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Reporters and Their Confidential Sources: How Judith Miller Represents the Continuing Disconnect Between the Courts and the Press

Elizabeth Coenia Sims*

INTRODUCTION

In 2004, Judith Miller, a reporter for the New York Times, spent 85 days in jail for refusing to reveal her confidential source to a federal grand jury investigating the leak of CIA agent Valerie Plame's identity. The case made headlines across the country and renewed the debate over whether the First Amendment provides reporters any protection from government inquiry into their methods of newsgathering. The D.C. Circuit Court of Appeals held that Miller had no First Amendment privilege that would allow her to refuse to identify the government official who leaked to her the fact that Valerie Plame was a CIA agent.

Less known is Miller's involvement in a similar case concerning a news story regarding Islamic charities on which she reported in 2001. In that case, the Second Circuit Court of Appeals allowed Special

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3. See In re Grand Jury Subpoena, Judith Miller, 438 F.3d 1138, 1141 (D.C. Cir. 2006). Under pressure from Special Counsel Patrick Fitzgerald, who was investigating whether the leaks were criminal, several other reporters revealed the identities of sources to whom they had promised confidentiality. At Fitzgerald's request, administration officials signed releases authorizing reporters to reveal any conversations they had with the officials. Miller, however, refused to reveal her source, fearing that the government-obtained releases were coerced. See Miller, supra note 1, at A31.
Counsel Patrick Fitzgerald\(^4\) to subpoena the *New York Times*’ telephone records in order to locate the sources of leaks to Miller and another *Times* reporter concerning impending government raids on Islamic charities suspected of ties to terrorist activities.\(^5\)

The two cases demonstrate a troublesome pattern. Relying on the United States Supreme Court’s decision in *Branzburg v. Hayes*,\(^6\) the D.C. and Second Circuits declined to recognize a First Amendment privilege that would allow reporters to refuse to reveal their confidential sources before a grand jury. This narrow interpretation of Supreme Court precedent erroneously failed to accord Miller and her fellow reporters the level of constitutional protection necessary for the media to fulfill its role as a facilitator of the democratic process. While the reporters’ questionable behavior arguably justifies the Second Circuit’s holding, the D.C. Circuit’s holding failed to account for the important public interests being served by reporting on matters essential to evaluating government—namely, the effectiveness of America’s intelligence and national security efforts. Decisions such as these put the public’s access to information from confidential government sources at risk and, more importantly, hinder the media’s ability to fulfill its constitutional role as a check on government power. The courts should thus adopt a new test for recognizing a reporter’s privilege that better facilitates the media’s constitutionally protected role in the democratic process while recognizing that certain government interests may outweigh a reporter’s First Amendment privilege to maintain confidentiality.

Although there is little consensus regarding the precise contours intended by the Press Clause,\(^7\) the very fact that the Framers referenced

\(^{4}\) This is the same Patrick Fitzgerald who subpoenaed Miller’s testimony in the Valerie Plame leak investigation.

\(^{5}\) See *N.Y. Times Co. v. Gonzales*, 459 F.3d 160 (2d Cir. 2006).

\(^{6}\) *408 U.S. 665* (1972).

\(^{7}\) U.S. CONST. amend I (“Congress shall make no law . . . abridging the freedom of . . . the press . . . .”). American courts have never taken the position that the First Amendment gives the press unfettered freedom. One attorney has described “freedom of the press” as an “evolving concept . . . that is informed by the perception of those who crafted the press clause . . . and by the views of Supreme Court justices who have interpreted that clause” amidst the changing technology of the media. Lee Levine, First Amendment Center, *Press Overview*, http://www.first
the press independently suggests that they at least intended some level of augmented protection outside that given to ordinary citizens by the Speech Clause. What does seem clear is that the Framers intended for the Press Clause to protect an institution that enables citizens to make informed judgments when participating in the democratic process. The Supreme Court has recognized this role of the press, one Justice noting that:

Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to


In fact, the Founding Fathers themselves may not have agreed on the meaning of the Press Clause. As one historian notes:

It is not even certain that the framers themselves knew what they had in mind. Most probably, few clearly understood what they meant by the free press clause. It is even doubtful that those few agreed except in a generalized way, and it is equally doubtful that they represented a consensus. PATRICK M. GARRY, THE AMERICAN VISION OF A FREE PRESS: AN HISTORICAL AND CONSTITUTIONAL REVISIONIST VIEW OF THE PRESS AS A MARKETPLACE OF IDEAS 17 (1990).

8. U.S. CONST. amend I (“Congress shall make no law . . . abridging the freedom of speech . . .”). It should be noted, however, that the Supreme Court has never expressly given the Press Clause any independent significance from the Speech Clause. GARRY, supra note 7, at 3.

9. Thomas Jefferson, for example, argued that the flow of information between the people and the government was vital to the success of the government. Jefferson said that “were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter. But I mean that every man should receive these papers, and be capable of reading them.” MAURICE R. CULLEN, JR., MASS MEDIA & THE FIRST AMENDMENT: AN INTRODUCTION TO THE ISSUES, PROBLEMS, AND PRACTICES 38 (1981).
distant lands to die of foreign fevers and foreign shot and shell.\textsuperscript{10}

Similarly, the Court noted in 1978 that its precedent “emphasize[s] the special and constitutionally recognized role of [the press] in informing and educating the public, offering criticism, and providing a forum for discussion and debate.”\textsuperscript{11} Having thus recognized the constitutional role granted to the press, some precedent, including \textit{Branzburg}, provides support for the idea that Press Clause protections ought to be balanced against competing governmental interests on a case-by-case basis, rather than rejected by a per se rule of inapplicability. In balancing these interests, courts should focus on responsible exercise of journalism that fosters the media’s role in the democratic process. That is, in order to enjoy certain First Amendment protections, the media—as agents of the democratic process—may have certain reciprocal responsibilities. If a journalist acts in accordance with her constitutional role, she should be entitled to a qualified First Amendment privilege against compelled disclosure of her source. Once it applies, this privilege should only be overcome when an asserted governmental interest in locating her source outweighs the public’s interest in unimpeded newsgathering.

This Note examines the way in which courts do and should balance the interests of a free press against other concerns—especially national security—using the two cases involving Judith Miller as relevant examples. Part I reviews the Supreme Court’s decision in \textit{Branzburg} and subsequent lower court cases that have relied on that precedent. Part II discusses the two recent D.C. and Second Circuit cases involving Judith Miller. Part III crafts a different approach to resolving issues when the government subpoenas reporters to reveal their sources, offering practical solutions rooted in First Amendment jurisprudence that would better protect public interests served by the Press Clause. Finally, Part IV applies this new test to the two Judith Miller cases and demonstrates that while the decision in the Valerie Plame leak case may have been wrongly decided, the decision involving


her reporting on Islamic charities appears to have been correct in its result, although the same result can be achieved in a way that gives more value to the First Amendment protections it burdens.

I. BRANZBURG V. HAYES: CONTROLLING PRECEDENT IN SOURCE PROTECTION

In 1972 the Supreme Court addressed for the first (and so far, only) time whether reporters have First Amendment protections regarding their confidential sources. In *Branzburg v. Hayes*, the Court heard the consolidated cases of three reporters subpoenaed by grand juries. Each grand jury was investigating crimes allegedly committed by confidential sources, which prosecutors believed the reporters had witnessed. One reporter, Branzburg, had been subpoenaed regarding two news stories he had written. The first focused on two drug dealers who were making hashish from marijuana, and was accompanied by a picture of their work showing only their hands. Branzburg was subpoenaed by a grand jury to identify the two individuals. The second subpoena sought Branzburg's testimony regarding sales and use of illegal drugs the reporter had allegedly witnessed after spending two weeks investigating a local drug scene by speaking to many drug users and observing some drug use. In the second case, a reporter named Pappas had been allowed entry into a Massachusetts Black Panthers headquarters located in an area barricaded due to civil disorder. The Panthers had only given him access in return for a promise of confidentiality. He was later subpoenaed by a grand jury to testify about what he had witnessed inside the headquarters. In the third case, another reporter named Caldwell was subpoenaed by a federal grand jury

13. Id. at 667-79.
14. Id. at 667-68.
15. Id. at 668.
16. Id. at 669.
17. Id. at 672.
18. Id.
19. Id. at 673.
concerning his interviews with Black Panthers officers and spokespeople in which they had discussed the group's goals and activities.  

Branzburg's and Pappas' motions to quash had been denied by the lower courts, while Caldwell's had been granted insofar as it protected him from identifying his sources by name. He was still required under the lower court's ruling to testify as to what he witnessed, but he did not have to identify his confidential sources. The Supreme Court granted certiorari on all three cases, and the cases were consolidated. Each reporter relied on the freedom of the press under the First Amendment to gather and disseminate news—an activity they argued would be chilled by the resulting hesitance of potential sources to speak to members of the media if reporters were forced to identify their confidential sources to the government.

In a 5-4 decision, the Court held that the First Amendment did not provide reporters a testimonial privilege from appearing before a grand jury. Nor were prosecutors required to make any preliminary showing as to the necessity or relevancy of the reporter's testimony. The Court reached this decision not by focusing on the role of journalism in a democratic society, but rather by framing the issue on the importance of the grand jury to the American judicial system and the duty of all citizens to participate in the criminal justice process. The Court justified its decision by noting that denying protection for confidential sources does not involve "restraint on what the newspapers may publish or on the type or quality of information reporters may seek to acquire, nor does it threaten the vast bulk of confidential relationships between reporters and their sources."

The reporters essentially argued that if they were forced to break their promises of confidentiality to their sources, such sources would no longer agree to talk to the press. This in turn would chill the news-

20. Id. at 675.
21. Id. at 667-69.
22. Id. at 677-79.
23. Id. at 679-81.
24. Id. at 690.
25. Id. at 701.
26. Id. at 686.
27. Id. at 691.
28. Id. 679-80.
gathering function of the press. The Court gave little weight to this argument, calling such fears “speculative.”  It acknowledged that the reporters’ concerns were not irrational and that there was evidence of such a chilling effect. However, the Court was dissatisfied because there was no clear measure of the extent of the effect. Ironically, the Court proceeded with a seemingly speculative justification of its own for denying a privilege to reporters. It stated that “quite often, such informants are members of a minority political or cultural group that relies heavily on the media to propagate its views, publicize its aims, and magnify its exposure to the public,” and thus would likely continue to speak to reporters. While the Court demanded quantification to prove that the acknowledged chilling effect was substantial, it offered no quantified measure for its own conclusions that most confidential sources would continue to provide information to reporters who broke that confidentiality in the grand jury room.

29. *Id.* at 693-94.
30. *Id.* at 693.
31. *Id.* The dissenters, on the other hand, gave more weight to the possible chilling effect on news-gathering. See, e.g., *id.* at 725 (Stewart, J., dissenting) (“this decision [will] impair performance of the press’ constitutionally protected functions.”). They developed a more coherent test which would require the government to show a “compelling and overriding” interest and “‘convincingly’ demonstrate that the investigation is ‘substantially related’ to the information sought.” *Id.* at 739-40 (Stewart, J., dissenting). Without such a test, the dissenting justices argued, the broad scope of a grand jury’s powers will allow the government to infringe upon a great deal of otherwise protected information bearing little or no relevance to the case at hand. *Id.* at 744 (Stewart, J., dissenting). While in this case they believed that the government had not met its burden, they recognized that there could be times where it would be necessary to curtail the protections afforded to the press. *Id.* at 747 (Stewart, J., dissenting). The dissenters also took exception to the majority’s high bar for proving the chilling effect. While acknowledging that not every relationship between a reporter and his source requires confidentiality, they claimed that the Court had:

never before demanded the that First Amendment rights rest on elaborate empirical studies demonstrating beyond any conceivable doubt that deterrent effects exist; we have never before required proof of the exact number of people potentially affected by governmental action, who would actually be dissuaded from engaging in First Amendment activity.

*Id.* at 733 (Stewart, J., dissenting).
32. *Id.* at 694-95.
While the Court ultimately denied any basis for a privilege, it did appear to perform some sort of balancing test, suggesting there might be some higher level of protection afforded to reporters than ordinary citizens. For example, the Court stated that it could not "accept the argument that the public interest in possible future news about crime from undisclosed, unverified sources must take precedence over the governmental interest in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future." Thus, the Court appeared to say that the public interest in law enforcement outweighed the news value of stories it seemed to believe were relatively unimportant to the public agenda. Furthermore, much of the Court's justification relied on its conclusion that any negative impact on reporting would be insubstantial. Presumably, then, if the reporters could have met the Court's demanding bar for proving a substantial chilling effect, the Court might have recognized First Amendment protection for maintaining confidentiality.

The Court also believed that even if a shield privilege were recognized, its usefulness would be minor unless such a privilege was absolute. If a privilege were adopted that required the government to establish a compelling interest in order to avoid a motion to quash the subpoena, the Court stressed, the reporter would be left with the same chilling effect because there would be uncertainty as to when the privilege would be recognized. Furthermore, the Court stated that application of a qualified privilege for reporters would be logistically difficult to apply. The Court noted that the Department of Justice had issued guidelines for subpoenaing testimony from journalists, suggesting

33. Id. at 695.
34. See supra notes 29-31 and accompanying text.
35. Id. at 702.
36. Id.
37. Id. at 703-06. The Court found that a qualified privilege would be difficult to apply for several reasons. First, it would require the Court to define "those categories of newsmen who qualified for the privilege." Id. at 704. Second, the Courts would have to administer a lengthy inquiry to determine whether the privilege applies in each individual case. Id. at 705. Finally, such an inquiry would require the Courts to infringe on "value judgment[s]" that should best be left to the legislature. Id. at 706 (alteration added).
that the executive branch would be in the best position to police itself on issues of infringement upon press freedoms.\textsuperscript{38}

In his concurring opinion, Justice Powell wrote to "emphasize" the "limited nature of the Court's holding."\textsuperscript{39} He understood the majority to have recognized that journalists do have constitutional protections even in the grand jury context.\textsuperscript{40} He noted that a balance must be struck "between the freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct,"\textsuperscript{41} and that each instance should be judged on a case-by-case basis as the courts traditionally had done.\textsuperscript{42} In cases "where legitimate First Amendment interests require protection," reporters may still seek protection through the courts.\textsuperscript{43} Thus, Justice Powell, who joined the majority, explicitly recognized the balancing of interests that the Court performed in \textit{Branzburg}, and stated that future cases should involve the same case-by-case examination of the facts and competing interests.

The federal courts have followed \textit{Branzburg} when dealing with First Amendment protections for confidential sources. However, the circuits vary in their interpretations of the holding. In \textit{Zerilli v. Smith},\textsuperscript{44} the D.C. Circuit held that although there is no absolute privilege under \textit{Branzburg}, there is First Amendment protection for maintaining confidentiality in the civil law context.\textsuperscript{45} Similarly, the Third Circuit has recognized First Amendment protection in the context of a criminal trial as opposed to a grand jury proceeding: in \textit{United States v. Criden},\textsuperscript{46} the court cited Justice Powell's concurring opinion in \textit{Branzburg} to demonstrate the necessity of balancing First Amendment press

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\textsuperscript{38} Id. at 706-707.
\textsuperscript{39} Id. at 709 (Powell, J., concurring).
\textsuperscript{40} Id. (Powell, J., concurring).
\textsuperscript{41} Id. at 709-10 (Powell, J., concurring).
\textsuperscript{42} Id. (Powell, J., concurring).
\textsuperscript{43} Id. (Powell, J., concurring).
\textsuperscript{44} 656 F.2d 705 (D.C. Cir. 1981).
\textsuperscript{45} Id. at 707. Here the court seemed to recognize that the governmental interest in criminal indictment through the grand jury carries greater weight than the private interests competing against First Amendment interests in the civil context. Id. at 711 (stating that the \textit{Branzburg} holding was limited to the criminal law context).
\textsuperscript{46} 633 F.2d 346 (3d Cir. 1980).
\end{flushright}
protections against the need for effective law enforcement. Drawing upon this balancing, the court ruled:

[A] journalist does in fact possess a privilege that is deeply rooted in the First Amendment. When no countervailing constitutional concerns are at stake, it can be said that the privilege is absolute; when constitutional precepts collide, the absolute gives way to the qualified and a balancing process comes into play to determine its limits.

Several other courts have also recognized that Branzburg stands for the importance of balancing competing interests. In applying Branzburg, most federal circuits have followed its holding strictly in the context of grand jury subpoenas, finding that there is no privilege under the First Amendment. However, it seems possible based on the rule in

47. Id. at 355.
48. Id. at 356 (alteration added). Arguably, the interests in a criminal trial are different than in a grand jury proceeding because of the secrecy of the grand jury. As the Branzburg Court saw it, “[o]nly where news sources themselves are implicated in crime or possess information relevant to the grand jury’s task need they or the reporter be concerned about grand jury subpoenas.” Branzburg v. Hayes, 408 U.S. 665, 691 (1972) (alteration added). This assertion must rely on the premise that because grand jury proceedings are secret, the source’s anonymity to the public is not at risk unless he is indicted or called upon to testify in a later criminal proceeding.
49. See, e.g., United States v. Matthews, 11 F. Supp. 2d 656, 662 (D. Md. 1998) (noting that Branzburg “recognized that the First Amendment . . . protects news gathering activities,” but that in “examining both the expected burden on news gathering and the important role of the grand jury in effective law enforcement, [the Court] concluded that the public’s interest in law enforcement was sufficient to override the burden imposed”) (alterations added) (citations omitted). Cf. Zerilli, 656 F.2d at 711 (recognizing First Amendment protection in civil cases, and finding Branzburg not controlling “where the public interest in effective criminal law enforcement is absent,” thereby suggesting that the public interest in criminal prosecution carries more weight on the scales than private interests in civil cases).
50. See, e.g., In re Grand Jury Proceedings, 810 F.2d 580, 583 (6th Cir. 1987) (holding there is no First Amendment privilege in the grand jury context because Branzburg rejected the existence of such a privilege); Lewis v. United States, 517 F.2d 236, 238 (9th Cir. 1975) (finding that Branzburg only recognized First Amendment protections in the grand jury context “where a grand jury investigation is ‘instituted or conducted other than in good faith’” (citing Branzburg, 408 U.S. at 707)).
Crider that the Third Circuit would recognize a qualified First Amendment privilege in the grand jury context as well.\(^5\) The Crider court’s decision reflects an expansive reading of Branzburg, using Justice Powell’s concurrence to temper what might otherwise be interpreted as a harsh result.\(^5\) Decisions like that in Crider have bolstered the media’s claims that Branzburg should not be read so harshly against journalists in similar situations. As an attorney for the New York Times in Branzburg noted, “there is no greater gloom in the media world than in 1972 when the Branzburg case came out . . . . That was the death knell, and there was no way the press could get out of that. But like Houdini, it did.”\(^5\) Similarly, one journalism professor commented that there was “this truce for a generation since Branzburg [where] nobody really pushed it,” although he felt the truce ended with the decision in Miller.\(^5\)

II. THE JUDITH MILLER CASES

Although many reporters have been subpoenaed to reveal their news sources, Judith Miller has become a recent symbol of this phenomenon. Her imprisonment for refusing to testify in regards to her confidential sources in the grand jury investigation of the Valerie Plame leak captured headlines and renewed the debate over the level of First Amendment protection reporters enjoy regarding the confidentiality of their sources.\(^5\) Miller’s involvement in a news story about Islamic charities with suspected terrorist ties garnered less attention but poses

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51. The point may be moot since the Third Circuit appears to recognize a federal common law privilege that is applicable in the grand jury context. See In re Grand Jury Subpoena of Williams, 766 F. Supp. 358 (W.D. Pa. 1991), aff’d 963 F.2d 567 (3d Cir. 1992) (en banc) (affirmed without discussion of the merits).

52. The Crider court relied on Justice Powell’s description of the “tension” between the Press Clause against the need for effective criminal justice as requiring a balancing between competing constitutional principles. Crider, 633 F.2d at 355.


55. See supra note 2 and accompanying text.
similar issues and offers a basis for requiring responsible exercise of a free press in order for the press to receive heightened First Amendment protection. Taken together, the two cases highlight the important role of the media in fostering democratic participation and the reciprocal responsibilities they must fulfill in order to enjoy the protections offered by the First Amendment. However, these goals are not served by the approach typically taken by courts in such cases. Understanding the facts of these two cases is key to evaluating how the courts should approach the level of protection offered to reporters by the First Amendment.

A. The Valerie Plame Leak Investigation

In his 2003 State of the Union address, President George W. Bush discussed the security threats posed to the United States by Iraq:

The International Atomic Energy Agency confirmed in the 1990s that Saddam Hussein had an advanced nuclear weapons development program, had a design for a nuclear weapon and was working on five different methods of enriching uranium for a bomb. The British government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa.56

It was the last sentence that led former Ambassador Joseph Wilson to write an op-ed piece for the New York Times on July 6, 2003, in which he said that he had visited Niger to investigate these claims on behalf of the CIA.57 He further indicated that he had let the CIA and the State Department know that the claims were highly doubtful, and he suggested that the administration purposely ignored his findings in the build-up to war.58 A little over a week later, reporter Robert Novak published a column in the Chicago Sun-Times in which he said that he had learned from “two senior administration officials” that Wilson’s wife

58. Id.
CONFIDENTIAL SOURCES worked at the CIA and secured the assignment for her husband. He also identified Wilson’s wife, Valerie Plame, by name.

Further media reports detailing administration officials’ discussions with reporters concerning Wilson’s wife and her career at the CIA surfaced. The Department of Justice soon began investigating the leaks as possibly criminal under 50 U.S.C. § 421. In October 2003, Richard Armitage, then Deputy Secretary of State, told investigators that he was Novak’s source. In December 2003, Attorney General John Ashcroft recused himself and appointed Patrick Fitzgerald as Special Counsel to oversee the investigation. Fitzgerald then convened a grand jury. As part of its investigation, the grand jury issued subpoenas to Matthew Cooper of Time magazine and Judith Miller of the New York Times in 2004. The subpoenas sought both testimony and documents that might help the government identify sources who identified Plame to the reporters. Both reporters refused to comply with the subpoenas and sought to have them quashed on the theory that journalists’ ability to


60. *Id.* Novak later revealed that his primary source did not reveal Plame’s name, but that he learned it by looking up Wilson’s entry in Who’s Who in America. He also confirmed the source’s information with a second administration official, Karl Rove, and the CIA. Robert Novak, Op.-Ed., *My Role in the Plame Leak Probe*, CHI. SUN-TIMES, Jul. 12, 2006, at 14.


62. Among other things, the statute makes it criminal for an official with access to classified information to reveal the identity of covert agent “knowing that the information disclosed so identifies such covert agent and that the United States is taking affirmative measures to conceal such covert agent’s intelligence relationship to the United States.” 50 U.S.C. § 421 (1994).


64. Tony Locy, *Attorney general recuses himself from CIA probe*, USA TODAY, Dec. 31, 2003, at 10A.

65. *Id.*


67. *Id.* Cooper did not originally report the information regarding Plame that he learned from his sources. After Novak’s column, he published an article on Time.com that referenced a conversation similar to the one that Novak referenced. *Id.* at 1143. Miller never published anything based on what her source revealed to her. *Id.* at 1182 (Tatel, J., concurring).
gather news (and thus the operation of a free press itself) is hampered by
the resulting chilling effect on the use of confidential sources.  

Judith Miller and Matthew Cooper relied on both the First
Amendment and the federal common law in their appeal before the D.C.
Circuit. First, they argued that the First Amendment allows journalists to
conceal confidential sources—a privilege that, according to Miller and
Cooper, extends to the arena of grand jury subpoenas. Second, they
asserted that there is a federal common law privilege, independent of any
First Amendment protections, which allows a journalist to conceal
confidential sources. In In Re Grand Jury Subpoena, Judith Miller, the
D.C. Circuit unanimously held that the First Amendment provides no
protection for journalists maintaining the confidentiality of their sources
when subpoenaed by a grand jury. The court stated that the Supreme
Court had settled this question in Branzburg. Finding no factual
differences between the cases at bar and Branzburg, the circuit court

68. Id. at 1144.

69. Id. In their reply brief to the D.C. Circuit, the reporters took issue with the
Special Counsel’s interpretation of Justice Powell’s Branzburg concurrence as
limiting protection to those instances where grand jury investigations are conducted
in bad faith. Arguing that bad faith grand jury investigations do not implicate First
Amendment rights (which Justice Powell recognized) because any citizen may seek
recourse from a bad faith subpoena, the reporters instead urged the court to follow
the balancing test identified in Justice Powell’s concurrence. Reply Brief of
Appellants Judith Miller, Matthew Cooper and Time Inc. at 4, In re Grand Jury
Subpoena, Judith Miller, 438 F.3d 1141 (D.C. Cir. 2004) (Nos. 04-3138, 04-3139,
04-3140), 2004 WL 4957263.

70. Miller, 438 F.3d at 1145. Miller and Cooper also argued that their due
process rights were violated because they were not allowed access to much of the
evidence the government used to overcome any asserted privilege. Id. They also
claimed that the Special Counsel’s alleged failure to comply with the Justice
Department’s guidelines for issuing subpoenas to journalists provided independent
grounds for reversal. Id. The court rejected both arguments, holding that the use of
in camera and ex parte proceedings did not violate the due process rights of the
reporters because of the importance of grand jury secrecy, and that the Department
of Justice guidelines regarding subpoenas issued to reporters created no enforceable
right. Id. at 1150-52.

71. Id. at 1145.

72. Id.

73. Id. at 1146. For an argument that there were important differences
between Branzburg and these cases, see David L. Westin, Op.-Ed., Just About the
Weakest Case, WALL ST. J., Feb. 18, 2005, at A10 (arguing that the fact that the
did not engage in any sort of balancing as the Supreme Court appeared to do in *Branzburg*. The court was split on whether the federal common law provided any protection for a reporter's confidential sources, but all judges agreed that if such a privilege existed, it would be overcome by the national security concerns at issue in the case. After this decision, Cooper cooperated with the grand jury while Miller was held in contempt of court and jailed until she, too, finally agreed to testify.

underlying crime in *Miller* was committed by the government, which then sought to coerce testimony from the journalists, changed the dynamics significantly). In essence, Westin argues that the government used the press to police itself, which Justice Powell said the Court did not condone when it made its decision in *Branzburg*. See *Branzburg v. Hayes*, 408 U.S. 665, 709 (1972) (Powell, J., concurring) (noting that the Court did not hold "that state and federal authorities are free to 'annex' the news media as 'an investigative arm of the government'" (quoting id. at 725 (Stewart, J., dissenting))).

74. *See supra* note 33 and accompanying text. In his concurring opinion, Judge Tatel did attempt to balance the government's interest in compelling disclosure against the reporters' interest in maintaining confidentiality, finding that the government's interests trumped the public interest in maintaining confidentiality. *Miller*, 438 F.3d at 1178 (Tatel, J., concurring). Judge Tatel noted that the leaks in question were "a serious matter." *Id.* He indicated that "Plame evidently traveled overseas on clandestine missions beginning nearly two decades ago" and concluded that her covert activities as well as that of her associates may have been compromised by the leak. *Id.* at 1178-79. He later indicated that "[w]hile another case might require more specific evidence that a leak harmed national security," the fact that the CIA seemed to have strongly implied to Novak that Plame was covert at some point in time was sufficient. *Id.* at 1182 (alteration added).

75. *Miller*, 438 F.3d at 1150. Judge Sentelle wrote the majority opinion for the court. Each of the three judges also wrote separate concurring opinions on the issue of whether there was a federal common law privilege that allowed reporters to maintain confidentiality of their sources in the grand jury context, with Judge Sentelle arguing that there is no federal common law privilege, *id.* at 1154 (Sentelle, J., concurring), Judge Henderson arguing that if a common law privilege existed it would be overcome on these facts, *id.* at 1159 (Henderson, J., concurring), and Judge Tatel arguing that there is a common law privilege, but it is overcome on these facts. *Id.* at 1164 (Tatel, J., concurring).


77. *Miller*, supra note 1. Miller was steadfast in her refusal until two things happened. First, her source, I. Lewis "Scooter" Libby, released her from her promise of confidentiality. Second, Special Counsel Fitzgerald agreed to limit the inquiry to information relevant to conversations with Libby and to refrain from questions regarding other sources of information. *Id.*
B. Reporters Alert Islamic Charities of Government Raids

Judith Miller and Special Counsel Fitzgerald were also at odds in another leak investigation, this one stemming from two stories that appeared in the *New York Times* in December 2001. Miller and Philip Shenon, another *Times* reporter, each received information from confidential government sources that a different Islamic charity was suspected of funding terrorist organizations and was about to be searched by federal agents and have its assets frozen. Each reporter, the day before the government raid, called the charity about which he or she had been given information and asked for comment on the impending government action. Furthermore, Miller's first article about the search of the charity was published in the late edition the day before the raid. Effectively, the reporters alerted the charities to the action, giving them opportunity to prepare for the search and perhaps hide evidence before their assets were frozen. In fact, when federal agents arrived at one of the charities in question, they were greeted by the charity's lawyer.

Upon discovering that the reporters had tipped the government's hand to the charities, the government began an inquiry into the identities of the reporters' sources. In August 2002, Special Counsel Fitzgerald initiated communications with the *Times* to seek its voluntary cooperation. Ultimately, in 2004, the Justice Department informed the *Times* that it would subpoena the paper's telephone records from its telephone company in an attempt to locate the reporters' sources. Believing that such a subpoena would violate its First Amendment protections, the *Times* filed suit seeking a declaratory judgment that such a subpoena could not be enforced. The *Times* argued first that the Constitution and federal common law allowed the reporters to protect the confidentiality of their sources and also that the subpoena was overbroad in that it gave the government access to all sources reached by telephone during the period in question, not just those who were relevant to the

78. N.Y. Times Co. v. Gonzales, 459 F.3d 160, 163 (2d Cir. 2006).
79. Id.
80. Id.
81. Id. at 164 n.2.
82. Id. at 164.
83. Id. at 165.
case at hand.84 The district court granted the Times’ motion for summary judgment, finding that the confidentiality of the reporters’ sources was protected by both federal common law and the First Amendment.85 The government appealed the decision to the Second Circuit Court of Appeals.

In New York Times v. Gonzales, the Second Circuit reversed the district court’s decision.86 Like the D.C. Circuit, the Second Circuit did not recognize any First Amendment or federal common-law privilege that would be applicable to the facts of the case at bar.87 The court ruled that without an applicable privilege, the government was free to subpoena the Times’ telephone records.88 Any concerns that the subpoena was too broad—in that it allowed the government access to information unrelated to the case—could be corrected through cooperation by the Times and its reporters in redacting irrelevant information.89

In the New York Times decision, the court seemed to give some weight to the value provided by a responsible media, although it never specifically articulated this philosophy. The court’s decision hinged in great part on the fact that “the reporters were not passive collectors of information whose evidence is a convenient means for the government to identify an official prone to indiscretion,”90 but rather were active

84. Id. at 164-65.
86. N.Y. Times, 459 F.3d at 174.
87. Id. at 169.
88. Id. at 174.
89. Id. The Times argued that redaction was not a feasible alternative but merely a means by which the newspaper could in essence be compelled to point the government toward the sources it was looking for. The court remained unmoved by this argument, stating that:

[T]he government, having unsuccessfully sought the Times’ cooperation, cannot be charged by the Times with having issued an unnecessarily overbroad subpoena. By the same token, the government, if offered cooperation that eliminates the need for the examination of the Times’ phone records in gross, cannot resist the narrowing of the information to be produced.

Id. at 171 (alteration added).
90. Id. at 170.
participants in alerting the charities to the impending government action. The court apparently did not require the government to provide detailed evidence to overcome the asserted privilege because the reporters acted as “conduit[s] to alert the targets of an asset freeze and/or searches.”

In a dissenting opinion, Judge Sack took issue with the court’s failure to acknowledge a source privilege and define its contours. More importantly, he felt that in no way had the government taken the appropriate steps to overcome the privilege asserted. Judge Sack argued that cases involving government leaks are necessarily different than other cases involving confidential sources because leak cases implicate the media’s role in informing the electorate about the conduct of its government. In these cases the courts should balance the governmental interest in compelled disclosure against the public interest in “‘newsgathering and maintaining a free flow of information.’” He was also adamant that courts should not take the government’s word that it had exhausted all alternative methods of identifying the sources of the leaks or that it had important interests in identifying the sources of the

91. Id.
92. The Court stated:

[O]ur holding is limited to the facts before us, namely the disclosures of upcoming asset freezes/searches and informing the targets of them . . . . [I]n order to show a need for the phone records, the government asserts by way of affidavit that it has “reasonably exhausted alternative investigative means” and declines to give further details of the investigation on the ground of preserving grand jury secrecy. While we believe that . . . is sufficient on the facts of this case, we in no way suggest that such a showing would be adequate in a case involving less compelling facts.

Id. at 171 (alterations added).
93. Id. at 173. The court also noted that the reporters’ actions “probably caused” the investigation into the leaks in the first place. Id. at 170.
94. Id. at 185 (Sack, J., dissenting).
95. Id. at 186 (Sack, J., dissenting) (quoting the proposed Free Flow of Information Act, S. 2831, 109th Cong., § 4(b)(4) (2006)). Judge Sack noted the basic equivalence between his test and that advocated by Judge Tatel in the Miller case. Id. See supra note 74.
For the privilege to have effect, the executive branch must not be free to determine when the privilege applies and when it does not. Rather, Justice Sack stressed, the courts must be responsible for protecting First Amendment interests and determining evidentiary standards. Because the government did not make the showings necessary to overcome the privilege as he identified it, Judge Sack would not have allowed enforcement of the subpoena sought by the government in this case.

Both *Miller* and *New York Times* rely on excessively narrow interpretations of the Supreme Court's holding in *Branzburg*, failing to recognize the important differences that arise when the government is seeking to discourage the use of confidential sources within its own ranks. Neither holding recognizes any level of First Amendment protection for maintaining the confidentiality of reporters' sources. The danger of such an approach is that it fails to account for factual differences in cases that might affect the balancing that Justice Powell, and possibly the Court as a whole, endorsed in *Branzburg*. By their rejection of reporters' claims in the grand jury contexts, the two appellate courts give no weight to the public interests served by maintaining confidentiality, even in cases where this value may exceed the government's interests in exposing confidential sources. A closer critique of the two decisions reveals why an alternative approach would better protect the public interest at stake in cases involving government leaks.

III. A BETTER APPROACH

A. Problems with the *Miller* and *New York Times* Decisions

The *Miller* and *New York Times* decisions are flawed in that they fail to recognize any concrete protections afforded by the Press Clause as well as the danger that the government's actions may adversely impact the democratic process. An analysis that takes these factors into account would not necessarily alter the outcome of these two cases, but it would

96. Id. at 188-89 (Sack, J., dissenting).
97. Id. at 177 (Sack, J., dissenting).
98. Id. at 189 (Sack, J., dissenting).
create a discernible standard that would promote public discourse and civic participation while offering the media a better understanding of their rights and responsibilities.

The courts' flawed interpretations of Branzburg that neglect a balancing of competing interests strip the media of any real protections, at least in the context of grand jury subpoenas. This approach fails to account for important factual differences between the Judith Miller cases and Branzburg. Chief among these differences is the fact that in both Miller and New York Times, the government was policing its own employees by compelling the reporters to identify their sources. In Branzburg, on the other hand, the reporters' stories centered on drug-related crimes and illegal activities carried out by private parties. The public interest in government activities and the workings of American intelligence agencies is inevitably greater than that in "possible future news about crime." The Branzburg court noted that there was:

little . . . [to] indicat[e] that informants whose interest in avoiding exposure is that it may threaten job security, personal safety, or peace of mind would in fact be in a worse position, or would think they would be, if they risked placing their trust in public officials as well as reporters.

This conclusion is less tenable in the instant cases where the sources' employer—the federal government—is the party conducting the grand jury investigation. In cases involving government sources, a leak will often reflect a determination by its source that he cannot place his trust in public officials and thus the only avenue for addressing the perceived problem is through the news media.

Furthermore, the Branzburg Court noted that there were instances where grand jury subpoenas were not justifiable—such as where the government’s purpose in compelling disclosure was "to disrupt a reporter’s relationship with his news sources"—and that the government was not free to commandeer the media as its investigative arm. Such dangers are inherent in a leak investigation: the
government's purpose here is always at least in part to prevent such communications in the future. In internal investigations, the reporter is often identified as essential to the government's internal policing procedures. Having recognized these dangers, the courts should engage in more delicate balancing in cases where this danger is high to account for differing fact patterns, rather than applying *Branzburg* as a strict, bright-line rule.

The *Miller* and *New York Times* decisions also fail to give any real consideration to the chilling effects of compelled disclosure, which may even be greater in the context of these cases than in *Branzburg*. The chilling effect seems especially likely in the context of government leaks. Where the media serves its role of fostering democratic participation, the nature of their relationship with the government is bound to be tense. It is not surprising then that historically that relationship has often been

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103. Compare this to the context of the consolidated *Branzburg* cases where the government arguably had an interest in encouraging the relationship, as the news reports themselves may have helped the government identify certain problem areas on which it should have focused its crime prevention efforts.

104. As Judge Sack noted in his *N. Y. Times* dissent:

In “leak” investigations, unlike in the typical situations with which courts have dealt over the years, the reporter is more than a third-party repository of information. He or she is likely an “eyewitness” to the crime, alleged crime, potential crime, or asserted impropriety. Once the prosecution has completed an internal investigation of some sort, therefore, it may be in a position to overcome the classic reporter’s privilege because it may well be able to make “a clear and specific showing that the information [i.e., the identity of the source] is: highly material and relevant, necessary or critical to the maintenance of the claim [that someone known or unknown ‘leaked’ the information to a reporter], and not obtainable from other available sources.”


105. See, e.g., *id.* at 184 (Sack, J., dissenting) (“The result [of the press’ role in the democratic process as created by the First Amendment] is a healthy adversarial tension between the government . . . and the press.” (alteration added)).
That natural tension between the media and the government is only amplified by the nature of the modern mass media and may explain the courts' traditional hesitancy to give much weight to the news media's need for substantive protection under the First Amendment. The modern twenty-four-hour news cycle has changed the nature of news coverage.\textsuperscript{107} In a 2001 report on PBS's \textit{The News Hour with Jim Lehrer}, CBS White House correspondent Bill Plante noted that the mass media puts people in the government "on edge."\textsuperscript{108} Likewise, \textit{U.S. News & World Report} White House correspondent Kenneth Walsh stated that reporters now feel pressure to focus on controversy because the demands of the mass media encourage edgy stories; controversial stories garner more attention and are thus taken more seriously inside the newsroom.\textsuperscript{109} The potential chilling effect may be even greater in the context of the current Bush administration, which is seen by many as one of the most tight-lipped administrations in history.\textsuperscript{110} Former White House Press Secretary Ari Fleischer blamed much of the tension between the

\textsuperscript{106} Even Thomas Jefferson, a champion of the importance of a free press to the democratic process, became dismayed by press coverage of his presidency: "Nothing can now be believed which is seen in a newspaper. Truth itself becomes suspicious by being put into that polluted vehicle." \textit{Cullen, supra} note 9, at 38.

\textsuperscript{107} \textit{The News Hour with Jim Lehrer} (PBS television broadcast Apr. 25, 2001), available at http://www.pbs.org/newshour/bb/media/jan-june01/president_4-25.html (examining the media coverage of the transition in the first 100 days of George W. Bush's presidency).

\textsuperscript{108} \textit{Id.}

\textsuperscript{109} \textit{Id.}

\textsuperscript{110} See Jay Rosen, \textit{Bush to Press: "You’re Assuming That You Represent the Public. I Don’t Accept That," PressThink, available at http://journalism.nyu.edu/pubzone/weblogs/pressthink/2004/04/25/bush_muscle.html} (noting that President Bush had held eleven news conferences at a certain point in his presidency where the first President Bush had held seventy-one and President Clinton had held thirty-eight). As one reporter has commented on this phenomenon:

> And when you ask the Bush people to explain that attitude, what they say is: We don't accept that you have a check and balance function. We think that you are in the game of "Gotcha." Oh, you’re interested in headlines, and you’re interested in conflict. You’re not interested in having a serious discussion . . . and exploring things.

\textit{Id.}
administration and the press on the nature of media coverage in general.\textsuperscript{111} In Fleischer’s view the Washington press corps has a tendency to treat politics like sports, focusing mainly on naming the winners and losers.\textsuperscript{112} There has also been some suggestion among commentators that President Bush’s avoidance of the media is due in large part to the way he feels the media treated his father’s presidency.\textsuperscript{113} Given the administration’s inherent hesitance to talk to members of the news media,\textsuperscript{114} the potential chilling effect of forcing reporters to reveal confidential discussions with administration officials seems all the more real.

When journalists exercise their role in the democratic process responsibly, their need to protect confidential sources will often play an important part in enabling that duty. A government source who is unwilling to speak on the record for fear of reprisal, but who nonetheless feels that the public should have access to certain information, will now likely think twice before speaking to reporters about controversial subjects.\textsuperscript{115} Armed with the knowledge that the government may force reporters to reveal their identities, sources may stop giving reporters such information, cutting off the flow of information not just to the reporters, but more importantly, to the public.

\textsuperscript{111} The News Hour, supra note 107.
\textsuperscript{112} Id. Perhaps surprisingly, Fleischer did not feel the media’s coverage of the Bush administration was any harsher than coverage of prior administrations. Pointing towards the coverage of President Clinton, Fleischer remarked that “[t]he Washington press corps couldn’t let the poor man go. The American people already had.” Id. (alteration added). He characterized the Clinton coverage as “overkill.” Id.
\textsuperscript{113} Id. It seems likely that part of his avoidance of the media stems from a desire to avoid the perceived “gotcha” mentality of the press, see supra note 110, and intense media coverage of the inevitable gaffes. For example, recall the media coverage of Vice President Dan Quayle’s infamous “potato” mistake. If there is any doubt as to how much media attention the incident garnered, an online search for “Dan Quayle” on Yahoo brings up “Dan Quayle potato” as a related recommended search.
\textsuperscript{114} Rosen, supra note 110 (arguing that the Bush administration believes there is no role for the current news media in the system of checks and balances because of the administration’s perception that the press has become “an interest group” that doesn’t “channel[] the public and its questions”) (alteration added).
\textsuperscript{115} And controversial subjects are arguably the ones to which the public needs greater access in order to make informed decisions come election time.
In late 2005, an American Journalism Review article found anecdotal evidence of a chilling effect resulting from the Plame leak investigation. The executive director of the Project on Government Oversight, who routinely helps reporters connect with government sources on stories that have important public ramifications, told Time magazine that she would “not be able to give [the magazine’s reporters] access to people whose identity needs to be protected” because of the magazine’s cooperation with federal investigators in the Plame investigation. The article also provided accounts of various reporters who said the scandal had affected their relationships with confidential sources. While many of those interviewed for the AJR article did not feel the chilling effects, reporter Stuart Taylor, Jr. noted that the real danger in the chilling effect is in a relatively small number of cases where the sources are “highly sensitive.” Presumably, where the sources are the most sensitive, the information will also be of the greatest value to the public debate. The difficulty with Branzburg’s high bar is that the Court in essence asked reporters to prove a negative. Even if the chilling effect created is substantial, it is difficult for a reporter to prove that he is losing sources of information because the sources may not indicate to the reporter that they are withholding information. As one journalist has noted in response to this phenomenon, “[y]ou don’t know what you don’t know.” However, as even the majority in Branzburg

116. See Smolkin, supra note 53.
117. Id. (alteration added)
118. Id. at 32-35. The New York Times noted that several of its “Washington reporters have noted signs of longtime sources becoming more anxious and more reluctant to speak freely on sensitive subjects.” Id. The Los Angeles Times indicated that some of its Washington sources have questioned whether the paper will truly protect confidentiality. Id. at 34. Reporter Rebecca Carr noted that her longtime FBI source expressed fear at being “outed” and told her that “agents are under great pressure to give up other agents in various leak investigations under way. ‘If you get outed, you are dead’ on the job, he said. ‘People are scared.’” Id. at 35.

119. In fact, many of the reporters felt that the case could have a positive impact on journalism by encouraging reporters to act more responsibly in their use of confidential sources by determining if the promise of confidentiality is warranted under the circumstances and whether the issue is important enough that the reporter would risk jail time to protect such a promise. Id. at 32-36.
120. Id.
121. Id. at 34 (alteration added) (quoting Knight Ridder Washington Editor Clark Hoyt).
indicated, there is no doubt that the chilling effect exists. And it is situations where government sources are at issue that its effects will most damage the role of the news media in fostering an educated electorate.

The failure of the courts to recognize that public speech will be chilled by the forced disclosure of sources who have spoken on the condition of anonymity also endangers the public interest in a free flow of information. None of the judges on the Miller court seemed to give any weight to the news value of the information provided by the confidential sources. Judge Tatel brushed aside the news value of the leak by saying it only reflected on Wilson's credibility. What he failed to address was the broader context in which both Wilson's statements and the administration's leaks were being made. The country had just entered a controversial war in Iraq. Wilson was leveling charges that the administration took the country into war on false pretenses. It was the year before a national election that would in large part be defined by the war in Iraq and possible intelligence failures.

The Supreme Court has stated that juries are entitled to hear details of a case that help to tell “a colorful story with descriptive richness,” theorizing that “[e]vidence . . . has force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains momentum, with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict.” Narrative power is also important in the news setting, and details should be available to the electorate so it can make an informed decision in holding its government accountable through the ballot. When courts require journalists to reveal confidential sources, they will undoubtedly chill to some degree the public's access to such narratives. Thus, it was appropriate to balance the public interest in the narrative of issues concerning national security against the potential harm posed to national security by the disclosure of

123. The implication being that nepotism or something similar played a part in Wilson's selection; thus, he was not the best suited candidate for such a mission, and his findings may not be as reliable. Judge Tatel found that the leak had but marginal news value, serving only to reflect on Joseph Wilson's credibility. In re Grand Jury Subpoena, Judith Miller, 438 F.3d 1141, 1179 (D.C. Cir. 2006) (Tatel, J., concurring).
such details, giving full weight to both sides. The courts in *Miller* and *New York Times* failed to give significant attention to the value of either.

The problem with decisions that fail to give adequate attention to the protections afforded the press by the First Amendment is that they interfere with the efficient function of the democratic process. If the courts continue to erode the news media’s freedoms to report without government interference, there is real danger that the government will lose much of its accountability to the public. If, for instance, government sources stop providing reporters with information they think the public should know, there may be no other avenue for the public to access such information. Here, the courts can protect the important role of the press as a check on government power by affording it greater protections and offering a standard by which it will apply such protections.

B. Developing a New Standard for First Amendment Press Protections

1. The Importance of Balancing

Courts often weigh speech interests against various governmental interests in restricting speech or press. However, free press advocates believe that in applying this balancing test, courts often fail to put the social values of speech on the scales; meaning, for example, that an *individual’s* speech or press rights, rather than the interests of the general public in having the individual speak, are weighed against society’s security—usually resulting in First Amendment interests giving way to governmental interests. This tendency is most common when national security concerns are the competing interests. The Supreme Court places a high value on national security such that it treats constitutional rights differently when national

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125. For instance, consider the fallout from the Watergate scandal. Had Bob Woodward and Carl Bernstein not promised and actively protected the anonymity of their source, “Deep Throat,” President Nixon may never have experienced the level of public pressure that ultimately led to his resignation.


127. *Id.* at 94.
security is also at issue.  

When national security and constitutional rights are in tension, the Court often applies a balancing test where the constitutional right would otherwise normally prevail.  

While this balance is likely to look different in a post-September 11th world, looking at the Court's prior decisions in this area highlights the basic philosophy that will likely guide future decisions.

As early as the 1930s, the Court recognized that the First Amendment affords different protections in the context of national security concerns.  

While holding that a Minnesota statute allowing publishers to be enjoined from printing "malicious, scandalous and defamatory" publications was an unconstitutional prior restraint, the Court in *Near v. Minnesota* recognized that there are times when prior restraints are constitutionally permissible. These "exceptional cases" include times of war and maintaining civil order. Three decades later, in *Zemel v. Rusk*, the Court held that the First Amendment right to gather information does not prevent the government from refusing to allow U.S. citizens to visit foreign countries that may pose a national security threat.

The Court engaged in a lively debate on the interplay between the First Amendment and national security concerns in the *Pentagon*

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129. Id.


131. Id. at 702.

132. Id. at 722-723.

133. Id. at 716.

134. Id.

135. Id.


137. Id. at 16. While recognizing that a citizen might be better informed about the government's national security determinations by visiting Cuba, the Court held that the government's interests in maintaining national security outweighed the citizen's right to a free flow of data. Furthermore, the Court characterized the plaintiff's arguments as exceeding the scope of the First Amendment, noting that "[t]he right to speak and publish does not carry with it the unrestrained right to gather information." Id. at 17 (alteration added). While recognizing that there are First Amendment rights to gather data, the Court noted that they were limited, especially where there were more important considerations at issue. Id.
Papers Case. In 1971, the *New York Times* and the *Washington Post* obtained classified documents regarding the Vietnam War. Once the Nixon Administration discovered that the newspapers had classified documents in their possession, it sought to enjoin them from publishing the documents' contents. In a hasty 6-3 decision, the Court held that the government’s prior restraint was not constitutionally sustainable in the case at bar, but the various opinions issued reflected different thoughts on the importance of national security interests. Two justices argued that prior restraints on the publication of news are never permissible. Three justices declared the prior restraints in the case at bar unconstitutional but nonetheless believed that prior restraints could be constitutional in certain situations. The dissenting justices believed

139. *Id.* at 714.
140. The case had reached the Supreme Court in a matter of weeks and was decided just four days after oral arguments.
142. *Id.* at 715 (Black, J., concurring). Justice Black’s concurring opinion, joined by Justice Douglas, focused on the role of a free press in sustaining democracy. Concerning the issue at hand, he argued:

> The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell. In my view, far from deserving condemnation for their courageous reporting, the New York Times, the Washington Post, and other newspapers should be commended for serving the purpose that the Founding Fathers saw so clearly. In revealing the workings of government that led to the Vietnam war, the newspapers nobly did precisely that which the Founders hoped and trusted they would do.

*Id.* at 717.

143. Justice Brennan emphasized the heavy burden the government must carry to allow a prior restraint, arguing:

> But the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise
that prior restraints could be constitutional and that the Court should have taken more time to fully weigh the competing interests at stake.\textsuperscript{144} The Court’s decision in \textit{Branzburg} a year later also demonstrated the importance of balancing First Amendment rights against competing interests.\textsuperscript{145} The Court did not deny the existence of First Amendment protections for reporters; it merely found that those protections did not

or conjecture that untoward consequences may result. Our cases, it is true, have indicated that there is a single, extremely narrow class of cases in which the First Amendment’s ban on prior judicial restraint may be overridden . . . Thus, only governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order. In no event may mere conclusions be sufficient . . .

\textit{Id.} at 725-27 (Brennan, J., concurring). Justice Stewart, who was joined in his concurrence by Justice White, recognized an enormous executive power in matters of national defense and foreign relations that gives rise to a duty to protect government confidentiality. However, he believed that the government had not met its burden of showing that disclosure would “surely result in direct, immediate and irreparable damage to our Nation or its people.” \textit{Id.} at 727-30 (Stewart, J., concurring).

144. \textit{Id.} at 748 (Burger, C.J., dissenting). The Chief Justice argued that a temporary injunction could have remained in place until the Court had adequate time to digest the facts and make an informed ruling that balanced the interests where “the imperative of a free and unfettered press comes into collision with another imperative, the effective functioning of a complex modern government and specifically the effective exercise of certain constitutional powers of the Executive.” \textit{Id.} (Burger, C.J., dissenting). Furthermore, he pointed out, the fact that the \textit{New York Times} had the documents for several months before it began publishing them undercut the press’ argument that the public’s right to know demanded a speedy resolution. \textit{Id.} at 750 (Burger, C.J., dissenting).

Justice Harlan argued that national security issues are political; thus, the role of the judiciary must be extremely narrow. \textit{Id.} at 757-58 (Harlan, J., dissenting). Justice Blackmun noted that the First Amendment is no more important than Article II of the Constitution, which gives the Executive Branch broad powers, and that the Court should weigh “the broad right of the press to print and . . . the very narrow right of the Government to prevent.” \textit{Id.} at 761 (Blackmun, J., dissenting). Both argued that the important issues at the heart of these cases required a more in-depth analysis by the courts than could be given in the short time in which these cases were processed.

145. \textit{See supra} Part I.
trump the asserted governmental interest in prosecuting crime through the secrecy of the grand jury. In weighing the values at stake, the Court held that "public interest in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future" outweighs "the public interest in possible future news about crime."\textsuperscript{146} Furthermore, the Court felt it important that the extent of the resulting chilling effect was not proven.\textsuperscript{147} This suggests that if a different case presented a more substantial burden on newsgathering, the balance may be different. Just as the Court decided in \textit{Zemel} that national security interests outweighed the public interest in free flow of information from countries posing national security threats, the \textit{Branzburg} court determined that the governmental interest in prosecuting and preventing crime outweighed the free flow of information about such crimes. Decided only a year after the \textit{Pentagon Papers Case}, it is unlikely that the Court intended to discount the importance of the press to the democratic process that it lauded there.\textsuperscript{148} Rather, the \textit{Branzburg} decision reflects the Court's determination that the public interest in news stories on crime is not sufficiently important to outweigh the public interest in preventing the crime. The question is whether the Court would consider a case like \textit{Miller} differently, where the public interest in receiving the news at issue is assuredly higher.

2. The Importance of Responsible Exercise of Journalism

Scholars have long debated what the Framers intended by the language of the Press Clause. One theory that has developed is that the media acts as a "fourth estate" whose duty it is to check the government's power.\textsuperscript{149} Under this theory, "the press primarily serves as an agent of the public to expose incidents of corruption in government and to fulfill the public's 'right to know.'"\textsuperscript{150} In essence, the press is designed to serve as a watchdog or an institutional check on the government.\textsuperscript{151} Thus, the First Amendment creates a privileged

\begin{footnotes}
\item[147] See supra notes 31-32 and accompanying text.
\item[148] See supra notes 142-43.
\item[149] GARRY, supra note 7, at 70.
\item[150] Id. at 71.
\item[151] Id. at 71.
\end{footnotes}
industry. Other theorists take a more restrained view of the language. Professor Leonard Levy, for example, argues that there was a common understanding of press freedom at the time the First Amendment was adopted: it encompassed freedom from previous restraint on publication, but not freedom from punishment for irresponsible publication. Whether we can identify the precise definition of the Press Clause the Framers intended, it is clear that the spirit of protecting a free press was to foster democratic participation.

Early state court decisions interpreting press freedoms in America demonstrated a common belief that the protection afforded to the press by state constitutions was not absolute. Many of the original states adopted press clauses that were extremely expansive in the protections they offered the press. However, after the revolutionary period, most states (including North Carolina and Virginia, which had previously adopted two of the most expansive press clauses) adopted a corresponding responsibility clause that allowed punishment for abuse of that freedom. Most state decisions in the early Nineteenth Century

152. *Id.* at 109.
153. Leonard W. Levy, *On the Origins of the Free Press Clause*, 32 UCLA L. REV. 177, 183 (1984). Professor Levy’s source for that understanding is Blackstone’s commentary on the role of the free press in a democratic society. Highlighting the Framers’ reliance on Blackstone’s commentaries in so many other areas and the wide acceptance of this view of press freedoms at the time, Professor Levy argues that if the Framers had intended a different definition of press freedoms, they would have detailed its scope. *Id.* at 202-03.
154. See *supra* note 9 and accompanying text.
155. The federal courts did not address the meaning of a free press under the First Amendment for more than 130 years after the Amendment was ratified. Charlene J. Brown and Bill F. Chamberlin, *Introduction* to *The First Amendment Reconsidered*, *supra* note 7 at 1, 2. During this time, the states were left to interpret the issue of a free press for themselves, establishing precedent that was later relied upon by the Supreme Court in interpreting the First Amendment. Blanchard, *supra* note 7, at 37-42.
156. See, e.g., Respublica v. Oswald, 1 Dall. 319, 325 (Pa. 1788) (holding that although the state constitution did not include language limiting the freedom of the press “it is impossible that any good government should afford protection and impunity” to publications “intended merely to delude and defame”).
158. *Id.*
reflected the belief that "[l]iberty of the press consists of [only] the right to publish with impunity, truth, with good motives, and for justifiable ends, whether it respects government, magistracy, or individuals."  

This focus on responsibility carried over into judicial interpretations, as early analysis focused on libelous material. Courts were loath to impose prior restraints on publication but felt free to punish irresponsible reporting after the fact.

In the early Twentieth Century, state courts began to focus on responsible reporting in terms of the general welfare, weighing the public interests served by news reporting against those served by restraining the press. They also began to recognize that certain interests, such as protection of society against indecency and incitement to rebellion against the state, took precedence over the right to publish without interference. The opinions seem to be motivated by an underlying belief that publication of indecent material or calling for overthrow of the government was itself irresponsible.

In one case, the New York Court of Appeals held that the press clauses of the state and federal constitutions did not "permit attempts to destroy that freedom which the Constitutions have established," and thus criminalization of advocating overthrow of the government was constitutionally permissible. In so deciding, the court identified the defendant as having an improper motive that denied him First

159. Id. at 20 (quoting People v. Croswell, 3 Johns. Cas. 337, 393-94 (N.Y. 1804) (alterations added)). It is important to recognize that the early courts did not extend this protection against libel to the government. Id. at 20-21, 30-31. See, e.g., In re MacKnight, 27 P. 336, 339 (Mont. 1891) (stating that the purpose behind the adoption of speech and press clauses was to protect speech or publication that offended "governmental powers and agencies").


161. Id. at 25-30.

162. See, e.g., Williams v. State, 94 So. 882 (Miss. 1923) (holding that the criminalization of the sale of obscene materials did not violate the First Amendment or the Mississippi Constitution’s freedom of press guarantees); State v. Gibson, 174 N.W. 34, 36 (Iowa 1919) (holding that the Iowa Constitution’s Press Clause did not protect one “who uses his tongue for the purpose of annihilating a free government”).

163. People v. Gitlow, 136 N.E. 317, 319 (N.Y. 1922) (citing People v. Most, 64 N.E. 175, 178 (N.Y. 1902)) (alteration added).
Amendment protections for the materials he published. Similarly, the Kansas Supreme Court in 1895 upheld a law banning publications “devoted largely to the publication of scandals, lechery, assignations, intrigues between men and women, and immoral conduct of persons.” In doing so, the court noted that such publications were “calculated to taint the social atmosphere, and . . . tend[ed] especially to corrupt the morals of the young, and lead them into vicious paths and immoral acts.” The court held that the Kansas Constitution’s Press Clause did not prevent the legislature from suppressing such publications.

Common among the states, these views—that press protections were limited by responsible exercise of the freedom—carried over into federal decisions. In an early Twentieth Century case, the U.S. Supreme Court stated:

It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom.

In 1946, the Court applied this responsibility requirement in a case where the Florida courts had held a journalist and his newspaper in contempt of court for criticizing sitting judges in relation to pending cases. The majority reversed the convictions, determining that, in the circumstances of the case at bar, the First Amendment protected the

164. Id. The defendant was convicted for advocating anarchy by calling for a violent mass strike that would overthrow the government. Id. The court stated that “[t]he strikes advocated by the defendant were not for any labor purposes, or to bring about the betterment of the workingman, but solely for political purposes to destroy the state or to seize state power.” Id. at 321 (alteration added).
165. In re Banks, 42 P. 693, 694 (Kan. 1895).
166. Id. (alteration added).
167. Id.
editorials. However, the Court did note that the convictions could have been sustained had the editorial presented a "clear and present danger to the fair administration of justice." In doing so, the Court looked at the journalist's motives and the editorials' effect on criminal proceedings, suggesting that the journalist had not acted irresponsibly, but could have been liable if he had. In his concurring opinion, Justice Frankfurter was more explicit about the responsibility inquiry:

A free press is vital to a democratic society because its freedom gives it power. Power in a democracy implies responsibility in its exercise. Most State constitutions expressly provide for liability for abuse of the press's freedom. That there was such legal liability was so taken for granted by the framers of the First Amendment that it was not spelled out.

This language of responsibility can be seen in various other press cases.

Viewing \textit{Branzburg} in light of such precedent, the decision does not foreclose an inquiry into reporters' responsibility. The importance of the responsibility inquiry becomes apparent only when the reporters, by acting irresponsibly, have failed their constitutional duty of fostering democratic participation. Although the \textit{Branzburg} Court did not address the responsibility of the reporters, there is no indication that the Court felt the reporters had acted irresponsibly. The Court instead based its decision on the theory that the governmental interest in effective grand jury proceedings outweighed the asserted First Amendment interest in

\begin{itemize}
  \item [170.] \textit{Id.} at 349.
  \item [171.] \textit{Id.} at 348.
  \item [172.] \textit{Id.}
  \item [173.] \textit{Id.} at 355-56 (Frankfurter, J., concurring).
  \item [174.] See, e.g., Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 51 (1971) ("In an ideal world, the responsibility of the press would match the freedom and public trust given in it."); Sheppard v. Maxwell, 384 U.S. 333, 350 (1966) ("A responsible press has always been regarded as the handmaiden of effective judicial administration . . ."); Near v. Minnesota, 283 U.S. 697, 732 (1931) ("That [the First Amendment] was intended to secure . . . an absolute right to . . . print whatever he might please, without any responsibility . . . is a supposition too wild to be indulged . . ." (citation omitted) (alteration added)).
\end{itemize}
newsgathering. The Second Circuit’s decision in New York Times, however, suggests that the court was driven more by what it saw as the irresponsible actions of Miller and Shenon than by a view that there are no First Amendment protections for reporters. The court gave a good deal of attention to the fact that the reporters had interfered in an ongoing government investigation being conducted in the wake of the September 11th terrorist attacks, referring to them as “conduit[s who worked] to alert the targets of” a government investigation into possible terrorist activities. Further, the court also noted that by alerting the charities to the impending raids, the reporters “probably caused” an investigation into the source of the leaks, suggesting that an investigation would not have been necessary had Miller and Shenon not used the information in such an irresponsible way.

This focus on responsible reporting takes on renewed importance in the context of the twenty-four-hour news cycle, as the information vital to creating an educated electorate is at risk of being lost amid the many voices inherent in modern mass communication. With increasing corporate and commercial control of media outlets resulting in limited access to the marketplace, the original conception of the press as a marketplace of ideas is also at risk as the number of viewpoints is limited. As Professors Ronald Collins and David Skover put it, in modern society we “think less about the marketplace of ideas and more

175. Branzburg v. Hayes, 408 U.S. 665, 687 (1972). The Court also stated: On the records now before us, we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial. Id. at 690-91.


177. Id.

178. Id.


180. GARRY, supra note 7, at 62-63.
They believe that focusing on conceptions of the First Amendment speech protections under the original marketplace of ideas theory invites trivialization of free speech. Given rampant commercialization in the modern media and society’s focus on pleasure, Collins and Skover argue that by extending speech protection to all speech, the original intent behind the First Amendment of promoting the democratic participation of an informed electorate gets lost amid the clutter.

Courts can allay their apparent fears to extend meaningful First Amendment protections to the media by focusing their analysis on the media’s responsibility to foster democratic participation. Requiring responsible exercise by journalists will encourage journalists to fulfill the constitutional role the First Amendment created for them. In doing so, the First Amendment will not offer the same level of protection to speech that is less important to the democratic process. Divesting themselves of this worry, the courts should then be free to weigh press freedoms against competing government interests, giving adequate weight to the value of a free press to the civic process.

The problem for journalists in adapting the practice of their trade to this responsibility is that the courts have created no discernable standard for responsible exercise. As Journalism Professor Margaret Blanchard noted in response to two early decisions regarding press responsibility, “[a]pparently, the decisions were based only on what the judges intuitively believed was the place freedom of speech and freedom of the press held in society.” This subjective approach is reminiscent of Justice Stewart’s famous observation that obscenity “may be indefinable . . . [b]ut I know it when I see it.”

It seems doubtful that responsible exercise of journalism is equally indefinable, and as such, a “you-know-it-when-you-see-it”
approach is misplaced in this context. As an integral part of our democratic process, the news media should be given a more concrete explanation of the expectations society places on them. The failure to develop a reliable standard creates a risk that judges’ personal views will lead to uncertainty and a lack of institutional respect for the role the news media serve. Creating a standard by which the media can assert their First Amendment protections in a variety of situations will help to correct such problems and better protect competing public interests.

3. A New Test

In evaluating grand jury subpoenas seeking to identify sources of government leaks to reporters, courts should adopt a test that incorporates and builds upon the tradition that the First Amendment provides heightened press protections for responsible exercise of journalism. When a reporter has acted responsibly, she should be able to assert privileges rooted in the First Amendment beyond the almost universal prohibition against prior restraints. These privileges should then be balanced against competing governmental interests, placing the burden on the government to demonstrate that its interests require compelled disclosure of the source on a case-by-case basis.

Step 1: Did the reporter act responsibly?

Under the first prong of this test, the court should ask whether the reporter has acted as a reasonable reporter would in similar circumstances. There are various considerations that would play into such a determination. First, the court should consider whether the reporting served a public good. Because the primary purpose behind the Press Clause seems to be fostering democratic participation through an informed electorate, providing information that is consistent with that purpose serves the public good. The reasonable journalist will always keep in mind that she, like government, is charged with serving the public. Adopting the view that a free news media operates like a fourth branch in the system of checks and balances places reciprocal responsibilities on the media.

187. See supra note 9 and accompanying text.
In applying the reasonableness standard, courts can also look to the ethical codes of the journalism profession. These codes tend to focus on the role of the news media in fostering public participation in the democratic process, and their goals as outlined tend to be in line with the role of the press that has been articulated by the courts.\footnote{188} Using the profession's own codes of ethics would eliminate some of the courts' past reliance on subjective personal opinion and would avoid the problem of having the government be the sole determinant of what constitutes a responsible journalistic check on its power. Because journalism is an activity that enjoys constitutional protection under the First Amendment, the government would carry the burden of showing that the reporter acted irresponsibly and thus should be stripped of her heightened First Amendment protections. If the government meets this burden, the reporter would not be able to assert a First Amendment privilege against compelled disclosure. The reporter would then face a choice common to anyone subpoenaed by a grand jury: cooperate with the government or face the penalties of being held in contempt of court.

However, if the court determines that the reporter acted responsibly, she would then be able to assert a limited privilege against compelled disclosure. This limited privilege would protect the reporter's First Amendment rights, while still allowing the government to compel disclosure in limited circumstances where the governmental interest in disclosure outweighs the public interest in unimpeded newsgathering. This determination can be achieved by the court balancing the competing interests at stake.

Step 2: Balancing competing interests.

First, on one side of the scales, determine the public interest in allowing the reporter to assert the privilege. The court would first look at the public interests served by the First Amendment protections asserted by the reporter. In the context of government leak investigations, the high bar set by *Branzburg* for demonstrating a resulting chilling effect should be lowered because the likelihood of such chilling and its potential harm are heightened. When the source is a government official, the public interest in the information is more closely tied to the purposes of the First Amendment than when the source is a private actor. For example, the information provided by the sources in the various *Branzburg* cases bore a much more tenuous connection to the government’s performance than did the information provided to Judith Miller and her colleagues in the *Miller* case. Information provided by government sources enables the public to make informed decisions at the ballot box. When the information is more valuable to the public, the potential harm of a chilling effect on the public interest is much higher. As the government is seeking to burden the reporter’s First Amendment rights, it should be required to demonstrate that the chilling effect would be insubstantial. Furthermore, placing the burden on the reporters would be unfair because there is no way for a reporter to forecast with any certainty the level of damage done to her ability to gather news. Moreover, the real danger is not in the adverse impact on the individual reporter’s ability to gather news; rather, it is the cumulative effect that chilling will have on newsgathering in general that poses a real threat to the flow of information to the public. 189

In evaluating the public interest in protecting the reporter’s First Amendment privilege, the court should also determine how much potential harm would be done to the public’s informed decisions regarding its government if newsgathering and reporting of the particular type of information at issue would be chilled. Where the information concerns the government’s effectiveness in protecting national security,

189. See supra note 118 (demonstrating that the *Miller* decision led several government sources to be more hesitant before talking to reporters who were not involved in the earlier litigation).
the harm done to the public by chilling such information would be at its
greatest.

Second, on the other side of the scales, determine the
government’s interest in compelling disclosure. The court would then
balance these public interests in protecting the reporter’s First
Amendment source privilege against the governmental interest in
locating the source of its leak. Because the reporter will have already
established a constitutional interest on the other side of the scales, the
government must now demonstrate an interest for requiring disclosure of
the source that outweighs the asserted First Amendment interests. Where
the government’s interest is less important—such as maintaining control
of government employees or punishing an employee—the reporter’s First
Amendment rights would weigh more heavily. In proving an overriding
interest, the government must present evidence that establishes the
interest and cannot rely on mere assertions that its interest is more
important. Using this evidence, the court will then determine whether
the government’s proferred interest in locating the source outweighs the
potential harm to newsgathering as earlier identified. Like any
balancing, this will require a judgment call by the court; but factual
considerations—such as whether the government could locate the source
without the reporter’s cooperation—will determine the outcome. Where
the court determines that the First Amendment interests take precedence,
the reporter would not be required to disclose the identity of her source.
However, where the court determines that the government interests take
precedence, the reporter would be required to cooperate with the
government.

The value of this test is that it gives weight to the important
goals of the Press Clause where courts have sometimes disregarded its
importance. At the same time, the test acknowledges that there are
instances when First Amendment goals must give way to overriding
governmental interests. Applying the test to the Miller and New York
Times cases offers a concrete example of how it works and why it better
serves the public interests at play.
IV. APPLICATION OF THE NEW TEST TO THE JUDITH MILLER CASES

A. In Re Grand Jury Subpoena, Judith Miller

Pursuant to the new test outlined above, it would be important for a court undertaking the responsibility inquiry to recognize that neither Judith Miller nor Matthew Cooper reported the information regarding Plame's identity before Robert Novak's column ran.\textsuperscript{190} Assuming for the moment that (1) the act of leaking the fact that Wilson's wife worked at the CIA was criminal, (2) the source of the leak was within the government, and (3) public disclosure of the fact would endanger Plame and/or American intelligence operations, Miller and Cooper have a stronger argument than Novak for invoking First Amendment protections.

Although Novak was not a party to the case, applying the test to his reporting illustrates the importance of the responsibility inquiry. If the government presented evidence that showed that public identification of Plame as a CIA agent endangered national security, there is a good argument that Novak was irresponsible in naming Plame by name. Identifying a CIA agent might have been unreasonable for Novak because it might have harmed both Plame's personal interests as well as important governmental interests in maintaining effective intelligence operations. Furthermore, if the leak were merely part of a smear campaign and Novak knew or should have known that, his reporting might violate ethical standards of fairness and impartiality. It is harder to argue that Miller and Cooper acted irresponsibly. More likely, the caution they exercised by refraining from publishing the information they received was likely reasonable if one assumes that publication could have endangered American interests.

In any event, the government would have the burden of proving irresponsibility through direct evidence. Much of the evidence that Judge Tatel cited in his balancing test in the \textit{Miller} case is unconvincing. He often relied on media reports and implication. Judge Tatel's basis for the fact that Plame was a covert agent was a Washington Post article\textsuperscript{191}

\textsuperscript{190} \textit{See supra} note 67.

\textsuperscript{191} \textit{In re} Grand Jury Subpoena, Judith Miller, 438 F.3d 1141, 1178-79 (D.C. Cir. 2005) (Tatel, J., concurring). Judge Tatel noted that the leaks in question were
and testimony that a CIA spokesperson had told Robert Novak that publication of Plame’s name “might be embarrassing” if she were to later travel overseas. Judge Tatel believed that the latter statement “strongly implies Plame was covert at least at some point.” Furthermore, he made clear that while Special Counsel Fitzgerald asserted that Plame’s identity was protected by the Intelligence Identities Protection Act, Fitzgerald never actually provided evidentiary support for that proposition. As to whether Novak knowingly took part in a partisan smear campaign, it would weigh in Novak’s favor that he first verified the information with the CIA. Novak has stated publicly that he “never would have written those sentences if [CIA spokesman] Harlow, then-CIA Director George Tenet or anybody else from the agency had told me that Valerie Plame Wilson’s disclosure would endanger herself or anybody.” Furthermore, one would reasonably expect the CIA to have responded more forcefully in discouraging the publication if true national security interests were at stake.

There is even less evidence that Miller and Cooper acted irresponsibly. While Miller learned the information from her source in “a serious matter.” He indicated that “Plame evidently traveled overseas on clandestine missions beginning nearly two decades ago,” information which he cited to a Washington Post article, and thus concluded that her covert activities as well as that of her associates may have been compromised by the leak. He later indicated that “[w]hile another case might require more specific evidence that a leak harmed national security,” in this case it was sufficient that the CIA seemed to have strongly implied to Novak that Plame was covert at some point in time. He also at 1182 (alteration added).

192. Id. at 1182 (Tatel, J., concurring).
193. Id. (Tatel, J., concurring).
194. Id. Judge Tatel stated: “[T]he special counsel refers to Plame as a ‘person whose identity the CIA was making specific efforts to conceal and who had carried out covert work overseas within the last 5 years’—representations I trust the special counsel would not make without support.” Id. (alteration added).
195. Robert Novak, Op.-Ed., The allegation against me is so incorrect I feel constrained to reply, Chi. Sun-Times, Aug. 1, 2005, at 41 (alteration added). Novak further stated that the CIA spokesman had told him “she probably never again would be given a foreign assignment but that exposure of her name might cause ‘difficulties,’ [and that] [a]ccording to CIA sources, she was brought home from foreign assignments in 1997, when agency officials feared she had been ‘outed’ by the traitor Aldrich Ames.” Id. (alterations added).
the course of an interview, she never used the information. Cooper ultimately published a story regarding his source’s disclosure of Plame’s identity, but he did not do so until after Plame’s identity had already been made public through Novak’s column. The caution Miller and Cooper exercised by refraining from publishing the information seems reasonable, especially if one accepts that publication could have endangered American interests.

After determining that Miller and her colleagues acted responsibly, the court would need to balance the public interest in newsgathering and reporting of information relating to America’s national security efforts against the government’s interest in compelling disclosure of the source. In Miller, the information leaked was part of a much bigger news story and escalating public debate. When viewed in isolation, the fact that Wilson’s wife worked at the CIA may seem relatively unimportant. However, its true importance stems from its role in the narrative of the Iraq War and the broader context of the state of America’s efforts to improve national security. Following the September 11th terrorist attacks, public debate focused on the intelligence failures that may have contributed to the success of the attacks. Understanding how American intelligence agencies learned of and reacted to the terrorist threat was an important part of evaluating whether the government responded to the attacks effectively. Furthermore, there

196. This raises the question as to how the special prosecutor even knew that Plame’s identity had been disclosed to Miller. As the government must have had some source for that information, it seems possible that it did not need Miller’s testimony in order to obtain the information it was seeking.

197. In fact, Cooper testified that he first learned Plame’s name either from Novak’s column or by searching for her on the Internet. Cooper, supra note 76.


199. See The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States (Official Government Edition), available at http://www.gpoaccess.gov/911/pdf/fullreport.pdf (last visited Mar. 29, 2007) (detailing the events that led up to the September 11th attacks and offering recommendations to prevent such attacks in the future). In explaining the importance of its report, the Commission stated:
was widespread debate over the propriety of invading Iraq and overthrowing Saddam Hussein.\textsuperscript{200} Joseph Wilson’s op-ed\textsuperscript{201} lent credence to the claims that the Bush administration had purposely misled the public. Information relating to Wilson’s credibility thus gave the public an important basis for judging the value that should have been given to the administration’s claims. Given the high governmental interest in continued and effective national security, great weight should be put on the side of the scales protecting the reporters’ ability to maintain confidentiality. By forcing disclosure, the government could likely cut off the flow of information that would allow the public to evaluate the effectiveness of American intelligence operations.

Without access to the evidence presented by the government in the \textit{Miller} case, it is hard to determine how much weight the government’s asserted interest in protecting national security should be given. It is possible that the D.C. Circuit got it right. However, the court offered no concrete explanation of why the evidence favored the

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At the outset of our work, we said we were looking backward in order to look forward. We hope that the terrible losses chronicled in this report can create something positive—an America that is safer, stronger, and wiser. That September day, we came together as a nation. The test before us is to sustain that unity of purpose and meet the challenges now confronting us.

\textit{Id.} at xvi.


Just as the country can’t bring the war in Iraq to a tidy conclusion, it can’t declare a truce over the fact that Bush took us there. For those who support him, the policy of pre-emptive engagement is the ultimate sign of his visionary grasp of what is needed to fight and win the war on terror . . . . For the increasing numbers who have doubts about the original mission to Iraq . . . Bush’s policy was driven by everything from a thirst for oil to a crusading interventionist zeal.

\textit{Id.} at 4.

\textsuperscript{201} See \textit{supra} note 57 and accompanying text.
government, opting instead to hold that Branzburg pre-empted all claims of First Amendment protections for journalists in the grand jury context.\textsuperscript{202} It is possible that the government’s interest here was high indeed. If public disclosure of Plame’s identity compromised ongoing American intelligence efforts, the government likely had a need to ferret out the sources of the leak in order to prevent such irresponsible leaking in the future. However, the government should have been required to prove that the leak itself was dangerous in order to demonstrate that it had an overriding interest in locating the source of the leak.

\textbf{B. New York Times v. Gonzales}

The same test can be applied to the \textit{New York Times} case. Beginning with the responsibility inquiry, the reporters here seem much less likely to be able to invoke First Amendment privileges than those in the Miller case. To begin, it is difficult to identify the public good served by Miller’s and Shenon’s reporting. While accepting the premise that the information in Miller’s first story (published before the raid)\textsuperscript{203} educated the public about ongoing American efforts to thwart terrorist activities, the reporters unreasonably alerted charities with suspected terrorist ties to impending government raids. That same information would have been just as available the next day, following the government raid. The government could persuasively argue that by notifying the charities and reporting the day before the raid the journalists actually \textit{endangered} the general welfare. Furthermore, applying journalistic ethical standards would give the government a good argument that the reporters had deviated from the norms of responsible reporting. Miller and Shenon were no longer independent reporters but had inserted themselves as participants in the news story. The American Society of Newspaper Editors’ standard of responsibility states:

\begin{quote}
    The primary purpose of gathering and distributing news and opinion is to serve the general welfare by informing the people and enabling them to make judgments on the issues of the time.
\end{quote}

\textsuperscript{202} \textit{In re Grand Jury Subpoena, Judith Miller}, 438 F.3d 1141, 1149 (D.C. Cir. 2006).

\textsuperscript{203} \textit{See supra note 80 and accompanying text.}
Newspapermen and women who abuse the power of their professional role for selfish motives or unworthy purposes are faithless to that public trust.\textsuperscript{204}

There is evidence to support an inference that Miller and Shenon acted for an unworthy purpose by alerting the charities of the impending government raids. Such interference in a government investigation is unwarranted and irresponsible. There appears to be little news value in obtaining comment from the charities before the government acted, rather than simply waiting twenty-four hours, until after the government had acted. Furthermore, the reporters could have endangered federal agents—and ultimately the American public—by thwarting an investigation into alleged terrorist activities.

With the government likely able to meet its burden of showing the reporters acted irresponsibly, Miller and Shenon would not able to assert First Amendment source protection, as they were no longer serving their constitutionally protected function under the Press Clause. Thus, the court would have no need to balance the governmental interests in compelled disclosure against the public interest in protecting the reporters’ First Amendment privilege. Note that the \textit{New York Times} decision seems to reflect much of this thinking already. Having placed such emphasis on the irresponsible behavior of the reporters,\textsuperscript{205} the Second Circuit’s apparent lack of sympathy for press protections\textsuperscript{206} may in fact be reflective of a belief that Miller and Shenon should be forced to reveal their sources, having failed to act responsibly with the information they had obtained.

\textbf{CONCLUSION}

The future of a First Amendment confidential source privilege lies in the hands of the Supreme Court, but the Court has yet to clarify or reconsider its holding in \textit{Branzburg}. Since \textit{Branzburg} was decided over thirty years ago, forty-nine states and the District of Columbia now offer either a statutory or common law privilege to reporters in such

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\textsuperscript{204} See ASNE STATEMENT OF PRINCIPLES, \textit{supra} note 188.
\textsuperscript{205} See \textit{supra} notes 92-93.
\textsuperscript{206} See \textit{supra} notes 87-89.
\end{flushright}
situations. And even when presented with an issue upon which the circuit courts have somewhat split—as most circuits recognize some type of privilege to shield confidential sources but offer "little agreement to the extent of the privilege"—the Supreme Court declined to grant Judith Miller’s and Matthew Cooper’s petitions for certiorari. Prominent attorney Floyd Abrams argued in the early 1980s that the Burger Court (which decided *Branzburg*) routinely refused to hear press cases in which the press had lost in the lower courts, thereby limiting the scope of the debate considerably. This trend may continue with the current Court. By passing on the issues decided so contentiously in *Branzburg*, the Court has left the analysis to the lower courts where certainty is more difficult to come by.

However, the news media should not necessarily be disheartened by the Court’s decision not to take the *Miller* case. Decisions handed down in today’s climate of distrust of the news media will serve as precedent for future decisions. Here it becomes evident that the media has an important role to play in reframing the public debate over the level of constitutional protection it deserves. For a variety of reasons, both the government and society have grown increasingly skeptical of the media and its motives. The media need to address these concerns

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210. See id. at 143.
212. Id. While pundits on both sides decry the media’s perceived liberal bias or conservative bias, some studies suggest that public dissatisfaction with the media stems from something else: What people often mean when they say the press is biased in its political reporting is that it is biased toward its own self-interest. The media are seen as exploitive, as needlessly stirring political controversy and offering too much contentious punditry. Surveys taken for the ASNE
head on. By re-engaging and earning the trust of the public through increased diversity of viewpoints, greater focus on the reporting of details instead of summarizing information, decreased emphasis on corporate culture, and dedication to independent, unbiased reporting, the media has the power to reframe its constitutional role in our society. Since the September 11th attacks, the government has understandably focused on national security and moved towards greater protection of classified information. The press must demonstrate, both to the public and to the government, that its goals are not inconsistent with the government’s national security goals. If the press fails to do so, it is unlikely that courts will dramatically change their current analysis of First Amendment press protection.

By the same token, judicial adoption of the theory that the First Amendment offers its greatest protection to press activities that responsibly fulfill the media’s role in the democratic process could combat some of the problems raised in the current analysis of press freedoms. If the courts begin rewarding responsible journalism that promotes the goals of the democratic process, they could encourage more media outlets to focus their efforts on promoting public participation and civic responsibility. Thus, the courts also have a role in encouraging the system to operate as the Founding Fathers envisioned—where a free media fosters educated participation of the electorate in our government.

Over thirty years ago, Justice Powell noted in his dissent to the Branzburg decision: “In the event of a subpoena, under today’s decision, the newsman will know that he must choose between being punished for contempt if he refuses to testify, or violating his profession’s ethics and impairing his resourcefulness as a reporter if he discloses confidential information.” Judith Miller can certainly attest to truth of his remarks. The test now for both the courts and the media is to change the adversarial nature of their relationship and put the public’s interests first.

Journalism Credibility Project in 1998 found that 71 percent thought that the cause of bias in television news was a desire for higher ratings, while only 10 percent thought it was due to political bias. Similar answers were given about bias in newspapers. Andrew Kohut, Listen Up, Bias Mongers! The Audience Doesn’t Agree, COLUM. JOURNALISM REV. 68 (Mar.-Apr. 2002).