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A SUMMARY OF HIGH-PROFILE CASES CHALLENGING THE REPORTER'S PRIVILEGE IN 2005

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A Summary of High-Profile Cases Challenging the Reporter's Privilege in 2005

In the seminal 1972 case *Branzburg v. Hayes*,[1] the Supreme Court declined to recognize an absolute First Amendment privilege protecting reporters from compelled testimony regarding confidential sources before grand juries. Writing for the 5–4 majority, Justice White found that when a grand jury investigation is conducted in good faith:

> [There is] no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.[2]

Justice Powell's pivotal concurrence in *Branzburg* made clear the "limited nature" of the case did not leave reporters "without constitutional rights with respect to the gathering of news or in safeguarding their sources."[3] Defining the scope of those constitutional rights has troubled courts in the three decades since *Branzburg* was decided.

This article discusses the high-profile cases of 2005 that challenged the contours of the reporter's privilege: (1) the investigation into the leak of the identity of then CIA agent Valerie Plame; (2) a Privacy Act suit brought by Dr. Wen Ho Lee (a nuclear physicist formerly under investigation on charges of espionage) seeking the source of information leaked to the press; (3) a Privacy Act suit brought by Steven Hatfill (named a "person of interest" in the investigation of the 2001 anthrax attacks) seeking the source of information leaked to the press; (4) the investigation into the leak of evidence under seal in a corruption case to Rhode Island reporter James Taricani;[4] (5) a suit brought by the *New York Times* seeking to block disclosure of phone records to the government by its phone service provider; and (6) the investigation into leaked grand jury testimony from the BALCO steroids scandal.

While these cases focused much public attention on the reporter's privilege in the last year, attention to the issue had been growing in legal circles ever since a controversial 2003 ruling authored by Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit.

In *McKevitt v. Pallasch*,[5] the Seventh Circuit suggested that the First Amendment provides no protection to journalists against compelled disclosure. Michael McKevitt, the plaintiff in the case, was under prosecution in Ireland for his membership in the Real IRA, an alleged terrorist organization, and

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[1] 408 U.S. 665 (1972).

[2] *Id*. at 690–91.

[3] *Id*. at 709.

[4] Though the case against Taricani was decided at the end of 2004, this article includes a discussion of the case given its import on the reporter's privilege.

[5] 339 F.3d 530 (7th Cir. 2003).

for directing terrorism.[6] The U.S. case arose when McKevitt petitioned an Illinois district court to compel journalists writing a biography of David Rupert—a witness for the prosecution against McKevitt in Ireland—to turn over taped interviews with Rupert.[7] The reporters claimed the tapes were protected from disclosure by the reporter's privilege found in both the common law and the First Amendment. The district court disagreed and in a ruling issued late in the afternoon on July 2, 2003, ordered the journalists to produce the tapes in court the following morning.

Approximately 30 minutes before the deadline to hand over the tapes, the journalists sought a stay from the appellate court. The Seventh Circuit denied the stay 90 minutes later, promising to later explain the reasons for its refusal. The tapes were subsequently handed over and the appellate court issued its explanation over a month later.

Judge Posner, writing for a 3-0 majority in a decision dated August 8, 2003, dismissed the appeal, on grounds that the disclosure of the tapes to McKevitt mooted the appeal.[8] But the court suggested, without explicitly holding, that there was no reporter's privilege grounded in the First Amendment.

A matter of first impression for the Seventh Circuit, the court questioned recognition of the reporter's privilege based on *Branzburg*. While noting that Justice Powell's concurrence in *Branzburg* creates difficulty when interpreting the majority opinion in that case, Judge Posner scoffed at the view followed in many circuits that *Branzburg* recognized at least a qualified reporter's privilege.[9] "A large number of cases conclude, rather surprisingly in light of *Branzburg*, that there is a reporter's privilege . . . some audaciously declare that *Branzburg* actually created a reporter's privilege . . . ."[10]

Citing *Branzburg* as evidence that protection of confidential sources was not absolute, Judge Posner noted that confidentiality presented no issue in the case at hand as the source was known and had no objection to disclosure of the tapes to McKevitt.[11] Judge Posner then went on to fault those courts that extended the privilege to nonconfidential information, writing that they "may be skating on thin ice."[12] In fact, he argued that "[w]hen the information in the reporter's possession does not come from a confidential source, it is difficult to see what possible bearing the First Amendment could have on the question of compelled disclosure."[13]

Rather than speak in terms of a privilege, Judge Posner wrote, "courts should simply make sure that a subpoena duces tecum directed to the media, like any other subpoena duces tecum, is

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[6] On August 6, 2003, McKevitt was sentenced by Dublin's Special Criminal Court to 20 years in prison.

[7] McKevitt petitioned the court under Section 1782(a) of the U.S. Judicial Code, which "authorizes federal district courts to order the production of evidentiary materials for use in foreign legal proceedings, provided the materials are not privileged." *McKevitt*, 339 F.3d at 531.

[8] *Id.*

[9] *Id.* at 532.

[10] *Id.*

[11] *Id.*

[12] *Id.* at 533.

[13] *Id.*

reasonable in the circumstances. . . . We do not see why there need to be special criteria merely because the possessor of the documents or other evidence sought is a journalist."[14]

As noted by the *McKevitt* court itself, its reluctance to recognize any sort of qualified privilege was counter to the view followed in almost all the other circuits. The attack on the validity of a constitutionally-based reporter's privilege found in *McKevitt*, together with the cases discussed herein that challenged the scope of the federal reporter's privilege (with the exception of the *New York Times* phone records case), is, indeed, disturbing.

While the *McKevitt* decision resulted in a significant amount of legal writing and commentary,[15] the depth of the impact of *McKevitt* may be limited. For example, in the Rhode Island leak case discussed below, the First Circuit cited *McKevitt* to note that "One distinguished judge has questioned whether Branzburg now offers protection much beyond what ordinary relevance and reasonableness requirements would demand …," but ultimately concluded that cases in its own circuit provided greater protection than *McKevitt*.[16] No other courts outside of the Seventh Circuit cited the First Amendment analysis of *McKevitt* to narrow recognition of the reporter's privilege.[17] In cases before federal courts in 2005, journalists successfully relied on the privilege in five cases,[18] on a state shield law in one case[19] and on federal procedural arguments in one case.[20] In addition to the Valerie Plame investigation and the Privacy Act suit brought by Dr. Wen Ho Lee, both discussed below, reporter's privilege arguments failed in three cases before federal courts in 2005.[21] Even in the Seventh Circuit, in the most recent case, *Patterson v. Burge*, a 2005 civil rights case, the district court quashed subpoenas for video and audio outtakes on general

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[14] *Id*.

[15] Four law review articles discuss *McKevitt* at length and almost a dozen other law journals and periodicals make reference to the case.

[16] *In re Special Proceeding*, 373 F.3d 37, 45 (1st Cir. 2004). Three other cases discussed below made passing reference to the *McKevitt* decision. *See In re: Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 1000 (D.C. Cir.) (Tatel, J., concurring in the judgment), cert. denied, 125 S.Ct. 2977 (2005); *Lee v. U.S. Dept. of Justice*, 428 F.3d 299, 301 (D.C. Cir. 2005) (Tatel, J., dissenting from denial of rehearing *en banc*); *New York Times v. Gonzales*, 382 F.Supp.2d 457, 485 (S.D.N.Y. 2005).

[17] The New York Court of Appeals cited *McKevitt* in a survey of circuit court decisions applying the reporter's privilege in criminal cases. *People v. Combest*, 4 N.Y.3d 341, 347 n.1 (N.Y. 2005).

[18] *See Price v. Time*, 416 F.3d 1327 (11th Cir. 2005); *New York Times Co. v. Gonzales,* 382 F.Supp.2d 457 (S.D.N.Y. 2005); *E&J Gallo Winery v. Encana Energy Services, Inc.*, 2005 U.S. Dist. LEXIS 482 (S.D.N.Y. 2005); *Kitzmiller v. Dover*, 379 F. Supp. 2d 680 (M.D. Pa. 2005); *Wright v. Federal Bureau of Investigation*, 381 F. Supp. 2d 1114 (C.D. Cal. 2005).

[19] *See Ventura v. The Cincinnati Enquirer*, 396 F.3d 784 (6th Cir. 2005).

[20] *See Patterson v. Burge*, 2005 U.S. Dist. LEXIS 1331 (N.D. Ill. 2005). *See infra* note 22.

[21] See *U.S. Commodity Futures Trading Commission v. The McGraw-Hill Companies, Inc.*, 390 F. Supp. 2d 27 (D.D.C. 2005) (energy industry newsletter covered under a qualified First Amendment reporter's privilege, but privilege had been overcome where information sought was crucial and defendants had exhausted all reasonable alternative sources for the information), *In re Natural Gas Commodity Litigation*, 2005 U.S. Dist. LEXIS 27470 (S.D.N.Y. 2005) (qualified privilege overcome where information held by McGraw-Hill Companies and Intelligence Press, Inc. was critical to plaintiffs' price fixing suit and unavailable from other sources); *How v. City of Baxter Springs*, 2005 U.S. Dist. LEXIS 8466 (D. Kan. 2005) (plaintiffs, a self-employed individual and a former patent attorney, may not claim the reporter's privilege as they are not journalists; court nonetheless applied the circuit's balancing test, but found it weighed in favor of the defendants).

federal procedural principles. Citing *McKevitt* as holding that there was no basis for recognition of the reporter's privilege under federal or state law and that subpoenas to the media, like any other subpoena, must be "reasonable in the circumstances," the court found that it would "… therefore pretermit consideration of the news organizations' statutory and constitutional arguments and analyze the motion to quash under the standards of Rule 45(c)."[22]

McKevitt aside then, reporter's privilege arguments based on the First Amendment failed in the high profile grand jury investigation, *In re: Grand Jury Subpoena*, discussed below, resulting in the jailing of a reporter in the Valerie Plame investigation. Arguably the closest fact pattern to *Branzburg*, a grand jury subpoena may put journalists on the weakest legal grounds. But far more worrisome is the failure of a recognized First Amendment privilege to protect journalists in the civil actions based on the Privacy Act, also discussed below.

What all of these cases – civil Privacy Act, grand jury and other investigations – have in common, however, is that they all arise out of a factual scenario that includes a leak of government information that the government otherwise held to be secret and that the law in other respects held to be legitimately secret from public disclosure. In each, the parties, and ultimately the courts, are in need as they see it, of information about the reporter's sources that only the reporter can provide. Nathan Siegel, in his article below, "Why Should There Be a Reporter's Privilege When a Leak Is a Crime?,"[23] astutely analyzes the unique problems that courts apparently confront in the face of the aftermath of an allegedly damaging leak of information, and he offers a valid counterpoint to the judicial reluctance to let reporters retain the secrets of their sources in such instances. What upcoming years will reveal is whether, either as a result of *McKevitt's* harsh conclusion about the privilege or the parsimonious application of the privilege in leak cases, the privilege will be narrowed in other litigation and circumstances.

In re: Grand Jury Subpoena: Judith Miller and Matthew Cooper

On July 14, 2003, the identity of secret CIA operative Valerie Plame was made public in a story written by journalist Robert Novak and published in the *Chicago Sun-Times*. In the column, Novak stated that two unidentified "senior administration officials" told him that Plame had engineered the selection of her husband, former U.S. Ambassador Joseph C. Wilson IV, for a mission to investigate allegations that Iraq had tried to procure uranium from Niger. Wilson found no evidence of Iraq having attempted to buy uranium and publicly challenged the Bush Administration's claims to the contrary made during the lead-up to the 2002 invasion of Iraq.[24]

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[22] *Patterson*, 2005 U.S. Dist. LEXIS at *5. The *Patterson* court relied on a 2004 Seventh Circuit case, *Hobley v. Burge*, 223 F.R.D. 499 (N.D. Ill. 2004), which applied the standard outlined in *McKevitt*. Finding that subsection (3)(A) of Rule 45(c) of the Federal Rules of Civil Procedure "… provides that a court 'shall' quash or modify a subpoena that 'subjects a person to undue burden,'" the *Hobley* court denied a motion to quash a subpoena for letters to a reporter on grounds that such letters were not confidential and that production of the letters was not overly burdensome, but granted a motion to quash a subpoena for the reporter's notes as production of such notes would impose an undue burden. *Hobley*, 223 F.R.D. at 504-05. The *Hobley* court cited *McKevitt* as "… the law in this Circuit, which this court is bound to follow." *Hobley*, 223 F.R.D. at 502. *See also United States v. Hale*, 2004 U.S. Dist. LEXIS 8905 (N.D. Ill. 2004), and *Solaia Technology, LLC v. Rockwell Automation, Inc.*, 2003 U.S. Dist. LEXIS 20196 (N.D. Ill. 2003), two other Seventh Circuit cases interpreting *McKevitt*.

[23] This article begins on page 23.

[24] In the State of the Union speech on January 28, 2003, President Bush stated that "The British government has learned that Saddam Hussein recently sought significant quantities of uraniam from Africa." Wilson published on

Following Novak's initial disclosure of Plame's identity, other journalists wrote or researched stories relating to Wilson's findings and the administration's response thereto and the allegation that Wilson's wife had played a role in the selection of her husband for the trip to Niger.

The Department of Justice appointed Special Prosecutor Patrick Fitzgerald to investigate who in the Bush Administration leaked Plame's identity to the press.[25] Fitzgerald began an investigation in December 2003 and subsequently convened a grand jury. Five reporters were subpoenaed to testify about their knowledge of the leak before the grand jury: Glenn Kessler and Walter Pincus of the *Washington Post*, Tim Russert of NBC, Matthew Cooper of *Time* and Judith Miller of the *New York Times*. *Time* magazine was also subpoenaed to produce documents related to the leak.

Novak has refused to publicly acknowledge whether he was also subpoenaed or testified before the grand jury.

Kessler received permission from his source, I. Lewis "Scooter" Libby Jr., Vice President Dick Cheney's chief of staff, to testify before Fitzgerald and answer questions relating to two conversations he had with Libby in 2003.[26] In a June 22, 2004 tape-recorded interview that was to be given to the grand jury, Kessler told Fitzgerald that Libby did not mention Plame or Wilson, or Wilson's trip to Niger, in conversations he had with Libby on July 12 and July 18, 2003.[27]

Pincus sat for a deposition on September 15, 2004 after his source revealed himself to Fitzgerald and told the prosecutor about a July 12, 2003 conversation he had with Pincus.[28] Though Pincus "recounted his conversation with the source," he refused to testify about his identity.[29]

Cooper and Russert moved to quash their subpoenas, but the motions were denied by Chief Judge Thomas Hogan of the District Court of Columbia in an opinion dated July 20, 2004.[30] *Time* also made a motion to quash its subpoena, which was denied on August 6, 2004, with the court citing the grounds stated in its July 20 opinion.[31]

Russert subsequently reached an agreement with Fitzgerald and was interviewed under oath by the special prosecutor and answered limited questions about a July 2003 phone conversation with Libby.[32] Pursuant to the agreement, Russert was not required to appear before the grand jury and

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Op-Ed article in the *New York Times* on July 6, 2003 entitled "What I Didn't Find in Africa."

[25] Fitzgerald was thought to be investigating, among other possible charges, whether criminal charges could be brought against the leaker under the Intelligence Identities Protection Act of 1982, 50 U.S.C. § 421 et seq (criminalizing disclosure of the identity of an undercover agent when the person disclosing the information had authorized access to the classified information).

[26] Glenn Kessler, *Statement by The Post's Glenn Kessler*, Wash. Post, June 22, 2004, at http://www.washingtonpost.com/wp-dyn/articles/A62621-2004Jun22.html.

[27] Susan Schmidt, *Post State Dept. Reporter Questioned in Leak Probe*, Wash. Post, June 23, 2004, at A22.

[28] Susan Schmidt, *Post Source Reveals Identity to Leak Probers*, Wash. Post, Sept. 16, 2004, at A2.

[29] *Id*.

[30] *In re: Special Counsel Investigation*, 332 F. Supp. 2d 26 (D.D.C. 2004).

[31] *In re: Special Counsel Investigation*, 332 F. Supp. 2d 33 (D.D.C. 2004).

[32] MSNBC Staff, *Judge Upholds Media Subpoenas in CIA Leak Case*, Aug. 9, 2004, at http://www.msnbc.msn.com/id/5651768. NBC News issued a statement on August 9, 2004 following Russert's testimony.

was not asked questions that would have required him to disclose information given to him in confidence.[33]

Time and Cooper refused to comply with the subpoenas and were held in civil contempt on August 9, 2004.[34] Though the court ordered Cooper to jail for up to 18 months and ordered *Time* to pay a $1,000 fine per day until both complied with the grand jury subpoenas, both orders were stayed pending an appeal to the U.S. Court of Appeals for the District of Columbia.[35] The district court vacated the contempt orders after Cooper sat for a deposition on August 23 and *Time* produced certain documents.[36] Pursuant to an agreement with Fitzgerald, Cooper agreed to answer certain questions relating to conversations with a specific source and Time agreed to hand over certain documents after Cooper's source "explicitly and unambiguously informed Cooper that he had no objection to Cooper identifying him."[37]

However, on September 13, the grand jury issued a second set of subpoenas to Cooper[38] and to *Time*.[39] Both parties again moved to quash the subpoenas and in an oral ruling on October 7, the court again denied their motions.[40] On October 13, both *Time* and Cooper were held in civil contempt.[41]

Meanwhile, on August 12 and 14, 2004, Miller received subpoenas to testify before the grand jury.[42] Though Miller spoke to confidential sources in contemplation of writing an article on Plame or Wilson, she never wrote such an article. Miller filed a motion to quash the subpoenas, which was denied on September 9. She refused to testify and on October 7, was held in civil contempt.[43] She too was ordered imprisoned for up to 18 months, but was granted bail pending an appeal.

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[33] *Id.*

[34] *In re: Special Counsel Investigation*, 332 F. Supp. 2d at 34-35.

[35] *Id*.

[36] *In re: Special Counsel Investigation*, 346 F. Supp. 2d 54, 55 (D.D.C. 2004).

[37] Petitioners Brief at 4, *Cooper v. U.S.*, 125 S.Ct. 2977 (2005).

[38] The Cooper subpoena requested: "'[a]ny and all documents . . . [relating to] conversations between Matthew Cooper and official source(s) prior to July 14, 2003, concerning in any way: former Ambassador Joseph Wilson; the 2002 trip by former Ambassador Wilson to Niger; Valerie Wilson Plame, a/k/a Valerie Wilson, a/k/a Valerie Plame (the wife of former Ambassador Wilson); and/or any affiliation between Valerie Wilson Plame and the CIA.'" *In re: Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 967 (D.C. Cir. 2005), cert. denied, 125 S.Ct. 2977 (2005).

[39] The *Time* subpoena requested: "'[a]ll notes, tape recordings, e-mails, or other documents of Matthew Cooper relating to the July 17, 2003 Time.com article entitled 'A War on Wilson?' and the July 21, 2003 *Time* magazine article entitled 'A Question of Trust.'" *Id*.

[40] The district court issued an opinion explaining the reasons for the denial on November 10, 2004. *See In re: Special Counsel Investigation*, 346 F. Supp. 2d 54 (D.D.C. 2004).

[41] Again, the court ordered Cooper to jail for up to 18 months and ordered *Time* to pay a daily fine of $1,000 until both complied with the grand jury subpoenas, but both orders were stayed pending an appeal.

In re: Miller, 397 F.3d at 967.

[42] The subpoenas sought "… documents and testimony related to conversations between her and a specified government official 'occurring from on or about July 6, 2003, to on or about July 13, 2003, . . . concerning Valerie Plame Wilson (whether referred to by name or by description as the wife of Ambassador Wilson) or concerning Iraqi efforts to obtain uranium.'" *Id*.

[43] *Id*. A copy of the October 7 order is available at: http://www.dcd.uscourts.gov/district-court-2004.html.

Miller, Cooper, and *Time* filed a consolidated appeal to the U.S. Court of Appeals for the District of Columbia, but in a decision dated February 15, 2005, the circuit court rejected all four of the appellants' arguments in favor of reversal and affirmed the lower court's contempt orders.[44]

The D.C. Circuit first rejected the reporters' argument that the First Amendment affords journalists a constitutional right protecting against compelled disclosure of their confidential sources when subpoenaed before a grand jury.[45] Writing for the court, Judge David B. Sentelle stated:

> 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.[46]

Next, the court rejected the appellants' argument against compelled disclosure based on recognition of the reporter's privilege under federal common law. The reporters argued that "Whether or not a federal common law privilege protecting reporters existed in 1972 when *Branzburg* was decided, in the 32 years since *Branzburg*, much has changed. There is now an overwhelming and almost total consensus in this country that a reporter's privilege exists and must be protected."[47] Though the appellants claimed they were protected from revealing their confidential sources under an absolute common law reporter's privilege, they argued that even if the privilege is only qualified, the government had not met its burden. The three-judge panel split on the issue of a privilege under federal common law, with each judge writing a separate opinion. But the judges all agreed that even if such a privilege existed, it was not absolute and the government had overcome its burden in this case.[48]

As set forth in the concurring opinion of Judge Tatel—the sole member of the three-judge panel to recognize a qualified common law reporter's privilege—the balancing of interests rested on "whether Miller's and Cooper's sources released information more harmful than newsworthy."[49] Judge Tatel concluded that the newsworthiness of Plame's identity paled in comparison to the increased risk of harm to Plame and her associates resulting from the public disclosure; thus, in this

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[44] *In re: Miller*, 397 F.3d 964.

[45] In arguing for a First Amendment privilege, the appellants relied on *Branzburg*, 408 U.S. 665, and *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981) (recognizing a qualified reporter's privilege in the civil context).

[46] *In re: Miller*, 397 F.3d at 970.

[47] Appellants Brief at 33, *In re: Miller*, 397 F.3d 964. The district court found that the Supreme Court's decision in *Branzburg* foreclosed the issue.

[48] Judge Sentelle found that there is no federal common law privilege. *In re: Miller*, 397 F.3d at 977-8 (Sentelle, J., concurring in the judgment). Judge Karen L. Henderson ruled that the question need not be answered because the prosecutor could overcome any common law privilege. *Id*. at 982 (Henderson, J., concurring in the judgment). Judge David S. Tatel found support for a privilege based in common law, but ruled that it nonetheless had been overcome. *Id*. at 995 (Tatel, J., concurring in the judgment).

[49] *Id*. at 1001 (Tatel, J., concurring in the judgment).

case, the government interest in disclosure outweighed any qualified privilege for newsgathering.[50] In calling for recognition of a qualified reporter's privilege under common law, Judge Tatel outlined a balancing test:

> In leak cases, then, courts applying the privilege must consider not only the government's need for the information and exhaustion of alternative sources, but also the two competing public interests lying at the heart of the balancing test. Specifically, the court must weigh the public interest in compelling disclosure, measured by the harm the leak caused, against the public interest in newsgathering, measured by the leaked information's value.[51]

Additionally, the court dismissed the reporters' contention that if there is a qualified privilege, their due process rights were violated by *ex parte* and in camera evidence offered by the government to overcome the privilege. Rejecting this argument, the court noted that "'privacy and secrecy are the norm'" in grand jury proceedings.[52] Judge Tatel, whose concurring opinion included eight blank pages, wrote that "[h]aving carefully scrutinized his voluminous classified filings … the special counsel has established the need for Miller's and Cooper's testimony."[53]

Finally, the court cast aside the reporters' argument that the prosecution had not complied with Department of Justice Guidelines governing the issuance of subpoenas to the media, finding that the Guidelines create no privately enforceable right.[54] Rather, observed the court, the Guidelines "merely guide the discretion of the prosecutors."[55]

Miller's and Cooper's request that their case be reviewed by the appellate court *en banc* was rejected on April 19, 2005.[56] Their subsequent appeals to the U.S. Supreme Court were denied on June 27.[57] Media organizations, media advocates and even state prosecutors filed amicus briefs urging the Supreme Court to take the cases; in fact, the attorneys general of 34 states and the District of Columbia argued that the Court should recognize a federal privilege, lest the federal judiciary undermine both the common law and statutory privileges that exist at the state level.

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[50] *Id.* at 1001–02 (Tatel, J., concurring in the judgment).

[51] *Id.* at 997-98 (Tatel, J., concurring in the judgment).

[52] *Id.*at 1001–02 (quoting *In re Sealed Case*, 199 F.3d 522, 526 (D.C. Cir. 2000)).

[53] *In re: Miller*, 397 F.3d at 1002 (Tatel, J., concurring in the judgment). In a November 4, 2005 editorial, the *Wall Street Journal* announced that its parent company, Dow Jones & Co., had filed a motion two days earlier requesting that the redacted pages of Judge Tatel's opinion be unsealed. *Fitzgerald's Eight Pages*, Wall St. J., Nov. 4, 2005, at A14. In response to the motion, the special prosecutor agreed to the unsealing of the pages relating to Libby (who was indicted on October 28, 2005 on five charges related to the leak investigation) on grounds that the information relating to Libby was publicly available in the indictment. Government's Response To Motion of Dow Jones & Co. To Unseal Redacted Portion of the Court's Opinion at 10, *In re: Miller*, 397 F.3d 964. Fitzgerald, however, opposed the unsealing of the remaining pages as they relate to individuals who have not been charged in the investigation or who have not been publicly identified as witnesses or subjects of the investigation. *Id*. at 10 -11.

[54] *In re: Miller*, 397 F.3d at 975. ("[T]he guidelines expressly state that they do 'not create or recognize any legally enforceable right in any person.'") The guidelines are set forth at 28 C.F.R. §50.10.

[55] *Id.*at 976.

[56] *In re: Grand Jury Subpoena, Judith Miller*, 405 F.3d 17 (D.C. Cir. 2005).

[57] *Cooper v. U.S.*, 125 S.Ct. 2977 (2005); *Miller v. U.S.*, 125 S.Ct. 2977 (2005).

At a June 29, 2005 district court hearing, Judge Hogan told Miller and Cooper to prepare for jail after both reporters stated that they still intended to not comply with the subpoenas and threatened to impose more substantial fines against *Time* for refusing to turn over documents pursuant to the court orders.[58] *Time's* editor-in-chief, Norman Pearlstine, decided on June 30 to turn over Cooper's notes to the grand jury, over Cooper's objections, stating 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."[59]

At a final hearing before the district court on July 6, Cooper stated that he received a last minute waiver from his confidential source (revealed in an email included in Cooper's notes handed over to the grand jury to be senior White House advisor Karl Rove) and would therefore testify before the grand jury; Judge Hogan lifted the contempt citation against him after he testified a week later on July 13.

At the July 6 hearing, Judge Hogan held Miller in civil contempt and ordered her incarcerated for the remaining term of the grand jury (set to expire on October 28, 2005) for refusing to testify. After spending 85 days in a federal prison in Alexandria, Virginia, she was released on September 29, 2005 when she agreed to testify before the grand jury. Like Cooper, she too had received a personal waiver from her source (now known to be Libby) releasing her from her promise of confidentiality.

Miller testified before the grand jury on September 30[60] and again on October 12, the same day Judge Hogan lifted the contempt order against her.[61]

On October 28, 2005, the last day of its term, the grand jury indicted Libby on five charges related to the leak investigation: one count of obstruction of justice, two counts of making a false statement and two counts of perjury.[62] No charges were brought under the Intelligence Identities Protection Act of 1982.

In mid-November, Fitzgerald announced his decision to empanel a second grand jury to continue the investigation of the leak. *Washington Post* Assistant Managing Editor Bob Woodward disclosed to Fitzgerald in a November 14 deposition that he learned Plame's identity in June 2003, before Libby allegedly disclosed similar information to another reporter.[63] Fitzgerald also spoke to

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[58] Adam Liptak, *Judge Gives Reporters One Week to Testify or Face Jail*, N.Y. Times, June 30, 2005, at A18.

[59] Norman Pearlstine, *Statement of Time Inc. on the Matthew Cooper Case*, Time, June 30, 2005, at http://www.time.com/time/nation/printout/0,8816,1078444,00.html.

[60] David Johnston and Richard W. Stevenson, *Times Reporter Gives Testimony in C.I.A. Leak Case*, N.Y. Times, Sept. 30, 2005, at A1.

[61] David Johnston, *Contempt Finding Is Lifted In Case of Times Reporter*, N.Y. Times, Oct. 12, 2005, at A23.

[62] A copy of indictment is available at http://www.usdoj.gov/usao/iln/osc/documents/libby_indictment_28102005.pdf.

[63] Bob Woodward, *Testifying in the CIA Leak Case,* Wash. Post, Nov. 16, 2005, at http://www.washingtonpost.com/wp-dyn/content/article/2005/11/15/AR2005111501829.html. Fitzgerald learned of the disclosure on November 3 from Woodward's confidential source. *Id.*

Time reporter, Viveca Novak, on November 10 about a 2004 conversation[64] she had with Rove's attorney, in which they discussed Rove and his alleged contacts with reporters.[65] Fitzgerald presented information to a new grand jury on December 7, 2005.

Lee v. Department of Justice

In December 1999, Dr. Wen Ho Lee brought suit under the Privacy Act[66] against the U.S. Departments of Energy and Justice and the F.B.I. for leaking confidential information about him to the media without his consent.[67] Government officials had commenced an investigation four years earlier after suspecting that China had acquired secret American nuclear technology, and Lee, then a nuclear physicist at the Los Alamos National Laboratory in New Mexico, became a primary suspect and was under investigation on charges of espionage from 1996 to 1999. The investigation eventually shifted from espionage to mishandling of computer files and Lee was indicted on 59 counts of mishandling classified computer files. As part of a plea agreement, he plead guilty to one count and the government dismissed the remaining 58 counts.

In the Privacy Act suit, Lee alleged that employees of the F.B.I. and the Energy and Justice Departments unlawfully disclosed information about him to discredit his image and distract from the agencies' own security lapses. Because government witnesses had not been forthcoming with information related to the leak for over three years of pretrial discovery[68], in August 2002, Lee issued subpoenas *duces tecum* for the depositions of five reporters who published or broadcast stories containing the leaked confidential information. The reporters were: James Risen and Jeff Gerth of the *New York Times*, Robert Drogin of the *Los Angeles Times*, Pierre Thomas, formerly of CNN and now with ABC News, and Josef Herbert of the Associated Press.[69] The reporters moved to quash the subpoenas, claiming reporter's privilege protection under the D.C. shield law and the First Amendment.

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[64] At the November 10 meeting, Ms. Novak told Fitzgerald that she could not precisely remember the date, but that entries in her calendar showed the conversation could have taken place in January or May 2004. Before a second meeting with Fitzgerald on December 8, Fitzgerald asked Ms. Novak to check specific days in her calendar for meetings with Rove's lawyer; one such day, March 1, 2004, checked out. Viveca Novak, *What Viveca Novak Told Fitzgerald*, Time, Dec. 11, 2005, at http://www.time.com/time/magazine/printout/0,8816,1139820,00.html.

[65] According to Ms. Novak, Rove's lawyer told Fitzgerald of her conversation with him at some point during the week of October 24, the final week of the grand jury's term when it was expected Fitzgerald would announce any indictments in the case. *Id*.

[66] The Privacy Act creates a private right of action against the government and states in relevant part: "No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains . . . ." 5 U.S.C. §552a(b).

[67] The leaked information "included his and his wife's employment history, their financial transactions, details of their trips to Hong Kong and China, details of the investigation and interrogation of Lee, and purported results of polygraph tests, all of which were disclosed in the press and should have been part of personnel or classified records." *Lee v. U.S. Dept. of Justice*, 413 F.3d 53, 56 (D.C. Cir. 2005).

[68] Lee took 20 depositions of employees of the defendants and one deposition of a journalist. The district court found that "[t]he deposition transcripts generally reveal a pattern of denials, vague or evasive answers, and stonewalling." *Lee v. U.S. Dept. of Justice*, 287 F.Supp.2d 15, 22 (D.D.C. 2003), aff'd in part and vacated in part, 413 F.3d 53 (D.C. Cir. 2005).

[69] Walter Pincus of the *Washington Post* received a subpoena in late 2002.

On October 9, 2003, Judge Thomas Penfield Jackson of the U.S. District Court in Washington, D.C. ordered the reporters to reveal their confidential sources, finding the D.C. shield law inapplicable in a federal case and holding that "… the Court has some doubt that a truly worthy First Amendment interest resides in protecting the identity of government personnel who disclose to the press information that the Privacy Act says they may not reveal."[70]

The reporters appeared for depositions by Lee's attorneys but ultimately refused to reveal their sources.[71] Consequently, on August 18, 2004, the five reporters were found in civil contempt of the October 2003 discovery order and fined $500 for each day they remained in contempt.[72] The fine was stayed while the case was appealed to the U.S. Court of Appeals for the District of Columbia.

The appellate court upheld the contempt citations against Risen, Drogin, Thomas, and Herbert but dropped the citation against Gerth because he had already testified that he had no confidential sources for his reporting on Lee and that he did not know the identity of sources who provided information about Lee for articles he co-authored with Risen.[73] Reviewing the decision below,[74] the court acknowledged that under *Zerilli v. Smith*,[75] non-party journalists are entitled to a qualified reporter's privilege in a civil action "where testimony of journalists is sought because government officials have been accused of illegally providing the journalists with private information."[76] However, that privilege may be overcome when the party seeking disclosure can prove that "the information sought [goes] to the 'heart of the matter'" and the party can prove that he has exhausted "'every reasonable alternative source of information.'"[77] The court found that the information sought clearly went to the heart of the matter because Lee would likely be unable to prove his case against the government without uncovering the identity of the leakers.[78] In determining that Lee also had met his burden of exhaustion, the court dismissed the argument that in cases such as Lee's, the exhaustion requirement mandates that the party seeking disclosure take as many as 60 depositions before seeking to compel disclosure from reporters.[79]

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[70] *Lee*, 287 F.Supp.2d at 23.

[71] The five journalists filed motions asking the court to amend and/or certify the October 9 order for immediate appeal and, before the court disposed of these motions, also filed notices of appeal. The court denied their motions and the journalists eventually withdrew their notices of appeal. *Lee v. U.S. Dept. of Justice*, 327 F.Supp.2d 26, 28 (D.D.C. 2004).

[72] *Id* at 33. Pincus did not move to quash his deposition subpoena and was not initially subject to the October 2003 order because he had not yet been deposed. *Id.* at 28 n.1.

[73] *Lee*, 413 F.3d at 64.

[74] The journalists urged the court to review the appeal de novo, relying on the Supreme Court directive in *Bose v. Consumers Union of the United States*, 466 U.S. 485 (1984), that in cases implicating intrusions on the freedom of expression protected by the First Amendment, appellate courts should review the entire record de novo. In rejecting the journalists' argument, the D.C. Circuit Court found no intrusion on free expression, observing that: "[t]here is no suggestion that the court or any branch of government in any fashion attempted to interfere with or now attempts to interfere with the Appellant journalists' right to print or communicate anything they choose." *Lee*, 413 F.3d at 58. The court also noted that no "heightened First Amendment scrutiny" applies to discovery orders. *Id*. at 59.

[75] 656 F.2d 705 (D.C. Cir. 1981).

[76] *Lee*, 413 F.3d at 59.

[77] *Id*. at 57 (quoting *Zerilli*, 656 F.2d at 713).

[78] *Lee*, 413 F.3d at 60.

[79] *Id*. at 60–61.

The journalists' petition for the case to be reheard *en banc* before the D.C. Circuit was denied on November 2, 2005.[80]

Pincus sat for a deposition on January 29, 2004, but like the other journalists, refused to answer questions about his confidential sources.[81] On June 29, 2004, Judge Jackson ordered Pincus to sit for a second deposition for the reasons stated in the October 9, 2003 discovery order.[82] At his second deposition, Pincus again refused to answer questions about his confidential sources.

On November 16, 2005, Judge Rosemary M. Collyer of the U.S. District Court in Washington, D.C. found Pincus in civil contempt of the June 29 order and fined him $500 for each day he remains in contempt.[83] The court rejected arguments that it recognize a privilege under the First Amendment or federal common law, including the balancing test proposed by Judge Tatel in *In re: Miller*.[84] It held that "[t]he reasoned disagreement among the learned judges on the D.C. Circuit cautions against recognizing a privilege …."[85]

In an unusual twist, the court went a step further and ordered Pincus, so as to "avoid a repetition of the Judith Miller imbroglio, ... to contact each and every one of his Government sources to inform them of the Court's order so that, should they release him from his pledge of confidentiality, Mr. Pincus can reconsider whether he needs to further resist the order of the Court and, perhaps, this matter can become moot without further litigation."[86] The court also ordered Pincus to file a sworn statement within 48 hours attesting he had so contacted his sources and whether he will answer questions identifying his sources.[87]

Pincus subsequently filed an affidavit on December 5, 2005 with the court, attesting that he asked his confidential sources to release him from the promise of confidentiality, but only one such source had agreed to do so, and that he was prepared to answer questions relating to that one source.[88]

Hatfill v. Attorney General John Ashcroft

In August 2003, Dr. Steven J. Hatfill filed a Privacy Act[89] claim against former Attorney General John Ashcroft, the Department of Justice, the F.B.I. and other government officials following media reports naming Hatfield as a "person of interest" in the investigation of the 2001

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[80] *Lee v. U.S. Dept. of Justice*, 428 F.3d 299 (D.C. Cir. 2005).

[81] *Lee v. U.S. Dept. of Justice*, 2005 U.S. Dist. LEXIS 27929 at *15-16 (D.D.C. 2005).

[82] *Id* at 16. Judge Jackson's August 18, 2004 contempt order did not apply to Pincus because his second deposition was scheduled for August 30, 2004.

[83] *Id.* at 60. The fine was stayed pending an appeal to the U.S. Court of Appeals for the District of Columbia. The case was assigned to Judge Collyer following Judge Jackson's retirement in August 2004.

[84] 397 F.3d 964 (Tatel, J., concurring in the judgment).

[85] *Lee,* 2005 U.S. Dist. LEXIS 27929 at *44.

[86] *Id.* at *59-60.

[87] *Id.* at *60.

[88] Christopher Lee, *Most Sources Refuse to Let Post Writer Testify on Lee*, Wash. Post, Dec. 6, 2005, at A12.

[89] 5 U.S.C. §522a.

anthrax attacks. In October of that year, anthrax-laced letters were sent to Senators Tom Daschle of South Dakota and Patrick Leahy of Vermont, as well as to media organizations.[90] The attacks resulted in the deaths of five people. Hatfill, a research scientist, had worked until 1999 at Fort Detrick's Army Medical Research Institute of Infectious Diseases, the primary custodian of the strain of anthrax found in the letters.

Although Hatfill was never charged with any crime in connection with the anthrax mailings, he alleged that the government destroyed his reputation and ruined his job prospects by linking him publicly to the anthrax attacks and unlawfully leaking information to the news media.

During the preliminary stages of his Privacy Act suit, Hatfill filed discovery requests to determine the identity of government officials who had leaked his name to the press. The Department of Justice refused to comply with the requests, claiming that doing so would hamper their ongoing investigation into the anthrax mailings. Judge Reggie B. Walton, the presiding judge in the case, agreed with the government and in February 2004 approved Hatfill's use of media subpoenas to determine the government sources for the leak. Hatfill declined to issue the subpoenas at that time for fear of legal challenge by the media.

In October 2004, Judge Walton again approved Hatfill's request to subpoena the media and in December ordered as many as 100 government agents to waive confidentiality agreements they had with members of the media.[91] Starting December 15, at least 13 news organizations who had identified Hatfill as a suspect in the anthrax mailings received subpoenas to testify about the information. Subpoenas issued to the *Baltimore Sun*, CNN, NPR and UPI were voluntarily withdrawn. The remaining subpoenas issued to ABC, CBS, NBC, the Associated Press, the *Los Angeles Times*, the *Washington Post*, *Newsweek*, Gannett Co. and reporter Scott Shane (formerly with the *Baltimore Sun*) were contested. A subpoena was also served in New York federal court on Don Foster, a professor at Vassar College who wrote about the investigation.

In May 2005, the federal government changed its position and made its employees available to Hatfill for deposition. Consequently, the remaining media subpoenas were voluntarily withdrawn (though they may be reinstated if Hatfill is not successful with the government witnesses).

Hatfill also brought a separate federal suit for libel and intentional infliction of emotional distress against the *New York Times* and *Times* reporter Nicholas Kristof in July 2004. The district court dismissed the suit in November 2004,[92] but the complaint against the paper was reinstated on appeal.[93] In a 6-6 split decision issued on October 18, 2005, the Fourth Circuit denied the petition of the *New York Times* for rehearing and/or rehearing *en banc*.[94] The *New York Times* has filed a petition for certiorari to the Supreme Court.

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[90] Letters to NBC News and the *New York Post* were found; letters were presumably sent to ABC News, CBS News and the *National Enquirer* at American Media, Inc. based on the pattern of infection.

[91] Similar waivers were used in the Valerie Plame investigation, which journalists viewed as coercive.

[92] *Hatfill v. New York Times Co.*, 2004 U.S. Dist. LEXIS 27530 (E.D. Va., 2004).

[93] *Hatfill v. New York Times Co.*, 416 F.3d 320 (4th Cir. 2005). Hatfill voluntarily dismissed Kristof as a defendant when it became clear that the district court lacked personal jurisdiction over him. *Id.* at 329.

[94] *Hatfill v. New York Times Co.*, 427 F.3d 253 (4th Cir. 2005).

In re Special Proceeding (James Taricani)

James Taricani, a reporter for WJAR-TV in Rhode Island, received a copy of a videotape from a confidential source that showed a former mayoral aide accepting an envelope that allegedly contained a cash bribe. WJAR-TV, an NBC Universal owned and operated affiliate station, aired the videotape in February 2001 as part of a broadcast on the federal corruption investigation of the administration of Vincent "Buddy" Cianci, Jr., then mayor of Providence. The videotape, evidence in the ongoing grand jury investigation of the case, was subject to a protective order that forbade counsel from distributing surveillance tapes handed over during the discovery process.[95]

The court subsequently appointed a special prosecutor[96] to determine whether criminal charges should be brought against the person who leaked the videotape to Taricani.[97] The special prosecutor deposed and interviewed a number of individuals before issuing a subpoena to Taricani to sit for a deposition.[98]

Asserting a First Amendment privilege against compelled disclosure, Taricani refused to answer questions at his deposition about the identity of the confidential source from whom he received the videotape. The special prosecutor subsequently obtained an order to compel disclosure from Chief U.S. District Court Judge Ernest Torres on October 2, 2003.[99] Judge Torres found that Taricani's right to maintain the identity of a confidential source was outweighed by the government's interest in disclosure.[100] Because Taricani received the information in violation of a court order, the court held that "…allowing the identity of the source to remain secret, in effect, would allow the conditional First Amendment protection afforded to a journalist's news-gathering activities to be used as a shield to protect from prosecution individuals who have apparently engaged in criminal activity."[101]

Taricani again refused to answer questions relating to his confidential source at a second deposition in February 2004, and on March 16, 2004, was found in civil contempt and fined $1,000 a day until he answered the special prosecutor's questions.[102]

Taricani appealed the contempt order to the U.S. Court of Appeals for the First Circuit, again on First Amendment grounds. The appellate court upheld the order on June 21, 2004, finding that

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[95] *In re Special Proceeding*, 291 F.Supp.2d 44, 47 (D. RI 2003). The protective order sought to maintain the secrecy of the grand jury process and to prevent any pretrial publicity that could prejudice the defendants' right to a fair trial. *Id.* at 47.

[96] Typically, the Department of Justice would have conducted the investigation, but the court appointed a private attorney, Marc DeSisto, to act as special counsel because the DOJ was involved in the pending corruption case. *In re Special Proceeding*, 373 F.3d 37, 41 (1st Cir. 2004).

[97] *Id.* at 47.

[98] *Id.*

[99] *In re Special Proceeding*, 291 F.Supp.2d 44.

[100] *Id.* at 60. Relying on *Branzburg v. Hayes* (408 U.S. 665) and on three cases tried in the First Circuit (*Cusumano v. Microsoft Corp*., 162 F.3d 708 (1st Cir. 1998); *United States v. The LaRouche Campaign*, 841 F.2d 1176 (1st Cir. 1988); and *Bruno & Stillman, Inc. v. Globe Newspaper Co*., 633 F.2d 583 (1st Cir. 1980)), the court outlined "… general guidelines for determining the extent to which First Amendment considerations protect the confidentiality of a journalist's sources in any particular case." *In re Special Proceeding*, 291 F.Supp.2d at 55-6.

[101] *Id.* at 59.

[102] *In re Special Proceeding*, 373 F.3d at 41.

"[t]he First Amendment argument is an uphill one in light of the Supreme Court's Branzburg decision …."[103] The court went on to find that, in situations distinct from *Branzburg*, deciding whether a reporter must disclose confidential sources in the First Circuit requires a "heightened sensitivity" to the First Amendment and a balancing of interests.[104] The leading cases in the First Circuit "… suggest that the disclosure of a reporter's confidential sources may not be compelled unless directly relevant to a nonfrivolous claim or inquiry undertaken in good faith; and disclosure may be denied where the same information is readily available from a less sensitive source."[105] The court found that the subpoena to Taricani sought information that was highly relevant to the investigation and that reasonable efforts had been made to obtain the information elsewhere.[106]

At a hearing on November 4, 2004, Judge Torres gave Taricani two weeks to testify or face charges of criminal contempt and up to six months in jail.[107] He suspended the $1,000 a day fine, finding that "the sanction is not accomplishing anything."[108]

Taricani continued to refuse to identify his source pursuant to the October 2003 order and was found guilty of criminal contempt on November 18.[109] At the hearing, Judge Torres advised Taricani that "… one of the things that I would consider of some significance in determining your sentence is whether at the time the tape was provided to you, you knew that that tape was being provided to you in violation of a court order."[110] Prior to the criminal contempt conviction, WJAR-TV paid $85,000 in Taricani's civil contempt fines.[111]

On December 9, 2004, Taricani was sentenced to six months' home confinement;[112] he elected not to appeal. He was released from his sentence on April 9, 2005, two months early, for fully complying with all the terms of his confinement.

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[103] *Id.* at 44.

[104] *Id*. at 45. The court noted that the First Circuit balancing test derived from a synthesized reading of *Cusumano,* 162 F.3d 708, *The LaRouche Campaign*, 841 F.2d 1176, and *Bruno*, 633 F.2d 583, the "three leading cases" in that circuit.

[105] *In re Special Proceeding*, 373 F.3d at 45.

[106] *Id.*

[107] *In re Special Proceeding*, C.A. No. 01-47 (D. RI, Nov. 4, 2004). A transcript of the November 4 hearing is available at http://www.rid.uscourts.gov.

[108] *Id*. at 17-18.

[109] *In re Special Proceeding*, M.C. No. 01-47 (D. RI, Nov. 18, 2004). A transcript of the November 18 hearing is available at http://www.rid.uscourts.gov.

[110] *Id*. at 9.

[111] Michael Mello, *Court Papers Identify Source of Undercover Videotape*, Associated Press, Dec. 2, 2004.

[112] *In re Special Proceeding*, C.A. No. 01-47 (D. RI, Dec. 9, 2004). A transcript of the December 9 hearing is available at http://www.rid.uscourts.gov. It is unusually detailed in that, prior to issuing Taricani's sentence, Judge Torres essentially spelled out the argument against recognizing the reporter's privilege in the context of a criminal leak investigation. Discussing "myths" surrounding the reporter's privilege, Judge Torres rebuked the belief that requiring Taricani to reveal his confidential sources is an "assault on the First Amendment" or an affront to Taricani's right to keep his confidential sources confidential because, according to Judge Torres, Taricani's silence was hindering prosecution of a criminal act. *Id*. at pp. 12–15.

Shortly after Taricani's conviction but before his sentencing, the special prosecutor announced that he had deduced the identity of Taricani's confidential source, Joseph Bevilacqua, Jr., a former city tax assessor who had been an attorney for another defendant in the corruption investigation.[113]

New York Times v. Gonzales

In *New York Times v. Gonzales*, a district court for the Southern District of New York recognized that the First Amendment and federal common law each create a qualified privilege protecting reporters from the compelled disclosure of the identity of confidential sources.[114]

The case arose out of a series of stories published in 2001 in the *New York Times* about the federal government's investigation of Islamic charities, including two in the United States: the Global Relief Foundation (GRF), located in Bridgeview, Illinois, and the Holy Land Foundation for Relief and Development (HLF), located in Richardson, Texas. The government suspected the charities of providing aid to al-Qaeda and other terrorist organizations.

Times reporter Judith Miller learned from confidential sources sometime prior to December 3, 2001 that the government planned to freeze HLF's assets.[115] In preparation for a December 4 article in the paper on the U.S. government's intention to freeze its assets, Miller contacted HLF on December 3 seeking comment. The F.B.I. raided HLF's offices on December 4.

Sometime before December 13, 2001, another *Times* reporter, Philip Shenon, received information from confidential sources about the U.S. government's intention to freeze the assets of GRF.[116] In preparation for an article, Shenon contacted GRF on December 13 seeking comment on the government's plan to freeze its assets. The F.B.I. raided GRF's offices on December 14.

That same day, the U.S. Attorney's Office for the Northern District of Illinois and the F.B.I. Chicago Field Office began an investigation into whether government officials had leaked to the *Times* that a search of GRF's offices was imminent.[117] The prosecutor, Patrick J. Fitzgerald (the same prosecutor assigned to act as a special prosecutor in the Valerie Plame investigation), alleged that Shenon disclosed to GRF that "government action was imminent" when he called the organization for comment.[118]

In August 2002, Fitzgerald requested a voluntary interview with Shenon and the production of his telephone records for a 9-day period in late September 2001 to early October 2001 and a 9-day

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[113] Bevilacqua was sentenced in September 2005 to 18 months in prison on counts of perjury and contempt, and will also serve three years of supervised release and pay fines of $152,000. Cianci and his aide were convicted in 2002 on corruption charges and are now serving time in federal prison.

[114] 382 F.Supp.2d 457 (S.D.N.Y. 2005).

[115] *Id.* at 466.

[116] *Id.* at 466-67.

[117] *Id.* at 467.

[118] *Id.*

period in December 2001.[119] The *Times* refused, stating that Shenon's newsgathering activities were protected by law.[120]

Almost two years later, in July 2004, the *Times* learned that the investigation had been expanded to include the alleged leak to Miller regarding HLF.[121] In addition to seeking an interview with Shenon and his telephone records, Fitzgerald now also sought a voluntary interview with Miller and the production of her telephone records for the same periods as Shenon, as well as a 4-day period in late November 2001 to early December 2001.[122] The prosecutor alleged that Miller disclosed to HLF that "government action was imminent" when she called the organization for comment.[123]

Fitzgerald also informed the paper that, pursuant to the Department of Justice Guidelines governing the issuance of subpoenas to members of the news media,[124] he had gotten authorization to subpoena the entities that provide telephone service to the *Times*, Shenon and Miller.[125]

The *New York Times* sought to convince Fitzgerald and the Department of Justice that disclosure of the telephone records to the government would reveal communications between the reporters and confidential sources not connected to the HLF and GRF articles. During the various time periods for which the telephone records were sought, Shenon and Miller also reported and gathered information for a number of stories that were published weeks later, in addition to the 15 articles they published in the paper during the time periods for which records were sought.[126]

Having failed to convince the government or to get an agreement from the telephone company to notify the paper of any subpoenas, the *Times* initiated an action in district court for the Southern District of New York on September 29, 2004 seeking a declaration that the reporters' telephone records were protected from disclosure by the third-party telephone company under the Department of Justice's own Guidelines, the First Amendment and common law. In an October 2004 brief filed in connection with the suit, the government admitted for the first time that a grand jury in the Northern District of Illinois was investigating whether government officials had unlawfully leaked information regarding the raids of HLF and GRF.[127]

The case was heard before Judge Robert W. Sweet, who, in a decision dated February 24, 2005, rejected the *Times'* claim that the Department of Justice's Guidelines created a privately enforceable right.[128] Referencing the U.S. Court of Appeals for the District of Columbia's decision

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[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *Id.* at 466.

[124] The Guidelines are set forth in 28 C.F.R. §50.10.

[125] *Gonzales*, 382 F.Supp.2d at 466. It is unknown whether the government has obtained the telephone records.

[126] *Id.* at 469-70.

[127] *Id.* at 469.

[128] The Guidelines are meant to "… strike the proper balance between the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice." 28 C.F.R. §50.10(a).

in *In re: Miller*[129], Judge Sweet concluded that the Guidelines are merely "touchstones to assist the DOJ in its exercise of prosecutorial discretion—and confer no substantive rights or protections such as may be privately enforced . . . ."[130]

Nevertheless, the district court found that compelled disclosure of the telephone records was barred by a qualified reporter's privilege found under both the First Amendment and the common law and that the government had failed to overcome the privilege.

The court first noted that the Second Circuit interpreted *Branzburg* to create a qualified First Amendment privilege protecting reporters from compelled disclosure of confidential sources:

> [T]he Second Circuit, based on *Branzburg,* has recognized a qualified First Amendment privilege, applicable in civil actions and in all phases of a criminal prosecution, that protects reporters from compelled disclosure of confidential sources. . . . Pursuant to this qualified privilege, the party seeking disclosure must make "a clear and specific showing that the sought information is: [1] highly material and relevant, [2] necessary or critical to the maintenance of the claim, and [3] not obtainable from other available sources."[131]

The district court also acknowledged that First Amendment protection for newsgathering based on confidential sources is the same whether the information sought to be compelled resides with reporters or with third-party telephone providers holding records evincing such confidential communications.[132]

Next, the court observed that the Second Circuit recognizes a qualified reporter's privilege for confidential material under the federal common law, as provided under Rule 501 of the Federal Rules of Evidence.[133] Applying the four-part analysis set forth by the Supreme Court in *Jaffee v. Redmond*[134] to determine whether the recognition of a common law testimonial privilege is overcome by the government's need for disclosure of the information, the court concluded that, in this case, the public and private interests and wide recognition of such a privilege by the states weighed in favor of recognizing the reporter's privilege.[135]

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[129] 397 F.3d 964.

[130] *Gonzales*, 382 F.Supp.2d at 484.

[131] *Id*. at 490 (quoting *Branzburg*, 408 U.S. at 76–77) (internal references omitted).

[132] *Gonzales*, 382 F.Supp.2d at 509.

[133] *Id*. at 495–96. The court noted that such a privilege is also recognized in the First, Third, Fifth, Tenth, Eleventh, and D.C. Circuits.

[134] 518 U.S. 1 (1996). The test asks: "(1) whether the asserted privilege would serve significant private interests; (2) whether the privilege would serve significant public interests; (3) whether those interests outweigh any evidentiary benefit that would result from rejection of the privilege proposed; and (4) whether the privilege has been widely recognized by the states." *Gonzales*, 382 F.Supp.2d at 494 (quoting *Jaffee*, 518 U.S. at 10–13). The district court noted that this was the first significant application of the *Jaffee* analysis to the reporter's privilege in the Southern District. *Gonzales*, 382 F.Supp.2d at 496.

[135] *Gonzales*, 382 F.Supp.2d at 508.

After recognizing the existence of a qualified reporter's privilege under both the First Amendment and federal common law, the court found that the government failed to meet its burden in overcoming the privilege. Applying the test articulated by the Second Circuit in *Petroleum Products*,[136] the court held that the government's assertions – absent any showing – that the information sought was highly material and relevant, and necessary to be insufficient and that it failed to demonstrate that the information sought was not available from other sources.[137] Interestingly, the court noted the government's acknowledgement that it could conduct an internal search of its own telephone records to ascertain who spoke to reporters at the *Times* during the relevant time periods.[138]

The court also observed that the government's failure to comply with the Department of Justice Guidelines weighed against overcoming the qualified privilege. It faulted the government for not showing, as required by §50.10(g)(1) of the Guidelines, that the subpoena was as narrowly drawn as possible and covered a reasonable time period, and that the government had pursued all other reasonable investigations before issuing a subpoena to the news media.[139]

Finally, the court briefly cited the balancing test outlined by Judge Tatel in *In re: Miller*,[140] arguing that it "warrants consideration," even though it has not been adopted by the Second Circuit.[141]

Judge Sweet concluded the opinion by finding that "[t]o deny the relief sought by The Times under these circumstances, i.e., without any showing on the part of the government that the sought records are necessary, relevant, material and unavailable from other sources, has the potential to significantly affect the reporting of news based upon information provided by confidential sources."[142]

In late May, the government filed a notice of appeal to the Second Circuit.

BALCO

In December 2003, a San Francisco grand jury was empanelled to investigate whether Bay Area Laboratory Co-operative (BALCO), a manufacturer of nutritional supplements founded by Victor Conte, had distributed illegal steroids to athletes. Among the witnesses before the grand jury were high-profile athletes, including Barry Bonds of the San Francisco Giants, Jason Giambi of the New York Yankees and sprinter Tim Montgomery.

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[136] In *In re Petroleum Products Antitrust Litigation*, 680 F.2d 5 (2d Cir. 1982), the court held that "[t]he law in this Circuit is clear that to protect the important interests of reporters and the public in preserving the confidentiality of journalists' sources, disclosure may be ordered only upon a clear and specific showing that the information is: highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources." *Id* at 7.

[137] *Gonzales*, 382 F.Supp.2d at 511–12.

[138] *Id.* at 512.

[139] *Id*.

[140] *In re: Miller*, 397 F.3d 964 (Tatel, J., concurring in the judgment).

[141] *Gonzales*, 382 F.Supp.2d at 512-13.

[142] *Id.* at 513.

Following the *San Francisco Chronicle's* publication in June 2004 of Montgomery's testimony before the grand jury (and prior publication of other confidential information), a federal prosecutor, Jeffrey Nedrow, was appointed to investigate the source of the leaks. In July 2004, Mark Fainaru-Wada and Lance Williams of the *San Francisco Chronicle* received letters from U.S. Attorney Kevin V. Ryan, the prosecutor in the BALCO case, requesting that they return materials leaked to them and disclose their confidential sources.[143] The reporters and *Chronicle* Editor Phil Bronstein said they would not break pledges of confidentiality to their sources.[144] Elliot Almond and Sean Webby of the *San Jose Mercury News* received letters from the prosecutor in August; the reporters and the paper's editor similarly refused to disclose their sources or turn over documents.[145]

In December 2004, a year after the grand jury had been empanelled, the sealed testimony of Bonds and Giambi was published in the *San Francisco Chronicle*. Giambi testified to using steroids received from BALCO[146] and Bonds testified to using what he thought were flax seed oil and arthritis balm from BALCO (prosecutors alleged that BALCO distributed undetectable steroids in the form of a clear oral liquid and a cream).[147]

Following the December 2004 publication of the grand jury testimony, U.S. District Judge Susan Illston, who was overseeing the BALCO case, initiated a Department of Justice investigation into the ongoing leaks.

Conte emerged as the main suspect in the leak investigation when FBI agents raided his home in January 2005, seizing a computer and other materials.[148] He received a subpoena to appear before the grand jury investigating the leak and to turn over computers and additional information from BALCO offices.[149]

Conte denied being the source of the leaked information. He plead guilty to one count of money laundering and one count of conspiracy to distribute anabolic steroids and was sentenced on October 18 to four months' imprisonment and four months' house arrest.

None of the reporters who received letters from the prosecutor in 2004 requesting confidential source information and the return of confidential material have been served with subpoenas.

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[143] Elizabeth Fernandez, *Justice Department Probe into Media Leaks Is Sought; Chronicle Reporters Will Not Divulge Sources, Editor Says*, S. F. Chronicle, Dec. 3, 2004, at A19.

[144] *Id.*

[145] Bee Sports Staff, *Two Newspapers Won't Reveal BALCO Sources; They Turn Down the U.S. Government's Request for Information Involving Grand-Jury Investigations*, Sacramento Bee, Sept. 17, 2004, at C2.

[146] Mark Fainaru-Wada and Lance Williams, *Giambi Admitted Taking Steroids*, S.F. Chronicle, Dec. 2, 2004, at A1.

[147] Lance Williams and Mark Fainaru-Wada, *What Bonds Told BALCO Grand Jury*, S.F. Chronicle, Dec. 3, 2004, at A1.

[148] Lance Williams and Mark Fainaru-Wada, *FBI Raids BALCO Chief's Home; Agents Seek Clues To IDs of Chronicle Sources in Scandal*, S.F. Chronicle, Jan. 27, 2005, at A6.

[149] Mark Fainaru-Wada and Lance Williams, *Probe of BALCO Leaks Reaches Conte; Grand Jury Issues Subpoena over Chronicle Stories*, S.F. Chronicle, Jan. 29, 2005, at A2.

WHY SHOULD THERE BE A REPORTER'S PRIVILEGE WHEN A LEAK IS A CRIME?

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Why Should There Be a Reporter's Privilege When a Leak Is a Crime?

Over the past year, three decisions from two federal courts of appeal have shaken journalists' long-held belief that their promises of confidentiality to sources will be respected by federal courts. All three cases – *In re Special Proceedings*,[1] *In re Grand Jury Subpoena, Judith Miller*,[2] and *Lee v. United States Department of Justice*[3] – share a related factual scenario. In each case, the confidential communications to reporters from their sources were the alleged crime or civil wrong at issue in the case. The first of this group (hereinafter referred to as *Taricani* after the name of the journalist involved) concerned an alleged leak of an undercover videotape in violation of a protective order entered in a criminal case; *Miller* the alleged leak of an undercover CIA agent's identity; and *Lee* leaks suggesting that former scientist Wen Ho Lee provided American nuclear secrets to China.

In each case, courts concluded that the journalists involved should be compelled to disclose their sources at least in part because they found there was no other way to identify the perpetrators of the illegal "leaks" being investigated. Thus, these cases have highlighted the potential weakness of the journalist's privilege's traditional test that focuses solely on (1) a party's need for source identities and (2) exhaustion of alternative ways to obtain that information.[4] If a court is persuaded that an illegal leak may have occurred, the identity of the leaker is likely to be central to resolving the case. And unless the source had loose lips or confesses, a journalist may be the only witness who can identify the leaker. Indeed, D.C. Circuit Judge David Tatel, a proponent of the journalist's privilege, has gone so far as to suggest that journalists in leak cases will "almost always" lose a legal test that only addresses the issues of need and exhaustion.[5]

However, it is abundantly clear that most of the judges who decided this trio of cases are not troubled by a test that the press may likely lose, because fundamentally they do not believe confidential newsgathering merits any legal protection at all in leak cases. Each of the three decisions suggests that there is no First Amendment interest in protecting communications that are illegal. The district judge in *Taricani* doubted that a privilege could "be used as a shield to protect from prosecution individuals who have apparently engaged in criminal activity."[6] The district court in *Lee* voiced nearly identical "doubt that a truly worthy First Amendment interest resides in protecting the identity of government personnel who disclose to the press information that the Privacy Act says they may not reveal."[7] D.C. Circuit Judge David Sentelle, writing separately in

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[1] 373 F.3d 37 (1st Cir. 2004).

[2] 397 F.3d 964 (D.C. Cir.), cert. denied, 125 S.Ct. 2977 (2005).

[3] 413 F.3d 53 (D.C. Cir. 2005).

[4] *See e.g.*, *Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979); *Baker v. F&F Inv.*, 470 F.2d 778 (2d Cir. 1972). While the test is often broken down into two parts, the first prong (relevance) is really already subsumed within the second (necessity).

[5] *Miller*, 397 F.3d at 997 (Tatel, J., concurring in the judgment); *Lee v. Dep't of Justice*, 428 F.3d 299, 301-2 (D.C. Cir. 2005) (Tatel, J, dissenting from denial of rehearing *en banc)*.

[6] *In re Special Proceedings*, 291 F. Supp. 2d 44, 59 (D.R.I. 2003).

[7] *Lee v. Dep't. of Justice*, 287 F. Supp. 2d 15, 23 (D.D.C. 2003), aff'd in part and vacated in part, 413 F.3d 53 (D.C. Cir. 2005).

Miller to explain his reasons for rejecting recognition of a common-law reporter's privilege, even implied that recognizing a privilege would be tantamount to sanctioning a reporter's "misprision of a felony – that is, the concealment of a felony."[8]

To the extent the press argues that compelled disclosure of source identities will have a chilling effect on future sources, these decisions portray that outcome as a positive result because future sources *should* be chilled from illegally leaking information to reporters.[9] Moreover, these decisions uniformly suggest that leak cases are indistinguishable from the facts that led the Supreme Court to compel the reporters in *Branzburg v. Hayes*[10] to testify.[11] In *Branzburg*, some of the journalists subpoenaed were also believed to have directly witnessed crimes by their sources, ranging from illegal drug activities to alleged plots against the President.[12]

These are powerful arguments, and they are not novel. Several other decisions in leak cases decided both before and after *Branzburg* articulate the same viewpoint.[13] Yet it is striking that judicial decisions and individual opinions from leak cases that are more sympathetic to the press, both past and present, contain very little in the way of a direct response to these arguments. Rather, the case for a privilege in leak cases typically consists of generic arguments about the importance of confidential newsgathering,[14] examples of newsworthy stories produced by leaks,[15] stringent application of the exhaustion requirement where the facts permit,[16] and more recently arguments that the applicable legal test must incorporate a broader balancing test in addition to the two-part inquiry addressing need and exhaustion.[17]

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[8] *Miller*, 397 F.3d at 981 (Sentelle, J., concurring) (citation omitted).

[9] *E.g. In re Special Proceedings*, 291 F. Supp. 2d at 58-59 ("if requiring disclosure under these somewhat unique circumstances deters some potential sources from, in the future, unlawfully providing similar information, it is unlikely to significantly impair Taricani's news-gathering activities.").

[10] 408 U.S. 665 (1972).

[11] *Lee*, 413 F.3d at 60 ("The same principle [articulated in Branzburg] applies here."); *Miller*, 397 F.3d at 969 ("there is no material factual distinction between the petitions before the Supreme Court in *Branzburg* and the appeals before us today"); *In re Special Proceedings*, 373 F.3d at 44 ("[t]he First Amendment argument is an uphill one in light of the Supreme Court's *Branzburg* decision")

[12] 408 U.S. at 667-673.

[13] *See e.g.*, *United Liquor Co. v. Gard*, 88 F.R.D. 123, 127 (D.Az. 1980) ("there is no First Amendment privilege to violate the law"); *Farr v. Superior Court*, 99 Cal. Rptr. 342, 350 (Cal. App. 2d Dist. 1971) ("If disclosure of the source of a violation [of a court order] may inhibit future violations, the inhibition serves the public purpose").

[14] *E.g.*, *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981) ("journalists frequently depend on informants to gather news, and confidentiality is often essential to establishing a relationship with an informant").

[15] *See, e.g.*, *Brief Amici Curiae of ABC, Inc., et. al.*, at 9-13 in *Miller v. United States*, No. 04-1507 and *Cooper v. United States*, No. 04-1508 (U.S.); *Brief Amici Curiae of ABC, Inc., et. al.*, at 7-8 in *In re Special Proceedings*, Nos. 03-2502 & 04-1383 (1st Cir.)

[16] *Zerilli*, 656 F.2d at 714 ("an alternative requiring the taking of as many as 60 depositions might be a reasonable prerequisite to compelled disclosure"); *In re Williams*, 766 F. Supp. 358, 370 (W.D. Pa. 1991) ("it would not be unreasonable to require the Government to first exhaust its investigation of those persons, though numerous, who did have access to the FD-302's before seeking production of the documents here"), *aff'd, by an equally divided court, en banc*, 963 F.2d 567 (3d Cir. 1992).

[17] *Miller*, 397 F.2d at 997 (Tatel, J., concurring in the judgment); *Lee*, 428 F.3d at 301-2 (Tatel, J, dissenting from denial of rehearing *en banc)*. *Cf. People v. Pawlaczyk*, 724 N.E.2d 901, 912-13 (Ill. 2000) (rejecting argument for application of a broader "compelling interest" test).

Yet none of these arguments supporting a privilege really address the fundamental contention that recognition of a leak privilege would constitute nothing less than judicial approbation of crime. Any judge sympathetic to that view is unlikely to quash a subpoena for confidential sources, regardless of whether the privilege is defined as a two-part need/exhaustion test or a broader balancing exercise. After all, if one believes that there should be no privilege in leak cases, one is unlikely to see any serious interest on the journalist's side of the ledger to weigh in the balance. In fact, some of the courts considering the *Taricani* and *Miller* cases did apply balancing tests and ruled against the journalists anyway.[18]

To be sure, in some leak cases a privilege that looks beyond the elements of need and exhaustion is essential to giving journalists even the theoretical possibility of prevailing. The recent 4-4 decision by the D.C. Circuit in *Lee* to deny the reporters' petitions for rehearing *en banc* starkly illustrates that point. Two of the judges who would have granted rehearing made clear that while they agreed that Wen Ho Lee met the need and exhaustion tests, they would have nonetheless ruled for the reporters solely on the basis of a balancing test.[19] However, ultimately any balancing exercise is likely to be a stalking horse for airing opposing views about the fundamental question of why there should be a reporter's privilege at all in this context. This article attempts to answer that question and respond directly to the privilege's critics.

To begin, Part I of this article surveys the history of the reporter's privilege in leak cases, to consider what lessons past experience may hold for the present. Part II discusses the most common arguments currently advanced for and against a privilege in leak cases. It concludes that while all of the arguments in favor of a privilege contribute a piece of the puzzle, none squarely answers the challenge posed by the privilege's detractors. Finally, Part III argues that a privilege is necessary in leak cases because unlike other laws governing criminal conduct, the purpose of anti-leak laws is to impose government and private sector secrecy by criminalizing speech about matters of public concern. Because secrecy may be easily abused, the press has long been regarded as the primary counterweight to the dangers of excessive secrecy, a role recognized by both the First Amendment and historical practice. Because confidential newsgathering is the press's most effective means of fulfilling that function, it merits legal protection.

Before turning to those questions, it is important to define what this article means by a "leak case." For these purposes, "leak cases" concern subpoenas issued to non-party journalists for the purpose of identifying a confidential source, where the source's communication to the journalists is itself the alleged crime or civil wrong at issue in the case. As Part I discusses, the overwhelming majority of leak cases actually litigated involve either (1) leaks that violate grand jury secrecy rules or judicial protective orders or (2) leaks of information by public officials alleged to have violated the statutory or common-law privacy rights of a civil plaintiff.

"Leak cases" for purposes of this article do not include defamation cases in which a confidential source may have provided the defamatory information. The fact that a reporter is also a party in such cases raises its own set of unique issues. Nor does this article address cases in which a leak itself is not the subject of a criminal investigation or lawsuit, but rather is alleged to be evidence relevant to some other wrong. Such cases typically do not raise issues that are materially

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[18] *Miller*, 397 F.2d at 973; *In re Special Proceedings*, 291 F. Supp. 2d at 58-59.

[19] *Lee*, 428 F.3d at 301-2 (Tatel, J, dissenting from denial of rehearing *en banc)*; *Id*. at 302-303 (Garland, J, dissenting from denial of rehearing *en banc).*

different from those raised by any subpoena to a non-party reporter seeking the identities of confidential sources.[20]

I. A History of the Reporter's Privilege in Leak Cases

A. The Privilege in Federal Court Leak Cases

Strikingly, at first blush the actual results of leak cases in federal court since *Branzburg* would seem to call into question the current conventional wisdom that reporters will "almost always" lose them. Prior to the First Circuit's decision in the *Taricani* case last year, the last reported federal leak case to finally result in contempt sanctions on a reporter ended in 1975, after Los Angeles *Herald Examiner* reporter William Farr was jailed for refusing to disclose the source of information leaked from criminal proceedings against Charles Manson.[21] Farr served 45 days, the longest prison sentence ever known to have been served by a journalist until Vanessa Leggett served six months in prison in 2001.[22]

In the nearly three decades between Farr and Taricani's cases there were roughly a dozen reported leak cases adjudicated in federal courts involving non-party reporter subpoenas for confidential sources. All of them either involved leaks arising out of criminal proceedings or leaks by public officials alleged to have invaded privacy rights – much like the facts in the *Taricani* and *Lee* cases. The dozen cases arise in a cross-section of federal proceedings, including both civil lawsuits, pre-trial and trial-related criminal proceedings, and grand jury investigations. Yet the press won nine of these cases,[23] lost one,[24] and two others either were dropped or decided on other grounds after initial press setbacks.[25]

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[20] Ironically, as it has actually evolved to date the *Miller* case is not a leak case under this definition, because no criminal charges have yet been filed concerning any leaks. Rather, to date journalists' testimony is only being used as alleged evidence supporting collateral perjury charges against Scooter Libby. However, despite both indications in the record and arguments by the journalists' counsel that a leak prosecution was unlikely to result, the opinions of all three judges on the panel treat the case as an investigation of the leaking of a covert agent's identity. The actual record before the Court is not yet known, because most references to it were redacted from the public version of their opinion on grounds of grand jury secrecy. *Miller*, 397 F.2d at 1002 (Tatel, J., concurring in the judgment).

[21] *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975). Farr was actually jailed in state court proceedings, and filed a federal petition for *habeas corpus*.

[22] www.rcfp.org/jail.html (last visited Dec. 12, 2005).

[23] *United States v. Ahn*, 231 F.3d 26, 28-29 (D.C. Cir. 2000); *Ashcraft v. Conoco, Inc.*, 218 F.3d 282 (4th Cir. 2000); *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981); *Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979); *United States v. Calvert*, 523 F2d 896 (8th Cir. 1975); *Tripp v. Dep't of Def.*, 284 F. Supp. 2d 50, 61 (D.D.C. 2003); *Lenhart v. Thomas*, 944 F. Supp. 525 (S.D. Tex. 1996); *Bischoff v. United States*, 1996 WL 807391 (E.D. Va. Sept. 20, 1996); *In re Grand Jury Subpoenas*, 8 Media L. Rep. 1418 (D. Col. 1982).

[24] *Sanders v. Alabama State Bar*, 887 F.Supp. 272 (M.D.Ala. 1995).

[25] *United Liquor Co. v. Gard*, 88 F.R.D. 123 (D. Ariz. 1980) (reporter lost motion to quash subpoena on First Amendment grounds, but assertions of a Fifth Amendment privilege sustained), *rev'd on other grounds sub nom In re Seper*, 705 F.2d 1499 (8th Cir. 1983); *In re Disclosure of Grand Jury Report*, 2 Media L. Rep. 1225 (S.D. Fl. 1977); *In re Disclosure of Grand Jury Report*, 3 Media L. Rep. 1161 (S.D. Fl. 1977). In these latter cases investigative journalist Seymour Hersh was ordered to produce *in camera* the identity of the source of a leaked grand jury report, but it is not clear what ultimately happened. There may be more leak cases that were unreported. However, given the media's propensity to vigorously challenge subpoenas for confidential sources, it is less likely there are any significant number of unreported cases the media ultimately lost.

This record might suggest that leak cases really are not so different, but rather their results mirror the ebb and flow of judicial attitudes towards the reporter's privilege in general. Generally, the press's record in privilege cases involving confidential sources was mixed in the first few years after *Branzburg*[26], and the press also suffered its last most significant loss in a leak case during that time in the *Farr* case. However, by the mid-1970s the federal judiciary was generally more protective of confidential and even non-confidential source relationships, and the results of leak cases seem to reflect that trend as well.[27] Beginning in the late 1990s, however, judicial attitudes towards the reporter's privilege in general began to harden.[28] Both the recent dramatic increase in the number of subpoenas to journalists issued in leak cases, and the willingness of courts to enforce them, seem to mirror those broader trends.

However, with the benefit of hindsight it is also evident that notwithstanding their positive results, the rationale for press victories in past leak investigations left this genre of cases especially vulnerable to changes in judicial and public attitudes. The press won a number of cases largely because the underlying claims brought were weak, though some of these cases do suggest that courts were more willing than they are today to subject claims to serious scrutiny prior to compelling disclosure of confidential sources.[29] When the potentially stronger cases are examined, nearly all of them were decided on the grounds that the party seeking the information had failed to exhaust alternative sources.

The exhaustion cases include two lawsuits that, like the *Lee* case, alleged violations of the Privacy Act[30], another that sought damages for leaked tax returns[31], and two criminal inquiries into the source of grand jury leaks.[32] In most of these cases, the party seeking the information had made little or no effort to depose or even investigate any alternative potential sources of the information sought from reporters. The same holds true for the one recent leak case decided in the press's favor, *New York Times Co. v. Gonzalez*, involving a subpoena for journalists' telephone records to identify the source of grand jury leaks.[33]

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[26] *See, e.g.*, *Lewis v. United States*, 517 F.2d 236 (9th Cir. 1975) and *Lewis v. United States*, 501 F.2d 418 (9th Cir. 1975) (requiring disclosure of materials anonymously sent to television station in response to a grand jury subpoena); *Carey v. Hume*, 492 F.2d 631 (D.C. Cir. 1974) (requiring disclosure of libel defendant's confidential source); *Baker v. F&F Investment*, 470 F.2d 778 (2d Cir. 1972) (recognizing a reporter's privilege in civil cases and denying a motion to compel disclosure of sources); *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972) (same in the context of a libel suit).

[27] *See, e.g.*, *Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977).

[28] *See, e.g.*, *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003); *In re Grand Jury Subpoenas*, 20 Media L. Rep. 2301 (5th Cir. 2001); *Gonzales v. NBC*, 194 F.3d 29 (2d Cir. 1999).

[29] *See, e.g.*, *United States v. Ahn*, 231 F.3d 26, 28-29 (D.C. Cir. 2000) (rejecting appeal by convicted criminal defendant); *Ashcraft v. Conoco*, 218 F.3d 282 (4th Cir. 2000) (underlying order sealing leaked settlement agreement held to be invalid); *Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979) (novel claim that leaks about a political opponent violated his right to run for public office); *United States v. Calvert*, 523 F2d 896 (8th Cir. 1975) (rejecting appeal by convicted criminal defendant).

[30] *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981); *Tripp v. Dep't of Def.*, 284 F. Supp. 2d 50, 61 (D.D.C. 2003).

[31] *Bischoff v. United States*, 1996 WL 807391 (E.D. Va. Sept. 20, 1996).

[32] *Lenhart v. Thomas*, 944 F. Supp. 525 (S.D. Tex. 1996); *In re Grand Jury Subpoenas*, 8 Media L. Rep. 1418 (D. Col. 1982).

[33] 382 F. Supp. 2d 457 (S.D.N.Y. 2005). However *Gonzalez* contained a number of very significant conclusions of law. It recognized a reporter's privilege pursuant to both the First Amendment and federal common law that applies

The fact that these cases could be relatively easily decided on exhaustion grounds meant that they do not address the more difficult questions posed when a litigant has exhausted alternative sources. To be sure, by securing the recognition of any reporter's privilege in the wake of *Branzburg* and setting a seemingly high threshold for satisfying the exhaustion requirement, the results of these cases were a very significant accomplishment for the press. By contrast, both the appellate decisions in the *Taricani* and *Lee* cases, in addition to foregoing any broader balancing exercise, arguably also applied a looser threshold for satisfying the exhaustion test.[34] And since some of the earlier decisions were plainly sympathetic to the privilege, they might well have favored the press even if sources had been exhausted.[35] Nonetheless, in hindsight it seems almost inevitable that at some point diligent litigants would recognize that if they could make a persuasive showing that illegal conduct had likely occurred and made some meaningful effort to exhaust, they would have a strong case.

B. Leak Cases in the States

Signs of the present troubles for journalists are more readily apparent in the record of leak cases adjudicated in state courts. Assessing the totality of the history of state-court privilege litigation is more difficult, because there are likely to be even more cases resolved without any formal decision or record of one. Nevertheless, looking principally at appellate decisions in the more than 30 states that recognize a qualified journalists' privilege similar to the one applied in federal courts, for most of the post-*Branzburg* era reporters' arguments drew a mixed reception. Even looking at the roughly 15 states that have reporter shield laws with a seemingly absolute privilege, in two instances state appellate courts managed to read exceptions into those laws.[36] In *toto*, reporters only won about half of the roughly dozen reported leak cases decided post-*Branzburg* in state courts.[37]

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in all federal judicial proceedings, including grand jury proceedings. It also held that a reporter's telephone records are protected by the privilege to the extent they may be used to identify sources. *Gonzalez* also declared the subpoenas at issue to be unenforceable even though they were issued in another jurisdiction, a rare step. The government has appealed the decision to the Second Circuit.

[34] Most of the alternative sources explored in *Taricani* were never questioned under oath, but rather were simply interviewed. In the *Lee* case, plaintiff's counsel deposed over twenty witnesses, but asked very few of them specific questions about whether they had communicated with most of the reporters involved. *Cf. In re Petrol. Prods. Antitrust Litig.*, 680 F.2d 5, 8-9 (2d Cir. 1982) ("While hundreds of depositions have already been taken, there is no indication that anyone was asked the simple question 'Have you ever communicated pricing information to [the news service]?'") (citation omitted).

[35] *See, e.g., Zerilli,* 656 F.2d at 714 n.52 ("We do not decide whether compelled disclosure would have been appropriate if appellants had fulfilled their obligation to exhaust alternative sources").

[36] *In re Decker*, 471 S.E.2d 462 (S.C. 1995); *Rosato v. Superior Court*, 124 Cal. Rptr. 427 (Cal. App. 5th Dist. 1975) (both holding that the South Carolina and California shield laws cannot apply to a court ordering a reporter to testify on its own initiative). *Cf. Beach v. Shanley*, 476 N.Y.S.2d 765 (N.Y. 1984) (explicitly declining to read any eyewitness exception into the New York's shield law's absolute protection for confidential sources).

[37] *Compare In re April 7, 1999 Grand Jury Proceedings*, 749 N.E.2d 325 (Ohio App. 7th Dist. 2000), *In re Willon*, 55 Cal. Rptr. 2d 245 (Cal. App. 6th Dist. 1996), *People v. Simpson*, 1995 WL 490502 (Cal. Super. Aug. 9, 1995), *Maddox v. Williams*, 23 Media L. Rep. 2118 (KY Cir. Ct. 1995), *Sinnott v. Boston Ret. Bd.*, 524 N.E.2d 100 (Mass. 1988), *Beach v. Shanley*, 476 N.Y.S.2d 765 (N.Y. 1984), *In re Special Grand Jury Investigation of Alleged Violation of the Juvenile Court Act*, 472 N.E.2d 450 (Ill. 1984), *and Morgan v. State*, 337 So. 2d 951 (Fl. 1976) (all refusing to compel disclosure of confidential sources), *with People v. Pawlaczyk*, 724 N.E.2d 901 (Ill. 2000), *In re Decker*, 471 S.E.2d 462 (S.C. 1995), *In re Investigation: Florida Statute 27.04 (Roche v. Florida)*, 589 So. 2d 978 (Fla. App. 4th Dist. 1991), *Winegard v. Oxberger*, 258 N.W.2d 847 (Ia. 1977), *In re Tierney*, 328 So.2d 40 (Fla. App. 4th Dist. 1976), *Rosato v. Superior Court*, 124 Cal. Rptr. 427 (Cal. App. 5th Dist. 1975) (all compelling disclosure).

The state court record is also qualitatively different from its federal counterpart because the cases did not always turn on the issues of need or exhaustion. Rather, state courts more often apply broader balancing tests and the resulting decisions therefore contain more robust debate over both the merits and contours of a privilege in leak cases.[38] They therefore provide a more useful basis for assessing the impact of defining the privilege as a broader balancing exercise, rather than a mechanical application of a two-part need and exhaustion test. Not surprisingly, these decisions suggest that regardless of how a qualified privilege is defined, the results of leak cases tend to be driven by core views about the merits of a leak privilege. Indeed, in some instances different courts within the same state, applying the same legal test, reached markedly different results.

In Florida, for example, in 1976 an intermediate appellate court presented with an early post-*Branzburg* leak case rejected the existence of any privilege in the grand jury context[39], only to be effectively overruled a few months later when the Florida Supreme Court reached the opposite conclusion in *Morgan v. State*, another grand jury leak case. Most importantly, *Morgan* found that the state's "generalized interest" in protecting grand jury secrecy was not sufficient to justify intrusion into reporter-source relationships.[40] That principle, if consistently applied, would provide significantly more protection to sources than the need/exhaustion test. Yet fifteen years later, *Stuart News* reporter Tim Roche spent 18 days in jail for refusing to disclose who leaked a judicial order entered in a sealed parental termination proceeding. Even though the case had been widely publicized and was therefore no secret in any event, a Florida intermediate appellate court applying *Morgan* concluded that the state's general interest in protecting the confidentiality of juvenile proceedings outweighed the interest in protecting confidential newsgathering, and the Florida Supreme Court (as well as the United States Supreme Court) declined to review the case.[41]

In California two intermediate appellate opinions present even more sharply conflicting results. In *Rosato v. Superior Ct.*, 124 Cal. Rptr. 427 (Cal. App. 5th Dist. 1975) the Fifth District Court of Appeal relied on separation-of-powers principles to hold that the California shield law could not constrain a court's ability to police misconduct (grand jury leaks in this case) by its own officers. *Rosato* reads a lot like some of the opinions in *Taricani, Miller,* and *Lee*, emphasizing that "If disclosure of the source of a violation [of grand jury secrecy rules] may inhibit future violations, the inhibition serves the public purpose . . ."[42]

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[38] *See, e.g.*, *Maddox*, 23 Media L. Rep. at 2119 (balancing the need "to stop disclosure of the questioned material in light of the attorney-client privilege" and "the right of the public to know whether [Brown & Williamson] has withheld information concerning the dangers of smoking")

[39] *In re Tierney*, 328 So. 2d 40 (Fla. App. 4th Dist. 1976)

[40] 337 So. 2d 951, 955 (Fl. 1976)

[41] *In re Investigation: Florida Statute 27.04 (Roche v. Florida)*, 589 So. 2d 978 (Fla. App. 4th Dist. 1991).

[42] *See also Farr v. Superior Ct.*, 99 Cal. Rptr. 342, 350 (Cal. App. 2d Dist. 1971). *Rosato*'s willingness to find a way around the clear command of an absolute shield law was echoed twenty years later in a similar case considered by the South Carolina Supreme Court, which affirmed contempt penalties on a reporter for refusing to disclose the source of leaks in the Susan Smith case on the grounds that the shield law only applied to a "party" seeking information. Because the trial court in the Smith case had initiated the leak investigation and issued the subpoenas to the reporters on its initiative, the Court concluded the shield law did not apply at all. *In re Decker*, 471 S.E.2d 462 (S.C. 1995).

Yet twenty years later a different California appeals court reached the opposite result in a case also involving alleged leaks by persons subject to a gag order. In *Willon v. Superior Court*[43] the Court rejected the continued relevance of *Rosato*'s separation-of-powers rationale since the shield law had since also been adopted as part of the California Constitution. More importantly, it also found that there is not a compelling interest in investigating all violations of court orders, regardless of their actual consequences – a point emphasized by Taricani in his case. Consequently, the only balancing factor that need ever be considered is whether the defendant's fair trial rights were compromised by the leak in question, the one exception the California Supreme Court has recognized to the absolute immunity from contempt the shield law recognizes.[44] The same result was also reached a year before *Willon* by Judge Lance Ito in the O.J. Simpson case, who refused to compel two reporters to identify the sources of alleged prosecution leaks.[45]

In sum, the post-*Branzburg* history of leak litigation reveals several valuable lessons. It shows that a privilege based solely on the need/exhaustion test is particularly vulnerable in leak cases, although perhaps not as inherently weak as Judge Tatel has recently suggested. However, while a balancing test that looks beyond the elements of need and exhaustion is necessary, how all of these factors are actually applied is primarily a function of competing views about whether there should be any privilege at all in this context. Therefore, this article next turns to exploring in more depth that foundational question, looking first at the challenge posed by the privilege's detractors and then at the most common arguments offered in its defense.

II. The Current Terms of the Debate Over a Privilege in Leak Cases

A. The Privilege's Detractors

The basic argument advanced by opponents of a leak privilege is easily articulated. In a leak case a reporter not only personally witnesses a criminal or tortious act by a source, the reporter is in effect the instrumentality by which the source's illegal acts are accomplished. No version of either the reporter's privilege or any other legal privilege, the argument goes, would permit a citizen to honor a promise of confidentiality to someone about to commit a criminal act, for the express purpose of gaining the ability to witness the crime. In that vein, most critics of a leak privilege emphasize (and repeatedly quote) Justice White's observation in *Branzburg* that we "cannot seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it."[46]

Implicit in this argument is the view that leak crimes are no different than any other form of criminal conduct, be it producing illegal drugs or robbing a bank. Thus, the Court in *Miller* declared that "there is no material factual distinction" between "the alleged illegal processing of hashish" (one of the crimes at issue in *Branzburg)* and "the alleged illegal disclosure of the identity of [a]

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[43] 55 Cal. Rptr. 2d 245 (Cal. App. 6th Dist. 1996).

[44] *Delaney v. Superior Court*, 268 Cal. Rptr. 753 (1990).

[45] *People v. Simpson*, 1995 WL 490502 (Cal. Super. Aug. 9, 1995).

[46] *See, e.g.*, *Lee*, 413 F.3d at 59-60 (*quoting Branzburg*, 408 U.S. at 692); *Miller*, 397 F.3d at 970 (same).

covert agent[].”[47] Likewise, the district court in the *Lee* case described a reporter’s receipt of information subject to the Privacy Act as if it were the functional equivalent of physical contraband, so that “a reporter who possesses such information does so without right.”[48] *Miller* also emphasized that because some of the facts of *Branzburg* involved the reporter-as-eyewitness scenario, any argument that Justice Powell’s concurring opinion limited the reach of the majority opinion cannot apply to leak scenarios, because Justice Powell agreed that the reporters in *Branzburg* had to testify.[49]

The logic and appeal of this argument is obvious. Even most press advocates would likely be reluctant to argue that the privilege would permit a journalist to honor a promise of confidentiality to a would-be bank robber, made in exchange for the ability to watch and then write about a bank robbery. Since illegal leaks are also crimes or civil wrongs, it seems logical that promises of confidentiality that potentially have the effect of encouraging such wrongs and then concealing their perpetrators from justice are no more worthy of legal protection. In fact, there are really only two possible responses to this argument. Either (1) notwithstanding *Branzburg* the reporter’s privilege should generally extend to reporter’s personal observations of any criminal conduct by their sources, or (2) there is something about the nature of a leak case that is different from the usual reporter-as-eyewitness scenario. As Part III discusses, the latter point is far more persuasive. However, before exploring this proposition in more depth, it is worth turning to the existing arguments that are most often advanced by the proponents of a privilege, to see whether they adequately answer the fundamental critique advanced by its critics.

B. Common Arguments for a Leak Privilege

Three legal or policy arguments are most commonly used to make the case for a privilege in recent leak cases: (1) reliance on Judge Tatel’s concurring opinion in the *Miller* case, (2) highlighting examples of newsworthy stories that have resulted from potentially illegal leaks, and (3) arguing that the First Amendment’s protection of the press’s right to *publish* the content of illegal leaks requires a concomitant right to some protection for the process of obtaining them. While each of these arguments provides some elements of a rationale for a leak privilege, none of them directly answer the challenge posed by its critics. Each is examined in turn.

1. Judge Tatel’s Argument for a Qualified Leak Privilege

In the recent spate of leak cases, the most vocal proponent of a reporter’s privilege on the bench is undoubtedly Judge David Tatel on the D.C. Circuit. Tatel’s lengthy concurring opinion in *Miller* both supported recognition of a federal common law reporter’s privilege and articulated a three-part test for such a privilege in leak cases. In addition to the standard requirements of need and exhaustion, Tatel argued that courts should balance the “harm the leak caused” against the “leaked information’s value” to the public.[50]

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[47] *Id.* at 969-70.

[48] *Lee*, 287 F. Supp. 2d at 24.

[49] *Miller*, 397 F.3d at 972.

[50] *Id*. at 998 (Tatel, J., concurring in the judgment).

In *Lee*, Tatel (along with three other judges) dissented from the Circuit's decision to deny *en banc* review of the panel's unanimous decision to affirm contempt findings against four reporters. Tatel again urged the application of a balancing test for leak cases, this time pursuant to the privilege recognized by the First Amendment in civil cases. Unlike in *Miller*, Tatel argued that on the facts of *Lee* that the balance favored the reporters.[51] Thus, Tatel not only supports a privilege in leak cases, he appears to argue that the legal test for overcoming the privilege should include a balancing component that is not necessary in cases that do not involve leaks.[52]

As a result, one might assume that Tatel's opinions are the best place to find a persuasive rebuttal to the view that reporters in leak cases should be treated like eyewitnesses to crimes. However, Tatel never responds directly to that argument. Rather, Tatel essentially articulates two sets of arguments for his proposed leak privilege. First, he argues generally that confidential newsgathering is essential to maintaining the free flow of information to the public and that it will be chilled absent a privilege, much as advocates for the privilege have argued for decades.[53] However, Tatel does not explain why such newsgathering remains essential even when the source's communications with the reporter may have been a crime.

Second, Tatel argues that a balancing test is necessary in leak cases because otherwise the press will "almost always" lose a two-part test focusing only on need and exhaustion. However, Tatel's critics argue that the press should lose leak cases because there is no public interest in permitting reporters to facilitate criminal conduct. Tatel never explains why he disagrees with that view, he just states the contrary.

In this respect, Tatel's opinions are similar to the way most federal courts have handled leak cases in the past. They recognize a privilege, a particularly strong one in Tatel's case, but typically avoid directly addressing the arguments of the privilege's detractors. Thus, while Tatel's *Miller* opinion provides a very important roadmap for defining and applying a privilege in leak cases, it does not provide a complete rationale for why there should be one in the first place.

2. The Empirical Argument

When media advocates do attempt to more directly answer the challenge posed by their critics, the most common argument advanced is an empirical one. The proposition that no public purpose is served by protecting leakers who may have broken the law, the argument goes, is empirically wrong because there are numerous current and historical examples of very important news stories that were brought to light by sources who probably broke the law. *Amicus curiae* briefs filed on behalf media organizations in these cases in particular tend to emphasize this argument.[54]

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[51] *Lee*, 428 F.3d at 301-2 (Tatel, J, dissenting from denial of rehearing *en banc)*.

[52] It is not entirely clear whether Tatel's view is that his proposed balancing test should only apply to leak cases. Whether or not a case involves a leak, applying only a narrow, two-part test creates the possibility that the privilege may always be overcome even in the most mundane cases, a criticism Tatel seems to recognize in his dissent in *Lee*. *Id.* at 301. Balancing the competing interests broadly in any case more appropriately recognizes the public interest in confidential newsgathering.

[53] *Miller*, 397 F.2d at 991-93 (Tatel, J., concurring in the judgment).

[54] See footnote 15. *See also* Steven Z. Zansberg, "The Empirical Case: Proving the Need for the Privilege", Media Law Resource Center Bulletin, 2004 Issue No. 2, at 145-181 (Aug. 2004).

The publication of the Pentagon Papers and the use of grand jury and other investigative leaks by journalists investigating the Watergate break-in are the examples most commonly cited, but there are many others relating to private as well as public malfeasance. For example, some of the most important reporting about tobacco company malfeasance was based on leaked, stolen documents subject to a judicial protective order.[55] The judge overseeing that dispute specifically found that "the right of the public to know whether or not [Brown & Williamson] has withheld information concerning the dangers of smoking" was stronger than the interest in preventing disclosure of such documents by compelling the identification of their source.[56] Similarly, the *Wall Street Journal* helped expose the Enron corporation's massive fraud on the public through the use of leaked, confidential documents.[57] The *San Francisco Chronicle*'s recent stories revealing the admitted use of steroids by prominent baseball players and track stars relied heavily on leaked grand jury testimony, yet immediately provoked Congressional hearings and reforms adopted by the nation's pastime.[58]

Even in the area of national security, often assumed to merit special deference by the courts, leaks have produced enormously important stories. The Pentagon Papers case is merely one of many examples. To note just a couple of others, in the late 1970s *Washington Post* reporter Walter Pincus used leaked, classified information to bring to light the Carter Administration's plans to develop a nuclear "neutron bomb" that would destroy only life, not property.[59] The ensuing public outcry caused the project's abandonment, and no subsequent Administration attempted to revive it. More recently, the reporting of CBS News and Seymour Hersh, writing for *The New Yorker*, that exposed the Abu Ghraib prison scandal also relied in part on leaked, classified documents.[60]

On balance, the argument goes, the number of serious, anti-social leak crimes that may have been facilitated by journalists' promises of confidentiality, if any, pale in comparison to the number and significance of these types of news reports. The empirical argument is quite powerful, and it is noteworthy that none of the recent judicial opinions rejecting the press' position attempt to respond to it. Nonetheless, the empirical argument does not fully answer the privilege's detractors, who presumably would argue that a crime is a crime, regardless of whether it may sometimes produce beneficial results.

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[55] *Id*. at 165 n.52, (*citing* Alix M. Freedman, *Inside the Soul of Marlboro*, Wall St. J., Oct. 18, 1995 at A11; Phillip J. Hilts, *Tobacco Company was Silent on Hazards*, N.Y. Times, May 7, 1994 at A1.)

[56] *Maddox v. Williams*, 23 Media L. Rep. at 2119.

[57] *See, e.g.*, Rebecca Smith & John R. Emshwiller, *Trading Places: Fancy Finances Were Key to Enron's Success, and Now to its Distress*, WALL ST. J., Nov. 2, 2001, at A1; Rebecca Smith & John R. Emshwiller, *Enron CFO's Partnership Had Millions in Profit*, WALL ST. J., Oct. 19, 2001, at C1; John R. Emshwiller & Rebecca Smith, *Corporate Veil: Behind Enron's Fall, A Culture of Operating Outside Public's View*, WALL ST. J., Dec. 5, 2001, at A1.

[58] *See, e.g.*, Mark Fainaru-Wada & Lance Williams, *Giambi Admitted Taking Steroids,* S.F. CHRONICLE, Dec. 2, 2004, at A1; Lance Williams & Mark Fainaru-Wada, *What Bonds told BALCO Grand Jury,* S.F. CHRONICLE, Dec. 3, 2004, at A1; Mark Fainaru-Wada & Lance Williams, *Sprinter Admitted Use of BALCO 'Magic Potion,'* S.F. CHRONICLE, June 24, 2004, at A1.

[59] *See, e.g.*, Walter Pincus, *Carter Is Weighing Radiation Warhead*, WASH. POST, June 7, 1977, at A5; Walter Pincus, *Pentagon Wanted Secrecy On Neutron Bomb Production; Pentagon Hoped To Keep Neutron Bomb A Secret*, WASH. POST, June 25, 1977, at A1.

[60] 60 Minutes II, Apr. 28, 2004, www.cbsnews.com/ stories/2004/04/27/60II/main614063.shtml?CMP=ILC-SearchStories; Seymour M. Hersh, *Torture at Abu Ghraib*, THE NEW YORKER, May 10, 2004, at 42.

Indeed, the two sides of the debate over a leak privilege often seem to talk past each other. Critics of the privilege articulate an abstract policy argument, questioning how the law can possibly protect lawbreaking and why journalists get to be the arbiter of those choices. Any effort to assess the real-world consequences of that view is ignored. In turn, the privilege's defenders do not directly answer the policy argument on its own terms, but instead just point to examples of lawbreaking by sources that have produced positive results.

3. The Relationship Between Publishing and Obtaining a Leak: *Bartnicki* and Company

Turning a full three hundred and sixty degrees from real-world experience to abstract principles of law, some press advocates also have argued that recognition of a privilege in leak cases inexorably flows from the rationale of a series of Supreme Court decisions beginning with *Cox Broadcasting Corp. v. Cohn*[61] and ending most recently with *Bartnicki v. Vopper*,[62] the Supreme Court's last decision involving news media speech. All of those cases involve circumstances in which someone may have acted improperly, or even illegally, in providing the information the press obtained. The principle synthesized in those cases is that if the press itself does not act illegally and "lawfully obtains" accurate information about a matter of public concern, then the First Amendment does not permit sanctioning its publication absent a state interest "of the highest order."[63] Thus, the argument for a leak privilege goes, if the First Amendment protects the publication of information provided by a source who acted illegally, it would be inconsistent to permit the government to effectively inhibit the same publication by interfering with a reporter's ability to obtain the information from sources in the first place.

In most of these cases the persons who initially made it possible for the press to obtain the information at issue were not really "sources" at all, let alone confidential sources, so their potential relevance to the confidential source scenario is more attenuated. Two of them involved public employees who inadvertently placed the names of rape victims into a public court file[64] or police report[65] available to the press, while in a third a reporter first learned the name of a juvenile victim by monitoring police radios.[66] The two cases with more potential parallels are *Bartnicki* and *Landmark Communications, Inc. v. Virginia*[67], both of which did involve illegal leaks by anonymous sources. However, the questions presented by each of these cases were actually quite different and *Landmark* is the more useful precedent for adopting a leak privilege.

In *Bartnicki*, the Court held that the provision of the federal wiretapping law barring the publication of the contents of illegally-recorded communications could not constitutionally be

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[61] 420 U.S. 469 (1975).

[62] 532 U.S. 514 (2001).

[63] *Id*. at 528 (*quoting Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 102 (1979)). See also *Florida Star* v. *B.J.F.*, 491 U.S. 524 (1989); *Landmark Commc'ns, Inc.* v. *Virginia*, 435 U.S. 829 (1978).

[64] *Cox*, *supra* n.61.

[65] *Florida State*, *surpa* n.63.

[66] *Daily Mail*, *supra* n.63. However, in that case reporters apparently subsequently confirmed the juvenile's identity with schoolmates and law enforcement sources, though none of them appear to have been confidential. *Id.* at 99.

[67] 435 U.S. 829 (1978).

applied to a radio talk show host who had received a copy of such a recording. A tape was literally dropped off at a radio station by a source unknown to the host. That a source may have broken the law in making the recording, the Court concluded, did not justify sanctioning the speech of the media personality who passively received it, even if he had reason to know that someone must have broken the law to make the tape.

The attraction of focusing on *Bartnicki* is obvious, since it was decided by most of the members of the current Supreme Court. However, if applied to the facts of a leak case involving a confidential source, the Court's rationale actually looks very problematic. The Court's conclusion that that the statute could not bar publication by the journalist-recipient turned heavily on the fact that the talk show host who received the tape was "not involved in the initial illegality," and it doubted that sanctioning publication by uninvolved reporters would have much of a deterrent effect on persons contemplating illegal taping.[68] Justice Breyer, who along with Justice O'Connor provided the decisive votes in the case, wrote separately to further emphasize that the defendant radio host " 'neither encouraged nor participated directly or indirectly in the interception,'" leaving open the question of whether the result might be different if that were not the case.[69] If applied to a leak case, it would be more difficult to argue that a reporter is wholly "uninvolved" in the leak crime at issue or that compelling reporters to disclosure sources would have no deterrent effect on potential leakers. Indeed, the essence of the argument for a privilege is that it is necessary to facilitate reporter-source communication.

However, *Bartnicki*'s rationale is not inconsistent with the recognition of a reporter's privilege because it is not really a case about leaks. Rather, it was a case about the relationship between the press and a source's illegal *conduct* in *obtaining* information, in that case through physically recording telephone conversations.[70] The analogous leak scenario would be a situation where a reporter's source not only may have committed a crime by leaking information, but may have also committed a crime by obtaining it, such as by physically stealing documents. That scenario presents a more difficult case than most leak disputes, because as *Bartnicki* points out, the government's interest in deterring sources from committing common crimes to obtain information are likely to be largely content-neutral.[71]

Most leak disputes, including the *Taricani*, *Miller/Cooper* and *Lee* cases, involve facts where the content of a source's *speech* alone is the crime or tort at issue, without any allegation that the source committed some crime to obtain the information communicated to a journalist. The question posed by such cases is whether the government's interest in enforcing such content-based speech crimes can affect any legal rights otherwise enjoyed by a reporter. Because *Bartnicki* is really a case about the effect of a source's violation of content-neutral laws governing criminal

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[68] *Id.*

[69] *Id.* at 538 (Breyer, J., concurring) (citation omitted). Lower courts have found the degree of a reporter's involvement in the underlying taping to be virtually dispositive. *See Peavy v. WFAA-TV, Inc.*, 221 F.3d 158 (5th Cir. 2000); *Boehner v. McDermott*, 332 F. Supp. 2d 149 (D.D.C. 2004)

[70] *Bartnicki*, 532 U.S. at 528 ("Simply put, the issue here is this: 'Where the punished publisher of information has obtained the information in question in a manner lawful in itself but from a source who has obtained it unlawfully, may the government punish the ensuing publication of that information based on the defect in a chain?'") (*quoting Boehner v. McDermott*, 191 F.3d 463, 484-85 (D.C. Cir. 1999) (Sentelle, J., dissenting)).

[71] *Bartnicki*, 523 U.S. at 529.

conduct, using it in the leak context can actually push the privilege debate in the wrong direction. Rather than distinguishing leaks from other forms of criminal conduct, the *sina qua non* of any argument for a leak privilege, invoking *Bartnicki* may serve to equate the two. Indeed, *Branzburg* explicitly referred to "private wiretapping" as one example of the kind of criminal conduct by a source that could not support any claim of a reporter's privilege.[72]

Landmark Communications, Inc. v. Virginia,[73] on the other hand, offers more promising parallels because it was a genuine leak case. *Landmark* involved a leak of information about confidential proceedings of the state's judicial review commission, evidently provided to the *Virginian Pilot* by a confidential source. A Virginia statute barred any dissemination of such information, and the Court held that the statute was unconstitutional as applied to the newspaper's publication of the leak.

More importantly for present purposes, its rationale strongly emphasized the speech in question "lies near the core of the First Amendment", involving "public scrutiny and discussion of governmental affairs which the First Amendment was adopted to protect."[74] Thus, at a minimum *Landmark* validates the empirical argument that there is often very substantial value in information obtained from sources who break the law by communicating it, a claim that could not likely be made about any benefits flowing from bank robberies and narcotics sales. *Landmark* thus went a step further than the Pentagon Papers case, in which the Court agreed that the extraordinary burden for a prior restraint was not met but was otherwise divided over whether publication of those Papers was in the public interest.[75]

Landmark is thus difficult to square with the views expressed by the district court in the *Lee* case that illegally-leaked information should necessarily be treated like verbal contraband, so there can be no "truly worthy First Amendment interest" in protecting the process by which it is obtained.[76] To be sure, *Landmark* does not answer or even ask the question of whether the state's interest in prosecuting the leaker would override the strong public interest in learning the substance of the leak. However, its rationale supports the conclusion that the public's interest should at least be considered when answering that question, and also illustrates why leak crimes involving matters of vital public concern raise countervailing public interests that are different than any presented by the enforcement of laws proscribing criminal conduct.

III. The Heart of the Matter - A Debate Over Public and Private Secrecy

As the preceding discussion demonstrates, none of the most common arguments for a leak privilege directly explain why a reporter's confidential communications with sources who commit leak crimes should be protected, when promises that have the effect of concealing the perpetrators of other forms of criminal conduct might not be. The fundamental reason that leak crimes should be treated differently is that speech itself is the only alleged wrongful activity. In fact, leak cases

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[72] 408 U.S. at 691.

[73] 435 U.S. 829 (1978).

[74] *Id*. at 838-39.

[75] *New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam).

[76] *Lee*, 287 F. Supp. 2d at 23.

uniquely involve what might be termed public speech crimes, i.e. crimes where the speaker's intent is to talk to the public, through a journalist, often about matters of obvious public concern.

Even at first blush, statutes defining public speech crimes, or analogous legal duties of confidentiality applicable to the private sector, trigger countervailing public interests that are very different from the kind of criminal conduct at issue in *Branzburg*, which had nothing to do with public speech crimes.[77] It would surely be very difficult to make even a short list of examples of acts of homicide or robbery that have yielded substantial public benefits. Yet, as both *Landmark* and numerous examples from the history of journalism demonstrate, the comparable list for public speech crimes would be very long indeed.

However, the real significance of the fact that leak crimes often involve public speech about matters of public concern lies even deeper. At bottom, all of the recent leak cases have involved clashes between a prosecutor or private litigant's desire to enforce laws proscribing persons involved in government activity from sharing certain information with the public, and the press's interest in informing the public about secret government activity. Both of these interests reflect values that lie at the core of effective democratic government and are necessarily in a state of permanent tension with each other.

One of the defining principles of a functioning democracy is the recognition of the natural tension between the two competing values at issue in leak cases: the government's need at times to act secretly to protect the public welfare and the public's need to know what its government is doing so that it can engage in meaningful democratic decision-making. Although some confidentiality within government is surely necessary, excessive government secrecy is the hallmark of authoritarian regimes. And while democracy is meaningless without an informed public, total government transparency would invite paralysis and even self-destruction.

The tension between the legitimate need for secrecy and the public's need to access information is woven into the fabric of the First Amendment itself, at least as it has been applied for several generations. When faced with clashes between these competing interests, the Supreme Court has typically limited its response to requiring that a level playing field be maintained between them. On the government's side, it has allowed the political branches largely unfettered authority to define the terms upon which the public may have access to information they maintain. Beyond the requirement of open judicial proceedings, the First Amendment's Free Speech Clause has not yet been understood to affirmatively require that either the Executive or Legislative branches share information with the public. While the First Amendment does constrain the government's ability to prevent public employees from expressing their individual views and beliefs,[78] it does not provide a "constitutional right to have access to particular government information, or to require openness from the bureaucracy."[79] As a result, attempts by the press to seek judicially-enforced access to information held by the executive or legislative branches that is not otherwise available to the

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[77] *See, e.g.*, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) (while "[t]he right to remain anonymous may be abused when it shields fraudulent conduct," it remains the case that, "in general, our society accords greater weight to the value of free speech than to the dangers of its misuse.").

[78] *See. e.g.*, *Perry v. Sinderman*, 408 U.S. 593 (1972).

[79] *Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978). However, the government may not selectively discriminate against the press, by "deny[ing] the press access to sources of information available to members of the general public." *Pell v. Procunier*, 417 U.S. 817, 835 (1974).

general public have been consistently rejected.[80] For the same reasons, anti-leak laws themselves are not readily subject to direct constitutional challenge.

Rather than attempt to act as the arbiter of the public information policies of political branches, the Court instead has recognized that the Constitution provides that "[t]he public's interest in knowing about its government is protected by the guarantee of a Free Press."[81] "The constitutional guarantee of a free press 'assures the maintenance of our political system and an open society,' and secures the 'paramount public interest in a free flow of information to the people concerning public officials.'"[82] The press's role in large part is to function as a kind of safety valve that recognizes the need for official secrecy but prevents the pendulum from swinging too far in that direction.

And just as the courts have resisted attempts by the press to force information out of the government, they have resisted efforts by the government to extend to the press secrecy obligations the law imposes on persons involved in government, absent very compelling reasons – even, as in *Landmark*, where sources with access to government information may have been the confidential sources of leaks to the press. It would be equally inconsistent with the constitutionally and historically-sanctioned division of labor between government and the press for the courts to affirmatively takes sides in the natural tug-of-war between government and the press, by freely using the press as their investigative arm to enforce official secrecy. As the many empirical examples proponents of the privilege have pointed to demonstrate, the press's ability to promise confidentiality to sources has proved to be essential to fulfilling its function of providing the public with vital information about the operations of government, almost as important as the press's ability to publish the information those sources provide.

Indeed, the importance of confidential newsgathering in the leak context has been widely accepted from the inception of the Republic. The first confidential source controversy in American history involved an anonymous communication to a newspaper publisher, John Peter Zenger, that constituted "criminal conduct" under the laws of the day. Zenger was prosecuted and ultimately acquitted for publishing a seditious libel only after he steadfastly refused to disclose the source of the article.[83]

Similarly, throughout the eighteenth and nineteenth centuries, the press periodically clashed with Congress or state legislatures over alleged illegal leaks, and a number of reporters were briefly detained as a result of their refusal to comply with legislative subpoenas seeking the identities of the leakers.[84] Ultimately, however, by the twentieth century Congress had apparently concluded that compelling reporters to disclose the source of leaks was both wrong and counterproductive, and that practice ceased. It is therefore ironic that all of the recent cases have held reporters in contempt ostensibly to enforce laws promulgated by Congress.

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[80] *Houchins, supra; Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974); *Pell, supra*.

[81] *Houchins*, 438 U.S. at 14.

[82] *Pell*, 417 U.S. at 832 (citations omitted).

[83] *See McIntyre*, 514 U.S. at 360-69 (Thomas, J., concurring).

[84] Note, *The Right of a Newsman to Refrain from Divulging the Sources of His Information*, 36 VA. L. REV. 61, 77-79 (1950).

Thus, the argument that leaked information should be treated like any other form of stolen goods ignores the unique context presented by crimes targeting public speech. Such crimes necessarily trigger competing interests, embodied within the Speech and Press Clauses of the First Amendment itself, that have no counterpart in criminal statutes and civil legal duties targeting other forms of criminal conduct. When the press talks to sources with access to secret information, it is fulfilling its constitutionally-assigned role of acting as a counterweight to official secrecy. Under the logic of the privilege's critics, if Congress or the Executive Branch simply barred officials from sharing any information with the public, neither the First Amendment nor the common law would have any interest in protecting a reporter's ability to pierce that veil through confidential newsgathering. That conclusion is wholly inconsistent with the press's ability to perform its function of serving as an "antidote to any abuses of power by governmental officials."[85]

It is no coincidence that the laws at issue in most leak cases are precisely the kind of laws that most readily trigger the inherent tension between official secrecy and an informed polity. They are typically extremely broad statutes that criminalize vast amounts of government speech about matters of obvious public concern. Laws like the federal Privacy Act, Espionage Act, and most grand jury secrecy laws all fit this description.

For example, the Privacy Act bars the intentional disclosure of any government "record" that is "about an individual" and "maintained by an agency."[86] The law serves the laudable purpose of deterring public officials from releasing the vast amount of personal data about individuals that the government necessarily amasses.[87] However, there are numerous instances in which such "records" contain information of extraordinary public concern, including virtually all of the information provided by sources like "Deep Throat" to Woodward and Bernstein. Under the principles of the *Lee* case, which challenges the legality of the release of information gleaned from any "records" amassed in a pre-indictment investigation, the Watergate burglars would have had the right to sue the government and compel Woodward and Bernstein to disclose the identities of their sources.

Yet the vague nature of the Privacy Act is merely one illustration of the broader reality that it is simply impossible to craft anti-disclosure laws that will both adequately protect official confidentiality or privacy interests and enable vital information to reach the public. While in the abstract it would be ideal if legislators, regulators and even courts could strike the perfect balance between the two, the evidence overwhelmingly suggests otherwise. For every Pentagon Papers or Watergate story there will also always be the potential for a corresponding malicious leak of information intended to harm national security or release of embarrassing private information. No statute enacted by Congress or narrowed by the process of judicial review is going to be able to somehow distinguish between the two in advance, nor will there likely be universal agreement even after the fact about whether any particular leak is on balance "bad" or "good". As has often been observed, one person's whistleblower is another's snitch.

Because it is impossible to differentiate between "good" and "bad" official secrecy in the abstract, Judge Tatel's proposal to assess whether particular leaks do more harm than good, however subjective and imperfect that notion may be, is a logical solution to the problem of how to protect

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[85] *Mills v. Alabama*, 384 U.S. 214, 219 (1966).

[86] 5 U.S.C.A. §552a(b).

[87] *Cochran v. United States*, 770 F.2d 949, 959 n. 15 (11th Cir. 1985).

the press's function as a safety valve against excessive secrecy, without undermining secrecy where it is truly warranted. Judge Tatel's case-by-case test expresses the balancing issue at its broadest possible level of generality, but there are other possible alternatives. For example, the proposed Free Flow of Information Act introduced in the present session of Congress spells out the specific exceptions to a leak privilege in advance, based on its sponsors' judgment about what leaks really do cause substantial harm

In that vein, it is appropriate that different courts have looked to both the First Amendment and federal common law as sources for the reporter's privilege. The privilege reflects both the constitutionally-recognized role of the press and the lessons of "reason and experience" that validate the importance of that function.[88] In that regard it is significant that while the press does not always win leak cases in state courts, state legislatures have not recognized any kind of formal leak exception when fashioning state shield laws.

Because a leak privilege is necessarily grounded in the inherent tension between secrecy and openness, the most serious potential threat to the privilege is not the cyclical ebb and flow of judicial attitudes towards the press. Rather, it is a growing tendency to dispute the necessity for any such contest at all. Maximum government secrecy is increasingly viewed as an essential prerequisite for national security, a trend that has rapidly accelerated since September 11, 2001. If one believes that the press's role as a check on abuses that can result from excessive secrecy is in fact antithetical to the public interest, then there is indeed no purpose served by a journalist's privilege in leak cases.

It is surely no coincidence that the conflicting opinions concerning the reporter's privilege in *Miller* and *Lee* mirrored the result of *Center for National Security Studies v. Department of Justice*,[89] in which Judges Sentelle (writing again for the majority) and Tatel (in dissent) sharply disagreed about whether the government should be required under the Freedom of Information Act to disclose the names of persons detained in the investigation of the September 11 attacks. Thus, at least in some respects, the debate over the privilege may be a proxy for larger divisions over the role of governmental secrecy in today's world. Yet if that is so, it is all the more important for press advocates to directly engage in that debate and defend the historic, constitutionally-sanctioned role of the press to investigate secrets as an essential barrier to the abuse of power, both public and private.

[88] *Jaffee v. Redmond*, 518 U.S. 1, 8-9 (1996).

[89] 331 F.3d 918 (D.C. Cir. 2003).

CONFLICT ISSUES IN CONFIDENTIAL SOURCE CASES:
NEW DANGERS FROM THE MODEL RULES?

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Conflict Issues in Confidential Source Cases: New Dangers from the Model Rules?

The recent media (and legal) brouhaha arising from problems of confidential source relationships between Judith Miller and *The New York Times* and between Bob Woodward and *The Washington Post* suggests the need for improved communication and coordination between media companies and their reporters in handling confidential sources. In both cases, reporters and management appeared to be at odds regarding the scope of the reporter's disclosure of his or her relationships with confidential sources. Meanwhile, in connection with the same investigation, *Time* reporters and *Time* management found themselves occasionally at odds regarding important strategic decisions in the case.

These recent cases present some useful not-so-hypothetical hypotheticals about the dangers of joint representation in confidential source litigation, and the concurrent dangers of not coordinating between reporters and their employers. These potential problems between employee and employer, which are to some extent inherent in the relationship between journalists and media companies (for example, imagine trying to represent both Hildy Johnson and the *Chicago Post* in connection with lawsuits or investigations spawned by *The Front Page* hijinks), may have been magnified by recent changes in the American Bar Association's Model Rules. Finally, a recent Eleventh Circuit decision illustrates the significant dangers for all media lawyers – and ultimately for their clients – in connection with confidential source cases.

Miller, Woodward, Cooper, and Novak at odds with management

Miller

Judith Miller's problems with *The New York Times*, in the wake of her decision to testify in the Fitzgerald investigation, have been well publicized in the media. For example, in October 2005, after Miller left jail and agreed to testify to a Washington, DC, grand jury investigating Vice President Cheney's chief of staff Lewis "Scooter" Libby, and the information about her confidential source relationships became generally known, Bill Keller, the executive editor of *The Times*, wrote an internal email message to *Times* employees stating: "If I had known the details of Judy's entanglement with Libby, I'd have been more careful in how the paper articulated its defense and perhaps more willing than I had been to support efforts aimed at exploring compromises."[1] He also noted that Miller had misled her editors about whether she had been "on the receiving end of the [Bush Administration's] anti-Wilson whispering campaign."[2]

Miller defended herself, stating in a letter to the editor upon her resignation on November 9, 2005, that she had "always written the articles assigned to [her], adhered to the paper's sourcing and ethical guidelines, and cooperated with editorial decisions, even those with which [she] disagreed."[3]

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[1] Howard Kurtz, *A Split Between The Times & Miller?*, N.Y. Times, Oct. 22, 2005, at C1. (Available at http://www.washingtonpost.com/wp-dyn/content/article/2005/10/21/AR2005102102037_pf.html)

[2] *Id.*

[3] Judith Miller, *Judith Miller's Farewell*, N.Y. Times, Nov, 10, 2005, at A28**.** (Available at http://judithmiller.org/news/p20051101.php#76) (This is Judith Miller's website. The original in the Times is behind their subscription wall.)

Meanwhile, in a detailed article in *The New Yorker*, Bob Bennett, Miller's personal criminal lawyer, told Ken Auletta that he "was astonished that Keller and [*New York Times* publisher] Sulzberger had not inspected Miller's [reporter's] notebook" before they agreed to come to her defense.[4]

Woodward

A few weeks after the Miller episode exploded in the media, after a federal indictment had been handed down by a Washington, DC, grand jury against Libby, former Watergate investigative reporter Bob Woodward suddenly announced that he, too, had a similar confidential source problem. Woodward's editors at *The Washington Post* had been unaware of Woodward's Bush Administration contacts when they sought, with their lawyers' assistance, to navigate through various subpoena disputes with Special Counsel Patrick J. Fitzgerald, who was investigating the leaking of the name of a Central Intelligence Agency operative, Valerie Plame.[5]

Woodward apologized to *The Washington Post* about his failure to disclose his contacts to his editors.[6] He told *Post* executive editor Leonard Downie Jr. that he held back the information because he was worried about being subpoenaed by Fitzgerald, in connection with the investigation.[7] "I hunkered down" said Woodward. "I'm in the habit of keeping secrets. I didn't want anything out there that was going to get me subpoenaed."[8]

Woodward was immediately criticized by *Washington Post* ombudsman Deborah Howell, who said that the newspaper took a "hit to its credibility" and called for more oversight of Woodward's work.[9] "He has to operate under the rules that govern the rest of the staff -- even if he's rich and famous," Howell wrote.[10] She also said that Woodward had committed a "deeply serious sin" by keeping Post Executive Editor Leonard Downie in the dark about his source for more than two years.[11]

In a statement reported in the *Post*, Downie agreed that Woodward had made a "serious mistake" in not informing him about the Plame conversation, Downie says, even as Woodward was repeatedly criticizing Fitzgerald as a "junkyard dog" whose conduct in issuing subpoenas to reporters was "disgraceful."[12]

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[4] Ken Auletta, *The Inheritance*, The New Yorker, Dec. 19, 2005. (Available at http://www.newyorker.com/fact/content/articles/051219fa_fact)

[5] Howard Kurtz, *Woodward Apologizes to Post For Silence on Role in Leak Case,* Wash. Post, Nov. 17, 2005. (Available at http://www.washingtonpost.com/wp-dyn/content/article/2005/11/16/AR2005111601286.html)

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] Deborah Howell, *Tough Week for The Post and a Star,* Wash. Post, Nov. 20, 2005, at B6. (Available at http://www.washingtonpost.com/wp-dyn/content/article/2005/11/19/AR2005111900964.html)

[10] *Id.*

[11] *Id.*

[12] Jim VandeHei and Carol D. Leonnig, *Woodward Was Told of Plame More Than Two Years Ago*, Wash. Post, Nov. 16, 2005, at A1. (Available at http://www.washingtonpost.com/wp-dyn/content/article/2005/11/15/AR2005111501857.html)

Cooper

The Valerie Plame investigation also led to one more company-employee problem. Matthew Cooper, a Washington reporter for *Time* magazine, and Time Inc. were subpoenaed by Mr. Fitzgerald. Cooper resisted testifying about information supplied by his confidential source, even after the United States Supreme Court denied review of his case.[13] However, Time's lawyers were aware that the source's identity was exposed in an internal Cooper email and the magazine decided it would comply with the subpoena.[14] Norman Pearlstine, Time's editor-in-chief, announced that the company would produce the information sought by Mr. Fitzgerald rather than face civil contempt.[15]

In a July 17, 2005 interview, Cooper told CNN viewers that he disagreed with this decision, because he feared it could hinder *Time* correspondents' ability to persuade potential sources to provide newsworthy information to the magazine.[16] "This is one of the things I was concerned about when I argued for holding out, because I thought that there might be fallout like this," Cooper said.[17] He also said that reporters would work to find ways to shield their sources' identities from management, and predicted that *Time* reporters "will take it upon themselves to put less in e-mail, you know, to put less in electronic form that the company owns and protect things better."[18]

Novak

Meanwhile, in December 2005, another *Time* reporter, Viveca Novak, gave a grand jury deposition. According to her account in Time, in May 2004, she met with Robert Luskin, the attorney for President Bush's advisor Karl Rove and advised him that she had heard in *Time's* newsroom that Rove was one of the confidential sources for Cooper.[19] (Cooper and Time were resisting the prosecutor's grand jury subpoena at the time, and refusing to testify.)

Novak did not tell *Time*'s editors about this conversation, and that she may have tipped off Rove's lawyer about the fact that his client was Cooper's confidential source.[20] Nor did she advise her editors that Fitzgerald was interested in her testimony.[21] Indeed, on November 10, 2005, Novak and her lawyer met with prosecutors for two hours, without notifying any of her *Time* editors.[22]

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[13] *Cooper v. U.S.*, 125 S.Ct. 2977 (2005).

[14] Carol D. Leonnig, *Time Will Surrender Reporter's Notes*, Wash. Post, July 1, 2005, at A1. (Available at http://www.washingtonpost.com/wp-dyn/content/article/2005/06/30/AR2005063002111_pf.html)

[15] *Id.*

[16] *Journalist at Center of Leak Probe Criticizes Time Boss*, CNN, July 17, 2005. (Available at http://www.cnn.com/2005/POLITICS/07/17/cooper.sources/)

[17] *Id.*

[18] *Id.*

[19] Viveca Novak, *What Viveca Novak Told Fitzgerald,* TIME, Dec. 11, 2005. (Available at http://www.time.com/time/magazine/article/0,9171,1139780,00.html)

[20] *Id.*

[21] *Id.*

[22] *Id.*

Novak and her editors agreed that she should take a leave of absence while they consider her future at the company. According to an account of this incident published in *The Washington Post* on December 12, 2005:

> [Novak] said she hoped she would not have to go before the grand jury. She hired a lawyer and opted not to tell her editors in hopes that she would not become a figure in the story and the subject of news accounts. But on the day she was writing a story about Washington Post reporter and Assistant Managing Editor Bob Woodward being deposed in the investigation, she learned Fitzgerald wanted to interview her under oath.
>
> Time Managing Editor Jim Kelly said yesterday he and Novak agreed in conversations Saturday evening that she needed to "take a deep breath," and that Kelly needed time to deliberate about her performance and future. "Clearly, there was a failure to keep her bureau chief posted about this," he said. "It's fair to say I am disturbed by that."[23]
>
> Kelly added, "there was no struggle" and the two agreed to temporarily part ways. "I take very seriously what's happened, and Viveca takes it very seriously, too," he said.[24]

As Kelly succinctly noted in a December 12, 2005 *New York Times* article, "I'm upset and she's upset."[25]

Given these disputes (or at least significant communications breakdowns) between media executives and reporters in the middle of the most significant confidential source cases since *Branzburg v. Hayes*, one lesson is clear. Company management and journalists should work together more effectively in handling future confidential source cases.

But the role of media lawyers in facilitating this coordination is complicated by recent changes in the American Bar Association's Model Rules, which are the basis of the legal ethics rules in 44 states and the District of Columbia.[26] These amendments, which were proposed by the ABA's Ethics 2000 Commission in the wake of corporate scandals involving Enron Corporation, WorldCom Inc., and others, and made final in February 2002, [27] may make joint representations more difficult, and may force media lawyers to disclose client confidences and to reveal their clients' confidential sources if the clients refuse to do so.

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[23] Carol D. Leonnig and Jim VandeHei, *Time Reporter May Have Tipped Rove's Lawyer to Leak, Wash. Post,* Dec. 12, 2005, at A4. (Available at http://www.washingtonpost.com/wp-dyn/content/article/2005/12/11/AR2005121100400.html)

[24] *Id.*

[25] David Johnston, *Reporter Recounts Talk About C.I.A. Leak*, N.Y. Times, Dec. 12, 2005. (Available at http://www.nytimes.com/2005/12/12/politics/12leak.html)

[26] Lonnie T. Brown, Jr., *Symposium: Ethics 2000 and Beyond: Reform or Professional Responsibility as Usual?*, 2003 U. Ill. L. Rev. 1173 (2003).

[27] American Bar Association, Center for Professional Responsibility, *Ethics 2000 Commission*. (Available at http://www.abanet.org/cpr/ethics2k.html)

ABA Model Rule 1.7 and joint representations

In those jurisdictions where it is adopted, ABA Model Rule 1.7 governs an attorney's joint representation of media companies and their employees. The rule states:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> > (1) the representation of one client will be directly adverse to another client; or
> >
> > (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> > (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
> >
> > (2) the representation is not prohibited by law;
> >
> > (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
> >
> > (4) each affected client gives informed consent, confirmed in writing

In what circumstances can or should a lawyer represent both reporter and media company in defending them in connection with a confidential source investigation? Assuming such joint representation is permissible, what factors would apply in analyzing the risks and benefits and in securing appropriate informed consent from both clients? As shown by the repeated revelations of apparently divergent interests between reporters and their employers during the course of the Fitzgerald investigation, the risks of concurrent conflicts of interest cannot be ignored.

The Fitzgerald-related problems suggest what types of questions might be considered in securing informed consent for such joint representations. For example, in connection with the joint representation of a future Judith Miller and her employer, the risk of possible job-related repercussions would be a factor to consider, as would the contents of the reporter's notes. If those notes belong to the reporter, and not to the newspaper, is it in Miller's interest to share them with her editors at *The New York Times* as part of a joint representation, or even with its lawyers in order to assess whether a concurrent conflict exists? If such disclosure creates job-related dangers for Miller, by revealing her alleged "entanglement" with a particular government source, is a joint representation appropriate?

The Matthew Cooper case presents a different set of risks. The Cooper incident suggests that the presence of electronic data on a company's servers could identify the source, which may be an

important factor in determining whether the reporter's confidential source defense is ultimately viable, if and when his employer is subjected to a court order and is forced to address the significant legal and market risks of corporate defiance. The source of these dangers is not simply the existence of digital information in Time's possession; knowledge of Cooper's confidential source information by *Time* editors would likely lead to the same result.

Yet, the lack of such corporate knowledge is precisely what the Bob Woodward scenario presents, by blindsiding his editors at *The Washington Post* in their coverage of the Fitzgerald-related proceedings and possibly their own strategic litigation decisions. The Viveca Novak problem is the inverse of Woodward – in effect, she had become a source for her source as she revealed what she had heard in *Time*'s newsroom without the knowledge of *Time*'s editors, but she failed to keep her editors informed as she was dragged into the Fitzgerald investigation. (This suggests another risk factor in representing companies, and in particular for joint representations involving reporters – the danger that confidential information may become very widely disseminated within an organization.)

Obviously, the defense of significant confidential source litigation requires intense coordination between reporter and media company and careful attention to the sometimes conflicting pressures of journalistic and legal imperatives. Joint representations are ideally suited to addressing these goals. But, as the Fitzgerald-related cases illustrate, there are significant risk factors that must be addressed in analyzing whether a joint representation is appropriate.

ABA Model Rule 1.6: the confidentiality rule

ABA Model Rule 1.6, which contains the general prohibition against disclosure of "information relating to the representation of a client", has added a new exception (Model Rule 1.6(b)(4)) to the nondisclosure principle, which allows lawyers to reveal client confidences and secrets "to comply with other law or a court order." (Prior to the new ABA Model Rules, there were only two exceptions – first, "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or bodily harm" and, second, "to establish a claim or defense on behalf of the lawyer and the client" and related defenses.)

How broad is this exception, and, given the prevalence of court orders in confidential source litigation, might the exception in effect swallow the basic rule of confidentiality when lawyers are privy to the identities of their clients' confidential sources? Comment 11 states that:

> A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(4) permits the lawyer to comply with the court's order.

As the discussion of *Price v. Time Inc.*, *infra*, illustrates, the application of a court order to the lawyer representing a reporter or media company is not a hypothetical risk in confidential source litigation. Coupled with the extension of the media client's disclosure obligations to the media client's lawyer imposed by the *Price* case, discussed below, this Model Rule revision, which allows a lawyer to avoid contempt by disclosing client confidences, raises the stakes of joint (or even single) representations significantly and may also constitute a type of concurrent conflict under Model Rule 1.7(a)(2).

The joint representation risks are potentially aggravated by several additional amendments to ABA Model Rules 1.6 and 1.13, which originated in August 2003, when the ABA Board of Governors adopted various recommendations from the ABA Task Force on Corporate Responsibility (the Cheek Commission) relating to lawyer obligations in cases of corporate client misconduct. Among its recommendations, the Cheek Commission proposed: (1) to amend Model Rule 1.13 to require lawyers who have knowledge of "facts from which a reasonable lawyer, under the circumstances, would conclude" that an officer, employee, or person associated with an organization has committed or intends to commit "a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization" to report this information up-the-line, even to the board of directors if necessary, and permit disclosure of corporate lawyer-client communications to third parties if the company's "highest authority" refuses to act "with respect to a clear violation of law" and the lawyer "reasonably" believes "that the violation is reasonably certain to result in substantial injury to the organization"; (2) to amend Model Rule 1.6 to broaden lawyers' discretion to reveal client confidences when reasonably necessary to prevent or mitigate corporate conduct that will result in substantial financial or property injury to third parties; and (3) to amend Model Rule 1.6 to require disclosure of client confidences when necessary to prevent client criminal conduct including violations of federal securities laws, that will result in "substantial financial or property injury to third parties."

As adopted, ABA Model Rule 1.6 now states that disclosure of client confidences is allowed "to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services" and "to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services." In addition, ABA Model Rule 1.13 now states that: "If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization." Furthermore, if the "highest authority" in a corporation fails to take appropriate action in response to any "action, or a refusal to act, that is clearly a violation of law" and "the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization," then "then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure . . . if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization."

Joint representation in these dire circumstances now presents additional risks beyond the ordinary. The changes to the ABA Model Rules, clearly aimed to promote the interests of the corporation in any representation of a corporation, add additional complications in connection with any effort by attorneys undertaking a joint representation of a reporter, who is eager to protect and defend his or her confidential source information, and the corporation itself, with additional obligations to shareholders and with its lawyers required to comply with a duty to disclose to third parties client confidences relating to those violations of law that will result in "substantial injury" to the corporation's interests.

Price v. Time Inc. and the risks of ABA Model Rule 3.3

Joint representation is not the only problem for practitioners seeking to defend media clients in connection with confidential source matters. A recent federal appellate decision raises the stakes further, and suggests that courts may impose on media lawyers a duty to disclose their client's confidential disclosures to them about their confidential sources because of the misconduct of third parties. Recent modifications to the ABA Model Rules have increased this risk in those states that have adopted the Model Rules.

In its July 15, 2005 decision, *Price v. Time Inc.*, 416 F.3d 1327 (11th Cir. 2005), the Eleventh Circuit ruled that *Sports Illustrated*, a magazine, could not avail itself of Alabama's shield law in defending against a defamation action brought by former Crimson Tide football coach Mike Price. At issue in the lawsuit was a story which detailed alleged sexual shenanigans by Price after a visit to a Pensacola topless bar. The court agreed that a First Amendment confidential source privilege existed, but suggested that the privilege might be overcome by the plaintiff if, after taking depositions from the four women who were possible sources for the story, the source for the story was not apparent.

In considering possible problems arising from these depositions, the Eleventh Circuit went further, and surprised some legal ethics practitioners, when the panel suggested that defense counsel had a **duty as an "officer of the court"**[28] to reveal to the trial court the identity of his client's confidential source when the plaintiff takes depositions of the four women and none of them admits to being the source of the *Sports Illustrated* article. The court stated:

> At oral argument we asked counsel for the defendants about his duty to correct false testimony that he hears a witness give on a material matter. More specifically, we asked him point blank what he would do if he heard the person he knows to be the confidential source deny under oath in deposition that she was the confidential source. It would be fair to say that counsel was somewhat uncomfortable with this question, but he did assure us that he would do his duty as an officer of the court and inform the district court that the witness' sworn denial was false. That assurance is important to our decision that Price should be required to depose the four women, one of whom almost certainly is the confidential source, before the defendants are forced to divulge the source's name. It is important because it assures us the identity of the confidential source (or perhaps the absence of one) is virtually certain to be discovered either from the deposition testimony of

[28] Does this concept mean that such a forced disclosure constitutes governmental or state action, which might trigger a First Amendment violation directly?

> the women or through the ethically compelled disclosures of counsel for the defendants, correcting any material testimony that he knows to be false.

On August 5, 2005, the lawyer for Time Inc., and the reporter, Don Yaeger, filed a petition for panel rehearing. The lawyer conceded that he had been asked "a series of hypothetical questions probing what might occur in those depositions" and that, when the court inquired "what he would do if he heard the confidential source deny under oath that she was the confidential source," he answered "that he would inform the District Court about the false testimony."

His petition added: "The undersigned now realizes that his answer to the Court's questions [was] in error." This was because neither the Alabama Rules of Professional Conduct nor the American Bar Association's Model Rules of Professional Conduct mandate such a duty "when testimony is given in a pretrial deposition." Rather, "the rules only require an attorney to correct false testimony if that testimony has been offered by the lawyer on his client's behalf." Time's petition requested that the decision be modified because, if left corrected, "the panel's opinion will serve as a precedent based upon a misconception."

According to the petition, Alabama Rule of Professional Conduct ("Ala. RPC") 3.3(a)(3) prohibits a lawyer from "knowingly" offering evidence that the lawyer "knows to be false" but sitting through a deposition is not tantamount to "offering" evidence. Thus, if the plaintiff takes the depositions of the alleged sources, and one of them lies in denying she was the source, counsel for defendants "will have no obligation to correct the testimony at that time because counsel will not be 'offering' it."

The language of Alabama's rule certainly supports Time's argument, because its duties (as regards false evidence) turn on whether the lawyer "offered" the evidence. Indeed, Ala. RPC 3.3(a) states as follows:

> (a) A lawyer shall not knowingly[29]:
>
> > (1) make a false statement of material fact or law to a tribunal;
> >
> > (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
> >
> > (3) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.
>
> (b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

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[29] Both the former, and current, ABA Model Rules define the terms "knowingly," "known," or "knows" as denoting "actual knowledge of the fact in question" and note that a "person's knowledge may be inferred from circumstances." There may be situations where a lawyer, by piecing together information from the case, suspects, thinks, and even believes that a particular witness is lying, and maybe has concluded that a jury will find so, but does the lawyer have "actual knowledge" of that fact?

Time's argument is also supported by the *Restatement (Third) of the Law Governing Lawyers*, which states (at § 120, comment d) that a lawyer has no duty to correct false deposition testimony by an opposing party or witness – indeed, the *Restatement* suggests that a lawyer may have strategic reasons for not correcting the false testimony of a third-party witness before trial. Any contrary rule, the petition argued, would imperil the attorney-client privilege (assuming the clients have disclosed the identity of the source to their counsel) and result in a conflict of interest between client and lawyer.

In response to Time's petition for rehearing, Price did not take issue with the ethics law cited by Time but instead argued that the panel should either stand by its original opinion, which had ordered Price to conduct depositions of the four women premised on the assurance given by opposing counsel that false testimony would immediately be rooted out, or eliminate the First Amendment requirement of exhaustion of alternate sources and force Time to reveal the identity of its source. "The potential for mischief and prejudice to Price," his lawyer argued, "is not vague or speculative if the avoidance of the assurance of identifying the source is permitted."

Time, in reply, stated that the issue was not whether the trial court could order the **clients** to disclose the name of the confidential source after Price had exhausted other alternatives during the depositions and had met the other elements for overcoming the qualified First Amendment confidential source privilege. Rather, Time suggested, the issue presented by the petition was whether the **lawyer** could also be compelled to disclose that information.

On September 16, 2005, the Eleventh Circuit denied the petition, with unusually strong language -- stating that "in imposing [the] requirement [to depose the four women before seeking access to information in Time's possession] we took into account this assurance given to us by counsel for the defendants." Given this "commitment", the court added, the later argument, "that it is the perfect prerogative of an officer of the court to stand silently by as the search for truth is led astray by perjury – assuming, of course, that the perjury serves his client's interests," was "an interesting position."

In this case, the court said, it would simply "hold counsel to his word. Even if lawyers cannot be counted on to inform the court on all occasions when a witness is perjuring herself, we think courts still have the right to hold lawyers to their word."

The Eleventh Circuit allowed the decision to be amended in one matter. In response to the argument from Time's attorney that its ruling created a conflict because the client, not the lawyer, has the disclosure duty, the court amended its decision – by stating that the lawyer's duty to disclose the identity of the confidential source in this case would not arise until the clients had refused to comply with a trial court's disclosure order after the four depositions had concluded. If the clients do not reveal the source's identity, the court added, counsel would have a duty to do so. The Eleventh Circuit agreed that this ruling put the defense lawyer in a "difficult situation" but stated it was "confident" that his clients would not "attempt to defy a court order."

So, aside from the obvious problem of the risks of representations made and questions answered during oral argument which a lawyer might later regret[30], what ethical issues are presented

[30] The problems created by concessions during oral arguments are not unfamiliar to the First Amendment Bar. As Floyd Abrams notes in his recent memoir, *Speaking Freely: Trials of the First Amendment*, Yale Law professor Alexander Bickel, who argued the "Pentagon Papers" case in the Supreme Court, made a crucial concession – that his clients' right to publish was not absolute and that the publication could be halted if the Court found it would

here? Does a lawyer owe a duty to the court to reveal confidential client information about a client's confidential source simply because a third-party witness becomes uncooperative or attempts to shade the truth? From a legal ethics perspective, given the language of the Alabama Rule, the legal analysis offered by Time's lawyer on the petition for rehearing seems relatively straightforward. Sitting through a deposition is not the same as offering testimony.

But the panel's comments raise some troubling and tricky issues about what ethics requirements exist after the deposition has been concluded and motion practice relative to the deposition testimony – and court hearing or even a trial – has begun. Furthermore, the stakes have potentially been raised by the changes made in the ABA Model Rules which are now under consideration by various states. (For the current state-by-state status report about these ABA proposals, check the listing at http://www.abanet.org/cpr/jclr/ethics_2000_status_chart.pdf.)

Prior to the ABA's Ethics 2000 proposals, as shown by the Alabama language, the lawyer's duty of candor to the court focused on knowingly "false" "evidence" that the lawyer "has offered" to the Court, not on false testimony by the opponent or by witnesses that is not "offered" by the lawyer. As shown by the Alabama language, the duty of candor to the court was governed by ABA Model Rule 3.3(a), which states that a lawyer shall not "knowingly":

> . . .
>
> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

The ABA Model Rules, however, now include a new provision, ABA Model Rule 3.3(b), which by its terms may mandate a duty of disclosure arising from the "criminal" or "fraudulent" conduct of any "person" that happens to be "related to"[31] any court proceeding:

> (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

Also, the ABA reforms have added a new subsection (c), which apparently mandates the elimination of the attorney-client privilege of the client, by requiring the lawyer to take action to remedy the person's wrongdoing "even if compliance requires disclosure of information" that is an

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cause the deaths of innocent American soldiers -- which Abrams believes garnered enough votes among the Justices to win a majority of the Court. Nonetheless, a few days after the argument, one of Bickel's clients, the ACLU, filed a post-argument memorandum with the Court, disavowing (in Bickel's words) his "inclinations to humanity."

[31] Is a civil deposition – which has not yet been offered into evidence by anyone, or even transcribed – "related" to a court proceeding? (The deposition takes place in a pending "proceeding" certainly.) The author hasn't looked into this interesting question, but history buffs may recall that this very issue was discussed by commentators *ad nauseam* during the recent Clinton-Lewinsky brouhaha, when the President's opponents insisted that perjury had occurred when the President denied under oath any "sexual relations" with Lewinsky.

attorney-client communication, when the duty to take "reasonable remedial measures" arises under subsection (b).

This novel duty to break client confidences merely to report on the fraud or misconduct by any "a person" in connection with anything "related" to a "proceeding" is potentially far-reaching,[32] but the ABA has suggested that it is not a major change from existing law. As the ABA Commission noted in its report:

> The Commission recommends adoption of a new provision (b) addressing the lawyer's obligation to take reasonable remedial measures, including disclosure if necessary, where the lawyer comes to know that a person is engaging or has engaged in any sort of criminal or fraudulent conduct related to the proceeding. This new provision incorporates the substance of current paragraph (a)(2), as well as ABA Model Code of Professional Responsibility DR 7-102(B)(2) ("A lawyer who receives information clearly establishing that a person other than the client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal") and DR 7-108(G) ("A lawyer shall reveal promptly to the court improper conduct by a venireperson or juror, or by another toward a venireperson or juror or a member of the venireperson's or juror's family, of which the lawyer has knowledge").

Thus, if and where these ABA reforms are adopted, a duty to disclose confidential client information about a confidential source may arise if the lawyer "knows" that a deponent lied during a deposition that is "related" to the adjudicative proceeding – even if the lawyer is not offering that testimony, and even if the lawyer's knowledge that the confidential source has lied stems from a confidential communication from his or her client. (Of course, this analysis may differ depending on whether and to what extent a state adopts the ABA's proposed language.)

The *Price v. Time Inc.* case, which after all focused on the deposition stage of the confidential source battle and later settled, has not yet addressed that issue – and, with the order on the petition for rehearing, which has transformed the legal rule threatened by the initial panel decision into nothing more than a judicial remedy for a lawyer's *faux pas,* the decision seems to have little precedential value in evaluating these ethics risks. But, as more states adopt the new ABA Model Rules, media lawyers in the future may encounter the problem – and, given this risk, should carefully consider when and whether they want to learn the name of any confidential source from their clients. The risk that a court will order a lawyer to disclose confidential client communications whenever any "person" lies during a deposition has been increased with these rules changes.

Can you safeguard your client's confidences if you can no longer safeguard your own? Obviously, if a lawyer learns the name of the confidential source, at least in those states where the ABA reforms are applicable, the lawyer should carefully read the applicable ethics rules and consider how to navigate through the problems apparently created by any changes made by the ABA Model Rules.

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[32] To carry the Clinton analogy further, under ABA Model Rule 3.3(b), would the attorney for Monica Lewinsky owe a duty to disclose her confidential communications to him as soon as he learned that the President, in his *Jones v. Clinton* deposition, had denied having "sexual relations" with her? The answer would appear to be yes, given that Comment 1 to Rule 3.3 states that the obligation imposed by the Rule applies even when a lawyer "is representing a client in an ancillary proceeding . . . such as a deposition."

Conclusion

The Fitzgerald investigation has revealed several fissures between reporters and management relating to the appropriate defense strategy in responding to confidential source litigation. Yet, the same investigation also shows the importance of securing ample coordination and cooperation between reporters and management in responding to the journalistic and legal problems created by such investigations. In such circumstances, joint representation may be ideally suited to facilitate such a strategy, assuming that "concurrent" conflicts are analyzed and addressed in a joint representation engagement letter.

The court's ruling in *Price v. Time Inc.*, and the threats its opinions present to effective lawyering, however, suggest a broader danger for media lawyers that is created with the adoption of the Model Rules. The case raises the broader question: Are media lawyers to become guarantors, in effect, of the honesty of every witness – even third party witnesses – who happen to testify in confidential source cases?

If so, then in some circumstances a corporate client discloses to its lawyer (and, given the Cheek Commission changes to the Model Rules, a jointly-represented employee doubly so) the identity of a confidential sources at its risk, and at the risk of further sanctions for the unwitting media lawyer who becomes privy to such confidences. If the lawyer is to become an unwilling snitch for corporate and individual clients, it is questionable whether even minimal coordination and cooperation is even possible, because the media clients must in that event insulate the attorney from any knowledge of the confidential source's identity. Indeed, if client confidences are to be stripped at the whim of a single dishonest witness, it is unlikely that any legal defense of any client could ever be undertaken effectively.

Whether these significant changes to existing legal duties were contemplated by the drafters of these revised Model Rules is questionable. The paradigm at the time of the amendments, and the intended target for the rules changes, was an Enron or a WorldCom. As suggested by the *Price v. Time Inc*. litigation, the risk is that the new duties of disclosure mandated by these Model Rules will be extended beyond corporate crooks such as Enron and WorldCom and deny effective legal representation to corporate and individual media clients seeking to vindicate basic civil liberties and defend fundamental First Amendment principles.