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Defending the Informers: The Media's Right to Protect Non-Confidential Source Information Following United States v. Smith

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Casenotes

DEFENDING THE INFORMERS: THE MEDIA'S RIGHT TO PROTECT NON-CONFIDENTIAL SOURCE INFORMATION FOLLOWING *UNITED STATES v. SMITH*

I. INTRODUCTION

The First Amendment rights to free speech and freedom of the press are arguably two of the most revered aspects of the American way of life.[1] The free flow of information within the American media allows citizens to make educated decisions regarding almost any issue of public concern.[2] Americans also rely on the media for entertainment.[3] To compete for ratings, media organizations have increasingly merged the goal of informing the public with the goal of entertaining the public. Throughout the highly publicized O.J. Simpson trial, for example, viewers were glued to their televisions to hear a commentary about Marcia Clark's new hairstyle as much as to hear about the trial.[4]

A further illustration of this merger is the development of television programs such as *60 Minutes, Dateline NBC* and *20/20* that

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1. *See* Branzburg v. Hayes, 408 U.S. 665, 726 n.1 (1972) (Stewart, J., dissenting) (citing Stromberg v. California, 283 U.S. 359, 369 (1931); DeJong v. Oregon, 299 U.S. 353, 365 (1937); Smith v. California, 361 U.S. 147, 153 (1959)). "We have often described the process of informing the public as the core purpose of the constitutional guarantee of free speech and a free press." *Id.* at 726 n.1.

2. *See id.* at 726 ("We do not question the significance of free speech, press or assembly to the country's welfare.").

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

Id. at 726-27 (Stewart, J., dissenting) (footnotes omitted).

3. *See id.* at 727 (Stewart, J., dissenting) ("The press has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences . . . .") (citations omitted). From the weather and traffic, to the latest sports scores, the American media is as entertaining as it is informative. *See id.*

4. For an illustration of the media turning the O.J. Simpson trial into entertainment, see Agence France-Presse, *BBC Defends Payment for Interview with O.J. Simpson, available in* 1998 WL 2264292. Following his civil trial, BBC paid O.J. Simpson sixteen thousand dollars for one interview. *See id.*

present investigative reporting in an entertainment format. These programs directly compete with pure entertainment programs during prime time.[5]

With the incredibly large number of people relying on the media, reporters must be reliable as well as entertaining and informative. To obtain reliable newsworthy information, reporters must frequently rely on outside sources and investigative reporting programs depend on such sources almost exclusively.[6] While many of these sources are willing to go "on-the-record," some wish to keep their identities unknown.[7]

Over the past twenty-five years, courts have grappled with whether news reporters should be required to reveal their sources and turn over relevant information to police, if such information may aid in the prosecution of a crime.[8] Specifically, courts have debated whether news reporters are entitled to a First Amendment privilege granting them a right to protect such information.[9]

Recent large-scale media events, such as Kenneth Starr's investigation of President Clinton's involvement with White House intern Monica Lewinski, have raised fundamental questions about the current state of news reporters' First Amendment rights.[10] In

5. ABC's investigative reporting program *20/20* airs opposite popular entertainment programs including *Melrose Place, Seventh Heaven* and *Nash Bridges. See* T.V. GUIDE, April 10-16, 1999, v. 47 No. 15 at 128, 154, 180 & 226. CBS's *60 Minutes* airs opposite the *Drew Carey Show* and *The World's Most Amazing Videos. See id. Dateline NBC* airs at various times throughout the prime-time slots, competing against such programs as *N.Y.P.D. Blue, Dawson's Creek, Unsolved Mysteries* and *L.A. Detectives. See id.*

6. *See Branzburg*, 408 U.S. at 729 (Stewart, J., dissenting) (characterizing informants as necessary to news-gathering process).

7. *See id.* at 731 n.8 (Stewart, J., dissenting). Walter Cronkite has stated that he "depend[ed] constantly on information, ideas, leads and opinions received in confidence." *Id.* Sources wish to hide their identities for numerous reasons. *See id.* Some want to avoid reprisal from the potentially dangerous individuals they are providing information about, while others simply wish to avoid public embarrassment. *See id.*

8. *See generally* James C. Goodale & John S. Kiernan, *Reporter's Privilege Recent Developments 1995-1996*, 461 PLI/Pat 955 (1996). For a discussion of the evolution of the newsreporters' privilege since 1972, see *infra* notes 30-91 and accompanying text.

9. *Compare* Miller v. Transamerican Press, 621 F.2d 721, 721 (5th Cir. 1980) (recognizing broad qualified reporter's privilege), *with* In re Grand Jury Proceedings, 810 F.2d 580, 584-85 (6th Cir. 1987) (refusing to acknowledge qualified reporter's privilege). For a discussion of the issues that have given rise to this debate, see *infra* notes 30-91 and accompanying text.

10. *See* Jane E. Kirtley, *The Vanishing Reporter's Privilege: What's Gone, What's Left*, 522 PLI/Pat 357, 366-67 (1998). Kenneth Starr's independent counsel investigation brought the issue of news reporters' privilege to the forefront of American politics. The Starr investigation involved grand jury subpoenas of various documents and video footage from media sources, including outtakes from an ABC

United States v. Smith,[11] the Fifth Circuit considered whether it could require a reporter to divulge information provided by non-confidential sources relating to ongoing criminal investigations, or whether such information was subject to a qualified news reporters' privilege under the First Amendment.[12]

Section II of this Note discusses the facts of *Smith*.[13] Section III discusses *Branzburg v. Hayes*,[14] the seminal case pertaining to news reporters' privilege, and details the various circuits' applications of *Branzburg* within the "non-confidential" source information context.[15] Section IV discusses the Fifth Circuit's approach in *Smith*, detailing the internal inconsistencies within the Fifth Circuit itself, as well as the treatment of non-confidential information throughout the courts.[16] Section V discusses the effect that the *Smith* decision will have on the media's ability to disseminate entertaining, informative and reliable information, and analyzes the Fifth Circuit's decision in light of decisions by other courts.[17] Section VI considers the potential impact *Smith* will have on the media's ability to present investigative reporting programs that rely heavily on outside source information, and the likelihood of reaching a resolution to the circuit conflict.[18]

II. FACTS

On March 21, 1996, fires destroyed the MacFrugal's Regional Distribution Center (MacFrugal's) in New Orleans, Louisiana.[19] Federal agents suspected Frank Smith, a MacFrugal's employee, of

interview with Susan McDougal and videotapes of Monica Lewinski and President Clinton, belonging to a West Palm Beach television station, WPEC-TV. *See id.* at 366.

11. 135 F.3d 963 (5th Cir. 1996).

12. *See id.* at 972. In *Smith*, a reporter refused to comply with a Rule 17(c) subpoena seeking copies of an on-the-record interview with a criminal suspect. *See id.* The Fifth Circuit refused to grant the reporter a First Amendment privilege. *See id.*

13. For a complete discussion of the facts of *Smith*, see *infra* notes 19-29 and accompanying text.

14. 408 U.S. 665 (1972).

15. For a discussion of non-confidential information and the reporters' privilege, see *infra* notes 56-75 and accompanying text.

16. *See infra* notes 92-153 and accompanying text.

17. *See infra* notes 154-85 and accompanying text.

18. *See infra* notes 186-90 and accompanying text.

19. *See United States v. Smith*, 135 F.3d 963, 965 (5th Cir. 1996). MacFrugal's is a Los Angeles-based corporation operating 321 close-out stores in 18 states, under the names "Pic 'n' Save" and "MacFrugal's Bargain Close-outs." *Id.* A close-out retailer purchases leftover or discounted goods from manufacturers and sells them at a steep discount on the retail market. *See id.*

setting the fires.[20] On March 27, 1996, Taylor Henry, a reporter for WDSU-TV, a local television station, conducted a videotaped interview of Smith in which Smith accused MacFrugal's executives of conspiring to burn down the structure.[21] Smith later consented to a tape-recorded interview with Warren McDaniels, the New Orleans Fire Department Superintendent, which the Fire Department gave to the federal government.[22] In a subsequent interview with the Bureau of Alcohol Tobacco and Firearms (ATF), Smith told a somewhat different version of his conspiracy story.[23]

The government became suspicious of Smith's conspiracy allegations after the ATF concluded that the second fire resulted from an electrical overload, and not arson.[24] Hoping to clarify the issue, the government asked WDSU-TV to turn over both the televised and un-televised portions of the interview.[25]

After obtaining the requisite approval, the government moved the court to issue a Rule 17(c) subpoena for the un-televised portion of the interview.[26] Believing it contained exculpatory evidence, Smith joined in the government's request.[27] WDSU-TV responded with a motion to quash the subpoena, asserting a First Amendment news reporters' privilege.[28] The U.S. Court of Appeals

20. *See id.*

21. *See id.* at 966. Apparently intending to spread his conspiracy allegations, Smith contacted reporters at WDSU-TV, claiming he had information regarding who had set the fires. *See Smith*, 135 F.3d at 966.

22. *See id.* Smith told McDaniels that "after the first fire occurred, he overheard the manager and assistant manager of the Distribution Center plotting to set the second blaze, at the direction of the MacFrugal's Corporate Office in California." *Id.* at 965.

23. *See id.* Smith was later indicted and charged with arson. *See id.* at 965. WDSU-TV subsequently aired a ten-second portion of the Smith interview, in which Smith claimed to have overheard the manager and assistant manager plotting to set the second fire. *See Smith*, 135 F.3d at 965. Although his face was distorted in the footage, Smith was identified by name as the source. *See id.*

24. *See id.* Federal agents arrested Smith on April 2, 1996, and charged him with setting the first of the two fires. *See id.*

25. *See id.* at 966. Despite a general willingness to cooperate with the prosecution, WDSU-TV refused to turn over any video footage absent a subpoena. *See Smith*, 135 F.3d at 966. The government obtained a Rule 17(c) subpoena for the aired portion of the interview, and WDSU-TV promptly complied. *See id.*

26. *See id.* To receive a subpoena for un-televised portions of video, the Attorney General's Guidelines require prosecutors to first obtain the Attorney General's authorization. *See id.* For a discussion of the Attorney General's Guidelines, see *infra* notes 83-86 and accompanying text. For a further discussion of Rule 17(c), see *infra* notes 76-81 and accompanying text.

27. *See Smith*, 135 F.3d at 967. While Smith initially joined the government in its subpoena request, he neither joined nor opposed any of its appeals. *See id.*

28. *See id.* The district court granted WDSU-TV's motion to quash the subpoena, agreeing with WDSU-TV's alleged First Amendment privilege. *See id.* In late July, the government filed a notice of interlocutory appeal from the court's

for the Fifth Circuit overruled the district court and granted the government's subpoena request, holding that news reporters do not enjoy a qualified privilege that would permit them to refuse to disclose non-confidential information in criminal cases.[29]

III. BACKGROUND

The law pertaining to the news reporters' privilege has roots in both statute and common law. The following section discusses the evolution of the relevant case law, beginning with *Branzburg v. Hayes*,[30] as well as the various statutory devices that states have used to protect news reporters' First Amendment rights.

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order. *See id.* The government, however, subsequently agreed to dismiss its appeal without prejudice while the district court inspected the videotaped interview *in camera*. *See Smith*, 135 F.3d at 967. After doing so, the district court entered a second order affirming its initial decision to quash. *See id.* In support of its findings, the court stated that the "government's interest in the interview was not sufficient to defeat WDSU-TV's qualified privilege, as the videotape contained evidence that was cumulative of what the government already possessed." *Id.* The government reinstated its appeal to the Fifth Circuit on March 21, 1997. *See id.*

29. *See id.* In ruling on the existence of a qualified reporter's privilege, the district court relied almost exclusively on *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980), *modified*, 628 F.2d 932 (1980). *See* United States v. Smith, Crim.A.No. 96-117, 1996 WL 371702 (E.D. La. July 2, 1996). The district court stated that "[a] reporter has a First Amendment privilege which protects his refusal to disclose certain information, but the privilege is not absolute[,] and must yield in some circumstances." *Smith*, 1996 WL 371702, at *2 (citing *Miller*, 621 F.2d at 725). *Miller* established a three-pronged test to determine "whether the privilege of the reporter is overcome by other considerations." *Id.* Under *Miller*, the court must ask three questions: "(1) is the information relevant?, (2) can it be obtained by alternative means?, and (3) is there a compelling interest in it?" *Id.* (citing *Miller*, 621 F.2d at 725).

In addition to their arguments on the merits, WDSU-TV asserted several jurisdictional and procedural objections. *See Smith*, 135 F.3d at 967-68. WDSU-TV first attacked the government's right to appeal, alleging that the order was not appealable as a final order under 28 U.S.C. § 1291 and that the government was not permitted to "avail itself of the appellate route set forth in 18 U.S.C. § 3731." *Id.* at 967.

> Title 18, U.S.C. § 3731, permits the United States to appeal orders 'suppressing or excluding' evidence in criminal cases so long as the relevant United States Attorney 'certifies . . . that the appeal is not taken for purpose of delay and that evidence is substantial proof of a fact material in the proceeding.'

Id. The Fifth Circuit quickly dispatched WDSU-TV's argument, finding jurisdiction pursuant to § 3731. *See id.* The court found there to be no basis for arguing "delay," because the defendant neither opposed the appeal, nor made any complaint of delay. *See id.*

WDSU-TV also argued that the government's filing of the appeal was untimely. *See id.* Because the government had timely filed its initial complaint and voluntarily dismissed it without prejudice, the court found no failure to file a timely appeal. *See Smith*, 135 F.3d at 967-68.

30. 408 U.S. 665 (1972).

A. *Branzburg v. Hayes*

Any discussion of the news reporter's privilege must begin by examining *Branzburg v. Hayes*, the Supreme Court's most detailed holding on the subject.[31] In *Branzburg*, the Court ruled that the First Amendment does not relieve reporters of a duty to give grand jury testimony.[32] *Branzburg* consolidated cases against three reporters who refused to reveal the identities of confidential informants.[33]

31. *See id.* at 665.

32. *See id.* at 709 (refusing to exempt news reporters from providing grand jury testimony unless forced testimony would amount to government harassment). While this case did not recognize an absolute privilege, it has formed the basis for recognizing a qualified privilege. *See infra* notes 56-75 and accompanying text.

33. *See Branzburg*, 408 U.S. at 709. Due in large part to President Nixon's efforts to control subversive groups such as the Black Panthers, subpoenas to journalists had increased dramatically at the time *Branzburg* was decided. *See* Lee Levine, COMMUNICATIONS LAWYER, Summer 1997. The *Branzburg* decision was the consolidation of four cases involving three reporters. *See Branzburg*, 408 U.S. at 667-68. One of the reporters refused to attend the grand jury proceedings, while the other two simply refused to answer questions pertaining to their sources' identities. *See id.* at 668.

In the first case, Branzburg, a reporter from Louisville, Kentucky, witnessed two drug producers synthesizing marijuana into hashish and subsequently published an article about what he had seen. *See id.* at 667-68. In the article, Branzburg stated that he had promised his sources that he would not reveal their identities. *See id.* A Kentucky state court ordered Branzburg to reveal his sources' identities at a grand jury proceeding. *See id.* After his refusal, a Kentucky Court of Appeals affirmed the order, holding that Branzburg was not entitled to a privilege under that state's constitution. *See Branzburg*, 408 U.S. at 668-69.

In the second case, Branzburg interviewed dozens of drug users in Frankfort, Kentucky, and witnessed many of them smoking marijuana. *See id.* Following publication of this story, a trial court ruled that Branzburg was required to appear to testify before a grand jury about what he had witnessed, but he was not required to reveal the identity of his sources. *See id.* at 669-70. The Kentucky Court of Appeals overruled this decision, holding that neither the United States, nor the Kentucky constitutions protected Branzburg from revealing his sources. *See id.* at 670.

The third case involved Pappas, a Massachusetts reporter who visited the Black Panther headquarters in Rhode Island. *See id.* at 672. The Panthers permitted Pappas to enter their headquarters to report on a potential police raid. *See Branzburg*, 408 U.S. at 672-73. In exchange, Pappas agreed not to divulge anything he saw or heard within the building. *See id.* Pappas later testified before a grand jury to what he witnessed outside the headquarters, but kept his promise not to reveal what he witnessed inside. *See id.* at 673. The trial court, later supported by the Massachusetts Supreme Judicial Court, ruled that Pappas was not protected by any privilege permitting him to refuse to divulge what he had witnessed. *See id.* at 673-74.

The fourth, and perhaps the most important case, involved Caldwell, a San Francisco reporter also in contact with the Black Panthers. *See id.* at 675. Caldwell refused to appear before a California grand jury, arguing that his appearance would drive a "wedge of distrust and silence between the news media and the militants." *Branzburg*, 408 U.S. at 676 (citation omitted). A federal district court denied Caldwell's motion to quash the subpoena, but granted a protective order allowing Caldwell to withhold the identities of any confidential sources. *See id.* at 677-78. Caldwell again refused to appear before the grand jury and was found in contempt. *See id.* at 679. The Ninth Circuit later overruled his contempt charge,

The reporters argued that forcing them to produce their informants' identities would severely curtail their ability to function as reporters.[34] Due to its deterrent effect on informants, this requirement would limit the free flow of information that the First Amendment is designed to protect.[35]

The reporters asked the Court to adopt a qualified news reporters' privilege, whereby a reporter could only be compelled to testify before a grand jury if the prosecutor could demonstrate that: (1) there are sufficient grounds to show that a reporter possesses information relevant to the crime under investigation; (2) the information is unavailable from other sources; and (3) the need for the information is so compelling that it overrides First Amendment interests.[36]

The *Branzburg* decision produced only a plurality opinion.[37] Writing for the plurality, Justice White emphasized that reporters

finding Caldwell had a qualified privilege to refuse to reveal confidential information absent proof of compelling reasons to do so. *See id.*

34. *See id.* ("[R]equiring a reporter . . . to testify would deter his informants from communicating with him in the future and would cause him to censor his writings in an effort to avoid being subpoenaed."). The resulting "self-censorship" would arguably threaten the dissemination of information throughout society. *See Branzburg*, 408 U.S. at 679. Without the security of knowing their work will not be subject to stringent subpoena requirements, news reporters may shy away from reporting the most sensitive and pressing issues of the day. *See id.*

35. *See id.* The reporters relied on cases supporting First Amendment rights to individual development and representative government. *See id.* at 680 n.17 (citing Curtis Publ'g Co. v. Butts, 388 U.S. 130, 145 (1967); New York Times v. Sullivan, 376 U.S. 254, 270 (1964); Talley v. California, 362 U.S. 60, 64 (1960); Bridges v. California, 314 U.S. 252, 263 (1941); Grosjean v. American Press Co., 297 U.S. 233, 250 (1936); Near v. Minnesota, 283 U.S. 697, 722 (1931)). They also relied on cases requiring official action adversely affecting First Amendment rights to be justified by an overriding public interest. *See Branzburg*, 408 U.S. at 680 n.18 (citing NAACP v. Button, 371 U.S. 415, 439 (1963); Thomas v. Collins, 323 U.S. 516, 530 (1945); DeGregory v. Attorney Gen. of New Hampshire, 383 U.S. 825, 829 (1966); Bates v. Little Rock, 361 U.S. 516, 524 (1960); Schneider v. State, 308 U.S. 147, 161 (1939); NAACP v. Alabama, 357 U.S. 449, 464 (1958)). Additionally, they considered cases rejecting overly broad means of protecting government interests that unnecessarily impacted freedom of speech, press and association. *See Branzburg*, 408 U.S. at 681 n.19 (citing Freedman v. Maryland, 380 U.S. 51, 56 (1965); NAACP v. Alabama, 377 U.S. 288, 307 (1964); Martin v. City of Struthers, 319 U.S. 141, 147 (1943); Elfbrandt v. Russel, 384 U.S. 11, 18 (1966)).

36. *See Branzburg*, 408 U.S. at 680. It is important to note that the reporters made no argument for an absolute privilege that would grant them freedom from testifying before a grand jury under any circumstances. *See id.* Instead, they requested a qualified privilege, under which a reporter would not be required to reveal confidential information if the resulting harm of revealing the information would be greater than the public's interest in that information. *See id.* at 680-81.

37. *See* In re Selcraig, 705 F.2d 789, 793 (5th Cir. 1983) (analyzing plurality in *Branzburg*). While five Justices joined Justice White's opinion, Justice Powell wrote a brief concurrence and Justices Stewart, Brennan, Marshall and Douglas dissented. *See generally Branzburg*, 408 U.S. at 667.

have no special immunity from generally applicable laws.[38] Justice White stated further that the right to speak and publish does not afford reporters an "unrestrained right to gather information."[39]

Traditionally, restrictions applied to the public have been applied with equal force to members of the media, despite any negative impact on potential newsgathering.[40] In accord with this traditional view, Justice White refused to exempt news reporters from testifying before grand juries regarding information relevant to ongoing criminal investigations.[41]

Although Justice White refused to apply a privilege, he recognized that news reporters have First Amendment protections.[42]

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38. *See Branzburg*, 408 U.S. at 682. "Citizens generally are not constitutionally immune from grand jury subpoenas; and neither the First Amendment[,] nor any other constitutional provision[,] protects the average citizen from disclosing to a grand jury information that he has received in confidence." *Id.* Justice White rejected the argument that confidentiality plays a major role in determining the existence of a privilege. *See id.*

39. *Id.* at 684 (quoting Zemel v. Rusk, 381 U.S. 1, 17 (1965)). In *Zemel*, an American citizen (Zemel) attempted to have his passport validated to travel to Cuba following the breaking of American diplomatic relations but was denied validation pursuant to a federal statute. *See Zemel*, 381 U.S. 1, 17 (1965). In a district court action, Zemel alleged, *inter alia*, that Rusk's refusal to validate his passport violated his First Amendment rights. *See id.* The court quickly discarded this argument, stating that there are many instances of gathering information that are prohibited without violating First Amendment rights. *See id.* The court explained that while the First Amendment does permit the relatively unabridged right to gather information, that right is clearly limited. *See id.*

40. *See Branzburg*, 408 U.S. at 685. At common law, courts generally refused to grant a privilege to newreporters from being compelled to disclose confidential information in grand jury proceedings. *See id.* (citing Ex parte Lawrence, 48 P. 124 (Cal. 1897); Plunkett v. Hamilton, 70 S.E. 781 (Ga. 1911); Clein v. State, 52 So.2d 117 (Fla. 1950); In re Grunow, 85 A. 1011 (N.J. 1913); People ex rel. Mooney v. Sheriff, 199 N.E. 415 (N.Y. 1936); Joslyn v. People, 184 P. 375 (Col. 1919); Adams v. Associated Press, 46 F.R.D. 439 (S.D. Tex. 1969); Brewster v. Boston Herald-Traveler Corp., 20 F.R.D. 416 (D. Mass. 1957)).

In *Brewster v. Boston Herald-Traveler Corp.*, for example, a Massachusetts district court refused to acknowledge a testimonial privilege from revealing a confidential source in a civil libel suit against the reporter who published falsehoods about the plaintiff. *See generally Brewster*, 20 F.R.D. 416 (D. Mass. 1957). The court reasoned that without a statute specifically granting a privilege, reporters are subject to the same duty to reveal pertinent evidentiary material as any ordinary citizen. *See id.*

41. See *Branzburg*, 408 U.S. at 692. Basing much of his analysis on the traditional importance of the grand jury, Justice White found reporters' obligations as citizens to appear before grand juries far outweighed the media's First Amendment interest. *See id.* at 688 n.23 (quoting Wood v. Georgia, 370 U.S. 375, 390 (1962) (footnote omitted)). Traditionally, the grand jury was regarded as the primary protector against the abuse of prosecutorial power. *See id.* The grand jury stands between the accused and accuser, ensuring that the charges brought against the accused have been brought in a reasonable manner and that there is adequate probable cause. *See id.*

42. *See id.* at 681. Justice White acknowledged that the First Amendment would clearly protect reporters against intrusions or restrictions on their right to

Specifically, Justice White argued that abusive grand jury proceedings, or official harassment of the press designed to disturb the relationships between news reporters and their sources, would not be tolerated.[43]

1. *Concurrence of Justice Powell*

The controversy surrounding the application of the *Branzburg* decision focuses on the conflicting tests established in Justice Powell's concurrence and Justice Stewart's dissent.[44]

While Justice Powell agreed with Justice White's argument that news people are entitled to First Amendment protection, Justice Powell also emphasized the "limited nature of the Court's holding."[45] Beyond these limits, Justice Powell described two situations in which the Court should apply a privilege: first, where a grand jury investigation is being conducted in bad faith; and second, where a "newsman is called upon to give information bearing only a remote and tenuous relationship" to the investigation.[46] In either instance, a reporter is free to file a motion to quash, or seek a protective order.[47] Justice Powell further stated that courts must consider these limited situations on a case-by-case basis, balancing the

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publish. *See Branzburg*, 408 U.S. at 681. He found, however, that the facts in *Branzburg* displayed no such intrusion. *See id.* Justice White limited the issues to whether reporters were under the same obligation as the average citizen to appear before grand juries. *See id.* at 682.

43. *See id.* at 681-89. Justice White did not see abusive behavior in *Branzburg*. *See id.* He held that requiring reporters to testify before grand juries did not restrict the media's freedom of speech or assembly, and did not restrict or impose the publication of any particular type of material. *See id.* Rather, it simply required newsreporters to comply with laws applicable to the average citizen. *See id.*

44. For a discussion of Justice Stewart's dissent, see *infra* notes 50-55 and accompanying text. Justice White's opinion is generalized and does not set forth a specific test to determine the propriety of extending a privilege. *See Branzburg*, 408 U.S. at 665-709. The tests established in Justice Powell's concurrence and Justice Stewart's dissent provide a more quantitative standard to determine privilege. *See id.* at 710 (Powell, J., concurring); *see also id.* at 725 (Stewart, J., dissenting).

45. *Id.* at 709 (Powell, J., concurring). Justice Powell openly criticized Justice Stewart's notion that requiring reporters to testify before grand juries was the equivalent of government annexation of the media as an "investigative arm." *Id.* Justice Powell's concurrence appears to be a direct response to Justice Stewart's dissent. *See id.* at 710 (Powell, J., concurring).

46. *See Branzburg*, 408 U.S. at 710 (Powell, J., concurring).

47. *See id.* (Powell, J., concurring). For example, Rule 26(b) of the Federal Rules of Civil Procedure permits courts to make any order necessary to protect a party from "annoyance, embarrassment, oppression or undue burden or expense . . . ." Fed. R. Civ. P. 26(b)(2). For a further discussion of the procedural safeguards to the reporters' privilege, see *infra* notes 76-91 and accompanying text.

freedom of the press with the obligations of citizens to testify before grand juries regarding criminal investigations.[48]

2. *Dissent of Justice Stewart*

Justice Stewart's dissent, joined by Justices Brennan and Marshall, is directly at odds with Justice Powell's concurrence.[49] Justice Stewart challenged Justice Powell's balancing test as threatening to "annex the journalistic profession as an investigative arm of government."[50] Justice Stewart further argued that both Justice White's opinion and the concurrence fail to stress the importance of confidentiality to the effective dissemination of information throughout society.[51]

The dissent argued that governmental power to force disclosure of confidential information would undoubtedly deter sources from coming forward.[52] Additionally, uncertainty as to how the government would wield such power could lead to self-censorship within the news industry.[53]

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48. *See Branzburg*, 408 U.S. at 710 (Powell, J., concurring). Justice Powell noted that "[t]he balance of these vital Constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions." *Id.* The court considers so many factors in deciding whether to grant a qualified privilege that it would be extremely difficult to apply a bright-line rule. *See id.*

49. *See id.* at 725-51 (Stewart, J., dissenting) (directly challenging Justice Powell's proposed balancing test). Justice Stewart initially referred to Justice Powell's concurrence as a "crabbed view" of the First Amendment and criticized it for being insensitive to the critical role of an independent press in American society. *See id.*

50. *Branzburg*, 408 U.S. at 725. Justice Stewart further stated that the application of Justice Powell's balancing test would "in the long run, harm rather than help the administration of justice." *Id.* Justice Powell argued that the reverence with which the courts have traditionally treated First Amendment freedom should itself be sufficient evidence that no such annexation would occur. *See id.* at 710 (Powell, J., concurring).

Justice Douglas also filed a dissenting opinion, arguing in favor of an absolute privilege from revealing confidential sources. *See Branzburg*, 408 U.S. at 713. This opinion, however, has not been the subject of much debate. An absolute privilege has been almost uniformly rejected in favor of some form of qualified privilege.

51. *See Branzburg*, 408 U.S. at 729 (Stewart, J., dissenting). In support of this argument, the dissent cited historical anonymous works, such as the Federalist Papers, that played an integral role in our nation's development. *See id.* at 730 (Stewart, J., dissenting) (citing Talley v. California, 362 U.S. 60 (1960)).

52. *See id.* at 731 (Stewart, J., dissenting). Justice Stewart asserted that sources discussing sensitive issues, particularly in criminal matters, would be hesitant to come forward for fear of reprisal or public humiliation. *See id.*

53. *See id.* (citing Smith v. California, 361 U.S. 147 (1959); New York Times v. Sullivan, 376 U.S. 254 (1964)). The uncertainty arises from the traditionally broad investigative powers with which grand juries have been invested. *See id.* (citing Antelli, *The Modern Grand Jury: Benighted Supergovernment*, 51 A.B.A. J. 153 (1965)).

The dissent ultimately proposed its own balancing test, whereby a member of the media could only be compelled to reveal confidential sources where the government could show: (1) probable cause to believe that the news person has information clearly relevant to a specific violation of law; (2) the "information sought cannot be obtained by alternative means less destructive of First Amendment rights;" and (3) there is a "compelling and overriding interest in the information."[54]

B. News Reporters and Non-Confidential Outtakes

After *Branzburg*, the federal circuits generally recognized some form of qualified privilege protecting news people from forced disclosure of confidential sources.[55] The Fifth Circuit granted such protection in *Miller v. Transamerican Press*, and later in *In re Selcraig*.[56] *Miller* involved a libel action against a magazine for printing a story that falsely accused the plaintiff of mismanagement of pension funds.[57] The Fifth Circuit recognized a qualified privilege for confidential sources that could be defeated only where the litigant could demonstrate: (1) the information was relevant; (2) it could

54. *Id.* at 743 (Stewart, J., dissenting). This balancing test was taken from *Garland v. Torre*, a Second Circuit opinion refusing to grant a privilege to a reporter in a civil trial. *See id.* at 743 n.33 (Stewart, J., dissenting) (citing Garland v. Torre, 259 F.2d 545 (2d Cir. 1958)). The Second Circuit noted that while reporters' confidential relationships are entitled to First Amendment protection, a privilege will not be granted where the question at issue goes to "the heart of the plaintiff's claim." *Id.*

Justice Powell criticized the dissent's proposed balancing test, arguing that such a test would defeat the fair balancing advocated by Justice White and, in turn, the "essential social interests in the detection and prosecution of crime would be heavily subordinated." *Id.* at 724 (Powell, J., concurring).

55. Nine circuits have expressly recognized a qualified privilege, and of the remaining three, only one has completely renounced the existence of such a privilege. *See* Bruno v. Stillman, Inc. v. Globe Newspaper Corp., 633 F.2d 583, 595-96 (1st Cir. 1980); United States v. Burke, 700 F.2d 70, 77 (2d Cir. 1982), *cert. denied*, 464 U.S. 816 (1983); United States v. Cuthbertson, 630 F.2d 139, 147 (3d Cir. 1980); LaRouche v. National Broad. Co., 780 F.2d 1134, 1139 (4th Cir. 1986), *cert. denied*, 479 U.S. 818 (1986); Miller v. Transamerican Press, 621 F.2d 721, 725 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); Cervantes v. Time, Inc., 464 F.2d 986, 992-93 n.9 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); Farr v. Pitchess, 522 F.2d 464, 467-68 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 436-37 (10th Cir. 1977); Zerilli v. Smith, 656 F.2d 705, 714 (D.C. Cir. 1981). *But see* In re Grand Jury Proceedings, 810 F.2d 580, 584-85 (6th Cir. 1987) (refusing to acknowledge qualified privilege).

56. *See Miller*, 621 F.2d at 721 (affording privilege in confidential source information context); *see also* In re Selcraig, 705 F.2d 789 (5th Cir. 1983).

57. *See Miller*, 621 F.2d at 723. Transamerican Press publishes *Overdrive* magazine. In June 1972, *Overdrive* contained a nine page article in which the author alleged that Miller "swindled" 1.6 million dollars from the Teamsters' pension fund through fraudulent loans. *See id.*

not be obtained by alternative means; and (3) there was a compelling interest in that information.[58]

In re Selcraig involved a libel suit against a school district for allegedly publishing stigmatizing falsehoods about a discharged school official.[59] A confidential source leaked the charges against the official to a local reporter who published the charges.[60] The official sought disclosure of the source's name and the Fifth Circuit refused, stating that such disclosure would offend the reporter's First Amendment rights.[61]

Courts have been far less consistent in applying a privilege to non-confidential outtakes.[62] The law in this area is relatively undeveloped because very few cases deal specifically with outtakes.[63]

Prior to 1998, the Fifth Circuit had not ruled on whether non-confidential sources should receive First Amendment protection.[64] Despite lack of precedent, the Fifth Circuit doubted whether a re-

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58. *See id.* at 726.

59. *See Selcraig*, 705 F.2d at 792.

60. *See id.* Paul Trautman, a school administrator, was employed under a one-year contract to replace an employee who had been suspended for alleged misuse of funds. *See id.* Soon after commencing employment, a custodial employee reported "derogatory information" about Trautman. *See id.* On October 4, 1979, Selcraig, a reporter for the *Dallas Morning News*, published an article detailing the allegations against Trautman. *See id.*

61. *See Selcraig*, 705 F.2d at 789. The Fifth Circuit expanded the scope of the *Miller* test beyond civil libel suits and applied it in determining whether Selcraig would have a testimonial privilege. *See id.* at 798-99.

The Sixth Circuit stands alone in refusing to acknowledge a privilege in the confidential context. *See generally* In re Grand Jury Proceedings, 810 F.2d 580 (6th Cir. 1987). In *In re Grand Jury Proceedings*, Bradley Stone, a television reporter, was held in contempt of court and taken into custody after refusing to comply with a subpoena *duces tecum*. *See id.* at 581. The subpoena ordered the release of video tapes containing footage gathered during an investigative report on inner city youth gangs. *See id.* The court sought the tapes to identify a member of the gang who was suspected of murdering a Detroit police officer during the period in which Stone was filming. *See id.* at 582. As a condition of filming the gang members, Stone agreed not to disclose portions of the video that included their faces. *See id.* In arguing for a qualified privilege, Stone relied heavily on Justice Stewart's dissent. *See In re Grand Jury Proceedings*, 810 F.2d at 582.

The Sixth Circuit is the only circuit to strictly apply Justice White's view. *See id.* at 584. The Sixth Circuit acknowledged other circuits' reliance on Justice Powell's concurrence. *See id.* at 585. However, they accused those courts of reading into the concurrence and ultimately rewriting Justice White's majority opinion. *See id.*

62. *See* Alison Lynn Tuley, *Outtakes, Hidden Cameras, and the First Amendment: A Reporter's Privilege*, 38 WM. & MARY L. REV. 1817, 1818 (1997). "Outtake" is the term commonly used to describe video or audio footage recorded, but not included, in a broadcast or other publication. *See id.*

63. *See id.* at 1825.

64. *See* Holland v. Centennial Homes, Inc., 22 MEDIA L. REP. 2270, 2273 (N.D. Tex. 1993) ("[T]he Fifth Circuit has yet to establish guidelines with regard to discovery of non-confidential information. . . .").

porter's privilege could be justified for non-confidential sources.[65] In *Pressey v. Patterson*,[66] the Fifth Circuit noted in dicta that it would be difficult to extend protection to information procured on-the-record without the expectation of confidentiality.[67]

Despite the Fifth Circuit's doubts regarding a non-confidential reporter's privilege, lower courts within that circuit extended the privilege to the non-confidential context.[68] In *Brinston v. Dunn*,[69] the Southern District of Mississippi limited questioning of reporters to the content of published work product and the truthfulness and accuracy of statements made therein.[70] The court also refused to permit questions pertaining to unpublished information in the reporters' possession.[71]

In *Holland v. Centennial Homes, Inc.*,[72] the Northern District of Texas quashed a subpoena seeking tapes of non-confidential interviews with the plaintiff in a sexual harassment suit.[73] The magistrate noted *Branzburg*, and stated that private litigants ordinarily should not be permitted to use the media as an "investigative tool."[74]

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65. *See* Pressey v. Patterson, 898 F.2d 1018, 1022 n.4 (5th Cir. 1990) (expressing "strong doubts" whether privilege was warranted without confidentiality).

66. 898 F.2d 1018 (5th Cir. 1990).

67. *See id.* In *Pressey*, a corrupt police officer (Patterson) shot William Pressey in the head after a routine traffic stop. *See id.* Following the incident, the *Houston Post* interviewed Sergeant Steven Reiser, a supervisor and spokesman for the Houston Police Department's internal affairs division. *See id.* at 1020. Reiser and the *Post* reporter made tapes of the interview. *See id.* Following the story's publication, Reiser transferred out of the internal affairs division and subsequently destroyed his copies of the tapes. *See Pressey*, 898 F.2d at 1020. The trial court refused to compel the *Post* reporter to turn over his tape of the interview, acknowledging a First Amendment reporters' privilege. *See id.* The Fifth Circuit upheld the trial court's ruling. *See id.*

68. *See* Brinston v. Dunn, 919 F. Supp. 240 (S.D. Miss. 1996) (instituting privilege despite lack of confidentiality); Holland v. Centennial Homes, Inc., 22 MEDIA L. REP. 2270 (N.D. Tex. 1993) (same).

69. 919 F. Supp. 240 (S.D. Miss. 1996).

70. *See id.*

71. *See id.*

72. 22 MEDIA L. REP. 2270 (N.D. Tex. 1993).

73. *See id.* at 2276.

74. *Id.* at 2272 ("State and federal authorities are not free to annex the news media as an investigative arm of the government. It logically follows that private litigants ordinarily should not be permitted to use the news media as an investigative tool.").

C. Statutory Safeguards for the Reporter's Privilege

1. *Criminal Procedure*

Courts are restricted in their ability to issue subpoenas against the media by the Federal Rules of Criminal Procedure, regardless of whether the federal circuits recognize a qualified privilege in criminal matters.[75] A party conducting criminal discovery must comply with Rule 17(c), which permits discovery only of materials that are "admissible as evidence."[76] Although material may be subject to subpoena at trial, this does not necessarily entitle the party to pre-trial production and inspection.[77] The litigant must first demonstrate: "(1) that the documents are evidentiary and relevant; (2) they are not otherwise reasonably procurable; (3) the party cannot properly prepare for trial without the material, and that the failure to obtain the material may unreasonably delay the trial; and (4) that the application is not a 'fishing expedition.'"[78]

Rule 17(c) does not permit discovery of potential impeachment materials prior to the testimony of a witness.[79] Even if evidence is clearly admissible, the court will not enforce a Rule 17(c) subpoena until it is apparent that the defendant will actually stand trial.[80]

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75. *See* Goodale & Kiernan, *supra* note 8, at 967-68.

76. United States v. Cuthbertson, 630 F.2d 139 (3d Cir.), *cert. denied*, 449 U.S. 1126 (1981). In *Cuthbertson*, CBS television sought to protect outtakes from an interview taped on their news program *60 Minutes*. *See id.* at 143. The court relied on *Riley v. City of Chester* and ultimately upheld a privilege. *See id.* (citing *Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979)). Rule 17(c) states that:

> A subpoena may . . . command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

Fed. R. Civ. P. 17(c).

77. *See* Goodale & Kiernan, *supra* note 8, at 968.

78. *Id.* at 968 (quoting United States v. Nixon, 418 U.S. 683 (1974)). *Nixon* involved the prosecution of government officials for conspiracy to defraud the United States. *See Nixon*, 418 U.S. at 683. The special prosecutor issued a subpoena *duces tecum* to President Nixon, seeking the release of tape recordings and documents relating to the President's conversations with his aids and advisors. *See id.*

79. *See Cuthbertson*, 651 F.2d at 189.

80. *See* Goodale & Kiernan, *supra* note 8, at 968-69.

2. *Civil Procedure*

In civil matters, the Federal Rules of Civil Procedure provide significant First Amendment protection. Rule 26(b) permits a court to grant or deny discovery, on its own initiative or upon a motion for a protective order, where: (1) the discovery documents sought are "evidentiary and relevant;" (2) the party had ample time to obtain the requested information through discovery; and (3) the burden or expense of the discovery outweighs its likely benefit.[81]

3. *The Attorney General's Guidelines*

In 1973, the Attorney General issued guidelines to regulate the government's power to subpoena members of the media.[82] The guidelines were an effort to limit forms of compulsory process that might conflict with the media's right to free press. They require courts to balance the public interest in the free dissemination of

81. *See id.* at 969. Rule 26(b) states:

> Upon motion by a party or by the person from whom discovery is being sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense, including one or more of the following: (1) that the dislosure or discovery not be had; (2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition, after being sealed, be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court. If the motion for protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery.

Fed. R. Civ. P. 26(b)(2).

82. *See generally* 28 C.F.R. § 50.10 (1973). The guidelines are preceded by the following policy statement:

> Because freedom of the press can be no broader than the freedom of reporters to investigate and report the news, the prosecutorial power of the government should not be used in such a way that it impairs a reporter's responsibility to cover as broadly as possible controversial public issues. This policy statement is thus intended to provide protection for the news media from forms of compulsory process, whether civil or criminal, which might impair the news gathering function.

Id.

information against the government interest in effective law enforcement and the fair administration of justice.[83] Before undertaking the balancing test, however, the court must first determine whether the government adequately investigated all reasonable alternative sources of the information sought.[84] If the court determines that requiring a reporter to comply with the subpoena would result in unnecessarily duplicative evidence, the subpoena request should be denied.[85]

4. *State Shield Laws*

In *Branzburg*, the Supreme Court invited the states to promulgate their own laws if they wished to afford reporters protection beyond that provided by the First Amendment.[86] Such statutes are commonly referred to as "shield laws."[87] The scope of the protection provided under shield laws varies greatly between states.[88] Some states provide an absolute reporters' privilege while others apply a qualified privilege.[89] Shield laws also vary in the information they protect, with some states protecting only confidential sources and others extending protection to non-confidential information.[90]

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83. *Id.* § 50.10(a).

84. *Id.* § 50.10(b).

85. *See* United States v. Blanton, 534 F. Supp. 295 (S.D. Fla. 1982), *aff'd* 730 F.2d 1425 (11th Cir. 1984) (quashing subpoena for failure to exhaust alternative sources).

86. *See Branzburg*, 408 U.S. at 706.

87. Goodale et al., *Reporter's Privilege Cases*, 421 PLI/Pat 63 (1995). States generally design shield laws to prevent the government from encroaching upon reporters' newsgathering power. *See id.*

88. *Compare* Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264 (3d Cir.), *cert. denied*, 449 U.S. 994 (1980) (discussing Pennsylvania's shield law providing for absolute privilege) *and* Playboy Enters., Inc. v. Superior Court, 154 Cal. App. 3d 14 (1984) (discussing California's statute providing absolute privilege for unpublished materials), *with* N.J. Stat. Ann. § 2A:84A-21-29 (1980) (New Jersey's statute providing only qualified privilege generally, and absolute privilege in civil libel actions).

89. *Compare* Playboy Enters., Inc. v. Superior Court, 154 Cal. App. 3d 14 (providing absolute privilege), *with* McNabb v. Oregonian Publ'g Co., 685 P.2d 458 (Or. Ct. App. 1984) (discussing Oregon's qualified privilege under its shield law).

90. *Compare* Williams v. ABC, 96 F.R.D. 658, 669 (W.D. Ark. 1983) (Arkansas shield law protects sources, not outtakes), *with* Burials v. Minneapolis Star and Tribune, 8 MEDIA L. REP. 1653 (Minn. Dist. Ct. 1982) (Minnesota shield law protects unpublished material even if non-confidential).

IV. NARRATIVE ANALYSIS

The narrative analysis of *United States v. Smith*[91] first discusses the court's refusal to recognize an "institutional" news reporters' privilege.[92] It then analyzes the application of *Branzburg* beyond grand jury proceedings.[93] Next, this section explores whether the Fifth Circuit is bound by *Miller v. Transamerican Press*.[94] The analysis concludes with a discussion of the distinction between published and unpublished source information.[95]

In *Smith*, the Court of Appeals for the Fifth Circuit considered whether the First Amendment protects news reporters against government subpoenas that request the disclosure of non-confidential video outtakes relevant to ongoing criminal investigations.[96] The reporters argued for a qualified reporters' privilege, stating that disclosure of non-confidential source information would unduly burden the media's First Amendment rights.[97] In concluding that no such privilege should be found, the Fifth Circuit addressed three issues: (1) whether the media, as an "institution," is entitled to a qualified privilege; (2) whether Justice Powell's balancing test set forth in *Branzburg* applies only to grand jury proceedings; and, most importantly, (3) whether the Fifth Circuit was bound by the existing privilege established in *Miller*.[98]

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91. 135 F.3d 963 (5th Cir. 1998).

92. For a discussion of the propriety of an "institutional" newsreporters' privilege, see *infra* notes 100-18 and accompanying text.

93. For a discussion of the application of *Branzburg* beyond grand jury proceedings, see *infra* notes 119-28 and accompanying text.

94. For a discussion of the precedential effect of *Miller*, see *infra* notes 129-38 and accompanying text.

95. For a discussion of the distinction between published and unpublished source information, see *infra* notes 143-53.

96. *See Smith*, 135 F.3d at 968-72. The United States District Court for the Eastern District of Louisiana granted a motion to quash a Rule 17(c) subpoena. *See id.* at 966-67. The subpoena requested WDSU-TV, a local New Orleans television station, to turn over a copy of the outtakes from a videotaped interview with Frank Smith, the prime suspect in a then ongoing criminal investigation. *See id.* For a discussion of the subpoena requirements under Rule 17(c), see *supra* notes 76-82.

97. *See Smith*, 135 F.3d at 969. WDSU-TV relied on the decisions of several other circuits that upheld a qualified privilege for "non-confidential" information. *See Smith*, 1996 WL 371702 at *1 (E.D. La. 1996) (citing United States v. Cuthbertson, 630 F.2d 139 (3d Cir. 1980); United States v. LaRouche Campaign, 841 F.2d 1176, 1180-82 (1st Cir. 1988); United States v. Burke, 700 F.2d 70 (2d Cir. 1983)).

98. *See Smith*, 135 F.3d at 969-72. For a discussion of the facts of *Miller*, see *supra* note 58 and accompanying text.

A. The Media's Right to an "Institutional" Privilege

WDSU-TV, a New Orleans television station, argued for a qualified reporters' privilege.[99] The station asserted that the media, as an institution, was entitled to a privilege protecting it from any undue burden on its First Amendment rights.[100] WDSU-TV argued that absent such a privilege, prosecutors would "'annex' the news media as an 'investigative arm of the government.'"[101] As a result, future sources may fear the media's close involvement with the government and hesitate to come forward with information.[102] This hesitancy, argued WDSU-TV, would severely hinder the media's ability to garner credible and newsworthy information.[103]

In addition, WDSU-TV asserted that without a privilege, criminal discovery requests would inundate the media.[104] Such requests would strain media resources, making it difficult to provide the public with current information.[105] Rather than comply with such requests, the media could simply destroy work-product after it is printed or aired, which would eliminate valuable archival footage.[106] Fearing potential involvement in criminal litigation, WDSU-TV argued that the media might avoid reporting on sensitive issues.[107]

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99. *See id.* at 969.

100. *See id.* WDSU-TV likened their proposed privilege to the attorney work-product privilege, which is "designed to promote effective representation of clients, and the executive privilege, intended to aid the operation of the executive branch." *Id.*

101. *Id.* at 969 (quoting *Branzburg*, 408 U.S. at 725 (Stewart, J., dissenting)). Justice Stewart, joined by Justices Brennan and Marshall, pointed out that Justice White's opinion in *Branzburg* virtually ignores the importance of an independent press in American society. *See id.* In a lengthy footnote to his concurrence, Justice Powell addresses Justice Stewart's assertions, alleging that Stewart's approach would undermine the "essential societal interest in the detection and prosecution of crime. . . ." *Id.* at 724 (Powell, J., concurring).

102. *See Smith*, 135 F.3d at 970.

103. *See id.*

104. *See id.*

105. *See id.*

106. *See id.* WDSU-TV cited no empirical evidence supporting this destruction of archival footage theory. *See Smith*, 135 F.3d at 971.

107. *See id.* at 970. The Fifth Circuit noted that other circuits considered similar arguments supporting the extension of a reporter's privilege to non-confidential information. *See id.* at n.2 (citing Shoen v. Shoen, 5 F.3d 1289, 1294-95 (9th Cir. 1993) (extending qualified privilege without regard to confidentiality); United States v. Cuthbertson, 630 F.2d 139, 147 (3d Cir. 1980) (same); von Bulow v. von Bulow, 811 F.2d 136, 143 (2d Cir. 1987) (same); United States v. LaRouche Campaign, 841 F.2d 1176, 1182 (1st Cir. 1998) (acknowledging privilege but finding it insufficient to outweigh the government's interest).

WDSU-TV's argument for an "institutional" privilege did not persuade the Fifth Circuit.[108] The court relied almost exclusively on *Branzburg*, stating that neither the plurality opinion nor Justice Powell's concurrence supported the type of privilege that WDSU-TV was seeking.[109] While the court recognized that other circuits have adopted a broad view of the reporters' privilege, the Fifth Circuit adopted a more narrow view.[110] The narrow view, set forth in Justice Powell's concurrence, limits the news reporters' privilege to intentional government harassment.[111] The court stated that short of intentional government harassment, the media bears the same burden of producing evidence of criminal wrongdoing as any other citizen.[112]

Although the court acknowledged the arguments supporting a privilege for confidential source information, it quickly dismissed the remainder of WDSU-TV's institutional privilege arguments.[113] The court declined to find that press interests outweighed the government interest in prosecuting Smith as a criminal defendant because Smith voluntarily gave his interview and aided the prosecution in attempts to procure the footage for trial.[114]

The court firmly rejected WDSU-TV's argument that criminal discovery would transform the media into an investigative arm of the government, finding little reason to fear that on-the-record informants would avoid the media for fear that information would be

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108. *See Smith*, 135 F.3d at 970.

109. *See id.* (strictly construing Justices White and Powell's opinions in *Branzburg*).

110. *See id.* at 971.

111. *See id*; *see also LaRouche Campaign*, 841 F.2d at 1182 (adopting broad interpretation of Justice Powell's concurrence); *Cuthbertson*, 630 F.2d at 147 (same). For a complete discussion of Justice Powell's concurrence, see *supra* notes 44-49 and accompanying text.

112. *See Smith*, 135 F.3d at 971. The court noted Ninth and Sixth Circuit decisions which narrowly interpreted Justice Powell's concurrence as applying only to the harassment of newsmen. *See id.* at 969 (citing In re Grand Jury Proceedings, 5 F.3d 397, 401 (9th Cir. 1993); In re Grand Jury Proceedings, 810 F.2d 580, 587-88 (6th Cir. 1987)).

113. *See Smith*, 135 F.3d at 969. The Fifth Circuit supported its decision to reject an "institutional" privilege by comparing the facts with those of *Branzburg*. *See id.* The Fifth Circuit believed that the *Branzburg* arguments favoring an institutional privilege were stronger than those in *Smith*. *See id.* The Fifth Circuit did not grant the institutional privilege largely because the Supreme Court rejected the privilege under *Branzburg's* much more compelling circumstances. *See id.*

114. *See id.* The Fifth Circuit distinguished the *Branzburg* facts because those reporters sought to protect confidential information. *See Smith*, 135 F.3d at 969. WDSU-TV was trying to protect non-confidential information that had been given "on-the-record" and with the expectation that thousands of viewers may hear it. *See id.*

given to the government.[115] The court found that the informants did not expect confidentiality for their information given on-the-record because they knew that such information could potentially be aired before the general public.[116] Although the court recognized that complying with discovery requests may take valuable time and resources, it found that the press is no worse off than any other individual possessing information relevant to criminal proceedings, and that any burden felt by the press would be merely incidental.[117]

B. Application Beyond Grand Jury Proceedings

WDSU-TV also asserted that the *Branzburg* balancing test applied solely to grand jury proceedings.[118] WDSU-TV relied on *Riley v. City of Chester*,[119] in which the Third Circuit refused to extend *Branzburg* beyond the context of grand jury proceedings.[120] In *Riley*, a mayoral candidate filed a civil action against his election opponent and several other city employees for leaking false information to the press regarding his personal life.[121] The Third Circuit upheld the news reporters' privilege and refused to require the reporters to reveal the source of the leaked information.[122]

The Fifth Circuit disagreed with the *Riley* decision and refused to apply the Third Circuit's view.[123] The Fifth Circuit emphasized the importance of effective law enforcement.[124] Citing *United States v. Nixon*, the court found that granting reporters the privilege to withhold evidence relevant to ongoing criminal trials "cut[s] deeply into the guarantee of due process of law and gravely impair[s] the

115. *See id.* at 970.

116. *See id.* The Fifth Circuit acknowledged that Smith may have had an alternative Sixth Amendment defense. *See id.* at 970 n.3. The court did not further discuss the matter because Smith did not assert this right or join the government in their appeal. *See Smith*, 135 F.3d at 970 n.3. (citing United States v. Fortna, 796 F.2d 724, 732 (5th Cir. 1980) (holding Sixth Amendment cannot be asserted vicariously)).

117. *See id.* at 971 (stating reporters have same responsibility to appear before grand juries as ordinary citizens). In addition, the court found no empirical evidence supporting WDSU-TV's contention that the media would destroy valuable archival footage simply to avoid criminal discovery. *See id.*

118. *See id.*

119. 612 F.2d 708, 714 (3d Cir. 1979).

120. *See Smith*, 135 F.3d at 971.

121. *See Riley*, 612 F.2d at 710.

122. *See id.* at 718. In support of its decision, the Third Circuit emphasized the importance of maintaining autonomy between the courts and the press. *See id.*

123. *See Smith*, 135 F.3d at 971. The Fifth Circuit refused to adopt the *Riley* view, stating that there is "little persuasive force" in the Third Circuit's distinction between grand jury and trial proceedings. *See id.*

124. *See id.*

basic function of the courts."[125] Additionally, the court found that the *Branzburg* Court did not intend to limit the balancing test enunciated by Justice Powell to grand jury proceedings.[126] Noting that evidentiary privileges are generally disfavored, the court reiterated that the media is subject to the same burden of producing evidence of criminal wrongdoing as are other members of society.[127]

C. Binding Effects of *Miller v. Transamerican Press*

WDSU-TV also asserted that the Fifth Circuit did not need to consider the merits of an institutional news reporter's privilege because the court was bound to apply the privilege that it had established in *Miller*.[128] In *Miller*, the Fifth Circuit upheld a qualified reporter's privilege in civil libel suits and concluded that the press interests had outweighed public interests.[129]

In *Smith*, the Fifth Circuit distinguished *Miller* on two grounds.[130] First, the *Miller* court recognized a qualified reporter's privilege in civil cases, not criminal.[131] In criminal matters, the public interest in law enforcement usually outweighs the media interest.[132] In civil cases, however, the issues are generally of less pub-

125. *Id.* (quoting United States v. Nixon, 418 U.S. 683, 711-12 (1974)). *Nixon* dealt primarily with the executive privilege. *See generally Nixon*, 418 U.S. 683.

126. *See Smith*, 135 F.3d at 971 (quoting *Branzburg*, 408 U.S. at 690-91). The *Branzburg* court found that the public's interest in law enforcement and effective grand jury proceedings did not override the "consequential, but uncertain, burden" placed on the media's newsgathering function as a result of responding to grand jury investigations. *See Branzburg*, 408 U.S. at 690-91.

127. *See Smith*, 135 F.3d at 971 (citing Herbert v. Lando, 441 U.S. 153, 175 (1979)). *Lando* involved a "public figure" defamation action in which plaintiff sought an order compelling discovery. *See* Herbert v. Lands, 441 U.S. 153, 153 (1979). The United States District Court for the Southern District of New York granted the discovery motion, but the Second Circuit reversed and remanded. *See id.* Finally, the Supreme Court held that the First Amendment does not absolutely protect newspeople who have allegedly published damaging falsehoods regarding public figures. *See id.*

128. *See Smith*, 135 F.3d at 971 (citing Miller v. Trans American Press, 621 F.2d 721 (5th Cir. 1980)).

129. *See* Miller v. Trans American Press, 621 F.2d 721, 726-27 (5th Cir. 1980). The Fifth Circuit held that the compelling need for effective law enforcement is not present in civil cases. *See id.* In civil cases, the press is far more likely to be granted a qualified privilege than in criminal cases because the press' interest in efficient dissemination of information is more likely to outweigh the interests of individual civil litigants than the interests of criminal defendants. *See id.* at 725-26.

130. *See Smith*, 135 F.3d at 972 (distinguishing *Miller* because it was a civil matter and there was no confidentiality issue).

131. For a discussion of the facts of *Miller*, see *supra* note 57 and accompanying text.

132. *See Smith*, 135 F.3d at 972.

lic concern.[133] The Fifth Circuit acknowledged its prior acceptance of a privilege in civil cases but refused to extend the *Miller* privilege to criminal cases.[134]

Second, the court found that *Miller*, unlike *Smith*, involved a privilege not to reveal "confidential" information.[135] Relying on previous Fifth Circuit decisions, the court observed that it had never recognized a privilege for "non-confidential" outtakes.[136] The court theorized that confidentiality was a prerequisite for the news reporters' privilege.[137]

D. The Fifth Circuit Holding

The Fifth Circuit ultimately held that news reporters do not possess a qualified privilege protecting "non-confidential" outtakes relating to criminal trials.[138] The court determined, therefore, that the government's burden, under Rule 17(c), was to prove that the evidence sought was relevant, admissible and specifically identified.[139] The court held that the government had met this burden in *Smith* because multiple contradictory statements by a defendant can show a "consciousness of guilt."[140] Therefore, the court was entitled to the videotaped footage.[141]

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133. *See id.*; *see also* Zerilli v. Smith, 656 F.2d 705, 711-12 (D.C. Cir. 1981) (recognizing a qualified privilege in "civil cases"); Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 437 (10th Cir. 1977) (same).

134. *See Smith*, 135 F.3d at 971-72 (citing *In re Selcraig*, 705 F.2d 789 (5th Cir. 1983) (recognizing qualified privilege for confidential sources but permitting override in civil libel cases)).

135. *See id.*

136. *See id.*

137. *See id.* (citing ACLU v. Finch, 638 F.2d 1336, 1344 (5th Cir. 1981)). In *Finch*, Mississippi residents sued state officials for allegedly violating their First Amendment rights by conducting surveillance of their lawful activities. *See* ACLU v. Finch, 638 F.2d 1336, 1338 (5th Cir. 1981).

In *Smith*, the Fifth Circuit compared a newsreporter's confidential interview to a testimonial privilege, stating that "the existence of a confidential relationship that the law should foster is critical to the establishment of a privilege." *Smith*, 135 F.3d at 972; *see also* Pressey v. Patterson, 898 F.2d 1018, 1022 n.4 (5th Cir. 1990) (expressing strong doubts whether privilege could exist absent confidentiality). For a further discussion of *Pressey* and *Finch*, see *infra* notes 174-82 and accompanying text.

138. *See Smith*, 135 F.3d at 972.

139. *See id.* Refusing to invoke a privilege, the court reverted to standard discovery rules under Rule 17(c). *See id.*

140. *Id.* at 973 (citing United States v. Simone, 205 F.2d 480, 482-83 (2d Cir. 1953) (allowing inference of guilt from multiple contradictory statements)).

141. *See id.* For a discussion and text of Rule 17(c), see *supra* notes 76-81 and accompanying text.

E. Published and Unpublished Information

To determine whether the information was confidential, the Fifth Circuit looked solely to whether the testimony was given on-the-record.[142] The court did not consider whether the information was ultimately published.[143] Access to published or aired interviews is generally not restricted because there is little argument supporting the existence of confidentiality. When an interview is not published, however, the question of confidentiality becomes less clear.[144] Lower courts within the Fifth Circuit have upheld a privilege based on the distinction between published and unpublished non-confidential information.[145] In *Brinston v. Dunn*, the Southern District of Mississippi did not permit questions relating to unpublished information within the reporter's possession, and limited the scope of the reporter's deposition questioning to the truthfulness and accuracy of the statements made within his publication.[146]

Other circuits have also expressly adopted the distinction between published and unpublished information.[147] In *United States v. LaRouche Campaign*,[148] for example, the First Circuit noted that compelled discovery could have a chilling effect on First Amendment rights and thus extended a privilege to all unpublished material within the reporter's possession, regardless of confidentiality.[149]

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142. *See Smith*, 135 F.3d at 972 ("WDSU-TV interviewed Smith 'on-the-record,' so there was no expectation between Smith and the television station that any of the information he provided was to be kept in confidence.").

143. *See id.*

144. *See id.*

145. *See* Brinston v. Dunn, 919 F. Supp. 240, 243-44 (S.D. Miss. 1996) (granting privilege for unpublished, non-confidential source information).

146. *See id.* at 244. In *Brinston*, a Mississippi deputy circuit clerk in the Hinds County Clerk's Office was terminated after announcing his candidacy for the Circuit Clerk position. *See id.* at 241. Brinston brought an action against the Circuit Clerk, Barbara Dunn, alleging that his termination violated his First Amendment rights. *See id.* Dunn sought to depose Ernest McBride, a local reporter, who wrote an article in which Brinston was quoted regarding the inner workings of the Clerk's Office. *See id.* McBride filed a motion to quash the subpoena. *See Brinston*, 919 F. Supp. at 241. The District Court granted the motion in part and denied it in part, prohibiting questioning pertaining to unpublished work product within McBride's possession. *See id.* at 244.

147. *See* United States v. LaRouche Campaign, 841 F.2d 1176, 1181-82 (1st Cir. 1988) (applying privilege to unpublished non-confidential information); United States v. Cuthsbertson, 630 F.2d 139, 147 (3d Cir. 1980) (same); Shoen v. Shoen, 5 F.3d 1289 (9th Cir. 1993) (same); United States v. Blanton, 534 F. Supp. 295, 297 (S.D. Fla. 1982), *aff'd*, 730 F.2d 1425 (11th Cir. 1984) (same); von Bulow v. von Bulow, 811 F.2d 136, 143 (2d Cir. 1987).

148. 841 F.2d 1176 (1st Cir. 1988).

149. *See id.* at 1181-82. It is important to note, however, that in *LaRouche*, the defendant's interests ultimately outweighed the privilege. *See id.*

Most other circuits disagree with the Fifth Circuit's argument that confidentiality is a prerequisite to privilege, and instead focus on the burden that compelled disclosure would place on the news gathering process.[150] This inquiry comports with Justice Stewart's dissent and affords adequate protection to all interests involved.[151]

V. CRITICAL ANALYSIS

In *Smith*, the Fifth Circuit failed to consider the vital role of an independent free press in American society.[152] The court applied Justice Powell's concurrence too strictly, and permitted a qualified privilege solely in government harassment cases.[153] Although this approach seems plausible, there are numerous situations where it could fail to adequately protect legitimate First Amendment interests.[154] Under the Fifth Circuit approach, law enforcement could conduct relatively limitless discovery, subject only to procedural rules and with little regard to the negative impact on newsgathering.[155] This demonstrates the type of government "annexation" of the media against which Justice Stewart warned in his *Branzburg* dissent.[156]

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150. *See id.* (applying privilege despite lack of confidentiality); *Cuthbertson*, 630 F.2d at 147 (same); Shoen v. Shoen, 5 F.3d 1289, 1295-96 (9th Cir. 1993) (confidentiality is merely one factor to be weighed against competing interest in privilege analysis); *Blanton*, 534 F. Supp. at 297 (same); *von Bulow*, 811 F.2d at 143.

151. Lower courts within the Fifth Circuit have also upheld a privilege for non-confidential information without regard to its publication. For a discussion of specific lower court opinions within the Fifth Circuit, see *infra* notes 170-76 and accompanying text.

152. *See Branzburg v. Hayes*, 408 U.S. 665, 725 (1972) (Stewart, J., dissenting) (arguing Justice Powell's "crabbed view" of First Amendment underestimated "critical role" of independent press in American society). For a complete discussion of Justice Stewart's dissent, see *supra* notes 50-55 and accompanying text.

153. *See* United States v. Smith, 135 F.3d 963, 971 (5th Cir. 1998) ("*Branzburg* will protect the press if the government attempts to harass it. Short of such harassment, the media must bear the same burden of producing evidence of criminal wrongdoing as any other citizen.").

154. For a complete discussion of the Fifth Circuit's rationale, see *supra* notes 139-42 and accompanying text.

155. For a discussion of the procedural rules governing the discovery process, see *supra* notes 76-82 and accompanying text. The media may still successfully fend off unnecessarily duplicative discovery requests. The burden of proof however, is on the media to prove duplicity, rather than on the government to prove why a privilege should be overcome. With the "hands off" attitude often applied to discovery proceedings, the media would be faced with a much more difficult burden in protecting its First Amendment rights to free press.

156. *See Branzburg*, 408 U.S. at 725 (Stewart, J., dissenting). Justice Stewart argued convincingly that denying the media a privilege to protect its sources would severely undermine the media's "historic independence," by permitting the government to "annex the journalistic profession as an investigative arm of government." *Id.*

The *Miller* test, which the district court adopted, protects First Amendment rights more than Justice Powell's "harassment" analysis and does not constrain the government interest in efficient law enforcement.[157] The *Miller* test permits a litigant seeking discovery to defeat the privilege if he can demonstrate the information: (1) is relevant; (2) cannot be obtained by alternative means; and (3) is of compelling interest to the litigation.[158] This analysis does not confine the privilege to government harassment cases.[159] Rather, it balances all interests involved and encompasses situations in which a legitimate First Amendment interest may be at stake.[160]

A. Civil and Criminal Matters

In refusing to adopt *Miller*, the Fifth Circuit distinguished *Smith* on two grounds.[161] First, the court noted that *Miller* dealt with a civil matter, while *Smith* was criminal in nature.[162] According to the court, this distinction is important because media interests are more likely to outweigh government interests in civil cases than in criminal cases.[163]

The Fifth Circuit refused to subordinate government interests because effective law enforcement is paramount to the media interest in disseminating information.[164] Although government interests often outweigh media interests in criminal cases, outright refusal to subject the government to First Amendment scrutiny could unfairly enable the government to use media resources.[165] For example, the government could freely benefit from media in-

157. *Compare* Miller v. Trans American Press, 621 F.2d 721, 725-26 (5th Cir. 1980) (adopting derivative of Justice Stewart's dissent to establish balancing text), *with Branzburg*, 408 U.S. at 709-10 (Powell, J., concurring) (applying privilege solely to government harassment). The *Miller* test permits a balancing of all interests involved, including those of the media, the government and the public. *See generally Miller*, 621 F.2d at 725-26.

158. *See id.* at 726.

159. *See id.*

160. By balancing the media's interest in informing the public with the government and public's interest in effective law enforcement, it is unlikely that the criminal justice system will suffer any serious impediment. *See id.* Such a balancing would merely shift the burden from the media to the government, to demonstrate that the evidence sought is not duplicative or available from alternative sources. *See id.*

161. *See* United States v. Smith, 135 F.3d 963, 971-72 (5th Cir. 1998).

162. *See id.* at 972.

163. *See id.*

164. *See id.*

165. *See id.* The court refused to balance the government's interests against those of the media and considered only the government's interest in its analysis. *See Smith*, 135 F.3d at 970 n.3.

vestigations.[166] Justice Stewart's test, as adopted in *Miller*, merely requires the government to justify its inquiries before burdening the media with needless or duplicative discovery requests.[167] The Fifth Circuit's distinction between civil and criminal matters transforms the media into a government instrument that aids criminal prosecutions.[168]

B. Confidential and Non-Confidential Information

The Fifth Circuit also distinguished *Miller* based on confidentiality.[169] In *Miller* and *Selcraig*, the Fifth Circuit recognized a privilege protecting confidential sources.[170] Unlike *Smith*, however, the court did not extend such a privilege to non-confidential outtakes.[171] Relying on *Pressey v. Patterson*[172] *and ACLU v. Finch*,[173] the court believed that confidentiality was an absolute prerequisite for a First Amendment privilege.[174]

The Fifth Circuit's reliance on *Pressey* demonstrates a misapplication of the facts of that case. In dicta, the *Pressey* court expressed reservations about whether a privilege could exist absent confidentiality, but did not directly rule on the issue.[175] In fact, the *Pressey* opinion expressed more concern that the journalist expressly waived the privilege, than whether the information was confidential.[176]

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166. *See* Branzburg v. Hayes, 408 U.S. 665, 725-45 (1972) (arguing failure to recognize reporter's privilege permits government to "annex" media's resources for governmental investigative purposes).

167. *See Miller*, 621 F.2d at 726 (upholding privilege unless litigant proves information is not available from alternative sources). Such a requirement protects the media from becoming the government's investigative crutch. *See id.* In situations where the information could be obtained from other sources, members of the media should not be forced to expend their time and resources procuring such information. *See id.*

168. *See id.*

169. *See Smith*, 135 F.3d at 972.

170. *See Miller*, 621 F.2d at 721.

171. *See id.* (recognizing privilege as applied to confidential source information); *In re Selcraig*, 705 F.2d 789, 792 (5th Cir. 1983) (same).

172. 898 F.2d 1018 (5th Cir. 1990).

173. 638 F.2d 1336 (5th Cir. 1981). For a complete discussion of the facts of *Finch*, see *supra* note 137 and accompanying text.

174. *See Smith*, 135 F.3d at 972 (citing *Pressey*, 898 F.2d at 1022 n.4).

175. *See* Pressey v. Patterson, 898 F.2d 1018, 1022 n.4 (5th Cir. 1990) ("Although the question is not directly before us, we have strong doubts whether the trial judge was correct in enforcing this privilege. . . . As far as we can discern from the record, Reiser [the informant] was a divulged source, not a confidential source. Moreover, Reiser expressly *waived* the privilege.") (emphasis added).

176. *See id.*

The facts of *Finch* are so different from *Smith* that its precedential role is questionable.[177] While it did not directly cite *Branzburg*, the *Finch* court found that state legislatures were free to promulgate their own privilege statutes to expand First Amendment protections.[178] The opinion focused on whether the state's interest in sealing the Mississippi Sovereignty Commission records overrode the government's interest in enforcing federal law.[179] The *Finch* court ruled on issues of sovereign immunity and did not involve privileges available to the media.[180] Therefore, *Finch*'s value as a controlling precedent in the media context appears minimal, particularly because other courts have directly ruled on the issue.[181]

The Fifth Circuit's strict reading of Justice Powell's concurrence leaves reporters virtually helpless against interference from the government.[182] This holding subjects reporters to the potentially burdensome expense of complying with governmental discovery requests and disregards whether such requests are an impediment to the media's historic independence.[183]

VI. IMPACT

The *Branzburg* plurality opinion perpetuates the divided circuit court holdings regarding the news reporters' privilege.[184]

177. For a discussion of the facts of *Finch*, see *supra* note 137.

178. *See Finch*, 638 F.2d 1336, 1342-45; *see also Branzburg*, 408 U.S. at 706 (encouraging states to promulgate their own privileges, taking into account specific issues in their localities).

179. *See Finch*, 638 F.2d 1336, 1338-39. *Finch*'s declaration that confidentiality was required to sustain a privilege was not directly addressed to the media. *See generally id.*

180. *See id.*

181. *See* Bruno & Stillman, Inc. v. Globe Newspaper Corp., 633 F.2d 583, 595-96 (1st Cir. 1980) (ruling directly on existence of privilege in confidential context); United States v. Burke, 700 F.2d 70, 77 (2d Cir. 1983), *cert. denied*, 464 U.S. 816 (1983) (same); United States v. Cuthbertson, 630 F.2d 139, 147 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981) (same); LaRouche v. National Broad. Co., 780 F.2d 1134, 1139 (4th Cir. 1986), *cert. denied*, 479 U.S. 818 (1986) (same); Miller v. Transamerican Press, 621 F.2d 721, 725 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981) (same); Cervantes v. Time, Inc., 464 F.2d 986, 992-93 & n.9 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973) (same); Farr v. Pitchess, 522 F.2d 464, 467-68 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976) (same); Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 436-37 (10th Cir. 1977) (same); Zerilli v. Smith, 656 F.2d 705, 714 (D.C. Cir. 1981) (same). *But see* In re Grand Jury Proceedings, 810 F.2d 580, 584-85 (6th Cir. 1987) (refusing to acknowledge qualified privilege).

182. *See Branzburg*, 408 U.S. at 725 (Stewart, J. dissenting) (asserting that application of Justice Powell's view would undermine press' "historic independence").

183. *See id.*

184. *See* In re Selcraig, 705 F.2d 789, 792 (5th Cir. 1983) (analyzing *Branzburg* plurality). Because many circuits have chosen to adopt Justice Stewart's dissent

Branzburg and its progeny suggest that the debate over a news reporters' privilege for non-confidential source information will not be resolved in the near future. The division among the circuits is a result of their fundamentally differing opinions regarding the importance of the media's newsgathering function.[185] For example, the Second, Third and Ninth Circuits have traditionally prioritized the newsgathering function more than the Sixth Circuit, which almost completely refuses to extend media privileges.[186]

While the future of the reporter's privilege within the Fifth Circuit is uncertain following *Smith*, it is clear that the Fifth Circuit's opinion will have a far more reaching impact.[187] *Smith* may have some effect on the producers of investigative reporting programs.[188] These programs often possess outtakes similar to those in *Smith* because they do not air all of their footage. In fact, *Smith's* negative impact has already been felt. Prior to *Smith*, the Second Circuit recognized a qualified privilege for non-confidential information.[189] One recent case, influenced by *Smith*, demonstrates the

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rather than Justice White's opinion or Justice Powell's concurrence, the development of reporters' privilege doctrine between circuits has been extremely inconsistent. *See* Miller v. Transamerican Press, Inc., 621 F.2d 721 (5th Cir. 1980).

185. *See Branzburg*, 408 U.S. at 725 (Stewart, J., dissenting). The circuit courts' disagreement with Justice Stewart's reverence toward the media is clearly demonstrated by the various different tests they have applied to determine the reporters' privilege.

186. *Compare* von Bulow v. von Bulow, 811 F.2d 136, 143 (2d Cir. 1987), (substantially deferring to media's importance), *and Cuthbertson*, 630 F.2d at 147 (same) *and* Shoen v. Shoen, 48 F.3d 412 (1995) (same), *with* In re Grand Jury Proceedings, 810 F.2d 580, 584-85 (6th Cir. 1987) (refusing to acknowledge privilege).

187. Decisions within the Fifth Circuit prior to *Smith* looked favorably upon the reporters' privilege. *See* Brinston v. Dunn, 919 F. Supp. 240, 244 (S.D. Miss. 1996) (affording privilege to all unpublished information); Holland v. Centennial Homes, Inc., 22 MEDIA L. REP. 2270 (N.D. Tex. 1993) (affording privilege without regard to confidentiality).

188. *See Evidence-Evidentiary Privelge-Second Circuit Refuses to Recognize Journalists' Privilege For Nonconfidential Information* Gonzales v. National Broadcasting Co., 112 HARV. L. REV. 2019 (June 1999). Noting a recent Second Circuit case in which the news-reporting program *Dateline NBC* was forced to turn over video outtakes, one commentator asserted that the "media's warnings about the need for a qualified privilege for nonconfidential information may prove to be more prescient than the court surmised." *Id.* at 2020.

189. *See generally* National Broad. Co. v. Graco Children Prods., Inc., 79 F.3d 346 (2d Cir. 1996). In *Graco*, the manufacturer of an infant cradle (Graco) sought copies of outtakes from an interview with a mother who brought suit against Graco after her child died while in the cradle. *See id.* at 349. The mother gave an interview as part of an exposé aired on *Dateline NBC*, a prime-time investigative reporting program on the NBC network. *See id.* at 348-49. The Second Circuit upheld the reporter's privilege finding that the outtakes were not "critical or necessary" and they were never aired. *See id.* at 352. In an earlier Third Circuit case, CBS television sought to protect outtakes from an interview taped on their news pro-

negative impact *Smith* is already having on investigative reporting programs in the Second Circuit.[190]

In *Gonzales v. National Broadcasting Company*,[191] plaintiffs brought a claim against a Louisiana Deputy Sheriff for unwarranted traffic stops based on racial bias.[192] In January of 1997, NBC's investigative reporting program, *Dateline NBC*, broadcast a report detailing similar unwarranted traffic stops, featuring video footage of the same officers against whom the complaint had been filed.[193] Both parties served subpoenas on NBC, seeking the complete unbroadcast footage of the incident.[194] NBC refused to comply, citing the First Amendment journalists' privilege.[195] NBC argued, as in *Smith*, that without a reporter's privilege for such outtakes, the press would be subject to a flood of subpoenas, forcing journalists to be participants in litigation.[196] The Second Circuit rejected this argument, citing *Smith*, and found that the First Amendment did not protect the press from what it considered an "incidental" burden.[197]

As large scale media events such as the O.J. Simpson trial and the Monica Lewinski affair bring the reporters' privilege into sharp focus, perhaps the Fifth Circuit will reassess its views on the importance of an independent media and possibly expand the currently sparse case law pertaining to a reporter's privilege and non-confidential source information. Until that day, reporters around the country will continue to bear the burden of serving as witnesses and gatherers of information for potential litigants.

Michael Fitzsimmons

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gram *60 Minutes*. *See* United States v. Cuthbertson, 630 F.2d 139, 142 (3d Cir. 1980). The court held that journalists have a qualified privilege. *See id.* at 147.

190. *See* Gonzales v. National Broad. Co., 155 F.3d 618 (2d Cir. 1998).

191. *See id.*

192. *See id.* Plaintiffs alleged that they had been stopped and detained without probable cause. *See id.* at 619.

193. *See id.* at 620.

194. *See Gonzales*, 155 F.3d at 620.

195. *See id.* A district court ordered the disclosure of the outtakes. *See id.*

196. *See id* at 625.

197. *See id.* (quoting United States v. Smith, 135 F.3d 963, 970 (5th Cir. 1998)).