1 The New York Times Co. v. Gonzales,
2 No. 05-2639

3 Sack, Circuit Judge, dissenting:

4 For reasons outlined in Part I below, I agree with much
5 of the majority opinion. I ultimately disagree with the result
6 the majority reaches, however, and therefore respectfully
7 dissent.

8 I.

9 Declaratory judgment can in some circumstances -- and
10 does in these -- serve as a salutary procedural device for
11 testing the propriety of a government attempt to compel
12 disclosure of information from journalists. It is indeed
13 questionable whether, in the case before us, the plaintiff could
14 have obtained effective judicial review of the validity of the
15 government's proposed subpoena of the plaintiff's phone records
16 without it. The Court holds today that contrary to the
17 government's view, a member of the press may in appropriate
18 circumstances obtain a declaratory judgment to protect the
19 identity of his or her sources of information in the course of a
20 criminal inquiry. It makes clear, moreover, that in the grand
21 jury context, such an action need not be brought in a
22 jurisdiction in which the grand jury sits. I agree.

The Court's decision also confirms the ability of journalists to protect the identities of their sources in the hands of third-party communications-service providers -- in this case, one or more telephone companies. Without such protection, prosecutors, limited only by their own self-restraint, could obtain records that identify journalists' confidential sources in gross and virtually at will. Reporters might find themselves, as a matter of practical necessity, contacting sources the way I understand drug dealers reach theirs -- by use of clandestine cell phones and meetings in darkened doorways. Ordinary use of the telephone could become a threat to journalist and source alike. It is difficult to see in whose best interests such a regime would operate.

More fundamentally still, the Court today reaffirms the role of federal courts in mediating between the interests of law enforcement in obtaining information to assist their discovery and prosecution of violations of federal criminal law, and the interests of the press in maintaining source-confidentiality for the purpose of gathering information for possible public dissemination. For the question at the heart of this appeal is not so much whether there is protection for the identity of reporters' sources, or even what that protection is, but which

branch of government decides whether, when, and how any such protection is overcome.

The parties begin on common ground. The government does not dispute that journalists require substantial protection from compulsory government processes that would impair the journalists' ability to gather and disseminate the news. Since 1970, two years before the Supreme Court decided Branzburg v. Hayes, 408 U.S. 665 (1972), United States Department of Justice regulations have set forth a departmental policy designed to protect the legitimate needs of the news media in the context of criminal investigations and prosecutions.

The Department of Justice guidelines are broadly worded. The preamble states:

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

28 C.F.R. § 50.10. The guidelines require that "the approach in every case must be to strike the proper balance between the public's interest in the free dissemination of ideas and information and the public's interest in effective law

enforcement and the fair administration of justice," id. § 50.10(a); that "[a]ll reasonable attempts should be made to obtain information from alternative sources before considering issuing a subpoena to a member of the news media," id. § 50.10(b); and that "[i]n criminal cases, [before a subpoena is served on a member of the media,] there should be reasonable grounds to believe, based on information obtained from nonmedia sources, that a crime has occurred, and that the information sought is essential to a successful investigation--particularly with reference to directly establishing guilt or innocence. The subpoena should not be used to obtain peripheral, nonessential, or speculative information," id. § 50.10(f)(1).

In 1980, the guidelines were extended to provide that "all reasonable alternative investigative steps should be taken before considering issuing a subpoena for telephone toll records of any member of the news media." Id. Subsection (g) of the guidelines reads in part:

> In requesting the Attorney General's authorization for a subpoena for the telephone toll records of members of the news media, the following principles will apply:
>
> (1) There should be reasonable ground to believe that a crime has been committed and that the information sought is essential to the successful investigation of that crime. The subpoena should be as narrowly drawn as possible; it should be directed at relevant

> information regarding a limited subject matter and should cover a reasonably limited time period. In addition, prior to seeking the Attorney General's authorization, the government should have pursued all reasonable alternative investigation steps as required by paragraph (b) of this section [quoted above].
>
> ....

Id. § 50.10(g).

The government has made clear that it considers itself bound by these guidelines, see, e.g., Gov't Br. at 63, and asserts that it has abided by them in this case, see, e.g., id.; Letter of James Comey, Deputy Attorney General, to Floyd Abrams, attorney for the plaintiff, dated Sept. 23, 2004 (referring to the Department as "[h]aving diligently pursued all reasonable alternatives out of regard for First Amendment concerns, and having adhered scrupulously to Department policy").

While the government argues strenuously that the Department's guidelines do not create a judicially enforceable privilege,[1] the substantive standards that they establish as Department policy are strikingly similar to the reporter's privilege as we have articulated it from time to time. For example, in In re Petroleum Products Antitrust Litigation, 680 F.2d 5, 7-8 (2d Cir.) (per curiam) (civil case), cert. denied,

[1] The plaintiff does not argue otherwise on this appeal.

459 U.S. 909 (1982) (quoted by the majority, ante at **[20]**), we said: "[D]isclosure [of the identity of a confidential source] may be ordered only upon a clear and specific showing that the information is: highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources." This is also the standard urged upon us by the plaintiff and apparently adopted by the district court. See N.Y. Times Co. v. Gonzales, 382 F. Supp. 2d 457 (S.D.N.Y. 2005) ("N.Y. Times") (passim). The guidelines' test is thus very much like the test that the plaintiff asks us to apply.

The primary dispute between the parties, then, is not whether the plaintiff is protected in these circumstances, or what the government must demonstrate to overcome that protection, but to whom the demonstration must be made. The government tells us that under Branzburg, "except in extreme cases of [prosecutorial] bad faith," Tr. of Oral Argument, Feb. 13, 2006, at 12, federal courts have no role in monitoring its decision as to how, when, and from whom federal prosecutors or a federal grand jury can obtain information. Apparently based on that supposition, the government did not make a serious attempt to establish to the district court's satisfaction that the standard for requiring disclosure had been met. Neither has it argued

forcefully to us that it in fact did so.[2] For example, with respect to the government's assertion that it has "pursued all reasonable alternative investigation steps" to source disclosure (guidelines formulation) or that the information it needs is "not obtainable from other available sources" (Petroleum Products formulation), the government tells us only that:

> The Affirmation of the United States Attorney for the Northern District of Illinois, who was personally involved in conducting, and responsible for supervising, the ongoing grand jury investigation, stated that "the government had reasonably exhausted alternative investigative means," and that the Attorney General of the United States had authorized the issuance of the challenged subpoenas pursuant to the DOJ Guidelines.

Gov't Br. at 63.[3] The government thus takes the position that it is entitled to obtain the Times' telephone records in order to determine the identity of its reporters' confidential sources

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[2] Only the last six and a half pages of its sixty-six page brief to us address the plaintiff's contention that the government has not met the burden.

[3] The government has repeatedly asserted that it has in fact exhausted alternative sources for obtaining the information it needs, but has not told us how it has done so. See Gov't Br. at 63-64; Affirmation of Patrick Fitzgerald, dated Nov. 19, 2004, at 5; id. at 5, n.18; Letter of Patrick Fitzgerald to Solomon Watson, General Counsel, The New York Times Company, dated July 12, 2004, at 2.

because it has satisfied itself that the applicable standard has been met.

I do not think, and I read the majority opinion to reject the proposition, that the executive branch of government has that sort of wholly unsupervised authority to police the limits of its own power under these circumstances. As Judge Tatel, concurring in judgment in In re Grand Jury Subpoena, Judith Miller, 397 F.3d 964 (D.C. Cir.) ("In re Grand Jury Subpoena"), cert. denied, 125 S. Ct. 2977 (2005), reissued as amended, 438 F.3d 1141 (D.C. Cir. 2006), observed not long ago:

> [T]he executive branch possesses no special expertise that would justify judicial deference to prosecutors' judgments about the relative magnitude of First Amendment interests. Assessing those interests traditionally falls within the competence of courts. Indeed, while the criminality of a leak and the government's decision to press charges might well indicate the leak's harmfulness -- a central concern of the balancing test -- once prosecutors commit to pursuing a case they naturally seek all useful evidence. Consistent with that adversarial role, the Federal Rules of Evidence assign to courts the function of neutral arbiter: "Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court." Fed. R. Evid. 104(a) (emphasis added). Accordingly, just as courts determine the admissibility of hearsay or the balance between probative

> value and unfair prejudice under Rule 403, so with respect to this issue must courts weigh factors bearing on the privilege.
>
> Moreover, in addition to these principles applicable to the judicial role in any evidentiary dispute, the dynamics of leak inquiries afford a particularly compelling reason for judicial scrutiny of prosecutorial judgments regarding a leak's harm and news value. Because leak cases typically require the government to investigate itself, if leaks reveal mistakes that high-level officials would have preferred to keep secret, the administration may pursue the source with excessive zeal, regardless of the leaked information's public value.

438 F.3d at 1175-76 (citations omitted).

In concluding that insofar as there is an applicable reporter's privilege, it has been overcome in this case, Judge Winter's opinion makes clear that the government's demonstration of "necessity" and "exhaustion" must, indeed, be made to the courts, not just the Attorney General.[4] The majority believes, wrongly in my view, that the standard has been satisfied in this case. But that is a far cry from the government's position that the Court's satisfaction is irrelevant.

The government relies primarily on Branzburg to support its view that the First Amendment provides journalists no

[4] In this case, then-Deputy Attorney General James Comey. The Attorney General had recused himself.

1 judicially enforceable rights as against grand jury subpoenas.
2 The government's reading of Branzburg is simply wrong. The
3 Branzburg Court did not say that a court's role is limited to
4 guarding against "extreme cases of prosecutorial bad faith," nor
5 was the burden of its message that prosecutors can decide for
6 themselves the propriety of grand jury subpoenas. Even in the
7 context of its examination of First Amendment protections, it
8 said that "the powers of the grand jury are not unlimited and are
9 subject to the supervision of a judge," 408 U.S. at 688, and that
10 "this system is not impervious to control by the judiciary," id.
11 at 698. The concluding portion of Justice White's opinion for
12 the Branzburg Court noted that "[g]rand juries are subject to
13 judicial control and subpoenas to motions to quash. We do not
14 expect courts will forget that grand juries must operate within
15 the limits of the First Amendment as well as the Fifth." Id. at
16 708. And, in affirming the judgment of the Supreme Judicial
17 Court of Massachusetts in one of the cases before it, the Court
18 noted that the duty of the reporter to testify on remand was
19 "subject, of course, to the supervision of the presiding judge as
20 to the propriety, purposes, and scope of the grand jury inquiry
21 and the pertinence of the probable testimony" under Massachusetts
22 law. Id. at 709 (internal quotation marks and citation omitted).

If there were any doubt on this point, Justice Powell, who cast the deciding vote for the Court, dispelled it. He referred, in his concurring opinion, to the "concluding portion of [Justice White's] opinion," id., portions of which are quoted above. Justice Powell wrote:

> [T]he Court states that no harassment of newsmen will be tolerated. 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 relationships 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.

Id. at 709-10 (Powell, J., concurring).

We have since written "that the Supreme Court's decision in [Branzburg] recognized the need [for the courts] to balance First Amendment values even where a reporter is asked to testify before a grand jury." United States v. Burke, 700 F.2d 70, 77 (2d Cir.) (citing Baker v. F&F Invs., 470 F.2d 778, 784-85 (2d Cir. 1972), cert. denied, 411 U.S. 966, 93 (1973)), cert.

denied, 464 U.S. 816 (1983); see also United States v. Cutler, 6 F.3d 67, 71 (2d Cir. 1993) (noting the Branzburg Court's commentary that "[w]e do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth." (quoting Branzburg, 408 U.S. at 708)); Gonzales v. Nat'l Broad. Co., 194 F.3d 29, 34 (2d Cir. 1998) (characterizing United States v. Cutler as "proceed[ing] on the assumption that, despite the nonconfidential nature of the information sought [from members of the media by a government subpoena in a criminal context], a qualified journalists' privilege applied, and the defendant had to show [to the district court] a sufficient need for the information to overcome the privilege"); cf. In re Grand Jury Subpoena, 438 F.3d at 1164 (Tatel, J., concurring in judgment) ("[G]iven that any witness -- journalist or otherwise -- may challenge [an 'unreasonable or oppressive'] subpoena, the [Branzburg] majority must have meant, at the very least, that the First Amendment demands a broader notion of 'harassment' for journalists than for other witnesses." (quoting Fed. R. Crim. P. 17(c)(2))).

Of course, Branzburg's core holding places serious, if poorly defined, limits on the First Amendment protections that reporters can claim in the grand jury context. But, as the majority implicitly acknowledges by treating them and the common

law privilege separately, any limits on the constitutional protection imposed by Branzburg do not necessarily apply to the common law privilege under Federal Rule of Evidence 501. See In re Grand Jury Subpoena, 438 F.3d at 1160 (Henderson, J., concurring) ("[W]e are not bound by Branzburg's commentary on the state of the common law in 1972."); id. at 1166 (Tatel, J., concurring in judgment) ("Given Branzburg's instruction that 'Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned,' Rule 501's [subsequent] delegation of congressional authority requires that we look anew at the 'necessity and desirability' of the reporter privilege -- though from a common law perspective." (quoting Branzburg, 408 U.S. at 706 (alterations incorporated))). The majority's primary focus on the common law privilege, as interpreted by Jaffee v. Redmond, 518 U.S. 1 (1996), therefore appears to me to be appropriate.

II.

To explain why I disagree with the majority's conclusion that we "need not decide whether a common law privilege exists because any such privilege would be overcome as a matter of law on the present facts," ante at 4979, I must set forth in some detail why I think a privilege is applicable and what protection I think it affords.

It is self-evident that law enforcement cannot function unless prosecutors have the ability to obtain, coercively if necessary, relevant and material information. As the district court put it, "[i]t is axiomatic that, in seeking such testimony and evidence, the prosecutor acts on behalf of the public and in furtherance of the 'strong national interest in the effective enforcement of its criminal laws.' United States v. Davis, 767 F.2d 1025, 1035 (2d Cir. 1985) (citations omitted)." N.Y. Times, 382 F. Supp. 2d at 463.

The vital role the grand jury plays in the process is also indisputable.

> [T]he grand jury, a body "deeply rooted in Anglo-American history" and guaranteed by the Fifth Amendment, see United States v. Calandra, 414 U.S. 338, 342-43 (1974), holds "broad powers" to collect evidence through judicially enforceable subpoenas. See United States v. Sells Eng'g, Inc., 463 U.S. 418, 423-24 (1983). "Without thorough and effective investigation, the grand jury would be unable either to ferret out crimes deserving of prosecution, or to screen out charges not warranting prosecution." Id. at 424.

In re Grand Jury Subpoena, 438 F.3d at 1163 (Tatel, J., concurring in judgment).

At the same time, it can no longer be controversial that to perform their critical function, journalists must be able to maintain the confidentiality of sources who seek so to be

treated -- reliably, if not absolutely in each and every case. As this Court recognized early on:

> Compelled disclosure of confidential sources unquestionably threatens a journalist's ability to secure information that is made available to him only on a confidential basis . . . . The deterrent effect such disclosure is likely to have upon future "undercover" investigative reporting . . . threatens freedom of the press and the public's need to be informed. It thereby undermines values which traditionally have been protected by federal courts applying federal public policy to be followed in each case.

Baker, 470 F.2d at 782. As we later remarked, the Baker Court "grounded the qualified privilege [protecting journalists' sources] in a broader concern for the potential harm to 'paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters.'" Nat'l Broad. Co., 194 F.3d at 33 (quoting Baker, 470 F.2d at 782). "The necessity for confidentiality [is] essential to fulfillment of the pivotal function of reporters to collect information for public dissemination." Petroleum Prods., 680 F.2d at 8; see also N.Y. Times, 382 F. Supp. 2d at 465, 469-71 (reviewing the evidence before the court with respect to need for these plaintiff's reporters in this case to be able to protect the identity of their sources in order to report effectively).

As Professor Alexander Bickel put it in the wake of Branzburg:

> Indispensable information comes in confidence from officeholders fearful of competitors, from informers operating at the edge of the law who are in danger of reprisal from criminal associates, from people afraid of the law and of government -- sometimes rightly afraid, but as often from an excess of caution -- and from men in all fields anxious not to incur censure for unorthodox or unpopular views . . . . Forcing reporters to divulge such confidences would dam the flow to the press, and through it to the people, of the most valuable sort of information: not the press release, not the handout, but the firsthand story based on the candid talk of a primary news source. . . . [T]he disclosure of reporters' confidences will abort the gathering and analysis of news, and thus, of course, restrain its dissemination. The reporter's access is the public's access.

Alexander Bickel, "Domesticated Disobedience," The Morality of Consent 84-85 (1975) (emphasis in original) (hereinafter "The Morality of Consent").[5]

Beginning no later than our own opinion in Baker, supra, which was decided several months after Branzburg, courts and legislatures throughout the country turned to this issue,

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[5] Professor Bickel represented amici on the losing side in Branzburg. He represented the successful petitioner in "The Pentagon Papers Case", N.Y. Times Co. v. United States, 403 U.S. 713 (1971). See The Morality of Consent, 61 n.6 & 84 n.38.

many for the first time. They assessed the needs of effective law enforcement and effective news gathering, seeking to resolve as best they could the tension between them. Although the solutions crafted tended to be similar, they were not entirely uniform -- one could hardly expect to find uniformity among thirty-one state legislatures[6] and myriad state and federal courts that established, or confirmed the existence of, a qualified privilege for journalists to protect the identity of their sources.[7] But they all-but-universally agreed that protection there must be. For the reasons set forth in great detail in both the seminal opinion of Judge Tatel in In re Grand Jury Subpoena and in the opinion of the district court here, I have no doubt that there has been developed in those thirty-four years federal common-law protection for journalists' sources

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[6] The statutes are enumerated in the district court's opinion. See N.Y. Times, at 382 F. Supp. 2d at 502 & n.34. More recently, Connecticut enacted such a law. See Conn. Public Act No. 06-140 (June 6, 2006) (effective Oct. 1, 2006); see also Lobbyist Argues against 'Shield' Laws for Media, Tech. Daily, May 5, 2006; Christopher Keating & Elizabeth Hamilton, A Deal at Last, The Hartford Courant, May 4, 2006, at A1.

[7] Judge Tatel referred to "the laws of forty-nine states and the District of Columbia, as well as federal courts and the federal government." In re Grand Jury Subpoena, 438 F.3d at 1172 (Tatel, J., concurring in judgment).

1 under Federal Rule of Evidence 501[8] as interpreted by Jaffee.

2 The district court here succinctly outlined the factors in Jaffee

3 a court should use in determining whether such a privilege

4 exists:

> 5 (1) whether the asserted privilege would
> 6 serve significant private interests; (2)
> 7 whether the privilege would serve significant
> 8 public interests; (3) whether those interests
> 9 outweigh any evidentiary benefit that would
> 10 result from rejection of the privilege
> 11 proposed; and (4) whether the privilege has
> 12 been widely recognized by the states. See
> 13 Jaffee, 518 U.S. at 10-13.

14 N.Y. Times, 382 F. Supp. 2d at 494. A qualified journalists'

15 privilege seems to me easily -- even obviously -- to meet each of

16 those qualifications. The protection exists. It is palpable; it

17 is ubiquitous; it is widely relied upon; it is an integral part

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[8] Rule 501, adopted three years after Branzburg, in 1975, reads in pertinent part:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

1 of the way in which the American public is kept informed and
2 therefore of the American democratic process.[9]
3 The precise words in which this journalist's privilege
4 is stated differ from jurisdiction to jurisdiction. Our
5 formulation of it in Petroleum Products quoted above is typical:
6 "[D]isclosure may be ordered only upon a clear and specific
7 showing that the information is: highly material and relevant,
8 necessary or critical to the maintenance of the claim, and not
9 obtainable from other available sources." Petroleum Prods., 680
10 F.2d at 7-8 (citing, inter alia, Zerilli v. Smith, 656 F.2d 705,
11 713-15 (D.C. Cir. 1981) and Silkwood v. Kerr-McGee Corp., 563
12 F.2d 433, 438 (10th Cir. 1977)).[10]

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[9] Laws protecting confidential sources are hardly unique to the United States. See, e.g., Goodwin v. U.K., 22 E.H.R.R. 123 (1996) (European Ct. of Human Rights) (interpreting Article X of the European Convention on Human Rights as requiring legal protection for press sources).

[10] The "exhaustion" requirement -- "not obtainable from other available sources" -- harks back to what seems to be our first foray into this subject, Garland v. Torre, 259 F.2d 545 (2d Cir. 1958), written by then-Sixth Circuit Judge Potter Stewart, sitting by designation. (Fourteen years later, by-then-Justice Stewart wrote the principal dissent in Branzburg.) This Court held, inter alia, that at that time there was no common law reporter's privilege. Indeed there was little upon which one might then have been found. We nonetheless noted, "While it is possible that the plaintiff could have learned the identity of the informant by further discovery proceedings directed to [the company of which the source was said to be an official], her

1 This qualified privilege has successfully accommodated
2 the legitimate interests of law enforcement and the press for
3 more than thirty years. That it serves the needs of law
4 enforcement is attested to by the Department of Justice's
5 guidelines themselves. As noted, they establish protection for
6 journalists' sources in terms similar to the qualified privilege,
7 albeit as a matter of self-restraint rather than legal
8 obligation. If adhering to that standard hobbled law
9 enforcement, it is difficult to imagine that the Department of
10 Justice would have retained it -- indeed, have expanded its
11 coverage -- over the course of more than three-and-a-half

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reasonable efforts in that direction had met with singular lack of success." Id. at 551. In Baker, we said about Torre: "In view of the[] denials [by witnesses that they were Torre's source], the identity of Miss Torre's source became essential to the libel action: in the words of this Court, it 'went to the heart of the plaintiff's claim.' [Torre,] 259 F.2d at 550. Appellants in this case [i.e., Baker], however, have not demonstrated that the identity of [the reporter]'s confidential source is necessary, much less critical, to the maintenance of their civil rights action." Baker, 470 F.2d at 784.

The Torre case is also remembered for another reason: Ms. Torre famously served a short jail sentence for contempt rather than reveal the identity of her confidential source. See Nick Ravo, Marie Torre, 72, TV Columnist Jailed for Protecting News Source (obituary), N.Y. Times, Jan. 5, 1997, at Sec. 1, p. 24, Col. 5. A noteworthy aspect of the current litigation is that, because the source identifying information is in the hands of one or more third party telephone providers, the reporters here do not have the option of similarly responding to an order of the Court.

decades. And the flourishing state "shield" statutes indicate that similar state-law protection has not interfered with effective law enforcement at the state level. That it works for the press, meanwhile, is demonstrated by "the dog that did not bark"[11] -- the paucity (not to say absence) of cases in the many years between Branzburg and In re Grand Jury Subpoena in which reporters have indeed been ordered to disclose their confidential sources.

As we observed in National Broadcasting Co., without requiring lawyers to seek alternative sources before permitting them to subpoena the press for the information, "it would likely become standard operating procedure for those litigating against an entity that had been the subject of press attention to sift through press files in search of information supporting their claims." Nat'l Broad. Co., 194 F.3d at 35. But little of what reporters learn is obtained first hand. Most is, in a broad sense, told to them by others. Most is, therefore, "hearsay" when published. When the government seeks information in a reporter's possession, there is almost always someone other than

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[11] See A. Conan Doyle, Silver Blaze, in The Memoirs of Sherlock Holmes 58 (1948) (cited in Frederick Schauer, Symposium: Defamation in Fiction: Liars, Novelists, and the Law of Defamation, 51 Brook. L. Rev. 233, 241 & n.38 (1985)).

1 the reporter and somewhere other than the newsroom from whom or
2 from which to obtain it. Under the qualified privilege, a lawyer
3 -- for the government or another party -- engaged in litigation
4 of any sort who thinks he or she needs information in a
5 journalist's possession, usually can, and then, under the
6 qualified privilege, therefore must, obtain it elsewhere.
7 "[W]hen prosecuting crimes other than leaks (murder or
8 embezzlement, say) the government, at least theoretically, can
9 learn what reporters know by replicating their investigative
10 efforts, e.g., speaking to the same witnesses and examining the
11 same documents." In re Grand Jury Subpoena, 438 F.3d at 1174
12 (Tatel, J., concurring in judgment). Except in those rare cases
13 in which the reporter is a witness to a crime,[12] his or her

[12] As was alleged to be the case in each of the three cases that comprise Branzburg. See Branzburg, 408 U.S. at 668-72, 675-76; Branzburg v. Pound, 461 S.W.2d 345 (1970) (the reporter personally observed the production of hashish and the sale and use of marijuana); In re Pappas, 358 Mass. 604, 266 N.E. 2d 297 (1971) (the reporter witnessed criminal acts committed by members of the Black Panthers during a period of civil disorder in New Bedford, Massachusetts), United States v. Caldwell, 434 F.2d 1081 (9th Cir. 1970) (reporter thought to have witnessed assassination threats against the President, mail fraud, attempt or conspiracy to assassinate the President, and civil disorder on the part of the Black Panthers).

1 testimony is therefore very rarely essential[13] and very rarely
2 compelled.

3 III.

4 The safeguard that has worked well over the years is,
5 however, incomplete when it is applied in "leak" inquiries such
6 as those at issue here and in In re Grand Jury Subpoena. Before
7 inquiring as to why, it is worth noting that the use of the term
8 "leak" to identify unauthorized disclosures in this context may
9 be unhelpful. It misleadingly suggests a system that is broken.
10 Some unauthorized disclosures may be harmful indeed.[14] But
11 others likely contribute to the general welfare[15] -- frequently,
12 I suspect, by improving the functioning of the very agencies or
13 other entities from which they came. Secretive bureaucratic

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[13] See The Morality of Consent, at 84-85: "Obviously the occasions when a reporter will witness a so-called natural crime in confidence, and the occasions when he will find it conformable to his own ethical and moral standards to withhold information about such a crime are bound to be infinitesimally few."

[14] "Leaks similar to the crime suspected [in In re Grand Jury Subpoena] (exposure of a covert agent) apparently caused the deaths of several CIA operatives in the late 1970s and early 1980s, including the agency's Athens station chief." In re Grand Jury Subpoena, 438 F.3d at 1173 (Tatel, J., concurring in judgment).

[15] "For example, assuming [Judith] Miller's prize-winning Osama bin Laden series caused no significant harm, I find it difficult to see how one could justify compelling her to disclose her sources, given the obvious benefit of alerting the public to then-underappreciated threats from al Qaeda." Id. at 1174.

agencies, like hermetically sealed houses, often benefit from a breath of fresh air.[16] As Judge Tatel explained, "although suppression of some leaks is surely desirable . . . , the public harm that would flow from undermining all source relationships would be immense." In re Grand Jury Subpoena, 438 F.3d at 1168 (Tatel, J., concurring in judgment).

The "disorderly system," The Morality of Consent 80 (1975), by and large and until recently, allowed government (and other entities jealous of their confidential information) to keep secrets the way most of us keep ours: by not disclosing them,[17] by employing people who will not disclose them, and by using other means to protect them. If the secret was kept, as we presume it usually was (though we obviously have no way to be sure), the secret was safe. If secrets escaped, the government could investigate within its own precincts to determine who was responsible. Once disclosed, however, for better or worse, the secret was a secret no longer, and that, for press and the public, was the end of the matter.

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[16] "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." Attributed to Louis Brandeis, Other People's Money 62 (Nat'l Home Library Foundation ed. 1933), in Buckley v. Valeo, 424 U.S. 1, 67 (1976) (per curiam).

[17] Within the limitations set by freedom of information and other disclosure laws, of course.

This is not to say, of course, that the government never declassifies material in the interest of public discourse, or that an editor never declines to publish matters of public interest because in his or her view, with or without consultation with the government, greater injury to the public will likely be occasioned by doing so. Professor Bickel, who described this "system," put it first and probably best:

> Not everything is fit to print. There is to be regard for at least probable factual accuracy, for danger to innocent lives, for human decencies, and even, if cautiously, for nonpartisan considerations of the national interest. . . . But I should add that as I conceive the contest established by the First Amendment, and as the Supreme Court of the United States appeared to conceive it in the Pentagon Papers case [New York Times Co. v. United States, 403 U.S. 713 (1971)], the presumptive duty of the press is to publish, not to guard security or to be concerned with the morals of its sources.

The Morality of Consent 81.[18]

The result is a healthy adversarial tension between the government, which may seek to keep its secrets within the law irrespective of any legitimate interest the public may have in

[18] Although stories about the instances of secrets that the press has known and kept are published from time to time, see, e.g., Scott Shane, A History of Publishing, and Not Publishing, Secrets, N.Y. Times, July 2, 2006, at Sec. 4., p. 4, Col. 1, it seems to me obvious that an unknowably large bulk of such secrets are not recounted in these stories precisely because in those instances the press chose to maintain the secrecy.

knowing them, and the press, which may endeavor to, but is usually not entitled to, obtain and disseminate that information.

> The government is entitled to keep things private and will attain as much privacy as it can get away with politically by guarding its privacy internally; but with few exceptions involving the highest probability of very grave consequences, it may not do so effectively. It is severely limited as to means, being restricted, by and large, to enforcing security at the source. . . . [T]he power to arrange security at the source, looked at in itself, is great, and if it were nowhere countervailed it would be frightening -- is anyway, perhaps -- since the law in no wise guarantees its prudent exercise or even effectively guards against its abuse. But there <u>is</u> a countervailing power. The press, by which is meant anybody, not only the institutionalized print and electronic press, can be prevented from publishing only in extreme and quite dire circumstances.

<u>Id.</u> at 79-80 (emphasis in original).

> [W]e are content, in the contest between press and government, with the pulling and hauling, because in it lies the optimal assurance of both privacy and freedom of information. Not full assurance of either, but maximum assurance of both.
>
> Madison knew the secret of [it], indeed he invented it. The secret is the separation and balance of powers, men's ambition joined to the requirements of their office, so that they push those requirements to the limit, which in turn is set by the contrary requirements of another office, joined to the ambition of other men. This is not an arrangement whose justification is

> efficiency, logic, or clarity. Its justification is that it accommodates power to freedom and vice versa. It reconciles the irreconcilable.
>
> . . . . [I]t is the contest that serves the interest of society as a whole, which is identified neither with the interest of the government alone nor of the press. The best resolution of this contest lies in an untidy accommodation; like democracy, in Churchill's aphorism, it is the worst possible solution, except for all the other ones. It leaves too much power in government, and too much in the institutionalized press,[19] too much power insufficiently diffused, indeed all too concentrated, both in government and in too few national press institutions, print and electronic. The accommodation works well only when there is forbearance and continence on both sides. It threatens to break down when the adversaries turn into enemies, when they break diplomatic relations with each other, gird for and wage war . . . .

Id. at 86-87.

IV.

But as this litigation bears witness, the system is not altogether self-regulating. When the "untidy accommodation" between the press and the government breaks down, and the government seeks to use legal coercion against the press to identify its sources in and around government, the qualified

[19] Whether the changes in "the institutional press" in the age of the internet or the rise of global terrorism more than thirty years since Professor Bickel wrote would in any way change his analysis we can, of course, only guess.

reporter's privilege described in Petroleum Products and similar cases may be inadequate to restore the balance. In "leak" investigations, unlike in the typical situations with which courts have dealt over the years, the reporter is more than a third-party repository of information. He or she is likely an "eyewitness" to the crime, alleged crime, potential crime, or asserted impropriety. Once the prosecution has completed an internal investigation of some sort, therefore, it may be in a position to overcome the classic reporter's privilege because it may well be able to make "a clear and specific showing that the information [i.e., the identity of the source] is: highly material and relevant, necessary or critical to the maintenance of the claim [that someone known or unknown "leaked" the information to a reporter], and not obtainable from other available sources." Petroleum Prods., 680 F.2d at 7-8.

It seems clear to me that such a result does not strike the proper balance between the needs of law enforcement and of the press because, typically, it strikes no balance at all. The government can argue persuasively that the "leak" cannot be plugged without disclosure of the "leaker"/source by the recipient reporter.

Recognizing this, Judge Tatel suggested revising the traditional qualified privilege so that the court must also

1 "weigh the public interest in compelling disclosure, measured by
2 the harm the leak caused, against the public interest in
3 newsgathering, measured by the leaked information's value." In
4 re Grand Jury Subpoena, 438 F.3d at 1175 (Tatel, J., concurring
5 in judgment).[20] This

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[20] A bill introduced by Sen. Richard Lugar (R-Ind.), Chairman of the Senate Foreign Relations Committee, with Judiciary Committee Chairman Sen. Arlen Specter (R-Penn.), Sen. Christopher Dodd (D-Conn.), Sen. Lindsey Graham (R-S.C.) and Sen. Chuck Schumer (D-N.Y.) -- The "Free Flow of Information Act of 2006" -- is interesting in this regard. S. 2831, 109th Cong., § 4 (2006). Under it, a journalist's disclosure of, among other things, the identity of a confidential source

> may be ordered only if a court, after providing the journalist . . . notice and an opportunity to be heard, determines by clear and convincing evidence that,
> (1) the attorney for the United States has exhausted alternative sources of the information;
> (2) to the extent possible, the subpoena--
> (A) avoids requiring production of a large volume of unpublished material; and
> (B) is limited to--
> (i) the verification of published information; and
> (ii) surrounding circumstances relating to the accuracy of the published information;
> (3) the attorney for the United States has given reasonable and timely notice of a demand for documents;
> (4) nondisclosure of the information would be contrary to the public interest, taking into account both the public interest in compelling disclosure and the public interest in newsgathering and maintaining a free flow of information to citizens;
> (5) there are reasonable grounds, based on an alternative, independent source, to believe

may in some circumstances involve a substantive determination of "whether [the reporters'] sources released information more harmful than newsworthy. If so, then the public interest in punishing the wrongdoers -- and deterring future leaks -- outweighs any burden on newsgathering, and no privilege covers the communication . . . ." Id. at 1178.

One could quibble with the precise wording that Judge Tatel employed. I think I might prefer something closer to the Senate bill's formulation: whether "nondisclosure of the information would be contrary to the public interest, taking into account both the public interest in compelling disclosure and the public interest in newsgathering and maintaining a free flow of information to citizens." Free Flow of Information Act, S. 2831, 109th Cong., § 4(b)(4) (2006). But without some such adjustment of the privilege in these circumstances, it threatens to become

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> that a crime has occurred, and that the information sought is critical to the investigation or prosecution, particularly with respect to directly establishing guilt or innocence; and
> (6) the subpoena is not being used to obtain peripheral, nonessential, or speculative information.

Id. § 4(b) (emphasis added).

I quote the proposed language not, of course, because it is the law -- obviously it is not and may never be -- but because the use of the emphasized language indicates concern on the part of the Senators with precisely the problem that we address here -- that the inadequacy of the classic three-part test in some circumstances requires an additional assessment of the public interest in deciding whether to compel disclosure.

ineffective in accommodating the various interests at stake. And this is a common-law privilege capable of change and improvement in the hands of successive judges in successive cases as they seek to apply it to differing circumstances and changing conditions.

V.

My disagreement with the majority opinion comes down to this: I do not think that "whatever standard is used, the privilege has been overcome as a matter of law on the facts before us." Ante at **[20]**.

As I have explained, I think that overcoming the qualified privilege in the "leak" context requires a clear and specific showing (1) that the information being sought is necessary -- "highly material and relevant, necessary or critical," Petroleum Prods., 680 F.2d at 7-8; (2) that the information is "not obtainable from other available sources," id; and (3) that "nondisclosure of the information would be contrary to the public interest, taking into account both the public interest in compelling disclosure and the public interest in newsgathering and maintaining a free flow of information to citizens," Free Flow of Information Act, S. 2831, 109th Cong., § 4(b)(4) (2006). As noted, the government denies that it must prove to anyone other than itself that it has met any part of any test. Not surprisingly, then, the prosecutors' efforts to

1 demonstrate that they have overcome the qualified privilege,
2 before the district court and before us, have been limited at
3 best.[21]

4 As for the first part of the inquiry, I do not see how
5 a court can know whether the production of records divulging the
6 identity of one or more confidential sources is necessary to a
7 grand jury investigation without knowing what information the
8 grand jury has and is looking for and why -- much as the In re
9 Grand Jury Subpoena district and appeals courts were presented

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[21] As previously mentioned, the government devotes just over six of the sixty-six pages in its brief to rebutting the plaintiff's assertion that the government has not met the burden it must carry to overcome their privilege. (The remainder of the brief contends that no privilege exists.) And the thrust of the government's argument to us in this regard is not that the district court should have granted judgment in its favor, as the majority would, but that summary judgment should not have been granted against it. See Gov't Br. at 61 ("[T]he district court . . . erred in granting summary judgment to the plaintiff given that the evidence, at the very least, demonstrated the existence of disputed issues of fact material to the application of the privilege."); id. at 63 ("At a minimum, the evidence established the existence of genuine issues of material fact precluding summary judgment."); id. at 65-66 ("[T]he district court was obligated to resolve all ambiguities and draw al reasonable inferences in favor of the government and against the plaintiff in assessing the plaintiff's motion for summary judgment . . . . The evidence before the district court was sufficient, even in the absence of disclosures of evidence protected by grand jury secrecy, to support a finding that any applicable privilege had been overcome. At the very least, the evidence established the existence of disputed issues of fact precluding summary judgment in favor of the plaintiff." (citation omitted; emphasis in original)).

with evidence of such details in the course of their deliberations. See In re Grand Jury Subpoena, 438 F.3d at 1180-82 (Tatel, J., concurring in judgment) (discussing classified material provided to the court).

As for the second part of the inquiry, as already noted, the government does not so much as attempt to present any evidence showing that it has exhausted possible alternative means to identify the source or sources of the "leaks" other than by obtaining the telephone records it now seeks or, of course, by subpoenaing the reporters themselves. Its argument to us on this score reads:

> The district court also erred in concluding that the information sought by the subpoenas may have been available from other sources, or that the government had failed to establish that the information was not available. The Affirmation of the United States Attorney for the Northern District of Illinois, who was personally involved in conducting, and responsible for supervising, the ongoing grand jury investigation, stated that "the government had reasonably exhausted alternative investigative means," and that the Attorney General of the United States had authorized the issuance of the challenged subpoenas pursuant to the DOJ Guidelines. As the district court acknowledged, the DOJ Guidelines provided that subpoenas for telephone records of reporters could only be authorized based upon a finding by the Attorney General that all reasonable alternative sources had been exhausted.

Gov't Br. at 63 (citations omitted). Instead of seeking to meet the test for overcoming the qualified privilege, the government asks us to take its word.

My colleagues nevertheless conclude that the government has demonstrated exhaustion. According to them, "[t]here is simply no substitute for the evidence [the reporters] have," because the "evidence as to the relationship of [the reporters'] source(s) and the leaks themselves to the informing of the targets is critical to the present investigation." Ante at **[21]**. To the extent the majority is saying that the government has exhausted available alternatives because the identity of the reporters' sources is "critical" information, this appears to confuse the requirement that evidence be important with the requirement that it be otherwise unavailable. However critical the identity of the reporters' confidential sources may be, it is known to at least one person besides the reporters: the source or sources themselves. Because the government has offered no evidence, other than the conclusory assertions of its own agents, that it has sought to discover this information from anybody other than the reporters, I do not see how we can conclude that it has made "a clear and specific showing" that the information

1 is "not obtainable from other available sources." Petroleum

2 Prods., 680 F.2d at 8; ante at **[20]**.[22]

3 The third, "public interest," part of the test, too,

4 was not addressed directly by the government.[23] Here, its

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[22] The majority asserts in footnote **[5]** of its opinion that "ascertaining the reporters' knowledge of the identity of their sources and of the events leading to the disclosure to the targets of the imminent asset freezes/searches is clearly essential to an investigation into the alerting of those targets." Id. It also asserts that such knowledge "is not obtainable from other sources" because "even a full confession by the leaker would leave the record incomplete as to the facts of, and reasons for, the alerting of the targets." Id. These arguments do not seem to me to relate to the discovery request at issue in this case, which is for telephone records that would no more than disclose the identity of the journalists' sources and the dates and times of contact.

[23] The majority refers to the reporters' disclosure of the government's plans to freeze the assets "and/or" search the foundations' offices. Ante at **[20]** This characterization of the government's allegations does not seem to me to be supported by the record. As I read it, the evidence suggests only that Judith Miller, who was covering the HLF story, was told of the government's plan to freeze HLF's assets -- not "and/or" conduct an FBI search. See Aff. of Judith Miller, dated Nov. 12, 2004, at ¶ 9. She then "telephoned a HLF representative seeking comment on the government's intent to block HLF's assets" Id. at ¶ 10 (emphasis added). Miller's December 4, 2001 published story referred to the imminent freezing of the foundation's assets but did not mention any search. Judith Miller, U.S. to Block Assets It Says Help Finance Hamas Killers, N.Y. Times, Dec. 4, 2001, at A9.

Reporter Shenon similarly says in his affidavit that on December 13, 2001, he "recall[s] contacting GRF [the 'Global Relief Foundation'] for the purposes of seeking comment on the government's apparent intent to freeze assets." Aff. of Philip Shenon, dated Nov. 9, 2004, at ¶ 5. He does not mention an FBI search of GRF, which he apparently did not report upon until

1 failure to do so is understandable inasmuch as the requirement
2 was not explicitly a part of our case law at the time this matter
3 was litigated in the district court. The majority and the
4 government seem to be of the view, nonetheless, that the
5 disclosure in this case was of great consequence and that
6 protection of the leaker's identity here is of little value to
7 the public in "maintaining a free flow of information." If that
8 is so, it would follow that the balance with respect to this
9 factor would tilt decidedly on the side of compelling disclosure.
10 I, for one, see no way that we can know based on the current
11 record.

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after it happened. Philip Shenon, A Nation Challenged: The Money Trail, N.Y. Times, Dec. 15, 2001, at B6.

Nothing in the sparse record suggests to me that either reporter told HLF about, or even themselves knew about, an FBI search before it happened. Nor does the government appear to contend, let alone seek to establish, that Shenon and Miller knew about imminent raids. Instead, it asserts only that the reporters disclosed the impending asset freezes and that as a result the foundations thought an FBI search to be likely.

There seems to me to be a significant difference between informing the target of an investigation about a freeze of its assets, presumably a white collar operation, and an FBI raid, knowledge of which could place FBI agents in danger of life and limb. It may be that a seasoned reporter would know that a tip as to an asset freeze is tantamount to a tip as to an FBI search. I have no idea whether that is true, but on the current record, it is no more than conjecture.

The information that the assets of HLF and GRF were being frozen was given to reporter Miller sometime before December 3, 2001, and to reporter Shenon sometime before December 13, 2001. The searches of the two organizations' offices took place on the mornings of December 4 and 14, respectively. It was not until August 7, 2002, that the government approached the Times seeking its cooperation with respect to this matter and its consent to review the reporters' telephone records. The Times declined. There was no further contact between the government and the Times on this matter until July 12, 2004, nearly two years later. After the flurry of communications between the parties that followed, the plaintiff began this litigation on September 29, 2004. It culminated in the district court's decision of February 24, 2005. The government's appeal has been pending in this Court since May 31, 2005. No request for expedition has been made. Indeed, at the government's September 9, 2005, request, it received a one-month extension to file its appellate brief.

There is, of course, nothing inherently wrong with the government proceeding deliberately. To the contrary, it may be laudably consistent with the goal of its own guidelines to protect the newsgathering process when it can. Nonetheless, the

elapsed four and a half years does fairly raise the question of just how significant the leaks were or are considered to be by the government. I thus do not see how we can possibly address the question posed by the third part of the qualified immunity test -- a balancing of interests -- without the government's demonstration as to precisely what its interests are.

I do not mean to suggest that the government could not have made an adequate showing on each of the three parts of the qualified privilege, much as it apparently did in In re Grand Jury Subpoena. Nor do I mean to imply that it does not need the information it seeks, has not in fact exhausted alternative sources, or that finding, silencing, and seeking to prosecute or punish the sources of the material that was disclosed is not crucial. I have no basis on which to dismiss out of hand the prosecutors' assertion that they did make a sufficient showing, at least on the first two counts, to the then-Deputy Attorney General. But the government was also required to make such a demonstration to the district court, subject of course to our review. It has declined to do so. For that reason, concluding that the judgment of the district court must be affirmed, I respectfully dissent.