WHEN RIGHTS COLLIDE: AN EXAMINATION OF THE REPORTER'S PRIVILEGE, GRAND JURY LEAKS, AND THE SIXTH AMENDMENT RIGHTS OF THE CRIMINAL DEFENDANT

JOSI KENNON*

I. INTRODUCTION

In March 2006, Sports Illustrated magazine published excerpts from the book GAME OF SHADOWS, written by *San Francisco Chronicle* reporters Mark Fainaru-Wada and Lance Williams.[1] Many of the details described in the book were taken from previously written articles by Fainaru-Wada and Williams published in the *San Francisco Chronicle*.[2] The excerpts started a legal and media frenzy[3] when they exposed Barry Bonds as having received various steroids from Victor Conte, a self-proclaimed nutritionist, throughout the late 1990s and the early 2000s—including when Bonds broke Mark McGuire's single season home-run record.[4] The article and book stated that Victor Conte, through his tiny nutritional supplement company, Bay Area Laboratory Co-Operative ("BALCO"), supplied an array of steroids to many of the nation's top athletes, including Bonds.[5] Along with exposing Bonds' steroid use, the book also claimed that Bonds had lied in his grand jury testimony about his alleged steroid use.[6] Fainaru-Wada and Williams compiled the information

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* J.D. Candidate, University of Southern California Law School, 2008. B.A. and B.S. Santa Clara University, 2002. Thank you to my parents for all their love and support; I would not have made it this far without you. Thank you to Professor Michael Shapiro for his valuable guidance and Professor Charles Whitebread for his ongoing support.

[1] *See* Mark Fainaru-Wada and Lance Williams, *The Truth About Barry Bonds and Steroids*, SPORTS ILLUSTRATED (Mar. 7, 2006) *available at* http://sportsillustrated.cnn.com/2006/magazine/03/06/growth0313/; *Bonds Exposed: Shadows Details Superstar Sluggers Steroids Use*, SPORTS ILLUSTRATED (March 7, 2006), *available at* http://sportsillustrated.cnn.com/2006/baseball/mlb/03/06/news.excerpt/index.html [hereinafter "*Bonds Exposed*"].

[2] *See, e.g.*, Mark Fainaru-Wada and Lance Williams, *What Bonds Told BALCO Grand Jury*, S.F. CHRON., Dec. 3, 2004, at A1.

[3] *See, e.g.*, Tim Layden, *In The Shadows*, SPORTS ILLUSTRATED, Mar. 27, 2006; Teddy Greenstein, *New Bonds Book Offer Startling Revelations Beyond Steroids*, CHI. TRIB., Mar. 22, 2006; The Associated Press, *New Book Detail BALCO's Cover-Ups*, TULSA WORLD, Mar. 23, 2006, at B2. *See also* Jeff Sears and T. J. Quinn, *Barry Bad Day: Bond's Looses First Court Motion*, N.Y. DAILY NEWS, Mar. 25, 2006; Daniel Brown, *Bonds Planning Lawsuit after Books Publication*, SAN JOSE MERCURY NEWS, Mar. 24, 2006, at A1; Tim Brown, *Mitchell to Lead Baseball's Steroid Inquiry*, L.A. TIMES, March 30, 2006, at D5.

[4] *See* MARK FAINARU-WADA & LANCE WILLIAMS, GAME OF SHADOWS, 115–18 (Gotham Books 2006) [hereinafter "Shadows"]; *Bonds Exposed*, *supra* note 1.

[5] *See generally* Shadows, *supra* note 4.

[6] The articles and book claim that in his grand jury testimony, Barry Bonds denied receiving steroids from his trainer Greg Anderson who had allegedly received steroids from BALCO and distributed them

detailed in the book and articles during a two-year investigation that included court documents, affidavits filed by BALCO investigators, confidential memoranda of federal agents, interviews with more than 200 sources, and secret grand jury testimony—including Bonds' testimony.[7]

On April 19, 2006, Fainaru-Wada and Williams were issued subpoenas by the Government to appear in front of the grand jury and produce documents regarding the sources of the grand jury testimony used in the newspaper articles.[8] The reporters immediately filed a motion to quash the summons.[9] The United States District Court for the Northern District of California denied the reporters' motions and ordered them to appear "before the grand jury at a date and time to be determined by the Government to answer questions posed to them and to produce all documents or objects requested in the subpoenas."[10] The district court rejected the reporters' claims that a First Amendment reporter's privilege existed that allowed them to avoid appearing, that a common law reporter's privilege existed that allowed them to avoid appearing, or that Rule 17 of the Federal Rules of Criminal Procedure allowed them to avoid producing requested materials because it would be unreasonable or oppressive.[11]

Even after the court order, Fainaru-Wada and Williams refused to reveal their sources or the material used in the book and articles provided by their sources.[12] As a result, the United States District Court of the Northern District of California held Fainaru-Wada and Williams in civil contempt.[13] The court sentenced the reporters to eighteen months in prison.[14] The sentence sparked outrage in the journalism community causing many people to call for a federally recognized reporter's privilege.[15]

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to the athletes he trained. *See* Shadows, *supra* note 4, at 201–07. *See also* Michael O'Keeffe, *Bonds' Grand Jury Report: Feds Probe Perjury*, N.Y. DAILY NEWS, April 14, 2006; Inquire Wire Service, *Bonds May Face Perjury Charges*, PHILA. INQUIRER, April 14, 2006, at D5; The Associated Press, *Barry's Perjury? Grand Jury Reportedly Probing Whether Bonds Lied When Testifying That He Never Used Steroids*, NEWSDAY (New York), Apr. 14, 2006, at A74.

[7] *See* Shadows, *supra* note 4, at 282–311; *Bonds Exposed*, *supra* note 1.

[8] In re Grand Jury Subpoenas to Mark Fainaru-Wada and Lance Williams, 438 F. Supp. 2d 1111, 1114 (N. D. Cal. 2006).

[9] *Id.*

[10] *Id.* at 1122.

[11] *Id.* at 1118, 1120–21.

[12] *See In re Grand Jury Subpoenas*, 483 F. Supp 2d at 1111. *See also Judge: Bonds' Book Authors Must Testify, San Francisco Chronicle Reporter's Ordered to Comply with Subpoena*, MSNBC.COM, Aug. 17, 2006, http://www.msnbc.msn.com/id/14365279/; Bob Egelko, *U.S. To Judge: Force Reporters to Reveal Source, Prosecutors Seek Leak Identity, Newspaper Defends Articles*, S.F. CHRON., June 22, 2006, at A1.

[13] *In re Grand Jury Subpoenas*, 438 F. Supp 2d at 1111.

[14] *Id. See also* Nick Cafardo, *Win for Steroid Probe*, BOSTON GLOBE, Dec. 28, 2006, at D1; Michael Silver, *Hanging Tough*, SPORTS ILLUSTRATED, Oct. 2, 2006. On February 28, 2007, a federal judge issued a one-page order vacating the contempt charges of Mark Fainaru-Wada and Lance Williams. Defense attorney Troy Ellerman admitted to allowing the reporters to take detailed notes of secret transcripts. Both reporters still refuse to reveal their sources. This may mean that more BALCO grand jury leakers are out there. *See BALCO Reporters No Longer in Contempt*, NEWS MEDIA UPDATE, Mar. 2, 2007, http://rcfp.org/news/2007/0302-con-balcor.html.

[15] *See* Gzedit, *Travesty: Jailing the Innocent*, SUNDAY GAZETTE-MAIL, Charleston (WV), Oct. 1, 2006; Zachary Coile, *Pelosi Urges Halt to Prosecution of Chronicle Writers: Letter to Attorney General Also Calls For Federal Shield Law*, S.F. CHRON., Jan. 20, 2007, at A4; *Reporter's Dilemma Implies Need For Federal Shield Law*, THE ARGUS (Fremont-Newark, CA), Sept. 26, 2006; *A National Shame: U.S.*

As a result of the implication in the book, the Government has been conducting an ongoing investigation into whether Bonds lied to the grand jury.[16] On November 15, 2007, a federal grand jury indicted Bonds on four counts of perjury and one count of obstruction of justice.[17] If convicted Bonds could face up to thirty years in prison.[18]

Bond's grand jury leak is not the first to occur.[19] Over the past twenty years, numerous cases have arisen involving the publishing of secret grand jury testimony.[20] Many of these cases have dealt with high profile potential defendants and have drawn much public attention.[21] As a result of the growing regularity of grand jury testimony leaking to the media, there is a great need to balance the Sixth Amendment rights of the criminal defendant against the interest of free press and free speech in democracy—which journalists claim should be reflected in First Amendment doctrine.

This Note will explore the issue of balancing the Sixth Amendment right to an impartial jury with the interest of free press and free speech in the context of grand jury subpoenas seeking the confidential identities of grand jury leakers. Although the Note's primary focus is exploring the topic of reporter's privilege in the context of grand jury leaks, many of the issues discussed may implicate other areas in which journalists claim reporter's privilege, such as when confidential government information is leaked to the press.[22]

Part II of the Note will highlight the role of grand jury proceedings in the criminal justice system and examine the general rule of grand jury secrecy detailed in the Federal Rules of Criminal Procedure 6(e)(3). Part III will examine how the Supreme Court handled the issue of reporter's privilege in *Branzburg v. Hayes.* Part IV will evaluate the validity of the "chilling effect" argument offered by journalists. Part V will discuss the two ways in which articles that publish information relayed by grand jury leakers compromise the identities of those implicated in the article. Part VI

Ranks Low On A World Listing of Nations That Cherish A Free Press, ALBANY TIMES UNION, Oct. 30, 2006.

[16] *See* Bob Nightengale, *BALCO Perjury Indictment Sends Message: Probe Targets Athletes Suspected of Lying*, USA TODAY, Dec. 15, 2006, at 1C; Stephen Cannella, *Short-Term Memory*, SPORTS ILLUSTRATED, Jan. 8, 2007; David Kravets and Paul Elias, *Feds Can Use Samples, Court Rules*, GLOBE AND MAIL, Dec. 28, 2006, at S3; Cafardo, *supra* note 14, at D1.

[17] *See* Bob Hohler, *Grand Jury Indicts Bonds: Perjury, Obstruction Charges Are Lodged*, BOSTON GLOBE, Nov. 16, 2007, at E1; Christian Reid, Teri Thompson & Michael O'Keeffe, *Barry Bonds Indicted for Allegedly Lying Under Oath*, N.Y. DAILY NEWS, Nov. 16, 2007; Paul Elias, *Bonds Indicted for Perjury; Homer King Also Hit with Obstruction-of-Justice Charge, Could Get Maximum Sentence of 30 Years*, CHI. SUN TIMES, Nov. 16, 2007, at 94.

[18] *See* Hohler, *supra* note 17; Reid, Thompson, & O'Keeffe, *supra* note 17; Elias, *supra* note 17.

[19] *See* Roma W. Theus II, Symposium, *"Leaks" in Federal Grand Jury Proceedings*, 10 ST. THOMAS L. REV. 551, 552 (1998).

[20] Theus, *supra* note 19, at 552. *See, e.g.*, Barry v. United States, 865 F.2d 1317 (D.C. Cir. 1989); United States v. Hemsley, 866 F.2d 19 (2d Cir. 1988); *In re* Grand Jury Investigation (Lance), 610 F.2d 202 (5th Cir. 1980); *In re* Sealed Case, 865 F.2d 392 (D.C. Cir. 1989). *See also* John M. Broder & David Carr, *From Grand Jury Leaks Comes Clash of Rights*, N.Y. TIMES, Jan. 15, 2005 at A8.

[21] *See* Broder & Carr, *supra* note 20; Theus, *supra* note 19, at 552.

[22] In July 2003, columnist Robert Novak revealed that Valerie Plame was a CIA operative, sparking a debate on whether Novak and other reporters who ran the story could avoid grand jury subpoenas by claiming reporter's privilege. *See* Eunnice Eun, Note, *Journalist Caught in the Crossfire: Robert Novak, the First Amendment, and the Journalist's Duty of Confidentiality*, 42 AM. CRIM. L. REV. 1073, 1073–74 (2006).

will explain why the current techniques utilized by the courts in remedying the effects of pretrial publicity, caused by the publishing of grand jury leaks, are flawed. Part VII examines whether the Sixth Amendment right to an impartial jury and the interest of free press can be balanced. It concludes that the Sixth Amendment and the interest of free press cannot be balanced and in instances in which the two collide, one of them will be compromised for the sake of the other. It also argues that in the context of grand jury leaks the scale should tip in favor of the right to an impartial jury and that a reporter's privilege should not be recognized in grand jury leak situations.

II. THE ROLE OF GRAND JURY PROCEEDINGS

A. GENERALLY

The Fifth Amendment states, "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."[23] The concept of the grand jury dates back to twelfth century England and was carried to Colonial America in the seventeenth century.[24]

In the American colonies, the grand jury had the job of investigating and reporting all suspected wrongdoings to the English government.[25] When it came time for America to declare its independence from England, the framers of the Constitution made sure to include a grand jury provision in the Constitution.[26] The framers gave the grand jury a greater power than was given by England, the power of presentment and indictment in all capital or infamous crime cases.[27] The framers gave the grand jury this power because they believed it to be a "bulwark against oppression."[28]

In 1946, Congress adopted the Federal Rules of Criminal Procedure, which codified the common law power of grand juries.[29] Over the past centuries, it has grown in its importance and power, acting as "a kind of buffer or referee between the Government and the people."[30] Today it is one of the cornerstones of the American criminal justice system and is

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[23] *See* U.S. CONST. amend. V. Black's Law Dictionary defines a capital crime as "punishable by execution; involving the death penalty." The dictionary defines an infamous crime as a crime punishable by imprisonment in a penitentiary. This includes all federal felony offenses. BLACK'S LAW DICTIONARY 84, 162 (2d Pocket ed. 2001).

[24] BLACK'S LAW DICTIONARY, *supra* note 23, at 831; *See also* Note, *Powers of Federal Grand Juries*, 4 STAN. L. REV. 68, 77 (1951).

[25] BLACK'S LAW DICTIONARY, *supra* note 23, at 831.

[26] *See* U.S. CONST. amend. V.

[27] *See id.*; Roger Roots, *If It's Not a Runaway, It's Not a Real Grand Jury*, 33 CREIGHTON L. REV. 821, 832 (2000).

[28] CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 584 (4th ed., Foundation Press 2000).

[29] *See* Roots, *supra* note 27, at 836. *See also* FED. R. CRIM. P. 6 (laying out the process of summoning a grand jury, the objections that may be raised concerning the composition of a grand jury, who may be present during the grand jury, the secrecy requirement, and the exceptions to the secrecy requirement).

[30] Daniel C. Richman, *Grand Jury Secrecy: Plugging the Leaks in an Empty Bucket*, 36 AM. CRIM. L. REV. 339, 354 (1999).

often referred to as the "people's watchdog against arbitrary and malevolent prosecutions."[31]

Federal grand juries consist of sixteen to twenty-three jurors selected through the two-part process of choosing the randomly selected jury pool and then selecting the grand jurors from that pool.[32] The jurors usually serve no longer than eighteen months.[33]

The grand jury performs as both a screening body and an investigating body.[34] As a screening body the grand jury has the authority to follow a prosecutor's suggestion and indict an offender or to go against that decision and refuse to indict.[35] As an investigating body the grand jury's job is to develop evidence against individual offenders and conduct broad-based assessments of organized crime.[36] This job gives it the "right to every man's evidence" which is "indispensable to the administration of justice."[37] To aid it in its pursuit of "every man's evidence," the grand jury has the power to issue a subpoena *ad testificandum*, which compels witness testimony; issue a subpoena *duces tecum*, which compels production of tangible evidence; grant immunity from prosecution; and hold a person who refuses to comply with its orders in civil or criminal contempt.[38]

Despite its many powers, the grand jury is subject to major limitations. Grand jury subpoenas must not be too sweeping, oppressive, or unreasonable.[39] If a grand jury subpoena falls into one of these categories, a petitioner can file a motion to quash the subpoena.[40] The functions and powers of the federal grand jury were codified by Congress in 1946 as the *Federal Rules of Criminal Procedure, Rule 6*.[41]

B. THE SECRECY REQUIREMENT

One of the most important features of the grand jury is its requirement of secrecy concerning the matters that occur in front of it. The requirement of secrecy was first adopted in 1681 as a requirement for English grand juries.[42] Under the rule of secrecy the grand jury operated without the interference of the King's prosecutors or other intermeddlers.[43] This enabled it to be a check on the government and directly oppose the wishes of those in power.[44] In the federal criminal justice system, the rule applies to all "matter[s] occurring before the grand jury."[45] Moreover, the

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[31] Roots, *supra* note 27, at 821. *See also* WHITEBREAD & SLOBOGIN, *supra* note 28, at 584.
[32] *See* WHITEBREAD & SLOBOGIN, *supra* note 28, at 586–87.
[33] *See id.* at 586.
[34] *Id.* at 584.
[35] *Id.*
[36] *See id.*
[37] Branzburg v. Hayes, 408 U.S. 665, 674 (1972).
[38] *Id. See also* WHITEBREAD & SLOBOGIN, *supra* note 28, at 598, 603.
[39] *See* Hale v. Henkel, 201 U.S. 43, 76 (1906); United States v. R. Enterprises, Inc., 498 U.S. 292, 299 (1991).
[40] *See R. Enterprises*, 498 U.S. at 299; FED. R. CRIM. P. 17(c).
[41] *See* Roots, *supra* note 27, at 836.
[42] *Id.* at 830.
[43] *Id.*
[44] *See id.*
[45] FED. R. CRIM. P. 6(2)(B).

requirement for secrecy applies to disclosure of witness testimony given before the grand jury when that disclosure is made by someone other than the witness.[46]

Rule 6(e)(2) of the Federal Rules of Criminal Procedure states "that unless otherwise provided by the rules, a grand juror, an interpreter, a stenographer, an operator of a recording device, a person who transcribes recorded testimony, an attorney for the government, or other persons to whom disclosure is made" under Rule 6(e)(3)(A)(ii) or (iii) shall not disclose matters occurring before the grand jury.[47]

The rule gives few exceptions for when disclosure of witness testimony, not disclosed by the witness, may occur.[48] Many of these exceptions included the disclosure of information needed to assist a government agency in its official capacity.[49] In certain cases, the secrecy requirement carries over to the individuals who have received grand jury testimony as a result of an exception to the rule.[50]

Rule 6(e) also makes it a crime, subject to prosecution for criminal and civil contempt, for a person, other than the witness, to disclose witness testimony.[51] The Supreme Court highlighted its rationales for the grand jury requirement of secrecy and its power of contempt in *Douglas Oil Co. v. Petrol Oil Stops Northwest*:

> (1) [t]o prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witness who may testify before [the] grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.[52]

The rationale highlighted in *Douglas Oil* that is of greatest concern for purposes of this analysis is the assurance that the person investigated, but not indicted, will not be subject to public ridicule or humiliation. When journalists are allowed to receive and publish secret grand jury testimony without anyone being held accountable, this is exactly what happens—a person's life is now splashed on the front pages of major newspapers,

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[46] *See* John Q. Barrett, *The Leak and The Craft: A Hard Line Proposal to Stop Unaccountable Disclosures of Law Enforcement Information*, 68 FORDHAM L. REV. 613, 620 (1999). The requirement of secrecy does not apply to witnesses. *See* WHITEBREAD & SLOBOGIN, *supra* note 28, at 590.
[47] FED. R. CRIM. P. 6(e)(2)(B).
[48] *See* FED. R. CRIM. P. 6(e)(3)(A)–(F).
[49] *See id.* An example of this is the disclosure of grand jury matters to any government personnel that an attorney of the government considers necessary to assist that attorney in his or her duty to enforce federal criminal law. FED. R. CRIM. P. 6(e)(3)(A)(ii).
[50] *See* FED. R. CRIM. P. 6(e)(3)(A)(ii).
[51] *See* FED. R. CRIM. P. 6(e)(7). A court may muzzle a witness while the grand jury is still in session or prohibit a witness from disclosing the testimony of other witnesses at the grand jury session. *See* WHITEBREAD & SLOBOGIN, *supra* note 28, at 591.
[52] Douglas Oil Co. v. Petrol Oil Stops Nw., 441 U.S. 211, 219 n.10 (1979).

opening him or her up to ridicule without actually being charged with a crime. In situations like this, a potential defendant is placed in the situation where he is viewed as guilty in the eyes of the public and potential jurors.

III. THE APPLICATION OF A REPORTER'S PRIVILEGE IN GRAND JURY PROCEEDINGS

A. REPORTER'S PRIVILEGE PRIOR TO BRANZBURG

Prior to the 1972 landmark Supreme Court decision of *Branzburg v. Hayes*,[53] few courts considered the issue of a constitutional reporter's privilege.[54] Between 1911 and 1968, less than twenty reported cases were litigated that addressed a reporter's right to keep his or her sources confidential.[55] This all changed in the late 1960s,[56] when various newspapers and television networks were subpoenaed for notes, materials, and file footage in their possession that might be connected with the 1968 Democratic Convention and Watergate Scandal.[57] As a result, the use of subpoenas to retrieve information from journalists became commonplace in the early 1970s.[58] In 1972, the Supreme Court granted certiorari in *Branzburg* to decide whether a reporter's privilege exists when a journalist is subpoenaed to appear before a grand jury and testify regarding his or her confidential sources.[59]

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[53] 408 U.S. 665 (1972).

[54] *See* Glenn A. Browne, Note, *Just Between You and Me . . . For Now: Reexamining a Qualified Privilege for Reporters to Keep Sources Confidential in Grand Jury Proceedings*, 1988 U. ILL. L. REV. 739, 742 (1988); Joan E. Osborn, *The Reporter's Confidentiality Privilege: Updating the Empirical Evidence After a Decade of Subpoenas*, 17 COLUM. HUM. RTS. L. REV. 57, 59 (1985–86).

[55] *See, e.g.*, Garland v. Torre, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958); *In re* Cepeda, 233 F. Supp. 465 (S.D.N.Y. 1964); Deltec, Inc. v. Dunn & Bradstreet, Inc., 187 F. Supp. 788 (N.D. Ohio 1960); Rosenberg v. Carroll, 99 F. Supp. 629 (S.D.N.Y. 1951); Brewster v. Boston Herald-Traveler Corp., 20 F.R.D. 416 (D. Mass. 1957); *In re* Howard, 289 P.2d 537 (3d Dist. 1955); Clein v. State, 52 So. 2d 117 (Fla. 1950); Plunkett v. Hamilton, 70 S.E. 781 (Ga. 1911); *In re* Goodfader, 367 P.2d 472 (Haw. 1961); Beecroft v. Point Pleasant Print and Pub. Co., 197 A.2d 416 (N.J. Super. Ct. 1964); Brogan v. Passaic Daily News, 123 A.2d 473 (N.J. 1956); State v. Donovan, 30 A.2d 421 (N.J. 1943); *In re* Gronnow, 85 A. 1011 (N.J. 1913); People *ex rel*. Mooney v. Sheriff, 199 N.E. 415 (N.Y. 1936); State v. Buchanan, 436 P.2d 729 (Or. 1979), *cert. denied*, 392 U.S. 905 (1968); *In re* Taylor, 193 A.2d 181 (Pa. 1963). Many of the courts in these cases failed to recognize a constitutional privilege in the First Amendment that allowed reporters to withhold the names of their sources. Browne, *supra* note 54, at 742 n.29; Osborn, *supra* note 54, at 59.

[56] *See* Browne, *supra* note 54, at 742.

[57] *See* Note, *The Newsman's Privilege After Branzburg: The Case for A Federal Shield Law*, 24 U.C.L.A. L. REV. 160, 162–63 (1976). *See also* Browne, *supra* note 54, at 743 n.34 (noting that two of three newspapers and networks subpoenaed were Time, Life Magazine, and Newsweek).

[58] By 1973 the Chicago Tribune had already received more than 350 subpoenas since 1968 and the Los Angeles Times spent $200,000 fighting 30 subpoenas. *See Fight Over Freedom and Privilege*, TIME, (March 1973) *available at* http://www.time.com/time/magazine/article/0,9171,903903-1,00.html (last visited Jan. 27, 2007).

[59] *See Branzburg*, 408 U.S. at 682. *See also* Browne, *supra* note 54, at 743.

B. BRANZBURG V. HAYES

1. *Background*

Branzburg v. Hayes was a consolidation of four cases, *Branzburg v. Pound*,[60] *Branzburg v. Meigs*,[61] *In re Pappas*,[62] and *Caldwell v. United States*.[63] All four cases addressed the issue of whether reporters could be compelled to testify in front of a grand jury.[64]

a. Branzburg v. Pound

Branzburg v. Pound involved an illustrated story, "*The Hash They Make Isn't To Eat*," published in the *Louisville Courier Journal* and written by staff writer, Paul Branzburg.[65] The article detailed how massive amounts of marijuana were converted into the more potent drug of hashish.[66] The information acquired for the story was compiled from first hand observations made by Branzburg.[67] The interview was granted to him upon the promise that the identity of the two drug producers would remain confidential.[68] Ten days after the article was published, Branzburg was summoned to appear before the Jefferson County grand jury.[69] The journalist refused to disclose the identities of his sources.[70] He argued that the Kentucky reporter's privilege statute, the First Amendment of the United States, and §§ 1, 2, and 8 of the Kentucky Constitution permitted his refusal.[71] The Kentucky Court of Appeals rejected the arguments and held that neither "the statute [nor the Constitution] permit[ted] a reporter to refuse to testify about events he had observed personally, including the identities of those persons he had observed."[72]

b. Branzburg v. Meigs

A year after *Branzburg v. Pound*, Branzburg once again found himself being summoned to appear in front of the Franklin County grand jury.[73] This time the summons concerned a story written by him and published in the *Courier Journal* and *Louisville Times* describing in detail the use of drugs in Frankfort, Kentucky.[74] Branzburg filed a motion to quash the subpoena and be excused from appearing before the grand jury, but the motion was denied.[75] An order was issued protecting Branzburg from

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[60] Branzburg v. Pound, 461 S.W.2d 345 (KY. 1970), *aff'd*, 402 U.S. 665 (1972).
[61] Branzburg v. Meigs, 503 S.W.2d 748 (KY. 1971), *aff'd*, 402 U.S. 665 (1972).
[62] *In re* Pappas, 266 N.E.2d 297 (Mass. 1971), *aff'd*, 402 U.S. 665 (1972).
[63] Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970), *rev'd*, 402 U.S. 665 (1972).
[64] *See Caldwell*, 434 F.2d at 1081; *Meigs*, 503 S.W.2d at 748, *Pound*, 461 S.W.2d at 345, *Pappas*, 266 N.E.2d at 297.
[65] *See Pound*, 461 S.W.2d at 345.
[66] *Id.*
[67] *Id.* at 346.
[68] *Id.*
[69] *Id.*
[70] *See id.*
[71] *Branzburg*, 408 U.S. at 668.
[72] *Id.* at 670. *See also Pound*, 461 S.W.2d at 346.
[73] *See Meigs*, 503 S.W.2d at 749.
[74] *See id.*; *Branzburg*, 408 U.S. at 669.
[75] *See Meigs*, 503 S.W.2d at 749.

revealing the identities of his confidential sources, but requiring him to answer questions pertaining to any criminal conduct that he observed.[76] Prior to having to appear in front of the grand jury, he sought writs of mandamus and prohibition from the Kentucky Court of Appeal contending that being forced to reveal confidential sources and information would greatly damage his effectiveness as a reporter.[77] The court denied the request for the writ of mandamus, reaffirming that no reporter's privilege existed in the Kentucky Statute or First Amendment that protects a journalist from revealing matters personally observed.[78]

c. In re Pappas

In re Pappas involved a situation where the Black Panthers, a radical civil rights organization, allowed Paul Pappas, a newsman photographer working for a Massachusetts television station, to record and tape a meeting at the Black Panther headquarters on the condition that he agree not to disclose anything he saw or heard except for an anticipated police raid, which Pappas was free to report on and photograph.[79] Pappas neither wrote a story on the event nor revealed what had happened during the meeting.[80] Two months later, he was summoned to appear in front of the Bristol County grand jury to answer questions about what he heard and saw during the meeting.[81] Pappas refused to answer any questions about what had taken place during the meeting, arguing that the "First Amendment afforded him a privilege to protect confidential informants and the information."[82] The case was reviewed by the Massachusetts Supreme Judicial Court, where the court denied Pappas' claim of privilege, stating that "the public has the right to every man's evidence."[83]

d. Caldwell v. United States

In contrast to both of Branzburg's cases and *In re Pappas*, Earl Caldwell's appeal for recognition of a reporter's privilege was accepted in the Ninth Circuit.[84] Caldwell, a reporter for the New York Times who had been assigned to cover the Black Panther Party and other black militant groups, was ordered to appear in front of the grand jury to testify and bring tape recordings and notes given to him by officers for the Black Panther Party.[85] The grand jury was engaged in a general investigation of the Black Panthers and the possibility that its members were engaged in criminal activity.[86] Caldwell filed a motion to quash the subpoena.[87] The District

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[76] *Branzburg*, 408 U.S. at 670.
[77] *Id.*
[78] *Id.*
[79] *See id.* at 672.
[80] *Id.*
[81] *Id.* at 672–73.
[82] *Id.* at 673.
[83] *Id.* at 674.
[84] *See id.* at 679.
[85] *See id.* at 675.
[86] *Caldwell*, 434 F.2d at 1083.
[87] *Branzburg*, 408 U.S. at 678.

Court denied the motion to quash.[88] The Court of Appeals, however, reversed the District Court's decision and found that the "First Amendment provided a qualified testimonial privilege to newsmen."[89] The court held that "absent compelling reasons for requiring his testimony, [Caldwell] was privileged to withhold it."[90]

The Ninth's Circuit decision finding a qualified reporter's privilege caused a split in the federal courts,[91] as a result of this split, the Supreme Court granted certiorari.[92]

2. *The Majority Opinion*

The sole issue addressed by the *Branzburg* Court was whether "requiring newsmen to appear and testify before state or federal grand juries abridges the freedom of speech and press guaranteed by the First Amendment."[93] In a five-four split, the court held that "it does not."[94]

The majority opinion, written by Justice White, justified its decision by weighing the importance of the grand jury proceeding versus the consequences that revealing sources would have on the journalist's ability to present the news to the public.[95] The Court addressed the importance of grand jury proceedings in the criminal law system, stating that "[t]he adoption of the grand jury in our constitution as the sole method for preferring charges in serious criminal cases shows the high place it holds as an instrument of justice."[96] The opinion noted that these proceedings were firmly rooted in American history.[97] Because of this, the Court proclaimed that grand jury proceedings were "not only historic, but essential to [the] task" of investigating criminal conduct.[98] The Court also found the long-standing principle that "the public . . . has the right to every man's evidence" as "particularly applicable to grand jury proceedings."[99]

Although the Court noted that "without some protection for seeking out the news, freedom of the press could be eviscerated,"[100] it still rejected the notion that the decision would have a "chilling effect" on journalists' ability to report the news. Specifically, the court stated that the decision would have little effect on the bulk of confidential relationships that develop between reporters and sources since grand juries only address themselves to "whether crimes have been committed and who committed them."[101] In these cases the court found that the First Amendment did not "confer a license on either the reporter or his news sources to violate valid

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[88] *Id.* at 677.
[89] *Id.* at 679.
[90] *Id.*
[91] *See* cases cited, *supra* note 64.
[92] *See generally, Branzburg*, 408 U.S. at 665, 682.
[93] *Id.* at 667.
[94] *Id.*
[95] *See id.* at 686, 687, 690, 693–95.
[96] *Id.* at 687 (quoting Costello v. United States, 350 U.S. 359, 362 (1956)).
[97] *Id.* at 687.
[98] *Id.* at 688.
[99] *Id.*
[100] *Id.* at 681.
[101] *Id.* at 691.

criminal law" and because of this neither was immune from testifying.[102] In response to studies conducted to prove the "chilling effect" the decision would have on journalism, the court stated that the studies were speculative, not credible, and must be viewed in "light of the professional self-interest of the interviewees."[103]

Although acknowledging that several states had enacted shield laws of varying degrees to protect journalists,[104] the Court found that the many failed congressional proposals suggested a reluctance by Congress to enact a federal shield law.[105] Since Congress had not acted, the Court felt no need to legislate the privilege from the bench. The Court concluded by affirming the decisions in *Pound*, *Meigs*, and *Pappas* and reversing the decision in *Caldwell*.[106]

3. *Powell's Concurrence*

Justice Powell, although voting with the majority, wrote a separate concurrence.[107] He asserts that despite the Court's decision, journalists are not without "constitutional rights with respect to the gathering of news or in safeguarding their sources."[108] Specifically, Justice Powell points to the ability of reporters to file a motion to quash the subpoena and seek a protective order if the reporter believes the grand jury investigation is being conducted in bad faith, if the information the grand jury is seeking is only remotely related to the subject being investigated, or if the reporter believes that his or her testimony implicates the reporter-source relationship without a legitimate need of law enforcement.[109]

In these cases, the concurrence states: "[t]he asserted claim to privilege should be judged on its facts by striking a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct."[110]

Instead of offering guidance to lower courts in determining how to balance the constitutional and societal interests, Justice Powell suggests that each situation should be looked at on a case-by-case basis "in accord with the tried and traditional way of adjudicating such questions."[111]

4. *The Dissent*

In his dissent, which Justice Brennan and Justice Marshall joined, Justice Stewart rejected the majority's decision stating that it "[n]ot only [would] impair performance of the press' constitutionally protected functions, but it [would] . . . in the long run, harm rather than help the

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[102] *Id.*
[103] *Id.* at 665.
[104] *See id.* at 689.
[105] *See id.* at 691 n.28 (listing all the failed congressional proposals).
[106] *See id.* at 709.
[107] *See generally*, *id.* at 709.
[108] *Id.*
[109] *See id.*, 408 U.S. at 710.
[110] *Id.*
[111] *Id.*

administration of justice.[112] Justice Stewart accepted the plaintiff's assertion that a constitutionally recognized right should be acknowledged by the Court in order to protect society's interest in a "full and fair flow of information to the public."[113]

Justice Stewart found that the conclusions of the surveys, rejected by the majority, proved the importance that the promise of confidentiality plays in newsgathering.[114] He declared that an "unbridled subpoena power will substantially impair the flow of news to the public."[115] In addition, Justice Stewart determined that more weight should be given to the First Amendment right of the reporters than to grand jury proceedings, finding that the "long standing rule making every person's evidence available to the grand jury is not absolute."[116]

Although Justice Stewart supported the need for a reporter's privilege, he did not go so far as to suggest an absolute privilege.[117] Instead, he created a balancing test which lower courts would be able follow, unlike the balancing test offered by Justice Powell.[118] The balancing test consists of three parts that the Government must meet in order to compel a reporter to appear before a grand jury: (1) "that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law;" (2) "that the information sought cannot be obtained by alternative means less destructive of First Amendment rights;" and (3) that there is a "compelling and overriding interest in the information."[119] A prominent difference between Justice Stewart's test and the majority's test is that Justice Stewart placed the burden of proof on the Government, while the majority placed the burden on the journalist.[120]

IV. THE CHILLING EFFECT: THE JOURNALIST'S ARGUMENT

The main argument relied on by journalists in asserting the need for a reporter's privilege is that allowing grand juries the unbridled power to subpoena a reporter would have a "chilling effect" on the free flow of information to the public.[121] Black's Law Dictionary defines the term "chilling effect" as "1. The result of a law or practice that seriously discourages the exercise of a constitutional right, such as the right to appeal or the right to free speech. 2. Broadly, the results when any practice is discouraged."[122] Journalists believe the discouraging effect grand jury subpoenas have on their ability to produce the news is twofold.

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[112] *Id.* at 725.
[113] *Id.*
[114] *See id.* at 731.
[115] *Id.* at 732–33.
[116] *Id.* at 737.
[117] *See id.* at 739–40 (Stewart, J. dissenting).
[118] *See id.* at 743.
[119] *Id.*
[120] *See id.* at 708.
[121] *See* Michael D. Saperstein, Jr., *Federal Shield Law: Protecting Free Speech or Endangering The Nation?*, 14 COMMLAW CONSPECTUS 543, 546, 560–61 (2006); Randall D. Eliason, *Leakers, Bloggers, and the Fourth Estate Inmates: The Misguided Pursuit of a Reporter's Privilege*, 24 CARDOZO ARTS & ENT. L.J. 385, 421 (2006); Browne, *supra* note 54, at 741. *See generally* Osborn, *supra* note 54, at 63–9.
[122] BLACK'S LAW DICTIONARY 98 (2d Pocket ed. 2001).

First, journalists argue that sources, which require a pledge of confidentiality by journalists, will grow more hesitant and reluctant to supply reporters with information if they believe that their identities will be compromised by the reporter's testimony in grand jury proceedings.[123] If this happens, reporters argue that many important stories and issues will never be brought to the public.[124] Second, journalists argue that in an attempt to avoid being subpoenaed by the grand jury or serve jail time for refusing to comply with the grand jury subpoena, many journalists will shy away from addressing certain topics.[125] Thus, many important stories will not reach the public—not because of the unwillingness of a source, but as a result of self-censorship imposed by journalists.

In *Branzburg*, the Supreme Court rejected the "chilling effect" argument, calling the empirical data offered by the defendants "widely divergent and to a great extent speculative."[126] Since 1972, very few studies have been conducted with the purpose of demonstrating the effect subpoenas have on a journalist's ability to report the news. One way to determine the present validity of the "chilling effect" argument is by examining the few empirical studies that have been conducted in the past 30 years. Two such studies are a 1982 survey of journalists nominated for the Pulitzer Prize[127] and the Agents of Discovery survey entitled *A Report on the Incidence of Subpoenas Served on the New Media in 2001*.[128]

Although the 1982 survey was conducted over twenty years ago and only surveyed Pulitzer Prize nominees, it serves as a starting ground for examining the effect subpoenas have on a journalist's ability to report the news.[129] Three hundred and sixty-six surveys were distributed to individual reporters; of that number, a hundred and ten were returned. All one hundred and ten reporters answered affirmatively when asked: "[d]o you presently use, or have you used confidential or background information in the course of your work in the past ten years?"[130] The majority of the reporters, fifty-one percent, responded that over half of the time they used the information that they received from these confidential sources to develop and report

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[123] *See* Saperstein, *supra* note 121, at 546; Osborn, *supra* note 54, at 64–66; Browne, *supra* note 54, at 742.

[124] *See* Saperstein, *supra* note 121, at 546. To back up this argument many reporters point to the Watergate Scandal and argue that without the promise of confidentiality, "Deep Throat" would have never supplied the information to the Washington Post that led to the investigation of President Nixon. *See* Nathan Swinton, *Privileging a Privilege: Should the Reporter's Privilege Enjoy the Same Respect as the Attorney-Client Privilege?*, 19 GEO. J. LEGAL ETHICS 979, 989 (2006).

[125] *See* Saperstein, *supra* note 121, at 561; Osborn, *supra* note 54, at 64–65. Freelance reporter Vanessa Legget was jailed for a record 168 days for refusing to obey several grand jury subpoenas. *See* Jennifer Elrod, *Protecting Journalists From Compelled Disclosure: A Proposal for A Federal Statute*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 115, 115 (2003–04).

[126] *Branzburg*, 408 U.S. at 693–94.

[127] *See generally*, Osborn, *supra* note 54.

[128] *See* Lucy A. Dalglish & Gregg P. Leslie eds., AGENTS OF DISCOVERY: A REPORT ON THE INCIDENCE OF SUBPOENAS SERVED ON THE NEWS MEDIA IN 2001 (2001), *available at*: http://www.rcfp.org/agents/index.html [hereinafter "AGENTS OF DISCOVERY"].

[129] *See* Osborn, *supra* note 54, at 69. The author rationalizes the decision to only poll Pulitzer Prize nominees by stating that "the objective was to select a sample so that the survey could achieve 'the quantitative measures that would be most relevant to the analysis of the legal questions." *Id.*

[130] *Id.* at 78.

their news stories.[131] Of those surveyed 93.8% of the journalists reported that verifying statements by others and following tips and leads accounted for the principal use of confidential or background information.[132]

When asked what percentage of the reporters' major news stories would not have been brought to their attention without the additional use of confidential sources, only 7.4% of the reporters replied that "most of" or "almost all" of their major stories would be affected. The majority of the reporters, 44.4%, replied that "quite a few," fifteen to fifty percent, of their major stories would have been affected.[133] These numbers did not vary much when the reporters were asked what percentage of major published stories would have lost their impact without confidential material.[134] The majority of the reporters stated that most or all of their stories would have been published anyway.[135]

Fewer than twenty percent of the reporters responded that their coverage of news stories have been adversely affected by the possibility that they might have to publicly disclose confidential information.[136] In addition, twenty-seven percent of the reporters thought that the jailing of reporters for refusing to comply with subpoenas has adversely affected their ability to obtain confidential information.[137] However, 71.8% stated that their ability to report the news *would be* substantially adversely affected if "every note [they] took, and every person [they] contacted might ultimately be publicly disclosed in court.[138]

The study seems to conclude that reporters continue to rely on confidential sources in developing their news stories. The data also seems to show that the issuance of subpoenas seeking the identities of confidential sources and the jailing of reporters has not deterred the majority of reporters from producing the news.[139] However, this data may not be very useful since it does not explain why the reporters' practices did not change. There are a number of reasons why the reporters' ability to produce the news has not been adversely affected by the issuance of subpoenas or the threat of jail time. One reason could be that confidential sources are reluctant to share information with reporters because of the threat of their identities being disclosed in court. However, a source may not relay this sentiment to a reporter when the source discontinues the reporter-source relationship. A confidential source may stop supplying information to a

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[131] *See id.* Of the reporters polled, 32% said they used confidential or background information to develop and report news stories "routinely" (20%-50% of the time) and 19.1% said they use this information "frequently" (50%-100% of the time). Of those polled, 98.2% stated that they used confidential information to get tips or leads and 86.1% stated that they used confidential information to verify statement made by others. *Id.*

[132] *See id.* at 79.

[133] *See id.*.

[134] *Id.* Of the reporters surveyed, 34.5% responded that "Quite a few" (15%–50%) of their stories would have lost their impact. 38.2% of the reporters responded that "a few" (5%–15%) would have lost their impact. *Id.*

[135] *Id.* A total of 74.3% of the reporters responded that either a few or practically none of their stories would have gone unpublished without the aid of confidential information.

[136] *See id.* at 80.

[137] *See id.* at 75.

[138] *See id.* at 80.

[139] *See id.*

reporter without explaining his or her decision. Because the reporter is unable to ascertain why the confidential source stopped supplying information to him or her, studies examining the "chilling effect" are unable to definitively conclude that the source's decision stems from a fear of having his or her identity disclosed in court by the reporter. Nevertheless, the majority of reporters polled in the 1982 study still felt that having to disclose publicly in court every note or contact made would substantially adversely affect their ability to produce.

In 2001, the Agents of Discovery, a subset of the Reporter's Committee for Freedom of Press, issued a survey to print and television outlets in order to determine the incidence of subpoenas issued on news organizations.[140] Out of the 2,300 surveys that were mailed to print and broadcast outlets in every state and the District of Columbia, 319 news outlets responded.[141] The results showed that forty-five percent of the respondents had received at least one subpoenas during 2001.[142] Of the respondents that reported receiving at least one subpoena, only three percent received them for grand jury proceedings.[143]

In addition, the subpoenas received by the news outlets were not seeking the identity of confidential sources. In only six instances, one percent of the total responses, journalists indicated that the subpoenas issued to them sought the identities of confidential sources or information obtained under a promise of confidentiality.[144] Of these subpoenas, four requested confidential information and only two requested the identity of a confidential source.[145]

The statistics show that only a small proportion of the subpoenas being issued to reporters are either from grand juries or are seeking confidential information and source identities. However, the low number of grand jury subpoenas issued to reporters does not mean that there is no dampening effect on the stories that do rely on confidential sources. This may effect the ultimate publication of the article or the nature of what is included or excluded from the published article. Many of these major stories are of public interest dealing with national security or organized crime. If a major story of public interest is not pursued or written, because of the threat of a grand jury subpoena, the loss to society could be significant.

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[140] *See* AGENTS OF DISCOVERY, *supra* note 128.

[141] *See* Lucy A. Dalglish & Gregg P. Leslie eds., AGENTS OF DISCOVERY: *METHODOLOGY*, REPORT ON THE INCIDENCE OF SUBPOENAS SERVED ON THE NEWS MEDIA IN 2001 (2001), *available at* http://www.rcfp.org/agents/methodology.html (last visited April 10, 2008). There was a 14% response rate. 74% of the responses came from newspapers and 26% came from broadcasters. Calculations in the survey were rounded to the nearest tenth percentage point. *Id.*

[142] Lucy A. Dalglish & Gregg P. Leslie eds., AGENTS OF DISCOVERY: *SURVEY POPULATION AND RETURNS*, A REPORT ON THE INCIDENCE OF SUBPOENAS SERVED ON THE NEWS MEDIA IN 2001 (2001), *available at* http://www.rcfp.org/agents/surveypop.html (last visited April 10, 2008).

[143] *See* Lucy A. Dalglish & Gregg P. Leslie eds., AGENTS OF DISCOVERY: *FORUMS AND PROCEEDINGS*, A REPORT ON THE INCIDENCE OF SUBPOENAS SERVED ON THE NEWS MEDIA IN 2001 (2001), *available at* http://www.rcfp.org/agents/forums.html (last visited April 10, 2008). Two percent of those polled did not identify the source of the subpoenas. *Id.*

[144] Lucy A. Dalglish & Gregg P. Leslie eds., AGENTS OF DISCOVERY: *MATERIAL THE SUBPOENAS SOUGHT*, A REPORT ON THE INCIDENCE OF SUBPOENAS SERVED ON THE NEWS MEDIA IN 2001 (2001), *available at* http://www.rcfp.org/agents/material.html (last visited April 10, 2008) [hereinafter "*MATERIAL THE SUBPOENAS SOUGHT*"] .

[145] *MATERIAL THE SUBPOENAS SOUGHT*, *supra* note 144.

The Bonds scandal could be used as an example of a publication that falls within that small group of stories affected by grand jury subpoenas. Some have pointed to the Bonds scandal as starting a "national dialogue" on sports and drugs.[146] The scandal placed a spotlight on not just steroid use in professional sports, but in high school sports as well.[147] In May 2005, as a result of the media coverage regarding the scandal, the California Interscholastic Federation became the first state high school organization to adopt an anti-steroid education campaign.[148] Many commentators would probably say that the Bonds scandal is an example of a major story of public interest that, if not published, would be a significant loss to society.

Considering the importance of the stories that are published as a result of grand jury leaks, the low overall incidence of subpoenas seeking the identity of confidential sources may not be decisive. The two studies are inconclusive on the validity of the "chilling effect" argument. It may be true, as reporters claim, that subpoenas seeking the identity of confidential sources deter sources from relaying information to journalists and journalists from pursuing certain news stories.

V. THE EFFECT OF GRAND JURY LEAKS: THE POTENTIAL DEFENDANT'S ARGUMENT

The argument relied on by those implicated in articles that publish grand jury leaks is that allowing journalists to claim a reporter's privilege when subpoenaed to testify in grand jury proceedings not only allows leakers to go unpunished, because the reporter will not have to reveal the leakers' identity, but also removes any incentives a reporter might have in not publishing the leak. Because of these reasons and the ineffectiveness of the current techniques used by the court to alleviate pretrial publicity, discussed below, those implicated argue that the balance of rights should sway in their favor.

As stated earlier, grand jury leaks compromise an implicated person's identity. The compromise happens in two ways. First, grand jury leaks can cause irreparable damage to the implicated person's social reputation.[149] Harm to a person's reputation often arises in the situation where the article

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[146] *See* Mark Fainaru-Wada & Lance Williams, *Steroid Scandal the BALCO Legacy: From Children to Pros, The Heat is on to Stop Use of Performance Enhancers*, S.F. CHRON., Dec. 24, 2006, at A1 [hereinafter "*From Children to Pros*"]; Duff Wilson, *Beyond BALCO: Steroids are to Blame for Suicide of Young Athlete*, N.Y. TIMES, Mar. 10, 2005, at A1; Posting of Charles Geier, Charlie.greier@gmail.com, to The World of Sports and Steroids (Dec. 11, 2006) (on file with author), *available at* http://sportandsteroids.blogspot.com/.

[147] *See From Children to Pros*, *supra* note 146.

[148] *See id.*

[149] *See generally* Phillip L. Judy, Comment, *The First Amendment Watchdog Has a Flea Problem*, 26 CAP. U. L. REV. 541 (1997). *See* Joanne Armstrong Brandwood, Note, *You Say "Fair Trial" And I Say "Free Press": British and American Approaches to Protecting Defendants' Rights in High Profile Trials*, 75 N.Y.U. L. REV. 1412, 1449 n.243 (2000) (discussing the FBI leak that implicated Richard Jewell as a suspect in the bombing of Atlanta's Centennial Park during the Olympic Games in 1996); Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 426 n.156 (2001).

implicates the person, but no charges are brought against him or her.[150] As a result of the implicating publication, many aspects of the person's life such as job security, relationships with family members and friends, and in the case of celebrities, fan loyalty, may be compromised.

An example of a grand jury leak causing damage to a person's social reputation is the Bonds scandal. As a result of grand jury leaks published in the *San Francisco Chronicle* articles and the book *Game of Shadows*, Bonds' relationship with once devoted fans is now in jeopardy. During a game against the San Diego Padres, a fan threw a syringe out on the field, and before playing the Dodgers in Los Angeles, fans arrived early to yell insults at him.[151] A poll released in April 2006 showed that seven out of ten fans thought Bonds lied during his grand jury testimony and should be punished.[152] This new animosity by fans toward Bonds could have a detrimental effect on his game and his future contracts.

Since the Bonds situation involves a multimillionaire and his multimillion-dollar contract, it may not elicit much sympathy regarding the consequences of the grand jury leaks. There are other instances, however, where grand jury leaks might cause serious irreparable harm to a person's life and livelihood. For example, consider a grand jury leak that implicates a teacher in molesting a student, or a city official in abusing drugs or accepting bribes. The publicity regarding the leak could lead to the teacher being fired from his or her job, or jeopardize the city official's chances of being reelected. Even if the teacher or city official are later cleared, the damage has already occurred.

Second, pretrial publicity stemming from grand jury leaks that paint the defendant as a criminal before the trial reduces the defendant's chance of receiving a fair trial.[153] The Sixth Amendment of the United States Constitution states, in part: "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an *impartial jury* of the State and district wherein the crime shall have been committed . . . ."[154] This right is challenged in high profile cases, such as the Bonds investigation, when grand jury testimony is not only leaked to, but published by news outlets.[155] In these situations, a defendant's right to be presumed innocent and the integrity of the criminal justice system is tainted by the publication of the grand jury leak before the defendant is indicted. Chief Justice John Marshall stressed the importance of an impartial jury when he stated: "[t]he great value of the trial by jury consists in its fairness and impartiality. Those who most prize the institution, prize it because it furnishes a tribunal which may be expected to be uninfluenced by an undue bias of mind."[156]

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[150] *See* Davis, *supra* note 149, at 426 n.156.
[151] *See* Tim Dahlberg, *Barry There's No Crying in Baseball! If Nasty Media Doesn't Make Bonds Weep, Wait Until Feds Get Done With Him*, MSNBC.COM, Apr. 15, 2006, http://www.msnbc.msn.com/id/12331822/.
[152] *See* Dahlberg, *supra* 151.
[153] *See* Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y. & L. 622, 687 (2001).
[154] U.S. CONST. amend. VI (emphasis added).
[155] *See generally* Broder & Carr, *supra* note 20, at 2–3.
[156] United States v. Burr, 25 F. Cas. 49, 50 (C.C.D. Va. 1807).

There are two different types of pretrial publicity that may cause a jury to be impartial: factual publicity and emotional publicity.[157] Factual publicity contains incriminating information about the defendant such as reports of a confession, prior criminal record, or inadmissible but relevant evidence.[158] Emotional publicity does not contain explicit incriminating information, but information that is likely to arouse negative emotions such as information that creates a climate of fear in a particular community or graphic depictions of a victim's injuries.[159] Emotional publicity tends to have a long-lasting influence on juries than factual publicity.[160] Although grand jury leaks would normally be characterized as factual publicity because they contain incriminating evidence, the public nature of the defendant in high profile cases and the subject matter in cases of public interest can transform the information leaked into emotional publicity. The Michael Jackson child molestation case is an example of a situation where the publicized information was both emotional and factual.[161] Jackson's profile as a celebrity and the emotionally sensitive nature of the case transformed the publicized grand jury leak from factual publicity to emotional publicity.[162]

Social science studies have found that both types of prejudicial pretrial publicity influence a juror's "evaluations of the defendant's likeability, sympathy for the defendant, perceptions of the defendant as a typical criminal, pretrial judgments of the defendant's guilt, and final verdict."[163] Between 1975 and 2001, five studies were conducted to examine the effect of pretrial publicity at the jury-level. These studies "produced evidence of bias consistent with the juror-level findings."[164] The results of the studies are especially troubling in the context of grand jury leaks, because neither the defendant nor the defendant's counsel is allowed to confront the witnesses testifying against the defendant.[165]

Some scholars have attempted to argue away the "free press-fair trial dilemma" by pointing to aggressive voir dire, strict jury instructions from the judge to ignore the pretrial publicity, venue changes, and trial continuance as ways to rectify the problem.[166] However these remedies

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[157] *See* Geoffrey P. Kramer, Nobert L. Kerr & John Carroll, *Pretrial Publicity, Judicial Remedies, and Jury Bias*, 14 L. & HUM. BEHAV. 409, 409 (1990).
[158] *See* Kramer, Kerr, & Carroll, *supra* note 157, at 409, 414.
[159] *Id.*
[160] *See id.* at 414.
[161] *See* Jessica Martin, *Star Status May Impede a Fair, Impartial Jackson Trial*, WASH. U. IN ST. LOUIS NEWS & INFO., March 2, 2005, *available at* http://news-info.wustl.edu/news/page/normal/4773.html; Steve Chawkins, *Jackson Rails Against Leaks in Abuse Case*, L.A. TIMES, Jan. 31, 2005.
[162] *See* Martin, *supra* note 161.
[163] Christina A. Studebaker & Steven D. Penrod, *The Media, the Law, and Common Sense*, 3 PSYCHOL. PUB. POL'Y & L. 428, 433 (1997). *See* Dennis J. Devine et al., *supra* note 153, at 687. This information comes from a meta-analysis based on 44 studies that reported a modest positive relationship ($r = 0.16$) between negative pretrial publicity and verdicts of guilty. *Id. But see* Steven Helle, *Publicity Does Not Equal Prejudice*, 85 ILL. B.J. 16, 18 n.23 (1997); Eileen A. Minnefor, *Looking for Fair Trials in the Information Age: The Need for More Stringent Gag Orders Against Trial Participants*, 30 U.S.F. L. REV. 95, 112 (1995) ("There is currently no effective way to measure the impact of pervasive publicity given our inability to recreate the actual trial experience with and without it.").
[164] Dennis J. Devine et al., *supra* note 153, at 687.
[165] *See* WHITEBREAD & SLOBOGIN, *supra* note 28, at 615.
[166] Broder & Carr, *supra* note 20, at 2–3. When asked by the New York Times about this dilemma, Professor Erwin Chemerinsky, a constitutional law scholar at Duke Law School, responded that there

have been called into question by social scientists and commentators. In 1978, commentators for the ABA Committee on Fair Trial and Free Press expressed their doubts about the effectiveness of judicial remedies to pretrial publicity.[167] These doubts stemmed from a belief that:

> (1) inadequate understanding of the way pretrial publicity influences the thought process of prospective jurors; (2) the tendency among a significant number of jurors to underplay the importance of exposure to pretrial publicity and to exaggerate their ability to be impartial; and (3) persistent concern about the ability of attorneys and trial judges to discern bias, particularly at the subconscious level, even when the prospective juror is being completely candid.[168]

The effectiveness of the various techniques used by judges to reduce the influence of pretrial publicity on a trial is explored in section VI of this Note.

VI. CURRENT JUDICIAL REMEDIES TO PRETRIAL PUBLICITY AND THEIR EFFECTIVENESS

A. VOIR DIRE

Voir dire typically involves routine questioning of potential jurors to gauge their competence to be on a jury and to determine any potential bias they may have towards the prosecution or defendant.[169] Although voir dire is the procedure favored by most judges,[170] the little research that has been conducted to prove if it is truly an effective means of remedying pretrial publicity suggests that it is, in fact, ill-suited for the task of selecting a competent, yet unbiased, jury.[171]

Many commentators have argued that voir dire questioning fails to elicit actually honest responses from potential jurors.[172] These critics claim that accurate and honest answers from potential jurors are unlikely; because most jurors are unwilling to discuss their biases openly in public.[173] The courtroom atmosphere also can have an impact in hindering a juror's self-disclosure.[174] Potential jurors may feel the pressure to provide the right answer in an effort to win approval from the judge, and "be in the

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were mechanisms in place to assure the impartiality of the jury including "aggressive questioning during jury selection, strict instructions from judge to ignore anything jurors might have read or heard and the presentation of a vigorous defense." *Id.*

[167] *See* Kramer, Kerr, & Carroll, *supra* note 157, at 410.

[168] *Id.*

[169] *See* Charles H. Whitebread & Darrell W. Contreras, *Free Press v. Fair Trial: Protecting the Criminal Defendant's Rights in a Highly Publicized Trial by Applying the* Sheppard-Mu'Min *Remedy*, 69 S. CAL. L. REV. 1598, 1600 (1996).

[170] *See* Patton v. Yount, 467 U.S. 1025, 1038 (1984).

[171] *See* Newton N. Minow & Fred H. Cate, *Who is an Impartial Jury in an Age of Mass Media?*, 40 AM. U. L. REV. 631, 650 & n.122 (1991); Norbert Kerr et al., *On the Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pretrial Publicity: An Empirical Study*, 40 AM. U.L. REV. 665, 666, 697 (1991).

[172] *See* Minow & Cate, *supra* note 171, at 650–51; John L. Carroll, *Speaking the Truth: Voir Dire in the Capital Case*, 3 AM. J. TRIAL ADVOC. 199–01 (1979). *See also* Fisher v. State, 481 So. 2d 203, 220 (Miss. 1985).

[173] *See* Kerr et. al., *supra* note 171, at 650.

[174] Susan Jones, *Judge Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor*, 11 L. & HUM. BEHAV. 131, 134 (1987).

majority."[175] Another problem with voir dire questioning is that many jurors often do not understand what information is prejudicial or improper, or know that they possess such information or bias.[176] The evidence seems to show that voir dire is ineffective in actually weeding out jurors that have become biased because of pretrial publicity.[177]

B. JURY INSTRUCTIONS

Jury instructions telling jurors to ignore information learned outside of the courtroom have also proven to be an ineffective way of eliminating pretrial publicity. A considerable amount of research and literature has questioned the effectiveness of cautionary jury instructions in eliminating the effect of pretrial publicity.[178] A study conducted by Geoffrey P. Kramer, Norbert Kerr, and John S. Carroll in 1990 found that admonitions from judges to ignore all pretrial publicity have no effect on jury verdicts.[179] The study also found that the instructions were counterproductive, actually strengthening the impact of factual publicity.[180] One reason for this may be that the instructions draw the jury's attention back to the information they are supposed to be ignoring, causing them to deliberate with that information fresh in their minds.[181]

Even though the assumption is that jury instructions help to reduce the influence of pretrial publicity, "it is possible that jurors lack the cognitive control to prevent such information from influencing their judgments."[182] Judge Learned Hand recognized this difficulty when he stated that jury instructions require jurors to perform a "mental gymnastics which is beyond, not only their powers, but anybody else's."[183]

C. VENUE CHANGE

Change of venue is another technique used by courts to lessen the effect of pretrial publicity on a jury. Change of venue occurs when a court moves a trial to another location.[184] Most courts are unwilling to change the venue of a trial based solely on the claim of pretrial publicity because of the expense involved in moving a trial.[185] Moving a trial from one location where the publicity is widespread to another location where the publicity is not as widespread may increase the likelihood of finding an impartial jury

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[175] Minow & Cate, *supra* note 171, at 651.
[176] *See id.* at 653; Dale W. Broeder, *Voir Dire Examination: An Empirical Study*, 38 S. CAL. L. REV. 503, 528 (1965) (stating that jurors will often lie, either consciously or unconsciously, when publicly questioned about their views).
[177] *But see* Whitebread & Contreras, *supra* note 169, at 1623 (stating that society should trust jurors to respond truthfully to the questions asked during voir dire and remain true to their oath of rendering a verdict based on what was presented at trial and not on outside influences).
[178] *See* Kramer, Kerr & Carroll, *supra* note 157, at 412.
[179] *See id.*
[180] *See id.* at 430.
[181] *See id.*
[182] *See id.* at 412.
[183] Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932). *See also* Minow & Cate, *supra* note 171, at 648.
[184] *See* Minow & Cate, s*upra* note 171, at 646.
[185] *See id.* at 647.

pool.[186] However, changing the venue of a trial can be highly ineffective in cases where the pretrial publicity is not limited to a single community, but is nationwide. This happens often in cases that involve high profile defendants or cases of strong public interest.

An example of a case where pretrial publicity was so widespread that a change of venue did not help is *Irvin v. Dowd*.[187] In *Irvin*, the Supreme Court overturned a conviction based solely on the pretrial publicity surrounding the case.[188] The media coverage surrounding *Irvin*, which involved the murder of six people in a small rural community, was so intense that the Indiana trial court granted the defendant's motion for change of venue.[189] Before the trial had begun, the media attention surrounding the case had reached the new location of the trial.[190] Because of the media attention, even with the change of venue, almost ninety percent of the prospective jurors questioned during jury selection had formed an opinion about the defendant's guilt before the trial.[191] After granting certiorari, the Supreme Court found that the pretrial publicity was so widespread and extensive that the verdict was flawed despite the change of venue.[192]

Another example of a case where pretrial publicity is so extreme that a change of venue might not aid a court in finding an impartial jury is the Bonds situation. The media attention surrounding Bonds makes it almost impossible to find an impartial jury in the Bay Area given his popularity in San Francisco. In fact, given the notoriety of the book *Game of Shadows* it could be impossible to find an impartial jury in California. Thus, in the situation where a published grand jury leak contains information about a high profile defendant or an issue of public interest, changing the venue of the trial might not produce an impartial jury.

D. TRIAL CONTINUANCE

Granting a continuance is another technique used by courts to alleviate the effects of pretrial publicity. However, like change of venue, courts are very reluctant to grant a motion for a continuance.[193] Granting a continuance runs the risks of court backlog and fading witness memories.[194] Postponing a trial is based on two assumptions: first, a potential juror will forget everything he or she heard in the news before the original trial

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[186] *See* Jaime N. Morris, Note, *The Anonymous Accused: Protecting Defendant's Right in High-Profile Criminal Cases*, 44 B.C. L. Rev. 901, 913–14 (2003).
[187] *See* Irvin v. Dowd, 366 U.S. 717 (1961).
[188] *See id.* at 728–29.
[189] *See id.* at 720.
[190] *See id.* at 725.
[191] *See id.* at 727.
[192] *See id.* at 728.
[193] *See* Minow & Cate, *supra* note 171, at 648.
[194] *See id.*; Morris, *supra* note 186, at 930. S*ee also* Morris v. Slappy, 461 U.S. 1, 15 (1983) (discussing problems with continued trials).

date,[195] and second, the media attention surrounding the case will fade away over time.[196] Both assumptions are false in high profile cases.

Potential jurors are not likely to forget the information they read when it involves a celebrity defendant. In addition, when a case involves a celebrity or high profile defendant the media attention surrounding the case will likely not fade. The *San Francisco Chronicle* articles implicating Bonds were published in March 2006 and the media attention surrounding the scandal has not faded. Even if the media attention does happen to fade over time, it will most likely resurge once the trial takes place.[197] Social science also supports the claim that judicial postponement is ineffective in alleviating pretrial publicity.[198] In addition, although the United States Supreme Court has not addressed this, a trial continuance may violate a defendant's right to a speedy trial.[199]

VII. CONCLUSION

The journalist's argument that allowing grand juries to subpoena reporters for grand jury leaker's identities will "chill" the free flow of information, though not decisively substantiated by empirical studies, does have some merit. However, the defendant's argument that grand jury leaks to the media can have a prejudicial effect on his or her reputation, and in the case of indictment his or her right to an impartial trial, also has merit. In addition, judicial techniques used by courts to remedy prejudicial pretrial publicity have proven ineffective. Because both arguments have merit, a few questions remain: Can these rights be balanced, and, if they can be balanced, how?

The Supreme Court has stated; "the authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other. . . . [I]t is not for us to rewrite the Constitution by undertaking what they declined to do."[200] This statement, however, does not ring true. The federal courts, including the United States Supreme Court, have on numerous occasions compromised one right in favor of the other.[201] In situations where the right

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[195] *See* Morris, *supra* note 186, at 929–30; Whitebread & Contreras, *supra* note 169, at 1615 (stating that psychologists are skeptical that time actually erodes the harmful effects of pretrial publicity).
[196] *See* Morris, *supra* note 186, at 929–30; Whitebread & Contreras, *supra* note 169, at 1615.
[197] *See* Morris, *supra* note 186, at 930.
[198] *See* Minow & Cate, *supra* note 171, at 648 (describing the result of one study, which concluded that a twelve-day continuance was ineffective in alleviating the bias created by emotional publicity).
[199] *But see* Whitebread & Contreras, *supra* note 169, at 1606 (stating that if a defendant moves for and is granted a continuance, it would seem unconscionable to allow the defendant to later succeed on a claim that the continuance violated his or her right to a speedy trial).
[200] Nebraska Press Ass'n. v. Stuart, 427 U.S. 539, 561 (1979).
[201] *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 564 (1980) (referring to a defendant's right to a fair trial as "superior" to the right of the press and the public to attend a trial); Bridges v. California, 314 U.S. 252, 260 (1941) (noting the difficult but often unavoidable judicial task of prioritizing constitutional rights); Press-Enter. Co. v. Superior Court, 464 U.S. 501, 508 (1984) ("[Although] [n]o right ranks higher than the right of the accused to a fair trial . . . , the primacy of the accused's right is difficult to separate from the right of everyone in the community to attend the *voir dire* which promotes fairness."); *In re* Dow Jones & Co., 842 F.2d 603, 609 (2d Cir. 1988) ("When the exercise of free press rights actually tramples upon Sixth Amendment rights, the former must nonetheless yield to the latter."), *cert. denied*, 488 U.S. 946 (1988).

to free press and the right to an impartial jury clash, some kind of tradeoff between the two is inevitable. As a society we must decide which right is more important. When do we properly compromise the rights of a person standing trial because of the public's interest in receiving information?

Most scholars have opted to compromise the rights of the defendant in favor of free press in grand jury leak situations. Many scholars have completely ignored the effect that grand jury leaks may have on a potential defendant and have argued for either an absolute privilege against governmental subpoenas or, in some cases, a qualified privilege.[202] Some have sought to rectify the problem by advocating new judicial techniques that would supposedly solve the pretrial publicity, impartial jury problem, such as establishing high profile courts which would take high profile cases out of the hands of a jury and place them in the hands of judges specially trained to deal with such cases.[203] Many of these new techniques are either impractical because of the expense associated with it, will not correct the impact of prejudicial pretrial publicity, or will conflict with other constitutional rights such as the right to be tried by a jury.[204] Other scholars have proposed remedies to the actual problem of grand jury leaks such as imposing criminal contempt sanctions on grand jury leakers.[205] Techniques to identify or stop leaks are rarely effective in practice because of the inability of the government to identify the leak without the aid of reporters and the rarity in which courts actually convict the leaker once identified.[206]

Perhaps the various scholars mentioned in the preceding paragraph opted to favor the wrong right. Leakers not only compromise a defendant's Sixth Amendment right, they "undermine the legitimacy of government, distort the criminal justice system, and undermine the principles of the supremacy of the law."[207] One court actually stated that a reporter witnessing a leak is similar to a reporter witnessing a crime.[208] Why should we be protecting leakers by allowing reporters to keep their identities secret? Why should we allow journalists to refuse court orders that apply to all citizens by claiming reporter's privilege?

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[202] *See* Browne, *supra* note 54; Elrod, *supra* note 125; Theodore Campagnolo, *The Conflict Between State Press Shield Laws and Federal Criminal Proceedings: The Rule 501 Blues*, 38 GONZ. L. REV. 445 (2002–03); Mary-Rose Papandrea, *Citizen Journalism and the Reporter's Privilege*, 91 MINN. L. REV. 515 (2007); Jeffrey S. Nestler, Comment, *The Underprivileged Profession: The Case for Supreme Court Recognition of the Journalist's Privilege*, 154 U. PA. L. REV. 201 (2005).

[203] *See* Laurie Nicole Robinson, Note, *Professional Athletes—Held to a Higher Standard and Above the Law: A Comment on High-Profile Criminal Defendants and the Need for States to Establish High-Profile Courts*, 73 IND. L.J. 1313 (1998). For other proposed techniques, *see* Whitebread & Contreras, *supra* note 169; Morris, *supra* note, 186.

[204] *See* Morris, *supra* note 186, at 935 (stating that the *Sheppard-Mu'Min* remedy advocated by Charles H. Whitebread and Darrell W. Contreras will not correct the influence of pretrial publicity in high-profile cases).

[205] *See* James W. Fox, Jr., Note, *The Road Not Taken: Criminal Contempt Sanctions and Grand Jury Press Leaks*, 25 U. MICH. J.L. REFORM 505 (1992). For other examples of proposed remedies for grand jury leaks, *see* Barrett, *supra* note 46; JoEllen Lotvedt, Note, *Availability of Civil Remedies Under the Grand Jury Secrecy Rule*, 47 CATH. U.L. REV. 237 (1997).

[206] *See* Theus, *supra* note 19, at 554; Davis, *supra* note 149, at 428–30.

[207] Theus, *supra* note 19, at 554.

[208] *See In re* Grand Jury Subpoena (Miller), 397 F.3d 964, 970 (D.C. Cir. 2005) (discussing illegal disclosure of the identity of covert agents); Eun, *supra* note 22, at 1085.

The answer to these questions is: we should not be. The same constitution that "protects the freedom of press requires obedience to final decisions of the courts and respect for their rulings and judgments."[209] A reporter's privilege allowing journalists to keep the identity of leakers secret condones the act of leaking and condones journalists' disregard for laws that apply to every citizen. This should not be allowed. Instead, Congress should follow the lead of the majority in *Branzburg* and not create a federally recognized reporter's privilege. If the "chilling effect" argument proffered by reporters is actually sound; reporters will not go after stories provided by grand jury leakers. This could solve the Sixth Amendment problem, because there will be no pretrial publicity to prejudice the defendant's trial. It could also solve the problem of leakers, because it will cut off their audience. Allowing grand jury subpoenas to "chill" the reporter-source relationship could mean the social loss of a few important stories, but considering the adverse effect grand jury leaks have on the rights of the defendant and the criminal justice system, the loss may be justified.

In the end, although the framers of the Constitution did not prioritize the rights enumerated in the Constitution, some prioritizing is necessary and inevitable. In the situation of publicized grand jury leaks the tradeoff should favor the criminal defendant and not the reporter the leaker hides behind.

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[209] *See* Statement of Time Inc. on the Matthew Cooper Case, TIME.COM, June 30, 2005 *available at* http://www.time.com/time/nation/article/0,8599,1078444,00.html.