UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2005

(Argued: February 13, 2006 Decided: August 1, 2006)

Docket No. 05-2639-cv

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THE NEW YORK TIMES COMPANY,

Plaintiff-Appellee,

- v. -

ALBERTO GONZALES, in his official capacity as Attorney General of the United States, and THE UNITED STATES OF AMERICA,

Defendants-Appellants.

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B e f o r e: KEARSE, WINTER, and SACK, Circuit Judges.

Appeal from a grant of summary judgment to a newspaper on its claim for a declaratory judgment that its reporters' telephone records are privileged from a potential grand jury subpoena. We vacate and remand.

Judge Sack dissents in a separate opinion.

JAMES P. FLEISSNER, Special Assistant United States Attorney (Patrick J. Fitzgerald, United States Attorney for the Northern District of Illinois, Debra Riggs Bonamici, Daniel W. Gillogly, Assistant United States Attorneys, Chicago, Illinois, on the brief), for Defendants-Appellants.

FLOYD ABRAMS, Cahill Gordon & Reindel LLP, New York, New York (Susan Buckley, Brian

Markley, Cahill Gordon & Reindel, New York, New York, on the brief; George Freeman, New York Times Company, New York, New York, of counsel), for Plaintiff-Appellee.

WINTER, Circuit Judge:

After the attacks on the World Trade Center and the Pentagon on September 11, 2001, the federal government launched or intensified investigations into the funding of terrorist activities by organizations raising money in the United States. In the course of those investigations, the government developed a plan to freeze the assets and/or search the premises of two foundations. Two New York Times reporters learned of these plans, and, on the eve of each of the government's actions, called each foundation for comment on the upcoming government freeze and/or searches.

The government, believing that the reporters' calls endangered the agents executing the searches and alerted the targets, allowing them to take steps mitigating the effect of the freeze and searches, began a grand jury investigation into the disclosure of its plans regarding the foundations. It sought the cooperation of the Times and its reporters, including access to the Times' phone records. Cooperation was refused, and the government threatened to obtain the phone records from third party providers of phone services. The Times then brought the present action seeking a declaratory judgment that phone records

of its reporters in the hands of third party telephone providers are shielded from a grand jury subpoena by reporter's privileges protecting the identity of confidential sources arising out of both the common law and the First Amendment.

Although dismissing two of the Times' claims,[1] Judge Sweet granted the Times' motion for summary judgment on its claims that disclosure of the records was barred by both a common law and a First Amendment reporter's privilege. He further held that, although the privileges were qualified, the government had not offered evidence sufficient to overcome them.

We vacate and remand. We hold first that whatever rights a newspaper or reporter has to refuse disclosure in response to a subpoena extends to the newspaper's or reporter's telephone records in the possession of a third party provider. We next hold that we need not decide whether a common law privilege exists because any such privilege would be overcome as a matter of law on the present facts. Given that holding, we also hold that no First Amendment protection is available to the Times on these facts in light of the Supreme Court's decision in Branzburg v. Hayes, 408 U.S. 665 (1972).

BACKGROUND

A federal grand jury in Chicago is investigating how two Times reporters obtained information about the government's imminent plans to freeze the assets and/or search the offices of

Holy Land Foundation ("HLF") and Global Relief Foundation ("GRF") on December 4 and 14, 2001, respectively, and why the reporters conveyed that information to HLF and GRF by seeking comment from them ahead of the search. Both entities were suspected of raising funds for terrorist activities. The government alleges that, "[i]n both cases, the investigations -- as well as the safety of FBI agents participating in the actions -- were compromised when representatives of HLF and GRF were contacted prior to the searches by New York Times reporters Philip Shenon and Judith Miller, respectively, who advised of imminent adverse action by the government." The government maintains that none of its agents were authorized to disclose information regarding plans to block assets or to search the premises of HLF or GRF prior to the execution of those actions. The unauthorized disclosures of such impending law enforcement actions by a government agent can constitute a violation of federal criminal law, e.g., 18 U.S.C. § 793(d) (prohibiting communication of national defense information to persons not entitled to receive it), including the felony of obstruction of justice, 18 U.S.C. § 1503(a).

On October 1, 2001, the Times published a story by Miller and another reporter that the government was considering adding GRF to a list of organizations with suspected ties to terrorism. Miller has acknowledged that this information was given to her by

"confidential sources." On December 3, 2001, Miller "telephoned an HLF representative seeking comment on the government's intent to block HLF's assets." The following day, the government searched the HLF offices. The government contends that Miller's call alerted HLF to the impending search and led to actions reducing the effectiveness of the search. The Times also put an article by Miller about the search on the Times' website and in late-edition papers on December 3, 2001, the day before the search. The article claimed to be based in part on information from confidential sources. The Times also published a post-search article by Miller in the December 4 print edition.

In a similar occurrence, on December 13, 2001, Shenon "contact[ed] GRF for the purposes of seeking comment on the government's apparent intent to freeze its assets." The following day, the government searched GRF offices. The government has since stated that "GRF reacted with alarm to the tip from [Shenon], and took certain action in advance of the FBI search." It has claimed that "when federal agents entered the premises to conduct the search, the persons present at Global Relief Foundation were expecting them and already had a significant opportunity to remove items." Shenon reported the search of the GRF offices in an article published on December 15, 2001, the day after the government's search.

After learning that the government's plans to take action

against GRF had been leaked, Patrick J. Fitzgerald, the United States Attorney for the Northern District of Illinois, opened an investigation to identify the government employee(s) who disclosed the information to the reporter(s) about the asset freeze/search. On August 7, 2002, Fitzgerald wrote to the Times and requested a voluntary interview with Shenon and voluntary production of his telephone records from September 24 to October 2, 2001, and December 7 to 15, 2001. Fitzgerald's letter stated that "[i]t has been conclusively established that Global Relief Foundation learned of the search from reporter Philip Shenon of the New York Times";[2] the requested interview and records were therefore essential to investigating "leaks which may strongly compromise national security and thwart investigations into terrorist fundraising." Anticipating the Times' response, the letter argued in strong language that the First Amendment did not protect the "potentially criminal conduct" of Shenon's source or Shenon's "decision . . . to provide a tip to the subject of a terrorist fundraising inquiry." The Times refused the request for cooperation on the ground that the First Amendment provides protection against a newspaper "having to divulge confidential source information to the Government."

On July 12, 2004, Fitzgerald wrote again to the Times and renewed the request for an interview with Shenon and the production of his telephone records. He enlarged the request to

include an interview with Miller and the production of her telephone records from September 24 to October 2, 2001, November 30 to December 4, 2001, and December 7 to 15, 2001. Fitzgerald stated that the investigation involved "extraordinary circumstances" and that any refusal by the Times to provide the pertinent information would force him to seek the telephone records from third parties, i.e., the Times' telephone service providers. The Times again refused the request and questioned whether the government had exhausted all alternative sources. The Times argued that turning over the reporters' telephone records would give the government access to all the reporters' sources during the time periods indicated, not just those relating to the government's investigation. The Times believed that such a request "would be a fishing expedition well beyond any permissible bounds."

The Times also contacted its telephone service providers and requested that they notify the Times if they received any demand from the government to turn over the disputed records, giving the Times an opportunity to challenge the government's action. The telephone service providers declined to agree to that course of action.

Fitzgerald responded with a letter stating that he had "exhausted all reasonable alternative means" of obtaining the information but that he was not obligated to disclose those steps

to the Times nor did he "intend to engage in debate by letter." Fitzgerald, however, invited the Times to contact him if it "wish[ed] to have a serious conversation . . . to discuss cooperating in this matter."

On August 4, 2004, attorneys Floyd Abrams and Kenneth Starr wrote a letter on behalf of the Times to James Comey, then the Deputy Attorney General. Abrams and Starr requested an opportunity to discuss Fitzgerald's efforts to obtain the telephone records of Shenon and Miller and reaffirmed that the Times believed that it was not required to divulge the disputed records. The letter also requested that, if the telephone records were sought from the Times' third party service providers, the Times reporters be given the opportunity to "assert their constitutional right to maintain the confidentiality of their sources . . . in a court of law." On September 23, 2004, Comey rejected the request for a meeting, saying: "Having diligently pursued all reasonable alternatives out of regard for First Amendment concerns, and having adhered scrupulously to Department policy, including a thorough review of Mr. Fitzgerald's request within the Department of Justice, we are now obliged to proceed" with efforts to obtain the telephone records from a third party. Comey noted that the government did not "have an obligation to afford the New York Times an opportunity to challenge the obtaining of telephone records from

a third party prior to [its] review of the records, especially in investigations in which the entity whose records are being subpoenaed chooses not to cooperate with the investigation."

Five days later, the Times filed the present action in the Southern District of New York. The counts of the complaint pertinent to this appeal sought a declaratory judgment that reporters' privileges against compelled disclosure of confidential sources prevented enforcement of a subpoena for the reporters' telephone records in the possession of third parties. The claimed privileges were derived from the federal common law and the First Amendment.

On October 27, 2004, the government moved to dismiss the complaint on the ground that plaintiffs have an adequate remedy under Federal Rule of Criminal Procedure 17. The Times opposed the government's motion to dismiss and moved for summary judgment. The government then filed a cross motion for summary judgment.

Judge Sweet denied the government's motion to dismiss. New York Times Co. v. Gonzales, 382 F. Supp. 2d 457 (S.D.N.Y. 2005). He concluded that he had discretion to entertain the action for declaratory judgment and had no reason to decline to exercise that discretion, especially because a motion to quash would not provide the Times the same relief provided by a declaratory judgment. Id. at 475-79. Judge Sweet granted the Times' motion

for summary judgment on its claims that Shenon's and Miller's telephone records were protected against compelled disclosure of confidential sources by two qualified privileges. Id. at 492, 508. One privilege was derived from the federal common law pursuant to Federal Rule of Evidence 501; the other source was the First Amendment. Id. at 490-92, 501-08, 510-13. The government appealed.

DISCUSSION

a) The Declaratory Judgment Act

Under the Declaratory Judgment Act, a district court "may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). A district court may issue a declaratory judgment only in "a case of actual controversy within its jurisdiction." Id. The Act does not require the courts to issue a declaratory judgment. Rather, it "'confers a discretion on the courts rather than an absolute right upon the litigant.'" Wilton v. Seven Falls Co., 515 U.S. 277, 287 (1995) (citing Public Serv. Comm'n of Utah v. Wycoff Co., 344 U.S. 237, 241 (1952)).

The government argues that the district court should not have exercised jurisdiction over this action for two reasons: (i) because there is a "special statutory proceeding" for the Times' claim under Federal Rule of Criminal Procedure 17(c)'s

provisions for quashing a subpoena, a declaratory judgment is unnecessary, and, (ii) because the district judge improperly balanced the factors guiding the exercise of discretion.

We review the underlying legal determination that Rule 17(c) is not a special statutory proceeding precluding a declaratory judgment action de novo, and we review the decision to entertain such an action for abuse of discretion. Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co., 411 F.3d 384, 388-89 (2d Cir. 2005).

1. Special Statutory Proceeding

Federal Rule of Civil Procedure 57 states that "[t]he existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." However, the Advisory Committee's Note purports to qualify this Rule by stating that a "declaration may not be rendered if a special statutory proceeding has been provided for the adjudication of some special type of case, but general ordinary or extraordinary legal remedies, whether regulated by statute or not, are not deemed special statutory proceedings." Fed. R. Civ. P. 57 advisory committee's note.

Rule 17(c)(2) permits a court to quash or modify a subpoena that orders a witness to produce documents and other potential evidence, when "compliance would be unreasonable or oppressive." Fed. R. Crim. P. 17(c)(2). Although Rule 17 itself is not a statute, it is referenced by 18 U.S.C. § 3484. The government

contends that Rule 17(c) is a special statutory proceeding within the meaning of the Advisory Committee's Note and that its existence therefore renders declaratory relief inappropriate. It further notes that there is only one decision in which a plaintiff attempted to challenge federal grand jury subpoenas through a declaratory judgment action, Doe v. Harris, 696 F.2d 109 (D.C. Cir. 1982), and that did not entail a ruling on whether the complaint stated a valid claim for relief. Id. at 112.

However, since the enactment of the Declaratory Judgment Act, only a handful of categories of cases have been recognized as "special statutory proceedings" for purposes of the Advisory Committee's Note. These include: (i) petitions for habeas corpus and motions to vacate criminal sentences, e.g., Clausell v. Turner, 295 F. Supp. 533, 536 (S.D.N.Y. 1969); (ii) proceedings under the Civil Rights Act of 1964, e.g., Katzenbach v. McClung, 379 U.S. 294, 296 (1964); and (iii) certain administrative proceedings, e.g., Deere & Co. v. Van Natta, 660 F. Supp. 433, 436 (M.D.N.C. 1986) (involving a decision on patent validity before U.S. patent examiners). Each of these categories involved procedures and remedies specifically tailored to a limited subset of cases, usually one brought under a particular statute. Rule 17(c) is not of such limited applicability. Rather, it applies to all federal criminal cases. Were we to adopt the government's theory and treat a motion to quash under

Rule 17(c) as a "special statutory proceeding," we would establish a precedent potentially qualifying a substantial number of federal rules of criminal and civil procedure as special statutory proceedings and thereby severely limit the availability of declaratory relief. Therefore, we hold that the existence of Rule 17(c) does not preclude per se a declaratory judgment.

2. Application of the Dow Jones Factors

In Dow Jones & Co., Inc. v. Harrods Ltd., 346 F.3d 357, 359-60 (2d Cir. 2003), we outlined five factors to be considered before a court entertains a declaratory judgment action: (i) "whether the judgment will serve a useful purpose in clarifying or settling the legal issues involved"; (ii) "whether a judgment would finalize the controversy and offer relief from uncertainty"; (iii) "whether the proposed remedy is being used merely for 'procedural fencing' or a 'race to res judicata'"; (iv) "whether the use of a declaratory judgment would increase friction between sovereign legal systems or improperly encroach on the domain of a state or foreign court"; and (v) "whether there is a better or more effective remedy." Id. (citations omitted).

We review a district court's application of the Dow Jones factors only for abuse of discretion. Duane Reade, 411 F.3d at 388. The district court did not abuse its discretion in entertaining the present action. Factors (i) and (ii) favor a

decision on the merits. There is a substantial chance that the phone records, although they will not reveal the content of conversations or the existence of other contacts, will provide reasons to focus on some individuals as being the source(s). If so, the Times may have no chance to assert its claim of privileges as to the source(s)' identity. It would therefore be "useful" to clarify the existence of the asserted privileges now. Dow Jones, 346 F.3d at 359. Moreover, a declaratory judgment will "finalize the controversy" over the existence of any privilege on the present facts and provide "relief from uncertainty" in that regard. Id. For similar reasons, factor (iii) also calls for a decision on the merits. Seeking a final resolution of the privilege issue is surely more than "procedural fencing" on the facts of this case. Id. at 359-60. Factor (iv) is inapplicable on its face.

As for factor (v), a motion to quash under Rule 17(c) would not offer the Times the same relief as a declaratory action under the circumstances of this case. First, a motion to quash is not available if the subpoena has not been issued. 2 Charles Alan Wright, Federal Practice and Procedure § 275 (3d ed. 2000) (citing In re Grand Jury Investigation (General Motors Corp.), 31 F.R.D. 1 (S.D.N.Y. 1962)). Second, it is unknown whether subpoenas have been issued to telephone carriers or not, and if so, whether the carriers have already complied. It is also

unclear whether, when a subpoena has been issued to a third party and the third party has complied, a motion to quash is still a viable path to a remedy. See Fed. R. Crim. P. 17(c) (not addressing whether a subpoena may be quashed after it is complied with).

The district court, therefore, did not abuse its discretion in concluding that it should exercise jurisdiction over this action.

b) Reporters' Privilege

1. Subpoenas to Third Party Providers

The threatened subpoena seeks the reporters' telephone records from a third party provider. The government argues that, whatever privileges the reporters may themselves have, they cannot defeat a subpoena of third party telephone records. Given a dispositive precedent of this court, we cannot agree.

In Local 1814, International Longshoremen's Ass'n, AFL-CIO v. Waterfront Commission, 667 F.2d 267 (2d Cir. 1981), a union sought to enjoin a subpoena issued to a third party by the Waterfront Commission. Id. at 269. In the course of investigating whether longshoremen had been coerced into authorizing payroll deductions to the union's political action committee, the Commission issued a subpoena to the third party that administered the union's payroll deductions. Id. The union challenged the subpoena, and we concluded that the union's First

Amendment rights were implicated by the subpoena to the third party. Id. at 271. We stated, "First Amendment rights are implicated whenever government seeks from third parties records of actions that play an integral part in facilitating an association's normal arrangements for obtaining members or contributions." Id. Because the payroll deduction system was an integral part of the fund's operations, the records of the third party were "entitled to the same protection available to the records of the [union]." Id.

Under this standard, so long as the third party plays an "integral role" in reporters' work, the records of third parties detailing that work are, when sought by the government, covered by the same privileges afforded to the reporters themselves and their personal records. Without question, the telephone is an essential tool of modern journalism and plays an integral role in the collection of information by reporters.[3] Under Longshoremen's, therefore, any common law or First Amendment protection that protects the reporters also protects their third party telephone records sought by the government.

2. Common Law Privilege

The Times claims that a common law privilege protects against disclosure of the identity of the confidential source(s) who informed its reporters of the imminent actions against HLF and GRF. The issue of the existence and breadth of a reporter's

common law privilege is before us in two contexts.

It arises, first, in the context of the Times' claim with regard to the third party providers' phone records, as noted above. Although a record of a phone call does not disclose anything about the reason for the call, the topics discussed, or other meetings between the parties to the calls, it is a first step of an inquiry into the identity of the reporters' source(s) of information regarding the HLF and GRF asset freezes/searches. The identity of the source(s) is at the heart of the claimed privilege that necessitates a declaratory judgement.

The privilege issue arises, second, in a more subtle way. The Times also argues that subpoenas to third party providers are overbroad because they might disclose the reporters' sources on matters not relevant to the investigation at hand. This overbreadth argument turns on the validity of the subsidiary claim that the government has not exhausted alternative sources that avoid the disclosure of sensitive information on irrelevant sources and do not implicate privileged material. Because the reporters are the only reasonable alternative source that can provide reliable information allowing irrelevant material to be excluded from the subpoena, the privilege of the reporters to refuse to cooperate is at stake in this respect also. That is to say, the overbreadth argument poses the question of whether the reporters themselves are unprivileged alternative sources of

information who can be compelled to identify the informant(s) relevant to the present investigation.

Using the method of analysis set out in Jaffee v. Redmond, 518 U.S. 1 (1996), in which the Supreme Court recognized a privilege between a psychotherapist and a patient and applied it to social workers and their patients, the district court concluded that a qualified reporter's privilege exists under Federal Rule of Evidence 501. New York Times Co., 382 F. Supp. 2d at 492-508. After finding that such a privilege exists, the district court held that any such privilege would be qualified rather than absolute and that it would not be overcome on the facts of the present case. Id. at 497. We agree that any such privilege would be a qualified one, but we also conclude that it would be overcome as a matter of law on these facts. It is unnecessary, therefore, for us to rule on whether such a privilege exists under Rule 501.

A. Any Common Law Privilege Would Be Qualified

The district court's conclusion that any common law privilege derived from Federal Rule of Evidence 501 would be qualified rather than absolute was based on several factors. While the court adopted the view that the lack of protection afforded by the absence of any privilege would impact negatively on important private and public interests but yield only a "modest evidentiary benefit," it also recognized that in

particular circumstances "compelling public interests" might require that the privilege be overcome. 382 F. Supp. 2d at 501. This recognition acknowledges that the government has a highly compelling and legitimate interest in preventing disclosure of some matters and that that interest would be seriously compromised if the press became a conduit protected by an absolute privilege through which individuals might covertly cause disclosure.

In that regard, the district court noted that every federal court that had recognized a reporter's privilege under Federal Rule of Evidence 501 had concluded that any such privilege was a qualified one, 382 F. Supp. 2d at 501, and that most states affording such a privilege also provided only qualified protection, id. at 502-03. We agree with, and substantially adopt, the district court's reasoning on this point.

B. Privilege Overcome

We need not determine the precise contours of any such qualified privilege. Various formulations have included: (i) a test requiring a showing of "clear relevance," United States v. Cutler, 6 F.3d 67, 74 (2d Cir. 1993), (ii) one requiring that

> the government must (1) show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable 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 compelling and overriding

interest in the information,

Branzburg, 408 U.S. at 743 (Stewart, J., dissenting); or (iii) a test requiring a showing that the information sought is "highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources," In re Petroleum Prods. Antitrust Litig., 680 F.2d 5, 7 (2d Cir. 1982) (citations omitted). The district court selected (iii) as the governing formula and concluded that the government had not shown either materiality or the unavailability elsewhere of the same information. 382 F. Supp. 2d at 510-13. We disagree. We believe that, whatever standard is used, the privilege has been overcome as a matter of law on the facts before us.

The grand jury investigation here is focused on: (i) the unauthorized disclosures of imminent plans of federal law enforcement to seize assets and/or execute searches of two organizations under investigation for funding terrorists, followed by (ii) communications to these organizations that had the effect of alerting them to those plans, perhaps endangering federal agents and reducing the efficacy of the actions.

The grand jury thus has serious law enforcement concerns as the goal of its investigation. The government has a compelling interest in maintaining the secrecy of imminent asset freezes or searches lest the targets be informed and spirit away those assets or incriminating evidence. At stake in the present

investigation, therefore, is not only the important principle of secrecy regarding imminent law enforcement actions but also a set of facts -- informing the targets of those impending actions -- that may constitute a serious obstruction of justice.

It is beyond argument that the evidence from the reporters is on its face critical to this inquiry. First, as the recipients of the disclosures, they are the only witnesses -- other than the source(s) -- available to identify the conversations in question and to describe the circumstances of the leaks. Second, the reporters were not passive collectors of information whose evidence is a convenient means for the government to identify an official prone to indiscretion. The communications to the two foundations were made by the reporters themselves and may have altered the results of the asset freezes and searches; that is to say, the reporters' actions are central to (and probably caused) the grand jury's investigation. Their evidence as to the relationship of their source(s) and the leaks themselves to the informing of the targets is critical to the present investigation. There is simply no substitute for the evidence they have.

The centrality of the reporters' evidence to the investigation is demonstrated by the Times' echoing of the district court's understandable view that some or many of the phone records sought are not material because they do not relate

to the investigation and may include reporters' sources on other newsworthy matters. The Times seeks to add to that argument by stating that the government has not exhausted available non-privileged alternatives to the obtaining of the phone records.

This argument is more ironic than persuasive. Redactions of documents are commonplace where sensitive and irrelevant materials are mixed with highly relevant information. United States v. Nixon, 418 U.S. 683, 713-14 (1974); In re Grand Jury Subpoenas Dated March 19, 2002 and August 2, 2002, 318 F.3d 379, 386 (2d Cir. 2003) (describing in camera review as "a practice both long-standing and routine in cases involving claims of privilege" and collecting cases). Our caselaw regarding disclosure of sources by reporters provides ample support for redacting materials that might involve confidential sources not relevant to the case at hand. United States v. Cutler, 6 F.3d 67, 74-75 (2d Cir. 1993) (rejecting defendant's subpoena seeking reporters' unpublished notes because the notes' "irrelevance . . . seems clear"). In the present case, therefore, any reporters' privilege -- or lesser legal protection -- with regard to non-material sources can be fully accommodated by the appropriate district court's in camera supervision of redactions of phone records properly shown to be irrelevant.

However, the knowledge and testimony of the reporters does not have a reasonably available substitute in redacting the

records because it is the content of the underlying conversations and/or other contacts that would determine relevancy. Redactions would therefore require the cooperation of the Times or its reporters, or both, in identifying the material to be redacted and verifying it as irrelevant, or in credibly disclosing the reporters' source(s) to the grand jury and obviating the need to view in gross the phone records.

In short, the only reasonable unavailed-of alternative that would mitigate the overbreadth of the threatened subpoena is the cooperation of the reporters and the Times.[4] We fully understand the position taken by the Times regarding protection of its reporters' confidential communications with the source(s) of information regarding the HLF and GRF asset freezes/searches. However, the government, having unsuccessfully sought the Times' cooperation, cannot be charged by the Times with having issued an unnecessarily overbroad subpoena. By the same token, the government, if offered cooperation that eliminates the need for the examination of the Times' phone records in gross, cannot resist the narrowing of the information to be produced. United States v. Burke, 700 F.2d 70, 76 (2d Cir. 1983) (rejecting subpoena when the information it sought would serve a "solely cumulative purpose").

There is therefore a clear showing of a compelling governmental interest in the investigation, a clear showing of

relevant and unique information in the reporters' knowledge, and a clear showing of need. No grand jury can make an informed decision to pursue the investigation further, much less to indict or not indict, without the reporters' evidence. It is therefore not privileged.

We emphasize that our holding is limited to the facts before us, namely the disclosures of upcoming asset freezes/searches and informing the targets of them. For example, in order to show a need for the phone records, the government asserts by way of affidavit that it has "reasonably exhausted alternative investigative means" and declines to give further details of the investigation on the ground of preserving grand jury secrecy. While we believe that the quoted statement is sufficient on the facts of this case, we in no way suggest that such a showing would be adequate in a case involving less compelling facts. In the present case, the unique knowledge of the reporters is at the heart of the investigation, and there are no alternative sources of information that can reliably establish the circumstances of the disclosures of grand jury information and the revealing of that information to targets of the investigation.

We see no danger to a free press in so holding. Learning of imminent law enforcement asset freezes/searches and informing targets of them is not an activity essential, or even common, to journalism.[5] Where such reporting involves the uncovering of

government corruption or misconduct in the use of investigative powers, courts can easily find appropriate means of protecting the journalists involved and their sources. Branzburg, 408 U.S. at 707-08 ("[A]s we have earlier indicated, news gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment. Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification. Grand juries are subject to judicial control and subpoenas to motions to quash. We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth.") (footnote omitted).

3. First Amendment Protection

Branzburg v. Hayes, 408 U.S. 665 (1972), is the governing precedent regarding reporters' protection under the First Amendment from disclosing confidential sources. That case was a consolidated appeal of various reporters' claims that they could not be compelled to testify before a grand jury concerning activity they had observed pursuant to a promise of confidentiality. Id. at 667-79. The reporters argued that "the burden on news gathering resulting from compelling reporters to disclose confidential information outweighs any public interest

in obtaining the information." Id. at 681.

The court concluded, on a 5-4 vote, that the reporters had no such privilege. Justice White wrote the majority opinion. Justice Powell, although concurring in the White opinion, wrote a brief concurrence. Justice Stewart wrote a dissent in which Justices Brennan and Marshall concurred. Justice Douglas wrote a further dissent.

Justice White's majority opinion stated, "We are asked to create another [testimonial privilege] by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do." Id. at 690. While the body of Justice White's opinion was decidedly negative toward claims similar to those raised by the Times, it noted that the First Amendment might be implicated if a subpoena were issued to a reporter in bad faith. "[G]rand jury investigations if instituted or conducted other than in good faith, would pose wholly different questions for resolution under the First Amendment." Id. at 707. See also id. at 700 (stating that "Nothing in the record indicates that these grand juries were probing at will and without relation to existing need.") (citation, brackets, and quotation marks omitted).

Justice Powell joined the majority opinion and also wrote a short concurrence for the purpose of "emphasiz[ing] what seems to me to be the limited nature of the Court's holding." Id. at 709

(Powell, J., concurring). He stated that:

> If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy. Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationship without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered.

Id. at 710. Justice Powell then concluded that "[t]he asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct." Id.

In dissent, Justice Stewart stated that he would recognize a First Amendment right in reporters to decline to reveal confidential sources. Id. at 737-38. The right would be qualified, however, and subject to being overcome under the test quoted above. Id. at 743, supra at Part (b)(2)(B). Justices Brennan and Marshall joined that opinion.

Justice Douglas's dissent recognized an absolute right in journalists not to appear before grand juries to testify regarding journalistic activities. He reasoned that unless those activities implicated a journalist in a crime, the First Amendment was a shield against answering the grand jury's

questions. If the journalist was implicated in a crime, the Fifth Amendment would provide a similar shield.

The parties debate various of our decisions addressing First Amendment claims with regard to reporters' rights to protect confidences and the import of Branzburg. Gonzales v. National Broadcasting Co., Inc., 194 F.3d 29 (2d Cir. 1999); United States v. Cutler, 6 F.3d 67 (2d Cir. 1993); United States v. Burke, 700 F.2d 70 (2d Cir. 1983); In re Petroleum Prods. Antitrust Litig., 680 F.2d 5 (2d Cir. 1982).

We see no need to add a detailed analysis of our precedents. None involved a grand jury subpoena or the compelling law enforcement interests that exist when there is probable cause to believe that the press served as a conduit to alert the targets of an asset freeze and/or searches. Branzburg itself involved a grand jury subpoena, is concededly the governing precedent,[6] and none of the opinions of the Court, save that of Justice Douglas,[7] adopts a test that would afford protection against the present investigation.

Certainly, nothing in Justice White's opinion or in Justice Powell's concurrence calls for preventing the present grand jury from accessing information concerning the identity of the reporters' source(s).[8] The disclosure of an impending asset freeze and/or search that is communicated to the targets is of serious law enforcement concerns, and there is no suggestion of

bad faith in the investigation or conduct of the investigation.

Indeed, as discussed in detail above, the test outlined in Justice Stewart's Branzburg dissent would be met in the present case. The serious law enforcement concerns raised by targets learning of impending searches because of unauthorized disclosures to reporters who call the targets easily meets Justice Stewart's standards of relevance and need. As also noted, while it is true that the disclosure of all phone records over a period of time may exceed the needs of the grand jury, the overbreadth can be cured only if the Times and its reporters agree to cooperate in tailoring the information provided to those needs. Otherwise, the overbreadth does not defeat the subpoena.

CONCLUSION

Accordingly, the judgment of the district court is vacated, and the case is remanded to enter a declaratory judgment in accordance with the terms of this opinion and without prejudice to the district court's redaction of materials irrelevant to the investigation upon an offer of appropriate cooperation.

FOOTNOTES

1. Judge Sweet granted summary judgment to the government on the Times' claim that the government attorneys in the present matter had not complied with DOJ guidelines. He also dismissed as moot the Times' due process claim. The Times does not appeal from these rulings.

2. The record is unclear as to whether the reporters mentioned the searches as well as the asset freezes to the targets. However, there is evidence that one of the foundations had a lawyer present when agents arrived to begin the search.

3. The government relies on Reporters Committee for Freedom of the Press v. American Telephone & Telegraph Co., 593 F.2d 1030, 1048-49 (D.C. Cir. 1978), which suggested that journalists have no more First Amendment rights in their toll-call records in the hands of third parties than they have in records of third party airlines, hotels, or taxicabs. Under Longshoremen's integral role standard, however, third party telephone records may be distinguishable from third party travel records. Telephone lines -- which carry voice and facsimile communication -- are a relatively indispensable tool of national or international

journalism, and one that requires the service of a third party provider. The same is arguably not true of lodging, air travel, and taxicabs. Whether such a distinction is valid need not be determined, however, because Longshoremen's governs this case in any event.

4. Understandably, the Times has not argued that identification of the source(s) by the reporters or the paper would be a reasonable, alternative means of obtaining the information.

5. We harbor no doubt whatsoever that, on the present record, the test adopted by our dissenting colleague for overcoming a qualified privilege has been satisfied. Following his articulation of that test, the following is apparent. First, ascertaining the reporters' knowledge of the identity of their source and of the events leading to the disclosure to the targets of the imminent asset freezes/searches is clearly essential to an investigation into the alerting of those targets. Second, that knowledge is not obtainable from other sources; even a full confession by the leaker would leave the record incomplete as to the facts of, and reasons for, the alerting of the targets. Third, we know of no sustainable argument that maintaining the confidentiality of the imminent asset freezes/searches would be contrary to the public interest; we see no public interest in

compelling disclosure of the imminent asset freezes/searches; we see no public interest in having information on imminent asset freezes/searches flow to the public, much less to the targets; and we see no need for further explication of the government's powerful interest in maintaining the secrecy of imminent asset freezes/searches. All of this is obvious on the present record. Our colleague's arguments to the contrary may be suited to the paradigmatic case where a newsperson is one of many witnesses to an event and the actions and state of mind of the newsperson are not in issue. See In re Grand Jury Subpoena, Judith Miller, 397 F.3d 964 (D.C. Cir. 2005). The present case, however, does not fit the paradigm because, as discussed in the text, the reporters were active participants in the alerting of the targets.

6. See In re Grand Jury Subpoena, Judith Miller, 397 F.3d 964, 970 (D.C. Cir. 2005); United States v. Smith, 135 F.3d 963, 968-69 (5th Cir. 1998); In re Grand Jury Proceedings, 5 F.3d 397, 400 (9th Cir. 1993); In re Grand Jury Proceedings, 810 F.2d 580, 584 (6th Cir. 1987). The D.C. Circuit noted:

> Unquestionably, the Supreme Court decided in Branzburg that there is no First Amendment privilege protecting journalists from appearing before a grand jury or from testifying before a grand jury or otherwise providing evidence to a grand jury regardless of any confidence promised by the reporter to any source. The Highest Court has spoken and never revisited the question. Without doubt, that is the end of the matter.

In re Grand Jury Subpoena, Judith Miller, 397 F.3d at 970.

7. The government has not stated that a crime has taken place; at this stage, it is merely investigating the circumstances of the disclosures that led to the alerting of the targets of the asset freeze and/or searches. We need not, therefore, explore the implications for the Times or its reporters of the privilege as described by Justice Douglas.

8. Justice Powell's concurrence suggests that the First Amendment affords a privilege "if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation." 408 U.S. at 710. The threatened subpoena thus may be overbroad under the First Amendment because it will surely yield some information that bears "only a remote and tenuous relationship" to the investigation. As we note elsewhere, however, this overbreadth problem can be remedied by redaction with the cooperation of the Times and its reporters.