

THE LAW OF THE CIRCUITS:
THE SCOPE OF THE THIRD-PARTY JOURNALIST'S
FIRST AMENDMENT PRIVILEGE
IN FEDERAL CIVIL PROCEEDINGS

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HONORS SCHOLARS SEMINAR, 2006-07

INTRODUCTION

In *Branzburg v. Hayes*, 408 U.S. 665 (1972), the Supreme Court held in a five to four decision that a journalist does not have a First Amendment privilege to refuse to appear before a grand jury. The Court offered both a concurrence and two dissents which have been interpreted to suggest broader implications of the majority holding as well as alternate applications. Since *Branzburg*, the federal circuits have struggled with applying its holdings to proceedings outside of *Branzburg's* factual context. Most prominently, the circuits have been faced with determining the scope of a journalist's First Amendment privilege (if any) and *Branzburg's* reach in criminal trials, defamation cases where the journalist is a party to the suit, and in civil cases where the journalist has been subpoenaed as a non-party. While many circuits have adopted a multi-factor balancing test suggested in Justice Stewart's *Branzburg* dissent to determine the scope of a journalist's First Amendment privilege outside of grand jury proceedings, others have read *Branzburg* narrowly, rejecting the opinion as not controlling beyond its context.

Most recently the Seventh Circuit questioned the existence of a "reporter's privilege" to withhold information at all, favoring the general requirement that any subpoena be "reasonable under the circumstances," while the Sixth Circuit has suggested that to read a conditional press privilege into *Branzburg* is to substitute the dissent for the majority.

This note examines the post-*Branzburg* circuit divides on the question of a First Amendment privilege for journalists, focusing on its application to civil cases where the journalist has been subpoenaed as a non-party and asserts the privilege to protect confidential information. Part I of this note discusses the arguments before the Supreme Court in *Branzburg*, the disagreements within the Court's opinions on a journalist's privilege, and briefly reviews relevant Supreme Court decisions in the nearly four decades since. Part II reviews the circuit divides post-*Branzburg*, the primary precedents relied on by the circuits in formulating their approaches to a journalist's First Amendment privilege, and discusses how these doctrines have been applied in federal civil suits. Part III argues that under the Supreme Court's First Amendment doctrines and by the policy underlying many of our statutory and common law privileges, the answer to the First Amendment privilege question should be dramatically different depending on the procedural context and the parties' roles in the proceedings.

Because this note focuses specifically on a non-party journalist's First Amendment privilege to withhold confidential information in a civil suit, it does not attempt to cover the worthy questions of who is a journalist and what is confidential information. There are a number of competing definitions of "journalist" within federal case law; generally, the most inclusive definition is that a "journalist" is someone who

has gathered information with the intent to disseminate it to the public¹, the narrower definitions are more likely to limit it someone who is engaged in the practice for their livelihood or who is affiliated with a major media organization. “Confidential” information at its broadest is information for which there has been a promise made of nondisclosure. This note also isolates and focuses exclusively on the question of a First Amendment privilege in federal courts. In diversity cases there may be state shield laws applicable under the rules of decision and the Federal Rules of Evidence.² In federal question cases, some federal courts may also find a non-constitutional privilege rooted in federal common law,³ thus permitted under Federal Rule of Evidence 501’s allowance for privileges “governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.”⁴

¹ Some tests are more stringent. *See, e.g.*, *Titan Sports, Inc. v. Turner Broad. Sys. (In re Madden)*, 151 F.3d 125, 130 (3d Cir. 1998) (“the person claiming privilege must be engaged in the process of ‘investigative reporting’ or ‘news gathering.’”). Others less so. *See, e.g.*, *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 714 (1st Cir. 1998) (extending the privilege to academic researchers because concerns for chilling effects on academic research and on journalists were equally valid). Compare the definition from the most recent Congressional proposal:

the term ‘journalist’ means a person who, for financial gain or livelihood, is engaged in gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing news or information as a salaried employee of or independent contractor for a newspaper, news journal, news agency, book publisher, press association, wire service, radio or television station, network, magazine, Internet news service, or other professional medium or agency which has as one of its regular functions the processing and researching of news or information intended for dissemination to the public.

Free Flow of Information Act, S. 2831, 109th Cong. § 3(3) (2006).

² *See, e.g.*, *McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003) (finding Illinois state statutory privilege inapplicable in a federal question case) (citing *Fed. R. Evid. 501*; *Patterson v. Caterpillar, Inc.*, 70 F.3d 503, 506 (7th Cir. 1995)).

³ There is more than one meaning to this term. As used here it means judicial rules created from reliance on other court’s opinions and not springing from statutory or constitutional interpretation.

I. *BRANZBURG* AND ITS EVOLUTION

In *Branzburg v. Hayes*, decided in 1972, four cases were consolidated on certiorari to the Supreme Court.⁵ Two of the cases involved a journalist's stories on marijuana use in Kentucky. After the stories were published, the journalist was ordered to appear before two different grand juries. He sought protection of identities and information related to those stories, arguing that disclosure would damage his effectiveness as a reporter.⁶ The third case involved a journalist's observations inside a Black Panther headquarters in Massachusetts. The Black Panthers allowed the journalist to enter the building on the condition that he agree not to disclose anything he witnessed unless there was a police raid, in which case he was only allowed to report on the raid.⁷ Although the journalist did not write a story, he was later summoned to appear before a grand jury. The journalist appeared, but refused to answer questions about what he had observed inside the headquarters. The fourth case also involved a journalist's relationship with the Black Panthers and a criminal investigation of the group's activities. The journalist in this latter case refused to appear before the grand jury at all, maintaining that giving secret testimony would drive "a wedge of distrust" between himself and the Panthers.⁸ At issue in all four cases was whether requiring reporters to testify before federal or state grand juries abridges the First Amendment's guarantee of freedom of speech and freedom of the press.⁹

⁴ Fed. R. Evid. 501.

⁵ 408 U.S. 665, 667-79 (1972).

⁶ *Id.* at 670.

⁷ *In re Pappas*, 358 Mass. 604, 605 (Mass. 1971).

⁸ 408 U.S. at 676.

⁹ *Id.* at 667.

Before the Supreme Court, the journalists argued that requiring them to reveal confidential information would burden freedoms guaranteed by the First Amendment. If they were forced to testify before a grand jury, they argued, their sources would be less likely to divulge confidential information and the resulting deterrence would “burden the free flow of information protected by the First Amendment.”¹⁰ They argued for a qualified First Amendment privilege for journalists, maintaining they should not be forced to appear or testify unless it was shown that: (1) they possessed information relevant to a crime the grand jury was investigating; (2) the information was unavailable from other sources; and (3) there was a compelling interest in the information.¹¹

The *Branzburg* majority¹² rejected these arguments, finding any burden on newsgathering to be both “uncertain” and insufficient to outweigh the public interest in criminal law enforcement.¹³ The Court found that all citizens have a duty to testify before a grand jury; journalists are not exempt, nor is a special showing required to compel their testimony. The Court found the preliminary showings advocated by the journalists to be an *ad hoc* approach inconsistent with a grand jury’s function as well as presenting “practical and conceptual difficulties of a high order.”¹⁴ Among the administrative difficulties of such balancing would be determining who qualified for the privilege, since the First Amendment was a guarantee for the “lonely pamphleteer” as well as the

¹⁰ *Id.* at 680.

¹¹ *Id.* at 680-81.

¹² Although the opinion has at times mistakenly been characterized as a plurality opinion by both courts and commentators, *Branzburg* was decided by a majority. See *United States v. King*, 194 F.R.D. 569, 576 n.7 (D. Va. 2000) (pointing out that a justice who concurs in the deciding opinion but also writes a separate concurring opinion is still counted as part of the majority). For examples of characterization of the opinion as a plurality, see *United States v. Smith*, 135 F.3d 963, 969 (5th Cir. 1998); Douglas H. Frazer, *Criminal Law: The Newsperson's Privilege in Grand Jury Proceedings: An Argument for Uniform Recognition and Application*, 75 J. CRIM. L. & CRIMINOLOGY 413, 418 (1984).

¹³ 408 U.S. at 690-91.

¹⁴ *Id.* at 703-04.

organized press, and determining the relative value of enforcing different criminal laws. In an often quoted passage, the Court found itself “unwilling to embark the judiciary on a long and difficult journey to such an uncertain destination.”¹⁵

Justice Powell, concurring in the opinion,¹⁶ wrote separately to emphasize that journalists were not without remedy if subpoenaed by a grand jury for illegitimate purposes. A journalist was required to appear, but could move to quash a subpoena which was overreaching or made in bad faith. He suggested that the facts of such cases—where the press moves to quash an illegitimate subpoena—should be judged on a case-by-case basis, balancing the claim to privilege against the obligation to testify.¹⁷

Justices Douglas and Stewart both wrote dissenting opinions. Douglas argued for an absolute First Amendment protection for a reporter called to appear before a grand jury—unless the reporter himself was involved in a crime.¹⁸ Douglas predicted that any balancing test would prove so pliable it would be “twisted and relaxed” to such an extent that it would provide “virtually no protection at all.”¹⁹

Justice Stewart, joined by Brennan and Marshall, reasoned that the constitutional right to publish and the constitutional right to gather news, both grounded in the First Amendment, lead to a journalist’s right to protect a confidential source from disclosure to a grand jury.²⁰ He argued that the majority’s decision would lead to such uncertainty about the scope of a grand jury’s powers, and whether confidential information would

¹⁵ *Id.*

¹⁶ It is because Powell concurred in the opinion, not just in the judgment, that *Branzburg* was decided by a majority. *See supra* n. 12.

¹⁷ *Id.* at 709-10 (Powell, J., concurring). Although Powell’s concurrence is sometimes cited to support an argument for case-by-case balancing in all First Amendment claims of media privilege, he states his test to be applicable to cases where the media asserts “improper or prejudicial questioning,” such as in absence of a “legitimate need of law enforcement.”

¹⁸ *Id.* at 712-13 (Douglas, J., dissenting).

¹⁹ *Id.* at 720 (Douglas, J., dissenting).

eventually have to be divulged, that the media would exercise self-censorship and informants would be deterred from going to the media. Instead, Stewart advocated that the government must show both a compelling interest and a substantial relationship between the investigation and the information it sought. His route to this showing was a three-factor test requiring the government to show its need to obtain the information: (1) is “clearly relevant” to a “specific probable violation of law”; (2) cannot be met by a “means less destructive of First Amendment rights”; and (3) is supported by a compelling interest.²¹ Thus, for Justice Stewart, the First Amendment mandated a strict level of scrutiny for the government’s argument to force disclosure.

Interpreted narrowly, the *Branzburg* majority held that a journalist has no First Amendment privilege, either absolute or qualified, to withhold confidential information from a grand jury. “We are asked to create [a testimonial privilege rooted in the Constitution] by interpreting the First Amendment to grant newsman a testimonial privilege that other citizens do not enjoy. This we decline to do.”²² While most circuits have followed *Branzburg* in the grand jury context, they have differed widely in attempting to apply *Branzburg*’s rule to other types of proceedings. As remarked by one court: “the variety of interpretations of *Branzburg* is astonishing.”²³ This “variety” led another court to state that case law on whether a journalist has a First Amendment privilege from compelled disclosure “is at best ambiguous.”²⁴

The primary approaches used by the circuits to determine the scope of journalist’s First Amendment privilege to withhold information reflects the disagreement amongst the

²⁰ *Id.* at 727-28 (Stewart, J., dissenting).

²¹ *Id.* at 741-43 (Stewart, J., dissenting).

²² *Id.* at 689.

²³ *United States v. Markiewicz*, 732 F. Supp. 316, 318 (N.D.N.Y. 1990).

Branzburg justices. Strains of the *Branzburg* majority opinion, concurrence, and dissents can all be found in the circuit tests now employed to determine the scope of a journalist's privilege. The multi-factor test advocated by the journalists in *Branzburg* and rejected by the Court's majority as both unsupported in common law²⁵ and too difficult to administer within the context of grand jury investigations, is strikingly similar to the test now used by a majority of circuits to balance the interests in criminal and civil proceedings.

In addition to reflecting the Supreme Court's disagreement, the circuit divides also reflect the discord existing before *Branzburg* was decided. In the cases before the Court in *Branzburg* were the opposing constitutional interpretations of the Ninth Circuit,²⁶ which had found a qualified journalist's privilege, and the decisions of the Supreme Judicial Court of Massachusetts²⁷ and the Kentucky Court of Appeals,²⁸ both of whom had rejected the Ninth Circuit's reasoning. In *Caldwell v. United States*, the Ninth Circuit sought to balance the needs of the press against criminal justice concerns and held that where it was shown "the public's First Amendment right to be informed" would be jeopardized by requiring a journalist to testify, the government was obligated to demonstrate a "compelling need for the witness's presence."²⁹ Justice Stewart relied on both the district and appellate level *Caldwell* opinions in his *Branzburg* dissent.³⁰

²⁴ *Baker v. F & F Inv.*, 470 F.2d 778, 781 (2d Cir. 1972).

²⁵ 408 U.S. at 698: "the common law recognized no such privilege." *See also id.* at 685, 693. Although the distinction may be blurred, it is important to distinguish common law from constitutional common law. One means to draw the line is that generally common law may be overruled by Congress whereas constitutional common law may not. *See* discussion in Adam J. Kwiatkowski, *How Not to Create a Reporter's Privilege: New York Times Co. v. Gonzales and the Frustration of Congressional Intent*, 4 GEO. J.L. & PUB. POL'Y 265 (2005).

²⁶ *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970), *rev'd* 408 U.S. 665 (1972).

²⁷ *In re Pappas*, 358 Mass. 604, 610 (Mass. 1971).

²⁸ *Branzburg v. Meigs*, 503 S.W.2d 748 (Ky. 1971).

²⁹ 434 F.2d at 1089.

³⁰ *See, e.g.*, 408 U.S. at 729 n.5, 732 (Stewart, J., dissenting).

By contrast, the *Branzburg* majority's reasoning can be found in the high court decisions of Massachusetts and Kentucky.³¹ Like the *Branzburg* majority, the Supreme Judicial Court of Massachusetts found any burden on newsgathering to be "indirect, theoretical, and uncertain,"³² holding that the journalist's duty to testify before a grand jury was the same as "every citizen." To hold otherwise, the court maintained, would be to engage in judicial legislation. The Kentucky Appellate Court similarly found the claimed burden on newsgathering to be a "speculation . . . so tenuous that it does not . . . present an issue of abridgement of the freedom of the press."³³

Although these cases presented an opportunity for the Supreme Court to clarify whether the First Amendment affords journalists any testimonial privilege, *Branzburg* limited itself to a narrow review and resolved the scope of a First Amendment press privilege in only one specific context. Moreover, with its five to four decision and continual miscasting as a plurality opinion, even cases falling squarely within *Branzburg*'s facts have been able to mount non-frivolous challenges to its rule. Outside of *Branzburg*'s limited facts, the scope of a journalist's First Amendment privilege, if any, remained largely unresolved. After *Branzburg*, the core disagreements remained.³⁴

In the thirty-five years since *Branzburg*, the Supreme Court has not granted certiorari to clarify the application of its holding to other procedural contexts. In fact, the

³¹ In re Pappas, 358 Mass. 604 (Mass. 1971).

³² *Id.* at 612. The Massachusetts court, however, did speak much more broadly than the *Branzburg* majority, finding "no constitutional newsman's privilege, either qualified or absolute, to refuse to appear and testify before a court or grand jury" (emphasis added).

³³ *Branzburg v. Meigs*, 503 S.W.2d 748, 751 (Ky. 1971).

³⁴ *But see* 408 U.S. at 685 (characterizing the claim of a reporter's privilege in a civil suit as "almost uniformly rejected . . . although a few recent cases . . . have recognized and given effect to some form of a constitutional newsman's privilege") (citations omitted).

Court has repeatedly denied petitions for certiorari.³⁵ The *Branzburg* majority stated that if there was to be a federal journalist's privilege in grand jury proceedings, it would have to be a statutory privilege based on a legislative determination: "Congress has freedom to determine whether [it] is necessary and desirable."³⁶ The Court's decision also left state legislatures "free, within First Amendment limits, to fashion their own standards...." Many states responded by enacting state shield laws protecting journalists' confidential sources, or interpreted their own constitutions to grant a qualified privilege. In contrast, while several federal shield laws have found support on Capitol Hill, Congress has not enacted a federal privilege.³⁷

This is not to say that the Court has not spoken on related issues. In a number of cases since *Branzburg* the Court has addressed whether the freedom of the press guaranteed by the First Amendment grants the media legal privileges greater than the average citizen, and has usually found, in accord with the *Branzburg* majority, that it does not.³⁸ In *Zurcher v. Stanford Daily*, the Court found no special privilege for the media from police searches, even where the media was uninvolved in the crime being investigated, reasoning that warrant procedures afforded adequate protection against any

³⁵ See, e.g., *Miller v. Transamerican Press*, 621 F.2d 721 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981); *In re Petroleum Prods. Antitrust Litig.*, 680 F.2d 5, 7 (2d Cir.), *cert. denied*, 459 U.S. 909 (1982); *United States v. Burke*, 700 F.2d 70 (2d Cir. 1983), *cert. denied*, 464 U.S. 816 (1983); *LaRouche v. National Broadcasting Corp.*, 780 F.2d 1134 (4th Cir. 1986), *cert. denied*, 479 U.S. 818 (1986).

³⁶ 408 U.S. at 706.

³⁷ There have been bills drafted, argued, and failing at least since the 1970s. Many of the proposals have raised Fifth Amendment concerns in purporting to grant media privileges of confidentiality in criminal proceedings without consideration of potential conflicts with the rights of criminal defendants. Most recently, the "Free Flow of Information Act of 2006" was introduced in the Senate and the "Free Flow of Information Act of 2005" was introduced in the House. Free Flow of Information Act of 2006, S. 2831, 109th Cong. (2006) (committee hearings held); Free Flow of Information Act of 2005, H.R. 3323, 109th Cong. (2005) (referred to committee). For discussion of recent proposals, see Randall D. Eliason, *Leakers, Bloggers, and Fourth Estate Inmates: The Misguided Pursuit of a Reporter's Privilege*, 24 *Cardozo Arts & Ent. L.J.* 385, 446 n.165 (2006) (concluding that the future of federal legislation to enact a reporter's privilege is uncertain).

chilling effects on First Amendment freedoms.³⁹ Similarly, in *Cohen v. Cowles Media*,⁴⁰ the Court held that the First Amendment gave the media no immunity from liability for breach of a promise of confidentiality: “Generally applicable laws do not offend the First Amendment simply because their enforcement has incidental effects on its ability to gather and report the news.”⁴¹ The “constitutionally insignificant” and consequential burdens on the First Amendment did not justify a privilege from an otherwise enforceable state law.⁴² Additionally, in *University of Pennsylvania v. EEOC*,⁴³ the Court used reasoning similar to *Branzburg*’s to reject a university’s claim to a First Amendment privilege for peer tenure review materials, finding the argument of a “chilling effect” to be too speculative and remote to raise First Amendment concerns.

In *Branzburg*, the majority reasoned that the First Amendment did not “invalidate every incidental burdening of the press” and relied on its prior holdings that the press has no constitutional right of access to information and proceedings not available to the general public.⁴⁴ Since *Branzburg*, the Court has further held that the First Amendment does not grant the press special rights of access to government proceedings. Instead it framed a test focused on the type of proceeding at issue. In the two-prong *Richmond* test, a press right of access to proceedings is found only where there is a larger public right of

³⁸ Erwin Chemerinski, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1125-27 (2d ed. 2002).

³⁹ 436 U.S. 547 (1978).

⁴⁰ 501 U.S. 663 (1991).

⁴¹ *Id.* at 669. The suit was for breach of contract; the Minnesota Supreme Court recharacterized the claim as promissory estoppel under Minnesota law.

⁴² 501 U.S. at 772.

⁴³ 493 U.S. 182, 199-200 (1990).

⁴⁴ 408 U.S. at 682.

access based on a tradition of openness and the public's value to the function of the proceedings.⁴⁵

However, the Court has also found occasion to discover First Amendment protections in cases litigated by the media and to limit laws of general applicability because of concerns over chilling effects on free speech. In a string of cases beginning with *New York Times v. Sullivan*, the Court reframed the common law of defamation to create standards more favorable to speech generally, and, arguably, more favorable to the press specifically.⁴⁶ Reasoning that fear of tort liability could unduly burden speech essential to self-government and robust debate by causing self-censorship, the *Times v. Sullivan* Court adopted a categorical rule that public officials must prove actual malice to recover for defamation.⁴⁷ The new rule, the Court stated, reflected a "privilege for the citizen-critic of government." This privilege, the Court held, "is required by the First and Fourteenth Amendments."⁴⁸ The *Branzburg* Court, writing eight years later, distinguished *Times v. Sullivan* on the ground that in the case of a grand jury subpoena, because the reporter was not subpoenaed as a party, "no penalty, civil or criminal, related to the content of published material is at issue."⁴⁹

In *Hustler Magazine, Inc. v. Falwell*,⁵⁰ the Court extended the *Times v. Sullivan* standard to the tort of intentional infliction of emotional distress. Again applying a categorical balancing, the Court reasoned that although the state may have an important

⁴⁵ This two-prong test was framed by a plurality in *Richmond Newspapers, Inc. v. Va.*, 448 U.S. 555, 589 (1980) and subsequently adopted in *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 603 (1982). *See also* *Press-Enter. Co. v. Super. Ct.*, 478 U.S. 1 (1986), *Press-Enter. Co. v. Super. Ct.*, 464 U.S. 501, 505 (1984).

⁴⁶ 376 U.S. 254 (1964); *Curtis Publishing v. Butts*, 338 U.S. 130 (1967) (extending the *New York Times* standard to public figures as well as public officials); *Gertz v. Welch*, 418 U.S. 323 (1973) (creating higher burdens of proof where defamation suits involve private figures but issue of public concern).

⁴⁷ 376 U.S. at 269-79.

⁴⁸ *Id.* at 282-83.

⁴⁹ 408 U.S. at 681.

interest in protecting its citizens from emotional distress, this interest is insufficient to override First Amendment concerns and the need to give “‘breathing space’ to the freedoms protected by the First Amendment.”⁵¹ Justice Blackmun, dissenting in *Cohen v. Cowles* and joined by Justices Marshall and Souter, argued that *Hustler* showed that even a law of general applicability (such as IIED) could be subject to limitation in its effect on the media because of the First Amendment.⁵² Justice Souter, also writing a dissent in *Cohen*, agreed that there “is nothing talismanic about neutral laws of general applicability.”⁵³

The Court also had occasion to decide another issue of an asserted claim to a constitutional testimonial privilege shortly after *Branzburg* was decided. In *U.S. v. Nixon* the Court addressed whether the President could assert an absolute privilege from subpoena served on him as a third party based on his implied powers under Article II.⁵⁴ A special prosecutor sought materials for prosecution of cover-ups after Watergate, and in connection with these criminal trials, subpoenaed tapes of White House conversations. The Court rejected the claim to an absolute executive privilege, reasoning that such a privilege would plainly conflict with the constitutional duty of the courts in criminal prosecutions, but held that there is a qualified privilege for the Executive based in part on the Constitution’s provision for separation of powers.⁵⁵ It then weighed the President’s asserted general interest in confidentiality against competing concerns of criminal justice, such as a defendant’s Sixth Amendment right to the production of all evidence at trial and

⁵⁰ 485 U.S. 46 (1988).

⁵¹ *Id.* at 56.

⁵² 501 U.S. at 675.

⁵³ *Id.* at 677 (quoting *Employment Div. v. Smith*, 494 U.S. 872, 901 (1990) (O’Connor, J., concurring in judgment)).

⁵⁴ *United States v. Nixon*, 418 U.S. 683 (1974).

⁵⁵ *Id.* at 707.

the Fifth Amendment's due process guarantee, and concluded, much as it did in *Branzburg*, that the specific and "fundamental demands of due process of law in the fair administration of criminal justice" outweighed the claimed privilege.⁵⁶

Few circuit opinions have read these later Supreme Court precedent dealing with the issue of whether the First Amendment grants the media privileges from laws of general applicability as bearing on the question of a journalist's First Amendment privilege. Fewer have connected the Court's emphasis on the interests at stake in criminal proceedings to trump claimed privileges. With *Branzburg*'s refusal to "make the law"⁵⁷ and "create" a privilege in grand jury proceedings, Congress' responding silence, and the Court's refusal to revisit the issue of a journalist's testimonial privilege, the circuits have forged their own rules governing the scope of a journalist's privilege in their jurisdiction. As a result, each of the *Branzburg* justice's separate predictions of administrative difficulties, pliable balancing tests, and chilling uncertainty have proven themselves uniquely profound.

At the same time, the media has become increasingly nationalized through changing technologies, increased syndication, and trends towards centralized media ownership, leaving a single outlet subject to the laws of a variety of federal jurisdictions. A journalist wishing to make a promise of confidentiality cannot know whether publication of a story will cause a litigant to subpoena her for that confidential information in a jurisdiction where it will be compelled. The issue is far from rhetorical: nearly half of all media outlets responding to a survey by the Reporters Committee for

⁵⁶ *Id.* at 713.

⁵⁷ 408 U.S. at 706.

the Freedom of the Press answered that they were subpoenaed.⁵⁸ As stated by one commentator: “The current state of affairs leaves sources, journalists . . . and lower federal courts without any clear guidance.”⁵⁹ However, the uncertainty goes beyond the journalist and the courts, touching the rights of anyone seeking justice in a federal court: a litigant may not know whether a subpoena for information critical to her claim or defense may be enforced.

II. CIRCUIT POSITIONS POST-*BRANZBURG*:

A. *Circuits Finding a Qualified First Amendment Privilege*

Though not explicit in the circuit opinions, at issue is whether government compulsion (through judicially enforced disclosure, backed up by threat of criminal or civil penalty) of a journalist’s confidential information burdens the social interests protected by the freedom of speech and press sufficiently to trigger First Amendment analysis. Some circuits find that it is a significant burden and thus employ a higher level of scrutiny of the compelled disclosure through a variety of balancing tests. Others (as *Branzburg* did in the grand jury context) find that the burden on the press is not significant enough to trigger First Amendment analysis, and thus does not require a different level of scrutiny for the governmental action of enforcing a subpoena or compelling testimony. When determining whether to use First Amendment analysis, few circuits have drawn distinct lines between the dramatically different interests and burdens in the types of proceedings at issue and the parties’ roles within them. Rather, when these differences have been considered, it has often been on an *ad hoc* basis through balancing of the elements making up the factors within a particular test.

⁵⁸ The Reporters Committee for Freedom of the Press, *The Reporter's Privilege Compendium* (2002), <http://www.rcfp.org/cgi-bin/privilege/item.cgi?i=intro>

A majority of circuits have held that there is, in fact, a qualified First Amendment privilege for a journalist. Common rationales for the privilege expressed in civil suits are concerns for deterring informants from going to the press, as well as creating a chilling effect on newsgathering by subjected journalists to subpoenas, or affecting editorial decisions for the same reason. These courts seek to reflect the public interest in encouraging whistle-blowing and, more generally, to promote the free flow of information in public discourse to support the First Amendment's larger rationales of effective self-government and an open marketplace of ideas. Additionally, there are practical concerns of burdening journalists with responding to subpoenas because of the time, resources, and legal fees involved,⁶⁰ concerns of governmental intrusion into the editorial process, subverting journalists' goals by forcing them to serve as investigators for the judicial system or private parties⁶¹ and creating a perverse incentive for the media to destroy materials rather than face a compelled disclosure.⁶² Courts also express concern that even where whistle-blowers are still willing to give journalists information, they will only do so anonymously, thus making it impossible or impractical for journalists to rely on their source when publishing.⁶³

These circuits have found a variety of ways to embrace or distinguish *Branzburg*. Some courts rely on the *Branzburg* majority for support,⁶⁴ some rely on the concurrence;

⁵⁹ Geoffrey R. Stone, *Why We Need a Federal Reporter's Privilege*, 34 HOFSTRA L. REV. 39, 58 (2005).

⁶⁰ *Shoen v. Shoen*, 5 F.3d 1289, 1295 (9th Cir. 1993).

⁶¹ *United States v. La Rouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988).

⁶² *Shoen v. Shoen*, 5 F.3d 1289, 1295 (9th Cir. 1993).

⁶³ *See, e.g., Miller v. Transamerican Press*, 621 F.2d 721, 725 (Former 5th Cir. 1980).

⁶⁴ *See Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993): "the journalist's privilege recognized in *Branzburg* was a 'partial First Amendment shield' that protects journalists against compelled disclosure in all judicial proceedings, civil and criminal alike" (citing *Farr v. Pitchess*, 522 F.2d 464, 467 (9th Cir. 1975)).

others find a federal common law privilege controlling⁶⁵—despite *Branzburg*'s rejection of it.⁶⁶ Some limit *Branzburg*'s rejection of a First Amendment privilege to its facts, finding it inapplicable outside the grand jury context. Those relying on Powell's *Branzburg* concurrence read his opinion broadly, citing it for the proposition that all claims of privilege should be balanced,⁶⁷ or judged on a case-by-case basis, though a close reading yields his intent to limit his analysis to those cases where a subpoena is issued in bad faith.⁶⁸ Although Stewart's *Branzburg* dissent is only rarely cited, the predominate circuit approaches actually demonstrate his call for a multi-factor balancing test.

1. The Multi-Factor Balancing Tests

All circuits finding a First Amendment privilege employ some type of balancing test. Most commonly used is a multi-factor balancing test, though it is phrased as both a three- and a four-factor test and there are some essential differences amongst the circuits that use it. Additionally, many of the circuits conflict even amongst themselves as to whether the test is employed.⁶⁹ Generally, the tests create a burden on the party who wishes to compel confidential information by requiring that the subpoenaing party make a showing that the information is: (1) highly material and relevant, (2) necessary or critical to the maintenance of the suit, and (3) not obtainable from other available sources.

⁶⁵ See, e.g., *Fox v. Twp. of Jackson*, 64 Fed. Appx. 338, 340 (3d Cir. 2003).

⁶⁶ 408 U.S. at 685.

⁶⁷ See, e.g., *La Rouche v. National Broadcasting Co.*, 780 F.2d 1134, 1139 (4th Cir. 1986): "In determining whether the journalist's privilege will protect the source in a given situation, it is necessary for the district court to balance the interests involved." (citing *Branzburg*, 408 U.S. at 710 (Powell, J., concurring)).

⁶⁸ 408 U.S. at 709-10 (Powell, J., concurring). Powell states his test to be applicable only to cases where the media asserts "improper or prejudicial questioning," such as in absence of a "legitimate need of law enforcement."

⁶⁹ Compare for example *In re Shain*, 978 F.2d 850, 853 (4th Cir. 1992) (rejecting the use of a balancing test in absence of a showing of bad faith or harassment and relying on *Branzburg* for support) and *Church of Scientology Int'l v. Daniels*, 992 F.2d 1329 (4th Cir. 1993) (applying the multi-factor balancing test).

A formulation of these factors appears in the Second,⁷⁰ Third,⁷¹ Fourth,⁷² Fifth,⁷³ Ninth,⁷⁴ Tenth,⁷⁵ and Eleventh Circuits.⁷⁶

Most circuits finding a qualified First Amendment privilege and employing a variant of this multi-factor balancing test have followed their own precedents on the issue, the precedents of other federal circuits, or both. Often these precedents have evolved from a different factual and procedural context. Possibly the most frequently cited test is “the *Miller* test” which emerged from a defamation case in the Fifth Circuit and is used to determine the privilege in criminal and civil cases alike, although the Fifth Circuit itself rejected it for criminal cases, at least where they involve non-confidential information.⁷⁷ *Miller v. Transamerican Press* was a libel suit by an officer of the Teamsters Union against the owners of *Overdrive*, a magazine for truckers, and its editor and publisher.⁷⁸ *Overdrive* published an article alleging that Miller had misappropriated money from the Union’s pension fund. In his libel suit, Miller sought disclosure of the identity of an informant the magazine relied on for the article.

⁷⁰ *Gonzales v. NBC*, 186 F.3d 102, 106 (2d Cir. 1998); *In re Petroleum Products Antitrust Litigation*, 680 F.2d 5, 7 (2d Cir. 1982).

⁷¹ *Fox v. Twp. of Jackson*, 64 Fed. Appx. 338, 340 (3d Cir. 2003); *Titan Sports, Inc. v. Turner Broad. Sys.* (In re Madden), 151 F.3d 125, 128 (3d Cir. 1998); *Riley v. City of Chester*, 612 F.2d 708, 715 (3d Cir. 1979).

⁷² *Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 287 (4th Cir. 2000); *Church of Scientology Int'l v. Daniels*, 992 F.2d 1329, 1335 (4th Cir. 1993); *but see United States v. King*, 194 F.R. D. 569, 584-85 (D. Va. 2000) (finding that the Fourth Circuit’s *LaRouche* balancing test only comes into play in “the circumstance in which both confidentiality of the source material and vexation or harassment is demonstrated by the record.”).

⁷³ *In re Selcraig*, 705 F.2d 789, 799 (5th Cir. 1983) (applying the Fifth Circuit’s *Miller* test, which was authored in the context of a libel case, to a civil proceeding where the journalist asserting the privilege was not a party); *see also Miller v. Transamerican Press*, 621 F.2d 721 (5th Cir.), *cert. denied*, 450 U.S. 1041 (1981).

⁷⁴ *Mark v. Shoen*, 48 F.3d 412, 416 (9th Cir. 1995).

⁷⁵ *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 438 (10th Cir. 1977).

⁷⁶ *Price v. Time, Inc.*, 416 F.3d 1327 (11th Cir. 2005).

⁷⁷ *United States v. Smith*, 135 F.3d 963, 969 (5th Cir. 1998).

⁷⁸ *Miller v. Transamerican Press*, 621 F.2d 721 (Former 5th Cir. 1980).

The nature of the suit was central to the court’s analysis of the First Amendment privilege accorded to *Overdrive*. It considered whether Miller was a public figure because under *New York Times v. Sullivan*, Miller would have had to show actual malice—that *Overdrive* printed the story with knowledge that it was false or with reckless disregard for its truth—thus making testimony about, and by, the informant critical to Miller’s defamation claim. The court also relied on the suit being a libel case to distinguish it from *Branzburg*: *Branzburg* dealt with subpoenas of the press where the journalist was not herself involved in the case, whereas in a libel suit, “the plaintiff and the press are on opposite sides.”⁷⁹ After distinguishing Supreme Court precedent which would point to the absence of a First Amendment privilege, the Fifth Circuit found “the other circuits have followed a three part test first outlined in *Garland*.”⁸⁰

Garland v. Torres,⁸¹ a pre-*Branzburg* decision from the Second Circuit, was also a defamation case. In its opinion, the Second Circuit opined at length about the citizen’s duty to testify and found “[t]he privilege not to disclose relevant evidence” is “an extraordinary exception to the general duty to testify. Even those few situations to which the law has long accorded this privilege have been seriously questioned.”⁸² It then affirmed its district court’s finding of criminal contempt for the journalist who refused to disclose her source. Nonetheless, *Garland* evolved into somewhat dubious support for the proposition that there is a qualified First Amendment privilege for journalists, to be ascertained case-by-case through a multi-factor balancing test. Relying on *Garland*, after

⁷⁹ Id. at 725.

⁸⁰ Id. at 726.

⁸¹ 259 F.2d 545.

⁸² 259 F.2d at 550 (citation omitted).

a rehearing, the Fifth Circuit clarified its *Miller* decision to a requirement that a plaintiff show:

substantial evidence that the challenged statement was published and is both factually untrue and defamatory; that reasonable efforts to discover the information from alternative sources have been made and that no other reasonable source is available; and that knowledge of the identity of the informant is necessary to proper preparation and presentation of the case.⁸³

This became “the *Miller* test,” a modified version of which has been used in many circuits, including the Fifth Circuit even where the reporter is not a party to the suit,⁸⁴ the Eleventh Circuit⁸⁵ as a general test, and in the Fourth Circuit as “the *LaRouche* test,” adapted from *Miller*, which the Fourth Circuit has used to determine “whether the journalist's privilege will protect the source in a given situation.”⁸⁶ Whether a bizarre example of the principle of the game of Operator—where a statement passes from person to person sometimes becoming distorted, rarely surviving intact—or an example of a constitutional evolution of the light of reason and experience as interpreted and applied by federal courts, *Garland*'s finding that the privilege to withhold evidence is an extraordinary exception to the general duty to testify leapfrogged to support for a test the Ninth Circuit recently cited as designed to “ensure that compelled disclosure is the exception, not the rule.”⁸⁷ *Miller*'s reliance on the law of libel and the parties' roles in the proceedings seems to have disappeared somewhere along the way.

⁸³ *Miller v. Transamerican Press*, 628 F.2d 932 (Former 5th Cir. 1980).

⁸⁴ *In re Selcraig*, 705 F.2d 789, 792 (5th Cir. 1983) (applying *Miller* to libel cases generally).

⁸⁵ *See, e.g., United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986) (criminal case):

The standard governing the exercise of reporter's privilege as articulated in [Miller] provides that information may only be compelled from a reporter claiming privilege if the party requesting the information can show that it is highly relevant, necessary to the proper presentation of the case, and unavailable from other sources.

⁸⁶ *La Rouche v. National Broadcasting Co.*, 780 F.2d 1134, 1139 (4th Cir. 1986).

2. The Multi-Factor Balancing Test Applied in Civil Suits

Although the circuits using the multi-factor test have some uniformity in their statements of the factors a litigant must show to overcome a journalist's First Amendment privilege, the results vary widely. In civil suits, the extent to which the litigant's claim hinges on the journalist's information is a unifying theme, but because each application is a fact-intensive inquiry, it is difficult, if not impossible, to predict the resolution of a particular journalist's objection to a particular litigant's desire for particular information prior to the court's analysis.

The Fifth Circuit used its *Miller* test in *In re Selcraig*⁸⁸ to review a contempt decree against Selcraig, a third-party journalist who refused to testify *in camera* about his sources for a story about Trautman, a Dallas school district official. Published in *The Dallas Morning News*, Selcraig's story reported allegations made by a school district employee against Trautman. After a resignation Trautman claimed was induced by fraud, he sued the school district for, *inter alia*, a denial of substantive and procedural due process because it had denied him a hearing to clear his name. Trautman sought to depose Selcraig to obtain the identities of the confidential sources who had given Selcraig the information about the report by the other district employee.⁸⁹ The court's *in camera* order proposed a sequence of questions designed by the trial judge to "prevent disclosure of the identity of the confidential informants until . . . Trautman's need to know their identities

⁸⁷ Mark v. Shoen, 48 F.3d 412, 416 (9th Cir. 1995).

⁸⁸ 705 F.2d 789 (1983).

⁸⁹ Trautman's claim was that the identities were necessary for him to prove malice by the school district, which would have entitled him to punitive damages.

was established.”⁹⁰ When Selcraig attended the hearing but refused to testify according to the order, claiming a First Amendment privilege, the trial court ordered him imprisoned.

The appellate court held the contempt order premature but validated its reasoning.⁹¹ Its decision hinged on whether Trautman had established the second factor of the multi-factor balancing test: that the information he sought was necessary or critical to the maintenance of his claim. “The method of establishing necessity for the confidential information depends on the circumstances of the case in which it is sought, including the issue to which the information is relevant.”⁹² It found Selcraig had a qualified privilege, but the privilege would be overcome if Trautman could put forth the essential elements of his claim. Once Trautman established his *prima facie* case, Selcraig’s issue would become relevant, Trautman would have a necessity to know the identity of Selcraig’s sources, and Trautman’s need would thus be sufficient to overcome Selcraig’s privilege. Critical to the court’s analysis was also its characterization of Selcraig as a “percipient witness to a fact at issue: the identity of the informants.”⁹³

By contrast, the Third Circuit used the multi-factor balancing test to deny access to materials a litigant sought to have compelled. In *Fox v. Township of Jackson*⁹⁴, a township municipal clerk sued the township after his contract was terminated, claiming he had been denied reappointment because the political composition of the appointment committee had changed. A newspaper reported statements of a committeeperson about the failure to appoint which could have been construed to support the clerk’s case. The clerk sought to introduce the story as an admission by the committeeperson and

⁹⁰ In re Selcraig, 705 F.2d 789, 795 (5th Cir. 1983).

⁹¹ He had not established that he had been denied a hearing to which he had a facial entitlement.

⁹² In re Selcraig, 705 F.2d 789, 797 (5th Cir. 1983)

⁹³ *Id.* at 798.

subpoenaed the journalist. The court applied a three-factor test to the subpoena, requiring the litigant to show: “(1) he has made an effort to obtain the information from other sources; (2) the only access to the information is through the journalist and his sources; and (3) the information sought is crucial to the claim.”⁹⁵ Because the committee person himself testified and there was no evidence that the journalist possessed personal knowledge about the reappointment, the appellate court found the clerk had failed to make the requisite showing and the district court had properly quashed the subpoena on the journalist’s motion.

3. Variations of the Multi-Factor Balancing Test

The Extraordinary Circumstances Test

In civil suits the D.C. Circuit has used a slight variation of the multi-factor balancing test. The circuit’s test allows the litigant to overcome a journalist’s qualified privilege, but this is done through a showing of extraordinary circumstances,⁹⁶ which places a weightier presumption in favor of the journalist’s preservation of confidentiality. Where the materiality of needed information might compel its production in circuits using the multi-factor test, the D.C. Circuit has sought something slightly more.

The test was adopted for the third-party journalist in *Zerilli v. Smith*.⁹⁷ *Zerilli* was a suit by Zerilli and Polizzi against the U.S. Attorney General, the FBI, and the Department of Justice. Zerilli and Polizzi had been under electronic surveillance by the federal agencies. *The Detroit News* published a series of articles on organized crime; Zerilli and Polizzi argued the stories were based on information from the transcripts of

⁹⁴ 64 Fed. Appx. 338 (2003).

⁹⁵ *Id.* at 341 (citing *United States v. Criden*, 633 F.2d 346, 358 (3d Cir. 1980)).

⁹⁶ *Lee v. DOJ*, 401 F. Supp. 2d 123, 132 (D.D.C. 2005), *cert. denied*, 126 S. Ct. 2373 (2006).

⁹⁷ 656 F.2d 705 (D.C. Cir. 1981).

their conversations. They brought suit under the Privacy Act and the Fourth Amendment, contending that employees of the Department of Justice leaked transcripts of their recorded conversations to the Detroit News. They deposed the author of the story, Kantor, who refused to reveal his sources. Zerilli and Polizzi moved to compel information and documents from him.⁹⁸

Kantor argued a First Amendment privilege to withhold the confidential information; Zerilli and Polizzi argued that the rights of plaintiffs supersede the qualified First Amendment privilege. The district court reasoned that there must be a “compelling” interest to supersede the First Amendment’s preferred status, which was not present.⁹⁹ The appellate court affirmed, holding that the privilege should be “overridden only in rare circumstances,”¹⁰⁰ as an exceptional case, “in part because confidential sources needed to be able to rely on the promise of confidentiality.”¹⁰¹ It formulated a two-factor test to determine whether the rare circumstance exists: (1) the information sought must be crucial to the plaintiff’s case and (2) the plaintiff must have exhausted every reasonable alternative source of information.¹⁰² It then found that Zerilli and Polizzi had failed to exhaust alternative avenues to the information because they could have deposed employees at the Department of Justice to find out who had leaked the transcripts, despite Zerilli and Polizzi’s argument that to do so would have been time-consuming, costly, and unproductive.

⁹⁸ Zerilli v. Bell, 458 F. Supp. 26, 28 (D.D.C. 1978).

⁹⁹ *Id.* at 29 (citing Baker v. F & F Investment, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973)).

¹⁰⁰ Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981).

¹⁰¹ *Id.*

¹⁰² *Id.* at 713.

Lee v. DOJ illustrates the “rare circumstance” when the compelling interest may be present to overcome the journalist’s privilege in the D.C. Circuit.¹⁰³ In the case underlying *Lee*, Dr. Wen Ho Lee had filed suit against the Department of Energy, the Department of Justice, and the FBI for violating his rights under the Privacy Act. Dr. Lee, a scientist at the Los Alamos National Laboratory, was investigated by the Federal Government on charges of espionage for China. Dr. Lee was imprisoned in solitary confinement for nine months during the investigation yet, under a negotiated agreement, was eventually charged with one count of mishandling computer files. In his suit against the federal agencies, Dr. Lee alleged the agencies gave his private information to various media outlets in an effort to cover up their own security lapses.¹⁰⁴ Reporters who published stories about Lee refused to disclose the source of their information and the district court held them in civil contempt.

The appellate court held that the first requirement of “information crucial to the plaintiff’s case” was met because it was clear that the information sought went to the heart of Dr. Lee’s case against the federal government. In order to determine whether Lee had met the second prong of exhausting all reasonable alternative sources to the information, the Court analyzed relevant precedent, determining that there were case-by-case determinations to be made.¹⁰⁵ Because Lee had used “all five principle tactical devices” available under the Federal Rules of Civil Procedure and had met with a “pattern of evasion and stonewalling” from the federal agencies, the appellate court affirmed the district court’s finding that he had exhausted all reasonable alternatives—thus demonstrating extraordinary circumstances compelling disclosure. After the

¹⁰³ 413 F.3d 53 (2005).

¹⁰⁴ *Lee v. DOJ*, 401 F. Supp. 2d 123, 123-27 (D.D.C. 2005).

appellate court decision, the case settled for a payment of \$1.6 million to Lee—with the federal government contributing \$895,000, and the media outlets, though not even parties to the suit, contributing \$750,000.¹⁰⁶

The Burden-Shifting Test

Although there is language in many circuits using the multi-factor balancing tests which implies a burden shifting between the party seeking disclosure and the journalist,¹⁰⁷ the First Circuit has explicitly employed one. The test, used in both criminal and civil cases, seeks to balance the potential harm to the First Amendment's need for the free flow of information against the asserted need for the information.¹⁰⁸ To do so it employs “special procedures” with a “heightened sensitivity” to First Amendment concerns.¹⁰⁹ Because the balancing “demands sensitivity, invites flexibility, and defies formula”¹¹⁰ the application varies by the factual circumstances of each case.

Under the burden shifting formula, the plaintiff must first establish her need for the information and the information's relevance to her case. Once this need for the information is established, the burden shifts to the party seeking to withhold information, who must establish the basis for nondisclosure. It is then up to the court to “place those factors that relate to the movant's need for the information on one pan of the scales and those that reflect the objector's interest in confidentiality and the potential injury to the free flow of information that disclosure portends on the opposite pan.”¹¹¹

¹⁰⁵ Lee v. DOJ, 367 U.S. App. D.C. 53 (D.C. Cir. 2005).

¹⁰⁶ Randall D. Eliason, *Leakers, Bloggers, and Fourth Estate Inmates: The Misguided Pursuit of a Reporter's Privilege*, 24 CARDOZO ARTS & ENT. L.J. 385, 403 (citing Paul Farhi, *U.S. Media Settle with Wen Ho Lee; News Organizations Pay to Keep Sources Secret*, WASH. POST, June 3, 2006, at A01).

¹⁰⁷ See, e.g., Shoen v. Shoen, 5 F.3d 1289, 1296 (9th Cir. 1993).

¹⁰⁸ Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 596 (1st Cir. 1980).

¹⁰⁹ See *id.* at 598-98.

¹¹⁰ *Id.* at 598.

¹¹¹ *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 716 (1st Cir. 1998).

Cusumano v. Microsoft Corporation illustrates the First Circuit's application of its test.¹¹² In *Cusumano*, Microsoft sought third-party information to aid in its defense against antitrust charges brought by the Department of Justice.¹¹³ Two professors from MIT and Harvard were working on a book about the battle between Netscape and Microsoft for domination of the browser market. As part of their research, the professors interviewed Netscape employees, under the conditions of a nondisclosure agreement and a promise to the employees to allow them to review any quotes attributed to them prior to publication. Microsoft subpoenaed the professors' notes, tape recordings of the interviews, and other materials. After the professors withheld parts of the requested materials they determined were subject to their agreement with Netscape and its employees, the district court denied Microsoft's motion to compel.

On appeal, Microsoft argued that the information was necessary to its defense that its domination of the browser market was due to Netscape's blunders rather than its own anti-competitive practices. It needed the information both for the purpose of impeaching Netscape witnesses as well as to demonstrate Netscape's business miscalculations. The appellate court agreed that Microsoft made its *prima facie* showing of need for the information as well as its relevance. The court then shifted its view to the interests supporting nondisclosure. It found that the type of scholarship at issue depended heavily on industry insiders as well as negotiated confidentiality agreements. To compel the disclosure of the information would "infrigidate the free flow of information to the

¹¹² 162 F.3d 708 (1st Cir. 1998). Some commentators have discussed this case as an example of an "academic researcher's privilege." The court, however, did not make this distinction.

¹¹³ *Id.* at 716.

public, thus denigrating a fundamental First Amendment value.”¹¹⁴ The lower court’s decision to deny compelled production was affirmed.

B. Circuits Rejecting the Privilege

In *Branzburg*, the majority opinion explicitly rejected a reporter’s privilege in grand jury proceedings: “We are asked to . . . interpret[] the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do.”¹¹⁵ Some circuits have read this statement quite literally and broken with their brethren’s reading of a qualified First Amendment privilege for journalists.

A number of valid arguments can be made to reject a journalist’s First Amendment privilege. Support can be found in the *Branzburg* majority opinion and in other Supreme Court precedent finding that the First Amendment creates no special exceptions for the press from laws of general applicability.¹¹⁶ Thus some courts find, as the *Branzburg* Court did in the grand jury context, that the First Amendment creates no exceptions for journalists from the obligation of citizens to testify. Correspondingly, there is an often-cited presumption against the expansion of evidentiary privileges because they obscure the search for truth.¹¹⁷ As stated by the Supreme Court “Whatever their origins, these exceptions to the demand for every man’s evidence are not lightly created nor expansively construed.”¹¹⁸ An additional concern, as it was in *Branzburg*, is the administrative difficulties of finding a privilege for journalists because of inherent problems in determining whom the privilege covers. As we have seen in the context of

¹¹⁴ *Id.* at 717.

¹¹⁵ *Branzburg v. Hayes*, 408 U.S. 665, 690 (1972).

¹¹⁶ See discussion *infra*, nn. 38–45.

¹¹⁷ See, e.g., *Trammel v. United States*, 445 U.S. 40, 50 (1980): “Testimonial exclusionary rules and privileges contravene the fundamental principle that ‘the public . . . has a right to every man’s evidence.’ As such, they must be strictly construed.” (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)).

¹¹⁸ *United States v. Nixon*, 418 U.S. 683, 710 (1974).

circuits finding the journalist's privilege, it has been found to cover the creators of both books and trade publications; issues abound with its potential extension to bloggers and more.¹¹⁹

In *McKevitt v. Pallasch*, a criminal case, the Seventh Circuit addressed the issue of a qualified privilege for journalists as a matter of first impression.¹²⁰ Justice Posner explained why the court refused to stay its district court's order to a group of journalists to turn over tape recordings of interviews made for a biography. McKevitt was facing charges of terrorism in Ireland and sought the recordings for cross-examination of a key prosecution witnesses. The journalists claimed a First Amendment privilege protecting the tapes from disclosure.

Posner reviewed the holdings in *Branzburg* and the "rather surprising[]" in light of *Branzburg*" conclusion of other courts that there is a qualified First Amendment privilege for journalists.¹²¹ He found that the "approaches that these decisions take to the issue of privilege can certainly be questioned."¹²² Confidential materials were not at issue in *McKevitt*, however Posner pointed out that journalists' claim to protect confidential sources did not prompt the Supreme Court to accept the journalists' argument in *Branzburg*, and those courts which had extended protection to non-confidential materials he found to be "skating on thin ice."¹²³ Instead of framing protection in terms of privileges, he maintained, courts should require subpoenas directed to the media to meet

¹¹⁹ See, e.g., *O'Grady v. Superior Court*, 44 Cal. Rptr. 3d 72, 106 (Cal. Ct. App. 2006) (extending a First Amendment privilege to "bloggers": "If their activities and social function differ at all from those of traditional print and broadcast journalists, the distinctions are minute, subtle, and constitutionally immaterial.").

¹²⁰ 339 F. 3d 530 (2003).

¹²¹ *Id.* at 532.

¹²² *Id.*

¹²³ *Id.* at 533.

the requirement of all subpoenas: they should be reasonable under the circumstances.¹²⁴

Citing the Supreme Court's decision in *Cohen v. Cowles*, he stated the panel's view: "We do not see why there need to be special criteria merely because the possessor of the other documents or other evidence sought is a journalist."¹²⁵

The Sixth Circuit has also questioned the privilege found by other circuits, as well as their reading of *Branzburg*.¹²⁶ *In re Grand Jury Proceedings* involved a television reporter, Bradley Stone, who was held in criminal contempt for his refusal to produce video tapes before a grand jury. The tapes were believed to hold information helping to identify the murderer of a state police officer. The footage was of gang members in Detroit; Stone had promised nondisclosure of portions of the tape as a condition of filming and had also reportedly been threatened with bodily harm if he violated the conditions.

Despite the *Branzburg* majority's rejection of a First Amendment privilege in grand jury proceedings, Stone urged the Sixth Circuit to adopt a reading of Powell's concurrence and the *Branzburg* dissents which would support his position. He also relied on the readings of other circuits finding a qualified privilege. The Sixth Circuit rejected Stone's argument because it would be "tantamount" to replacing the *Branzburg* majority's holding with Stewart's dissent.¹²⁷ Although the facts before it were clearly within *Branzburg*'s framework, the court's holding was stated more broadly: "we decline to join some other circuit courts, to the extent that they have . . . adopted the qualified privilege balancing process urged by the three *Branzburg* dissenters and rejected by the

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Storer Communs. Inc. v. Giovan (In re Grand Jury Proceedings)*, 810 F.2d 580 (6th Cir. 1987).

¹²⁷ *Id.* at 584.

majority.”¹²⁸ However, the court also went on to find that even if it had applied the three factor test from Stewart’s dissent, disclosure would have been compelled in this case—a step which some courts have found limits the scope of *In re Grand Jury Proceedings*.

C. Circuits Who have Not Weighed In

Compounding the uncertainty on the appellate level, the Eighth Circuit has stated that the law on a journalist’s privilege has not been determined in its jurisdiction. It cited *Branzburg* for the proposition that a “reporter’s privilege” had been rejected, and in a footnote stated: “Although the Ninth Circuit . . . cited our opinion . . . for support, we believe this question is an open one in this Circuit.”¹²⁹ Its district courts, however, have read this in a variety of ways. The multi-factor balancing test has been followed.¹³⁰ The issue has also been avoided by straddling more than one position: finding an absence of bad faith, working through prongs of the multi-factor balancing test to find that even if the test had been used testimony would have been compelled, and limiting a decision to the specific facts of the case.¹³¹

III. CONTEXT DEPENDENCY

In *Branzburg*, a majority of the Court chose to do a categorical balancing for grand jury proceedings and rejected the call for a higher level of scrutiny. It found that in grand jury proceedings as a whole, and in the cases before it, the public interest in criminal law enforcement outweighed any “consequential, but uncertain”¹³² burden on First Amendment freedoms. The majority’s conclusion was also rooted in its finding that

¹²⁸ *Id.*

¹²⁹ *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, n.8 918 (8th Cir. 1997).

¹³⁰ *See Richardson v. Sugg*, 220 F.R.D. 343, 347 (D. Ark. 2004) (finding that a First Amendment privilege applies to both confidential and non-confidential materials and adopting a three-part balancing test to determine whether the privilege may be overcome).

¹³¹ *United States v. Hively*, 202 F. Supp. 2d 886, 892 (D. Ark. 2002).

¹³² 408 U.S. at 690.

grand jury subpoenas apply only where a journalist is involved in a crime, or possesses information relevant to the commission of a crime; because of this, its holding would not impinge on “the vast bulk of confidential relationships” involving journalists and their sources.¹³³ Moreover, the Court reasoned, grand jury proceedings are usually secret.¹³⁴

As it stands now, the vast bulk of confidential relationships would in fact be impinged. For the purpose of a privilege to be served, the parties “must be able to predict with some degree of certainty whether particular discussions will be protected.”¹³⁵ Because of the non-uniform approaches among the circuits, the journalist with forethought may be as “chilled” outside of the grand jury context as inside it. Even though a majority of federal circuits have found a First Amendment privilege, because the forum is unpredictable, the journalist has no guarantee that the First Amendment will protect her promise of confidentiality, or even guard against disclosure; even within the circuits finding a privilege, she has no predictability of what test would be used and what factors might be considered.¹³⁶ If a disclosure were judicially compelled, she may be liable for the disclosure as a breach.¹³⁷ Should she refuse to disclose, she may face civil or criminal contempt. Because of the uncertainty as well as the liability, her only safe option is to abide by the most restrictive option: that of no privilege—and no promises.¹³⁸

In turn, the uncertainty affects journalists’ reporting, the stories chosen to be told or not

¹³³ *Id.* at 691.

¹³⁴ *Id.* at 694.

¹³⁵ *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981) (discussing attorney-client privilege).

¹³⁶ Perhaps she can make an argument for a court’s discretionary relief under the Federal Rules of Civil Procedure. The *Branzburg* Court did remind lower courts that subpoenas are subject to motions to quash.

¹³⁷ See *Cohen v. Cowles*, 501 U.S. 663, 669 (1991), and discussion *infra*, nn. 39–38. She might also face liability under other common law doctrines. See e.g. Sandra S. Baron, Hilary Lane, David A. Schulz, *Undercover Newsgathering Techniques: Issues and Concerns: Tortious Interference: The Limits of Common Law Liability for Newsgathering*, 4 WM. & MARY BILL OF RTS. J. 1027

told,¹³⁹ the information the public receives, and, thus the constitutional concerns at the heart of the issue: the public's need for a free flow of information and our aspirations for a media which can serve as an effective "watchdog."

As we have seen, in the abstract there are valid arguments—both pragmatic and constitutional—to find a qualified privilege for journalists, as well as to reject one.¹⁴⁰ Fair reasoning and valid policy on both sides of the debate has created conflicting opinions, zigzagging precedent, and a great deal of *ad hoc* application. Through close analysis of *Branzburg* and other Supreme Court precedent, laying out the post-*Branzburg* circuit positions, viewing the dominant tests as they have been applied, and tracing the origins and precedent, we see critical differences which provide a beginning for a less tautological position. At the core of *Branzburg*'s reasoning was its finding that criminal law concerns outweigh First Amendment burdens in the grand jury context. *U.S. v. Nixon* similarly found criminal law concerns to outweigh a constitutional protection for an executive privilege. The two circuits—the Sixth and Seventh—which have rejected the privilege have done so in criminal cases.¹⁴¹ By contrast, the circuits which have adopted a privilege have largely culled their tests from civil cases.

¹³⁸ The unprecedented settlement in *Lee v. DOJ* also raises another option: perhaps the journalist can buy his way out of compelled disclosure. This market-based option, however, does not seem a satisfying resolution to the question of the existence of a constitutional right.

¹³⁹ Jennifer Elrod, *Protecting Journalists from Compelled Disclosure: A Proposal for a Federal Statute*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 115, 126 (2003–04).

¹⁴⁰ There are also a number of arguments both pro and con which can be rejected. For example, one argument against the privilege that doesn't hold water is that preserving confidentiality does not reflect the public interest because a source who needs confidentiality is probably "engaged in prior criminal conduct or [] committing a potential criminal act by disclosing the information to the reporter." 24 *Cardozo Arts & Ent LJ* 385, 426. This argument ignores a variety of social, political, and economic reasons a source might wish to give information anonymously.

¹⁴¹ For the district court treatment of these opinions, compare *Southwell v. Southern Poverty Law Ctr.*, 949 F. Supp. 1303, 1312 (D. Mich. 1996) (stating that its circuit's rejection of a qualified privilege in *In re Grand Jury Proceedings* was "dictum" and adopting its own three-factor test) with *In re DaimlerChrysler AG Sec. Litig.*, 216 F.R.D. 395, 401 (D. Mich. 2003) (finding itself "constrained by Sixth Circuit precedent to find that Respondents are not constitutionally shielded by a First Amendment privilege, qualified or

Because criminal and civil cases call for different sets of interests to be counter-balanced against the journalist's First Amendment claim, federal courts should draw clear and consistent lines distinguishing the privilege, or lack thereof, in civil and criminal suits. Moreover, within civil cases, the First Amendment privilege claim when a journalist is a non-party to the suit calls for a different set of doctrines, interests to be balanced, and policy concerns, than when the journalist is a party claiming the privilege. The question of judicially compelled disclosure of a journalist's confidential information in a federal civil suit where the journalist is not a party to the suit presents a distinct set of First Amendment concerns which weigh heavily, and, more importantly, weigh differently, against the interests in disclosure. When lumping these proceedings and interests together, courts and commentators are blurring important distinctions integral to the constitutional issues at stake.

While many aspects of the *Branzburg* Court's reasoning extend beyond the grand jury context to criminal proceedings generally, civil proceedings present different interests. Absent in civil proceedings is our concern for criminal law enforcement and the criminal defendant's constitutional rights. As in criminal cases, in civil cases there is a weighty interest in the fair administration of justice, due process, and the "search for truth," resulting in the citizens' obligation to testify, all of which must be balanced against concern for the guarantees of the First Amendment. In civil cases, however, First Amendment concerns present a much more compelling counterweight to the interests of a civil litigant than they do to a criminal defendant's constitutional rights or the state's need

otherwise."); *see also* *Solaia Tech. v. Rockwell Automation Inc.*, 2003 U.S. Dist. LEXIS 20196 (D. Ill. 2003) (finding that the *McKevitt* only rejected a privilege for non-confidential materials and that confidential materials were protected by the First Amendment).

to enforce criminal laws.¹⁴² As one court articulated, the “public” goals of protecting First Amendment concerns might be posited in opposition to the “private” litigant’s goals of vindicating her rights.¹⁴³

Civil suits where the media is not a party to the suit also present a different scope of interests and a different range of governing law. Defamation suits present the counterweight of the litigant’s due process rights and rights under the substantive law covering their claim, as well as call upon a distinct line of Supreme Court precedent. In civil suits where the journalist is not a party to the suit, these concerns are noticeably absent. Defamation cases against journalists where journalists assert testimonial privileges often fall under the doctrines and reasoning of the *New York Times* line of cases; case law where a media outlet asserts a right of nondisclosure of information related to its business dealings may fall under the First Amendment’s commercial speech doctrines. Additionally, our notions of a fair administration of justice play out differently where the journalist is not involved in the suit itself. Discovery is by its nature invasive; parties to civil litigation “must accept its travails.”¹⁴⁴ Where the journalist is a party to the suit and the privilege would shield her from liability, the equities weigh more heavily against her arguments for disclosure.¹⁴⁵ But where she has “no dog in [the] fight,” the burden of invasive discovery creates a different range of concerns.¹⁴⁶

Distinguishing clearly between the privilege in civil and criminal proceedings not only follows *Branzburg* and *Nixon*, it also accords with many of our common law and

¹⁴² See, e.g., *United States v. Smith*, 135 F.3d 963, 972 (5th Cir. 1998) (“Because the public has much less of an interest in the outcome of civil litigation . . . the interests of the press may weigh far more heavily. . .”).

¹⁴³ *Baker v. F & F Investment*, 470 F.2d 778 (2d Cir. 1972).

¹⁴⁴ *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 717 (1st Cir. 1998).

¹⁴⁵ *Zerilli v. Smith*, 211 U.S. App. D.C. 116 (D.C. Cir. 1981).

¹⁴⁶ 162 F.3d at 717.

statutory approaches.¹⁴⁷ The Federal Rules of Evidence provide different rules, for example, on character evidence¹⁴⁸ and the admission of sexual behavior or predisposition in rape cases¹⁴⁹ depending on whether it is a civil or criminal proceeding. The rape-shield rules draw a distinction between public concerns in criminal and civil cases by creating a rule of exclusion in criminal cases, with specified exceptions for defense needs and the defendant's constitutional rights, but balancing probative value against potential harms to the parties in civil cases. Similarly, the state secrets privilege takes a different form depending on the proceeding: it may provide absolute protection in civil proceedings against the disclosure of information which has a "reasonable danger" of harming national security,¹⁵⁰ while Congress enacted a series of specific procedures to govern its disclosure in criminal proceedings.¹⁵¹

When considering the question of a journalist's First Amendment privilege, the circuits should draw clear—and consistent—lines between the types of proceedings and the journalist's role in the proceeding. The question of a privilege in civil and criminal cases should be subject to separate analysis. Moreover, defamation cases against the media and civil suits where the journalist is not a party should not be lumped together. By separating these inquiries at the outset we have a cleaner grip on what interests are involved. Although we certainly need flexibility on constitutional questions, John Marshall might remind us that a constitution's "great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be

¹⁴⁷ Other doctrines of privilege, however, do not necessarily draw a clear distinction. As with the journalist's privilege, courts conflict on whether a privilege against disclosing the identity of government informants should undergo the same test in civil and criminal proceedings.

¹⁴⁸ See Fed. R. Evid. 404.

¹⁴⁹ Fed. R. Evid. 412.

¹⁵⁰ See *United States v. Reynolds*, 345 U.S. 1, 11-12 (1953).

¹⁵¹ See the Classified Information Procedures Act, 18 U.S.C. App. 3 §§ 1 et. seq.

deduced from the nature of the objects themselves.”¹⁵² By clearly distinguishing the categorical interests at stake in each type of proceeding, we are better able to designate the important objects to guide the inquiry. This gives us greater means for more categorical balancing, less *ad hoc* rule making, and permits the law to better serve its function of giving us a framework to guide behavior.

¹⁵² *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819).