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Julie M. Zampa

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Journalist’s Privilege: When Deprivation Is a Benefit

_Gonzales v. NBC_, 155 F.3d 618 (2d Cir. 1998)

Debate over the issue of a journalist’s privilege not to disclose information and source identities to the courts predates the United States Constitution.¹ Advocates for the privilege argue that the press’s responsibility to provide a check on the government justifies affording the press certain privileges to fulfill that function.² Yet one can accept that the press is an important component of democracy and still reject an absolute privilege for journalists’ information.³ Indeed, when the Second Circuit in _Gonzales v. NBC_⁴ deprived journalists of a privilege for nonconfidential information, it set a precedent that will increase press independence from the courts and will thus further, rather than frustrate, the press’s performance of its constitutionally delegated function.

Though the Supreme Court has never ruled on the issue of journalist’s privilege as it relates to nonconfidential information, related precedent invited the Second Circuit to move the law⁵ in the direction of less

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¹. The common law according to Wigmore did not recognize a journalist’s privilege. Yet an overwhelming number of courts have long relied on the common law as a source of the privilege. Journalists have consistently asserted a privilege, and countless scholars have championed them. Compare Timothy L. Alger, Comment, Promises Not To Be Kept: The Illusory Newsgatherer's Privilege in California, 25 Loy. L. Rev. 155, 169 (1991) (quoting Wigmore for the proposition that there was no journalist’s privilege at common law), and id. at 157-58 (offering examples of courts that have grounded their recognition of a privilege in common law authorities), with Paul Allee Curtis, Case Note & Comment, New Limits on Freedom of the Press, 34 Idaho L. Rev. 191, 193-94 (1997) (describing journalists' long struggle to assert a privilege). For an eloquent discussion of the battle waged between journalists and jurists over the privilege, see Howard Simons and Joseph A. Califano, Jr., Jurists and Journalists, in THE MEDIA AND THE LAW 2-3 (Howard Simons and Joseph A. Califano, Jr. eds., 1976).


³. In this Case Note, “information” and “communications” refer to material obtained from sources as well as to identities of sources.

⁴. 155 F.3d 618 (2d Cir. 1998).

⁵. The Second Circuit has long been a leader in the area of press privileges. The circuit in _Garland v. Torre_, 259 F.2d 545 (2d Cir. 1958), was the first to consider a privilege for a reporter’s promises of confidentiality. The Second Circuit also articulated the three-part test widely used by those federal courts that extend a qualified privilege to journalists’ information. See _In re Petroleum Prods.,_ 680 F.2d 5, 7 (2d Cir. 1982).
protection for journalists. In *Branzburg v. Hayes*, the Supreme Court authority on press privileges, the Court refused to extend any privilege to confidential information in criminal cases and suggested in dicta that press privileges are generally disfavored. Several subsequent federal court decisions, however, evinced dissatisfaction with *Branzburg*’s implications; the movement has been toward increased protection for journalistic privileges. *Gonzales* signals a reversal of this trend.

I

Plaintiffs Albert and Mary Gonzales brought a civil rights action against a Louisiana deputy sheriff whom they accused of stopping minority citizens without probable cause and detaining and questioning them longer than other citizens. The Gonzaleses sought production of nonconfidential, unaired portions of a Dateline NBC program on law-enforcement abuses for use in their civil suit. The video outtakes in question contained footage of the deputy sheriff unlawfully searching a motorist. NBC contested the subpoena, arguing that the tapes were privileged and that disclosure would be unduly burdensome. The district court held that journalists enjoyed a qualified privilege for nonconfidential as well as confidential information, but that the plaintiffs’ need in this case was sufficiently compelling to override that privilege.

On appeal, the Second Circuit affirmed the order directing production of the tapes but held, contrary to the lower court, that journalists have no privilege to avoid disclosing nonconfidential information. In the Second Circuit after *Gonzales*, confidential communications remain subject to the

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7. Information attains confidential status through an agreement between a journalist and a source that communications or source identities exchanged in the course of their relationship will not be disclosed. See generally John B. Kuhns, Note, *Reporters and Their Sources: The Constitutional Right to a Confidential Relationship*, 80 YALE L.J. 317 (1970) (characterizing confidentiality as a product of the particular relationship reporters and sources agree to establish).
8. *Gonzales*, and thus this Case Note, involve privilege solely in the context of civil cases.
9. 408 U.S. at 690-91 (declining to create for newsmen a privilege not held by other citizens and criticizing the creation of new privileges).
10. See, e.g., Shoen v. Shoen, 48 F.3d 412, 414 (9th Cir. 1995) (asserting that *Branzburg* should not be construed as a mandate for compelling disclosure of journalists’ information); cases cited infra note 17. The Second Circuit was in fact one of the trendsetters in broadening the privilege after *Branzburg*. See Baker v. F & F Investment, 470 F.2d 778, 781, 784 (2d Cir. 1972) (proposing that *Branzburg*’s holding is limited in scope and that application of a privilege is valid in both the civil and criminal contexts).
12. See *Gonzales*, 155 F.3d at 619-20.
13. See id. at 620-21.
14. See id. at 626.
following three-part test: For the privilege to be denied, the information sought must be highly material and relevant, necessary or critical to the claim, and unobtainable from other sources.\textsuperscript{15} Nonconfidential communications, by contrast, are governed by the ordinary rules of discovery and receive no special privilege.\textsuperscript{16} Neither the appellate court nor the litigants recognized that this outcome benefited NBC as well as its adversary. In retaining a qualified privilege for confidential but not for nonconfidential information in civil cases, the court created distinct standards for these two types of communications and thereby reduced the risk of arbitrary judicial treatment of the press.

II

A number of courts outside the Second Circuit continue to extend a qualified privilege to both confidential and nonconfidential information in civil cases.\textsuperscript{17} The use of the same standard for both confidential and nonconfidential communications at worst conflates the two and at best obscures the true bases for decision, rendering the outcomes of the decisionmaking process unpredictable and ultimately imperiling reporter-source relationships.

Most courts that extend a qualified privilege apply the same three-part test to both confidential and nonconfidential information that the Second Circuit now restricts to confidential information. Whether the information in question is confidential is not a formal consideration in the current three-part inquiry. Application of the standard to both types of communications invites courts to set the same threshold of protection for both. The three-part test is subjective: How "highly" material and how strictly "necessary" the information in question must be will vary according to the strength of the countervailing interest in protecting that information.\textsuperscript{18} The interest should be greater when information is confidential and lower when it is not. When the standard does not specify this, courts have license to fill the void with their own subjective values, and they need not explain or justify their choices.\textsuperscript{19} Courts that favor less protection for journalists' materials are free

\textsuperscript{15} See \textit{In re Petroleum Prods.}, 680 F.2d 5, 7 (2d Cir. 1982).
\textsuperscript{16} See \textit{Gonzales}, 155 F.3d at 627-28 ("The only question is whether the information is relevant to the Gonzalenses' case and discovery should not otherwise be limited under Fed. R. Civ. P. 26.").
\textsuperscript{17} Circuits that extend a qualified privilege include the Ninth and the Third. See \textit{Shoen v. Shoen}, 48 F.3d 412, 418 (9th Cir. 1995); U.S. v. Cuthbertson, 630 F.2d 139, 146-47 (3d Cir. 1980). For other courts that apply the privilege, see Alan S. Wasserstrom, Annotation, \textit{Reportorial Privilege as to Nonconfidential News Information}, 60 A.L.R. 5th 75, 120-21 (1998).
\textsuperscript{18} See Kuhns, \textit{supra} note 7, at 340-41 (asserting that inquiries concerning relevance and importance yield broad discretion to judges).
\textsuperscript{19} See generally D.J. GALUIGAN, DISCRETIONARY POWERS 31 (1986) (explaining that where standards allow broad discretion, decisionmakers will be guided by their own values).
to conflate the two types of information—as the standard invites them to do—and afford confidential information as low a level of protection as they afford nonconfidential information. Alternatively, courts that believe journalists’ communications should enjoy protection can impose a higher threshold, even for nonconfidential communications, before the privilege will be denied. Overbroad judicial discretion is an inevitable result of the pre-Gonzales approach.

The standard’s lack of guidance has allowed judges to inconsistently include or ignore the nature of the information in privilege analyses. When the nature of the information is not a consistent and explicit factor in the inquiry, parties cannot determine the factors influencing judges’ decisions. Where courts have explicitly considered whether the information is confidential, they have failed to specify how much weight this factor carries. The lower court in Gonzales, for example, mentioned in its holding that the information at issue was not confidential, but did not explain what role this fact played in the analysis. Similarly, in Shoen v. Shoen, the dissent pointed out that the absence of confidentiality had been a consideration in a previous case, but that that factor was not viewed as significant in the case at hand. The court in United States v. Cutler, by contrast, considered confidentiality in the course of applying the balancing test. Yet when this element is not a formal part of the inquiry, litigants cannot be sure whether these courts or others will make it a consideration in any given case.

that the problem of subjectivity, though it may be lessened, would nonetheless persist even if the standard did direct judges to impose a somewhat higher threshold for confidential information than for nonconfidential information. Questions of degree give rise to answers that are inherently inexact. The most effective way to counter subjectivity is to draw a definite demarcation line between the two types of information; creating an absolute standard for one type of information accomplishes this. See infra Part III.

20. Extending protection to nonconfidential communications is difficult to justify as a policy matter because such communications by definition are unaccompanied by expectations of confidentiality. See infra note 34 and accompanying text.


23. 48 F.3d 412, 419 (9th Cir. 1995).

24. 6 F.3d 67, 71 (2d Cir. 1993).

25. The likelihood is high that particular judges will implicitly evaluate whether or not the communications are confidential; to ask judges to ignore the nature of the information—as the pre-Gonzales approach does—runs counter to the more natural and doctrinally desirable inclination to treat the two types of communications distinctly. See infra notes 33-34 and accompanying text.

Some judges may decide to take the nature of the information into account out of an impulse for fairness. Nonconfidentiality can weigh in favor of making information available to a litigant in
Whether judges set a single threshold or take the nature of the information into account, the use of the same standard for both confidential and nonconfidential information is a prescription for vagueness and uncertainty. Overbroad or vague laws cause a chilling effect that threatens the exercise of First Amendment rights. Vagueness breeds increased litigation and unpredictable outcomes. The risk of becoming embroiled in litigation with uncertain results acts as a deterrent to the speech of both journalists and their sources.

By facilitating arbitrary legal outcomes, the pre-Gonzales approach to the journalist's privilege amounts to excessive interference with the relationship between reporters and their sources and endangers the speech to which that relationship gives rise. When protection or lack thereof is uncertain, journalists and sources lose control over the information they communicate. Cultivating clarity in the doctrine of privilege is the solution.

III

The Gonzales decision produces precisely the kind of clarity necessary in journalist's privilege cases. By depriving nonconfidential materials of protection while retaining a qualified privilege for confidential materials, the Gonzales court ensured that confidential and nonconfidential information would be treated distinctly. Courts that follow the Second Circuit's approach need no longer struggle to find a single threshold that will accommodate both nonconfidential and confidential information or settle upon a threshold more suitable to one type of information. Gonzales brings coherence to the interplay between the press and the judiciary.

dire need of it. If, however, the information is confidential, judges may be inclined to extend more protection out of respect for journalist-source agreements.

26. See Stromberg v. California, 283 U.S. 359, 369 (1931) (invalidating a vague statute clause on the grounds that it allows punishment of protected speech); Overbreadth Doctrine, supra note 21, at 853 (describing how a chilling effect results from overbroad and vague laws).

27. See Overbreadth Doctrine, supra note 21, at 868 (stating that overbroad or vague privilege rules create uncertainty for litigants as to how particular claims will be adjudicated); id. at 871 (asserting that overbroad statutes, in failing to produce consistent outcomes, create a necessity to litigate).

28. See Kuhns, supra note 7, at 340-41 (arguing that vague standards of privilege make it difficult for journalists and sources to predict whether disclosure will be required). Sources will be reluctant to communicate with journalists if they fear their confidentiality will be breached. Reduced access to sources limits journalists' expressive freedom. See Alger, supra note 1, at 162 (asserting that alienating sources results in an inability to gather vital information); Kuhns, supra note 7, at 336 (“Unless reporters and informers can predict with some certainty the likelihood that newsmen will be required to disclose names or information . . . there is a substantial possibility that many reporters and informers will be reluctant to engage in such relationships.”). The price for maintaining access to sources can be high. Journalists who refuse to disclose information on demand of the courts risk contempt citations and possible imprisonment. See Marcus A. Asner, Note, Starting from Scratch: The First Amendment Reporter-Source Privilege and the Doctrine of Incidental Restrictions, 26 U. Mich. J.L. Reform 593, 596 (1993); Kuhns, supra note 7, at 332.
Moreover, the use of two different standards clarifies the bases for decisionmaking.

The press cannot be completely free from judicial intervention, yet Gonzales minimizes press-judiciary interaction surrounding the press privilege. By creating different standards for confidential and nonconfidential information, the court created two distinct possibilities for those jurisdictions that follow Gonzales. Journalists either will receive a subpoena seeking the disclosure of confidential information, which may ultimately receive protection, or they will be subpoenaed for nonconfidential information, which will never be protected. The Gonzales rule makes it clear to journalists that it is never worthwhile to contest a subpoena for nonconfidential materials. The pre-Gonzales extension of a qualified privilege to both confidential and nonconfidential information, by contrast, meant that success in contesting a subpoena was always theoretically possible, thus creating an incentive to litigate. After Gonzales, journalists will know not to litigate a subpoena when the information at issue is not confidential.

While confidential information is not subject to a standard as absolute as that for nonconfidential information, the new approach will aid journalists in determining whether even confidential information is likely to receive protection. The elimination of covert bases for decisionmaking that comes with a clearer standard will make journalists better informed about the factors that have influenced judges in past cases, and it will aid them in predicting the results of a potential suit contesting a particular subpoena. Reporters will thus be better able to determine when to invest their resources in litigation and when to simply comply with a discovery request. In Gonzales, NBC argued that, absent the privilege, it would be deluged with subpoenas for its information and forced to spend its resources in the courtroom, rather than on the news beat. Actually, the court’s decision will allow the press to use its resources more sparingly and intelligently than it could have when outcomes were less certain. NBC was ultimately fortunate that its arguments did not persuade the court.

29. See Branzburg v. Hayes, 408 U.S. 665, 682 (1972) ("It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability.").

30. 155 F.3d at 624. It is difficult to imagine how this particular ruling inconvenienced NBC even in the short term. As the court pointed out, there was no expectation that the footage would be kept confidential, and thus there was no danger of alienating any source. See Gonzales, 155 F.3d at 627. Moreover, the tapes were already in NBC’s possession, so production did not require any additional investment of reporting resources.

31. Clearer approaches deter litigation in a variety of legal contexts. See, e.g., John G. Sprankling, An Environmental Critique of Adverse Possession, 79 CORNELL L. REV. 816, 878 (1994) (noting that bright-line tests deter litigation); Norbert F. Kugele, Note, How Much Does It Take?: Copyrightability as a Minimum Standard for Determining Joint Authorship, 1991 U. ILL. L. REV. 809, 833 ("If the courts were to announce a clear standard, parties could more easily
IV

Journalists are typically interested in preserving another crucial resource: their sources. The press-source relationship fuels the debate about press privileges. A number of scholars assert that a failure to privilege journalists’ information places journalists at risk of alienating their sources. Yet sources that do not insist upon confidentiality as a condition of sharing information have no expectation of receiving protection against disclosure. Nonetheless, even nonconfidential sources likely would prefer that journalists’ information not be delivered into the hands of a litigating party. The Gonzales decision offers protection against this contingency. The increased clarity achieved by the use of two distinct standards serves a notice-giving function. Sources who fear being embroiled in litigation will know not to expect any protection unless they specifically invoke confidentiality in agreements with journalists.

predict the outcome of the litigation and thus make more intelligent decisions regarding whether to proceed with a suit or not.

32. See Langley & Levine, supra note 2, at 41 (documenting journalists’ dependence on their sources); Monk, supra note 11, at 6 (“[T]he journalist’s relationship with sources is critical to the full and effective exercise of the profession.”).

33. See, e.g., Monk, supra note 11, at 5 (postulating that journalists’ relationships with sources are harmed in the absence of a privilege).

34. The Gonzales court recognized this. See 155 F.3d at 627. It is worth noting that sources that do not request confidentiality presumably cannot predict which components of their information the press will decide to disseminate. Sources thus can have no reasonable expectation that certain portions of that information will never be seen by the public and cannot object to disclosure on these grounds.

35. Sources may fear being called as a witness in another’s suit. Alternatively, information could be sought for use in a suit against a source. Note that in Gonzales neither scenario could have occurred, as the footage derived from mere observation of an event. However, situations that would subject sources to a subpoena or to litigation are easy to imagine and probably more typical than the situation in Gonzales. In Baker v. F & F Investment, 470 F.2d 778 (2d Cir. 1972), for example, the plaintiffs alleged discrimination in real estate prices and sought disclosure of the identity of a source who had informed a journalist that discriminatory action was occurring. In In re Petroleum Products, 680 F.2d 5 (2d Cir. 1982), five states brought an antitrust suit against several oil companies and sought a reporter’s documents containing communications on oil prices.

36. Vagueness is the culprit in the denial of fair notice to potential parties. Clarity mitigates this danger. See Overbreadth Doctrine, supra note 21, at 871-72; Void-for-Vagueness Doctrine, supra note 21, at 86. In achieving clarity, therefore, Gonzales advances due process interests.

37. As a result, sources may invoke confidentiality more often. This is not necessarily a negative outcome. If more information is confidential, a greater percentage of journalists’ information will be subject to a qualified privilege and journalists’ information as a whole may receive more protection. Though this may tend to insulate sources and their information from public scrutiny for accuracy, the responsibility merely devolves upon journalists. As Kuhns notes, “Since his professional success depends upon presenting fresh, important information to the public, the reporter will presumably act in a manner that will contribute to the full flow of information.” Kuhns, supra note 7, at 344. See also id. at 370 n.215 (asserting that journalists can best ensure that adequate information reaches the public and that they should be the judges of when information should remain confidential). Moreover, in the context of litigation, courts can deny the privilege where a litigant’s need outweighs a journalist’s desire for confidentiality.
Press-source agreements will be respected more often after Gonzales. Nonconfidential information will not be privileged and confidential information might be—an arrangement that more closely parallels journalist-source intentions than does the pre-Gonzales framework. Journalists and their sources either do not contemplate that information will be kept in confidence—as is the case with nonconfidential information—or they prefer that it not be disclosed—as is the case with confidential information. Under the pre-Gonzales approach, neither of these outcomes can be assured. Post-Gonzales, expectations for nonconfidential information will be met, and confidential information will be automatically eligible for more protection than nonconfidential information. While full protection for confidential information is not guaranteed under either approach, confidential information is more likely to be shielded from disclosure after Gonzales, because such information can no longer be conflated with nonconfidential information. Sources after Gonzales can rely with more confidence on journalists’ promises, and both journalists and sources can be more certain that their expectations will be fulfilled.

The Gonzales court and NBC were engaged in an important and principled struggle over First Amendment freedoms. The potential loss of those freedoms is a troubling prospect, yet Gonzales’s resolution rendered that danger less imminent. Free speech rights repose more securely in clear standards, and press-source relationships are strengthened when the results of external interference with those relationships are less arbitrary. In clarifying privilege analysis and increasing the predictability of legal outcomes, Gonzales decreased the doctrine’s potential to create ambiguity and countered a threat to the free exercise of First Amendment rights. Courts that follow Gonzales’s lead will prove themselves guardians of speech even as they forfeit some protection for that speech. As a result, journalists can more freely fulfill their constitutionally significant function of scrutinizing the branches of government. Gonzales ultimately facilitates the press’s performance of this duty by increasing press independence from one of those branches—the judiciary.

—Julie M. Zampa

38. See Gonzales, 155 F.3d at 624 (“[W]e are still mindful of the preferred position which the First Amendment occupies in the pantheon of freedoms.” (quoting Baker, 470 F.2d at 783)).
39. See David A. Anderson, The Origins of the Press Clause, 30 UCLA L. Rev. 455, 460 (1983) (discussing the press’s responsibility to counterbalance the three branches of government by providing a check on official power).