Testimony of

Mr. Rodney Smolla

Dean
University of Richmond School of Law
June 6, 2006

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United States Senate
Committee on the Judiciary

First Amendment and Public Policy Issues Regarding Reporter's Privilege And Criminal Liability for Knowing Possession of Illegally Leaked Classified National Security Information.

I am pleased to have the opportunity to present this testimony to the committee. Rather than burden the Committee with a long prepared statement, my opening remarks will be brief and succinct. I will welcome questions from the Members of the Committee and the opportunity to expand on these points as you deem appropriate. I have five points to make:

(1) There is disagreement among lower federal courts over the meaning of Branzburg v. Hayes and over the fundamental question of whether a First Amendment "Reporter=s Privilege" exists at all. There is, however, substantial reason to doubt that current First Amendment Doctrine does include a Reporter=s Privilege.

(2) There is no clarity in current constitutional doctrine over whether the First Amendment permits the criminal prosecution of reporters for the mere possession or subsequent publication of classified material that the reporter knows to have been leaked illegally. There is, however, substantial reason to doubt that current First Amendment doctrine does bar the making of such mere possession or subsequent publication of classified material criminal.

(3) Sound public policy rationales support the enactment by Congress of a federal shield law that would create a qualified Reporter=s Privilege in federal courts. Sound policy rationales support recognition of the survival of this privilege after the death of the reporter.

(4) While the language of current federal espionage laws might plausibly be read to make knowing possession or subsequent publication of illegally leaked classified material criminal, there is substantial reason to doubt that Congress intended current statutory provisions to apply to journalists. Given the ambiguity surrounding congressional intent, and given the constitutional doctrine that cautions courts to construe statutes in a manner that avoids tension with First Amendment principles when possible, courts could appropriately hold that current laws are not intended to apply to journalists, instead inviting Congress to clarify its intent through new legislation that clearly does nor does not make knowing possession or subsequent publication of illegally leaked classified material by journalists criminal.

(5) Sound public policy rationales support the view that it would be unwise to make mere possession or subsequent publication of illegally leaked classified material by journalists criminal, even if the First Amendment is understood as permitting such an enactment.

I will be pleased to expand on any of these points during the question period. My principal value as a resource to the Committee is my expertise on the First Amendment issues implicated by points (1) and (2) above, and so I have appended to this summary of my testimony a brief Memorandum of Law summarizing the basis for my analysis on those two constitutional issues.

Appendix to Testimony of Rodney A. Smolla Memorandum of Law

First Amendment Issues Regarding Reporter=s Privilege
And Criminal Liability for Knowing Possession of Illegally Leaked Classified
National Security Information.

I. There is Disagreement Among Lower Federal Courts Over the Meaning of Branzburg v. Hayes and over the Fundamental Question of Whether a First Amendment Reporter=s Privilege Exists at All. There is, However, Substantial Reason to Doubt that Current First Amendment Doctrine Does Include a Reporter=s Privilege

A. Courts Are Divided Over the Meaning of Branzburg

Courts are divided over whether current constitutional doctrine does or does not recognize a reporters privilege grounded in the First Amendment or federal common law. This disagreement among the lower courts stems from disagreement over how to interpret the Supreme Court=s decision Branzburg v. Hayes. In Branzburg the Supreme Court appeared to reject, by a five-to-four vote, the notion that there was any Areporter=s privilege@ emanating from the First Amendment protecting journalists from disclosure of confidential sources. The opinion of the Court, written by Chief Justice Burger for what appeared to be five Justices, was brusque and unequivocal, squarely repudiating the recognition of any such privilege. In a short three-paragraph concurring opinion, however, Justice Powell wrote separately, in his words, to Aadd this brief statement to emphasize what seems to me to be the limited nature of the Court=s holding.@ He then went on to suggest that it may be appropriate to balance the competing interests at stake on a case-by-case basis.

Notwithstanding the apparently resounding defeat in Branzburg for the press, many lower courts, relying on Justice Powell=s cryptic concurring opinion, held that the First Amendment did provide a conditional reporter=s privilege of some kind. Not all lower courts have been persuaded by this movement, and the question of whether the First Amendment does or does not provide a Areporter=s privilege@ of some kind remains a matter of debate, fueled in part by ambivalent signals from the Supreme Court itself.

B. Recent Decisions Cast Gathering Doubt Over the Existence of the Privilege

Several recent decisions, including the highly visible decision by the United States Court of Appeals for the District of Columbia in the Judith Miller litigation, have cast serious doubt on the existence of a First Amendment privilege. Until the United States Supreme Court squarely addresses the issue and revisits Branzburg, First Amendment law will continue to be plagued by uncertainty.

In In re Grand Jury Subpoena, Judith Miller, the United States Court of Appeals for the District of Columbia Circuit in 2005 held that pursuant to the Supreme Court=s decision in Branzburg no First Amendment reporter=s privilege existed, period. When the United States Supreme Court refused to accept review, despite the urging of many amici and the able representation of prominent constitutional litigators, the significance of the Court of Appeals= ruling was further magnified. That the Supreme Court would let rest a decision of the District of Columbia Court of Appeals rejecting the privilege in a case of such prominence and visibility seemed to send a signal of agreement with the Judith Miller ruling, and the possible demise the long run of lower court precedent that had endorsed the existence of a qualified reporter=s privilege grounded in the First Amendment. In the aftermath of Branzburg, journalists who continued to successfully assert the existence of a First Amendment reporter's privilege may have been living on borrowed time. That time may now have run out.

II. There is no Clarity in Current Constitutional Doctrine Over Whether The First Amendment Permits the Criminal Prosecution of Reporters for the Mere Possession or Subsequent Publication of Classified Material. There is, however, Substantial Reason to Doubt that Current First Amendment Doctrine Does Bar the Making of Mere Possession or Subsequent Publication of Classified Material Criminal.

A. The ADaily Mail@ Line of Cases Protecting Publication of Truthful Information Lawfully Obtained

In a line of First Amendment cases nearly three decades old the Supreme Court has repeatedly stated that the First Amendment provides a high degree of protection for the publication of truthful information, often emphasizing the link of such speech to the democratic process. This line of precedent is sometimes referred to in shorthand as the ADaily Mail@ line of cases. These cases have never recognized an absolute First Amendment bar against the government prohibiting the publication of truthful information Alawfully obtained,@ however. Instead, they have applied a Aheightened scrutiny@ or Astrict scrutiny@ standard to such laws, requiring that they be justified by governmental interests of the Ahighest order@ and that they be Anarrowly tailored@ to effectuate those interests.@

B. The Ambiguity of Meaning of the Phrase ALawfully Obtained@

The Supreme Court has generally trimmed its holdings protecting the dissemination of truthful information with the caveat that such information be Alawfully obtained.@ What the cases do not fully explain is what is meant by Alawfully obtained.@

Two plausible and very different meanings present themselves. At minimum, of course, the phrase as invoked by the Court was clearly intended to mean that the media itself had not engaged in any affirmative lawbreaking--that it had not hacked into the computer or broken into the file cabinet. In Branzburg v. Hayes, the Supreme Court sternly admonished that it Awould be frivolous to assert@ that Athe First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws.@ Newsworthy information might often be generated through criminal misconduct, and newsworthiness alone cannot confer immunity, for A[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.@

If the minimum meaning of Alawfully obtained@ is obvious, however, the outer limits not. The phrase could mean more. At least when the government has passed specific legislation making downstream disclosure of the information also criminal, it would not stretch ordinary understandings of language to treat such information as not being Alawfully obtained,@ in exactly the same way that we do not treat the knowing receipt of stolen goods as Alawfully obtained.@ The Court in Florida Star v. B.J.F., in striking down a judgment against the media for publishing the name of a rape victim inadvertently disclosed by the police themselves, explicitly reserved judgment on the trafficking problem, noting that the ADaily Mail principle does not settle the issue 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.@

C. The Mixed Message of the Court=s Ruling in Bartnicki v. Vopper

In Bartnicki v. Vopper, the Supreme Court held that federal and state statutes prohibiting the disclosure of information obtained through illegal interception of cellular phone messages was unconstitutional as applied to certain media and non-media defendants who received and disclosed to others tape recordings of the intercepted messages from anonymous sources. The Court in Bartnicki made it abundantly clear that it was not answering the ultimate question of whether the media may ever be held liable for publishing truthful information lawfully obtained, but was rather addressing what it described as Aa narrower version of that still open question,@ which it put as: A>Where the punished publisher of information has obtained the information in question in a manner lawful in itself but from a source who has obtained it unlawfully, may the government punish the ensuing publication of that information based on the defect in a chain?=@

Justice Stevens wrote the opinion of the Court in Bartnicki, in an opinion nominally joined by Justices Kennedy, Souter, Ginsberg, Breyer, and O=Connor. But these appearances are deceiving. Although decided by a six-to-three majority, two of the Justices in the majority, Justices Breyer and O=Connor, concurred in an opinion (written by Justice Breyer) that appeared to dramatically trim the reach and rationale of the majority opinion. The holding in Bartnicki thus was narrowed in two ways: first, by the numerous explicit limitations placed on the reach of the decision in Justice Stevens= opinion for the Court, and second, by the substantial and important additional limitations articulated in Justice Breyer=s concurring opinion. Indeed, Bartnicki is a case in which the nominal Aopinion of the Court@ may well not be that at all. Justice Stevens= opinion is more aptly described as a four-Justice plurality decision, a decision that was quite sharply and dramatically constrained by the limiting language in the Breyer and O=Connor concurrence.

Whereas the opinion for the Court by Justice Stevens emphasized the Daily Mail line of cases and the presumptive unconstitutionality of laws that burden trafficking in truthful information, Justice Breyer=s opinion adopted exactly the opposite baseline. Laws protecting private electronic conversations, like Alaws that would award damages caused through publication of information obtained by theft from a private bedroom,@ must as Aa general matter@ be tolerated by the First Amendment, he argued, because of the importance of privacy, including its role in fostering private speech. In Justice Breyer=s view, the question was merely one of balance and tailoring; the Constitution does not broadly forbid legislation against trafficking in privacy contraband, it merely Ademands legislative efforts to tailor the laws in order reasonably to reconcile media freedom with personal, speech related privacy.@

As Justice Breyer saw the matter, the case posed a true constitutional conflict, involving competing constitutional values--indeed, competing First Amendment values, the right of the media to publish information on the one hand, and the Aright to be let alone,@ which in turn served the First Amendment interest in fostering private speech. The strict scrutiny standard was out of place in such situations, Justice Breyer reasoned. Rather, with interests of constitutional dimension on both sides of the equation, a balancing methodology that gave meaningful weight to both of those dimensions was called for. Using a First Amendment cost-benefit analysis, Justice Breyer stated that he Awould ask whether the statutes strike a reasonable balance between their speech restricting and speech enhancing consequences. Or do they instead impose restrictions on speech that are disproportionate when measured against their corresponding privacy and speech related benefits, taking into account the kind, the importance, and the extent of these benefits, as well as the need for the restrictions in order to secure those benefits?@

The majority=s holding, Justice Breyer insisted, was limited to the Aspecial circumstances@ the case presented, in which Athe radio broadcasters acted lawfully (up to the time of final public disclosure)@ and the information broadcasted Ainvolved a matter of unusual public concern, namely a threat of potential physical harm to others.@ Note the emphasis added in the just-quoted caveat, in which Justice Breyer spoke of the case as involving a matter of Aunusual@ public concern, and then identified what was so unusual about it--a threat of potential physical harm to others.

And therein was the crux of the concurring views of Justices Breyer and O=Connor. Their quarrel was not with the general principle of banning the disclosure of illegally intercepted communication, but with the specific balance struck by the statutes being reviewed, as applied to the specific factual circumstances in Bartnicki, circumstances the two concurring Justices viewed through a prism of factual assumptions that cast them in their most sinister possible light. The statutes, as applied, failed to Areasonably reconcile@ the competing interests, interfering Adisproportionately@ with Amedia freedom.@

The broadcasters, Justice Breyer noted, did not Aencourage@ or participate Adirectly or indirectly@ in the interception. ANo one claims that they ordered, counseled, encouraged, or otherwise aided or abetted the interception, the later delivery of the tape by the interceptor to an intermediary, or the tape=s still later delivery by the intermediary to the media.@ This observation suggested that in Justice Breyer=s view, any such involvement by the media would have disqualified it from the protection the Court granted in Bartnicki, and rendered the media answerable under the statutes.

In a particularly intriguing discussion, Justice Breyer also emphasized that the laws at issue did not forbid the receipt of the tape itself. Justice Breyer seemed to be signaling that if the law made it illegal to receive the actual tape recording, to obtain it (at least with knowledge that it contained illegally purloined conversations) would itself be unlawful conduct. In such a case, Justice Breyer appeared to be arguing, the media could no longer claim the safety-base of having acquired the information Alawfully,@ and would now be outside the ambit of the Bartnicki protection. If this is what Justice Breyer in fact meant, he had identified a sizable constitutional loophole, and all but invited legislatures to amend their statutes and drive through.

D. The Pentagon Papers Case Reinforces the Prior Restraint Doctrine, But Does not Fully Solve the Possession or Subsequent Publication Questions

The APentagon Papers@ case, New York Times Co. v. United States, is famous for its holding that the First Amendment=s heavy presumption against prior restraints barred the issuance of injunctions against The New York Times and The Washington Post forbidding them from publishing excerpts from the APentagon Papers,@ classified government documents recounting the history of the Vietnam War. But the APentagon Papers@ case left many

decisions unanswered. There were many opinions issued by individual Justices ranging widely over numerous constitutional and statutory questions. The very short per curiam decision that actually constituted the formal ruling of the Court said very little beyond recitation of the heavy presumption against prior restraints, and the conclusion that the government had failed to meet its burden of overcoming that presumption.

The Pentagon papers case did not overturn the traditional First Amendment principle, since reaffirmed by the Court, that the presumption against prior restraints is not absolute. Most pointedly, in specific context of national security, the Court stated in dicta in Near v. Minnesota, that Aprotection even as to previous restraint is not absolutely unlimited,@ and that Ano one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.@ The material that had been leaked in the Pentagon Papers was primarily historical, and there was no strong showing by the government that its release would endanger American lives or jeopardize in some palpable sense any ongoing American military or intelligence operations. The ruling in the Pentagon Papers case would thus not foreclose a prior restraint to prevent dissemination of leaked material in situations in which the government met the burden of demonstrating that dissemination was likely to endanger American lives or compromise an ongoing or planned military or espionage operation.

Wholly aside from the prior restraint issue, the Pentagon Papers case did not purport to rule upon or resolve the question of whether the First Amendment permitted prosecution for the knowing possession of illegally leaked classified material, or whether subsequent publication of such material could be made criminal, or whether existing federal statutes did or did not permit such prosecutions.

E. The Principle that The First Amendment Does Not Shield Journalists from Criminal or Civil Laws of General Applicability

If Congress were to clearly make the knowing possession or subsequent publication of illegally leaked classified material by any person (including journalists), the law would gain constitutional support from the principle that the First Amendment normally does not shield journalists from criminal or civil laws of general applicability.

The Supreme Court=s decision in Cohen v. Cowles Media Company, for example, held that the First Amendment did not prevent Minnesota from using its law of contracts and promissory estoppel in a suit brought by a source for breach of a promise of confidentiality made to the source by a journalist. In Cohen, there were numerous intersections with expressive activity. The promise made by the journalist to Dan Cohen to keep his identity secret involved the use of language. The breach of that promise by the journalist and the newspaper was effectuated entirely through expressive activity--publication of Cohen=s name in the newspaper. The newspaper printed the truth, Cohen=s identity, and his identity was entirely newsworthy. The newspaper printed Cohen=s name because in the exercise of its editorial judgment it determined that Cohen, a political operative, had tried to smear an opponent. Yet despite all of this, the Court refused to apply any heightened First Amendment standard to Cohen=s promissory estoppel claim, stating that Agenerally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news.@

F. The Media May Normally Not be Singled Out for Especially Unfavorable Treatment

The Ageneral applicability@ rule cuts in two directions. While the Cohen ruling is an example of the doctrine that journalists are generally not exempted from ordinary rules of civil and criminal law, it is also when the government acts to attempt to criminalize publication of truthful information, government may not single out the press for especially unfavorable treatment. This was an important element in the Supreme Court=s ruling in The Florida Star v. B.J.F., in which the Court refused to permit liability against a newspaper that had revealed the name of an alleged rape victim. One of the constitutional infirmities emphasized by the Court was the Florida law=s exclusive focus on media dissemination.

G. The First Amendment Does not Absolutely Forbid Criminalizing Possession of Material to ADry Up the Market@ for Trafficking in Such MaterialBthe Child Pornography Example

Outside the realm of communication, legislatures routinely make the judgment that is as important to dry up the market for contraband as it is to attack its initial creation. At times, most notably when approving laws attacking pornography, the Supreme Court has accepted the Adry up the market@ rationale even when dealing with speech. In Osborne v. Ohio, the Supreme Court held that the rule of Stanley v. Georgia, protecting Ahome possession@ of obscene material, did apply to possession of child pornography. Whereas in Stanley the State of Georgia primarily sought to proscribe the private possession of obscenity because it was concerned that obscenity would poison the minds of its viewers, in regulating possession of child pornography, the government was able to rely on more than a mere paternalistic interest in regulating possessor=s mind, but could rather defend its law in the hope Ato destroy a market for the exploitative use of children.@

H. Suggested Elements of a Law that Could Satisfy Constitutional Requirements

The protection of national security secrets would presumably qualify as an interest of the Ahighest order.@ A well-crafted law that made the knowing possession or subsequent publication of illegally leaked classified material a criminal act, and that met the standard of Anarrow tailoring,@ could thus presumably satisfy First Amendment requirements. The Anarrow tailoring@ of the law could well be critical to its constitutionality. Some of the attributes of a narrowly tailored law, for example, would be:

(1) Clarity in its intention to make possession illegal for all citizens (including but not limited to journalists) whether or not the situation involves classic espionage activity.

(2) A knowledge or scienter that required that the citizen-possessor or publisher knew that the material was classified and was illegally released.

(3) A knowledge or scienter requirement that the citizen-possessor or publisher knew or should have known that disclosure of the material could pose concrete injury to the national security of the United States, such as by placing in danger the lives of American military or intelligence personnel, or compromising an ongoing or planned military or intelligence operation.

(5) The existence of a Awhistleblower@ or Asafe harbor@ defense that would exempt the citizen-possessor from liability when the material leaked exposes criminal wrongdoing or unconstitutional behavior by the government or government officials (tracking the rationale of Justice Breyer in Bartnicki).

I. A Cautionary Conclusion: Constitutional Power Does Not Equate with Sound Policy

In this Memorandum I have attempted to state objectively the currently understood constitutional principles that would be implicated by legislation rendering criminal the mere possession of illegally leaked classified national security material. That Congress may the constitutional power to pass such legislation, however, does not mean that it should.

It is beyond the scope of this Memorandum of Law, which seeks to provide objective guidance, to delve deeply into the public policy questions that would be posed by such legislation. It is worth noting, however, that we have for many years lived in a society in which we have not prosecuted journalists merely for possessing classified material, even though it they journalist knew the material had been illegally leaked. We have instead chosen to investigate and in appropriate cases prosecute the government employees who broke the law most directly by leaking the material in the first instances. New legislation that would upset this carefully honed balance between the government and the vital and important independence of the press in a free society ought not be entertained or enacted without a strong showing that it is necessary to protect national security. It is important to way in the balance the social good that is often produced by the freedom of a vigorous press to receive and publish material exposing arguably criminal, unethical, or unconstitutional actions by the government.

I believe that our society would not be well-served by new legislation that would clarify existing law to render mere possession or subsequent publication of illegally leaked classified national security material illegal.

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408 U.S. 665 (1972).
The opinion of the Court in Branzburg is literally permeated with rejection of the privilege, with scores of sentences expressing, in different ways, the Court=s unwillingness to read such a privilege into the First Amendment. See, e.g., id. at 697 (A Of course, the press has the right to abide by its agreement not to publish all the information it has, but the right to withhold news is not equivalent to a First Amendment exemption from the ordinary duty of all other citizens to furnish relevant information to a grand jury performing an important public function.@); id. at 698 (AWe are admonished that refusal to provide a First Amendment reporter=s privilege will undermine the freedom of the press to collect and disseminate news. But this is not the lesson history teaches us. As noted previously, the common law recognized no such privilege, and the constitutional argument was not even asserted until 1958. From the beginning of our country the press has operated without constitutional protection for press informants, and the press has flourished. The existing constitutional rules have not been a serious obstacle to either the development or retention of confidential news sources by the press.@); id. at 699 (AIt is said that currently press subpoenas have multiplied, that mutual distrust and tension between press and officialdom have increased, that reporting styles have changed, and that there is now more need for confidential sources, particularly where the press seeks news about minority cultural and political groups or dissident organizations suspicious of the law and public officials. These developments, even if true, are treacherous grounds for a far-reaching interpretation of the First Amendment fastening a nationwide rule on courts, grand juries, and prosecuting officials everywhere.@).
Id. at 709 (Powell, J., concurring).
Id. at 709-10 (Powell, J., concurring) (AThe Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources. Certainly, we do not hold, as suggested in Mr. Justice Stewart=s dissenting opinion, that state and federal authorities are free to >annex= the news media as >an investigative arm of government.= ... If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy. Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationship without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.@).

See, e.g., Zerilli v. Smith, 656 F.2d 705 (D.C.Cir.1981) (qualified privilege available under some circumstances in civil litigation, since Branzburg does not control in civil cases); United States v. Burke, 700 F.2d 70 (2d Cir.), cert. denied, 464 U.S. 816 (1983) (reporters qualified privilege in criminal, as well as civil cases, conditioned upon Aclear and specific showing@ that the information sought [1] is highly material and relevant, [2] is necessary or critical to the claim, and [3] is not obtainable from other available sources); United States v. Cuthbertson, 630 F.2d 139 (3d Cir.1980), cert. denied, 454 U.S. 1056 (1981) (journalists have a federal common law qualified privilege, in both civil and criminal cases, to refuse to divulge their sources); LaRouche v. National Broadcasting Co., 780 F.2d 1134 (4th Cir.), cert. denied, 479 U.S. 818 (1986) (whether journalist's privilege will protect source depends upon whether the information sought is relevant, can be obtained by alternate means, and is the subject of a compelling interest); Miller v. Transamerican Press, Inc., 621 F.2d 721 (5th Cir.1980), cert. denied, 450 U.S. 1041 (1981) (reporter has first amendment privilege which protects refusal to disclose identity of confidential informants, although privilege is not absolute).
See In re Grand Jury Proceedings, Storer Communications, Inc. v. Giovan, 810 F.2d 580, 585 (6th Cir. 1987) (AAccordingly, we decline to join some other circuit courts, to the extent that they have stated their contrary belief that those predicates do exist, and have thereupon adopted the qualified privilege balancing process urged by the three Branzburg dissenters and rejected by the majority... That portion of Justice Powell's opinion certainly does not warrant the rewriting of the majority opinion to grant a first amendment testimonial privilege to news reporters, especially when the quoted language is considered in the context of that language which precedes it.@). Among courts that do recognize a reporter=s privilege, there is a debate over whether it applies only to Aconfidential@ material gathered by journalists, or to Anon-confidential@ material as well, such as videotape Aouttakes@ from television interviews. Several circuits have extended the privilege to non-confidential work product, either in civil or criminal cases. See Shoen v. Shoen, 5 F.3d 1289, 1294 95 (9th Cir.1993). Other courts, however, have refused to extend the privilege to non-confidential material. See Gonzalez v. National Broadcasting Company, 155 F.3d 618 (2d Cir. 1998) (rejecting privilege as to non-confidential material); United States v. Smith, 135 F.3d 963 (5th Cir.1998) (refusing to apply privilege to nonconfidential videotape outtakes sought in a criminal proceeding); In re Shain, 978 F.2d 850, 853 (4th Cir.1992) (tacitly rejecting the privilege in a criminal case where the information sought was non-

confidential).
Subsequent statements by the Supreme Court and individual Justices have advanced the ambiguity. In University of Pennsylvania v. EEOC, 493 U.S. 182, 201(1990), for example, the Supreme Court stated: AIn Branzburg, the Court rejected the notion that under the First Amendment a reporter could not be required to appear or to testify as to information obtained in confidence without a special showing that the reporter=s testimony was necessary.@ And in New York Times, Co. v. Jascalevich, 439 U.S. 1301, 1302 (1978), Justice White writing an in-chambers single-Justice opinion denying a stay, stated: AThere is no present authority in this Court that a newsman need not produce documents material to the prosecution or defense of a criminal case, or that the obligation to obey an otherwise valid subpoena served on a newsman is conditioned upon the showing of special circumstances.@
See McKevitt v. Pallasch, 339 F.3d 530 (7th Cir. 2003) (Posner, J.) (AThe defendants claim that the tapes in question are protected from compelled disclosure by a federal common law reporter=s privilege rooted in the First Amendment. See Fed. R. 501. Although the Supreme Court in Branzburg v. Hayes, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972), declined to recognize such a privilege, Justice Powell, whose vote was essential to the 5-4 decision rejecting the claim of privilege, stated in a concurring opinion that such a claim should be decided on a case-by-case basis by balancing the freedom of the press against the obligation to assist in criminal proceedings. at 709-10, 92 S.Ct. 2646. Since the dissenting Justices would have gone further than Justice Powell in recognition of the reporter's privilege, and preferred his position to that of the majority opinion (for they said that his Aenigmatic concurring opinion gives some hope of a more flexible view in the future, id. at 725, 92 S.Ct. 2646), maybe his opinion should be taken to state the view of the majority of the Justices-though this is uncertain, because Justice Powell purported to join Justice White's Amajority@ opinion. A large number of cases conclude, rather surprisingly in light of Branzburg, that there is a reporter's privilege, though they do not agree on its scope. See, e.g., In re Madden, 151 F.3d 125, 128-29 (3d Cir.1998); United States v. Smith, 135 F.3d 963, 971 (5th Cir.1998) Shoen v. Shoen, 5 F.3d 1289, 1292-93 (9th Cir.1993); In re Shain, 978 F.2d 850, 852 (4th Cir.1992); United States v. LaRouche Campaign, 841 F.2d 1176, 1181-82 (1st Cir.1988); United States v. Caporale, 806 F.2d 1487, 1504 (11th Cir.1986). A few cases refuse to recognize the privilege, at least in cases, which Branzburg was but this case is not, that involve grand jury inquiries. In re Grand Jury Proceedings, 5 F.3d 397, 402-03 (9th Cir.1993); In re Grand Jury Proceedings, 810 F.2d 580, 584-86 (6th Cir.1987). Our court has not taken sides. Some of the cases that recognize the privilege, such as Madden, essentially ignore Branzburg, see 151 F.3d at 128; some treat the Amajority@ opinion in Branzburg as actually just a plurality opinion, such as Smith, see 135 F.3d at 968-69; some audaciously declare that Branzburg actually created a reporter's privilege, such as Shoen, 5 F.3d at 1292, and von Bulow v. von Bulow, supra, 811 F.2d at 142; see also cases cited in Schoen at 1292 n. 5, and Farr v. Pitchess, 522 F.2d 464, 467-68 (9th Cir.1975). The approaches that these decisions take to the issue of privilege can certainly be questioned. See In re Grand Jury Proceedings, supra, 810 F.2d at 584-86. A more important point, however, is that the Constitution is not the only source of evidentiary privileges, as the Supreme Court noted in Branzburg with reference to the reporter's privilege itself. 408 U.S. at 689, 706, 92 S.Ct. 2646. And while the cases we have cited do not cite other possible sources of the privilege besides the First Amendment and one of them, LaRouche, actually denies, though without explaining why, that there might be a federal common law privilege for journalists that was not based on the First Amendment, see 841 F.2d at 1178 n. 4; see also In re Grand Jury Proceedings, supra, 5 F.3d at 402-03, other cases do cut the reporter's privilege free from the First Amendment. See United States v. Cuthbertson, 630 F.2d 139, 146 n. 1 (3rd Cir.1980); In re Grand Jury Proceedings, supra, 810 F.2d at 586-88; cf. Gonzales v. National Broadcasting Co., 194 F.3d 29, 36 n. 2 (2d Cir.1999).@).
397 F.3d 964, 33 Media L. Rep. (BNA) 1673 (D.C. Cir. 2005), cert. denied, 125 S. Ct. 2977 (2005).
See, e.g., Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) (holding unconstitutional a civil damages award entered against a television station for broadcasting the name of a rape murder victim obtained from courthouse records); The Florida Star v. B.J.F., 491 U.S. 524 (1989) (holding unconstitutional the imposition of liability against a newspaper for publishing the name of a rape victim in contravention of a Florida statute prohibiting such publication in circumstances in which a police department inadvertently released the victim=s name); Smith v. Daily Mail Publishing Co., 443 U.S. 97, 104 (1979) (finding unconstitutional the indictment of two newspapers for violating a state statute forbidding newspapers to publish, without written approval of the juvenile court, the name of any youth charged as a juvenile offender, where the newspapers obtained the name of the alleged juvenile assailant from witnesses, the police, and a local prosecutor, stating that the Amagnitude of the State=s interest in this statute is not sufficient to justify application of a criminal penalty@); Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) (overturning criminal sanctions against newspaper for publishing information from confidential judicial disciplinary proceedings leaked to the paper); Butterworth v. Smith, 494 U.S. 624 (1990) (refusing to enforce the traditional veil of secrecy surrounding grand jury proceedings against a reporter who wished to disclose the substance of his own testimony after the grand jury had terminated, holding the restriction inconsistent with the First Amendment principle protecting disclosure of truthful information).

See Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 778 (1986) (Aspeech of public concern is at the core of the First Amendment's protections@); Garrison v. Louisiana, 379 U.S. 64, 74 75 (1964) (When the law regulates discussion on Apublic affairs@ truthful speech Amay not be the subject of either civil or criminal sanctions,@ because such speech Ais more than self expression; it is the essence of self government.@).
The Daily Mail case, Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979) has come to be seen as the case encapsulating the principle most succinctly. See id. at 103 (Aif a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.@)
The Florida Star v. B.J.F., 491 U.S. 524 (1989).
See, e.g., The Florida Star v. B.J.F., 491 U.S. 524, 534 (1989) (AFirst, because the Daily Mail formulation only protects the publication of information which a newspaper has >lawfully obtain[ed],=. . . the government retains ample means of safeguarding significant interests upon which publication may impinge, including protecting a rape victim's anonymity. To the extent sensitive information rests in private hands, the government may under some circumstances forbid its nonconsensual acquisition, thereby bringing outside of the Daily Mail principle the publication of any information so acquired.@); Smith v. Daily Mail Publishing Co., 443 U.S. 97, 103 (1979) (ANone of these opinions directly controls this case; however, all suggest strongly that if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.@); Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 837 (1978) (in the course of protecting a newspaper=s First Amendment right to print confidential material from proceedings before Virginia=s Judicial Inquiry and Review Commission the Court noted that its holding was not Aconcerned with the possible applicability of the statute to one who secures the information by illegal means and thereafter divulges it.@).
The Florida Star v. B.J.F., 491 U.S. 524, 535 n. 8 (1989) (AThe Daily Mail principle does not settle the issue 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. This issue was raised but not definitively resolved in New York Times Co. v. United States . . . and reserved in Landmark Communications. . . We have no occasion to address it here.@) (emphasis in original) (citing New York Times Co. v. United States 403 U.S. 713 (1971); Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 837 (1978).
408 U.S. 665 (1972).
Id. at 691.
Id.
491 U.S. 524 (1989).
Florida Star, 491 U.S. at 535 n.8 (emphasis added).
121 S.Ct. 1753 (2001).
Gloria Bartnicki was a principal labor negotiator for a teachers= union in Pennsylvania, the Pennsylvania State Education Association. Anthony Kane, a high school teacher at Wyoming Valley West High School, was president of the union. In May of 1993, Bartnicki and Kane had a telephone conversation concerning the ongoing labor negotiations with a local school board. Kane was speaking from a land phone at his house. Bartnicki was talking from her car, using her cellular phone. Strategies and tactics were discussed, including the possibility of a teacher strike. The talk was candid, and included some blunt down-and-dirty characterizations of their opponents in the labor controversy, at times getting personal. One of the school district=s representatives was described as Atoo nice,@ another as a Anitwit,@ and still others as Arabble rousers.@ Among the opposition tactics that raised the ire of Bartnicki and Kane was the proclivity, in their view, of the school district to negotiate through the newspaper, attempting to pressure the teachers= union by leaks to the press. The papers had reported that the school district was not going to agree to anything more than a pay raise of three percent. As they discussed this position, Kane stated: AIf they=re not gonna move for three percent, we=re gonna have to go to their, their homes . . . [t]o blow off their front porches, we=ll have to do some work on some of those guys.@ An unknown person intercepted the conversation, presumably using a scanner that picked up the cell phone transmissions, recording it on a cassette tape. An unknown person proceeded to place the tape in the mail box of the president of a local taxpayer=s group that was opposed to the teachers= union and its bargaining positions, a man named Jack Yocum. Yocum listened to the tape, recognized the voices of Bartnicki and Kane, and took the tape to a local radio station talk show host, Frederick Vopper. Vopper received the tape in the Spring of 1993, but waited until late September 30 to broadcast it, which he did a number of times. At first Vopper broadcast a part of the tape that revealed Bartnicki=s phone numbers. She began to receive menacing calls, and was forced to changed her numbers. The tape later was warped so that the numbers would be indistinguishable when it was played on the air. Yocum, who first received the tape, and Vopper, who played it on the radio, both realized that it had been intercepted from a cell phone, and that a scanner had probably been used to make the intercept. Other media outlets also received copies of the tape,

including a newspaper in Wilkes Barre, but no other broadcaster or publisher played the tape or disclosed its contents until the material on the tape was initially broadcast by Vopper. Once Vopper broke the story, however, secondary coverage of the events, including the contents of the tape, appeared in other media outlets. Invoking a federal statute and a very similar Pennsylvania law, Bartnicki and Kane sued Yocum, Vopper, and the radio stations that carried Vopper=s show, for having used and disclosed the tape of their intercepted telephone conversation.
Id. at 1762.
Id. at 1762 (quoting Boehner, 191 F.3d. at 484 485) (Sentelle, J., dissenting). The Court observed that it=s unwillingness to construe the question before it any more broadly was consistent with the ACourt=s repeated refusal to answer categorically whether truthful publication may ever be punished consistent with the First Amendment.@
Bartnicki, 121 S.Ct. at 1762.
Id. (citing Warren & Brandeis, The Right to Privacy, 4 Harv. L.Rev. 193 (1890); Restatement (Second) of Torts ' 652D (1977); Katz v. United States, 389 U.S. 347, 350 351 (1967) (A[T]he protection of a person=s general right to privacy his right to be let alone by other people is, like the protection of his property and of his very life, left largely to the law of the individual States@).
Bartnicki, 121 S.Ct. at 1767 (Breyer, J., concurring).
Id. 1766 (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).
Bartnicki, 121 S.Ct. at 1766 (Breyer, J., concurring).
Bartnicki, 121 S.Ct. at 1766 (Breyer, J., concurring).
Id. 1766 (Emphasis added).
Id. at 1767.
Id.
Id. (Citing 18 U.S.C. ' 2 (criminalizing aiding and abetting any federal offense); 2 W. LaFave & A. Scott, Substantive Criminal Law '' 6.6(b) 8, pp. 128 129 (1986) (describing criminal liability for aiding and abetting).
Bartnicki, 121 S.Ct. at 1767 Id. (Breyer, J., concurring).
Id., 1767 (AThe Court adds that its holding >does not apply to punishing parties for obtaining the relevant information unlawfully.=@).
403 U.S. 713 (1971).
See Nebraska Press Association v. Stuart, 427 U.S. 539, 570 (1976).
383 U.S. 697 (1931).
The question of whether current federal espionage laws were intended by Congress to reach journalists who knowingly receive illegally leaked classified material is not addressed in this Memorandum of Law. As the conflicting opinions of those Justices in the APentagon Papers@ who addressed this issue attest, however, the intent and meaning of existing laws are a best unclear, and for that reason alone the laws ought not be invoked against journalists unless and until Congress acts affirmatively to clarify their meaning.
501 U.S. 663 (1991).
Id. at 669. See also Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378 (1990) (sustaining generally applicable tax laws as applied to religious institution); Citizen Publishing Co. v. United States, 394 U.S. 131 (1969) (sustaining application of antitrust laws to the press); Associated Press v. United States, 326 U.S. 1 (1945) (same); Associated Press v. NLRB, 301 U.S. 103 (1937) (sustaining application of National Labor Relations Act to the press); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946) (sustaining application of Fair Labor Standards Act to the press).
See, e.g., Florida Star, Inc. v. B.J.F., 491 U.S. 524, 109 S. Ct. 2603, 105 L. Ed. 2d 443 (1989); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 107 S. Ct. 1722, 95 L. Ed. 2d 209 (1987); Minneapolis Star & Tribune Co. v. Minnesota Comm=r of Revenue, 460 U.S. 575, 103 S. Ct. 1365, 75 L. Ed. 2d 295 (1983); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 94 S. Ct. 2831, 41 L. Ed. 2d 730 (1974); Grosjean v. American Press Co., 297 U.S. 233, 56 S. Ct. 444, 80 L. Ed. 660, 1 Media L. Rep. (BNA) 2685 (1936). See also Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 109 S. Ct. 890, 103 L. Ed. 2d 1 (1989) (striking down exemption from state sales and use tax of religious periodicals under Establishment Clause, but not reaching Press Clause issues).
491 U.S. 524 (1989).
See Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law ' 93, at 692 (1972) (explaining that social policy rationale for making it a crime to receive stolen property is to remove the incentive to steal by drying up the market for stolen goods).
495 U.S. 103 (1990).

394 U.S. 557 (1969).
Osborne involved an Ohio statute which, on its face, purported to prohibit the possession of Anude@ photographs of minors. The Supreme Court recognized that depictions of nudity, without more, constitute protected expression. But

as construed by the Ohio Supreme Court, the statute prohibited only Athe possession or viewing of material or performance of a minor who is in a state of nudity, where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals, and where the person depicted is neither the child nor the ward of the person charged.@. By limiting the statute=s operation in this manner, the Supreme Court held, Athe Ohio Supreme Court avoided penalizing persons for viewing or possessing innocuous photographs of naked children.@ Id. The Supreme Court also found it significant that the Ohio Supreme Court concluded that the State must establish scienter in order to prove a violation of the law. .

See also New York v. Ferber, 458 U.S. 747, 760 (1982). (A[t]he most expeditious if not the only practical method of law enforcement may be to dry up the market.@).