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Open Season on the Journalist's Privilege: Do Recent Rulings Represent a Trend Against Assertions of the Privilege or Proper Applications of Existing Law?

Will E. Messer¹

A legal issue can smolder for years until suddenly the winds of a larger controversy fan it into flame. Such has been the case with the question whether information received in confidence by journalists is entitled to a legal privilege against compulsory process.²

INTRODUCTION

IN a year filled with historic events—U.S. President George W. Bush won re-election,³ Major League Baseball's Boston Red Sox captured an elusive World Series,⁴ and a tsunami devastated Southeast Asia⁵—the journalists who reported these events will find 2004's significance lies not on the campaign trail, the ball field, or the disaster area but instead lies in the courtroom. In no less than four separate legal proceedings, journalists who sought to keep their sources confidential by relying on a "journalist's privilege" faced contempt-of-court charges.⁶ These cases came on the heels

1 J.D. expected 2006, University of Kentucky; B.A. 2003, University of Kentucky.

2 Vince Blasi, *The Newsmen's Privilege: An Empirical Study*, 70 MICH. L. REV. 229, 229 (1971).

3 Richard Benedetto & Judy Keen, *President Gets to Celebrate Win This Time*, U.S.A. TODAY, Nov. 4, 2004, at 5A.

4 Mel Antonen, *Red Sox Sweep Away Old Identity*, U.S.A. TODAY, Oct. 28, 2004, at 4C.

5 Dan Vergano, *Clash of Continents Unleashed Deadly Waves*, U.S.A. TODAY, Dec. 28, 2004, at 10A.

6 *See, e.g.*, Lee v. DOJ, 413 F.3d 53 (D.C. Cir. 2005) (ruling followed 2004 district court ruling ordering journalists in contempt), *cert. denied*, Miller v. United States, 125 S.Ct. 2977 (2005); *In re* Grand Jury Subpoena, Judith Miller, 397 F.3d 964 (D.C. Cir. 2005) (ruling followed 2004 district court ruling ordering journalists in contempt); *In re* Special Proceedings, 373 F.3d 37 (1st Cir. 2004) (ruling followed previous district court ruling ordering journalist in contempt); Weinberger v. Maplewood Review, 668 N.W.2d 667 (Minn. 2003) (holding that the journalist could not seek shelter behind the privilege).

of high-profile judgments in 2001⁷ and 2003⁸ that also cast doubt on the continued viability of the privilege. The litigation in two of these cases continued into 2005,⁹ a year that, ironically, will partially be remembered as the year in which the most important confidential source in modern U.S. journalism, “Deep Throat,” outed himself.¹⁰

The developments in 2004 and 2005 concerning the journalist’s privilege make this Note’s introductory quote—written on the eve of the Supreme Court’s seminal journalist’s privilege ruling, *Branzburg v. Hayes*¹¹—as prescient in 2004 as it was in 1971. The “larger controversy” to which the quote refers involved the federal government’s efforts to probe and curb radical activity spawned by the Vietnam War and the civil rights movement of the 1960s.¹² A consequence of these efforts was a sharp increase in subpoenas issued against journalists in the late 1960s.¹³ Such attempts to discover the identities of radical protestors set the stage for *Branzburg*. In that 1972 case, the Supreme Court held that journalists could not assert a “journalist’s privilege” in response to subpoenas issuing from grand jury investigations.¹⁴ The Court held that the government has a compelling interest in investigating crime, and this interest justifies the intrusion of the public’s First Amendment interest.¹⁵

Now, more than thirty years later, the flames rise again, stoked by a series of controversies ranging from matters of national security¹⁶ to civil defamation claims.¹⁷ But, while the facts and circumstances surrounding each assertion of journalist’s privilege differ, a constant runs through each

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

8 *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003).

9 *Lee v. DOJ*, 413 F.3d 53 (D.C. Cir. 2005); *In re* Grand Jury Subpoena, Judith Miller, 397 F.3d 964 (D.C. Cir. 2005).

10 “Deep Throat” was identified as FBI agent W. Mark Felt in a July, 2005, Vanity Fair article. John D. O’Connor, “I’m the Guy They Called Deep Throat,” VANITY FAIR, July 2005, at 86.

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

12 Karl H. Schmid, *Journalist’s Privilege in Criminal Proceedings: An Analysis of the United States Courts of Appeals’ Decisions from 1973 to 1999*, 39 AM. CRIM. L. REV. 1441, 1442 (2002).

13 Blasi, *supra* note 2, at 229–30.

14 *Branzburg*, 408 U.S. at 667.

15 *Id.* at 700 (quoting *Bates v. City of Little Rock*, 361 U.S. 516, 525 (1960) (concluding that “the investigation of crime by the grand jury implements a fundamental governmental role of securing the safety of the person and property of the citizen, and it appears to us that calling reporters to give testimony in the manner and for the reasons that other citizens are called ‘bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification’”).

16 *In re* Grand Jury Subpoena, Judith Miller, 397 F.3d 964 (D.C. Cir. 2005) (involving a journalist’s refusal to reveal confidential sources in response to a special prosecutor’s investigation into the outing of an undercover CIA operative).

17 *Lee v. DOJ*, 413 F.3d 53 (D.C. Cir. 2005) (involving a former government scientist’s defamation claim); *Weinberger v. Maplewood Review*, 668 N.W.2d 667 (Minn. 2003) (involving a fired high school football coach’s defamation claim).

scenario: the privilege was denied.¹⁸ Aside from the predictable outrage stemming from these rulings,¹⁹ much news media dialogue has focused on two things: (1) whether the recent rulings signal the end of the privilege,²⁰ and (2) what can be done to reverse the trend.²¹

An analysis of the recent cases and a review of post-*Branzburg* journalist's privilege law suggest that the new rulings do not imply an end of the privilege. Rather, these rulings represent proper applications of existing privilege law.

Part I of this Note offers an overview of the origins of the journalist's privilege and an analysis of the *Branzburg* opinion.²² Part II outlines the privilege's post-*Branzburg* evolution.²³ Part III provides a case-by-case analysis of the recent developments in journalist's privilege law and attempts to judge what impact the rulings will have on the privilege.²⁴

¹⁸ *Lee*, 413 F.3d at 53; *Miller*, 397 F.3d at 964; *In re* Special Proceedings, 373 F.3d 37 (1st Cir. 2004); *Weinberger*, 668 N.W.2d at 667.

¹⁹ See Walter Shapiro, 'Time' Reporter Being Unfairly Punished in Debacle Over CIA Leak, U.S.A. TODAY, Aug. 20, 2004, at 8A; Editorial, *Leak Probe Threatens Reporters' Privilege*, THE HONOLULU ADVERTISER, Oct. 11, 2004, at 10A (concluding that the recent rulings might represent "a growing precedent by which prosecutors can wipe out a reporter's pledge of confidentiality, either to conduct fishing expeditions, or to intimidate reporters in their necessary work"); Editorial, *Press Freedom on the Precipice*, N.Y. TIMES, Oct. 16, 2004, at A16 (arguing that "[t]he specter of reporters' being imprisoned merely for doing their jobs is something that should worry everyone who cherishes the First Amendment and the essential role of a free press in a democracy"); Arthur Ochs Sulzberger, Jr. & Russell T. Lewis, Editorial, *The Promise of the First Amendment*, N.Y. TIMES, Oct. 10, 2004, at A11; Editorial, *And Strikes a Blow at a Strong Press*, N.Y. TIMES, June 28, 2005, at A22 ("The jailing of reporters for pursuing the truth rings particularly medieval in this information age."). But see Bruce Fein, *Losing Sight of Free Press Aims*, THE WASHINGTON TIMES, Aug. 17, 2004, at A15 (arguing that journalists might be entitled to a qualified privilege under some circumstances, "but the criminal investigation of the Bush administration leak of Valerie Plame's identity is not such a candidate"); Geoffrey R. Stone, *Miller, Novak, Plame, Wilson . . .*, THE WALL STREET JOURNAL, Oct. 18, 2004, at A18 (rebutting *The New York Times'* argument that jailing journalists violated the First Amendment).

²⁰ See Michael Kirkland, *Are 'Sourced' Stories Extinct?*, UNITED PRESS INTERNATIONAL, Sept. 20, 2004; Richard Willing, *Reporters Try to Shield Sources' Identities in Inquiry*, U.S.A. TODAY, Sept. 3, 2004, at 13A (highlighting recent cases dealing with the issue of journalists' privilege); Jacques Steinberg, *Setbacks on Press Protections Are Seen*, N.Y. TIMES, Aug. 18, 2004, at A16; Adam Liptak, *Courts Grow Increasingly Skeptical of Any Special Protections for the Press*, N.Y. TIMES, June 28, 2005, at A16 ("We're seeing outright contempt for an independent press in a free society," said Jane Kirtley, who teaches media ethics and law at the University of Minnesota. "The fact that courts have no appreciation for this is new, is troubling, and you cannot overestimate the impact it will have over time.").

²¹ The *New York Times* has repeatedly encouraged Congress to pass a federal shield law to solve the journalist's privilege issue. See Sulzberger & Lewis, *supra* note 19, at A11 ("[I]t is now time for Congress to follow the lead of the states and enact a federal shield law for journalists."); Editorial, *Press Freedom on the Precipice*, N.Y. TIMES, Oct. 16, 2004, at A16.

²² See *infra* notes 25–93 and accompanying text.

²³ See *infra* notes 94–121 and accompanying text.

²⁴ See *infra* notes 122–288 and accompanying text.

I. THE ORIGIN OF THE JOURNALIST'S PRIVILEGE

A. *Pre-Branzburg Development of the Privilege*

Journalists seeking to maintain the confidentiality of their sources when confronted with a subpoena is not a recent phenomenon.²⁵ However, almost all litigation on this controversy in the federal courts has occurred within the last forty-five years. The first such instance occurred in a Second Circuit case in 1958, *Garland v. Torre*,²⁶ when the actress Judy Garland sought to force the disclosure of Marie Torre's confidential sources.²⁷ The dispute arose out of a defamation suit Garland had filed against Columbia Broadcasting System, Inc. (CBS).²⁸ Torre wrote a column for the *New York Herald Tribune* that quoted an unnamed CBS executive.²⁹ Garland alleged that the quotes attributed to the executive were false and defamatory.³⁰ To settle the issue, the trial court ordered Torre to reveal her source, and she refused, citing privilege.³¹ The court held her in contempt, and she appealed.³² Although Torre lost her appeal, the three-prong test that the court employed³³ to resolve the issue remains in use today.³⁴

There is an explanation for the concentration of privilege litigation within the last forty-five years: while subpoenas always posed problems for journalists working with confidential sources, such court orders were not issued "in such numbers and circumstances as to generate consternation in virtually all quarters of the journalism profession and a questioning by many reporters of the Government's motives" until the late 1960s.³⁵ The federal government believed that the subpoenas were a necessary component of its effort to throttle fringe groups involved with the ongoing civil rights movement and protests of the Vietnam War.³⁶ But the journalists who

25 See, e.g., Blasi, *supra* note 2, at 229 n.1 (recounting Benjamin Franklin's appearance before a government official who sought to discover the identity of an author).

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

27 *Id.* at 547.

28 *Id.*

29 *Id.*

30 *Id.*

31 *Id.*

32 *Id.*

33 The court held the party seeking disclosure (1) made "reasonable efforts" to discover the information from alternative sources, (2) that the party's claim was not "patently frivolous," and (3) that "[t]he information sought was of obvious materiality and relevance." *Id.* at 551.

34 See, e.g., *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 726 (5th Cir. 1980); *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 598 (1st Cir. 1980).

35 Blasi, *supra* note 2, at 230.

36 Schmid, *supra* note 12, at 1442.

were the targets of those court orders insisted that newspaper reporters would face an unfair “burden” on their ability to gather news if forced to respond to subpoenas.³⁷

In 1970, this tension produced *Caldwell v. United States*.³⁸ Earl Caldwell was a *New York Times* reporter covering the Black Panther Party.³⁹ Federal authorities were investigating criminal activity linked to the party and subpoenaed Caldwell to appear before a federal grand jury in the Northern District of California.⁴⁰ The district court entered an order instructing Caldwell to appear but also granted him a “privilege of silence as to certain matters until such time as the Government should demonstrate ‘a compelling and over-riding national interest in requiring Mr. Caldwell’s testimony which cannot be served by any alternative means.’”⁴¹ Caldwell appealed the order, arguing that he could not be compelled to attend the hearing at all without a showing of a specific need by the government.⁴² Caldwell alleged that because of the secretive nature of grand jury proceedings, a qualified privilege would not be sufficient to maintain the level of confidence he enjoyed with his sources.⁴³

The Ninth Circuit agreed,⁴⁴ and, in doing so, “became the first federal circuit court to extend explicit constitutional protection to the press.”⁴⁵ Noting that “[t]he need for an untrammelled press takes on special urgency in times of widespread protest and dissent,”⁴⁶ the court held that if a journalist seeking to assert privilege can show that her participation in secret grand jury proceedings endangers the public’s First Amendment right to be informed, the journalist cannot be compelled to attend a grand jury proceeding unless the government demonstrates “a compelling need for the witness’s presence.”⁴⁷

37 See, e.g., *Branzburg v. Hayes*, 408 U.S. 665, 690–91 (1972).

38 *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970), *rev’d*, *United States v. Caldwell*, 408 U.S. 665 (1972).

39 *Id.* at 1082.

40 *Id.*

41 *Id.*

42 *Id.* at 1083.

43 *Id.*

44 *Id.* at 1090.

45 Nancy V. Mate, Comment, *Piercing The Shield: Reporter Privilege in Minnesota Following State v. Turner*, 82 MINN. L. REV. 1563, 1569 (1998).

46 *Caldwell*, 434 F.2d at 1084–85.

47 *Id.* at 1089.

B. *The Seminal Decision: Branzburg v. Hayes*

1. *Factual Background.*—The Supreme Court abridged the protection *Caldwell* provided two years later when it decided *Branzburg v. Hayes*,⁴⁸ the seminal case on journalist's privilege. *Branzburg* consisted of four consolidated cases. Two of these involved articles written by Paul Branzburg, a reporter for the *Louisville Courier-Journal*.⁴⁹ The first case, *Branzburg v. POUND*,⁵⁰ originated when the *Courier-Journal* published an article written by Branzburg that contained observations of two Jefferson County residents making hashish from marijuana.⁵¹ Branzburg was subsequently subpoenaed by the Jefferson County grand jury, but he refused to identify those he saw in possession of marijuana or those synthesizing hashish.⁵² He relied on Kentucky's journalist's privilege statute.⁵³ The Kentucky Court of Appeals (now the Kentucky Supreme Court) ruled against Branzburg, holding that the Kentucky statute provided no protection to a journalist for events he observed personally.⁵⁴

In the second case, *Branzburg v. Meigs*,⁵⁵ the *Courier-Journal* published an article about the drug culture in Frankfort, Kentucky in which Branzburg recounted conversations he had had with several unnamed drug users.⁵⁶ In this instance, the Franklin County grand jury subpoenaed Branzburg, and he moved to quash the summons.⁵⁷ Again, the Kentucky Court of Appeals ruled against him.⁵⁸ The court was not persuaded by Branzburg's argument that, if the court forced him to testify about his anonymous sources, his ability to perform his job would suffer.⁵⁹

The third case, *In re Pappas*,⁶⁰ involved a television journalist/photographer who worked for a news station in New Bedford, Massachusetts.⁶¹ Pappas had spent approximately three hours inside the New Bedford head-

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

49 *Id.* at 667.

50 *Branzburg v. Pound*, 461 S.W.2d 345 (Ky. 1970), *aff'd sub nom.* *Branzburg v. Hayes*, 408 U.S. 665 (1972).

51 *Branzburg*, 408 U.S. at 667.

52 *Id.* at 668.

53 *Id.*; *see also* KY. REV. STAT. ANN. § 421.100 (2004).

54 *Branzburg*, 408 U.S. at 669.

55 *Branzburg v. Meigs*, 503 S.W.2d 748 (Ky. 1971), *aff'd sub nom.* *Branzburg v. Hayes*, 408 U.S. 665 (1972).

56 *Branzburg*, 408 U.S. at 669.

57 *Id.*

58 *Id.*

59 *Id.* at 670.

60 *In re Pappas*, 266 N.E.2d 297 (Mass. 1971), *aff'd*, 408 U.S. 665 (1972).

61 *Branzburg*, 408 U.S. at 672.

quarters of the Black Panther Party.⁶² In advance of entry, however, Pappas agreed to disclose nothing about what he saw or heard except events relating to an anticipated police raid that never occurred.⁶³ As a result, Pappas prepared no story about the time he spent in the headquarters and did not otherwise disclose any information about his time there.⁶⁴ Pappas was later subpoenaed to appear before the Bristol County grand jury where he refused to answer any questions about what he saw or heard inside the headquarters.⁶⁵ Unlike *Branzburg*, Pappas had no state journalist's privilege statute upon which to rely, but he argued he had a First Amendment privilege nonetheless.⁶⁶ A trial judge refused to grant Pappas' motion to quash, and the Supreme Judicial Court of Massachusetts agreed with that decision.⁶⁷ The Massachusetts court concluded that "the obligation of newsmen ... is that of every citizen ... to appear when summoned, with relevant written or other material when required, and to answer relevant and reasonable inquiries."⁶⁸

The final case was *Caldwell v. United States*,⁶⁹ a decision that was heavily criticized by its companion cases. The Kentucky court characterized the decision as "a drastic departure from the generally recognized rule that the sources of information of a newspaper reporter are not privileged under the First Amendment."⁷⁰ The Massachusetts court stated "that there exists no constitutional newsman's privilege, either qualified or absolute, to refuse to appear and testify before a court or grand jury."⁷¹

2. *Majority and Concurring Opinions.* — Justice White, speaking for the Supreme Court, framed the issue as whether journalists, like ordinary citizens, have an obligation to respond to grand jury subpoenas and answer questions about its investigations.⁷² The Court held that journalists do share this duty.⁷³ Echoing the sentiments of the Kentucky Court of Appeals in *Branzburg v. Meigs*, the Court observed that "[i]t is thus not surprising that the great weight of authority is that newsmen are not exempt from the normal duty of appearing before a grand jury and answering questions

62 *Id.*

63 *Id.*

64 *Id.*

65 *Id.* at 672–73.

66 *Id.* at 673.

67 *Id.* at 673–74.

68 *Id.* at 674 (quoting *In re Pappas*, 266 N.E.2d 297, 303 (1971)).

69 *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970). For a discussion of *Caldwell*, see *supra* notes 38–47 and accompanying text.

70 *Branzburg*, 408 U.S. at 670.

71 *Id.* at 674.

72 *Id.* at 667.

73 *Id.* at 702.

relevant to a criminal investigation."⁷⁴ Ultimately, the Court decided the case by balancing the public's First Amendment interest in the free flow of information against the State's interest in solving crime.⁷⁵ It noted that because "the grand jury implements a fundamental governmental role of securing the safety of the person and property" and requiring journalists to testify before it "bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification," the State's interest in a journalist's testimony will always be compelling enough to warrant the intrusion on the First Amendment.⁷⁶

The Court also discussed the practical difficulties facing a court attempting to evaluate an assertion of the type of qualified privilege created by *Caldwell*.⁷⁷ Such a privilege "would present practical and conceptual difficulties of a high order,"⁷⁸ and it would involve the courts "in distinguishing between the value of enforcing different criminal laws."⁷⁹ The Court held that this was a task best left to the legislature: "The task of judges . . . is not to make the law, but to uphold it in accordance with their oaths."⁸⁰ Ultimately, the Court's ruling affirmed the decisions of the Kentucky and Massachusetts courts and reversed the Ninth Circuit's ruling.⁸¹

In his concurring opinion, Justice Powell wrote to highlight what he termed "the limited nature of the Court's holding."⁸² He emphasized that the ruling does not permit the harassment of journalists.⁸³ If a journalist believes an investigation lacks good faith, she is free to challenge a subpoena on the basis that her testimony bears "only a remote and tenuous relationship to the subject of the investigation" or that her testimony is not a "legitimate need of law enforcement."⁸⁴ Such challenges, Justice Powell wrote, should be adjudicated on a case-by-case basis by balancing the "freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct."⁸⁵

3. *Dissenting Opinions.* — Justice Douglas' dissent advocated that journalists should enjoy an absolute privilege unless personally involved in a crime.⁸⁶

74 *Id.* at 685.

75 *Id.* at 699-700.

76 *Id.* at 700 (quoting *Bates v. City of Little Rock*, 361 U.S. 516, 525 (1960)).

77 *Id.* at 702.

78 *Id.* at 704.

79 *Id.* at 705-06.

80 *Id.* at 706.

81 *Id.* at 708.

82 *Id.* at 709.

83 *Id.* at 709-10.

84 *Id.* at 710.

85 *Id.*

86 *Id.* at 712 (Douglas, J., dissenting).

He justified his stance on his belief “that all of the ‘balancing’ was done by those who wrote the Bill of Rights. By casting the First Amendment in absolute terms, they repudiated the timid, watered-down, emasculated versions” argued for by the federal government.⁸⁷ The danger with a balancing approach, Justice Douglas wrote, is that, “[s]ooner or later, any test which provides less than blanket protection to beliefs and associations will be twisted and relaxed so as to provide virtually no protection at all.”⁸⁸

Justice Stewart’s dissent proposed a three-part test similar to the one proposed in *Caldwell*.⁸⁹ First, the State must show probable cause to believe the journalist has information “clearly relevant to a specific probable violation of law.”⁹⁰ Second, the State must “demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights.”⁹¹ Finally, the State must “demonstrate a compelling and overriding interest in the information.”⁹² Justice Stewart found *Garland* illustrative of this point: he noted that the Ninth Circuit found that the identity of Torre’s source was undoubtedly material to Garland’s claim.⁹³

II. POST-*BRANZBURG* EVOLUTION OF THE JOURNALIST’S PRIVILEGE

A. *Shield Laws*

In *Branzburg*, the Court noted that “[a] number of States have provided newsmen a statutory privilege of varying breadth, but the majority have not done so, and none has been provided by federal statute.”⁹⁴ Such statutes are commonly referred to as shield laws. States passed these statutes to provide some protection to journalists who faced threats of jail for refusing to disclose confidential sources and information. They offer varying degrees of protection and their applicability often depends on the factual circumstances surrounding a particular case.⁹⁵ Maryland passed the first shield law in 1896,⁹⁶ and ten more states followed between 1933 and 1941.⁹⁷ By the time the Court decided *Branzburg*, seventeen states had enacted shield

87 *Id.* at 713.

88 *Id.* at 720.

89 *Id.* at 743.

90 *Id.*

91 *Id.*

92 *Id.*

93 *Id.* at 743 n.33.

94 *Id.* at 689 (majority opinion).

95 Mate, *supra* note 45, at 1568.

96 *Id.*

97 *Id.* at 1568–69.

laws.⁹⁸ In the thirty-two years since *Branzburg*, an additional fourteen states and the District of Columbia have enacted shield laws.⁹⁹ In 1999, North Carolina became the most recent state to do so.¹⁰⁰

Shield law activity at the state level has not led to analogous activity at the federal level; indeed, there continues to be no federal shield law. As the Court noted in *Branzburg*, legislation that would have created a federal shield law was introduced in Congress¹⁰¹ but failed.¹⁰² Lawmakers proposed bills involving a federal shield law in *Branzburg*'s wake, but they too suffered a similar fate.¹⁰³ The implicit meaning behind Congress' failure to act is that it did not believe a federal journalist's privilege was necessary to protect the public's First Amendment interests. However, other reasons also explain Congress' lack of response. For example, as noted in *Branzburg*, in 1970 the Department of Justice created a set of guidelines to police its use of subpoenas against journalists.¹⁰⁴ Perhaps more important, however, were the decisions of federal circuit courts that interpreted *Branzburg* as creating a qualified journalist's privilege.¹⁰⁵ These decisions arguably lessened the need for a federal statute.

B. Federal Circuit Courts' Interpretations of *Branzburg*

As Justice Powell noted in his concurring opinion, *Branzburg* is a fact-specific opinion.¹⁰⁶ It is noteworthy that the journalists in the four consolidated cases were all alleged eyewitnesses to crimes and were responding to grand jury subpoenas.¹⁰⁷ *Branzburg* is certainly the definitive ruling regarding journalists' attempts to quash subpoenas issued from grand juries, and the opinion sets the bar high. It essentially requires that the journalist show the subpoena was issued in bad faith.¹⁰⁸

98 *Branzburg*, 408 U.S. at 690 n.27.

99 Edward L. Carter, Notes and Comments, *Reporter's Privilege in Utah*, 18 *BYU J. PUB. L.* 163, 171-72 (2003).

100 Laurence B. Alexander, *Looking Out for the Watchdogs: A Legislative Proposal Limiting the Newsgathering Privilege to Journalists in the Greatest Need of Protection for Sources and Information*, 20 *YALE L. & POL'Y REV.* 97, 97 (2002).

101 *Branzburg*, 408 U.S. at 691 n.28.

102 *Id.* at 689.

103 Mate, *supra* note 45, at 1573. In February 2005, identical bills purporting to create an absolute journalist's privilege were introduced in the House and Senate. Jonathan E. Kaplan, *Advocates for Journalists May Take Agenda to K Street*, *THE HILL*, Feb. 10, 2005, at 3. As of August 2005, no further action had been taken on the bills.

104 *Branzburg*, 408 U.S. at 707 n.41.

105 Mate, *supra* note 45, at 1573.

106 *Branzburg*, 408 U.S. at 710 (Powell, J., concurring).

107 See *supra* notes 48-71 and accompanying text.

108 *Branzburg*, 408 U.S. at 707-08.

Although *Branzburg* proved dispositive on privilege claims regarding grand jury subpoenas, it did not address whether the privilege could be asserted in other scenarios such as in response to subpoenas issued in connection with civil cases or from criminal defendants. Thus, the circuit courts were given some freedom to resolve journalist's privilege litigation that did not involve subpoenas issuing from a grand jury.

The circuit courts' interpretations of these issues have been favorable to journalists. All twelve of the federal circuits have recognized the existence of some form of a qualified journalist's privilege.¹⁰⁹ The circuits use different approaches to evaluate claims of privilege. At least two circuits use the test articulated in *Garland v. Torre*.¹¹⁰ Several circuits use variations of that three-pronged test.¹¹¹ The Tenth Circuit uses a four-pronged test.¹¹²

109 See *Cusumano v. Microsoft Corp.*, 162 F.3d 708 (1st Cir. 1998) (recognizing and upholding a qualified privilege for a nonparty to an antitrust case); *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980) (vacating a district court ruling ordering disclosure of confidential sources); *United States v. Burke*, 700 F.2d 70 (2d Cir. 1983) (upholding a qualified privilege in response to a discovery request from a criminal defendant); *Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979) (recognizing a qualified privilege for a nonparty journalist in civil litigation); *Larouche v. NBC*, 780 F.2d 1134 (4th Cir. 1986) (recognizing a qualified privilege for defendant journalist in defamation case); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980) (recognizing a qualified privilege but declining to apply it on the instant facts); *NLRB v. Midland Daily News*, 151 F.3d 472 (6th Cir. 1998) (applying a commercial speech analysis, the court allowed a newspaper to maintain the confidentiality of its advertiser); *Desai v. Hersh*, 954 F.2d 1408 (7th Cir. 1992) (affirming a district court order that a journalist libel defendant could testify about the reliability of his sources without disclosing their identity); *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972) (upholding libel defendant journalist's assertion of privilege); *Shoen v. Shoen*, 48 F.3d 412 (9th Cir. 1995) (upholding defendant author's assertion of privilege in a defamation case); *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975) (recognizing a qualified privilege but failing to apply it to the instant factual scenario); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977) (allowing a nonparty journalist's assertion of privilege in response to a subpoena issued by a civil defendant); *United States v. Caporale*, 806 F.2d 1487 (11th Cir. 1986) (upholding nonparty journalist's assertion of privilege); *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981) (upholding nonparty journalist's assertion of privilege); *Carey v. Hume*, 492 F.2d 631 (D.C. Cir. 1974) (recognizing the existence of a qualified privilege but refusing to permit libel defendant journalist to assert it).

110 See *Miller*, 621 F.2d at 726; *Bruno & Stillman*, 633 F.2d at 598. The *Garland* test asks the following: (1) is the information relevant?, (2) can the information be obtained by reasonable alternative means?, (3) is there a compelling interest in the information? See *Garland v. Torre*, 259 F.2d 545, 551 (2d Cir. 1958).

111 The Second Circuit asks whether the information is "highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources." *Burke*, 700 F.2d at 77. Like the Second Circuit, the Fourth Circuit asks whether the information is relevant and whether it can be obtained from alternative sources. It also asks "whether there is a compelling interest in the information." *Larouche*, 780 F.2d at 1139. The Ninth Circuit asks: "(1) whether the requesting party has exhausted all reasonable alternative sources; (2) whether the information sought is relevant, material, and noncumulative; and (3) whether the information sought is crucial to the maintenance of the plaintiffs' legal claims." *Shoen*, 48 F.3d at 415.

112 "1. Whether the party seeking information has independently attempted to obtain

The other circuits use a basic balancing test where First Amendment interests are weighed against the interests of the party seeking disclosure.¹¹³ In these circuits, like those using the multipronged tests, the party seeking disclosure generally must show that the information could not be obtained through an alternative source and that the information is relevant to her claim.¹¹⁴ Some of these circuits also require that alternative sources be exhausted, a requirement seemingly much more difficult to satisfy than *Garland's* requirement that the discovering party make "reasonable efforts" to discover the information from alternative sources.¹¹⁵

This discussion illustrates that, outside the factual scenario presented in *Branzburg*,¹¹⁶ journalists have been successful in arguing a qualified privilege. Indeed, the D.C. Circuit concluded that in civil litigation there should be a preference for assertions of the privilege.¹¹⁷ Conversely, journalists enjoyed no such success arguing that the privilege should apply in scenarios similar to *Branzburg*. There appears to be only one circuit court case recognizing a qualified privilege in this scenario,¹¹⁸ and there are very few circuit court cases addressing assertions of privilege in response to grand jury or special prosecutor investigations. In *Scarce v. United States*,¹¹⁹ a case in which a journalist challenged a contempt order after refusing to answer questions before a grand jury, the Ninth Circuit observed that journalists' success in arguing privilege in scenarios factually distinct from *Branzburg* had no bearing on the instant facts. "[The journalist] cites to an array of cases in which other Courts of Appeals have held that a reporter has a qualified privilege to withhold confidential information, but we observe that those cases did not

the information elsewhere and has been unsuccessful. 2. Whether the information goes to the heart of the matter. 3. Whether the information is of certain relevance. 4. The type of controversy." *Silkwood*, 563 F.2d at 438.

113 See *Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979); *Desai v. Hersh*, 954 F.2d 1408 (7th Cir. 1992); *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972); *United States v. Caporale*, 806 F.2d 1487 (11th Cir. 1986); *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981).

114 See, e.g., *Caporale*, 806 F.2d at 1504 (holding "that information may only be compelled from a reporter claiming privilege if the party requesting the information can show that it is highly relevant, necessary to the proper presentation of the case, and unavailable from other sources").

115 *Riley*, 612 F.2d at 717 (holding that "[p]laintiffs must show that they exhausted other means of obtaining the information").

116 See *supra* notes 48-71 and accompanying text. In *Branzburg*, the Court addressed four consolidated cases where four separate journalists individually tried to invoke a qualified journalist's privilege. Each journalist attempted to effect the privilege to prevent revealing his confidential sources in ongoing grand jury proceedings.

117 "Thus in the ordinary case the civil litigant's interest in disclosure should yield to the journalist's privilege." *Zerilli v. Smith*, 656 F.2d 705, 712 (D.C. Cir. 1981).

118 *In re Williams*, 766 F. Supp. 358 (W.D. Pa. 1991), *aff'd en banc by equally divided court*, 963 F.2d 567 (3d Cir. 1992) (ruling did not discuss merits of the case).

119 *Scarce v. United States*, 5 F.3d 397, 402 (9th Cir. 1993).

involve grand jury inquiries.”¹²⁰ This ruling illustrates that advancements in other areas of journalist’s privilege law failed to influence the state of the law in grand jury settings. Thus, after *Branzburg*, the federal courts virtually unanimously disallowed assertions of privilege in the face of a subpoena or criminal investigation absent a showing of bad faith.¹²¹

III. RECENT DEVELOPMENTS IN JOURNALIST’S PRIVILEGE LAW

Branzburg was certainly a setback for proponents of the journalist’s privilege. The majority opinion leaves little room for an assertion of privilege in response to a subpoena to appear before a grand jury.¹²² But Justice Powell’s concurrence left a slight crack in the door concerning such grand jury subpoenas,¹²³ and the majority opinion left the door wide open with respect to other scenarios in which privilege might be asserted.¹²⁴ Both the federal courts and the states—through their legislative bodies—have since responded to these openings. All of the federal circuit courts have recognized at least some form of a journalist’s privilege,¹²⁵ and in the years since *Branzburg*, fourteen states and the District of Columbia¹²⁶ have enacted shield laws to join the seventeen mentioned in that landmark opinion. But a series of high-profile cases since the turn of the 21st century have spurred speculation that the trend in the courts toward a broader journalist’s privilege has halted and possibly reversed.

A. *In re* Grand Jury Subpoenas:¹²⁷ *The Vanessa Leggett Case*

In 2000, Vanessa Leggett was an adjunct university lecturer at the University of Houston—Downtown moonlighting as an aspiring true-crime writer.¹²⁸ Two years later, she was transformed into a First Amendment mar-

¹²⁰ *Id.* at 403.

¹²¹ A case illustrative of this point is *Storer Commc’n, Inc. v. Giovan*, 810 F.2d 580 (6th Cir. 1987). In that ruling, the Sixth Circuit concluded that “[t]he Constitution does not, as it never has, exempt the newsman from performing the citizen’s normal duty of appearing and furnishing information relevant to the grand jury’s task.” *Id.* at 583 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 689–91 (1972)).

¹²² See *supra* notes 72–81 and accompanying text.

¹²³ See *supra* notes 82–85 and accompanying text.

¹²⁴ See *supra* notes 109–21 and accompanying text.

¹²⁵ See *supra* note 109 and accompanying text.

¹²⁶ Carter, *supra* note 99, at 171–72.

¹²⁷ *In re* Grand Jury Subpoenas, No. 01-20745 (5th Cir. Aug. 17, 2001) (per curiam).

¹²⁸ Ross E. Milloy, *Writer Who Was Jailed in Notes Disputes is Freed*, N.Y. TIMES, Jan. 5, 2002, at A8.

tyr.¹²⁹ During the course of those two years, Leggett investigated a high-profile Houston murder, refused to divulge the fruits of her research to a grand jury, and spent 168 days in jail.¹³⁰

Leggett's ordeal began with the murder of Doris Angleton on April 16, 1997.¹³¹ Houston prosecutors believed Doris' husband, Robert Angleton, had paid his brother, Roger Angleton, to commit the crime.¹³² But before either could be tried for the murder, Roger committed suicide, leaving a note confessing to the crime.¹³³ Robert, a bookie, was acquitted in state court—but federal prosecutors began investigating him on charges of tax evasion and money laundering.¹³⁴

In December 2000, a federal grand jury subpoenaed Leggett¹³⁵ and she did in fact appear.¹³⁶ In the summer of 2001, Leggett received a second and third subpoena, but when she appeared before the grand jury on July 19, 2001, she refused to cooperate with the terms of the subpoenas, citing journalist's privilege.¹³⁷ The court then cited her for civil contempt¹³⁸ pursuant to 28 U.S.C. § 1826(a), which permits jailing for up to eighteen months.¹³⁹ In an unpublished opinion, the Fifth Circuit refused to grant Leggett's motion to quash.¹⁴⁰ The Fifth Circuit, following *Branzburg*, held that "the journalist's privilege is ineffectual against a grand jury subpoena absent evidence of governmental harassment or oppression."¹⁴¹ As a result, Leggett remained jailed until January 4, 2002, when the federal grand jury's term expired.¹⁴²

129 *Jailed Writer Wins PEN/Newman's Own First Amendment Award*, THE ASSOCIATED PRESS, April 12, 2002, available at <http://www.freedomforum.org/templates/document.asp?documentID=16059>.

130 Milloy, *supra* note 128, at A8.

131 *Id.*

132 *Id.*

133 *Id.*

134 *Id.*

135 Leggett was subpoenaed because, while working at the University of Houston-Downtown, she had been seeking a subject for a true-crime book she wished to write. Eventually, "a chance conversation with Roger Angleton led to hundreds of interviews with him and other people close to the case." *Id.* Federal agents were in dire need of the information contained in those interviews and hoped to compel her cooperation by issuing her the initial subpoena. *Id.*

136 Schmid, *supra* note 12, at 1441 n.1.

137 *Id.*

138 *Id.* at 1441.

139 28 U.S.C. § 1826(a) (2000).

140 *In re Grand Jury Subpoenas*, No. 01-20745 (5th Cir. Aug. 17, 2001) (per curiam).

141 *Id.*

142 Milloy, *supra* note 128, at A8.

The 168 days Leggett spent jailed represent a record in the United States for journalists refusing to reveal their sources and work product;¹⁴³ her plight certainly did not go unnoticed. In April 2002, she received the PEN/Newman's Own First Amendment Award which honors those who fight to safeguard First Amendment rights.¹⁴⁴ Proponents of a journalist's privilege for grand jury subpoenas said Leggett's case was critical in that it illustrated the severe penalties journalists may face when they shield sources and work product.¹⁴⁵

It is understandable that proponents of a privilege would express outrage at the length of time Leggett spent jailed. It is more difficult, however, to understand why the case would be deemed critical given that the law regarding assertions of privilege in the face of grand jury subpoenas is relatively black and white—in *Branzburg*, the Court essentially held that no such privilege exists unless a journalist can show bad faith.¹⁴⁶ It is well documented that the federal courts of appeals have recognized a qualified journalist's privilege in civil suits.¹⁴⁷ Some circuits also recognize a privilege for subpoenas emanating from a criminal defendant.¹⁴⁸ But the federal circuits have roundly rejected claims of privilege in response to grand jury investigations.¹⁴⁹ Indeed, commentators have noted the rarity with which federal courts of appeals hear privilege claims issuing from criminal appeals.¹⁵⁰ Thus, it hardly seems surprising that the Leggett litigation unfolded as it did.

B. McKeivitt v. Pallasch

In *McKeivitt v. Pallasch*¹⁵¹, Irish authorities charged Michael McKeivitt with directing terrorist activities through his involvement in a splinter group of the Irish Republican Army.¹⁵² The prosecution's most important witness

¹⁴³ *Id.*

¹⁴⁴ "In naming Leggett the recipient of the PEN award yesterday, the judges called her 'a powerful example of personal conviction and courage in the face of the most extreme pressure' and 'a hero in the effort to preserve investigative freedom for writers and journalists in the U.S.'" *Jailed Writer Wins PEN/Newman's Own First Amendment Award*, THE ASSOCIATED PRESS, April 12, 2002, available at <http://www.freedomforum.org/templates/document.asp?documentID=16059>.

¹⁴⁵ Milloy, *supra* note 128, at A8.

¹⁴⁶ See *supra* notes 72–85 and accompanying text.

¹⁴⁷ See *supra* notes 106–21 and accompanying text.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ Schmid, *supra* note 12, at 1441. Implicit in the lack of litigation of this matter is the conclusion that state law in this area is settled.

¹⁵¹ *McKeivitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003).

¹⁵² Heather Stamp, Case Note and Comment, *McKeivitt v. Pallasch: How the Ghosts of the Branzburg Decision are Haunting Journalists in the Seventh Circuit*, 14 DEPAUL-LCA J. ART & ENT.

was Daniel Rupert who was the subject of a biography being written by three Chicago journalists—Flynn McRoberts, Abdon Pallasch, and Robert C. Herguth.¹⁵³ McKeivitt's attorneys filed a motion in federal court in Illinois asking the court to order the journalists to produce the tapes of their interviews with Rupert so that McKeivitt might use them to discredit Rupert's testimony.¹⁵⁴ The district court ordered that the tapes be produced, and the journalists subsequently appealed to the Seventh Circuit.¹⁵⁵

However, the journalists found no relief at the appellate level.¹⁵⁶ To the dismay of proponents of the privilege,¹⁵⁷ Judge Posner, speaking for the court, questioned the need for such a privilege: "It seems to us that rather than speaking of privilege, courts should simply make sure that a subpoena duces tecum directed to the media, like any other subpoena duces tecum, is reasonable in the circumstances, which is the general criterion for judicial review of subpoenas."¹⁵⁸ The court found support for this position by citing *Branzburg's* conclusion that journalists could, and should, quash subpoenas issued in bad faith or to harass.¹⁵⁹

On its face, *McKeivitt* certainly has more harmful consequences to the privilege than the Vanessa Leggett case. Leggett faced a grand jury subpoena and, in light of *Branzburg*, the Fifth Circuit's ruling was predictable. The Chicago journalists, unlike Leggett, faced a subpoena emanating from a criminal defendant. And journalists asserting privilege have traditionally had more success when the subpoena emanates from a defendant and not a grand jury.¹⁶⁰ But not only did the Seventh Circuit deny that privilege existed in this case, it seemingly denied the existence of any qualified privilege.

Key factors present in *McKeivitt* suggest the court's ruling might not be as harsh as it seems. The first—and perhaps most important factor in the Seventh Circuit's decisionmaking process—was that the journalists were protecting no confidentiality.¹⁶¹ Rupert's identity was known, and he was in favor of disclosing the information.¹⁶² This was a fact certainly not lost on Judge Posner: "When the information in the reporter's possession does not come from a confidential source, it is difficult to see what possible bearing the First Amendment could have on the question of compelled dis-

L. & POL'Y 363, 376 (2004).

153 *Id.* at 377.

154 *McKeivitt*, 339 F.3d at 531.

155 *Id.*

156 *Id.* at 535.

157 *See, e.g.*, Stamp, *supra* note 152.

158 *McKeivitt*, 339 F.3d at 533.

159 *Id.*

160 *See supra* notes 106–21 and accompanying text.

161 *McKeivitt*, 339 F.3d at 533.

162 *Id.*

closure.”¹⁶³ In *Branzburg*, the Court noted that the primary rationale for a privilege was that forcing journalists to disclose confidential sources would have a chilling effect on would-be confidential sources.¹⁶⁴ Today, leading proponents of the privilege still cite the chilling effect as the basis for a privilege.¹⁶⁵ In light of this, the Seventh Circuit's position is sound.

The second factor is that an international criminal defendant sought to compel disclosure. Although journalists have more success arguing privilege when faced with a subpoena issuing from a criminal defendant than a grand jury, journalists generally have more success arguing privilege when faced with a subpoena originating from a civil litigant than from a criminal defendant.¹⁶⁶ Also, the fact that this defendant was facing charges of terrorism might have been a latent factor in the court's reasoning. This case was argued and decided after the events of September 11, 2001, and the court may not have wanted to jeopardize the Irish authorities' prosecution of McKevitt. In light of these facts, it is entirely possible that the Seventh Circuit might reach a different result in a civil matter or in circumstances in which journalists are seeking to maintain the confidentiality of their sources as opposed to protecting estimated book sales.¹⁶⁷

C. *Weinberger v. Maplewood Review*¹⁶⁸

Unlike Vanessa Leggett, Wally Wakefield did not arrive in contempt of court by writing a book; he did not even write a news article.¹⁶⁹ Instead, Wakefield—a retired elementary teacher working part-time for the *Maplewood Review*, a Minnesota newspaper—used his status as a reputable member of his community to garner information from confidential sources.¹⁷⁰ Wakefield contributed to an article about Tartan High School's decision to

¹⁶³ *Id.*

¹⁶⁴ *Branzburg v. Hayes*, 408 U.S. 665, 681–82 (1972).

¹⁶⁵ See, e.g., *Part-Time Reporter Finds Himself Unlikely Journalism Hero*, THE ASSOCIATED PRESS, July 4, 2004, available at <http://www.firstamendmentcenter.org/%5Cnews.aspx?id=13656>. “Lucy Dalglish, executive director of the Reporters Committee for Freedom of the Press . . . argues that forcing a journalist to reveal sources to benefit one party in a lawsuit would jeopardize the perceived independence of the media. And it could have a chilling effect on other people's willingness to speak. ‘If people get the idea that “Well, someone is promising me confidentiality, but look at that reporter in Maplewood—he wasn't able to keep his promise, so what does that mean to me?”’” *Id.*

¹⁶⁶ See, e.g., *Zerilli v. Smith*, 656 F.2d 705, 712 (D.C. Cir. 1981) (noting that in civil litigation, there should be a preference for the privilege).

¹⁶⁷ “The reason they want it secreted is that the biography of him that they are planning to write will be less marketable the more information in it that has already been made public.” *McKevitt*, 339 F.3d at 533.

¹⁶⁸ *Weinberger v. Maplewood Review*, 668 N.W.2d 667 (Minn. 2003).

¹⁶⁹ *Part-Time Reporter Finds Himself Unlikely Journalism Hero*, *supra* note 165.

¹⁷⁰ *Id.*

fire its football coach, Richard Weinberger.¹⁷¹ The article included quotes attributed to school officials and disparaging quotes from anonymous sources, which Weinberger believed also came from school officials.¹⁷² In turn, Weinberger sued the school district and four school officials for defamation.¹⁷³ He believed those officials provided the article's unattributed quotes and sought to compel Wakefield to reveal his sources.¹⁷⁴ Wakefield refused to divulge them.¹⁷⁵

To resolve the case, the Minnesota Supreme Court interpreted Minnesota's shield law, the Minnesota Free Flow of Information Act.¹⁷⁶ The dispositive issue was the statute's defamation exception.¹⁷⁷ The Minnesota high court concluded that Wakefield should be ordered to reveal his sources if the statute's three prongs were satisfied.¹⁷⁸

The court concluded that Weinberger satisfied the statute's first prong—whether the party seeking disclosure “can demonstrate that the identity of the source will lead to relevant evidence on the issue of actual malice”¹⁷⁹—by demonstrating “that the identity of the source will lead to evidence having any tendency to prove or disprove that the defendants spoke with the

171 *Id.*

172 *Id.*

173 *Weinberger*, 668 N.W.2d at 669

174 *Id.*

175 *Id.*

176 MINN. STAT. §§ 595.021–595.025 (2004). Section 595.022 provides:

In order to protect the public interest and the free flow of information, the news media should have the benefit of a substantial privilege not to reveal sources of information or to disclose unpublished information. To this end, the freedom of press requires protection of the confidential relationship between the news gatherer and the source of information. The purpose of sections 595.021 to 595.025 is to insure and perpetuate, consistent with the public interest, the confidential relationship between the news media and its sources.

Section 595.023 provides:

Except as provided in section 595.024, no person who is or has been directly engaged in the gathering, procuring, compiling, editing, or publishing of information for the purpose of transmission, dissemination or publication to the public shall be required by any court, grand jury, agency, department or branch of the state, or any of its political subdivisions or other public body, or by either house of the legislature or any committee, officer, member, or employee thereof, to disclose in any proceeding the person or means from or through which information was obtained, or to disclose any unpublished information procured by the person in the course of work or any of the person's notes, memoranda, recording tapes, film or other reportorial data whether or not it would tend to identify the person or means through which the information was obtained.

177 § 595.025 (2004).

178 *Weinberger*, 668 N.W.2d at 673.

179 *Id.* at 673 (citing § 595.025).

knowledge that the statements were false or with reckless disregard as to whether the statements were false or not.”¹⁸⁰ Second, the court considered “whether ‘there is probable cause to believe that [Wakefield’s unnamed] sources have information clearly relevant to the issue of defamation.’”¹⁸¹ The court found that Weinberger satisfied this prong, too.¹⁸² Finally, the court examined “whether ‘the information cannot be obtained by any alternative means or remedy less destructive of first amendment rights.’”¹⁸³ The court concluded that this factor also weighed in Weinberger’s favor.¹⁸⁴ Accordingly, the Minnesota Supreme Court compelled Wakefield to disclose his sources.¹⁸⁵

When Wakefield refused to comply with the order, he was held in contempt and fined \$200 per day.¹⁸⁶ Like Vanessa Leggett, Wakefield received the support of his peers in the media.¹⁸⁷ It is understandable that journalists would empathize with Wakefield. As a retired schoolteacher and a veteran of the Korean War, he was a sympathetic figure facing a stiff penalty.¹⁸⁸ But, like with the Vanessa Leggett case, it is unclear why journalists would be surprised by the outcome of Wakefield’s case or consider the opinion an encroachment on the privilege. In reaching its conclusion, the Minnesota Supreme Court simply followed the direction of the state’s shield law which included a special exception for defamation cases. The test was similar to those used by federal circuits in such factual scenarios.¹⁸⁹ Nothing in the court’s ruling intimated that journalists will no longer be permitted to assert the privilege in Minnesota or that the court was not prepared to recognize the privilege under different circumstances.¹⁹⁰

180 *Weinberger*, 668 N.W.2d at 673.

181 *Id.* at 674 (citing § 595.025).

182 *Weinberger*, 668 N.W.2d at 674.

183 *Id.* at 674–75 (citing § 595.025).

184 *Weinberger*, 668 N.W.2d at 675. “It is obvious that the only persons who know the source of each of the statements are the declarants and the reporters. It follows that if plaintiff can[not] determine the source of the statements from the declarants, the only other available means to secure that information is from the reporters.” *Id.*

185 *Id.*

186 *Part-Time Reporter Finds Himself Unlikely Journalism Hero*, *supra* note 165.

187 “Since the coach sued, Wakefield has been subpoenaed, questioned, held up as an example by national media groups and ordered to name his sources by the Minnesota Supreme Court.” *Id.*

188 Wakefield was ordered to pay \$200 per day until the conclusion of Weinberger’s trial. Fortunately for Wakefield, the case settled, but he still paid \$16,800 in fines. *Society of Professional Journalists Legal Defense Fund to Receive Donation from Wakefield Defense Fund*, ASCRIBE: THE PUBLIC INTEREST NEWSWIRE, March 3, 2005, available at <http://www.ascribe.org/cgi-bin/hold.pl?ascribeid=20050303.101343&time=10%2027%20PST&year=2005&public=1>.

189 *See supra* notes 151–67 and accompanying text.

190 *See generally Weinberger*, 668 N.W.2d 667.

D. *In re* Special Proceedings:¹⁹¹ *The James Taricani Case*

The first of the 2004 cases grew out of a political scandal involving city officials of Providence, Rhode Island.¹⁹² The opprobrium resulted in two federal corruption cases, one of which involved Frank Corrente, the administrative director for Providence's mayor, Vincent A. Cianci, Jr.¹⁹³ The trial court recognized the explosive nature of the case and issued a pretrial protective order on August 8, 2000 that prohibited attorneys in the case from revealing the contents of certain audio and video surveillance tapes which were made by government officials and provided to the defense through discovery.¹⁹⁴

Despite the order, James Taricani—an investigative reporter for Providence's WJAR Channel 10, an NBC affiliate—gained access to one of the videotapes and broadcasted it on his station.¹⁹⁵ The tape revealed a government witness allegedly bribing Corrente.¹⁹⁶ Taricani did not reveal who he received the tape from, noting that he promised his source confidentiality.¹⁹⁷

Counsel for the defense asked the district court to probe the matter,¹⁹⁸ which resulted in the court appointing Marc DeSisto as special prosecutor to investigate.¹⁹⁹ DeSisto proceeded by interviewing multiple witnesses with the goal of uncovering the tape's source.²⁰⁰ After concluding that he had exhausted all other sources, he sought and received a subpoena requiring Taricani to appear for questioning.²⁰¹ Citing journalist's privilege, Taricani refused to answer any of DeSisto's questions.²⁰² "DeSisto then filed a motion to compel, which the district court granted..."²⁰³ Taricani again refused to answer questions about the tape's source, and the district court held him in civil contempt on March 16, 2004.²⁰⁴ The court imposed a penalty of a \$1,000 fine for each day Taricani withheld the tape's source.²⁰⁵

191 *In re* Special Proceedings, 373 F.3d 37 (1st Cir. 2004) [hereinafter the "James Taricani Case"].

192 *Id.* at 40.

193 *Id.*

194 *Id.*

195 *Id.*

196 *Id.*

197 *Id.*

198 *Id.*

199 *Id.* at 41.

200 *Id.*

201 *Id.*

202 *Id.*

203 *Id.*

204 *Id.*

205 *Id.*

Taricani appealed the order to the U.S Court of Appeals for the First Circuit.²⁰⁶

Taricani's argument on appeal was that the district court's order violated the First Amendment.²⁰⁷ Specifically, he claimed that subpoenas issued by special prosecutors should face a stricter test than subpoenas emanating from a grand jury.²⁰⁸ The appellate court rejected this argument.²⁰⁹ First, the First Circuit noted that in *Branzburg* the Supreme Court had "flatly rejected any notion of a general-purpose reporter's privilege for confidential sources."²¹⁰ The court then held that the same test should apply for subpoenas issued from prosecutors and grand juries because "the considerations bearing on privilege are the same in both cases."²¹¹ To bolster this finding, the First Circuit noted that the three other federal circuits which recently decided this issue reached the same conclusion.²¹²

The First Circuit did concede that its prior cases required that "heightened sensitivity" be given to First Amendment cases.²¹³ But this did not affect its ruling that the subpoena was constitutional. The court observed that even if a stricter standard applied to subpoenas issuing from special prosecutors, the order in question satisfied *Branzburg's* requirements.²¹⁴ There was no doubt that DeSisto, the special prosecutor, issued the subpoena in good faith given that he made reasonable efforts to obtain information highly relevant to a criminal investigation from alternative witnesses.²¹⁵ As a result, the First Circuit upheld the district court's \$1,000 per day fine.²¹⁶

Taricani was ultimately assessed \$85,000 in fines, and he still refused to divulge his source.²¹⁷ As a result, a federal district judge in Rhode Island held Taricani in criminal contempt of court and sentenced him to six months of home confinement.²¹⁸ In his ruling, Judge Torres turned the chilling effect argument cited by journalists as a rationale for a journalist's privilege

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 44.

²⁰⁸ *Id.* at 45.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 44.

²¹¹ *Id.* at 45.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.* at 46.

²¹⁷ *From Barbara Wartelle Wall: Legal Watch: Journalist Convicted for Refusing to Disclose Source*, GANNETT NEWS WATCH, (GANNETT NEWS WATCH is a weekly newsletter produced by the Gannett Corporate News Department), available at <http://www.gannett.com/go/newswatch/2004/november/nw1124-3.htm> (last visited 9/8/05).

²¹⁸ Pam Belluck, *Reporter Who Shielded Source Will Serve Sentence at Home*, N.Y. TIMES, Dec. 10, 2004, at A28.

on its head: “[a] reporter should be chilled from violating the law in order to get a story’ and ‘from making ill-advised promises of confidentiality in order to encourage a source to do so.’”²¹⁹ Judge Torres also concluded that Taricani deserved to be in prison, but he lightened the punishment due to the reporter’s health concerns.²²⁰

As with the Vanessa Leggett Case,²²¹ it is somewhat difficult to understand why Taricani’s case would incite such controversy.²²² As the First Circuit noted, the three federal circuits which most recently ruled on the dispositive issue in Taricani’s case—whether subpoenas issued by a prosecutor should be held to a heightened standard—concluded that subpoenas from prosecutors should be judged by the same standards as subpoenas from grand juries. In *Branzburg*, the Supreme Court concluded that grand jury subpoenas ordering journalists to reveal confidential sources are constitutional absent a showing of bad faith.²²³ It was clear that Special Prosecutor DeSisto issued the subpoena in good faith. As a result, the First Circuit’s opinion represents a proper application of *Branzburg* as opposed to a new blow against the privilege.

E. *Lee v. DOJ*²²⁴

Like *Weinberger*,²²⁵ the journalist’s privilege claims in *Lee v. DOJ* grew out of civil litigation. But the similarities end there. While *Weinberger* involved a high school football coach’s attempts to force a semi-retired journalist to reveal confidential sources, *Lee* involved a nuclear scientist’s lawsuit against the United States and his attempt to reveal the sources of journalists at some of the nation’s most important media outlets.²²⁶ The plaintiff, Dr. Wen Ho Lee, alleged that the Department of Justice, the Department of Energy, and the Federal Bureau of Investigation violated the federal Privacy Act of 1974 by disclosing information without his consent.²²⁷ To confirm that these agencies were the sources of the reports published and broadcasted about

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ See *supra* notes 127–50 and accompanying text.

²²² It should also be noted that Taricani cuts a less sympathetic figure than Leggett. The latter was an aspiring author attempting to solve a mystery who promised sources confidentiality. The former promised confidentiality to his source, too, but he essentially violated a court order by procuring and airing the video.

²²³ See *supra* notes 72–85.

²²⁴ *Lee v. DOJ*, 413 F.3d 53 (D.C. Cir. 2005)

²²⁵ See *supra* notes 168–90 and accompanying text.

²²⁶ *Lee v. DOJ*, 287 F. Supp. 2d 15, 16–17 (D.D.C. 2003), *aff’d in part and vacated in part*, 413 F.3d 53 (D.C. Cir. 2005).

²²⁷ *Id.* at 16.

him, Lee issued subpoenas duces tecum against the journalists responsible for the stories concerning him.²²⁸

The journalists²²⁹ responded by moving to quash the subpoenas.²³⁰ They relied on a Washington, D.C. shield law and asserted a general journalist's privilege.²³¹ The district court held the shield law inapplicable because Lee's case involved federal law, not Washington, D.C., common law, and rejected the assertion of privilege.²³² Consequently, on October 9, 2003, the court denied the motion to quash and ordered the journalists to appear for questioning.²³³

Subsequently, the journalists appeared for questioning but refused to divulge their confidential sources.²³⁴ Lee then moved to have the journalists held in civil contempt, and on August 18, 2004, the district court entered an order holding the journalists in contempt.²³⁵ The journalists argued for a nominal sanction of \$1 per day, while Lee argued for a fine of \$1,000 per day, citing the fines issued in the James Taricani²³⁶ and Valerie Plame cases.²³⁷ The court compromised and imposed a \$500-per-day fine.²³⁸ The court stayed the fine until the journalists could have their appeal heard by the U.S. Court of Appeals for the District of Columbia.²³⁹

Between 1972 (the year the Supreme Court decided *Branzburg*) and 2003, the U.S. Court of Appeals for the District of Columbia decided only two cases involving claims of journalist's privilege.²⁴⁰ Both cases were civil suits. In *Carey v. Hume*, the court ordered a journalist, who was the defendant in a libel action, to disclose confidential sources.²⁴¹ The court reached this conclusion after balancing the interests of the plaintiff and the freedom of the press.²⁴² The court said that the most important factor in balanc-

228 *Id.* at 17.

229 "The journalists are James Risen and Jeff Gerth of *The New York Times*; Robert Drogin of *The Los Angeles Times*; Josef Hebert of the Associated Press; and Pierre Thomas of the Cable News Network ("CNN')." *Id.* at 17 n.1.

230 *Id.* at 17.

231 *Id.*

232 *Id.*

233 *Id.* at 24–25.

234 *Lee*, 327 F. Supp. 2d at 28.

235 *Id.*

236 *See supra* notes 191–223 and accompanying text.

237 *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D.C. Cir. 2005) [hereinafter the "Valerie Plame Inquiry Case"]. For further analysis of the *Valerie Plame Inquiry Case*, see *infra* notes 261–88 and accompanying text.

238 *Lee*, 327 F. Supp. 2d at 33.

239 *Id.*

240 *See Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981); *Carey v. Hume*, 492 F.2d 631 (D.C. Cir. 1974).

241 *Carey*, 492 F.2d at 632.

242 *Id.* at 636.

ing these interests was whether the information sought was material to the plaintiff's claim.²⁴³

In *Zerilli v. Smith*, the D.C. Circuit upheld a claim of privilege asserted by a nonparty journalist and further refined its balancing test.²⁴⁴ The court proposed three factors that should be weighed: (1) whether the information was material to the plaintiff's claim, (2) whether the plaintiff had exhausted other alternative sources of the information, and (3) whether the journalist was a party to the action.²⁴⁵ The court found that although the information sought was material, the plaintiff had not exhausted other sources and the journalist was not a party to the action.²⁴⁶ The dispositive factor was that the plaintiff might have discovered the information sought from other sources.²⁴⁷

The facts of *Zerilli* and *Lee* are very similar. In both cases, the plaintiffs sued the federal government for alleged violations of the federal Privacy Act and sought to compel disclosure of confidential sources from nonparty journalists.²⁴⁸ The district court, however, found that the dispositive difference between the two cases was that, in *Lee*, the plaintiff evidently exhausted all other sources of the information.²⁴⁹ In upholding the contempt orders against four of the five journalists,²⁵⁰ the Court of Appeals for the District of Columbia agreed with this conclusion, dismissing the argument

243 "The key factor which the Second Circuit identified as allowing it to move confidently to [compel disclosure] was that the 'question asked of [Torre] went to the heart of the plaintiff's claim.'" *Id.* at 634.

244 *Zerilli*, 656 F.2d at 707.

245 *Id.* at 713-14.

246 *Id.* at 714.

247 "But appellants clearly have not fulfilled their obligation to exhaust possible alternative sources of information." *Id.*

248 "Appellants ... brought an action under the Privacy Act and the Fourth Amendment against the Attorney General of the United States, the Director of the Federal Bureau of Investigation, and the Department of Justice." *Zerilli*, 656 F.2d at 706. "By his complaint in this case Dr. Lee sues the United States Departments of Justice and Energy ... and the Federal Bureau of Investigation ... for money damages for their alleged violations of his rights under the Privacy Act of 1974." *Lee v. Dep't of Justice*, 287 F. Supp. 2d 15, 16. (D.D.C. 2003), *aff'd in part and vacated in part*, 413 F.3d 53 (D.C. Cir. 2005).

249 "Unlike the indolent plaintiffs in *Zerilli*, Dr. Lee has been diligently pursuing direct proof that officers or employees of one or more defendant agencies were the original disseminators of the information about him to the news media." *Lee*, 287 F. Supp. 2d at 20. The court concluded this was sufficient to satisfy the D.C. Circuit's exhaustion requirement: "The Court reminds the journalists that the *Zerilli* exhaustion-of-alternative-sources factor requires only that all 'reasonable' sources of evidence be tapped." *Id.* at 23.

250 The appellate court vacated the contempt order against Jeff Gerth "[b]ecause [he] never refused to answer questions directly covered by the Discovery Order and consistently professed ignorance of the identity of sources who provided information specifically about Lee" *Lee v. Dep't of Justice*, 413 F.3d 53, 63 (D.C. Cir. 2005).

that exhaustion required “parties to take upwards of 60–65 depositions.”²⁵¹ The journalists argued that *Zerilli* supported such a requirement, but the court concluded that no “specific number of depositions is necessary to create exhaustion.”²⁵² Instead, the court stated that the number of depositions needed to satisfy the exhaustion burden must be decided on a case-by-case basis.²⁵³ It found that Lee met this burden: “Lee has done far more to exhaust alternatives than the plaintiff in *Zerilli* who did not meet his burden, and at least as much as the successful plaintiffs in *Garland* and *Carey*.”²⁵⁴

Of the recent journalist’s privilege cases discussed in this Note, *Lee* appears to be the most troubling to privilege proponents. This is because *Lee*, like *Weinberger*, is a civil case, and the federal circuits are generally more receptive to claims of privilege arising in private litigation.²⁵⁵ As the Vanessa Leggett case,²⁵⁶ *McKeivitt v. Pallasch*,²⁵⁷ the James Taricani case,²⁵⁸ and the Valerie Plame inquiry case²⁵⁹ illustrate, the federal circuits refuse to allow assertions of privilege that arise in the criminal context. However, a factual analysis of *Lee* suggests that the Court of Appeals for the District of Columbia properly followed its precedent. Indeed, the court noted that it continues to recognize a qualified privilege for nonparty journalists to civil actions.²⁶⁰ Nowhere in the opinion does the court suggest that a journalist facing a subpoena in a *Zerilli*-like setting would be denied an assertion of privilege. Consequently, *Lee* does not represent a new assault on the journalist’s privilege; instead, it is a proper interpretation of existing law.

F. *In re* Grand Jury Subpoena, Judith Miller:²⁶¹ *The Judith Miller Case*.

As the D.C. Circuit notes, the Judith Miller case has its origins in President George W. Bush’s January 28, 2003, State of the Union Address.²⁶² In that speech, the president discussed the alleged efforts of Saddam Hussein to obtain uranium from Africa.²⁶³ Subsequently, the *New York Times* published an article written by Joseph Wilson in which the author claimed that he was

²⁵¹ *Id.* at 60.

²⁵² *Id.* at 61.

²⁵³ *Id.*

²⁵⁴ *Id.* For a detailed discussion of *Garland*, 259 F.2d 545 (2d Cir. 1958), see *supra* notes 26–34 and accompanying text.

²⁵⁵ See *supra* notes 106–21 and accompanying text.

²⁵⁶ See *supra* notes 127–50 and accompanying text.

²⁵⁷ See *supra* notes 151–67 and accompanying text.

²⁵⁸ See *supra* notes 191–223 and accompanying text.

²⁵⁹ See *infra* notes 261–88 and accompanying text.

²⁶⁰ *Lee v. Dep’t of Justice*, 413 F.3d 53, 59 (D.C. Cir. 2005).

²⁶¹ *In re* Grand Jury Subpoena, Judith Miller, 397 F.3d 964 (D.C. Cir. 2005).

²⁶² *Id.* at 965.

²⁶³ *Id.*

sent to Africa to investigate possible Iraqi solicitation of uranium.²⁶⁴ Wilson wrote that he found no credible evidence linking Iraq to Africa.²⁶⁵ The case's next key development occurred on July 14, 2003 when the *Chicago Sun-Times* published a column written by Robert Novak.²⁶⁶ Novak stated that senior Bush Administration officials told him that Wilson was selected for the mission because his wife, Valerie Plame, was a CIA field operative.²⁶⁷ In the wake of Novak's revelation, other media outlets reported that Bush Administration officials had contacted at least six Washington, D.C.-based journalists and disclosed Plame's identity and occupation.²⁶⁸

In response to these articles, the Department of Justice began investigating whether the government employees had violated federal law by disclosing the identity of a CIA agent.²⁶⁹ The deputy attorney general appointed Patrick J. Fitzgerald, the U.S. attorney for the Northern District of Illinois, as special counsel and gave him full authority to investigate the disclosure.²⁷⁰ The instant litigation began in earnest in May 2004 when Fitzgerald began subpoenaing journalists to testify before a grand jury convened to investigate the disclosure of Plame's identity.²⁷¹ On September 13, 2004, Matthew Cooper, a journalist for *Time Magazine*, was issued his second grand jury subpoena.²⁷² His employer, Time, Inc., had also been issued a second subpoena.²⁷³ This time, neither party cooperated with the grand jury, and both were held in civil contempt.²⁷⁴

On August 12 and August 14 of 2004, the grand jury issued subpoenas to Judith Miller, a journalist for the *New York Times*.²⁷⁵ Like Cooper and Time, Miller refused to comply with the subpoenas and moved to quash them.²⁷⁶ The district court denied her motions and when she failed to com-

264 *Id.* at 966. The article was published on July 6, 2003. *Id.*

265 *Id.*

266 *Id.*

267 *Id.*

268 *Id.*

269 *Id.*

270 *Id.* "[T]he Attorney General recused himself from participation and delegated his full authority in the investigation to the Deputy Attorney General as Acting Attorney General." *Id.*

271 On May 21, 2004, a grand jury subpoena was issued to Matthew Cooper, a journalist for the magazine *Time*, and subsequently a subpoena was issued to Time, Inc. Both Cooper and *Time* moved to quash the subpoenas but had their motions denied. As a result, both were eventually held in civil contempt of court. One of Cooper's sources subsequently released him from his pledge of confidentiality, Cooper testified to the grand jury, and Fitzgerald, the special counsel, moved to vacate the contempt order. *Id.* at 966-67.

272 *Id.* at 967.

273 *Id.*

274 *Id.*

275 *Id.*

276 *Id.*

ply, ordered her in civil contempt of court.²⁷⁷ Cooper, *Time*, and Miller consolidated their cases and appealed their contempt orders.²⁷⁸

On appeal, the journalists made four arguments, but only two concerned the journalist's privilege.²⁷⁹ First, they argued that the district court's ruling that "a reporter called to testify before a grand jury regarding confidential information enjoys no First Amendment protection"²⁸⁰ is "flatly contrary to the great weight of authority in this and other circuits."²⁸¹ Citing the Supreme Court's decision in *Branzburg*, the D.C. Circuit dismissed this argument.²⁸² Second, the court considered appellants' claim that a federal common law privilege applied.²⁸³ The court disagreed about whether such a privilege exists and whether the court should even address its existence, but it nonetheless concluded that "if there is any such privilege, it is not absolute and may be overcome by an appropriate showing."²⁸⁴ The court found that such a showing had been made in this case.²⁸⁵

Much like the other recent decisions dealing with the journalist's privilege, the Judith Miller Case is far from a novelty. As the D.C. Circuit noted, the Supreme Court "considered and rejected" the same claims that Cooper, *Time*, and Miller argued.²⁸⁶ The D.C. Circuit simply correctly applied the existing controlling law which has been applicable for more than thirty years. The Supreme Court's subsequent denial of certiorari affirms this view.²⁸⁷ In light of the application of existing law, it is difficult to understand how the opinion could be considered a setback for privilege proponents.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ Appellants' third argument was that their due process had been violated. *Id.* at 973. The final argument was that the special counsel "did not comply with the Department of Justice guidelines for issuing subpoenas to news media." *Id.* at 974. Regardless of whether the guidelines had been violated, the court rejected this argument because it held the guidelines do not create an enforceable right. *Id.* at 975.

²⁸⁰ *Id.* at 968 (quoting *In re* Special Counsel Investigation, 332 F. Supp. 2d 26, 31 (D.D.C. 2004)).

²⁸¹ *Id.* at 968 (quoting appellants' brief to the court).

²⁸² "Appellants are wrong. The governing authority in this case, as the District Court correctly held, comes not from this or any other circuit, but the Supreme Court of the United States. In *Branzburg v. Hayes*, ... the Highest Court considered and rejected the same claim of First Amendment privilege on facts materially indistinguishable from those at bar." *Id.* at 968.

²⁸³ *Id.* at 972–73.

²⁸⁴ *Id.* at 973.

²⁸⁵ *Id.*

²⁸⁶ *Id.* at 968.

²⁸⁷ Cooper v. United States, 125 S. Ct. 2977 (2005); Miller v. United States, 125 S. Ct. 2977 (2005).

In the wake of the Supreme Court's denial of certiorari, Matthew Cooper, the reporter for *Time* magazine, avoided jail time by making a deal with his confidential source. Adam Liptak, *Reporter Jailed After Refusing to Name Source*, N.Y. TIMES, July 7, 2005, at A1. Judith Miller, on

Another similarity the Judith Miller Case shares with the other recent cases is that it is again possible to empathize with the journalists who have been ordered in contempt. In the instant case, not one of the parties—Cooper, *Time*, or Miller—authored or published an article that disclosed Plame's identity and occupation. Yet they were issued subpoenas while Novak, whose column revealed Plame's CIA ties, has apparently avoided a grand jury subpoena.²⁸⁸ This anomaly alone, however, is certainly not enough to suggest that Fitzgerald, the special counsel, is conducting his investigation in bad faith.

IV. CONCLUSION

Perhaps the quote used for this Note's Introduction has lost its prescience after all. It no doubt encapsulated the feelings of First Amendment scholars on the eve of *Branzburg*. But—after reviewing the recent journalist's privilege litigation—this Note concludes that the privilege is no longer a smoldering issue. Today, the law on privilege is relatively well settled. In criminal cases, there is no privilege in response to grand jury subpoenas or subpoenas issued by special prosecutors, absent a showing of bad faith. With respect to subpoenas from criminal defendants and subpoenas emanating from civil litigation, a qualified privilege appears to exist in every circuit.²⁸⁹ In deciding whether the assertion of privilege is proper, a court will balance the litigant's need for the information against First Amendment interests on a case-by-case basis.

The six cases discussed in this Note added no new dimensions to this law. While they certainly did not expand the privilege, they did not narrow it, either. Instead, they illustrate the state of contemporary privilege law.

If the above conclusion is sound, it begs the question why the recent privilege litigation has created such controversy. Judge Torres' remarks at James Taricani's criminal contempt sentencing offer an answer. The judge said he wanted to use the sentencing hearing to eradicate the "myths" surrounding privilege law.²⁹⁰ Chief among these myths was that the First

the other hand, was jailed on July 6, 2005, and was not released until September 29, 2005, when she agreed to testify before the grand jury only after securing a waiver of confidentiality from her source. David Johnston and Douglas Jehl, *Times Reporter Free From Jail; She Will Testify*, N.Y. TIMES, Sept. 30, 2005, at A1.

288 "[Novak] has never said whether he has testified to the grand jury or whether he identified his sources. [The special prosecutor] has never taken public steps to compel his cooperation, suggesting that the prosecutor has the information he wants from Mr. Novak." David Johnston and Richard W. Stevenson, *Times Reporter Gives Testimony in CIA Leak Case*, N.Y. TIMES, Oct. 1, 2005, at A1.

289 *McKevitt v. Pallasch* casts some doubt on whether even a qualified privilege exists in the Seventh Circuit. See *supra* Part III.B.

290 Pam Belluck, *supra* note 218, at A28.

Amendment allowed a journalist to assert privilege in the face of a subpoena emanating from a criminal investigation.²⁹¹ In essence, Judge Torres concluded that Taricani and proponents of a broader journalist's privilege were ignorant of contemporary privilege law. This conclusion, with which this Note agrees, explains the media's outrage in response to the recent decisions.²⁹²

Privilege proponents see every denial of privilege as a fresh assault on a journalist's right to maintain the confidentiality of her sources. There are two problems with this logic. First, as the discussion of the recent privilege cases illustrates, these decisions are not new efforts at eroding the privilege—they simply apply the existing law. Second, the argument is structurally flawed because the Supreme Court declared in *Branzburg* that no absolute right to privilege exists. The federal courts of appeals have interpreted *Branzburg* to allow a qualified privilege in certain scenarios, but this does nothing to lessen *Branzburg's* fundamental holding and its general disapproval of assertions of privilege.²⁹³

The recent rulings do not imply an end to all assertions of privilege, and those who argue this point seem to misconstrue the state of privilege law. The rulings do imply, however, that *Branzburg* is as binding today as it was when decided and, consequently, that the federal judiciary will not create a constitutional journalist's privilege. Thus, proponents of a *broader* privilege should not expect to achieve this through litigation in the federal courts. Instead, and as the Supreme Court noted in *Branzburg*, privilege proponents' best option would be a congressionally enacted federal privilege.²⁹⁴ The Supreme Court's denial of certiorari in the Judith Miller case

291 *Id.*

292 An August 2004 *New York Times* article is illustrative of this point. The article reads:

Among the principles at stake in the investigation into the leak of the name of the C.I.A. official, Valerie Plame, is that of a reporter's privilege to avoid having to testify about confidential or unpublished information, unless it goes "to the heart" of a particular case and cannot be otherwise obtained. While lower-court judges have generally upheld that principle, the need to which they have clung—a concurrence in Justice Lewis F. Powell Jr. in a Supreme Court case from 1972 known as *Branzburg*—has been characterized as relatively thin in several recent decisions.

Jacques Steinberg, *Setbacks on Press Protections Are Seen*, N.Y. TIMES, Aug. 18, 2004, at A16. The *New York Times* is arguably the most respected and influential newspaper in the United States, yet the previous passage is simply wrong. Federal judges have never "generally upheld" the privilege when asserted in response to a grand jury or prosecutorial subpoena. Rather, the privilege is generally denied. Perhaps it is this misconception about the state of the law concerning journalist's privilege that is responsible for the criticism of these recent cases.

293 *See, e.g.*, *Scarce v. United States*, 5 F.3d 397, 403 (9th Cir. 1993).

294 The owner of the *New York Times*, Arthur Ochs Sulzberger, Jr., has recognized that if journalists are to gain protection from grand jury investigation, Congress will have to provide such defense; "[t]o reverse this trend, to give meaning to the guarantees of the First Amendment and to thereby strengthen our democracy, it is now time for Congress to follow

apparently cemented this point. That decision saw newspapers across the country intensify calls for a federal shield law.²⁹⁵

Identical bills proposing such a law were introduced in both houses of Congress in February, 2005. Titled the "Free Flow of Information Act," the proposed law would provide an absolute privilege for confidentiality of sources. Both bills were referred to the respective judiciary committees of the House and Senate and, as of August, 2005, no further action had been taken.²⁹⁶

This Note declines to discuss the merits of a federal shield law. Rather, it merely highlights that the criticism directed at the recent privilege decisions in the federal courts is legally unfounded. Those courts never recognized an absolute privilege and only under certain circumstances and after careful consideration were they willing to recognize a qualified privilege. Criticisms suggesting otherwise irresponsibly spread the myth, to borrow Judge Torres' word, that journalists enjoy a broad privilege. Simply put, since 1972, journalists' claims of privilege in response to subpoenas issuing from grand juries and federal prosecutors have been roundly rejected by the federal courts. The privilege claims of nonparty journalists to civil actions have fared better, but the privileges upheld in these scenarios have been far from absolute. Journalists seeking a stronger privilege, therefore, would be better served by fighting a legislative rather than a judicial battle over the issue.

the lead of the states and enact a federal shield law for journalists." Sulzberger & Lewis, *supra* note 19.

²⁹⁵ See, e.g., Editorial, *Federal Shield Law Needed*, RENO GAZETTE-JOURNAL, July 24, 2005, at A8; Editorial, *National 'Shield' Law Needed for Journalists*, THE HONOLULU ADVERTISER, July 6, 2005, at A14; Editorial, *Off the Back Burner*, ST. LOUIS POST-DISPATCH, July 22, 2005, at B8; Editorial, *Pass Federal Shield Law*, THE TENNESSEAN, June 16, 2005, at A14; Editorial, *A Shield For Journalists*, WASH. POST, July 1, 2005, at A24.

²⁹⁶ Bill status can be viewed at THOMAS, at <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:SN00340:@@X|/bss/d109query.html> (last visited Sept. 15, 2005).