

EVIDENCE — JOURNALIST PRIVILEGE — DISTRICT OF COLUMBIA CIRCUIT HOLDS THAT PRIVACY ACT SUIT SATISFIES TWO-PRONG TEST TO OVERCOME JOURNALIST PRIVILEGE TO CONCEAL CONFIDENTIAL SOURCES. — *Lee v. Department of Justice*, 413 F.3d 53 (D.C. Cir. 2005).

For the past thirty years, legal scholars have debated the proper understanding of the relationship between the Speech and Press Clauses of the First Amendment, specifically asking whether the Press Clause bestows on institutional media any newsgathering protections not afforded to the population at large under the Speech Clause.¹ While the Supreme Court has never directly addressed this theoretical question,² the Court's press-related jurisprudence strongly reflects the view that the clauses are coextensive in their scope and should be read together as a general expressive right.³ This view came into sharp relief in *Branzburg v. Hayes*,⁴ in which the Court declined to grant journalists a First Amendment privilege to withhold grand jury testimony regarding information received in confidence.⁵ In the years following that case, however, most circuits pursued the opposite theoretical tack, creating heightened newsgathering protections for the press by construing Justice Powell's concurrence in *Branzburg* as allowing qualified

¹ The Supreme Court decided a number of significant press-related cases in the 1970s. *See, e.g.*, *Gannett Co. v. DePasquale*, 443 U.S. 368, 393–94 (1979) (denying press organizations an absolute right to access court proceedings); *Pell v. Procunier*, 417 U.S. 817, 833–35 (1974) (holding that state restrictions on face-to-face interviews with prison inmates were consistent with the First Amendment); *Branzburg v. Hayes*, 408 U.S. 665, 689–91 (1972) (denying journalists a First Amendment testimonial privilege in criminal grand jury proceedings). At the same time, many seminal works exploring the significance of the Press Clause were published. *See, e.g.*, Randall P. Bezanson, *The New Free Press Guarantee*, 63 VA. L. REV. 731 (1977); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521; Melville B. Nimmer, *Introduction — Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?*, 26 HASTINGS L.J. 639 (1975).

² *See* *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 798 & n.3 (1978) (Burger, C.J., concurring).

³ *See* Jon Paul Diltz, *The Press Clause and Press Behavior: Revisiting the Implications of Citizenship*, 7 COMM. L. & POL'Y 25, 31 n.36 (2002) (recognizing that the Court has tended to “merg[e] both [clauses] under the rubric [of] freedom of expression”). Even when the Court has seemed to imply some heightened protections for the press, it has tempered such implications with strong language to the contrary. *See* MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH § 2.08[A], at 2-108-09 (student ed. 1984) (discussing how the Court seemingly conceded significant press protections in *Pell* but then withdrew that concession with “as clear a statement as has thus far emerged . . . [that] ‘freedom of the press’ [does] not carry any meaning beyond that contained in . . . ‘freedom of speech’”).

⁴ 408 U.S. 665 (1972).

⁵ *See id.* at 690.

journalist privileges.⁶ Recently, in *Lee v. Department of Justice*,⁷ the Court of Appeals for the District of Columbia held that the testimonial privilege of a group of journalists in a Privacy Act⁸ case was overcome because the journalists' testimony went "to the heart" of the complaint and the plaintiff had exhausted all other means of obtaining the information.⁹ In this decision, the D.C. Circuit pared back the contours of the privilege it had previously announced, both exposing and significantly ameliorating the tension between the divergent First Amendment theories underlying *Branzburg* and the circuit's adoption of a journalist privilege.

In 1999, after a three-year investigation, the United States indicted Dr. Wen Ho Lee on fifty-nine counts of mishandling classified files while working on nuclear weapons design for the Department of Energy (DOE).¹⁰ Lee filed a Privacy Act suit against the government,¹¹ claiming that DOE employees had improperly released personal information about him to the news media during the investigation.¹²

⁶ Because *Branzburg* was decided 5-4, with Justice Powell casting the decisive fifth vote, courts have grounded journalist privileges in Justice Powell's statement in his brief concurring opinion that "[t]he 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." *Id.* at 710 (Powell, J., concurring). This statement can be understood as simply reinforcing the majority's holding that journalists, like all other citizens, are protected from bad faith subpoenas meant only to harass them and impede their work. However, many circuits have reasoned that the statement limited the majority's holding, creating room for a broader privilege. *See, e.g.,* Zerilli v. Smith, 656 F.2d 705, 711 (D.C. Cir. 1981); Riley v. City of Chester, 612 F.2d 708, 715-16 (3d Cir. 1979). The Seventh Circuit was scathingly critical of this interpretive trend: "A large number of [circuit] cases conclude, rather surprisingly in light of *Branzburg*, that there is a reporter's privilege, though they do not agree on its scope. . . . Some of the cases . . . essentially ignore *Branzburg*; some treat the 'majority' opinion in *Branzburg* as actually just a plurality opinion . . . ; [and] some audaciously declare that *Branzburg* actually created a reporter's privilege . . ." *McKevitt v. Pallasch*, 339 F.3d 530, 532 (7th Cir. 2003) (citations omitted).

⁷ 413 F.3d 53 (D.C. Cir. 2005).

⁸ 5 U.S.C. § 552a (2000).

⁹ *See Lee*, 413 F.3d at 60.

¹⁰ *See id.* at 55. Lee worked at the DOE's Los Alamos National Laboratory, which houses some of the agency's most sensitive nuclear operations. *See Lee v. U.S. Dep't of Justice*, 287 F. Supp. 2d 15, 16 (D.D.C. 2003). The investigation initially focused on espionage charges involving the Chinese government but resulted in an indictment on the lesser charges. *See Lee*, 413 F.3d at 55. Ultimately, the case was resolved through a plea agreement in which Lee pled guilty to one minor count. *See id.*

¹¹ The Privacy Act creates a civil right of action, *see* 5 U.S.C. § 552a(g)(4), when an agency "disclose[s] any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains," *id.* § 552a(b).

¹² *Lee*, 413 F.3d at 55. The media seized on the story of a possible mole passing state nuclear secrets to the Chinese government and made it front-page news. *See, e.g.,* Walter Pincus, *Spy Suspect Fired at Los Alamos Lab*, WASH. POST, Mar. 9, 1999, at A1; James Risen & Jeff Gerth, *Breach at Los Alamos: China Stole Nuclear Secrets for Bombs*, U.S. AIDES SAY, N.Y. TIMES, Mar. 6, 1999, at A1. These early reports, however, came under public fire as overzealous and too eager

During discovery, Lee deposed six DOE officials — including those he identified as likely sources of the leaks — but was unable to uncover the identities of the leakers.¹³ Lee then subpoenaed five journalists who had reported on his case to testify as to the identities of their confidential sources.¹⁴ The journalists filed motions to quash the subpoenas, claiming journalist privilege.¹⁵

The district court denied the motions and issued a discovery order compelling the journalists to testify.¹⁶ Citing two guidelines announced by the D.C. Circuit in *Zerilli v. Smith*¹⁷ for assessing journalist privilege claims, the court found that the information sought by Lee was “of central importance” to his suit and that Lee had “exhausted every reasonable alternative source of information.”¹⁸ The journalists refused to comply with the discovery order, and the court held them in civil contempt.¹⁹

The D.C. Circuit upheld the discovery order and four of the five contempt findings.²⁰ Writing for the panel, Judge Sentelle²¹ found that the district court did not abuse its discretion in finding that Lee’s interest in obtaining nonparty testimony in a civil proceeding was sufficient to outweigh any First Amendment interests that would otherwise exempt the journalists from revealing their sources.²² Explaining the validity of the discovery order, Judge Sentelle traced the development of the circuit’s journalist privilege, noting that the circuit’s decisions in *Carey v. Hume*²³ and *Zerilli* carved constitutional space for a civil privilege out of the seemingly categorical statement against such privileges by the Supreme Court in *Branzburg*.²⁴ *Carey* suggested that in a civil action — as opposed to a criminal grand jury proceeding, which

to support even a weak government case against Lee, prompting one newspaper to reexamine its reporting and express regret. See *The Times and Wen Ho Lee*, N.Y. TIMES, Sept. 26, 2000, at A2.

¹³ *Lee*, 413 F.3d at 56.

¹⁴ *Id.*

¹⁵ *Lee*, 287 F. Supp. 2d at 17.

¹⁶ *Id.* at 24–25.

¹⁷ 656 F.2d 705, 713 (D.C. Cir. 1981).

¹⁸ *Lee*, 287 F. Supp. 2d at 18 (quoting *Zerilli*, 656 F.2d at 713) (internal quotation marks omitted).

¹⁹ *Lee v. U.S. Dep’t of Justice*, 327 F. Supp. 2d 26, 27–28 (D.D.C. 2004).

²⁰ *Lee*, 413 F.3d at 60–61.

²¹ Judges Randolph and Rogers joined the opinion.

²² See *id.* at 59–61. The court reviewed for abuse of discretion after rejecting the appellants’ argument that the court should have applied a de novo standard of review. See *id.* at 58–59.

²³ 492 F.2d 631 (D.C. Cir. 1974).

²⁴ See *id.* at 59–60. The *Branzburg* Court stated:

[T]he only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against compelled self-incrimination. We are asked to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do.

Branzburg v. Hayes, 408 U.S. 665, 689–90 (1972).

was the fact setting in *Branzburg* — a court should weigh “the need for the testimony . . . against the claims of the newsman that the public’s right to know is impaired.”²⁵ *Zerilli* took this suggestion to its full fruition, holding that a qualified journalist privilege exists in civil proceedings “in all but the most exceptional cases.”²⁶

Applying that reasoning to the district court’s finding, Judge Sentelle deemed Lee’s suit to be one of those rare cases. Hewing closely to the district court’s reading of *Zerilli*, Judge Sentelle applied a two-prong balancing test: if the information sought by subpoena goes to “the heart of the matter,” and if the plaintiff exhausts all reasonable alternative sources of information, a journalist privilege will be vitiated.²⁷ Judge Sentelle considered the information sought by Lee — the identities of the leakers — to be undoubtedly central to an improper disclosure case and determined that Lee exhausted all reasonable alternatives when he deposed and received denials from the officials he suspected of being the unnamed sources.²⁸ These two findings therefore outweighed the journalists’ privilege.

The *Lee* court read *Zerilli* narrowly, declining *Zerilli*’s invitation to explore balancing factors beyond the two prongs it deemed sufficient for its particular case. In doing so, the court signaled its awareness that *Zerilli*’s theoretical understanding of the Press Clause as giving special status to journalists did not comport with that of the Supreme Court in *Branzburg*. While the *Lee* court’s narrowing of the scope of the *Zerilli* privilege did not achieve complete theoretical coherence between the circuit’s and the Supreme Court’s privilege doctrines, it did significantly move the circuit — after twenty-five years of what many view as prodigal jurisprudence — in the direction of harmonization.

A close reading of *Branzburg* and *Zerilli* makes clear the divergence between their theoretical underpinnings. While Justice White’s opinion for the *Branzburg* majority stated that newsgathering does qualify for “First Amendment protection,”²⁹ he outlined the shape of that protection in traditional free speech terms. Justice White framed the facts of *Branzburg* as entailing:

no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold. No exaction or tax for the privilege of publishing, and no penalty, civil or criminal, related to the content

²⁵ *Carey*, 492 F.2d at 636.

²⁶ *Zerilli v. Smith*, 656 F.2d 705, 712 (D.C. Cir. 1981).

²⁷ *Lee*, 413 F.3d at 59 (quoting *Zerilli*, 656 F.2d at 713) (internal quotation marks omitted).

²⁸ *See id.* at 60–61.

²⁹ *Branzburg*, 408 U.S. at 681 (1972).

of published material is at issue here. . . . [R]eporters remain free to seek news from any source by means within the law.³⁰

This formulation is basically a recounting of speech rights available to all citizens,³¹ supporting the Court's view that the press freedom is a "fundamental personal right" which "is not confined to newspapers and periodicals."³² In declining to create a press-specific testimonial privilege, the *Branzburg* Court plainly endorsed the theory that the Press Clause is merely a "natural extension" of the expressive freedom guaranteed by the Speech Clause that implicates no heightened news-gathering rights for an institutional press.³³

Zerilli went in the opposite theoretical direction, adopting the "Fourth Estate" theory of the Press Clause, which envisions an institutional press as a check on governmental power that is essential to the democratic functioning of society.³⁴ The court viewed the First Amendment as protecting the role of the press as "a vital source of public information"³⁵ that "bare[s] the secrets of government"³⁶ and ensures that citizens can "make informed political, social, and economic choices."³⁷ Distinguishing *Branzburg* on the basis that *Branzburg* involved a criminal rather than a civil proceeding,³⁸ the *Zerilli* court adopted a journalist privilege predicated on the reasoning that exposure of confidential sources would deter prospective sources from disclosing information to reporters, thus impinging on the constitutionally guaranteed press freedom to gather news.³⁹

³⁰ *Id.* at 681–82. While the absence of a tax on publishing may seem to imply a certain solicitude for the institutional press, it is clear later in the opinion that Justice White is referring to discriminatory taxation that targets the press in an attempt to indirectly censor it. *See id.* at 683 (citing *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936) (invalidating a state tax on advertising that affected only nine publishers)).

³¹ *Cf. Pell v. Procunier*, 417 U.S. 817, 833–35 (1974) (holding that the press possesses the same rights of access to information as the general public).

³² *Branzburg*, 408 U.S. at 704 (quoting *Lovell v. Griffin*, 303 U.S. 444, 450, 452 (1938)).

³³ *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 797–802 (1978) (Burger, C.J., concurring) (discussing the relationship between the Speech Clause and the Press Clause and concluding that the Press Clause endows institutional media with no special rights).

³⁴ Professor Alexander Meiklejohn developed this instrumentalist view of the First Amendment as serving a democratic society's needs in *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948), and Professor Vincent Blasi articulated the checking function in *The Checking Value in First Amendment Theory*, *supra* note 1. *See NIMMER, supra* note 3, § 1.02[H]–[I]. Justices Brennan and Stewart popularized both theories as applied to the Press Clause in various speeches and dissenting opinions. *See C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH* 229–31 (1989).

³⁵ *Zerilli v. Smith*, 656 F.2d 705, 710–11 (1981) (quoting *Grosjean*, 297 U.S. at 250).

³⁶ *Id.* at 711 (quoting *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring)) (internal quotation mark omitted).

³⁷ *Id.*

³⁸ *Id.* at 711–12 & n.42.

³⁹ *See id.* at 712.

In *Lee*, Judge Sentelle strongly implied that the court recognized the inconsistency between the theoretical premises underpinning *Branzburg* and *Zerilli* and that if the cases were in fact distinguishable, they were only so on a superficial basis disconnected from any deeper understanding of the First Amendment.⁴⁰ His opinion seemed to express surprise at the fact that *Zerilli* “actually held that despite *Branzburg* there is a reporter’s privilege in civil actions” even though “some would read the absolute language of the Supreme Court as foreclosing the possibility of any such privilege under any circumstance.”⁴¹ Judge Sentelle then crystallized this theoretical discomfiture in one paragraph. He first quoted *Branzburg*, writing that one “cannot seriously entertain the notion that the First Amendment protects a newsman’s agreement to conceal criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it.”⁴² He then stated that “[t]he same principle applies here,”⁴³ after which he immediately began his application of the *Zerilli* privilege’s balancing factors. But quite clearly, the “same principle” did not apply in *Lee*. The *Zerilli* privilege’s explicit purpose was to protect a newsman’s confidential sources, based very much on the theory that, up to a point, it is better for the press to perform its Fourth Estate role in writing about events than to aid in their investigation, even when a confidential source may have broken a law such as the Privacy Act.

Seemingly acknowledging the theoretical divergence of the Supreme Court and the D.C. Circuit, *Lee* subtly restricted the scope of

⁴⁰ Judge Sentelle expanded on his views regarding the proper scope of the Press Clause and testimonial privileges in his concurrence in *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D.C. Cir. 2005), handed down four months before the *Lee* decision. He wrote:

The [*Branzburg*] Court . . . observe[d] that “freedom of the press is a ‘fundamental personal right . . . not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.’” Are we then to create a privilege that protects only those reporters employed by Time Magazine, the New York Times, and other media giants, or do we extend that protection as well to the owner of a desktop printer producing a weekly newsletter . . . [or to] the stereotypical “blogger” sitting in his pajamas at his personal computer posting on the World Wide Web . . . ? If not, why not?

Id. at 979 (Sentelle, J., concurring) (citations omitted) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972)).

⁴¹ *Lee*, 413 F.3d at 58. This incredulity at *Zerilli*’s holding echoed the court’s opinion in *In re Grand Jury Subpoena, Judith Miller*. While that case dealt with the journalist privilege in a criminal rather than a civil context and therefore did not directly implicate the *Zerilli* line of cases, Judge Sentelle — the same judge writing in *Lee* — cast doubt on the *Zerilli* court’s strategy of construing Justice Powell’s *Branzburg* concurrence as creating a privilege. He wrote that Justice Powell did not “intend[] to give reporters more protection than other citizens” or “elevate the journalistic class above the rest.” *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d at 972.

⁴² *Lee*, 413 F.3d at 59–60 (quoting *Branzburg*, 408 U.S. at 692).

⁴³ *Id.* at 60.

the *Zerilli* privilege in what can be interpreted as an attempt to bring the privilege more in line with *Branzburg*'s understanding of the Press Clause. Following a trend in which circuits have rejected or limited the journalist privilege,⁴⁴ the court chose to limit *Zerilli* to a restrictive two-prong test, even though *Zerilli* suggested a more flexible balancing test. The *Zerilli* court affirmed the holding in *Carey v. Hume*⁴⁵ that in determining whether the privilege applies, courts should weigh "the public interest in protecting the reporter's sources against the private interest in compelling disclosure" and stated that a "number of more precise guidelines can be applied."⁴⁶ The *Zerilli* court applied only two guidelines because the case was sufficiently disposed of — and the journalist privilege preserved — on the grounds that the plaintiff had not exhausted all other testimonial alternatives.⁴⁷ Yet the court explicitly refrained from deciding "whether compelled disclosure would have been appropriate if appellants had fulfilled their obligation to exhaust alternative sources,"⁴⁸ inviting the reasonable inference that there would have been other factors to weigh even if the plaintiff had satisfied the two guidelines the court discussed.⁴⁹ The *Lee* court, in contrast, did not recognize the possibilities for a wider balancing test. Instead, the court limited its inquiry to the factors of centrality and exhaustion, thereby precluding future courts from fashioning new factors.

While this narrowing of the privilege was by no means a full reconciliation of the D.C. Circuit's privilege with the theory that the Press Clause extends only a general expressive right,⁵⁰ it represented a significant step in that direction because the decision severely undermined the privilege's purported goal of encouraging confidential sources not to be deterred from speaking with journalists. Whereas *Zerilli* had held out the promise that a privilege would protect the con-

⁴⁴ See, e.g., *McKevitt v. Pallasch*, 339 F.3d 530, 532–33 (7th Cir. 2003) (holding that the validity of subpoenas served on journalists should be evaluated by the same harassment standard used to evaluate subpoenas served on any citizen); *United States v. Smith*, 135 F.3d 963, 972 (5th Cir. 1998) (concluding that there is no privilege for nonconfidential outtakes of an interview with a criminal defendant); *Gonzales v. Nat'l Broad. Co.*, 155 F.3d 618, 627 (2d Cir. 1998) (holding that no journalist privilege exists for nonconfidential information). See also Kara A. Larsen, Note, *The Demise of the First Amendment-Based Reporter's Privilege: Why This Current Trend Should Not Surprise the Media*, 37 CONN. L. REV. 1235, 1236 (2005) ("Judges have . . . been more inclined to hold reporters in contempt, charge large fines, or jail them for invoking the privilege.").

⁴⁵ 492 F.2d 631 (D.C. Cir. 1974).

⁴⁶ *Zerilli v. Smith*, 656 F.2d 705, 712–13 (D.C. Cir. 1981).

⁴⁷ See *id.* at 714.

⁴⁸ *Id.* at 714 n.52.

⁴⁹ The *Zerilli* court also discussed a third factor: whether the journalist is the defendant in the lawsuit, which would weigh in favor of overriding the privilege. See *id.* at 714. Because the journalist was not the defendant, however, the court did not apply this factor. See *id.* at 715.

⁵⁰ A true reconciliation would be an abandonment of the privilege, placing journalists on the same constitutional plane as other citizens.

fidence of sources who reveal information of significant public importance,⁵¹ after *Lee* potential sources cannot expect such protection.

The *Lee* court's decision can be viewed — and would be welcomed by many⁵² — as an act of theoretical and doctrinal “correction.” Some commentators have noted that the various journalist privileges crafted by circuit courts post-*Branzburg* were created in the wake of the Watergate scandal, when the role of the press took on a greater and more salient cultural significance.⁵³ That significance may have influenced the First Amendment theories judges employed in their opinions. But as the memory of Watergate fades and the power of the press becomes diffused among new forms of citizen media,⁵⁴ the lionized image of a reporter as the defender of the public's right to know atrophies. In a cultural milieu in which the press's status is diminished, the Fourth Estate theory that prizes the Press Clause as a stand-alone right carrying a special mandate loses sway within the judiciary. And what implicitly occurs is a return to the idea that undergirds the holding in *Branzburg*: that the First Amendment right the press enjoys is nothing more than an expressive freedom that it shares with all Americans, one bound to — not residing above — the fundamental duties of citizenship.

⁵¹ Indeed, D.C. Circuit Judge Tatel interpreted the *Zerilli* test this way in the high-profile Judith Miller case just four months before *Lee* was decided. See *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 997–98 (D.C. Cir. 2005) (Tatel, J., concurring in the judgment). Judge Tatel stated that *Zerilli*'s call to balance “the public interest in protecting the reporter's sources against the private interest in compelling disclosure,” *id.* at 997 (quoting *Zerilli*, 656 F.2d at 712), should properly be answered in government leak cases by “weigh[ing] the public interest in compelling disclosure, measured by the harm the leak caused, against the public interest in newsgathering, measured by the leaked information's value.” *Id.* at 998.

⁵² Many commentators have been critical of both the Fourth Estate theory and the constitutional journalist privileges announced by circuit courts post-*Branzburg*. See, e.g., David Lange, *The Speech and Press Clauses*, 23 UCLA L. REV. 77 (1975) (casting doubt on the historical provenance and current prudence of the Fourth Estate theory); Martin H. Redish & Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235, 262–63 (1998) (questioning the practical benefits of the media's checking function under the Fourth Estate theory); Eugene Volokh, *Deterring Speech: When Is It “McCarthyism”? When Is It Proper?*, 93 CAL. L. REV. 1413, 1444 n.106 (2005) (disagreeing with circuit courts that have created privileges and viewing *Branzburg* as having foreclosed the creation of any such privileges).

⁵³ See, e.g., Bernard W. Bell, *Judging in Interesting Times: The Free Speech Clause Jurisprudence of Justice Byron R. White*, 52 CATH. U. L. REV. 893, 895 (2003).

⁵⁴ See Linda L. Berger, *Shielding the Unmedia: Using the Process of Journalism To Protect the Journalist's Privilege in an Infinite Universe of Publication*, 39 HOUS. L. REV. 1371, 1373–74 & nn.1–3 (2003) (explaining how the proliferation of web logs and other online publications is complicating the application of journalist privileges).