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DÉJÀ VU ALL OVER AGAIN: HOW A GENERATION OF GAINS IN FEDERAL REPORTER'S PRIVILEGE LAW IS BEING REVERSED

*Lucy A. Dalglish**
*Casey Murray***

I. INTRODUCTION

The question of whether reporters should have the legal right to resist complying with subpoenas predates the founding of the United States. The first known American reporter punished for refusing to identify the source of published information was Benjamin Franklin's brother, James, in 1722.¹ Over the ensuing 250 years, government officials occasionally tussled with reporters, seeking their cooperation in investigations and court cases. Reporters seldom cooperated. Two time periods, however, stand out for the sheer volume of subpoenas served on the media—the late 1960s and early 1970s, when government officials aggressively went after political groups and others deemed to be “subversive,” and the last three years, when the post-9/11 atmosphere caused federal and state governments to clamp down on the public release of government information. This culture of conspiracy has caused more reporters than ever to rely on anonymous sources.

The spate of subpoenas served on United States reporters by prosecutors, defense counsel, and civil litigants in the federal courts over the last three years is eerily reminiscent of the atmosphere of the late 1960s and early 1970s. This article compares and contrasts these two periods. The first section examines (1) what led to the spate of subpoenas served on journalists during President Richard Nixon's administration, (2) the aftermath of *Branzburg v. Hayes*²—the only United States Supreme Court case to address the availability of a reporter's privilege—in 1972, (3) the failure of the United States Congress to adopt a statutory privilege in the 1970s, and (4) the thirty-year evolution of a sort of common law reporter's privilege that

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1. BENJAMIN FRANKLIN, AUTOBIOGRAPHY 30 (H. Weld ed. 1848).
2. 408 U.S. 665 (1972).

seems to have dissolved in the last three years. The second section reviews federal case law during the post-*Branzburg* years and tracks the evolution in judicial thinking that initially provided a qualified privilege, but then began to chip away at it.

II. THE LEGISLATIVE HISTORY OF THE PRIVILEGE

For most reporters, the issue of whether to protect sources is black and white. They keep their promises. The most widely used Code of Ethics for journalists today, first adopted in 1926 by Sigma Delta Chi (now the Society of Professional Journalists), reminds reporters to “[a]lways question sources’ motives before promising anonymity. Clarify conditions attached to any promise made in exchange for information. Keep promises.”³ The American Newspaper Guild adopted a canon in 1934 that required a “news-paperman” to refuse to reveal his confidences before any court or investigative body.⁴

In the eyes of reporters, the arguments for a testimonial reporter’s privilege have not changed over the past 250 years. First, reporters argue that they must be “independent.” Reporters have credibility when they are perceived as having independently collected and reported information.⁵ If they are perceived as being an agent of discovery for a plaintiff, a prosecutor, or a defendant, who will trust them? Ultimately, sources will dry up and journalists will not be able to do their jobs. Justice Powell’s concurring opinion in *Branzburg* recognized the need to protect the independence of the news gathering and reporting process: “[c]ertainly, we do not hold . . . that state and federal authorities are free to annex the news media as an investigative arm of the government.”⁶

Second, there is the “truth” argument. When sources dry up, the public gets to hear only the party line. Just as with the other testimonial privileges extended to doctors, lawyers, and clergy, public policy must sometimes encourage sources to come forth with the truth.⁷ When members of the public cannot get accurate, independently gathered information about their government, they lose the ability to make informed choices at the ballot box.

3. SOCIETY OF PROFESSIONAL JOURNALISTS, CODE OF ETHICS, *available at* <http://www.spj.org/ethicscode.asp> (last visited July 3, 2006).

4. AMERICAN NEWSPAPER GUILD, CODE OF ETHICS, CANON 5 (1934) (now known as The Newspaper Guild-Communications Workers of America).

5. *See, e.g.,* *Gonzales v. Nat’l Broad. Co.*, 194 F.3d 29, 35 (2d Cir. 1999); *United States v. LaRouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988).

6. *Branzburg*, 408 U.S. at 709 (internal quotations omitted).

7. *See, e.g.,* *United States v. Cuthbertson*, 630 F.2d 139, 146 (3d Cir. 1980) (“This holding was based, in part, on the strong public policy supporting the unfettered communication to the public of information and opinion, a policy we found to be grounded in the [F]irst [A]mendment.”).

The United States Supreme Court also recognized this important role of the press in *Branzburg*:

Enlightened choice by an informed citizenry is the basic ideal upon which an open society is premised, and a free press is thus indispensable to a free society. Not only does the press enhance personal self-fulfillment by providing people with the widest possible range of fact and opinion, but it also is an incontestible precondition of self-government.⁸

Those are the altruistic reasons. Then, there is this very practical one: If reporters do not resist, they will frequently find themselves in court as the witness of choice. The Second Circuit Court of Appeals clearly understood this concern in *Gonzales v. National Broadcasting Co.*⁹ The court wrote the following:

If the parties to any lawsuit were free to subpoena the press at will, it would likely become standard operating procedure for those litigating against an entity that had been the subject of press attention to sift through press files in search of information supporting their claims. The resulting wholesale exposure of press files to litigant scrutiny would burden the press with heavy costs of subpoena compliance, and could otherwise impair its ability to perform, its duties—particularly if potential sources were deterred from speaking to the press, or insisted on remaining anonymous, because of the likelihood that they would be sucked into litigation.¹⁰

The *Gonzales* court further explained that “[i]ncentives would also arise for press entities to clean out files containing potentially valuable information lest they incur substantial costs in the event of future subpoenas.”¹¹

A. The Nixon Years: The Deterioration of the Media-Government Relationship

During the last years of the Johnson Administration and the first years of the Nixon Administration, reporters assumed the First Amendment supported the notion of protection of confidential sources. They had had a string of media-law victories in recent years—starting with *New York Times Co. v. Sullivan*,¹² which cemented First Amendment rights for journalists in libel cases.

8. *Branzburg*, 408 U.S. at 726–27 (Stewart, J., dissenting).

9. 194 F.3d 29 (2d Cir. 1999).

10. *Id.* at 35.

11. *Id.*

12. 376 U.S. 254 (1964).

But, there was no question that during this time the relationship between the media and the government began to deteriorate. Reporters became more determined in the way they covered news stories. The Justice Department, in turn, believed that there was a lot of suspicious activity going on—particularly in the anti-war movement—and that the media could help them investigate.¹³

When President Nixon took office, the Justice Department became even more aggressive. Subpoenas to journalists multiplied at alarming rates, due largely to the Nixon Administration's efforts to monitor "subversive groups," such as the Black Panther Party and the Students for a Democratic Society.¹⁴ At the time, *New York Times* reporter Earl Caldwell wrote stories about the Black Panthers' operations in Oakland. Caldwell, who was one of the first very prominent black reporters to work for the national desk of *The New York Times*, and who had gained notoriety for being on the Memphis hotel balcony when Martin Luther King, Jr., was shot, was subpoenaed by a federal grand jury to testify about events he had witnessed and people he had spoken to while covering the Black Panthers.¹⁵

These days, if a *New York Times* reporter is called to testify, the *New York Times* will do what it takes to support that reporter.¹⁶ It was not as common for news organizations to go to the wall for reporters in the 1960s and 1970s. Caldwell, believing his interests might conflict with the newspaper's at some point, hired his own lawyer, the noted Anthony Amsterdam.¹⁷

Caldwell was not alone. The Justice Department and state prosecutors targeted reporters across the country. The subpoenas seemed never-ending. In October 1969, federal grand juries investigating the Weathermen faction of the Students for a Democratic Society subpoenaed the unedited files and unused pictures of *Time*, *Life*, and *Newsweek* magazines.¹⁸ A federal grand jury in 1969 subpoenaed four Chicago newspapers, seeking files related to

13. See generally Sam J. Ervin, Jr., *In Pursuit of a Press Privilege*, 11 HARV. J. ON LEGIS. 233, 256–60 (1974). The article by the legendary Senator Ervin, who was deeply involved in Congressional efforts to create a reporter's privilege in the 1970s, is the seminal piece chronicling the legal and political battle facing journalists and members of Congress following the United States Supreme Court's decision in *Branzburg*.

14. Lee Levine, *The Law of Reporters*, 15 COMM. LAW. 1 (1997).

15. *United States v. Caldwell*, 408 U.S. 665 (1972), *aff'd sub nom. Branzburg v. Hayes*, 408 U.S. 665 (1972).

16. Don Van Natta, Jr., Adam Liptak & Clifford J. Levy, *The Miller Case: A Notebook, a Cause, a Jail Cell, and a Deal*, N.Y. TIMES, Oct. 16, 2005, at A1 (Regarding the 2005 jailing of reporter Judith Miller, the article provided the following quotation: "'She'd given pledge of confidentiality,' said Arthur Sulzberger Jr., the publisher. 'She was prepared to honor that. We were going to support her.'").

17. Earl Caldwell, *Ask Me. I Was the Test Case*, 15 COMM. LAW. 2, 20 (1997).

18. Henry Raymond, *Magazines' Files Under Subpoena*; *Time, Life, and Newsweek Data Involve S.D.S. Unit*, N.Y. TIMES, Feb. 1, 1970, at 24.

activities of the Weathermen and the Black Panthers.¹⁹ In January 1970, subpoenas were served on CBS to produce all tapes in its possession involved in the making of a documentary on the Black Panther Party.²⁰

And the subpoenas kept coming. From 1969 until July 1971, for example, the NBC and CBS television networks and their wholly-owned affiliates received a combined 121 subpoenas, the majority involving network coverage of militant and anti-war groups, demonstrations, and campus disturbances.²¹ Field Enterprises was served with more than thirty subpoenas from 1969 to 1971.²²

The federal case involving Caldwell was a catalyst in other ways. Caldwell, a prominent reporter, had important friends in the business. The Reporters Committee for Freedom of the Press ("Reporters Committee"), formed in March 1970 by prominent New York and Washington, D.C. reporters, marked the beginning of an effort to support Caldwell and publicize his plight.²³ His case was combined with two state cases—one involving *Louisville Courier-Journal* reporter Paul Branzburg and another involving Providence, Rhode Island television journalist Paul Pappas—into a Supreme Court case called *Branzburg v. Hayes*. In Branzburg's case, the issue was whether the Kentucky shield law entitled a *Louisville Courier-Journal* reporter to protection from naming confidential sources to a grand jury.²⁴ Branzburg had refused to disclose the identity of two men whose activities in making the drug hashish he had witnessed and later reported.²⁵ The question in *In re Pappas*²⁶ was whether a television reporter and photographer could refuse to tell a state grand jury what he had observed while preparing to film a police raid on a Black Panther Party headquarters in New Bedford, Massachusetts.²⁷

19. *Id.*

20. Jack Gould, *United States Seeks TV Film from Panther Show; United States Seeks Panther Film C.B.S. Cuts*, N.Y. TIMES, Jan. 26, 1970, at 1.

21. Ervin, *supra* note 13, at 245 (citing *Hearings on Freedom of the Press Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 92d Cong. 56 (1972)).

22. *Id.* (citing *Hearing on Newsman's Privilege Before the Subcomm. No. 3 of the H. Comm. on the Judiciary*, 92d Cong. 246 (1972)).

23. Floyd J. McKay, *First Amendment Guerillas: Formative Years of the Reporters Committee for Freedom of the Press*, 6 JOURNALISM & COMM. MONOGRAPHS 108–11 (2004).

24. *Branzburg v. Hayes*, 408 U.S. 665, 667 (1972).

25. *Branzburg v. Pount*, 461 S.W.2d 345 (Ky. 1971), *aff'd sub nom. Branzburg v. Hayes*, 408 U.S. 665 (1972).

26. 266 N.E.2d 297 (Mass. 1971), *aff'd sub nom. Branzburg v. Hayes*, 408 U.S. 665 (1972).

27. *Id.* at 298.

B. *Branzburg v. Hayes*: No First Amendment Privilege for Reporters?

In 1972, the Supreme Court handed down a disappointing and shocking decision to some First Amendment advocates. The Court held that reporters do not have a First Amendment right to refuse to testify before a grand jury regarding crimes they witnessed.²⁸ In that regard, they are just like ordinary citizens. But, the Supreme Court stated that Congress and the states were free to pass “shield laws” that provide statutory protection for reporters and their sources.²⁹

The *Branzburg* case had an energizing effect on the legislative front, particularly in the states. The Reporters Committee and other journalism organizations went to work to convince Congress and state legislatures about the necessity of “shield laws” to protect newsgathering. Although only a handful of states had shield laws in 1972, today thirty-two states and the District of Columbia have statutory protection in the form of “shield laws.”³⁰ Twelve of those states have absolute protection for confidential sources.³¹ Another eighteen states, including Arkansas, have court decisions that provide varying levels of protection from subpoenas.³² Only Wyoming is off those lists.³³

State laws evolved to provide statutory protection for reporters and their sources in the 1970s. But, in Congress it was another story. Between 1973 and 1978, ninety-nine bills were introduced in Congress.³⁴ None passed—largely because “the media” could [not] decide what it wanted.³⁵ Some hard-liners thought reporters should never turn the issue of source protection over to Congress. These media analysts worried that getting Con-

28. *Branzburg*, 408 U.S. at 699. The Court stated as follows:

The obligation to testify in response to grand jury subpoenas will not threaten these sources not involved with criminal conduct and without information relevant to grand jury investigations, and we cannot hold that the Constitution places the sources in these two categories either above the law or beyond its reach.

Id.

29. *Id.* at 706.

30. Reporters Committee for Freedom of the Press, *Agents of Discovery: A Report on the Incidence of Subpoenas Served on the News Media in 2001* (2003), available at <http://www.rcfp.org/agents/shieldlaws.html> (last visited June 15, 2006).

31. *Id.*

32. *Id.*

33. *Id.* The state legislature in Connecticut passed a shield law on May 3, 2006, which was signed into law on July 27, 2006. 2006 Conn. Acts 140 (Reg. Sess.).

34. Michael D. Saperstein, Jr., Comment, *Federal Shield Law: Protecting Free Speech or Endangering the Nation*, 14 COMM.LAW CONSPECTUS 543, 559 (2006) (citing Wendy N. Davis, *The Squeeze on the Press: More Courts Are Forcing Reporters to Testify as Judges Reconsider Media Privilege*, 91 A.B.A. J. 23 (2005)).

35. Ervin, *supra* note 13, at 261, 270. “The divergence among legislators only reflected the divergence in the press.” *Id.* at 261.

gress involved would begin the slippery slope of Congress legislating the definition of a journalist. Plus, they worried that what Congress gives, it can take away.³⁶ Other groups said that any statutory protection must provide an absolute privilege for confidential sources.³⁷ Some thought a qualified privilege that protected journalists in most situations would be enough.³⁸ In short, it was a disorganized mess. This started thirty years of inconsistent rulings and confusion among reporters as to what law they were operating under.

There were a couple of bright notes for reporters on the federal level—never discount what a clever constitutional lawyer can pull off. Since *Branzburg* was a plurality decision with a final vote in the court of five to four, it was possible to craft some wiggle room. And, that is exactly what creative First Amendment lawyers did. They pointed out that the decision was actually a four-one-four ruling. In other words, four justices found absolutely no reporter's privilege under the First Amendment, while four clearly found one under the First Amendment. Justice Powell, however, tried to go right down the middle. In a concurring opinion, he said the decision should not be read to suggest that there is never a privilege for journalists—just that the facts presented in the combined cases under *Branzburg* did not provide for a privilege.³⁹ The argument was that without Powell's limiting concurrence, the Supreme Court would not have found any constitutional reporter's privilege. So, for thirty-two years, many subpoenaed reporters and their lawyers convinced courts all over the country that Justice Powell's concurrence represented the true majority view.⁴⁰

In other words, by using the Powell concurrence, the media crafted some exceptions to *Branzburg* and, in some cases, used the balancing test suggested by Justice Stewart's dissent.⁴¹ In such cases, courts typically

36. *Id.* at 271.

37. Resolutions calling for enactment of an absolute privilege were passed by the American Society of Newspaper Editors and Sigma Delta Chi (now Society of Professional Journalists) in November 1972 and by the Radio Television News Directors Association and the American Newspaper Publishers Association (now Newspaper Association of America) in December 1972. *Hearings on Newsmen's Privilege Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 93d Cong. 251, 301, 354 (1973).

38. Ervin, *supra* note 13, at 262.

39. *Branzburg v. Hayes*, 408 U.S. 665, 709 (1972) (Powell, J., concurring).

40. *See supra* Section II.

41. *Branzburg*, 408 U.S. at 743 (Stewart, J., dissenting). Justice Stewart stated the following:

Accordingly, when a reporter is asked to appear before a grand jury and reveal confidences, I would hold that the government must (1) show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.

forced a journalist to testify only if there was an overriding public interest in disclosure, which the court determined by deciding whether the information sought was absolutely necessary to the case and whether there were no alternative sources of the information.⁴²

At the same time, the Justice Department crafted guidelines for when it would subpoena a reporter that provided some protection for reporters' rights.⁴³ Under the guidelines, approval for any federal subpoena of a reporter had to be approved by the United States Attorney General.⁴⁴ However, it remained difficult to evade a grand jury subpoena once the Justice Department decided it needed an appearance by a reporter. Even under these guidelines, a reporter would still go to jail now and again,⁴⁵ but the situation had improved greatly since the Nixon-era excesses of media subpoenas.

III. FEDERAL CASES ANALYZING *BRANZBURG*

After *Branzburg*, a legal fight ensued between media lawyers and litigants seeking to have journalists testify. The media attorneys attempted to focus the courts on the narrowness of *Branzburg*—by applying it only to journalists called before a grand jury—and to focus on the qualified privilege found in Justice Powell's necessary concurrence. Prosecutors and litigants obviously focused on the plurality decision and endeavored to broaden *Branzburg*'s majority.

Much of the legal analysis regarding *Branzburg*—currently being undone by cases such as *McKevitt v. Pallasch*⁴⁶—arose from the decisions immediately following it. Because there was such confusion regarding exactly what *Branzburg* meant, the media knew the importance of setting a precedent that narrowed the case as much as possible. In many ways, the media had extraordinary success. In just over ten years, most federal courts had

Id.

42. See, e.g., *Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 287 (4th Cir. 2000); *United States v. LaRouche Campaign*, 841 F.2d 1176, 1181 (1st Cir. 1988); *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 437 (10th Cir. 1977).

43. Ervin, *supra* note 13, at 252. United States Attorney General John Mitchell announced the guidelines at a meeting of the American Bar Association on August 10, 1970. *Mitchell Sets Rules Limiting Subpoenas Issued to Newsmen; Mitchell Sets Subpoena Rules to Allay Growing Press Fears*, N.Y. TIMES, Aug. 11, 1970, at 1.

44. 28 C.F.R. § 50.10(e) (2006).

45. See Reporters Committee for Freedom of the Press, *Paying the Price: A Recent Census of Reporters Jailed or Fined for Refusing to Testify*, available at <http://www.rcfp.org/jail.html> (last visited June 15, 2006).

46. 339 F.3d 530 (7th Cir. 2003).

developed a qualified privilege in federal cases.⁴⁷ Generally, courts applied a qualified privilege that required journalists to testify in criminal cases while generally refusing to require journalists to testify as third parties in civil cases.⁴⁸ In grand jury cases, courts would often not even apply the qualified privilege. The following section will examine the ways in which courts hearing cases immediately following *Branzburg* applied the privilege to grand jury, criminal, and civil cases.

A. Grand Jury Cases

Immediately following *Branzburg*, the Ninth Circuit Court of Appeals decided *Burse v. United States*.⁴⁹ Here, the court examined journalists who were direct witnesses of a Black Panther protest in which there was a threat to kill the president.⁵⁰ The government wanted to ask the reporters for information regarding the threat, as well as information regarding the workings of their newspaper.⁵¹ The court severely limited the government's questioning and found "[a]ll speech, press, and associational relationships are presumptively protected by the First Amendment; the burden rests on the Government to establish that the particular expressions or relationships are outside its reach."⁵² The court concluded that the government needed to find a "substantial connection" between the information it sought and the "overriding governmental interest in the subject matter of the investigation," emphasizing that obtaining the information should not be "more drastic than necessary."⁵³

Using this template, the court found that the journalists did not have to answer each and every question presented by the government:

47. John E. Osborn, *The Reporter's Confidentiality Privilege: Updating the Empirical Evidence After a Decade of Subpoenas*, 17 COLUM. HUM. RTS. L. REV. 57, 67 (1985). Osborn stated the following:

Many decisions in the wake of *Branzburg* have proven more favorable towards the press, as lower courts strive to reconcile that decision's holding with their own inclination to afford a measure of [F]irst[-A]mendment protection for the media. The result has been the development of a flexible 'qualified' privilege, where courts apply varying degrees of protection depending on the factual context in which the dispute arises.

Id.

48. *Id.* at 68.

49. 466 F.2d 1059 (9th Cir. 1972).

50. *Id.* at 1065.

51. *Id.* at 1066-71.

52. *Id.* at 1082 (citing *Gooding v. Wilson*, 405 U.S. 518 (1972); *Cohen v. California*, 403 U.S. 15 (1971); *Speiser v. Randall* 357 U.S. 513 (1958)).

53. *Id.* at 1083.

The Ninth Circuit held that the questions dealing with threatened violence and the military interference were legitimate, but ruled the two women could not be compelled to testify about the publication and distribution of Black Panther newspapers or pamphlets because those inquiries violated the [F]irst[-A]mendment rights of free association and freedom of the press.⁵⁴

This case immediately answered the question of how much protection journalists would have while testifying in front of a grand jury.

Although *Burse* was released the same day as the *Branzburg* decision, the *Burse* court was still able to examine its opinion in light of *Branzburg* because of an immediate government appeal.⁵⁵ The court concluded as follows: "We have reexamined our analysis of the factors involved in balancing the First[-]Amendment rights against the governmental interests asserted to justify compelling answers to the questions here involved, and we have concluded that the balance we struck is not impaired by *Branzburg*."⁵⁶ The court did not conclude that journalists had a privilege in grand jury situations.⁵⁷ Instead, the *Burse* court applied a very low bar, requiring the government to show a "legitimate and compelling" interest in the information.⁵⁸ This type of explanation of *Branzburg* became common. The media had the least success in limiting testimony for journalists in front of grand juries, as courts generally required reporters to testify.⁵⁹

In another decision released just after *Branzburg*, *In re Bridge*,⁶⁰ a court held a reporter in contempt when he would not answer a grand jury's questions about a story he wrote regarding bribery and the New Jersey Housing Authority.⁶¹ In his story, the reporter named his source but did not name the person who had attempted to make a bribe.⁶² He spent twenty days in jail for refusing to testify, and neither the New Jersey appellate court nor the United

54. Stephen R. Hofer, *The Fallacy of Farber: Failure to Acknowledge the Constitutional Newsmen's Privilege in Criminal Cases*, 70 J. CRIM. L. & CRIMINOLOGY 299, 319 (1979).

55. *Burse*, 466 F.2d at 1091.

56. *Id.*

57. *See id.* at 1090.

58. Hofer, *supra* note 54, at 319.

59. James C. Goodale, *Branzburg v. Hayes and the Developing Qualified Privilege for Newsmen*, 26 HASTINGS L.J. 709, 725 (1975). "Thus far, however, no court since *Branzburg* has applied the balancing test to excuse reporters from testifying as to the witnessing of a crime[,] even though such information has been taken out of their stories." *Id.*

60. 295 A.2d 3 (N.J. Super. Ct. App. Div. 1972), *cert. denied*, 490 U.S. 991 (1973). *Bridge* was eventually superseded by statute. *See In re Woodhaven Lumber & Mill Work*, 589 A.2d 135 (N.J. 1991).

61. *In re Bridge*, 295 A.2d at 4.

62. *Id.* at 4-5.

States Supreme Court stayed his contempt sentence.⁶³ Here, the court concluded there was no privilege at all for a journalist testifying before a grand jury.⁶⁴

Since *Branzburg* dealt exclusively with grand jury testimony, courts generally required journalists to testify. "In the seven years since the Supreme Court's 1972 decision, at least eleven federal and state court decisions have been handed down that cite *Branzburg* as their authority for rejecting privilege claims in the grand jury context."⁶⁵

The press had slightly more success when reporters faced grand jury testimony in cases in which the media did not witness a potential crime, but instead, received physical evidence. In these cases, courts tended to apply a portion of Justice Powell's concurrence. For example, in *In re Lewis*,⁶⁶ the Ninth Circuit was faced with a government brief that attempted to apply a very broad application of *Branzburg*. The government lawyers argued as follows:

[T]he factual situation in tis [sic] case presents a far stronger case for the application of the principle that newsmen are not immune from the obligation of appearing before a grand jury and giving relevant testimony with respect to criminal contact, even if that testimony requires the disclosure of a confidential source.⁶⁷

Under this argument, the government claimed *Branzburg* nullified all claim of a reporter's privilege and that the reporter would have no First Amendment grounds to withhold the information from the grand jury.⁶⁸ The media failed to prevent the court from holding the reporter in contempt for refusing to testify.⁶⁹ However, the reporter's lawyers did convince the court

63. *In re Matter of Bridge*, 299 A.2d 78 (N.J. 1972), cert. denied sub nom. *Bridge v. New Jersey*, 410 U.S. 991 (1973).

64. *In re Bridge*, 295 A.2d at 6. "We do not read the majority opinion in *Branzburg* as requiring a balancing of interests test to determine when a reporter should be compelled to testify." *Id.*

65. Hofer, *supra* note 54, at 318 (citing *Lewis v. United States*, 517 F.2d 236 (9th Cir. 1975); *In re Lewis*, 501 F.2d 418 (9th Cir. 1974); *In re Powers*, 4 MEDIA L. REP. (BNA) 1600 (Vt. Dist. Ct. 1978); *Andrews v. Andreoli*, 400 N.Y.S.2d 422 (N.Y. Sup. Ct. 1977); *In re Tierney*, 328 So.2d 40 (Fla. Dist. Ct. App. 1976); *Fisher v. Dan*, 342 N.Y.S.2d 731 (N.Y. App. Div. 1973); *In re McGowan*, 298 A.2d 339 (Del. Super. Ct. 1972); *In re Bridge*, 295 A.2d at 3).

66. 501 F.2d 418 (9th Cir. 1974) (considering a case in which KPFK station manager Will Lewis refused to turn over a document reportedly containing information about the bombing of a governmental building from "The Weather Underground" and a tape recording issued by "The Symbionese Liberation Army" regarding the Patty Hearst kidnapping).

67. Brief of Respondent-Appellee at 27, *In re Grand Jury Proceedings of Will Lewis*, 501 F.2d 418 (9th Cir. 1974) (No. 74-2170).

68. *Id.*

69. See *In re Grand Jury Proceedings of Will Lewis*, 501 F.2d 418, 421 (9th Cir. 1974).

that he had a legitimate First Amendment privilege that, in this case, the government had overcome.⁷⁰

The *Burse*, *Bridge*, and *Lewis* decisions helped determine the limits of what was left of the privilege for grand jury testimony. While journalists did not even have a qualified privilege, the government was not free to question journalists at will if the questions would violate the media's First Amendment rights or if the grand jury was designed to harass the press.⁷¹ The government need only show a legitimate and compelling need for the information to overcome the media's First Amendment rights.

By 2002, most federal circuits had determined that reporters had little to no protection from grand jury questioning unless the media could show that the grand jury had not acted in good faith. Most circuits gave the government broad power to compel testimony from journalists, requiring only a showing of legitimate need for the information.⁷² Only the Third Circuit⁷³ has applied a broader qualified privilege for grand jury cases.

B. Criminal Cases

The media had better results with post-indictment criminal cases. The Supreme Court helped establish a qualified privilege in criminal cases by refusing to grant certiorari in two cases that applied a privilege in reporter's source cases immediately after *Branzburg*. For example, *Farr v. Superior Court*⁷⁴ set up a qualified privilege, and, although the appellate court's decision was rendered prior to *Branzburg*, the Supreme Court did not take the case to clarify or correct *Farr*'s interpretation of the reporter's privilege.⁷⁵ In *Farr*, a reporter violated a court's publicity order in the trial of Charles Manson and would not identify his source.⁷⁶ The governmental lawyers seeking information from the journalist displayed the common tactic of overemphasizing the breadth of *Branzburg* and misstating the reporter's argument. The government argued that the reporter had claimed "an immu-

70. *Id.* at 423.

71. *Id.* This notion is based upon Justice Powell's concurrence in *Branzburg*, which stated the following: "If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy." *Branzburg v. Hayes*, 408 U.S. 665, 710 (1972) (Powell, J., concurring).

72. Reporters Committee for Freedom of the Press, *The Reporter's Privilege* (2002), available at <http://www.rcfp.org/privilege/index.html> (last visited May 7, 2006).

73. See *In re Grand Jury Subpoena of Williams*, 766 F. Supp. 358 (W.D. Pa. 1991), *aff'd without opinion by equally divided court*, 963 F.2d 567 (3d Cir. 1992).

74. 22 Cal. App. 3d 60 (Cal. Ct. App. 1971), *cert. denied*, 409 U.S. 1011 (1972).

75. 409 U.S. 1011 (1972) (denying certiorari).

76. *Farr*, 22 Cal. App. 3d at 66.

nity from the requirement of all citizens to testify”⁷⁷ In fact, the reporter was just attempting to claim a privilege given to many members of society such as doctors and priests. It also oversimplified *Branzburg*'s holding by suggesting that in *Branzburg* the Supreme Court “held that a reporter’s freedom of speech and press was not abridged by requiring him to appear and testify before a grand jury.”⁷⁸

Fortunately for the media, the appellate court ignored these arguments and applied a balancing test that weighed the press’s First Amendment right to publish against the government’s need for the information.⁷⁹ In this case, the court required the reporter to identify the source, but at least it applied a balancing test and did not use the government’s extensive view of *Branzburg*.⁸⁰

Just three years later, the Ninth Circuit determined conclusively that *Branzburg* requires a balancing test in criminal cases. In *Farr v. Pitchess*,⁸¹ the court stated, “[i]t is clear that *Branzburg* recognizes some First Amendment protection of news sources. The language of the case likewise indicates that the privilege is a limited or conditional one.”⁸²

Just seven years after *Branzburg*, courts tended toward finding a qualified privilege in criminal cases.⁸³ From 1972 to 1979, courts granted the media immunity in fifteen of twenty-seven cases in which it was sought, and it ordered disclosure in only nine.⁸⁴ Courts tended to use the balancing test to

77. Brief for Respondent in Opposition at 9, *Farr v. Super. Ct.*, 409 U.S. 1011 (1972) (No. 71-1642).

78. *Id.* at 15.

79. *Farr*, 22 Cal. App. 3d at 72. The court clearly stated the test as follows:

Where, as here, the impediment to the free flow of information is indirect by the creation of a situation in which the press informants may be inhibited by the possibility that their identity will be revealed, the need for disclosure of [a] source must be weighed to determine whether it is so compelling as to outweigh the vital interest in [the] uninhibited flow of news.

Id.

80. *Id.* at 72–73.

81. 522 F.2d 464 (9th Cir. 1975).

82. *Id.* at 467.

83. Hofer, *supra* note 54, at 320 (“As in the area of civil litigation, courts in criminal cases generally seem to be acknowledging the existence of a conditional or qualified privilege for the press.”).

84. *Id.* at 320–21. “[C]ases in which courts have accepted first amendment claims of newsman’s privilege” are *United States v. Pretzinger*, 542 F.2d 517 (9th Cir. 1976); *United States v. DePalma*, 466 F. Supp. 917 (S.D.N.Y. 1979); *United States v. Orsini*, 424 F. Supp. 229 (E.D.N.Y. 1976); *Laughlin v. State*, 323 So. 2d 691 (Fla. Dist. Ct. App. 1975); *Florida v. Morel*, 4 MEDIA L. REP. (BNA) 2309 (Fla. Cir. Ct. 1979); *Florida v. Beattie*, 4 MEDIA L. REP. (BNA) 2150 (Fla. Cir. Ct. 1979); *Florida v. Petrantoni*, 4 MEDIA L. REP. (BNA) 1554 (Fla. Cir. Ct. 1978); *Florida v. Hurston*, 3 MEDIA L. REP. (BNA) 2295 (Fla. Cir. Ct. 1978); *People v. Monroe*, 370 N.Y.S.2d 1007 (N.Y. Sup. Ct. 1975) (citing *People v. Barnes*, Indict. No. 3194/74 (N.Y. Sup. Ct. 1975)); *People v. Marahan*, 368 N.Y.S.2d 685 (N.Y. Sup. Ct. 1975);

award immunity if the confidential information was "collateral" and to require testimony if the confidential information was "relevant and material" to the guilt or innocence of the party.⁸⁵

The idea that *Branzburg* gave reporters a qualified privilege in criminal cases became more and more settled. By 1980, even the government lawyers seeking journalists' testimonies had conceded that a qualified privilege existed. For example, the government lawyers in *United States v. Cuthbertson*,⁸⁶ in their brief before the United States Court of Appeals for the Third Circuit, stated that in *Branzburg*, "the court held that the Constitution confers no special right on news reporters and news organizations to withhold relevant evidence when disclosure is compelled by the overriding public interest in the fair administration of law enforcement."⁸⁷ The court agreed, holding that "journalists possess a qualified privilege not to divulge confidential sources and not to disclose unpublished information in their possession in criminal cases."⁸⁸

Courts allowed this qualified privilege because they understood the need for journalists to obtain information from anonymous sources. In 1980, the Third Circuit heard a case that sounds very similar to the Judith Miller⁸⁹ situation. In *United States v. Criden*,⁹⁰ a journalist was summoned as a witness in a criminal case and was held in contempt for refusing to say whether she had a conversation with a person who had already told the court that their conversation took place.⁹¹ Although the court ended up requiring the journalist to testify—judging that the communication was no longer confidential—it did lay out the logic and reasoning behind supporting a privilege

Brown v. Commonwealth, 204 S.E.2d 429 (Va. 1974); *Zelenka v. State*, 266 N.W.2d 279 (Wis. 1978). Hoffer, *supra* note 54, at 320–21.

Criminal cases in which courts have "rejected first amendment privilege claims" are *United States v. Liddy*, 354 F. Supp. 208 (D.D.C. 1972); *Farr*, 22 Cal. App. 3d at 69; *State v. Sandstrom*, 581 P.2d 812 (Kan. 1978); *Michigan v. Smith*, 4 MEDIA L. REP. (BNA) 1753 (Mich. Cir. Ct. 1978); *New Jersey v. De La Roche*, 3 MEDIA L. REP. (BNA) 2317 (N.J. Super. Ct. Law Div. 1977); *New York v. LeGrand*, 4 MEDIA L. REP. (BNA) 1897 (N.Y. Sup. Ct. 1979); *New York v. Zagarino*, 4 MEDIA L. REP. (BNA) 1693 (N.Y. Sup. Ct. 1978); *People v. Dupree*, 388 N.Y.S.2d 1000 (N.Y. Sup. Ct. 1976); *In re Dan*, 363 N.Y.S.2d 493 (N.Y. Sup. Ct. 1975). Hoffer, *supra* note 54, at 320–21.

85. *Id.* at 321 (citing *State v. Sandstrom*, 581 P.2d 812, 815 (Kan. 1978); *People v. Monroe*, 370 N.Y.S.2d 1007, 1013 (N.Y. Sup. Ct. 1975); *Brown v. Commonwealth*, 204 S.E.2d 429, 431 (Va. 1974)).

86. 630 F.2d 139 (3d Cir. 1980) (explaining that third-party CBS refused to comply with a court order directing it to submit materials for in camera inspection).

87. Brief of Appellee-Respondent at 29, *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980) (No. 80-1325).

88. *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980).

89. See generally *Van Natta*, *supra* note 16.

90. 633 F.2d 346 (3d Cir. 1980).

91. *Id.* at 349–50.

for confidential sources.⁹² The court stated the following: “[T]here is a general expectation in certain sectors of society that information flows more freely from anonymous sources. Experience in the operation of such public service facilities as hotels, restaurants, and common carriers shows that proprietors often solicit from their customers anonymous information grading the service received.”⁹³

In addition, the court understood that anonymous sources played an important role in allowing the media to effectively monitor the government for the people. As the so-called Fourth Estate, the media must inform the public regarding its government’s actions. The *Criden* court stated the following:

[C]ommunications media not only serve as the vehicle that widely disperses information but also constitute an important instrument of democracy that assists our officials in fashioning public policy. Without the protection of the source, the cutting edge of this valuable societal instrument would be severely dulled and public participation in decision-making severely restricted.⁹⁴

Just ten years after *Branzburg*, most courts had established a qualified privilege for journalists in criminal cases.⁹⁵ This federal, common law privilege tended to follow Justice White’s balancing test in his *Branzburg* concurrence. Most courts required that the government show the information it sought was relevant and material.⁹⁶ In addition, a few courts also required the government to show that the information sought was not available from alternate sources.⁹⁷ This balancing test was eventually picked up by most circuits and even expanded by some.

As of 2002, most federal circuits have adapted the early legal doctrines developed following *Branzburg* and apply a qualified privilege for the media in criminal cases. The First Circuit Court of Appeals applies a balancing test requiring, generally, relevancy, admissibility, and specificity—that the party seeking the information is not on a “general fishing expedition.”⁹⁸ The Second Circuit Court of Appeals has a three-part test (relevant, necessary, and unavailable from alternate sources) and has found that the privilege is weaker in criminal cases and in cases in which there is no confidentiality.⁹⁹

92. *Id.* at 355–60.

93. *Id.* at 356.

94. *Id.*

95. Hofer, *supra* note 54, at 320.

96. *Id.* at 321.

97. *Id.*

98. *See* United States v. LaRouche Campaign, 841 F.2d 1176, 1179 (1st Cir. 1988).

99. *See* Gonzales v. Nat’l Broad. Co., 194 F.3d 29, 36 (2d Cir. 1999); *see also* United States v. Burke, 700 F.2d 70 (2d Cir. 1983).

In the Third Circuit, *Cuthbertson*'s qualified privilege still applies.¹⁰⁰ The Fourth Circuit Court of Appeals also applies a qualified privilege; however, it is less expansive than its privilege for civil cases.¹⁰¹ The Ninth Circuit still applies the qualified test it applied in *Farr*.¹⁰² The Tenth Circuit Court of Appeals has not expressly addressed the issue, but a United States district court in Colorado found a qualified privilege.¹⁰³ The Eleventh Circuit Court of Appeals also applies a qualified privilege requiring relevancy, necessity, and unavailability from other sources.¹⁰⁴ In the Seventh Circuit, a qualified privilege at one time applied,¹⁰⁵ but it appears that Judge Posner's *McKevitt*¹⁰⁶ decision has eliminated that privilege in cases not involving confidential sources.¹⁰⁷

Not all federal circuits, however, apply a clear qualified privilege for journalists in criminal cases. The Fifth Circuit Court of Appeals found no privilege at all for non-confidential information, and it remains unclear whether one would even apply to confidential information.¹⁰⁸ The United States Court of Appeals for the District of Columbia Circuit has found that the privilege exists only with regard to bad faith attempts to gain information from the media.¹⁰⁹ However, this has likely changed following the *Miller*¹¹⁰ decision. The Sixth and Eighth Circuit Courts of Appeal have not definitively addressed this issue.¹¹¹

C. Civil Cases

Since *Branzburg* dealt exclusively with grand jury subpoenas, courts have had more freedom to apply a stronger reporter's privilege in civil cases. Civil cases tend to fall into two categories: when the media is called as a third-party witness and when the media is a party to the civil action,

100. *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980).

101. *See In re Shain*, 978 F.2d 850 (4th Cir. 1992).

102. *Farr v. Pichess*, 522 F.2d 464, 467 (9th Cir. 1975).

103. *Re/Max Int'l Inc. v. Century 21 Real Estate Corp.*, 846 F. Supp. 910 (D. Colo. 1994).

104. *See United States v. Blanton*, 730 F.2d 1425 (11th Cir. 1994).

105. *See United States v. Lloyd*, 71 F.3d 1256 (7th Cir. 1995).

106. 339 F.3d 530 (7th Cir. 2003).

107. *See, e.g., Patterson v. Burge*, No. 03 C 4433, 2005 WL 43240, at *1 (N.D. Ill. Jan. 6, 2005); *Hobley v. Burge*, 223 F.R.D. 499, 502 (N.D. Ill. 2004); *Solaia Tech., LLC v. Rockwell Automation, Inc.*, No. 03 C 6904, 2003 WL 22597611, at *2 (N.D. Ill. Nov. 10, 2003).

108. *See United States v. Smith*, 135 F.3d 963 (5th Cir. 1998).

109. *See Reporters Comm. for Freedom of the Press v. Am. Tel. & Tel. Co.*, 593 F.2d 1030 (D.C. Cir. 1978).

110. *See generally* Van Natta, *supra* note 16.

111. Reporters Committee for Freedom of the Press, *The Reporter's Privilege*, available at <http://www.rcfp.org/cgi-local/privilege/compare.cgi?searchtype=compare&outline=3C2&06=on&08=on> (last visited May 7, 2006).

such as a defamation action. As would be expected, courts have taken very different tactics when faced with these types of cases. Generally, however, courts are much more likely to find a reporter's privilege when the media is called as a third-party witness.

The first court to address *Branzburg's* effect on civil litigation was the Second Circuit in *Baker v. F & F Investment*.¹¹² The court concluded that under *Branzburg*, although "federal law does not recognize an absolute or conditional journalist's testimonial 'privilege,' neither does federal law require disclosure of confidential sources in each and every case, both civil and criminal, in which the issue is raised."¹¹³ With this conclusion, the court applied a qualified privilege and refused to force the journalist to testify because it concluded (1) the plaintiff had not exhausted alternate sources or shown the relevance of the information sought and (2) his claim did not go to the heart of the matter.¹¹⁴

These three factors were to become common among courts looking to establish a privilege in civil cases—and would become a part of any so-called federal common law reporter's privilege. Significantly, the court also recognized the dangers of involving the media in civil litigation:

Compelled disclosure of confidential sources unquestionably threatens a journalist's ability to secure information that is made available to him only on a confidential basis The deterrent effect such disclosure is likely to have upon future undercover investigative reporting threatens freedom of the press and the public's need to be informed.¹¹⁵

Just one year after *Branzburg*, a federal court explicitly distinguished the differences between civil cases and criminal cases with regard to the reporter's privilege. In *Democratic National Committee v. McCord*,¹¹⁶ the court, while quoting James Madison, applied a qualified privilege requiring the party seeking the information to exhaust alternate sources and show that the information is material to the case.¹¹⁷ This court, like the *Baker* court, recognized that allowing civil litigants to use the media for discovery without applying a qualified privilege would have a vast "chilling effect . . . on the flow of information to the press, and so to the public."¹¹⁸ This acknowl-

112. 470 F.2d 778 (2d Cir. 1972) (calling a reporter to reveal his source for a story about "blockbusting" in Chicago to advance a civil suit).

113. *Id.* at 781.

114. Goodale, *supra* note 59, at 737.

115. *Baker*, 470 F.2d at 782 (internal quotations omitted).

116. 356 F. Supp. 1394 (D.D.C. 1973) (subpoenaing tapes, recordings, drafts, and numerous other pieces of information from numerous media outlets that had reported on the Watergate break-in).

117. *Id.* at 1399 ("A popular government without popular information or the means of acquiring it is but a prologue to a farce or tragedy or perhaps both.")

118. *Id.* at 1397.

edgment of the danger of allowing litigants to use the press would become more common as more and more courts applied *Branzburg* to civil cases.

The courts that looked in this area tended to focus on the limiting language of *Branzburg*.¹¹⁹ Armed with this way to protect the media, many federal courts in the mid-1970s greatly expanded the privilege in civil cases. A Tenth Circuit case upheld this qualified privilege and extended its reach to the independent producer of a documentary film.¹²⁰ A Fourth Circuit decision, *United States v. Steelhammer*,¹²¹ required journalists to testify because it concluded that the journalists were not protecting confidential sources, but it applied the qualified privilege in coming to that conclusion.¹²² "In all, twenty-eight reported post-*Branzburg* civil cases in which information was sought from a nonlitigant journalist have been decided in the state and federal courts. In only three cases were the reporters required to testify."¹²³ Of those three, only *Steelhammer* involved a federal court.

During the same time, federal courts found a common law privilege in civil cases developing along with a constitutional privilege found in *Branzburg*. The Third Circuit, in *Riley v. City of Chester*,¹²⁴ concluded "that journalists have a federal common law privilege, albeit qualified, to refuse to divulge their sources."¹²⁵ The court cited numerous cases¹²⁶ supporting its

119. Hofer, *supra* note 54, at 314.

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

121. 539 F.2d 373 (4th Cir. 1976).

122. *See id.* at 374-75.

123. Hofer, *supra* note 54, at 317-18 (citing *Baker v. F.S.F. Ins.*, 470 F.2d 778, 778 (2d Cir. 1972); *Steelhammer*, 539 F.2d 373; *Poirier v. Carson*, 537 F.2d 823 (5th Cir. 1976); *Carey v. Hume*, 492 F.2d 631 (D.C. Cir. 1974); *Gulliver's Periodicals Ltd. v. Charles Levy Circulating Co.*, 455 F. Supp. 1197 (N.D. Ill. 1978); *Citicorp v. Interbank Card Ass'n*, 4 MEDIA L. REP. (BNA) 1429 (S.D.N.Y. 1978); *In re Consumers Union*, 4 MEDIA L. REP. (BNA) 2119 (S.D.N.Y. 1978); *Altemose Constr. Co. v. Bldg. & Constr. Trades Council*, 443 F. Supp. 489 (E.D. Pa. 1977); *Gilbert v. Allied Chem. Corp.*, 411 F. Supp. 505 (E.D. Va. 1976); *Apicella v. McNeil Lab., Inc.*, 66 F.R.D. 78 (E.D.N.Y. 1975); *Loadholtz v. Fields*, 389 F. Supp. 1299 (M.D. Fla. 1975); *Democratic Nat'l Comm. v. McCord*, 356 F. Supp. 1394, 1394 (D.D.C. 1973); *Conn. State Bd. of Labor Relations v. Fagin*, 370 A.2d 1095 (Conn. Super. Ct. 1976); *Coira v. Depoo Hosp.*, 4 MEDIA L. REP. (BNA) 1692 (Fla. Cir. Ct. 1978); *Schwartz v. Almart Stores*, 42 Fla. Supp. 165, 166 (Fla. Cir. Ct. 1975); *Winegard v. Oxberger*, 258 N.W.2d 847 (Iowa 1977); *Dumez v. Hauma Mun. Fire & Police Civil Serv. Bd.*, 341 So. 2d 1206 (La. Ct. App. 1976); *Opinion of the Justices*, 2 MEDIA L. REP. (BNA) 2083 (N.H. 1977); *MacKay v. Driscoll*, 3 MEDIA L. REP. (BNA) 2582 (N.Y. Sup. Ct. 1978); *Davis v. Davis*, 386 N.Y.S.2d 992 (N.Y. Fam. Ct. 1976); *Forest Hills Util. Co. v. City of Heath*, 302 N.E.2d 593 (Ohio Ct. C.P. 1973); *Dallas Oil & Gas, Inc. v. Mouer*, 533 S.W.2d 70 (Tex. Civ. App. 1976); *Amato v. Fellner*, 4 MEDIA L. REP. (BNA) 1552 (Wis. Cir. Ct. 1978).

124. 612 F.2d 708 (3d Cir. 1979).

125. *Id.* at 715.

126. *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 436 (10th Cir. 1977); *Baker*, 470 F.2d at 782; *Gulliver's Periodicals Ltd.*, 435 F. Supp. at 1203; *Zerilli v. Bell*, 458 F. Supp. 26, 28 (D.D.C. 1978); *Altemose Constr. Co.*, 443 F. Supp. at 491; *Gilbert*, 411 F. Supp. at 508.

position, including *Baker*, to show that a qualified privilege had been built.¹²⁷ The common law, *Riley* found, required the “balance on one hand [of] the policies [that] give rise to the privilege and their applicability to the facts at hand against the need for the evidence sought to be obtained in the case at hand.”¹²⁸ Along with the balancing test, the court concluded that the party seeking the information needed to show the materiality and relevance of the information, as well as the fact that there was no other source for the information.¹²⁹

Riley was not followed by other circuits and was called into question by a few courts,¹³⁰ but it was never overturned. Even so, the court’s idea of balancing the interests would play an important role in developing the federal common law privilege. This step could prevent a plaintiff who had overcome the privilege from being able to receive the information because the media’s interest would outweigh the litigant’s interest in the information.¹³¹

Surprisingly, journalists have not faced extra difficulties when fighting for a privilege in defamation cases. Courts have used *Branzburg*, as well as *Garland v. Torre*,¹³² to apply a qualified privilege to journalists. “The test applied by [the court in] *Garland* is very similar to the one Justice Stewart later articulated in his *Branzburg* dissent.”¹³³ The test requires that the party seeking information show that the information is relevant, that the party has exhausted alternate sources of the information, and that the information requested goes “to the heart of the matter.”¹³⁴ Courts facing a claim of privilege in a defamation action tended to apply the qualified privilege that started in *Garland* and was affirmed in *Branzburg*.

For example, in *Carey v. Hume*,¹³⁵ the Court of Appeals for the District of Columbia stated that “it appears to us that *Branzburg*, in language if not in holding, left intact, insofar as civil litigation is concerned, the approach

127. *Riley*, 612 F.2d at 715.

128. *Id.* at 716.

129. *Id.*

130. See, e.g., *United States v. Smith*, 135 F.3d 963 (5th Cir. 1998); *In re Grand Jury Proceedings*, 5 F.3d 397 (9th Cir. 1993); *In re Grand Jury Empaneled Feb. 5, 1999*, 99 F. Supp. 2d 496 (D.N.J. 2000).

131. See, e.g., *Lee v. Dep’t of Justice*, 428 F.3d 299, 301 (D.C. Cir. 2005) (Tatel, J., dissenting) (“In this case, the panel never balanced the public and private interests. . . . [T]he panel’s arid two-factor test allows the exigencies of even the most trivial litigation to trump core First[-]Amendment values . . .”).

132. 259 F.2d 545 (2d Cir. 1958) (involving actress Judy Garland, who sought to have a CBS journalist name his sources about who called her overweight).

133. Goodale, *supra* note 59, at 737.

134. *Id.* at 738.

135. 492 F.2d 631 (D.C. Cir. 1974) (involving litigant who sought the identity of a source who claimed lawyers for United Mine Workers took records from the UMW’s president’s office).

taken in *Garland*.¹³⁶ The court applied the balancing test from *Garland* and concluded that the information requested went to the heart of the matter.¹³⁷ But, even while rejecting the privilege, the court made sure that the journalist's interests would be protected in further decisions, stating as follows: "The courts must always be alert to the possibilities of limiting impingements upon press freedom to the minimum; and[,] one way of doing so is to make compelled disclosure by a journalist a last resort after pursuit of other opportunities has failed"¹³⁸

Courts were also careful to prevent a plaintiff from suing for libel in an effort to find confidential sources. In *Cervantes v. Time, Inc.*,¹³⁹ the Eighth Circuit held that "there must be a substantial state interest present before the court will require the disclosure of a newsman's source."¹⁴⁰ If there is no probability of the plaintiff's success in the action, no disclosure is required.¹⁴¹ This case has also been used to find a common law reporter's privilege.¹⁴² However, even though courts apply a qualified privilege, it usually ends up being a hollow victory for the media as courts often require the disclosure of information in defamation actions because they conclude that the identity of the source goes to the heart of the claim.

As of 2002, most federal circuits had installed a strong, common law qualified reporter's privilege. The First Circuit applies the balancing test, but has found fewer First Amendment interests in cases without confidentiality.¹⁴³ The Second Circuit provides a strong privilege for confidential information¹⁴⁴ and a somewhat weaker privilege when the information sought is nonconfidential.¹⁴⁵ The Third Circuit requires a qualified privilege, but the civil litigant seeking the information must show a much stronger case than criminal litigants.¹⁴⁶ As recently as 2000, the Fourth Circuit had reaffirmed a strong qualified privilege in civil cases.¹⁴⁷ The Fifth Circuit uses the *Garland* balancing test in civil cases for both confidential and nonconfidential cases.¹⁴⁸ The Sixth,¹⁴⁹ Seventh,¹⁵⁰ and Eighth¹⁵¹ Circuits have less case law in

136. *Id.* at 636.

137. *Id.* at 636-37.

138. *Id.* at 639.

139. 464 F.2d 986 (8th Cir. 1972).

140. Goodale, *supra* note 59, at 740 (citing *Cervantes*, 464 F.2d 986).

141. *Id.* (citing *Cervantes*, 464 F.2d 986).

142. See generally *Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979).

143. See *Cusumano v. Microsoft Corp.*, 162 F.3d 708 (1st Cir. 1998).

144. See *United States v. Burke*, 700 F.2d 70 (2d Cir. 1983).

145. *Gonzales v. Nat'l Broad. Co.*, 194 F.3d 29, 36 (2d Cir. 1999).

146. See *Parson v. Watson*, 778 F. Supp. 214 (D. Del. 1991).

147. *Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 282 (4th Cir. 2000).

148. See *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980).

149. See *NLRB v. Midland Daily News*, 151 F.3d 472 (6th Cir. 1998).

150. See *Warnell v. Ford Motor Co.*, 183 F.R.D. 624 (N.D. Ill. 1998).

this area, but the cases they have decided support the qualified privilege. The Ninth Circuit follows *Farr* in civil and criminal cases but has found that the privilege should defeat the litigant's interest in disclosure.¹⁵² The Tenth Circuit still follows *Silkwood's* balancing test. In the Eleventh Circuit, the courts have found that the reporter's interest in having confidential sources often outweighs a litigant's interest in the information.¹⁵³ And, finally, the District of Columbia Circuit found that in an "ordinary case," the privilege should prevail.¹⁵⁴ Generally, the legal consensus after *Branzburg* has established a qualified privilege.

Many decisions in the wake of *Branzburg* have proven more favorable toward the press as lower courts strive to reconcile that decision's holding with their own inclination to afford a measure of First Amendment protection for the media. The result has been the development of a flexible 'qualified' privilege in which courts apply varying degrees of protection depending on the factual context in which a dispute arises.¹⁵⁵

D. Department of Justice Guidelines

The interpretations of *Branzburg* favorable toward the media were not the only reasons that subpoenas and jailings of journalists declined so steadily after reaching its heights in the late 1960s. Responding to criticism about the large number of journalists being compelled to testify in criminal cases, the Department of Justice instituted guidelines for when and how a Justice Department agent could subpoena a journalist. Perhaps more than anything, these guidelines helped stem the tide of journalists testifying.

Issued on August 10, 1970, the "Guidelines for Subpoenas to the News Media"¹⁵⁶ provided guidance for issuing subpoenas to journalists. In October 1973, Attorney General Elliot Richardson turned the guidelines into formal regulations.¹⁵⁷ They have been amended a few times since then, and they now require "reasonable attempts" to obtain the information from alternate sources,¹⁵⁸ and they require the attorneys general to negotiate with the media.¹⁵⁹ No subpoena will be issued without the "express authorization" of the

151. See *Cont'l Cablevision, Inc. v. Storer Broad. Co.*, 583 F. Supp. 427 (E.D. Mo. 1984).

152. See *Shoen v. Shoen*, 48 F.3d 412, 416 (9th Cir. 1995).

153. See *Kidwell v. McCutcheon*, 962 F. Supp. 1477 (S.D. Fla. 1996).

154. See *Zerilli v. Smith*, 656 F.2d 705, 711-12 (D.C. Cir. 1981).

155. Osborn, *supra* note 47, at 67.

156. 28 C.F.R. § 50.10 (2006).

157. Policy Regarding Issuance of Subpoenas to and Interrogation, Indictment, or Arrest of Members of the News Media, 38 Fed. Reg. 29,588, 29,589 (Oct. 26, 1973) (codified at 28 C.F.R. § 50.10).

158. 28 C.F.R. § 50.10(b) (2006).

159. *Id.* § 50.10(c).

Attorney General.¹⁶⁰ In addition, when making the request to the Attorney General, the government attorneys must show that the information sought is "essential" to both civil and criminal cases¹⁶¹ and is as limited as possible.¹⁶²

Limited by these guidelines, attorneys for the Department of Justice began to cut back on the subpoenas issued to journalists. On March 1, 1973, the Department of Justice issued a memo detailing the effects of the guidelines.¹⁶³ It found only two situations between August 1970 and March 1973 in which "negotiations with the newsman were unsuccessful[,] and a division of the Department, believing that the information was essential to a successful investigation, forwarded its request for a subpoena to the Attorney General."¹⁶⁴ In both cases, the subpoena request was authorized.¹⁶⁵ However, there were "seven other situations in which the Department determined that conditions set forth in the Guidelines were not satisfied and that subpoenas should not be requested."¹⁶⁶

Officially, the Department of Justice was proud of the guidelines. During the mid-1970s, many Justice Department spokesmen made comments about the importance of the guidelines in fixing tension between the media and government. For example, in 1973, John Hushen, the director of public information for the Department of Justice, told the Detroit Press Club the following:

The key to resolving the problem was to . . . agree that the Attorney General personally had to authorize a subpoena to a reporter, not some Assistant [United States] Attorney out in the country who was blithely unaware of the impact he was having nationally by issuing a subpoena for a reporter's notes or negatives. Almost overnight, a problem [that] had been creating extreme friction between the news media and the Federal Government disappeared. Our guidelines have been so successful, in fact, that we have encouraged state governments to consider them as a model.¹⁶⁷

Richardson, then Attorney General, also spoke of the positive results gained from the guidelines in an August 1973 speech before the House of Delegates American Bar Association. He stated as follows:

160. *Id.* § 50.10(e).

161. *Id.* § 50.10(f)(1)-(2).

162. *Id.* § 50.10(f)(6).

163. Memorandum Re: Department of Justice Requests for Subpoenas to Newsman Since the Issuance of the Attorney General's Guidelines in August 1970, at 3 (Mar. 1, 1973).

164. *Id.*

165. *Id.*

166. *Id.*

167. John W. Hushen, Remarks Before the Detroit Chapter of Sigma Delta Chi at the Detroit Press Club (Oct. 4, 1973).

Reporters have a primary responsibility to the public, just as we do. This responsibility can lead them into controversial situations. But[,] the procedural power of the Department should never be used—not even by indirection or innuendo—in a way that could weaken the exercise of First[-]Amendment rights . . . [The guidelines] have worked so well that only [thirteen] subpoenas have been issued[,] and only two of those were contested. These guidelines have been viewed as a model for the nation.¹⁶⁸

During his confirmation hearings, Edward Levi, who replaced Richardson as Attorney General, also stated his strong support for the guidelines:

I would think that one would be very cautious before permitting the calling of the newspaper person before a Grand Jury to divulge sources. It would have to mean that there was a pressing need for it, that there was no other way of finding out important information with respect to a really important criminal matter, and I would think that presumptively one would be against it . . . So[,] I am more content, frankly or otherwise[,] to feel that it is not an absolute privilege, but it is certainly, presumptively a privilege, and therefore one would be very careful before abusing the limited right to call newspaper men or women before the Grand Jury.¹⁶⁹

While the public face of the Department of Justice overwhelmingly supported the guidelines, local United States attorneys often seemed to have a much narrower view of their importance. Away from the public eye in Washington, the guidelines remained guidelines, and would have little to no effect if the attorneys issuing the subpoenas did not want to follow them. In fact, to allow the guidelines to become law would, according to one attorney general, “prove catastrophic.”¹⁷⁰ In other words, while the higher office of the Attorney General maintains that the guidelines are vitally important, the United States Attorneys have the ability to ignore the guidelines as they deem necessary.

Although the guidelines did work to stem the tide of subpoenas, they certainly did not turn out to be the silver bullet to solve this issue, as their supporters claimed them to be. Failure to follow the guidelines is grounds for “administrative reprimand” or “appropriate action,” and they “are not intended to create or recognize any legally enforceable right in any per-

168. Elliot L. Richardson, Address Before the House of Delegates, American Bar Association (Aug. 8, 1973).

169. *Nomination of Edward Hirsch Levi to Be Attorney General: Hearings Before the Senate Comm. on the Judiciary*, 93d Cong. (1975) (statement of Levi).

170. Brief of Appellee at 26, *In re Grand Jury Proceeding of Will Lewis*, 501 F.2d 418 (9th Cir. 410) (No. 74-2170).

son.”¹⁷¹ In fact, the Department of Justice opposed any codification—as in a federal shield law—of its guidelines after first introducing them.¹⁷²

This feeling has not changed since the 1970s. Testifying in 2005 before the Senate Judiciary Committee for the Department of Justice, United States Attorney for the Southern District of Texas, Chuck Rosenberg, specifically stated the department’s opposition to turning the guidelines into law.¹⁷³ He said the department had a “fundamental objection to the principle of a reporter’s privilege as an exception to every citizen’s duty to give testimony in a federal criminal proceeding.”¹⁷⁴ In addition, he testified that codifying the guidelines would harm national security because it “imposes inflexible, mandatory standards in lieu of existing *voluntary* guidelines that can be adapted to changing circumstances.”¹⁷⁵

Without the support of the Department of Justice, passing a federal shield law with an absolute privilege will be impossible, and even passing a qualified privilege will remain difficult. What remains is for media lawyers to continue to fight for the qualified privilege, which developed in grand jury, civil, and criminal cases immediately after *Branzburg*.

IV. BRANZBURG TODAY

A. The Perfect Storm: A Return to the Nixon Era Privilege

1. McKevitt v. Pallasch¹⁷⁶

Three years ago, the perfect storm that devastated the federal reporter’s privilege started gathering. Three newspaper reporters in Chicago were working on a book about terrorism in Ireland.¹⁷⁷ One of their sources was a FBI informant who had been called as a witness in Ireland in a case against an alleged terrorist.¹⁷⁸ The interview with the informant had been taped.¹⁷⁹ Defense counsel in Ireland wanted the tape because they thought it might contain information that could impeach the informant on the witness

171. 28 C.F.R. § 50.10(n) (2006).

172. Jeffrey S. Nestler, *The Underprivileged Profession: The Case for Supreme Court Recognition of the Journalist’s Privilege*, 154 U. PA. L. REV. 201, 233 (“And, despite the Guidelines, the Justice Department does not support the protection of journalists.”).

173. Casey Murray, *Sparring over a Shield Law*, NEWS MEDIA & THE LAW, Fall 2005, at 15.

174. *Id.*

175. *Id.* (emphasis added).

176. 339 F.3d 530 (7th Cir. 2003).

177. *Id.* at 531.

178. *Id.*

179. *Id.*

stand.¹⁸⁰ The Irish court went to a United States district court in Chicago for a subpoena ordering the reporters to turn over their tape.¹⁸¹

The reporters resisted but lost. They asked the Court of Appeals for the Seventh Circuit for a stay, but it was denied.¹⁸² The reporters turned the tape over to the FBI, which redacted the tape before sending it to Ireland.¹⁸³ The reporters thought the case had ended with little “damage” done to the law of the reporter’s privilege.¹⁸⁴ But, Judge Richard Posner of the Seventh Circuit issued an opinion anyway.¹⁸⁵ He had no briefs before him and had heard no arguments,¹⁸⁶ but Posner issued an opinion that essentially said courts that use *Branzburg* to fashion a reporter’s privilege “may be skating on thin ice.”¹⁸⁷

Posner is an unusually influential judge, and the rest of the federal judiciary has lined up behind him to deny reporter’s privilege cases for the last three years.¹⁸⁸ Any suggestion that a First Amendment argument has been developing over the past thirty years in the federal courts has been collapsing.

2. *Post 9/11 Secrecy*

All the while, the perfect storm continued to pick up velocity. In the post-9/11 world, the number of secrets kept by the federal government has soared. For example, the number of documents classified as secret since 9/11 has more than doubled over the last five years.¹⁸⁹ In 2004, the federal government classified 15.6 million documents, almost double the 8.6 million new documents classified as recently as 2001.¹⁹⁰ And, in 2004, federal agencies spent a record \$148 creating and storing new secrets for each one dollar spent declassifying old secrets.¹⁹¹ Overall, the government spent \$7.2

180. *Id.*

181. *Id.*

182. *McKevitt*, 339 F.3d at 531.

183. Wendy Tannenbaum, *Forfeited Interview Tapes Screened by FBI*, NEWS MEDIA & THE LAW, Summer 2003, at 47.

184. *Id.*

185. *Id.*

186. *McKevitt*, 339 F.3d at 531.

187. *Id.* at 532–33.

188. *See, e.g., In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141 (D.C. Cir. 2006); *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 1000 (D.C. Cir. 2005); *In re Special Proceedings*, 373 F.3d 37, 45 (1st Cir. 2001); *People v. Combest*, 828 N.E.2d 583, 587 (N.Y. 2005).

189. *Secrecy Report Card 2005: Quantitative Indicators of Secrecy in the Federal Government*, available at <http://www.openthegovernment.org/otg/SRC2005.pdf> (last visited May 7, 2006) [hereinafter *Secrecy Report Card 2005*].

190. *Id.*

191. *Id.*

billion in 2004, stamping 15.6 million documents “top secret,” “secret,” or “confidential.”¹⁹² In the same year, the number of pages declassified declined for the fourth straight year to 28.4 million.¹⁹³ In 2001, 100 million pages were declassified—down from the record 204 million pages declassified in 1997.¹⁹⁴

Requests for information under the Freedom of Information Act have quadrupled over the last six years to more than four million in 2004, far outpacing the government’s resources to handle those requests.¹⁹⁵ Nearly two-thirds of the 7,045 federal advisory committee meetings last year were closed to the public,¹⁹⁶ undermining the thrust of the law¹⁹⁷ that created the committees over thirty years ago to provide open scientific and technical advice to the government.

The Foreign Intelligence Surveillance Court approved 1,754 requests from law enforcement officials in 2004 to conduct surveillance on foreign nationals within the United States, almost double the number it issued four years earlier.¹⁹⁸ The secret court approved all of the requests for warrants, according to the report.¹⁹⁹ No one argues that all information held by the federal government should be released to the public. But, a lot of information that can be used by terrorists to do harm can also be used by citizens to make their communities safer and healthier. Because of this obsession with secrecy, long-time Washington correspondents report that high-level administration sources have dried up. No one is “off message.”²⁰⁰

The result is that right now there are more federal subpoenas pending than at any time since the 1970s. In fact, at one point in October 2004, there were more than twenty-one subpoenas pending in the federal courts seeking the identities of confidential sources.²⁰¹ This perfect storm has led the privilege to where it is today—right back where it was when President Nixon was in office.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Secrecy Report Card 2005*, *supra* note 189.

196. *Id.*

197. Federal Advisory Committee Act § 2, 5 U.S.C. app. § 2 (2006).

198. Rebecca Carr, *New Report Shows Government Secrecy Growing Fast*, COX NEWS SERVICES (Sept. 4, 2005), available at http://www.coxwashington.com/news/content/reporters/stories/BC_SECRETY_ADV04_COX.html (last visited May 7, 2006).

199. *Secrecy Report Card 2005*, *supra* note 189, at 6.

200. Rachel Smolkin, *Under Fire*, AM. JOURNALISM REV., Feb./Mar. 2005, available at <http://www.ajr.org/Article.asp?id=3810> (last visited May 7, 2006).

201. Grant Penrod, *A Problem of Interpretation: DOJ Guidelines for Subpoenaing Reporters Are Useful, but No Substitute for a Federal Shield Law*, NEWS MEDIA & THE LAW, Fall 2004, at 4, 6–7 (Subpoena Gallery sidebar).

Amidst this perfect storm, the debate over the reporter's privilege continues to rage. Beginning with the well-publicized saga of *New York Times* reporter Judith Miller,²⁰² and continuing on to controversial articles based on confidential sources that exposed the misdeeds of the current administration with regard to secret prisons²⁰³ and secret surveillance,²⁰⁴ the debate over a reporter's privilege is as hot as it ever was in the 1960s and 1970s. This atmosphere—in which some respected conservative commentators have seriously called for the jailing of reporters for writing stories²⁰⁵ or for charging reporters with treason under the Espionage Act²⁰⁶—may be helping to bring about an end to any judicial respect afforded to a federal reporter's privilege developed under the First Amendment or through federal common law. This current argument may weaken the work done by the media in the years immediately following *Branzburg*.

Up until 2003 and the *McKevitt* decision, most courts accepted the qualified federal privilege that *Branzburg* provided for journalists. But, Judge Posner's comment that courts relying on the case for a reporter's privilege "may be skating on thin ice"²⁰⁷ drastically changed the formulations. Since then, the media has lost much of the ground it gained since *Branzburg*.

B. Cleaning up After the Storm: How Courts Today Deal with the Reporter's Privilege

Most significantly, a three-judge panel from the District of Columbia Court of Appeals could not agree on whether any kind of privilege exists for a grand-jury situation. In the well-publicized case *In re Miller*,²⁰⁸ one federal judge found a privilege existed, one felt the question did not need to be answered, and one found that nothing had changed since *Branzburg* and that

202. Van Natta, *supra* note 16.

203. Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1.

204. James Risen & Eric Lichtblau, *Bush Lets United States Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

205. Bennett: Pulitzer Winners Risen, Lichtblau, Priest 'Worthy of Jail,' EDITOR & PUBLISHER, Apr. 18, 2006, available at http://www.editorandpublisher.com/eandp/news/article_display.jsp?vnu_content_id=1002345921 (last visited May 7, 2006).

206. Gabriel Schoenfeld, *Has the New York Times Violated the Espionage Act*, COMMENTARY MAG., Mar. 2006, available at http://www.commentarymagazine.com/article.asp?aid=12103025_1#2foot (last visited May 7, 2006).

207. *McKevitt v. Pallasch*, 339 F.3d 530, 532–33 (7th Cir. 2003).

208. 397 F.3d 964 (D.C. Cir. 2005); see also Van Natta, *supra* note 16 (for more information).

there should be no reporter's privilege.²⁰⁹ The media tried to explain the massive change in case law since *Branzburg* was decided, stating as follows: "There is now an overwhelming and almost total consensus in this country that a reporter's privilege exists and must be protected."²¹⁰ However, the prosecutor seeking the information argued that "there is no constitutional or common law reporter's privilege to resist compliance with a grand jury subpoena."²¹¹

District Judge David B. Sentelle, in his concurring opinion, agreed with the government in finding that no significant changes in the law had occurred since *Branzburg*.²¹² He found it "indisputable that the High Court rejected a common law privilege in the same breath as its rejection of such a privilege based on the First Amendment."²¹³ Although no other judge in the panel agreed with that part of his ruling, the fact that a federal judge is now finding no privilege at all is telling regarding the current state of the privilege.

In addition, the Supreme Court refused to hear the case, lending credence to the idea that it supports the limiting of the privilege in grand jury situations. But, the real story is that an American journalist spent eighty-five days in prison because she talked to a source and did not want to break her promise to keep his identity secret. The story, of course, will not end there. Miller's source, I. Lewis "Scooter" Libby, the former chief of staff of Vice President Dick Cheney, was indicted on charges of perjury, obstruction of justice, and lying to the FBI.²¹⁴ His defense appears to rely upon the testimony of journalists, which will inevitably lead to another round of arguments over the federal reporter's privilege.²¹⁵

As the *Miller* and *Libby* cases show, the privilege could be losing its effectiveness for grand jury and criminal testimony. But, even more concerning is that it is even being weakened in its strongest area, civil cases. In another case before the Court of Appeals for the District of Columbia Circuit,

209. See generally *In re Miller*, 397 F.3d 964 (Judge David B. Sentelle found no privilege, Judge David S. Tatel found a privilege existed, and Judge Karen L. Henderson would not have reached the question.).

210. Brief of Appellant at 33, *In re Grand Jury Subpoena*, Judith Miller, 397 F.3d 964 (D.C. Cir. 2005) (Nos. 04-3138 to 04-3140).

211. *Id.* at 34.

212. *In re Grand Jury Subpoena*, Judith Miller, 397 F.3d 964, 978 (D.C. Cir. 2005) (Sentelle, J., concurring).

213. *Id.* at 977.

214. David Stout, *Libby Resigns His Post: Rove's Fate Uncertain*, N.Y. TIMES, Oct. 28, 2005, at A1.

215. Neil A. Lewis, *Lawyers in Leak Case Outline Libby's Defense*, N.Y. TIMES, Feb. 1, 2006, at A20.

Lee v. Department of Justice,²¹⁶ the party seeking the information had overcome the privilege and was entitled to discovery.²¹⁷ Although it applied the qualified privilege, the court did not weigh the need for disclosure against the First Amendment values at stake.²¹⁸ Instead, it concluded that because the plaintiff had a case that appeared to need journalists to tell who provided information, the privilege had been overcome.²¹⁹ An *amicus* brief explained this holding as follows: “[In] a highly regulated world, a privilege that can be defeated by an allegation of some illegality—and colorable allegation are all that is needed, because decision on press subpoenas will typically be made before the plaintiff’s case is tested on summary judgment—is tantamount to no privilege at all.”²²⁰

Judge Tatel’s dissent, which would have brought the case to the District of Columbia Circuit en banc, recognized this problem.²²¹ Nonetheless, the full court dismissed those concerns, and the Supreme Court did not grant certiorari—in effect subscribing to this notion.²²²

The First Circuit has also stepped back from accepting a qualified privilege. In a case involving a television reporter who refused to disclose his source of a leaked FBI videotape, the court concluded that *Branzburg* “flatly rejected any notion of a general-purpose reporter’s privilege for confidential sources, whether by virtue of the First Amendment or of a newly hewn common law privilege.”²²³ The case also called *Farr* an “elderly” case limiting *Branzburg* to grand juries—implying that idea was out-of-date.²²⁴ It then positively quoted *McKevitt*.²²⁵ The court concluded that, if there was a privilege, the government had overcome it.²²⁶ But, in a greater sense, it showcased another step backward from the strides made by media lawyers following *Branzburg*.

McKevitt has also altered the privilege law in the Seventh Circuit. If the reporter’s information is not confidential, the courts have refused to apply

216. 413 F.3d 53 (D.C. Cir. 2005) (involving a Privacy Act action brought by nuclear scientist whose identity was leaked by government agents to reporters with regard to an alleged selling of nuclear secrets to the Chinese government).

217. *See id.* at 61.

218. *See generally id.*

219. *See id.* at 60.

220. Brief for ABC, Inc. as Amici Curiae, *Lee v. Dep’t of Justice*, 413 F.3d 53 (D.C. Cir. 2005) (No. 04-5301).

221. *See Lee v. Dep’t of Justice*, 428 F.3d 299, 305 (D.C. Cir. 2005).

222. *Drogin v. Lee*, 126 S. Ct. 2351 (2006).

223. *In re Special Proceedings*, 373 F.3d 37, 44 (1st Cir. 2004) (involving television reporter who refused to name the source of an FBI tape he aired showing a local government official taking a bribe).

224. *Id.* at 44–45.

225. *Id.* at 45.

226. *Id.* at 47.

any privilege and require that only the government make the same showing it would make for any subpoena.²²⁷

All of this has caused a dramatic spike in federal subpoenas. The Department of Justice has recently subpoenaed at least seven reporters in high-profile cases,²²⁸ and in 2006 it subpoenaed two reporters from the *San Francisco Chronicle* over their articles and book about a baseball player's alleged steroid use.²²⁹ Clearly, the country has reached another breaking point for the idea of the reporter's privilege.

V. CONCLUSION

Even amidst this dark era for the privilege, encouraging signs have emerged. The lack of a strong privilege has not prevented some journalists from doing exceptional investigative work. Priest,²³⁰ Lichtblau, and Risen²³¹ have shown that investigative reporting can still take place. But, there remains the question of the stories that are not written because sources worry that the journalists will not be able to protect them.

Fortunately for sources, journalists are beginning to do a much better job coming together and explaining the need for a privilege. Unlike the 1970s when media organizations fought among themselves, they have begun to speak with one voice. During the 109th Congress, the United States Senate and House of Representatives introduced reporter's shield laws providing varying degrees of privilege in all situations that would not have been enough for most media organizations thirty years ago.²³² Journalists today, however, have realized the changing atmosphere and the importance of getting some protection for journalists.²³³

227. See *supra* note 107 and accompanying text.

228. Murray, *supra* note 173, at 14.

229. Bob Egelko, *The BALCO Case: More Pressure on Reporters to Name Sources*, SAN FRANCISCO CHRONICLE, May 7, 2006, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2006/05/07/MNGELIN29E1.DTL> (last visited May 8, 2006).

230. See *supra* note 73 and accompanying text.

231. See *supra* note 74 and accompanying text.

232. H.R. 3323, 109th Cong. (1st Sess. 2005); S. 2831, 109th Cong. (2d Sess. 2006).

233. Jack Nelson, *A Limited Shield Law for Reporters Is Better than None*, SALT LAKE TRIBUNE, June 30, 2006, available at http://www.sltrib.com/opinion/ci_4000842 (last visited Dec. 4, 2006).