RECONSIDERING THE FEDERAL JOURNALIST'S PRIVILEGE FOR NON-CONFIDENTIAL INFORMATION: *GONZALES V. NBC*

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INTRODUCTION

In September 1998 a three-judge panel of the Second Circuit of the U.S. Court of Appeals delivered a serious blow to the journalist's qualified privilege protecting non-confidential information from forced disclosure in federal courts.[1] In *Gonzales v. National Broadcasting Co.*,[2] the Second Circuit ruled unanimously that NBC had to turn over unaired videotape, or "outtakes," from a story it had broadcast.[3] The court also determined that there was no journalist's privilege when the information subpoenaed was non-confidential rather than confidential.[4]

The court's decision came as a surprise to the media since the Second Circuit previously had recognized a privilege for non-confidential information—or so the media believed. *Editor & Publisher*, a media trade journal, called the decision "devastating" for the media.[5] *Editor & Publisher* said the decision was particularly upsetting because the Second Circuit "often set the tone and precedents for journalistic legal standards throughout the country."[6] The statement was an apparent reference to the fact that the Second Circuit, which includes New York, the home base for television networks and other media companies, hears more media cases than most other circuits.

However, in what has been called a rare turnabout for a federal court, the Second Circuit changed its mind.[7] After the court vacated the *Gonzales* ruling, a three-judge panel composed of two of the three original judges[8] reversed the part of the ruling that de-

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1 *See* Gonzales v. Nat'l Broad. Co., 155 F.3d 618 (2d Cir. 1998).

2 *See id.*

3 *See id.* at 621.

4 *See id.* at 627.

5 *See* Jim Moscou, *U.S. Appellate Court Ruling Erodes Reporters' Rights*, EDITOR & PUBLISHER, Sept. 4, 1999, at 9.

6 *Id.*

7 *See* Mark R. Kravitz, *Developments in the Second Circuit 1998-99*, 32 CONN. L. REV. 949, 962 n.54 (1999).

8 *See* Alan Finder, *In Reversal, Court Rules Journalists' Notes Can Be Protected*, N.Y. TIMES,

cleared that there was no privilege in federal law for non-confidential material.[9] However, both decisions had the same practical effect—NBC was required to turn over the unaired tapes sought by the plaintiffs in the lawsuit.[10]

The debate over whether a privilege for non-confidential information exists in federal court is important for journalists. Four national empirical studies conducted by the Reporters Committee for Freedom of the Press have shown that ninety-five to ninety-seven percent of subpoenas received by news organizations are for non-confidential information.[11] As will be discussed in more detail below, journalists argue that subpoenas in criminal and civil cases interfere with a number of media interests protected by the First Amendment.[12] At the same time, journalists' assertions of privileges to protect information from forced disclosure often run afoul of judicial concerns about maintaining the courtroom as a place where all evidence must be heard to find the truth.

This article examines how the federal appellate courts have responded when faced with journalists' assertions of privilege involving non-confidential information obtained in the course of newsgathering. The article will focus on how the Second Circuit parsed out the issues in the two *Gonzales* rulings. Part I will examine the First Amendment concerns raised by journalists in privilege cases and the countervailing arguments. It will also examine how the U.S. Supreme Court dealt with those concerns in its seminal 1972 case, *Branzburg v. Hayes*,[13] and how federal journalist's privilege law developed after *Branzburg*. Part II explains how the privilege for non-confidential information has developed as an outgrowth of the confidential-source privilege in federal appellate courts. Part III discusses the two *Gonzales* rulings and those ques-

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Aug. 31, 1999, at B2. In the correction, the newspaper noted that Circuit Judge Fred I. Parker, Circuit Judge Joseph M. McLaughlin, and District Judge Arthur D. Spatt, sitting by designation, had decided the first case. *See Corrections*, N.Y. TIMES, Sept. 1, 1999, at B2. Judge Parker recused himself without explanation for the second hearing and was replaced by Judge Pierre N. Leval, who wrote the opinion for a unanimous panel in the second decision. *See id.*

9 *See* Gonzales v. Nat'l Broad. Co., 194 F.3d 29, 32 (2d Cir. 1999).

10 *See id.* at 35-36.

11 *See* REPORTERS COMM. FOR FREEDOM OF THE PRESS, AGENTS OF DISCOVERY: A REPORT ON THE INCIDENCE OF SUBPOENAS SERVED ON THE NEWS MEDIA IN 1989, at 12 (1991); REPORTERS COMM. FOR FREEDOM OF THE PRESS, AGENTS OF DISCOVERY: A REPORT ON THE INCIDENCE OF SUBPOENAS SERVED ON THE NEWS MEDIA IN 1991, at 13 (1993); REPORTERS COMM. FOR FREEDOM OF THE PRESS, AGENTS OF DISCOVERY: A REPORT ON THE INCIDENCE OF SUBPOENAS SERVED ON THE NEWS MEDIA IN 1993, at 10 (1995); REPORTERS COMM. FOR FREEDOM OF THE PRESS, AGENTS OF DISCOVERY: A REPORT ON THE INCIDENCE OF SUBPOENAS SERVED ON THE NEWS MEDIA IN 1997, at 8 (1999).

12 *See infra* Part II.

13 408 U.S. 665 (1972).

tions left unanswered by the Second Circuit. Part IV considers the possible significance of the final *Gonzales* ruling.

I. *BRANZBURG*, ITS PRECEDENTS AND PROGENY

A. *Subpoenaed Journalists Discover the First Amendment*

Journalists have sought to avoid revealing the names of confidential sources in courts and other official settings since at least 1848, when a *New York Herald* correspondent refused to tell the Senate how he obtained a copy of a secret treaty.[14] For the next 110 years, journalists continued to resist subpoenas to reveal the names of confidential sources without claiming a First Amendment right to do so.[15] They argued that the norms of their profession and their personal codes of honor forbade them from breaking their promises of confidentiality.[16] Courts regularly found the journalists' arguments unpersuasive.[17]

The journalists' defense changed in 1958, when a columnist for the *New York Herald-Tribune* fought a subpoena from actress Judy Garland, who was embroiled in a breach of contract and defamation suit against the Columbia Broadcasting System (CBS). In *Garland v. Torre*,[18] entertainment columnist Marie Torre argued that she should not be forced to reveal her source for an allegedly libelous comment about Garland.[19] Torre claimed that forcing her to name her source would violate the First Amendment's free-press guarantee by restraining the flow of news to reporters and to the public.[20] Torre argued that sources who could not trust that journalists would keep their promises of confidentiality would stop providing information to the media, and the media would thus be prevented from relaying important information to the public.[21]

Second Circuit Judge Potter Stewart, who was later named to the U.S. Supreme Court, rejected Torre's claim in an opinion for a unanimous panel.[22] Judge Stewart wrote that there was no precedent supporting a First Amendment-based privilege for journal-

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14 *See* Aaron David Gordon, 2 Protection of News Sources: The History and Legal Status of the Newsman's Privilege 431 (1971) (unpublished dissertation, University of Wisconsin, on file with University of Florida Legal Information Center).

15 *See id.* v.1 at 184-287.

16 *See id.*

17 *See id.*

18 259 F.2d 545 (2d Cir. 1958), *cert. denied*, 358 U.S. 910 (1958).

19 *See id.* at 547.

20 *See id.* at 547-48. Torre also claimed that apart from the constitutional question, the court should protect the societal interest "in assuring a free and unrestricted flow of news to the public" by granting at least a qualified privilege to Torre. *Id.* at 548.

21 *See id.* at 548.

22 *See id.* at 551.

ists.[23] In this case, he added, the identity of Torre's source "went to the heart" of Garland's claim against CBS.[24]

However, Judge Stewart hinted that the resolution of the case might have been different under other circumstances.[25] He noted that the *Torre* case did not deal with an effort to force a wholesale disclosure of a journalist's sources or with information that was of "doubtful relevance."[26] Stewart's comments suggested that subpoenas that harassed journalists for no good purpose or that sought irrelevant information could be considered invalid under the First Amendment.[27]

The *Torre* case marked the entry of the journalists' privilege issue into a continuing debate about the meaning of the "press clause" of the First Amendment, which states: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[28] Historians and legal scholars have debated for years why the Framers singled out the press for protection under the First Amendment along with the right to freedom of speech. Did the two terms describe two different expressive acts of individuals or two different protected groups, the public (speech) and the institutional press?

Law professor Melville Nimmer has suggested that speech and press rights serve similar interests, but that there are distinctions.[29] According to Nimmer, if the speech right is viewed as an individual right, then it serves three major functions: (1) a conduit for democratic dialogue; (2) a source of self-fulfillment for the speaker; and (3) a "safety valve" through which persons can express themselves, without which they may feel compelled to seek expression in violent actions.[30] However, Nimmer adds, the press, through its informing and opinion-shaping functions, is more significant than individual speech in the democratic dialogue function, but less significant to self-fulfillment and the "safety valve" function.[31]

Nimmer explains, however, the pre-ratification debates in Congress about the First Amendment do not imply a distinction between speech and press.[32] One inference, Nimmer suggests, is that the Framers merely wanted to make sure that both oral expres-

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[23] *See id.* at 549.
[24] *Id.* at 550.
[25] *See id.* at 551.
[26] *See id.* at 549-50.
[27] *See id.* at 551.
[28] U.S. CONST. amend. I.
[29] *See* Melville B. Nimmer, *Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?*, 26 HASTINGS L.J. 639, 653 (1975).
[30] *See id.*
[31] *See id.* at 653-54.
[32] *See id.* at 640.

sion (speech) and written expression (press) were protected from abridgement.[33] Nimmer adds, however, the original understanding of the Framers is not necessarily controlling.[34] Nimmer's view that original intent is largely irrelevant is shared by other writers who have pondered the press clause's meaning in the last quarter of the twentieth century,[35] but not all.[36]

The original intent question notwithstanding, the U.S. Supreme Court has consistently refused to grant special rights and privileges to the press that are not available to the public at large. This is not to say that the Supreme Court has given short shrift to the importance of free speech and a free press to a self-governing populace, at least in the second half of the twentieth century. In its landmark 1964 ruling in *New York Times v. Sullivan*,[37] the Court determined that even false speech, as long as the falsity was inadvertent, should be protected when it was about public officials and public measures.[38] In striking down an Alabama libel judgment against the *Times* and the sponsors of a pro-civil rights advertisement in the newspaper, a unanimous Court also strongly endorsed the role of freedom of speech and of the press in self-government.[39] The decision, written by Justice William Brennan, was reached in accordance with a "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open," even "caustic."[40]

However, the Supreme Court has not taken the position that the people's right to an "uninhibited, robust and wide-open" debate about public issues created a concomitant right to gather information to inform the debate.[41] As legal historian Margaret Blanchard has written, one of the most consistent lines of precedent in Supreme Court history is that the press has no rights beyond those of individuals.[42] However, the reverse is also true; the press does not have fewer rights than individuals.[43] So, for exam-

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33 *See id.*

34 *See id.* at 641.

35 *See, e.g.*, David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 462 (1983); LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 348 (Oxford Univ. Press 1985).

36 *See generally* WALTER BERNS, THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY (Basic Books 1976); ROBERT H. BORK, THE TEMPTING OF AMERICA (Free Press 1990).

37 376 U.S. 254 (1964).

38 *See id.* at 279.

39 *See id.* at 269.

40 *Id.* at 270.

41 *Id.*

42 *See* Margaret A. Blanchard, *The Institutional Press and Its First Amendment Privileges*, 1978 SUP. CT. REV. 225.

43 *See id.* at 228.

ple, the Supreme Court has ruled that the First Amendment does not shield the press from suits for unfair competition practices,[44] from being required to remedy unfair labor practices,[45] or from being required to adhere to federal antitrust laws.[46] On the other hand, the press cannot be punished for publishing information that is readily available to the public[47] or forced to pay discriminatory taxes.[48] Both the press and public have the right to attend criminal trials,[49] including pretrial hearings[50] and jury questioning[51] in most cases, and to be free from censorship for reporting what they see in court.[52]

In First Amendment cases directly involving claims that the Constitution gives the press affirmative rights, the Supreme Court consistently has said that the news media have no special privileges under the First Amendment to enter prisons or jails and talk to inmates.[53] The media have no First Amendment right to keep the identities of news sources hidden from grand juries,[54] to refuse to answer questions about "editorial functions" in libel trials,[55] or to be free from police searches for evidence of crimes.[56] Although the media have no First Amendment right to keep the identities of sources secret, they are not immune from civil suits under the doctrine of promissory estoppel if they voluntarily break their promises to keep source identities confidential.[57] Moreover, the press has no First Amendment right to accompany law enforcement agents on raids and searches of private residences that would violate the Fourth Amendment if anyone not essential to the mission accompanied the police.[58]

It follows, therefore, that the media also have no special rights under the First Amendment to protect confidential or non-confidential information from forced disclosure. If the press and public have basically the same rights under the First Amendment, then to

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44 *See* Int'l News Serv. v. Associated Press, 248 U.S. 215 (1918).
45 *See* Associated Press v. Labor Bd., 301 U.S. 103 (1937).
46 *See* Associated Press v. United States, 326 U.S. 1 (1945).
47 *See* United States v. Dickey, 268 U.S. 378 (1925).
48 *See* Grosjean v. Am. Press Co., 297 U.S. 233 (1936).
49 *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).
50 *See* Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986).
51 *See* Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984).
52 *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).
53 *See* KQED, Inc. v. Houchins, 438 U.S. 1 (1978); Saxbe v. Washington Post, 417 U.S. 847 (1974); Pell v. Procunier, 417 U.S. 817 (1974).
54 *See* Branzburg v. Hayes, 408 U.S. 665 (1972).
55 *See* Herbert v. Lando, 441 U.S. 153 (1979).
56 *See* Zurcher v. Stanford Daily, 436 U.S. 547 (1978).
57 *See* Cohen v. Cowles Media Co., 501 U.S. 663 (1991).
58 *See* Hanlon v. Berger, 526 U.S. 808 (1999); Wilson v. Layne, 526 U.S. 603 (1999).

grant journalists a First Amendment privilege that would allow them to avoid testifying or handing over evidence to grand juries or courts would open a floodgate of such claims of privilege. As the next section will discuss, courts in general have shown varying degrees of hostility to privilege claims.

B. *The Need for Evidence*

Working against journalists such as Torre, and those who argued for a First Amendment-based privilege after her, was a long legal history of distrust toward testimonial and evidentiary privileges in general. Privileges are suspect to legal authorities because they are counter-intuitive in a system designed to arrive at the truth. While some rules that block the introduction of certain testimony or evidence are designed to enhance the search for truth,[59] privileges tend, as Charles McCormick stated, to "shut out the light."[60] Nonetheless, privileges slowly developed over time as a means of protecting interests and relationships considered sufficiently important to society to warrant the loss of otherwise competent testimony or material evidence.[61] The most notable examples are attorney-client, doctor-patient, clergy-penitent, and spousal privileges.

Dean John Henry Wigmore, quoting Lord Hardwicke from a 1742 Parliamentary debate, wrote that it was a widely recognized maxim "that the public . . . has a right to every man's evidence."[62] Wigmore's respected evidence treatise noted that due to the importance of witnesses to the community's interest in promoting justice, privileges exempting witnesses from the duty to testify should be exceptional.[63] Attempts to expand recognized privileges were an "unwholesome" trend and counter to the investigation of truth inherent in the adversarial legal system.[64] At the same time, Wigmore added, a citizen called as a witness had a right to demand that society make his service to the legal system as painless as possible.[65] To balance the competing goals of maximizing the effectiveness of the justice system and making minimal demands on witnesses, Wigmore recognized that some privileges may be neces-

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59 The hearsay rule is one example. *See* EDWARD W. CLEARY, MCCORMICK ON EVIDENCE § 72 (3d ed. 1984 & Supp. 1987).

60 *Id.*

61 *See id.*

62 8 J. WIGMORE, EVIDENCE § 2192, at 70 (John T. McNaughton ed., Little Brown and Co. 1961).

63 *See id.*

64 *See id.* at 71.

65 *See id.* at 73.

sary.[66] However, Wigmore explained that four conditions should exist before a privilege was created or recognized:

> (1) The communications must originate in a *confidence* that they will not be disclosed. (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties. (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered.* (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.[67]

According to Wigmore, the four conditions were present in the attorney-client privilege and, arguably, the clergy-penitent privilege, but not in most other privileges based on occupational relationships.[68]

Although the various professional and occupational privileges have developed largely at the state level, Congress and the U.S. Supreme Court occasionally have intervened to clarify certain parameters. In 1975, Congress approved an evidence code for the federal courts that included a section on privileges.[69] Rule 501 of the Federal Rules of Evidence replaced a more specific, multi-section rule proposed by the Supreme Court.[70] Rule 501 states that privileges should be governed "by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."[71] In other words, federal privilege law largely depends upon state privilege law.

In general, the Supreme Court has at least tacitly accepted the existence of privileges while often limiting them. For example, the Court has accepted, tacitly or explicitly, the attorney-client privilege in a number of cases, even those in which it nonetheless found the privilege did not apply.[72] In two cases, the Court also has specifically rejected allowing accountants to claim privileges.[73] More

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66 *See id.*

67 *Id.*

68 *See id.*

69 *See* FED. R. EVID. 501; *see also* Edward J. Imwinkelried, *An Hegelian Approach to Privileges Under Federal Rule of Evidence 501: The Restrictive Thesis, the Expansive Antithesis, and the Contextual Synthesis,* 73 NEB. L. REV. 511 (1994) (tracing the history of the passage of the Federal Rules of Evidence, particularly Rule 501).

70 *See* Imwinkelried, *supra* note 69, at 514.

71 FED. R. EVID. 501; *see also* Imwinkelried, *supra* note 69, at 514.

72 *See, e.g.*, Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343 (1985); Upjohn Co. v. United States, 449 U.S. 383 (1981); Fisher v. United States, 425 U.S. 391 (1976); Hickman v. Taylor, 329 U.S. 495 (1947).

73 *See* United States v. Arthur Young & Co., 465 U.S. 805 (1984); Couch v. United States, 409 U.S. 322 (1973).

recently, the Court embraced the psychotherapist-patient privilege in *Jaffe v. Redmond.*[74] However, that decision largely rested upon the fact that all fifty states and the District of Columbia already had statutory psychotherapist-patient privileges in place.[75] The Court found that the states' support for the privilege indicated "reason and experience" for recognizing it at the federal level as well.[76]

There is no federal shield law for journalists, and the states vary widely in their approaches to protecting journalists. Thirty-one states and the District of Columbia have shield laws that provide varying levels of protection for journalists seeking to protect source identities or unpublished information.[77] Unlike the psychotherapist-patient privilege, the journalist's privilege has not been adopted by statute in all states.

C. *Branzburg Goes to the Court*

After the *Torre* decision, subpoena disputes between the media and the courts were relatively rare for about ten years. But in the late 1960s, as unrest over civil rights, the Vietnam War, women's rights, and other social issues increased, journalists who were in contact with dissidents faced an increasing number of subpoenas. As one study of the journalist's privilege observed, the total number of subpoenas issued to the press annually averaged approximately 1.5 from 1960 to 1968.[78] However, the number increased to

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74 518 U.S. 1 (1996).

75 *See id.* at 12-13.

76 *Id.* at 13 (quoting FED. R. EVID. 501).

77 *See* ALA. CODE. § 12-21-142 (Michie 1995 & Supp. 1998); ALASKA STAT. §§ 09.25.300 to 09.25.390 (Michie 1998); ARIZ. REV. STAT. ANN. § 12-2237 (West 1994 & Supp. 1999); ARK. CODE ANN. § 16-85-510 (Michie 1987); CAL. EVID. CODE § 1070 (West 1995 & Supp. 2000); COLO. REV. STAT. § 13-90-119 (Bradford 1999); DEL. CODE ANN. tit. 10, §§ 4320-4326 (Michie 1999); D.C. CODE ANN. §§ 16-4701 to 16-4704 (Michie 1997 & Supp. 1998); FLA. STAT. ANN. § 90.5015 (West 1999 & Supp. 2000); GA. CODE ANN. § 24-9-30 (Michie 1995 & Supp. 1999); ILL. COMP. STAT. ANN. §§ 5/8-901 to 5/8-909 (Michie 1993 & Supp. 1999); IND. CODE ANN. §§ 34-46-4-1 to 34-46-4-2 (West 1999); KY. REV. STAT. ANN. § 421.100 (Michie 1992 & Supp. 1999); LA. REV. STAT. ANN. §§ 1451-1459 (West 1999 & Supp. 2000); MD. CODE ANN., CTS. & JUD. PRO., § 9-112 (LEXIS through 2000 legislation); MICH. COMP. LAWS § 767.5A (West 1982 & Supp. 1999); MINN. STAT. ANN. §§ 595.021 to 595.025 (West 1988 & Supp. 2000); MONT. CODE ANN. §§ 26-1-901 to 26-1-902 (1999); NEB. REV. STAT. §§ 20-144 to 20-147 (1997); NEV. REV. STAT. § 49.275 (Michie 1996 & Supp. 1999); N.C. GEN. STAT. § 8-53.11 (1999); N.D. CENT. CODE § 31-01-06.2 (Michie 1996 & Supp. 1999); N.J. STAT. ANN. §§ 2A:84A-21 to 2A:84A-21.13 (West 1994); N.M. EVID. RULES § 11-514 (Michie 1994); N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1992 & Supp. 1999); OHIO REV. CODE ANN. §§ 2739.04 & 2739.12 (Anderson 1994 & Supp. 1999); OKLA. STAT. ANN. tit. 12, § 2506 (West 1993); OR. REV. STAT. ANN. §§ 44.510 to 44.540 (1988 & Supp. 1998); 42 PA. CONS. STAT. ANN. § 5942 (West 1982 & Supp. 1999); R.I. GEN. LAWS §§ 9-19.1-1 to 9-19.1-3 (1998); S.C. CODE ANN. § 19-11-100 (Law Co-Op. 1985 & Supp. 1999); TENN. CODE ANN. § 24-1-208 (Michie 1980 & Supp. 1999).

78 *See* Achal Mehra, *Newsmen's Privilege: An Empirical Study*, 59 JOURNALISM Q. 560, 561 (1982).

seventy-five per year in the next two years and to eighty-three annually from 1970 to 1976.[79] A 1970 law review article, without citing figures, also reported that the number of subpoenas issued to the news media, particularly by government investigators, had increased substantially from 1968 to 1970.[80] The article speculated that the government, faced with large-scale social unrest, was gathering evidence from every source possible in its haste to restore order.[81] In addition, it suggested that the press was unwilling to cooperate discreetly with investigators, as it had at times in the past, because of criticism of the press by the Nixon administration.[82]

Similarly, Vince Blasi, who conducted a quantitative and qualitative study of the journalist's privilege issue that was published in 1971, found that journalists were less likely than in the past to cooperate with officials.[83] Blasi traced what he called journalists' "disillusionment" with the nation's political leadership to the early 1960s and government attempts at "subtle manipulation" of the press.[84] Blasi reported that older as well as younger journalists had become so alienated from government that they felt no obligation to help officials.[85]

Blasi's 1971 study also noted that the journalists' confidential relationship with sources was particularly sensitive when it came to dissidents.[86] However, the empirical study was unable to document a significant damaging effect on most journalists' relationships with confidential sources.[87] Journalists who were asked if their coverage had been adversely affected in the past eighteen months by the possibility that they might be subpoenaed answered "no" 81.1 percent of the time.[88]

In the qualitative portion of Blasi's study, some journalists reported that sources in dissident groups had reacted to the threat of the journalist being subpoenaed by cutting off access.[89] For example, one reporter for the *New York Times* said he had responded to a

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79 *See id.*

80 *See* Margaret Sherwood, Comment, *The Newsman's Privilege: Government Investigations, Criminal Prosecutions and Private Litigation*, 58 CAL. L. REV. 1198, 1202 (1970).

81 *See id.* at 1202-03.

82 *See id.*

83 *See* Vince Blasi, *The Newsman's Privilege: An Empirical Study*, 70 MICH. L. REV. 229, 234-35 (1971).

84 *See id.* at 234.

85 *See id.*

86 *See id.* at 240-41.

87 *See id.* at 270-71.

88 *See id.*

89 *See id.* at 264.

U.S. House committee subpoena for testimony about a radical student organization.[90] However, he had confined his testimony only to information in his published stories.[91] Still, the organization refused to let the reporter further cover its activities, and officially condemned his cooperation with the committee.[92]

Generally, courts remained unconvinced that the First Amendment press clause provided a basis for a privilege. However, journalists' perceptions of government interference with their jobs increased and journalists continued to fight court orders to reveal sources. As a result, the groundwork was laid for the U.S. Supreme Court's only decision that directly confronted journalists' claims of a constitutional right to shield confidential information from forced disclosure to grand juries.[93]

In 1970, the Ninth Circuit in *Caldwell* was the first federal appellate court to recognize a First Amendment privilege in a case involving a grand jury investigation.[94] Earl Caldwell, a *New York Times* reporter who covered the Black Panther Party in California, argued that even his appearance before a federal grand jury would jeopardize his sensitive working relationship with the militant organization.[95] The Ninth Circuit agreed, and ruled that the government had to show a "compelling need" for Caldwell's evidence about possible criminal activity by the Black Panthers before he could be forced to appear before the grand jury.[96] The government appealed the *Caldwell* case and the U.S. Supreme Court granted certiorari.[97] In *Branzburg v. Hayes*,[98] the Court consolidated the *Caldwell* case with two others in which journalists had unsuccessfully claimed a common law or state shield law privilege.[99]

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90 *See id.*

91 *See id.*

92 *See id.* at 262-63.

93 *See* Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970), *rev'd sub nom.* Branzburg v. Hayes, 408 U.S. 665 (1972).

94 *See id.* at 1083.

95 *See id.*

96 *See id.* at 1089.

97 *See* United States v. Caldwell, 402 U.S. 942 (1971).

98 408 U.S. 665 (1972).

99 *See id.* In *Branzburg v. Pound*, 461 S.W.2d 345 (Ky. 1971), and *Branzburg v. Meigs*, 503 S.W.2d 748 (Ky. 1971), which were consolidated on appeal, the Kentucky Court of Appeals held that Kentucky's shield law granting a privilege to journalists to refuse to disclose confidential sources of information did not apply to a journalist who had witnessed criminal activity. *See Branzburg*, 408 U.S. at 709. Paul Branzburg, a reporter for the *Louisville Courier-Journal*, was called to appear before two grand juries after he wrote about the activities of hashish makers and drug users. *See id.* at 673. The name of the case was changed to *Branzburg v. Hayes* after Judge Pound of Jefferson County, Ky., died and was replaced by Judge Hayes. *See id.* at 665. In the other case consolidated with *Branzburg* and *Caldwell*, a Massachusetts television reporter was subpoenaed to testify before a grand jury after he

Justice Byron White's majority opinion rejected the reporters' First Amendment claims that forcing them to reveal the identities of confidential sources would deter the "free flow of information" protected by the amendment.[100] While conceding that news gathering deserved "some" First Amendment protection,[101] Justice White wrote that the First Amendment did not invalidate any "incidental burdening" of the press caused by the enforcement of laws that applied to all citizens.[102] Courts, Justice White wrote, consistently had found that the public "has a right to every man's evidence" except in those instances when a constitutional, common law, or statutory privilege has been accorded to a possible witness.[103]

Noting that the press litigants in *Branzburg* had sought a qualified rather than absolute privilege,[104] Justice White said the Court was still unwilling to "embark the judiciary on a long and difficult journey to . . . an uncertain destination."[105] There was difficulty for two reasons. First, a qualified privilege would embroil courts in preliminary proceedings to determine if the government had a "compelling need" for a reporter's information.[106] Such a case-by-case approach would make it difficult to predict those situations in which judges would order disclosure.[107]

Second, courts would have to determine who qualified as a journalist able to claim the privilege.[108] The Supreme Court traditionally had found the press clause to embody a personal right that applied to the "lonely pamphleteer" as well as the metropolitan newspaper publisher.[109] Justice White added that almost any author could claim that he or she performed the informative func-

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spent three hours in a New Bedford Black Panthers headquarters after a night of rioting in the city. *See In Re Pappas,* 266 N.E.2d 297, 298 (Mass. 1971). The Black Panthers agreed to allow Paul Pappas into the headquarters on the condition he reveal nothing he saw except for an anticipated police raid. *See id.* The raid did not occur and Pappas did not file a story. *See id.* After Pappas had been subpoenaed to reveal what he saw in the Black Panthers headquarters, the Supreme Judicial Court of Massachusetts held that there was no constitutional privilege allowing a journalist to refuse to appear and testify before a grand jury. *See id.* at 302-03.

100 *Branzburg,* 408 U.S. at 679-80.

101 *See id.* at 681.

102 *See id.* at 682-83.

103 *Id.* at 686-88 (citing United States v. Bryan, 339 U.S. 323, 331 (1950)).

104 A qualified privilege would allow those seeking information from journalists to overcome the presumption of a privilege by proving some sort of overriding need that would be more important than the First Amendment interests of the journalists. *See* BLACK'S LAW DICTIONARY 864 (6th ed. 1991).

105 *Branzburg,* 408 U.S. at 703.

106 *See id.* at 708.

107 *See id.* at 702 n. 39.

108 *See id.* at 704.

109 *See id.*

tion that reporters performed.[110]

In a pivotal concurring opinion, Justice Lewis Powell noted the "limited nature" of the holding.[111] Justice Powell said that journalists who suspected they were called to testify for the purpose of harassment or otherwise in bad faith would "have access to the court" to quash a subpoena.[112] In addition, Justice Powell suggested that courts should be responsive to journalists whose evidence appeared to be irrelevant to an investigation or for which the government had no legitimate need.[113] Each such claim, Justice Powell added, should be judged on a case-by-case basis.[114]

Justice Potter Stewart, joined by Justices William Brennan and Thurgood Marshall, dissented, arguing that the decision would lead state and federal authorities to "annex the journalistic profession as an investigative arm of the government" and thus endanger the media's autonomy.[115] Moreover, Justice Stewart wrote that the right of journalists to protect confidential sources was also rooted in the societal interest in "a full and free flow of information to the public."[116] A free flow of information was essential to a free society based on the idea of self-government.[117] Before a journalist should be required to testify in front of a grand jury and reveal confidences, the government should have to show:

> (1) that, there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law; (2) that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) a compelling and overriding interest in the information.[118]

The Court was sharply divided and Justice Powell's concurrence, which was necessary to gain five votes for the majority opinion, took on added importance. Justice Stewart's dissent, which appeared to expand upon his *Torre* opinion, suggested that courts adopt a balancing test with the two prongs suggested by Justice

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110 *See id.* at 704-05.
111 *See id.* at 709 (Powell, J., concurring).
112 *Id.* at 709-10.
113 *See id.* at 710.
114 *See id.* at 709-10.
115 *Id.* at 725 (Stewart, J., dissenting).
116 *Id.*
117 *See id.* at 725-27.
118 *Id.* at 743. In a separate dissent, Justice William O. Douglas argued that the journalist's privilege should be absolute. *See id.* at 712 (Douglas, J., dissenting). He explicitly rejected the use of a balancing test, saying that "all of the 'balancing' was done by those who wrote the Bill of Rights" when they framed the First Amendment in "absolute terms." *Id.* at 714.

Powell: (1) relevance and need; and (2) a requirement that no other source be available.[119]

D. *Branzburg's Aftermath*

The *Branzburg* decision appeared to shut the door on journalists' claims that the First Amendment granted a privilege to refuse to reveal the names of confidential sources to authorities. Justice Powell, however, noted in his concurrence that journalists are not without constitutional protection when called to testify before a grand jury.[120] Justice Powell explained that:

> if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationship without legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered.[121]

Despite the Supreme Court's ruling in *Branzburg* and its general rejection of special privileges for the press, lower federal courts have often looked at *Branzburg* as an endorsement of a journalist's privilege in situations other than grand jury subpoenas for direct testimony about criminal activity.[122] Within a year after *Branzburg*, three federal appellate courts, including the Second Circuit, recognized a qualified privilege along the lines suggested by Justice Stewart in *Branzburg*.[123] In *Baker v. F & F Investment*,[124] the Second Circuit distinguished the case from both its own precedent in *Garland* and from *Branzburg*.[125] Since journalist Alfred Balk was a non-party in a discrimination action, the *Baker* court distinguished his situation from *Torre* by stating that the identity of Balk's confidential source did not go to the heart of the matter, and the court also noted that it was distinguishable from *Branzburg* because the underlying case was not criminal.[126] The Second Circuit found that Justice Powell's concurrence in *Branzburg* suggested that a

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119 *See id.* at 676.
120 *See id.* at 709.
121 *Id.* at 710.
122 *See, e.g.*, United States v. Burke, 700 F.2d 70 (2d Cir. 1983).
123 *See* Baker v. F & F Investment Co., 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); Bursey v. United States, 466 F.2d 1059 (9th Cir.), *reh'g denied*, 466 F.2d 1090 (9th Cir. 1972); Cervantes v. Time Inc., 464 F.2d 986 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).
124 470 F.2d 778 (2d Cir. 1972).
125 *See id.* at 783-84.
126 *See id.* at 783-85.

journalist's First Amendment interests could outweigh the journalist's duty to testify in criminal investigations.[127] The court explained, however, that "courts must recognize that the public interest in non-disclosure of journalists' confidential news sources will often be weightier than the private interest in compelled disclosure" in civil cases.[128]

The Second Circuit concluded by affirming a lower court order quashing Balk's subpoena with a ringing endorsement of free speech and free press rights:

> It is axiomatic, and a principle fundamental to our constitutional way of life, that where the press remains free so too will a people remain free. Freedom of the press may be stifled by direct or, more subtly, by indirect restraints. Happily, the First Amendment tolerates neither, absent a concern so compelling as to override the precious rights of freedom of speech and the press. We find no such compelling concern in this case.[129]

In the years since *Baker,* every federal appellate court except the Sixth Circuit has explicitly or tacitly recognized the existence of a qualified journalist's privilege to protect the identities of confidential sources.[130] As the Sixth Circuit noted in rejecting the existence of a First Amendment privilege in 1987, the other circuits largely relied upon a reading of Justice Powell's concurrence in *Branzburg* that favored a privilege in cases other than good-faith grand jury investigations.[131] In rejecting the approach taken by other circuits, the Sixth Circuit explained that reading Justice Powell's concurrence as an endorsement of Stewart's dissenting opinion would be tantamount to substituting the dissent for the majority opinion.[132] The court interpreted Justice Powell's concur-

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127 *See id.* at 784.

128 *Id.* at 785.

129 *Id.*

130 *See, e.g.,* United States v. Lloyd, 71 F.3d 1256 (7th Cir. 1995) (explaining that the district court did not abuse discretion in quashing subpoena for reporter whose confidential information was sought); United States v. Caporale, 806 F.2d 1487 (11th Cir. 1986) (recognizing qualified privilege and finding district court did not err in quashing subpoenas to journalists in criminal case); LaRouche v. Nat'l Broad. Co., 780 F.2d 1134 (4th Cir. 1986) (applying Stewart's three-part test), *cert. denied,* 479 U.S. 818 (1986); United States v. Burke, 700 F.2d 70 (2d Cir. 1983) (criminal case), *cert. denied,* 464 U.S. 815 (1983); Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981) (civil case); United States v. Cuthbertson, 630 F.2d 139 (3d Cir. 1980) (stating that federal common law privilege exists in both civil and criminal cases), *cert. denied,* 454 U.S. 1056 (1981); Miller v. Transamerican Press, Inc., 621 F.2d 721 (5th Cir. 1980) (stating that journalists have First Amendment privilege, although it is not absolute), *cert. denied,* 450 U.S. 1041 (1981); Silkwood v. Kerr-McGee, 563 F.2d 433 (10th Cir. 1977) (recognizing privilege and finding that documentary filmmaker could assert journalist's privilege).

131 *See In re* Grand Jury Proceedings, 810 F.2d 580, 584-85 (6th Cir. 1987).

132 *See id.* at 584.

rence as a mere agreement with the majority that neither limited nor expanded Justice White's opinion.[133] According to the court, Justice Powell's concurrence was only intended to respond to Justice Stewart's mischaracterization of the majority opinion as an invitation for the government to "annex the press" as an investigative arm of the executive branch.[134]

II. Protection for Non-confidential Information

A. *Origins of the Federal Privilege*

Branzburg and its early progeny generally did not discuss whether information that journalists collected without an explicit or implicit promise of confidentiality also should be privileged under certain circumstances. However, only three years after *Branzburg,* a U.S. District Court in Florida held that the First Amendment privilege should protect non-confidential as well as confidential information.[135]

In *Loadholtz v. Fields,*[136] the district judge rejected a motion to compel discovery after a newspaper reporter refused to answer questions in regard to a civil suit in which he was not a party.[137] The plaintiff in the suit demanded reporter Arnold "Butch" Prevatt's testimony and documents related to an interview with the defendant that resulted in a published story.[138] Prevatt resisted even though the interview was "on the record" and no confidential sources were implicated.[139]

In rejecting the plaintiff's discovery motion, the court noted the non-confidential nature of the material sought, but found there was no difference between compelling the disclosure of confidential or non-confidential material.[140] The court found the distinction "utterly irrelevant" to the "chilling effect" that enforcing the subpoenas in the case would have on the press and the flow of

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133 *See id.* at 585.

134 *See id.* at 585. In a footnote to his concurrence, Justice Powell took issue with the balancing test that would have been required by the Stewart dissenters. *See* Branzburg v. Hayes, 408 U.S. 665, 710 n.* (1972) (Powell, J., concurring). Justice Powell rejected the idea that the government should be required to show a compelling need for a journalist's testimony before that journalist could even be called to appear before a grand jury. *See id.* Moreover, he suggested that some balancing of interests was appropriate but said the Stewart test would tip the balance too far in favor of the press. *See id.* at 710.

135 *See* Loadholtz v. Fields, 389 F. Supp. 1299 (M.D. Fla. 1975).

136 *See id.*

137 *See id.* at 1300.

138 *See id.*

139 *See id.*

140 *See id.* at 1303.

information to the public.[141] "The compelled production of a reporter's resource materials," the court wrote, "is equally as invidious as the compelled disclosure of his confidential informants."[142]

A number of federal and state courts have followed *Loadholtz* and extended the journalist's privilege to non-confidential information.[143] However, two circuits have rejected extension of the privilege to non-confidential information, at least in certain proceedings.[144] The issue has not been directly decided by the Sixth, Seventh, Eighth, Tenth, Eleventh, or District of Columbia Circuits. As noted earlier, the Sixth Circuit of the U.S. Court of Appeals has denied the existence of any journalists' privilege in federal law.[145] In addition, some courts in states without shield laws have refused to extend constitutional or common-law protection to journalist's non-confidential information.[146]

B. *Why Protect Non-confidential Information?*

The Florida District Court in *Loadholtz* did not explain why subpoenas for non-confidential information had the same "chilling effect" as subpoenas for confidential source identities.[147] The circuits have taken inconsistent approaches to determining which First Amendment interests are implicated when a journalist is subpoenaed to testify about or produce non-confidential material. Moreover, the federal appellate courts differ on whether non-confidential information should get the same, less, or no protection from forced disclosure.

Only a few federal appellate courts have discussed in detail which interests are implicated by forced disclosure of non-confi-

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141 *Id.*

142 *Id.*

143 *See, e.g.*, Shoen v. Shoen, 48 F.3d 412 (9th Cir. 1995); Pugh v. Avis Rent A Car System, Inc., 1997 U.S. Dist. LEXIS 16671 (S.D.N.Y. Oct. 28, 1997); United States v. Nat'l Talent Assocs., Inc., 1997 WL 829176, at *1 (D.N.J. Sept. 4, 1997); United States v. Blanton, 534 F. Supp. 295 (S.D. Fla. 1982); Bell v. Des Moines, 412 N.W.2d 585 (Iowa 1987); West Virginia *ex. rel.* Charleston Mail Assoc. v. Ranson, 488 S.E.2d 5 (W.Va. 1997).

144 *See* United States v. LaRouche Campaign, 841 F.2d 1176 (1st Cir. 1988) (stating that a journalist's claim of privilege has some merit but is overcome by need for testimony in criminal case); United States v. Smith, 135 F.3d 963 (5th Cir. 1998) (noting that there is no privilege for non-confidential outtakes of interview with criminal defendant sought by both prosecution and defense).

145 *See supra* notes 131-134 and accompanying text.

146 *See, e.g.*, State of Idaho v. Salsbury, 924 P.2d 208 (Idaho 1996) (stating that qualified privilege does not apply to non-confidential videotape shot at public event); *In re* Letellier, 587 A.2d 722 (Maine 1990) (noting that the qualified privilege does not extend to tapes of non-confidential interview with public official suspected of criminal activity); State *ex. rel.* Healey v. McMeans, 884 S.W.2d 772 (Tex. Crim. App. 1994) (stating that no journalists' privilege exists in criminal cases).

147 *See Loadholtz*, 389 F. Supp. at 1303.

dential information.[148] There are three identifiable media interests that can be discerned from these decisions: (1) protecting the free flow of information to the public; (2) protecting the autonomy, or independence, of the press; and (3) protecting the press from undue burdens on time and resources caused by the threat of an unchecked flood of subpoenas. The last two are intertwined because the media have argued that the burdens created by the threat of unchecked subpoenas infringe on their ability to make independent decisions about how to spend money and allocate journalists' time, and what material should be archived for future reference.[149] The interests of autonomy and undue burdens will be discussed together below.

C. *Free Flow of Information*

In *von Bulow by Auersperg v. von Bulow*,[150] the Second Circuit for the first time explicitly dealt with a claim of non-confidentiality and stated that there was no particular difference between the need to protect confidential and non-confidential information.[151] In the course of denying the journalist's privilege to a book author, the court examined the principles involved in determining whether someone was entitled to claim the privilege.[152] The Second Circuit noted that there were five principles involved: (1) gathering news is a protected, although qualified, right under the First Amendment, stemming from the "strong public policy" supporting unfettered communication to the public; (2) whether a person is a journalist entitled to claim the privilege is determined by that person's intent at the beginning of the information-gathering process; (3) a person may successfully assert the privilege if he or she is involved in activities associated with the gathering and dissemination of news, even if the person is not a member of the institutional press; (4) the relationship between the journalist and his or her source may be either confidential or non-confidential; and (5) unpublished resource material may be protected.[153] However, in this instance, the Second Circuit found that the book author had not shown that she gathered the subpoenaed information in order to disseminate it to the public, and therefore could not claim a

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148 *See infra* Part II.C-D and cases cited.

149 *See, e.g., LaRouche Campaign*, 841 F.2d at 1180-81; *Smith*, 135 F.3d at 970.

150 811 F.2d 136 (2d Cir. 1987), *cert. denied sub nom.* Reynolds v. von Bulow by Auersperg, 481 U.S. 1015 (1987).

151 *See id.* at 145.

152 *See id.* at 142.

153 *See id.*

privilege.[154]

In a Third Circuit criminal case in 1980, *United States v. Cuthbertson,*[155] a three-judge panel determined that a qualified privilege should apply to both confidential and non-confidential information.[156] The court found that any forced disclosure of information could "undercut the public policy favoring the free flow of information to the public."[157] However, the court added, without explanation, that the lack of a confidential source could be an "important element" in balancing the interests of journalists and those seeking disclosure.[158] The Third Circuit affirmed a contempt ruling against CBS for failure to turn over outtakes of its interviews with people on the government's witness list in the underlying trial, but ruled for CBS in regard to outtakes of interviews with non-witnesses.[159]

On remand, the district court inspected the CBS materials *in camera* and determined that outtakes of both witness and non-witness interviews should be turned over to the defense because they contained possible exculpatory material.[160] CBS again appealed and the Third Circuit ruled in CBS's favor.[161] The court found that the defense had not shown that the information on the tapes was unavailable elsewhere, such as through depositions from the witnesses, whose names were known.[162] The court then determined that the trial court was premature in releasing the materials to the defense when the potential witnesses interviewed by CBS had not yet testified.[163]

D. *Press Autonomy and Undue Burdens*

The First Circuit, in *United States v. LaRouche Campaign,*[164] ordered the NBC television network to turn over to the defense its unbroadcast outtakes of an interview with a prosecution witness in a criminal case.[165] The court noted that other federal courts had found that a distinction between subpoenas for confidential and

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154 *See id.* at 145.
155 630 F.2d 139 (3d Cir. 1980), *cert. denied sub nom.* Cuthbertson v. CBS, Inc., 449 U.S. 1126 (1981).
156 *See id.* at 147.
157 *Id.*
158 *See id.*
159 *See id.* at 149.
160 *See* United States v. Cuthbertson, 651 F.2d 189, 192-93 (3d Cir. 1981) [hereinafter *Cuthbertson II*], *cert. denied sub nom.* Cuthbertson v. CBS, Inc., 454 U.S. 1056 (1981).
161 *See id.* at 191.
162 *See id.* at 195-96.
163 *See id.* at 195.
164 841 F.2d 1176 (1st Cir. 1988).
165 *See id.* at 1182.

non-confidential materials was "irrelevant as to the chilling effect" of forced disclosure.[166] The court stated that "no illuminating examples or reasoning [were] produced to support" the idea that the disclosure of non-confidential information would have a chilling effect on the press.[167]

However, the court found that four of NBC's five First Amendment reasons for opposing *in camera* review of its outtakes had merit.[168] It rejected NBC's contention that disclosure would increase the chances that the witness, Forrest Lee Fick, would be harassed by the *LaRouche* criminal defendants.[169] The court noted that Fick was already known to the defendants through the broadcast interview and through his participation in a related case.[170]

NBC also claimed that forced disclosure would raise the threat of "administrative and judicial interference" into the news-gathering process; would cause the network to appear to be an investigative arm of the court; would serve as a disincentive to gather and keep unbroadcast material; and would place a burden on journalists' time and resources.[171] The First Circuit noted that there was "some merit" to those interests, and it recognized a "lurking and subtle threat" to journalists and their employers if compelled disclosure became routine.[172] Further, the court noted that routine disclosure demands could lead to internal policies favoring destruction of materials to avoid disclosure, that frequent subpoenas would take up the valuable productive time of journalists, and in general, lead to higher legal costs for the media.[173] Finally, quoting Justice Powell in *Branzburg*, the court stated, "certainly, we do not hold . . . that state and federal authorities are free to annex the news media as an investigative arm of government."[174]

Finding all of those interests "legitimate," however, the First Circuit found that they were overcome by the defendants' Fifth and Sixth Amendment rights to due process, a fair trial, and the

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166 *Id.* at 1181 (citing U.S. v. Blanton, 534 F. Supp. 295, 297 (S.D. Fla. 1982); Loadholtz v. Fields, 389 F. Supp. 1299, 1303 (M.D. Fla. 1975)).

167 *LaRouche Campaign*, 841 F.2d at 1181.

168 *See id.* The four arguments were as follows: (1) "'the threat of administrative and judicial intrusion' into the newsgathering and editorial process"; (2) "the disadvantage of a journalist appearing to be 'an investigative arm of the judicial system'"; (3) "the disincentive to 'compile and preserve nonbroadcast material'"; and (4) "the burden on journalists' time and resources in responding to subpoenas." *Id.* at 1182 (quoting the affidavit submitted by NBC Vice President Thomas Ross).

169 *See id.* at 1181.

170 *See id.*

171 *Id.* at 1182.

172 *Id.*

173 *See id.*

174 *Id.*

obvious materiality of Fick's comments.[175] The three-judge panel did not resolve the question of whether a privilege for non-confidential information would be available to journalists in other situations, such as civil suits.[176]

The Fourth Circuit has had an inconsistent record in ruling on cases involving non-confidential information. In the 1976 case of *United States v. Steelhammer*,[177] the court, in a 2-1 opinion, overturned a contempt conviction and six-month jail sentence for two West Virginia reporters who attended a coal miners union meeting at which union leaders allegedly urged members to defy a judge's back-to-work order.[178] The court cautioned that its ruling was limited to the facts of the case and also noted that it was not according the reporters a privilege; rather, it was a privilege which belonged to the public.[179] The court rested its opinion on the fact that there were numerous other witnesses to the meeting who could be subpoenaed.[180]

Circuit Judge Winter, in his dissent, noted that the absence of confidentiality, along with the lack of evidence that the subpoena was meant to harass and embarrass the reporters led the district court to order the journalists to testify.[181] Judge Winter also rejected the reporters' argument that forcing them to testify would lead the miners to close future meetings to reporters or other outsiders and impede news gathering.[182] Even if the miners did close future meetings to journalists, Judge Winter noted, no legal rights of journalists would be violated.[183] Judge Winter cited *Pell v. Procunier*[184] for the proposition that the First Amendment did not require that the press be given special access to information or places not accessible to the public at large.[185]

On rehearing *en banc*, the Fourth Circuit adopted the dissenting opinion and ruled, 4-3, that the district judge acted properly in finding the reporters in contempt.[186] However, the court also found that because the underlying case already had been tried, the contempt controversy was moot and the reporters would not be

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175 *See id.*
176 *See id.*
177 539 F.2d 373 (4th Cir. 1976), *rev'd en banc*, 561 F.2d 539 (4th Cir. 1977).
178 *See id.* at 376.
179 *See id.* at 375.
180 *See id.*
181 *See id.* at 376 (Winter, J., dissenting).
182 *See id.* at 377.
183 *See id.*
184 417 U.S. 817 (1974).
185 *See Steelhammer*, 539 F.2d at 377-78 (Winter, J., dissenting).
186 *See* 561 F.2d 539, 540 (4th Cir. 1977).

forced to serve the six-month jail sentences.[187] The full panel did not address the merits of the privilege issue.[188]

Steelhammer appeared to stand for the proposition that in the absence of confidentiality or a showing that journalists were being harassed by subpoenas issued in bad faith, there was no constitutional privilege. In 1992, a three-judge panel of the Fourth Circuit reached a similar conclusion in *In re Shain,*[189] in which reporters' testimony was sought as to non-confidential comments made to them by a South Carolina legislator accused of taking illegal contributions.[190] In a concurring opinion, Judge Wilkinson agreed that the reporters should be held in contempt for refusing to testify, but chided the two judges in the majority for claiming that the lack of confidentiality meant that there were no legitimate First Amendment issues implicated.[191] The concurrence was concerned that reporters would be discouraged from doing exclusive interviews or reporting on controversial issues if they had to fear that their "scoops" would land them on the witness stand.[192] Judge Wilkinson explained that the "values served by an independent press" would be harmed if reporters were routinely dragged into cases.[193]

In 1993, in *Church of Scientology International v. Daniels,*[194] the Fourth Circuit again examined the confidential versus non-confidential problem.[195] However, in *Daniels* the court applied the privilege without discussing its previous rulings.[196] One possible explanation for the lack of reliance on precedent may be that the previous cases were criminal in nature and *Daniels* was a civil case.[197] In affirming a magistrate's order to quash a subpoena requiring *USA Today* to submit all documents related to an editorial board meeting at which statements were made that later were quoted in the newspaper, the Fourth Circuit determined that the civil plaintiff failed to meet the requirements of the three-part Stewart test.[198] However, the court did not discuss whether it considered the information confidential or non-confidential.[199] Two

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187 *See id.*
188 *See id.*
189 978 F.2d 850 (4th Cir. 1992).
190 *See id.* at 851.
191 *See id.* at 855 (Wilkinson, J., concurring).
192 *See id.*
193 *Id.*
194 992 F.2d 1329 (4th Cir.), *cert. denied,* 510 U.S. 869 (1993).
195 *See id.* at 1335.
196 *See id.*
197 *See id.* at 1331.
198 *See id.* at 1335.
199 *See id.*

years later, however, a district court in the Fourth Circuit read *Daniels* to mean that confidential and non-confidential information were subject to the same tests and carried the same weight.[200]

The Ninth Circuit has dealt with the federal non-confidential privilege question twice, although both rulings were in the same underlying case.[201] In *Shoen v. Shoen,*[202] the court, quoting *von Bulow,* determined that a book author who planned to disseminate information to the public could claim protection of the journalists' privilege.[203] The court also agreed with the First Circuit's *LaRouche* finding that four of the five First Amendment interests claimed by NBC in *LaRouche* were legitimate.[204] However, the Ninth Circuit agreed with the Third Circuit in *Cuthbertson* that the absence of confidentiality should be considered when weighing competing interests in a case.[205] The *Shoen I* court determined that in the underlying libel case in which two sons sued their father for accusing them of being involved in the murder of another relative, the plaintiffs had failed to exhaust alternative means for the information they sought.[206]

On remand, however, the trial court found the book author in contempt for refusing to testify about his interviews with the father, Leonard Shoen.[207] The trial court determined that the plaintiffs, having deposed Leonard Shoen, had exhausted all other sources for the information they sought from the author.[208] In *Shoen II,* the Ninth Circuit noted that the two sides in the subpoena controversy disagreed about what test was to be applied to overcome a valid assertion of a journalist's privilege when the information was non-confidential.[209] The *Shoen II* court determined that the proper test was: 1) whether alternative sources had been exhausted; 2) whether the information sought was non-cumulative; and 3) whether the information sought was clearly relevant to an important issue in the case.[210] The court determined that the plaintiffs had not made the required showing and returned the case to the

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200 *See* Penland v. Long, 922 F. Supp. 1080, 1084 (W.D.N.C. 1995).

201 *See* Shoen v. Shoen, 48 F.3d 412 (9th Cir. 1995); Shoen v. Shoen 5 F.3d 1289 (9th Cir. 1993).

202 5 F.3d 1289 (9th Cir. 1993) [hereinafter *Shoen I*].

203 *See id.* at 1293-94.

204 *See id.* at 1294-95.

205 *See id.* at 1295.

206 *See id.* at 1296.

207 *See* Shoen v. Shoen, 48 F.3d 412, 414 (9th Cir. 1995) [hereinafter *Shoen II*].

208 *See id.*

209 *See id.* at 414-15.

210 *See id.* at 416.

trial court.[211]

On different occasions, then, federal appellate courts have found that either confidential and non-confidential information gathered by journalists should have the same protection, or that non-confidential material should have less protection. The courts that have found that non-confidential information deserves at least some protection have based their decisions on the free flow of information and autonomy interests claimed by the media.[212] In contrast, however, the Fifth Circuit has determined that non-confidential information is unprotected in criminal cases.[213]

III. THE TWO *GONZALES* DECISIONS

A. *Factors Leading to* Gonzales I

In its *von Bulow* decision, the Second Circuit found no particular difference between confidential and non-confidential material in determining the question of whether a journalist should be forced to disclose information in court.[214] Other federal appellate courts have determined either that non-confidential information should receive less protection than confidential information or no protection at all.[215]

However, in *von Bulow,* the author who asserted the privilege lost because she did not fit the Second Circuit's definition of a journalist.[216] In the first *Gonzales* case, a three-judge panel of the Second Circuit declined to follow *von Bulow.*[217] The panel said that the Second Circuit's discussion in *von Bulow* regarding the five principles at stake when journalists challenge disclosure was not binding precedent.[218] In denying an NBC appeal of a contempt citation, the court also denied that a privilege for non-confidential

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211 *See id.* at 416-18.

212 A student case note appearing in the *Yale Law Journal* after the first *Gonzales* decision argued that the Second Circuit's finding that there was no privilege for non-confidential information actually aided the media's desire to be perceived as independent of the government. *See* Julie M. Zampa, Note, *Journalist's Privilege: When Deprivation Is a Benefit,* 108 YALE L.J. 1449 (1999). Because the decision clearly stated that there was no privilege for non-confidential information, it freed journalists and their sources from the uncertainty engendered by a qualified privilege based on shaky foundations, thus also freeing journalists and their sources from judicial interference in their relationships. *See id.* at 1454. The writer's point is intriguing but is largely moot in light of the Second Circuit's reconsideration of *Gonzales.*

213 *See* United States v. Smith, 135 F.3d 963 (5th Cir. 1998). *See infra* notes 236-251.

214 *See* von Bulow by Auersperg v. von Bulow, 811 F.2d 136, 145 (2d Cir.), *cert. denied sub nom.* Reynolds v. von Bulow by Auersperg, 481 U.S. 1015 (1987).

215 *See supra* Part II.

216 *See von Bulow,* 811 F.2d at 145.

217 *See* Gonzales v. Nat'l Broad. Co., 155 F.3d 618 (2d Cir. 1998) [hereinafter *Gonzales I*].

218 *See id.* at 623.

information existed in federal law.[219]

Why did the Second Circuit appear to support a privilege, at least in theory, for non-confidential information in *von Bulow* but not in the *Gonzales I* case? The reason is not completely clear, but at least two factors appear to have strongly affected the decision. First, Second Circuit case history on the privilege for non-confidential information was ambiguous. As noted above, the *von Bulow* decision, while theoretically favorable, was unfavorable to the particular privilege claim being adjudged.[220] Moreover, other precedents either did not clearly mention that non-confidentiality was an issue or relied upon a state law interpretation.[221]

In 1983, in *United States v. Burke*,[222] the Second Circuit determined that the trial court did not err in quashing a subpoena for a reporter who interviewed a key government witness in the criminal case.[223] Although the source was quoted by name and therefore not confidential, the court did not discuss whether it considered the material and testimony subpoenaed confidential or non-confidential.[224] The court instead focused on whether the test for determining whether a privilege is overcome is different when the case is criminal rather than civil.[225] The three-judge panel found that it was not.[226]

In another criminal case, *United States v. Cutler*,[227] the Second Circuit held that an attorney on trial for allegedly violating a gag order had made the necessary showing to overcome the privilege in relation to notes and outtakes of comments he made to the media.[228] However, the court noted that the attorney had not made the required showing for notes and outtakes of comments made by prosecutors to the media, which the attorney intended to use to show that he was not alone in violating the gag order.[229] Again, the Second Circuit did not discuss whether it considered the material confidential, although the source's identity was known.[230]

In 1996, the Second Circuit in *In re Application to Quash Sub-*

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219 *See id.*
220 *See* von Bulow by Aersperg v. von Bulow, 811 F.2d 136, 145 (2d. Cir. 1987).
221 *See infra* notes 222-235 and accompanying text.
222 700 F.2d 70 (2d Cir. 1983).
223 *See id.* at 78.
224 *See id.* at 76-78.
225 *See id.* at 77.
226 *See id.*
227 6 F.3d 67 (2d Cir. 1993).
228 *See id.* at 73.
229 *See id.* at 73-75.
230 *See id.*

poena to National Broadcasting Co., Inc.[231] overturned a trial judge's finding of contempt against NBC for refusing to disclose outtakes of interviews with a plaintiff and plaintiff's attorney.[232] The court determined that under New York's shield law, the network had a qualified privilege not to disclose non-confidential information unless the party issuing the subpoena showed that the information sought was "highly material and relevant, . . . critical or necessary" to the maintenance of the claim or defense, and unavailable from any other source.[233] The court determined that the civil defendants had failed to make the required showing to overcome the privilege.[234] In response to a defense argument that *Cutler* was controlling, the court noted that in *Cutler* it had applied a standard "identical" to the standard in New York law.[235]

In short, then, the Second Circuit had ruled in favor of the media in one criminal case and partly so in another. It also found in favor of the media in a civil case, all involving apparently non-confidential material. However, in criminal cases, the court did not specify that it considered the material non-confidential, and in the civil case it relied upon state, not federal, law.

The second factor that may have influenced the *Gonzales I* panel was a 1998 criminal case, *Smith v. United States.*[236] In *Smith,* the Fifth Circuit held that there was no privilege in federal law protecting journalists from being forced to disclose non-confidential information.[237] The court interpreted Justice Powell's concurrence in *Branzburg* as limiting the government's right to compel a journalist's testimony to a grand jury only in cases in which grand jury investigations were being conducted in bad faith.[238]

In *Smith,* a New Orleans television station appealed an order to produce outtakes of its interview with an arson suspect, arguing that it deserved an "institutional" privilege, similar to privileges accorded to attorneys' work product and the executive branch of government.[239] The station contended that journalists needed the privilege to avoid being annexed as an investigative arm of government.[240] Furthermore, the station maintained that without a privilege, future news sources would be wary of the media's close

231 79 F.3d 346 (2d Cir. 1996) [hereinafter 1996 NBC case].
232 *See id.* at 353.
233 *Id.* at 351 (citing N.Y. CIV. RIGHTS LAW § 79-h(c) (McKinney 1992)).
234 *See id.* at 353.
235 *See id.* at 352-53.
236 135 F.3d 963 (5th Cir. 1998).
237 *See id.* at 969.
238 *See id.*
239 *See id.*
240 *See id.*

connection to the government and would hesitate to approach the media.[241] The station also argued that it would be swamped with discovery requests hampering its ability in the future to inform the public.[242] Without a privilege and facing a deluge of subpoenas, the station explained, the media would be forced to destroy archival material rather than risk having it subpoenaed.[243] Finally, the station claimed the media might hesitate before reporting on important matters to avoid being dragged into criminal litigation.[244]

The Fifth Circuit rejected the station's arguments. It noted that even though journalists had argued "compellingly" in *Branzburg* that news sources would "dry up" if forced disclosure was allowed, the U.S. Supreme Court nevertheless ruled against a First Amendment privilege for confidential information.[245] Moreover, the Fifth Circuit noted that the dangers that sources would avoid the media were less substantial because the information subpoenaed was non-confidential.[246] The court also found the station's other arguments unpersuasive.[247] To the extent that the media could be burdened with subpoenas, the court asserted that the media were not "differently situated" from other businesses that might find themselves possessing relevant evidence.[248] The court noted that the station was unable to supply any empirical evidence for its assertions that the media would destroy possibly valuable information or avoid doing certain stories.[249] Further, the Fifth Circuit pointed out that the media were protected under *Branzburg* from undue harassment.[250] Short of such harassment, the court held, there was no privilege available to the media.[251]

B. *The* Gonzales I *Decision*

In the *Gonzales* case, the Gonzaleses claimed that a Louisiana deputy sheriff pulled them over on Interstate 10 and detained them longer than similarly situated Caucasians because of their Hispanic origin.[252] A *Dateline* investigation that aired on NBC showed a reporter's car, equipped with hidden cameras, being pul-

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241 *See id.* at 970.
242 *See id.*
243 *See id.*
244 *See id.*
245 *Id.* (citing Branzburg v. Hayes, 408 U.S. 665 (1972)).
246 *See id.*
247 *See id.*
248 *See id.*
249 *See id.* at 971.
250 *See id.*
251 *See id.*
252 *See* Gonzales v. Nat'l Broad. Co., 155 F.3d 618, 619 (2d Cir. 1998).

led over by the same deputy.[253] *Dateline* used the footage in a report accusing Louisiana law enforcement officers of making unwarranted traffic stops, particularly of out-of-state drivers, and sometimes seizing vehicles or property after such stops without probable cause.[254] Both the plaintiffs and defendants subpoenaed NBC's outtakes of its footage from the reporter's car before, during, and after the traffic stop.[255]

The court wrote, in language similar to the Fifth Circuit in *Smith*, that no privilege existed in federal law for non-confidential information and that NBC had presented neither a persuasive argument nor empirical evidence showing how compelled disclosure of non-confidential material would harm First Amendment interests.[256] In fact, the court commented, if the absence of a privilege might affect journalists' editorial decisions, the effect might be for the better.[257] If journalists and their employers were faced with the threat of subsequent judicial analysis of their editorial decisions, the court wrote, "such scrutiny is likely to make the final news product more complete, accurate and reliable."[258]

The *Gonzales I* court also rejected NBC's argument that failure to protect the press from subpoenas for non-confidential information would subject the press to frequent and burdensome demands for information.[259] In that respect, the court said, echoing *Smith*, the press was not "differently situated" from other businesses that might find themselves in possession of relevant evidence.[260]

In addition to relying heavily on *Smith*, the Second Circuit in *Gonzales I* also relied in part upon the U.S. Supreme Court's characterization of *Branzburg* in *University of Pennsylvania v. EEOC*.[261] In *University of Pennsylvania*, the Court stated that *Branzburg* indicated "a reluctance to recognize a constitutional privilege where it was 'unclear how often and to what extent informers are actually deterred from furnishing information when newsmen are forced to testify before a grand jury.'"[262] Like the *Branzburg* Court, the Second Circuit declined to recognize a First Amendment privilege based on claims of an "uncertain" burden on news-gathering.[263]

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253 *See id.* at 620.
254 *See id.*
255 *See id.*
256 *See id.* at 624.
257 *See id.*
258 *Id.*
259 *See id.* at 626.
260 *Id.* at 625 (quoting Smith v. United States, 135 F.3d 963, 970 (5th Cir. 1998)).
261 493 U.S. 182 (1990).
262 *Gonzales I*, 155 F.3d at 626 (citing Univ. of Pennsylvania, 493 U.S. at 201).
263 *See id.*

Oddly, the *Gonzales I* court found that NBC was incorrect in saying that the journalists' privilege under federal law was "identical" to the New York shield law privilege, as the court had said in the 1996 NBC case.[264] The panel noted that the privilege was not identical because New York's law granted an absolute privilege to confidential information, and a qualified privilege to non-confidential material.[265] The Second Circuit, the panel asserted, had never recognized an absolute privilege for confidential material or any privilege for non-confidential material.[266]

At least two district court cases in the Second Circuit followed *Gonzales I* in finding that there was no privilege for non-confidential information under federal law.[267] However, in June 1999, the Second Circuit vacated *Gonzales I*.[268] The court ordered that until the Second Circuit could rule on NBC's motion for rehearing, all district courts should abide by the law in the circuit as it existed prior to *Gonzales I* but make no inference from the Court of Appeals' decision to vacate the ruling.[269]

In the same month, the Second Circuit also vacated and remanded one of the two district court rulings that followed *Gonzales I*.[270] The Second Circuit upheld the second ruling on the grounds that even if the district court had determined that a privilege existed for non-confidential material, the litigants seeking the journalists' information would have been able to prove that disclosure was required by meeting the requirements of a balancing test.[271]

C. *Gonzales II*

In September 1999, two-thirds of the original three-judge panel in *Gonzales I* issued a new ruling that reversed its previous ruling in part.[272] In *Gonzales II*,[273] Judge Pierre N. Leval, who had not been on the original *Gonzales* panel, wrote that the court agreed with NBC that the federal journalist's privilege applied to

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264 *See id.* at 623 (citing *In re* Application to Quash Subpoena to Nat'l Broad. Co., 79 F.3d 346, 353 (2d. Cir. 1996)).

265 *See id.*

266 *See id.*

267 *See In re* Ramaekers, 33 F. Supp.2d 312 (S.D.N.Y. 1999); *In re* Dow Jones & Co., 27 Media L. Rep. 1307 (BNA) (S.D.N.Y. 1998).

268 *See* Gonzales v. Nat'l Broad. Co., 27 Media L. Rep. 2148 (BNA) (2d Cir. 1999) (per curiam).

269 *See id.* at 2149.

270 *See In re* Dow Jones & Co., 27 Media L. Rep. 2149 (BNA) (2d Cir. 1999).

271 *See In re* Ramaekers, 27 Media L. Rep. 1633, 1637 (BNA) (2d Cir. 1999).

272 *See* Gonzales v. National Broad. Co., 194 F.3d 29, 30 (2d Cir. 1999) [hereinafter *Gonzales II*].

273 *See id.*

non-confidential as well as confidential material.[274] However, Leval wrote that the court also agreed with the Gonzaleses that a party seeking non-confidential material had to make a lesser showing than those seeking confidential material in order to overcome the privilege.[275]

Judge Leval's opinion in *Gonzales II* explicitly noted that both *Burke* and *Cutler* involved attempts to force disclosure of non-confidential material.[276] The opinion stated that those earlier cases, as well as *von Bulow,* had not expressed in detail the reasons why non-confidential information should be protected from forced disclosure.[277] Judge Leval added that both confidential and non-confidential information deserved protection for the same constitutional and public policy reasons.[278] The court explained that the qualified journalists' privilege was based on the need to protect the "pivotal function of reporters to collect information for public dissemination"[279] and the "paramount interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters."[280]

The *Gonzales II* court found that the interests in maintaining the "pivotal function" of reporters and the "maintenance of a vigorous, aggressive and independent press" were relevant when deciding whether the information subpoenaed was confidential or non-confidential.[281] In language similar to *LaRouche* and *Shoen I,* the panel wrote that if parties to a lawsuit were free to subpoena the press without restriction, it was likely that litigants would "sift through press files" anytime a case gained media attention.[282] If that were to happen, the panel wrote, the press would be burdened with the heavy costs of subpoena compliance.[283] In addition, it was possible that potential sources could be deterred from speaking to the press or could insist on anonymity to avoid being "sucked into" litigation.[284] Moreover, the court explained, the press would likely clean out files of any potentially valuable information to avoid com-

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274 *See id.* at 32.
275 *See id.*
276 *See id.* at 33-34.
277 *See id.* at 35.
278 *See id.*
279 *Id.* (citing *In re* Petroleum Products Antitrust Litigation, 680 F.2d 5, 8 (2d Cir. 1982)).
280 *Id.* (citing Baker v. F & F Investment, 470 F.2d 778, 782 (2d Cir. 1972)).
281 *See id.*
282 *Id.*
283 *See id.*
284 *See id.*

plying with subpoenas.[285] Finally, the court stated that unrestricted subpoenas would likely have the "symbolic harm" of making journalists appear to be an investigative arm of litigants.[286]

The *Gonzales II* panel also mentioned, contrary to the *Gonzales I* court, that the 1996 NBC case "expressly noted" that the New York and federal privileges were identical.[287] Having stated all that, however, the *Gonzales II* panel, with little explanation, determined that non-confidential information did not deserve the same degree of protection as confidential information.[288] Citing both *Shoen I* and *Cuthbertson*, the panel agreed that the non-confidential nature of the material subpoenaed could be an important element in balancing the needs of a litigant against the interests of the press.[289] The panel determined that when a subpoena sought non-confidential information, a civil litigant only had to show that the material sought was "of likely relevance" to the case and was not "reasonably obtainable" from other sources.[290] The court then determined that the Gonzaleses had proved both likely relevance and lack of a reasonable alternative source, and ordered NBC to turn over the *Dateline* outtakes.[291]

Immediate reactions to the *Gonzales II* decision among media advocates were mixed. James Goodale, a prominent New York media attorney and former vice chairman of the New York Times Company, called the new decision a "major victory" for the press not only in the Second Circuit but nationwide.[292] Goodale wrote that *Gonzales I* "made no sense at all" because journalists' non-confidential information was protected under New York's shield law[293] but now would not have been under federal law.[294] Journalists would not be able to predict whether a privilege would apply when they were gathering news because they could not know whether the story they were writing would result in a subpoena from federal or state court.[295]

Goodale noted that the *Gonzales II* panel set the bar lower for

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285 *See id.*
286 *See id.*
287 *See id.* at 34.
288 *See id.* at 35-36.
289 *See id.* at 36.
290 *Id.*
291 *See id.*
292 *See* James C. Goodale, *A Sigh of Relief*, N.Y.L.J., Oct. 1, 1999, at 3.
293 *See* N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1992 & Supp. 1999) (providing an absolute privilege for confidential information and a qualified privilege for non-confidential information).
294 Goodale, *supra* note 292, at 3.
295 *See id.*

litigants seeking non-confidential information than those seeking confidential material.[296] However, the key, Goodale wrote, was that litigants would have to go to court on a case-by-case basis to attempt to overcome the privilege, which was still a vast improvement over the *Gonzales I* ruling.[297]

However, media advocates quoted in an *Editor & Publisher* article shortly after the *Gonzales II* decision were not as upbeat as Goodale.[298] Gregg Leslie, then Acting Director of the Reporters Committee for Freedom of the Press, called the new decision "a real mixed bag" because it restored the privilege but changed the burden of proof for a litigant seeking a journalist's non-confidential information.[299]

Putting the commentary aside, it is clear that the *Gonzales II* decision was an improvement, from journalists' perspective, over *Gonzales I.* Several important questions, however, are unanswered. Although the *Gonzales II* decision confirmed that *Burke* and *Cutler* involved non-confidential material, the panel did not thoroughly explain why the test for determining whether a litigant had overcome the privilege needed to be changed.[300] In *Burke,* the Second Circuit had held that the test for determining whether a party subpoenaing the press had overcome the presumption of a privilege was whether the litigant had shown that the information sought was "highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources."[301] In *Gonzales II,* the panel said that the principles undergirding the journalists' privilege were the same regardless of whether the journalist's information was confidential or non-confidential.[302] However, the *Gonzales II* panel determined, without explanation, that a lesser showing was required of a litigant subpoenaing the press if the information was non-confidential.[303] In such cases, the court explained, the litigant must only show that the non-confidential information sought was "of *likely relevance* to a significant issue" in the case and "not *reasonably* obtainable" elsewhere.[304] If the same First Amendment interests are implicated when both confidential and non-confidential information is sub-

296 *See id.*
297 *See id.*
298 *See* Moscou, *supra* note 5, at 9.
299 *See id.*
300 *See* Gonzales v. Nat'l Broad. Co., 194 F.3d 29, 36 (2d Cir. 1999).
301 United States v. Burke, 700 F.2d 70, 77 (2d Cir. 1983).
302 *See Gonzales II,* 194 F.3d at 32.
303 *See id.* at 36.
304 *Id.* (emphasis added).

poenaed, then why does the same test not apply? The Second Circuit provided no answer.

Furthermore, the Second Circuit in *Gonzales II* did not explicitly state whether in criminal cases the same interests were implicated and its new test would apply.[305] When a criminal defendant subpoenas the press, the stakes generally are higher for the defendant than they are for a civil litigant, and the Sixth Amendment guarantee of a fair trial is implicated. However, both *Burke* and *Cutler* were criminal cases in which the Second Circuit applied a more stringent test for subpoenas than the *Gonzales II* panel did in a civil case. It probably will take a test of the new non-confidential privilege in a criminal case to find an answer to the question of what test a defendant must pass before he or she can successfully subpoena the press.

CONCLUSION

Clearly, the media in the Second Circuit are better off under the *Gonzales II* ruling than they were under *Gonzales I.* A privilege for non-confidential information still exists, although in weakened form. Whatever problems *Gonzales II* may cause, it does indicate the early stages of a consensus among federal appellate courts regarding the privilege for non-confidential information. All of the circuits except the Sixth agree that a privilege exists for confidential material. The Second, Third, Fourth and Ninth Circuits agree that the privilege extends to non-confidential information, at least in civil cases. The First and Fifth Circuits have rejected the existence of a privilege for non-confidential material only in the criminal context, and the First Circuit hinted that it might be willing to consider a privilege in a different fact situation. The other circuits have not yet taken up the issue. The Second, Third, and Ninth Circuits agree, in principle, that the privilege for non-confidential information is weaker than the privilege for confidential material. However, only the Second Circuit, in *Gonzales II,* has formulated a specific balancing test for the weakened privilege.

The media need to be alert to the subtle change in the status of the non-confidential-information privilege occasioned by *Gonzales II.* Unless and until the media gather significant empirical evidence showing that protecting non-confidential material is as important as protecting confidential sources' identities, there may be more troublesome days in court ahead. While the *Gonzales II* decision kept intact a privilege for non-confidential material in

305 *See id.*

civil cases, it did so in weakened form. The decision may provide a basis for other circuits to expand the journalists' privilege to non-confidential information, or it may signal the beginning of a "chipping away" at the privilege in those circuits that have recognized it. So far, however, no other circuit has followed the Second Circuit's lead in a journalist's privilege case.

Also somewhat troubling is the fact that the Second Circuit, while noting that it previously had determined that the New York state and federal privileges were identical, proceeded to establish a new test weaker than the state test. The difference may not significantly affect journalists' work habits or the outcome when they challenge subpoenas in federal court. However, the difference may be important in some close cases in which journalists attempt to stem the tide of subpoenas that they fear may be approaching. For now, the best that can be said is that the "subtle and lurking threat" to the press from subpoenas that the First Circuit recognized in 1988[306] is still only subtle and lurking.

[306] United States v. LaRouche Campaign, 841 F.2d 1176, 1182 (1st Cir. 1988).