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The Source of the Problem of Sources: The First Amendment Fails the Fourth Estate

Joel Gora

THE SOURCE OF THE PROBLEM OF SOURCES: THE FIRST AMENDMENT FAILS THE FOURTH ESTATE

*Joel M. Gora**

It is a great honor to have this article appear in this Symposium, *Are Journalists Privileged?*, because of the identity of the principal participants. Anthony Lewis almost singlehandedly invented the genre of journalism about law;[1] Victor Kovner has been a pioneer in fashioning the law's protection of journalism and journalists; Max Frankel, prize-winning reporter and editor at the *New York Times*, supplied the professional understanding and rationale for why journalism needs and is entitled to claim the law's protection.[2] There are many intersections of law and journalism—the modern era of defamation law and its becoming subjected to First Amendment restraints,[3] questions of media ownership and concentration of power,[4] issues of protection of media content especially in this digital age,[5] and occasionally even questions of prior restraint and the press—the crucible which gave rise to the underpinnings of the First Amendment originally.[6]

The intersecting issue that is the subject of this Symposium has bedeviled law and journalism for a generation. Fifty years ago this year, the first prominent decision attempting to reconcile the First Amendment claim of a right to protect confidential sources with the judicial system's demand to discover and disclose all legally relevant evidence was handed down in the well-known case of *Garland v. Torre*.[7] In that case, then-Circuit Judge Potter Stewart fashioned a careful balancing approach to reconcile these conflicting demands in a way which the intervening years have not necessarily much improved.

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1 *See* ANTHONY LEWIS, GIDEON'S TRUMPET (1964).

2 *See* Max Frankel, *The Washington Back Channel*, N.Y. TIMES MAG., Mar. 25, 2007, at 40.

3 *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

4 *See* Fed. Commc'ns Comm'n v. Nat'l Citizens Comm. for Broad., 436 U.S. 775 (1978).

5 *See* Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005).

6 *See* N.Y. Times Co. v. United States, 403 U.S. 713 (1971).

7 259 F.2d 545 (2d Cir. 1958).

In attempting to put these issues into a larger perspective, and to mark the journey that we have all taken, I would like to touch upon three themes: (1) where did we start?, (2) where have we come?, and (3) what have we learned?

I. WHERE DID WE START?

My own personal Zelig-like involvement in the issue of the right of journalists to protect their sources began in the spring of 1970, even before there was a "Deep Throat." As is well known, the key case guiding us all on this issue is the Supreme Court's 1972 ruling in *Branzburg v. Hayes*[8] on whether the press should have a First Amendment right to protect its confidential sources. As a young lawyer with the ACLU, I wrote a brief in that case, siding, not surprisingly, with the press, and that case gave me the privilege of working, for the first time, with Floyd Abrams, as well as many other prominent media lawyers. But there was another reason for my interest in press rights, namely, the fact that my wife, Ann Ray Martin, being a Newsweek reporter, had a few confidential sources of her own to protect, one of whom, occasionally, was this writer. In fact, we would sometimes joke that whenever we had a conversation, there were three potential privileges working simultaneously: husband/wife, lawyer/client, and journalist/source.

But of course, these issues of whether journalists can protect their confidential sources are not laughing matters. They were raised most powerfully in the *Branzburg* case a generation ago in a setting eerily reminiscent of the current mood in the country. Then, as now, a war deeply divided the country, and there were sharp antagonisms between the press and the Administration on a wide variety of issues, including the attempt to enjoin the publication of the leaked Pentagon Papers and to prosecute the Deep Throat in that case, Daniel Ellsberg.[9]

The interlocking of events was stunning. The lawyers who represented the New York Times in the Pentagon Papers case in 1971, got that assignment as a result of working on the Times' brief in the *Branzburg* case. The Pentagon Papers were leaked in 1971 by a confidential source, Daniel Ellsberg. The plumbers unit was set up to plug leaks like that, leading to the Watergate burglary in 1972. That burglary, which would give us our most famous confidential source—I am referring of course to the famous "Deep Throat" who was revealed, after his death, to have been Mark Felt, a high level FBI official—

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[8] 408 U.S. 665 (1972).

[9] *See generally N.Y. Times*, 403 U.S. at 713.

occurred ten days before the Supreme Court's *Branzburg* decision on the constitutional right to protect such confidential sources.

The specific dispute over confidential sources in *Branzburg* came in the context of cutting-edge reporting about the counterculture: articles about trafficking in marijuana and other drugs, stories about the Black Panther Party. Government officials believed they were properly investigating crimes, and that the grand jury had the right to "every man's evidence." The reporters claimed, on the other hand, that the purpose of constitutional protection for freedom of the press was to enable them to inform the public about critical issues, that their ability to do so depended on their ability to gather information from confidential sources, and that if they had to disclose those sources in grand jury investigations, the sources would dry up, and the public would be without the information necessary to govern effectively.

The press and its supporters had a strong basis for their claim of powerful First Amendment protection for journalistic processes. In its brief to the Supreme Court in the *Branzburg* case, the ACLU pointed out the Court had consistently recognized that a free and unfettered press was the indispensable prerequisite to democratic government and that the press was the constitutionally-appointed agent of the public's right to know and the constitutionally-designated facilitator of the free flow of information to the public. Here are some of the precedents we cited to the Court:

> The [primary] purpose of the grant of immunity here invoked was to preserve an untrammeled press as a vital source of public information. The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. . . . A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.[10]
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> [The First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, [and] that a free press is a condition of a free society."[11]
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> The free press has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public

[10] Grosjean v. Am. Press Co., 297 U.S. 233, 250 (1936).

[11] Associated Press v. United States, 326 U.S. 1, 20 (1945).

> officers and employees and generally informing the citizenry of public events and occurrences.[12]
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The primary purpose of the First Amendment is "producing an informed public capable of conducting its own affairs."[13] This understanding was nowhere more eloquently and precisely summed up than by Justice Hugo L. Black, in his final opinion on the Court in the Pentagon Papers Case, a year before the *Branzburg* decision:

> In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. 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.[14]

The point was clear: in our scheme of things the press exists not primarily to provide employment, to advertise products, or even to make profits, but to inform the public. Any inhibition on the press's ability to do so impairs one of the fundamental understandings of our political democracy. The press is constitutionally protected so that it could disseminate information to the public. The cases suggested a powerful emphasis on the public's right to know, as enhanced by a free flow of information to the public, as enforced by the press as an agent of the public's right to know.[15]

Not only were there these extremely strong understandings of the role of the press in gathering information for dissemination to the public, but they existed in a constitutional environment that was generally hospitable to strong First Amendment claims. The First Amendment landscape in 1972 was more protective than it had ever

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12 Estes v. Texas, 381 U.S. 532, 539 (1965).

13 *See* Red Lion Broad. Co. v. Fed. Commc'ns Comm'n, 395 U.S. 367, 392 (1969).

14 *See* N.Y. Times Co., v. United States, 403 U.S. 713, 717 (Black, J., concurring) (1971).

15 In more recent times, the Court has seemed less willing to protect the free flow of information to the public, *see* McConnell. v. Fed. Election Comm'n, 540 U.S. 93 (2003), though more recent indications in this area are more positive, see Fed. Election Comm'n v. Wis. Right to Life, Inc., 127 S. Ct. 2652 (2007).

been. The Supreme Court, in a series of contemporaneous decisions, had established the maximum degree of protection for speech about government and politics. In cases like *New York Times Co. v. Sullivan*,[16] *Miami Herald Publishing Co. v. Tornillo*,[17] *Brandenburg v. Ohio*,[18] *Cohen v. California*[19] and *New York Times Co. v. United States*,[20] the Court fashioned the broadest protection to that time for political speech and established the central role of the First Amendment as freeing people to criticize the government, maximizing the flow of political information to the public, giving individuals and institutions the power to choose how and when to speak with minimal governmental interference or direction. To be sure, the Court was not extending First Amendment protection in all cases as far as the eye could see, and it upheld some regulation of political speech in certain contexts such as broadcasting and government employment.[21] But these seemed special contexts, and apart from them First Amendment claims generally enjoyed smooth sailing. It felt, as we sailed into the seas of seeking protection for confidential sources, that we had a strong First Amendment wind at our backs.

So it was not surprising that, when the Supreme Court resolved these conflicting claims and established the First Amendment standard in *Branzburg* the case produced the following opinion:

> [T]here is no "compelling need" that can be shown which qualifies the reporter's immunity from appearing or testifying before a grand jury, unless the reporter himself is implicated in a crime. His immunity . . . is therefore quite complete, for, absent his involvement in a crime, the First Amendment protects him against an appearance before a grand jury and if he is involved in a crime, the Fifth Amendment stands as a barrier. Since . . . there is no area of inquiry not protected by a privilege, the reporter need not appear for the futile purpose of invoking one to each question. . . . [A] newsman has an absolute right not to appear before a grand jury . . . .
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> The New York Times . . . takes the amazing position that First Amendment rights are to be balanced against other needs or conveniences of government. My belief is that all of the "balancing" was done by those who wrote the Bill of Rights. By casting the First Amendment in absolute terms, they repudiated the timid, watered-down, emasculated versions of the First Amendment which the Government and the New York Times advance in [this] case.[22]

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16 376 U.S. 254 (1964).

17 418 U.S. 241 (1968).

18 395 U.S. 444 (1969).

19 403 U.S. 15 (1971).

20 403 U.S. 713 (1971).

21 See U.S Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548 (1973); Red Lion Broad. Co. v. Fed. Commc'ns Comm'n, 395 U.S. 367, 392 (1969).

22 Branzburg v. Hayes, 408 U.S. 665, 712-13 (1972) (Douglas, J., dissenting).

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> A reporter is no better than his source of information. Unless he has a privilege to withhold the identity of his source, he will be the victim of governmental intrigue or aggression. If he can be summoned to testify in secret before a grand jury, his sources will dry up and the attempted exposure, the effort to enlighten the public, will be ended. If what the Court sanctions today becomes settled law, then the reporter's main function in American society will be to pass on to the public the press releases which the various departments of government issue.[23]

That last sentence probably reveals a professorial ploy on my part. Those stirring passages came not from the Court's opinion, but from the dissent of Justice William O. Douglas, one of Court's greatest champions of freedom of speech and freedom of the press. But it is a reminder of the real baseline from which we should view today's battles. Because, in the *Branzburg* case, the Court was one vote away from giving extremely strong, if not Justice Douglas' absolute, protection to the press's First Amendment claims.

The *Branzburg* Court majority, unfortunately, took a much more distressing tack. In an opinion, written by Justice Byron White, the Court sharply rejected the broad contours of the First Amendment claims. Emphasizing the importance of investigating and prosecuting criminal wrongdoing, the Court held that the First Amendment did not afford the journalists a broad right to protect their confidential sources against otherwise legitimate grand jury inquiries.[24]

How broad or narrow that ruling was has been the subject of debate ever since. Some have claimed that the Court categorically rejected First Amendment protection for confidential sources, except in rare cases of bad faith or harassing investigation by prosecutors. Others, buoyed by a concurring opinion by Justice Lewis Powell, whose vote was decisive to the outcome, argued that there would have to be an ad hoc balancing of interests in each case.

And thus the lines were drawn, and the battle over the right of journalists to protect their confidential sources has raged ever since on a number of fronts.

II. WHERE HAVE WE COME?

In the wake of *Branzburg*, what recourse did the press have to try

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[23] *Id.* at 722.

[24] *Id.* at 665 (majority opinion).

to protect its confidential sources? A number of options were available.

First, there was the effort to rely on the presence of Justice Powell's concurring opinion to argue that the Court decision and the First Amendment required a traditional balancing of the interests in each case. That balancing would essentially ask: how much did the government or the litigants need the information in the particular circumstance and what alternatives were available other than getting it from the press? Some lower court cases had taken this approach pre-*Branzburg*, and the Court's decision arguably authorized it henceforth.[25]

Second, there was the prospect of statutory protection. A number of "shield laws" had been enacted by States, and they often provided significant, if not complete, protection to journalistic sources.[26] Immediately following the Court's *Branzburg* decision, there was a push to enact a federal shield law, which would give similar statutory protection in federal judicial and administrative proceedings and which would, as a practical matter, have been a significant barrier to interference with confidential sources. Despite a flurry of hearings later that year, no federal legislative progress was made.[27] It is 35 years later, and that is still the case, although a bill has recently passed the House Judiciary Committee.[28]

Finally, there were the relatively new Justice Department Guidelines on subpoenaing news sources. Those guidelines, promulgated, ironically, by then Attorney General John Mitchell, no friend of the media and vice versa, required that federal lawyers also go through a balancing process before seeking confidential information from the press.[29] Though there was a debate about whether these guidelines were judicially enforceable as administrative regulations, their presence provided a practical buffer to indiscriminate and unnecessary intrusion on press information by federal attorneys.

A. *The Development of the Federal Case Law*

First, through the process of case-by-case constitutional

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25 *See id.* at 709 (Powell, J., concurring).

26 The Court's opinion in *Branzburg* noted that 17 States in 1972 provided some type of statutory protection to a journalist's confidential sources. *Id.* at 689 n.27.

27 *See Newsmens' Privilege, Hearings Before Subcom. No. 3, H. Comm. on the Judiciary*, 92nd Cong. (1972).

28 On August 1, 2007, the House Judiciary Committee, by voice vote, passed H.R. 2102, The Free Flow of Information Act of 2007. *See* S. 1267, H.R. 2102, 110th Cong. (1st sess. 2007). The bill passed the full House on October 16 2007 by a vote of 398 to 21 and has passed the Senate Judiciary Committee. President Bush has threatened to veto the measure if it reaches his desk. *See* Elizabeth Williamson, *House Passes Bill to Protect Confidentiality of Reporters' Sources*, WASH. POST, Oct. 17, 2007, at A03.

29 The Guidelines can be found at 28 C.F.R. § 50.10 (2008).

adjudication, the lower courts have given a variety of differing interpretations to the Court's *Branzburg* ruling. Some courts, for example, have viewed its precedential scope as limited to grand jury criminal investigations, feeling free to grant significant First Amendment protection to journalistic sources outside that setting, in civil cases, for example. Indeed, in a key case decided shortly after *Branzburg*, the Second Circuit held that in civil cases the First Amendment required a careful balancing of whether the "public interest in non-disclosure of a journalist's confidential sources outweighs the public and private interest in compelled testimony."[30] In that case, the Court ruled the reporter could not be made to testify.

In the years since then, dozens, perhaps hundreds, of decisions have been handed down recognizing various degrees of First Amendment protection of confidential sources, such that press advocates could confidently claim that, a quarter century after the defeat in *Branzburg*, that the courts have generally come to recognize a broadly recognized constitutional Qualified Privilege to protect confidential sources. Indeed, starting shortly after *Branzburg*, in civil cases, courts had consistently rebuffed efforts to probe confidential sources (except perhaps in libel and similar suits against the press itself for serious derelictions of responsible reporting or editing) so much that one could almost say that in civil cases there was a de facto "absolute privilege."[31] In 1998, for example, the Second Circuit observed:

> The law in this Circuit is clear that to protect the important interests of reporters and the public in preserving the confidentiality of journalists' sources, disclosure may be ordered only upon a clear and specific showing that the information is: highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources.[32]

One could accurately say that the press had lost the battle in *Branzburg*, but won the war in three decades of lower court rulings giving a narrow interpretation to that ruling and finding broad room for First Amendment protection of confidential sources.[33] In more recent years, however, the press would come in for a bit of a rude awakening. Despite the numerous cases recognizing strong First Amendment protection for confidential sources (and despite a steady growth in the number of state shield laws or state court decisions strongly protecting the press's ability to protect confidential sources), two cases in the last few years have cast a bit of a pall on the sense of the inevitable

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30 Baker v. F & F Inv. Co., 470 F.2d. 778, 783 (2d Cir. 1972).

31 *See, e.g., id. See generally* Romualdo P. Eclavea, Annotation, *Privilege of Newsgatherers Against Disclosure of Confidential Information*, 99 A.L.R.3d 37 (1980).

32 Gonzales v. Nat'l Broad. Co., Inc., 186 F.3d 102, 106 (2d Cir. 1998) (quoting McGraw-Hill, Inc. v. Arizona (*In re* Petroleum Prod. Antitrust Litig.), 680 F.2d 5, 7 (2d Cir. 1982)).

33 *See, e.g.*, United States v. Cuthbertson, 630 F.2d 139 (3d Cir. 1980).

expansion of the scope of confidential source protection.

The first case, *McKevitt v. Pallasch*,[34] involved a decision by Judge Richard Posner, widely regarded as one of the most astute, and scholarly judges on the federal bench. The case involved a criminal defendant being prosecuted in Ireland for directing terrorism, who wanted journalists to turn over tapes and information concerning a key prosecution witness, whom the journalists had interviewed for a book. Although this was not a case where the press's own behavior was at issue, and the journalists were truly third parties to the events, Judge Posner nonetheless sustained the order to turn over the tapes and his decision cataloged the law and concluded rather powerfully that the concurrence by Justice Powell was too slender a reed upon which to base the de facto Qualified Privilege which many courts have derived since 1972.

Perhaps even more deflating was the ruling in the Judith Miller/Matthew Cooper/Valerie Plame/"Scooter" Libby case. This case originated in the early months of the Iraq War, the summer of 2003, and was fueled by developing debates over the Administration's justification for the war. Joseph Wilson, a former diplomat, wrote an Op Ed piece in the *New York Times* indicating that he had been dispatched to Africa to determine the validity of reports of Saddam Hussein's quest for nuclear materials, and that such reports were unfounded. The article was obviously a powerful blow against the White House. A few days later, prominent conservative columnist Robert Novak wrote about the matter and quoted a confidential source as indicating that Wilson had been dispatched on that African trip by his CIA operative wife, Valerie Plame, an expert on weapons of mass destruction. The family connection had the effect of undermining Wilson's article by making it seem that his trip was more a nepotistic junket arranged by his wife than a serious study of Iraq's nuclear capacity. Many speculated that Novak's source was a White House staffer or ally out to undermine Wilson's report (despite Novak's description of his source as "not a partisan gunslinger"). Amidst a chorus of cries for an investigation of the "leak"—including a notorious editorial in the *New York Times* supporting such an investigation from the White House35—the Bush administration felt pressured to accede to demands for appointment of a special prosecutor to investigate "the leak" and to determine whether the revelation of Plame's identity violated the laws protecting intelligence agents' identities36—laws whose passage the press had strongly resisted. The primary witness lists would consist of White

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34 339 F.3d 530 (7th Cir. 2003).

35 *See* Editorial, *Investigating Leaks*, N.Y. TIMES, Oct. 2, 2003 at A30 (opining that the "Justice Department should focus its attention on the White House, not on journalists").

36 Intelligence Identities Protection Act, 50 U.S.C. § 421 (2000).

House and high level administration officials and top echelon members of the Washington press establishment, all of whom would be called before a federal grand jury by Special Counsel Patrick Fitzgerald, a highly visible and highly regarded federal prosecutor. It was a recipe for a constitutional pile-up.

Then ensued a two-year pitched battle involving the media, the White House, and the special prosecutor, with a "whole world is watching" quality as the case unfolded and top level journalists and political figures were hauled before a Washington, D.C. grand jury to testify about the Plame leak: what did they know?, and when did they know it? When the dust had settled, the results were not pretty for the press or the First Amendment. The District Court's court ruling on the press claims of First Amendment protection was sharply critical of the basis for the claim.[37] On appeal, with the most prominent First Amendment counsel representing an establishment of media representatives, the results were extremely disappointing. The prevailing opinion in the appeals court was almost dismissive of the constitutional claims, took the adamant position that *Branzburg* had clearly considered and rejected any special First Amendment protection for the press, and scoffed at the Powell concurring opinion as somehow legitimizing the recognition of rights squarely rejected by the opinion of the Court, which Powell also joined.[38] There was some solace in the fact that a concurring opinion in the case did go to considerable lengths to recognize a common law—as distinct from constitutional—basis for protecting the press's use of confidential sources.[39] But the formula crafted by that judge involved highly contingent and subjective factors—including, quite problematically, how harmful was the impact of the leak and how important was the news value of the leak. And, at the end of the day, in applying that balancing approach, the judge concluded that the press information was important enough to compel the testimony (in an opinion where eight pages of confidential information essential to the judges' conclusion about the importance of the testimony was blocked from public view).

The decision was highly visible in the legal and journalistic communities, as was the subsequent Supreme Court denial of review, which was unanimous,[40] despite the large number of media and First Amendment groups which had asked the Court to intervene on behalf of the press. You could almost hear the courthouse door slam shut on the

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37 *See In re* Special Counsel Investigation, 332 F. Supp. 2d 26 (D.C. Cir. 2004).

38 *See In re* Grand Jury Subpoena, Judith Miller, 397 F.3d 964, 968-72 (D.C. Cir. 2005).

39 *See id.* at 986 (Tatel, J., concurring).

40 Judith Miller v. United States, 545 U.S. 1150 (2005). For one key insider's account of the legal battles and the whole issue of journalists' protecting their confidential sources, see NORMAN PEARLSTINE, OFF THE RECORD: THE PRESS, THE GOVERNMENT, AND THE WAR OVER ANONYMOUS SOURCES (2007).

effort to get the Court to review *Branzburg* while it still has relevance. As a consequence of those rulings, when the Scooter Libby case came to trial—not over the legality of the leaks, but over the alleged perjury and obstruction of justice in connection with the investigation into those non-criminal leaks—we had to witness the spectacle of some of the nation's most prominent national journalists having to testify indiscriminately about their sources, the use of the information, their methods of journalism and other tools of the trade that rarely have been the subject of such open public testimony in the past. It was a doleful spectacle. As Max Frankel so poignantly noted in his New York Times magazine article:

> So there I sat, watching the United States government in all its majesty dragging into court the American press (in all its piety), forcing reporters to betray confidences, rifling their files and notebooks, making them swear to their confused memories and motives and burdening their bosses with hefty legal fees—all for the high-sounding purpose, yet again, of protecting our nation's secrets. Top-secret secrets! In wartime![41]

The results in these cases point up the advantages, but also the occasional perils, of courts' utilizing a "balancing test" to "weigh" the interests on both sides and determine whether First Amendment rights can be overcome in each particular case. During the *Branzburg* litigation, some press groups argued for such a balancing approach, applied strictly and tightly to be sure, that would offer the press basic constitutional protection to shield sources and information except in those cases where the government need for the information was *really* compelling and going after the press was *really* the government's only option. Other press groups argued that if you actually applied the balancing test in a strict way, there would be very few cases where the press right would need to yield, and, therefore, recognizing an "absolute" protection was both not that great a compromise of governmental interests and also the only practical guarantee of press freedom to use confidential sources.

There are two reasons why such balancing tests can be very problematic. First, courts often err on the side of the government, and the malleability of the verbal formula that embodies such tests is an invitation to judicial rejection of constitutional protection. One of the most classic balancing formulas is the well-known "clear and present danger" test, framed by Justice Oliver Wendell Holmes in a case whose outcome—punishing anti-war criticism—was clearly wrong, provides as follows:

> The question in every case is whether the words used are used in

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41 Frankel, *supra* note 2, at 40.

> such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.[42]

Application of that standard for the next half century resulted in victories for speakers whose speech was only minimally threatening to public order,[43] but proved wholly insufficient when push came to shove to protect more challenging speech and association.[44] Only in more recent times have the Courts applied a refurbished version of that test in a more speech protective fashion.[45]

The other reason that a balancing test falls short of providing significant protection is its lack of predictability. If all a journalist can tell a source about the law's protection is that it is available *depending* on the outcome, months or years later, of a subjective and contingent legal formula, that is not exactly a recipe for confidence in the mind of confidential sources. That is particularly true when even highly conscientious and First Amendment-friendly judges can differ in any particular case on whether the government's need for the confidential information is sufficiently pressing so that the rights of the press—and, remember, through the press, the public—must yield.[46]

Obviously, if the choice for the press is a "qualified" privilege, or none at all, pragmatism dictates opting for the former. But the protection afforded, especially in cases where it is needed most, may be so ephemeral that it is equivalent to no protection at all.

The pattern of cases in the wake of the Miller/Cooper matter certainly provides cause for concern. In a number of prominent cases since the Miller/Cooper ruling, the press has had mixed results in continuing to try to prevail in fashioning constitutional or common law protection for confidential sources.

In one well-known case, Wen Ho Lee, a nuclear scientist working for the government, sued the government and the press for leaked stories suggesting he had been involved in espionage and revealing private information about him and his family.[47] After the press's claims to protect the confidential sources of the leaks were rejected,[48] the press and the government settled the suit by each paying a significant amount of money to Lee. Likewise, another federal appeals court held that a

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42 Schenck v. United States, 249 U.S. 47, 52 (1919).

43 *See, e.g.*, Craig v. Harney, 331 U.S. 367 (1947).

44 *See, e.g*, Dennis v. United States, 341 U.S. 494 (1951); *cf*, Communist Party of the U.S. v. Subversive Activities Control Bd., 367 U.S. 1 (1961).

45 *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969); NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).

46 See the thoughtful majority and dissenting opinions of Judges Ralph Winter and Robert Sack, respectively, in *New York Times Co. v. Gonzales*, 459 F.3d 160 (2d Cir. 2006).

47 *See* Wen Ho Lee v. Dep't of Justice, 413 F.3d 53, 56 (D.C. Cir. 2005).

48 *Id.* at 64.

former college football coach was entitled to discover the identity of confidential sources for an allegedly defamatory article about him in *Time Magazine*, once he exhausted all reasonable means of obtaining the information elsewhere.[49] This case was settled before further proceedings as well. In another widely-covered instance, a freelance video journalist spent several months in jail for refusing to turn over videotapes of a violent demonstration to a federal grand jury. The Ninth Circuit rejected the journalist's constitutional and other claims,[50] but thereafter the tape mysteriously appeared on the internet, obviating the need for further disposition. A turn of events would also spare the two Hearst reporters ordered to 18 months in jail, and their newspapers fined $1,000 per day, for refusing to tell a federal grand jury the identity of the person who leaked to them confidential federal grand jury minutes relating to the BALCO steroids investigation in the San Francisco Bay Area, the same investigation involving Barry Bonds. A District Court opinion rejected their claims to protection,[51] but while the case was pending on appeal, a lawyer who had once represented BALCO executives admitted to having been the source of the secret grand jury transcripts.

Most recently, former government researcher Steven Hatfill, having been labeled as being involved in the 2001 anthrax attacks, sought to probe the journalist's governmental sources for the allegations. Though Hatfill's defamation suit against the press was dismissed on the grounds that he could not prove "actual malice" by the reporter (an appeal is pending), his separate breach of privacy suit against the government was allowed to continue, and reporters writing about the matter have been ordered to identify their government sources on penalty of contempt.[52] In ordering the reporters to testify, the District Court observed: "Denying civil litigants access to the identity of government officials who have allegedly illegally leaked information to reporters would effectively leave Privacy Act violations immune from judicial condemnation, while leaving potential leakers virtually undeterred from engaging in such misbehavior."[53]

In almost all of these cases the press has had its legal claims rejected, but reporters have avoided actually having to testify because the matter was resolved in some other way. But these cases pose a particular difficulty because the leaked information is the gravamen of the civil or criminal harm being pursued. It is understandable to yield to

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[49] *See* Price v. Time, Inc., 416 F.3d. 1327 (11th Cir. 2005).

[50] *See In re* Grand Jury Subpoena, Joshua Wolfe v. United States, 201 F. App'x 430 (9th Cir. 2006).

[51] *See In re* Grand Jury Subpoenas to Mark Fainaru-Wadu and Lance Williams, 438 F. Supp. 2d 1111 (N.D. Cal. 2006).

[52] *See* Hatfill v. Gonzales, 505 F. Supp. 2d 33, 50 (D.D.C. 2007).

[53] *Id.* at 45.

the temptation to say that the press should not be allowed to hide behind the First Amendment when its own reporting causes the alleged harm. But that perspective has the 20/20 advantage of hindsight. When the reporter is doing the story, however, he may not know what kind of legal claims the story may generate three years down the road, and he or she has to be able to give the guarantee of anonymity now. Likewise, though some stories may result in personal harm to individuals, that harm may be in the context of reporting that serves the public interest in the flow of information, particularly about government policies and processes.

B. *The Promise of State Law*

Our federalism has played a vital role in addressing the issue of confidential source protection. Surprisingly, the strongest argument that we can live with, giving the press an "absolute" right to protect confidential sources without the sky or the Republic falling, comes from the area where the press has been most successful in getting recognition for protection of its rights: namely, state law, especially statutory law. At the time of *Branzburg*, seventeen states had some form of "shield law" protecting the press against having to reveal confidential sources, and many of these shield laws provided "absolute" as opposed to qualified or balancing-determined protection. Since *Branzburg*'s rejection of a broad constitutional privilege, many states have enacted or reaffirmed such state shield laws, and, at the time of the Miller/Cooper case, thirty-one states gave strong statutory protection, often "absolute" protection, to journalist sources. Another dozen or so states have judicial decisions providing comparable state common law protections in the absence of such statutes. As a result almost every state now affords either state statutory or common law protection to journalists' use of confidential sources in state judicial or administrative proceedings.[54]

Thus, on this difficult issue, the states have served as the individual laboratories that Justice Brandeis celebrated a century ago.[55] Indeed, in the Miller/Cooper case, the journalists' request for Supreme Court

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[54] The New York shield law is contained in the N.Y. CIV. RIGHTS LAW § 79-h (2008). It provides absolute protection for confidential news and qualified protection for non-confidential news. For an article discussing the overall interpretation and application of the New York shield law, see David Paul Horowitz, *2005-2006 Survey of New York Law*, 57 SYRACUSE L. REV. 999, 1021-24 (2007).

[55] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). ("It is one of the happy incidents of the federal system that a single courageous State may , if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

review was supported by a coalition of thirty-four state attorneys general. These state law enforcement officials took the position that the absence of federal constitutional or other uniform protection for journalist sources *undermines the States' policy* choices to protect journalists' sources and ignores the fact that law enforcement in those states are able to function effectively without having to impose upon journalists. The states' point was that often the journalist or the source will not know if the subject matter of the story will lead to possible federal judicial proceedings—where confidentiality may not be available—or state judicial proceedings—where there is probably a protective shield law. This uncertainty undermines the likelihood that the source will cooperate with the journalist and thereby undercuts the states' policy of protecting journalists' sources. Hard cases make strange bedfellows.

C. *The Department of Justice Guidelines*

As noted above, the executive branch has played a role in helping the press protect its confidential sources. As the *Branzburg* cases were unfolding, Attorney General John Mitchell, certainly no partisan of the press, promulgated *Guidelines for Subpoenas to the News Media*, requiring the Department of Justice to balance the harm to First Amendment interests against the need for the information before going after the press. Now codified at 28 C.F.R. § 50.10, these Guidelines have protected the press in a wide variety of circumstances, and have formed part of the protective legal culture in which broader legal recognition of press rights could occur. They have validated the notion that subpoenas to journalists should be a last resort, not a first option. On the other hand, as Max Frankel pointed out in this symposium, the Miller/Cooper case was conducted pursuant to those Guidelines, and they did not stop an avid prosecutor from going after the press and an appellate court from approving the disclosures. Moreover, it is not at all clear whether those Guidelines are judicially enforceable.

D. *A Federal Shield Law?*

The one source of law that has not addressed this issue is any kind of federal legislative shield law. In the wake of the *Branzburg* decision, there were bills introduced in both houses to remedy the gap in federal protection created by the Court's decision.[56] But nothing came of those

[56] I had the privilege of testifying before both the House and the Senate Judiciary Committees

early efforts, despite a good deal of support for a bill. Now, however, in the wake of the Miller/Cooper case and others, the question of protection of confidential sources has become a significant legislative matter once again, with liberals and conservatives joining together to support a bill. Indeed, at this writing, a bill, the Free Flow of Information Act of 2007, H.R. 2102, recently passed the House Judiciary Committee by voice vote.[57] Its prospects in the Senate are

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on the proposed legislation, accompanied each time by a first-rate journalist: Victor Navasky before the House Committee, and Brit Hume on the Senate side.

[57] The text of the bill is as follows:

Free Flow of Information Act of 2007 (Introduced in House)

HR 2102 IH

110th CONGRESS

1st Session

H. R. 2102

To maintain the free flow of information to the public by providing conditions for the federally compelled disclosure of information by certain persons connected with the news media.

IN THE HOUSE OF REPRESENTATIVES

May 2, 2007

Mr. BOUCHER (for himself, Mr. PENCE, Mr. CONYERS, Mr. COBLE, Mr. YARMUTH, and Mr. WALDEN of Oregon) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To maintain the free flow of information to the public by providing conditions for the federally compelled disclosure of information by certain persons connected with the news media.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Free Flow of Information Act of 2007'.

SEC. 2. COMPELLED DISCLOSURE FROM COVERED PERSONS.

(a) Conditions for Compelled Disclosure- In any proceeding or in connection with any issue arising under Federal law, a Federal entity may not compel a covered person to provide testimony or produce any document related to information possessed by such covered person as part of engaging in journalism, unless a court determines by a preponderance of the evidence, after providing notice and an opportunity to be heard to such covered person—

(1) that the party seeking to compel production of such testimony or document has exhausted all reasonable alternative sources (other than a covered person) of the testimony or document;

(2) that—

(A) in a criminal investigation or prosecution, based on information obtained from a person other than the covered person—

(i) there are reasonable grounds to believe that a crime has occurred; and

(ii) the testimony or document sought is essential to the investigation or prosecution or to the defense against the prosecution; or

(B) in a matter other than a criminal investigation or prosecution, based on information obtained from a person other than the covered person, the testimony or document sought is essential to the successful completion of the matter;

(3) in the case that the testimony or document sought could reveal the

identity of a source of information or include any information that could reasonably be expected to lead to the discovery of the identity of such a source, that—

(A) disclosure of the identity of such a source is necessary to prevent imminent and actual harm to national security with the objective to prevent such harm;

(B) disclosure of the identity of such a source is necessary to prevent imminent death or significant bodily harm with the objective to prevent such death or harm, respectively; or

(C) disclosure of the identity of such a source is necessary to identify a person who has disclosed—

(i) a trade secret of significant value in violation of a State or Federal law;

(ii) individually identifiable health information, as such term is defined in section 1171(6) of the Social Security Act (42 U.S.C. 1320d(6)), in violation of Federal law; or

(iii) nonpublic personal information, as such term is defined in section 509(4) of the Gramm-Leach-Bliley Act (15 U.S.C. 6809(4)), of any consumer in violation of Federal law; and

(4) that nondisclosure of the information would be contrary to the public interest, taking into account both the public interest in compelling disclosure and the public interest in gathering news and maintaining the free flow of information.

(b) Limitations on Content of Information- The content of any testimony or document that is compelled under subsection (a) shall, to the extent possible—

(1) be limited to the purpose of verifying published information or describing any surrounding circumstances relevant to the accuracy of such published information; and

(2) be narrowly tailored in subject matter and period of time covered so as to avoid compelling production of peripheral, nonessential, or speculative information.

SEC. 3. COMPELLED DISCLOSURE FROM COMMUNICATIONS SERVICE PROVIDERS.

(a) Conditions for Compelled Disclosure- With respect to testimony or any document consisting of any record, information, or other communication that relates to a business transaction between a communications service provider and a covered person, section 2 shall apply to such testimony or document if sought from the communications service provider in the same manner that such section applies to any testimony or document sought from a covered person.

(b) Notice and Opportunity Provided to Covered Persons- A court may compel the testimony or disclosure of a document under this section only after the party seeking such a document provides the covered person who is a party to the business transaction described in subsection (a)—

(1) notice of the subpoena or other compulsory request for such testimony or disclosure from the communications service provider not later than the time at which such subpoena or request is issued to the communications service provider; and

(2) an opportunity to be heard before the court before the time at which the testimony or disclosure is compelled.

(c) Exception to Notice Requirement- Notice under subsection (b)(1) may be delayed only if the court involved determines by clear and convincing evidence that such notice would pose a substantial threat to the integrity of a criminal investigation.

SEC. 4. DEFINITIONS.

In this Act:

(1) COMMUNICATIONS SERVICE PROVIDER- The term 'communications

uncertain, but a number of Senators on both sides of the aisle have indicated support for the bill or one like it. Of course, any legislation of this kind, which would give journalists protection in federal judicial and administrative proceedings, poses a number of key questions, most significantly what are the contours of such a privilege, how can it be defeated and who can invoke its protections.

H.R. 2102 provides that the federal government could not compel a person covered by the statute to provide testimony or produce documents without first showing the need to do so by a preponderance of evidence. The content of compelled testimony or documents must be limited and narrowly tailored, and certain financial or commercial information is exempt. At the heart of the bill is the provision that journalists can be compelled to reveal the identity of sources only when the court finds it necessary to prevent "imminent and actual harm to national security" or "imminent death or significant bodily harm." However, journalists may also be compelled to identify a person who has disclosed trade secrets, protected health information, or nonpublic personal information of any consumer in violation of current law. Interestingly, in terms of whether the First Amendment should protect the proverbial "pajama-clad bloggers" the bill would cover and protect anyone "engaged in journalism." Journalism is defined as "the gathering, preparing, collecting, photographing, recording, writing, editing, reporting or publishing of news and information for dissemination to the public." While the bill does not explicitly protect bloggers, to the extent a court determines they are engaged in the practice of journalism, they are likely to be shielded.[58] The act

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service provider'—

(A) means any person that transmits information of the customer's choosing by electronic means; and

(B) includes a telecommunications carrier, an information service provider, an interactive computer service provider, and an information content provider (as such terms are defined in sections 3 and 230 of the Communications Act of 1934 (47 U.S.C. 153, 230)).

(2) COVERED PERSON- The term 'covered person' means a person engaged in journalism and includes a supervisor, employer, parent, subsidiary, or affiliate of such covered person.

(3) DOCUMENT- The term 'document' means writings, recordings, and photographs, as those terms are defined by Federal Rule of Evidence 1001 (28 U.S.C. App.).

(4) FEDERAL ENTITY- The term 'Federal entity' means an entity or employee of the judicial or executive branch or an administrative agency of the Federal Government with the power to issue a subpoena or issue other compulsory process.

(5) JOURNALISM- The term 'journalism' means the gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing of news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public.

[58] One California state court has held that bloggers are entitled to the full protection of the

additionally applies to communications service providers with regard to testimony or any record, information or other communication that relates to a business transaction between such providers and covered persons. This latter provision would overturn the result of the case of *New York Times Co. v. Gonzales*,[59] where a sharply divided Second Circuit upheld the right of the government to subpoena phone records of Times' reporters in an attempt to learn who might have discussed sensitive material with a reporter in a way that allegedly compromised a government terrorism investigation.

As was the case with the Qualified Privilege that courts had fashioned over the years, this bill is probably better than no bill at all. And it certainly attempts to limit the generic kind of circumstances when the identity of confidential sources can be breached to cases of "imminent and actual harm to national security" or "imminent death or significant bodily harm." But the latter category can cover a number of law enforcement scenarios, and the specific exceptions from protection for health or consumer information would seem to have the potential for opening a major loophole in the statute's protection. If the bill becomes the law, we will have lots of cases answering these questions.

III. WHAT HAVE WE LEARNED?

Finally, how have the debates and disputes of the last three years—sparked by the Miller/Cooper case and the reactions to it, within courtrooms, newsrooms and seminar rooms—impacted our views on all of these questions?

Let me hazard a few of my own reactions to these recent events:

1. *Watch out what you wish for.* Soon after the Valerie Plame leak first surfaced in the Robert Novak column, the CIA requested that the Justice Department investigate for possible violation of the Intelligence Identities Protection Act. That one sentence has *four* things that immediately should have set off the loudest of First Amendment alarms: leaks, Justice Department Investigation of the press, Intelligence Identities Protection Act, and CIA. For those of us who had lived through the era of the Pentagon Papers case, the *Branzburg* case, the *Agee*[60] and *Snepp*[61] cases on punishing CIA leaks and leakers, and the

California shield law. *See* O'Grady v. Super Ct., 44 Cal. Rptr. 3d 72 (Ct. App. 2006).

59 459 F. 3d 160 (2d Cir. 2006). At this writing the Free Flow of Information Act of 2007, which affords very strong, but not absolute protection, to journalists from having to reveal confidential sources unless the government makes a compelling showing of the need to breach that protection in any particular case, has passed the House but not the Senate. This is the first time such a bill has passed either house of Congress. *See supra* note 28.

60 Haig v. Agee, 453 U.S. 280 (1981).

61 Snepp v. United States, 444 U.S. 507 (1980).

debates over the constitutionality of criminalizing such leaks, the whole thing seemed like "deja vu all over again." Yet, in precisely the precincts where the bells should have gone off the loudest came a surprisingly contrary message. A well known *New York Times* editorial strongly *supported* such an investigation, while admonishing the government to "focus its attention on the White House, not on journalists."[62] Right. More recently, the CIA requested a new Justice Department investigation, this time of a news story about alleged CIA torture sites in Eastern Europe. And so it goes. To their credit, a number of news organizations filed a brief in the Judith Miller case questioning whether the Identities Act covered Plame at all. And, as events in the Libby case would reveal, the government never had enough evidence to charge anyone with violation of that Act. So, after three years and millions of dollars of investigation, there turned out to have been no crime committed, except in connection with investigating the crime that was never committed. What is worse is that the prosecutor apparently knew early on who the source of the Plame/Novak leak was, and it turned out to be a high ranking State Department official who was against the Iraq war in the first place. So any sense that the White House was leaking sensitive information to benefit itself politically or as a vendetta against ambassador Wilson was dispelled almost immediately. What could have possibly justified a continuation of the prosecution? Scooter Libby was convicted, but the First Amendment was diminished. All in all a pretty bad trade-off.

As one media observer put it:

> I think my fellow liberals, partaking in some hypocrisy of their own, have failed to grasp the true toll of this inquisition. We're supposed to be champions of the First Amendment and foes of overzealous prosecutors. For most of the postwar era, we were the ones who demanded greater exposure of government secrets, sharper skepticism about blanket claims of "national security," and stronger support for reporters against the assaults of the organized right. In keeping with those convictions, we should have protested this overwrought case from the start. In fact, applauding it actually benefits the Bush administration—and future regimes of its ilk—by further sanctifying secrecy and demonizing the press.[63]

2. *Do not take sides.* A good story is a good story no matter where the chips may fall, and no matter who the sources are or whether you would vote for them. I learned from years as an ACLU lawyer that you have to protect everyone's right to speak, not just the speakers you like. First Amendment rights are indivisible and non-partisan. The same should be true of confidential sources and stories about government

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62 *Investigating Leaks*, supra note 35, at A30.

63 David Greenberg, *Trial and Error*, NEW REPUBLIC, Mar. 5–Mar. 12, 2007, at 11.

wrongdoing. If you denigrate the sources you do not like, you undermine your credibility to claim protection for the ones you do. The Valerie Plame story was as much about Plame and her husband and their motivations, as it was about the White House efforts to manipulate the story. Those who leaked the Plame story to the press were as much a part of the same process of informing the public as was the original Deep Throat. The only question is whether the source is reliable, not whether the source is noble or lovable. Journalists rely on sources with questionable motives every hour of every day. It turns out that Mark Felt—Deep Throat—was not a purely motivated prince either. He was just a disappointed office seeker getting back at his bosses. But his information for the public was vital. So we applaud him and the reporters who protected his identity.

It is difficult to resist the sense that those members of the press who supported the leak investigation and attacked the leaks were animated by an animus for the policies and politics of the Bush Administration which trumped what should have been their normal protectiveness toward the press's role in protecting the public's right to know. As Max Frankel put it so well in the Symposium:

> A reporter covering the Pentagon, the CIA, or foreign affairs and wars simply cannot function unless a large number of officials from the president on down—for both noble and vile reasons—are willing to talk about those secrets on a confidential basis. The price of learning about eavesdropping and the price of learning about these awful renditions of prisoners around the world and of the torture that we engage in has to be paid by also allowing the Libbys of this world to pass secrets for less noble reasons.[64]

3. *Special prosecutors pose special problems.* Without revisiting the whole question of the constitutional validity and political wisdom of the use of special prosecutors, it is sufficient to observe that Justice Scalia was absolutely right in 1988 when he was the only Justice to challenge the constitutionality of the Independent Counsel law.[65] The most eloquent testimony to the wisdom of his position was that the Democrats in 1998 let the Independent Counsel law die without renewal. In his prophetic dissent, Justice Scalia had described the prosecutorial dangers to the civil liberties of individuals when you have a politically unaccountable "independent" prosecutor, no matter how professional and fair-minded that person may be. If you think this view is just the *Wall Street Journal*'s morning line, read Jeffrey Rosen's excellent piece in *The New Republic*, where he called the Libby indictment indefensible and concluded that it showed "the entire

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[64] Max Frankel, Panel Discussion at Cardozo Law School: Are Journalists Privileged? (Apr. 23, 2007), *in* 29 CARDOZO L. REV. 1361 (2008).

[65] *See* Morrison v. Olson, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

apparatus of special prosecutors is a menace."[66] Remember that this professional and fair-minded person—Patrick Fitzgerald—managed to haul representatives of the core of the news media establishment in front of a grand jury, and in some cases, repeatedly, to force them to testify. Even Ken Starr did not do that. As former Solicitor General Ted Olson reportedly put it, in commenting on the prospect that the key witness scheduled against Libby was going to be NBC's Tim Russert, the special prosecutor was giving a whole new meaning to the concept of "Meet the Press."

4. *The First Amendment belongs to everyone.* The First Amendment should protect everyone who uses it. In the push to establish constitutional or statutory protection for protecting confidential sources, we should not forget the bloggers. Freedom of the Press should not belong just to those who own one, or to those who graduate from a journalism school. It should protect all those who seek to inform the public, whether or not they wear bathrobes or have fancy credentials and mastheads.[67] More broadly, we sail into treacherous constitutional waters when we have a kind of First Amendment "caste system" decreeing that some people or groups can speak on some subjects at some times and places, and others cannot. We have been foundering in that kind of whirlpool in the campaign finance regulation area,[68] and, in my view, it is destructive of First Amendment coherence.

5. *The First Amendment is indivisible.* The First Amendment should be indivisible. Remember Justice Douglas. His strong views of press freedom were part of his larger vision of a First Amendment that protected all speakers in all forums reflecting all parts of the political spectrum. Journalists should remember that the next time they write a story or editorial applauding laws against cigarette advertising or urging laws to deal with "negative" campaigning or excessive campaign spending. A First Amendment that only protects some will wind up not protecting anyone at all. The rights you save may truly be your own.

6. *Has the game been worth the candle?* Finally, we should ask ourselves what has society gained from the *Branzburg* regime. Have we solved or deterred important crimes that would not have been otherwise interdicted by law enforcement? Have journalists ever provided the smoking gun to help catch a killer or a terrorist, or just a leaker? Conversely, would the country have been harmed if Justice Douglas's position supporting an absolute privilege for journalists been

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66 Jeffrey Rosen, *Overcharged*, NEW REPUBLIC, Nov. 14, 2005, at 14.

67 I was once part of a student group who met the legendary columnist, Drew Pearson, at his home in Washington, D.C, and he was wearing his bathrobe when he greeted us. On second thought, it might have been a smoking jacket.

68 See particularly Justice Kennedy's opinions in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 405 (2000) and *McConnell v. Federal Elections Commission*, 540 U.S. 93, 286 (2003).

accepted? This question is especially pertinent in light of the fact that numerous state shield laws—many in populous states like New York and California—provide comparable "absolute" protection to confidential sources. Has the gain to law enforcement been worth the loss to the First Amendment? A proper respect for the First Amendment requires that we at least ask these questions.