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FAIR REPORT PRIVILEGE AS A LIBEL DEFENSE: STATUS FOR FOREIGN GOVERNMENT STATEMENTS

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I. INTRODUCTION

Under Anglo-American libel law, "talebearers are as bad as talemakers."[1] Restatement (Second) of Torts, summarizing the republisher's liability, notes: "Except as to those who only deliver or transmit defamation published by a third person, one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it."[2] More often than not, however, the republication rule is qualified by the "fair report privilege,"[3] which has been termed a "strategic" exception to the general rule of republication liability.[4] Indeed, the fair report privilege permits publication of ac-

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1. Harris v. Minvielle, 19 So. 925, 928 (La. Ct. App. 1896). *See also* Houston Chronicle Publishing Co. v. Wegner, 182 S.W. 45, 48 (Tex. Cir. App. 1915).

2. RESTATEMENT (SECOND) OF TORTS § 578 (1977). One legal scholar observed that the republication rule is based on the fiction that one who repeats a libel or slander "adopts it as his own." *See* Robertson, *Defamation and the First Amendment: In Praise of* Gertz v. Robert Welch, Inc., 54 TEX. L. REV. 199, 262-63 n.388 (1976), *citing* Evans v. Smith, 5 B. Mon. 363 (Ky. 1845).

3. The fair report privilege is also known as "official report privilege," "public records privilege," "reporter's privilege," or "public eye doctrine." *See* D. GILLMOR, J. BARRON, T. SIMON & H. TERRY, MASS COMMUNICATION LAW 250 (5th ed. 1990); R. SACK LIBEL, SLANDER, AND RELATED PROBLEMS 316 (1980).

4. B. SANFORD, LIBEL AND PRIVACY 370 (1987).

counts of public or governmental proceedings or reports despite their defamatory nature.[5]

The fair report privilege is viewed historically as the "single most important media defense."[6] Notwithstanding the "actual malice" rule enunciated in *New York Times Co. v. Sullivan*,[7] it still thrives as "one of the most powerful and frequently invoked common law defenses, particularly for the press."[8] The privilege may apply even when the *New York Times* defense fails. Further, the privilege does not depend upon whether the target of defamation is a public figure or a private individual. Indeed, one author has expressed concern that, combined with the protection provided by the actual malice rule, the fair report privilege may create too great a burden for plaintiffs.[9] Consequently, the privilege should be rigidly defined and limited in its application to prevent abuse.[10]

In *Lee v. Dong-A Ilbo*,[11] the United States Court of Appeals for the Fourth Circuit agreed with the need to limit the application of the fair report privilege. The court refused to extend the privilege to a press account based on the proceedings or reports of a foreign government.[12] This precedent-setting interpretation of the fair report privilege in the context of republication of a defamatory foreign gov-

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5. The publication of defamatory matter concerning another in a report of an official action or proceeding or a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported. RESTATEMENT (SECOND) OF TORTS § 611 (1977). According to one commentator, RESTATEMENT (SECOND) OF TORTS § 611 (1977) has been adopted by at least twenty-one jurisdictions as a foundation for recognizing the privilege as a libel defense. *See* Bech, *Isolating the Marketplace of Ideas from the World:* Lee v. Dong-A Ilbo *and the Fair Report Privilege*, 50 U. PITT. L. REV. 1153, 1157 n.13 (1989).

6. Sowle, *Defamation and the First Amendment: The Case for a Constitutional Privilege of Fair Report*, 54 N.Y.U. L. REV. 469, 475 (1979).

7. 376 U.S. 254 (1964). The "actual malice" rule requires that the public official plaintiff prove the defamatory statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 280.

8. R. SMOLLA, LAW OF DEFAMATION 8-34 (1988). *See also* K. MIDDLETON & B. CHAMBERLIN, THE LAW OF PUBLIC COMMUNICATION 144 (1988) (characterizing the privilege as the "most important" libel defense in the post-*New York Times Co.* era); Sanford, *supra* note 4, at 370 (terming the privilege the "most useful" common law defense).

9. M. MAYER, THE LIBEL REVOLUTION: A NEW LOOK AT DEFAMATION AND PRIVACY 131-32 (1987). Indeed, the Supreme Court of California noted recently: "These constitutional obstacles to recovery [created by *New York Times* and its progeny] provide even greater protection for the news media than the common law privileges." Brown v. Kelly Broadcasting Co., 771 P.2d 406, 429 (Cal. 1989).

10. M. MAYER, *supra* note 9, at 131-32.

11. 849 F.2d 876 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 1343 (1989).

12. *Id.* at 880.

ernment report[13] may have important implications for the American press. It is not surprising, therefore, that the media has criticized the Fourth Circuit's decision. For example, a *Washington Post* editorial denounced the Fourth Circuit ruling as "preposterous," arguing that the opinion was a "narrow view strangl[ing] the free flow of important information [and] should be revised at the first opportunity."[14] *Editor & Publisher*, the trade journal of the American daily newspapers, characterized the ruling in *Lee* as an "[i]nsult to foreign governments."[15] It also stated that the decision will deprive the American people of considerable information about foreign governments.[16]

Examining the impact of *Lee* upon the American press, this study pursues three lines of inquiry concerning the fair report privilege. First, what is the common law and statutory evolution of the fair report privilege as a libel defense in Anglo-American law? Second, what is the judicial interpretation in *Lee* of the privilege with regard to publication of foreign government reports? Finally, what are the implications of *Lee* for the American press?

II. THE FAIR REPORT PRIVILEGE: ITS ORIGIN AND RATIONALES

A. *English History*

The fair report privilege appears to have its genesis in *Curry v. Walter*,[17] an English libel case of 1796.[18] The *Curry* court stated: "[T]hough the matter contained in the paper might be very injurious to the character of the magistrates, yet . . . being a true account of what took place in a court of justice which is open to all the world, the publication of it was not unlawful."[19] In recognizing the privilege of the press to accurately report "open" judicial proceedings, the Eng-

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13. *See id.* at 878 (noting that American courts have never addressed the issue of republication liability involving reports of foreign government acts). *But cf.* Saenz v. New York Tribune, 290 N.Y.S. 316, 318-24 (Sup. Ct. 1936) (recognizing the fair report privilege for a newspaper story of Cuban criminal proceedings initiated against plaintiff, a former Cuban secretary of treasury and a New York resident at the time the proceedings were initiated); Sharon v. Time, 599 F. Supp. 538, 542-43 (S.D.N.Y. 1984) (stating in dictum that much of the matter in the defendant's article on the Kahan Commission report on the Lebanon massacre would have been protected under the fair report privilege in that it was "the fair report of a judicial proceeding" of Israel).

14. Editorial, *Stifling the News From Abroad*, Washington Post, Mar. 7, 1989, at A24.

15. Editorial, *Insult to Foreign Governments*, Editor & Publisher, Mar. 18, 1989, at 4.

16. *Id.*

17. 1 Bos. & Pul. 525, 126 Eng. Rep. 1046 (C.P. 1796) (Eyre, C.J.).

18. *See* Sowle, *supra* note 6, at 478.

19. *Curry*, 1 Bos. & Pul. at 526, 126 Eng. Rep. at 1046.

lish courts accepted the role of the press as an agent for conveying to the public information already in the public domain. Under the initially recognized agency theory of the privilege, the news reporter functions as nothing but a "substitute for the public eye," informing members of the public of what transpires in a public, official proceeding.[20]

The socio-political setting of England in the seventeenth and eighteenth centuries contributed to the birth of the common law libel defense.[21] According to some authorities,[22] English case law at the end of the eighteenth century demonstrated a judicial attempt to rectify the abuses of the Star Chamber during the seventeenth century by ensuring that "the proceedings of Courts of Justice should be universally known."[23] The privilege was expanded to include accounts of parliamentary reports[24] and debates.[25] When the English courts balked at recognizing the privilege beyond judicial and parliamentary proceedings, however, Parliament led the way to steady expansion of the privilege, starting with the Newspaper Libel and Registration Act of 1881.[26] Under the Act, the privilege applied to reports of non-governmental public proceedings.[27] The Defamation Act of 1952 extended the privilege defense to broadcasts within the United Kingdom.[28]

In 1960, an English court interpreted the privilege within the context of newspaper republications of foreign judicial proceedings. In *Webb v. Times Publishing Co.*,[29] the Court for the Queen's Bench

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20. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 836 (5th ed. 1984) [hereinafter PROSSER & KEETON ON TORTS].

21. *See* F. SIEBERT, THE RIGHTS AND PRIVILEGES OF THE PRESS 190-91 (1934).

22. D. ELDER, THE FAIR REPORT PRIVILEGE 15 (1988); Comment, *Constitutional Privilege to Republish Defamation*, 77 COLUM. L. REV. 1266, 1268 n.21 (1977).

23. The King v. Wright, 8 T.R. 293, 298, 101 Eng. Rep. 1396, 1399 (1799) (Lawrence, J.).

24. *See id.* at 298, 101 Eng. Rep. at 1399.

25. *See* Wason v. Walter, L.R. 4 Q.B. 73, 96 (1868).

26. Newspaper Libel and Registration Act, 1881, 44 & 45 Vict., ch. 60, § 4.

27. *Id.* The privilege section of the Newspaper Libel and Registration Act of 1881 was somewhat modified by the Law of Libel Amendment Act of 1888. *See* Law of Libel Amendment Act, 1888, 51 & 52 Vict. ch. 64, § 4. For a discussion of the Libel Amendment Act, *see* Fraser, *The Privileges of the Press in Relation to the Law of Libel*, 7 LAW Q. REV. 158 (1891).

28. Defamation Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, ch. 66, § 9, sub. 2. For a discussion of the Defamation Act of 1952, *see* Todd, *The Defamation Act, 1952*, 16 MOD. L. REV. 198 (1953).

29. 2 Q.B. 535 (1960). For analyses of Webb v. Times Publishing Co., see Notes, 76 LAW Q. REV. 481 (1960); Payne, *Qualified Privilege*, 24 MOD. L. REV. 178 (1961); *Reports of Foreign Judicial Proceedings*, Scots Law Times, Jan. 28, 1961, pp. 17-19; Williams, *Defamation — Report of Foreign Judicial Proceedings*, 1960 CAMBRIDGE L.J. 149.

ruled that if public interest dictated that certain foreign court proceedings should be reported in English media, then those reports would be privileged.[30] In *Webb*, the ex-wife of a man tried for murder and acquitted in an English court sued *The Times* over the publication of her ex-husband's testimony in a subsequent trial.[31] The plaintiff in *Webb* claimed that her ex-husband's testimony in a Swiss murder trial indicated that she had committed adultery and perjury.[32] In the previous murder trial, the plaintiff testified that she never had met the victim.[33] Balancing the public benefit from reporting foreign judicial proceedings against the incidental defamatory injury to individuals, the English court recognized a limited privilege to report subject matter in which the British public had a legitimate interest.[34] The Court distinguished "a legitimate and proper interest" from "an interest which is due to idle curiosity or a desire for gossip."[35] One commentator characterized the *Webb* decision as "a case of first impression founded . . . openly on general considerations of public advantage."[36]

B. *American History*

Although American courts first turned to English law in applying the fair report privilege, their approach to applying the privilege was

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30. *Webb*, 2 Q.B. at 568-69.
31. *Id.* at 537-39.
32. *Id.* at 568-69.
33. *Id.* at 537-39.
34. *Id.* at 568-69.
35. *Id.* at 569. Justice Pearson, illustrating the distinction, said:

> A report of the decision of the United States Supreme Court on an important question of commercial law has legitimate and proper interest. On the other hand, a report of a judicial proceeding concerned with an alleged scandalous affair between Mrs. X and Mr. Y is unlikely to have such interest and is likely to appeal only to idle curiosity or a desire for gossip.

Id. at 569-70. Justice Pearson further stated:

> Sometimes a report of foreign judicial proceedings will have intrinsic world-wide importance, so that a reasonable man in any civilized country, wishing to be well-informed, will be glad to read it, and he would think he ought to read it if he has the time available. Sometimes a report of foreign judicial proceedings will not have such intrinsic world-wide importance, but will have a special connection with English affairs, so that it will have a legitimate and proper interest for English readers, and the reasonable man in England will wish to read it or hear about it.

Id. at 570.

36. Payne, *supra* note 29, at 181. He further stated that, "Though public interest has been the ultimate criterion, it is fair to say that the predominant approach has been to ask *whether inconvenience would be caused by denying protection to a communication*, rather than whether a legitimate interest is served by publication." *Id.* (emphasis added). *See also* Williams, *supra* note 29, at 149 (terming the *Webb* ruling "a learned and careful judgement").

more liberal than that of British courts. For example, in the 1856 media libel case of *Barrows v. Bell*[37] the Massachusetts Supreme Judicial Court held that the privilege protected a report of a disciplinary meeting of the nongovernmental Massachusetts Medical Society.[38] Writing for the court, Chief Justice Shaw stated:

> [W]hatever may be the rule as adopted and practised on in England, we think that a somewhat larger liberty may be claimed in this country and in this commonwealth, both for the proceedings before all public bodies, and for the publication of those proceedings for the necessary information of the people.[39]

Notwithstanding the Massachusetts court's expansive application of the fair report privilege, American courts have not been uniformly generous in defining the scope of the privilege.[40] To remedy this, some state legislatures have passed statutes broadening the common law privilege. For example, in 1854 the New York legislature responded to the New York Superior Court's denial of the privilege to publication of *ex parte* judicial proceedings.[41] Directly addressing the judicial refusal to apply the privilege to *ex parte* criminal proceedings, a New York statute[42] stipulated that "the fact that he who claims to be libeled by the report was not a party to the judicial proceedings does not affect the privilege."[43] In addition to the informational rationale set

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37. 73 Mass. 301 (1856). The Barrows case is said to be the first court decision in the United States recognizing the fair report privilege. *See* Webb, Lee v. Dong-A Ilbo: *Use of Official Report Privilege to Protect Defamatory Statements in Press Account Based on Foreign Government Report*, 23 GA. L. REV. 275, 279 (1988).

38. *Barrows*, 73 Mass. at 313.

39. *Id.*

40. Sowle, *supra* note 6, at 480. A journalism scholar has noted that American courts' refusal in the nineteenth century to expand the privilege beyond its British parameters was in part related to "judges' displeasure with the increased sensational reporting of crime news and the insertion of editorial comment into crime and trial stories" in the American commmercial press. *See* T. GLEASON, THE WATCHDOG CONCEPT 65 (1990).

41. *See* Matthews v. Beach, 5 Sand. 256, 264 (N.Y. Super. Ct. 1851), *rev'd on other grounds*, 8 N.Y. 173 (1853); Stanley v. Webb, 4 Stan. 21, 30-31 (N.Y. Super. Ct. 1850).

42. An Act in Relation to Libel, 1854 N.Y. Laws ch. 130. A media law authority has described the New York law as "ground breaking" for the privilege. *See* H. NELSON, D. TEETER & D. LE DUC, LAW OF MASS COMMUNICATIONS 217 (6th ed. 1989).

43. An Act in Relation to Libel, 1854 N.Y. Laws ch. 130. M. NEWELL, THE LAW OF LIBEL AND SLANDER 544 (2d ed. 1897), *citing* Ackermann v. Jones, 37 N.Y. Super. Ct. 42 (1874). A legal historian explains that the New York legislature's liberal recognition of the privilege was in no small measure precipitated by the then exploding popular press in the mid-nineteenth century America. *See* H. NELSON, LIBEL IN NEWS OF CONGRESSIONAL INVESTIGATION COMMITTEES 12 (1961).

forth in *Barrows*, the privilege is also justified on the ground that it provides a means of monitoring government conduct.[44] Justice Holmes, then of the Massachusetts Supreme Judicial Court, formulated the supervisory rationale for the privilege in the 1884 libel action of *Cowley v. Pulsifer*.[45] Holmes wrote:

> [T]he privilege and the access of the public to the courts stand in reason upon common ground. It is desirable that the trial of causes should take place in the public eye, not because the controversies of one citizen with another are of public concern, but *because it is of the highest moment that those who administer justice should always act under the sense of public responsibility and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.*[46]

Thus, the supervisory theory is considered the "pivotal raison d'etre" for fair report[47] in that it directly relates to the democratic body polity of the United States where the people are the governors to whom the government is accountable for its actions.[48]

A more expansive view of the American courts is posited on the basic principle of American democracy. The public should be informed about events that affect its welfare. The informational rationale of the privilege, which the Massachusetts court set forth in *Barrows*,[49] is intricately connected with the supervisory rationale of the privilege. The public's informational right would be of little significance if it were not recognized as a *sine qua non* of the public's right to monitor its government.[50] Adopting the informational underpinning for the privilege, some jurisdictions exempt the press from liability for publishing information of various proceedings, whether governmental or non-governmental, so long as they are related to the general interest of the public.[51] This helps to explain why accentuating the informational

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44. Wilson v. Birmingham Post, 482 So. 2d 1209, 1211 (Ala. 1986).

45. 137 Mass. 392 (1884).

46. *Id.* at 394 (emphasis added).

47. Elder, *supra* note 22, at 3.

48. *See* F. HARPER & F. JAMES, THE LAW OF TORTS 430-31 (1956) ("In a democratic community where political power is vested in the people, it is essential that public proceedings be published and widely disseminated.").

49. *See supra* note 37.

50. One authority on the fair report privilege has noted: "[T]he relationship between the supervisory and informational rationales is almost symbiotic, and the decisions almost invariably link the two functions in delineating the justification for fair report." Elder, *supra* note 22, at 4.

51. *See generally* PROSSER & KEETON ON TORTS, *supra* note 20, at 836; Elder, *supra* note 22, at 111-25.

aspect of the privilege permits a more comprehensive analysis of public interest.[52]

In the United States, the fair report privilege is largely a creation of state defamation law.[53] Its recognition is statutory, judicial or both, and application of the privilege varies from state to state. A number of state laws qualify the privilege with fairness,[54] truth,[55] and absence of malice in publication of reports of public proceedings[56] while others place no such conditions upon the privilege.[57] In addition, some states specifically limit the privilege to the press, as distinguished from the general public.[58] Other states, however, fail to distinguish between the public and the press in terms of their right to the privilege.[59]

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52. Note, *Privilege to Republish Defamation*, 64 COLUM. L. REV. 1102, 1113 (1964).

53. *Lee*, 849 F.2d at 877. Some authorities do use "state privilege" in referring to the privilege. *See* T. CARTER, M. FRANKLIN & J. WRIGHT, THE FIRST AMENDMENT AND THE FOURTH ESTATE 92 (4th ed. 1988); T. CARTER, M. FRANKLIN & J. WRIGHT, THE FIRST AMENDMENT AND THE FIFTH ESTATE 537 (2d ed. 1989).

54. *See, e.g.*, ALA. CODE § 13-A-11-161 (1982); CAL. PENAL CODE § 254-55 (West 1970); GA. CODE ANN. § 51-5-9 (1982); IDAHO CODE §§ 6.710-11, .713 (1979); KY. REV. STAT. ANN. § 411.060 (Baldwin 1988); LA. REV. STAT. ANN. § 14:49 (West 1986); MONT. CODE ANN. § 27-1-804 (1985); N.J. STAT. ANN. § 2A:43-1 (West Supp. 1986); N.D. CENT. CODE § 14-02-05 (1981); OHIO REV. CODE ANN. §§ 2317.05, 2739.03 (Page 1981); OKLA. STAT. ANN. tit. 12, § 1443.1 (West Supp. 1985), tit. 21, § 772 (West 1983); S.D. CODIFIED LAWS ANN. § 20-11-5 (1987); TEX. CIV. PRAC. & REM. CODE ANN. art § 73.002 (Vernon 1986); UTAH CODE ANN. §§ 45-2-3, 45-2-4, 45-2-10 (1981), § 76-9-504 (1978); VA. CODE § 2.1-37.14 (1979); WASH. REV. CODE ANN. § 9.58.050 (1977); WYO. STAT. §§ I-29-104, I-29-106 (1988).

55. *Id.* The "truth" under the privilege doctrine is distinguished from that of the common law "truth" defense. While the former concerns the accuracy of the republished defamation as made in the course of an official proceeding, the latter is related to the issue of whether the plaintiff actually did what the defamatory charge as published said he did. *See* James v. Powell, 152 S.E. 539, 546 (Va. 1936).

56. *See supra* note 54.

57. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-653 (1982); MICH. COMP. LAWS ANN. § 600.2911 (West 1986); MINN. STAT. ANN. § 609.765 (West 1964); MONT. CODE ANN. 45-8-212 (1985); N.Y. CIV. RIGHTS LAW § 74 (McKinney 1976); WIS. STAT. ANN. § 895.05 (West 1983).

58. The state of Washington, for example, requires that:

> No prosecution for libel shall be maintained against *a reporter, editor, proprietor, or publisher of a newspaper* for the publication therein of a fair and true report of any judicial, legislative or other public and official proceeding, or of any statement, speech, argument, or debate in the course of the same, without proving actual malice in making the report.

WASH. REV. CODE ANN. § 9.58.050 (1977) (emphasis added). *See also* ARIZ. REV. STAT. ANN. § 12-653 (1982); CAL. PENAL CODE § 254 (West 1970); IDAHO CODE §§ 6-710-11, 6-713, 18-4807 (1979); MICH. COMP. LAWS ANN. § 600.2911 (West 1986); N.J. STAT. ANN. § 2A:43-1 (West Supp. 1986); TEX. CIV. PRAC. & REM. § 73.002 (Vernon 1986); UTAH CODE ANN. § 76-9-504 (1978); WIS. STAT. ANN. § 895.05 (1) (West 1983).

59. *See e.g.*, ALA. CODE § 13A-11-161 (1982); GA. CODE ANN. § 51-5-7 (1982); KY. REV. STAT. ANN. § 411.060 (Baldwin 1988); LA. REV. STAT. ANN. § 14:49 (West 1986); MINN.

While an increasing number of states recognize variants of the privilege through statutes,[60] the fair report privilege is still a judicial creation in a majority of jurisdictions. To date, the United States Supreme Court has not found a constitutional dimension in the privilege,[61] though the Court has seemingly recognized the first amendment underpinnings of the common law defense.[62] As the Third Circuit in *Medico v. Time, Inc.*[63] stated in 1981, "[F]ederal courts have, as a matter of federal law, expressed reluctance to hold the press responsible for publication of defamatory statements originally uttered by others," especially "when the source of newsworthy defamation is a government official or report."[64]

III. FOURTH CIRCUIT DENIES PRIVILEGE TO FOREIGN GOVERNMENT

Lee resulted from a lengthy press release issued in September 1985 by the South Korean government announcing the breakup of two student-run spy rings operating in the United States and West Germany.[65] In the press release, the government identified the plaintiff, Chang-Sin Lee, as a North Korean agent involved in the spy ring based in the United States.[66] Disruption of the spy networks received extensive coverage by the news media in South Korea.[67] Within several days,

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STAT. ANN. § 609.765 (West 1964); MONT. CODE ANN. §§ 27-1-804, 45-8-212 (1985); N.Y. CIV. RIGHTS LAW § 74 (McKinney 1976); N.D. CENT. CODE § 14-02-05 (1981); OKLA. STAT. ANN. tit. 12, § 1443.1 (West Supp. 1985); tit. 21, § 772 (West 1983); S.D. CODIFIED LAWS ANN. § 20-11-5 (1987); WYO. STAT. §§ I-29-104, I-29-105 (1988).

60. For a collection of various "libel privilege statutes," *see* Sanford, *supra* note 4, at 571-661.

61. *See* Cox Broadcasting v. Cohn, 420 U.S. 469 (1975); Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978); Time, Inc. v. Pape, 401 U.S. 279 (1979).

62. *See Landmark Communications*, 435 U.S. at 829; *Cohn*, 420 U.S. at 469; *Pape*, 401 U.S. at 279; Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6 (1970).

63. 643 F.2d 134 (3d. Cir. 1981).

64. *Id.* at 145. *See also* J. WATKINS, THE MASS MEDIA AND THE LAW 191 (1990) ("the fair report privilege is compelled by the first amendment, although the Supreme Court has not directly ruled on the question").

65. The 62-page press release, entitled "North Korean Activities in the South, Activist Student Related Happenings; Campus Infiltration by Overseas Korean Students Espionage Ring," was issued by the National Security and Planning Agency, formerly known as Korean CIA, and the Military Security Command, both intelligence agencies of the South Korean government. *See* Joint Appendix to Appellate Brief at 229, Lee v. Dong-A Ilbo, 849 F.2d 876 (4th Cir. 1988) (No. 87-2578) [hereinafter Appendix].

66. *Lee*, 849 F.2d at 877. For an English translation of the press release relevant to the plaintiff, *see id.* at 230, 232, 234, 236, 238.

67. Joint Brief of Appellees at 6, Lee v. Dong-A Ilbo, 849 F.2d 876 (4th Cir. 1988) (No. 87-2578) [hereinafter Joint Brief].

six newspapers and a public television station in Virginia carried reports of the spy ring, relying mainly on the accounts from the South Korean press.[68] Lee, then a permanent resident living in New York City,[69] sued the newspapers and the television station for libel in the United States District Court in Alexandria, Virginia.[70] He claimed that the news stories injured his reputational interests by falsely identifying him as a North Korean agent.[71] The defendants moved for summary judgment, asserting that their "accurate" accounts of the press release of the Korean government were protected by the fair report privilege, which applied to all foreign government official reports.[72] The plaintiff objected, arguing that extension of the privilege to publication of defamatory foreign governmental records would serve no public policy.[73]

Granting summary judgment for the defendants,[74] Judge Hilton ruled that the "blanket" privilege should apply to the republication of all government reports, domestic or foreign, in light of the United States' "substantial" involvement in international relations with foreign countries.[75] Judge Hilton reasoned further that "[t]his privilege is one for the public's need to know what is happening in this country and

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68. *Lee*, 849 F.2d at 877. For an English translation of pertinent segments of the news stories on the spy ring, as published in the Korean-language newspapers in the United States, see Appendix, *supra* note 65, at 66, 69, 72, 75, 78. For a story published in the *Korea Herald*, an English-language daily, see Appendix, *supra* note 65, at 79-80. For an English translation of the Korean-language KBS News Report, as broadcast on WNVC-TV see Appendix, *supra* note 65, at 1882-83.

69. *Id.* at 877. Lee immigrated to the United States in 1975 and graduated from Western Illinois University in 1984. When the press report was published in September, Lee was a Korean citizen with the status of a permanent resident alien in the United States. *See* Brief of Appellant at 2-3, Lee v. Dong-A Ilbo, 849 F.2d 876 (4th Cir. 1988) (No. 87-2578) [hereinafter Appellant's Brief]. Since that time Lee has become a U.S. citizen. *See Accurate Report of Foreign Official Data Not Privileged*, 12 THE NEWS MEDIA & THE LAW 34 (Fall 1988) [hereinafter Accurate Report].

70. *Lee*, 849 F.2d at 877. Lee filed his libel suit on August 21, 1986, less than one month before Virginia's one-year statute of limitations expired. VA. CODE § 8.01-248 (1984) (covering personal actions); *see* Evans v. Sturgill, 430 F. Supp. 1209 (W. Va. 1977) (reputational injury gives rise to personal action).

71. Appellant's Brief, *supra* note 69 at 1.

72. Chang-Sin Lee v. Dong-A Ilbo, No. 86-0958-A, Memorandum Opinion In Support of Order, at 3 (E.D.Va. Mar. 23, 1987) [hereinafter Memorandum Opinion].

73. *Id.*

74. *Id.* The federal district court granted the defendants' motions for summary judgment simply because the plaintiff failed to show actual malice in overcoming the fair report defense against defamation. *Id.* at 6.

75. *Id.* at 6-7.

in other nations, particularly where a news story has a significant nexus . . . between persons located in the United States and involved with foreign governments."[76] In arguing for protection of foreign government statements under the privilege doctrine, Judge Hilton placed greater emphasis upon the informational rationale of the doctrine than upon its agency and supervisory justifications.[77]

In his appeal, Lee argued that neither the supervisory nor the informational rationale supported application of the privilege to foreign government reports.[78] Asserting that the American public has no supervisory role in the affairs of the Korean government, Lee contended that the extension of the privilege to publication of statements by the Korean government served no purpose.[79] Lee also pointed out that the informational theory underlying the privilege is not well grounded as a rationale for extending the privilege to foreign government reports.[80] Lee added that the denial of the media privilege to republish foreign government reports would have little impact upon the American press as compared with the increased reputational injury that might easily result from such republications.[81] Lee further contended that the district court's recognition of other interests relating to extension of the privilege to foreign governments was inadequate as a rationale for the wholesale extension of the privilege because it went too far in protecting the press at the expense of individual reputations.[82]

In response, the media defendants argued that the news media functions as an informational agent for the public, which has a right

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76. *Id.* at 9. Judge Hilton found a "nexus" between the subject of the press release by the Korean government and the security interests of the United States in dealing with foreign espionage agents. He also took note of the "legitimate and proper" interest of the Korean-American community particularly in the news release, which he held should be protected from defamation suits. *Id.*

77. *See id.* at 10 (referring to the "right of persons anywhere in the United States to be informed of what governments in this nation and throughout the world are doing").

78. Appellant's Brief, *supra* note 69, at 5.

79. *Id.* at 11.

80. *Id.* at 18. Lee stated:

> When measured against the marked increase in risk of defamation inherent in the unbridled republication of official reports of foreign government actions and proceedings, the importance of that "informational interest" is reduced. The privilege could too easily be abused to shield republication of irresponsible, inaccurate and even intentionally defamatory statement.

Id.

81. *Id.* at 18-19.

82. *Id.* at 21.

to know about foreign governments.[83] Therefore, the privilege should cover reports made by foreign governments. The defendants also claimed that Lee failed to establish evidence of common-law malice in their republishing of the Korean government press release.[84]

In June 1988, the United States Court of Appeals for the Fourth Circuit reversed the lower court's ruling, holding that the fair report privilege did not apply to reports of foreign government activities.[85] The court noted that no *American* courts had confronted the question of whether the privilege would apply to news accounts of foreign government activities.[86] In a 2-1 decision,[87] the court stated that the privilege was not applicable to republication of foreign government reports because of "other considerations" not associated with the traditional invocation of the privilege.[88]

While recognizing the three rationales underlying the privilege as a libel defense,[89] the majority noted that "[s]tanding alone, an analysis

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83. Joint Brief, *supra* note 67, at 15, 23. It is surprising that the defense totally relied on the fair report privilege for its argument. No doubt it was a strategically unwise approach. The defense could have employed the so-called "wire service" defense as an alternative in that the facts precipitating the libel suit in *Lee* were similar to those often associated with the cases involving the "wire service" defense. That is, under what one authority has called the "fairly well established" wire service libel defense, Sanford, *supra* note 4, at 344, the "accurate" republication of a dispatch provided by a "reputable wire service" is neither reckless nor negligent as a matter of law. *See* Appleby v. Daily Hampshire Gazette, 478 N.E.2d 721, 725 (Mass. 1985), *citing* eight cases in Florida, Puerto Rico, Hawaii, Alaska, New York, and the District of Columbia. Notwithstanding the fact that the stories published by the newspapers and the television station were not furnished by a wire service, it is indisputable that the defendant news media used the stories provided by the highly regarded media in South Korea, which was not negligent on the part of the defendants in that "requiring verification of wire service stories [in the case of *Lee*, the Korean news media] prior to publication would impose a heavy burden on the media's ability to disseminate newsworthy material." Appleby, 478 N.E.2d at 725. In this context, might the Fourth Circuit have ruled as it did in *Lee* if the media defendants had published the stories on the basis of the AP or UPI dispatches from South Korea? The case law on the wire service defense most likely might have led the federal appeals court to rule the other way.

84. *Id.* at 28.

85. *Lee*, 849 F.2d at 880.

86. *Id.* at 878. The court cited a 1960 English case, *Webb v. Times Publishing Co. See id.* at 878 n.2 (noting a "limited" extension of the privilege to a Swiss "judicial" proceeding involving an English citizen). For a discussion of *Webb*, *see supra* notes 29-36 and accompanying text.

87. *Id.* at 877, 880. Judge Ervin, who was joined by Judge Murnaghan, wrote the majority opinion. Senior District Judge Kaufman, sitting by designation, dissented.

88. *Lee*, 849 F.2d at 879.

89. *Id.* at 878-79. In discussing the agency, public supervision, and informational rationales for the privilege, the Fourth Circuit heavily relied upon Medico v. Time, Inc., 643 F.2d 134 (3d Cir. 1981).

of these policy considerations supports the extension of the official report privilege to reports of foreign government activities."[90] In the context of the foreign government activities involved, however, the majority found these considerations unpersuasive. Accepting the appellant's arguments *in toto*,[91] the court concluded that the agency rationale was not sufficiently strong because the information at issue was available only in Korea.[92] The supervisory rationale, the court argued, was also unconvincing because foreign governments are not directly accountable to the American people.[93] On the other hand, the court found the informational rationale directly applicable to the news stories in question. Borrowing from the lower court's opinion,[94] the court said that Americans in general and Korean-Americans in particular possessed a strong interest in being informed about the disruption of a spy ring in the United States by an American ally, South Korea.[95]

After concluding that the defendants failed to satisfy the criteria for applying the privilege, the court focused on the distinction between the American government and foreign governments. Since foreign governments are "not necessarily familiar, open, reliable, or accountable" to the same extent as the American government, the court stated that reports concerning foreign government activities should not be protected by the privilege.[96] The court acknowledged that establishing criteria to determine whether a foreign government was sufficiently open and reliable would be extremely difficult.[97]

Disputing the case-by-case application of the privilege based on the importance of the information at issue, the court contended that the public's right to know and the importance of the defamatory information should be carefully balanced against the state's interest in protecting the reputational interests of private individuals.[98] The court also reasoned that the public interest approach to applying the privilege would create a "blanket" for reports of foreign government

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90. *Id.* at 879.

91. *Compare* Appellant's Brief, *supra* note 69, at 10-22 *and* Reply Brief of Appellant, Lee v. Dong-A Ilbo, 849 F.2d 876 (4th Cir. 1988) (No. 87-2578), at 3-8 *with Lee*, 849 F.2d at 879-80.

92. *Lee*, 849 F.2d at 879.

93. *Id.* at 878-79. The court noted that the public supervision rationale was "indirectly" applicable in the case in that the American public had a supervision interest in South Korea because Korea was an ally and aid recipient of the United States. *Id.* at 878.

94. *See* Memorandum Opinion, *supra* note 72, at 9.

95. *Lee*, 849 F.2d at 878-79.

96. *Id.* at 879.

97. *Id.*

98. *Id.*

activities, while leaving the defamed private person with no remedy for reputational injury.[99] The court further held that proper attribution in the republication is still not a ground for application of the privilege because it would not necessarily discourage false or undeserved reliance on foreign reports.[100]

The court did acknowledge that its decision had "some chilling effect" upon the news media. The court stated that without the privilege, newspapers and television stations assume the risk that hastily gathered and promulgated information is incorrect.[101] However, the court argued that the burden on the press to verify reports from foreign governments did not significantly differ in nature or scope from the burden they bear in verifying information from non-official sources.[102] Accordingly, the court held that the burden is outweighed by the possible harm to the reputation of private individuals.[103]

In dissent, Judge Kaufman argued for recognition of a "*qualified* privilege" to strike a "more appropriate balance between the conflicting interests at issue."[104] Although he agreed with the majority of the court that the privilege is supported by its three policy justifications, Judge Kaufman pointedly emphasized that "[i]n a given context, one of those rationales may well be given more weight than the others."[105] In this context, the dissent argued that the public's right to information should bear greater weight.[106] Using *Webb*[107] as a "framework" for applying the limited privilege to foreign government activities, Judge Kaufman stated that the legitimate and proper interest of the subject matter involved should be a determining factor in granting or denying the privilege to the report.[108] Notwithstanding his emphasis upon the informational aspect of the privilege in the case at bar, Judge Kaufman also noted an indirect supervisory function of the privilege in connection with republication of foreign government reports.[109] As an example

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99. *Id.* at 879-80.

100. *Id.* at 880.

101. *Id.* The court stated: "Even mere negligence constitutionally can be the basis for liability when the defamed party is a private person." *Id.* (citations omitted).

102. *Id.*

103. *Id.*

104. *Id.* (emphasis added).

105. *Id.* at 881, *citing* Medico v. Time, Inc., 643 F.2d 134, 142 (3d Cir. 1981), *cert. denied*, 454 U.S. 836 (1981); *Privilege*, *supra* note 52, at 1102.

106. *Lee*, 849 F.2d at 881.

107. *Webb*, 2 Q.B. at 535. For a discussion of *Webb*, *see supra* notes 29-36 and accompanying text.

108. *Lee*, 849 F.2d at 883 (Kaufman, J. dissenting).

109. *Id.*

of indirect supervision, the dissent referred to public pressure exerted by a number of international human rights groups upon foreign governments.[110] On the other hand, Judge Kaufman dismissed the importance of the agency rationale of the privilege as questionable whenever the government report is not available to the public, regardless of whether the government was American or foreign.[111]

Judge Kaufman questioned the paternalistic assumption of the majority regarding the way Americans deal with foreign reports published in the media.[112] Challenging the court's argument that the risk of defamation arising from republication of foreign government statements justifies denial of the privilege, Judge Kaufman pointed to the tendency of many Americans to discredit foreign government statements when that government is perceived as undemocratic by American standards.[113] Judge Kaufman added that proper attribution to the source of the publication would help Americans evaluate the credibility of the information.[114] With regard to the chilling effect and the "relatively small" media involved in the case, Judge Kaufman noted:

> In the heat of the moment, faced with the prospect of potentially devastating lawsuits on the one hand and the difficulty of confirming a story's accuracy on the other, the media party may not find much comfort in the fact that, if the case goes to trial, the plaintiff may not be able to prove falsity. On balance, media defendants, especially the smaller ones which are targeted to specific audiences, may all too often decide not to publish. As a result, certain segments of the American public . . . will be deprived of access to information of great importance to them.[115]

Judge Kaufman proposed a five point test for using the privilege to escape liability. The media should prove that: (1) the original source of the news story was an "official report"; (2) that it contained defamat-

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110. *Id.* In a similar vein, a Korean-born American journalism scholar recently suggested that the Korean-language newspapers in the United States "can . . . contribute to a sound development of democracy in Korea" by "effectively" using the first amendment in editorializing the "critical issue" facing South Korea. Lee, *The Role of Korean Language Newspapers in the Korean-American Community*, in KOREANS IN NORTH AMERICA: NEW PERSPECTIVES 114 (S. Lee & T. Kwak ed. 1988).

111. *Lee*, 849 F.2d at 883 (Kaufman, J. dissenting).

112. *Id.* at 882.

113. *Id.*

114. *Id.*

115. *Id.* at 884.

ory elements; (3) that the subject matter involved was of public concern; (4) that republication was "fair and accurate"; and (5) that the source of the report was "properly" attributed.[116]

IV. IMPLICATIONS OF *LEE* FOR THE PRESS

In *New York Times Co. v. Sullivan*, a landmark libel decision, the United States Supreme Court stated that "[w]hatever is added to the field of libel is taken from the field of free debate."[117] *Lee* is a case in point in that it expands "the field of libel" at the expense of the first amendment right to free discussion on issues of public concern, especially those related to foreign governments. One writer, characterizing *Lee* as "a case of first impression in American law," observed: "Should Lee prevail, news organizations in the U.S. would conceivably be vulnerable to a new class of libel suits simply for reporting the actions of foreign governments."[118] Keenly aware of the possible adverse impact of the Fourth Circuit ruling upon the American press as a whole and the ethnic news media particularly, a Spanish-language television network, argued in an *amicus* brief that *Lee* will cause the media to limit its news coverage of foreign government reports on matters of public interest, resulting in self-censorship and a chilling effect on the media.[119] In a similar vein, Judge Kaufman, taking special note of the chilling effect of the decision upon the news media in general and the "relatively small" media in particular, stated that the non-profit, non-commercial, pubic television station involved had a viewership of less than 19,000, and targeted its multi-language programming at many ethnic communities in the Washington, D.C. area. Further, Judge Kaufman emphasized that the five Korean-language newspapers in question were directed at the Korean-American public.[120]

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116. *Id.*

117. *New York Times*, 376 U.S. at 272, *quoting* Judge Edgerton in Sweeny v. Patterson, 76 U.S. App. D.C. 23, 24, 128 F.2d 457, 458 (D.C. Cir. 1942), *cert. denied*, 317 U.S. 678 (1942).

118. Moran, *Spy Story Tests Limits of First Amendment Law*, LEGAL TIMES, Sept. 12, 1988, at 8.

119. Brief of Amicus Curiae for Appellant at 3, Central Va. Educ. Television Corp. v. Chang-Sin Lee, 849 F.2d 876 (4th Cir. 1988) (No. 88-1163). Univision, the largest producer of Spanish-language television programming in the United States argued:

> Univision has neither the financial nor human resources to determine the accuracy of foreign government reports, nor does Univision have foreign government sources who could — or would — verify the official reports of these governments. If Univision faced potential liability to persons defamed in foreign government reports, Univision would be unable to broadcast these reports.

Id.

120. *Lee*, 849 F.2d at 884. n.5 (Kaufman, J. dissenting).

The immediate impact of the Fourth Circuit's reversal was an award of $90,000 to Lee by a Virginia federal jury at retrial.[121] In the future, *Lee* may serve to support the argument against first amendment protection for disseminating foreign government information. For example, the *Lee* ruling may apply to defamatory actions resulting from televising proceedings of the British and Canadian parliaments by the Cable-Satellite Public Affairs Network (C-SPAN). Since reports of legislative proceedings in England and Canada are statutorily and judicially protected under the qualified privilege rule of libel law,[122] potential libel litigants may find it useful to explore American courts as their judicial forums, especially if they are "private" individuals.[123]

Further, the chilling ramifications of *Lee* will spread far, wide and deep among the ethnic news media in the United States. As important social and educational institutions in the immigrant communities, the ethnic news media often serves as a watchdog of foreign governments and is often aware of and reports foreign government policy more quickly than the mainstream newspapers.[124] Blanket denial of the fair

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121. *See* Carelli, *Libel Privilege*, Associated Press, Mar. 6, 1989. Charges against WNVC-TV, a public television station, in Fall Church, Virginia, were dismissed on the ground that Lee was not mentioned by name during the news broadcast of the station and that the two charts showing how the alleged North Korean agents were organized were "not sufficiently clear" to identify the plaintiff as such and further were televised only briefly. Telephone interview with Steve Schneebaum, counsel for Lee (Aug. 28, 1989). For an English translation of the Korean-language broadcast aired by WNVC-TV on Sep. 15, 1985, see Central Va. Educ. Television Corp. v. Chang-Sin Lee, 849 F.2d 876 (4th Cir. 1988), *pet. for cert. filed* (U.S. Jan. 12, 1989) (No. 88-1163).

122. For a discussion of English libel law, *see* P. LEWIS, GATLEY ON LIBEL AND SLANDER (8th ed. 1981). For a discussion of Canadian libel law, *see* Skarsgard, *Freedom of the Press: Availability of Defences to a Defamation Action*, 45 SASKATCHEWAN L. REV. 287 (1980-81).

123. Under American libel law, a "public" plaintiff is required to prove with convincing clarity "actual malice" — that is, knowing falsehood or reckless disregard of the truth — on the part of the defendant to claim damages for defamatory publications relating to matters of public interest, *New York Times*, 376 U.S. at 254; Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), while a "private" plaintiff more often than not can win general damages by proving negligence, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). By contrast, neither British nor Canadian libel law recognizes the "actual malice" rule. An English jurist cogently stated: "[I]n this modern age of international mass communications which includes the provision of satellite transmissions, it is most likely that the courts will follow the earlier precedents and accept that the wrong is committed at the place the transmission is received, not where it originated." Cooper, *Defamation by Satellite*, SOLICITORS JOURNAL, July 15, 1988, p. 1022. *See also It's All Greek to Me: Libel Law and the Freedom of the Press*, NEW L.J., July 3, 1987, pp. 609-10; DeBenedictis, *Moving Abroad*, A.B.A. J., Sept. 1989, pp. 38-39.

124. J. FOLKERTS & D. TEETER, VOICES OF A NATION 304 (1989). *See also* W. CHANG, MASS COMMUNICATION AND KOREA 230 (1988) (Korean-language newspapers in the United States "help Korean-Americans gain access to news and information about their native country that is not contained in English language publications").

report privilege to the news media for republication of foreign government pronouncement may serve to inhibit certain information of public interest from being disseminated to the most attentive segment of American society. Indeed, *Lee* has already led a Korean-American organization to threaten to sue two Korean-language newspapers for publication of defamatory stories based on a South Korean government's announcement. The anti-South Korean government organization, which the Korean National Security and Planning Agency alleged to have close ties with North Korea, reportedly stated in July 1989 that it would bring a libel action against the newspapers for publishing the Korean intelligence agency's charges.[125] Whether the libel threat is a bona fide attempt at remedying the alleged reputational injury or not, it is clear that the threat can induce self-censorship and undue timidity in the Korean-language or other media handling of foreign news and information.

While American libel law in the context of constitutional considerations since 1964 testifies to the "coming of the Information Age,"[126] the Fourth Circuit was rather myopic in sticking to an increasingly outdated and narrow concept of the privilege. In the emerging information age, where the international flow of information is the rule rather than the exception, the *Lee* court refused to look at the need for "a new jurisprudential crib" to afford greater breathing space to the media.[127] The court focused on an assumed increase of risk of defamation potentially arising from recognition of the privilege for accurately and fairly reporting foreign government reports.[128] In light of the often contradictory American approach toward the global free exchange of information,[129] *Lee* illustrates a troublesome approach to judicial balancing between freedom of the press and interests of individuals in their reputation.

Further, the reasoning of the federal appellate court in *Lee* sharply contrasts with that of Justice Brennan in *New York Times*. Justice

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125. Kim, *Travel to North Korea Gaining Popularity and Prospects for Unification Movements in South Korea and Abroad, Han-kyoreh Shinmun*, Nov. 18, 1989, p. 4 (U.S. ed.).

126. Sanford, *supra* note 4, at 1.

127. *Id.*

128. *Lee*, 849 F.2d at 880. As one commentator forcefully noted, "[A] danger in not protecting reports which could contain some measure of disinformation is reduction of public awareness of international affairs. An uninformed public could, in turn, be even more susceptible to subtle influence than a misinformed one." Bech, *supra* note 5, at 1179.

129. *See generally* A. MEHRA, FREE FLOW OF INFORMATION: A NEW PARADIGM (1986); Mehra, *Freedom Champions as Freedom Muzzlers: U.S. Violations of Free Flow of Information*, 36 GAZETTE 3 (1985).

Brennan stated that, "Some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than in that of the press."[130] Although acknowledging the possibility of an adverse impact upon the American press, the *Lee* court insisted that there would be no substantial difference in the burden of the American news media between verifying information from foreign governments and from domestic non-official sources.[131] As *Editor & Publisher* aptly noted, the basic difference lies in the fact that while domestic information is not too dificult to double-check, information from many governments overseas is almost impossible to check.[132] One author agreed, stating that the practical implications of newspapers' burden in confirming foreign government reports would be "staggering."[133] To make matters worse, the burden would be immeasurably enormous for a financially weak news media, which characterizes most of the ethnic news media in the United States.[134]

In comparing American defamation law with that of Great Britain, an American legal scholar wrote that "The American approach . . . reflects a society in which the press is considered to occupy a much more important role in the resolution of public issues. The press occupies a special position in the American system, a position that accounts for its strong protection against inhibiting defamation laws."[135] Nevertheless, the *Lee* court's sweeping rejection of any kind of privilege for any report of foreign government action affords little protection for the press from inhibitory defamation laws. By contrast, English libel law is more protective of reputation than American law,[136] which recognizes a fair report privilege for publication of reports on foreign judicial proceedings if the reports have "legitimate and proper interest."

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130. *New York Times*, 376 U.S. at 271, *quoting* Madison in 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 571 (1876).

131. *Lee*, 849 F.2d at 880.

132. Insult to Foreign Governments, *supra* note 15, at 4.

133. Accurate Report, *supra* note 69, at 34, *quoting* Jane Kirtley.

134. *See e.g.*, Kelly, *In the Land of Free Speech*, TIME, July 8, 1985, at 95; Scardino, *A Renaissance for Ethnic Papers*, N.Y. Times, Aug. 22, 1989, at D1; *Why Ethnic Press is Alive and Growing*, U.S. NEWS & WORLD REPORT, Oct. 29, 1984, at 79. For an illuminating discussion of various ethnic news media in the United States, *see* THE ETHNIC PRESS IN THE UNITED STATES (S. Miller ed. 1987).

135. Schauer, *Social Foundations of the Law of Defamation: A Comparative Analysis*, 1 J. MEDIA L. & PRAC. 18 (1980). *See also* M. FRANKLIN & D. ANDERSON, MASS MEDIA LAW 230 (4th ed. 1990).

136. *See* Franklin & Anderson, *supra* note 135, at 230; Sanford, *supra* note 4, at 23-24; Supperstone, *Press Law in the United Kingdom*, in PRESS LAW IN MODERN DEMOCRACIES 12 (P. Lahav ed. 1985).

V. SUMMARY AND CONCLUSIONS

Historically, the fair report privilege evolved under the common law as a method of expanding the freedom of the press in the course of establishing an increasingly open government accountable to its people. While the United States initially adopted the parameters of the privilege as drawn by British courts, those same courts later expanded the privilege. Notwithstanding its variance from state to state, the privilege has often been used to protect the media's right to publish information concerning a number of non-governmental proceedings of public interest.

In spite of the growing importance of the free flow of information among nations, the United States Court of Appeals for the Fourth Circuit in *Lee* ruled that the privilege applies to reports of American government actions only, and not to those of foreign governments. While recognizing the chilling effect of its decision upon the American press in dealing with foreign news, the court nevertheless dismissed as negligible the difference between the burden of the media in checking the "truth" of foreign government reports and that of domestic non-official information. In strong contrast with the precedential reasoning of the Fourth Circuit in *Lee*, an English court in 1960 recognized a limited privilege to reports of foreign government proceedings if they contained informational value for the British public.

For the American press in general and the ethnic news media in particular, *Lee* will have a chilling effect since it provides a potential weapon, especially for private figure plaintiffs. *Lee* may force the American media to use more caution than ever in determining whether stories based on foreign government reports are worth the effort to verify and publish. This is particularly true with the ethnic press, which relies considerably upon news published in foreign countries and is financially unable to fight libel actions. In this regard, the English court's decision in *Webb* seems to be a more appropriate balancing approach. What is at stake is not so much the informational value of the pronouncements for the public as the enormous "inconvenience" to the media resulting from the blanket denial of the privilege.