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The Reporter's Privilege v. The Corporate-Interest Muzzle: Philip Morris Cos., Inc. v. ABC, Inc.

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ARTICLES

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Clay Calvert[*]

I. INTRODUCTION

A growing tension exists between broadcast journalists and their bosses in the television news industry. It pits journalists' interests in truth telling and investigative reporting against corporate executives' interests in maximizing profits and minimizing liability. The strength of the corporate-interest muzzle on broadcast journalism is highlighted by a recent case involving journalists' legal protection of confidential sources.

Journalists won a prized safeguard for protecting the identity of confidential sources in *Philip Morris Cos., Inc. v. ABC, Inc.*[1] This case provides reporters with the professional freedom necessary to probe for tough stories that disseminate information that one party would prefer to keep secret. This freedom is nullified, however, when media executives decide not to air stories that are harmful to their business interests. Corporate owners with diversified portfolios and non-media holdings may, alternatively, settle defamation suits before trial and publicly apologize for stories "unpopular" with the businesses and individuals featured in the reports. In short, money appears to control the voice of the investigative reporter, while legal protection facilitates hard-hitting reporting. Attorneys and journalists, often the brunt of jokes and the objects of public scorn,[2] did little to help their reputations in the defamation[3] case of *Philip Morris Cos., Inc. v. ABC, Inc.*[4] This case involved

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1. 23 Media L. Rep (BNA) 1434 (Va. Cir. Ct.), *vacated in part*, 23 Media L. Rep. (BNA) 2438 (Va. Cir. Ct. 1995).

2. *See generally* Mike Wallace, *The Press Under Fire*, QUILL, Nov.-Dec. 1995, at 21, 22 (describing public disdain for the press).

3. The term defamation generally encompasses both the torts of libel and slander. The four basic elements of a cause of action for defamation include the following: (1) a false and defamatory statement concerning another; (2) the unprivileged publication of that statement to at least one third party; (3) fault; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. RESTATEMENT (SECOND) OF TORTS § 558 (1977). *See* VA. CODE ANN. § 8.01-45 (Michie 1992) (defining defamation under Virginia law that applied in *Philip Morris Cos., Inc. v. ABC, Inc.*). The identity of confidential sources may be crucial to a public-figure plaintiff in establishing the state of mind of a defendant at the time of publication toward the truth or falsity of the defamatory statements in question. ROBERT D. SACK & SANDRA S. BARON, LIBEL, SLANDER, AND RELATED PROBLEMS 701 (2d ed. 1994). Conversely, the revelation of a source's identity may impede future news gathering and the free flow of information. *Id.* at 700. Regarding libel law, "the reporter who discloses the identity of a confidential source today will not obtain information on a confidential basis tomorrow." *Id.* at 701. Fewer individuals, such as whistle blowers, may be willing to meet with reporters for fear that disclosure of their identity may be compelled in court despite journalists' promises to the contrary. *See* SISSELA BOK, SECRETS 210-29 (2d. ed.

ABC's refusal to disclose the identity of its sources for broadcasts claiming that the tobacco industry manipulated the nicotine content in cigarettes. ABC made an "infamous apology"[5] and settled—or, perhaps, sold-out—on behalf of its investigative news magazine program, *Day One*, which exposed two giant cigarette manufacturers' practice of allegedly adding nicotine to cigarettes. ABC apologized three times for these reports—first on its *World News Tonight* program on August 21, 1995, then during the Monday Night Football game the same day, and once later that week on *Day One*.[6] The timing of the apology suggests that Walt Disney Company's purchase of the network influenced the negotiations and settlement.[7] Proponents of freedom of the press were not impressed by ABC's actions.[8]

Philip Morris, however, need not be painful for journalists. The court affirmatively recognized that a "qualified reporter's privilege"[9] *includes* protection against subpoenas of records from disinterested third parties.[10] A reporter's privilege protects against the compelled disclosure of a reporter's confidential sources.[11] The court also held that Philip Morris had *not* overcome this privilege, thus substantially reducing its likelihood of prevailing.[12] These

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1989) (providing a thorough discussion of the ethical implications of protecting the identity of whistle blowers). A journalist who breaches a promise of confidentiality to a source may also be held civilly liable for damages suffered by the source as a result of the breach. *See* Cohen v. Cowles Media Co., 111 S. Ct. 2513 (1991) (holding that a confidential source's cause of action against newspaper publishers for promissory estoppel based on breach of a promise of confidentiality is not barred by the First Amendment).

4. For example, Philip Morris' attorneys engaged in discovery tactics intent on frustrating defendants. Philip Morris' attorneys produced documents on dark red paper designed to prevent photocopying and scanning. Steve Weinberg, *Hardball Discovery*, A.B.A J., Nov. 1995, at 66, 103. In addition to the red color, ABC alleged that the paper was chemically treated to produce a rancid odor. *Id.* at 103. The documents were produced on this paper even though a protective order limited their dissemination.

5. Steve Weinberg, *Smoking Guns: ABC, Philip Morris and the Infamous Apology*, COLUM. JOURNALISM REV., Nov.-Dec. 1995, at 29. ABC was "slammed daily in print for two weeks after apologizing," and its news staffers "seethed over each successive media slam." Robert Lissit, *The Uneasy Aftermath of the ABC Settlement*, AM. JOURNALISM REV., Oct. 1995, at 8. It should be emphasized that neither the Pulitzer Prize-winning journalist and producer, Walt Bogdanich, nor the correspondent, John Martin, responsible for the *Day One* episodes in question signed the settlement agreement. Mark Landler, *ABC News Settles Suits on Tobacco*, N.Y. TIMES, Aug. 22, 1995, at A1, D6.

6. John Schwartz, *ABC Issues Apology for Tobacco Report*, WASH. POST, Aug. 22, 1995, at A1.

7. Walt Disney Co. announced its purchase of Capital Cities/ABC on July 31, 1995, creating the world's largest media company. *See* Nancy Gibbs, *Easy as ABC*, TIME, Aug. 14, 1995, at 20; *see also* Steve McClellan, *Megamedia's Megadeal*, BROADCASTING & CABLE, Aug. 7, 1995, at 14. However, executives at both Philip Morris and ABC told *The New York Times* that "the negotiations for a settlement began several weeks before the deal with Disney." Landler, *supra* note 5, at D6.

8. *See, e.g.*, Alicia C. Shepard, *Up in Smoke*, AM. JOURNALISM REV., Nov. 1995, at 28.

9. Philip Morris Cos., Inc. v. ABC, Inc., 23 Media L. Rep. (BNA) 1434, 1440, *vacated in part*, 23 Media L. Rep. (BNA) 2438 (Va. Cir. Ct. 1995).

10. *Id.*

11. The source of this privilege sometimes is based on the First Amendment, sometimes on a statute or state constitutional law, and sometimes on common law. *See* MARC A. FRANKLIN & DAVID A. ANDERSON, CASES & MATERIALS ON MASS MEDIA LAW 483 (5th ed. 1995). *See also* James C. Goodale, et al., *Reporter's Privilege Cases, in* COMMUNICATIONS LAW 389 (PLI Patents, Copyrights, Trademarks and Literary Course Handbook Series No. G-372 1993).

12. *Philip Morris*, 23 Media L. Rep. (BNA) 2438, 2440. The conclusion that a constitutional, qualified reporter's privilege applies in a defamation case involving a media defendant is not unusual, although there

victories are overshadowed, however, by the vast publicity generated by full-page advertisements placed by Philip Morris in newspapers and magazines across the country containing the text of ABC's apology letter under the caption "Apology Accepted."[13] Despite favorable results in the courtroom, the network settled the defamation suit and apologized publicly. As *Philip Morris* illustrates, money often controls media decisions in such situations.

This article reviews the discovery dispute in *Philip Morris* concerning ABC's refusal to disclose the identity of four sources for its *Day One* broadcasts.[14] It focuses on Philip Morris' efforts to discover the sources' identities by subpoenaing from disinterested third parties the travel records of ABC journalists. Part I reviews the facts and frames the issues in *Philip Morris* that are relevant to the dispute over confidential sources.[15] Part II then presents the arguments of Philip Morris to compel, and the arguments of ABC to deny, discovery of the sources' identities.[16] Part II also reviews the issues, facts, and holdings in three cases—*Branzburg v. Hayes*,[17] *Reporters Comm. for Freedom of the Press v. AT & T Co.*,[18] and *Herbert v. Lando*[19]—which were critical to Judge Markow's decisions in *Philip Morris* about source revelation.[20] Part II then describes the court's resolution of the dispute over confidential sources.[21] Judge Markow's rulings also demonstrate the fundamental tension in libel actions between a public-figure plaintiff's[22] need to prove actual malice[23] and

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is a split of authority among state courts on the existence of such a First Amendment privilege. *See* Goodale, *supra* note 11, at 309 (providing that "the law in this area varies significantly from state to state," and identifying cases that have and have not recognized a qualified privilege in defamation actions involving media defendants). What was unusual and unique, however, was the court's decision, on an issue of first impression for *any* state or federal court, to extend the scope of that privilege in a libel case to include protection against the use of third-party subpoenas to trace, indirectly, the identity of a media defendant's confidential sources. *See* FRANKLIN & ANDERSON, *supra* at 11, 520.

13. The Philip Morris advertisement "ran in approximately 700 publications." Weinberg, *supra* note 5, at 31. As the *Washington Post* opined in an editorial, Philip Morris took ABC's apology and "reproduced it gleefully." *The ABC Settlement*, WASH. POST, Aug. 27, 1995, at C8.

14. *Day One: Smoke Screen* (ABC television broadcast, Feb. 28, 1994) and *Day One: Smoke Screen, Part Two* (ABC television broadcast, Mar. 7, 1994). The discovery disputes involved four confidential sources for the ABC stories. One source, Deep Cough, appeared three times in the first segment of Smoke Screen, "voice disguised, wearing a baggy sweatshirt and a billed cap over a silhouetted face." Weinberg, *supra* note 5, at 33.

15. *See infra* notes 27-41 and accompanying text.

16. *See infra* notes 42-60 and accompanying text.

17. 408 U.S. 665 (1972).

18. 593 F.2d 1030 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 949 (1979).

19. 441 U.S. 153 (1979).

20. *See infra* notes 61-100 and accompanying text.

21. *See infra* notes 61-100 and accompanying text. Judge Markow's rulings, including the authorities he cites, provide excellent primers on the application and analysis of the qualified reporter's privilege.

22. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974) (defining two classes of public-figure plaintiffs, including all-purpose public figures, who achieve such pervasive fame and notoriety that they are deemed public figures in all cases, and limited-purpose public figures, who voluntarily inject themselves into, or who are drawn into, a particular controversy).

23. Actual malice is a fault standard that requires proof that a statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964). The standard was initially adopted by the United States Supreme Court to apply

the reporter's privilege to gather and report the news.[24] The section concludes that Judge Markow's reasoning in concluding that the qualified reporter's privilege entails protection against production of documents from neutral third parties in cases involving media defendants and that Philip Morris had not overcome the privilege provides hope for journalists faced with similar disputes in the future. While minor in terms of precedential value as a state circuit court decision, the case suggests that the press' arguments for extending the reporter's privilege are sound and may be met favorably by judges in other jurisdictions. Further, however, Part IV opines that "journalists everywhere . . . suffered [a] loss of credibility"[25] because of ABC's public settlement; the bottom line often influences the dissemination of news stories.[26] Corporate America flexes its muscle and muzzles the journalists' mouthpiece—the pen.

II. *PHILIP MORRIS COS., INC. V. ABC, INC.*

A. The Facts and Issues

Philip Morris Cos., Inc. v. ABC, Inc.,[27] centers on two 1994 segments of the ABC news magazine, *Day One*.[28] These segments described ABC's

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in cases involving public-official plaintiffs and speech about their official conduct. *Id.* at 279. The Supreme Court later extended the standard to apply in cases involving public-figure plaintiffs. Curtis Publishing Co. v. Butts, 388 U.S. 130, 162 (1967). In cases involving private figures, actual malice must be shown only when the plaintiff seeks recovery of presumed and/or punitive damages. *See Gertz*, 418 U.S. at 350. As the Court stated in *Gertz*, "the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury." *Id.* Actual malice is a legal term of art that must be distinguished from the common law meaning of malice as ill will, spite, or hatred. Masson v. New Yorker Mag., Inc., 501 U.S. 496, 510-11 (1991).

In *Sullivan*, the Supreme Court adopted the actual malice rule as a constitutional fault standard in cases involving public-plaintiffs. 376 U.S. at 279-80. Actual malice replaced the common law rule of strict liability. The Court, reasoning that accidental errors are inevitable in course of heated debate, adopted the actual malice standard to prevent self-censorship and to give the press and citizen-critics of government officials the breathing space they need in a self-governing democracy. *Id.* at 269-79.

24. A positivist conception of the First Amendment freedoms of speech and press includes the concomitant freedom to gather news. The right to gather news, however, is not expressly stated in the First Amendment. For instance, in Branzburg v. Hayes, 408 U.S. 665, 681 (1972), Justice Byron White wrote, "[n]or is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated." In his dissenting opinion in *Branzburg*, Justice Potter Stewart, joined by Justices William Brennan and Thurgood Marshall, wrote that "[a] corollary of the right to publish must be the right to gather news." *Id.* at 727.

A similar positivist conception of the First Amendment underlies the Court's judicial access jurisprudence. In Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 576 (1980), Chief Justice Warren Burger cites to *Branzburg* for the proposition that the First Amendment implies a limited right to gather information. Without a right of access, the media could not gather news for dissemination to the public and function "as surrogates for the public." *Id.* at 573. *But see* Zemel v. Rusk, 381 U.S. 1, 17 (1965) (providing that the "right to speak and publish does not carry with it the unrestrained right to gather information").

25. Weinberg, *supra* note 5, at 29.

26. *See infra* notes 141-81 and accompanying text.

27. 23 Media L. Rep. (BNA) 1434 (Va. Cir. Ct.), *vacated in part*, 23 Media L. Rep. (BNA) 2438 (Va. Cir. Ct. 1995).

28. Weinberg, *supra* note 5, at 30.

investigation of the tobacco industry's practice of nicotine reconstitution in the manufacturing of cigarettes.[29] "The gist of the broadcast was that the 'fortifying,' 'spiking,' 'manipulating,' [of] cigarettes with nicotine occur[red] in the production of reconstituted tobacco. The broadcast implie[d] that nicotine that does not belong, *i.e.*, which is extraneous, [was] added to the tobacco so as to hook smokers."[30] Within one month of the airing of the final segment, Philip Morris filed a ten billion dollar[31] defamation action in state court in Richmond, Virginia, against ABC, *Day One* correspondent John Martin, and producer Walt Bogdanich.[32] Philip Morris contended that the broadcasts falsely accused Philip Morris of adding nicotine to its cigarettes from outside sources.[33]

The discovery dispute at the heart of this case concerned ABC's desire to keep the identity of its sources for its *Day One* broadcasts confidential. Philip Morris wanted to know the sources' identities because, as a corporate public-figure plaintiff in a libel action,[34] it had to prove actual malice. Philip Morris had to prove, by clear and convincing evidence, that the defendants acted with knowledge of the falsity of their statements or with a reckless disregard for the truth.[35]

ABC refused to reveal its sources directly in written responses to interrogatories. Consequently, in an attempt to identify the confidential sources, Philip Morris engaged in a tactic designed to trace the steps of the *Day One* journalists. Philip Morris served *subpoenas duces tecum* on third parties that the journalists had contacted during the investigation. Subpoenas were served on companies such as American Express, Citibank, USAir, Hertz Corporation, AT&T, Cellular One, Sprint, and NYNEX.[36]

In response to these tactics employed by Philip Morris, ABC claimed that

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29. *See id.* During the production of cigarettes, the leftover tobacco stems and small leaf pieces are used to create "tobacco sheets" that are recycled back into the cigarettes. *Id.* The process used to create the tobacco sheets results in the removal of nicotine and other soluble chemicals from the tobacco. *Id.* Nicotine reconstitution is necessary to reinsert the nicotine into the tobacco. *Id.*

30. Philip Morris Cos. v. ABC, Inc., 23 Media L. Rep. (BNA) 2438, 2439 (Va. Cir. Ct. 1995).

31. *See* Weinberg, *supra* note 5, at 34. Philip Morris sought five billion dollars in compensatory damages and five billion dollars in punitive damages. *Id.* Despite Philip Morris' prayer for five billion dollars in punitive damages, punitive damages are capped at $350,000 under Virginia law. VA. CODE ANN. § 8.01-38.1 (Michie 1992).

32. *See* Weinberg, *supra* note 5, at 34.

33. Philip Morris Cos., Inc. v. ABC, Inc., 23 Media L. Rep. (BNA) 1434, 1439, *vacated in part*, 23 Media L. Rep. (BNA) 2438 (Va. Cir. Ct. 1995).

34. *See generally* Matthew D. Bunker, *The Corporate Plaintiff as Public Figure*, 72 JOURNALISM Q. 597, 599-600 (1995) (describing the problem of determining when a corporation is classified as a public-figure plaintiff for purposes of libel law).

35. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (defining actual malice as a statement published "with knowledge that it was false or with reckless disregard of whether it was false or not"). If Philip Morris could show that Deep Cough and the other sources were disreputable, untrustworthy, or otherwise unreliable, this would militate in favor of proving that ABC acted with either reckless disregard for the truth or knowledge of the falsity of its statements.

36. *Philip Morris*, 23 Media L. Rep. (BNA) at 1435 (stating "Philip Morris' purpose in seeking discovery from these non-parties . . . [was] to trace the movements of the defendants in the course of their investigation in the hope of identifying their confidential sources").

a constitutional reporter's privilege precluded not only the direct disclosure of confidential sources, but also the indirect disclosure via subpoenas of third-party documents.[37] Philip Morris claimed, however, that it was entitled to know the identity of ABC's sources.[38] Accordingly, Judge Markow had to decide the following: (1) if the qualified reporter's privilege applies in public-figure defamation cases when the reporter claiming the privilege is a party to the case;[39] (2) if applicable, did the privilege also protect against the disclosure of confidential sources via the service of subpoenas for the production of documents on disinterested third parties;[40] and (3) if the privilege did apply and did protect against source disclosure via third-party subpoenas, did the need to prove actual malice overcome the privilege?[41]

B. The Arguments and Decisions

1. Threshold Issue

The threshold issue facing Judge Markow was whether the court-created constitutional reporter's privilege against the disclosure of confidential sources applied in cases involving public-figure plaintiffs and media defendants. Although Virginia does not have a codified shield law, its supreme court had previously recognized a reporter's privilege based upon *Branzburg v. Hayes*[42] and its progeny.[43] The battle over the threshold issue focused on which United States Supreme Court decision would serve as the controlling authority for Judge Markow's decision—*Herbert v. Lando*[44] or *Branzburg v. Hayes*.[45]

Philip Morris argued that *Herbert v. Lando*[46] was the controlling precedent on the issue of whether the qualified reporter's privilege applies in public-figure defamation cases. In *Herbert*, the Supreme Court addressed the issue of whether a public-figure libel plaintiff "is barred from inquiring into the editorial processes of those responsible for the publication, even though the inquiry would produce evidence material to the proof of a critical element of

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37. *Id.* at 1434-45. Although Virginia does not have a "shield law protecting reporters from revealing their sources, its courts have recognized a limited First Amendment privilege in such situations." Mark Hansen, *Travel, Phone Records Sought in Libel Suit*, A.B.A. J., Feb. 1995, at 34.

38. *Philip Morris*, 23 Media L. Rep. (BNA) at 1435 (contending that a defendant-reporter has no constitutional protection to refuse to reveal the identity of a source in a public figure defamation case).

39. *Id.*

40. *Id.* at 1436.

41. *Id.* at 1440.

42. 408 U.S. 665, 667 (1972).

43. *See, e.g.*, Brown v. Commonwealth, 204 S.E.2d 429, 431 (Va.), *cert. denied*, 419 U.S. 966 (1974).

44. 441 U.S. 153 (1979).

45. 408 U.S. 665 (1972).

46. Philip Morris Cos., Inc. v. ABC, Inc., 23 Media L. Rep. (BNA) 1434, 1435, *vacated in part*, 23 Media L. Rep. (BNA) 2438 (Va. Cir. Ct. 1995).

his cause of action."[47] In the case, the plaintiff, Herbert, needed to prove that the defendants acted with actual malice.[48] The defendants in *Herbert* argued that allowing any such intrusion into the editorial process "will have an intolerable chilling effect on the editorial process and editorial decision-making."[49]

Ruling in favor of Herbert, the Supreme Court refused to create an editorial process privilege in libel actions involving public-figure plaintiffs.[50] The Court reasoned that "the suggested privilege for the editorial process would constitute a substantial interference with the ability of a defamation plaintiff to establish the ingredients of malice as required by *New York Times*."[51] Discovery of decisions made in the editorial process was relevant toward proving actual malice, as it facilitates revelation of the defendant's state of mind. The Court found no "sound reason to believe that editorial exchanges and the editorial process are so subject to distortion and to such recurring misunderstanding that they should be immune from examination in order to avoid erroneous judgments in defamation suits."[52]

Based on this reasoning in *Herbert*, Philip Morris asserted that it was entitled to discover the identity of ABC's confidential sources.[53] Philip Morris contended that any privilege preventing disclosure of confidential sources was tantamount to a privilege on the editorial process, thereby rendering an increased burden on public-figure plaintiffs not contemplated by the Supreme Court when it adopted the actual malice standard.[54] In brief, Philip Morris argued that confidential sources are subsumed within the editorial process to which public-figure plaintiffs have a right of access following the Supreme Court's decision in *Herbert*.[55]

Judge Markow rejected Philip Morris' argument, however, by deftly distinguishing *Herbert* from the issue in the case at bar.[56] Judge Markow stated that the "'editorial process privilege' refused in *Herbert* is 'wholly different' from the reporter's privilege against disclosure of confidential sources."[57] Judge Markow emphasized that the editorial privilege "would shield from discovery the reporter's state of mind, which constitutes the essence of a

47. *Herbert*, 441 U.S. at 155.
48. *Id.* at 156.
49. *Id.* at 171.
50. *Id.* at 174-76.
51. *Id.* at 170.
52. *Id.* at 174.
53. Philip Morris Cos., Inc. v. ABC, Inc., 23 Media L. Rep. (BNA) 1434, 1435 (Va. Cir. Ct.), *vacated in part*, 23 Media L. Rep. (BNA) 2438 (Va. Cir. Ct. 1995).
54. *Id.* at 1435. The Supreme Court adopted the actual malice standard in New York v. Sullivan, 376 U.S. 254 (1964).
55. *Philip Morris*, 23 Media L. Rep. (BNA) at 1435.
56. *Id.*
57. *Id.*

showing of 'actual malice.'"[58] The reporter's privilege, however, "shields from discovery a human being who constitutes the source of the story."[59] Judge Markow concluded that *Herbert* "did not abrogate the already recognized reporter's privilege against disclosure of confidential sources."[60] Accordingly, Judge Markow based his decision on the fractured United States Supreme Court decision in *Branzburg v. Hayes*.[61]

Branzburg v. Hayes[62] involved reporters who refused to provide grand jury testimony that would reveal the identity of their confidential sources. The issue considered by the United States Supreme 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."[63]

The journalists in *Branzburg* argued "that the burden on news gathering resulting from compelling reporters to disclose confidential information outweighs any public interest in obtaining the information."[64] Fewer sources would be willing to come forward if reporters were compelled to reveal the identities of the sources, and the lack of informants would be detrimental to the free flow of information protected by the First Amendment.[65] The reporters claimed that the First Amendment should give them a qualified privilege not to testify, thereby protecting them from violating their promises of confidentiality, unless "sufficient grounds are shown for believing that the reporter possesses information relevant to a crime . . . that the information is unavailable from other sources, and that the need for the information is sufficiently compelling."[66]

Justice Byron White, writing for the Court,[67] refused to create a First Amendment testimonial privilege for reporters.[68] In response to the call for judicial creation of a qualified testimonial privilege for journalists, Justice White wrote that "[s]ooner or later it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer . . . just as much as of the large metropolitan

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58. *Id.*
59. *Id.*
60. *Id.* at 1436.
61. 408 U.S. 665 (1972).
62. *Id.*
63. *Id.* at 667.
64. *Id.* at 681.
65. *Id.* at 680. This argument was particularly true in two of the cases considered in *Branzburg*, in which the sources were members of the Black Panthers. *Id.* at 675-76. Once burned, these sources were unlikely to give reporters access to their organizations. *Id.* at 680.
66. *Id.*
67. Justice White was joined by Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist. *Id.* at 665. Justice Powell, however, also filed a separate concurring opinion that would become crucial in lower courts' decisions interpreting *Branzburg* as creating a qualified reporter's privilege under the First Amendment. *Id.* at 709-10.
68. *Id.* at 706.

publisher . . . ."[69] While Justice White left the task of creating reporters' privileges to Congress and state legislative bodies, he conceded that "news gathering is not without its First Amendment protections."[70]

In reaching this decision, the Court weighed the First Amendment concerns of free speech and a vigilant press against "the general obligation of a citizen to appear before a grand jury . . . and give what information he possesses."[71] The Court also considered the purpose of grand jury proceedings and investigations and the long-standing tradition that the "public . . . has a right to every man's evidence,"[72] calling the grand jury's authority to subpoena "essential to its task."[73]

Despite the majority's holding, the crucial opinion in *Branzburg* was Justice Lewis Powell's concurrence.[74] Seeking to "emphasize . . . the limited nature of the Court's holding,"[75] Justice Powell argued that whether a First Amendment privilege protects against source revelation should be determined on a "case-by-case basis."[76] Justice Powell stated that a protective order was appropriate when the information had a "tenuous relationship to the subject of the investigation," or otherwise implicated "confidential source relationships without a legitimate need of law enforcement."[77] Generally, "Justice Powell's concurring opinion plus Justice Stewart's and Justice Douglas' dissenting opinions provide the basis for a qualified privilege."[78]

Justice Stewart's dissenting opinion advocated the adoption of a qualified First Amendment privilege.[79] He articulated a three-part test for determining when the privilege might be overcome. For Justice Stewart, a qualified privilege strikes "the proper balance between the public interest in the efficient administration of justice and the First Amendment guarantee of the fullest flow of information."[80] Justice Stewart concluded that to defeat a motion to quash a grand jury subpoena seeking confidences, the government must establish the following: (1) show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a

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69. *Id.* at 703-704.
70. *Id.* at 707.
71. *Id.* at 686.
72. *Id.* at 688.
73. *Id.*
74. *Id.* at 709-10. Sack and Baron emphasize the importance of Powell's concurrence, stating that "[b]ecause Justice White's plurality opinion was rather enigmatic and Justice Powell's was the pivotal fifth vote, his concurring opinion has been treated as authoritative." SACK & BARON, *supra* note 3, at 706.
75. *Branzburg*, 408 U.S. at 709.
76. *Id.* at 710.
77. *Id.*
78. Goodale, *supra* note 11, at 397.
79. *Branzburg*, 408 U.S. at 725-52.
80. *Id.* at 738.

compelling and overriding interest in the information.[81]

Branzburg marked "the full Court's first and only discussion of the scope of the constitutional protections afforded a journalist's promise of confidentiality to a source of information."[82] Since *Branzburg*, as media attorney Bruce W. Sanford stated, the Supreme Court "has consistently shunned further review of the issue."[83]

In *Philip Morris*, Judge Markow, like numerous judges before him,[84] interpreted *Branzburg* as creating a qualified reporter's privilege. Citing directly to *Branzburg* and, in particular, to Justice Stewart's concurrence, Judge Markow concluded that under the First Amendment "the press enjoys a qualified privilege against disclosure of confidential sources in public figure defamation cases where the reporter is a defendant."[85] "Under the U.S. Constitution . . . the press enjoys a qualified privilege against disclosure of confidential sources in public-figure defamation cases where the reporter is a defendant."[86] Furthermore, Judge Markow adopted a variation of the three-part test formulated by Justice Stewart's dissenting opinion in *Branzburg* for determining whether the privilege had been overcome in *Philip Morris*.[87]

2. Determining the Scope of the Qualified Privilege

Having concluded that a qualified reporter's privilege applied in *Philip Morris*, Judge Markow was faced with the task of defining the scope of such a privilege—an issue of first impression with profound First Amendment implications.[88] Philip Morris argued that the D.C. Circuit decision in *Reporters*

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81. *Id.* at 743. In contrast to Stewart's dissent, Justice Douglas' dissent vehemently called for the creation of an absolute privilege. *Id.* at 722. Justice Douglas reasoned that a "reporter is no better than his source of information . . . . [u]nless he has a privilege to withhold the identity of his source, he will be the victim of government intrigue or aggression." *Id.*

82. Monica Langley & Lee Levine, *Branzburg Revisited: Confidential Sources and First Amendment Values*, 57 GEO. WASH. L. REV. 13 (1988).

83. Bruce W. Sanford, *Twenty Years After Branzburg*, COMM. LAW., Spring 1993, at 18.

84. *Seegenerally* SACK & BARON, *supra* note 3, at 707 (providing that after *Branzburg*, "most courts that have faced the question have concluded that there is a qualified privilege for a journalist to protect the identity of a confidential source, at least during the course of libel litigation").

85. Philip Morris Cos., Inc. v. ABC, Inc., 23 Media L. Rep. (BNA) 1434, 1436 (Va. Cir. Ct.), *vacated in part*, 23 Media L. Rep. (BNA) 2438 (Va. Cir. Ct. 1995).

86. *Id.* at 1436.

87. *Id.* at 1438.

88. Philip Morris took what one commentator describes as an "unprecedented move" by trying to discover the identity of confidential sources in libel litigation. Alison Frankel, *Blowing Smoke,* THE AM. LAW., July-Aug. 1995, at 69. Philip Morris used third-party subpoenas to obtain documents through which it might trace the footsteps of ABC's reporters to reveal the identities of ABC's confidential sources. *See Philip Morris*, 23 Media L. Rep.(BNA) at 1435. Media defense attorney Floyd Abrams, who argued the case of the media defendants in Herbert v. Lando, 441 U.S. 153, 155 (1979), argued that this first-time tactic by a libel plaintiff threatened to create "a new regime of libel." Frankel, *supra*, at 77. The gravity of the issue for advocates of free speech and free press is reflected in the filing of an amicus curiae brief that enlisted the help of 15 other news organizations. Mark Hansen, Travel, *Phone Records Sought in Libel Suit*, A.B.A. J., Feb. 1995, at 34.

Comm. for Freedom of the Press v. AT & T Co.[89] should control Judge Markow's ruling.

In *Reporters Comm.*, the Court of Appeals considered whether journalists "are entitled to prior notice of subpoenas issued in the course of criminal investigations."[90] The journalist-plaintiffs were concerned with the government's subpoenaing of their toll-call records in felony investigations.[91] The journalists alleged that "AT&T's policy in certain felony cases of releasing toll-call records to investigators without prior notice to the subscriber violates their Fourth Amendment rights."[92] The journalists also argued that the First Amendment gave journalists a right to prior notice of toll-call record subpoenas issued in the course of felony investigations because the practice intruded on and interfered with their news gathering rights.[93]

The Court of Appeals rejected both the Fourth and First Amendment arguments. It concluded that one surrenders any expectation of privacy under the Fourth Amendment when one seeks out the assistance of a third party such as the phone company.[94] Indeed, the court noted that the records actually belong to the third party.[95] Citing *Branzburg*, the Court of Appeals also dismissed the First Amendment arguments.[96] Philip Morris argued that *Reporters Comm.* was controlling with respect to its action in subpoenaing of the telephone, credit card, airline, rental car, and hotel records of third parties.[97] Judge Markow rejected this argument, however, by distinguishing *Reporters Comm.* from *Philip Morris*.

First, Judge Markow noted that the issue in *Reporters Comm.* was narrowly framed by the court to deal only with the question of prior notice of subpoenas.[98] It did not address the practice of subpoenas in general. Second, Judge Markow emphasized that *Reporters Comm.* was decided against a background of "at least 50 years where state and federal law enforcement officials used information from telephone company toll-billing records in criminal investigations and prosecutions."[99] In contrast, Judge Markow observed that in public-figure defamation cases, or even civil practice, did not have such a background with "regard to the subpoena of third-party records in order to trace a journalist's movements and thereby identify confidential

89. 593 F.2d 1030 (D.C. Cir. 1978), *cert. denied*, 440 S. Ct. 949 (1979).

90. *Id.* at 1041.

91. *Id.* at 1039-40. A "toll-call record" contains company billing records for each long distance call charge to a customer. *Id.* at 1036.

92. *Id.* at 1042.

93. *Id.* at 1046.

94. *Id.* at 1036.

95. *Id.* at 1043-46.

96. *Id.* at 1049-50.

97. Philip Morris Cos., Inc. v. ABC., Inc. 23 Med. L. Rep. (BNA) 1434, 1436 (Va. Cir. Ct.), *vacated in part*, 23 Media L. Rep. (BNA) 2438 (Va. Cir. Ct. 1995).

98. *Id.* at 1436-37.

99. *Id.* at 1437.

sources."[100]

3. The "Parade of Horrors"

Judge Markow went beyond merely distinguishing *Reporters Comm.*, however, by laying out the proverbial parade of horrors. Judge Markow sought to identify the evils that would occur were he to open up what he likened to a Pandora's Box by holding that third-party subpoenas in libel actions involving media defendants were not within the scope of the qualified reporter's privilege. If third-party subpoenas to identify confidential sources did not come within the constitutional privilege, every plaintiff in libel suits, and potentially in other litigation, would automatically request "this type of discovery whenever a confidential source is known to exist."[101] Thus, "[a] reporter's promise to maintain [the] confidentiality [of his source] would be meaningless."[102]

Judge Markow then did something that would delight any free speech, pro-press advocate by discussing, in nearly reverential fashion, what he dubbed as "the right to gather news."[103] Borrowing from Justice Stewart's dissent in *Branzburg*, Judge Markow reasoned that the "right to gather news implies a right to a confidential relationship between a reporter and his source."[104]

The implications of allowing the subpoena of third-party records to identify confidential sources are grave and strike at the fundamentals of a free press protected by the First Amendment. This type of discovery will deter sources from divulging information and deter reporters from gathering and publishing information.[105]

Judge Markow then recognized the relationship between modern technologies and the necessities of news gathering practices. Judge Markow scoffed at the idea of news gathering in the 1990s without using available transportation and communication technologies.[106] Accordingly, Judge Markow concluded that the First Amendment qualified reporter's privilege includes protection against third-party subpoenas seeking documents that might

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100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. Judge Markow stated the following:

> ABC correctly argues that a reporter must travel and use the telephone . . . to develop stories and foster the free flow of information. True, it is possible for a reporter to employ alternative means of research . . . to evade creating a paper trail, but these alternative means, in today's society, are unreasonable . . . . The gathering and free flow of information would be hampered indeed if a journalist had to drive from state to state, sleep in his vehicle during overnight trips, pay for things only in cash, and seek out pay telephones every time the [sic] wanted to communicate with sources, all in order to evade creating records that may later be subject to discovery in a libel suits [sic].

Id.

provide an indirect route to the discovery of confidential sources.[107] As the foregoing reveals, Judge Markow's decisions on the first two issues were First Amendment victories. A qualified reporter's privilege did apply in the case, and it did include protection against the use of third-party subpoenas.

4. Overcoming the Privilege

On January 26, 1995, Judge Markow issued an order stating that Philip Morris had indeed overcome the privilege and was entitled to discover Deep Cough's" identity.[108] After vehement objection and a motion for reconsideration from ABC, Judge Markow took the bold step of vacating his previous order[109] and admitting error. On July 11, 1995, he reversed the January 26 order, concluding that Philip Morris had not overcome the qualified reporter's privilege.[110] The second order, a distinctly pro-press decision, was still in place at the time ABC decided to settle the case.

To determine whether Philip Morris had overcome the qualified privilege, Judge Markow applied a version of the three-prong test articulated by Justice Stewart in his *Branzburg* dissent.[111] In addressing each prong separately, Judge Markow began with the question of relevance. Judge Markow concluded that the identity of ABC's four sources was relevant to the issue of actual malice.[112] Judge Markow reasoned that "Philip Morris has limited ability to prove 'actual malice' without the confidential sources and information they provided that shaped ABC's state of mind."[113] He observed that because Deep Cough "was the only source with alleged first hand knowledge, it was upon her credibility alone that ABC based much of its story and drew conclusions, therefore who she is, what she said, and what she did not say, shaped ABC's state of mind."[114]

As to the question of alternative means for discovering the sources' identities and the information that they provided to ABC, Judge Markow found that the information was not available by "means other than compelled disclosure."[115] With regard to Deep Cough, Judge Markow observed that at least one of the non-confidential sources had already claimed attorney-client

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107. *Id.*
108. *Id.* at 1441.
109. Philip Morris Cos., Inc. v. ABC, Inc., 23 Media L. Rep. (BNA) 2438, 2440 (Va. Cir. Ct. 1995). Judge Markow's decision to vacate a previous order in the name of protecting free speech and First Amendment interests bears a remarkable parallel to United States Court of Appeals, District of Columbia, Judge Edwards' reversal of his initial decision in Moldea v. New York Times Co., 15 F.3d 1137 (D.C. Cir.), *modified*, 22 F.3d 310 (D.C. Cir.), *cert. denied*, 115 S. Ct. 202 (1994).
110. *Philip Morris*, 23 Media L. Rep. (BNA) at 2440.
111. *Philip Morris*, 23 Media L. Rep. (BNA) at 1438.
112. *Id.* at 1439.
113. *Id.* at 1438.
114. *Id.*
115. *Id.* at 1439.

privilege, and thus objected to the taking of his deposition.[116] With respect to the identity of the confidential sources, Judge Markow stated that these could be hundreds of individuals; therefore, the discovery of their identities was impractical through means other than compulsion.[117]

Finally, Judge Markow considered whether there was a compelling interest in obtaining the identity of Deep Cough and the other sources.[118] He called Deep Cough the "core of the broadcasts,"[119] noting that ABC had postponed its story for more than one year because it felt it had no story until it received information from Deep Cough.[120] Judge Markow initially reasoned that there was no rule stating that "prior to compelling the disclosure of and information about a reporter's confidential source, that the person be the sole source of the allegedly defamatory statements."[121] Accordingly, Judge Markow concluded that Philip Morris had shown a compelling need for disclosure of the identity of the sources because "its case necessarily rises or falls with the information sought with or without further discovery."[122]

Judge Markow addressed the issue of actual malice with the third-prong of the test. He observed that "Philip Morris has little hope of proving 'actual malice' absent a full understanding of the reporters' states of mind."[123] At this point, Judge Markow made an interesting and rather unusual move. He cited favorably a New Hampshire state court case, *Downing v. Monitor Publishing Co.*, where the court had rejected creating an absolute reporter's privilege in public-figure defamation cases and failed to articulate a test for a qualified privilege.[124] While stating that he did not agree with the *Downing* court's decision not to recognize a reporter's privilege, Judge Markow cited *Downing* approvingly for the proposition that it is "untenable to impose the heavy *New*

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116. *Id.*

117. *Id.* He concluded as well that "there are no alternate sources for what these individuals said to ABC in the course of its investigation." *Id.*

118. Deep Cough's identity was not compelling because she was not the only source for the allegedly defamatory statements, and also because her identity was not critical to resolving the question of falsity that first must be resolved before the question of actual malice. *Id.* ABC also contended that the record before the court at the time of the motion to compel discovery showed insufficient proof that the case turned on Deep Cough's identity and information. *Id.* ABC urged the court to postpone finding a compelling interest until discovery had progressed further. *Id.* Judge Markow squarely rejected these arguments. *Id.*

119. *Id.*

120. *Id.* Judge Markow described Deep Cough as "the only individual presented as having first hand knowledge of the alleged improprieties in the cigarette manufacturing process and the only one to specifically accuse Philip Morris." *Id.* at 1438.

121. *Id.* at 1440.

122. *Id.*

123. *Id.*

124. 415 A.2d 683 (N.H. 1980). In *Downing*, the New Hampshire Supreme Court articulated the following rule:

> [W]here a defendant in a libel action, brought by a plaintiff who is required to prove actual malice under *New York Times*, refuses to declare his sources of information upon a valid order of the court, there shall arise a presumption that the defendant has no source. This presumption may be removed by a disclosure of the sources [at] a reasonable time before trial.

Id. at 686.

York Times burden of proof upon a plaintiff and at the same time prevent [it] from obtaining the evidence necessary to meet that burden."[125]

ABC was dealt a severe blow with this conclusion. Judge Markow ordered the network to disclose the identity of Deep Cough and its other sources, and denied ABC's motion to quash the third-party subpoenas.[126] Although ABC was down, it was not out. It asked Judge Markow to stay his order and reconsider the decision.[127] Judge Markow obliged.

On July 11, 1995, Judge Markow reaffirmed his prior decision that a qualified privilege that included protection against third-party subpoenas applied in *Philip Morris*.[128] This time, however, Judge Markow went further, and concluded that Philip Morris had not yet overcome the privilege.

Judge Markow began by noting that the constitutional dimensions of the confidential source issue compelled him to grant ABC's motion for reconsideration.[129] Judge Markow then reaffirmed part of his prior order, stating that there is a qualified reporter's privilege against disclosure in public-figure defamation cases.[130] Again, Judge Markow reiterated that the information sought was indeed relevant to Philip Morris' burden of establishing actual malice on the part of ABC. With regard to the question of whether alternative means of discovery were available to Philip Morris, Judge Markow stated that his prior ruling had been made "at a very early stage of discovery."[131] With regard to the need to show a compelling interest in the information, Judge Markow stated that "prudence" suggested that Philip Morris further establish a record "that further convinces the court that its need for discovering the confidential sources is, indeed, compelling."[132] Philip Morris may not yet

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125. *Philip Morris*, 23 Media L. Rep. (BNA) at 1440 (quoting Downing v. Monitor Publishing Co., 415 A.2d 683, 685-686 (N.H. 1980)). Interestingly, this language echoes the earlier arguments of Philip Morris in citing *Herbert v. Lando*, which Judge Markow had rejected. It suggests, perhaps, some judicial backpedaling by Judge Markow, or, more favorably, a desire to strike a balance between the needs of public-figure plaintiffs to prove actual malice, and the corresponding needs of journalists to gather information. The problem, however, from a pro-press perspective, is that by citing *Downing* for authority, Judge Markow cleared the path for his conclusion that the qualified reporter's privilege had been overcome. Essentially, he eviscerated the privilege by accepting the above-quoted reasoning in *Downing*.

126. *Id.* at 1441.

127. Philip Morris Cos. v. ABC, Inc., 23 Media L. Rep. (BNA) 2438 (Va. Cir. Ct. 1995). Before Judge Markow granted a stay of his order, Philip Morris pounced on the chance to receive documents it was looking for, and Philip Morris received many of the documents:

> As soon as [Philip Morris] got [Judge] Markow's ruling validating the subpoenas to third parties, Philip Morris's lawyers began contacting subpoenaed parties. . . . A messenger picked [the American Express documents] up just before ABC got a court order to halt release pending reconsideration. . . . [American Express]. . . had sent over far more material than the one month's worth Philip Morris was legally entitled to: seven years of receipts on Bogdanich and Summa as well as perhaps two dozen other journalists with no connection to the *Day One* investigation.

Weinberg, *supra* note 5, at 36.

128. *Philip Morris*, 23 Media L. Rep. (BNA) at 2440.

129. *Id.* at 2439.

130. *Id.* at 2440.

131. *Id.*

132. *Id.*

discover sufficient information from other sources that would keep it from impinging on the qualified privilege.[133] Basing its decision on these grounds, the court then granted ABC's motion to vacate the disclosure of its confidential sources.[134] ABC's victory in the courtroom was complete. Judge Markow's reasoning—in particular, his rejection of *Reporters Comm.*[135] and *Branzburg*[136] as creating a qualified privilege against disclosure of confidential sources which also includes protection against third-party subpoenas—is distinctly pro-press and pro-privilege.

Judge Markow's order in favor of Philip Morris, as he initially made, would threaten news gathering, thereby chilling potential sources from speaking with journalists.[137] On reconsideration, Judge Markow implicitly suggested that this concern was crucial to his ultimate decision by noting that he chose to entertain the motion for reconsideration "[b]ecause of the constitutional dimensions of the confidential source issue in this case."[138]

Judge Markow's resolution of the tension between the competing interests in this case was correct. He ultimately ruled in favor of broader protection of First Amendment interests, but carefully worded his second order to suggest that, after further discovery, it may be necessary to compel discovery. How Judge Markow would have ruled on another motion to compel is pure speculation, given the settlement of the case in August, 1995.

Unfortunately, ABC's legal victories, which included the first impression issue of whether the qualified reporter's privilege includes protection against third-party subpoenas, are largely overshadowed by the perception that the network gave up its fight far too early and the network's well-publicized apology.[139] The significance of these legal victories should not be forgotten,

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133. *Id.*

134. *Id.*

135. 593 F.2d 1030 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 949 (1979).

136. 408 U.S. 665 (1972).

137. Frankel, *supra* note 88, at 68. The aggressive policy of Philip Morris in litigating against ABC appears to be having the chilling effect desired by the tobacco industry on negative publicity about cigarette smoking. For instance, a television station owned by CBS, KCBS in Los Angeles, killed a commercial critical of the tobacco industry on the same day that it was disclosed that CBS's *60 Minutes* news magazine had dropped a planned interview with a tobacco industry whistle blower. Bill Carter, *CBS-TV Station Drops Commercial Critical of Smoking*, N.Y. TIMES, Nov. 11, 1995, at 39. In addition, the *Tyndall Report*, a newsletter that monitors network news, "calculates that the time network evening news shows devoted to the tobacco industry fell by more than 75 percent during the second half of 1994—after Philip Morris filed its suit against ABC." Frank Rich, *Bennett's Moral Filter*, N.Y. TIMES, Dec. 9, 1995, at 15.

With the use of hard-hitting tactics used by Philip Morris, "giant tobacco companies have served notice that they will draw on their formidable legal resources to combat any news media report that they deem unfair or inaccurate." Mark Landler, *Philip Morris Revel in Rare ABC News Apology for Report on Nicotine*, N.Y. TIMES, Aug. 28, 1995, at D5.

138. *Philip Morris*, 23 Media L. Rep. (BNA) at 2439. It is unfortunate, however, that Judge Markow did not make a record, in his second order, of the constitutional dimensions driving his decision. His use of the plural in "dimensions" suggests there is more than just one First Amendment concern behind his decision. There are, or at least should be, two concerns—the right to gather news and the right to disseminate it.

139. A plaintiff's attorney in a current class-action suit against the tobacco industry calls ABC's decision to settle "a corporate sellout, pure and simple." Landler, *supra* note 5, at A1. Professor Richard A. Daynard,

however, by other news organizations.[140] This next section illustrates the tension between the reporters' privilege and the corporations' business interests, a tension that dictates what information is disseminated regardless of First Amendment ramifications.

III. PUTTING THE SETTLEMENT IN PERSPECTIVE

ABC's decision to settle *in spite of its legal victory* is troubling. The network won an important, hard-fought courtroom battle, that quickly was overshadowed by an out-of-court settlement and its well-publicized apology.[141] What makes the settlement so disturbing is that it is symptomatic of an insidious problem that plagues the future of investigative journalism. The problem is self-censorship.[142] Its roots are a mounting "conglomeration juggernaut"[143] and an ever-increasing, bottom-line corporate pressure that conflicts with basic goals of investigative journalism.

These goals do not include providing shareholders a healthy dividend. One goal of journalism, stated Norman Isaacs, is to assure that "the editorial product is as honest as fair-minded people can make it, as balanced as possible, and *untainted by either corporate or personal bias*."[144] Likewise, a recent book on journalism ethics admonishes reporters to seek truth as fully as possible while acting independently of interests that run counter to that goal.[145]

Northeastern University School of Law and chairman of the Tobacco Liability Project, called ABC's decision to settle "a triumph of bottom-line thinking over news judgment." *Id.*

140. Indeed, several legal scholars and attorneys suggest that ABC eventually would have prevailed in the case had it decided to fight it out. Likewise, John P. Coale, a plaintiff's attorney involved in the largest class-action suit in history against tobacco companies, said the "evidence is overwhelming that ABC could have successfully defended this case." *Id.*

141. *See infra* notes 148-49 and accompanying text.

142. Self-censorship occurs when speech is stifled not by the government directly but by the speaker based on the threat or fear of potential monetary liability that might be caused by the communication of that speech or simply by the cost of litigation defending the speech. *See* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-12, at 863-64 (2d ed. 1988). Rather than risk liability for speech, the potential speaker opts instead for silence and thus avoids potential liability and litigation expenses. This self-censorship is sometimes referred to as a "chilling effect." Dombrowski v. Pfister, 380 U.S. 479, 487 (1965).

The danger of self-censorship played a pivotal role in the United States Supreme Court's decision to adopt the actual malice standard in libel cases involving public-official plaintiffs. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964); *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974) (discussing the dangers of self-censorship by the news media when potentially defamatory speech is involved).

143. Todd Gitlin, *Not So Fast*, MEDIA STUD. J., Spring-Summer 1996, at 1. This "blizzard of mergers and partnerships," Ken Auletta emphasizes, is not driven by goals of improving news quality but instead is "motivated by good business reasons." Ken Auletta, *Fourteen Truisms for the Communications Revolution*, MEDIA STUD. J., Spring-Summer 1996, at 29, 30.

144. NORMAN E. ISAACS, UNTENDED GATES: THE MISMANAGED PRESS 154 (1986) (emphasis added). Isaacs was former chair of the now-defunct National News Council and a past president of the American Society of Newspaper Editors.

145. JAY BLACK ET AL., DOING ETHICS IN JOURNALISM: A HANDBOOK WITH CASE STUDIES 17 (2d ed. 1995).

Objectivity and bias-free truth telling are a journalist's chief goals.[146]

Unfortunately, fighting for the ideals of investigative journalism ran counter to the principles of upper-level executives at ABC. ABC settled with Philip Morris just three weeks on the heels of the network's takeover by Walt Disney Co.[147] ABC's decision to settle appears more than slightly dictated by business concerns.[148]

The terms of the settlement included an agreement by ABC to pay Philip Morris' and R.J. Reynolds' legal fees, which were estimated at fifteen to twenty million dollars.[149] From a fiscal standpoint, the settlement may have been the right choice. Laurence Tribe stated that the settlement made "economic sense" if ABC was concerned "purely with the corporate bottom line."[150] Tribe quickly pointed out, however, that from both a legal and journalistic perspective the decision was wrong.[151] Calling ABC's capitulation "a disgraceful settlement," Tribe stressed that "[a]nybody with half a brain would advise [ABC] that at the end of the road they will prevail."[152] The settlement reveals how "ominous the corporatization of the news has become."[153]

Distressingly, ABC's settlement with Philip Morris is not a rare or isolated instance of corporate media capitulation. For example, shortly after Westinghouse Electric Corp. took over CBS in 1995,[154] the network canceled a *60 Minutes* segment featuring an interview with a whistle-blowing former executive of Brown & Williamson Tobacco Corp.[155] The former executive told *60 Minutes* that the nation's third largest tobacco company[156] gave up on plans

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146. The 1987 version of the journalism ethics code of the Society of Professional Journalists provides that "[t]ruth is our ultimate goal" and that "[o]bjectivity in reporting the news is another goal that serves as the mark of an experienced professional." LOUIS A. DAY, ETHICS IN MEDIA COMMUNICATIONS: CASES AND CONTROVERSIES 422 (2d ed. 1997).

147. Alix M. Freedman & Elizabeth Jenson, *Capital Cities, Philip Morris Settles Lawsuit*, WALL ST. J., Aug. 22, 1995, at A3.

148. ABC conceded in its apology the following: "[W]e should not have reported that Philip Morris adds significant amounts of nicotine from outside sources. That was a mistake that was not deliberate on the part of ABC, but for which we accept responsibility and which requires correction." *See* Shepard, *supra* note 8, at 33. Disney unveiled its $19 billion takeover of Capital Cities/ABC Inc. on July 31, 1995. Laura Landro Et Al., *Disney Deal for ABC Makes Show Business A Whole New World*, WALL ST. J., Aug. 1, 1995. The settlement occurred less than one month later.

149. Weinberg, *supra* note 4, at 67.

150. Howard Kurtz, *Long-Term Effect of ABC Settlement Concerns Critics*, WALL ST. J., Aug. 23, 1995, at A4.

151. *Id.*

152. *Id.*

153. Reese Cleghorn, *Cigarette Settlement Shames ABC*, Am. Journalism Rev., Oct. 1995, at 4. Cleghorn is president of the American Journalism Review and is Dean of the College of Journalism of the University of Maryland.

154. Steven Lipin & Elizabeth Jensen, *Westinghouse-CBS Pact Expected Today*, WALL ST. J., Aug. 1, 1995, at A3.

155. Bill Carter, *'60 Minutes' Ordered to Pull Interview in Tobacco Report*, N.Y. TIMES, Nov. 9, 1995, at A1.

156. Brown & Williamson Tobacco Corp., a unit of London-based B.A.T. Industries PLC, is the nation's third largest tobacco company. Suein L. Hwang & Milo Geyelin, *Getting Personal: Brown & Williamson Has*

to create a "safer" cigarette and altered documents revealing that it had plans to develop such a product.[157] The source, Jeffrey Wigand, also alleged that Brown & Williamson knowingly used a pipe-tobacco additive that causes cancer in laboratory animals.[158] In addition, Wigand alleged that one of Brown & Williamson's executives, Thomas Sandefur, lied to Congress during testimony about nicotine's addictiveness.[159]

Although the information was of public concern, CBS chose not to air the episode.[160] CBS feared legal liability for intentionally inducing Wigand to breach a confidentiality agreement with his former employee, Brown & Williamson.[161] CBS eventually ran the interview several months after it was originally scheduled, but only then after *The Wall Street Journal* had printed the substantially same information and reduced CBS's chance of being held liable.[162] Just as ABC caved to Philip Morris after Disney took over that network, CBS, taken over by Westinghouse, collapsed from the potential lawsuit by Brown & Williamson. As these cases reveal, a trend is emerging that does not bode well either for investigative journalists or the public they serve.

Instead of fighting for journalistic principles with the end goal of serving the public, corporate conglomerates that own news organizations are apologizing at an alarming rate.[163] The tension between corporate, profit-driven journalism and investigative, watch-dog journalism is increasing.[164] The fate of hard-hitting reporting lies in the balance. There is an increasing threat posed by mega-media conglomerations to investigative reports like the *Day One* episodes in *Philip Morris*.

Walt Disney Co. controls ABC; Westinghouse owns CBS; and General Electric strives to bring good things to life on its network, NBC. How do corporate conglomeration and cross-ownership influence investigative

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500-Page Dossier Attacking Chief Critic, WALL ST. J., Feb. 1, 1996, at A1. Tobacco is a $45 billion industry. Alix M. Freedman et al., *Tort TV: CBS Legal Guarantees To '60 Minutes' Source Muddy Tobacco Story*, WALL ST. J., Nov. 16, 1995, at A1.

157. Suein L. Hwang, *Brown & Williamson Sues Ex-Executive Over Information Leaks to '60 Minutes'*, WALL ST. J., Nov. 22, 1995, at A3.

158. *Id.*

159. *Id.*

160. *See generally* Lawrence K. Grossman, *CBS, 60 Minutes, and the Unseen Interview*, COLUM. JOURNALISM REV., Jan.-Feb. 1996, at 39 (providing an excellent summary of CBS's decision not to air the Wigand interview).

161. *See generally* William Bennett Turner, *News Media Liability for "Tortious Interference" with a Source's Nondisclosure Contract*, COMM. LAW., Spring 1996, at 13, 13-15 (focusing on CBS' decision to cancel the Wigand television interview and analyzing hypothetical scenarios involving potential news media liability for inducing sources to breach nondisclosure agreements).

162. Bill Carter, *CBS Broadcasts Tobacco Executive's Interview*, N.Y. TIMES, Feb. 5, 1996, at B8.

163. The American Society of Newspaper Editors stresses that the "purpose of distributing news and enlightened opinion is to serve the general welfare." LOUIS A. DAY, ETHICS IN MEDIA COMMUNICATIONS: CASES AND CONTROVERSIES 421 (2d ed. 1997).

164. *See generally* TIMOTHY W. GLEASON, THE WATCHDOG CONCEPT (1990) (providing a history of the watchdog role of the press in the United States).

journalism? Mergers in "the media services segment of the information technology sector last year [1995] grew to a record 243, up 123 percent over the previous year."[165] Leo Bogart observed, "[t]he ability of the news media to serve the public interest depends on the professional freedom with which journalists can probe, investigate and report events or developments that require open discussion."[166] Cynicism, pressure, and compromise inevitably affect that professional freedom.[167] Compromise of the professional journalism standards is driven by the hidden, indirect forces of the interests of the conglomerate owners.[168] For example, the former executive vice president and general manager of the Newspaper Advertising Bureau, Leo Bogart, stated that "[f]ew media overlords are so crude as to give direct orders to kill or slant stories."[169] Rather, most of the intervention and screening is subtle.[170]

In short, compromise is a subtle molding of the reporters to the conglomerate owners' business interests. The impetus of such self-serving censorship by journalists is to "avoid getting yourself or your boss in trouble."[171] Because the job market is tight, "an adjective gets dropped, a story skipped, a punch pulled."[172] In the case of conglomerates with diverse holdings, there may be more than one "boss" that the journalist must avoid getting into trouble. As Bogart stated, "[t]he larger and more diversified the company, the greater and the more varied the corporate interests that may be threatened by crusading journalism."[173] Thus, journalists go easy on topics that may negatively effect their own financial security and the balance sheet(s) of their parent corporations.

Generally, the type of coverage that is influenced by conglomeration are those stories which deal with the parent company itself and its diversified business interests and holdings. Stories about the news agency and the parent companies are reduced or closely scrutinized and monitored by upper-level editors and management. For example, "[e]ditors at *Newsweek* will read what is written about [the] parent company, The Washington Post, with extra care. The same applies throughout corporate media."[174] Although "companies with media holdings say that they try to report on themselves fairly and accurately,

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165. Randall H. Lucius et al., *Concerns at the Top*, MEDIA STUD. J., Spring-Summer 1996, at 69 (discussing the issue of media mergers).

166. Leo Bogart, *What Does It All Mean?*, MEDIA STUD. J., Spring-Summer 1996, at 15, 21-22. Bogart is former executive vice president and general manager of the Newspaper Advertising Bureau.

167. *Id.*

168. *Id.* at 21-22.

169. *Id.*

170. BEN H. BAGDIKIAN, THE MEDIA MONOPOLY 47 (1983) (noting that "[s]ome intervention by owners is direct and blunt . . . .[b]ut most of the screening is subtle, some not even occurring at a conscious level, as when subordinates learn by habit to conform to owners' ideas").

171. Jonathan Alter, *A Call for Chinese Walls,* NEWSWEEK, Aug. 14, 1995, at 31.

172. *Id.*

173. Bogart, *supra* note 166, at 24.

174. Alter, *supra* note 171, at 31.

and they often succeed . . . so-called silent bargains and silent routines keep the subject of self-coverage generally quiescent among writers and reporters without direct managerial involvement," said Joseph Turow.[175]

In addition to hindering self-coverage, conglomeration also influences coverage of entities that advertise on a media outlet. Media owners "must have a care not to offend other large financial interests, especially those of big corporate advertisers" because "[a]dvertisers will cancel ads when they feel the reporting reflects unfavorably on their product or industry," stated Turow.[176]

Corporate conglomeration influences not only self-coverage and coverage of advertisers, but, more generally, coverage of all entities and corporations willing to fight legal battles over coverage that harms their interests. For example, the ABC and CBS incidents illustrate that the tobacco industry is ready, willing and more than able to fight the broadcast networks over coverage critical of their products. High litigation costs, regardless of the ultimate outcome, were enough to deter the corporate owners of these two news organizations from fighting for First Amendment principles of free press and free speech.

In addition to subtle pressures on reporters to go easy on stories that may harm their parent corporation's financial status, economic realities of network news suggest that it is simply not a profitable enough enterprise for corporate owners to take journalistic risks. For example, after Walt Disney Co. acquired the ABC television network, the "total profits of the news division [were] only one percent of the entire Disney company."[177] Thus the news division is not "financially material to the whole company."[178] While this may actually help investigative journalism because the parent company has greater resources to defend a possible lawsuit, in the big picture at Disney, the importance of investigative journalism is nominal. It is not worth expenditures made in either cash or resources. The risk to shareholders is great, while the return on an investment in news resources and hard-hitting coverage is de minimis.

At one time, deep pockets meant that "news outlets had the resources to back up investigative reporting, which often risks lawsuits. Today, deep pockets often mean a higher duty to shareholders and potential buyers than to journalists ferreting out the truth."[179] As such, an inverse relationship develops—the deeper the pocket, the more shallow the investigation. Therefore, increasing corporate conglomeration poses a danger to investigative journalism. ABC's legal battle with Philip Morris is a case in point.[180] A legal

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175. Joseph Turow, *Hidden Conflicts and Journalistic Norms: The Case of Self Coverage*, J. COMM., Spring 1994, at 29.

176. *Id.* at 35-36.

177. Tom Wolzien, *The Big News-Big Business Bargain*, MEDIA STUD. J., Spring-Summer 1996, at 109-11. Wolzien is a media analyst and former news producer at NBC.

178. *Id.*

179. Jonathan Alter, *The Cave on Tobacco Road*, NEWSWEEK, Sept. 4, 1995, at 29.

180. Ultimately, when viewed in an economic context of mega-media conglomeration, the ABC battle

victory achieved today in a case like *Philip Morris* may mean little in an age of corporate conglomeration where news is little more than an "industrial by-product."[181] A trend is emerging, but it is not irreversible. A stricter separation between the editorial and business operations of news media outlets is essential.

IV. CONCLUSION

Of the many questions raised by *Philip Morris,* this article has addressed only one narrow but important set of legal issues—those surrounding the use of confidential sources. These issues were largely forgotten amidst the discussion of ABC's settlement decision. They should not be forgotten, however, by media attorneys and students of communication law. The decision by the corporate bosses at ABC to settle must not be permitted to obscure the victories achieved by ABC's attorneys on the issue of source confidentiality.

Philip Morris has injected a new tactic—the use of third-party subpoenas to expose confidential sources—into public-figure libel litigation. Media defense attorneys, backed by ownership with an interest in aggressive reporting and a desire for fighting for First Amendment rights, need not be intimidated by those tactics. There are compelling First Amendment arguments that may, as they ultimately did in Judge Markow's courtroom, find judicial support. Whether other corporate libel plaintiffs with the financial resources to play hardball in the discovery phase will use such tactics and whether media defendants choose to fight those tactics in court remains to be seen.

The case of *Philip Morris Cos., Inc. v. ABC, Inc.* raises questions and concerns for journalists, attorneys, corporate conglomeration, and the general public. The chilling forces of bottom-line oriented corporate ownership on news and editorial divisions' independence are evidenced by ABC's decision to settle in *Philip Morris*. The economic pressures on profit-driven corpora-

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with Philip Morris raises a number of issues. A complete discussion of these questions is beyond the scope of this article. The issues are raised here, however, for future consideration. The questions include the following:

1. Who should call the shots on editorial content: Journalists? Editors? Attorneys? Owners? Readers? A combination of the above?
2. Who should call the shots on decisions to settle: Journalists who might have a better understanding of the truth of the publication? Attorneys who might have a better understanding of the legal issues? Executives with their pulse on the insurance coverage and fiscal state of the company?
3. Is greater government intervention in the marketplace necessary to preserve a modicum of investigative journalism: In other words, must systemic, structural changes occur to facilitate investigative reporting?
4. How much conglomeration is too much conglomeration? In particular, this question suggests consideration of the issue of whether the public interest in receiving information that affects the general welfare might better be served by more independent media outlets.

These questions must be debated by all affected by the potential answers. In other words, more is needed than merely an internal dialogue among journalists or a closed-door meeting at the networks. The sound of self-censorship, *i.e.* the sound of silence, affects public knowledge detrimentally.

181. BAGDIKIAN, *supra* note 170, at 29.

tions to produce shareholder dividends influence the decisions of their attorneys when it comes to settlements. What must be remembered, however, is that the public pays the price, as information is withheld from it for fear that it may spark expensive and time consuming litigation.