ARE JOURNALISTS PRIVILEGED?

PANEL DISCUSSION

Anthony Lewis[*]

During the years of racist oppression in South Africa, a news magazine called *To the Point* published an article about a black minister, Dr. Manas Buthelezi. It said that while Dr. Buthelezi spoke publicly of the need for peaceful change, in private—according to reliable sources—he advocated violence. That was an extremely damaging charge in apartheid South Africa, one that could have brought Dr. Buthelezi a lengthy term in prison. He sued the magazine—and demanded to know who the reliable sources were. The editor refused to say, and claimed a privilege to keep the names secret. The court rejected the claim. As a penalty for not complying with an order to testify, the judge entered judgment for substantial damages for Dr. Buthelezi. Some time later, in what South Africans called the "Information Scandal," disclosures from the Ministry of Information showed that the article in *To the Point* had actually been written by the secret police and planted in the magazine.

I have begun my talk this evening with that story to make a simple point. In the debate about confidential sources, the press does not always have right and justice on its side. Other interests have to be considered, and one of them is reputation.

The interest of the press in being able to rely on confidential sources is profoundly important. Or I should say the *public* interest in the press's use of such sources. Years ago, when I was teaching the

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Mr. Lewis was for fifteen years a Lecturer on Law at the Harvard Law School, teaching a course on The Constitution and the Press. He has taught at a number of other universities as a visitor, among them, the Universities of California, Illinois, Oregon, and Arizona. Since 1983, he has held the James Madison Visiting Professorship at Columbia University.

Mr. Lewis was born in New York City on March 27, 1927. He attended Horace Mann School in New York City and Harvard College, receiving a B.A. in 1948.

Pentagon Papers case, the students—and I—were particularly interested in an affidavit used by the lawyers for the *New York Times* to show the judges why they should not stop the *Times* from publishing that secret history of the origins of the Vietnam War. The affidavit was by Max Frankel. It described how Washington reporters regularly, daily, talked with government officials about matters that were classified. Without that interplay, he said, there could be no informed reporting on foreign and national security affairs. I asked Max how he had come to write that affidavit. He said the *Times*'s own lawyers could not seem to understand how its reporters could make use of classified information. In frustration, Max said, he typed out a memo to the lawyers explaining how the system worked. They liked it so much that they had him swear to it and put it in as an affidavit. You have heard the echoes of that episode in Max's recent *New York Times Magazine* article.

We have lately had some dramatic illustrations of the fact that journalists can often do their most important work only by relying on confidential sources to get at official secrets. One example was the *Times* report two years ago that President Bush had ordered the National Security Agency to tap international telephone calls without obtaining the warrants that are required by law. It was a vitally important story, bringing to light—and to a degree of accountability—a lawless executive activity. Another example was the *Washington Post* report on the CIA's use of secret prisons in Europe to hold and interrogate alleged enemy combatants. Neither of those stories could have been reported without the use of confidential sources. And without, I should add, great courage on the part of the journalists and their newspapers. The response of the Bush Administration and its political supporters was to threaten the reporters, call them traitors and so on; that is, to focus on the leaks instead of one of the flagrant violations of law that officials had committed.

The use and abuse of executive power and secrecy have expanded so greatly in recent years that the Pentagon Papers conflict of 1971 seems like simpler days. President Bush has claimed the unilateral power not only to eavesdrop on American citizens but to imprison them forever, without trial, on suspicion of being enemy combatants. His lawyers told him that he could order the torture of detainees—and that Congress could not stop him.

The press, with all its defects of haste and short attention span, is often the only defense against the abuse of power. James Madison, in his design of the Constitution, relied on the Separation of Powers to perform that function. That is, if one branch of the federal government overreached, another would counter its thrust for power. But in the years after September 11, 2001, Congress did not live up to Madison's visions. It was a doormat until the change of the political lineup this

past January. I had to say that the press, too, was slow to take up the challenge of looking into the growth of executive power. Both the *Washington Post* and the *New York Times* indeed apologized, after the event, for their failure to examine the claimed reasons for the war in Iraq before it began.

That period of press silence only emphasizes how much we need an energetic, probing, courageous press in this age of expanding, secretive government power. And that, as I have said, involves reliance by journalists on confidential sources. But I think it also requires a realistic recognition by the press of the limits on what it can expect of the law.

The familiar argument of the press is that the First Amendment protects journalists from having to testify about sources. As constitutional arguments go, that is a large step. The First Amendment provides that governments may not abridge "the freedom of speech, or of the press." These words firmly protect the right of the press to publish what it knows. But they have never been interpreted to give the press the right to *acquire* knowledge. To find a testimonial privilege for the press in the First Amendment, the courts would first have to find the press a right to acquire information and then hold that silence about sources was an essential component of that new right.

The first time the claim for such a privilege was made in the courts was in 1958, in the case of *Garland v. Torre*.[1] Garland was Judy Garland, the singer. Torre was Marie Torre, a television columnist for *The Herald-Tribune*. She wrote that, according to a CBS executive, Ms. Garland was not scheduling a special on CBS because she thought she was too fat. Ms. Garland sued, and demanded the name of the alleged CBS executive—which Marie Torre refused to produce, claiming a constitutional privilege. In the Court of Appeals, Judge Potter Stewart—who would later be promoted to the Supreme Court—said that the harm to news-gathering by compelled disclosure of a source "must give place under the Constitution to a paramount public interest in the fair administration of justice."[2] The testimony demanded in this case, he added, "went to the heart of the plaintiff's claim."[3]

In 1972, the issue went to the Supreme Court, which rejected the constitutional claim. In the years since, some courts have found room in the Supreme Court opinions to protect press sources. And editors and press lawyers have often talked loosely of what they call "our First Amendment right not to talk about sources." But that claim, whatever its legitimacy in the past, has been decisively rejected in recent

1 259 F.2d 545 (2d Cir. 1958).
2 *Id.* at 549.
3 *Id.* at 550.

decisions. The Supreme Court has shown absolutely no interest in revisiting the issue. I put it to you that the chance of winning that argument in the Supreme Court today is zero.

Given the dim chance of the constitutional claim, the press is pushing for a federal shield law that would excuse journalists from having testify about sources in federal courts. Most states now have such shield laws, but they do not apply in federal courts, where most of the highly controversial conflicts have taken place. Attempts to get such a statute through Congress have so far gotten nowhere. The reason is what I indicated at the start of this talk: There are other interests that conflict with the press's wish for such a shield.

Consider the interest of reputation. One of the great press victories in the Supreme Court, *New York Times v. Sullivan*[4] in 1964, made it very hard for public officials who are subjected to criticism to recover damages for libel. They can do so, the Court said, only if they prove that someone published a false charge about them with knowledge of its falsity or in reckless disregard of its truth or untruth. Recklessness was later defined as being aware of probable falsity when you published.

Now suppose a federal shield law were in place. A newspaper publishes a story that a cabinet member has taken a bribe—according to an unnamed confidential source. To recover his good name, the official sues for libel. To win, he must find out the name of the source—to show that the source was unreliable, say, or non-existent. But the shield allows the journalist or publisher to avoid disclosing the name, so the official has no way to redeem his reputation.

That is not a far-fetched possibility. Think about the case of Wen Ho Lee, the nuclear scientist who was described in press reports as a spy for China. He was arrested, charged with 59 felony counts and held in solitary confinement for nine months. Then the government dropped all but one count, and Mr. Lee agreed to plead guilty of mishandling information. The judge apologized to Mr. Lee and said the case had "embarrassed our entire nation."[5]

Wen Ho Lee sued the government for violation of his privacy in the leaks to the press.[6] He subpoenaed reporters and asked them to name the source or sources of the leaks. They refused to answer. Would we want a shield law that would support that refusal and effectively deprive Mr. Lee of any chance to repair a ruined life? I would not.

What actually happened in the Lee case is that reporters and their

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4 376 U.S. 967 (1964).

5 Helen Zia, Open Forum, Why Privacy Matters—the Case of Wen Ho Lee, S.F. CHRON., June 6, 2006, *available at* http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2006/06/06/EDGDOILM0B1.DTL.

6 401 F. Supp. 2d 123 (D.D.C. 2005).

news organizations were held in contempt for not naming the sources. Five news companies then settled the case by agreeing to pay Wen Ho Lee $750,000 and the government contributed $895,000 toward his legal fees. That seems fair to me. I am less enthusiastic about the statement the news organizations made. They said they agreed to settle to "protect our journalists from further sanctions" and protect their ability to get information from confidential sources.[7] In other words: We don't care about what we did to Wen Ho Lee; we only care about our needs. One paper that had not taken part in piling on him, the *Boston Globe*, commented that "powerful institutions rarely admit abuse of their powers," adding that "the rule of law is imperiled when the government and a compliant or gullible press tramples on the rights of a single private citizen."[8]

Another reason there is no federal shield law is that a wise federal shield law is difficult to draft, or get passed. Government prosecutors from time to time want journalists' testimony in *criminal* cases, typically before a grand jury. And the government likes to argue that the testimony is needed for reason of national security. That argument is a serious obstacle to Congressional passage of a shield law.

Professor Geoffrey Stone of the University of Chicago Law School recently suggested that, to get around this dilemma, shield legislation include a provision allowing journalists to be subpoenaed when their testimony is needed to deal with an imminent threat to national security.[9] The trouble with that proposed exception is that it could easily become as wide as a barn door. The most important press disclosures have had to do with what the government says is national security: the *Pentagon Papers* case, warrantless wiretapping, secret CIA prisons. The government so often sounds as if the fate of the nation were imminently at stake, and judges tend to be uneasy about differing with official claims of national security.

There is one more inescapable problem with proposals for a federal journalists' shield law: defining who is a journalist. We are in the new age of the blogger—forty million of them or so. Anyone with a cell phone camera can be a news photographer. Are all to be treated as journalists if they happen upon some contested event, and to be excused from testifying about it? That is not a theoretical question. This April a man was released from federal prison in California where he had been held for eight months for refusing to give federal authorities a videotape

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[7] Editorial, *Remembering Wen Ho Lee*, BOSTON GLOBE, June 11, 2006, available at http://www.boston.com/news/globe/editorial_opinion/editorials/articles/2006/06/11/remembering_wen_ho_lee/.

[8] *Id.*

[9] Geoffrey R. Stone, Op-Ed., Half a Shield Is Better Than None, N.Y. TIMES, Feb. 21, 2007, *available at* http://www.nytimes.com/2007/02/21/opinion/21stone.html.

he had made of a violent protest. He was not affiliated with any news organization, but advocates of press freedom called him a journalist and pressed for his release. I think they were right. But how do you draft a shield law that does not, potentially, excuse millions of people from the citizen's obligation to testify?

I shall give you one more case. Two reporters for the *San Francisco Chronicle* obtained documents from a federal grand jury investigation and wrote stories—important stories—about baseball players' use of performance-enhancing drugs. Grand jury proceedings are secret. The reporters were subpoenaed and asked the source of the documents. They refused to answer but were saved from going to jail for contempt when the prosecutors found the source themselves. He was a lawyer who had represented the defendants indicted by the grand jury. When the stories based on his leaks appeared, he moved to dismiss the charges against his clients on the ground of improper disclosures! I hope I am right in believing that many journalists would not want to protect that kind of trickery.

If anyone here expected to hear from me a simple answer to the problem of protecting needed press confidentiality, your expectations have been frustrated. I do not believe that there is a bright-line rule that will satisfy both society's interest in a strong press and its interest in justice. I am driven, in the end, to a reliance on judges to balance those interests.

The testimonial privileges that are familiar to us—the right not to testify against a spouse, for example, or the lawyer-client privilege—were not created by the Constitution. They were developed by courts over the centuries. In 1975 Congress formally authorized federal courts to define privileges in keeping with "the principles of the common law as they may be interpreted . . . in the light of reason and experience."[10]

One judge, David Tatel of the United States Court of Appeals for the District of Columbia Circuit, has proposed that the federal courts use that authority to adopt a qualified privilege for journalists. He said "reason and experience" called for that step because the press played such an important role in exposing official abuse of power and because most states had adopted some form of press privilege by statute or judicial decision.

Judge Tatel focused on criminal cases. He spoke of what he called the "clash between two truth-seeking institutions: the grand jury and the press."[11] He suggested this form of balancing when the government is trying to find the source of a leak: The public interest in newsgathering,

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10 FED. R. EVID. 501.

11 *In re* Grand Jury Subpoena, Judith Miller, 397 F.3d 964, 986 (D.C. Cir. 2005) (Tatel, J., concurring).

measured by the leaked information's value, should be balanced against the official interest in limiting the harm caused by the leak. For example, if the government wanted to learn who leaked the fact of President Bush's order for illegal wiretapping, a court would weigh the harm caused by that leak against the importance of the information to the public. In my view the public interest would prevail in that case, and the reporters would be protected against having to disclose their source. In other cases, the balance might come out the other way.

It is a heavy responsibility to put on judges. But balancing interests is a function they perform all the time. We live under a Constitution that has been given meaning over the decades by their decisions. And I see no other way—no shortcut—but relying on judges to resolve the conflicts over demands for reporters' sources.

Those conflicts seem to have grown more frequent lately, and bitterer. Prosecutors are not as wary as they used to be of tangling with journalists over subpoenas. I am not sure why that may be so. Perhaps lower public support for the press is a reason, or the generally divided, partisan nature of our society.

Make no mistake: The passion that journalists feel about this issue is genuine. When they make a promise of confidentiality to a source, they have to keep it. Those promises should be given with care, not casually, and reserved for important occasions. The press should take particular care not to rely on anonymous sources for stories that injure private reputations. But we have to protect journalists when they are doing their essential work of keeping the country honest.

Max Frankel[*]

Good evening. Tony Lewis stole every valuable word I had to contribute to this forum by quoting my affidavit, so let me just testify that while he winds up his quaint and remarkable faith in the judiciary to solve this problem, that he has held this faith long before he married one. (A judge that is.) And so it's an old conundrum that I face with him because I don't share that faith.

Let me go back to the beginning of his question of what can the press expect from the law. I think Tony has proved to us that we can't expect much from the so-called shield law. Defining who is a journalist and defining the circumstances is such a difficult thing. There is in fact in the Justice Department a rule of thumb, a set of guidelines, that is supposed to govern when they want journalists' testimony: It has to be the last resort and with no other way to get the information.

However, those guidelines break down. Since Judy Miller went to jail for refusing to cooperate in the Libby case,[1] for example, the Hearst Cooperation reported that something like eighty-five subpoenas descended upon their newspaper and television stations. In other words, prosecutors around the country were encouraged by the sight of that reporter in jail to go after reporters as part of their duties. There is a great temptation when reporters are out there getting information, taking pictures, to corral them into the case and to use their notes, their notebooks, their sources, and their pictures, as an arm of government. That is the problem; it is a condition that we are trying to resist in the press.

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Frankel moved to Washington in 1961, becoming diplomatic correspondent then White House correspondent, and was from 1968 to 1972 chief Washington correspondent and head of bureau. After being summoned to New York, he served as Sunday editor until 1976, editor of the editorial pages from 1977 to 1986, and executive editor from 1986 to 1994. In retirement, he wrote a *New York Times Magazine* column until 2000.

Frankel won a Pulitzer Prize in 1973 for reporting on President Nixon's visit to China. He is the author of an autobiography, *The Times of My Life and My Life With The Times*, and a history of the Cuban missile crisis, *High Noon in the Cold War*.

[1] *See In re* Grand Jury Subpoena, Judith Miller, 397 F.3d 964, 986 (D.C. Cir. 2005) (Tatel, J., concurring).

The red herring in all this is our occasional liability in a case such as that concerning Wen Ho Lee, where we do outrageous things and defame an individual. I would submit—and I agree with Tony—that when the press is in fact guilty of what amounts to libelous or criminal conduct, that the press itself cannot hide behind the secrecy of sources. The corollary of this is that we should never allow a prosecutor to defame a person like Wen Ho Lee by predicting his indictment before he actually is indicted.

I tried very hard, when I was Editor at the *New York Times*, to forbid a certain kind of story where an anonymous law enforcement source would say, "I'm going to indict judge so-and-so because he's been taking bribes." There would immediately appear some headlines—in the days before I was Editor—defaming that judge, whether or not an indictment actually followed. The press should not entrust its protection of sources to law enforcement people unless they take official action. Defamation is clearly one of the cases that I would move off the table of this problem.

But national security, friends, is at stake. In the process through which reporters and government officials in the realm of diplomatic and military affairs daily conduct their business, there is a third party—not just the courts and the press—a third un-democratic aspect central to the whole process by which we conduct national security affairs; this is the so-called "classification system." It exists under no law; it is merely an executive order of our presidents whereby they classify millions and tens of millions of documents and pieces of information as "secret" or "top secret."

It is impossible to discuss military and foreign affairs intelligently without walking through that body of material and documents. A reporter covering the Pentagon, the CIA, or foreign affairs and wars simply cannot function unless a large number of officials from the President on down—for both noble and vile reasons—are willing to talk about those secrets on a confidential basis. The price of learning about eavesdropping and the price of learning about these awful renditions of prisoners around the world and of the torture that we engage in has to be paid by also allowing the Libbys of this world to pass secrets for less noble reasons.

The only way that reporting can continue to function in this realm of national security is if the law takes care not to legislate the nature of the relationship between the press and its sources. Judge Tatel would have us believe that he could sit in judgment about the value of a given leak and decide whether its source deserves to be shielded or must be disclosed. Now imagine you are a government official and you want to talk to the *Washington Post* to tell them about something untoward that is going on. Will you have to sit there and say, "Well, which judge is

going to hear this case? What is going to be his judgment of the quality of the leak that I am about to engage in?"

The *Washington Post* is not just going to take a piece of paper from one little leak and run to the press with it. They're going to take that leak and build on it and go to another source and say, "I hear this is going on." Then that source will calculate in his or her head and perhaps add another piece of information. And then the reporters will go to a third source and a fourth source.

Ultimately, a story appears. Even if a judge would dare to try to decide the value of any portion of those leaks, how right and wrong can he or she be? Believe me, when you are in the newspaper business, and you print a given story that is of consequence and is of moment, that is likely to shatter preconceptions and to shock people, you simply never know the consequences of information once it gets into the public realm. No one can anticipate the ultimate consequence of any given story; it can do good or it can do harm, but there is absolutely no certain way of predicting.

This is why the motto in a newspaper office comes to be: "Publish and be damned." Ultimately, the contest between sources and the law and the press comes down to a game. It comes down to combat. The government tries to protect its secrets. The press tries to ferret them out by maintaining its reputation with the public, to prove that it is working and publishing in the public interest, and therefore that it deserves protection, to not be thrown in jail for refusing to reveal its sources. Thus, the press hopes the public will support its right to continue to give promises of confidentiality with responsibility. The law cannot intrude in that process in any constructive way.

At certain moments, if the country is panicked with fear, it may be willing to put a reporter or two in jail. So be it. The contest must go on. It is a political contest for which—I ultimately agree with Tony—the law has no answer. There is no point throwing the Constitution at this problem. The Constitution did not foresee the garrison state in which we have lived since the onset of the Cold War—that condition has created a set of unique problems. Therefore, I don't trust the judges to do this. I trust the politics of this game to decide the issue, in each generation of journalist.

Victor Kovner[*]

As a lawyer—we are in a law school after all—I thought I should speak briefly about the nature of the privilege and then its scope and some of the different characteristics of the privilege. Then I will try to take on some of the challenging remarks of my colleagues here, with which I agree only in part.

First of all, there are different kinds of journalistic privilege. There's an absolute privilege, which protects a journalist against testifying as a third-party witness in virtually every circumstance. We have an absolute privilege here in the state of New York; it is provided by our shield law. It was passed in 1970 and it has worked well. Notwithstanding this absolute privilege, law enforcement works effectively in the State of New York. We are able to combat terrorism rather effectively. If you ask prosecutors about the things they worry about, about their legal challenges, about their constraints, about their ability to enforce the law, I promise you that our New York shield law will not make their top ten list. They have many more profound concerns in terms of enforcing the law.

A qualified privilege—which is the heart of what we are talking about today—may be adopted by statute; this is a so-called shield law. Many shield laws provide for a qualified privilege; some for an absolute privilege. A shield law may also arise, as many courts have found, under the First Amendment of the Constitution, and it may arise under federal common law based upon judicial recognition of evidentiary privileges as the law has developed over a period of years. Indeed, the qualified privilege that exists in large parts of our country derives from all three of these sources: under state statutes, under the Constitution, and as a matter of federal common law—at least in the view of many.

To whom does the privilege belong? This is a very important question and I feel very strongly about it because there are conflicting decisions with regard to this issue. The majority of the decisions—the

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weight of authority, as lawyers say—is that the privilege belongs to the journalist, not to the source. Therefore, if the source decides to waive the privilege, the waiver cannot compel the journalist to testify. If the source could do so, it would eviscerate the privilege because prosecutors or other large companies would pressure potential sources to waive their privilege and inevitably the sources would become identifiable. Thus, the weight of authority is that the privilege belongs to the journalist who may take into consideration a waiver and decide to honor it and testify, or not. That is properly a matter of journalistic discretion.

Now I differ somewhat from Tony in his view of the *Branzburg* case,[1] the 1972 case where the Supreme Court in a very narrow and controversial decision, found that there was no First Amendment privilege arising in the context of federal grand jury subpoenas.

Branzburg did not go beyond that limited holding. So I do believe that there is much to be said and indeed much authority for the proposition that there is a constitutional privilege in civil proceedings and in aspects of criminal proceedings, even in criminal trials. However, the broadest flexibility for a federal prosecutor is in the context of the grand jury subpoena and that, of course, is where the most difficult cases arise. Indeed, since *Branzburg*, we have had about three decades of decisions expanding and recognizing the privilege in a variety of circumstances.

As an active litigator, let me just say that most subpoenas are not served in criminal proceedings. Most subpoenas are served in civil proceedings. This is why the qualified privilege is so critical. If someone engaged in litigation wants to conduct an investigation, why not start with the reporter that has covered the accident, the incident or the dispute? That reporter has already done a lot of work. They talked to witnesses. Let's find out what the reporter knows. And of course if you will permit that to happen, you in effect turn journalists into the the arm of the government or private litigants—as Max just suggested—and you drastically diminish the willingness of people with important information to speak to the press. You impair the free flow of public information and that would be disastrous. It is vital that we have a have strong authority for a qualified privilege in civil cases and happily, in most of the country, we do.

Let me come to where I most disagree with Tony and that is where he relies heavily for his concern about the privilege: libel cases. First, one must distinguish cases where the press is the defendant from cases where the press is a third-party witness. Where the press is the defendant, if it relies on a single confidential source and refuses to

[1] Branzburg v. Hayes, 408 U.S. 665 (1972). The Justices voted five to four in this case.

answer questions regarding the source of the libel against Minister Buthelezi—to take Tony's example—or whomever it may be, the press takes a great risk. The courts will generally, at a minimum, preclude the press from relying on that source at trial through so-called preclusion orders. Thus, the reporter being sued for sensitive materials, when asked what is the basis is for the statement in suit, may have in effect no source.

Some courts will even go beyond that, some will strike entire defenses. There was a particularly troublesome case a few years ago in Boston, *Ayash v. Boston Globe*.[2] The *Ayash* case involved an invasion of privacy claim ultimately rejected by the Supreme Court, but because the *Boston Globe* employee had refused to disclose the source, the newspaper had to pay, my recollection is, more than one million dollars in sanctions, which were finally sustained. So in libel cases, while the press has the privilege, the courts often deter them from relying on it indiscriminately.

It is a very different situation where the press is merely covering the matter and is a third-party witness, such as in the Wen Ho Lee case,[3] in the case involving Steven Hatfill, the "person of interest" in the anthrax mailing investigation,[4] and ultimately, in the criminal setting, in the cases involving Judith Miller and Matthew Cooper.[5] In those contexts, it seems to me, at the bare minimum a qualified privilege ought to apply. This does not mean that it is going to preclude the relevant testimony in all events. It places upon the government, or the proponent of the subpoena, the burden of showing that the material sought is highly relevant or material, critical to the outcome of the case, and cannot be obtained from alternative sources. These three prongs to overcome the privilege are what we who practice in the field often describe quickly as materiality, criticality, and exhaustion of sources. This burden is not easy to satisfy and the fact that this burden exists is the reason why the press for many years has not been subpoenaed every day, countless times.

Unfortunately, due to the notoriety of recent cases, we are now witnessing a plethora of subpoenas issued upon the press. I have clients who have received scores of subpoenas all over the country and there are others who have received many more. Prosecutors will feel, because of the notoriety of the *Miller* case, that they are not doing their job effectively unless they subpoena the press. This has virtually turned the relationship on its head.

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2 Globe Newspaper Co., Inc. v. Ayash, 546 U.S. 927 (2005).

3 401 F. Supp. 2d 123 (D.D.C. 2005).

4 Hatfill v. Ashcroft, 404 F. Supp. 2d 104 (D.D.C. 2005).

5 *In re* Grand Jury Subpoena, Judith Miller, 397 F.3d 964, 986 (D.C. Cir. 2005) (Tatel, J., concurring).

Had there been a qualified privilege in the *Miller* case, many believe that at the time Ms. Miller was sent to prison, the prosecutor Mr. Fitzgerald could not have overcome it because Miller's testimony was little more than peripheral to the charges that went to the jury.

In the *Miller* case, only five counts went to the jury; one led to an acquittal and four led to convictions. However, in the indictment, there were additional counts that Fitzgerald included because the Miller testimony would have been more relevant to those charges. But the judge did not permit those to go to the jury. Therefore, in the case that was actually tried—as described in Max's article—the key witnesses did not include Miller. The key witnesses were Russert and Cooper. Miller was largely ancillary. If Fitzgerald had to show that her testimony was essential, critical to the outcome to the case, he may not have been able to do it.

That is yet another reason why we should not have Special Counsel at all, in my view. Because when you're acting as independent counsel—Fitzgerald was not governed by the Justice Department guidelines—you do not require the approval of Attorney General Gonzales. (Not that Fitzgerald would not have obtained it.) Fitzgerald was off on his own.

We have seen this in other contempt findings against reporters, such as in the Rhode Island case involving the reporter Jim Taricani where there was another special counsel, the prosecutor was not governed by the basic rules that apply to attorneys in the Justice Department.[6] These rules in effect provide for a qualified privilege that remains the Justice Department's own internal law. It has lasted for thirty-four years. In my view, it is shocking that the government now resists a federal shield law which would provide for a qualified privilege, when they purport to apply these rules to themselves internally.

As to the "national security carve out" in the proposed federal shield law—a concern mentioned by Tony, which I share—realistically, in order to get a shield law adopted, politically, it is not going to be possible without that "carve out." But the recognition of a qualified privilege at the federal level is nonetheless vital and I think that we can get that law passed. I do not think the President will veto it. I am an optimist by nature, but this year I think there is real opportunity.

Last year, a bill was introduced by Senator Lugar and Congressman Pence. Congressman Pence, it should be noted, is the Chair of the Conservative Caucus among the Republicans in the House, but he is also a former journalist who understands the First Amendment

[6] I refer to the *Attorney General Guidelines*, adopted by Attorney General John Mitchell back in the early nineteen-seventies.

and is quite outspoken on these issues. The bipartisan initiative for this legislation makes the passage of this legislation realistic, and of course, it is vital that we urge its adoption.

Before I sit down and let others respond, I do want to say that not everything that has emerged from these cases in the last couple of years is bad. There are two very important opinions, one is the Tatel opinion in the *Miller* case—which Tony has referred to and I commend you; the other is in a case called *New York Times v. Gonzales*.[7] This case was the *New York Times*'s attempt to obtain a declaratory judgment restraining the Justice Department from seeking the telephone toll records of two reporters, one of which was Judith Miller. Again, whether there was a qualified privilege applicable was the heart of the question. There Judge Sweet granted the declaratory judgment in the District Court. His decision was reversed by the Second Circuit, two to one.

I recommend to everyone who is interested in the subject the opinion of Judge Sack in the *Gonzales* case; it is so beautifully written and captures so much of the heart of the debate. It sets forth the continuing struggle between the government and the press and why—as Max has suggested—they should be permitted to tussle it out in their own arenas and should not be interfered with by prosecutors or courts which may compel disclosure.

Now, some will say, "Now Kovner, you are just citing two dissents: Tatel in *Miller* and Sack in *Gonzalez*." Actually, in the *Miller* case, one circuit judge (Sentelle) found no common law privilege and Judge Tatel found a common law privilege, which he agreed would have been overcome on the facts of *Miller*, but that was not a defeat. The most important principle was the recognition of the privilege. Judge Henderson, the third circuit judge, did not reach the question of whether there was a common law privilege. Thus, on the issue of whether there is a common law qualified privilege under federal law, the vote was one to one to one in that court.

Also, in the *Gonzales* case, the two judge majority did not reach the question of whether there was a qualified privilege. They decided only that if there were such a privilege, it would have been overcome. Judge Sack, in his dissent, found that there was a qualified privilege and in his view on that record it had not been overcome.

Therefore, as to whether there is a federal common law privilege, based upon the two leading cases in the field now—you have got one

[7] N.Y. Times Co. v. Gonzales, 459 F.3d 160 (2d Cir. 2006).

court of appeals judge (Sentelle) in the negative, two (Tatel and Sack) in the affirmative, and three that did not reach the question, but went on to find that the privilege could be overcome—in my view, we are well on the road to the recognition of a federal common law privilege. I do not know whether we are going to recognize it there first judicially, or if we are going to get to a federal shield law first, but we are going to one way or the other. Thank you.

DISCUSSION

DEAN DAVID RUDENSTINE: Tony's going to wait before he responds. Max do you have anything to say at this point?

MR. FRANKEL: I hate to defend the prosecution in the Libby case, but they did respect the federal guidelines to a "T." While Judy Miller's testimony, in the end turned out not to be critical to the case, going into the case, the prosecutor in very good faith thought that she was vital to establish the motive to the leak and to prove that Libby in fact had leaked to her. That she kind of didn't produce the goods at trial doesn't take away from the fact that, I think, the prosecutor was acting in good faith in including her in the case.

MR. KOVNER: I agree with that—but the question was relevant when the Supreme Court denied cert and Miller was about to go into jail. By then, I think Fitzgerald had to know that her testimony was at most ancillary. Of course, there was no qualified-privilege, so he didn't have to abide by it and he was not governed by the *Attorney General Guidelines*. I think by then he had waged this long fight and it would have been hard for him to step back at that point, but he should have. There was no need for her to go to jail.

DEAN RUDENSTINE: Anything else Max?

MR. FRANKEL: No. No.

DEAN RUDENSTINE: Before I see questions from all of you, Max, you ended your article in the *New York Times Magazine* section, I think, with the wonderful phrase, basically, "butt out."

MR. FRANKEL: Yes.

DEAN RUDENSTINE: I think, your advice to prosecutors and law enforcement officials and any member of the executive branch that had any authority whatsoever to intrude into press freedoms was to keep their nose out of your tent.

MR. FRANKEL: Right. Right.

DEAN RUDENSTINE: Of course, that's advisory. The question is, if they don't take your advice and they put their nose into your tent, what legal norm or rule are you, in fact, recommending? Let's just talk about the national security cases, which are of great concern to you.

MR. FRANKEL: I'm saying that the law is especially political and that there is no law that we could write to address this issue, especially when you wave national security in front of the judges. Judge Tatel folded his own hand, when national security was thrown at him. The judges are much too easily intimidated by that phrase and by a president

invoking it, especially in war time.

There is no answer. The answer, ultimately, is jail or appealing to the public and putting our faith in the service that we render to the public to provide a shield of a different order. So that putting a journalist into jail, when that journalist has been shown to have rendered good public service, becomes impossible politically. And that attorney generals who protect the order—not like some present occupants of the office—would back off and butt out; that was really the meaning of my phrase.

DEAN RUDENSTINE: I have one question for Tony if I might? Tony in many of your writings, you have expressed enormous admiration for members of the bench. You have also expressed in much of your writing, dismay, if not deep disappointment, with many members of the bench, and yet tonight you urged that we trust the courts.

Now from your writings, we would say that there are judges and there are judges. There are those that you think discharged the responsibility with great loyalty and understanding about important values and there are those who get lost in the wilderness, make fundamentally wrong decisions, and threaten the powers and individual liberty.

Given the fact that our bench can be occupied by people who have such startlingly different views, some of which you would applaud and some of which you would criticize, why do you turn to the bench with, kind of, open arms and such faith on a matter that so many in the press think is so fundamentally important to their freedoms? Why trust the judges?

MR. LEWIS: Well, Max said I was quaint to do so, but I took a certain honor in that adjective because it's the one Alberto Gonzales used to describe the Geneva Conventions.

Well, maybe I am quaint. Of course, you're right, David. Of course, judges make bad mistakes. They have made them throughout our history; they decided the *Dred Scott* case.[1] They held the income tax unconstitutional. They installed President Bush over Al Gore in a decision without a single feather of precedent, logic, or even jurisdiction, in my judgment. So I'm not naive about judges. They make very bad mistakes. But what else are we to do?

I think we have two choices here. One is the choice of politics, which Max has presented very fairly and persuasively: we would let the chips fall and we would rely on politics—meaning public opinion—to save us.

Essentially, Victor has adopted my view. He's very happy because

[1] Dred Scott v. Sanford, 60 U.S. 393 (1856).

two judges have adopted the federal common law privilege, which is what Judge Tatel wanted. So Victor likes judges to decide.

I don't claim it's a sure cure. I just don't know another one. Other than that, we're left with brickbats and politics.

MR. KOVNER: You're right. I'm with you on that. And not only am I, but more important, such a provision was in the Lugar-Pence Bill of a year ago; it is an additional ground.

You know when the federal judge in the BALCO case[2] sentenced the two *San Francisco Chronicle* reporters to almost eighteen months, he stated that he was pained and regretted doing so. In the absence of a statute setting forth a balancing test, or federal recognition of federal common law privilege, the judge was constrained to do what he really didn't want to do.

I think that a statute would be a major step forward. It's not going to solve all cases, but it will be a major step forward.

DEAN RUDENSTINE: Okay. Questions from the audience? If you, I'm sure that there are going to be many, so if you could just keep your questions, short and to the point we'll have a chance for more people to ask. Yes, sir?

QUESTIONER 1: This is a question on the issue of ethics and morality, I would like all four of you to pretend that any one of you, were elected the President of the United States in the year 2008. Tell the audience how would you approach the issue of trying to turn things around in this country on the topics of ethics and morality?

DEAN RUDENSTINE: Tony why don't you give a short answer to that.

MR. LEWIS: Well, I have a short answer actually. It's not what we're discussing this evening, but I have a short answer. It doesn't depend on any of us being President, which is very unlikely.

I think the most important thing the next President could do would be to start out his term with his inaugural address saying, "I'm going to return this country to what John Adams said it was going to be: I'm going to have a government of law, not men. I'm going to follow the law; we're going to have law in this country. And that's what I believe in."

I can't imagine anything that could put this country on the right path better than to return to law.

DEAN RUDENSTINE: Max or Victor?

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[2] At the time this piece was published, U.S.A. v. Bonds, 3:07-cr-00732, was being adjudicated in the United States District Court for Northern District of California. For a list of court documents related to this case, see https://ecf.cand.uscourts.gov/cand/USAvBonds/. For a collection of media reports on the Bay Area Laboratory Co-Operative (BALCO) steroids case involving Major League Baseball star Barry Bonds, see *The BALCO Investigation, A Look at Steroids in Sports*, SFGATE.COM, http://www.sfgate.com/balco/ (last visited Mar. 26, 2008).

MR. FRANKEL: No. I'm not eligible to run for President. I was born abroad.

DEAN RUDENSTINE: Victor, do you have an excuse?

MR. KOVNER: No. You can't expect the President to do more than set a tone, which, obviously, has been missing. A lot of those questions do not lend themselves to legal resolution. The way they conduct themselves in office, I think, is the best example that could be offered.

DEAN RUDENSTINE: Sir?

QUESTIONER 2: First of all, my question is directed to Mr. Lewis. You mentioned at the very beginning of your talk, the *Buthelezi* case, and you also mentioned at the very end, the BALCO case. Both troubling examples. But what's interesting about both of them, is that they seemed ultimately to be cleared by leaks themselves. In other words, is it not fair to say that the marketplace of information ultimately clears itself when allowed to function openly and without impediment?

MR. LEWIS: I'm not sufficiently familiar with the BALCO case to say whether that was inevitable, but I did know South Africa in those days and it was very unusual for that leak to occur from the Ministry of Information. It was a startling event; nothing like it ever occurred, again or before. You couldn't have relied on leaks to correct the abuses of the apartheid regime, certainly not.

I mean, naturally, Max's solution—leave it to politics, leave it to pressure—if the government action is sufficiently grotesque—if the public sees it putting a journalist in prison, or as in the *Buthelezi* case, holding a man liable to even the death penalty for something he wrote on the basis of an anonymous source—the situation will correct itself. But I'm not so confident about this solution.

MR. KOVNER: I want to say a word about the BALCO case because I read it just the way Tony did originally. Namely, the reporters there were sentenced to serve eighteen months for contempt, suspended pending appeal. During that appellate process, the real leaker was identified: one of the defense lawyers, who was exposed by a disgruntled vendor of that lawyer. At that point, the prosecutor withdrew the subpoena.

But I was told by a senior person at Hearst, that was not why the subpoena was dropped, that—just like Fitzgerald who knew about the original leak from Armitage from the very beginning—for a long time, the prosecutors in San Francisco knew that the leaker was the defense attorney—who lost his license to practice law and will go to prison—but they pursued the reporters anyway and they only changed their mind after the Justice Department received letters from Speaker Pelosi and four senior members of the California Congress. Only then did they withdraw the subpoenas. This vindicates Max's point.

MR. FRANKEL: Yeah. Well tricky or not the public was a lot better off knowing how many ballplayers were using steroids, so the sanctity of the grand jury is an issue, but it isn't just a simple balance in my view. I think transparency is a higher cause than the sanctity of the grand jury.

DEAN RUDENSTINE: Yes, sir?

QUESTIONER 3: Tony, I'd like to follow up on Max's point. If you have a qualified-privilege and you're a journalist talking to a source, and the source says, "Hey, are you going to keep this confidential?" You have to say, "Well, depends on how the judges balance things out," which essentially gives your source no assurance. I think, therefore, a qualified-privilege, in terms of assurances that a source has, is no privilege. How do you respond to that?

MR. LEWIS: Well, that's been a troubling issue right from the beginning. Justice White mentioned that possibility in his opinion in the *Branzburg* case in 1972. You know, you visualize this conversation with the source, it doesn't usually happen this way, but to follow up it might be even more complex.

I think on the whole I agree with Victor, that mostly it would work because, let's put it this way, sources usually leak for some good reason and nobility is not at the top of their list.

Sometimes it is nobility; sometimes they think it's important for the country. But they usually have some ax to grind. They have a reason to leak and that reason will continue no matter what the exact terms of confidentiality are.

QUESTIONER 3: Tony and Victor, let me ask you this question. Let's go back to the fall of 1972, it's a couple months after Watergate break-in, but is before most of the country had any idea about the scandals that were going to be revealed by the Watergate investigation. The *Washington Post* is going to press, printing this information, which most of the press in the country is not picking up on, and in fact, questions are being asked whether or not the people in the *Post* have lost their minds because they're doing war with the Nixon administration. The *Post* is being threatened by their advertisers and they're publishing stuff that people just think is just a dry hole or a dead end. Now let's just suppose that the Nixon administration begins a Grand jury investigation because some of the information is clearly coming out from inside the FBI, is confidential, and it may be violating federal criminal laws.

Now the reporters Woodward and Burnstein get subpoenaed to the Grand jury. The judge has a balancing test under this approach—I take it—under Tony's approach especially. One of the big factors in the scale is what we think the public interest is that's going to be served by this position. Now if you're with me in late-September/October '72, we

don't think that this investigation is in the public interest; not very many people in the country believe that much is there.

Nobody has the imagination to really imagine what Nixon actually had done. So, you're the judge and these people come in and the prosecutor says, "Make this person talk." You've got your thumb on the scale, trying to figure out the balance, and you're having a hard time finding the public interest here. How are you going to decide that? And does that cause you any concerns about your balancing approach?

MR. LEWIS: I can't resist changing the subject—but in a relevant way, I hope, because there's something that happens even before that and it happened in the *Pentagon Papers* case, as Max will surely tell us about and remembers well. I was abroad at that time.

In the *Pentagon Papers* case, the government very early on demanded that the New York Times turn over the documents it had. And the Times resisted, because, it said, the government would be able to tell from the markings on the documents where the leak came from. The issue came before Judge Gurfein and he decided for reasons that turn out to be probably wrong under *Branzburg*—but it was before *Branzburg* that there was a privilege—that he would not order the papers turned over. Am I right Max?

MR. FRANKEL: I don't think that was the burden of his decision though.

MR. KOVNER: Yeah. I don't think it was quite that way.

It didn't go to the source protection; it went to the right to publish.

MR. FRANKEL: No. The government wanted to know what documents the Times had because it needed to prepare evidence in order to prove that a prior restraint was justified and Gurfein basically said, "Well the Times aren't going to produce the documents so we'll assume they have every single page."

MR. KOVNER: That's right.

MR. LEWIS: Well, the Times made the argument of a possible disclosure of the source.

MR. KOVNER: Oh. I'm sure that was correct.

MR. LEWIS: And Gurfein respected that but he said a list of the documents would do instead.

MR. KOVNER: Yes.

MR. FRANKEL: That's correct.

MR. LEWIS: But anyway, I agree with you, historically, as best I can remember, that the public was not seized of the Watergate business in September or October of 1972. It eventually was a very slowly developing matter.

Max was there and would remember better.

I'm not full of confidence that the judge would have decided that as I proposed—

MR. FRANKEL: And there were questions in the press corps as to whether the sourcing was really accurate because, the Washington Post was not revealing its sources. As rendered, as the sourcing appeared in the stories themselves, it was very unconvincing. There was a suspicion that they were taking a wild chance—nobody knew about Deep Throat.

MR. LEWIS: No. In fact, Deep Throat didn't appear in the stories, only in the movie.

MR. FRANKEL: Right. Exactly right.

DEAN RUDENSTINE: Yes, sir?

QUESTIONER 4: Mr. Lewis, Dean Roscoe Pound once observed that the law was the only agency of social control. As a former journalist some years ago, I might say to that, "I second the motion." The law is as good as the judges and there are judges of disparate quality sometimes eminently just and sometimes with a certain bias. Above all, from a laymen's stand-point, and from an ex-reporter's stand-point, the law is concerned about certain neatness and finality. In politics and culture, it's dynamism. I want to leave you with this question: If not for the late Ed Bradley of CBS news, would we ever have pierced the truth, about the situation in North Carolina?

MR. LEWIS: I don't know that I can have anything to add to that. I agree with you that the law seeks neater answers than may exist in life, but it's often satisfied with less than neat results. It has to be because life isn't neat. I think, in the end, that we really have to rely—even if you follow my advice or Victor's and hope the judges will find a qualified privilege in some way—that public opinion is not absent from that decision process. It's part of what moves judges, and quite rightly. Judges read the newspapers like everybody else and it's right that they do. So, I don't think that they're mutually exclusive. Let me leave it at that.

DEAN RUDENSTINE: Yes, in the back?

MR. KOVNER: David, if I may just add?

DEAN RUDENSTINE: Oh. I'm sorry. Just one second, sir.

MR. KOVNER: Judges are human; they have limitations. But our judiciary is a treasure; it is the protector of our liberties and it's not always perfect. We should not expect perfection. We are very fortunate and the judiciary deserves the enormous confidence we have in them.

Over any period of time, they produce remarkable results, vindicating our fundamental freedoms. It doesn't mean that justice is done right away—and many issues are not resolved quickly—but over time, the system really works. So when I hear reservations about our judges generally, I have to say, I just don't share that. I think you need to look at that the overall system and then you'll have more comfort in it.

MR. LEWIS: Victor, I wish I'd said that. And you're having said

it, I move to add something. That is—remember this ladies and gentlemen—a large part of what we're talking about here today is just the First Amendment, not the technicalities of it, but the sense of a free-spoken country and an open society, and that came from judges.

Ladies and gentlemen, I once heard Potter Stewart—the same judge I mentioned earlier—it was a conference put on by Fred Friendly—remember "That Delicate Balance" that Fred had? This was the first big one, and it was sponsored by the *Washington Post*. There were a lot of big important people there, including Justice Stewart, who went on condition that he not say anything and not be asked any questions and would be able to hide in the shadows and so on and so on.

Justice Stewart listened to the press talk with grandiosity about its rights and how important they were. One important journalist said it was so important to get the facts that he would certainly steal grand jury minutes, if he had to, and he would even kidnap a grand juror.

Justice Stewart had about all he could stand and he finally spoke up and said, "You know, I've listened to you say how terrible these judges are. They don't give you all the rights you think you have and you have a lot of rights, and where do you think they came from? The stork didn't bring them. The judges gave them to you." And that's true.

The First Amendment has been brought to what it means today by judges in just seventy years. It's only in the last seventy years that the First Amendment—which was added to the Constitution in 1791—has come to mean what we think of it today: real protection for speech and press. That's because of judges.

DEAN RUDENSTINE: Yes, sir? I called on you.

QUESTIONER 5: Resisting the temptation to follow that track, might I suggest that the lawyers and the journalists are kind of suffering from a lack of imagination, which is leading to the current despair? When Max Frankel wrote his affidavit, his memo to explain to the lawyers how things worked, which led to the *Pentagon Papers*, and the decision that the locus of power, of who should make the critical publication, should be in the press and not in the government, the press was being defended by a bunch of corporate lawyers, hastily drafted in to defend their clients against the Nixon administration, who in the *Branzburg* case, came and saw that people were asking for notes and things and said, "Ah-hah, work product!"

They didn't say absolute-privilege or attorney-client privilege partly because they thought courts wouldn't buy it and partly because they didn't come at it with a journalistic sensibility. They didn't think it would protect their clients. For example, if Wen Ho Lee confessed to his lawyers that he was guilty of selling stolen secrets and the prosecutor subpoenaed the lawyer, and said, "You know, its really highly-relevant to my investigation what Wen Ho Lee told you, and

there's no other alternative source that could have it." I don't think the lawyers would have gone for that—and I assume you support that result—because, of course, then no future client would ever tell his lawyer anything. Even though, focusing on the Wen Ho Lee case, the prosecutors were absolutely right: it's incredibly relevant to the case.

So my question is: Shouldn't you have something of a system wide perspective and be thinking—and that goes to the legal test as well—not in terms of how relevant is this to this investigation—it will always be—but in terms of putting an absolute-privilege in for the greater good of protecting all the future cases, of the sources, who don't show up?

MR. LEWIS: I don't think I can add to what I said before as to the ultimate question, but I'll say—picking up what you said along the way—I don't think it's fair to say that the Times and the *Pentagon Papers* case were defended by corporate lawyers and that there was some corporate mentality. Hell, Alex Bickel was our lawyer; he was a professor at the Yale Law School and assisted by Floyd Abrams, hardly your typical corporate lawyer.

MR. FRANKEL: But they—like the judges along the way, and indeed like the judges on the Supreme Court—felt that there was something awful in journalists, possessing top-secret information about a war in wartime and claiming the right to publish it against the Commander in Chief and President of the United States.

I rapidly tried to explain that, with secrets in Washington, there are secrets and there are secrets, and the traffic in them is legion. Therefore the normal process of bowing and genuflecting before executive authority was wrong-headed. It was wrong on the part of our lawyers and it was wrong on the part of the judges. Indeed four of the Supreme Court Justices, in the end were willing to think about the repercussions of the Times, after publication, being hauled into court for violating the Espionage Act by publishing this material; that's four out of nine, so we were hardly on safe ground.

MR. LEWIS: When Robert McNamara decided to look into the origins of the Vietnam War, he hired a Harvard Ph.D. named Leslie Gelb to conduct this inquiry.

The first day on the job, Les dictated to his secretary a memorandum asking everybody who got this memo to supply him with documents and history. The secretary went away, and after a while she came back and said, "Dr. Gelb, how should we classify this?" He replied, "I don't know, what are my choices?" She said, "Well, I'll tell you this, unless you mark it 'Top Secret,' nobody will read it." And he said, "Make it 'Top Secret.'"

MR. KOVNER: Remember that the press went to the state legislatures and got the shield laws adopted with little resistance so that today there are thirty-one. Even since the Libby case is over,

Washington State has just adopted a shield law. And the laws are still growing. In all the other states except one, the courts have recognized a similar privilege as a matter of common law.

MR. FRANKEL: You've forgotten in fact that the Watergate case was broken not, as you would say in the movies, by Woodward and Bernstein, but by Judge Sirica.

So, there are some judges who will actually do that. On the other side, the problem with the prosecutor Mr. Fitzgerald, pursuing the Joan of Arc of American journalism Miller would like to become, is that he didn't go far enough—if I can borrow a phrase, as I'm speaking as a newspaper man now, who also covered Watergate. He basically stopped, and—if I can borrow another phrase that comes from a similar post-mortem of war in the Middle East: Why should I bother with the monkey, when the organ grinder is standing next to it? But Mr. Fitzgerald never got to Vice President Cheney; he never got to him.

If I had to come down on either side, it would be that I would like to see stronger editors, like I used to have, who defended me when I was in Washington. I'm sorry about the editors who failed to stand up for Ms. Miller and failed to stand up for other people, when in fact they should have—how shall I say it—they should have had a responsibility for what they do. The press doesn't have a legal code; there's a professional code for journalists, but I think it's been coarsened and down-graded.

DEAN RUDENSTINE: Yes, Victor?

MR. KOVNER: I just want to say that a route to defeat is to start picking and choosing among which sources should have your commitments of confidentiality honored. Even if their motives are ill, if we are going to have a privilege and if it is going to work and supply the public with newsworthy information, even when less worthy people are the sources who are being protected, it is important they be protected. I think—looking back at it, though I wasn't involved at all—that the *Times* editors and Judith Miller handled themselves appropriately throughout the litigation. They went through an awful lot, they spent a lot of money, and they took a lot of abuse and, until the very end—when I thought it was unwarranted criticism of Miller—the people at the *Times* did the right thing. I wouldn't fault them one bit.

DEAN RUDENSTINE: Yes. We have time for one more question.

QUESTIONER 6: How does the system of checks and balances work in regard to the classification system which is so arbitrary?

MR. LEWIS: It doesn't work. It is autocratic and arbitrary. Congress operates fitfully, especially when it is a different party from the president asking for classified documents. Then the executive branch will stall and refuse to comply and then there's a conflict. They hide behind classification and there's no genuine examination of the

issue as to whether the documents should have been classified. And policy decisions, which aren't really matters for classification, are hidden.

MR. FRANKEL: They're not only hidden, but the information is then in fact used and misused by executive authority. They do put it out, but they put it out with spin. They put it out with timing calculated to manipulate public opinion. And the only way to intrude on that process is through an energetic press. The press, when it has the resources to perform that function, does so extremely well. But it's quite a battle.

MR. KOVNER: The press can fulfill its function well if they are permitted to honor their commitments of confidentiality. It is a profound mistake for government to come in and intrude on those commitments; that is how the press may play its appropriate role in an effective democracy.

DEAN RUDENSTINE: We are out of time. Please join me in thanking our guests.