the dynamics of the reporting process and how political rumors swirl.”).

²¹⁴ See 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, 124-25 (2002).

The operators of many blogs certainly consider themselves to be operating as investigative journalists—including following the practice of offering confidentiality to sources. See, e.g., Joshua Micah Marshall, *Talking Points Memo* (June 7, 2006), http://www.talkingpointsmemo.com/archives/week_2006_06_04.php (requesting information concerning a pending story being investigated: “Keep the tips coming. Confidentiality, of course, protected in all cases.”).

²¹⁵ See *In re Madden*, 151 F.3d 125 (3d Cir. 1998); *Von Bulow v. Von Bulow*, 811 F.2d 136 (2d Cir. 1987).

²¹⁶ See *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977).

to determine whether the person receiving or making the communication is a member of the class the privilege is designed to protect. Lawyers, doctors, and social workers all have certain educational and licensing requirements, and are monitored by professional associations to ensure their credentials; whether or not someone is a witness's spouse likewise is usually easy to determine. Anyone, however, can call himself a journalist.²¹⁷ There are no particular educational requirements and no licensing regulations. Most are likely to agree that this is a good thing, consistent with our cherished free speech traditions. I am entitled to set up a blog from my home computer, or use desktop publishing to create my own local newspaper, and may claim the First Amendment's protection as legitimately as the *Washington Post*. Drafting and applying a reporter's privilege, therefore, requires either including virtually everyone who claims to be a journalist, or drawing lines and deciding who the "real" journalists are.

The traditional approach to limiting the scope of the privilege is to focus on the format of the journalism in question. Many state statutes specify the types of media to which the privilege applies; for example, newspapers, magazines, television, and other periodical publications.²¹⁸ Those seeking to invoke the privilege must be affiliated somehow with one of these types of media outlets. This approach may have made some sense when most of the statutes were drafted, before the rise of the Internet, satellite communications and cable television. Today, though, any statute that sought to limit its application only to certain forms of the media would be difficult to justify. Not only are many of the newer technologies an increasingly important source of news, but many media companies now provide their news content over several different formats at the same time, including newspapers, magazines, satellite, cable, and the Internet.²¹⁹ As this development continues, "format-based definitions [of the press] will seem increasingly dubious."²²⁰ Indeed, many state statutes that limit their application to the traditional news media—newspapers and television—may be on a collision course with technology: ripe for a lawsuit brought by a blogger or other non-traditional

²¹⁷ "Unlike law or medicine, no course of study, examination, or license is required to practice journalism in the United States. One need not major in journalism or even attend college." Clay Calvert, *And You Call Yourself a Journalist?: Wrestling with a Definition of 'Journalist' in the Law*, 103 DICK. L. REV. 411 (1999) (footnotes omitted); see also Volokh, *supra* note 213 ("Because of the Internet, anyone can be a journalist.").

²¹⁸ See Alexander, *supra* note 214, at 115.

²¹⁹ See Anderson, *supra* note 211, at 436-41 (discussing "media convergence" and the use by "content providers" of all different media formats).

²²⁰ *Id.* at 437.

journalist challenging his or her unequal treatment.²²¹

Some privilege proponents argue that differentiating among different types of journalists in drafting a privilege would not be a significant problem. For example, Professor Stone has argued that the government treats different First Amendment speakers differently from one another all the time:

Which reporters are allowed to attend a White House press briefing? Which are eligible to be embedded with the military? Broadcasting is regulated but print journalism is not. Legislation treats the cable medium differently from both broadcasting and print journalism.²²²

So long as the distinctions between different types of journalists are not based on content and are otherwise reasonable, Stone argues, they do not present a constitutional problem.²²³ The differing treatment of journalists pointed out by Stone, however, are practical regulations which are tolerated due to scarcity or necessity. Regulation of broadcasting is permitted because of the limited amount of available spectrum on the public airwaves,²²⁴ and physical limitations make it impossible for every reporter to fit into the White House or to accompany the military on each operation. By contrast, a privilege statute that included only the more traditional or established media and excluded, for example, Internet journalists, could not rely on such a scarcity or physical limitation rationale to justify the law's discrimination against certain speakers.²²⁵

²²¹ See, e.g., the Alabama shield law, ALA. CODE § 12-21-142 (2005) (limiting coverage to those employed by or connected with a newspaper, radio or television broadcasting system); the Georgia shield law, GA. CODE ANN. § 24-9-30 (2006) (limiting coverage to those engaged in disseminating news through a newspaper, book, magazine, or radio or television broadcast); the Kentucky shield law, KEN. REV. STAT. ANN. § 421.100 (2006) (limiting coverage to those who publish information in a newspaper, or by radio or television broadcast).

For an analysis of the definition of a "journalist" under various state laws, see Alexander, *supra* note 214, at 115-18.

²²² Stone, *supra* note 154, at 48 (footnote omitted); see also Lee, *The Priestly Class*, *supra* note 207, at 676 (arguing that there would be no constitutional problem with a privilege statute that excluded web bloggers).

²²³ See Stone, *supra* note 154, at 48.

²²⁴ See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 375-77 (1969).

²²⁵ Rather than analogizing to cases involving the regulation of broadcasting or cable television, a better analogy would be to those cases where the Supreme Court has struck down tax schemes that applied only to certain media formats but not others. See *Ark. Writer's Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (striking down, on First Amendment grounds, a sales tax that applied to magazines but exempted newspapers and religious, professional, and sports journals); *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575 (1983) (striking down a state tax that applied only to newspapers and exempted smaller newspapers while taxing larger ones). Admittedly the press taxation cases represent an area of special concern to the Court, yet the analogy still seems apt: a statute that rewards certain types of media companies and penalizes others, based on their format. See also Anderson, *supra* note 211, at 444 n.79 (suggesting that discriminating among different forms of the media in the granting of certain privileges

Any privilege statute that purports to apply only to certain media formats would automatically create two classes of journalists: those whom the legislature deems important enough to have their communications protected, and those it does not. Giving the force of law to any such distinction conflicts with the Supreme Court's admonition that freedom of the press is a fundamental personal right belonging equally to the lowly street corner pamphleteer and to the large institutional media.²²⁶ What's more, in the modern media era, it would be hard to justify excluding Internet blogs and on-line news sites from the privilege: newspaper readership is declining, and more and more people today get their news from the Internet.²²⁷ If the purpose of the privilege is to encourage the free flow of information to the public, what rational basis could there be for a law that shields communications to a small local newspaper with a few hundred readers but denies the privilege to the proprietor of an established political blog reaching hundreds of thousands of people each day?

In addition, if one credits for the sake of argument the dubious assumption that the reporter's privilege encourages sources to come forward, then a privilege that applies only to some types of media outlets creates a favored class of journalists: those with whom potential sources will know they can communicate without fear of being exposed. This would (again, if the rationale for the privilege is correct) presumably lead potential leakers to gravitate towards those media outlets and to avoid speaking to those to whom the privilege does not apply. This would put the latter at a clear disadvantage in their efforts to carry out the mandate of the First Amendment—a disadvantage created by legislative or judicial discrimination that would perhaps inevitably favor the more established “mainstream media.”²²⁸

Professor Volokh has argued that “[t]he First Amendment can't give special rights to the established news media and not to upstart outlets like [Internet blogs]. Freedom of the press should apply to people equally, regardless of who they are, why they write

historically accorded to the press may raise equal protection or unconstitutional conditions issues).

²²⁶ See *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972).

²²⁷ According to one report, “[b]y the end of 2005, 50 million Americans got news online” every day. John Horrigan, *Online News: For Many Home Broadband Users, the Internet Is a Primary News Source*, PEW INTERNET & AMERICAN LIFE PROJECT (Mar. 22, 2006), http://www.pewinternet.org/PPF/r/178/report_display.asp (discussing the rise of on-line news and decline of newspaper readership).

²²⁸ Part of the risk is that the large and powerful media organizations are the ones most able to devote substantial monetary and political resources to seeking the passage of a privilege. These institutions would have a vested interest in a privilege that was drafted to support their own operations at the expense of smaller, upstart companies.

or how popular they are.”²²⁹ Even if the constitutional hurdles could be cleared, drafting a privilege that discriminates among different media formats would be unsound as a matter of policy. Such a privilege would be inconsistent with the goal of encouraging a vigorous and free-flowing competitive marketplace of ideas.

The natural solution is to focus not on protecting certain media formats with the reporter's privilege, but on protecting the functions traditionally performed by the press. The few courts that have considered whether the reporter's privilege should apply beyond the traditional media have taken this approach, and have considered the function and purpose of journalism rather than simply the nature of the institution or individual claiming the privilege. The most recent notable example of a court following this approach is the *O'Grady* case discussed above, which extended California's privilege law to cover the operators of Internet sites. But nearly two decades ago, when considering whether the privilege should apply to a book author, the Second Circuit followed a similar functional approach. In *Von Bulow v. Von Bulow*, the Court concluded that the reporter's privilege should apply to all individuals who were engaged in the act of gathering or receiving information and who, at the time they gathered the information, had the intent “to disseminate [that] information to the public.”²³⁰ The Ninth Circuit followed suit in *Shoen v. Shoen*,²³¹ when it extended the privilege to cover an investigative author of books, finding there was no principled basis to treat such an author differently from a traditional journalist. As the Ninth Circuit concluded, “[w]hat makes journalism journalism is not its format but its content.”²³² In *In re Madden*,²³³ the Third Circuit formulated a three-part functional test, holding that to claim the protections of the privilege, an individual must be “engaged in investigative reporting,” must be “gathering news,” and must intend at the time of the newsgathering to “disseminate [the] news to the public.”²³⁴

A functional approach to determining who qualifies as a journalist, similar to the approach followed by the court in *O'Grady*, is the solution most consistent with the values purportedly protected by the privilege. Once this is recognized,

²²⁹ Volokh, *supra* note 213.

²³⁰ See *Von Bulow v. Von Bulow*, 811 F.2d 136, 147 (2d Cir. 1987).

²³¹ 5 F.3d 1289 (9th Cir. 1993).

²³² *Shoen v. Shoen*, 5 F.3d at 1293.

²³³ 151 F.3d 125 (3d Cir. 1998).

²³⁴ *In re Madden*, 151 F.3d at 131. See also Alexander, *supra* note 214, at 118-30 (discussing the development of a functional approach to the privilege).

however, the breathtaking potential scope of the privilege in the Internet age becomes clear. Thirty years ago, gathering and disseminating information to the public to any significant degree required at least some capital investment or material not readily accessible to most people: a printing press, a book contract, or a job with a newspaper or television station. Now, however, all it requires is a computer and an Internet connection, which may be obtained for free at the public library. A citizen journalist may gather information, post it on the Internet, and disseminate it to millions around the world. If a pure functional test is applied, then truly almost anyone can be a journalist.²³⁵

Some limiting principle would thus be necessary to prevent the privilege from becoming unacceptably broad under the functional approach. One possible solution would be to focus on whether the information that was reported in a particular case was

²³⁵ Another recent example that illustrates the potential breadth of the privilege in the Internet age is the case involving Josh Wolf. Wolf is a freelance video journalist and blogger. On July 8, 2005, he shot some video of a group of anti-G8 protestors in San Francisco who, among other things, set fire to a police car. Wolf later posted some of the footage on his website. A federal grand jury investigating the activities of the protestors subpoenaed all of Wolf's video footage, including materials not previously posted. He refused to turn it over, relying on a claim of reporter's privilege. On August 1, 2006, a federal judge in San Francisco found that there was no privilege, held Wolf in contempt, and ordered him jailed when he still refused to turn over the tapes. See Jesse McKinley, *Blogger Jailed After Defying Court Orders*, N.Y. TIMES, Aug. 2, 2006, at A15; David Kravets, *Journalist Jailed Over Protest Footage*, ASSOCIATED PRESS, Aug. 1, 2006. Wolf is apparently the first blogger to be jailed for refusing to cooperate with a grand jury. The judge's ruling in Wolf's case was based not on a finding that Wolf was not a journalist, but rather on the ground that under *Branzburg* there is no privilege in a grand jury setting.

Wolf works freelance, and is not employed by any media organization. The "mainstream media," however, have been quick to run to his defense, agreeing that he is a journalist entitled to the protections of any applicable reporter's privilege. See, e.g., Editorial, *Free Josh Wolf*, S.F. CHRON, Aug. 3, 2006, at B6. The Reporter's Committee for Freedom of the Press filed an amicus brief on Wolf's behalf. See Reporter's Committee for Freedom of the Press, *News Media Update: Freelance Journalist Jailed by Federal Judge*, Aug. 1, 2006, <http://www.rcfp.org/news/2006/0801-con-freela.html>. Shortly after Wolf was jailed, Judith Miller attempted to visit him, saying that she was there "to express [her] solidarity as a fellow journalist." See Posting of Liz to www.joshwolf.net/blog (Aug. 7, 2006).

After serving about a month in jail, Wolf was temporarily granted bail while the Ninth Circuit considered his appeal. A three-judge panel of the Ninth Circuit then rejected his appeal in an unpublished opinion and ruled that Wolf had no legal basis to resist the grand jury subpoena. *In re Grand Jury Subpoena, Joshua Wolf*, 2006 U.S. App. LEXIS 23315 (9th Cir. Sept. 8, 2006). In its opinion, the Ninth Circuit also suggested that even if the California state shield law applied, Wolf would not fall within it because he is not a "publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication." *Id.* On September 18, the Ninth Circuit revoked his bail and ordered Wolf back to jail unless and until he decides to comply. See *In re Grand Jury Subpoena, Joshua Wolf*, No. 06-16403 (9th Cir. Sept. 18, 2006); Demian Bulwa, *Freelance Journalists Loses Appeal on Keeping Footage from Grand Jury*, S.F. CHRON, Sept. 12, 2006, at B2; Demian Bulwa, *Bail Revoked for Journalist in Contempt Case*, S.F. CHRON, Sept. 19, 2006, at B3. Wolf returned to jail on September 22, 2006, and as of this writing remains incarcerated. See Henry Lee, *Appeals Panel Sends Journalist Back to Prison*, S.F. CHRON, Sept. 23, 2006, at B5.

“newsworthy,”²³⁶ or whether the activities of the individual claiming the privilege met certain standards that embody “true” journalism, such as an established record of transmitting truthful information to the public and internal verification mechanisms to ensure that the information being reported is accurate.²³⁷ But these standards too are fraught with difficulty. For example, in the CIA leak case, opponents of the Bush administration argue that the information about Valerie Plame’s employment was not newsworthy and was leaked simply in an attempt to smear a critic of the President’s Iraq policy. Supporters of the administration, on the other hand, argue that the information was very newsworthy because it cast doubt on Ambassador Wilson’s qualifications and conclusions.²³⁸ If the privilege is left to turn on a standard such as “newsworthiness,” then courts are put in the inevitable position of making normative judgments about the importance to the public of particular reporting, based on its content.²³⁹ This task seems incompatible with First Amendment values, under which the worth of particular information is to be evaluated by the public in the free marketplace of ideas, not by judicial referees.²⁴⁰

²³⁶ See, e.g., Miller GJ Subpoena, *supra* note 16, at 1173-74 (Tatel, J., concurring) (arguing that a court should consider the value or the newsworthiness of the leaked information when deciding whether the privilege may be overridden).

²³⁷ See Berger, *supra* note 208, at 1411-16 (arguing that the privilege should apply to those engaged in the “process of journalism,” which should be determined by looking at the individual’s record of regular publication of information, the presence of internal verification methods and controls, and the availability of information with which readers can judge the publisher’s independence).

²³⁸ Judge Tatel in the CIA leak case argued that a court applying the reporter’s privilege should balance factors including the newsworthiness or public value of the information that was leaked, and concluded that “[t]he leak of Plame’s . . . employment . . . had marginal news value.” Miller GJ Subpoena, *supra* note 16, at 1179 (Tatel, J., concurring). However, the President’s supporters, and at least one journalist, Robert Novak, undoubtedly would disagree with this assessment. See also Christopher Hitchens, *Full Disclosure: Bring on the Press Revelations*, SLATE, July 10, 2006, <http://www.slate.com/id/2145376> (arguing that the information about Plame disclosed by Novak was in fact newsworthy).

²³⁹ Content-based distinctions, of course, are usually forbidden under the First Amendment, and require the government to demonstrate a compelling state interest and that the regulation is narrowly drawn to achieve that interest. See *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). See also Clay Calvert, *And You Call Yourself a Journalist?: Wrestling with a Definition of ‘Journalist’ in the Law*, 103 DICK. L. REV. 411, 436-37 (1999) (arguing that courts attempting to define what “news” is would necessarily make content-based distinctions that would raise First Amendment concerns).

²⁴⁰ See Berger, *supra* note 208, at 1410 (“[R]equiring that the end publication contain a particular kind of content—whether it is defined as ‘news’ or information of legitimate public concern—is both constitutionally suspect and unworkable [I]f newsworthiness is judged from a purely normative standpoint, ‘courts could become to an unacceptable degree editors of the news and self-appointed guardians of public taste.’”) (quoting *Shulman v. Group W. Prods. Inc.*, 955 P.2d 469, 481 (Cal. 1998)) (internal footnote omitted); 23 WRIGHT & GRAHAM, *supra* note 26, § 5426, at 750-61 (discussing the problems with and dubious constitutionality of defining such terms as “news” and

It is no less troubling to suggest that courts should examine a particular journalist's editorial operations to see whether they measure up to some objective standards of "real" journalism. To apply such a test, courts would be required to scrutinize the editorial practices and judgments of the journalists involved to see whether, in the court's view, they meet certain criteria.²⁴¹ Any such examination will inevitably favor the older, more well-established "mainstream media," with their long proven track records of reporting to the public, and will discriminate against newer, perhaps bolder, upstarts. Requiring that a court bless a journalist's editorial operations before granting the privilege is similar to a licensing scheme for journalists—except in this case the licenses would be granted by the judiciary, not by the legislature.²⁴²

Further complicating any such analysis is the blurring of news and entertainment in today's media. For example, a network such as CNN has a respected news operation, with systems and procedures in place to verify the accuracy of its stories, and a long track record of disseminating hard news to the public. It would certainly fit the profile of a legitimate news organization. But if a particular CNN report is concerned with the latest romantic escapades of some overpaid movie star, or the most recent developments on *American Idol*, is that report "newsworthy" and deserving of the privilege simply by virtue of its being on CNN? Would the same stories on an obscure website lacking any editorial controls not be privileged? Consider further the case of a little-known blog that posts an item concerning a major scandal in the White House. By definition the topic is newsworthy, but the story may be based solely on rumor and innuendo, with no fact-

"newsmen"). See also Miller GJ Subpoena, *supra* note 16, at 1162-63 (Henderson, J., concurring) (arguing that Judge Tatel's proposed balancing test considering the newsworthiness of the leaked information "seems antithetical to our nation's abiding commitment to the uninhibited trade in ideas") (citing cases); *In re Grand Jury Subpoenas, Mark Fainaru-Wada and Lance Williams*, 438 F. Supp. 2d 1111, 1120 (N.D. Cal. 2006) (BALCO investigation; court rejects the reporters' argument that it should engage in Judge Tatel's proposed balancing test by evaluating the newsworthiness of the information, because it "would require [the court] to place greater value on the reporting of certain news stories over others . . .").

²⁴¹ The Supreme Court in *Branzburg*, discussing a hypothetical danger that "sham" newspapers might seek to claim the privilege, noted that it would be inappropriate for a court to inquire whether such a newspaper was in fact a legitimate organ of the press, because the First Amendment "protects speech and publications regardless of their motivation, orthodoxy, truthfulness, timeliness, or taste." *Branzburg v. Hayes*, 408 U.S. 665, 705 n.40 (1972) (citations omitted).

²⁴² See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 801 (1978) (Burger, C.J., concurring) ("The very task of including some entities within the 'institutional press' while excluding others, whether undertaken by legislature, court, or administrative agency, is reminiscent of the abhorred licensing system of Tudor and Stuart England—a system the First Amendment was intended to ban from this country.").

checking or other editorial verification. Does the privilege therefore not apply, despite the obvious newsworthiness of the subject matter? What if the same story appears on a well-established network, but for some reason the standard fact-checking practices were not followed?

Applying tests that consider factors such as newsworthiness or the legitimacy of a reporter's operations would actually require a court to evaluate both the content of a story and the credentials and practices of the media outlet reporting the story. Again, this level of judicial entanglement with the substance and process of reporting, done to determine the applicability of a legal benefit, is troubling and constitutionally suspect.

In the simpler *Branzburg* era of daily newspapers and three television networks, determining the proper scope of a privilege was challenging enough; in today's media world a privilege may well be impossible to administer in a way that is both practical and consistent with constitutional values. The only solution that seems compatible with the First Amendment is to grant the privilege to all who fall within a functional definition of journalism, regardless of the format or content of the reporting in question. But given the explosion of media outlets and the rise of the Internet, any such privilege would be impossibly broad.²⁴³ The reality is that today's information technology may have outpaced the law to such a degree that the very concept of a journalist's privilege, like so much of the early media technology itself, has simply become obsolete.²⁴⁴

B. *Qualified vs. Absolute Privilege*

Journalists and other privilege proponents have consistently maintained that only an absolute privilege would truly serve the First Amendment interests at stake.²⁴⁵ A qualified privilege, they

²⁴³ See Anderson, *supra* note 211, at 528 ("It is impossible, or at least impractical, to extend press perquisites equally to all information providers, and it is difficult to distinguish the press from the rest because the press is 'disappearing inside the larger world of communications.'") (footnote omitted).

²⁴⁴ See *id.* at 529 (arguing that changes in technology and format of the media make it increasingly difficult to distinguish among different media for the purposes of granting special legal treatment, and may necessarily "put an end to special legal treatment of the press").

²⁴⁵ See Ervin, *supra* note 159, at 262 (noting that during the post-*Branzburg* efforts to pass a privilege, journalists favored an absolute privilege, and withdrew their support for legislation that proposed a qualified privilege); 23 WRIGHT & GRAHAM, *supra* note 26, § 5426, at 748 (noting that proponents of a privilege claimed that legislation was desirable only if it created an absolute privilege). See also Sniffen, *supra* note 166 (reporting that Lucy Dalglish, executive director of the Reporters Committee for Freedom of the Press, said that her group had only recently "dropped its 35-year-old insistence on an absolute privilege for reporters to withhold source identities" and agreed to support an exception for national security cases). See also Miller GJ Subpoena, *supra* note 16, at 1178 (Tatel, J.,

argue, injects too much uncertainty into the process. A source cannot realistically look into the future and predict whether a court will weigh the interests at stake and rule against the privilege, and so the only safe course will be to remain silent.²⁴⁶ As the Supreme Court noted in *Branzburg*, “[i]f newsmen’s confidential sources are as sensitive as they are claimed to be, the prospect of being unmasked whenever a judge determines the situation justifies it is hardly a satisfactory solution to the problem. For them, it would appear that only an absolute privilege would suffice.”²⁴⁷

In *Jaffee v. Redmond*,²⁴⁸ where the Supreme Court relied upon the common law and Federal Rule of Evidence 501 to recognize a federal psychotherapist-patient privilege, the Court held that the qualified privilege adopted by the Court of Appeals was inadequate:

Making the promise of confidentiality contingent upon a trial judge’s later evaluation of the relative importance of the patient’s interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege “An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.”²⁴⁹

All of the *Jaffee* Court’s concerns about an uncertain privilege are equally applicable to the reporter’s privilege. Bowing to political reality, however, journalists and advocates arguing for the reporter’s privilege generally recognize that they have a better chance of success if they seek only a qualified privilege, at least as a fallback position. This was true in *Branzburg*²⁵⁰ as well as in the CIA leak case.²⁵¹

An absolute privilege, even one that applied only to source identities, would be unwise. Such a privilege would render virtually impossible any investigation where the conversation with the reporter itself is a potential crime, as in the CIA leak case.²⁵²

concurring) (noting that the reporters were arguing that only an absolute privilege would provide the certainty their work requires).

²⁴⁶ See, e.g., Stone, *supra* note 154, at 51-54 (arguing for an absolute privilege and that a qualified privilege is “deeply misguided”).

²⁴⁷ *Branzburg*, 408 U.S. at 702 (citations omitted).

²⁴⁸ 518 U.S. 1 (1996).

²⁴⁹ *Jaffee v. Redmond*, 518 U.S. at 17-18 (quoting *Upjohn v. United States*, 449 U.S. 383, 393 (1981)).

²⁵⁰ *Branzburg*, 408 U.S. at 702.

²⁵¹ *Miller GJ Subpoena*, *supra* note 16, at 1150.

²⁵² Other investigations that would have been impossible with an absolute privilege include the Rhode Island case involving reporter Jim Taricani, whose source violated the law by providing him with a copy of an FBI videotape of an undercover operation, see *In re Special Proceedings*, 373 F.3d 37 (1st Cir. 2004), and the ongoing investigation into the leaks of the government’s plans to search and/or seize the assets of organizations

There is an important distinction between such a case and the perhaps more typical situation where a whistleblower reveals information to a reporter about some other misconduct. In the latter case, the prosecution usually will be able to go directly to those allegedly involved in the misconduct in order to investigate; the source's "tip" to the reporter does not add any essential information that cannot be obtained directly. 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. If the identity of that source is protected by an absolute privilege, then Congress will have effectively granted immunity to anyone who commits a crime such as unmasking a CIA agent—no matter how grave the resulting harm—so long as they leak the information to someone who qualifies as a journalist.

When the disclosure of information to a reporter is itself a crime, society's interest in encouraging or protecting that communication is weak to nonexistent. One solution would be to adopt a nearly absolute privilege with narrow exceptions for when the source has committed a crime, akin to the crime-fraud exception that applies to the attorney-client privilege.²⁵³ The political reality, however, is that there is a broad consensus that an absolute privilege is not appropriate. Those courts that have recognized a privilege after *Branzburg* have uniformly held that the privilege is a qualified one, subject to various balancing tests. Most state statutes do not provide for an absolute privilege.²⁵⁴ The proposed federal legislation, the Free Flow of Information Act of 2006, contains a series of different, multi-part balancing tests to be performed, depending upon whether the party seeking the information is a criminal prosecutor, a criminal defendant, or a civil litigant, as well as other balancing tests to be applied when national security is at stake, when there is a need to prevent death or substantial bodily injury, or when the reporter was the

suspected of supporting terrorism, *see* *N.Y. Times Co. v. Gonzales*, 459 F.3d 160 (2d Cir. 2006).

²⁵³ *See, e.g.*, Stone, *supra* note 154, at 57-58 (arguing for a privilege with exceptions to protect national security or when the leak itself was a crime and did not "substantially contribute to public debate."); Volokh, *supra* note 213 (arguing for a privilege that contains an exception when the source is violating the law by leaking the information).

²⁵⁴ *See* DIENES ET AL., *supra* note 46, § 15-2(e)(2), at 804-05 ("The protection afforded by most shield statutes is, at least in some respects, qualified Even where a statute, on its face, sets out an absolute privilege, several state courts have imposed qualifications by judicial construction."); *see also* *N.Y. Times*, 459 F.3d at 169.

eyewitness to a crime.²⁵⁵

Legislation such as the proposed federal privilege, with its multiple qualifications and balancing tests, is the product of political compromise. But in the process of reaching such a compromise, Congress has unmoored the privilege from its underlying purpose and rationale. The more complex the privilege, and the more possible exceptions and balancing tests that apply, the less likely the privilege is to convince any source that she can speak to a reporter without fear of being exposed. At the time of a potential leak, a confidential source cannot possibly look into the future and predict in any meaningful way whether a privilege such as that in the proposed federal law will protect her. The future application of the privilege will depend upon a court's balancing of such factors as the importance of the case, whether alternative means to obtain the information have been exhausted, whether the overall public interest favors disclosure, whether national security is implicated, and whether there is a danger of death or serious bodily harm. In addition, application of the privilege may vary depending upon whether the information is being sought by a prosecutor, a criminal defendant, or in a civil case. Faced with all of these possibilities and future unknowns, a potential source could only throw up her hands.²⁵⁶

The more exceptions and qualifications that apply to a privilege, the less likely that privilege is to serve its supposed purpose of encouraging sources to come forward. When that fact is coupled with all of the empirical reasons to doubt the effect of the privilege, it becomes clear that any privilege with a chance of being enacted by Congress is extremely unlikely to achieve the desired result of bringing forth any potential confidential sources who otherwise would have remained silent. Without the societal benefit of encouraging sources to disclose information to the press, however, the privilege itself has no justification. Any such privilege then becomes not a means of encouraging information flow to the press, but rather a simple *post hoc* entitlement not to

²⁵⁵ Free Flow of Information Act of 2006, S. 2831, 109th Cong. (2d Sess. 2006). The earlier Senate bill proposed by Senator Lugar provided for a nearly absolute privilege for a source's identity, allowing it to be discovered only to prevent imminent harm to national security. See Free Flow of Information Act of 2005, S.1419, 109th Cong. (1st Sess. 2005). That nearly absolute privilege failed to garner significant support, leading Senator Lugar to introduce his substantially modified bill on May 18, 2006. See Free Flow of Information Act of 2006, S. 2831, 109th Cong. (2d Sess. 2006). The modified bill contains a much less absolute privilege and provides multiple balancing tests to determine when the privilege will apply. The modifications apparently were deemed necessary because the original proposed privilege was thought to be too sweeping. See 152 CONG. REC. S4798, S4803 (daily ed. May 18, 2006) (statement of Sen. Schumer).

²⁵⁶ See Stone, *supra* note 154, at 51-53 (arguing that a qualified, uncertain privilege leaves a potential source in a "craps-shoot").

testify, granted to some journalists in some cases.

Assuming, for argument's sake, that the presence or absence of a privilege really does determine whether or not some significant number of sources come forward, then privilege advocates are correct: to be effective, the reporter's privilege must be virtually absolute. Congress has made it clear, however, that there is little support for such an absolute privilege, and courts that have found a privilege in the Constitution or common law uniformly reject an absolute privilege. In addition, given the expanding media world and evolving definitions of who qualifies as a journalist, any absolute privilege would result in an unacceptably large amount of information being shielded from the justice system. Thus the dilemma: an absolute privilege is unacceptable and unworkable, but that is the only kind of privilege with even the potential to fulfill the privilege's purported function. If Congress continues down the current road, we may end up with the worst of all possible worlds: a privilege containing multiple qualifications and exceptions, which will impose costs (by excluding relevant evidence in at least some cases) but will result in no benefits.

VI. WHY REPORTERS GO TO JAIL

The recent calls for a federal reporter's privilege statute have been fueled in large part by the jailing of Judith Miller. Supporters maintain a federal law is necessary so that we may avoid the specter of journalists being jailed to protect their sources.²⁵⁷ One might assume, therefore, that if a federal privilege law were passed, reporters would never again go to jail. One would be wrong.

When reporters are jailed in privilege disputes, they are not being punished for newsgathering or for anything that they wrote. They are being held in contempt for refusing a valid court order to testify.²⁵⁸ In that regard, they are being treated no differently

²⁵⁷ See, e.g., Editorial, *When Journalists Go to Jail . . .*, S.F. CHRON, Sept. 24, 2006, at F4 (discussing BALCO case and urging Congress to pass the shield law so reporters won't "go to jail for doing their jobs"); Editorial, *Reporters and Sources; Congress Considers a Federal Shield Law*, WASH. POST, June 15, 2006, at A26 (arguing that the *Miller* case demonstrates the need for a federal shield law so that reporters won't face jail time for protecting their sources); Mara Lee, *Shield Law Still Mired in Congress*, EVANSVILLE COURIER & PRESS, July 26, 2006, at B5 (quoting Senator Lugar who argues that the United States needs the Free Flow of Information Act so that reporters here are not jailed as they are in countries like China, Burma, and Cuba); Miller Testimony, *supra* note 165 (urging Congress to pass a privilege statute so that "no other reporter will have to choose between doing her small bit to protect the First Amendment and her liberty").

²⁵⁸ This is why statements comparing journalists jailed in the United States to journalists jailed in countries like China, Burma, or Cuba, are off the mark. See 152 CONG. REC. S4798, S4801 (daily ed. May 18, 2006) (remarks of Senator Lugar in support of the

from any other witness who asserts an unsuccessful privilege claim. For example, if I am subpoenaed to a grand jury and believe that my testimony would incriminate me, I have a right to assert my Fifth Amendment privilege to remain silent. If a court disagrees with my claim and orders me to testify, I may appeal that order. If I am ultimately unsuccessful, however, I must comply with the court order and testify, no matter how firmly convinced I am that the court is wrong. If I refuse, I will be held in contempt and likely jailed until I agree to testify. The courts are the final arbiters of the constitutional privilege question, and the rule of law requires that their orders be obeyed.

Journalists who assert a privilege, however, frequently do not abide by this legal process. They believe that their professional obligations require them to refuse to reveal their sources regardless of what a court says. In their view, the courts are not the final arbiters of these privilege questions, journalists are.²⁵⁹ There's not a great deal of suspense involved in their evaluation of the privilege issue, however, because the answer is always the same: the reporter wins. Nothing short of an absolute privilege will suffice. Therefore, even if there is a privilege statute, if a court rules it does not apply in a given case, many journalists will defy the court order.

For example, in Judith Miller's case, the D.C. Circuit essentially assumed that there was a common law privilege, and held that even so, the privilege should be overridden. Miller disagreed with the court's privilege ruling and chose to go to jail. Absent an absolute, unqualified privilege that applies under all circumstances—which, as discussed above, would be unwise, has not been found by any court, and is not in the cards politically—a privilege statute will have no effect on the outcome for those, such as Miller, who are ordered to testify despite the privilege and refuse to do so. They will continue to be held in contempt and to go to jail.

Ethics codes drafted by various journalism organizations generally require reporters to protect the confidentiality of their

Free Flow of Information Act). In totalitarian societies, journalists are jailed because of what they write. When journalists are jailed in the United States, it is because they are refusing to abide by a lawful court order, entered after a full and fair hearing and due process of law. Rather than demonstrating that the United States is akin to a totalitarian regime, these jailings show just the opposite: that we are a society governed by the rule of law, and that no one is above the law or has the right to pick and choose for herself which laws she will obey.

²⁵⁹ See Michael Kinsley, *Constitutional Cafeteria*, WASH. POST, May 5, 2006, at A19 (“[M]any in the media . . . believe passionately that it is not merely okay but profoundly noble to follow their own interpretation [of the First Amendment] and ignore the Supreme Court’s.”).

sources.²⁶⁰ One might assume that a subtext of any such professional ethical requirement is “to the extent allowed by law.” In other words, a reasonable interpretation of this requirement would be that a journalist must never voluntarily betray the confidences of a source, and must use all legal means to avoid being forced to do so. In the end, however, if all legal efforts fail, a journalist would be expected to comply with the law, just as any other citizen. But journalists have widely construed their professional obligations to mean that they must refuse to reveal a source even if doing so means defying a lawful court order and going to jail. In fact, to do anything less is to risk being deemed something of a wimp by the journalism community.

For example, when the Supreme Court declined to review the Miller and Cooper case, Time Inc. concluded that it had exhausted its legal remedies and should now comply with the court's order. Time accordingly turned over Matt Cooper's notes and e-mails pursuant to the subpoena. The company issued a statement explaining that, in a society ruled by law, journalists do not have the right to decide for themselves what the law requires, and that having fought the good fight the responsible course was now to abide by the court's order.²⁶¹ It noted that “[t]he same Constitution that protects the freedom of the press requires obedience to final decisions of the courts and respect for their rulings and judgments. That Time Inc. strongly disagrees with the courts provides no immunity.”²⁶² For this responsible course of action, Time was criticized by Cooper and pilloried by many others in the media for “caving in” on the privilege question.²⁶³ The editorial page of the *New York Times* pronounced itself “deeply disappointed” with Time Magazine's decision to obey the law.²⁶⁴

²⁶⁰ See, e.g., AM. SOC'Y OF NEWSPAPER EDITORS, ASNE STATEMENT OF PRINCIPLES art. VI, Aug. 28, 2002, <http://www.asne.org/index.cfm?ID=888> (“Pledges of confidentiality to news sources must be honored at all costs, and therefore should not be given lightly.”); RADIO-TELEVISION NEWS DIRS. ASS'N & FOUND., CODE OF ETHICS AND PROF'L CONDUCT, Sept. 4, 2000, <http://rtnda.org/ethics/coe.shtml> (“Journalists should keep all commitments to protect a confidential source.”).

²⁶¹ See *Statement of Time Inc. on the Matthew Cooper Case*, TIME.com, June 30, 2005, <http://www.time.com/time/nation/article/0,8599,1078444,00.html>.

²⁶² *Id.*

²⁶³ See, e.g., Jeff Bruce, *Judy Miller Kept Her Word; Reporter Shouldn't Be Jailed for Asking Questions About Government*, DAYTON DAILY NEWS, July 10, 2005, at B6 (accusing Time Inc. of an “appalling act of corporate cowardice”); Editorial, *Time Sells Out; Freedom of the Press Communications Giant Puts Profit Over Principle*, SALT LAKE TRIBUNE, July 1, 2005, at A14 (same); CNN—*Reliable Sources* (CNN television broadcast July 3, 2005) (transcript available on Westlaw at 2005 WLNR 10457918) (Lucy Dalglish, executive director of the Reporter's Committee for Freedom of the Press, stated that “[T]his was an unexpected turn of events, and my organization is very disappointed. This—to our knowledge, this is the first time in about 25 years that a journalism organization has gone over the wishes of a reporter and identified a source.”).

²⁶⁴ See Editorial, *Judith Miller Goes to Jail*, N.Y. TIMES, July 7, 2005, at A22.

It is difficult to think of another example of a profession whose members believe that their professional obligations require them to break the law. A practice whereby journalists obtain information from confidential sources by promising to violate the law if necessary has little to recommend it from a social policy standpoint. Such a practice also enables those sources who themselves may be breaking the law—as may have been the case in the CIA leak case, or the *New York Times v. Gonzalez* case—to hide behind a journalist, confident that the journalist will go to jail so that, perhaps, the source will not have to. Journalists have no right to promise to break the law in order to obtain information. Any promise of confidentiality is appropriate and ethical only if it includes the (at least implicit) understanding that the journalist will, of course, abide by the law while doing his job.²⁶⁵

Journalists claim that when they defy court orders to reveal their sources they are simply engaged in noble acts of civil disobedience, refusing to honor a legal but unjust command. The day after Judith Miller was jailed, the *New York Times* editorialized that her actions were “in the great tradition of civil disobedience that began with this nation’s founding,” and called forth the memories of such civil rights activists as Rosa Parks and Dr. Martin Luther King, Jr.²⁶⁶ This “civil disobedience” argument is deeply misguided.

Journalists who invoke the privilege are not asserting a fundamental individual right, such as the right to equal protection or due process. They are claiming the right to decide for themselves how best to protect an institution: the free press. Institutions do not have civil rights, although they certainly have interests. The interests of the press, however, are not absolute, and must be balanced against other societal concerns and values. There was no valid countervailing social interest when the issue was whether citizens should be required to ride in the back of a bus or be denied the right to vote. In cases involving reporter’s privilege, however, there are weighty, legitimate interests on the other side, including the historic right of a grand jury to hear

²⁶⁵ See Stone, *supra* note 154, at 55 (arguing that, with a reporter’s privilege as with all other privileges, “a promise of confidentiality should be understood as binding only to the extent allowed by law.”).

²⁶⁶ Editorial, *Judith Miller Goes to Jail*, N.Y. TIMES, July 7, 2005, at A22. See Reporter’s Committee for Freedom of the Press, *The Free Flow of Information Act of 2006: A Brief Analysis by The Reporters Committee for Freedom of the Press*, http://www.rcfp.org/shields_and_subpoenas/specter.html (arguing that, because the proposed federal legislation is not an absolute privilege, those reporters who are ordered to testify despite the privilege, and who believe the First Amendment protects their sources, will have to be “willing to engage in the civil disobedience of going to jail to protect their sources and maintain their independence”).

every person's evidence and the rights of individual defendants or litigants to due process of law and to confront the witnesses against them. These interests, like that of a free press, have constitutional stature. Deciding how best to balance those competing individual and institutional interests is peculiarly the province of the courts.

Orders that compel journalists to testify do not issue from bigoted public officials acting out of discriminatory motives. The decisions are made by a neutral judge after a full and fair hearing from both sides and due process of law. The rule of law requires that journalists, just as any other citizens, accept the rulings of the courts on these questions—which means that sometimes the journalists will lose. By continuing to defy court orders even after all appeals have been exhausted, journalists are not engaging in civil disobedience. Instead, they are proclaiming a right to decide for themselves what the law should require.²⁶⁷ In effect, they are saying that only journalists—not the courts and not the legislature—are qualified to say what the First Amendment means. Attorneys, doctors, spouses, and clergy do not claim a right to decide for themselves what the law says about the application of a privilege in a particular case. Only the Fourth Estate arrogates this right to itself. Civil rights pioneers generally looked to the courts to protect their fundamental rights. Journalists, on the other hand, place themselves above the courts when they refuse to abide by judicial rulings on the privilege.

Journalists don't go to jail simply because of the lack of a federal reporter's privilege. They go to jail in part due to a professional culture that insists on an absolute privilege, chastises reporters who comply with orders to testify, and lionizes those who defy the law as martyrs for the First Amendment. Passage of a federal privilege law will not alleviate that problem. Journalists will continue to go to jail until there is a cultural change within journalism, and a recognition that adherence to the ethics of the profession cannot reasonably be interpreted to include a duty to break the law.

²⁶⁷ See Michael Kinsley, Editorial, *Reporters Aren't Above the Law; The Courts Have Spoken in the Plame Case. Why Does the New York Times Think it Doesn't Have to Listen?*, L.A. TIMES, July 10, 2005, at 5.

The New York Times is an influential newspaper owned by a large corporation. It is claiming an exemption from one of the normal duties of citizenship. It has hired some of America's best lawyers to pursue this claim through every available avenue. And then, when the claim has been rejected, it encourages its employees to defy the courts and break the law. If that is civil disobedience, then almost any law that anyone does not care for is up for grabs.

Id. Cf. Stone, *supra* note 154, at 39 ("When journalists disregard lawful court orders because they are serving a 'higher' purpose, they endanger the freedom of the press itself.").

VII. CONCLUSION

The Supreme Court in *Branzburg* expressed considerable skepticism over whether confidential sources would truly be “chilled” by the absence of a reporter’s privilege.²⁶⁸ Nearly thirty-five years later, that skepticism seems even more justified. There is reason to doubt the accepted wisdom that a federal reporter’s privilege law would have any real impact on the press or on the willingness of sources to come forward. Lawmakers should not simply accept at face value the alleged benefits of a privilege. Congress should take care to ensure that policy is not driven by the flurry of attention surrounding a few high-profile cases, and that a federal reporter’s privilege law is not just a messy solution in search of a problem. Similarly, courts tempted to discover a reporter’s privilege in the common law should carefully evaluate whether the public interest is truly served by judicial creation of a privilege with such uncertain benefits and parameters.

The ever-expanding media world also makes the creation and enforcement of a reporter’s privilege problematic. The only privilege consistent with constitutional values would be a sweeping privilege that, in the Internet age, would shield an unacceptable amount of information that is gathered and shared by millions of citizen journalists. Similarly, the only type of privilege that would even potentially accomplish the privilege’s purported goal of encouraging sources to come forward would be a nearly absolute privilege, which is politically and practically unacceptable. The real issue, then, is not whether federal privilege law should be brought into line with the states, but rather whether the state privilege laws themselves continue to make any sense.

As the media and journalism in the modern information age continue to expand and redefine themselves, the notion of a reporter’s privilege becomes increasingly unworkable and impractical. If lawmakers are truly concerned about confidential sources fearing to come forward, there may be better policy avenues to pursue, such as increased and meaningful legal protections for public and private whistleblowers. A federal reporter’s privilege statute, however, is not the answer. There is little reason to believe that the privilege, where it is recognized, is actually generating the social benefits that are supposed to be its justification. There is no reason to compound the problem with federal legislation.

²⁶⁸ See *Branzburg v. Hayes*, 408 U.S. 665, 693-94 (1972).