The Role of News Leaks in Governance and the Law of Journalists' Confidentiality, 1795-2005

RICHARD B. KIELBOWICZ*

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* Associate Professor, Department of Communication, University of Washington. B.A., College of Wooster, 1975; M.A. and Ph.D., University of Minnesota, 1978, 1984.

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I. INTRODUCTION

News leaks from government sources began appearing in the press even before the nation's capital relocated to the District of Columbia in 1800, and they have remained a staple of American political communication ever since.[1] Leaks have boosted the efforts of some public officials, enraged others, and triggered occasional investigations for more than two hundred years. Only rarely, however, did disputes over the identity of government sources end up in court, leaving journalists' confidentiality law to coalesce from cases with factual settings bearing little resemblance to the typical political leak. Most notably, *Branzburg v. Hayes*,[2] the

1. The term *leak* originally applied to inadvertent slips by sources but has since acquired a broader, more active meaning. A leak is the calculated release of information to reporters with the stipulation that the source remain unidentified. *See* HATCHET JOBS AND HARDBALL: THE OXFORD DICTIONARY OF AMERICAN POLITICAL SLANG 162-63 (Grant Barrett ed., 2004); 8 OXFORD ENGLISH DICTIONARY 759 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989). Leaks authorized by an agency's officials are sometimes known as plants. *See* STEPHEN HESS, THE GOVERNMENT/PRESS CONNECTION 75 (1984). Though now dated, the most thorough review of different conceptions of leaks is Muhammad A. Dahlan, Anonymous Disclosure of Government Information as a Form of Political Communication 19-38 (1967) (unpublished Ph.D. dissertation, University of Illinois) (on file with Author). *See also infra* Part IV (discussing the various types of leaks). For this Article, *leak* denotes any information released to the press by a government source with an expectation of anonymity, ranging from high-ranking elected or appointed officials to staff members or employees. Leaks can also spring from nongovernmental institutions, but as used here the term carries the narrower meaning of a source in government. For a discussion of whistleblowing in business that notes important parallels with leaks from government, see, for example, Terry Morehead Dworkin & Elletta Sangrey Callahan, *Employee Disclosures to the Media: When Is a "Source" a "Sourcerer"?*, 15 HASTINGS COMM. & ENT. L.J. 357 (1993).

2. 408 U.S. 665 (1972) (rejecting a First Amendment privilege for reporters to refuse to testify before grand juries when witnessing possible crimes). For further discussion of this case, see *infra* Part III.B.

Supreme Court's only direct engagement with journalists' confidentiality,[3] never mentioned the word *leak* and only obliquely addressed the place of anonymous sources in political communication.[4] Journalists' confidentiality law thus developed with scant consideration for the role of leaks in governance.[5]

A spate of recent stories highlights the importance of leaks and reminds journalists of the tenuous legal status of any confidentiality promises they make.[6] In 2005, a special counsel hauled several journalists before a grand jury, and jailed one for twelve weeks in pursuit of sources who had leaked the name of a Central Intelligence Agency (CIA) operative.[7] Later that year the *Washington Post* published a story, based on leaks, about secret overseas U.S. prisons for terrorists,[8] and the *New York Times* revealed that the National Security Agency had been monitoring telecommunications without warrants since the terrorist attacks on September 11, 2001.[9] Both of these stories also triggered leak

3. Since *Branzburg*, "the Court has never again accepted for review a case directly raising issues surrounding the constitutional privilege," and has provided only indirect guidance in other types of cases. C. THOMAS DIENES, LEE LEVINE, & ROBERT C. LIND, NEWSGATHERING AND THE LAW 930 (3d ed. 2005). "Perhaps because these infrequent and decidedly nondefinitive clues concerning the contours of the privilege are all that the Court has offered since *Branzburg*, they continue to be consulted and interpreted with something approaching talmudic passion." *Id.*

4. The Court cites, but does not discuss, its seminal case dealing with anonymous communication by a pamphleteer. *Branzburg*, 408 U.S. at 680 (citing Talley v. California, 362 U.S. 60 (1960)).

5. *See* Monica Langley & Lee Levine, Branzburg *Revisited: Confidential Sources and First Amendment Values*, 57 GEO. WASH. L. REV. 13, 14, 32-33 (1988).

6. Besides the major controversies surrounding leaks discussed in this paragraph, another set of 2005 cases held the attention of journalists. Several reporters were held in contempt for refusing to identify government sources sought by Dr. Wen Ho Lee for his suit claiming that leaks accusing him of espionage had violated his rights under federal privacy law. *See* Lee v. Dep't of Justice, 413 F.3d 53 (D.C. Cir. 2005); Lee v. Dep't of Justice, 401 F. Supp. 2d 123 (D.D.C. 2005); *infra* notes 223-34 and accompanying text.

7. *In re* Grand Jury Subpoena, Judith Miller, 397 F.3d 964, 966-67 (D.C. Cir. 2005); *see also* David Johnston & Richard W. Stevenson, *Cheney Aide Charged with Lying in Leak Case*, N.Y. TIMES, Oct. 29, 2005, at A1; David Johnston & Richard W. Stevenson, Times *Reporter Gives Testimony in C.I.A. Leak Case*, N.Y. TIMES, Oct. 1, 2005, at A1; *infra* Part III.D.

8. Dana Priest, *CIA Holds Terror Suspects in Secret Prisons; Debate Is Growing Within Agency About Legality and Morality of Overseas System Set up After 9/11*, WASH. POST, Nov. 2, 2005, at A1.

9. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

investigations.[10] Even history fueled the debate over leaks in 2005. Deep Throat, the anonymous source who had kept the *Washington Post*'s Watergate reporting on track, stepped forward to end thirty years of speculation about his identity.[11]

When leaks produce legal battles over the identities of unnamed sources, an uncommon occurrence until recently,[12] journalists' confidentiality law treats them as disputes over evidence and ignores both their origins as political speech and their value to governance. Unlike the situations presented in *Branzburg*, the recent CIA leak case stemmed from partisan and bureaucratic maneuvering. The leak itself targeted a George W. Bush administration critic, while the ensuing probe to ferret out the unnamed sources was partly actuated by CIA and White House officials jockeying to blame each other for intelligence failures.[13] Although the appellate court noted the political roots of the case and used the word *leak* throughout its opinions, the legal rules it applied adhered closely to

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10. *See, e.g.*, David Johnston & Carl Hulse, *C.I.A. Asks Criminal Inquiry Over Secret-Prison Article*, N.Y. TIMES, Nov. 9, 2005, at A18; Scott Shane, *Criminal Inquiry Opens into Leak in Eavesdropping*, N.Y. TIMES, Dec. 31, 2005, at A1. The secret-prisons story even triggered a leak investigation overseas. *See* Doreen Carvajal, *Swiss Investigate Leak to Paper on C.I.A. Prisons in Eastern Europe*, N.Y. TIMES, Jan. 12, 2006, at A11.

11. *See* BOB WOODWARD, THE SECRET MAN: THE STORY OF WATERGATE'S DEEP THROAT (2005); John D. O'Connor, *"I'm the Guy They Called Deep Throat,"* VANITY FAIR, July 2005, at 86; *see also infra* notes 359-62 and accompanying text (discussing the role of leaks in Watergate).

12. Accurate counts of subpoenas seeking the identity of government sources as a subset of all subpoenas served on the press are elusive. The Reporters Committee for Freedom of the Press most thoroughly tracks legal battles involving all aspects of journalists' confidentiality. *See* Shields and Subpoenas, http://www.rcfp.org/shields_and_subpoenas.html (last visited Apr. 7, 2006). The Committee's homepage, http://www.rcfp.org/ (last visited Apr. 7, 2006), refers to "the unprecedented number of federal subpoenas." *See also* Douglas McCollam, *Why the Plame Case Is So Scary: Attack at the Source*, COLUM. JOURNALISM REV., Mar./Apr. 2005, at 29 (2005) (listing several confidentiality cases involving government sources). In the late 1960s and early 1970s, the Nixon administration obtained dozens, maybe hundreds, of subpoenas to get information from the press about counterculture activities, but these did not target sources in government. *See* Margaret Sherwood, Note, *The Newsman's Privilege: Government Investigations, Criminal Prosecutions and Private Litigation*, 58 CAL. L. REV. 1198, 1202 (1970).

13. *See* Scott Shane, *Ex-Diplomat's Surprise Volley on Iraq Drove White House Into Political Warfare Mode*, N.Y. TIMES, July 24, 2005, § 1, at 20 ("Behind the scenes, the Central Intelligence Agency and the National Security Council were skirmishing over who would take the blame for inaccurate intelligence."). Several months later, reports indicated that both President George W. Bush and Vice President Dick Cheney had approved intelligence leaks about Iraq's weapons program. *See* David Johnston & David E. Sanger, *Cheney's Aide Says President Approved Leak*, N.Y. TIMES, Apr. 7, 2006, at A1; *see also* Christopher Hitchens, *The Insider*, N.Y. TIMES, July 24, 2005, § 7, at 8 (comparing Nixon era bureaucratic infighting that led to leaks with intragovernmental disagreements over the Iraq War that prompted leaks).

those established by the Supreme Court in 1972.[14] Other examples further illustrate the political essence of most leaks. For instance, the judge supervising independent counsel Kenneth Starr's investigation of President Bill Clinton felt compelled to appoint a special master in 1998 to examine the flood of leaks from that probe.[15] With leaks so thoroughly steeped in politics, courtrooms hardly seem the most appropriate venue, nor do the customary rules of evidence provide the best tools, to balance the interests at stake.

Journalists' standard argument for an evidentiary privilege—that confidentiality assures a continuing flow of information to the public[16]—understates the importance of leaks. The assertion that informants with sensitive information will dry up unless journalists guarantee their confidentiality applies to all reporter-source relations and ignores considerations specific to leaks from government sources. Speech about government occupies a special place in the American system of free expression. The venerable notion of the press as the fourth estate, one of the checks and balances in governance, partly epitomizes this conception.[17]

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14. *In re* Grand Jury Subpoena, Judith Miller, 397 F.3d 964, 965 (D.C. Cir. 2005) ("[T]his litigation began with a political and news media controversy over a sixteen-word sentence in the State of the Union Address of President George W. Bush on January 28, 2003.").

15. The White House and Starr pointed to one another as the source of the leaks. James Bennet, *Whispered Secrets Start a Loud Debate*, N.Y. TIMES, Feb. 9, 1998, at A15. News analysts observed that this was but the latest instance of a prosecutor seeking tactical advantages by leaking information from supposedly secret grand jury proceedings. *See* William Glaberson, *Pssst, Says Prosecutor to Reporter; I'm All Ears, Is the Reply*, N.Y. TIMES, June 24, 1998, at A22. After several months, Judge Norma Holloway Johnson appointed a special master to investigate whether leaks from the independent counsel's office violated rule 6(e) of the Federal Rules of Criminal Procedure governing grand jury secrecy. *See* Neil A. Lewis, *Judge Cites Possible Improper Leaks by Starr Office*, N.Y. TIMES, Oct. 31, 1998, at A9. The leaks prompted Judge Holloway to order the Justice Department to launch a criminal investigation of Starr's office, but an appeals court reversed. *See* Neil A. Lewis, *A Leak from Starr's Office Was Not Illegal, Court Says*, N.Y. TIMES, Sept. 14, 1999, at A18. Charles G. Bakaly III, former spokesman for the office of independent counsel, was prosecuted but acquitted for lying about leaks. John M. Broder, *Starr's Ex-Spokesman Charged with Contempt in Case on Leaks*, N.Y. TIMES, July 7, 2000, at A10; David Stout, *Aide to Starr Is Acquitted of Contempt*, N.Y. TIMES, Oct. 7, 2000, at A12.

16. *See* Branzburg v. Hayes, 408 U.S. 665, 679-80 (1972) (summarizing petitioners' argument as follows: compelling the disclosure of sources will deter others from providing information "all to the detriment of the free flow of information protected by the First Amendment").

17. *See generally* TIMOTHY W. GLEASON, THE WATCHDOG CONCEPT (1990) (tracing the origins of the watchdog concept in First Amendment theory to nineteenth-century cases); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977

The watchdog role, however, overemphasizes the adversarial nature of press-government relations by discounting the many ways that officials use the media to govern.[18] Leaks warrant a distinct status in confidentiality law because they serve governance both ways. In a system with divided but shared powers, leaks supplement or complement official communications as well as challenge them.

The flow-of-information-to-the-public argument also falls short in court because it conflates two claims—reporters' right to gather news and the public's right to receive it—neither of which rests on solid constitutional footing.[19] In contrast, treating leaks as speech by and about government emphasizes their political and institutional role, shifting the basis for claiming an evidentiary privilege into a new realm. It also distinguishes them from other situations in which journalists invoke an evidentiary privilege. Leaks would thus warrant greater protection whether analyzed using classic First Amendment doctrine, which treats political speech as the core value at stake,[20] or more recent approaches focusing on the social and institutional contexts of communication.[21] As courts grapple with leak cases, and as legislatures,

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AM. B. FOUND. RES. J. 521 (1977) (arguing that the watchdog or checking role of the press underpins a wide range of First Amendment decisions); Potter Stewart, *"Or of the Press*,*"* 26 HASTINGS L.J. 631 (1975) (arguing that the First Amendment's language mentioning the press in addition to speech suggests that the media deserve special institutional protection). The watchdog role fits squarely in the libertarian conception of the press. *See generally* Fred S. Siebert, *The Libertarian Theory of the* Press, *in* FOUR THEORIES OF THE PRESS 39 (Fred S. Siebert, Theodore Peterson, & Wilbur Schramm eds., 1956) (providing the historical, cultural, and philosophical context for the idea that a free press exists in tension with government).

18. *See generally* TIMOTHY E. COOK, GOVERNING WITH THE NEWS: THE NEWS MEDIA AS A POLITICAL INSTITUTION (1998) (providing a historically sensitive look, by a political scientist, at the central role occupied by the press in governance); RICHARD B. KIELBOWICZ, NEWS IN THE MAIL: THE PRESS, POST OFFICE, AND PUBLIC INFORMATION, 1700-1860S (1989) (noting how early Congresses facilitated communication between officials and the electorate by conferring postal privileges on the press). In contrast to the largely negative role for government in the libertarian conception of the press, the social responsibility theory recognizes that government has an affirmative duty to enhance communication. *See generally* 1 ZECHARIAH CHAFEE, JR., GOVERNMENT AND MASS COMMUNICATIONS: A REPORT FROM THE COMMISSION ON FREEDOM OF THE PRESS (1947) (discussing government's various roles in improving public communication consistent with First Amendment principles); Theodore Peterson, *The Social Responsibility Theory of the Press*, *in* FOUR THEORIES, *supra* note 17, at 73 (sketching the historical, technological, and philosophical bases for an affirmative government role in communication).

19. On the right to gather and receive information, see *infra* notes 400-03 and accompanying text.

20. *See infra* notes 389-94 and accompanying text.

21. The work of Frederick Schauer and Robert C. Post are especially noteworthy in rethinking First Amendment analysis. Schauer recommends applying the First Amendment in a fashion that recognizes the "contingent institutional elements of our collective life" instead of categorizing speech "on the basis of the content of the

including Congress,[22] consider shield laws, they should carefully weigh the political and institutional contributions of anonymous communications from government sources. Any judicial or legislative rules governing leaks should start with a strong presumption in favor of protecting a leaker's identity. They should then incorporate elements in the legal analysis beyond the criteria now customarily used in deciding confidentiality cases.[23]

When the Supreme Court first grappled with prior restraints and the rights of reporters to attend criminal trials, it looked to history and the societal functions of the media in establishing presumptions that favored the press.[24] This Article follows a similar path. Part II sketches the role

communication." Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1256, 1259 (2005); *see also* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765 (2004); Frederick Schauer, Comment, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84 (1998). Post focuses less on the institutions of communication, but agrees with Schauer that First Amendment applications should be more sensitive to the "particular social practices" connected with communication and the "nature and constitutional significance of such practices." Robert C. Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1250 (1995).

22. The controversy over contempt citations for journalists in the CIA leak case led to the latest congressional consideration of a federal shield law. *See* Free Flow of Information Act of 2005, S. 1419, 109th Cong. (2005); Free Flow of Information Act of 2005, H.R. 3323, 109th Cong. (2005); Free Speech Protection Act of 2005, S. 369, 109th Cong. (2005). The Senate held hearings on these bills in 2005. *See Reporters' Privilege Legislation: Issues and Implications: Hearings Before the S. Judiciary Comm.*, 109th Cong. (2005), *available at* http://judiciary.senate.gov/hearing.cfm?id=1579; *Reporters' Privilege Legislation: An Additional Investigation of Issues and Implications: Hearings Before the S. Judiciary Comm.*, 109th Cong. (2005), *available at* http://judiciary.senate.gov/hearing.cfm?id=1637. For similar bills introduced in the wake of *Branzburg*, see *infra* Part III.C.1.

23. For a discussion of the traditional elements considered in journalists' confidentiality cases, see *infra* notes 216-19 and accompanying text.

24. In the first prior restraint case to come before it, Near v. Minnesota, 283 U.S. 697, 713 (1931), the Supreme Court relied heavily on a review of historical experience to conclude that such restrictions should be presumed unconstitutional. "The question is whether a statute authorizing such proceedings in restraint of publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed." *Id.* at 713. Similarly, in the Supreme Court's first direct engagement with the constitutional right of the press and public to attend criminal trials, Chief Justice Warren Burger's opinion relied heavily on historical experience and the functional role of the press in reporting on the legal system. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 564-73 (1980). "From this unbroken, uncontradicted history, supported by reasons as valid today as in centuries past, we are bound to conclude that a presumption of openness inheres in the very nature of a criminal trial under our system of justice." *Id.* at 573. Several years later, the Court expressly incorporated historical and functional tests into the process a judge must follow before closing pre- or post-trial proceedings or

of leaks in governance between the adoption of the Constitution and World War II to underscore the integral role leaks have played in the nation's political communication. Part III shows that the general law of journalists' confidentiality before and after *Branzburg* developed with little regard for the distinct institutional contributions of leaks. Part IV provides two perspectives on leaks that underscore their centrality in modern governance. When considered together, these perspectives suggest guidelines for courts as they weigh the value of different types of leaks. Finally, Part V recommends how the legal principles currently regulating journalists' confidentiality can be adjusted slightly to accommodate the contributions of political leaks to governance.

II. A HISTORICAL SNAPSHOT OF LEAKS AND THEIR ROLE IN GOVERNANCE

Leaks to the press have always figured in the formal and informal processes of government, though their frequency and character have changed with developments in journalism and shifts in institutional power. The earliest leaks and leak investigations stemmed from partisan maneuvering in Congress, the principal locus of federal decisionmaking for most of the nineteenth century. With the emergence of the modern administrative state in the late 1800s, leaks began springing from many government agencies as part of a burgeoning culture of news management.

A. Leaks in the Era of Congressional Dominance and a Partisan Press

Leaks that involved Congress in the nineteenth century served at least four purposes. They armed minority factions with the power of publicity, gave lawmakers leverage in battles with the White House, exposed congressional corruption, and prompted investigations of executive departments.[25] To accomplish their goals, congressional leakers typically

sealing pre- or post-trial documents. Press-Enter. Co. v. Riverside Super. Ct., 478 U.S. 1 (1986). In the first phase of the process, a judge determines whether a proceeding or document is presumptively open by considering whether it has historically been open to the press and public, or whether access functions positively in the judicial system and society. *Id.* at 10-12. Although this Article tackles a different topic, it likewise provides background for a historical test in Part II and a functional evaluation of leaks in Part IV.

25. The most thorough studies of congressional leaks and the press are Leigh F. Gregg, The First Amendment in the Nineteenth Century: Journalists' Privilege and Congressional Investigations (1984) (unpublished Ph.D. dissertation, University of Wisconsin) (on file with University of Wisconsin Library); and Thomas H. Kaminski, Congress, Correspondents, and Confidentiality in the Nineteenth Century (1976) (unpublished M.S. thesis, San Diego State University) (on file with Claremont Colleges Libraries) [hereinafter Correspondents and Confidentiality]. *See also* Thomas H. Kaminski, *Congress, Correspondents and Confidentiality in the 19th Century: A Preliminary Study*, 4 JOURNALISM HIST. 83 (1977) (summarizing findings from his thesis).

planted their stories with like-minded partisan newspapers.[26] Investigations of the leaks themselves or the problems they exposed frequently ensnared reporters, some of whom cooperated while others protected their sources. When congressional investigations turned into legal battles over journalists' confidentiality, reporters relied mainly on claims of personal honor that they had given their word, rather than assertions of abstract press rights.

The first significant leak occurred as part of the fierce partisan struggles between Federalists and Jeffersonian Republicans.[27] A 1795 leak by Republican Senators embarrassed President George Washington, the congressional majority, and the Chief Justice—all Federalists. The Senators violated their chamber's order enjoining members to secrecy and passed along to a journalistic ally information about the first treaty signed after the adoption of the Constitution.[28] Negotiated by Chief

26. Early Presidents also wrote anonymously for friendly papers or encouraged others in their administrations to do so. *See* JAMES E. POLLARD, THE PRESIDENTS AND THE PRESS 40, 129, 156-57, 353 (1947) (discussing anonymous contributions to the press by Vice President John Adams and Presidents John Quincy Adams, Andrew Jackson, and Abraham Lincoln). On partisan journalism and the close relations between the press and government through the Civil War, see generally WILLIAM E. AMES, A HISTORY OF THE *NATIONAL INTELLIGENCER* (1972); CULVER H. SMITH, THE PRESS, POLITICS, AND PATRONAGE: THE AMERICAN GOVERNMENT'S USE OF NEWSPAPERS, 1789-1875 (1977).

27. Of course, leaks to the press occurred before the organization of the U.S. government. *See, e.g.*, Larry L. Burriss, America's First Newspaper Leak: Tom Paine and the Disclosure of Secret French Aid to the United States (1983) (unpublished Ph.D. dissertation, Ohio University) (on file with Ohio University Library). More generally, the practice of attacking authorities through anonymous and pseudonymous articles and pamphlets was well established before the Revolutionary War, though such actions may not qualify as leaks. Benjamin Franklin recalled a 1722 incident involving his older brother's *New England Courant*: "One of the Pieces in our News-Paper, on some political Point which I have now forgotten, gave Offence to the [colonial] Assembly. He was taken up, censur'd and imprison'd for a Month by the Speaker's Warrant, I suppose because he would not discover his Author." THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN 69 (Leonard W. Labaree et al. eds., Yale Univ. Press 1964) (1790); *see also* JEFFREY A. SMITH, PRINTERS AND PRESS FREEDOM: THE IDEOLOGY OF EARLY AMERICAN JOURNALISM 100-04 (1988) (discussing the circumstances that led to James Franklin's imprisonment for legislative contempt). As part of the 1735 seditious libel prosecution of John Peter Zenger, the royal governor offered a reward to anyone who identified the author(s) of the offending articles. *See* JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER 18 (Stanley N. Katz ed., Harvard Univ. Press, 2d ed. 1972) (1736).

28. The Senate adopted an order "[t]hat the Senators be under an injunction of secrecy on the communications this day received from the President of the United States, until the further order of the Senate." 1 S. EXEC. J. 178 (4th Cong., Spec. Sess. (1795)); *see also* JAMES TAGG, BENJAMIN FRANKLIN BACHE AND THE PHILADELPHIA *AURORA* 244-

Justice John Jay, the treaty offered concessions to the British that discomfited even Federalists.[29] When the staunchly Republican *Aurora* published the treaty, so many people thronged the newspaper's office to get a copy that the scene "was more like a fair than anything else," the editor's wife remarked.[30]

Five years later, the same newspaper became the first target of a leak investigation. Its new editor, William Duane, who had been prosecuted under state and federal sedition laws for earlier criticisms of the Federalists,[31] published a story about a politically sensitive bill based on information leaked from a secret Senate session.[32] The Federalist bill, introduced in anticipation of the 1800 election, proposed to revise the procedure for deciding the outcome of close presidential races.[33] Recognizing the incendiary nature of the proposal,[34] outraged Jeffersonian Senators ignored the confidentiality rule and passed the news to Duane.[35]

The ensuing leak inquiry, called "the first congressional investigation of the press, the first forcible detention of a journalist by Congress, and the first citation [of a journalist] for contempt of Congress," then became as much the issue as the leak itself.[36] One Republican Senator defended anonymous communications about public affairs. "Men who engage in public life, or are members of legislative bodies, must expect to be exposed to anonymous, and sometimes avowed, attacks on their

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47 (1991); Everette E. Dennis, *Stolen Peace Treaties and the Press: Two Case Studies*, 2 JOURNALISM HIST. 6 (1975).

29. *See* TAGG, *supra* note 28, at 239-44.

30. *Quoted in* Bernard Fay, *Benjamin Franklin Bache, A Democratic Leader of the Eighteenth Century*, 40 PROC. AM. ANTIQUARIAN SOC'Y (n.s.) 277, 293 (1931); *see also* Dennis, *supra* note 28, at 7-8.

31. A jury acquitted Duane for circulating a petition against the Alien and Sedition Acts, and Federalists prosecuted him under federal sedition law for alleging that the British exerted undue influence on the State Department. Federalists abandoned the case, however, when Duane claimed to have a letter from President John Adams leveling the same charge. *See* RICHARD N. ROSENFELD, AMERICAN AURORA: A DEMOCRATIC-REPUBLICAN RETURNS 592-95, 771 (1997); JAMES MORTON SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES 279-88 (1956).

32. *See* S. MISC. DOC. NO. 53-278, at 7-8 (2d Sess. 1894) [hereinafter PRECEDENTS OF THE SENATE & HOUSE]; ROSENFELD, *supra* note 31, at 746-70.

33. *See* SMITH, *supra* note 31, at 288-89.

34. The proposal prompted even a Federalist to proclaim that "the Senate ought to be hanged, I mean the Federal part of the Senate." JOHN C. MILLER, CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS 200 (1952).

35. DONALD A. RITCHIE, PRESS GALLERY: CONGRESS AND THE WASHINGTON CORRESPONDENTS 10 (1991).

36. *Id.* at 10. *But see* ERNEST J. EBERLING, CONGRESSIONAL INVESTIGATIONS: A STUDY OF THE ORIGIN AND DEVELOPMENT OF THE POWER OF CONGRESS TO INVESTIGATE AND PUNISH FOR CONTEMPT 37-41 (Octagon Books 1973) (1928) (noting an earlier congressional citation for contempt, but one not involving a journalist); *see also* SMITH, *supra* note 31, at 288-306 (providing the best discussion of this incident).

principles and opinions."[37] Ironically, Vice President Jefferson, as the presiding officer, represented the Senate in investigating his journalistic ally Duane to determine the source of the leak.[38] Brought before the Senate, Duane requested a delay to consult with counsel, but leading Republican attorneys refused to defend him in a chamber that set its own rules.[39] Duane never returned to the Senate and lawmakers held him in contempt but made no effort to enforce their order.[40] Once Congress adjourned, Duane reappeared in public as a "persecuted Patriot, & Martyr to the Liberty of the Press."[41]

Duane was but the first of at least 222 correspondents, news writers, and editors who were asked by congressional committees during the nineteenth century to identify sources or disclose other information.[42] Most of the major leak investigations before the Civil War involved the Senate because of its general penchant for secrecy, especially in reviewing treaties.[43] But efforts to conduct Senate business in closed executive sessions were "little more than a charade since the press so easily uncovered and reported their substance, quoted their speeches, and reprinted tallies of votes cast," according to a Senate historian.[44] For instance, the Democratic Washington-based *Daily Times* reported that Whig officials were conspiring, perhaps treasonously, with the British minister in an 1846 deal to resolve a boundary dispute with Canada.[45] During the Senate inquiry, the paper identified its sources. Under oath, however, these individuals denied that they had passed information to the *Daily Times*.[46] The investigating committee found the paper's

37. 10 ANNALS OF CONG. 78 (1800) (remarks of Sen. Charles Pinckney of South Carolina).
38. *See* MILLER, *supra* note 34, at 201.
39. *Id.* at 200-01; ROSENFELD, *supra* note 31, at 761.
40. *See* PRECEDENTS OF THE SENATE & HOUSE, *supra* note 32, at 14-16; RITCHIE, *supra* note 35, at 11. The Senate did urge his prosecution for sedition. His indictment under federal sedition law was dismissed after the election of Thomas Jefferson as President. MILLER, *supra* note 34, at 202.
41. Letter from William Bingham to Rufus King (Aug. 6, 1800) *in* 3 THE LIFE AND CORRESPONDENCE OF RUFUS KING 284 (Charles R. King ed., New York, G. P. Putnam's Sons, 1896).
42. For a thorough accounting of journalists called before Congress to testify about their sources or secret information they published, see Gregg, *supra* note 25, at 526.
43. RITCHIE, *supra* note 35, at 163.
44. *Id*.
45. Much of the pertinent material in connection with this episode is reprinted in PRECEDENTS OF THE SENATE & HOUSE, *supra* note 32, at 45-76.
46. *Id*. at 65-74.

charges false, and the Senate expelled the *Daily Times* from the chamber's press galleries.[47]

The Senate's secret review of treaties also led to three incidents between 1844 and 1848 in which newspapers published whole documents, not just information about them.[48] Most significantly, the *New York Herald*'s publication of the still secret 1848 treaty that ended the war with Mexico prompted a rare confinement of a journalist, an even rarer court decision, and one of the few wide-ranging nineteenth-century debates about leaks.[49] The paper's correspondent, John Nugent, refused to name his source, though he denied that it was anyone connected with the Senate.[50] The Senate cited Nugent for contempt, and confined him in a committee room for several days, but he still managed to file articles for the *Herald* under the dateline "Custody of the Sergeant-at-Arms of the Senate."[51] Nugent challenged the Senate's confinement by filing a writ of habeas corpus. Judge William Cranch, however, ruled solidly for the Senate.[52] He noted the Senate's authority to "punish all contempts of its authority" and the merits of its standing rules protecting the secrecy of communications from the President, especially for treaty deliberations.[53] To save face, the Senate finally released Nugent because of the prisoner's supposed poor health.[54]

In one of its last comments on the Nugent matter, the *Herald* offered a "Statistical Table of the Leaks of the United States Senate" that underscored the hypocrisy of the Senate's action and indicated how leaks had become a common tool of political communication.[55] The table's first column listed newspapers in five leading cities, the second

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47. *See id.* at 76.

48. Documents published in connection with an 1844 treaty to annex Texas led the Senate to censure one of its own members for the disclosure. RITCHIE, *supra* note 35, at 28. In 1846, the Senate investigated two correspondents who obtained the treaty settling the Oregon boundary dispute. *Id*.

49. *See* F. B. MARBUT, NEWS FROM THE CAPITAL: THE STORY OF WASHINGTON REPORTING 85-93 (1971).

50. 7 S. EXEC. J. 354-404 (30th Cong., 1st Sess. 1848) (reporting the interrogation of Nugent about the source of the leak).

51. *See, e.g.*, *Galviensis and the Senate*, N.Y. HERALD, Apr. 13, 1848, at 3 (Galviensis was Nugent's pen name).

52. *Ex parte* Nugent, 18 F. Cas. 471, 483 (C.C.D.C. 1848) (No. 10,375).

53. *Id.* The Supreme Court narrowed congressional contempt power in *Kilbourn v. Thompson*, 103 U.S. 168 (1881). For a state court ruling similar to *Nugent*, see *Ex parte D.O. McCarthy*, 29 Cal. 395 (1866). A San Francisco newspaper had reported that members of the state senate received thousands of dollars to secure their votes on a bill; the editor refused to identify his sources and was held in contempt of the legislature. *McCarthy*, 29 Cal. at 397-99; Correspondents and Confidentiality, *supra* note 25, at 269-72. The editor unsuccessfully challenged his detention in the state supreme court. *McCarthy*, 29 Cal. at 407.

54. RITCHIE, *supra* note 35, at 29.

55. *Presidential, Senatorial and Diplomatic Secrecy*, N.Y. HERALD, May 3, 1848, at 2.

named the correspondent for each, and the third identified senators who favored each reporter with confidential information.[56] "The whig Senators were . . . the most comprehensive leakers," the *Herald* noted wryly, "but some of the democratic Senators were the most accurate leakers during these mysterious debates."[57]

The focus of major leaks and the relationship of reporters to the stories both shifted perceptively in the second half of the nineteenth century. The Senate's secret review of treaties continued to pique reportorial curiosity,[58] but leaks increasingly dealt with allegations of corruption in Congress and federal agencies. At the same time, Washington correspondents became more than conduits for stories of partisan maneuvering. Some figured centrally in the stories themselves, which complicated congressional investigations.[59]

An 1857 story based partly on leaked information prompted the resignations of three members of Congress and the passage of a law that compelled testimony in congressional hearings. In January, the *New York Times* printed an article from its Washington correspondent, James W. Simonton, charging that lobbyists induced corrupt members of Congress to enact the Minnesota Land Bill that granted land to railroads.[60] An accompanying editorial referred to the "new and magnificent land-stealing scheme," alleging that some congressmen received $1000 for their vote.[61] The ensuing investigation followed two tracks. One dealt

56. *Id.*
57. *Id.*
58. Three examples convey the flavor of Senate leak investigations in connection with treaties. "A treaty negotiated early in 1854 by southern railroad promoter James Gadsden, who represented President Pierce, and Mexican President Santa Ana was leaked to the press prior to declassification of the document." Correspondents and Confidentiality, *supra* note 25, at 237. In this case, however, the Senate investigated just its members, not the press. *Id.* at 237-38. In 1871, the Senate investigated how reporters obtained copies of the Treaty of Washington. *See* PRECEDENTS OF THE SENATE & HOUSE, *supra* note 32, at 311-504; *see also* RITCHIE, *supra* note 35, at 90-91. In 1881 the Senate sought to determine how the press obtained proposed treaties with China, and then investigated how news of the secret leak investigation itself was leaked. *See* Correspondents and Confidentiality, *supra* note 25, at 312-15.
59. On general changes in relations between reporters and their Washington sources from the Civil War to the early 1900s, see MARBUT, *supra* note 49, at 134-60; MARK WAHLGREN SUMMERS, THE PRESS GANG: NEWSPAPERS AND POLITICS, 1865-1878, 1-8 (1994).
60. H.R. REP. NO. 34-243, at 160 (3d Sess. 1857); *The Pacific Railroad—Minnesota Land Grant—A Monster Speculation—Congressional Corruption*, N.Y. TIMES, Jan. 6, 1857, at 1.
61. Editorial, *Piracies of the Washington Lobby—The Land Robberies*, N.Y. TIMES, Jan. 6, 1857, at 4.

with the substance of the charges, which forced three resignations, while the other focused on the leak.[62]

During the debate to establish a select investigating committee, one lawmaker denounced newspaper correspondents as "those demented fragments of humanity that hang around this Hall merely for the purpose of gathering up every whisper and every word that may fall from the lips of a member, even in private conversation, and trumpeting it throughout the land."[63] *New York Times* editor and publisher Henry J. Raymond and the paper's Washington correspondent James W. Simonton testified before the select committee about a week after the offending articles appeared.[64] Both disavowed having direct knowledge of actual bribes, but they insisted they had heard about them from reliable sources.[65] Simonton said that members of Congress routinely asked if they could trust him to keep their confidences. "In my profession, such questions are put to me almost every day . . . and I always, unless I have some special reasons for supposing that the particular individual has an improper proposal to make, accept their confidence, and give my unqualified promise not to reveal their names."[66] He testified that two lawmakers had directly asked him to broker bribes and others had intimated that they wanted the reporter's help to arrange payments for their votes.[67] When Simonton refused to identify his sources, the House held him in contempt for nineteen days.[68] The House investigation also revealed that Simonton had acted as a lobbyist in a minor capacity some years earlier; lawmakers used this finding to expel him from the press galleries.[69]

One day after the House voted to hold Simonton in contempt, it passed a bill to punish recalcitrant witnesses and the Senate quickly concurred.[70] The 1857 legislative contempt statute set a maximum fine of $1000 and a one year jail sentence for anyone who "refuse[s] to answer any question pertinent to the matter of inquiry in consideration . . . ."[71] Simonton, in fact, had cited the absence of such a clear-cut law as one

62. H.R. REP. NO. 34-243 (3d Sess. 1857); CONG. GLOBE, 34th Cong., 3d Sess. 274-77 (1857); PRECEDENTS OF THE SENATE & HOUSE, *supra* note 32, at 85-190.

63. CONG. GLOBE, 34th Cong., 3d Sess. 276 (1857) (quoting remarks of Rep. Brenton); PRECEDENTS OF THE SENATE & HOUSE, *supra* note 32, at 92.

64. H.R. REP. NO. 34-243, at 154-79 (3d Sess. 1857).

65. *Id.*

66. *Id.* at 162.

67. *Id.* at 166-67.

68. *See* PRECEDENTS OF THE SENATE & HOUSE, *supra* note 32, at 117-27; Correspondents and Confidentiality, *supra* note 25, at 243-44.

69. Correspondents and Confidentiality, *supra* note 25, at 243-44.

70. *See* PRECEDENTS OF THE SENATE & HOUSE, *supra* note 32, at 129-90 (tracing the congressional deliberations on the law).

71. Act of Jan. 24, 1857, ch. 29, 11 Stat. 155 (1857) (current version at 2 U.S.C. § 192 (2000)).

basis for his refusal to answer questions. "You have not on your statute-books any law forbidding that confidence—none whatever," he told the House.[72] "Make such a law, and I will observe it. Make such a law, and when Mr. A or Mr. B comes to me, and wishes to make a confidential communication, I will say to him: 'Yes, I will receive it, subject always to the provisions of this law.'"[73] The 1857 statute, however, did little more than codify Congress's inherent contempt power recognized by the courts nine years earlier.[74]

Regardless of the statute, stories about official corruption based on anonymous sources proliferated after mid-century, especially during the scandal-ridden Gilded Age.[75] Accordingly, leak investigations peaked in the 1870s.[76] Between 1870 and 1876, confrontations between Congress and reporters over unnamed sources occurred as part of investigations into mismanagement at the Freedman's Bureau,[77] bribes allegedly offered to congressmen by lobbyists for Cuban rebels,[78] charges of corruption against the secretary of the Navy and his department,[79] distributions of Union Pacific Railroad stock to lawmakers in the infamous Credit Mobilier scandal,[80] rumors that lobbyists bribed congressmen and reporters to support subsidies for the Pacific Mail

72. CONG. GLOBE, 34th Cong. 3d Sess. 411 (1857).
73. *Id.*
74. *See Ex parte* Nugent, 18 F. Cas. 471 (C.C.D.C. 1848) (No. 10,375); EBERLING, *supra* note 36, at 341-91 (discussing early judicial review of congressional power to compel testimony and punish for contempt); *supra* notes 52-54 and accompanying text (discussing *Nugent*).
75. *See generally* SUMMERS, *supra* note 59 (discussing the role of the press in Gilded Age politics). Of course, not all mid-century leaks involved corruption; some investigations were instituted more as political retribution. In 1860, for instance, a Republican congressman launched a leak investigation—basically a fishing expedition that involved several journalists—to determine whether the Democratic administration of James Buchanan was using bribes to secure the passage of laws in Congress. *See* H.R. REP. NO. 36-648 (1st Sess. 1860); *see also* Correspondents and Confidentiality, *supra* note 25, at 244-48. An 1862 House Judiciary Committee investigation of telegraphic censorship in Washington expanded its scope to determine how the *New York Herald* obtained an early version of President Abraham Lincoln's State of the Union address; the investigation, which suggested that Lincoln's wife was the source, gave radical Republicans an opportunity to embarrass the President. *See id.* at 250-67.
76. Gregg, *supra* note 25, at 584 ("The 1870s produced the most recorded investigations and the most testimony from journalists.").
77. *See* H.R. REP. NO. 41-121 (2d Sess. 1870).
78. *See* H.R. REP. NO. 41-104 (2d Sess. 1870); 2 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 1635, at 1108-09 (1907).
79. *See* H.R. MISC. DOC. NO. 42-201 (2d Sess. 1872).
80. *See, e.g.*, H.R. REP. NO. 42-77 (3d Sess. 1873).

Steamship Line,[81] election frauds in Alabama,[82] malfeasance in the War Department,[83] and the misuse of money appropriated for Indian tribes by the Interior Department.[84] Although Congress conducted fewer leak investigations in the 1880s and 1890s, lawmakers still sought information from at least twenty-three journalists during these two decades.[85]

One late nineteenth-century investigation underscored the confounding nature of leaks. They shed light on government operations but, by using anonymous sources, denied readers an opportunity to evaluate the stories and frustrated lawmakers' inquiries into the merits of the charges. In 1894, correspondents for New York and Philadelphia newspapers had reported that the "Sugar Trust" tried to secure favorable tariff legislation by bribing Senators and contributing to Democratic Party campaigns.[86] A Senate investigating committee referred the reporters for prosecution when they refused to identify their sources.[87] Some newspapers, notably the *New York Times,* agreed that the reporters should identify their sources to assure the public that the story was more than a stratagem to embarrass Democrats.[88] But the two reporters stood firm. A grand jury indicted them, along with other contumacious witnesses, for violating the 1857 contempt of Congress statute.[89] The District of Columbia courts overruled their demurrers, rejecting claims of a reporter's privilege, and ordered the defendants to plead.[90] The reporters ultimately prevailed

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81. *See* H.R. REP. NO. 43-268 (2d Sess. 1875).
82. *See* H.R. REP. NO. 43-262 (2d Sess. 1875).
83. *See* H.R. REP. NO. 44-799 (1st Sess. 1876).
84. *See* H.R. MISC. DOC. NO. 44-167 (1st Sess. 1876).
85. Gregg found that eleven journalists were called by Congress to testify in the 1880s and twelve in the 1890s. Gregg, *supra* note 25, at 585-86. Gregg's count is based on "cases reported in official journals . . . . There may be other unreported cases." *Id.* at 586. For details about some of the late nineteenth-century leak investigations, see Correspondents and Confidentiality, *supra* note 25, at 310-66.
86. *See* 26 CONG. REC. 4848-51 (1894); PRECEDENTS OF THE SENATE & HOUSE, *supra* note 32, at 583-86; Correspondents and Confidentiality, *supra* note 25, at 340-66.
87. *See* 26 CONG. REC. 5454-55, 5458-59 (1894); PRECEDENTS OF THE SENATE & HOUSE, *supra* note 32, at 583-86.
88. *News Sources Not Betrayed*, N.Y. TIMES, May 27, 1894, at 1; Editorial, N.Y. TIMES, May 27, 1894, at 4.
89. PRECEDENTS OF THE SENATE & HOUSE, *supra* note 32, at 828.
90. United States v. Seymour (D.C. 1894), *in* PRECEDENTS OF THE SENATE & HOUSE, *supra* note 32, at 855-57. The lower court decisions and the briefs for the reporters and other defendants, including some discussion of reporters' privilege, can be found in PRECEDENTS OF THE SENATE & HOUSE, *supra* note 32, at 797-854. Considering just the demurrer, the Supreme Court denied certiorari for one of the non-reporter defendants. *In re* Chapman, 156 U.S. 211 (1895). Two years later the Court ruled on the merits of the case, upholding congressional authority to hold witnesses in contempt when they refused to cooperate with an investigation. *In re* Chapman, 166 U.S. 661, 668 (1897).

two years later, however, when a judge found that the testimony sought by Congress was not essential to its investigation.[91]

The nineteenth-century leaks and associated investigations did not produce cohesive public policy or free speech rationales behind the use of anonymous sources. One study found that seventy percent of journalists complied when called to testify before Congress; forty-one named sources and 115 provided other information.[92] Sixty-six refused to cooperate and some were held in contempt of Congress; of these, eleven were confined.[93] Journalists who resisted answering questions about their sources typically relied on personal honor—they had given their word—as the basis for doing so during the first half of the century.[94] Later in the century, in keeping with the emergence of an occupational self-consciousness, journalists increasingly relied on professional honor as the justification for keeping confidences.[95] This rationale sometimes included assertions about the importance of confidential sources in assuring the flow of information to the public.[96] The journalists did not, however, rely on freedom of the press in their defense. In only three instances did journalists or their allies even obliquely invoke the First Amendment or use language reminiscent of its press clause.[97]

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91. Unreported decision *discussed in The Inviolability of Confidential Communications to Newspaper Reporters*, 55 ALB. L.J. 430 (1897). The judge reviewing the indictment made a passing reference to the nation's first state shield law adopted the previous year and noted claims about confidentiality in reporters' work, but declined to recognize an evidentiary privilege for journalists. *Id.* at 430-31; *see also* Aaron David Gordon, Protection of News Sources: The History and Legal Status of the Newsman's Privilege 193-94 (1971) (unpublished Ph.D. dissertation, University of Wisconsin) (on file with the University of Wisconsin Library).

92. Gregg, *supra* note 25, at 526; *see also id.* at 532-34 (providing reasons why most journalists did testify).

93. Kaminski found that eleven nineteenth-century journalists—counting twice one journalist who was involved in two incidents six years apart—were confined for refusing to answer questions as part of congressional leak inquiries. Correspondents and Confidentiality, *supra* note 25, at 371 & n.6.

94. Correspondents and Confidentiality, *supra* note 25, at 368; Gregg, *supra* note 25, at 532.

95. Correspondents and Confidentiality, *supra* note 25, at 368.

96. *Id*. The public's right to know argument could also be inverted, as it was by some editorialists, to oppose journalistic confidentiality. Reporters who agreed to testify about sources or secret information provided the public with additional details it needed to know, especially for stories about corruption in government. This was a common refrain in the editorial responses to Simonton's 1857 refusal to testify. *See* Gregg, *supra* note 25, at 389-92.

97. Correspondents and Confidentiality, *supra* note 25, at 369-85. Although the First Amendment is reflexively invoked in all manner of controversies today, most

B. Leaks and Reporter-Source Relations in the Administrative State

The communication strategies of politicians, government officials, business leaders, and even social movements shifted with the ascendancy of the commercial mass media in the late nineteenth century.[98] Individuals and groups discovered that successful communication required more than issuing their own publications or cooperating with like-minded media outlets. Those seeking to influence public opinion and shape policy instead scrambled to get their messages into the commercial mass media, and gaining access meant making information newsworthy enough to satisfy the demands of professional communicators.[99] News—both its informational and symbolic content—formed the connective tissue in a society where civic decisionmaking was dispersed among branches and levels of government, between the private and public sectors, and through all manner of associations.[100]

News leaks figured centrally in this new milieu of political communication, especially as reporters and sources renegotiated their relationship between the turn of the century and the New Deal. Unlike journalists at the center of nineteenth-century leak investigations, who typically wrote as avowedly partisan functionaries,[101] the new breed of reporters attained significant occupational autonomy, especially those in the Washington press corps. Reporters demonstrated professional success through prowess in cultivating sources rather than by advancing a

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doctrines derived from it were crafted after World War I. The two leading studies of nineteenth-century understandings of press freedom do not mention journalists' confidentiality. *See* MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY (2000); DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS (1997).

98. By the outset of the twentieth century, newspapers increasingly identified themselves as business or social institutions rather than as political organs. They appealed to heterogeneous audiences or a class of readers in their market with news articles that minimized or sublimated political ideology. *See* GERALD J. BALDASTY, THE COMMERCIALIZATION OF NEWS IN THE NINETEENTH CENTURY (1992).

99. *See generally* James W. Carey, *The Communications Revolution and the Professional Communicator*, *in* SOC. REV.: MONOGRAPH NO. 13, at 23 (Paul Halmos ed., 1969) (discussing the emergence of reporters as an occupation that brokers information and symbols between the various sectors of society).

100. *See id.*; COOK, *supra* note 18, at 17-60.

101. For excellent discussions of the many ways in which politics and journalism insinuated themselves into each other's realm from the end of the Civil War to the close of the century, see generally RICHARD L. KAPLAN, POLITICS AND THE AMERICAN PRESS: THE RISE OF OBJECTIVITY, 1865-1920 (2002); SUMMERS, *supra* note 59. Quite a few Washington correspondents from the Civil War to the early 1900s held patronage appointments as clerks of congressional committees. This supplemented their income as writers and gave them easier access to information, including confidential intelligence. *See* RITCHIE, *supra* note 35, at 62-64, 71-72, 75-77, 98-99, 109, 153, 171-72, 183-84, 192-94, 206.

publisher's or party's agenda.[102] Sources adjusted to this new environment by pursuing two general strategies. One tack was simply to assist reporters' newsgathering efforts through press offices, press releases, press conferences and the like.[103] Sources also exploited the values and routines of journalists to cultivate favorable coverage. They carefully timed the release of news, played reporters against one another, staged newsworthy events, and generally tried to regulate the terms on which news flowed to the public.[104] The calculated release of information from unnamed sources—leaks—thus became one news management tool among many in a source's repertoire.

Congress and the White House began institutionalizing the techniques of modern news management, including news leaks, by the 1890s. Lawmakers in the leak-prone Senate discovered that they could communicate with constituents in home districts by leaking stories to favorite reporters. The reporters, in return, discovered that editors played up such stories over routine news.[105] One correspondent who had been the target of a leak investigation explained the symbiotic relationship in 1897:

> Members of Congress, of course, have their own particular fortunes to consider, and, finding it necessary to use the newspapers for the purpose of reaching the ears of their constituents and the voters generally, frequently give reliable information of a confidential nature and in advance of general publicity to correspondents with whom they desire to be on friendly terms.[106]

The reporter added that cabinet members also "occasionally 'leak[ed]' on some live topic of news" when it suited their purposes, but "not because they desire[d] to do a favor to the newspaper correspondent and through him to the dear public."[107]

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102. *See generally* LEO C. ROSTEN, THE WASHINGTON CORRESPONDENTS (1937) (finding that many members of the Washington press corps enjoyed considerable autonomy in their work and had closer relations with their sources than with their publishers, with whom they often politically disagreed).

103. On the emergence of public relations in Progressive Era politics, see COOK, *supra* note 18, at 44-52; STUART EWEN, PR!: A SOCIAL HISTORY OF SPIN 39-137 (1996).

104. *See* RITCHIE, *supra* note 35, at 131-44, 179; Lili Levi, *Dangerous Liaisons: Seduction and Betrayal in Confidential Press-Source Relations*, 43 RUTGERS L. REV. 609, 677-83 (1991).

105. *See* RITCHIE, *supra* note 35, at 132, 164, 167-68. An 1890 Senate leak investigation, unproductive like most before it, confirmed that lawmakers regularly dispensed supposedly secret information to reporters. *Id.* at 168-69.

106. David S. Barry, *News-Getting at the Capital*, 26 THE CHAUTAUQUAN, 282, 282 (1897).

107. *Id.*

The White House had remained in the shadow of Congress as a news making institution for most of the nineteenth century. But the Spanish-American War and the administration of Theodore Roosevelt moved the presidency onto the journalistic center stage.[108] A masterful news maker, Roosevelt incorporated leaks into his policymaking maneuvers.[109] He floated trial balloons to test public reaction to policy options without formally committing to them.[110] If the response seemed positive, the White House embraced the proposal; if negative, the President denied the veracity of a report based on unnamed sources.[111] Roosevelt also anonymously released information that might alienate political allies so they would not hold him responsible for the bad news, information that appeared self-serving if attributed to the White House, and information that undercut congressional opposition to bills he favored.[112] "Roosevelt even appreciated the nuances in choosing the recipients of leaks. All things being equal, he preferred the stories to appear in opposition newspapers because the gambit was less transparent that way."[113] Roosevelt recognized that effective political communication depended more on shaping newspapers' front page reports than their editorial columns, a marked departure from nineteenth-century political uses of the press.[114]

Roosevelt and all subsequent Presidents discovered that leaks not authorized by the White House subverted their efforts to engineer public consent. For instance, Roosevelt's unofficial press secretary devoted considerable energy to investigating the source of unauthorized leaks.[115] "The President says it looks as if there is a leak in the Department," the aide wrote to cabinet officials, "and he would like to be advised if you know how the information got out."[116] Such leaks sprang from various executive departments and Roosevelt devoted an entire cabinet meeting to discussing the problem.[117]

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108. *See* STEPHEN PONDER, MANAGING THE PRESS: ORIGINS OF THE MEDIA PRESIDENCY, 1897-1933, at 1-15 (1998) (discussing the shift in media attention from Congress to the presidency and the growing sophistication of the White House in managing news).

109. *See* GEORGE JUERGENS, NEWS FROM THE WHITE HOUSE: THE PRESIDENTIAL-PRESS RELATIONSHIP IN THE PROGRESSIVE ERA 1-90 (1981); JOHN TEBBEL & SARAH MILES WATTS, THE PRESS AND THE PRESIDENCY: FROM GEORGE WASHINGTON TO RONALD REAGAN 318-48 (1985).

110. JUERGENS, *supra* note 109, at 41-42.

111. *Id.*

112. *Id.* at 43-45; ELMER E. CORNWELL, JR., PRESIDENTIAL LEADERSHIP OF PUBLIC OPINION 18 (1965).

113. JUERGENS, *supra* note 109, at 44.

114. *Id.* at 5-13.

115. *See* LOUIS W. KOENIG, THE INVISIBLE PRESIDENCY 177 (1960).

116. *Id.*

117. *Id.*; *see also* PONDER, *supra* note 108, at 48 (discussing Roosevelt's efforts to quash unauthorized leaks).

Although the unauthorized release of news did little to derail Roosevelt's agenda, his successor found it more than a mere annoyance. William Howard Taft, who did not share Roosevelt's instincts for dealing with reporters, sometimes saw his indiscreet private remarks appear in published reports attributed to unnamed sources.[118] Even more damaging to Taft was a 1909 publicity war fought by two administration officials over federal conservation policy.[119] Officials held over from the Roosevelt administration deftly deployed leaks to undermine Taft's position.[120]

The role of leaks in both the international and domestic dimensions of foreign policymaking became apparent during the administration of President Woodrow Wilson. At first, Wilson enjoyed modest success in minimizing negative leaks and maximizing favorable ones.[121] After World War I, however, leaks gutted his efforts to temper some of the harsh terms of the Treaty of Versailles and to win domestic approval for his international agenda.[122] During secret treaty negotiations in Paris, the British and especially the French leaked material to their journalists in an effort to gain advantages over Wilson at the bargaining table.[123] British Prime Minister Lloyd George even apologized to Wilson for particularly embarrassing leaks from his delegation and banished the offending diplomat and journalist.[124] Perhaps most frustrating for Wilson, the leakers aimed to strengthen the hand of Republican Senators who opposed his idealistic peacemaking efforts in Europe, and who later voted to keep the United States from joining the League of Nations.[125] Partly because of such policy failures and Presidential misstatements, Wilson and his two successors in the White House began directing that reporters attribute some information to "an official spokesman," "a White House official," or "a high authority."[126]

The explosive growth of the federal government during the New Deal and World War II fueled a corresponding expansion in agencies' public

118. *See* PONDER, *supra* note 108, at 54.
119. *Id.* at 63-75.
120. *Id.*
121. *Id.* at 85-90.
122. JUERGENS, *supra* note 109, at 235-44.
123. *Id.* at 238-41.
124. *Id.* at 236.
125. *Id.* at 239, 262-64.
126. SILAS BENT, BALLYHOO: THE VOICE OF THE PRESS 76-81 (1927); CORNWELL, *supra* note 112, at 65; POLLARD, *supra* note 26, at 716; ROSTEN, *supra* note 102, at 24-25.

information efforts and in the size of the Washington press corps.[127] Leaks to the press flourished in this environment as a way to inform and persuade the public about increasingly complex public affairs. Franklin Roosevelt skillfully deployed leaks as part of his administration's well-orchestrated multichannel communication campaigns.[128] This controlled, strategic news release exemplified how a modern ethos of reporter-source relations supplanted the rules that had governed nineteenth-century partisan journalism. By the mid-twentieth century, leaks had become a transaction in which reporters and sources each derived advantages regardless of their partisan inclinations. Like his distant cousin Theodore, Franklin Roosevelt often leaked to papers that editorially opposed his policies in order to heighten the credibility of the anonymous communication.[129] For their part, reporters welcomed leaks regardless of their political opinions about a source because doing so boosted their standing as enterprising newsgatherers.

Even in security conscious Washington during World War II, leaks sprang from all manner of institutions to enrich political communication among elites while informing the public. Leaks had become "essential to the operation of the democracy in these complex times," according to government administrator and later Civil War historian Bruce Catton.[130]

> [I]t is through the leak that the people are kept in touch with their government. . . . It is the leak which enables them to know whether the fine boasts and pretensions of an appointed person are really justified. It is the leak—telling them what may happen, what is being planned, what the carefully hidden facts actually are—which makes it possible for them to react while there is still time and thus exert an influence on the handling of affairs.[131]

Although leaking was "frequently misused by self-seekers and schemers" and often made officials look inefficient, "our particular form of government wouldn't work without it."[132]

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127. *See* JAMES L. MCCAMY, GOVERNMENT PUBLICITY: ITS PRACTICE IN FEDERAL ADMINISTRATION (1939); RICHARD W. STEELE, PROPAGANDA IN AN OPEN SOCIETY: THE ROOSEVELT ADMINISTRATION AND THE MEDIA, 1933-1941 (1985).

128. The best discussion of Franklin Roosevelt's press relations is BETTY HOUCHIN WINFIELD, FDR AND THE NEWS MEDIA (1990). For examples of Roosevelt's use of leaks for a variety of political and policy purposes, see *id.* at 66, 133, 142-43.

129. DONALD A. RITCHIE, REPORTING FROM WASHINGTON: THE HISTORY OF THE WASHINGTON PRESS CORPS 10 (2005).

130. BRUCE CATTON, THE WAR LORDS OF WASHINGTON 89 (1948).

131. *Id.* at 87.

132. *Id.*

III. THE MARGINAL PROTECTION FOR LEAKS AFFORDED BY JOURNALISTS' CONFIDENTIALITY LAW

The facts in *Branzburg v. Hayes*,[133] the Supreme Court's seminal analysis of journalists' asserted constitutional privilege, had nothing to do with leaks of government information. The Court synthesized its decision from a modest body of law that had been developing since the late 1800s, which also never significantly addressed the importance of political or policy leaks. Nonetheless, as the Court's only ruling dealing centrally with journalists' privilege,[134] this 1972 decision often proves decisive when leaks raise questions about confidentiality law.

*A. Pre-*Branzburg *Confidentiality Law and Leaks*

The major legal principles governing confidentiality developed from the common law, statutes, and constitutional interpretation, with only occasional glances at the special role that leaks play in governance. Protecting the confidentiality of leakers nevertheless found some support at the margins of the law.

1. Mainstream Developments in Confidentiality Law

Confidentiality disputes arising from contexts other than congressional investigations began reaching the courts in the late 1880s. Most reported decisions stemmed from one of three situations: when reporters refused to provide prosecutors with information or the identity of sources used in writing stories about criminal activities,[135] identify sources for articles that breached the secrecy or challenged the integrity of grand jury proceedings,[136] or disclose sources sought by plaintiffs in libel suits.[137]

133. 408 U.S. 665 (1972).
134. DIENES, LEVINE & LIND, *supra* note 3, at 917, 930.
135. *See, e.g.*, *In re* Grand Jury Witnesses, 322 F. Supp. 573 (N.D. Cal. 1970); People v. Durrant, 48 P. 75, 86 (Cal. 1897); Clein v. State, 52 So. 2d 117 (Fla. 1950); State v. Donovan, 30 A.2d 421 (N.J. 1943).
136. *See, e.g.*, Joslyn v. People, 184 P. 375 (Colo. 1919); People *ex rel.* Mooney v. Sheriff of New York County, 199 N.E. 415 (N.Y. 1936).
137. *See, e.g.*, Garland v. Torre, 259 F.2d 545 (2d Cir. 1958), *cert. denied*, 358 U.S. 910 (1958); Brewster v. Boston Herald-Traveler Corp., 20 F.R.D. 416 (D. Mass. 1957); Pledger v. State, 3 S.E. 320 (Ga. 1887); Brogan v. Passaic Daily News, 123 A.2d 473 (N.J. 1956); Clinton v. Commercial Tribune Co., 8 Ohio N.P. 655 (Ct. Com. Pl. 1901); *see also, e.g.*, *In re* Goodfader's Appeal, 367 P.2d 472 (Haw. 1961) (seeking journalist's testimony for a suit challenging the firing of a public employee).

Reported cases invariably held that, absent statutory protection, the common law did not recognize a testimonial privilege for the press.[138] In rejecting journalists' claims, courts and commentators frequently invoked Wigmore's admonition against any expansion of testimonial privileges.[139]

The most important pre-*Branzburg* confidentiality case testing journalists' constitutional claims arose from a 1965 libel action involving celebrity gossip, a situation far removed from the typical government leak case. In *Garland v. Torre*,[140] columnist Marie Torre published critical remarks about singer Judy Garland's physical appearance and performance attributed to an unnamed television executive.[141] To advance her libel suit, Garland sought the identity of the unnamed source. Torre refused, relying principally on a constitutional argument that compelling testimony "would impose an important practical restraint on the flow of news from news sources to news media and would thus diminish *pro tanto* the flow of news to the public."[142] The appellate court opinion by Judge Potter Stewart, written shortly before he joined the Supreme Court, acknowledged that forced disclosure had First Amendment implications and could indeed compromise newsgathering.[143] But because the source's identity went to the heart of the libel claim and could not be discovered by alternative means, the court found that "the interest to be served by compelling the testimony of the witness . . . justifies some impairment of this First Amendment freedom."[144]

Journalists fared better in some state legislatures, winning passage of shield laws that established a basis for refusing to testify in many circumstances. Maryland adopted the first shield law in 1896,[145] and a

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138. "In the view of the reported cases, no testimonial privilege exists, save in those twelve states where such a privilege is specifically set out by statute." W. D. Lorensen, Note, *The Journalist and His Confidential Source: Should a Testimonial Privilege Be Allowed?*, 35 NEB. L. REV. 562, 562 (1956). The Supreme Court reached the same conclusion seventeen years later. Branzburg v. Hayes, 408 U.S. 665, 685 (1972) ("At common law, courts consistently refused to recognize the existence of any privilege authorizing a newsman to refuse to reveal confidential information to a grand jury.").

139. *See, e.g.*, *Donovan*, 30 A.2d at 426 (citing 8 WIGMORE, EVIDENCE, § 2286 (3d ed. 1940)) (criticizing journalists' shield laws to justify why New Jersey's statute should be construed narrowly in this case). For two examples of how Wigmore dominated legal thinking about the merits of journalists' confidentiality, see Lorensen, *supra* note 138, at 563; LeGrand C. Tibbits, Note, *Privilege of a Newspaper Reporter to Refuse to Testify Concerning Information Confidentially Received*, 22 CORNELL L.Q. 115, 116-18 (1936).

140. 259 F.2d 545 (2d Cir. 1958).

141. MARIE TORRE, DON'T QUOTE ME 34-37 (1965).

142. *Garland*, 259 F.2d at 547-48 (quoting Appellant's Brief).

143. *Id.* at 548-49.

144. *Id.* at 548; *see* Comment, *Confidentiality of News Sources Under the First Amendment*, 11 STAN. L. REV. 541 (1959).

145. David Gordon, *The 1896 Maryland Shield Law: The American Roots of Evidentiary Privilege for Newsmen*, JOURNALISM MONOGRAPHS, No. 22 (1972).

widely publicized 1936 New York confidentiality case mobilized press associations to lobby for similar laws elsewhere.[146] By the time *Branzburg* reached the Supreme Court, seventeen states had granted journalists an evidentiary privilege through statute.[147] Several times between 1929 and 1972 Congress also considered the privilege, but stopped short of enacting a federal shield law.[148]

2. Protection for Leaks on the Margins

Some pre-*Branzburg* legal actions involving leaks did favor the press, though they had limited precedential value. Most notably, by 1970 the majority of state shield laws afforded special protection to journalists' sources as distinct from the contents of their confidential communications.[149] For instance, Alabama's absolute protection for source identity prevented a libel plaintiff from compelling a journalist to name officials in the state prison system who had leaked information about abuses over a number of years.[150]

The Fifth Amendment right against self-incrimination provided more oblique protection for leaks. The Supreme Court in 1914 upheld a journalist's claim that compelled testimony might violate his right against self-incrimination.[151] A city editor who had written articles about customs fraud refused to reveal his sources to a federal grand jury

146. People *ex. rel*. Mooney v. Sheriff of New York County, 199 N.E. 415 (N.Y. 1936); *see also* Walter A. Steigleman, *Newspaper Confidence Laws—Their Extent and Provisions*, 20 JOURNALISM Q. 230, 233-34 (1943). This case also prompted the first flurry of law review commentaries on journalists' privilege. *See, e.g.*, Recent Case, *Duty of Reporter to Disclose Name of Informer*, 3 U. CHI. L. REV. 680 (1935); Albert D. Nohr, Recent Case, People *ex rel.* Mooney v. Sheriff, *199 N.E. (N.Y. 1936)*, 11 WIS. L. REV. 576 (1936); Note, *Privilege of Newspapermen to Withhold Sources of Information from the Court*, 45 YALE L.J. 357 (1935).

147. DIENES, LEVINE & LIND, *supra* note 3, at 912-13, n.20.

148. *See* N.Y. LAW REVISION COMM'N, LEG. DOC. NO. 65(A): REP. & STUDY RELATING TO PROBLEMS INVOLVED IN CONFERRING UPON NEWSPAPERMEN A PRIVILEGE WHICH WOULD LEGALLY PROTECT THEM FROM DIVULGING SOURCES OF INFORMATION GIVEN TO THEM 38-73 (1949) (reprinting all the bills introduced into Congress between 1929 and 1943); MAURICE VAN GERPEN, PRIVILEGED COMMUNICATION AND THE PRESS 29-57, 127 (1979) (listing shield bills introduced before 1975).

149. *See* Note, *Reporters and Their Sources: The Constitutional Right to a Confidential Relationship*, 80 YALE L.J. 317, 321 (1970) (detailing the statutory privileges shielding the identities of journalists' informants available in some states on the eve of *Branzburg*).

150. *Ex parte* Sparrow, 14 F.R.D. 351, 352 (N.D. Ala. 1953) (relying on ALA. CODE tit. 7, § 370 (1940)).

151. Burdick v. United States, 236 U.S. 79, 94 (1915).

on the grounds that he might incriminate himself.[152] President Wilson granted him a pardon, and he was held in contempt when he still refused to testify.[153] The Supreme Court recognized the editor's right to decline the pardon, and thereby avoid testifying, in an opinion criticized for opening a backdoor to journalists' confidentiality.[154] In later cases, prosecutors simply offered reporters immunity to circumvent their Fifth Amendment claims.[155]

Unreported decisions, which comprise the majority of pre-*Branzburg* confidentiality cases,[156] furnished support for protecting source identities in stories based on leaks. For instance, reporters who wrote about misconduct and graft in state agencies sometimes rebuffed efforts to uncover their sources.[157] When a reporter for the *Nashville Tennesseean* refused in 1948 to reveal his sources for a story about police officers aiding bootleggers, the judge accepted a claim of journalists' privilege for stories exposing wrongdoing in government.[158] The judge concluded that the press necessarily receives much information given in confidence. "I am unable to hold the witness in contempt on this matter. It's true it is hard to have serious charges made against a public official on hearsay evidence, but at times much good has been done in this way."[159]

Congress similarly and repeatedly stopped short of forcing reporters to identify sources for stories based on leaks in the decades before *Branzburg*. Lawmakers often sympathized with journalists' confidentiality

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152. *Id.* at 85; *see also* RICHARD KLUGER, THE PAPER: THE LIFE AND DEATH OF THE *NEW YORK HERALD TRIBUNE* 187-89 (1986) (discussing the case from the newspaper's perspective).

153. *Burdick*, 236 U.S. at 85-86.

154. *See* 2 CHAFEE, *supra* note 18, at 498 ("He got all the practical advantage of a special newspaper privilege by dressing himself up in the United States Constitution."); Note, *Effect of an Unaccepted Pardon upon the Privilege Against Self-Incrimination*, 28 HARV. L. REV. 609 (1915).

155. In *Branzburg*, the Court noted that prosecutors sometimes offered immunity to reporters who invoked their right against self-incrimination as the basis for refusing to testify. Branzburg v. Hayes, 408 U.S. 665, 702 n.39 (1972).

156. "It should be noted that the great majority of cases on this subject are unreported." Note, *The Right of a Newsman to Refrain from Divulging the Sources of His Information*, 36 VA. L. REV. 61, 61 n.3 (1950).

157. For example, a reporter refused to identify his sources for a story about the Pennsylvania liquor board's violations of procedures in issuing a license. *See Right to Withhold News Source Upheld*, EDITOR & PUBLISHER, Dec. 9, 1933, at 16. A year later another reporter rebuffed attempts to uncover his sources for a story about graft at the Illinois Emergency Relief Commission. *See Chicago Court Defers Contempt Ruling*, EDITOR & PUBLISHER, Aug. 4, 1934, at 1; *Court Drops Sloan Contempt Charge*, EDITOR & PUBLISHER, Aug. 11, 1934, at 10; *Judge Backs Chicago Reporter*, N.Y. TIMES, Aug. 4, 1934, at 13; *Sloan Case Based on Legal Myths*, EDITOR & PUBLISHER, Aug. 11, 1934, at 11.

158. *Court Upholds Press on Shielding Source*, N.Y. TIMES, June 1, 1948, at 25; *Judge Frees Reporter, Then Adds Praise*, EDITOR & PUBLISHER, June 5, 1948, at 64.

159. *Court Upholds Press on Shielding Source*, *supra* note 158, at 25.

claims. In one instance, a reporter's account of shortcomings in Veterans Administration hospitals, based on information from unnamed officials, triggered a 1945 congressional investigation.[160] Citing professional ethics, the reporter refused to reveal his sources.[161] Committee members initially voted to hold him in contempt but reversed their decision after hearing from a number of colleagues.[162] "To compel a member of the newspaper profession to expose the source of his information would, in many instances revolt against the public good," one representative told the House.[163] Nearly twenty years later, columnist Jack Anderson refused to identify sources who told him that members of Congress cheated on payrolls and expense accounts, but the investigating committee accepted his assertion that "reporters had a constitutional right to protect their sources."[164]

Other investigatory bodies also backed down when reporters refused to reveal their sources. In 1955, a *Washington Post* reporter declined to tell the Federal Bureau of Investigation (FBI) who leaked information

160. *See Investigation of the Veterans' Administration with a Particular View to Determining the Efficiency of the Administration and Operation of Veterans' Administration Facilities: Hearings on H.R. Res. 192 Before the H. Comm. on World War Veterans' Legislation, pt. 1*, 79th Cong. 165, 171 (1945) [hereinafter *Investigation of the Veterans' Administration*]; *House Body Defers News Source Vote*, N.Y. TIMES, May 23, 1945, at 17; Charles Hurd, *The Veteran*, N.Y. TIMES, May 20, 1945, at 21; *Story of Beating of Veterans Waits*, N.Y. TIMES, May 24, 1945, at 20.

161. *See Investigation of the Veterans' Administration*, *supra* note 160, at 171 (testimony of Albert Deutsch, reporter for the newspaper *PM*).

162. *Id.* at 172, 182-83, 342; 91 CONG. REC. 4847, 4859, App. 2554 (1945) (remarks of Reps. Kopplemann, O'Toole, and Biemiller, all speaking in favor of respecting the reporter's confidentiality).

163. 91 CONG. REC. 4859 (1945) (remarks of Rep. O'Toole). In another 1940s incident with a similar outcome, a House committee investigating labor disruptions in Pacific combat areas ordered a newspaper editor to identify the sources for his story. *Hearings Before the H. Comm. on Naval Affairs of Sundry Legislation Affecting the Naval Establishment: Hearings before the Subcomm. of the H. Comm. on Naval Affairs No. 30*, 78th Cong. 197 (1944). When the editor refused, the committee backed down, noting that having the names "would have been helpful . . . . We are aware, however, of the customary practice of newspapers in not revealing the sources of such stories." *Id*. at 199.

164. *See List of 'Cheaters' Spurned in House*, N.Y. TIMES, Apr. 10, 1963, at 22; *see also* JACK ANDERSON, WASHINGTON EXPOSE 44-45 (1967) (asserting that Congress did not want him to reveal too many details about congressional corruption). In another congressional investigation the same year, a reporter refused to disclose his sources for a story that raised questions about the fairness of the Pentagon's procedures for letting contracts. *Reporter Refuses to Tell Senate Who Gave Him Data on the TFX*, N.Y. TIMES, May 25, 1963, at 6.

from the National Security Council (NSC).[165] The FBI dropped the matter when the reporter assured agents that he had not seen actual NSC documents.[166] In another instance, a series of articles for the *Arizona Republic* about corruption at two state commissions prompted grand jury and legislative investigations; the reporter successfully resisted efforts to learn who had leaked key information.[167]

B. Branzburg v. Hayes

When the question of journalists' confidentiality reached the Supreme Court in 1972, the contours of the law were clear. The First Amendment furnished weak support at best, the common law resisted efforts to recognize evidentiary privileges, and state shield laws provided varying degrees of protection.[168] Furthermore, confidentiality law made no distinction between cases involving leaks from government and those where journalists had witnessed crimes or had defamed someone using unnamed sources. Unreported cases and congressional actions that exhibited sympathy for journalists' claims in situations involving leaks carried little precedential weight.

The four cases consolidated in *Branzburg v. Hayes* grew out of governmental attempts to exploit the media's information gathering activities for its own criminal investigations of counterculture and dissident political activities.[169] Possibly hundreds of subpoenas were issued to news organizations in the late 1960s to identify sources or turn over information about the Black Panther Party, Students for a Democratic Society, drug use, anti-Vietnam War organizing, and kindred activities.[170] In two of the cases that ended up at the Supreme Court, reporter Paul Branzburg declined to testify before a grand jury about illicit drug activities he had witnessed while preparing an article

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165. CHALMERS M. ROBERTS, FIRST ROUGH DRAFT: A JOURNALIST'S JOURNAL OF OUR TIMES 125-26 (1973); James Reston, *Reporter Is Queried on Security 'Leaks,'* N.Y. TIMES, Sept. 7, 1955 at 1.

166. ROBERTS, *supra* note 165, at 125; Reston, *supra* note 165, at 1, 63.

167. Jack Langguth, *Arizona Presses Bribery Inquiry*, N.Y. TIMES, Apr. 19, 1964, at 75; Jack Langguth, *4th Arizona Aide Will Go on Trial*, N.Y. TIMES, May 25, 1964, at 18.

168. The state of journalists' confidentiality law on the eve of *Branzburg* is conveniently summarized in DIENES, LEVINE & LIND, *supra* note 3, at 910-13.

169. "Government prosecutors and legislators actively sought the assistance, voluntary or otherwise, of reporters who had established valuable confidential contacts with the leaders and rank-and-file members of these 'subversive' groups." John E. Osborn, *The Reporter's Confidentiality Privilege: Updating the Empirical Evidence After a Decade of Subpoenas*, 17 COLUM. HUM. RTS. L. REV. 57, 60 (1985); *see also* VAN GERPEN, *supra* note 148, at 29-57 (discussing subpoenas issued to the press as part of the government's investigation of the counterculture).

170. *See* Sherwood, *supra* note 12, at 1202*; see also* Osborn, *supra* note 169, at 59-61; Note, *supra* note 149, at 317.

for the *Louisville Courier-Journal*.[171] Both of the other appeals considered in *Branzburg* involved reporters' refusals to testify before grand juries investigating the Black Panther Party's possible criminal activities.[172]

Of the four cases, *United States v. Caldwell* presented the strongest claim for recognizing journalists' confidentiality,[173] and it was the only one in which the press prevailed in the lower courts. *New York Times* reporter Earl Caldwell testified that he was among the few journalists working for the mainstream media who had successfully cultivated sources in the Black Panther Party.[174] Caldwell claimed that vital sources would refuse to deal with him once he stepped inside the grand jury room.[175] Affidavits from prominent journalists supported his assertion about the value of confidential sources.[176] Despite the district court's willingness to issue a protective order shielding Caldwell's "confidential associations, sources or information received," the *New York Times* reporter still refused to appear and was held in contempt.[177] The appeals court vacated the contempt citation, recognizing that the "public's First Amendment right to be informed" conferred a qualified constitutional right on the press to refuse to testify.[178]

The Supreme Court disagreed. Although the majority conceded that compelling journalists to testify imposed some burden on newsgathering, "the evidence fails to demonstrate that there would be a significant constriction of the flow of news to the public if this Court reaffirms the prior common-law and constitutional rule regarding the testimonial obligations of newsmen."[179] Looking beyond the cases at hand, Justice

171. Branzburg v. Pound, 461 S.W.2d 345, 345-46 (Ky. 1970), *aff'd sub nom.*, Branzburg v. Hayes, 408 U.S. 665 (1972); Branzburg v. Meigs, 503 S.W.2d 748, 749 (Ky. 1971), *aff'd sub nom.*, Branzburg v. Hayes, 408 U.S. 665 (1972).

172. *In re* Pappas, 266 N.E.2d 297 (Mass. 1971), *aff'd sub nom.*, Branzburg v. Hayes, 408 U.S. 665 (1972); *In re* Caldwell, 311 F. Supp. 358 (N.D. Cal. 1970), *rev'd*, Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970), *rev'd sub nom.*, Branzburg v. Hayes, 408 U.S. 665 (1972).

173. 434 F.2d 1081 (9th Cir. 1970).

174. *Id.* at 1087 n.7 (reprinting testimony from Caldwell); *see also Newsmen's Privilege: Hearings on H.R. 717 Before Subcomm. No. 3 of the H. Comm. on the Judiciary*, 93d Cong. 39-43 (1973) (statement of Earl Caldwell about the problems he faced in reporting on the Black Panthers and the complications caused by the government's efforts to use him as a source of information about the Party) [hereinafter *1973 House Hearings*].

175. *Caldwell*, 434 F.2d at 1088 n.7.

176. *Id.* at 1084.

177. *Caldwell*, 311 F. Supp. at 362; *Caldwell*, 434 F.2d at 1081.

178. *Caldwell*, 434 F.2d at 1089.

179. Branzburg v. Hayes, 408 U.S. 665, 693 (1972).

White observed that "from the beginning of our country the press has operated without constitutional protection for press informants, and the press has flourished."[180] The interests of the press thus must yield to the "longstanding principle that the 'public . . . has a right to every man's evidence,'" especially for grand jury proceedings.[181]

Despite the majority's holding, several aspects of the Court's decision held open the possibility of recognizing some claims to protect confidentiality, perhaps including those involving leaks. First, the opinion twice acknowledged that "news gathering is not without its First Amendment protections."[182] Second, the four cases decided in *Branzburg* all involved efforts to compel testimony before *grand juries*. Indeed, the Court repeatedly framed its analysis in terms of its import for grand juries, suggesting a limitation on its reach, and many lower courts interpreted it accordingly.[183] Third, the majority opinion focused on confidentiality in cases dealing with *criminal* activity; nowhere did it address confidentiality in connection with leaks from government.[184]

The concurring and dissenting opinions furnish additional support for construing *Branzburg* narrowly enough to protect the confidentiality of leaks from government sources. Providing the majority's necessary fifth vote, Justice Powell's concurring opinion emphasized "the limited nature of the Court's holding."[185] He underscored the importance of striking a balance between "the obligation of all citizens to give relevant testimony" and the interests of the press "on a case-by-case basis."[186] This single passage "has formed the cornerstone of much subsequent constitutional law on the subject," according to one treatise.[187]

Justice Stewart's dissent also exerted unusual influence on subsequent developments. The three-part test he fashioned has been followed by many

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180. *Id*. at 698-99.

181. *Id.* at 688 (quoting United States v. Bryan, 339 U.S. 323, 331 (1950)).

182. *Id.* at 681, 707. But the Court held that the compelled testimony at issue here imposed an incidental burden on the press and not a "prior restraint or restriction on what the press may publish." *Id.* at 681.

183. "The sole issue before us is the obligation of reporters to respond to grand jury subpoenas . . . ." *Id.* at 682; *see also id.* at 687-88, 701-02 (addressing assertions of journalists' confidentiality in a grand jury context). Absent statutory protection, courts considering the scope of a common law or constitutional privilege have been most reluctant to recognize it when journalists have been called to testify before a grand jury. *See* DIENES, LEVINE & LIND, *supra* note 3, at 1066-69.

184. In reciting the facts presented by the three cases, the Court emphasized the journalists' knowledge of other parties' possible criminal activity. *See Branzburg*, 408 U.S. at 667-79.

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

186. *Id.* at 710.

187. DIENES, LEVINE & LIND, *supra* note 3, at 926.

lower courts and mirrors the elements of most shield laws.[188] Believing that the "right to gather news" implied "a right to a confidential relationship between a reporter and his source," Stewart shifted the presumption in favor of the press.[189] Before forcing disclosure, he would require the government to prove that a journalist has relevant information, not obtainable by alternative means, for which there is a "compelling and overriding interest."[190] In a separate dissent, Justice Douglas recognized an absolute right for journalists to maintain their confidences.[191] In an observation with special import for leaks, Douglas praised the role of journalistic confidentiality in exposing government's inner workings to public scrutiny.[192]

C. Confidentiality Law and Leaks from Branzburg *to the CIA Leak Case*

The press pursued two strategies in the wake of the Court's *Branzburg* decision. In the short term, journalists pushed for more shield laws, especially at the federal level.[193] The effort fell short in Congress but presented an opportunity for the press to articulate the importance of protecting confidences in reporting on government. In the longer term, and with considerable success, the press and its legal advocates argued that courts should use the three-part test from Stewart's dissenting opinion in deciding confidentiality cases.[194] This approach provided considerable protection for a wide range of cases, but it did little to recognize leaks as a form of political communication.

1. Leaks and the Campaign for a Federal Shield Law

Though it declined to recognize journalists' First Amendment confidentiality claims, the *Branzburg* majority invited Congress and the

188. *Branzburg*, 408 U.S. at 743 (Stewart, J., dissenting). "The Stewart approach now governs much of the law of journalist's privilege in the context of civil *and* criminal proceedings. The three-part test of Stewart's *Branzburg* dissent has thus become enormously important." DONALD M. GILLMOR, ET AL., MASS COMMUNICATION LAW 363 (5th ed. 1990).
189. *Branzburg*, 408 U.S. at 728.
190. *Id.* at 743.
191. *Id.* at 712 (Douglas, J., dissenting).
192. *Id.* at 722.
193. *See* VAN GERPEN, *supra* note 148, at 147-70 (reviewing efforts to secure a shield law in Congress).
194. *See* Lawrence J. Mullen, Comment, *Developments in the News Media Privilege: The Qualified Constitutional Approach Becoming Common Law*, 33 ME. L. REV. 401, 419 (1981).

states to extend a statutory privilege to the press.[195] One day after the ruling, a Senator introduced the first of dozens of bills considered by Congress through the mid-1970s to protect journalists' sources and confidential information.[196] The congressional hearings focused, at most, modest attention on the importance of news leaks from government sources.[197] In arguing for the merits of shield legislation, the press and its allies highlighted a few examples of stories developed through unnamed sources that exposed government malfeasance.[198] More than one shield law proponent pointed to a recent exposé by the *Memphis Commercial Appeal* about problems in state hospitals as illustrating the need to protect journalists' confidentiality.[199] Witnesses complained that state authorities devoted more energy to seeking the leak's source than addressing the problems.[200] Witnesses also mentioned, but did not explore, the importance of protecting source confidentiality in making the Pentagon Papers public and in bringing the still unfolding Watergate scandal to light.[201] More frequently, those testifying on behalf of the shield bills cited examples like those addressed in *Branzburg*—compelling

195. *Branzburg*, 408 U.S. at 706 (majority opinion).

196. Senator Alan Cranston of California, a former wire service reporter, introduced the bill immediately after the *Branzburg* decision. *See* VAN GERPEN, *supra* note 148, at 149; *see also Newsmen's Privilege: Hearings on S. 36, S. 158, S. 318, S. 451, S. 637, S. 750, S. 870, S. 917, S. 1128, and S.J. Res. 8 Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 93d Cong. 45-59 (1973) (remarks of Sen. Cranston); *1973 House Hearings*, *supra* note 174, at 256-64 (testimony of Arthur B. Hanson, General Counsel, American Newspaper Publishers Association and secretary for an ad hoc committee of media groups pushing for a federal shield law) (analyzing differences among the various proposals for a shield law); VAN GERPEN, *supra* note 148, at 147-70 (reviewing the failed efforts to pass a federal shield statute in the wake of *Branzburg*).

197. For instance, the chairman of the House Judiciary Committee, citing research by law professor Vince Blasi, noted that "stories of Government operations involve the heaviest use of promises of confidentiality with something over one-third of the stories written said to have been affected by promises of confidentiality." *1973 House Hearings*, *supra* note 174, at 12 (remarks of Rep. Peter W. Rodino, Jr.); *see* Vince Blasi, *The Newsman's Privilege: An Empirical Study*, 70 MICH. L. REV. 229, 251-53 (1971).

198. *See, e.g.*, *Newsmen's Privilege: Hearings on H.R. 837, 1084, 15891, 15972, 16527, 16713 and 16542 Before Subcomm. No. 3 of the H. Comm. on the Judiciary*, 92d Cong. 177-79 (remarks of Sen. Cranston), 218-19 (testimony of Richard Oliver of the *New York Daily News*) (1972) [hereinafter *1972 House Hearings*]; *1973 House Hearings*, *supra* note 174, at 61 (testimony on behalf of the Reporters Committee for Freedom of the Press), 240 (remarks of A. M. Rosenthal, managing editor, *New York Times*).

199. *See, e.g.*, *1972 House Hearings*, *supra* note 198, at 64 (statement of Guy Ryan, president, Sigma Delta Chi, a professional organization of journalists), 195-97 (remarks of Rep. Dan Kuykendall of Tennessee).

200. *Id.*

201. *See, e.g.*, *id*. at 172-73 (testimony of Rep. Edward I. Koch of New York mentioning the Pentagon Papers); *1973 House Hearings*, *supra* note 174, at 67 (statement of the Reporters Committee for Freedom of the Press mentioning Watergate).

reporters to testify about possible criminal activity they witnessed.[202] They also focused on the ever-growing number of subpoenas served on photographers and television journalists for visual evidence sought by law enforcement.[203]

The few opponents of shield laws who testified during the congressional hearings downplayed the need for a federal statute and ignored the importance of protecting leaks.[204] The Department of Justice, represented by Assistant Attorney General Antonin Scalia, reassured reporters that its guidelines for subpoenaing the press guarded against abuses.[205] The guidelines had been issued in August 1970, drafted with the help of William Rehnquist, head of the Office of Legal Counsel before joining the Court.[206] In presenting the case against a federal shield law, Scalia offered hypothetical situations in which the media's insistence on maintaining confidentiality could cause grave harm.[207] The parade of horrors included reporters who refused to turn over a kidnapper's ransom note or a message about a bomber's threats, television stations that refused to supply video outtakes needed to investigate demonstrations or "the attempted assassination of a prominent political figure," newspapers that refused to identify the source of illegally released secret grand jury testimony that "irreparably injur[ed] the reputation of a prominent individual" who may never be indicted, and reporters who refused to identify the source from which they obtained properly classified national defense secrets.[208]

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202. *See, e.g.*, *1973 House Hearings*, *supra* note 174, at 65-68 (statement of the Reporters Committee for Freedom of the Press listing post-*Branzburg* clashes between prosecutors and the press over confidential sources and information).

203. *Id.*

204. "With the sole exception of the Department of Justice, witnesses at the [1972 House] hearings, comprising Members of Congress and representatives of organizations, and so forth, favored some form of privilege." *1973 House Hearings*, *supra* note 174, at 1 (remarks of Rep. Robert W. Kastenmeier of Wisconsin).

205. *See Newsmen's Privilege: Hearings on H.R. 215 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the H. Comm. on the Judiciary*, 94th Cong. 6-15 (testimony of Scalia) (1975) [hereinafter *1975 House Hearings*]. The Justice Department guidelines, announced August 10, 1970, are reprinted in *1972 House Hearings*, *supra* note 198, at 28-29 (current version at 28 C.F.R. § 50.10 (2005)).

206. *See* Lawrence R. Velvel, *The Supreme Court Stops the Presses*, 22 CATH. U. L. REV. 324, 341-42 (1973) (arguing that Rehnquist should have recused himself in *Branzburg* because he had recently participated in shaping the administration's policy on subpoenaing reporters).

207. *1975 House Hearings*, *supra* note 205, at 7.

208. *Id.*

In the end, no shield bill made much headway in Congress in the years immediately after *Branzburg*. Disagreements among different segments of the media over the features of a federal shield law undermined the legislative campaign.[209] Initially, much of the press seemed willing to support a qualified privilege along the lines of Stewart's three-prong test.[210] But as subpoenas to reporters continued to proliferate, even in states with shield laws, reporters' groups increasingly pushed for unqualified protections.[211] The media also divided over who (student journalists, freelance writers, book authors, photographers, scholars) should enjoy the protection of a shield law, whether a law should apply to just federal proceedings or also extend to the states, and other issues.[212] Thus, Congress never came close to a floor vote on federal shield legislation in the 1970s,[213] though several states enacted protections following the *Branzburg* decision and several others modified existing statutes.[214]

2. Confidentiality Cases and Leaks, 1972-2005

Post-*Branzburg* confidentiality rulings did not treat unidentified government sources differently than other types of journalistic informants.[215]

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209. *See* VAN GERPEN, *supra* note 148, at 166-69; AM. SOC'Y OF NEWSPAPER EDITORS, PROBLEMS OF JOURNALISM 178-98 (1973).

210. *See, e.g.*, *1972 House Hearings*, *supra* note 198, at 42 (statement of the American Society of Newspaper Editors), 55 (Associated Press Managing Editors), 61 (Radio Television News Directors Association), 75 (American Newspaper Publishers Association); VAN GERPEN, *supra* note 148, at 149.

211. *See, e.g.*, *1973 House Hearings*, *supra* note 174, at 58, 60, 65-68 (Reporters Committee), 256 (American Newspaper Publishers Association). In fact, discussions about shield legislation revealed growing fissures between reporters on the one hand and editors and publishers on the other. The Reporters Committee for Freedom of the Press, which had been formed in 1970 to fight Nixon administration subpoenas, emerged as and remains the leading advocacy group for reporters, especially when their interests diverge from those of editors and media owners. *See* Floyd J. McKay, *First Amendment Guerillas: Formative Years of the Reporters Committee for Freedom of the Press*, 6 JOURNALISM & COMM. MONOGRAPHS 105 (2004).

212. VAN GERPEN, *supra* note 148, at 150-55, summarizes the debate over which types of communicators should qualify for the privilege under the proposed federal shield laws.

213. Apparently only one bill was even reported out of committee. *See id.* at 169.

214. Between 1973 and 1975 eight states passed shield laws, others modified theirs, and some considered but rejected a statutory privilege. *See id.* at 127-28, 202 n.1.

215. Except for a one paragraph discussion of the general contours of confidentiality law, *infra* text accompanying notes 216-19, this section focuses on cases in which the identity of a *government* source was at issue—that is, cases involving leaks, as defined *supra* note 1. This subset of all journalists' confidentiality cases was constructed from the *Media Law Reporter*, which provides more complete coverage for this topic than other reporters. Nonetheless, there is no easy way to quantify how many confidentiality cases involve government sources. Indeed, given the nature of this issue—unnamed sources—it was not entirely clear in a handful of cases in state courts whether the

Courts weighed the customary media claim that forcing disclosure could dry up sources and ultimately diminish the flow of information to the public, but the implications for governance received scant attention. Except when a state shield law dictated a different outcome, decisions in confidentiality cases typically applied elements from Stewart's test or some variant of them.[216] Stewart's test required the government to prove that a journalist had relevant information, not otherwise obtainable, for which there was a compelling interest. In terms of relevance, courts frowned on fishing expeditions by parties merely hoping to discover useful evidence in the hands of a reporter.[217] Courts also preferred that parties seeking to breach journalistic confidentiality exhaust other sources first or at least make a good faith effort to develop the same information through other channels.[218] Courts assessed the compelling need for the information largely by assigning varying weight to different legal contexts for which the evidence was sought, whether criminal, civil, libel, or grand jury.[219]

Courts usually protected the confidentiality of a reporter's government sources when their identity was sought to advance a civil suit.[220] For instance, one cluster of confidentiality cases stemmed from actions by city, county, or state employees against an agency that had fired or otherwise punished them; courts rarely compelled reporters to identify government sources sought for such suits.[221] Similarly, demands that

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sources were in fact individuals in government. In such situations, contextual clues were used to include or exclude them from the analysis.

216. *See* GILLMOR ET AL., *supra* note 188, at 363.

217. *See* DIENES, LEVINE & LIND, *supra* note 3, at 1009-10 (discussing the relevance requirement recognized in shield laws and in some constitutional and common law interpretations of a journalist's privilege).

218. *See id.* at 1010-13 (discussing the exhaustion requirement).

219. *See id.* at 1066-89 (discussing confidentiality claims in different proceedings).

220. *See, e.g*, Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981) (declining to compel a newspaper to identify, for purposes of a civil suit, a government source who leaked transcripts of wiretaps made in an organized crime investigation).

221. *See, e.g.*, *In re* Selcraig, 705 F.2d 789 (5th Cir. 1983); Green v. Office of the Sheriff, 31 Media L. Rep. (BNA) 1756 (M.D. Fla. 2002); McKee v. Starkville, 11 Media L. Rep. (BNA) 2312 (N.D. Miss. 1985); Whitney v. O'Hara, 11 Media L. Rep. (BNA) 1607 (W.D. Mo. 1985); Connecticut Labor Relations Bd. v. Fagin, 370 A.2d 1095 (Conn. Super. Ct. 1976); Miller v. Greer, 20 Media L. Rep. (BNA) 1061 (Ga. Super. Ct. 1992); Waterloo/Cedar Falls Courier v. Hawkeye Cmty. Coll., 646 N.W.2d 97 (Iowa 2002); Wojcik v. Boston Herald Inc., 803 N.E.2d 1261 (Mass. App. Ct. 2004); Sinnott v. Boston Ret. Bd., 524 N.E.2d 100 (Mass. 1988). *But see* Trautman v. Dallas Sch. Dist., 8 Media L. Rep. (BNA) 1088 (N.D. Tex. 1982) (holding a reporter in contempt for

reporters identify their government sources in civil suits against the IRS for leaking information about taxpayers' records have also been largely unsuccessful.[222] But in one long-running case, courts recently held five reporters in contempt for refusing to identify sources sought by a plaintiff suing federal agencies for violating the Privacy Act.[223] The appeals court found that ordering disclosure was the only way the plaintiff could prove essential elements of his claim.[224]

Libel suits confounded the usual application of confidentiality principles in civil actions.[225] A federal appeals court noted that "[w]hen the journalist is a party [in a libel action], and successful assertion of the

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refusing to identify, even in camera, the source for a story that led to the dismissal of a school employee).

222. When a liquor company sued an IRS agent for leaking supposedly confidential information from a tax audit, it sought to compel a Phoenix newspaper reporter to identify other unnamed IRS sources. A federal district court rejected the reporter's claim based on the First Amendment and the Arizona shield law. United Liquor Co. v. Gard, 88 F.R.D. 123, 131-32 (D. Ariz. 1980). But the court upheld the reporter's claim that testifying could violate his Fifth Amendment right against self-incrimination. United Liquor v. Gard, 7 Media L. Rep. (BNA) 1345, 1349 (D. Ariz. 1981). As the appellate court noted, federal tax law left open the possibility that publishing such information was a federal crime. *In re* Seper, 705 F.2d 1499, 1501 (9th Cir. 1983) (noting that 26 U.S.C. § 7213(a)(3) made it unlawful to publish tax information "disclosed in a manner unauthorized by this title . . . ."); *see also* Bischoff v. United States, 25 Media L. Rep. (BNA) 1286 (E.D. Va. 1996) (quashing subpoena requiring a reporter to identify IRS agents who leaked taxpayers' records).

223. The Act, 5 U.S.C. § 552a, creates a right of action against agencies that improperly disclose personal information about individuals. Dr. Wen Ho Lee, a scientist employed at the Department of Energy's Los Alamos laboratory, was suspected of passing nuclear secrets to the People's Republic of China. In early 1999, unnamed sources in the Departments of Justice and Energy and the FBI leaked information about Lee's supposed espionage. After further investigation, Lee was indicted on fifty-nine counts of mishandling computer files; he pleaded guilty to one count and the government dismissed the rest. In December 1999, Lee sued the three agencies for having leaked personal information about him and his wife in violation of the Privacy Act. After extensive discovery, Lee subpoenaed five journalists seeking the identities of the leakers. A district court ordered five of the journalists to testify. *See* Lee v. Dep't of Justice, 287 F. Supp. 2d 15, 24-25 (D.D.C. 2003); Lee v. Dep't of Justice, 327 F. Supp. 2d 26, 26-28 (D.D.C. 2004). The appeals court affirmed the order for four, Lee v. Dep't of Justice, 413 F.3d 53, 61-64 (D.C. Cir. 2005), *aff'd* 428 F.3d 299 (D.C. Cir. 2005) (en banc) (4-4 vote), and later a different, fifth reporter was also cited for contempt, Lee v. Dep't of Justice, 401 F. Supp. 2d 123 (D.D.C. 2005). The case ended in June 2006 when the government and the five news organizations reached a $1.6 million settlement with Lee. The news organizations contributed $750,000. "Specialists in media law said such a payment by news organizations to avoid a contempt sanction was almost certainly unprecedented." Adam Liptak, *News Media Pay in Scientist Suit*, N.Y. TIMES, June 3, 2006, at A1; *see also* Charles Lane, *In Wen Ho Lee Case, a Blow to Journalists After the Fact*, WASH. POST, June 6, 2006, at A3.

224. *Lee*, 413 F.3d at 60.

225. On the application of confidentiality law when the party from which the testimony is sought is also the libel defendant, see DIENES, LEVINE & LIND, *supra* note 3, at 1077-89; Patrick M. Garry, *Anonymous Sources, Libel Law, and the First Amendment*, 78 TEMP. L. REV. 579 (2005).

privilege will effectively shield him from liability, the equities weigh somewhat more heavily in favor of disclosure."[226] Where shield laws seemingly protected the press, some courts fashioned a remedy that presented libel defendants with a difficult choice: they did not have to disclose their government sources, but neither could they rely on the existence of the sources in their defense.[227]

Criminal defendants' Sixth Amendment right to compel testimony normally strengthens their claim to override a reporter's promise of confidentiality.[228] But courts have proven unsympathetic to many such requests to uncover a reporter's government sources. Criminal defendants have failed to force disclosure to support a change of venue,[229] impeach the credibility of government investigators,[230] or discover who in a police department or prosecutor's office leaked information to the press during an investigation or trial.[231] In ruling against defendants, courts

226. Zerilli v. Smith, 656 F.2d 705, 714 (D.C. Cir. 1981).

227. *See* Bufalino v. Associated Press, 692 F.2d 266, 271-72 (2d Cir. 1982); Newton v. Nat'l Broad., Inc., 109 F.R.D. 522 (D. Nev. 1985); Caldero v. Tribune Publ'g, 562 P.2d 791 (Idaho 1977); Sands v. News America Publ'g Inc., 560 N.Y.S.2d 416 (N.Y. App. Div. 1990); Sharon v. Time, 599 F. Supp. 538, 543 (S.D.N.Y. 1984) (denying summary judgment because libel defendant refused to identify government sources); Atlanta Journal-Constitution v. Jewell, 555 S.E.2d 175 (Ga. Ct. App. 2001) (rejecting reliance on a state shield law but finding that the libel plaintiff had not followed customary discovery procedures); *see also* Robert G. Berger, *The "No-Source" Presumption: The Harshest Remedy*, 36 AM. U. L. REV. 603 (1987) (exploring the implications of directing a jury to assume that there is no source when media defendants in libel cases refuse to disclose them to plaintiffs). *But see* Maressa v. New Jersey Monthly, 445 A.2d 376 (N.J. 1982) (finding that some state shield laws absolutely protect confidentiality in libel cases).

228. "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . ." U.S. CONST. amend. VI.

229. North Carolina v. Wallace, 23 Media L. Rep. (BNA) 1473 (N.C. Super. Ct. 1995).

230. United States v. Aponte-Vega, 20 Media L. Rep. (BNA) 2202 (S.D.N.Y. 1992).

231. United States v. DePalma, 466 F. Supp. 917 (S.D.N.Y. 1979); Rodriguez v. Superior Court, 601 P.2d 318 (Ariz. Ct. App. 1979); New Hampshire v. Siel, 444 A.2d 499 (N.H. 1982); State v. Peterson, 31 Media L. Rep. (BNA) 2501 (N.C. Super. Ct. 2003); North Carolina v. Rogers, 9 Media L. Rep. (BNA) 1254 (N.C. Super. Ct. 1983). *But see* United States v. Criden, 633 F.2d 346 (3d Cir. 1980) (holding that a reporter's testimony about a conversation with a U.S. attorney who leaked information is crucial to defendants' efforts to establish prosecutorial misconduct). *See generally Law Enforcement and the Media: Information Leaks and the Atlanta Olympic Bombing Investigation: Hearing Before the Subcomm. on Terrorism, Technology, and Government Information of the S. Comm. on the Judiciary*, 104th Cong. (1996) (reviewing how leaks from law enforcement agencies can compromise criminal investigations and unfairly brand some people as suspects).

generally find that the journalist's testimony might shed some light on the conduct of the trial—for example, reveal which parties were talking to the press—but would not yield exculpatory evidence.[232]

Despite their secrecy, grand jury proceedings sometimes spring leaks. Reporters' efforts to protect their sources, government investigators in many instances, have met with mixed success.[233] Not surprisingly, courts bristle at leaks from secret grand jury proceedings.[234] Reporters are typically required to testify unless clearly protected by a shield law,[235] or unless they successfully invoke their Fifth Amendment right against self-incrimination.[236] Journalists' confidentiality claims based on protecting the flow of information to the public ring hollow when leaks spring from grand jury investigations, one court pointedly noted.[237] When an official investigation is already underway, it explained, the press does not serve the public by uncovering government wrongdoing but instead simply embellishes its report with details gleaned from a secret grand jury inquiry.[238] Courts have similarly ordered reporters to reveal the identity of sources who leaked sealed court orders.[239]

Until recently, the factual situation presented in *Branzburg*, in which grand juries seek testimony to advance their investigations, rarely involved efforts to uncover reporters' government sources.[240] Unlike leaks *from* grand juries, in these cases the media has independently developed information sought *by* grand juries.[241] Courts customarily

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232. Zelenka v. State, 266 N.W.2d 279 (Wis. 1978).

233. *See generally* James W. Fox, Jr., *The Road Not Taken: Criminal Contempt Sanctions and Grand Jury Press Leaks*, 25 U. MICH. J.L. REFORM 505 (1992) (arguing that holding prosecutors in contempt for leaks from grand juries might be an appropriate remedy); Daniel C. Richman, *Grand Jury Secrecy: Plugging the Leaks in an Empty Bucket*, 36 AM. CRIM. L. REV. 339 (1999) (reviewing the reasons for grand jury secrecy in light of the leaks from the special prosecutor's investigation of President Clinton).

234. *See* Richman, *supra* note 233.

235. *See, e.g.*, Beach v. Shanley, 465 N.E.2d 304 (N.Y. Ct. App. 1984).

236. Arizona v. Walker, 20 Media L. Rep. (BNA) 1645 (Ariz. Super. Ct. 1992).

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

238. *See id*. This case led to the appointment of a special prosecutor to determine who leaked evidence, a videotape, from a federal grand jury probe of corruption in city government. The leaker gave a television reporter great visual material for his story. But protecting the source, probably someone in the Justice Department, did not advance the investigation itself. *Id.* at 59-60.

239. *See, e.g.*, Roche v. State, 589 So. 2d 978 (Fla. Ct. App. 1991).

240. *See* REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AGENTS OF DISCOVERY: A REPORT ON THE INCIDENCE OF SUBPOENAS SERVED ON THE NEWS MEDIA IN 2001, at 7 (2003), *available at* http://rcfp.org/agents/ (last visited Apr. 7, 2006) (finding that, based on a survey, only three percent of 189 subpoenas issued in connection with criminal cases were for testimony before grand juries and these did not necessarily seek government sources).

241. For two reported cases in which reporters resisted requests to testify about their government sources before grand juries, see People v. Pawlaczyk, 724 N.E.2d 901 (Ill. 2000); Andrews v. Andreoli, 400 N.Y.S.2d 442 (Sup. Ct. 1977).

hold that *Branzburg* directly controls these cases and order reporters to testify.[242]

Of the cases involving unnamed government sources, a mere handful dealt with the relation between leaks and governance, and then only indirectly. At least twice Seymour Hersh's investigative reporting about national politics and international affairs prompted demands for his unnamed government sources.[243] In the 1985 prosecution of a Pentagon employee for selling classified satellite photos to *Jane's Defense Weekly*, the court observed that "[f]requent leaks of the same classified information" by the government would undermine its assertion that the intelligence "was closely held or valuable."[244] And many reporters were shocked to learn in the 1970s that law enforcement officials had been scrutinizing their long-distance telephone records to uncover government sources passing along information.[245] Courts rejected journalists' First and Fourth Amendment challenges to the practice.[246]

The most direct consideration of leaks in governance came in a brief opinion by the New Hampshire Supreme Court.[247] A 1976 series of articles based partly on unnamed sources exposed problems in New Hampshire's Department of Probation and prompted a legislative hearing to remove its director.[248] When the reporter refused to identify

242. *See* DIENES, LEVINE & LIND, *supra* note 3, at 1066-69; Douglas H. Frazer, *The Newsperson's Privilege in Grand Jury Proceedings: An Argument for Uniform Recognition and Application*, 75 J. CRIM. L. & CRIMINOLOGY 413, 415, 419 (1984).

243. Desai v. Hersh, 954 F.2d 1408 (7th Cir. 1992) (seeking the identities of U.S. government sources, as part of a libel suit, used in a story that a prominent Indian politician was on the CIA's payroll and funneled intelligence to the Nixon White House); *In re* Disclosure of Grand Jury Report, 3 Media L. Rep. (BNA) 1161 (S.D. Fla. 1977) (seeking Hersh's Justice Department source who leaked a sealed grand jury report probing allegations that the IRS abused its powers to gather tax information about individuals).

244. United States v. Morison, 18 Fed. R. Evid. Serv. (Callaghan) 1417, 1418 (D. Md. 1985). Morison argued that much of the supposedly confidential information he was accused of selling to *Jane's* had already been leaked to the press when it suited the government's interests. Morison sought testimony from three journalists who would buttress this assertion, and the court recognized its relevance. The court declined, however, to compel this testimony if the journalists invoked a reporter-source privilege, which would preclude a thorough cross-examination. In the end, one journalist did testify because he did not need to claim a testimonial privilege. *Id.* at 1418-19.

245. Reporters Comm. v. Am. Tel. & Tel., 593 F.2d 1030, 1038-40 nn.17-19 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 949 (1979) (providing examples of how phone records were used in efforts to uncover reporters' sources).

246. *Id.*

247. Opinion of the Justices, 373 A.2d 644 (N.H. 1977).

248. *Id.* at 645.

his sources in the department, the legislature asked the state supreme court for an advisory opinion about its authority to compel testimony.[249] Noting that the state had no shield law, the court weighed the *Branzburg* holding and the common law status of a journalist's privilege.[250] In the end, it concluded that the state "constitution quite consciously ties a free press to a free state, for effective self-government cannot succeed unless the people have access to an unimpeded and uncensored flow of reporting. News gathering is an integral part of the process."[251] The court linked the success of such reporting to journalists' ability to protect the identity of their sources.[252]

D. The 2004-2005 CIA Leak Case

More than thirty years after *Branzburg*, the federal courts finally grappled with a case directly pitting the ethos of leaks from government sources against the law of journalists' confidentiality. The conflict between journalistic and judicial conventions grew from a July 2003 op-ed column in the *New York Times* contributed by former Ambassador Joseph Wilson.[253] He had been dispatched to Niger by the CIA in 2002 to investigate rumors that Iraq was attempting to acquire materials for nuclear weapons.[254] In his column, Wilson charged that the White House had twisted intelligence about Iraq's nuclear weapons program, a claim featured in the President's State of the Union address to justify the 2003 invasion.[255] One week after the column appeared, conservative columnist Robert Novak wrote that "two senior administration officials" told him that Wilson's wife, CIA operative Valerie Plame, had arranged her husband's Niger probe.[256] Similar articles, also citing unnamed administration officials, appeared in national media over the next days, and some noted that Plame had worked as a covert CIA operative.[257] Observers surmised that Bush administration sources had leaked the details about Plame's CIA role to undercut her husband's credibility as a critic of the Iraq war.[258]

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249. *Id.*
250. *Id.* at 646-47.
251. *Id.* at 647.
252. *Id.*
253. *In re* Grand Jury Subpoena, Judith Miller, 397 F.3d 964, 965-66 (D.C. Cir. 2005).
254. *Id.* at 966.
255. *Id.* at 965-66.
256. *Id.* at 966 (quoting Robert Novak, *The Mission to Niger*, CHI. SUN-TIMES, July 14, 2003, at 31).
257. *Id.* (citing Mike Allen & Dana Priest, *Bush Administration is Focus of Inquiry; CIA Agent's Identity was Leaked to Media*, WASH. POST, Sept. 28, 2003, at 1).
258. *Id.*; *see also supra* notes 13-14 and accompanying text.

The CIA initiated a legal inquiry by asking the Department of Justice to find the leakers for possible prosecution under a 1972 law that prohibited government employees with access to classified information from publicly identifying covert intelligence agents.[259] At first, the administration insisted that the Department of Justice could conduct the leak probe without a conflict of interest, but Attorney General John Ashcroft eventually recused himself, leading to the appointment of U.S. Attorney Patrick Fitzgerald as special counsel.[260]

At Fitzgerald's behest, a grand jury subpoenaed a number of journalists, most of whom refused to testify because they had promised to protect their sources' confidentiality.[261] Fitzgerald tried to avoid a direct legal confrontation with the journalists by securing written statements from a number of administration officials who were likely sources of the leak, releasing reporters from honoring their promises.[262] Regarding these waivers as coerced, some reporters continued to rebuff requests for their testimony and were cited for contempt.[263] In the end, reporter Judith Miller of the *New York Times* served eighty-five days in jail.[264] She eventually identified her source, the Vice President's Chief of Staff Lewis "Scooter" Libby, after he sent Miller a personal note freeing her from her promise.[265]

The Special Counsel's attempts to uncover the journalists' sources produced the most searching, though still inadequate, judicial consideration of leaks as a distinct type of confidentiality case. The press nevertheless lost each round in court. In reviewing the contempt citations of Miller and *Time* magazine reporter Matthew Cooper, the court of appeals rejected the appellants' efforts to distinguish their situations from those presented in *Branzburg*.[266] The press argued that *Branzburg* dealt only

259. *Miller*, 397 F.3d at 966 (citing 50 U.S.C. § 421).

260. *Id.*; *see* Michael Duffy, *Leaking with a Vengeance*, TIME, Oct. 13, 2003, at 29, 33-34; Timothy M. Phelps, *My Plame Problem—and Yours*, COLUM. JOURNALISM REV., Jan./Feb. 2006, at 22, 23.

261. *Miller*, 397 F.3d at 966-68.

262. *Id.* at 999-1000 (Tatel, J., concurring); *see also* Phelps, *supra* note 260, at 23-24 (discussing Fitzgerald's use of waivers to secure the reporters' cooperation).

263. *In re* Special Counsel Investigation, 374 F. Supp. 2d 238 (D.D.C. 2005); *In re* Special Counsel Investigation, 332 F. Supp. 2d 26 (D.D.C. 2004).

264. *See* Johnston & Stevenson, *Times Reporter Gives Testimony*, *supra* note 7.

265. *See id.* Partly on the basis of Miller's testimony, Libby was indicted for lying to the grand jury about his role in the leak. David Johnston & Richard W. Stevenson, *Cheney Aide Charged with Lying in Leak Case*, N.Y. TIMES, Oct. 29, 2005, at A1.

266. *Miller*, 397 F.3d at 969 ("[T]here is no material factual distinction between the petitions before the Supreme Court in *Branzburg* and the appeals before us today.").

with reporters witnessing crimes, but the court concluded otherwise. First, it held that the Supreme Court's decision included references to confidential sources.[267] Second, it decided that Miller and Cooper had indeed witnessed a crime by receiving "information concerning the identity of a covert operative of the United States from government employees . . . ."[268] The court also forcefully rejected the claim that Justice Powell's concurrence somehow converted *Branzburg*, which rejected a journalist's First Amendment right not to testify, into a holding that recognized it.[269] The court concluded that Powell "only emphasized that there would be First Amendment protection in cases of bad faith investigations."[270]

The appellants' secondary arguments also failed to persuade the court to vacate the contempt citations. Although the judges disagreed about the existence of a federal common law evidentiary privilege for journalists, "all believe that if there is any such privilege, it is not absolute."[271] Even if they recognized a qualified privilege, "it has been overcome" here.[272] The court also held that the "Special Counsel's secret evidentiary submissions in support of the enforcement of the subpoenas" did not violate the appellants' due process rights.[273] Finally, the court ruled that the Department of Justice's guidelines for issuing subpoenas to the news media did not create a legally enforceable right and "merely guide[d] the discretion of the prosecutors."[274]

Although Judge David S. Tatel concurred in the outcome, he exhibited considerable sympathy for protecting the confidentiality of some journalistic informants in an opinion that grappled with leaks and their role in governance.[275] Tatel argued that *Branzburg* might offer modest support for journalistic confidentiality in some grand jury contexts.[276] In this case, however, he concluded that the claim "for a constitutional privilege appears weak indeed with respect to leaks" because the reporter's testimony would probably be the only way to prove a crime when the offense was the disclosure itself.[277]

Looking to the common law, however, Judge Tatel noted that Federal Rule of Evidence 501, enacted by Congress three years after *Branzburg*,

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267. *Id.*
268. *Id.*
269. *Id.* at 971-72.
270. *Id.* at 972.
271. *Id.* at 973.
272. *Id.*
273. *Id.*
274. *Id.* at 987 (Tatel, J., concurring).
275. *Id.* at 986-87.
276. *Id.* at 987.
277. *Id.* at 988.

gives courts latitude to fashion an evidentiary privilege for journalists.[278] "[G]iven the many leaks that no doubt occur in this city [Washington] every day, it would be naïve to suppose that it will be the last. For the sake of reporters and sources whom such litigation may ensnare, we should take this opportunity to clarify their relationship."[279] Reporters rely on confidences as do doctors, lawyers, and even psychotherapists, Tatel observed, and thus should be able to protect confidentiality in some circumstances.[280] Otherwise, "[r]eporters could reprint government statements, but not ferret out underlying disagreements among officials; they could cover public governmental actions, but would have great difficulty getting potential whistleblowers to talk about government misdeeds. . . ."[281] Tatel pointed to state shield laws and the Justice Department's subpoena guidelines as providing both a rationale for a federal common law privilege as well as "a strong indication that leakers demand such protection."[282]

Tatel's opinion appreciates some of the nuances that distinguish leak cases from other legal disputes over journalists' confidentiality: "Because leak cases typically require the government to investigate itself, if leaks reveal mistakes that high-level officials would have preferred to keep secret, the administration may pursue the source with excessive zeal, regardless of the leaked information's public value."[283] Thus, "the dynamics of leak inquiries afford a particularly compelling reason for judicial scrutiny of prosecutorial judgments regarding a leak's harm and news value."[284] Furthermore, the privilege, if one exists, belongs here to the reporter to "safeguard[] public dissemination of information."[285] In contrast, traditional evidentiary privileges enable sources to block the disclosure of information.[286] This distinction becomes pivotal when

278. *Id.* at 988-89 ("[A]uthorizing federal courts to develop evidentiary privileges in federal question cases according to 'the principles of the common law as they may be interpreted . . . in the light of reason and experience.' FED. R. EVID. 501."). Congress enacted this rule in Pub. L. No. 93-595, 88 Stat. 1926, 1933 (1975).
279. *Miller*, 397 F.3d at 990.
280. *Id.* at 989-93 (arguing that an evidentiary privilege for reporters would serve the public interest as much as the privilege for psychotherapists recognized by the Court in *Jaffee v. Redmond*, 518 U.S. 1 (1996)).
281. *Id.* at 991.
282. *Id.* at 993.
283. *Id.* at 998-99.
284. *Id.* at 998.
285. *Id.* at 1000.
286. *Id.* at 999-1000.

prosecutors secure waivers from the government sources who may have leaked, as the Special Counsel did, "[A] source's waiver is irrelevant to the reasons for the privilege."[287]

Though he rejected absolute protection for journalists, Tatel would apply a variant of the customary three-prong qualified privilege. He acknowledges that in leak cases the first two elements—need and exhaustion—"will almost always be satisfied, leaving the reporter's source unprotected . . . ."[288] Tatel's common law privilege therefore relies heavily on a balancing test for its third element: "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."[289] Applying his balancing test to the CIA leak case, Judge Tatel concluded that "no privilege bars the subpoenas."[290] He believed that the possible harm caused by leaking the name of a covert CIA operative outweighed its informational value to the public.[291] In reaching this conclusion, Tatel noted that Congress had criminalized such disclosures because earlier leaks had possibly led to the death of intelligence agents.[292] The balance also tipped in favor of compelling disclosure because of the "sinister motive" behind the leaks to punish an administration critic.[293] "[D]iscouraging leaks of this kind is precisely what the public interest requires."[294]

IV. TWO PERSPECTIVES ON THE ROLE OF LEAKS IN GOVERNANCE

A thorough understanding of the varied purposes behind leaks in modern political communication should guide any effort to realign confidentiality law.[295] Most scholars, along with journalists, regard leaks as primarily a form of news management by sources for political gain.[296] This perspective, though undeniably important, has overshadowed

287. *Id.* at 1000. The release may also have been secured through coercion.
288. *Id.* at 997.
289. *Id.* at 998.
290. *Id.* at 1003.
291. *Id.* at 1001-04.
292. *Id.* at 996.
293. *Id.* at 1003.
294. *Id.*
295. To explicate the modern use of leaks, this Part draws on examples from World War II, where Part II left off, through the Clinton administration. By ending in 2000, this Article attempts to sketch enduring patterns in the media's use of unnamed government sources without getting embroiled in the partisan disputes surrounding recent leaks and the litigation they spawned.
296. For studies of the Washington press corps that treat leaks mainly as a form of political maneuvering, see DOUGLASS CATER, THE FOURTH BRANCH OF GOVERNMENT 128-41 (1959); RITCHIE, *supra* note 129, at xiii-xiv, 141, 227-34; WILLIAM L. RIVERS, THE OPINIONMAKERS *passim g*(1965); ROSTEN, *supra* note 102, at 82; LEON V. SIGAL,

another view that sees leaks as a form of communication within and between organizations. In this view, the anonymous disclosure of information through the mass media supplements the transmission of messages sent along the formal channels of intra and intergovernmental communication.[297] These complementary perspectives highlight the varied functions of leaks in modern governance.

A. Leaks for Political and Policy Purposes

With power in the federal government widely dispersed and partly derived from public opinion, officials maneuver to shape the news that surrounds policymaking as well as that which affects their own political standing or that of their allies and enemies. Government officials and politicians tailor leaks to serve these ends. Leaks have considerable utility in launching and advancing policies as well as crippling them, in enhancing the political status of the leaker and the leaker's patron or in undercutting enemies, and in cultivating favorable relations with reporters for long-term gain. Of course, a single leak can serve multiple purposes.

1. Leaks to Influence Policy

Sources use leaks for two basic policymaking maneuvers—to promote and undermine plans—and for a number of subsidiary reasons. Officials turn to leaks when they want to test policy options, warm up public and

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REPORTERS AND OFFICIALS: THE ORGANIZATION AND POLITICS OF NEWSMAKING 131-50 (1973). Similarly, journalists reflecting on the role of leaked information also typically view the practice as a political maneuver. *See, e.g.*, Thomas Griffith, *Just Don't Quote Me*, TIME, Dec. 10, 1979, at 126; Thomas Griffith, *A Sinking Feeling About Leaks*, TIME, Dec. 22, 1980, at 81; Richard Halloran, *A Primer on the Fine Art of Leaking Information*, N.Y. TIMES, Jan. 14, 1983, at A16; Mark Hosenball, *Leak-a-Boo: A Washington (Dis)information Guide*, NEW REPUBLIC, Oct. 12, 1987 at 23; Howard Kurtz, *How Sources and Reporters Play the Game of Leaks*, WASH. POST NAT'L WKLY. ED., Mar. 15-21, 1993, at 25; Flora Lewis, *Leaks and Stories*, N.Y. TIMES, Mar. 14, 1982, at E23; Tom Wicker, *Leak On, O Ship of State!*, N.Y. TIMES, Jan. 26, 1982, at A15; *see also* STAFF OF H. COMM. ON GOVERNMENT OPERATIONS, 88TH CONG., GOVERNMENT NEWS FROM ANONYMOUS SOURCES (Comm. Print 1964) (discussing leaks as both political maneuvers and as efforts by government to communicate with domestic and foreign audiences); Dahlan, *supra* note 1, at 2-5, 19-38 (reviewing the pre-1967 literature on leaks).

On leaks as political maneuvering in Britain, see MICHAEL COCKERELL, PETER HENNESSY & DAVID WALKER, SOURCES CLOSE TO THE PRIME MINISTER 31-33, 45, 128, 130-35, 139, 183-84, 234 (1984); BERNARD INGHAM, THE WAGES OF SPIN 88-89, 94, 110-11, 134, 187-88 (2003).

297. *See* Dahlan, *supra* note 1; *infra* Part IV.B.

congressional opinion, influence the context of deliberations, and more. Officials seeking the widest publicity often leak to the *New York Times* and *Washington Post* to reach these publications' influential readers as well as to "set the agenda" for broadcast news programs with more general audiences later in the day.[298]

One of the most venerable types of leaks, a trial balloon, allows a source to gauge the reaction of key agencies, clientele organizations, or the public before openly embracing a policy.[299] White House initiatives to overhaul health care, Social Security, or tax policy are typically preceded by leaks to assess the probable fate of various options.[300] Administrations also test the viability of potential nominees for important positions by floating trial balloons.[301] The White House sometimes conducts polls after it leaks a policy option to formally gauge the public's response.[302] Although used mainly in connection with domestic policy, trial balloons can also help the White House predict international response to a foreign policy or military initiative.[303] The chief advantage of trial balloons, of course, is that sources simply deny that they ever formally embraced a proposal whose prospects appear bleak after the leak, thereby saving both face and political capital.[304]

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298. MARK HERTSGAARD, ON BENDED KNEE: THE PRESS AND THE REAGAN PRESIDENCY 122-23 (1988) (noting that the White House routinely leaked to the *Times* and *Post* "overnight, which set the agenda for the next day's TV stories," according to United Press International correspondent James Anderson).

299. For early twentieth-century examples, see *supra* notes 109-11 and accompanying text.

300. *See, e.g.*, Robert Pear, *Health Aides See a Tax on Benefits Beyond Basic Plan*, N.Y. TIMES, Sept. 5, 1993, at A1 (discussing how the Clinton administration used leaks as it developed proposals for national health care policy). When the Clinton administration was segueing from the trial balloon leak stage to promoting specific policies, "several journalists . . . pleaded with them [senior administration officials] to permit disclosure of their names." A White House spokesman refused: "We want to explain and communicate our policies to the American people, and we think background discussions are a good way of doing it." *Id.* at A38; *see also* Keith Erickson, *Presidential Leaks: Rhetoric and Mediated Political Knowledge*, 56 COMM. MONOGRAPHS 199, 202 (1989) (discussing Ford and Carter administration leaks about possible new taxes on gasoline that were abandoned because of the negative public response).

301. *See, e.g.*, Griffith, *A Sinking Feeling*, *supra* note 296, at 81 (discussing negative congressional response to Reagan administration trial balloons about possible cabinet nominees).

302. *See, e.g.*, Erickson, *supra* note 300, at 202 (discussing the Carter administration's polling of national and international opinion about a boycott of the 1980 Olympics then under consideration and floated via a trial balloon).

303. *See, e.g.*, BRUCE LADD, CRISIS IN CREDIBILITY 113 (1968) (discussing President Johnson's trial balloon to gauge international reaction, especially that of the Soviet Union, to the contemplated bombing of Haiphong harbor in North Vietnam).

304. Douglass Cater provides a good example of how trial balloons allow sources to tell seemingly contradictory public and private stories and yet just manage to remain truthful. In 1953, Secretary of State John Foster Dulles talked to reporters, on the condition that they not use his name, about a possible Korean boundary settlement. The

A well-designed trial balloon can do more than simply gauge reaction to a tentative policy. Trial balloons can pave the way for negotiations between the White House and Congress, as when President Ronald Reagan signaled through a leak his willingness to reduce the 1983 military budget if lawmakers cut social programs.[305] In the hands of a master manipulator like President Lyndon Johnson, a trial balloon became a political feint. On one occasion he directed an aide to plant a story about a possible administration move to cut support for domestic rice growers.[306] Johnson had no such plans, but the leaked story prompted the desired response: rice growers and lawmakers from affected districts met with Johnson to plead for their program.[307] The President offered to drop the nonexistent plan in return for their support on other matters.[308] Another variation on trial balloons involves leaking several policy options, including highly unpopular ones, to ease the public into accepting a distasteful course of action.[309]

Beyond testing policy options, a promotional leak discloses information that advances a policy favored by the source. Because most promotional leaks spring from institutions' upper echelons, one veteran Washington reporter famously observed that the ship of state is the only vessel that leaks mainly at the top.[310] President Kennedy's press secretary concurred, noting that a leak "generally occurs when Presidents and governments

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hostile reaction on Capitol Hill prompted the White House to issue a "denial, drafted by none other than Dulles himself, which stated that 'the Administration has never reached any conclusion that a permanent division of Korea is desirable or feasible . . . .'" CATER, *supra* note 296, at 136-37. The operative phrase, "never reached any conclusion," while literally true, "was not, in fact, what it seemed—a clear repudiation of what Mr. Dulles told the reporters and what they wrote, perforce on their own authority, for their papers." *Id.* at 137.

305. *See* Erickson, *supra* note 300, at 201. Erickson notes that "presidential leaks rhetorically accom[m]odate congressional decision-making by signaling negotiable positions, impending decisions, and presidential 'leanings.'" *Id.* at 211.

306. MICHAEL B. GROSSMAN & MARTHA J. KUMAR, PORTRAYING THE PRESIDENT: THE WHITE HOUSE AND THE NEWS MEDIA 175-76 (1981).

307. *Id.* at 175.

308. *Id.* at 175-76.

309. *See, e.g.*, LADD, *supra* note 303, at 108-09 (discussing how the Johnson administration used a trial balloon-like leak to "psychologically prepar[e] the public to accept" more troops in Vietnam).

310. JAMES RESTON, THE ARTILLERY OF THE PRESS: ITS INFLUENCE ON AMERICAN FOREIGN POLICY 66 (1967); Griffith, *A Sinking Feeling*, *supra* note 296, at 81; *see also* WILLIAM MCGAFFIN & ERWIN KNOLL, ANYTHING BUT THE TRUTH: THE CREDIBILITY GAP—HOW THE NEWS IS MANAGED IN WASHINGTON 106-23 (1968) (discussing leaks, many competing with each other, from the White House, leading members of Congress, and agency heads during the 1950s and 1960s).

wish to advance a certain viewpoint and pass to newspaper men documents or information of a confidential nature which would advance this point of view."[311] Such leaks allow newsmakers "to orchestrate coverage from behind a curtain of anonymity."[312] They can be deployed in combination with any of about twenty other techniques, most overt, that agencies use to cultivate a favorable information environment surrounding a policy.[313] Thus, Presidents have leaked classified data about Soviet military strength, satellite photos, and less sensitive information to advance their policies.[314] Alexander Haig, Secretary of State during the Reagan administration, noted that despite the problems caused by some leaks, "in the end I concluded that they were a way of governing. Leaks constituted policy; they were the authentic voice of the government."[315]

Crippling leaks, in contrast to promotional leaks, disclose information that undermines a policy or counters an agency's intended action. They often provide insights into the policymaking process and prompt rebukes from agencies trying to keep their deliberations secret. Crippling leaks stem from interagency rivalries, disagreements between the executive and legislative branches, and tension between political appointees and the civil servants they direct.[316] For instance, one military service might

311. Memo from Pierre Salinger to Theodore Sorenson, *quoted in* GROSSMAN & KUMAR, *supra* note 306, at 282.

312. Kurtz, *supra* note 296, at 25.

313. *Id.* A source's tools for shaping a favorable information environment include communication plans, press conferences, op-ed contributions, official reports, staged events, media tours, arrangements for traveling media, news features, background briefings, video news releases, print public relations, meetings with columnists, meetings with editorial boards, meetings with reporters, press guidances, press briefing books, polls, and multiple uses of the Internet. Patrick O'Heffernan, *Mass Media and U.S. Foreign Policy: A Mutual Exploitation Model of Media Influence in U.S. Foreign Policy*, *in* MEDIA AND PUBLIC POLICY 187, 198-99 (Robert J. Spitzer ed., 1993).

314. *See, e.g.*, DAVID WISE, THE POLITICS OF LYING: GOVERNMENT DECEPTION, SECRECY, AND POWER 104-05, 108-09 (1973) (discussing leaks by the administration of classified information, including details of Soviet military strength, whose release was designed to pressure Congress to accept the President's budget); Hosenball, *supra* note 296, at 24 (discussing the leak of satellite photos supposedly supporting administration claims of Soviet assistance for communists in Latin America).

315. ALEXANDER M. HAIG, JR., CAVEAT: REALISM, REAGAN, AND FOREIGN POLICY 17 (1984).

316. *See, e.g.*, HUGH HECLO, A GOVERNMENT OF STRANGERS: EXECUTIVE POLITICS IN WASHINGTON (1977) (discussing power relationships between a department's political leaders and its top bureaucrats); JOHN B. MEDARIS WITH ARTHUR GORDON, COUNTDOWN FOR DECISION 244-47 (1960) (discussing the Army's use of leaks to elicit support from Congress in opposing a shift of resources to NASA); ROGER HILSMAN, TO MOVE A NATION: THE POLITICS OF FOREIGN POLICY IN THE ADMINISTRATION OF JOHN F. KENNEDY 71 (1967) (discussing a leak designed to get Congress to block the transfer of some duties from the State Department to the CIA even though State was willing to relinquish them). On leaks from Congress and the Pentagon intended to undermine administration plans to increase troop deployments in Vietnam, see MARVIN KALB & ELIE ABEL, ROOTS

leak information disparaging another service's proposed weapons system so that its competing system is approved.[317] In one Machiavellian maneuver involving all three services, the Army leaked to the press an Air Force staff paper that deprecated the Navy's newest aircraft carriers.[318] Some crippling leaks involve international ploys. American officials displeased with changes in foreign policy can leak information to the press that brings pressure from overseas to bear inside the Capital Beltway.[319] Because leaks can undermine administration initiatives, officials in the executive branch worry about them more than members of Congress and sporadically order investigations to ferret out the sources.[320]

Sources also wield leaks for more subtle tactical purposes than simply supporting or opposing a policy. Officials in a position to manufacture news, such as the President, can leak an important story to overshadow the newsmaking efforts of a rival,[321] or to save face by circulating explanations for unpalatable decisions.[322] Sources use leaks to affect the policymaking process by speeding up or delaying deliberations.[323] Sources

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OF INVOLVEMENT: THE U.S. IN ASIA, 1784-1971, 238 (1971); WISE, *supra* note 314, at 283-84.

317. *See, e.g.*, JAMES BAAR & WILLIAM HOWARD, POLARIS! 215-16 (1960); WALTER MILLIS, ARMS AND THE STATE: CIVIL-MILITARY ELEMENTS IN NATIONAL POLICY 241-42 (1958); JACK RAYMOND, POWER AT THE PENTAGON 198-201 (1964).

318. By making it appear as though the Air Force was undermining the Navy, the Army drove a wedge between the two services and strengthened its own position. MICHAEL H. ARMACOST, THE POLITICS OF WEAPONS INNOVATION: THE THOR-JUPITER CONTROVERSY 93 n.31 (1969).

319. *See, e.g.*, SIGAL, *supra* note 296, at 142 (discussing an Air Force leak to arouse European opposition to American plans for changes in NATO); MAXWELL D. TAYLOR, THE UNCERTAIN TRUMPET 41-42 (1959) (discussing how a leak about U.S. plans to withdraw troops elicited enough international opposition to thwart the plan).

320. *See* MARTIN LINSKY, IMPACT: HOW THE PRESS AFFECTS FEDERAL POLICYMAKING 136 (1986); *see also infra* note 431 (reviewing leak investigations under several Presidents).

321. *See, e.g.*, Erickson, *supra* note 300, at 202 (discussing several Presidents' leaks of upbeat news to drown out bad).

322. *See, e.g.*, JEB STUART MAGRUDER, AN AMERICAN LIFE: ONE MAN'S ROAD TO WATERGATE 200 (1974) (explaining how the Nixon White House leaked a cover story to account for shifting the Republican national convention out of San Diego).

323. *See, e.g.*, LINSKY, *supra* note 320, at 80, 185 (providing examples of how leaks accelerated action by officials and also were used, unsuccessfully, to forestall action). More generally, Linsky's survey of officials found that leaks may influence the policymaking process as much as the output. "Policymakers expect leaks, anticipate their impact, take preventative measures, and use them strategically themselves." *Id.* at 188. To minimize the possibility of leaks, policymakers narrow the range of policy options they consider, limit the number of people involved in decisionmaking, and put less information in writing. *Id.*

also leak stories to control the timing and context of making news public. To mitigate the damage from negative stories that CBS was about to air, the Clinton White House leaked the same information to newspapers shortly before the broadcast, thus determining the timing and avoiding the "hyperventilated" and "accusatory" tone of much television news.[324]

2. Leaks to Shape Personal Images

Policy considerations figure in nearly all leaks, but some are motivated primarily by a desire to influence a person's political standing positively or negatively, and only indirectly to influence deliberations. Officials can burnish their own or an ally's image through leaked stories. President Kennedy, for instance, cooperated with journalists writing a behind-the-scenes account of the decisionmaking during the Cuban Missile Crisis.[325] The article underscored Kennedy's resolve in confronting the Soviet Union, a portrayal that immediately boosted his standing with the public and left a record that influenced historians' interpretations.[326] In a so-called "reverse blame leak," stories about Secretary of State Alexander Haig reported undiplomatic remarks he had made about world leaders at a staff meeting.[327] Although the leak ostensibly appeared to harm Haig, in fact it repaired his image of "not being tough enough for the job" by presenting him as "a confident and independent official with his own point of view."[328] As Vice President, Nixon used leaks to distance himself from positions held by President Dwight Eisenhower.[329]

Sources involved in intra-administration personal rivalries and especially those behind salacious attacks on opponents find it imperative to

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324. HOWARD KURTZ, SPIN CYCLE: INSIDE THE CLINTON PROPAGANDA MACHINE 42-44 (1998).

325. *See* DAVID HALBERSTAM, THE BEST AND THE BRIGHTEST 28 (1972); *see also* ELIE ABEL, LEAKING: WHO DOES IT? WHO BENEFITS? AT WHAT COST? 33-34 (1987) (discussing carefully crafted leaks by the White House that gave the *New York Times* direct quotes from Kennedy's exchanges with the Soviet foreign minister showing the President's resolve).

326. *Id.*

327. LINSKY, *supra* note 320, at 195.

328. *Id.* HECLO, *supra* note 316, at 226 n.11, recounts a daring reverse leak:

> While jockeying with another staff member, the [Presidential] assistant leaked a disclosure of his own impending removal from the West Wing. The opponent, who obviously stood the most to gain from the story, was naturally asked to confirm or deny the report. Since he was not yet strong enough to accomplish such a removal, the opponent had to deny responsibility for the leak and its accuracy, thereby inadvertently strengthening the position of the presidential assistant who first leaked the story.

329. *See* FRANCIS E. ROURKE, SECRECY & PUBLICITY: DILEMMAS OF DEMOCRACY 201 (1961).

maintain anonymity as they use the news media to fight their battles. Under Lyndon Johnson, the White House leaked information about sexual escapades of both Democrats and Republicans.[330] In the Nixon White House, the "plumbers" unit leaked information about those on its enemies list, including a photograph of Edward Kennedy in Rome standing next to an attractive woman; the *National Enquirer* and later *Newsweek* published it.[331] Leaks have been used to undermine rivals competing for the President's attention and to shift blame or settle grudges.[332] Nancy Reagan leaked news to a favorite luncheon companion, columnist George Will, to blame chief of staff Donald Regan for failing to protect President Reagan in the Iran Contra affair.[333] High stakes political battles, such as Independent Counsel Kenneth Starr's investigation of President Clinton, often degenerate into endless dueling leaks filled with personal information.[334] Most recently, the stories at the center of the CIA leak investigation involved, in part, such hostile leaks.[335]

3. Leaks to Improve Relations with Reporters

Sources, especially high status ones, employ several means for ingratiating themselves with reporters, including dispensing leaks.[336]

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330. *See* Erickson, *supra* note 300, at 203.

331. *See* MAGRUDER, *supra* note 322, at 66-71. The White House plumbers unit involved in the Watergate break-in was originally set up to plug Pentagon Papers-like leaks but, ironically, also planted its own stories. It leaked information that attacked Daniel Ellsberg, who had leaked the Pentagon Papers, and it also mined classified documents from the Kennedy administration to leak stories that tarnished the former President's image. *See* DANIEL ELLSBERG, SECRETS: A MEMOIR OF VIETNAM AND THE PENTAGON PAPERS 425-43 (2002). *But see* WISE, *supra* note 314, at 278-81 (discussing a story leaked by the Nixon White House designed to embarrass the chairman of the Federal Reserve Board that backfired when reporters saw through the ploy).

332. *See, e.g.*, BERNARD C. COHEN, THE PRESS AND FOREIGN POLICY 197 (1963) (discussing the use of news by two foreign policy officials to promote their competing approaches to disarmament in the Eisenhower administration); Kurtz, *supra* note 296, at 25 (providing examples of leaks arising from intra-administration feuds during the presidency of George H. W. Bush); LINSKY, *supra* note 320, at 185 (discussing leaks from the Reagan White House to shift blame for an embarrassing policy).

333. *See* Joel Connelly, *Nancy Reagan Has Risen Above Her Detractors' Barbs*, SEATTLE POST-INTELLIGENCER, June 11, 2004, at A2.

334. *See supra* note 15 and accompanying text.

335. *See* HESS, *supra* note 1, at 77 (defining the animus leak as one "used to settle grudges. Information is disclosed to embarrass another person.").

336. *See* GROSSMAN & KUMAR, *supra* note 306, at 283-88 (listing several ways sources ingratiate themselves with reporters: courting elite journalists, cultivating friendships, performing direct favors, and throwing them raw meat—that is, giving a hostile reporter good information).

The goodwill leak, where a source bestows a "scoop" on a favorite reporter, earns credit that might later prove valuable.[337] "This type of leak is often on a subject with which the leaker has little or no personal involvement and happens because most players in governmental Washington gather a great deal of extraneous information in the course of their business and social lives."[338] Maintaining good relations with reporters is probably a "subsidiary motivation" behind most leaks.[339] Rewarding reporters with leaked information also enables sources to divert attention from more sensitive topics.[340] For instance, as an avid leaker, Colonel Oliver North ingratiated himself with reporters, making them reluctant to vigorously investigate and publicize his role in the Reagan administration's covert sale of arms to Iran.[341]

B. Leaks as Organizational Communication

Besides their role in political maneuvering and policymaking, leaks facilitate governance by supplementing the formal channels of organizational and inter-organizational communication.[342] From this perspective, leaks to the press annex the mass media to relay information among government decisionmakers outside the official communication network.[343] The Reagan administration, for instance, converted the *New York Times, Washington Post*, news magazines, and television networks into "White

337. HESS, *supra* note 1, at 77. WISE, *supra* note 314, at 328-36, reports how a small gesture by Lyndon Johnson, bestowing a seemingly minor leak on a new reporter covering the President, snowballed into a major political event. "Before it was over, the stock market was shaken, the Federal Reserve Board had raised the discount rate, and the nation appeared, at least briefly, to be in the grip of a serious economic crisis." *Id.* at 328-29.

338. HESS, *supra* note 1, at 77; *see also* LINSKY, *supra* note 320, at 194-95 (providing examples of information leaked to maintain favorable relations with reporters).

339. SIGAL, *supra* note 296, at 142.

340. *See, e.g.*, COHEN, *supra* note 332, at 204.

341. *See* ABEL, *supra* note 325, at 27.

342. *See generally* DORIS A. GRABER, PUBLIC SECTOR COMMUNICATION: HOW ORGANIZATIONS MANAGE INFORMATION (1992) (providing an overview of communication structures and practices in government agencies). Now-classic works by political scientists, economists, and organizational behaviorists from the late 1940s through the 1960s moved intra- and inter-organizational communication to center stage in understanding governmental decisionmaking. *See, e.g.*, KARL W. DEUTSCH, THE NERVES OF GOVERNMENT: MODELS OF POLITICAL COMMUNICATION AND CONTROL (1963); ANTHONY DOWNS, INSIDE BUREAUCRACY (1967); RICHARD NEUSTADT, PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP (1960); HERBERT A. SIMON, ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATION (2d ed. 1957); HAROLD L. WILENSKY, ORGANIZATIONAL INTELLIGENCE: KNOWLEDGE AND POLICY IN GOVERNMENT AND INDUSTRY (1967).

343. "The news media serve as a network to convey messages through a governmental system that is extremely decentralized and that has no consistently effective internal communications system." GROSSMAN & KUMAR, *supra* note 306, at 31.

House bulletin boards," on which staff posted leaks to communicate "with other officials and agencies of the U.S. government, and even with foreign governments."[344] Information leaked to the press thus becomes available to the public although it is aimed primarily at a narrow, attentive audience of other decisionmakers. The targeted receivers may work in the organization from which the leak originated, in other agencies, or even in other governments. A survey of high-ranking federal officials confirms that some of their leaks had a major communicative component distinct from their purposes as policy maneuvers.[345]

News leaks overcome common failings of organizational communication. Agency structure can constrain the volume of messages transmitted in different directions, slow message relay, and distort the message as it is conveyed from source to receiver.[346] Leaks thus supplement inadequate internal channels, bypass obstacles, and serve as an antidistortion device. As a type of subformal communication, the messages conveyed by leaks "can be withdrawn, altered, adjusted, magnified, or canceled without any official record being made."[347] Additionally, information leaked to the press can be more persuasive for the recipient than messages sent through formal channels. Leaked information, however, suffers from its own communication pitfalls. The press can garble messages much as agency gatekeepers distort information they relay through channels. Furthermore, the cryptic nature of news leaks means that some intended receivers never see the messages and, if they do, they can misinterpret them or wrongly infer the identity of the source.[348]

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344. HAIG, *supra* note 315, at 18 (noted by Secretary of State).

345. LINSKY, *supra* note 320, at 230-39, reports survey results from 483 senior federal officials who served in executive branch agencies, Congress, and independent commissions between the Johnson and Reagan administrations. When asked about leaks, 73% said they had used them to "gain attention for an issue or policy option," which could have both a policy and a communicative dimension; 30% "to inform other officials of a policy consideration or action"; 14% to "reveal your bargaining position on an issue"; and 32% to "send a message to another branch of government." Most of the other reasons for leaking clearly involved policy maneuvers. *Id.*

346. On organizational structure and impediments to full, accurate information flows, see DOWNS, *supra* note 342, at 112-31; GRABER, *supra* note 342, at 94-101; EVERETT M. ROGERS & REKHA AGARWALA-ROGERS, COMMUNICATION IN ORGANIZATIONS 77-107 (1976); Frederic M. Jablin, *Formal Organization Structure*, *in* HANDBOOK OF ORGANIZATIONAL COMMUNICATION 389 (Frederic M. Jablin et al. eds., 1987); Charles A. O'Reilly, Jennifer A. Chatman, & John C. Anderson, *Message Flow and Decision Making*, *in id.* at 600.

347. DOWNS, *supra* note 342, at 113.

348. *See* Dahlan, *supra* note 1, at 130-93 (reviewing the problems targets encounter in deciphering the source and import of leaks, especially foreign governments attempting

1. Leaks as Upward Communication

Lower-level officials sometimes leak information to the press to communicate with the upper echelons of their own agency. Leaks of this type partly redress two problems with upward communication. Messages in the press stand out from the clutter of routine organizational intelligence that competes for superiors' attention, and they also bypass intermediaries who obstruct the upward flow of embarrassing information.[349]

"Communicating out of channels" is a common response to the "dilemma of hierarchy vs. intelligence," according to a prominent political scientist.[350] From reading newspapers, especially the *New York Times* and *Washington Post*, Presidents and agency heads learn of issues bottled up in their bureaucracies.[351] In the Pentagon Papers case, a veteran *New York Times* reporter asserted that "[m]iddle-rank officials" routinely leaked information to "attract the attention of their superiors."[352] Estrangement between civil service employees and politically appointed agency heads also breeds leaks as a kind of upward communication.[353] Even the leaders of state agencies learn to scan the press for information about their own departments.[354]

The State Department and other bureaucracies in which information flows from distant outposts through many desks and bureaus are especially prone to use leaks as a tool for upward communication. "I found it easier to bring my views to bear on the President of the United States by way of *The Washington Post* and its New Delhi correspondent

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to infer the meaning of a communication sent via the press); HESS, *supra* note 1, at 93 (questioning the "utility and rationality of leaks as an intragovernmental means of communications" because their cryptic nature means that "there are so many different interpretations of what is being accomplished, by whom, and for what purposes . . . .").

349. On problems with upward flows in government bureaucracies, see Dahlan, *supra* note 1, at 72-73; DOWNS, *supra* note 342, at 116-18; GRABER, *supra* note 342, at 95-96, 107-09.

350. WILENSKY, *supra* note 342, at 46.

351. MORTON H. HALPERIN, BUREAUCRATIC POLITICS AND FOREIGN POLICY 173, 179-80 (1974). Halperin notes that a President's aides scan the media for leaked stories in the days before a press conference because these are likely subjects for questions. "Thus an official anxious to bring an issue to the attention of the President may plant a story with the expectation that the subject will then come up in the preparation for the press conference." *Id.* at 180; *see also* Carol H. Weiss, *What America's Leaders Read*, 38 PUB. OPINION Q. 1 (1974) (discussing the importance of the *New York Times* and *Washington Post* as news sources for federal officials).

352. SANFORD J. UNGAR, THE PAPERS AND THE PAPERS 167 (1972) (quoting *New York Times* Washington bureau chief Max Frankel); *see also* Dahlan, *supra* note 1, at 75 (noting that leaks sometimes attract more attention than official announcements); MEDARIS, *supra* note 316, at 246 (noting a leak designed to inform the President of disagreements among lower level bureaucrats).

353. *See* HECLO, *supra* note 316, at 208-09.

354. DELMER D. DUNN, PUBLIC OFFICIALS AND THE PRESS 102-03 (1969).

than by way of the State Department," an ambassador to India once asserted.[355] Similarly, U.S. officials in Saigon during the early days of the Vietnam War discovered that some of their assessments of the situation were more likely to be noticed in Washington if published in influential newspapers than if communicated through institutional channels.[356] Upward leaks have considerable utility even in a flat bureaucracy such as Congress. Congressional aides with easy access to members of Congress leak information to attract their bosses' attention because memoranda might literally lie buried in a stack of documents or at best compete for attention with other pressing issues.[357]

Whistleblowers who leak information to the press sometimes turn to the media only after obstacles in an agency's internal communication system prevent them from informing superiors about problems. In such cases, leaks surmount organizational hurdles.[358] The unauthorized release of the Pentagon Papers and Deep Throat's leaks to the *Washington Post* both raised concerns that had not been successfully addressed through official channels.[359] In the Pentagon Papers case, Daniel Ellsberg first attempted to communicate his findings to government officials; he leaked to the press only when members of Congress hesitated to act.[360] As Deep Throat, FBI Deputy Director Felt leaked information about Watergate to the *Washington Post* because his immediate superior, the acting director of the agency, had just been appointed by Nixon and was

355. SIGAL, *supra* note 296, at 135 (quoting Ambassador John Kenneth Galbraith's affidavit filed in the Pentagon Papers case, 403 U.S. 713 (1971)).

356. *See, e.g.*, COHEN, *supra* note 332, at 243 (discussing State Department leaks of information that sources hesitated to send through formal channels); HILSMAN, *supra* note 316, at 499 (discussing maneuvers to get competing assessments of the situation in Vietnam noticed in Washington); JOHN MECKLIN, MISSION IN TORMENT: AN INTIMATE ACCOUNT OF THE U.S. ROLE IN VIETNAM 223 (1965) (discussing Ambassador Henry Cabot Lodge's use of leaks to attract attention from Saigon).

357. Susan H. Miller, *Reporters and Congress: Living in Symbiosis*, JOURNALISM MONOGRAPHS, No. 53, at 4 (1978).

358. *See* Lea P. Stewart, *"Whistle Blowing": Implications for Organizational Communication*, 30 J. COMM. 90 (1980); *see also* MYRON P. GLAZER & PENINA M. GLAZER, THE WHISTLEBLOWERS: EXPOSING CORRUPTION IN GOVERNMENT AND INDUSTRY 48-50, 167-77 (1989) (discussing whistleblowing generally and with some attention to the role of the press); Bruce D. Fisher, *The Whistleblower Protection Act of 1989: A False Hope for Whistleblowers*, 43 RUTGERS L. REV. 355 (1991) (reviewing the role of government whistleblowers and noting the shortcomings of statutory protections).

359. These two examples also have elements of crippling leaks, discussed *supra* text accompanying notes 316-20.

360. ELLSBERG, *supra* note 331, at 181-83, 323-29, 356-64.

obstructing the investigation.[361] He even went as far as burning some of the suspects' documents.[362] Although whistleblowing leaks rarely approach the significance of Deep Throat's, such communications by unidentified news sources remain a valuable safety valve in our system of government.

2. Leaks as Downward Communication

At first glance, Presidents and agency heads would seem unlikely to leak information to the press to communicate with their subordinates. But even when ample channels exist for downward communication, leaks can be useful in conveying information.[363] Leaks to the press percolate quickly to the lower levels of a large bureaucracy and capture subordinates' attention. Information that "appears to have been pried loose rather than officially communicated" is more salient to staff.[364]

Sitting atop a huge bureaucracy, Presidents have found leaks to the press a useful mechanism for communicating their wishes to those who formulate and implement policy.[365] For example, when Lyndon Johnson wanted the State Department to tone down its efforts to promote a multilateral force (MLF), he drafted a memo for internal circulation and leaked the story to the *New York Times*.[366] "Unlike an internal memorandum with limited circulation inside the executive branch, a press clipping could be cited as proof of the President's wishes by opponents of the MLF on both sides of the Potomac and the Atlantic."[367] A leak signaling the President's (or other executive's) preference serves as a "hunting license" to subordinates who share the same goals.[368] Leaks can also direct subordinates to ignore public pronouncements. A President who strikes a public posture to appease some interest group can, via a leak, signal the bureaucracy to discount the public statement.[369] Distasteful or delicate decisions, such as the need for a Presidential aide to resign, can also be communicated through leaks.[370]

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361. *See* O'Connor, *supra* note 11, at 129, 131.
362. *Id.*; *see also* WOODWARD, *supra* note 11, at 96-97.
363. *See* GRABER, *supra* note 342, at 101-05 (discussing the impediments to successful downward communication in organizations).
364. GROSSMAN & KUMAR, *supra* note 306, at 31.
365. HALPERIN, *supra* note 351, at 286.
366. *Id.*
367. SIGAL, *supra* note 296, at 136-37; *see also* PHILIP GEYELIN, LYNDON B. JOHNSON AND THE WORLD 174-76 (1966).
368. HALPERIN, *supra* note 351, at 180.
369. GROSSMAN & KUMAR, *supra* note 306, at 31.
370. For example, Eisenhower's chief of staff, Sherman Adams, embarrassed the administration by taking gifts from a Boston industrialist in return for influencing regulatory proceedings. To hasten Adams' departure without forcing a public confrontation,

3. Leaks as Horizontal Communication Within and Between Governments

Bureaucrats use leaks to convey information to other departments of their own agency, to other agencies, to another branch of government, and even to foreign governments. In a sense, all such messages are horizontal intra- or inter-organizational communication.

When leaks convey information between units of government, they partly bridge communication gaps created by the separation of powers. Scholars of organizational behavior term this "boundary spanning."[371] Such messages short circuit, usually in a positive way, the tortuous path messages follow if transmitted through the chain of command of two or more agencies.[372] The media "serve as a means of supplementing the internal lines of communication of the sprawling federal establishment."[373] Members of Congress, for example, have few opportunities to question the President directly and must rely upon reports in the press, many based on leaks, to obtain clues about the White House position on some matters.[374]

The dispersion of power within legislative bodies creates many centers of decisionmaking with imperfect channels for exchanging information. A study of Wisconsin government found that "legislative leaders, more than other officials, rely on newspapers for intra-organizational information."[375] Likewise, the communication channels in Congress provide only limited information exchange between the two chambers.[376]

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the President authorized a leak that Adams' days in the White House were numbered. *See id.* at 172-73.

371. *See* GRABER, *supra* note 342, at 106-07, 189-97, 247 (discussing horizontal communication within agencies and communication that spans organizational boundaries). Structural problems government agencies face in spanning organizational boundaries create an especially important role for the press in supplementing formal communication channels, Graber notes. *Id.* at 196-97.

372. For a mid-level official to communicate with a counterpart in another agency through the formal chain of command, a message must be relayed upward to the first's superior, laterally to the second's superior, and finally downward to the receiver. Not only does this delay receipt, but it also increases the chances for message distortion during transmission. *See* DOWNS, *supra* note 342, at 115-27. Of course, a number of strategies other than leaking information to the press can be used to bypass intermediaries.

373. V. O. KEY, JR., PUBLIC OPINION AND AMERICAN DEMOCRACY 405 (1963).

374. DOUGLASS CATER, POWER IN WASHINGTON: A CRITICAL LOOK AT TODAY'S STRUGGLE TO GOVERN IN THE NATION'S CAPITAL 14 (1964).

375. DUNN, *supra* note 354, at 112 (emphasis omitted).

376. Harrison W. Fox, Jr. & Susan W. Jammond, *The Growth of Congressional Staffs*, *in* CONGRESS AGAINST THE PRESIDENT 112, 120-23 (Harvey C. Mansfield, Sr., ed., 1975).

Senators and Representatives thus keep abreast of developments in their own institution partly by following news reports.[377]

Leaks have proven so useful in communicating between governments that the diplomatic establishment recognizes several subtypes, including leaks to signal or clarify intentions, induce discussions, and alter the course of negotiations.[378] Although governments have formal means of communicating with each other, relaying messages anonymously through the media enjoys several advantages. The media can transmit information outside the often rigid international bureaucracies faster and more efficiently, and news in high-status publications commands the respect of diplomats.[379] Furthermore, news accounts can signal a government's intentions without committing it to a particular proposal, and stories about negotiations between two countries apprise other governments of developments.[380] Media reports can even substitute for formal talks when parties are deadlocked and no longer meeting, and news can send messages between governments that have no formal diplomatic relations.[381]

During crises, governments send messages through an array of formal and informal channels to prevent misunderstandings that can produce catastrophic consequences.[382] While negotiating with the Soviet Union during the Cuban Missile Crisis, President Kennedy was acutely aware

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377. Delmer D. Dunn, *Symbiosis: Congress and the Press*, *in* CONGRESS AND THE NEWS MEDIA 240, 242-43 (Robert O. Blanchard ed., 1974).

378. *See* Dahlan, *supra* note 1, at 99-109.

379. For the most thorough discussion of leaks as international communication, see *id.* at 94-128.

380. *Id.* During the Nixon and Ford administrations, Secretary of State Henry Kissinger frequently leaked information as a "senior State Department official":

> Everybody really knew that I was the senior official. The advantage of doing it in this manner was that it enabled foreign governments not to have to take a formal position about what I had said, and not to force me to take a formal position. Since everybody in the negotiations was, theoretically, pledged to secrecy, but at the same time, since everybody was giving a briefing on their own version, I felt it was important that the American version also be available, so we all played this complicated game.

JEFF BLYSKAL & MARIE BLYSKAL, PR: HOW THE PUBLIC RELATIONS INDUSTRY WRITES THE NEWS 61-62 (1985); *see also, e.g.*, DORIS GRABER, MASS MEDIA AND AMERICAN POLITICS 266-71 (7th ed. 2006); R. A. R. Maclennan, *Secrecy and the Right of Parliament to Know and Participate in Foreign Affairs*, *in* SECRECY AND FOREIGN POLICY 132, 141 (Thomas M. Franck & Edward Weisband eds., 1974) (noting that European Union nations leak information to communicate with each other).

381. *See* Dahlan, *supra* note 1, at 106-28.

382. During the 1956 Middle East crisis, when little news was conveyed formally through White House and State Department press conferences, cloaked news filled the gap. CATER, *supra* note 296, at 130. "During the most critical period in recent months, at a time when any word out of Washington was considered of international significance, what had developed, it appeared, was government by leak," an unidentified newspaperman remarked. *Id.*

that a garbled message could trigger a nuclear exchange.[383] He supplemented the direct, formal contacts between Washington and Moscow with indirect communications through the press, including some leaked information.[384] But this episode also illustrated the dangers posed by leaks as intergovernmental communication. The Soviet Union misread a prominent American newspaper columnist's suggestion for a diplomatic solution as a leak authorized and subscribed to by the administration.[385]

V. ENHANCED PROTECTIONS FOR LEAKS IN CONFIDENTIALITY LAW

News leaks have figured in the nation's governance since the early days of the Republic. Yet the law of journalists' confidentiality developed before and after *Branzburg* without sufficiently recognizing leaks as a form of politics, policymaking, and intra or intergovernment communication. Confidentiality law must be recalibrated to protect the indispensable role that certain types of leaks play in modern governance.[386]

A. Legal Rationales for Protecting Leaks

At bottom, most leaks are a form of political speech. They express partisan disagreements, support or oppose policies, relay intelligence

383. *See* GRAHAM T. ALLISON & PHILIP ZELIKOW, ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS 214-30 (2d ed. 1971); PIERRE SALINGER, WITH KENNEDY 285-302 (1966).

384. *See* ALLISON & ZELIKOW, *supra* note 383, at 214. Kennedy had similarly used leaks to convey his intentions to the Soviet Union in 1961 over U.S. resolve to remain in Berlin. *See* JAMES RESTON, DEADLINE: A MEMOIR 469-70 (1991). Kennedy "did not want to make the crisis worse by making a personal declaration to this effect. It would, however, be 'helpful,' he said mildly, if I wrote in the *Times* on my own authority that this was his clear intention." *Id.*

385. Walter Lippmann wrote a column suggesting that the United States should withdraw its missiles from Turkey if the Soviet Union would do likewise in Cuba. Lippmann's intimate connections with the Kennedy administration were well known to the Kremlin, and Moscow interpreted this proposal as an authentic offer tendered by the White House. Although Lippmann's column had often carried administration leaks in the past, this time the ideas were his own, and the Kremlin's misinterpretation created some consternation. *See* MONTAGUE KERN, PATRICIA W. LEVERING & RALPH B. LEVERING, THE KENNEDY CRISES: THE PRESS, THE PRESIDENCY, AND FOREIGN POLICY 129-30 (1983); *see also* WISE, *supra* note 314, at 78-80 (discussing how President Johnson mistakenly blamed Robert Kennedy for a foreign affairs leak).

386. The proposal presented here addresses only aspects of journalists' confidentiality pertaining to leaks from government sources. It does not tackle many other legal issues that arise in connection with journalists' confidentiality.

within and among governments, and assure a robust flow of information to the public. The CIA leak case, for instance, began as a dispute over a single sentence in the 2003 State of the Union Address.[387] The political controversy then mushroomed into a years-long probe that threatened several journalists with contempt and jailed one before prompting yet another round of proceedings seeking reporters' confidential information, this time for use by a criminal defendant.[388]

Such intrusion by law into the realm of political communication deviates from the tradition of according speech about government the greatest possible latitude. In *Free Speech and Its Relation to Self-Government*, political philosopher Alexander Meiklejohn forcefully argues that the First Amendment fully protects speech about public affairs.[389] The Supreme Court has reinforced Meiklejohn's precepts through the preferred-freedom theory of the First Amendment by making it extremely difficult for the government to impose certain restraints on the press.[390] Notably, the Court has made it nearly impossible to impose prior restraints on the press,[391] for judges to gag reporters who obtain information in open court,[392] and for public officials to prevail in libel suits.[393] These and other Court rulings, along with much soaring judicial prose, attest to the special place that speech about government occupies in the American system of free expression.[394]

Key attributes and functions of leaks already enjoy some legal recognition. Courts acknowledge the value of anonymous speech,

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387. *See supra* notes 13-14 and accompanying text.

388. Appointed in December 2003, Special Counsel Fitzgerald won an indictment of Libby in October 2005. *See* Johnston & Stevenson, *supra* note 265. In early 2006, Libby's defense attorneys indicated that they planned to subpoena the journalists questioned by Fitzgerald. *See* Carol D. Leonnig, *Libby Team to Subpoena Media*, WASH. POST, Jan. 21, 2006, at A7.

389. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); *see also* Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245 (presenting his view that speech about governance should be absolutely protected).

390. The Court launched the preferred position (or freedom) theory in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938). It suggested that restrictions on freedoms guaranteed in the Bill of Rights should be subject to "more exacting judicial scrutiny" than restrictions on other interests. *Id.* at 152-53 n.4; *see also* GILLMOR ET AL., *supra* note 188, at 22-23.

391. New York Times v. United States (Pentagon Papers), 403 U.S. 713 (1971); Near v. Minnesota, 283 U.S. 697 (1935).

392. Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).

393. New York Times v. Sullivan, 376 U.S. 254 (1964).

394. *See, e.g.*, Mills v. Alabama, 384 U.S. 214, 218 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."); *see also supra* note 17 and accompanying text (discussing the libertarian tradition that defines press freedom in relation to government).

especially in connection with discussions of public affairs;[395] leaks obviously require anonymity. Law enforcers often invoke a privilege to shield the identity of their informants;[396] leaks similarly allow informants in government to communicate with other officials or the public. Government speech has a legitimate role in democracies;[397] many leaks, notably authorized messages, constitute speech on behalf of a government agency or a policy position. In a similar vein, but with different implications, case law and whistleblower statutes afford government employees' speech some protection;[398] the most valuable leaks function the same way as employee speech by disclosing wrongdoing or disagreements within agencies. Finally, courts strenuously resist calls to referee speech

395. Talley v. California, 362 U.S. 60 (1960). *Talley* relied heavily on a historical review of the importance of anonymous political communication. *Id.* at 62 & n.3, 64-65; *see also* NAACP v. Alabama, 357 U.S. 449 (1958) (protecting the confidentiality of membership lists so as not to chill freedom of association).

396. *See, e.g.*, McCray v. Illinois, 386 U.S. 300, 306 (1967); Roviaro v. United States, 353 U.S. 53 (1957); 8 WIGMORE, EVIDENCE § 2374 (McNaughton rev. 1961). *But cf.* Branzburg v. Hayes, 408 U.S. 665, 697-98 (1972) (distinguishing the informant's privilege from a journalist's privilege).

397. "Participation by the government in the system of freedom of expression is an essential feature of any democratic society. It enables the government to inform, explain, and persuade—measures especially crucial in a society that attempts to govern itself with a minimum use of force." THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 698 (1970); *see also, e.g.*, 2 CHAFEE, *supra* note 18, at 723-82; Frederick Schauer, *Is Government Speech a Problem?*, 35 STAN. L. REV. 373 (1983) (book review). Some analysts, however, fear that government speech might dominate the marketplace of ideas and that any protections for such speech can not be found in the First Amendment's negative admonition. *See* MARK G. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA (1983); Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1502 (2001).

398. *See, e.g.*, Garcetti v. Ceballos, 126 S. Ct. 1951 (2006); Connick v. Myers, 461 U.S. 138 (1983); Pickering v. Board of Education, 391 U.S. 563 (1968). *Connick* refined a balancing test first presented in *Pickering* to protect a public employee's speech when it dealt with matters of public concern, which "must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 147-48. *Garcetti* refined the test further, indicating that public employees' statements made in the course of their work deserve less First Amendment protection than similar remarks they may offer as citizens. *Garcetti*, 126 S. Ct. at 1960. One dissenter suggested, ironically, that the majority holding offered more cover for public employees to complain to the press than to their supervisors, which, if true, provides an incentive to leak. *Id.* at 1965 n.1 (Souter, J., dissenting). Similarly, some lower courts have held that blowing the whistle through the press partly satisfies the public concern criterion of *Connick* and *Pickering*. *See* Dworkin & Callahan, *supra* note 1, at 372-73. Federal and state statutes protecting whistleblowers are summarized and discussed in MARCIA P. MICELI & JANET P. NEAR, BLOWING THE WHISTLE 232-79 (1992).

about politics, such as candidates' charges and counter-charges at election time;[399] leaks often stem from similar partisan bickering.

Treating leaks as political or governmental speech rather than as an element of newsgathering would also enhance their constitutional standing. Although *Branzburg* acknowledges that newsgathering is not without First Amendment protections, the Court has been loath to expressly recognize a constitutionally based public right to know except in cases involving access to trials.[400] To be sure, federal statutes such as the Freedom of Information Act create limited rights of access,[401] and dicta in First Amendment cases are replete with references to the importance of an informed citizenry.[402] But Justice Stewart, whose dissent in *Branzburg* evinced considerable sympathy for the press, nonetheless warned about relying too heavily on the people's right to know as an asserted First Amendment right: "There is no constitutional right to have access to particular government information, or to require openness from the bureaucracy. . . . The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act."[403] For governance, leaks occupy the territory between a Freedom of Information Act and Official Secrets Act; they spring from "the tug and pull of the political forces in American society" that ultimately regulate press access to government information.[404]

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399. *See* Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 223 (1989) (recognizing that the First Amendment prevents regulation of the content of campaign speech); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988) (granting broad protection to outrageous political and social commentary).

400. *See* Houchins v. KQED, Inc., 438 U.S. 1, 9 (1978) ("This Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control."). Two years later, in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), the Court recognized the right of the public and press to attend criminal trials, one specific component of gathering news. Chief Justice Warren Burger wrote the Court's opinion in both cases.

401. 5 U.S.C. § 552 (2000).

402. Advocates of a constitutionally based people's right to know invariably cite James Madison: "A popular government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or Tragedy; or, perhaps both." Letter from James Madison to W. T. Barry (Aug. 4, 1822), *in* 9 WRITINGS OF JAMES MADISON 103 (Gaillard Hunt ed., 1910). For the argument that a right of access to government information can be inferred from constitutional jurisprudence, see Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U. L.Q. 1, 14. *But cf.* Thomas I. Emerson, *The Affirmative Side of the First Amendment*, 15 GA. L. REV. 795, 831 (1981) (conceding that the right of access suggested by *Richmond Newspapers* might be quite limited).

403. Stewart, *supra* note 17, at 636. For other analyses that caution against pushing arguments about the public's right to know too far, see David M. O'BRIEN, THE PUBLIC'S RIGHT TO KNOW: THE SUPREME COURT AND THE FIRST AMENDMENT 166 (1981); James C. Goodale, *Legal Pitfalls in the Right to Know*, 1976 WASH. U. L.Q. 29.

404. Stewart, *supra* note 17, at 636 ("The public's interest in knowing about its government is protected by the guarantee of a Free Press, but the protection is indirect.").

B. A Proposal to Protect Leaks

To safeguard the special role of leaks, disputes about the identity of government sources should be distinguished from routine journalists' confidentiality claims. Reclassifying leaks as a form of political communication enhances their constitutional status by establishing presumptions against identifying sources associated with a preferred-freedom balancing test. Reviewing the widely varied nature of leaks, as sketched in Part IV, would allow courts to tailor their decisions to protect anonymity where it advances the most vital forms of political communication. Congress might also use this approach as it considers enacting a shield law. States could do likewise as they rework existing statutory protections.

The first step in securing protection for leaks is to revisit Wigmore's criteria for conferring evidentiary privileges:

> 1. The communications must originate in a *confidence* that they will not be disclosed;
> 2. This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties;
> 3. The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*; and
> 4. The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.[405]

Pre-*Branzburg* court decisions and commentators proceeded with the largely unexamined premise that journalists' confidentiality claims did not satisfy Wigmore's criteria, and they certainly never considered leaks as a distinct category.[406] Thus, the body of decisions that culminated in

405. 5 WIGMORE, EVIDENCE § 2285, at 1-2 (2d ed. 1923).

406. Wigmore did not disguise his hostility to an evidentiary privilege for journalists. He referred to the Maryland shield law "as detestable in substance as it is crude in form" and inaccurately predicted in 1923 that it "will probably remain unique." *Id.* § 2286, at 4 n.7. Wigmore's criteria for granting evidentiary privileges did not change between the 1923 edition of his treatise and the Court's reliance on his work in *Branzburg*. *See* 408 U.S. 665, 691 n.29 (1972); *compare* 5 WIGMORE, EVIDENCE § 2285, at 1-2 (2d ed. 1923), *with* 8 WIGMORE, EVIDENCE § 2285, at 527 (McNaughton rev. 1961) (indicating only changes in punctuation). *But see* James A. Guest & Alan L. Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 NW. U. L. REV. 18, 26-27 (1969) (arguing shortly before *Branzburg* that "a literal application of Wigmore's conditions to the issue of the newsman's privilege borders on sophistry and drastically misconstrues the problem").

Banzburg failed to seriously apply Wigmore's test.[407] Now the issue should be judged anew, particularly for leaks.

Leaks satisfy Wigmore's first confidentiality requirement by definition. As for the second criterion regarding the essential nature of the secrecy, officials admittedly have considerable self-interest in maintaining relations with the press even without expectations of confidentiality. But the leaks that contribute most to governance—those involving whistleblowing and policy disputes—are also the ones most dependent on concealing a source's identity.

Wigmore's third and fourth criteria require an assessment of leaks' value to society. Leaks have enhanced political communication for two hundred years despite fundamental change in the nation's press, politics, and government. They have functioned as a necessary part of governance, which addresses Wigmore's third requirement. The fourth criterion invites judges or legislatures to balance the value of leaks against evidentiary needs in different contexts. Judge Tatel's concurrence in the CIA leak case took a first step in that direction.[408] In at least one vital respect pertinent to Wigmore's third and fourth criteria, reporters' confidentiality *surpasses* the societal value of traditional evidentiary privileges (lawyer-client, doctor-patient, and clergy-penitent). Journalists shield their government sources to provide the public, and indirectly the legal system, with *more* information about public affairs. In stark contrast, lawyers, doctors, clergy, and others invoke long recognized privileges to assure that *less* information becomes public.[409]

Consequently, confidentiality law, at least as it applies to leaks from government sources, should be reconceived along the following lines. The party seeking disclosure of a reporter's government sources should first prove relevancy and exhaustion of alternative sources, requirements already widely accepted and often easily satisfied. The outcome in most leak cases will thus turn on balancing the benefits of preserving confidentiality against the importance of the source's identity in a legal action. This is essentially the "compelling need" test from Stewart's *Branzburg* dissent as recognized in many shield laws and court decisions. In striking this balance, courts should treat most leaks from government sources as a form of political speech with its attendant protections. Starting with a presumption against disclosure, the party

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407. In pressing for a federal shield law in the wake of *Branzburg*, Representative Charles W. Whalen, Jr., a Republican of Ohio, argued that journalists' claim for an evidentiary privilege satisfied Wigmore's requirements. *See 1973 House Hearings*, *supra* note 174, at 177-78; CHARLES W. WHALEN, JR., YOUR RIGHT TO KNOW 147-54 (1973).

408. *See supra* text accompanying notes 288-94.

409. *See* Fred S. Siebert, *Professional Secrecy and the Journalist*, 36 JOURNALISM Q. 3, 6-8 (1959).

seeking a source's identity would have a burden to prove, by clear and convincing evidence, that the need for the testimony outweighed the value of protecting this form of political communication. The balancing should consider the merits of political communication in the case at hand as well as its implications for chilling similar speech in the future. For instance, forcing disclosure of a whistleblower's identity in one case might discourage others from stepping forward.

Judgments about the contributions of a leak to governance, and hence the variable weight accorded to it in a balancing test, should be informed by an analysis along the lines of the one presented in Part IV. At one end of the continuum are leaks that perform an indispensable role in political speech. Whistleblowing and anonymous communications from sources inside agencies registering disagreements with policies fit here because the formal channels of government often bottle up such messages.[410] These leaks honor the long tradition of the press serving as a check on government. Furthermore, such leaks counterbalance all the tools government uses to communicate, or spin, official policy.

Less but still considerable weight should be accorded leaks that communicate information from one agency to another or signal the positions of key players.[411] Through such leaks, the press facilitates government decisionmaking. Leaks from ongoing investigations conducted by grand juries, the police, the FBI, and the like also fall in the middle range. If obtaining inside information is merely a scoop for a media outlet, prematurely publicizing information that would ultimately come out anyway, then a leak deserves little weight in balancing against the need to reveal the source.[412] However, where leaks stimulate an investigation and keep it on track, as in Watergate, then protecting confidentiality warrants much greater deference.[413] At the opposite end of the spectrum, deserving little weight for their negligible contributions to governance, are leaks advancing personal goals. These leaks use anonymous messages to burnish or attack reputations.[414] When courts address government leak cases as a distinct subset of journalists' confidentiality claims, they can further refine the variable weight to accord different types of anonymous messages conveyed through the press.

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410. *See supra* notes 316-20, 358-62 and accompanying text.
411. *See supra* notes 371-77 and accompanying text.
412. *See supra* notes 234-39 and accompanying text.
413. *See supra* notes 11, 361-62 and accompanying text.
414. *See supra* notes 325-35 and accompanying text.

Journalists, First Amendment stalwarts, and even judges might recoil at the prospect of having courts pass judgment on good versus bad leaks and probe the motives of sources and journalists.[415] But courts already have experience conducting inquiries into the journalistic and political contexts of news stories. The Court of Appeals for the District of Columbia, an important forum for leak cases, devised a test that relied extensively on judgments about the context of a story to determine whether allegedly defamatory statements should be treated as opinion or factual assertions.[416] Other questions of libel and privacy law[417] similarly require courts to delve into the context of a news story. Weighing the political context of a leak thus represents nothing new for courts. Stories themselves often provide cues that can assist in categorizing a leak.[418] And courts can evaluate a reporter's source information in camera to gain a better sense of whether protecting the identity outweighs the need for disclosure.[419]

Focusing on the role of leaks in governance also obviates difficult decisions about who qualifies as a professional communicator entitled to a testimonial privilege. *Branzburg* expressed serious reservations about recognizing "a constitutional newsman's privilege":

> Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods.[420]

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415. *See* SISSELA BOK, SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION 218 (1983) (arguing from a philosophical and ethical vantage point that it is appropriate to distinguish between good and bad leaks).

416. Ollman v. Evans, 750 F.2d 970, 979 (D.C. Cir. 1984) (en banc). The *Ollman* test requires determining (1) whether the allegedly defamatory statement is susceptible to being proved true or false; (2) the ordinary meaning of the words; (3) the journalistic context of the remarks; and (4) the social context of the language at issue. *Id.* at 979-84; *see also* Timothy W. Gleason, *The Fact/Opinion Distinction in Libel*, 10 HASTINGS COMM. & ENT. L.J. 763 (1988).

417. In libel law, for example, deciding whether a plaintiff is a limited-purpose public figure (having to prove actual malice) or a private person (having to prove only negligence), depends on assessing the nature of the underlying controversy, the plaintiff's role in it, and the timing of the plaintiff's involvement in relation to the publication of the defamatory message. *See* DON PEMBER, MASS MEDIA LAW 175-84 (2005). For the tort of publicizing embarrassing private facts, courts or juries must consider whether the intimate information is of legitimate public concern or newsworthy. *See, e.g.*, Virgil v. Time, Inc., 527 F.2d 1122 (9th Cir. 1975); PEMBER, *supra* note 417, at 288-93.

418. A helpful analysis of contextual considerations to be used in evaluating confidentiality claims can be found in Levi, *supra* note 104, at 714-27.

419. On in camera review in journalists' confidentiality cases, see DIENES, LEVINE & LIND, *supra* note 3, at 1022-24.

420. Branzburg v. Hayes, 408 U.S. 665, 703-04 (1972); *see also* Clay Calvert, *And You Call Yourself a Journalist?: Wrestling with a Definition of "Journalist" in the Law*, 103 DICK. L. REV. 411 (1999); Kraig L. Baker, Note, *Are Oliver Stone and Tom Clancy Journalists? Determining Who Has Standing to Claim the Journalist's Privilege*, 69

Indeed, state shield laws do vary considerably in the range of communicators brought within their protective ambit, which "only serves to heighten the concern expressed by the majority in *Branzburg*."[421] Today, of course, almost anyone can become a communicator simply by creating a Web site or a blog. One judge in the CIA leak case speculated that government leakers could avoid detection by channeling their messages through a friendly blogger who would then claim an evidentiary privilege as a journalist.[422] As a practical matter, leaking to the *New York Times*, *Washington Post*, and other established media remains the preferred route for most government sources.[423] But if leaks start springing from more ephemeral media, legal judgments about journalists' confidentiality should turn on the nature of the leak—specifically its place in governance—rather than the nature of the communicator conveying it.

The threshold for forced disclosure of journalists' government sources should also vary with the legal setting in which a leaker's identity is sought. Courts and legislatures could reasonably set a higher bar for disclosure in the investigative phase of an inquiry than in adjudicating outcomes,[424] a distinction recognized for government informants.[425]

WASH. L. REV. 739 (1994). Frederick Schauer, however, believes that First Amendment jurisprudence could make constitutionally defensible and socially beneficial distinctions among communication institutions and their personnel. *See* Schauer's articles cited *supra* note 21.

421. *In re* Grand Jury Subpoena, Judith Miller, 397 F.3d 964, 980-81 (D.C. Cir. 2005) (Sentelle, J., concurring) (sketching the range of communicators covered by state shield laws); Anthony L. Fargo, *Analyzing Federal Shield Law Proposals: What Congress Can Learn from the States*, 11 COMM L. & POL'Y 35, 50-51, 56-59 (2006).

422. *Miller*, 397 F.3d at 979-80 ("[W]ould it not be possible for a government official wishing to engage in the sort of unlawful leaking under investigation in the present controversy to call a trusted friend or a political ally, advise him to set up a Web log (which I understand takes about three minutes) and then leak to him under a promise of confidentiality the information which the law forbids the official to disclose?"). This scenario parallels one suggested in *Branzburg* long before the Internet: groups establishing "'sham' newspapers" to shield their criminal activities by invoking a journalist's privilege. *Branzburg*, 408 U.S. at 705 n.40. Such subterfuges to cloak leaks by manufacturing a reporter-source relationship seem farfetched.

423. Even in the age of the Internet, government leakers prefer established media as outlets. The established media directly reach Washington decisionmakers, involve journalists with whom sources have already cultivated relationships and, if litigation ensues, reporters for such media can draw on their employers' considerable legal and financial resources to shield the source.

424. In the wake of *Branzburg*, the National Conference of Commissioners on Uniform State Laws considered a model shield law that would have protected journalists from compelled testimony in investigative proceedings but required testimony in some trials. *See 1973 House Hearings*, *supra* note 174, at 131-33 (testimony of Professor Vincent Blasi presenting the draft shield law); David Shipler, *Model Newsmen's*

Ironically, *Branzburg's* grip on confidentiality law has produced the opposite effect. Lower courts hesitate to deny grand jury requests for compelled testimony because the Supreme Court ruling dealt expressly with that situation.[426] By their nature, however, investigative proceedings such as grand jury probes and legislative hearings cast a wide net, operate with fewer checks than trials, and serve as but a preliminary step for later action if warranted.[427] Subpoenas issued to journalists in the course of investigative and adjudicative proceedings thus "are vastly different, both in terms of their evidentiary gain and also in terms of the damage they do, the fears they generate, [and] the climate they create which is the real problem."[428] Fifteen years before *Branzburg*, the Supreme Court also recognized the dangers of compelled testimony in investigations. "It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas."[429]

For trials, in contrast, a lower threshold for compelled disclosure of a source's identity might adequately protect the contributions of leaks to governance because such adjudications proceed with a tighter focus and more rigorous safeguards. Criminal defendants clearly have a strong constitutional claim to compel exculpatory testimony and prosecutors should be entitled to nearly the same consideration for trials. For civil proceedings, judges need to safeguard political communication by limiting discovery when it intrudes into confidential relations between government sources and the press.[430] Libel suits, however, warrant a

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Privilege Law Being Drafted, N.Y. TIMES, Mar. 26, 1973, at 32. Some of the federal shield bills considered by Congress in the mid-1970s also provided absolute protection for journalists appearing before grand juries but less protection for trials, an approach that won grudging support from prominent news organizations. *See* VAN GERPEN, *supra* note 148, at 169. It should be noted that these proposals did not distinguish between leaks and other types of journalists' confidentiality claims, as does this Article.

425. *Compare* United States v. Harris, 403 U.S. 573 (1971) (protecting the identity of an informant for investigatory purposes, specifically for securing a search warrant), *with* Roviaro v. United States, 353 U.S. 53 (1957) (holding that an informant's identity should be disclosed at trial when central to the defense).

426. *See supra* note 242 and accompanying text.

427. *But see Branzburg*, 408 U.S. at 687-88 (explaining the reasons for according grand juries such wide latitude).

428. *1973 House Hearings*, *supra* note 174, at 129 (remarks of Professor Vince Blasi); *see also Reporters and Their Sources*, *supra* note 149, at 345-58 (offering an extended argument for protecting journalists' confidentiality in grand jury and legislative investigations).

429. Sweezy v. New Hampshire, 354 U.S. 234, 245 (1957).

430. *See Reporters and Their Sources*, *supra* note 149, at 358-60 (arguing for an absolute journalists' privilege in civil litigation except for libel suits, though without distinguishing between government and other sources).

lower threshold for disclosure. When the plaintiff has established falsity and clearly needs a government source's identity to prove fault, either actual malice or negligence, a media defendant should not be able to shield the source to avoid liability.

Finally, the contribution of leaks to political communication entitles them to special consideration when a government agency seeks to unveil a source's identity. To do otherwise invites officials, who enjoy considerable discretion in these matters, to pursue leaks they dislike even as they sponsor their own leaks, as has nearly every administration since World War II.[431] This raises the specter of content or viewpoint discrimination

431. All administrations since World War II have conducted investigations to find the sources of unwelcome leaks, usually unsuccessfully. On leak investigations during the 1950s and 1960s, see ROURKE, *supra* note 329, at 78-80; SIGAL, *supra* note 296, at 145-47; WISE, *supra* note 314, at 284-86; Dahlan, *supra* note 1, at 70-71. On investigations during the Ford administration, see JOSEPH C. SPEAR, PRESIDENTS AND THE PRESS 284-85 (1984). On investigations during the Carter administration, see *id.* at 287-88. On investigations during the Reagan administration, including efforts to restrict officials' contacts with the press and give suspected informants polygraph tests, see A.B.A. STANDING COMM. ON LAW & NAT'L SECURITY, THE MEDIA AND GOVERNMENT LEAKS *passim* (Patricia Garvin Cathcart & Deborah Fletcher eds., 1984); LAURENCE I. BARRETT, GAMBLING WITH HISTORY: RONALD REAGAN IN THE WHITE HOUSE 429-36 (1983); HERTSGAARD, *supra* note 298, at 140-47; HESS, *supra* note 1, at 86-92; SPEAR, *supra*, at 29-31, 292. On investigations during the George H. W. Bush administration, see Andrew Rosenthal, *Bush Would Oust Rio Memo's Leaker*, N.Y. TIMES, June 8, 1992, at A5. On investigations during the Clinton administration, see Debra G. Hernandez, *Investigating Leaks*, EDITOR & PUBLISHER, Apr. 13, 1996, at 14. *See also* GROSSMAN & KUMAR, *supra* note 306, at 280 (quoting officials on difficulties in tracking down leakers); HESS, *supra* note 1, at 88 (citing a General Accounting Office study that between 1975 and 1982 the Department of Defense investigated sixty-eight leaks); Alan M. Katz, *Government Information Leaks and the First Amendment*, 64 CAL. L. REV. 108 (1976) (analyzing criminal and civil actions against leakers in the 1960s and 1970s).

Congress has also conducted a number of leak investigations. One that is especially revealing suggests that while Congress publicly deplores leaks from its ranks, it actually prefers not to inquire too deeply. In 1991, the Senate appointed a temporary special independent counsel to investigate leaks from the Senate confirmation hearings for Supreme Court nominee Clarence Thomas and leaks from the Ethics Committee about five Senators suspected of improper dealings with the head of a savings and loan company. The special counsel carefully documented the leaks in the two cases and railed against the congressional culture of leaking, but could not identify any leakers. *See* S. DOC. NO. 102-20, pt. 1 (1992). The special counsel complained that "[t]he journalists possessed the evidence which was most relevant to fulfilling the mandate of" the investigation, *id.* at 78, but the Senate declined to grant authority to compel their testimony. *See* S. DOC. NO. 102-20, pt. 2, at 22-24 (1992). The special counsel concluded that Congress did not truly want to jeopardize "the continued ability and perhaps even the right of senators and staff persons to disclose confidential information with a certainty that their anonymity will be secure." S. DOC. NO. 102-20, pt. 1, at 80.

for political speech.[432] Because unauthorized leaks augment and even challenge messages dispensed through official channels, they function as "[i]mportant safety valves in the U.S. government."[433] They deserve deference, and a higher burden of proof to compel disclosure, for journalists in confidentiality cases.

VI. CONCLUSION

Outwardly, government and the press have changed dramatically since the 1795 leak of the Jay Treaty. Yet leaks function in much the same fashion today: they facilitate government decisionmaking while augmenting information available to the public. As the locus of federal policymaking during the nineteenth century, Congress was initially the source of most leaks and launched occasional investigations to discover journalists' informants. By the end of the century, however, most members of Congress accepted leaks as an element of governance and thereafter rarely demanded that journalists disclose their sources. The rise of the administrative state, including the ascendancy of the White House, provided another impetus for leaking to the press to communicate within and across the sprawling, ever more complex federal establishment. Thus, by the mid-twentieth century, leaks had become a common tool of governance, even during such crises as World War II and the Cold War.

Viewed historically and functionally, anonymous communications from government sources to the press can be distinguished from other situations that present legal questions about journalists' confidentiality. The media's traditional claim for shielding their sources—to assure an unfettered flow of information to the public—undervalues the significance of leaks and rests on shaky constitutional underpinnings. Treating leaks as messages by and about government entitles them to consideration as political speech and honors their institutional role in a democratic society. Not all leaks deserve equal treatment under this reformulation and, in rare circumstances, some should still be subject to disclosure. But moving toward a more nuanced understanding of leaks' varied nature and contributions to governance would assist judges and legislators in properly adjusting the interests at stake. It would also give government sources and their media contacts greater predictability about the legal consequences, and ethical merits, of crafting stories based on leaks.

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432. *See* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (invalidating a hate speech ordinance because it punished specified viewpoints); *see also* KATHLEEN M. SULLIVAN & GERALD GUNTHER, FIRST AMENDMENT LAW 193 (1999) ("The Court generally treats restriction of the expression of a particular point of view as the paradigm violation of the First Amendment.").

433. HECLO, *supra* note 316, at 231.