Amendment concerns are outweighed by a subpoenaing defendant's need for the information. *United States v. Cutler,* 6 F.3d 67 (2d Cir. 1993) (Limiting *Burke* to its facts, the court lowered the level of "need" that must be shown to overcome the privilege when the materials at issue were sought by a criminal defendant). *See also Gonzales v. National Broadcasting Co.,* 194 F.3d 29 (2d Cir. 1999).

THIRD CIRCUIT

The Court of Appeals has found that a newsperson's First Amendment qualified privilege applies in criminal cases and protects a journalist from divulging confidential information and unpublished materials. *United States v. Cuthbertson,* 630 F.2d 139, 146-147 (3d Cir. 1980) ("Cuthbertson I"), *cert. denied,* 449 U.S. 1126 (1981). The lower court must balance a subpoenaing defendant's need for the information against the interests underlying the First Amendment privilege in order to determine whether the newsman's privilege will yield in a particular case. *Id.* at 148. The lower court should not require the disclosure of a journalist's information for an *in camera* review unless it is first shown that a defendant's subpoena complies with Fed. R. Crim. P. 17(c) and he is unable to acquire the information from another source that does not enjoy such a privilege. *Id. See also United States v. Cuthbertson,* 651 F.2d 189 (3d Cir.), *cert. denied,* 454 U.S. 1056 (1981) ("Cuthbertson II").

When no countervailing constitutional concerns are at stake, a journalist's First Amendment privilege is absolute; when constitutional precepts collide, the privilege

becomes qualified and a balancing process comes into play to determine its limits. *United States v. Criden*, 633 F.2d 346, 356 (3d Cir. 1980). Before a reporter can be compelled to disclose a confidential source in a criminal case, the movant must demonstrate that he has made an effort to obtain the information from other sources, must demonstrate that the only access to the information sought is through the journalist and the journalist's sources and must persuade the court that the information sought is crucial to the claim. *Id.* In grand jury situations, the government must over come a three part test by demonstrating: 1) it has attempted to obtain the information from other sources, 2) the only access to the information sought is through the journalist and his/her sources, and 3) the information sought is crucial to the cause at issue. *In re Williams*, 766 F.Supp. 358 (W.D. Pa. 1991), *aff'd by equally divided court*, 963 F.2d 567 (3d Cir. 1992) (*en banc*).

FOURTH CIRCUIT

The Court of Appeals, citing *Branzburg* and emphasizing the nonconfidentiality of the information sought, held that absent evidence of government harassment or bad faith, reporters have no privilege under the First Amendment that is different from any other citizen that would allow them not to testify about knowledge relevant to a criminal prosecution. *In re Shain*, 978 F.2d 850 (4th Cir. 1992).

FIFTH CIRCUIT

The Court of Appeals has held, under *Branzburg*, that there is no qualified journalist's First Amendment privilege and no balancing of the interests under the First Amendment in regards to subpoenaed confidential and nonconfidential information in criminal cases. *United States v. Smith*, 135 F.3d 963 (5th Cir. 1998); *In re Grand Jury Subpoenas (Leggett)*, Slip. opin. 01-20745 (Nov. 13, 2001). The Court will only protect a reporter from government harassment or oppression. *Id.* In Ms. Leggett's case, the Court upheld the lower court's more narrow application of an "intentional harassment" standard to Ms. Leggett's claim of privilege.

SIXTH CIRCUIT

The Court of Appeals has held, citing *Branzburg* and rejecting any effect resulting from Justice Powell's opinion, that newsmen have no greater rights under the First Amendment than any other witnesses when appearing before a grand jury. The Court also determined that the proper test to be applied is whether a reporter is being harassed to disrupt his relationship with his confidential source, whether the information bears more than a remote and tenuous relationship to the subject of the investigation, and whether the forced disclosure of the confidential source relationship will serve a legitimate law enforcement need. *Storer Communications, Inc. v. Giovan*, 810 F.2d 580 (6th Cir. 1987).

SEVENTH CIRCUIT

The Court of Appeals has not squarely addressed a journalist's qualified First Amendment privilege in criminal cases, but in 1996, it found that a lower court had not abused its discretion when it quashed, under the First Amendment and an Illinois shield law, a criminal defendant's subpoena requesting a reporter's confidential information. *United States v. Lloyd,* 71 F.3d 1256 (7th Cir. 1995), *cert. denied,* 517 U.S. 1250 (1996). In making its finding, the Court recognized that the substance of the information sought by the defendant was merely speculative and was only going to be offered for impeachment purposes. *Id.*

EIGHTH CIRCUIT

The Court of Appeals has not squarely addressed whether journalist's enjoy a qualified First Amendment privilege in criminal cases, although it footnoted to *Branzburg* in a civil libel case for the proposition that a newsman does not possess a First Amendment privilege to refuse to answer relevant and material questions asked during a good-faith grand jury investigation. *Cervantes v. Time, Inc.,* 464 F.2d 986, 992, n. 9 (8th Cir. 1972), *cert. denied,* 409 U.S. 1125 (1973).

NINTH CIRCUIT

The Court of Appeal's first case after the *Branzburg* decision upheld a journalist's claim of a qualified First Amendment privilege where a grand jury investigation failed to establish a "substantial connection" between the

information sought and the conduct being investigated. *Bursey v. United States,* 466 F.2d 1059 (9th Cir. 1972). The Court later held that a balancing of conflicting interests was appropriate in a non-grand jury criminal case where a reporter's First Amendment qualified privilege was being weighed against a defendant's guarantee of due process in an on-going trial. *Farr v. Pitchess,* 522 F.2d 464, 466-69 (9th Cir. 1975), *cert. denied,* 427 U.S. 912 (1976). The Court in subsequent cases has also held that where a grand jury's requests for information from a reporter were posed in good faith and with a legitimate need for law enforcement purposes – a journalist has no First Amendment qualified privilege. *In re Lewis,* 501 F.2d 418 (9th Cir. 1974) ("Lewis I"), *cert. denied,* 420 U.S. 913 (1975) and *In re Lewis,* 517 F.2d 236 (9th Cir. 1975) ("Lewis II"). In both *Lewis* cases, the court also noted that the Justice Department had complied with its own regulations regarding subpoenas to the media. *See also In re Grand Jury Proceedings (Scarce),* 5 F.3d 397 (9th Cir. 1993), *cert. denied,* 510 U.S. 1041 (1994) (Ph.D. student's claim of a "scholar's privilege", as akin to a journalist's First Amendment qualified privilege, was not applicable before a federal grand jury as invoking Justice Powell's balancing test, where the individual had not argued that the grand jury's inquiry was not conducted in good faith, did not involve a legitimate need of law enforcement, or had only a remote and tenuous relationship to the subject of the investigation).

TENTH CIRCUIT

The Court of Appeals has not yet addressed a reporter's qualified First Amendment privilege in criminal cases.

ELEVENTH CIRCUIT

The Court of Appeals has held that in a criminal case, the standard governing a reporter's First Amendment privilege applies only to information obtained while news gathering and may only be compelled if the party requesting the information can show that it is highly relevant, necessary to the proper presentation of the case and unavailable from other sources. *United States v. Caporale,* 806 F.2d 1487, 1504 (11th Cir. 1986), *cert. denied,* 483 U.S. 1021 (1987). The privilege applies equally to both confidential and nonconfidential information. *United States v. Blanton,* 534 F.Supp. 295 (S.D.Fla. 1982), *aff'd,* 730 F.2d 1425 (11th Cir. 1984).

In Sum

The division among the circuits is no more clear than what occurred in Ms. Leggett's case. Here, the Court of Appeals recognized the conflict amongst the circuits (and its own disparate application of the privilege in civil and criminal cases) but choose to take "a narrow view" of the privilege in the criminal sector. Thus in the Fifth Circuit there is no inertia to the government utilizing the press as its investigative arm. It may do so at the whim of the local assistant U.S. Attorney without a requirement that

the public's First Amendment right to a free and independent press be considered. Citizens in other areas of our country enjoy a more protected First Amendment freedom. The diverging views within the individual Court of Appeals has undoubtedly given underlying district courts and state courts little guidance in their own application of the privilege. Whether the privilege should be "broad", such as in the Second or Third Circuits, or whether it should be replaced by the limited criteria imposed by the Fifth Circuit is a key question[14] that should be addressed and given clarification by this Court.

C.

Is *Branzburg* limited merely to protecting against harassment and oppression of newsmen without a balancing of the interests?

While *Smith* stated that "Justice Powell had in mind the 'harassment of newsmen' ", no doubt Justice Powell, and every other justice of this Court, would condemn outright harassment of the press. But by limiting the analysis of *Branzburg* to only the harassment or oppression of the individual newsman himself – the court is drawn away from the ultimate right that requires protection – the public's right to know.

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[14] Although *Branzburg* was cited as authority in *Smith*, no petition for writ of certiorari was filed in *Smith*, and it remains to be seen whether *Smith* applied *Branzburg* correctly.

Clearly, this Court in *Branzburg* recognized that the First Amendment guarantees protection to news gatherers beyond those of a procedural nature, as was evidenced when this Court stated: "[t]he Court does not hold that newsmen, subpoenaed to testify before the grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources." 408 U.S. at 709. Yet, to accept the Fifth Circuit's narrow view of the privilege in Ms. Leggett's case (intentional harassment) would provide fewer rights to a journalist than those already provided to all subpoenaed criminal witnesses under Federal Rule of Criminal Procedure 17(c), which protects against unreasonable or oppressive subpoenas.[15] It is the balancing test – asserted through a newsperson's claim of qualified constitutional privilege – that serves to protect the public's First Amendment right to be informed.

No where is the need for a balancing test more apparent than when the government issues a subpoena that compels "**any and all . . . originals and copies**" of four years of a journalist's investigative research, as is the case here. The Court of Appeals erred by affirming a test that condones a subpoena that allows the government to seize far more information than is necessary for the grand jury to execute its investigatory function. Limiting a reporter's First Amendment protections to that of "intentional government harassment" does not prevent the government from confiscating *all* copies of Ms. Leggett's journalistic

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[15] Ms. Leggett continues to also assert that the subpoena should have been quashed under Fed. R. Crim. P. 17(c).

interviews, without any justification, and thereby effectively preventing Ms. Leggett from writing her book and substantiating her accounts to a publisher.[16] What the Fifth Circuit's test fails to protect against is the government's unfettered power to implement a "prior restraint" on Ms. Leggett's ability to publish which consequently restricts the public's right to know.

This Court in *Branzburg* specifically did not address the issue of "prior restraint" and the *Branzburg* majority found it important to point out that the cases under its consideration did not involve that as an element:

> But these cases involve no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold.

408 U.S. at 681. Yet this issue is arguably one of the most important components of the First Amendment analysis when dealing with news gatherers. This Court has stated that preventing prior restraint of the press "was a leading purpose in the adoption of the constitutional provision." *Lovell v. City of Griffin, Ga.*, 303 U.S. 444, 451-452 (1938).

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[16] The government's earlier attempt to control the dissemination of her book by contract failed when Ms. Leggett rejected the confidential informant contract. Seizing, by grand jury subpoena, all of her interviews, both originals and copies, would of course delay the writing of her book. And surely, her incarceration for resisting the subpoena has stopped the book from being disseminated to the public altogether, "[a]n inmate currently confined in an institution may not be employed or act as a reporter or publish under byline." Department of Justice – Federal Bureau of Prisons, P.S.1480.05 § 540.60(3)(d).

By virtue of taking away a journalist's records, the government may make it impossible for a journalist to function, as is the situation in the present case. Yet, under *Smith* and the test approved in this case, a journalist has no recourse against such an action in a criminal setting.

Here, the Court of Appeals upheld the validity of the subpoena, finding that the record does not indicate that Ms. Leggett has been harassed, that the materials requested were related to the subject matter of the grand jury and:

> "While perhaps not as narrowly tailored as would be ideal, the subpoena directing Leggett to produce her tape recordings and interview notes is not so overly broad as to be oppressive" (Slip opin., p. 7).

The Court never addresses the issue of prior restraint because it does not fit into its narrow analysis under the First Amendment and Federal Rule of Criminal Procedure 17(c). Surely Ms. Leggett's "right to publish without prior governmental approval" is a given and therefore, should have been part of a proper balancing analysis by the district court. *Near v. Minnesota*, 283 U.S. 697 (1931); *New York Times Co. v. United States*, 403 U.S. 713 (1971).

Indeed, this Court in *Branzburg, supra* at 709, expressly stated that it did not want to convert the press into an investigative arm of the government, which is exactly what Ms. Leggett would become if the government, and not Ms. Leggett or a publisher, is given exclusive possession and control of Ms. Leggett's work product. Ironically, it was only after Ms. Leggett refused

to become a confidential informant for the government, due in part to the government's requested restriction on the dissemination and publication of her materials, that she faced the total loss of her entire research through the government's subpoena power. There is no reason why Ms. Leggett should have been denied copies of her own work. At the very least, a proper balancing test would have prevented complete confiscation. Since this Court did not have occasion in *Branzburg* to deal with a subpoena which had a "prior restraint" effect, let alone one with an effect amounting to confiscation, it is important that this Court grant the writ of certiorari and consider this aspect of the issue.

Finally, only a balancing test, without a threshold requirement that "intentional harassment" or "oppression" be shown, adequately protects the public interest. A newsperson's claim of qualified constitutional privilege ultimately serves to protect the public's First Amendment right to be informed by an independent press. Conducting such a "case by case" review would not burden the system because as this court recognized in *Branzburg*, "the bulk of disagreements and controversies between press and federal officials" will be handled internally by the U.S. Attorney General through the Department of Justice's own regulations regarding subpoenas to the press. 408 U.S. at 7070; *see* 28 C.F.R. § 50.10.[17] However it

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[17] The regulations mandate federal prosecutors to seek the express approval of the U.S. Attorney General prior to subpoenaing a journalist's information and in doing so, following a specific series guidelines that will allow them to "strike the proper balance" between the public's right to know and the public's interest in effective law enforcement when

is in those extreme cases, such as here, where the Government has failed to conduct an internal balancing test or where the subpoena has resulted in an improper prior restraint that the balancing of interests is most necessary. Under the Fifth Circuit's limited test of "intentional harassment" or oppression, these issues cannot be addressed or evaluated. For the foregoing reasons, this Court is urged to accept review of Ms. Leggett's case and provide clarification as to the proper test to be applied to a news gatherer's First Amendment qualified privilege.

II.

Was the Court of Appeals determination that the contemnor had not made an adequate showing to invoke her Fifth Amendment privilege in conflict with the relevant decisions of this Court?

Under the Fifth Amendment, a witness may resist not only testimony but also the production of personal documents that may be incriminating. That privilege has long been construed as applying within the grand jury room. *Counselman v. Hitchcock,* 142 U.S. 547 (1892); *United States v. Mandujano,* 425 U.S. 564, 570-573 (1976). As further explained in *Mandujano,* immunity grants play an important role in determining the applicability of the Fifth Amendment to grand jury witnesses. Ms. Leggett

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compelling a journalist's information. 28 C.F.R. § 50.10. Indeed, this Court in *Branzburg, supra* at 707, noted the importance of the Department of Justice's internal review and many of the circuit courts have used this factor as part of their balancing tests. No such analysis was done in this case because the interests were not balanced by the lower courts.

asserted her Fifth Amendment privilege before the grand jury based on a reasonable fear of self-incrimination, or in other words, a good faith basis, thereby requiring the government to secure immunity under 18 U.S.C. §§ 6001, *et seq.*

The Fifth Amendment protects against production of tapes or notes, when the act of production is testimonial. *Fisher v. United States,* 425 U.S. 391, 408 (1976) As the Fifth Circuit itself recognized:

> [T]he testimonial component involved with order for production of documents "is the witness' assurance, compelled as an incident of the process, that the articles produced are the ones demanded. . . . A defendant is protected from producing his documents in response to a subpoena duces tecum, for his production of them in court would be his voucher of their genuineness. There would then be testimonial compulsion.

In re Grand Jury Subpoena (Kent), 646 F.2d 963, 968 (5th Cir. 1981). *See also United States v. Doe*, 465 U.S. 605, 612-13 (1984) (the act of production of papers which are covered by the Fifth Amendment establishes that the papers exist, are in the witness' possession or control, and are authentic.)

The Court of Appeals made short work of Ms. Leggett's Fifth Amendment claim, first observing that Ms. Leggett was "repeatedly advised that she is neither a target nor a subject of the grand jury investigation." Slip opin., p. 8. The Court of Appeals went on to hold that Ms. Leggett had not met the requirement of "reasonable cause to apprehend danger from a direct answer" to questions

and had not shown that her answers might "furnish a link in the chain of evidence needed for a prosecution," citing *United States v. Whittington*, 786 F.2d 644, 645-646 (5th Cir. 1986). Finally, the Court of Appeals accepted the government's proffer of a non-prosecution agreement as an adequate alternative safeguard. The problems with the Court's ruling regarding Ms. Leggett's claim of Fifth Amendment privilege will be discussed in turn below.

First, the Court of Appeals analysis failed to recognize that a witness need not confess guilt to any crime, or even be guilty of any crime, to properly invoke the Fifth Amendment. *Ohio v. Reiner*, 532 U.S. 17, 121 S.Ct. 1252 (2001). The privilege is not limited to those who may be the "target" or the "subject" of a grand jury investigation. As this Court recently reaffirmed:

> One of the Fifth Amendment's basic functions . . . is to protect innocent men . . . "who otherwise might be ensnared by ambiguous circumstances." *Grunewald v. United States*, 353 U.S. 391 (1957).

Reiner, supra, at 1254.

The Court of Appeals decision also did not recognize that Ms. Leggett had made a sufficient showing that she had "reasonable cause" to apprehend danger of prosecution and that her assertion of the Fifth Amendment privilege was well justified. Here, the Government's subpoena requested all taped interviews conducted by Ms. Leggett "either with or without consent". Ms. Leggett testified at the Motion to Quash hearing that in the course of her research (conducted throughout the United States), she had taped interviews that fit both categories (Tran. I-28

and 34). The government recognized this was potentially illegal activity in about "five or six" states (Tran. II-35). Similarly, the mere possession of surreptitious interception devices may also be a violation of federal law under 18 U.S.C. § 2512. Ms. Leggett provided more than enough information to assert that she had "reasonable cause" to believe that she was in danger of prosecution. However by asserting her Fifth Amendment privilege, she refused to provide the "missing link" that could lead to an indictment.

Finally, the Court of Appeals erred by accepting the government's inadequate offer of immunity as the equivalent of the Fifth Amendment's protection. It upheld the District Court's erroneous conclusion that the prosecutor's offer of a unilateral letter of "immunity" was equivalent to Section 6001, *et seq.* Immunity can be granted only (1) by following the requirements of Section 6001 *et seq.* or (2) by a mutually agreed letter or contract between the government and the witness, and not by a rejected offer of an "immunity letter." The validity of a letter agreement is determined by contract law – arms length bargaining, a meeting of the minds on the essential terms of the agreement and acceptance without coercion. Here the government said either you agree to the terms of the letter or we will ask the court to jail you for criminal contempt.

An important difference between statutory/formal immunity and informal immunity is that the latter is not binding upon the States. This follows from the fact that the local prosecutor representing the State is normally not a party to the agreement between the witness and the federal prosecutor, and this, cannot be contractually

bound by the federal prosecutor's agreements.[18] This distinction is especially important in this case where the government recognized that Ms. Leggett may need additional state immunity for nonconsensual recordings of conversations outside the state of Texas. Yet, the government refused to seek statutory or state prosecution immunity, unless Ms. Leggett gave incriminating details supporting her asserted privilege. Ms. Leggett was not properly immunized and for this reason alone, this court should grant further review of this case and vacate Ms. Leggett's finding of contempt.

CONCLUSION

Wherefore the petitioner prays that this Court grant the writ of certiorari as to the questions presented in order to mandate uniform application of the qualified privilege of journalist's under the First Amendment and to order recognition of petitioner's absolute Fifth Amendment privilege.

Respectfully submitted,

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[18] Similarly, it was doubtful that the informal immunity letter would be binding on a federal prosecutor outside the jurisdiction of the Southern District of Texas upon review for possible prosecution under 18 U.S.C. § 2512.