# Article

## Probing Secrets: The Press and Inchoate Liability for Newsgathering Crimes

William E. Lee*



* Professor, Henry W. Grady College of Journalism and Mass Communication, University of Georgia

## Introduction

> I'm not supposed to know this.
> —Steven Rosen, overheard by a court-authorized wiretap[1]

The unprecedented indictment charges hit Washington in August 2005 like a bombshell. Steven Rosen and Keith Weissman, lobbyists for the American Israel Public Affairs Committee (AIPAC), one of the capital's most influential lobbying groups, were charged with violating the Espionage Act by conspiring with Defense Department official Lawrence Franklin to pass classified information to reporters and Israeli government officials. Journalists watched the case with alarm, as coverage of diplomacy and national security relies heavily on the receipt and disclosure of classified information.[2] Indeed, Rosen and Weissman claimed that by receiving information from Franklin and passing it on to others, they merely did what "members of the media, members of the Washington policy community, lobbyists and members of congressional staffs do perhaps hundreds of times every day."[3] The potential of the Espionage Act to reach journalists was emphasized by Judge T.S. Ellis III when he sentenced Franklin to more than twelve years in prison:

> So, all persons who have authorized possession of classified information, and persons who have unauthorized possession, who come into possession in an unauthorized way of classified

---

1. Superseding Indictment at 12, ¶ 29, United States v. Franklin, No. 05-CR-225 (E.D. Va. Aug. 4, 2005), *available at* http://www.fas.org/irp/ops/ci/franklin0805.pdf.

2. The Reporters Committee for Freedom of the Press claimed that the indictments "raise issues that could well affect the very nature of how journalism can be practiced." Motion for Leave to File Brief *Amicus Curiae* of the Reporters Committee for Freedom of the Press at 2, United States v. Franklin, No. 05-CR-225 (E.D. Va. Oct. 12, 2005), *available at* 2005 WL 5912060. Indeed, it is difficult to find national security coverage in major newspapers that does not attribute information to senior administration officials who have been promised anonymity in exchange for the disclosure of classified information. *See, e.g.* Peter Baker, David Johnston & Mark Mazzetti, *Abuse Issue Puts the Justice Dept. and C.I.A. at Odds*, N.Y. TIMES, Aug. 28, 2009, at A1 ("The officials interviewed for this article spoke anonymously so that they could discuss debates over classified matters."); John Markoff & Thom Shanker, *U.S. Weighs Risks of Civilian Harm in Cyberwarfare*, N.Y. TIMES, Aug. 2, 2009, at A1 (quoting a senior Defense Department official who spoke on the condition of anonymity because of the classified topic); Joby Warrick & Peter Finn, *Internal Rifts on Road to Torment*, WASH. POST, July 19, 2009, at A1 (quoting former U.S. official who "spoke on the condition of anonymity to discuss classified information"); Scott Shane, *Cheney Is Linked to Concealment of C.I.A. Project*, N.Y. TIMES, July 12, 2009, at A1 (referring to an intelligence official "who would speak about the classified program only on condition of anonymity"); David E. Sanger, *U.S. Rejected Aid for Israeli Raid on Nuclear Site*, N.Y. TIMES, Jan. 11, 2009, at A1 (referring to senior American and foreign officials who would not speak on the record "because of the great secrecy surrounding the intelligence developed on Iran."); Karen DeYoung & Joby Warrick, *Pakistan and U.S. Have Tacit Deal On Airstrikes*, WASH. POST, Nov. 16, 2008, at A1 (quoting senior officials in both countries who would discuss the sensitive military and intelligence relationship only on the condition of anonymity).

3. Memorandum of Law in Support of Defendant's Motion to Dismiss the Superseding Indictment at 3, United States v. Rosen, No. 05-CR-225 (E.D. Va. Jan, 19, 2006), *available at* http://www.fas.org/sgp/jud/rosen011906.pdf.

> information, must abide by the law. They have no privilege to estimate that they can do more good with it. So, that applies to academics, lawyers, journalists, professors, whatever. They are not privileged to disobey the laws, because we are a country that respects the rule of law, and that's the real significance.[4]

The AIPAC lobbyist trial promised to provide an inside view of the way classified information flows from government officials to reporters, lobbyists, and others, a view perhaps even more revealing than the 2007 trial of Bush administration official Scooter Libby for lying to a grand jury investigating the leaking of Valerie Plame's CIA affiliation. Rosen and Weissman's lawyers intended as part of their defense to focus on Bush administration practices concerning classified national security information.[5] Rosen and Weissman received permission to subpoena high-level former officials, such as former Secretary of State Condoleezza Rice, to show that U.S. government officials frequently disclosed classified information to various non-governmental entities to advance U.S. foreign policy interests.[6]

On May 1, 2009, the government moved to dismiss charges against Rosen and Weissman, stating that a trial risked the disclosure of classified information and that Judge Ellis changed the landscape of the case by imposing heightened scienter requirements that the statute does not require.[7] Unstated in the government's motion to dismiss, but disclosed to the *New York Times*, was the fact that government policy makers were "clearly uncomfortable" with the prospective testimony of senior officials.[8]

---

4. Transcript of Sentencing Hearing at 23–24, United States v. Franklin, No. 05-CR-225, No. 05-CR-421 (E.D. Va. Jan. 20, 2006), *available at* http://www.fas.org/sgp/jud/franklin012006.pdf.

5. Evan Perez & Jay Solomon, *U.S. Drops Pro-Israel Spying Case*, WALL ST. J., May 2, 2009, at A3.

6. *See generally* United States v. Rosen, 520 F. Supp. 2d 802 (E.D. Va. 2007).

7. Motion to Dismiss Superseding Indictment, United States v. Rosen, 445 F. Supp. 2d 602 (E.D. Va. 2009) (No. 05-CR-225), *available at* 2009 WL 1162779. U.S. Attorney Dana Boente explained:

> When this indictment was brought, the government believed it could prove this case beyond a reasonable doubt based on the statute. However, as the Court of Appeals for the Fourth Circuit noted, the District Court potentially imposed an additional burden on the prosecution not mandated by statute. Given the diminished likelihood the government will prevail at trial under the additional intent requirements imposed by the court and the inevitable disclosure of classified information that would occur at any trial in this matter, we have asked the court to dismiss the indictment.

Eli Lake, *Case Against Lobbyists Dropped*, WASH. TIMES, May 2, 2009, at A1.

8. Neil A. Lewis & David Johnston, *U.S. Moves to End Secrets Case Against Israel Lobbyists*, N.Y. TIMES, May 2, 2009, at A11 (sources revealing that "while senior political appointees at the Justice Department did not direct subordinates to drop the case, they were heavily involved in the deliberations."). Lawyers for Rosen and Weissman "attributed the withdrawal of the case in part to the Obama administration." Jerry Markon, *U.S. Drops Case Against Ex-Lobbyists*, WASH. POST, May 2, 2009, at A1. However, sources close to the case said a review of the case "was not begun by political appointees from the Obama administration and would have been undertaken even if Republicans had retained the presidency." R. Jeffrey Smith, Walter Pincus & Jerry Markon, *U.S. Might Not Try Pro-Israel Lobbyists*, WASH. POST, Apr. 22, 2009, at A1.

It is one thing for officials to decry leaks in settings such as press conferences but quite another for them to testify under oath about their frequent use of this communication technique.

Journalists were relieved by the dismissal of the charges; if Rosen and Weissman were criminals, then, according to the *Wall Street Journal*, "half [of] the Beltway press corps could be indicted."[9] But the relief at the dismissal of the charges may be short-lived; there remain serious questions about Judge Ellis's reading of the statute.[10]

Recent events highlight the potency of conspiracy and similar charges against journalists. A fear of being prosecuted for conspiracy with a source animates the recent Fifth Amendment plea of David Ashenfelter, a reporter for the *Detroit Free Press*.[11] In addition, federal judge Jack Weinstein recently denounced *New York Times* reporter Alex Berenson for conspiring with two others to obtain and publish sealed documents in knowing violation of a court order not to do so. In an opinion bristling with outrage, Judge Weinstein described Berenson's behavior as "reprehensible,"[12] and claimed that Berenson was "deeply involved in the effort to illegally obtain the documents."[13] Eli Lilly, a global pharmaceutical company whose documents were illegally acquired and disclosed, obtained an injunction against Berenson's co-conspirators, but chose not to pursue an injunction against Berenson or the *Times*.[14] Yet

---

9. Editorial, *The AIPAC Case Fallout*, WALL ST. J., May 2, 2009, at A10.

10. *See infra* Section IV.C and accompanying text. However, some observers believe the dismissal closes the door on the use of the Espionage Act to prosecute journalists. *See* Lake, *supra* note 7.

11. *See infra* notes 74–91 and accompanying text.

12. *In re* Zyprexa Injunction, 474 F. Supp. 2d 385, 428 (E.D.N.Y. 2007).

13. *Id.* at 396. In a series of articles published in December 2006, Berenson claimed that Eli Lilly had engaged in a long-term effort to promote the medical drug Zyprexa for unapproved uses and to down play the health risks of the drug, a best-selling medication for schizophrenia. *See* Alex Berenson, *Eli Lilly Said To Play Down Risk of Top Pill*, N.Y. TIMES, Dec. 17, 2006, at A1; Alex Berenson, *Drug Files Show Maker Promoted Unapproved Use*, N.Y. TIMES, Dec. 18, 2006, at A1; Alex Berenson, *Disparity Emerges in Lilly Data on Schizophrenia Drug*, N.Y. TIMES, Dec. 21, 2006, at C1. Berenson based this series on hundreds of internal Lilly documents that he said had been "given" to the *Times* by a lawyer representing mentally ill patients. Berenson, *Eli Lilly Said To Play Down Risk*, *supra*. After learning of Berenson's alleged role in obtaining the documents, discussed *infra* note 14, Judge Weinstein invited Berenson to voluntarily appear and discuss how he obtained the sealed documents. *In re* Zyprexa Injunction, 474 F. Supp.2d 385, 408–09 (E.D.N.Y. 1007). The *Times* declined this invitation; George Freeman, an attorney for the *Times*, wrote that "it would be inappropriate for any of our journalists voluntarily to testify about news gathering [.]" *Id.* at 411. When Judge Weinstein issued his opinion describing the conspiracy, see *infra* note 14, *Times* spokespersons claimed that Weinstein "overstated" Berenson's role in the release of the documents. *See, e.g.*, Patricia Hurtado, *Eli Lilly Regains Leaked Papers*, WASH. POST, Feb. 14, 2007, at D2. In another opinion, Judge Weinstein repeated that the *Times* had obtained the documents illegally. *In re* Zyprexa Prods. Liab. Litig., 253 F.R.D. 69, 93 (E.D.N.Y. 2008).

14. Thirty thousand personal injury suits related to Eli Lilly's drug Zyprexa were assigned to Judge Weinstein, and he issued a protective order to protect Lilly's trade secrets and the medical records of plaintiffs. *In re* Zyprexa Injunction, 474 F. Supp. 2d 385, 397–99. According to Judge Weinstein, Berenson conspired with Dr. David Egilman, a plaintiff's expert, and James Gottstein, an attorney, to violate the protective order. Gottstein obtained protected documents from Egilman and sent them to Berenson and others such as congressional staffers. No distribution to newspapers other than the

another pharmaceutical giant, Mylan, recently filed suit against the *Pittsburgh Post-Gazette* and two of its reporters, accusing the reporters of wrongfully obtaining a confidential internal report about the company's manufacturing procedures.[15]

As this Article shows, a theoretical basis for punishing a journalist's efforts to obtain classified or sealed documents is found in *United States v. Williams*,[16] a 2008 Supreme Court opinion dealing with speech proposing an illegal transaction. In *Williams*, Justice Scalia noted in passing that Congress could punish those who solicit the unauthorized disclosure of national security documents.[17] Before abandoning the prosecution of Rosen and Weissman, the Government relied on *Williams* for the claim that the conspiracy was outside the First Amendment's

---

*Times* was made because Berenson explicitly told his co-conspirators that if the *Times* did not have an exclusive on the story, it would not publish anything about the documents. *Id.* at 399–405.

Judge Weinstein enjoined Egilman, Gottstein, and six individuals who received the documents from Gottstein, from any further dissemination of the documents. *Id.* at 427–28. To avoid criminal and civil sanctions, Egilman subsequently negotiated an agreement in which he paid Lilly $100,000 and publicly admitted that he had provided Gottstein with only those documents portraying Lilly in an unfavorable light. *Doctor Who Leaked Documents Will Pay $100,000 to Lilly*, N.Y. TIMES, Sept. 8, 2007, at C2; Declaration of David Egilman, *In re* Zyprexa Prods. Liab. Litig., 253 F.R.D. 69 (E.D.N.Y. 2008) (No. 1:07-cv-00504), *available at* 2004 WL 5481943. Eli Lilly has threatened Gottstein with sanctions, including disbarment, and settlement discussions delayed Gottstein's appeal of the injunction for several years. E-mail from James Gottstein to author, (Aug. 28, 2009, 1:33:00 EST) (on file with author). Gottstein's appeal is now proceeding. In a recently filed brief, he claimed his actions were proper. Brief for Respondent-Appellant at 4, Eli Lilly Co. v. Gottstein, No. 07-CV-1107 (2d Cir. July 23, 2009), *available at* http://psychrights.org/States/Alaska/CaseXX/EilLilly/InjunctionAppeal/090723Brief.pdf. Due to Lilly's 2009 agreement to plead guilty and pay a massive fine for promoting Zyprexa for unapproved uses, see Press Release, United States Department of Justice, Eli Lilly and Company Agrees to Pay $1.415 Billion to Resolve Allegations of Off-Label Promotion of Zyprexa, Jan. 15, 2009, Gottstein claims the confidentiality order was invalid as a means of concealing criminal misconduct. Brief for Respondent-Appellant at 57–58, Eli Lilly Co. v. Gottstein, No. 07-CV-1107 (2d Cir. July 23, 2009), *available at* http://psychrights.org/States/Alaska/CaseXX/EilLilly/InjunctionAppeal/090723Brief.pdf. Lilly chose not to seek an injunction or sanctions against Berenson or the *New York Times*. As a public relations executive wrote, "It's generally accepted as a given in public relations that it is foolhardy for a major company, particularly one in an 'easy target' industry that is held in low public esteem, to aggressively attack a powerful newspaper that buys ink by the barrel. Doing so would only heighten awareness of the damaging charges Lilly seeks to rebut and further exacerbate its reputational damage." Erik Starkman, *Without Fear or Favor?* The New York Times *vs. Eli Lilly* (Sept. 25, 2007), http://www.starkmanassociates.com/blogs/eric/fear-or-favor/.

15. Mylan Pharm. Inc. v. PG Publ'g Co., No. Civ. 09-C-592 (Cir. Ct. Monongalia County, W.V. Aug. 19, 2009). On July 26, 2009, the *Pittsburgh Post-Gazette* published a lengthy piece detailing Mylan's violation of government-mandated quality control procedures at its Morgantown, West Virginia drug manufacturing plant. Patricia Sabatini & Len Boselovic, *Mylan Workers Overrode Drug Quality Controls*, PITTSBURGH POST-GAZETTE, July 26, 2009, at A1. This article was based on a "confidential internal report" obtained by the newspaper and comments by workers who were promised anonymity. *Id.* In response, the company sent all of its Morgantown-based employees a memo asking them to "be vigilant against unauthorized disclosures of company information, inappropriate communications with outsiders or any other similar misconduct[.]" Memorandum from Hal Korman, President, Mylan North America, to all Morgantown-based Employees (July 29, 2009) (on file with author). In a press release announcing the suit, Mylan claimed the newspaper "published a series of sensational and misleading articles based on improperly obtained and misconstrued confidential internal documents." Press Release, Mylan Inc., Mylan Files Lawsuit Against *Pittsburgh Post-Gazette* (Aug. 19, 2009) (on file with author).

16. 128 S.Ct. 1830 (2008).

17. *Id.* at 1845.

protection.[18]

Contemporary First Amendment doctrine provides the press with almost absolute protection to publish truthful information that is lawfully acquired.[19] However, the contours of the phrase lawfully acquired are uncertain.[20] The Court's cases reveal that "routine" newsgathering methods, such as acquiring information from court documents open to public inspection, are lawful.[21] While a reporter's theft of documents would be illegal regardless of the news value of those documents,[22] the Court has ruled that reporters may *passively* receive newsworthy information illegally obtained by a source.[23]

The conceptualization of reporters either actively stealing documents or passively receiving documents does not account for the complex interactions between reporters and sources on matters such as the disclosure of restricted information and the terms of identification.[24] In between the polar extremes of theft or passive receipt lie fascinating and novel cases possibly involving inchoate crimes such as solicitation[25] and conspiracy.[26] Is it illegal for a reporter to solicit or induce the disclosure of classified information?[27] Is it illegal for a reporter to encourage the leaking of classified information by promising a government official anonymity? Is such an agreement a conspiracy?

---

18. Brief of the United States at 43–44, United States v. Rosen, 557 F.3d 192 (4th Cir. 2008) (No. 08-4358), *available at* 2008 WL 2959062.

19. *See, e.g.*, Landmark Commc'ns. v. Virginia, 435 U.S. 829, 837 (1978).

20. William E. Lee, *The Unusual Suspects: Journalists as Thieves*, 8 WM & MARY BILL RTS. J. 53, 56 (1999) [hereinafter Lee, *The Unusual Suspects*]; Rodney Smolla, *Information as Contraband: The First Amendment and Liability for Trafficking in Speech*, 96 NW. U.L. REV. 1099, 1128 (2002) (arguing Supreme Court cases do not explain what is meant by "lawfully obtained" information).

21. *See, e.g.*, Cox Broad. v. Cohn, 420 U.S. 469, 495 (1975).

22. Branzburg v. Hayes, 408 U.S. 665, 691 (1972) (stating that "[a]lthough stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news.").

23. Bartnicki v. Vopper, 532 U.S. 514, 532 (2001); *see also infra* notes 105–45 and accompanying text.

24. *See* Monica Langley & Lee Levine, Branzburg *Revisted: Confidential Sources and First Amendment Values*, 57 GEO. WASH. L. REV. 13, 30–31 (1988) (stating that "the confidential transfer of information from government official to journalist is increasingly the product of sophisticated negotiations" and "extensive bargaining typically occurs as to the measure of anonymity governing the exchange, and elaborate ground rules are negotiated by the parties").

25. Solicitation is when a person invites, requests, or encourages another to engage in criminal conduct. MODEL PENAL CODE § 5.02(1) (defining solicitation).

26. Conspiracy is an agreement between two or more persons to attempt, solicit or commit an unlawful act or a series of unlawful acts. *Id.* at § 5.03 (defining conspiracy).

27. Without citing any cases for support, Judge Weinstein asserted that "[a]ffirmatively inducing the stealing of documents is treated differently from passively accepting stolen documents of public importance for dissemination." *In re* Zyprexa Injunction, 474 F. Supp. 2d 385, 396 (E.D.N.Y. 2007). This statement was followed with a "but see" reference to *Bartnicki*, 532 U.S. at 528–29, and the following parenthetical comment: "noting that the issue has been left open." This issue is not whether the press is liable for inducing the stealing of documents, but whether "in cases where information has been acquired *unlawfully* by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well." *Bartnicki*, 532 U.S. at 528 (quoting Fla. Star v. B.J.F., 491 U.S. 524, 535 n.8 (1989)) (emphasis added).

Ethics codes for news organizations state that reporters must not commit crimes such as trespassing or stealing information but are silent on inchoate crimes such as solicitation.[28] And while news organizations have elaborate rules about relations with confidential sources,[29] they do not address the propriety of promising confidentiality as an inducement to the disclosure of classified information. Common journalistic practices reveal that journalists work under the premise that they are free to ask for classified information and those with access are free to say no.[30] In effect, journalists believe that the legal problems posed by the disclosure of classified information are borne by the source and not the reporter.[31] For example, in defending the pursuit of judicially-sealed information about prominent baseball players testing positive for performance-enhancing drugs,[32] *New York Times* reporter Michael Schmidt asserted: "I believe it is legal and ethical for me to ask questions of people who may be covered by court orders . . . It is the choice of the source to talk."[33]

The structure of information gathering in our legal and political environment says much about how far society wants journalists to probe secrets. There is a paucity of constitutional doctrine protecting newsgathering from criminal law. The delicate balance between the government's ability to protect secrets and the press's ability to discover those secrets largely reflects policy preferences of the political branches. Stated differently, courts are highly unlikely to craft First Amendment exemptions for the press from generally applicable criminal laws. However, due to the role the press plays in our political system, the political branches may fashion such exemptions, either legislatively or by the exercise of

---

28. *See, e.g.*, N.Y. TIMES, ETHICAL JOURNALISM: A HANDBOOK OF VALUES AND PRACTICES FOR THE NEWS AND EDITORIAL DEPARTMENTS 9 (Sept. 2004), *available at* http://www.nytco.com/pdf/NYT_Ethical_Journalism_0904.pdf ("Staff members must obey the law in the pursuit of news. They may not break into buildings, homes, apartments, or offices. They may not purloin data, documents or other property, including such electronic property as databases and e-mail or voice mail messages. They may not tap telephones, invade computer files or otherwise eavesdrop electronically on news sources. In short, they may not commit illegal acts of any sort.") S.F. CHRONICLE, ETHICAL NEWS GATHERING ¶ 11 (May 1996), *available at* http://asne.org/article_view/smid/370/articleid/289/reftab/57.aspx ("The Chronicle does not use illegal means to gather information. Chronicle staffers must not trespass or steal information. Private papers or private records are rarely used without consent of their owner.").

29. *See, e.g.*, N.Y. TIMES, CONFIDENTIAL NEWS SOURCES POLICY (2004) *available at* http://www.nytco.com/company/business_units/sources.html; ASSOCIATED PRESS, THE ASSOCIATED PRESS STATEMENT OF NEWS VALUES AND PRINCIPLES 2–3 (Feb. 2006) *available at* http://www.ap.org/newsvalues/index.html.

30. Lee, *The Unusual Suspects*, *supra* note 20, at 54–56.

31. *See* William E. Lee, *Deep Background: Journalists, Sources, and the Perils of Leaking*, 57 AM. U. L. REV. 1453, 1464–65 (2008) [hereinafter Lee, *Deep Background*].

32. Michael S. Schmidt, *Stars of Red Sox Title Years Are Linked to Doping*, N.Y. TIMES, July 31, 2009, at A1 (stating that testing information was provided by lawyers speaking anonymously because the information was under seal by a court order).

33. Clark Hoyt, *Baseball's Top-Secret Roster*, N.Y. TIMES, Aug. 9, 2009, at WK8. Donald Fehr, the executive director of Major League Players Association, disagreed, stating, "The active pursuit of information that may not lawfully be disclosed because it is under court seal is a crime." *Id.*

prosecutorial discretion.

This Article first explores whether journalists may refuse to answer questions about how they acquire information from sources. If a source violates the law by disclosing restricted information to a reporter, this Article shows that shield laws and First Amendment-based privileges generally do not allow reporters to refuse to answer questions about these transactions. Once the method by which a reporter obtains information is identified, the Article considers circumstances in which a reporter passively receives information illegally obtained or disclosed by a source. Passive receipt cases are contrasted with those in which a reporter actively solicits information from a source or conspires with a source. Although there are practical and political difficulties in prosecuting reporters for solicitation or conspiracy, there is little First Amendment precedent in support of the argument that reporters should be exempt from generally applicable criminal laws.

## I. Shield Laws and First and Fifth Amendment Privileges

> The First Amendment does not confer on reporters or anyone else the right to violate the law in order to get information they consider to be newsworthy, the right to encourage others to do so, or the right to conceal the identity of a source who committed a criminal act in providing the information by refusing to comply with a lawful court order directing the reporter to identify the source. To suggest that these things are protected by the First Amendment, demeans the First Amendment.
> —United States District Judge Ernest C. Torres[34]

There are usually no witnesses to a leak other than the reporter and the source. Because "the confidential exchange of information leaves neither paper trail nor smoking gun, the great majority of leaks will likely be unprovable without evidence from either leaker or leakee."[35] Within Washington, leak investigations rarely identify leakers due to longstanding Department of Justice policy focusing these investigations solely on potential leakers rather than the press.[36]

Patrick Fitzgerald, who as special counsel for the Valerie Plame leak investigation was not subject to Department of Justice oversight, upset this tidy arrangement when he sought to question journalists about their confidential conversations with White House sources. Fitzgerald decimated

---

34. Transcript of Sentencing Hearing at 12–13, *In re* Special Proceedings, No. 01-47 (D.R.I. Dec. 9, 2004) (on file with author).

35. Lee v. Dept. of Justice, 428 F.3d 299, 302 (D.C. Cir. 2005) (Tatel, J., dissenting from denial of rehearing en banc).

36. *Concerning Unauthorized Disclosure of Classified Information: Hearing Before the S. Select Comm. On Intelligence*, 106th Cong. 7 (2000) (statement of Janet Reno, Att'y Gen.); *see also* Lee, *Deep Background*, *supra* note 31, at 1470–71.

the journalists' arguments for a First Amendment-based privilege as he obtained judicial authorization for grand jury testimony of reporters.[37] Similarly, private plaintiffs, also unconstrained by Department of Justice policy, have obtained judicial authorization to question reporters about sources whose leaks may violate the Privacy Act.[38] Under state shield laws, journalists generally have to answer questions about crimes committed by sources; only a small number of states allow journalists to refuse to answer questions about sources who commit crimes.[39] In light of the general dearth of protection under the First Amendment or shield laws, journalists have recently turned to the Fifth Amendment as a way to avoid disclosing their transactions with sources.

### A. State Shield Laws

A small number of states have some form of absolute journalist's privilege,[40] but this privilege can be pierced in certain proceedings [41] or where the reporter witnesses a source commit a crime.[42] In contrast, the shield laws of two states, New York[43] and Pennsylvania[44] have been judicially construed as providing absolute protection for information received from confidential sources, even when those disclosures are illegal. The Court of Appeals of New York has found that as "the statute is framed, the protection is afforded notwithstanding that the information concerns criminal activity and, indeed, *even when revealing the information to the reporter might itself be a criminal act.*"[45] Most recently the Pennsylvania Supreme Court in *Castellani v. Scranton Times, L.P.* found there was no crime/fraud exception to the state's shield law.[46]

---

37. *In re* Grand Jury Subpoena (Miller), 397 F.3d 964, 996 (D.C. Cir. 2005).

38. *See infra* notes 70–73 and accompanying text.

39. For a summary of the shield laws of various states, see Poynter Institute Online, http://www.poynterextra.org/shieldlaw/ (last visited Dec. 1, 2009).

40. Of the thirty-six states with shield statutes, fourteen offer some form of absolute protection, usually for source identity. *See generally* Reporters Committee for Freedom of the Press, Privilege Compendium, http://www.rcfp.org/privilege (last visited Dec. 16, 2009) (compiling privilege statutes).

41. For example, in New Jersey civil proceedings, there is an absolute protection for the identity of sources, but criminal defendants may pierce this privilege. *See In re* Subpoena (Schuman), 552 A.2d 602, 605-07 (N.J. 1989) (discussing the development of New Jersey shield statutes).

42. For example, the Kentucky and Maryland shield laws offer absolute protection to the identity of a reporter's source, but courts have required reporters to identify individuals who commit crimes in the presence of the reporter. Branzburg v. Pound, 461 S.W.2d 345, 347 (Ky. 1971) (Kentucky shield law grants a reporter a privilege from disclosing the source of information, but when a reporter witnesses others committing crimes, the reporter is the "source."); Lightman v. State, 294 A.2d 149, 156 (Md. Ct. Spec. App. 1972), *aff'd*, 295 A.2d 212 (Md. 1972) ("Where a newsman, by dint of his own investigative efforts, personally observes conduct constituting the commission of criminal activities by persons at a particular location, the newsman, and not the persons observed, is the 'source' of the news or information in the sense contemplated by the statute.").

43. N.Y. CIV. RIGHTS LAW § 79-h (McKinney 2009).

44. 42 PA. CONS. STAT. § 5942 (2009).

45. Beach v. Shanley, 465 N.E.2d 304, 306 (N.Y. 1984) (emphasis added).

46. 956 A.2d 937, 940 (Pa. 2008).

In *Castellani*, two county officials claimed that a newspaper defamed them by falsely describing their testimony before a grand jury.[47] They sought disclosure of the newspaper's unnamed source, arguing that the Pennsylvania shield law, like attorney-client privilege, should have a crime/fraud exception where the press "was involved in the solicitation of criminal contempt and/or obstruction of justice."[48] The plaintiff's motion for compelled disclosure of source was granted, with the court concluding that "the news media should not act as a protective vessel into which criminal communications are channeled. . . . [t]he public interest is not served, however, when a reporter, through an unnamed source, invades the grand jury process and pierces its recognized veil of confidentiality."[49] This was not a case where a source was providing information *about a crime* to a reporter; rather, the communication "is the crime."[50]

The Pennsylvania Supreme Court refused to recognize a "crime-fraud" exception to the shield law, concluding the law offered journalists absolute protection and whether there should be such an exception was a policy question for the legislature.[51] Moreover, the shield law was not analogous to attorney-client privilege which benefits the client. The protections in the shield law were intended to allow the press to serve the public. "[D]escribing the Shield Law's protections in common evidentiary privilege terms, while the news media may be the 'holder' of the protection, the general public is deemed to be the overall beneficiary of the Shield Law's protections."[52]

Yet the majority of states with shield laws authorize judicially-compelled production of a reporter's source where the communication was criminal. The text of some shield laws expressly states that they do not apply where reporters personally observe the commission of a crime.[53] Other shield laws specify the privilege does not protect the source of information concerning grand jury or other secret proceedings.[54] In addition, some state shield laws have been judicially construed as requiring journalists to testify about a source's criminal activity, which presumably would include the illegal disclosure of restricted information.[55]

---

47. *Id.* at 940 (quoting Castellani v. Scranton Times, L.P., 73 Pa. D. & C. 4th 483, 486 (Pa. Ct. Com. Pl. 2005)) (attributing the account to "an unnamed source close to the investigation").

48. 73 Pa. D. & C. 4th 483, 491 (Pa. Ct. Com. Pl. 2005).

49. *Id.* at 514–15.

50. *Id.* The order was reversed by the Superior Court of Pennsylvania, concluding that neither it nor the trial court was authorized to read into the Shield Law an exception not enacted by the legislation nor found by the state supreme court. 916 A.2d 648, 654–55 (Pa. Super. Ct. 2007).

51. *Castellani*, 956 A.2d 937, 951 (Pa. 2008).

52. *Id.*

53. *See, e.g.*, COLO. REV. STAT. § 13-90-119(2)(d) (2009); FLA. STAT. § 90.5015(2) (2009); N.C. GEN. STAT. § 8-53.11(d) (2009).

54. *See, e.g.*, R.I. GEN. LAWS § 9-19.1-3(b)(2) (2009). Rhode Island law also allows the divesting of the privilege if the information is necessary to permit a criminal prosecution for the commission of a specific felony. *Id.* at (c).

55. *See, e.g., In re* Grand Jury Proceedings (Ridenhour), 520 So.2d 372, 374–75 (La. 1988)

B. The First Amendment

In federal proceedings, the prevailing precedent is *Branzburg v. Hayes* where the Court rejected a First Amendment-based privilege for reporters to refuse to testify before grand juries.[56] Writing for the Court, Justice White noted,

> [W]e cannot seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it. Insofar as any reporter in these cases undertook not to reveal or testify about the crime he witnessed, his claim of privilege under the First Amendment presents no substantial question. *The crimes of news sources are no less reprehensible and threatening to the public interest when witnessed by a reporter than when they are not.*[57]

Even as many lower federal courts in the post-*Branzburg* era developed a qualified First Amendment privilege in settings such as civil proceedings,[58] federal courts have uniformly required reporters to testify before a grand jury about crimes they witness.[59] In the context of federal criminal trials, though, it is "wildly disputed" whether there is a First Amendment reporter's privilege.[60] Some federal jurisdictions apply a balancing test,[61] while other jurisdictions refuse to treat reporters differently than other citizens.[62]

---

(Louisiana shield law protects source identity but reporter must answer questions about criminal acts); Branzburg v. Pound, 461 S.W.2d 345, 347 (Ky. 1971) (Kentucky shield law construed as requiring a reporter to testify as to events observed), *aff'd sub. nom.*, Branzburg v. Hayes, 408 U.S. 665, 684–85 (1972).

56. 408 U.S. 665 (1972).

57. *Id.* at 692 (emphasis added).

58. *See, e.g.*, Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981).

59. *See, e.g., In re* Grand Jury Subpoena, 201 Fed. App'x. 430, 432 (9th Cir. 2006) (no First Amendment privilege available to videographer who refused to turn over videotape to grand jury conducting legitimate investigation); *In re* Grand Jury Subpoena (Miller), 397 F.3d 964, 968–69 (D.C. Cir. 2005) (journalists, no matter how defined, do not have a First Amendment privilege to refuse to testify before a grand jury investigating the leaking of a CIA employee's name); *In re* Grand Jury Proceedings, 810 F.2d 580, 583–86 (6th Cir. 1987) (privilege not available to reporter who refused to provide to grand jury videotapes of gang members that would be useful in identifying murder suspects).

60. *See, e.g.*, United States v. Libby, 432 F. Supp. 2d 26, 46 (D.D.C. 2006).

61. *See, e.g.*, United States v. LaRouche Campaign, 841 F.2d 1176, 1182 (1st Cir. 1988) (press interests must be balanced against the criminal defendant's interests); United States v. Caporale, 806 F.2d 1487, 1504 (11th Cir. 1986) (to overcome the reporter's privilege, the party seeking the testimony must show that information is "highly relevant, necessary to the proper presentation of the case, and unavailable from other sources.")

62. *See, e.g.*, United States v. Smith, 135 F.3d 963, 969 (5th Cir. 1998) (although some courts have construed "a broad, qualified newsreporters' privilege in criminal cases, we decline to do so"); In re Shain, 978 F.2d 850, 852 (4th Cir. 1992) (stating that "reporters have no privilege different from that of any other citizen" not to testify about knowledge relevant to a criminal prosecution).

The most recent and important criminal trial precedent is *United States v. Libby*,[63] which arose in the context of the trial of Scooter Libby for perjury and obstruction of justice stemming from the grand jury investigation of the public disclosure of Valerie Plame's CIA affiliation. Libby sought documents from three reporters who had been forced to testify before a grand jury about their conversations with him: Judith Miller of the *New York Times*, Tim Russert of NBC News, and Matthew Cooper of *Time*.[64] As Judge Walton wrote, "[t]hese three news reporters did not simply report on alleged criminal activity, but rather they were personally involved in the conversations with the defendant that form the predicate for several charges in the indictment."[65] In refusing to quash Libby's subpoena, Judge Walton concluded that the Supreme Court's reasoning in *Branzburg* "applies with equal force to the trial proceedings in this case as it does in grand jury proceedings."[66] Judge Walton wrote, "The First Amendment does not protect news reporters or news organizations from producing documents when the news reporters are themselves critical to both the indictment and prosecution of criminal activity."[67]

Judge Walton refused to apply a balancing test developed in civil cases[68] but added that even under a balancing test, a qualified reporter's privilege would be overcome in this case.[69] This resembled two recent civil cases, *Lee v. Department of Justice*[70] and *Hatfill v. Mukasey*[71] in which

63. 432 F. Supp. 2d 26 (D.D.C. 2006).

64. The three would also figure prominently as witnesses at Libby's trial. Lee, *Deep Background*, *supra* note 31, at 1458 (stating that the prosecution of Libby would not have been possible without the testimony of prominent journalists).

65. *Libby*, 432 F. Supp. 2d at 43.

66. *Id.* at 46 (footnote omitted).

67. *Id.* at 48.

68. Walton found the need for information in the criminal context is "much weightier," than in the civil context. *Id.* at 46 (quoting Cheney v. U.S. Dist. Court, 542 U.S. 367, 384 (2004)); *see also* Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981).

69. *Libby*, 432 F. Supp. 2d. at 48 n.27 (concluding that the documents sought are relevant and could not be obtained from alternative sources).

70. 413 F.3d 53 (D.C. Cir. 2005). Anonymous sources revealed to the press that Wen Ho Lee, a scientist for the Department of Energy, was the target of an investigation into security breaches at the Los Alamos nuclear research facility. *See, e.g.*, James Risen & Jeff Gerth, *Breach at Los Alamos: A Special Report*, N.Y. TIMES, Mar. 6, 1999, at A1. Lee claimed these leaks, which included information about his employment history, finances, and results of polygraph examinations, were in violation of the Privacy Act. Several reporters were ordered to reveal their sources to Lee's attorneys. When the journalists refused to do so, they were held to be in contempt. Lee v. Dept. of Justice, 327 F. Supp. 2d 26 (D.D.C. 2004), *aff'd in part and rev'd in part*, 413 F.3d 53 (D.C. Cir. 2005). Rather than reveal confidential sources, five news organizations agreed to pay $750,000 to Lee to settle the case. Adam Liptak, *News Media Pay in Scientist Suit*, N.Y. TIMES, June 3, 2006, at A1.

71. 539 F. Supp. 2d 96 (D.D.C. 2008); *see also* Hatfill v. Gonzales, 505 F. Supp. 2d 33 (D.D.C. 2007). Dr. Steven Hatfill, a former government scientist, was branded a "person of interest" in the investigation of the 2001 anthrax attacks. *See, e.g.*, Marilyn W. Thompson, *The Persuit of Steven Hatfill*, WASH. POST, Sept. 14, 2003 (Magazine), at W6. When reporter Toni Locy refused to reveal the identity of her government sources, she was found to be in contempt and stiff fines, escalating to $5,000 per day, were imposed upon her. Hatfill v. Mukasey, 539 F. Supp.2d 96 (D.D.C. 2008). After the government agreed to pay Hatfill $5.8 million in a settlement—*see* Scott Shane & Eric Lichtblau, *Scientist Is Paid*

reporters were ordered to identify government sources who leaked information in possible violation of the Privacy Act. Although the *Lee* and *Hatfill* courts applied a balancing test, each questioned the importance of journalists protecting the illegal actions of sources. For example, in *Lee*, Judge Thomas Penfield Jackson wrote that he doubted "that a truly worthy First Amendment interest resides in protecting the identity of government personnel who disclose to the press information that the Privacy Act says they may not reveal."[72] Similarly, the appellate court in *Lee* drew upon *Branzburg*'s position that journalists must testify about the criminal conduct of a source. The appellate court wrote, "The same principle applies here; the protections of the Privacy Act do not disappear when the illegally disclosed information is leaked to a journalist, no matter how newsworthy the government official may feel the information is."[73]

C. The Fifth Amendment Privilege

Journalists in *Lee* and *Hatfill* avoided testifying or facing contempt charges when the cases settled.[74] Another case, *Convertino v. Department of Justice*,[75] presents similar Privacy Act issues, but adds the Fifth Amendment privilege against compelled self-incrimination as a new factor. That privilege, as the Court stated in *Branzburg*, is the "only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution[.]"[76]

The *Detroit Free Press* published an article on January 17, 2004 claiming that the Justice Department's Office of Professional Responsibility was investigating possible misconduct by Richard Convertino when he was the lead prosecutor during the 2003 Detroit "sleeper cell" terrorism trial.[77]

---

*Millions by U.S. In Anthrax Suit*, N.Y. TIMES, June 28, 2008, at A1—the Court of Appeals for the District of Columbia Circuit ruled that Locy's appeal was moot, and the contempt order was vacated. Order, Hatfill v. Mukasey, No. 08-5049 (D.C. Cir. Nov. 17, 2008), *available at* http://www.rcfp.org/newsitems/docs/20081117_180338_locy_appellate_order.pdf.

72. Lee v. Dept. of Justice, 287 F. Supp. 2d 15, 23 (D.D.C. 2003); *see also Hatfill*, 539 F. Supp. 2d at 101 (noting that reporter's claim "exaggerates" the extent of the constitutional interest she has in protecting her sources under the circumstances of this case).

73. *Lee*, 413 F.3d at 60.

74. *See* Liptak, *supra* note 70, and Shane & Lichtbau, *supra* note 71.

75. Convertino v. U.S. Dep't of Justice, No. 07-CV-13842, 2009 WL 891701 (E.D. Mich. Mar. 31, 2009).

76. Branzburg v. Hayes, 408 U.S. 665, 689–90 (1972). Assertion of a Fifth Amendment privilege by journalists actually precedes the assertion of a First Amendment-based privilege. In 1914, George Burdick, editor of the *New York Tribune*, appeared before a grand jury investigating whether Treasury Department employees were leaking. When asked for the sources of information published in *Tribune*, Burdick asserted his Fifth Amendment privilege. At a later grand jury appearance, Burdick was presented with a pardon by President Wilson. Burdick declined to accept the pardon and again refused to testify; the Supreme Court ruled that Burdick had a right to refuse the pardon and continue to assert his right to refuse to testify. *See generally* Burdick v. United States, 236 U.S. 79 (1915).

77. David Ashenfelter, *Terror Case Prosecutor Is Probed on Conduct*, DETROIT FREE PRESS, Jan. 17, 2004, at A1. Convertino was subsequently acquitted of charges that he illegally withheld evidence from defense lawyers in the "sleeper cell" terrorism trial. Philip Shenon, *Ex-Prosecutor Acquitted of*

The article, written by reporter David Ashenfelter, attributed the information about the investigation to Justice Department officials "who spoke on condition of anonymity, fearing repercussions."[78] Convertino said the leak was "about as low as it gets"[79] and brought a Privacy Act suit against the Department of Justice.

After efforts to obtain the identity of Ashenfelter's sources from the Justice Department proved unsuccessful,[80] Convertino sought from Ashenfelter the identity of the sources cited in his article. Judge Robert Cleland ruled that under the Sixth Circuit's precedent, Ashenfelter had no First Amendment-based evidentiary privilege.[81] In assessing whether Convertino's request complied with Rule 26 of the Federal Rules of Civil Procedure,[82] Judge Cleland concluded that compelled disclosure of Ashenfelter's confidential sources would not deter *legitimate* investigative reporting. Striking a tone similar to the *Lee* and *Hatfill* courts, Judge Cleland wrote,

> If the informants indeed violated the Privacy Act as Convertino alleges, potential sources of further similar violations *should* be deterred from interactions of this kind with representatives of the press. This is not an instance where the reporter's informant reveals hitherto unknown dangerous or illegal activities that, being unlikely otherwise to come to light, result in reporting that is obviously more weighty in a court's calculation of First Amendment safeguards. Rather, this situation is more akin to a reporter's observation of criminal conduct, from which the Supreme Court has explicitly stripped constitutional protection[.][83]

Ashenfelter refused to identify his sources, citing his Fifth Amendment privilege against self-incrimination. Ashenfelter's attorneys claimed that the reporter had a legitimate basis to fear the risk of prosecution:

---

*Misconduct in 9/11 Case*, N.Y. TIMES, Nov. 1, 2007, at A18.

78. Ashenfelter, *supra* note 77.

79. *Id.*

80. An investigation into the leak was conducted by the DOJ's Office of the Inspector General. Although approximately thirty DOJ officials had access to the information that was leaked to the *Free Press*, all denied leaking the information. The Inspector General was unable to determine the identity of the leaker. OFFICE OF THE INSPECTOR GENERAL, REPORT OF INVESTIGATION OF A LEAK OF CONFIDENTIAL INFORMATION TO THE *DETROIT FREE PRESS* (Dec. 15, 2004); United States Department of Justice's Opposition to Plaintiff's Motion to Lift the Stipulated Protective Order from the Inspector General Report on the Leak of Information to the *Detroit Free Press* at Exhibit 2, Convertino v. Dept. of Justice, No. 04-0236 (D.D.C. July 25, 2006) (showing a heavily redacted version of the report).

81. Convertino v. Dep't of Justice, No. 07-CV-13842, 2008 WL 4104347 at *5 (E.D. Mich. Aug. 28, 2008) (citing *In Re* Grand Jury Proceedings, 810 F.2d 580 (6th Cir. 1987)).

82. FED. R. CIV. P. 26 (laying out rules and guidelines for disclosures and discovery).

83. *Convertino*, 2008 WL 4104347, at *8.

> Not only the Privacy Act, but several other federal statutes criminalize the improper receipt and distribution of confidential government documents and information. If Convertino's allegations are true, then Ashenfelter could face prosecution as one who participated directly in criminal acts, or who aided, abetted, concealed, or conspired with those who did.[84]

The prospect of Ashenfelter facing criminal charges if he revealed his sources was emphasized by Justice Department attorney Elizabeth Shapiro at a February 11, 2009 hearing, stating "There could be ... an ongoing conspiracy."[85] The shadow of the then-pending AIPAC lobbyist conspiracy case loomed over these proceedings; Ashenfelter's attorneys noted, "It is certainly conceivable that the DOJ could view the transaction between Ashenfelter and his source(s) as materially identical to that in the AIPAC case, and prosecute them accordingly."[86]

Judge Cleland ordered Ashenfelter to reappear for a deposition but allowed the reporter to submit an ex parte affidavit for in camera review to help the court examine the legitimacy of his fear of prosecution.[87] On March 6th, Ashenfelter submitted the affidavit.[88] At his April 21st closed-

---

84. Non-Party David Ashenfelter's Omnibus Response to Motion for Order to Show Cause Why He Should Not Be Held In Civil Contempt at 1, Convertino v. U.S. Dep't of Justice, No. 07-CV-13842-DT (E.D. Mich. Jan. 21, 2009), *available at* 2009 WL 210581. Ashenfelter's lawyers outlined a number of federal statutes that could be applied to the reporter, ranging from the conspiracy statute, 18 U.S.C. § 371, to the Espionage Act, 18 U.S.C. § 793(d)-(e). The prospect of an Espionage Act prosecution against Ashenfelter was enhanced by the AIPAC case; the transaction between Ashenfelter and his source could be viewed by the DOJ as identical to that in the AIPAC case. *Id.* at 20. Convertino's attorney responded that Ashenfelter had no reasonable basis to assert a Fifth Amendment self-incrimination privilege because the statute of limitations for most of the crimes had lapsed, Plaintiff Richard G. Convertino's Reply to David Ashenfelter's Omnibus Response to Plaintiff's Motion for Order to Show Cause Why Mr. Ashenfelter Should Not be Held in Civil Contempt and Motion for Sanctions at 10–11, Convertino v. Dept. of Justice, No. 07-CV-13842 (E.D. Mich. Jan. 28, 2009), *available at* 2009 WL 210582 (citing crimes such as Privacy Act and Espionage Act), and he failed to provide any examples of prosecuted journalists with similar circumstances:

> Mr. Ashenfelter has provided no evidence that his fear of prosecution under any of these statutes is anything other than "imaginary, remote or speculative." Indeed, Mr. Ashenfelter has provided no evidence, and cites to no case, in which journalists have ever been prosecuted under any of these statutes for receiving and printing information protected by the Privacy Act.

*Id.* at 13.

85. *Federal Judge Mulls Holding Detroit Reporter in Contempt*, Associated Press, Feb. 12, 2009, *available at* http://www.firstamendmentcenter.org/news.aspx?id=21228.

86. Petition for Writ of Mandamus, In re Ashenfelter, No. 09-1443 at 16 (6th Cir. Apr. 9, 2009), *available at* http://www.medialaw.org/Content/NavigationMenu/Hot_Topics/Reporters_Privilege/Convertino_v_DOJ/PetitionWritMandamus.pdf.

87. Opinion and Order Denying Plaintiff's "Motion for an Order to Show Cause" and Directing Non-party Respondent to Reappear for a Deposition at 9–10, Convertino v. United States, No. 07-CV-13842 (E.D. Mich. Feb. 26, 2009), *available at* 2009 WL 497400.

88. Ashenfelter's attorneys also filed a petition for a writ of mandamus with the Court of Appeals for the Sixth Circuit seeking a stay of all district court proceedings and upholding Ashenfelter's asserted First and Fifth Amendment privileges. Petition for Writ of Mandamus, In re Ashenfelter, No. 09-1443 (6th Cir. Apr. 9, 2009). Alternatively, they asked the appellate court to direct the district court to resolve Ashenfelter's Fifth Amendment claims based on the information on the record, to quash the deposition

door deposition, Ashenfelter asserted his Fifth Amendment privilege against self-incrimination when asked to name his sources.[89] Judge Cleland was present at the deposition and upheld Ashenfelter's Fifth Amendment claims without explaining his rulings. It was not known what role Ashenfelter's affidavit played in the judge's rulings.[90] Convertino's attorney described Ashenfelter's Fifth Amendment claim as a "clever ruse."[91]

Although Convertino's attorney claimed that Ashenfelter's fear of prosecution was unrealistic, during 2008, two other reporters, Bill Gertz of the *Washington Times* and Jim DeRogatis of the *Chicago Sun-Times*, successfully invoked the Fifth Amendment. Gertz invoked the Fifth Amendment to refuse to answer questions about his sources for an article about grand jury proceedings. DeRogatis refused to answer questions about his handling of a videotape showing what appeared to be R&B singer R. Kelly having sex with an underage girl.[92] The Gertz case is the most

---

and to stay any sanctions that might be imposed. *Id.* at 16. The Court of Appeals for the Sixth Circuit rejected Ashenfelter's writ for mandamus on April 16, setting the stage for Ashenfelter's April 21 deposition. Order at 2, In re Ashenfelter, No. 09-1443 (6th Cir. Apr. 16, 2009), *available at* http://www.rcfp.org/newsitems/docs/20090416_171557_ashenfelter_6th_circtui.pdf. The appellate court stated that mandamus is "an extraordinary remedy" reserved for unusually important questions and the petitioners must demonstrate a clear abuse of discretion on the part of the district court. The procedure established by the district court—requiring Ashenfelter to assert his privilege with respect to particular questions and in each instance the district court will determine the propriety of his refusal to testify—was not a clear abuse of discretion. *Id.* at 1.

89. *Federal Judge: Detroit Reporter Doesn't Have to ID Sources*, Associated Press, Apr. 22, 2009, *available at* http://www.firstamendmentcenter.org/news.aspx?id=21508.

90. *Id.*

91. Joe Swickard, Ben Schmitt, M.L. Elrick & Jim Schaefer, *Ruling Boost to Press Freedom, Reporters Rights Group Claim*, DETROIT FREE PRESS, Apr. 22, 2009, at A10; *see also generally* Samantha Fredrickson, *Leaning on the Fifth*, NEWS MEDIA & L., Winter 2009, at 23, *available at* http://www.rcfp.org/news/mag/33-1/leaning_on_the_fifth_23.html. After the April 21 deposition, the parties now dispute whether Ashenfelter waived his Fifth Amendment rights when he filed a March 26, 2008 affidavit stating that his sources for the article were Department of Justice officials. *See* Plaintiff Richard G. Convertino's Supplemental Brief in Support of his Argument that David Ashenfelter has Waived Any Fifth Amendment Privilege, Convertino v. U.S. Dep't of Justice, No. 07-CV-13842 (E.D. Mich. May 5, 2009), *available at* 2009 WL 3232394; Non-Party David Ashenfelter's Response to Plaintiff's "Supplemental Brief" in Support of His Argument that Ashenfelter Has Waived Any Fifth Amendment Privilege, Convertino v. United States Dep't of Justice, No. 07-CV-13842 (E.D. Mich. May 19, 2009), *available at* 2009 WL 3232395.

92. DeRogatis broke the story of Kelly's pattern of sexual relationships with underage girls in 2000. Jim DeRogatis & Abdon M. Pallasch, *Kelly Accused of Sex With Teenage Girls*, CHI. SUN-TIMES, Dec. 21, 2000, at 12. On February 1, 2002, an anonymous source sent DeRogatis a 26-minute 39-second videotape showing what appeared to be Kelly having sex with a girl. The girl in the video was identified for DeRogatis on February 4 by her aunt who claimed that her niece was fourteen at the time the tape was made. Jim DeRogatis, *"He Likes Them When They Are Ripe . . . ." Aunt of Girl in Sex Video Speaks Out*, CHI. SUN-TIMES, June 5, 2008, at 9. DeRogatis turned the tape over to the police who had been investigating Kelly's relationships with girls for several years.

Kelly was subsequently charged with child pornography for videotaping himself having sex with an underage girl. During Kelly's 2008 trial, DeRogatis was subpoenaed by defense attorneys who claimed that DeRogatis harbored an "extreme bias" toward Kelly and may have fabricated or manipulated the tape between the time he received it and turned it over to police. Miranda Fleschert, *Reporter Forced to Testify in R. Kelly Case is a No-Show in Court Today*, June 3, 2008, http://www.rcfp.org/newsitems/index.php?i=6785. Judge Vincent Gaughan concluded that DeRogatis could

relevant to this discussion.

Gertz wrote an article in May 2006 about impending grand jury charges expected to be filed against defense contractor Chi Mak and three relatives. Mak, his wife, and his brother had been arrested earlier in October 2005 on charges that they failed to register as Chinese government agents.[93] Gertz reported the new grand jury charges, including conspiracy to provide China with defense technology.[94] Gertz attributed the information to senior Justice Department officials "who spoke on the condition of anonymity."[95]

Judge Cormac Carney found there was a prima facie violation of Federal Rule of Criminal Procedure 6(e), which states that an attorney for the government shall not disclose matters occurring before a grand jury,[96] and ordered the government to conduct an investigation to uncover the source of the grand jury leak. After a year-long investigation, the government was unable to determine who leaked the grand jury information to Gertz.[97] A subpoena was then issued to Gertz seeking the identity of his sources. To assist Judge Carney's evaluation of the need for confidentiality, Gertz submitted a declaration stating that his confidential U.S. government sources:

> [W]ill not provide sensitive, closely held information to investigative reporters and other journalists without the assurance of absolute confidentiality. The U.S. government employees whom I developed as confidential sources fear that, if their identities as sources are divulged, they would be ostracized by their co-workers, penalized by their superiors, and possibly even suffer the loss of their jobs.[98]

Just before the beginning of a hearing to determine if Gertz should be compelled to divulge his sources, the National Security Division of the Department of Justice informed Judge Carney that the Attorney General had approved a subpoena seeking Gertz's testimony before a federal grand jury investigating the leaking of classified information.[99] Gertz's lawyer

---

not be forced to divulge the identity of his sources, but he could be asked questions about what he did with the tape after he received it. Eric Herman & Kim Janssen, *Sun-Times Music Critic Takes the 5th*, CHI. SUN-TIMES, June 5, 2008, at 8. On June 4, 2008, Kelly's attorneys asked DeRogatis whether he made any "changes or alterations" to the tape, or if he had any copies. DeRogatis' refusal to answer these questions on Fifth Amendment grounds were sustained because possessing or copying the tape may have violated child pornography laws. *Id.*

93. Bill Gertz, *New Charges Expected in Defense Data Theft Ring*, Wash. Times, May 16, 2006, at A3.

94. *Id.*

95. *Id.*

96. FED. R. CRIM. P. 6 (e)(2) (2009).

97. Order Regarding Investigation into Rule 6(e) Violation at 3, United States v. Chi Mak, No. 05-293 (C.D. Cal. May 1, 2008), *available at* http://fas.org/sgp/jud/gertz050108.pdf.

98. Response of William Gertz to July 14, 2008 Order at 4, United States v. Chi Mak, No. 05-293 (C.D. Cal. July 22, 2008), *available at* http://www.fas.org/sgp/jud/gertz072208.pdf.

99. Judge Carney denied the Department of Justice's request to stay the proceedings until the

regarded this as "the proverbial shot across our bow" and in light of this development, "another privilege" would be presented.[100] When Gertz took the witness stand, Judge Carney asked if he would voluntarily reveal the confidential sources used in the May 16 article. When Gertz said no, the judge asked for an explanation, prompting the following reply:

> [T]he United States Supreme Court recognized in Ohio v. Reiner that the Fifth Amendment to the constitution protects the innocent who might be ensnared by ambiguous circumstances. Therefore, I accept the advice of my counsel and respectfully decline to answer on the basis of my Fifth Amendment rights.[101]

Other questions, such as whether the case was newsworthy, also elicited the assertion of the Fifth Amendment privilege. At the conclusion of Gertz's testimony, Judge Carney ruled Gertz had not waived his Fifth Amendment privilege by filing a sworn affidavit with the court and would not be ordered to reveal his confidential sources.[102]

Although prosecutors may overcome Fifth Amendment assertions by granting immunity, it is unlikely to happen when sources are inside the Department of Justice. As Ashenfelter's attorney remarked, the reporter's silence benefits the Department of Justice in Convertino's Privacy Act lawsuit.[103] Thus in the absence of either a shield law or First Amendment privilege in cases where information sharing is a crime, the Fifth Amendment is a viable option *if* the reporter can establish a sufficient foundation for valid assertion of the privilege.[104]

---

conclusion of the grand jury investigation and also refused a request for a brief stay to seek appellate review of this ruling. Transcript of Hearing at 9–10, United States v. Chi Mak, No. SACR 05-293-CJC (C.D. Cal. July 24, 2008) *available at* http://www.gertzfile.com/gertzfile/documents/July24Courthearing.pdf. *See generally* H.G. Reza, *Reporter Needn't Reveal Sources*, L.A. TIMES, July 25, 2008, at B3; Tom Ramstack, *Judge Upholds Reporter's Right to Protect Sources*, WASH. TIMES, July 25, 2008, at A1.

100. Transcript of Hearing, *supra* note 99, at 28.

101. *Id.* at 36. In Ohio v. Reiner, 532 U.S. 17 (2001), the Court reiterated earlier rulings holding that one of the Fifth Amendment's basic functions is to protect innocent men "who otherwise might be ensnared by ambiguous circumstances." *Id.* at 21 (quoting Slochower v. Bd. of Educ., 350 U.S. 551, 557–58 (1956)).

102. Transcript of Hearing, *supra* note 99, at 39–40. In his concluding remarks Judge Carney focused on First Amendment rather than Fifth Amendment issues. Gertz performed a "vital public service" by reporting on the Chi Mak case and the court gave "substantial weight" to Gertz's belief that the story would not have broken without confidential sources. *Id.* at 43–44. Moreover, the leak did not harm the defendants since they had already been indicted on similar charges. *Id.* at 43. "I think in this case, the freedom of the press and investigative reporter's need to protect the confidentiality of his sources outweighs the court's interest in determining the identity of the person who improperly disclosed to Mr. Gertz the additional charges that prosecutors were presenting to the grand jury." *Id.* at 42–43.

103. Fredrickson, *supra* note 91.

104. *See, e.g., In re* Morganroth, 718 F.2d 161, 167 (6th Cir. 1983) (stating that a witness asserting the Fifth Amendment "must . . . show a 'real danger' and not a mere imaginary, remote, or speculative possibility of prosecution.").

## II. Passive Receipt of Illegally Obtained Information

In *Bartnicki v. Vopper*, the Supreme Court ruled the First Amendment protects the disclosure or publication of information illegally obtained by someone else.[105] Although the *Bartnicki* Court asserted that the holding did not apply to "punishing parties for obtaining the relevant information unlawfully,"[106] the Court did not explore the boundaries of "lawfully acquired" information. Two appellate courts have interpreted *Bartnicki* to mean that a reporter's knowledge of a source's illegal action does not render the receipt of information also illegal, but these cases may be confined to their unique facts. (As discussed later, awareness of a source's illegal action would be a critical aspect of the conspiracy charges against Rosen and Weissman.)[107] To understand *Bartnicki* and its progeny, it is necessary to consider the peculiar facts of *Bartnicki.*

Jack Yocum, president of a taxpayers' association formed solely to oppose a teachers' union request for a pay raise, found a tape recording of a telephone conversation in his mailbox. The tape had no markings indicating who made it or gave it to Yocum.[108] He played it and recognized the voices of the union president and the union's chief negotiator. The illegal recording of the telephone conversation revealed the president threatening to go to the homes of school board members opposed to a raise for teachers and "blow off their front porches[.]"[109] After Yocum played the tape for some members of the school board, he gave a copy to Frederick Vopper, a local radio commentator, who played the tape on his news/talk program.[110] Yocum, Vopper, and the two radio stations airing Vopper's program were sued for violating the Pennsylvania and federal wiretapping statutes.[111]

The Third Circuit found the wiretapping statutes could not be constitutionally applied to the defendants. Since reporters "often will not know the precise origins of information they receive from . . . sources, nor whether the information stems from a lawful source[,]" the appellate court feared a chilling effect would be created if the press were liable for merely disclosing information improperly intercepted by another party.[112] By finding the tape in his mailbox, Yocum had not "entered into" any transaction with the interceptor.[113]

In carving out a First Amendment-based exemption from the wiretapping laws, the Supreme Court emphasized that Yocum and Vopper played no part in the illegal interception and did not know who made the

105. 532 U.S. 514, 518 (2001).
106. *Id.* at 532 n.19.
107. *See infra* notes 264–314 and accompanying text.
108. Bartnicki v. Vopper, 200 F.3d 109, 113 (3d Cir. 1999).
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.* at 127.
113. *Id.* at 129.

interception.[114] The Court accepted the petitioners' submission that Yocum and Vopper knew, or had reason to know, that the interception was unlawful.[115] Yet this state of mind did not reduce the First Amendment protection for their disclosures. The Court viewed this as a case involving punishment for disclosure, not for making the tape recording or inducing its production.[116]

After *Bartnicki*, the Court vacated and remanded for reconsideration *Boehner v. McDermott*, a case involving disclosure of an illegally recorded phone call.[117] In *Boehner*, Representative James McDermott, the ranking Democrat on the House Ethics Committee, leaked to the press an illegally recorded telephone conversation between leading House Republicans and then-Speaker of the House Newt Gingrich.[118]

The illegal recording was made by John and Alice Martin in late December 1996. The Martins believed the conversation could be damaging to House Republicans and were told by their representative, Democrat Karen Thurman, to give the tape to McDermott.[119] In early January 1997, at a brief meeting outside the Ethics Committee hearing room, the Martins told McDermott they used a scanner to intercept the conversation.[120] McDermott made no promises to the Martins to induce them to give the tape to him.[121] After listening to the tape, McDermott decided to leak it to reporters for the *New York Times* and the *Atlanta Journal-Constitution*.[122] McDermott's role as the leaker was revealed shortly after the newspapers published detailed accounts of the illegally recorded conversation. Whether McDermott lawfully received the recording was a hotly contested issue in the subsequent suit brought by Representative John Boehner, one of the participants in the telephone conversation.[123]

In *Boehner I*, the Court of Appeals for the District of Columbia Circuit ruled that by knowing the illegal origin of the tape, McDermott had

---

114. Bartnicki v. Vopper, 532 U.S. 514, 525 (2001). In a concurring opinion, Justice Breyer implied that the outcome would be different if the broadcasters had played a more active role in the interception. He emphasized that the broadcasters did not encourage or participate in the interception. "No one claims that they ordered, counseled, encouraged, or otherwise aided and abetted the interception, the later delivery of the tape by an interceptor to an intermediary, or the tape's still later delivery by the intermediary to the media." *Id.* at 538 (Breyer, J., concurring).

115. *Id.*

116. *Id.* at 534 (stating that "privacy concerns give way when balanced against the interest in publishing matters of public importance").

117. McDermott v. Boehner, 532 U.S. 1050 (2001).

118. Boehner v. McDermott, 484 F.3d 573, 576 (D.C. Cir. 2007).

119. *Id.*

120. *Id.*

121. Although the Martins' letter, taped to the outside of the envelope containing the tape, stated that they believed they would be granted immunity, this originated with the Martins' dealings with Representative Thurman. There is no proof that McDermott offered the Martins immunity in exchange for the tape. *See* H.R. REP. NO. 109-732, at 8 (2006).

122. *Id.*

123. A more detailed account of the case and its many judicial rulings is found in Lee, *Deep Background*, *supra* note 31, at 1502–11, 1520–28.

illegally obtained the recording.[124] On remand, the appellate court in *Boehner II* again found that McDermott had acted illegally because unlike *Bartnicki,* where the interceptor was anonymous, McDermott met with the Martins and knew of their illegal act when he accepted the tape. The appellate court wrote,

> It is the difference between someone who discovers a bag containing a diamond ring on the sidewalk and someone who accepts the same bag from a thief, knowing the ring inside to have been stolen. The former has committed no offense; the latter is guilty of receiving stolen property, even if the ring was intended only as a gift.[125]

In contrast, the dissenting opinion by Judge Sentelle argued that *Bartnicki* "underlined" the lack of significance of a communicator's knowledge of another party's illegal action.[126]

Sentelle's views became those of the majority of the court of appeals when the court heard the case en banc in 2007. In *Boehner III*, five members of the court of appeals announced that there were no distinctions of significance "between our facts and those before the Court in *Bartnicki*."[127] The "otherwise-lawful receipt of unlawfully obtained information remains in itself lawful, even where the receiver knows or has reason to know that the source has obtained the information unlawfully."[128] Four members of the court of appeals believed McDermott unlawfully obtained the tape.[129]

A dispute over the meaning of *Bartnicki* was also present in *Jean v. Massachusetts State Police.*[130] Paul Pechonis, who had a long-running dispute with a Massachusetts police officer John Gough, posted online photographs of himself carrying weapons with the words "Death to Pig Gough."[131] Pechonis was arrested at his home on a misdemeanor charge of threatening to commit a crime. After Pechonis was handcuffed at the front door, eight armed police officers assigned to Worcester County District

---

124. Boehner v. McDermott (*Boehner I*), 191 F.3d 463, 474 (D.C. Cir. 1999), *vacated*, 532 U.S. 1050 (2001).

125. Boehner v. McDermott (*Boehner II*), 441 F.3d 1010, 1017, *vacated and reh'g en banc granted*, 441 F.3d 1010 (2006) *aff'd en banc*, 484 F.3d 573 (D.C. Cir. 2007).

126. *Id.* at 1020 (Sentelle, J., dissenting).

127. *Id.* at 1021. In its en banc opinion, the court of appeals ruled by a 5-4 vote that McDermott violated a duty of nondisclosure when he leaked the tape recording. Boehner c. McDermott (*Boehner III*), 484 F.3d 573, 577–81. On the separate issue of knowledge of illegal activity, Judge Sentelle wrote for a majority of the court of appeals. *Id.* at 582–86 (Sentelle, J., dissenting).

128. *Id.* at 585.

129. *Id.* at 577 n.1.

130. 492 F.3d 24 (1st Cir. 2007).

131. Patricia James, *Northboro Man Out on Bail in Threat Case*, WORCESTER TELEGRAM & GAZETTE (Mass.), Feb. 9, 2006, at B1. Pechonis' views on police misconduct and governmental abuse of power are online, *available at* http://www.bonuskill.com (last visited Nov. 17, 2009).

Attorney John Conte conducted a warrantless search of Pechonis's entire house. Unbeknownst to the police, the arrest and subsequent search were videotaped by a "nanny-cam," a motion activated camera frequently used by parents to monitor activities within the home.[132]

Shortly after the arrest, Pechonis contacted Mary Jean, a political activist,[133] whom he did not know, requesting her help in publicizing his version of the arrest. Jean ran a website opposed to the reelection of District Attorney Conte, and Jean posted the video on the website in late January 2006, along with an editorial critical of Conte's performance in office.[134] The video, she believed, displayed an abuse of police power.[135]

When the state police learned the embarrassing video had been posted on Jean's website, a deputy general counsel of the state police sent Jean a letter informing her that the secret, unauthorized recording was a violation of the state wiretapping law.[136] Unless Jean removed the tape from her website within forty-eight hours, the matter would be referred to the District Attorney's office for "possible prosecution."[137] Jean then filed a complaint seeking a temporary restraining order and preliminary and permanent injunctive relief precluding the police and the commonwealth from threatening her with prosecution or enforcing the wiretapping law against her.[138] The district court granted the preliminary injunction,[139] because Jean played no part in the recording of the video.[140] Under *Bartnicki* she had obtained the tape lawfully.[141]

In affirming the district court, the First Circuit found Jean's

---

132. Caught on Tape—Mass. State Police Making Illegal Arrest, http://www.youtube.com/watch?v=AIygl2im8fY (last visited Nov. 17, 2009).

133. For more colorful descriptions of Jean, see Dianne Williamson, *News Flash: Jean Quits Campaign,* SUNDAY TELEGRAM (Mass.), May 7, 2006, at B1 (describing Jean as a woman whose "sweet-sounding name belies the fact that she runs what is perhaps the most libelous Web site in Worcester County"; "a self-styled victims' advocate and Conte critic with a penchant for conspiracy theories and wild accusations," and "The Ex-Campaign Manager from Hell.")

134. Without consulting legal counsel, Jean conducted an Internet search under the terms "babycam" and "videocam" and concluded that her dissemination of the video was legal. She assumed that the making of a secret babycam recording in the home was legal but did not investigate this matter. Defendants' Memorandum in Opposition to Preliminary Injunction at 4, Jean v. Mass. State Police, No. 06-CV-40031 (D. Mass. Mar. 30, 2006). The First Circuit assumed for the purposes of the appeal that when Jean accepted the tape she had reason to know that it had been illegally recorded. Jean v. Mass. State Police, 492 F.3d 24, 25 (1st Cir. 2007).

135. Richard Nangle, *Leominster Web Site Operator to Seek Injunction,* WORCESTER TELEGRAM & GAZETTE (Mass.), Feb. 17, 2006, at B5.

136. Letter from Ann M. McCarthy, Office of General Counsel, Department of State Police, Commonwealth of Massachusetts, to Mary T. Jean (Feb. 14, 2006) (on file with author).

137. *Id.*

138. Plaintiff's Verified Original Complaint, Application for Temporary Restraint and Show Cause, and for Preliminary and Permanent Injunctive Relief, Jean v. Mass. State Police, No. 06-CV-40031 (D. Mass. Feb. 17, 2006), *available at* http://www.bluemassgroup.com/showDiary.do?diaryId=1508.

139. Jean v. Mass. State Police, No. 06-CV-40031 (D. Mass. Apr. 7, 2006) (order granting preliminary injunction).

140. *Jean,* 492 F.3d at 26.

141. *Id.*

circumstances indistinguishable from those of the defendants in *Bartniki*, and therefore her publication of the recording was protected by the First Amendment.[142] The state police had claimed that *Bartnicki* did not apply because Jean knew Pechonis's identity when she received the tape. Hence, the police argued that Jean "actively" collaborated with Pechonis while Yocum in *Bartnicki* "passively" received the tape from an anonymous source. The First Circuit rejected this as a "distinction without a difference."[143] Both Jean and Yocum "made the decision to proceed with their disclosures knowing that the tape was illegally intercepted, yet the Supreme Court held in *Bartnicki* that such a knowing disclosure is protected by the First Amendment."[144]

Significantly, in these three cases, the recipients of the tapes did not know the sources of the recordings at the time the recordings were made. As Justice Breyer wrote in his *Bartnicki* concurring opinion, "[n]o one claims that they ordered, counseled, encouraged, or otherwise aided or abetted the interception[.]"[145] Acceptance of an illegally recorded tape under these circumstances, even with knowledge of illegality, is not sufficient to make the recipient an accessory or conspirator to the original crime. More difficult circumstances arise when reporters encourage sources to break the law.

## III. Solicitation

> It's not unusual for reporters to seek documents, even confidential information, from sources. It's done all the time. It's part of the process.
> —Steve Geimann, President,
> Society of Professional Journalists[146]

In 1999, Ford Motor Company sought an injunction against Robert Lane, operator of a website devoted to Ford news. Lane's website published internal Ford documents that had been anonymously provided to Lane, likely by former and current Ford employees in violation of the company's

---

142. The First Circuit found that the privacy interests discussed in *Bartnicki* were "virtually irrelevant here, where the intercepted communications involve a search by police officers of a private citizen's home[.]" *Id.* at 30.

143. *Id.* at 32.

144. *Id.* Even if Yocum did not know of the illegality of the interception at the time he received the tape, Vopper had knowledge of illegality at the time he received the tape from Yocum. Since the Supreme Court did not distinguish between Yocum and Vopper, the First Circuit found that the Court's conclusion that Vopper obtained the tape lawfully "applies equally" to Jean. *Id.*

145. Bartnicki v. Vopper, 532 U.S. 525, 538 (2001) (Breyer, J., concurring).

146. David Noack, *Tribe Launches Web Attack on Newspaper*, EDITOR & PUBLISHER, Oct. 4, 1997, at 30. "Documents are the stuff of newsgathering. Journalists routinely ask for and receive documents of all kinds from their most trusted sources[.]" C. THOMAS DIENES, LEE LEVINE & ROBERT LIND, NEWSGATHERING AND THE LAW 793 (3d ed. 2005) [hereinafter DIENES ET. AL., NEWSGATHERING].

confidentiality agreement.[147] A temporary restraining order was issued enjoining Lane from disclosing Ford's internal documents and from "interfering with Ford's contractual relationship with its employees by soliciting Ford employees to provide Ford trade secrets or other confidential information."[148] Lane challenged the provision preventing him from disclosing Ford documents but agreed to the non-solicitation provision.[149] Though the non-disclosure provision was found to be an unconstitutional prior restraint,[150] a preliminary injunction was issued preventing Lane from soliciting Ford employees to provide trade secrets or other confidential information.[151]

If Lane had challenged the non-solicitation provision on First Amendment grounds, how would his claim have been treated? Three different ways of analyzing this question are explored. First, proposals for illegal transactions simply do not trigger substantive First Amendment analysis. Laws punishing the solicitation of illegal acts are generally applicable, and newsgathering activities are not entitled to an exemption from such laws. Second, generally applicable laws incidentally restricting First Amendment rights are subject to the *O'Brien* balancing test.[152] The Supreme Court's application of this test, however, is so toothless that the outcome under the *O'Brien* analysis will likely be the same as with the first approach. Employing other ad hoc balancing tests would lead to uncertainty for reporters. Third, the uncertainty of an ad hoc approach could be avoided by a rule holding that "simply" asking for information is a "routine" newsgathering technique that does not violate criminal solicitation laws or other laws punishing the seeking of information. Asking for information is not coercive. Even when accompanied by a reporter's promise of anonymity, sources are free to say no to such requests.

### A. General Applicability

While the Court has on rare occasion exempted certain communicators from generally applicable laws,[153] generally applicable laws

---

147. Lane received documents in the mail or found them in the back of his truck. He testified he did not know the identity of anyone who provided him with documents. Ford Motor Co. v. Lane, 67 F. Supp. 2d 745, 747–48, 753 (E.D. Mich. 1999). Although in a letter written to Ford on October 30, 1998, Lane threatened to solicit confidential information from Ford employees, there was no evidence that he did so. *Id.* at 753.

148. *Id.* at 749.

149. *Id.* at 748.

150. *Id.* at 751–54. The district court relied heavily on *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219 (6th Cir. 1996) in which the Sixth Circuit ruled that while the way in which *Business Week* acquired a sealed document and its reporters' awareness of a sealing order "might be appropriate lines of inquiry for a contempt proceeding or a criminal prosecution, they are not appropriate bases for issuing a prior restraint." *Proctor & Gamble*, 78 F.3d at 225.

151. *Lane*, 67 F. Supp. 2d at 754.

152. United States v. O'Brien, 391 U.S. 367, 377 (1968). *See infra* notes 183–90 and accompanying text.

153. *See, e.g.*, Bates v. City of Little Rock, 361 U.S. 516, 527 (1960) (holding NAACP exempt

usually trigger no First Amendment scrutiny.[154] That is, a law not aimed at constitutionally protected expression, nor seriously burdening such expression, is presumed to be constitutional under the First Amendment. As illustrated by the recent decision in *United States v. Williams*, speech proposing a criminal transaction is not "speech" in a constitutional sense and may be proscribed.[155]

In *Williams*, the Court upheld the conviction of a Florida man who violated a federal statute making it illegal to pander *or* solicit child pornography.[156] The statute did not require the existence or possession of child pornography.[157] Rather, the statute at issue in *Williams* targeted the *collateral* speech that introduces such material into the child-pornography distribution network.[158] Justice Scalia wrote that offers to engage in illegal transactions are categorically excluded from the First Amendment.[159] After referring to solicitation and conspiracy—laws punishing speech intended to induce or commence illegal activities—Justice Scalia stated, "Offers to provide or requests to obtain unlawful material . . . are similarly undeserving of First Amendment protection."[160]

Read narrowly, *Williams* may be limited to the child pornography setting. Child pornography is so socially harmful that it is excluded from the right to possess obscene materials announced in *Stanley v. Georgia*.[161] Distribution of child pornography may be punished even when those materials are not obscene under the *Miller* test.[162] In effect, since it is illegal to possess child pornography, it is illegal to engage in speech proposing the transfer of such contraband images.[163]

A broader reading of *Williams*, though, shows that the case provides a theoretical justification for other laws punishing speech that proposes an unlawful transaction, even when that transaction does not involve contraband. Two non-contraband cases were cited in *Williams* as

---

from disclosing its membership lists under city's occupation license ordinance); NAACP v. Alabama, 357 U.S. 449, 466 (1958) (holding NAACP exempt from disclosing its membership lists under state corporation law).

154. *See, e.g.*, Arcara v. Cloud Books, Inc., 478 U.S. 697, 705–07 (1986) (finding that a public health law was aimed at sexual activity and not expression).

155. 128 S. Ct. 1830, 1841–42 (2008).

156. *Id.* at 1846–47.

157. *Id.* at 1838.

158. *Id.* at 1838–39.

159. *Id.* at 1841.

160. *Id.* at 1842.

161. *See* Osborne v. Ohio, 495 U.S. 103, 109–10 (1990) (holding that *Stanley v. Georgia*, 394 U.S. 557 (1969), does not protect the private possession of lewd materials showing minors).

162. *See* New York v. Ferber, 458 U.S. 747, 764–65 (1982) ("[In cases of child pornography, a] trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole.")

163. *Williams*, 128 S. Ct. at 1841 ("offers to give or receive what it is unlawful to possess have no social value"). Of course, legislatures can treat classified information as contraband by punishing the unauthorized receipt or possession of classified information.

support for the proposition that offers to engage in illegal transactions are excluded from the First Amendment. The first, *Pittsburgh Press*, involved speech proposing an illegal employment practice.[164] The second, *Giboney*, involved speech proposing a violation of the antitrust laws.[165] Tellingly, Justice Scalia's *Williams* opinion offered the following example: Congress, if it chose to do so, could punish those who attempt to acquire national security documents.[166] The collateral speech theory underlying *Williams* provides Congress and state legislatures with ample authority to enact laws punishing efforts seeking the illegal disclosure of classified or restricted information.

Furthermore, when *Williams* is read along with *Pittsburgh Press* and *Giboney*, these cases show that the Court regards proposals to engage in illegal acts as having absolutely no value under the First Amendment; consequently, these cases do not warrant substantive First Amendment analysis. Justice Black's *Giboney* opinion is illustrative. In *Giboney,* Justice Black stressed that union picketing calculated to force a company to refuse to sell to non-union members, in violation of a state antitrust law, was not "speech" in a constitutional sense.[167] As Justice Black said, "[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."[168]

Justice Black's *Giboney* opinion illustrates the difference between coverage and protection, a major First Amendment distinction. Justice Black argued that the First Amendment can be absolute in its protection without being absolute in terms of its coverage.[169] There are some activities—such as price fixing, extortion, and blackmail—that are totally outside the First Amendment's coverage. In each of these activities, the

---

164. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973).

165. Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949).

166. *Williams,* 128 S. Ct. at 1845. Justice Scalia's illustration involved an attempt to acquire national security documents that turn out to be fakes. He stated, "There is no First Amendment exception from the general principle of criminal law that a person attempting to commit a crime need not be exonerated because he has a mistaken view of the facts." *Id.*

167. *Giboney,* 336 U.S. at 498. Similarly, Justice Powell's *Pittsburgh Press* opinion emphasized that the restriction in that case did not endanger arguably protected speech. 413 U.S. at 390. The Court in *Pittsburgh Press* held that there was no First Amendment interest served by advertising illegal commercial activity. *Id.* at 389.

168. *Giboney,* 336 U.S. at 502. There was more than picketing at issue in this case. As Justice Black described the actions of the union, it was exercising its economic power to compel Empire to acquiesce to its unlawful demands. *Id.* at 503 n.6 (emphasizing that union was "doing more" than exercising a right of free speech).

169. Thus, *The New York Times* and the *Washington Post* had an absolute right to publish the Pentagon Papers. *See* N.Y. Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring) ("[T]he press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints."). Picketing, however, "is not speech, and therefore is not of itself protected by the First Amendment." Cox. v. Louisiana, 379 U.S. 536, 578 (1965) (Black, J., concurring in part and dissenting in part).

conduct at issue "is not taken to be speech in the First Amendment sense, and thus First Amendment modes of analysis are inappropriate."[170] "Speech" activities that are covered, however, trigger analysis of the circumstances in which they may be protected. As examples, consider the following: political content is covered, but it is not protected if it is likely to produce imminent lawless action;[171] defamatory speech is covered, but it is not protected if it is published with actual malice in the case of public figures and public officials.[172]

Courts have applied the *Giboney* approach in a variety of criminal cases, finding, for example, that criminal acts involving the use of language, such as mail fraud, conspiracy to defraud the IRS, and aiding and assisting the filing of false tax documents, presented no substantive First Amendment issues.[173] The First Amendment, as the Second Circuit said, is "an unnecessary complication" in these types of criminal cases.[174] Another federal court added that the First Amendment does not countenance an "end run around criminal law."[175]

In the newsgathering context, courts have displayed "general antipathy" to claims that journalists are exempt from the application of generally applicable criminal laws.[176] For example, in *United States v. Matthews*, a freelance journalist who claimed to be researching a news story about child pornography was precluded from presenting to the jury a newsgathering justification for his trading in child pornography.[177] The Fourth Circuit sustained the lower court, stating that the law does not "permit a defendant to present a defense unless the law recognizes that defense."[178] In response to a claim by a reporters group that reporters are entitled to special exemptions from criminal law, the Fourth Circuit wrote that this argument was "ill-advised."[179] As the Supreme Court wrote in *Branzburg*, the First Amendment does not confer "a license on either the reporter or his news sources to violate valid criminal laws."[180]

Indeed, the court's two reporter–source cases, *Branzburg v. Hayes* and *Cohen v. Cowles Media Co.*,[181] show the Court believes reporter–

---

170. Frederick Schauer, *"Private" Speech and the "Private" Forum:* Givhan v. Western Line School District, 1979 SUP. CT. REV. 217, 228.

171. Brandenberg v. Ohio, 395 U.S. 444 (1969).

172. N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

173. United States v. Rowlee, 899 F.2d 1275, 1278–81 (2d Cir. 1990). *See also* United States v. Varani, 435 F.2d 758, 762 (6th Cir. 1970) (sustaining conviction for threatening an IRS agent and stating that speech is not protected by the First Amendment when it is the "very vehicle of the crime itself").

174. *Rowlee*, 899 F.2d at 1280.

175. United States v. Riggs, 743 F. Supp. 556, 561 (N.D. Ill. 1990).

176. DIENES ET. AL., NEWSGATHERING, *supra* note 146, at 816.

177. 11 F. Supp. 2d 656 (D. Md. 1998).

178. United States v. Matthews, 209 F.3d 338, 344 (4th Cir. 2000).

179. *Id.* at 344 n.3.

180. Branzburg v. Hayes, 408 U.S. 665, 691 (1972).

181. 501 U.S. 663 (1991).

source relations are governed by generally applicable laws. In both cases, the Court treated the reporter–source relationship as not much more constitutionally significant than the business practices at issue in *Giboney*.[182]

B. Applying a First Amendment Balancing Test

The Court has acknowledged that laws not aimed at protected expression can nonetheless incidentally burden free speech and has developed a test, derived from *United States v. O'Brien* (hereinafter *O'Brien*), to assess such laws.[183] The results of *O'Brien's* application, however, are not encouraging.[184] As Professor Schauer observed, application of the *O'Brien* test "although open linguistically to the possibility of some bite, has resembled rational basis review. In this respect, therefore, application of the standard parallels the results in those cases . . . in which the relevance of the [F]irst [A]mendment is expressly dismissed."[185]

It is extremely unlikely that the Court would apply *O'Brien* with enough bite to invalidate application of a criminal solicitation law to the press.[186] In the instances when the Court has exempted communicators from generally applicable laws, the Court found the groups, such as the Socialist Workers Party, were subject to harassment by government officials.[187] In contrast, the Court believes the press is a politically powerful player that is "far from helpless to protect itself from harassment or substantial harm."[188] Nor is *O'Brien* likely to reveal that the government is actually seeking to punish publication of the information rather than the

182. *See Branzburg*, 408 U.S. at 682 ("the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability"); *Cohen*, 501 U.S. at 670 ("enforcement of . . . general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations.").

183. United States v. O'Brien, 391 U.S. 367, 377 (1968) ("a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.").

184. *See, e.g., id.* (upholding law punishing destruction of draft cards despite its impact on Vietnam War protesters); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984) (upholding ban on camping in certain Washington D.C. parks despite its impact on demonstrations); Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) (upholding public indecency law despite its impact on nude dancing).

185. Frederick Schauer, *Cuban Cigars, Cuban Books, and the Problem of Incidental Restrictions on Communications*, 26 WM. & MARY L. REV. 779, 788 (1985); *see also id.* at 789 ("Under most circumstances a burden on speech incidental to a generally applicable regulation . . . will be tested against standards not significantly more stringent than minimal rationality[.]").

186. The only instances in which the Court has exempted the press from generally applicable laws have involved restrictions on publication. *See e.g.,* Bartnicki v. Vopper, 532 U.S. 514 (2001); Hustler Magazine v. Falwell, 485 U.S. 46 (1988). Neither case involved application of *O'Brien*.

187. *See* Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 99–100 (1982) (detailing government harassment of Socialist Workers Party).

188. Branzburg v. Hayes, 408 U.S. 665, 706 (1972).

means by which the information was acquired.[189] Most importantly, *O'Brien* is unlikely to lead a court to conclude that a generally applicable criminal law has a disparate impact on the press.[190]

Some judges[191] and commentators[192] have suggested other ad hoc balancing tests for the application of criminal law to newsgathering activities. The central problem with ad hoc balancing tests is that they provide little *advance* guidance to reporters. In effect, a reporter would have to be clairvoyant to anticipate how a court would later assess the propriety of her newsgathering activities. The uncertainty caused by ad hoc balancing would arguably cause reporters to "steer far wider of the unlawful zone."[193] A brighter line between legal and illegal acts can be provided by adoption of a rule that a reporter's request for information from a source does not fall within the scope of solicitation laws. In short, "simply" asking for information does not rise to the level of a command.

### C. Protection for Asking for Confidential Information

Although some states limit their solicitation statutes to certain crimes,[194] such as solicitation to commit murder, today nearly all states

---

189. One commentator fears that efforts to punish newsgathering are "backdoor attempts to punish the publication of classified information in situations when a prosecution based on publication would be impermissible." Mary-Rose Papandrea, *Lapdogs, Watchdogs and Scapegoats: The Press and National Security Information*, 83 INDIANA L.J. 233, 237 (2008).

190. Disparate impact has not been a concern of the Court when applying *O'Brien*. *See, e.g.*, Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984) (holding that the impact of a park-use regulation's impact on speech was outweighed by the government interest in "conserving park property" that is served by the proscription of sleeping in the park). Although *Branzburg* did not involve application of *O'Brien*, the *Branzburg* Court was unconvinced by press claims that subpoenas have a disparate impact on the press. *Branzburg*, 408 U.S. at 691–93. Nor has the Court been convinced that search warrants have a disparate impact on the press. *See* Zurcher v. Stanford Daily, 436 U.S. 547, 565 (1978) (The Framers "did not forbid warrants where the press was involved, did not require special showings that subpoenas would be impractical, and did not insist that the owner of the place to be searched, if connected with the press, must be shown to be implicated in the offense being investigated.").

191. *See, e.g.*, Stahl v. State, 665 P.2d 839, 846 (Okla. Crim. App. 1983) (Brett, J., dissenting) (suggesting that in criminal trespass case involving reporters, a court should examine the nature of the forum, the information sought by the journalists, and the countervailing governmental interests). *See also In re* Grand Jury Subpoena (Miller), 397 F.3d 964, 997–98 (D.C. Cir. 2005) (Tatel, J., concurring) (suggesting that in leak cases where the government seeks the identity of a journalist's confidential source, the harm caused by a leak should be balanced against the leaked information's value).

192. *See, e.g.*, Geoffrey R. Stone, *Government Secrecy vs. Freedom of the Press*, 1 HARV. L. & POL'Y REV. 185, 213 (2007). Stone advocates that in cases where journalists seek classified information from government sources, the government cannot punish the journalist unless it can be shown the journalist "(a) expressly incites the employee unlawfully to disclose classified information, (b) knows that publication of this information would likely cause imminent and serious harm to the national security, *and* (c) knows that publication of the information would not meaningfully contribute to public debate." *Id.* (emphasis in original). Professor Stone adds a cautionary note, stating that "the enforcement of solicitation law in this setting would be uncertain, confusing, and treacherous. The interjection of the government into the very heart of the journalist-source relationship could have a serious chilling effect on journalist-source exchanges." *Id.* at 212.

193. Speiser v. Randall, 357 U.S. 513, 526 (1958)

194. *See, e.g.*, CAL. PENAL CODE § 653f (2009) (enumerating specific crimes, the solicitation of

have a *general* prohibition on criminal solicitations.[195] State criminal solicitation laws use a variety of terms to describe the proscribed actions, from the mild, "requests," to the slightly stronger, "encourages," to the strongest terms, "importunes" or "commands."[196] To avoid the problems posed by open-ended terms such as "requests" or "encourages," some states have drafted their solicitation statutes to focus on actions such as "commands."[197]

Longstanding practice by both journalists and prosecutors regards a journalist's request for confidential information as not falling within the scope of criminal solicitation statutes. In American history, as Professor Stone notes, "no journalist has *ever* been prosecuted" under the theory that it is illegal to solicit or receive classified information from a government employee.[198]

Although courts have not confronted application of criminal solicitation statutes to newsgathering, they have found in the tort context that "simply" asking for confidential information is a "routine"[199] newsgathering technique. Embedded in this approach is the idea that sources solely bear responsibility for illegally disclosing restricted information;[200] reporters commit no wrongdoing by asking for information. Stated differently, it is for the government or employers to deploy internal measures to protect their secrets,[201] and as long as reporters do not attempt to gain information through illegal means (e.g., bribery, theft), requests for confidential information are legal. Applying criminal solicitation law to requests for information would disrupt a long-standing journalistic practice.

---

which is punishable by law).

195. JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 804 (4th ed. 2007).

196. *See, e.g.*, GA. CODE ANN. § 16-4-7 (2009) ("solicits, requests, commands, importunes"); N.Y. PENAL LAW § 100.13 (McKinney 2009) (same); 18 PA. CONS. STAT. ANN § 902 (2008) ("commands, encourages or requests"); TEX. PENAL CODE ANN. § 15.03 (Vernon 2009) ("requests, commands, or attempts to induce"). The Model Penal Code uses the terms "commands, encourages or requests" in its definition of criminal solicitation. MODEL PENAL CODE §5.02 (2001).

197. *See, e.g.*, State v. Lee, 804 P.2d 1208, 1210 (Or. Ct. App. 1991) (stating that drafters of state criminal solicitation law, OR. REV. STAT. §161.435, did not include terms "requests" and "encourages" because such language was regarded as "too open-ended").

198. Stone, *supra* note 192, at 204 (emphasis in original). Although journalists have not been prosecuted under federal law for receiving classified information, in *People v. Kunkin*, 507 P.2d 1392 (Cal. 1973), the California Supreme Court reversed stolen property convictions of a reporter and editor who had received a list of undercover narcotics officers from a government employee. *See* Lee, *The Unusual Suspects*, *supra* note 20, at 90–91.

199. *See* Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 99–103 (1979) (reporters "simply" asked questions of witnesses to a crime and this is a "routine" reporting technique).

200. *Cf.* Castellani v. Scranton Times, 956 A.2d 937 (Pa. 2008). The Pennsylvania Supreme Court claimed that only an individual swearing an oath of secrecy can violate grand jury secrecy. "[I]t was the opening of the speaker's mouth which violated the Grand Jury Act, not the attentiveness of the listener's ears." *Id.* at 952. *But see generally* State v. Heltzel, 552 N.E.2d 31 (Ind. 1990) (treating reporters' requests for grand jury information as unprotected newsgathering activities but finding the acts were not contemptuous because the grand jury's term had expired).

201. *See, e.g.*, Landmark Commc'ns. v. Virginia, 435 U.S. 829, 845 (1978) (noting the availability of internal procedures to protect the confidentiality of judicial commission proceedings).

In *Nicholson v. McClatchy Newspapers* a California appellate court rejected the argument that the press improperly acquired and published a confidential evaluation of a judicial candidate.[202] California law requires evaluations of potential judicial appointees to be kept confidential.[203] In 1983, however, two newspapers published the commission's "unqualified" rating of George Nicholson, a recently unsuccessful candidate for Attorney General. Nicholson filed suit claiming the publication was illegal because the newspapers "conducted an unreasonably intrusive investigation into Plaintiff's confidential and private affairs by means of soliciting, inquiring, requesting and persuading agents, employees and members of the State Bar to engage in the unauthorized and unlawful disclosure of information [knowing such information to be confidential]."[204]

The appellate court acknowledged that the press is not immune from liability for crimes and torts committed during newsgathering, but concluded that newsgathering was privileged "at least to the extent it involves 'routine . . . reporting techniques.'"[205] The court defined these techniques as "asking persons questions, including those with confidential or restricted information."[206] While the state could impose a duty on judicial commission participants to maintain confidentiality, it could not impose criminal or civil liability upon the press for obtaining and publishing information acquired by merely asking for it.[207]

Even where a reporter added a promise of confidentiality as an incentive to a source, the Florida Court of Appeals regarded asking for confidential information as a legitimate newsgathering technique.[208] Consider the following letter written by *St. Petersburg Times* reporter Brad Goldstein to Patricia Diamond, executive assistant to the chairman of the Seminole Tribe of Florida:

> Dear Pat:
> I understand the position this letter puts you in, but I've only the interest of the tribe at heart. I'm aware that you may be in possession of certain documents that could help out our pursuit of the truth: namely how rank and file tribal members are being hurt by irresponsible leadership.
> You don't need to contact me by telephone. But if copies of those documents were to arrive in an envelope that has no return

202. 177 Cal. App. 3d 509, 520–22 (Cal. Ct. App. 1986).

203. *Id.* at 513.

204. *Id.* at 520 (alteration in original).

205. *Id.* at 519 (quoting Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979)).

206. *Id.*

207. *Id.* at 519–20. The court regarded the case as closely analogous to *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829 (1978), in which the Supreme Court held that criminal sanctions could not be imposed on a newspaper for publishing information about a state judicial review commission.

208. Seminole Tribe of Fla. v. Times Publ'g Co., 780 So. 2d 310, 315–18 (Fla. Dist. Ct. App. 2001).

> address on it, the truth will get out and there will be no trace. . . .
> * * *
> Anonymity is crucial. Your name will never come up. Anonymous notes, written on a home typewriter would be best.[209]

The Florida Court of Appeals found Goldstein and another reporter's actions not to be tortious interference with the relationship between the tribe and its employees. The reporters "did not resort to methods tortious in themselves, such as defamation, bribery, 'physical violence, fraudulent misrepresentation and threats' and intimidation."[210] The court of appeals described the techniques used in this case as "routine," adding that while the phrase is poorly defined, "certainly it includes" the practice of asking for information.[211]

Both the *Nicholson* and *Seminole* courts are correct in treating the behavior at issue as non-tortious[212] and seeing these cases as publication-damage actions in disguise.[213] Therefore, these cases provide only a very preliminary and limited exploration of newsgathering liability issues. Furthermore these cases do not provide a complete view of the reporting process; it is naïve to suppose that reporters "simply" ask for information and cease asking when their requests are refused. Good reporters are persistent.[214] As explained by a police officer who improperly leaked a confidential document to Bob Woodward of the *Washington Post*, Woodward's repeated phone calls and conversations made the officer feel

---

209. *Id.* at 312.

210. *Id.* at 316 (quoting RESTATEMENT (SECOND) OF TORTS § 767 (1979)).

211. *Id.* at 317.

212. In *Nicholson*, asking questions was not the sort of unreasonable behavior that constituted intrusion, 177 Cal Ct. App. at 521; in *Seminole,* the reporters' actions were not designed to terminate the relationship between the tribe and its employees, 780 So. 2d at 310.

213. In *Seminole Tribe*, the court of appeals said the purported damages "flowed from the publication of the news stories" and that "this is a defamation case in the clothing of a different tort." 780 So. 2d at 318. In *Nicholson,* nine of the ten causes of action against the media defendants were related to disclosure of the confidential evaluation of Nicholson as unfit. The trial court ruled that the damages due to intrusion were caused by publication. 177 Cal. App. 3d at 521 n.6. Although the appellate court ruled that the press could be liable for criminal or tortious newsgathering, it did not dispute the trial court's conclusion that the damages in this case were caused by publication. *Id.*
In the recent *Mylan* suit, although the Mylan company claims the *Pittsburgh Post-Gazette* improperly obtained confidential documents, the damage was tied to the "sensationalized misuse" of the documents which caused harm to "Mylan and its shareholders, evidenced by substantial market volatility, a decrease in its stock price, and the resulting decrease in market capitalization[.]" Complaint at 5–6, Mylan Pharm. Inc. v. PG Publ'g Co., No. Civ. 09-C-592 (Cir. Ct. Mononagalia County, W.Va. Aug. 19, 2009) (on file with author) [hereinafter "Mylan Complaint"].

214. Journalist Max Frankel described "great reporting" as "dogged detective work that confronts and badgers sources until they cough up the clues that transform suspicion into evidence." MAX FRANKEL, THE TIMES OF MY LIFE AND MY LIFE WITH *THE TIMES* 346 (1999). In the recent Mylan suit, the Mylan company alleges that reporters contacted Mylan employees over at least a two month period. Mylan Complaint, *supra* note 213, at 7.

"pressured" to release the report.[215] Surely repetitive phone calls and conversations, without more, are skillful routine reporting techniques rather than "commands" in violation of solicitation law. Certainly the outer contours of "routine" reporting techniques need to be fleshed out, but as a general guidepost, the core idea that reporters engage in no wrongdoing by "simply" asking for information reflects a widespread social consensus about the role of the press in probing for secrets.

Although the Court has ruled that the press may publish confidential information,[216] it has never addressed the question of whether asking someone for information, with knowledge that the information is not to be disclosed, is a privileged activity under the First Amendment. It can be argued that the Supreme Court's concept of "routine" newsgathering was never meant to give journalists license to ask sources to divulge confidential information. In that sense, the *Nicholson* and *Seminole Tribe* courts may have extended greater constitutional reach to the phrase "routine" newsgathering than the Supreme Court intended.

The phrase "routine" newsgathering originated in *Smith v. Daily Mail Publishing Co.*, where reporters merely asked witnesses, police, and other officials for information about a crime involving a juvenile suspect.[217] Neither disclosure of this information to the press nor possession of the information by the press was held to be illegal.[218] Publication of this information by a newspaper, however, violated a West Virginia law. In what has become known as the *Daily Mail* principle, the Court ruled that the press has a nearly absolute privilege to publish lawfully acquired truthful information about a matter of public significance.[219] Hence, the phrase "routine" newsgathering activity did not originate in a setting in which a reporter asked a source for confidential information.

Nonetheless, the longstanding practice of journalists and the reluctance of prosecutors to prosecute the press for solicitation reveals that there is an unspoken cultural and political agreement that the press is free to probe for secrets in this fashion. The reluctance of prosecutors to take on

---

215. Jurgensen v. Fairfax County, 745 F.2d 868, 875 (4th Cir. 1984).

216. *See, e.g.*, Landmark Commc'ns v. Virginia, 435 U.S. 829, 838 (holding that publication of confidential information about a judicial commission "lies near the core of the First Amendment").

217. 443 U.S. 97 (1979).

218. *Id.* at 104–05

219. *Id.* at 103. The *Daily Mail* Court drew primarily upon three earlier cases for the notion that punishing "the publication of truthful information seldom can satisfy constitutional standards." *Id.* at 102. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 472–73 (1975) and *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308, 309 (1977), the information published was acquired by attending court proceedings or viewing court records open to public inspection. In *Landmark Communications v. Virginia*, the press published information about a pending confidential inquiry of a judicial review commission. *Landmark Commc'ns*, 435 U.S. at 830. The record in *Landmark Communications* was silent on the manner in which the newspaper acquired the information. *See* Landmark Commc'ns Inc. v. Virginia, 233 S.E.2d 120, 123 n.4 (1977). Nevertheless, the Supreme Court assumed the information was lawfully obtained. *See Landmark Commc'ns*, 435 U.S. at 837 (stating that the issue in the case was not "the possible applicability of the [Virginia penal] statute to one who secures . . . information by illegal means and thereafter divulges it").

the press in this arena is understandable. As indicated by the government's decision not to indict journalists along with Rosen and Weissman, the government understands prosecuting the press is politically messy.[220]

Similarly, the decision of Eli Lilly to go after two of the Zyprexa sealing-order conspirators but not Berenson or the *New York Times* is also illustrative of an important principle: it is not wise to aggressively attack a "powerful newspaper that buys ink by the barrel."[221] Since leaks generally leave no smoking gun, prosecutors would face a politically messy task in acquiring information about how the press and sources interact. Wiretaps on journalists' telephones are not politically attractive, nor are subpoenas seeking documents or information from journalists. Plus, such inquiries are likely to lead to the embarrassing exposure of highly-placed political figures as leakers. In short, there is no political upside in applying solicitation law to the press.

Legislatures are free to exempt the press from criminal laws, as some states have done, for example, with stalking,[222] but at this point this step is unnecessary in the solicitation context given the consensus that sources alone bear responsibility for leaks.

## IV. Conspiracy

Learned Hand described conspiracy as the "darling of the modern prosecutor's nursery" because of its frequent use and expansive nature.[223] Similarly, Justice Jackson described conspiracy an "elastic, sprawling and pervasive offense."[224] The pervasive aspect of conspiracy is underlined by the fact that nearly one quarter of all federal criminal prosecutions and a large number of state cases involve conspiracy counts.[225] Indeed, the crime is so pervasive that Judge Frank Easterbrook of the Seventh Circuit wrote, "[P]rosecutors seem to have conspiracy on their word processors as Count I."[226]

The elastic aspects of conspiracy law that make it especially

---

220. During a pretrial hearing in *Rosen*, Judge Ellis asked the government's attorney, "Does it make any difference to you if, instead of these defendants, it had been reporters for the *Washington Post* and the *Washington Times*?" Hearing on Motions to Dismiss at 49, United States v. Rosen, 520 F. Supp. 2d. 802 (E.D.Va. 2007), *available at* http://www.fas.org/sgp/jud/rosen032406.html. Kevin DiGregory, attorney for the United States, backed away from an earlier claim that the press has special constitutional status and said that due to the "function that the media serves in this country[,]" the government would carefully exercise its prosecutorial discretion. *Id.* at 52–53.

221. Starkman, *supra* note 14.

222. *See, e.g.*, NEV. REV. STAT. § 200.575(6)(e)(2) (2009) (exempting activities of reporter, photographer, cameraman or other employee of newspaper, periodical, press association, or radio or television station from stalking law). Other states exempt from stalking laws those who are lawfully engaged in bona fide business activity or constitutionally protected activities. *See, e.g.*, GA. CODE ANN. § 16-5-92 (2009); MINN. STAT. ANN. §609.749 sub. 7 (2009); MONT. CODE ANN § 45-5-220(2) (2007).

223. Harrison v. United States, 7 F.2d 259, 263 (2d Cir. 1925).

224. Krulewitch v. United States, 336 U.S. 440, 445 (1949) (Jackson, J., concurring).

225. Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1310 (2003).

226. United States v. Reynolds, 919 F.2d 435, 439 (7th Cir. 1990).

troubling are the following:[227] First, prosecutors in conspiracy cases do not need to prove the conspirators accomplished their illegal ends. Thus, a defendant's guilt or innocence is unaffected by the fact that the underlying crime was never committed.[228] Second, conspiracy is a separate offense from the underlying crime the conspirators aimed to accomplish. Conspiracy does not merge with the underlying crime, and a defendant may be convicted for conspiracy to commit a crime as well as the actual accomplishment of that crime.[229] Third, conspiracy law has an exception to the hearsay rule so that statements generally inadmissible become admissible in conspiracy cases.[230] Fourth, any party to a conspiracy is liable for the actions of co-conspirators. This is known as *Pinkerton* liability; a defendant may be convicted for acts committed by others in furtherance of a conspiracy even if the defendant did not participate in those acts.[231] Fifth, the term conspiracy has vague and unpleasant connotations. As Justice Jackson wrote in his famous concurring opinion in *Krulewitch v. United States*,[232] conspiracy "sounds historical undertones of treachery, secret plotting and violence on a scale that menaces social stability and the security of the state itself."[233] As will be shown, in cases such as *Dennis v. United States*,[234] conspiracy charges lead to an increased sense of danger and diminished protection for speech.

---

227. Professor Katyal summarized the contours of conspiracy law in the following manner:

> Imagine that Joe and Sandra agree to rob a bank. From the moment of agreement, they can be found guilty of conspiracy even if they never commit the robbery (it's called "inchoate liability"). Even if the bank goes out of business, they can still be liable for the conspiracy ("impossibility" is not a defense). Joe can be liable for other crimes that Sandra commits to further the conspiracy's objective, like hot-wiring a getaway car (it's called "Pinkerton" liability, after a 1946 Supreme Court case involving tax offenses). He can't evade liability by staying home on the day of the robbery (a conspirator has to take an affirmative step to "withdraw"). And if the bank heist takes place, both Joe and Sandra can be charged with bank robbery and with the separate crime of conspiracy, each of which carries its own punishment (the crime of conspiracy doesn't "merge" with the underlying crime).

Katyal, *supra* note 225, at 1309.

228. Salinas v. United States, 522 U.S. 52, 65 (1997) (stating that a conspiracy may be punished whether or not the substantive crime ensues, "for the conspiracy is a distinct evil, dangerous to the public, and so punishable in itself").

229. United States v. Felix, 503 U.S. 378, 389 (1992) (holding that conspiracy is a partnership in crime distinct from any substantive offense).

230. Bourjaily v. United States, 483 U.S. 171, 183 (1987) ("co-conspirators' statements, when made in the course and in furtherance of the conspiracy, have a long tradition of being outside the compass of the general hearsay exclusion.").

231. Pinkerton v. United States, 328 U.S. 640, 646–47 (1946) (establishing vicarious liability in conspiracy cases).

232. 336 U.S. 440 (1949).

233. *Id.* at 448 (Jackson, J., concurring). Indeed, the infamous Sedition Act of 1798 had a provision making it illegal to "combine or conspire together" to "counsel, advise or attempt to procure any insurrection, riot, unlawful assembly, or combination, whether such conspiracy, threatening, counsel, advice, or attempt shall have the proposed effect or not[.]" 1 Stat. 596 (1798); *see generally* JAMES MORTON SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES (1956).

234. 341 U.S. 494 (1951).

News organizations or journalists have rarely been charged with conspiracy;[235] some notable exceptions are *Associated Press v. United States*,[236] the famous antitrust case, and *Carpenter v. United States*,[237] in which a *Wall Street Journal* reporter provided two stockbrokers with information about to be published in the *Journal* so that the brokers could make trades in anticipation of the probable impact of the information on the market.[238]

The most prominent application of conspiracy doctrine in the free expression context has been against dissidents.[239] Examples include World War I era anarchists,[240] Communists during the Red Scare of the 1950s,[241] and opponents of the Vietnam War.[242] Commentators have criticized the approach taken by courts in these cases, noting that courts "have upheld use of conspiracy to prosecute for past illegal utterances while citing reasons for its use as an inchoate offense. At the same time, they have failed to perceive the difficulties of applying first amendment standards where projected or future advocacy has not yet occurred."[243]

Conspiracy cases brought against public communicators can be divided into two distinct groups. On the one hand are cases where the object of the conspiracy is speech, such as advocacy of Communist doctrine. Courts in these cases assess whether the speech may be protected. On the other hand are cases where speech is used to accomplish objectives such as gaining economic advantage through illegal means. In the latter type of case, the Court regards the speech at issue as not covered by the First Amendment; consequently, no substantive First Amendment analysis takes place. The Court has yet to address a conspiracy that aimed to produce speech but also included the illegal acquisition of information.

---

235. *But see* Schaefer v. United States, 251 U.S. 466 (1920); Frohwerk v. United States, 249 U.S. 204 (1919) (detailing prosecution of World War I era German-language newspapers for conspiracy to violate the Espionage Act).

236. 326 U.S. 1 (1945) (conspiracy to violate the Sherman Act).

237. 484 U.S. 19 (1987) (conspiracy to misappropriate employer's proprietary information).

238. *See generally id.*

239. David B. Filvaroff, *Conspiracy and the First Amendment,* 121 U. PA. L. REV. 189, 200 (1972) ("Not surprisingly, most of the American speech-crime conspiracy law has been developed in times of national tension. Each of the key decisions involved dissenters whose political deviance tended to magnify their perceived threat to national security, thereby probably helping to propel the courts to pro-government results"); Note, *Conspiracy and the First Amendment*, 79 YALE L.J. 872, 872 (1970) (indicating that, throughout periods of collective paranoia in American history, conspiracy law has been one of the primary governmental tools employed to deter individuals from joining controversial political causes and groups). *See also* Marie E. Siesseger, Note, *Conspiracy Theory: The Use of the Conspiracy Doctrine in Times of National Crisis*, 46 WM. & MARY L. REV. 1177, 1178 (2004) (claiming that conspiracy doctrine "has the potential to become perverted and unduly expanded when political and social stresses are placed upon it.").

240. Abrams v. United States, 250 U.S. 616 (1919) (conspiracy to violate the Espionage Act).

241. Dennis v. United States, 341 U.S. 494 (1951) (conspiracy to violate the Smith Act).

242. United States v. Spock, 416 F.2d 165 (1st Cir. 1969) (conspiracy to violate the Selective Service Act).

243. Filvaroff, *supra* note 239, at 232.

A. Speech as the Objective of the Conspiracy

*Dennis v. United States,* involving the provisions of the Smith Act punishing conspiracy to advocate violent overthrow of the government, shows how the charge of conspiracy can deflate protection for speech.[244] To the *Dennis* plurality, discussion of political doctrine such as Marxism was within the coverage of the First Amendment,[245] but the formation of "a highly organized conspiracy" posed special dangers to society.[246] In effect, the conspiracy charge elevated the plurality's evaluation of the gravity of the danger and deflated the protection for speech.[247]

Chief Justice Vinson, writing for the plurality, referred to the Communist Party's "rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come for action, coupled with the inflammable nature of world conditions" as creating a grave danger,[248] albeit one which dissenting Justices Black and Douglas argued was not imminent.[249] The fact that the petitioners were charged with "a conspiracy to advocate, as distinguished from the advocacy itself,"[250] was immaterial to Chief Justice Vinson. He wrote, "It is the existence of the conspiracy which creates the danger. If the ingredients of the reaction are present, we cannot bind the Government to wait until the catalyst is added."[251]

Justices Black and Douglas objected to the conspiracy charge, with Justice Black offering the following comment:

> These petitioners were not charged with an attempt to overthrow the Government. They were not charged with overt acts of any

---

244. *Dennis*, 341 U.S. 494 (1951).

245. *Id.* at 502–03, 513 ("[W]e must pay special heed to the demands of the [F]irst [A]mendment . . . . Whether the [F]irst [A]mendment protects the activity . . . must depend upon a judicial determination of the scope of the [F]irst [A]mendment applied to the circumstances of the case.").

246. *Id.* at 511.

247. As Filvaroff wrote, "In *Dennis* itself, the Vinson and Jackson opinions focused less on what the defendants before the Court actually said than on the asserted enormity of the danger posed by their ideology and their movement . . . . it appears in *Dennis* that the measure of danger and its imminence were not tested by the words of the several defendants, but by the vaguely described threat of the communist conspiracy[.]" Filvaroff, *supra* note 239, at 216.

248. *Dennis*, 341 U.S. at 511. Justice Jackson, like Chief Justice Vinson, believed the Smith Act was appropriately applied in *Dennis*, but believed the clear and present danger test was inapplicable in a case raising so many "imponderables, including international and national phenomena which baffle the best informed foreign offices and our most experienced politicians." *Id.* at 570 (Jackson, J., concurring).

249. *Id.* at 584–89 (Douglas, J., dissenting). Additionally, Justice Douglas did not believe the ideas of Communism needed to be feared. He wrote that free speech had so "thoroughly exposed [Communism] in this country that it ha[d] been crippled as a political force." *Id.* at 588 (Douglas, J., dissenting).

250. *Id.* at 511.

251. *Id.* (internal citations omitted). Filvaroff commented that Vinson's opinion "contained no substantive analysis of the elements of the crime and nothing significant was said about intent . . . . There was no review of the evidence, although the grant of certiorari went to the constitutionality of the Smith Act *as applied*." Filvaroff, *supra* note 239, at 210 (emphasis in original).

> kind designed to overthrow the Government. They were not even charged with saying anything or writing anything designed to overthrow the Government. The charge was that they agreed to assemble and to talk and publish certain ideas at a later date[.][252]

*Dennis* was issued at the height of the Red Scare. Six years later, after McCarthyism had subsided, the Warren Court adopted a markedly different approach to the same issues. In *Yates v. United States*,[253] the Court by a 6–1 vote downplayed the conspiracy issue and focused on a distinction between advocacy of abstract doctrine and advocacy directed at producing unlawful action.[254] The Court held that advocacy of forcible overthrow as an abstract principle "divorced from any effort to instigate action to that end" was outside the scope of the Smith Act.[255] Although couched in terms of statutory interpretation, this distinction was motivated by First Amendment principles and was later expressed as First Amendment doctrine in *Brandenburg v. Ohio*.[256]

### B. Conspiracies Designed to Achieve Economic Goals

In conspiracy cases involving proposals for unlawful transactions in violation of generally applicable laws, the Court has refused to engage in any substantive First Amendment analysis. Justice Black, who dissented in *Dennis*, wrote two opinions for the Court treating such conspiracies as outside the First Amendment's coverage.

In *Associated Press v. United States*,[257] Black rejected newspaper publisher claims that the First Amendment provided the press with an exemption from the antitrust laws, specifically the conspiracy provisions in Section 1 of the Sherman Act.[258] At issue were Associated Press bylaws prohibiting member newspapers from selling news stories to non-members. Justice Black wrote, "The fact that the publisher handles news . . . does not . . . afford the publisher a peculiar constitutional sanctuary in which he can with impunity violate laws regulating his business practices."[259] The First Amendment protected publishing from prior restraint or punishment;[260] it

---

252. *Dennis*, 341 U.S. at 579 (Black, J., dissenting); *see also id.* at 584 (Douglas, J., dissenting) ("To make a lawful speech unlawful because two men conceive it is to raise the law of conspiracy to appalling proportions.").

253. 354 U.S. 298 (1957).

254. *Id.* at 298, 318–19.

255. *Id.* at 318.

256. 395 U.S. 444, 447 (1969) (holding the constitutional guarantees of free speech do not permit a State to forbid or proscribe advocacy of the use of force except where such advocacy is directed to inciting imminent lawless action and is likely to produce such action).

257. 326 U.S. 1 (1945).

258. *Id.* at 32–33 (indicating that conspiracy provisions of the Sherman Act apply equally to the press).

259. *Id.* at 7.

260. *Id.* (describing clear and present danger doctrine as providing "protection for utterances

did not provide an exemption from generally applicable laws such as the antitrust statutes. Justice Black concluded, "Freedom to publish is [guaranteed] by the Constitution, but freedom to combine to keep others from publishing is not."[261]

Similarly, in *Giboney v. Empire Storage & Ice Co.*, as shown earlier, Justice Black stressed that union picketing calculated to force a company to refuse to sell to non-union members in violation of a state antitrust law was not "speech" in a constitutional sense.[262] In both *Associated Press* and *Giboney*, the Court did not engage in any meaningful First Amendment analysis because it believed no constitutionally significant speech was at stake.

Given these two different approaches, how should the conspiracy charge in the Rosen and Weissman case have been assessed? That the conspiracy's objective was to produce speech would seem to warrant First Amendment analysis of whether that speech was constitutionally protected. A complicating factor, however, is that the conspiracy involved Franklin's illegal disclosure of classified information. The government complained that since the conspiracy was premised on an illegal transaction, no First Amendment analysis was called for.[263]

### C. Rosen, Weissman and Franklin: A Conspiracy to Violate the Espionage Act?

Lawrence Franklin, an expert on Iran in the Office of the Secretary of Defense, was "frustrated" with American foreign policy in the Middle East.[264] Franklin believed that by leaking information about Iran to the press, an Israeli diplomat, and Steven Rosen and Keith Weissman of AIPAC, Iran's threat to American security would be taken more seriously by the National Security Council (NSC).[265] Franklin also had a more self-interested goal—he hoped to obtain a position at the NSC.

The FBI had been monitoring the activities of Rosen and Weissman since 1999 as part of a wide-ranging investigation of possible Israeli espionage within the United States. When Franklin began meeting with

---

themselves, so that the printed or spoken word may not be that subject of previous restraint or punishment"); *see also id.* at 20 n.18 (stating that antitrust decree does not interfere with freedom to print).

261. *Id.* at 20.

262. 336 U.S. 490, 498 (1949).

263. Brief of the United States at 42, United States v. Rosen, 557 F.3d 192 (4th Cir. 2009) (No. 08-4358), *available at* 2008 WL 2959062 (stating that the district court erred in holding that "unlawfully conspiring to steal this nation's secrets" was among the First Amendment's core values); United States v. Rosen, 445 F. Supp. 2d 602, 629–30 (E.D. Va. 2006) (noting that the government advocates a categorical rule that the espionage statutes cannot implicate the First Amendment).

264. Jerry Markon, *Pentagon Analyst Given 12 ½ Years in Secrets Case*, WASH. POST., Jan. 21, 2006, at A1.

265. Eric Lichtblau, *Pentagon Analyst Admits He Shared Secret Information*, N.Y. TIMES, Oct. 6, 2005, at A21.

them in 2003, the FBI was listening. Through this surveillance, for example, the FBI learned that at a lunch on June 26, 2003, Franklin orally disclosed classified information about potential attacks on American forces in Iraq, adding that the information was "highly classified."[266]

During a June 30, 2004 interview with the FBI, Franklin admitted to leaking classified information to Rosen and Weissman, an Israeli diplomat, and the press.[267] Franklin agreed to cooperate with the FBI; following the FBI's instructions and wearing a hidden microphone, Franklin met with Weissman on July 24, 2004 and warned Weissman that the information he was about to disclose about Iran's actions in Iraq was highly classified "Agency stuff" and that Weissman could "get in trouble" for having the information.[268] Later that day, Weissman shared the information with Rosen, other AIPAC colleagues, an Israeli diplomat, and Glenn Kessler of the *Washington Post*. The wiretap of Weissman and Rosen's telephone call with Kessler revealed Rosen offering Kessler a remark he frequently made when talking with journalists: "at least we have no Official Secrets Act."[269]

Unfortunately for Rosen and Weissman, Paul McNulty, the United States Attorney for the Eastern District of Virginia, upset a longstanding political consensus by viewing the Espionage Act as an effective way of combating leaks. Rosen and Weissman were charged with conspiring with Franklin to communicate national defense information (NDI) to those unauthorized to receive it.[270] In announcing the indictments, McNulty stated, "Those not authorized to receive classified information must resist the temptation to acquire it, no matter what their motivation may be."[271]

Franklin, as a government employee who held a Top Secret security

---

266. Superseding Indictment at 13, United States v. Rosen, 445 F. Supp. 2d 602 (E.D. Va. 2006) (No. 05-CR-225), *available at* http://www.fas.org/irp/ops/ci/franklin0805.pdf.

267. Affidavit in Support of Criminal Complaint and Arrest Warrant at 8, United States v. Franklin, No. 05-CR-309 (E.D. Va. May 3, 2005) *available at* http://news.findlaw.com/cnn/docs/dod/usfrnkln50305cmp.pdf.

268. Superseding Indictment, *supra* note 266, at 15. Franklin was authorized to disclose this information. *Id.* at 3.

269. Dana Milbank, *Amid AIPAC's Big Show, Straight Talk With a Noticeable Silence*, WASH. POST, Mar. 7, 2006, at A2.

270. Superseding Indictment, *supra* note 266, at 8. Rosen was separately charged with aiding and abetting Franklin's disclosure of classified information by providing a fax number for the transmission of a classified document. *Id.* at Count III. Judge Ellis ruled that a critical element of the government's burden of proof on this charge was Rosen's awareness of the illegal nature of Franklin's activity. United States v. Rosen, 240 F.R.D. 204, 209–10 (E.D. Va. 2007). This was similar to the burden of proof on the conspiracy charge. *See infra* notes 298–307 and accompanying text. The emphasis in this discussion is on the conspiracy issues. Although aiding and abetting and conspiracy are separate crimes, the same evidence of a defendant's participation in a conspiracy may support proof of guilt of aiding and abetting. *See* United States v. Burgos, 94 F.3d 849, 873 (4th Cir. 1996). Of course, an individual may be found innocent on a conspiracy charge, yet may still be guilty of aiding and abetting. *See, e.g.*, United States v. Winans, 612 F. Supp. 827 (S.D.N.Y. 1985) (finding one of the defendants not to be a conspirator, but he did aid and abet the scheme).

271. Neil A. Lewis, *Trial to Offer Look at World of Information Trading*, N.Y. TIMES, Mar. 3, 2008, at A14.

clearance and had repeatedly signed agreements acknowledging his obligation to safeguard classified information, had no First Amendment defense. As Judge Donald S. Russell said in the only other Espionage Act prosecution of a government official for leaking information to the press, a "recreant intelligence department employee" who leaks is "not entitled to invoke the First Amendment as a shield to immunize his act of thievery."[272] Accordingly, Franklin pled guilty and agreed to assist the prosecution.[273] Rosen and Weissman, as outsiders, however, had no employment or contractual obligation with the government and their unprecedented prosecution raised novel First Amendment questions.[274]

Judge T.S. Ellis III issued several pretrial rulings that created significant difficulties for the government. First, he imposed heightened scienter requirements as a way of protecting First Amendment rights.[275] Second, he authorized the testimony of defense expert J. William Leonard as to whether the information at issue was properly categorized as NDI.[276] Third, he authorized the testimony of former high-level officials such as Condoleezza Rice to show the government frequently used AIPAC as a diplomatic back channel.[277] Although Ellis wrote comparatively little about the conspiracy issue, the scienter requirements he found necessary under the First Amendment would be an important aspect of his definition of conspiracy. A brief comment by the Fourth Circuit, however, undercuts Ellis's interpretation of the Espionage Act.[278]

Judge Ellis discussed the First Amendment issues in a memorandum opinion, known as the Section 793 opinion, that held that the conduct at issue, "collecting information about United States[] foreign policy and discussing that information with government officials (both United States and foreign), journalists, and other participants in the foreign policy establishment," was deserving of First Amendment scrutiny.[279] This was central to Judge Ellis's reading of the statute. If he had agreed with the government and regarded the conduct as similar to the behavior at issue in *Williams*, no First Amendment glosses, such as proof of intent to cause

---

272. United States v. Morison, 844 F.2d 1057, 1069 (4th Cir. 1988). The status of government employees who leak is discussed in Lee, *Deep Background, supra* note 31, at 1478–90.

273. *Sentence Reduced in Pentagon Case,* WASH. POST, June 12, 2009, at A12. After the charges were dropped against Rosen and Weissman, the twelve and a half year sentence given to Franklin was reduced to probation and ten months of home confinement. *Id.*

274. *See* United States v. Rosen, 445 F. Supp. 2d 602, 627 ("[D]efendants argue that . . . application of the statute to these defendants is so novel and unprecedented that it violates the fair warning prong of the vagueness doctrine.").

275. United States v. Rosen, 445 F. Supp. 2d 602, 636 (E.D. Va. 2006).

276. United States v. Rosen, 599 F. Supp. 2d 690, 692 (E.D. Va. 2009).

277. United States v. Rosen, 520 F. Supp. 2d 802, 813-14 (E.D. Va. 2007).

278. United States v. Rosen, 557 F.3d 192, 199 n.8 (4th Cir. 2009).

279. United States v. Rosen, 445 F. Supp. 2d 602, 630 (E.D. Va. 2006). Even when more narrowly defined as "passing of government secrets relating to the national defense to those not entitled to receive them in an attempt to influence United States foreign policy," the conduct was "unquestionably still deserving of First Amendment scrutiny." *Id.*

harm, would have been necessary.[280]

Judge Ellis, though, did not go as far as the defendants wanted and rejected their claim that only insiders such as Franklin could be punished for the unauthorized disclosure of NDI.[281] He found that common sense and *New York Times Co. v. United States*,[282] in which several Justices suggested that a post-publication prosecution of the newspapers publishing the Pentagon Papers would be constitutionally acceptable,[283] led to the conclusion that those outside the government can be punished for the "unauthorized receipt and deliberate retransmission" of NDI.[284]

To ensure the Espionage Act would be applied only where national security was genuinely at risk,[285] Ellis imposed a number of limiting constructions on the Act. These were summarized as follows:

> [T]o establish a prosecution for conspiracy to violate § 793(d) and (e) by orally disclosing NDI, the government must prove beyond a reasonable doubt that at the time they entered the unlawful agreement, the defendants (i) knew that the information the conspiracy sought to obtain and disclose was NDI, *i.e.*, knew that the information was closely held by the government and that the disclosure of the information would be damaging to the national security, (ii) knew the persons to whom the disclosures would be made were not authorized to receive the information, (iii) knew the disclosures the conspiracy contemplated making were unlawful, (iv) had reason to believe the information disclosed could be used to the injury of the United States or to the aid of a foreign nation, and (v) intended that such injury to the United States or aid to a foreign nation result from the disclosures.[286]

The government argued in an unsuccessful appeal to the Fourth Circuit that the statute only had two intent requirements: a) proof that the defendants had reason to believe that the NDI at issue could be used to the injury of the United States or to the advantage of any foreign nation; and b) proof that the defendants "willfully" communicated the information.[287]

---

280. Brief for the United States at 41–43, United States v. Rosen, 557 F.3d 192 (4th Cir. 2009) (No. 08-4358), *available at* 2008 WL 2959062 (citing *Williams* for the proposition that speech with no value is categorically excluded from First Amendment protection). *See also supra* note 256.

281. *Rosen*, 445 F. Supp. 2d at 637.

282. 403 U.S. 713 (1971).

283. *See, e.g.*, *id.* at 737–39 (White, J., concurring) (stating that he would have no difficulty in sustaining post-publication convictions under the Espionage Act on facts that would not justify the imposition of a prior restraint).

284. *Rosen*, 445 F. Supp. 2d at 637.

285. *Id.* at 639.

286. United States v. Rosen, 520 F. Supp. 2d 786, 793 (E.D. Va. 2007).

287. Brief of the United States at 13, United States v. Rosen, 557 F.3d 192 (4th Cir. 2009) (No. 08-4348), *available at* 2008 WL 2959062 (quoting 18 U.S.C. §§ 793(d) (2004)). The government argued that the statute's existing elements ensure its constitutional application and no "judicial gloss"

According to the government, Judge Ellis labored "under a basic misunderstanding about the elements of the 'crime charged.' Specifically . . . one necessarily searches Section 793 in vain for the numerous judicial 'glosses' that the district court imposed . . . on the statute's otherwise straightforward willfulness requirement."[288] While the Fourth Circuit regarded an appeal of Judge Ellis's pretrial Section 793 order as inappropriate,[289] it did offer the following comment:

> Although we do not possess jurisdiction to review the § 793 Order at this juncture, it is apparent that the district court worked tirelessly to balance the competing forces inherent in a prosecution involving classified information, and that its efforts to protect the fair trial rights of the defendants were not inappropriate. *We are nevertheless concerned by the potential that the § 793 Order imposes an additional burden on the prosecution not mandated by the governing statute.* Section 793 must be applied according to its provisions, as any other course could result in erroneous evidentiary rulings or jury instructions.[290]

The government abandoned the case in part due to the increased burdens posed by Judge Ellis's interpretation of the Espionage Act.[291] But as the comment by the Fourth Circuit indicates, it is an open question as to

---

was necessary. *Id.* at 49.

288. Reply Brief of the United States at 5–6, United States v. Rosen, 557 F.3d 192 (4th Cir. 2009) (No. 08-4358), *available at* 2008 WL 4370897.

289. Court Order Granting Defendant's Motion to Dismiss Most of the Appeal at 1–2, United States v. Rosen, 557 F.3d 192 (4th Cir. 2009) (No, 08-4358), *available at* http://www.fas.org/sgp/jud/aipac/062008order.pdf. In 2008, the Fourth Circuit dismissed as interlocutory the government's appeal of the district court's § 793 Order. *Id.* In a later appeal of Judge Ellis's rulings on the admissibility of two classified documents, the government renewed its claim that the district court had erroneously interpreted the statute. Brief of the United States at 13–14 United States v. Rosen, 557 F.3d 192 (4th Cir. 2009) (No. 08-4348), *available at* http://www.fas.org/sgp/jud/aipac/rosen072508.pdf. The Fourth Circuit affirmed the district court's rulings on the classified documents and added that the government's effort to "piggyback a pretrial review of the court's interpretation of § 793 is improper at this juncture." United States v. Rosen, 557 F.3d 192, 199 (4th Cir. 2009).

290. *Rosen*, 557 F.3d at 199 n.8 (4th Cir. 2009) (emphasis added).

291. In seeking dismissal of the indictment, the government's attorneys wrote the following:

> The landscape of this case has changed significantly since it was first brought. The pleadings filed in this Court and in the Court of Appeals for the Fourth Circuit document the Government's disagreement with some of the legal rulings in this case. In addition to adjusting to the requirement of meeting an unexpectedly higher evidentiary threshold in order to prevail at trial, the Government must also assess the nature, quality, and quantity of evidence—including information relevant to prosecution and defense theories expected at trial. In the proper discharge of our duties and obligations, we have re-evaluated the case based on the present context and circumstances, and determined that it is in the public interest to dismiss the pending superseding indictment.

Motion to Dismiss Superseding Indictment at 1–2, United States v. Rosen, 445 F. Supp. 2d 602 (E.D. Va. 2009) (No. 05-CR-225), *available at* 2009 WL 1162779; *see also supra* note 7.

whether that interpretation is correct. Stated differently, if the government's reading of the statute is correct, Section 793 of the Espionage Act could become a potent weapon against outsiders who conspire with insiders to disseminate NDI to unauthorized recipients. Strict enforcement of the Espionage Act in the context of leaking would require, however, a significant change in our political culture.

Because this was a conspiracy case, it was technically unnecessary for the government to prove that Rosen and Weissman obtained and disclosed NDI. It was sufficient to show that the conspiracy's *goal* was the disclosure of NDI to unauthorized recipients.[292] As a practical matter, though, the government acknowledged that to persuade a jury to convict, it must prove the conspirators succeeded in obtaining NDI.[293] Hence, "a major battleground at trial" would have been a dispute over whether the information obtained and disclosed qualifies as NDI (information closely held by the United States and potentially damaging to the United States or helpful to a foreign nation if disclosed).[294] In a significant pretrial ruling, Ellis said that the fact that information is classified was not determinative as to whether it was closely held; the defendants could show that the information was leaked or otherwise in the public domain.[295] Further, the government's classification decision was inadmissible hearsay on the second prong of the NDI definition, whether unauthorized disclosure might damage the United States or aid a foreign nation.[296] Ellis's ruling meant that unlike FOIA cases where courts defer to executive branch officials on matters of classification,[297] the jury would decide whether the information was NDI largely on the basis of expert testimony.

To that end, Ellis authorized the testimony of J. William Leonard, a retired government official with "unsurpassed" experience in information classification,[298] who was prepared to testify that the information at issue was not NDI.[299] After the government dropped the charges, Leonard wrote

---

292. United States v. Rosen, 520 F. Supp. 2d 786, 792–93 (E.D. Va. 2007).

293. United States v. Rosen, 599 F. Supp. 2d 690, 694 n.6 (E.D. Va. 2009).

294. *Id.* at 694.

295. *Id.* at 695.

296. *Id.*

297. *See* KENT R. MIDDLETON & WILLIAM E. LEE, THE LAW OF PUBLIC COMMUNICATION 569 (2010 Update ed., 2009) (stating that courts rarely order the release of national security information the executive branch says should be classified).

298. *Rosen*, 599 F. Supp. 2d at 697. Judge Ellis commented that it was understandable that the defense would characterize Leonard's experience and expertise as "unsurpassed." Among Leonard's extensive qualifications was a six-year stint as Director of the Information Security Oversight Office, colloquially known as the "Classification Czar" responsible for oversight of the government-wide information classification system. *Id.* He also served as Executive Secretary of the Interagency Security Classification Appeals Panel, an agency that reviews classification decisions to determine whether classified information meets the required classification standards. *Id.*

299. J. William Leonard's Motion to Quash Defendant's Subpoena at 1, United States v. Rosen, 599 F. Supp. 2d 690 (E.D. Va. 2009) (No. 05-CR-225), *available at* http://www.fas.org/sgp/jud/aipac/leonard082808.pdf. As Leonard's attorney wrote, Leonard's expert opinion "is the government has not and will not be able to satisfy its burden to prove that the

in his blog that he

> became convinced that the Government would not be able to demonstrate that the specific information the defendants were accused of disclosing was indeed classified in accordance with the process set forth by the President or that, in other instances, it would be easy for the defense to demonstrate that the information was already widely known and thus part of the vast morass of official information subject to the frequent abuse of over-classification.[300]

To disprove that they knew their activities were unlawful, Rosen and Weissman also sought to show that American diplomats frequently used AIPAC as a back channel for U.S. diplomacy. Judge Ellis authorized subpoenas for sixteen high-level officials, such as Condoleezza Rice, to demonstrate that Rosen and Weissman frequently had meetings with officials in which classified information was disclosed.[301] Rosen and Weissman claimed that in their minds "there was simply no difference between the meetings for which they [were] not charged and those for which they [were] charged, and that they believed the meetings charged in the Indictment were simply further examples of the government's use of AIPAC as a diplomatic back channel."[302] In fact, lawyers for Rosen and Weissman wrote to Attorney General Eric Holder that two of the government officials other than Franklin who prosecutors said passed classified information to the defendants "have told both us and/or government investigators, that they were authorized to speak with our clients and knew full well (and even intended) that our clients pass the information on to others."[303]

It is critical to emphasize that Rosen and Weissman were not charged with the substantive offense of unauthorized dissemination of NDI. Rather, they were charged with *conspiring* to commit this offense. The central elements of a conspiracy are "an agreement among the defendants *to do something which the law prohibits*; knowing and willing participation by the defendants in the agreement; and an overt act by the defendants in

---

information disclosed to or by Defendants was classified national defense information." *Id.* The Government sought to prevent Leonard's testimony on the ground that he was statutorily barred from testifying against the United States. Government's Opposition to Order Authorizing Testimony of Defense Expert J. William Leonard at 1, United States v. Rosen, 599 F. Supp. 2d 690 (E.D. Va 2009) (No. 1:05CR225), *available at* http://www.fas.org/sgp/jud/aipac/usa033108.pdf. Ellis rejected this argument. *Rosen*, 599 F. Supp. 2d at 697–701.

300. Witness for the Defense, http://www.secgov.info/2009/06/withness-for-defense.html (June 27, 2009, 15:31 EST).

301. United States v. Rosen, 520 F. Supp. 2d 802, 813 (E.D. Va. 2007).

302. *Id.*

303. Walter Pincus, *A Look at the Dropping of Espionage Charges*, WASH. POST, May 5, 2009, at A19.

furtherance of the purpose of the agreement."[304] Although the indictment alleged fifty-seven overt acts in furtherance of the conspiracy, it was not necessary to prove all of these acts, only that one conspirator committed one of the alleged overt acts.[305] Nor was it necessary to prove that the overt act was independently criminal, as long as the act was "an effort to accomplish some object of the conspiracy."[306]

This meant that Rosen and Weissman's cultivation of a relationship with Franklin—consisting of mealtime meetings and in one instance taking Franklin to a Baltimore Orioles baseball game—was criminal if done with the mental states necessary to violate the Espionage Act. As I wrote elsewhere, if Rosen and Weissman's cultivation of a relationship with Franklin was illegal, "then reporters are in widespread violation of the Espionage Act. Reporters carefully cultivate relationships with government officials, frequently meet for meals with those officials, ask about classified topics—knowing the restraints upon those officials—and promise anonymity in exchange for information."[307] Conceivably reporters would be even more at risk because they solicit classified information from government sources. The indictment did not claim that Rosen and Weissman solicited classified information from Franklin; their crime was *agreeing* to listen to Franklin with knowledge that his disclosures and their subsequent disclosures were illegal.

Recall that under *Bartnicki*, knowledge of the tainted origin of information does not render its publication illegal.[308] Rosen and Weissman argued that even if they were aware of the illegality of Franklin's disclosures to them, their disclosures to others were protected.[309] By contrast, the government claimed Rosen and Weissman were not "mere" recipients; they were conspirators.[310] Judge Ellis did not address the relevance of *Bartnicki* in his Section 793 order, but his ruling on burden of proof issues required that the government prove Rosen and Weissman knew of the illegality of Franklin's acts.[311]

A close reading of *Bartnicki* reveals what may be a significant distinction between the wiretapping laws at issue in that case and Section 793 of the Espionage Act. The wiretapping laws do not prohibit the *receipt or possession* of illegal recordings.[312] In contrast, Section 793(e) prohibits

---

304. United States v. Rosen, 520 F. Supp. 2d 786, 791 (E.D. Va. 2007) (quoting United States v. Hedgepeth, 418 F.3d 411, 420 (4th Cir. 2005)).

305. *Id.* (citing United States v. Fleschner, 98 F.3d 155, 159 (4th Cir. 1996)).

306. *Id.* (quoting *Fleschner*, 98 F.3d at 159).

307. Lee, *Deep Background*, supra note 31, at 1518.

308. Bartnicki v. Vopper, 532 U.S. 514, 518 (2001).

309. Transcript of Motions Hearing at 42–43, United States v. Rosen, 240 F.R.D. 204 (E.D. Va. 2007) (No. 05-CR-225), *available at* http://ftp.fas.org/sgp/jud/rosen042106.html.

310. *Id.* at 24.

311. United States v. Rosen, 240 F.R.D. 204, 209–10 (E.D. Va. 2007).

312. As Judge Hogan wrote in *Boehner*,

> Although the wiretap statutes prohibit the Martin's interception, and the Martin's

unlawful possession of NDI.[313] Moreover, *Bartnicki* and its progeny involve the passive receipt of information. It may be that Rosen and Weissman's cultivation of a relationship with Franklin goes far beyond the boundaries set by *Bartnicki*.[314] Indeed, any activities that can be cast as an inducement for Franklin to violate his security agreements might be regarded as outside of *Bartnicki*'s privilege.

Apart from whether Judge Ellis's reading of Section 793 is correct, the other significant unanswered question in this case is the relevance of knowledge of the illegality of a source's disclosure. Journalists do passively receive information from sources, but more often they seek information from sources. The newsgathering process would be fundamentally altered if journalists were liable for crimes such as conspiracy whenever it could be shown that they went beyond waiting for unmarked packages in the mail.

## Conclusion

Congress has the authority to enact measures protecting the government's secrets.[315] Restrictions aimed at government insiders, if properly crafted to avoid issues such as vagueness, do not raise constitutional questions as government employees do not have a First Amendment right to leak information obtained in the course of their employment.[316] More novel problems are presented by criminalization of the activities of outsiders, such as journalists, who solicit classified information or cultivate relationships with insiders to receive leaks. As this

---

> disclosure of the tape to Reps. Thurman and McDermott, they do not prohibit Rep. McDermott's *receipt* of the tape. Because defendant did not break any laws in taking possession of the tape, he lawfully obtained that information, in a literal sense.

Boehner v. McDermott, No. 98-CV-594, 1998 WL 436897 at *4 (D.D.C. July 28, 1998).

313. The statute prohibits those in unlawful possession of NDI from transmitting it to unauthorized recipients or retaining it. Unauthorized possessors must deliver the information to an authorized employee of the United States, an obvious impossibility with orally disclosed information. *See* Harold Edgar & Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929, 1049 (1973) (stating that this provision is "meaningless as to information not in tangible form").

314. Professor Vladeck reads *Bartnicki*'s First Amendment privilege as applying "only where it is not *also* a crime for the media to *possess* the information, and where the media had no role in obtaining the information in the first place." Stephen J. Vladeck, *Inchoate Liability and the Espionage Act: The Statutory Framework and the Freedom of the Press*, 1 HARV. L. & POL'Y REV. 219, 234 (2007) (emphasis in original). Thus, as long as "the *retention* of classified national security information is itself unlawful, and so long as the reporters are being punished not for the act of publication itself, but for the unlawful gathering of secret information, it is impossible to find any precedent in the Supreme Court's jurisprudence that would recognize a First Amendment defense." *Id.*

315. *See, e.g.*, Snepp v. United States, 444 U.S. 507, 509 n.3 (1980) ("The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service.")

316. In the rare prosecutions of government insiders who leaked to the press, courts have refused to regard this behavior as within the First Amendment's coverage. *See, e.g.*, United States v. Morison, 844 F.2d. 1057, 1069 (4th Cir. 1988).

Article shows, the right of the press to publish confidential information is well established. There is, however, a paucity of constitutional doctrine protecting newsgathering activities that seek the leaking of confidential information.

If *Williams* means what a fair reading suggests, Congress may punish outsiders who solicit classified information or conspire to receive leaks. The question is why Congress has yet to do so. The answer is found in the consensus in Washington that leaks to the press play an especially vital role in the democratic process.[317] Unless there is a massive realignment in our political culture, Congress will not enact something akin to the Official Secrets Act. Similarly, the anomalous prosecution of Rosen and Weissman upset a longstanding consensus that the Espionage Act is an unwieldy instrument for prosecuting leaks. Significant questions remain about Judge Ellis's interpretation of the Espionage Act, and these questions increase the need for legislative clarification[318] but are unlikely to motivate prosecutors to attempt to apply the Espionage Act to the press.

The political consensus about the importance of leaks to the press also explains why Rosen and Weissman were charged, while Bob Woodward of the *Washington Post* remained free to obtain and publish the government's secrets.[319] The activities of Rosen and Weissman are constitutionally indistinguishable from those of Woodward, yet prosecutors in the case viewed the defendants as playing a less important role in society than the press.[320] Indeed, prosecutors emphasized that Rosen and Weissman were not members of the press but were "lobbyists representing for all practical purposes the interests of a foreign country."[321] Moreover, an investigation of the activities of lobbyists is not accompanied by the same political considerations as an investigation of journalists. There is little appetite among Washington policy makers to probe the newsgathering methods of the press. If special prosecutor Patrick Fitzgerald's actions had been subject to Department of Justice approval, his leak investigation would

317. Lee, *Deep Background*, *supra* note 31, at 1467–70.

318. Even Judge Ellis encouraged Congress to revisit the Espionage Act. Due to technological and political changes that have transpired since the enactment of the Espionage Act, Ellis said, "[T]he time is ripe for Congress to engage in a thorough review and revision of these provisions" to ensure that the Act reflects "contemporary views about the appropriate balance between our nation's security and our citizens' ability to engage in public debate[.]" United States v. Rosen, 445 F. Supp. 2d 602, 646 (E.D. Va. 2006).

319. Woodward's career has been built on leaks. Recently, he obtained the top U.S. and NATO commander's classified assessment of the deteriorating situation in Afghanistan. Bob Woodward, *McChrystal: More Forces or "Mission Failure,"* WASH. POST, Sept. 21, 2009, at A1. The Obama administration believed that publicizing the report could threaten troop safety; the *Post* agreed to delay publicizing the report and to withhold certain operational details. Howard Kurtz, *At Pentagon's Request, Post Delayed Story on General's Afghanistan Report*, WASH. POST, Sept. 23, 2009, at A10.

320. Government's Consolidated Responses to Defendants' Pretrial Motion at 17, United States v. Rosen, 445 F. Supp. 2d 602 (E.D. Va. 2006) (No. 05-CR-225) *available at* http://www.fas.org/sgp/jud/aipac013006.pdf (claiming that the defendants do not enjoy the constitutional rights reserved to the press).

321. *Id.*

have concluded without the forced testimony of Judith Miller and other reporters.[322] The Department of Justice guidelines concerning the subpoenaing of reporters are not constitutionally mandated, but they reflect deeply held political values and preferences.[323]

In an important 1974 address about press–government relations, Justice Potter Stewart said the press "may publish what it knows, and may seek to learn what it can. But this autonomy cuts both ways." [324] As an example, Stewart noted that the Constitution "is neither a Freedom of Information Act nor an Official Secrets Act."[325] By this, Stewart meant that policy on many issues concerning the flow of information is defined not by constitutional law but by the tug and pull of political forces. These views are also mirrored by the recent comments of Max Frankel, former executive editor of the *New York Times*. Frankel urged prosecutors with the authority to subpoena to the press to take a hands-off approach, that is, to carefully exercise their discretion. "Prosecutors of the realm," he wrote, "let this back-alley market [in leaks] flourish. Attorneys general and others armed with subpoena power, please leave well enough alone. Back off. Butt out."[326] In an era when news organizations are forced to downsize, resulting in fewer "shoeleather journalists to ferret the story out[,]"[327] it would be especially ill-advised for the government to criminalize long-standing newsgathering activities.

---

322. *See* Anne Marie Squeo & Gary Fields, *Journalists' Case Baffles Fans of Fitzgerald*, WALL ST. J., July 1, 2005, at A4. Mark Corallo, who was responsible for approving requests for journalist subpoenas under former Attorney General Ashcroft, stated that he would have refused requests for subpoenas if Fitzgerald had been subject to Justice Department oversight. *Id.*

323. *See* 28 C.F.R. § 50.10 (2009) (stating that "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").

324. Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 636 (1975).

325. *Id.*

326. Max Frankel, *The Washington Back Channel*, N.Y. TIMES, Mar. 25, 2007 § 6 (Magazine) at 40.

327. Andrew v. Clark, 561 F.3d 261, 273 (4th Cir. 2009) (Wilkinson, J., concurring).