The Bakaly Debacle: The Role of the Press in High-Profile Criminal Investigations

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THE BAKALY DEBACLE: THE ROLE OF THE PRESS IN HIGH-PROFILE CRIMINAL INVESTIGATIONS

JULIE R. O’SULLIVAN*

INTRODUCTION

When I was invited to discuss the likely legal fallout of the Clinton "scandals," I was hard pressed to isolate a theme that other authors participating in this Symposium had not already explored or would not now effectively address. I wish, then, to take a slight detour, in hopes that it will be both a worthwhile one for debate and ultimately pertinent to the legacy of the independent counsel statute and the Clinton "scandals." My subject concerns the case of Charles G. Bakaly, III, former spokesperson for Independent Counsel Kenneth Starr. Mr. Bakaly was tried in the U.S. District Court for the District of Columbia on charges of criminal contempt. The case is founded on allegations that Mr. Bakaly, in certain court filings made on behalf of the Office of the Independent Counsel (OIC), lied when he denied leaking information to a reporter for the New York Times, Don Van Natta Jr. As of this writing, the case has not been resolved, but even

1. See In re Grand Jury Proceedings, 117 F. Supp. 2d 6, 8 (D.D.C. 2000). Mr. Bakaly was charged pursuant to 18 U.S.C. § 401(1) (1994), which states that "[a] court of the United States shall have the power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as . . . [m]isbehavior of any person in its presence or so near thereto as to obstruct the administration of justice."

2. See In re Grand Jury Proceedings, 117 F. Supp. 2d at 8-16 (detailing the facts surrounding the charges brought against Mr. Bakaly).

3. Eds.—After this Article was submitted for publication, but before the editorial process was completed, the district court acquitted Mr. Bakaly of all charges. See id. at 8. Because it was too late in the process to perform substantive revisions, and because the
at this point it is interesting to touch upon the questions it raises about the interaction between actors in the criminal process and the press in a scandal-driven environment.

Others have examined why prosecutors or law enforcement agents may be inclined to "leak" information regarding ongoing criminal investigations, documented the rules that govern federal prosecutors' interaction with the press in such circumstances, outlined the difficulties encountered in enforcing those rules, and critiqued the performance of Mr. Starr's office in this regard. In other words, the dynamic as it flows from governmental actors to the press has been scrutinized. I would like to suggest that a more searching examination be conducted of the press's role, and perhaps its responsibilities, in this context. Because I am neither a journalist nor a First Amendment scholar (and have committed to an article, not a book), I do not undertake exhaustively to cover this topic, or even to answer many of the questions I raise. I write in hopes that others will find the perspective of a criminal lawyer interesting in the ongoing debate regarding the place of the press in the Lewinsky affair and in high-profile or scandal-driven criminal investigations generally.

court's decision does not affect most of the discussion in this piece, that decision is not reflected in the body of this Article. Some footnotes have been altered to reflect the court's findings, and others have been added to document the court's holdings on the substantive counts discussed. The court also made one observation regarding the sourcing of the New York Times article at issue, which is quoted infra note 170.


5. Because I discuss journalistic sourcing at some length, I should perhaps address my own choices of sources. I have relied throughout on perspectives offered by press commentators and editorial writers. I am cautioned by one highly respected reporter who reviewed an earlier draft that equating editorial comments by news organizations with the attitudes of reporters and editors may be misleading. It has been suggested to me that news management and editorial writers are viewed by many reporters as part of a community establishment from which they are proudly divorced. My reliance on these sources stems from their relevance, my own lack of experience, and the fact that most reporters seem to lack the time and the inclination for "hand-wringing" about issues such as those raised within. To the extent that I was able to divine from beat reporters their attitudes about some of the issues raised, however, I have tried to reflect them within.

I should also note that, from what I am told, some reporters would view my entire enterprise in this Article as something of a fool's errand. I am assured that many journalists would say that they do not get the news out to win popularity contests or even public approval. Good reporters feel no obligation to help make governmental processes work; they are not, in practicing their craft, looking for good citizenship awards. They attempt to
I. THE BAKALY CASE

A. Background

On January 31, 1999, the *New York Times* published a front-page story authored by Don Van Natta Jr. and entitled “Starr Is Weighing Whether to Indict Sitting President.”6 The lead for the story read: “The independent counsel, Kenneth W. Starr, has concluded that he has the constitutional authority to seek a grand jury indictment of President Clinton before he leaves the White House in January 2001, several associates of Mr. Starr said this week.”7 The article then went on to report on discussions allegedly occurring within the OIC concerning the options open to that office,8 which were said to be to decline a criminal prosecution against the President; to indict, but postpone the trial; to indict the President under seal; or to indict after the President leaves office.9 The article constantly cited as the source of its information “several associates of Mr. Starr,” and explicitly stated: “Charles G. Bakaly 3d, the spokesman for Mr. Starr, declined to discuss the matter. ‘We will not discuss the plans of this office or the plans of the grand jury in any way, shape or form,’ he said.”10

The day after the article appeared, the President and the White House filed a motion seeking an Order to Show Cause why the OIC, or individuals in that office, should not be held in contempt for violating Federal Rule of Criminal Procedure 6(e),11 which requires attorneys for the government to maintain the secrecy of “matters occurring

be accurate and honest in recounting the facts and in their sourcing not because they worry about the effects that their reports will have on sources, the functioning of the criminal justice system, or the government, but rather because of their professional pride in their vocation. If reporting the news is done well, it may well have consequences, some of which may be adverse to individuals or institutions. But, I am told, many journalists believe that as long as they have done their job, the unintended consequences are someone else’s problem.

This is a perspective that is profoundly foreign to me as an academic and lawyer (that is, a professional hand-wringer). It may well be, then, that the only members of the fourth estate interested in my comments will be press commentators, editorial writers, press management, and the odd reporter here and there—an audience I would be happy to have. I hope, however, that just as I have found challenging and interesting the profoundly different perspectives of the journalists with whom I have conversed while writing this piece, journalists will find my comments worthy of at least some reflection.

7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
before the grand jury." In addition to the lead sentence quoted above, the President and the White House identified the following portions of the Times story as containing information divulged by the OIC in violation of Rule 6(e):

— "While the President's legal team has fought in the Senate chamber for the President's political survival, Mr. Starr and his prosecutors have actively considered whether to ask a Federal grand jury here to indict Mr. Clinton before his term expires, said Mr. Starr's associates, who spoke on the condition of anonymity."

— "Inside the Independent Counsel's Office, a group of prosecutors believes that not long after the Senate trial concludes, Mr. Starr should ask the grand jury of 23 men and women hearing the case against Mr. Clinton to indict him on charges of perjury and obstruction of justice, the associates said. The group wants to charge Mr. Clinton with lying under oath in his Jones deposition in January 1998 and in his grand jury testimony in August, the associates added."

— "Since early last year, the constitutional question has been exhaustively researched by two constitutional law experts who are paid consultants to Mr. Starr: Ronald D. Rotunda of the University of Illinois Law School and William Kelley of the University of Notre Dame. Both Mr. Rotunda and Mr. Kelley have concluded that the 1997 Supreme Court decision in the Paula Jones case suggests that the Constitution does not prohibit a prosecutor from seeking an indictment, trial and conviction of a sitting President, the associates said."

The OIC hired outside counsel, Donald Bucklin, to represent it in the Order to Show Cause litigation and asked the FBI to investigate the alleged Rule 6(e) violation. To respond to the Order to Show Cause motion, Mr. Bucklin and an associate met on several occasions with Mr. Bakaly. Mr. Bakaly had served as Counselor to Mr. Starr since April 13, 1998, and in that capacity his responsibilities included "addressing strategic and public policy issues, and communication of the work of the OIC to the general public." He also served as

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12. FED. R. CRIM. P. 6(e)(2).
14. See id.
15. Id. at 10.
"the OIC's spokesman and contact person with the news media." 17 The attorneys prepared a declaration for Mr. Bakaly, which he then reviewed and amended. 18 On February 9, 1999, Mr. Bakaly swore to and signed the declaration. 19 It was filed with the court in support of the OIC's Memorandum in Opposition to the Motion for an Order to Show Cause (Opposition Brief). 20 The Opposition Brief made two arguments. First, the OIC contended that the Times article did not disclose "matters occurring before the grand jury." 21 Second, the OIC argued that it was "not the source of the disclosures complained of by movants." 22 The OIC cited Mr. Bakaly's declaration in arguing that the disclosures complained of by the White House and the President did not originate with persons inside the OIC. 23

Throughout February 1999, the OIC's internal investigation continued. 24 During this period, Mr. Bakaly met with various OIC attorneys, counsel for the OIC, and FBI agents to discuss his conversations with Mr. Van Natta. 25 On March 8, 1999, the OIC filed an amendment to its Opposition Brief, withdrawing the Bakaly Declaration and the portion of the Opposition Brief that stated that the OIC was "not the source of the disclosures in [the Times] article." 26 The asserted basis for the amendment was that:

[recently, the FBI informed undersigned counsel that Mr. Bakaly had acknowledged to its investigators that he provided Mr. Van Natta some of the information reported in the New York Times article or confirmed the accuracy of information that Mr. Van Natta already possessed and attributed to sources outside the OIC. 27

17. Id. (quoting Bakaly Declaration, supra note 16, ¶ 1).
22. Id.
23. See id.
24. See id. at 11.
25. Id.
26. Id. at 12 (citing Amendment to the Opposition of the OIC to the Motion for Order to Show Cause and Withdrawal of Argument and Supporting Declaration at 1-2, In re Grand Jury Proceedings, 117 F. Supp. 2d 6 (D.D.C. 2000) [hereinafter Amendment to Opposition Brief]).
27. Id. (alteration in original) (quoting Amendment to Opposition Brief, supra note 26, at 1-2).
The amendment also informed the court that the OIC had referred the matter to the Department of Justice (DOJ).\textsuperscript{28}

On March 25, 1999, the district court issued an Order to Show Cause why the OIC should not be held in contempt for violating Rule 6(e), finding that one passage in the \textit{Times} article did disclose matters occurring before the grand jury.\textsuperscript{29} The court further ordered that Mr. Bakaly "appear at a hearing to address the serious allegation that he filed a materially false declaration intended to mislead this Court and to show cause why he should not be held in contempt for his conduct."\textsuperscript{30} At the request of the DOJ, the Order to Show Cause was stayed pending the DOJ’s investigation.\textsuperscript{31}

On July 13, 1999, the DOJ notified the court that it would not prosecute Mr. Bakaly and suggested that "the alleged misconduct committed by Mr. Bakaly can best be addressed and remedied through the contempt proceedings already initiated by the Court."\textsuperscript{32} The DOJ further suggested that:

"in light of the nature of the allegations against Mr. Bakaly and the sanctions that would likely be imposed upon him if he were found guilty by the Court, ... Mr. Bakaly should be provided the procedural protections of the criminal law ... and the contempt proceedings therefore should be considered criminal rather than civil in nature."\textsuperscript{33}

The DOJ also "advised the Court that a jury trial was not required because, should Mr. Bakaly be found guilty, DOJ would not recommend a term of imprisonment in excess of six months."\textsuperscript{34} On July 14, 1999, the

\begin{itemize}
  \item \textsuperscript{28} Id. (quoting Amendment to Opposition Brief, supra note 26, at 1-2).
  \item \textsuperscript{29} Id. at 12 (citing Order to Show Cause at 5-6, \textit{In re Grand Jury Proceedings}, 117 F. Supp. 2d 6 (D.D.C. 2000) [hereinafter Order to Show Cause]). The one passage was:
    "Inside the Independent Counsel's Office, a group of prosecutors believes that not long after the Senate trial concludes, Mr. Starr should ask the grand jury of 23 men and women hearing the case against Mr. Clinton to indict him on charges of perjury and obstruction of justice, the associates said. The group wants to charge Mr. Clinton with lying under oath in his Jones deposition in January 1998 and in his grand jury testimony in August, the associates added."
  \item \textsuperscript{30} Id. at 13 (quoting Order to Show Cause, supra, at 5-6, quoting in turn Van Natta, supra note 6, at 1).
  \item \textsuperscript{31} Id.
  \item \textsuperscript{32} Id. (quoting Letter from Michael Horowitz, Deputy Assistant Attorney General, to the Honorable Norma Holloway Johnson, Chief Judge, United States District Court, District of Columbia 1 (July 13, 1999) [hereinafter Letter from Michael Horowitz]).
  \item \textsuperscript{33} Id. (second alteration in original) (quoting Letter from Michael Horowitz, supra note 32, at 1).
  \item \textsuperscript{34} Id. (citing Letter from Michael Horowitz, supra note 32, at 1, citing in turn \textit{Cheff v. Schnackenberg}, 384 U.S. 373, 378 (1966)).
\end{itemize}
1999, the district court lifted its stay of the contempt proceedings and adopted the DOJ's recommendations.\(^\text{35}\) The court announced that the contempt proceedings would be criminal in nature and that the DOJ would be appointed to prosecute the contempt charges against Mr. Bakaly and the OIC.\(^\text{36}\)

The OIC appealed the court's March 25 and July 14 orders.\(^\text{37}\) The United States Court of Appeals for the District of Columbia Circuit reversed as to the OIC, holding that the one passage in the Times article cited by the district court as the foundation for its Order to Show Cause against the OIC\(^\text{38}\) was in fact "not Rule 6(e) material."\(^\text{39}\) In short, none of the information contained in the article that was asserted to constitute grand jury material covered by Rule 6(e) was found to be subject to the secrecy requirements of that rule.\(^\text{40}\)

Nonetheless, the contempt case against Mr. Bakaly alone then proceeded on the basis of the Government's Amended Notice of Essential Facts Constituting Criminal Contempt, filed pursuant to Federal Rule of Criminal Procedure 42(b).\(^\text{41}\) The case was tried without a jury before Chief Judge Norma Holloway Johnson, and, as of this writing, the Judge has yet to issue an opinion.\(^\text{42}\) In discussing the substance of the case, then, I will rely on the submissions of the parties. In particular, I will largely accept as true the factual assertions of the Government, although not the inferences and conclusions it draws from those facts. My purpose in accepting the Government's statement of facts is to demonstrate why I believe that, even assuming the worst

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\(^{36}\) Id. (citing Order of July 14, supra note 35, at 2).

\(^{37}\) Id.

\(^{38}\) See supra note 29 (quoting the passage in the New York Times article, the disclosure of which the district court found to have violated Rule 6(e)).

\(^{39}\) In re Sealed Case No. 99-3091, 192 F.3d 995, 1003 (D.C. Cir. 1999).

\(^{40}\) See id. at 1001-05 (discussing why disclosure of the material contained in the Times article did not constitute a violation of Rule 6(e)).


\(^{42}\) See supra note 3.
case for the defense, this was a matter that in a less highly charged context probably would not have been pursued.

It appears clear, at least from the Government's papers, that Mr. Bakaly spoke extensively with Mr. Van Natta and provided him with information and confirmation of information that appeared in the *Times* article. In a statement signed by Mr. Bakaly, he explained that he "aggressively sought to direct the article in a way that would protect the office against future attacks and 'set the stage' for our future work including the possible criminal prosecution of the President regardless of the outcome of the Senate impeachment trial." Although both sides agree that Mr. Bakaly admitted to the OIC (and derivatively to the court) certain of the help he had provided Mr. Van Natta, the Government's submission also indicates that Mr. Bakaly did not initially disclose to the OIC or its counsel all of the assistance he had rendered. Whether this was due to an initial failure of recollection, a mistaken belief that the OIC and its counsel wished to know only whether he provided *grand jury material* to Mr. Van Natta, or a desire to deceive them as to his role is far less clear.

As the discussion that follows this case summary evidences, I have—to put it mildly—serious reservations about the wisdom and propriety of any prosecutor's office engaging in these types of off-the-record, "spinning" conversations with reporters. I certainly do not condone lying to any court in any form or for any reason. The question I examine here, however, is not whether Mr. Bakaly should have been talking to Mr. Van Natta. And it is not, for present purposes, whether he could or should have been more forthcoming. It is whether Mr. Bakaly deserves criminal sanction on the basis of the allegedly false and misleading statements charged by the Government.

**B. The Charges Against Mr. Bakaly**

In successive rounds of briefing, the parties have engaged in careful and detailed discussion of the charges brought and the evidence presented at trial. Recounting their analyses would unduly tax read-

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ers’ patience. I therefore will attempt to summarize the basic issues, I hope without doing too much violence to the subtleties of the case. It is my belief that the case ultimately revolves around two sets of charges.\textsuperscript{46}

\textit{First,} the Government charged that Mr. Bakaly lied in making the following underscored statement in his declaration:\textsuperscript{47}

During a conversation with Mr. Van Natta on either January 28 or 30, 1999, it became apparent that he was going to proceed with the article. I expressed my concerns over how he intended to source the information that he had described to me as coming from outside the OIC. I feared that information about the purported views of Judge Starr and some group within the OIC would be perceived as originating from within the Office. Mr. Van Natta again assured me that his sources were outside the OIC, that he was “working on his sourcing” and that he intended to make it clear in his article that his sources were not within the OIC. I also expressed concern over the timing of his article—during the Senate impeachment trial—and that the OIC would once

\textsuperscript{46} The Government brought four counts against Mr. Bakaly. \textit{See In re} Grand Jury Proceedings, 117 F. Supp. 2d at 14-16 (quoting Amended Notice, \textit{supra} note 41, \textsuperscript{12}12-14). The charge discussed \textit{first} (above) relates to one count set forth in Amended Notice \textsuperscript{12}12(c). \textit{See In re} Grand Jury Proceedings, 117 F. Supp. 2d at 15-16 (quoting the relevant charge). The charges discussed \textit{second} (above) relate to two counts set forth in Amended Notice \textsuperscript{12}12(a) and \textsuperscript{12}12(b). \textit{See In re} Grand Jury Proceedings, 117 F. Supp. 2d at 15 (quoting the relevant charges). Finally, the Government alleged in Amended Notice \textsuperscript{13}13 that:

Mr. Bakaly’s knowing misrepresentations and knowing failure to inform [OIC counsel] and OIC personnel about his contacts with Van Natta caused the following materially false and misleading statement to appear on page 13 of the OIC’s Opposition Brief: “Mr. Van Natta further told Mr. Bakaly that all his information came from sources ‘outside’ the OIC.”

\textit{Government’s Proposed Findings of Fact, supra} note 43, \textsuperscript{13}67, at 26 (quoting Opposition Brief, \textit{supra} note 20, at 13, and discussing Amended Notice, \textit{supra} note 41, \textsuperscript{13}13). Defense counsel argue that “Mr. Bakaly was not involved in the preparation of the OIC brief in opposition to the motion for an order to show cause, and did not see the brief, or any draft of the brief, prior to the brief being filed with the Court.” Bakaly’s Pre-Trial Brief, \textit{supra} note 18, at 13. I see nothing in the Government’s Proposed Findings of Fact to gainsay this statement. Instead, the Government argues that it was “fully foreseeable” that the OIC would rely on Mr. Bakaly’s declaration in preparing its brief, and thus he should be chargeable with this allegedly false statement. Government’s Proposed Findings of Fact, \textit{supra} note 43, \textsuperscript{13}67, at 27. My own view is that the causal nexus here is very attenuated and that, absent other strong counts, a declarant should not be criminally pursued for the overstatements made by counsel over which he had no control. Further, this count rises and, I submit, falls on the disposition of the other substantive charges. Accordingly, I do not treat this count in text.

\textsuperscript{47} \textit{See In re} Grand Jury Proceedings, 117 F. Supp. 2d at 15-16 (“At the time that Mr. Bakaly made the . . . underscored statement and representation he knew that it was false and misleading . . . .”) (quoting Amended Notice, \textit{supra} note 41, \textsuperscript{12}12(c))).
again be unfairly criticized for interfering in the Senate's business. Mr. Van Natta said that he had not thought of that as an issue.48

It is worth noting (for purposes of later discussion) that the Government did not force Mr. Van Natta to testify regarding the truth of this passage. Thus, there was no direct evidence introduced that Mr. Van Natta did not say that which Mr. Bakaly attributed to him in the underscored sentence. The Government argued, however, that the underscored statement "conveys, and was intended to convey, the impression that Mr. Bakaly simply was not one of the unnamed 'associates' of Mr. Starr in the article," an impression the Government contends was false.49

Perhaps this is the impression left by a quick read, but it is certainly not the most natural reading of the statement in context. Fairly read, the assertion that Mr. Van Natta's sources were "outside the OIC" refers only to the sources of the information in the two sentences that precede the underscored portion of Mr. Bakaly's declaration. Mr. Bakaly in fact amended a draft of this paragraph, prepared by OIC counsel to make clear that the information he was referring to was limited to the specific information that Mr. Van Natta had described to Mr. Bakaly as coming from outside the OIC—that is, that Mr. Starr had recently concluded that he had the authority to indict a sitting president and that a group of OIC prosecutors favored indictment.50 Indeed, the person who drafted the sentence—the OIC's attorney, Mr. Bucklin—testified that this limited interpretation of the amended sentence was intended.51 Because it appears uncontested that Mr. Van Natta did indeed have at least one other source telling him about the purported views of Mr. Starr and some group of prosecutors within the OIC, there is no evidence to suggest that Mr. Bakaly's characterization of Mr. Van Natta's assurances was false.52

49. Government's Proposed Findings of Fact, supra note 43, ¶ 66, at 25. The Government further stated that "the entire thrust of Mr. Bakaly's declaration was to convince the Court that he provided no information to Mr. Van Natta other than the specific items disclosed in the declaration." Id.
51. Id. ¶ 92, at 34.
52. Eds.—The district court found that "[i]t is overly broad to read the statement in Mr. Bakaly's declaration as denying that he was the source at all for Mr. Van Natta... [A] fair reading of this statement limits it to 'information about the purported views of Judge Starr and some group within the OIC.'" In re Grand Jury Proceedings, 117 F. Supp. 2d at
Second, the Government charged that Mr. Bakaly lied in telling the court in his declaration that he had not discussed "non-public" matters with Mr. Van Natta, and that he similarly lied when he stated that he "refused to confirm or comment on what Judge Starr or the OIC was thinking or doing."

The Government relied on a number of alleged communications to prove these charges: (1) Mr. Bakaly confirmed to Mr. Van Natta the four options considered by the OIC regarding the possible indictment of President Clinton; (2) Mr. Bakaly told Mr. Van Natta that a perjury count based on the President’s deposition in the Jones lawsuit was a stronger case than the perjury count being tried in the Senate; (3) Mr. Bakaly told Mr. Van Natta, when discussing the persons Mr. Bakaly believed to be the sources of Mr. Van Natta’s information, that Professor Rotunda was not in the office much and that Mr. Udolf left the OIC in April or May 1998, and may be biased against the OIC; (4) Mr. Bakaly told Mr. Van Natta that Mr. Starr relies quite a bit on the ad-

32 (quoting Bakaly Declaration, supra note 16, ¶ 11). The court held that this statement was not proved false beyond a reasonable doubt. Id.

53. In re Grand Jury Proceedings, 117 F. Supp. 2d at 15 (quoting Amended Notice, supra note 41, ¶¶ 12(a), 12(b), at 5-6). The Government alleged in Amended Notice ¶ 12(a) that Mr. Bakaly lied in making the following underscored statement:

"I next recall a conversation with Mr. Van Natta on this subject on or about January 21, 1999. This occurred just a few days after an article by Jill Abramson appeared in the New York Times. Ms. Abramson’s article addressed possible trials of the President and others after the conclusion of the Senate impeachment proceeding. . . . Consistent with the position I took with Mr. Van Natta, I declined to discuss non-public matters with Ms. Abramson, and her article states: "Charles G. Bakaly, 3d, a spokesman for the Independent Counsel’s Office, would not comment on any indictment speculation . . . ."

Id. ¶ 12(a) (underscore added) (quoting Bakaly Declaration, supra note 16, ¶ 6, at 2, quoting in turn Jill Abramson, Ideas & Trends: No Exit; The Trial May End, But the Trials Will Go On, N.Y. TIMES, Jan. 17, 1999, § 4, at 1). The central question with respect to this count is whether Mr. Bakaly did in fact discuss "non-public" matters with Mr. Van Natta.

54. In re Grand Jury Proceedings, 117 F. Supp. 2d at 15 (quoting Amended Notice, supra note 41, ¶ 12(b), quoting in turn Bakaly Declaration, supra note 16, ¶ 8, at 3). The Government alleged in Amended Notice ¶ 12(b) that Mr. Bakaly knowingly made the underscored false and misleading statement in his declaration:

"I cautioned Mr. Van Natta that he should not rely on information from outside sources purporting to know what was going on inside the OIC. I noted that people often overstate their knowledge as well as their own importance. In an effort to steer Mr. Van Natta away from an inaccurate report, I suggested that Judge Starr was himself a constitutional scholar and would not be swayed by any one person or recent event. I refused to confirm or comment on what Judge Starr or the OIC was thinking or doing. I agreed to provide an on-the-record quote, which appeared in Mr. Van Natta’s article: ‘We will not discuss the plans of this office or the plans of the grand jury in any way, shape or form.’"

Id. (underscore added) (quoting Bakaly Declaration, supra note 16, ¶ 8, quoting in turn Van Natta, supra note 6, at 1).
vice of Professor Kelley; and (5) Mr. Bakaly confirmed that the OIC was doing research at the National Archives.\textsuperscript{55} Specifically, the Government asserted that matters (1)-(5) were, in fact, "non-public" and that matters (1), (2), and (5) demonstrated that Mr. Bakaly informed Mr. Van Natta about what the OIC was "thinking and doing."\textsuperscript{56}

To some extent the resolution of this case depends upon two definitional questions: (1) whether the assertion that Mr. Bakaly "refused to confirm or comment on what Judge Starr or the OIC was thinking or doing"\textsuperscript{57} relates (as the defense would have it) specifically to the OIC’s internal deliberations regarding a possible indictment,\textsuperscript{58} or whether (as the Government claims) it relates generally to anything that was going on in the office;\textsuperscript{59} and (2) what constitutes “non-public” information.\textsuperscript{60}

It is worth remembering that the Government bears a heavy burden in criminal prosecutions. In light of this burden, the defense has the better position on the first question. In the context of the entire declaration, the most natural meaning of Mr. Bakaly’s statement is that he declined to discuss Mr. Starr’s or the office’s deliberations regarding a possible indictment.

With respect to the second question, concerning the definition of “non-public” matters, the defense asserts that the Government did not present evidence demonstrating a commonly understood definition of that term.\textsuperscript{61} The defense further notes that it is uncontested that none of the matters itemized above were covered by Rule 6(e)’s ser-

\begin{itemize}
\item \textsuperscript{55} Government’s Proposed Findings of Fact, \textit{supra} note 43, ¶ 64, at 19-23.
\item \textsuperscript{56} \textit{See id.} (discussing the Government’s allegations concerning these five communications). To prove the charge in Amended Notice ¶ 12(b), which alleges that Mr. Bakaly falsely stated that he “refused to confirm or comment on what Judge Starr or the OIC was thinking or doing,” Bakaly Declaration, \textit{supra} note 16, ¶ 8, at 3, the Government also relied on a further assertion that Mr. Bakaly did confirm or comment on what was going on in the OIC when he “discussed ‘internal matters’ with Mr. Van Natta in an attempt to influence Van Natta to write an article that would protect the OIC and set the stage for its future work.” Government’s Proposed Findings of Fact, \textit{supra} note 43, ¶ 65(b), at 23. I do not treat this allegation in the text because it rests entirely on one agent’s testimony that Mr. Bakaly admitted in an interview that "he had discussed internal OIC matters with Mr. Van Natta." \textit{Id.} Mr. Bakaly denies that he made this statement. \textit{Id.} Due to the Government’s apparent failure to elicit specifics about these matters from the agent at trial, it is difficult to evaluate this assertion.
\item \textsuperscript{57} Bakaly Declaration, \textit{supra} note 16, ¶ 8, at 3.
\item \textsuperscript{58} \textit{See Bakaly’s Proposed Findings of Fact, \textit{supra} note 50, ¶ 63, at 26.}
\item \textsuperscript{59} \textit{See Government’s Proposed Findings of Fact, \textit{supra} note 43, ¶ 65, at 23-24.}
\item \textsuperscript{60} \textit{See Bakaly’s Proposed Findings of Fact, \textit{supra} note 50, ¶¶ 21-59, at 12-23 (discussing the disputed conversations and arguing that Mr. Bakaly did not disclose “non-public” information); Government’s Proposed Findings of Fact, \textit{supra} note 43, ¶ 64, at 19-25 (discussing these conversations and characterizing the information disclosed as “non-public”).}
\item \textsuperscript{61} \textit{See Bakaly’s Proposed Findings of Fact, \textit{supra} note 50, ¶ 23, at 13.}
\end{itemize}
crecy requirement. Mr. Bakaly argues that his understanding of "non-public" matters was matters covered by Rule 6(e); thus, by definition, in his mind, nothing he discussed was "non-public."  

The Government believes that this is an after-the-fact rationalization and was not Mr. Bakaly's contemporaneous belief. It argues that this position is inconsistent with the reasonable inferences to be drawn from the chronology of what Mr. Bakaly did and said. In casting about for some standard by which to judge what is "non-public," the Government relies on the OIC's concession in the Rule 6(e) litigation that the information disclosed in the *Times* article was confidential and non-public in nature. There are at least two difficulties with this approach. First, it is questionable whether Mr. Bakaly should be bound by counsel's statements in the OIC's filings in the original Order to Show Cause litigation. Second, and more fundamental, only two of the above-described communications—the first and the fifth—even appeared in the *Times* article. Thus, even if the OIC took the position that the matters discussed in the article were confidential, most of the Government's asserted bases for a finding that Mr. Bakaly shared "non-public" information would not be covered by that concession.

Given the Government's burden, it seems to me that if there is any arguable basis for a finding that the five items specified above were in the public domain, the Government's case should fail. With this perspective, were the five pieces of information relied upon by the Government "non-public" matters that illuminated in material ways the inside workings of the OIC?

1. Mr. Bakaly Confirmed to Mr. Van Natta the Four Options Considered by the OIC Regarding the Possible Indictment of President Clinton.—This is by far the most material of the allegations lodged by the Government because the fact that the four options were under consideration was apparently that which earned the article its notoriety (even if it was questionable whether this was actually "news"). The four options available to the OIC were reported to be to decline, to indict and de-

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62. See Bakaly's Pre-Trial Brief, supra note 18, at 3 ("The motion to show cause based on asserted Rule 6(e) violations that was filed by the White House . . .—which detailed a number of specific portions of the article that contained Rule 6(e) material—did not mention even one of the items contained in any of these five statements.").

63. See id. at 4.

64. See Government's Proposed Findings of Fact, supra note 43, ¶ 64(a), at 20.

65. See id. ¶ 64, at 19 (citing Opposition Brief, supra note 20, at 2).

66. See Van Natta, supra note 6, at 1 (reporting the OIC's four indictment options and noting that the office was conducting research at the National Archives).
fer trial, to indict under seal, and to await the end of the President’s term to indict.\textsuperscript{67} Mr. Bakaly informed OIC counsel that Mr. Van Natta had told Mr. Bakaly that he knew about the four options and knew that there had been an OIC meeting at which those options were put on the blackboard by one of the prosecutors and another OIC attorney.\textsuperscript{68} The Government seems to accept this statement as true.\textsuperscript{69} In other words, there was a source for this information other than Mr. Bakaly. Mr. Bakaly admits that he “confirmed that these were prosecutive options available to the independent counsel.”\textsuperscript{70} The heart of the dispute between the parties lies in whether Mr. Bakaly did more than confirm that these options existed, and, in fact, essentially confirmed that they were being actively discussed by the OIC.\textsuperscript{71}

It is true, as Mr. Bakaly’s counsel argues, that conceding that the OIC had these four options states a truism to anyone with any familiarity with criminal law.\textsuperscript{72} I would go further and contend that the fact that Mr. Starr was actively considering these options should not have been “news” and should not have been considered a “non-public” matter. One could reasonably conclude, in fact, that Mr. Starr would not be doing his job if he failed to have this debate in light of the facts that his mandate was to determine whether a criminal case should be pursued based on the conduct discovered, that he had extensively used the coercive powers of the criminal law (grand jury, immunity, etc.) to investigate the case, and that he had written a report arguing

\begin{itemize}
\item \textsuperscript{67} Id.
\item \textsuperscript{68} Government’s Proposed Findings of Fact, supra note 43, ¶ 64(a), at 19.
\item \textsuperscript{69} See id. (arguing that Mr. Bakaly’s statement to OIC attorneys is part of the clear evidence that Mr. Bakaly confirmed the “four options”). One wonders why we do not yet know the identity of the “leaker” who apparently provided the information that Mr. Bakaly was asked to confirm. The fact that no one has come forward or been identified (or, apparently, sanctioned) lends a certain scapegoat quality to Mr. Bakaly.
\item \textsuperscript{70} Bakaly’s Proposed Findings of Fact, supra note 50, ¶ 31, at 14-15 (quoting Government’s Exhibit 14, supra note 44, at 4).
\item \textsuperscript{71} It is worth noting that a close reading of the Bakaly Declaration reveals that the paragraphs of the Declaration in which the allegedly false statements appeared relate to specific conversations between Mr. Bakaly and Mr. Van Natta on specific dates. See generally Bakaly Declaration, supra note 16. The defense contends that whatever conversation occurred about the “four options” took place seven days after the conversations described in those paragraphs; thus, his statements could not have been false. Bakaly’s Proposed Findings of Fact, supra note 50, ¶ 28, at 14; id. ¶ 65, at 26. Eds.—The district court, in acquitting Mr. Bakaly, also noted the “temporal problem” with the Government’s proof on this count. In re Grand Jury Proceedings, 117 F. Supp. 2d 6, 29 (D.D.C. 2000).
\item \textsuperscript{72} See Reply Memorandum in Support of Charles G. Bakaly, III’s Motion to Dismiss Pending Contempt Charges at 15, In re Grand Jury Proceedings, 117 F. Supp. 2d 6 (D.D.C. 2000) [hereinafter Bakaly’s Reply Brief] (“Such confirmation would convey no more information than would, in an ordinary criminal case, a prosecutor’s confirmation of a reporter’s statement that the grand jury will either indict or not indict.”).
\end{itemize}
that there was "substantial and credible" evidence that Mr. Clinton had committed "high crimes and misdemeanors" potentially warranting impeachment. 73 In any case, it had been publicly reported that certain of Mr. Starr's advisors believed that he could indict a sitting president and, indeed, that Mr. Starr had been persuaded by Professor Rotunda that a president could be tried, but not imprisoned, while in office. 74 Why else would Mr. Starr be considering and deciding this question if not to debate the OIC's options vis-à-vis indictment?

Whatever one concludes about whether confirmation that the OIC was actively debating these options was in fact "non-public," it seems to me that the Government's proof as to the extent of Mr. Bakaly's involvement was fairly limited. According to the defense:

Mr. Bakaly testified that he did not tell Mr. Van Natta that these options had been discussed during an internal OIC meeting, did not tell Mr. Van Natta that there was an internal OIC meeting at all, did not tell Mr. Van Natta what the OIC was considering or not considering, and did not tell Mr. Van Natta what weight was being given to any of the options. The Government offered no contrary evidence. 75

In response, the Government argued that:

[w]hat occurred in this case is that on January 28, one day after the all-attorneys meeting in the OIC, Van Natta specifically knew that the OIC had recently held a meeting at which all four options were listed on a board and discussed. In other words, Van Natta knew that all four options were under current consideration by the OIC. There can be no dispute that that was non-public, internal OIC information. In the face of what Van Natta already knew, therefore, Mr. Bakaly's confirmation that the four options were "available" to Mr. Starr was manifestly a confirmation of the accuracy of Van Natta's non-public information about the recent meeting and OIC deliberations. . . . Even if Mr. Bakaly did not tell Van Natta about the meeting or the four options in the first instance, he helped to give Van Natta a seat at the con-


74. Mr. Bakaly provided numerous examples of such reports. See Bakaly's Proposed Findings of Fact, supra note 50, at 16 n.5.

75. Id. ¶ 32, at 15 (citation omitted).
ference room table on January 27 by confirming the accuracy of the information Van Natta had. 76

At bottom, the Government's position seems to be that Mr. Bakaly's limited confirmation could have been understood by Mr. Van Natta to imply a further confirmation of the fact that there was a meeting at which these issues were discussed. This inference itself seems questionable in light of the fact that Mr. Van Natta did not report on the January 27 meeting in the article in question 77 (and, had it been reported, the fact of such a meeting would have been the only true "news" in the article). In any case, it is difficult to conclude beyond a reasonable doubt that Mr. Bakaly lied in denying that he provided "non-public" information based not on what he actually said to the reporter, but rather on the inferences that a reporter may have taken from what was said (but apparently found to be an insufficient basis for reporting). This seems precious thin ground upon which to rest a criminal contempt case. 78

2. Mr. Bakaly Told Mr. Van Natta That a Perjury Count Based on the President's Deposition in the Jones Lawsuit Was a Stronger Case Than the Perjury Count Being Tried in the Senate.—Mr. Bakaly does not concede that he made this statement, and he questions the accuracy of the testifying FBI agent's recollection in this regard. 79 Whatever the truth, Mr. Bakaly's alleged opinion was widely shared and publicly expressed by a number of commentators. 80 His view would only be "non-public" news, then, if it represented a statement of opinion by the OIC.

The defense argues that the Government failed to prove that Mr. Bakaly told Mr. Van Natta that the views expressed were those of the OIC. The defense theory is that if the statements were made, they were expressions of Mr. Bakaly's personal opinion and did not reveal internal OIC matters. 81 The Government argues that "by virtue of

76. Government's Proposed Findings of Fact, supra note 43, ¶ 64(a), at 20 (citations omitted).
77. See Van Natta, supra note 6, at 1.
78. Eds.—The district court concluded that "[w]hile the Court finds that Mr. Bakaly did confirm and discuss with Mr. Van Natta that these were indeed four options regarding indictment of the President that were available to the OIC, the Government has not proven that these discussions delved into the OIC's internal, 'non-public' deliberation of these options." In re Grand Jury Proceedings, 117 F. Supp. 2d 6, 28 (D.D.C. 2000).
80. See id. at 19 n.7 (listing commentators who stated their belief that a perjury case based upon two portions of the President's grand jury testimony would be more difficult to prove than perjury in the Paula Jones case).
81. See id. ¶¶ 40-42, at 18.
Bakaly's position in the OIC and the context in which the discussions were taking place, it is clear that Mr. Bakaly was necessarily providing information about the work and thought processes of the OIC.\textsuperscript{82} Again, the Government's argument seems to hinge on what Mr. Van Natta \textit{might have drawn} from Mr. Bakaly's statement rather than the plain import of the words themselves. And again, given that Mr. Van Natta did not actually report that this was the view of the OIC, the inference that Mr. Van Natta understood Mr. Bakaly to be speaking as Mr. Starr's mouthpiece in this regard is subject to substantial question.\textsuperscript{83}

3. Mr. Bakaly Told Mr. Van Natta That Professor Rotunda Was Not in the Office Much and That Mr. Udolf Left the OIC in April or May 1998, and May Be Biased Against the OIC.—Mr. Bakaly concedes that he "re-minded" Mr. Van Natta of this information.\textsuperscript{84} The parties do not contest that Mr. Udolf's departure from the office and Professor Rotunda's role as an OIC consultant were public facts.\textsuperscript{85} The Government contends, however, that:

Mr. Bakaly's comments on Mr. Rotunda's absence from the office and Mr. Udolf's possible biases did convey non-public information. Those comments would necessarily have signaled to Van Natta that he should not rely on information learned from either Rotunda or Udolf—and indeed, Bakaly conceded that is what he intended.\textsuperscript{86}

"Reminding" Mr. Van Natta of this type of scuttlebutt was hardly a disclosure of important "inside" information that revealed the office's deliberations regarding indictment. Telling Mr. Van Natta to beware of these potentially suspect sources says little about what is going on within the OIC—especially since Mr. Van Natta apparently did not confirm that these were his sources or communicate the substance of

\begin{itemize}
  \item 82. Government's Proposed Findings of Fact, supra note 43, ¶ 64(b), at 21.
  \item 83. Eds.—The district court held that because Mr. Bakaly's opinion regarding the relative strength of the perjury charges was not reflected in the \textit{Times} article, "it could not comprise one of the alleged grand jury leaks that movants complained of in their motion to show cause," and thus was "immaterial to that motion." \textit{In re Grand Jury Proceedings}, 117 F. Supp. 2d at 29. The court concluded that "[a]ny discussion of immaterial, 'non-public' matters cannot properly prove the criminal contempt charge against Mr. Bakaly." \textit{Id.}
  \item 84. Bakaly's Proposed Findings of Fact, supra note 50, ¶ 49, at 20 (quoting Government's Exhibit 14, supra note 44, at 1-2).
  \item 85. \textit{See id.} ¶ 50, at 21; Government's Proposed Findings of Fact, supra note 43, ¶ 64(c), at 22.
  \item 86. Government's Proposed Findings of Fact, supra note 43, ¶ 64(c), at 22 (emphasis added).
\end{itemize}
their disclosures. Thus, Mr. Bakaly's attempt to raise issues regarding their reliability as sources could not even be said to send a signal regarding the accuracy of any specific information provided.\(^{87}\)

4. **Mr. Bakaly Told Mr. Van Natta That Mr. Starr Relies Quite a Bit on the Advice of Professor Kelley.**—Mr. Bakaly admits making this comment to Mr. Van Natta.\(^{88}\) The fact that Professor Kelley was a consultant to the OIC, and that he is a friend and former law clerk of Mr. Starr's, was public knowledge.\(^{89}\) The Government, however, argued that "[b]y telling Van Natta that Judge Starr relies quite a bit on Mr. Kelley's advice, Mr. Bakaly may well have permitted Van Natta to draw the conclusion, also reported in his article, that Judge Starr agreed with Mr. Kelley's view on the indictability of the President."\(^{90}\)

Again, it is difficult to see how Mr. Bakaly's comment can truly be characterized as "non-public" information indicative of the OIC's thinking regarding possible indictment. To me, it is self-evident that Mr. Starr reached out to employ Professor Kelley, a friend and former employee, because he valued Professor Kelley's advice. I view this as an obvious makeweight because the "information" leaked seems so obvious—indeed, this is something I (by no means an OIC insider at the time) knew or assumed to be true. It would never occur to me that this type of information would be considered "non-public," so I have a hard time concluding that someone should go to jail for making a similar judgment. In any case, the Government's argument again is that Mr. Bakaly lied about providing "non-public" information, not because he actually provided such information and did not disclose it, but rather because a reporter might have drawn inferences regarding the goings-on in the OIC from the innocuous comments Mr. Bakaly actually made.\(^{91}\) Perhaps this type of argument would support a deci-

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\(^{87}\) Eds.—The district court concluded that "[a]lthough the Court has found that Mr. Bakaly made these statements to Mr. Van Natta, it is not apparent how these comments disclose material, 'non-public' matters. . . . They do not prove that Mr. Bakaly's specific statement that he declined to discuss non-public matters with Mr. Van Natta is false." In re Grand Jury Proceedings, 117 F. Supp. 2d at 29 (citations omitted).

\(^{88}\) See Bakaly's Proposed Findings of Fact, supra note 50, ¶ 54-55, at 22.

\(^{89}\) See id. ¶ 58, at 23; Government's Proposed Findings of Fact, supra note 43, ¶ 64(d), at 22 (conceding that these are "publicly known facts").

\(^{90}\) Government's Proposed Findings of Fact, supra note 43, ¶ 64(d), at 22 (emphasis added).

\(^{91}\) See id.
sion to fire Mr. Bakaly; it hardly serves as a legitimate basis to jail him. 92

5. Mr. Bakaly Confirmed That the OIC Was Doing Research at the National Archives.—Mr. Bakaly early on told representatives of the OIC that he had provided Mr. Van Natta with a redacted, internal OIC document (referred to as the Bates Memorandum) that contained quotations from, and descriptions of debates among, Watergate prosecutors regarding the propriety of indicting President Nixon. 93 Mr. Bakaly also apparently confirmed to Mr. Van Natta that the OIC had done research at the National Archives. 94 Mr. Van Natta used quoted portions of the Bates Memorandum and reported that “Mr. Starr’s lawyers . . . obtained copies of prosecution memorandums in the National Archives written by the Watergate prosecutors.” 95 The Government argues that “this information was not public” and that “[t]he National Archives research concerns a matter internal to the OIC, reflecting the investigative and analytical steps its attorneys were taking in the process of evaluating whether to indict the President.” 96

This asserted basis for conviction strikes me as even weaker than the last. Given that Mr. Bakaly disclosed to the OIC that he had provided the redacted memorandum that contained some of the National Archives research, it is difficult to argue that he intentionally sought to withhold the fact that he confirmed the National Archives

92. Eds.—The district court held that this comment made by Mr. Bakaly provides “a very slim basis for a criminal contempt conviction.” In re Grand Jury Proceedings, 117 F. Supp. 2d at 29. The court further explained that:

[i]n order to attach significance to this information, the reporter is required to infer that this reliance on Professor Kelley’s advice confirms that Independent Counsel Starr has concluded that he has the authority to indict a sitting President. Even though the Court concurs with the Government’s argument that Mr. Bakaly was clearly trying to suggest to the reporter this unspoken piece of sensitive and “non-public” information, the Court is not willing to conclude that Mr. Bakaly’s inferential message is identical to stating directly that the Independent Counsel has concluded that he has the authority to indict the President. While, in certain circumstances, a wink and a nod are unquestionably tantamount to outright confirmation, the Court is unwilling to base a criminal conviction on Mr. Bakaly’s unelaborated hint to Mr. Van Natta.

Id. at 29-30.

93. See Bakaly Declaration, supra note 16, ¶ 9, at 3.

94. See Government’s Proposed Findings of Fact, supra note 43, ¶ 64(e), at 22 (citing the testimony of FBI Agent Thomas Lewis, who stated that Mr. Bakaly conceded this point in a February 25, 1999 interview). Despite the Government’s assertion, it should be noted that Mr. Bakaly does not make such a concession. See Bakaly’s Proposed Findings of Fact, supra note 50, at 23 n.13 (“[T]here is no evidence that Mr. Bakaly in fact confirmed [that the OIC was doing research at the National Archives].”).

95. Van Natta, supra note 6, at 1.

96. Government’s Proposed Findings of Fact, supra note 43, ¶ 64(e), at 23.
research. Further, this stretches the outer limits of any definition of "non-public" information. If the OIC prosecutors secured library cards, would that constitute "inside information"? Perhaps, again, my view is affected by the fact that I knew well in advance of the *Times* article that members of the OIC were doing research at the National Archives and never considered that this might be confidential, deliberative information. My own conclusion was that, given their mandate and statutory responsibilities, it was not at all surprising that OIC prosecutors were doing so. I have been told by one member of the media that he, too, knew of the research efforts, as presumably did the staff at the National Archives and others.

C. Conclusion

In sum, I do not condone what Mr. Bakaly was doing in attempting to "spin" Mr. Van Natta—it is not a function that I believe is appropriate to a prosecutor's office. It also appears that Mr. Bakaly was not as forthright as he should have been with either the OIC or the court. But it seems to me that the evidentiary basis of this case is very thin. The fact that the last two arguments were even put forth by the Government underscores just how weak its position is. We can speculate as to why the DOJ said that it would prosecute the case as a criminal contempt at the court's election. My own supposition is that the DOJ acted out of a disinclination to antagonize the Chief Judge of the District Court rather than out of any conviction regarding the importance of the case. It is worth remembering that the DOJ declined to bring a criminal false statements or perjury prosecution founded on the above proof, presumably because the case did not meet DOJ standards. It may have failed the DOJ test both because of evidentiary difficulties, and because the alleged false statements concerned leaks that did not violate Rule 6(e) and indeed concerned leaks all but two of which did not even appear in the news article at issue (and one of the two was the bogus National Archives charge). In short, this is a case that should not or would not have been brought in the normal course.

II. THE PRESS'S ROLE IN HIGH-PROFILE CRIMINAL CASES

The ironies surrounding the Bakaly case abound. First and foremost, of course, is the fact that, as of this writing, the only person caught up in "Monica-gate" subjected to a criminal trial and under immediate and concrete threat of criminal punishment is a member of prosecutor Kenneth Starr's office. Not Ms. Lewinsky, who, by her

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own immunized account, committed various and sundry federal crimes. Not President Clinton, who many believe to be even more culpable than Ms. Lewinsky. No, it is Mr. Starr's "counselor and spokesman" who is being prosecuted—at Mr. Starr's referral—by the Justice Department, whose ultimate chief is, of course, Mr. Starr's, and for a time, Mr. Bakaly's, nemesis.

Mr. Bakaly is alleged to have lied when he denied discussing a number of subjects with Mr. Van Natta, but none of those subjects were ones that involved secret grand jury information guarded by Federal Rule of Criminal Procedure 6(e). The charge of contempt of court brought against Mr. Bakaly is founded, then, not on allegedly illegal leaking, but rather on the allegations that Mr. Bakaly lied in denying that he leaked and obstructed the course of justice in doing so. In short, the case supposedly is not about sex—I mean the propriety of Mr. Bakaly's otherwise legal leaking—it is about lying about sex—I mean leaking. See where I am going here?

As should be clear from my discussion above, regardless of whether the district court concludes that Mr. Bakaly actually lied about these matters and finds that the other elements of contempt (materiality and interference with the due administration of justice) have been proved, it seems to me that this case is a weak one. One must ask, then, why it was pursued. What does the case reveal about the effect of the press on the quality of criminal justice accorded targets (or others) where scandal-driven criminal investigations are at issue? And, given the context, what does the case reveal about the role or responsibilities of the press in such investigations?

A. Why Investigatory Targets and Prosecutors Leak and Spin

Any criminal investigation of high-ranking political officials justifiably rates very high in the media's estimation of newsworthy topics. Certainly the appointment of an independent counsel, whether under DOJ regulations or under the lapsed independent counsel statute, confers upon an investigation an instant imprimatur of credibility and importance. In these cases, virtually everything—including topics almost never discussed in reference to "ordinary" prosecutors, such as


99. See supra note 40 and accompanying text.

staff hires and office expenditures—seems to find its way into the public realm via the press.\textsuperscript{101} What makes the press's role particularly interesting in this context is not, however, its wide range or sheer volume—it is the consequence of those qualities.

The certainty of extensive press attention creates its own dynamic that has had a demonstrable effect on the legacy of individual independent counsels and the viability of the statute itself.\textsuperscript{102} More important for present purposes, white-hot media attention may also have a profound effect on the conduct and course of a criminal investigation. These consequences usually have been said to flow from the interaction between politics and the media—that is, from the simple fact that \textit{political partisans} understand the power of the press to direct public attention and shape opinions. In highly politicized cases, such as the "scandals" we have just endured, some of those at the center of the inquiry, and many at the periphery, are more concerned with the political consequences of the investigation than its resolution in the grand jury or the courts. As I have argued elsewhere:

Given the public and press attention devoted to [independent counsel (IC)] investigations, partisans cannot afford to let the IC process simply unfold and the political chips fall where they may. Recent experience demonstrates that the favored means by which \textit{[investigatory targets and their political allies seek]} to blunt the political damage posed by an IC investigation is to attack as biased the IC, or the judges that appointed him.

... Conversely, the opposing political party has every incentive to keep the case in the news, to press for a result discrediting the person under investigation and the administration with which that person is affiliated, and to create grave questions about the impartiality or judgment of an IC who exonerates the subject.\textsuperscript{103}

\textsuperscript{101} See, e.g., Connie Cass, \textit{Starr Reports $4.2 Million in Contract Work; Counsel Defends Money Spent for Investigators, Advice, Legal Representation}, \textit{WASH. POST}, Aug. 28, 1999, at A10 (detailing the amount of money spent by Independent Counsel Kenneth Starr on private investigators and on outside legal and ethical advisors); David A. Vise, \textit{Criminal Probe of Clinton 'Open'; Counsel Hires Staff, Weighs Indictment}, \textit{WASH. POST}, Apr. 11, 2000, at A1 (reporting that Independent Counsel Robert W. Ray hired six lawyers and projected spending $3.5 million over six months to continue the OIC's investigation of the Lewinsky scandal).


\textsuperscript{103} \textit{Id.} at 464, 474.
Politicians have learned to look to the press to air their attacks, and the press has cooperated because charges of the politicization of the criminal process are indeed highly newsworthy (at least if they have some potential to be true).

What has come into focus during this last investigation is the extent to which the press attention has affected the conduct of lawyers engaged in some capacity in the investigation. As many have noted, increasingly:

attorneys [in high-profile white-collar cases] appear just as interested in winning in the court of public opinion as in a court of law. . . .

. . . "Feeding" the media with information and "spinning" a case so that the facts and circumstances are viewed in a light most favorable to one's client has now become a common practice. 104

Strategic use of the press by the defense is demonstrably on the upswing in these cases, and some prominent prosecutors—in the DOJ as well as in the office of Mr. Starr—believe that the prosecution, too, must sometimes speak out in order to safeguard the perceived integrity of investigations subject to defense attack. 105

To understand the strategy of the game, one must understand the constraints imposed on the players by the grand jury process itself. White-collar criminal investigations of the type of wrongdoing that is often at stake in cases involving highly placed political actors (e.g., corruption, false statements, and obstruction) most often are conducted by prosecutors and agents under the authority of a federal grand jury. Federal Rule of Criminal Procedure 6(e) imposes upon prosecutors, agents, grand jurors, and all others involved in the governmental process an obligation to maintain the secrecy of matters occurring before the grand jury. 106 The rule does not, however, muzzle the witnesses who provide that grand jury with evidence, or those

104. Eric H. Holder, Jr. & Kevin A. Ohlson, Dealing with the Media in High-Profile White Collar Crime Cases: The Prosecutor's Dilemma, in WHITE COLLAR CRIME 1995 at B-1 (ABA 1995); see also Moses, supra note 4, passim.

105. See Holder & Ohlson, supra note 104, at B-1 (stating that prosecutors must at times speak to the media to protect their public image and to demonstrate to the public that the system of justice is applied equally to all citizens).

106. Fed. R. Crim. P. 6(e)(2). The rule states that:

A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules.

Id.
with whom the witnesses share their stories, including, of course, witnesses' lawyers. \(107\) Those who are subpoenaed to provide evidence—either physical or testimonial—may freely detail for the press and public just what they have provided to the government, as well as what they have learned (through the questions asked or the items requested by subpoena) about the direction or content of the investigation.

A further layer of complexity is provided by the fact that the bounds of Rule 6(e) are not well-defined, \(108\) leaving prosecutors to navigate, to some extent, at their own risk when they choose to talk. Further, there are a variety of constraints quite apart from Rule 6(e) that counsel against prosecutorial discussion of even clearly non-grand jury investigative materials. \(109\) The ethical rules that apply in most jurisdictions generally bar prosecutors from making extrajudicial statements that may negatively influence public proceedings, and, in particular, that may compromise the impartiality of decision-makers. \(110\) DOJ policy also bars discussion of all but specified types of information, again, generally in the interests of safeguarding the "adjudicatory process," but leaves prosecutors several large "outs." \(111\)

\(107\). See id. (failing to include such persons within the coverage of the rule and stating that "[n]o obligation of secrecy may be imposed on any person except in accordance with this rule").

\(108\). See Richman, supra note 4, at 339-42.

\(109\). See Moses, supra note 4, at 1816-26.

\(110\). The Model Rules of Professional Conduct bar lawyers participating in the investigation into or litigation of a matter from making extrajudicial statements "that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." Model Rules of Prof'l Conduct R. 3.6(a) (1999); see also Model Code of Prof'l Responsibility DR 7-107 (1994) (stating that attorneys should disclose, without elaboration, nothing more than "(1) Information contained in a public record. (2) That the investigation is in progress. (3) The general scope of the investigation . . . [and] (4) A request for assistance in apprehending a suspect").

\(111\). Both the DOJ regulations and the United States Attorneys Manual articulate rather strict general standards regarding discussions with the press. See 28 C.F.R. § 50.2(b) (2000) (limiting information DOJ officials can release in a criminal matter to basic facts about the defendant—name, age, and other background information—and facts relating to the charge or the arrest); 4 Dep't of Justice Manual, tit. 9, § 1-7.550(A) (2d ed. Aspen Law & Bus. 2000-01 Supp.) [hereinafter U.S.A.M.] (barring DOJ personnel from "respond[ing] to questions about the existence of an ongoing investigation or comment[ing] on its nature or progress, including such things as the issuance or serving of a subpoena, prior to the public filing of the document"). But each gives prosecutors the discretion to stray from these rules. For example, the United States Attorneys Manual states that:

[i]n matters that have already received substantial publicity, or about which the community needs to be reassured that the appropriate law enforcement agency is investigating the incident, or where release of information is necessary to protect
If a prosecutor "believes that in the interests of justice and law enforcement process" non-grand jury information should be made public, or where "release of information is necessary to protect the public interest, safety, or welfare," she may disclose this investigatory information to the public (after securing relevant approvals).

Perhaps more important than these rules is the professional culture that counsels against public discussion of ongoing investigations, at least in some prosecutorial circles. That culture is founded not only on the above rules, but also on the interests underlying those rules, which include law enforcement imperatives, institutional concerns, and the professional self-definition of prosecutors as "ministers of justice." Most obviously, loose lips can sink cases:

Premature disclosure of investigative data—identity of targets, nature of allegations, nature of proof—can lead targets to flee, destroy evidence, intimidate or deter witnesses, create phony evidence, and otherwise impede investigations. Even disclosures that do not trigger obstructionary behavior can impede the government's investigatory powers by drying up information sources that rely on the promise or assumption of confidentiality.

Secrecy in the grand jury context is also justified, at least in part, to "insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors." Finally, silence is necessary to protect the privacy of subjects, targets, and witnesses caught up in grand jury investigations where the investigation does not lead to an indictment. In light of the shattering consequences that disclosure of involvement in a criminal investigation may have on an individual's the public interest, safety, or welfare, comments about or confirmation of an ongoing investigation may need to be made.

U.S.A.M., supra, § 1-7.530(B); see also 28 C.F.R. § 50.2(b)(9) (allowing DOJ prosecutors, subject to the approval of the attorney general or deputy attorney general, to avoid abiding by the regulations if that prosecutor "believes that in the interest of the fair administration of justice and the law enforcement process information beyond these guidelines should be released").

112. 28 C.F.R. § 50.2(b)(9).

113. U.S.A.M. § 1-7.530(B).

114. Richman, supra note 4, at 345 (footnote omitted); see also Douglas Oil Co. v. Petrol Oil Stops Northwest, 441 U.S. 211, 219 n.10 (1979).


116. See id. (stating that grand jury secrecy is justified, in part, "to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation").
life, \textsuperscript{117} prosecutors often conclude that basic fairness dictates that publicizing the fact that an investigation is ongoing (let alone the details of it) is only warranted once a grand jury has passed on the propriety of formal criminal action. At the very least, most prosecutors recognize the fundamental illegitimacy of leaking to influence those who may be the eventual adjudicators of the defendant's guilt. \textsuperscript{118} Certainly prosecutors who leak to score political points or to blacken the reputation of an investigatory subject are acting completely beyond the professional pale.

Given the rationales for secrecy in the investigative process, why are lawyers for both sides increasingly turning to the court of public opinion—and thus the press? From the defense's perspective, "perhaps the most important catalyst [for attempting to try cases in the press] is that a growing number of lawyers and clients believe a public relations strategy can get results in certain kinds of cases. If so, the lawyers reason, they have a duty to pursue such a strategy on behalf of clients." \textsuperscript{119} The kinds of cases in which a public relations strategy makes particular sense are those in which the clients are of a type that generate a great deal of media attention, and in which the clients are concerned with "the judgment of a number of people and institutions—not just juries." \textsuperscript{120} Thus, lawyers attempt to use the press to

\textsuperscript{117} See Fund for Constitutional Gov't v. Nat'l Archives & Records Serv., 656 F.2d 856, 864 (D.C. Cir. 1981) (stating that "'[t]here can be no clearer example of an unwarranted invasion of personal privacy than to release to the public that another individual was the subject of an FBI investigation'" (quoting Baez v. Dep't of Justice, 647 F.2d 1328, 1338 (D.C. Cir. 1980))).

\textsuperscript{118} The DOJ regulations explicitly prohibit this type of disclosure:

\begin{quote}
At no time shall personnel of the Department of Justice furnish any statement or information for the purpose of influencing the outcome of a defendant's trial, nor shall personnel of the Department furnish any statement or information, which could reasonably be expected to be disseminated by means of public communication, if such a statement or information may reasonably be expected to influence the outcome of a pending or future trial.
\end{quote}


\textsuperscript{119} Moses, \textit{supra} note 4, at 1831. Four members of the Supreme Court have recognized that "[a]n attorney's duties do not begin inside the courtroom door. . . . [A]n attorney may take reasonable steps to defend a client's reputation and reduce the adverse consequences of indictment . . . including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried." Gentile v. State Bar of Nev., 501 U.S. 1030, 1043 (1991) (opinion of Kennedy, J., joined by Marshall, Blackmun, and Stevens, J.); see also Holder & Ohlson, \textit{supra} note 104, at B-1 ("Some casual observers of this process may believe that the attorneys involved in such [use of the media in high-profile white-collar cases] are attempting to improperly influence the jury pool or are simply seeking to thrust themselves into the limelight. But more astute observers understand that in high profile white collar cases, there are important and legitimate reasons why attorneys cooperate with the media.").

\textsuperscript{120} Moses, \textit{supra} note 4, at 1832.
further their clients' interests in minimizing the political or other collateral fallout of an investigation or prosecution, as well as to influence the outcome of that investigation or prosecution.\footnote{121}

Defense lawyers are becoming increasingly sophisticated and overt in their use of press relations\footnote{122} and, at least in politicized cases, are increasingly relying on an attack strategy. The strategy may be stated simply as "putting the government on trial," with the object of demonstrating that the investigation or prosecution is meritless or trivial and is inspired by political or personal animus. Prosecutors usually attribute such a "strategy" at best to zealous representation and at worst to cynical manipulation. It is also true that such attack efforts are often founded on a sincere (and sometimes accurate) belief that the client is being wronged, and that the prosecutor is at best overreaching and at worst corrupt.

The most effective means of attack is obviously to demonstrate that the prosecutor is acting illegally, improperly, or, at the very least, outside the norms of prosecutorial practice. Such attacks may take a variety of forms. One fairly obvious example from recent history is the charge that the OIC was overzealous in pursuing a potential criminal perjury case based on alleged false statements made in a civil deposition context. By arguing that such cases are not normally pursued, the inference was that the OIC was acting selectively and out of improper purpose.

Attacks that are founded upon arguments regarding general policies or practices, however, are less effective than arguments that prosecutors have violated clear rules and thus are not only unfair, but also lawless. Because there are not that many concrete "rules" that apply to prosecutors in the investigative stage, those that apply to the conduct of the grand jury provide the best opportunity for the defense to demonstrate that a prosecutor is acting beyond the law. For example, it is common and effective strategy to charge prosecutors with violating grand jury secrecy.\footnote{123} Again, this can be done, as I believe it is in

\footnote{121. See \textit{id.} at 1832-40 (discussing targets of public relations campaigns, including the public, judges, prosecutors, executive branch policy makers, and opposing litigants).}

\footnote{122. See generally \textit{id. passim}.}

\footnote{123. See, e.g., Peter Baker \& Susan Schmidt, \textit{Clinton Vows 'Never' to Resign}, \textit{WASH. POST}, Feb. 7, 1998, at A1 (quoting President Clinton's attorney David Kendall as stating that "[t]he leaking of the past few weeks is intolerably unfair.... These leaks make a mockery of the traditional rules of grand jury secrecy. They often appear to be a cynical attempt to pressure and manipulate witnesses, deceive the public and smear persons involved in this investigation."); Roberto Suro, \textit{Judge Cites 24 Stories in Ordering Leak Probe}, \textit{WASH. POST}, Oct. 31, 1998, at A6 (quoting White House special counsel Gregory Craig as stating, "[w]e believe that the Office of the Independent Counsel has been waging a campaign of leaks against the president, in an improper effort to influence public and congressional opinion,}
most cases, in a sincere effort to force the prosecutor to hew to the law and to contain the damage that such disclosures can cause to investigatory targets' reputations, professional or business interests, and social or family relations, or it can be done for the simple purpose of putting the prosecutor at a disadvantage.

What of prosecutors? Do they simply take their hits and wait for vindication at trial? Many do, and properly so. However, in heavily politicized cases the answer increasingly seems to be "no." A number of legitimate reasons are said to support governmental disclosure of (non-grand jury) investigative materials prior to indictment. Publicity may aid the law enforcement effort, for example, by causing witnesses to come forward or, as was alleged in the Lewinsky matter, by putting pressure on potential cooperators to make a deal quickly. Further, "[m]uch to the interest—and sometimes chagrin—of law enforcement authorities, in the course of reporting a story, members of the media sometimes uncover additional information that bolsters the prosecution’s case." Discussions with the media about pending cases is also said to further the law enforcement mission in a larger sense by reassuring the prosecutor's client—the public—that possible wrongdoers or crimes are being vigorously pursued, thus building confidence in the criminal justice system.

and it has done so in direct violation of federal laws safeguarding the confidentiality of grand jury proceedings.

124. See, e.g., Holder & Ohlson, supra note 104, at B-1 to B-2 (observing that prosecutors in high-profile white-collar cases appeal to the media to educate the public about the enforcement of the laws, to reassure the public that the law is being applied equally to all citizens, and to motivate witnesses to cooperate in ongoing investigations). There are also less admirable motives, such as ego gratification, the desire to curry favor with the media, the wish to improve the prosecutor's or agent's image for personal career reasons, a plan to taint the jury pool, or hopes of harming an investigatory subject.

125. See id. at B-2 (stating that "publicity frequently causes potential witnesses to come forward and share with law enforcement authorities information they have about a particular case"); Richman, supra note 4, at 346 (explaining that disclosure may compel criminals seeking leniency to come forward and may "prod non-culpable people into providing new information, by triggering memories, or by merely assuring them that the government is pursuing a case").

126. See, e.g., Howard Kurtz, In a Blizzard of Allegations, Did the Media Throw Caution to the Wind?, Wash. Post, Jan. 27, 1998, at E1 (noting that "[l]ittle has been reported about the motivation of the sources providing the allegations to reporters, although some of the leaks are attributed to 'investigators' or 'sources close to the investigation' of independent counsel Kenneth W. Starr," and that "[t]his means that journalists, unwittingly or not, may be helping prosecutors put pressure on Lewinsky by acting as conduit for selective bits of damaging information").


128. See id. at B-1.
Finally, and most important for present purposes, some prosecutors believe that "in cases involving well-known people, the public has a right to be kept reasonably informed about what steps are being taken to pursue allegations of wrongdoing so that they can determine whether prosecutors are applying the law equally to all citizens."\(^{129}\) The political context will often dictate what must be said in order to counter attacks of selective and unfair prosecution. Thus, DOJ prosecutors may feel compelled to speak to reassure the public that they are not sweeping wrongdoing by high-ranking public officials under the rug. Independent counsel may wish to talk to the press in order to counter allegations that they are engaging in partisan witch-hunts or are generating or exaggerating claims of official wrongdoing.

This last rationale for prosecutorial comment has fans at the highest ranks of the Clinton Justice Department as well as in the office of Mr. Starr. For example, Deputy Attorney General Eric Holder has argued that misperceptions, fed by public officials under investigation, about the motivations of prosecutors "have a corrosive effect on our system of justice, and the only effective means by which prosecutors may dispel them is through the dissemination of timely and accurate information."\(^{130}\) Similarly, Mr. Starr (relying in part on Mr. Holder's statements) frequently invoked this justification for his office's press contacts.\(^{131}\)

\(^{129}\) Id. (emphasis added).

\(^{130}\) Id. at B-2. It should be noted, however, that although Deputy Attorney General Holder's comments have been widely cited as sanctioning prosecutorial comment in such circumstances, and his introductory comments unequivocally do so, see id. at B-1 to B-2, the balance of the paper in which these comments appear contains a much more detailed and specific discussion, founded on DOJ rules, of the specific types of information that may be disclosed and the particular considerations that should apply in making these judgments. See id. at B-2 to B-7. In other words, I believe it is a mistake to read Mr. Holder's remarks as an invitation for prosecutors to open wide the spigot of information any time defense counsel takes a shot at them. Indeed, Mr. Holder's concluding remarks make clear that his orientation is ultimately fairness, and not vindication:

The best policy for any prosecutor to follow when discussing a pending criminal matter with reporters is to always be fair and cautious, and to always keep in perspective the significance of the case. Although a case or defendant may seem of overwhelming importance at the time that the press is howling for information and details, eventually every case—no matter how sensational—recedes from the headlines as other pressing issues of the day come to the fore. But what lingers on in the mind of the public, and what remains permanently affixed in the memories of one's colleagues, is how the media inquiries about such cases were handled. If they were consistently handled ethically, fairly, and effectively, then one of the greatest responsibilities—and challenges—of a modern day prosecutor will have been admirably fulfilled.

\(^{131}\) When questioned by David E. Kendall about Mr. Bakaly's appearance on ten talk shows and Nightline, Mr. Starr responded:
This certainly sounds good—why shouldn’t the Government respond to attempts to mislead the public and impair confidence in the criminal justice system? There may be a number of reasons. First, this rationale has no readily ascertainable standards and obviously can be (honestly or not) abused. What constitutes a sufficient attack to warrant a prosecutorial response? What limits are there (outside of Rule 6(e)) on the types of information prosecutors may disclose in response to such attacks? When the target of the investigation denies wrongdoing and says that the allegations are baseless, may prosecutors respond by leaking evidence of guilt? When the defense argues that prosecutors are out to get the target, may the Government respond by sharing with the press the goods that indicate that the prosecution has a factual, and not political, predicate?

Second, one wonders why, if official credibility is the goal, prosecutorial press contacts should ever be off-the-record. Professor John Barrett has argued that such contacts should occur only at the highest levels, should be made generally and not to individual reporters, and should “always, and only, [be] on the record.”132 A policy that “[a]nonymity should end and accountability should begin”133 would have the virtue of “demonstrat[ing] law enforcement’s substantive commitment to fair play and restraint in using the powerful voice of government.”134 It would also force prosecutors to be conservative in employing this rationale for making public statements. Finally, it would “permit law enforcement officials to be held accountable both for their statements and for the substantive acts that on-the-record statements can explain, thereby eliminating the ‘who said what’ mysteries that stem from the media protecting their sources and too often are the end of today’s leaks investigations.”135

Most fundamentally, one could argue that prosecutors, if they are wise, will never enter the fray; if they do, experience demonstrates

Not only do we have the right, we have the duty to engage in a proper public information function because this is the public’s business. We must do so in order at times to combat misinformation that is being spread about, including frequently by lawyers who claim that their clients have been grossly mistreated, which is what criminal defense lawyers are paid to do.

Starr Is Questioned by Abbe D. Lowell and David E. Kendall, WASH. POST, Nov. 20, 1998, at A36; see also Editorial, An Unruly Mess, WASH. POST, Feb. 25, 1998, at A16 (quoting Mr. Starr’s explanation for subpoenaing presidential aide Sidney Blumenthal to be that “misinformation” spread about prosecutors may be “intended to intimidate prosecutors and investigators, impede the work of the grand jury, or otherwise obstruct justice”).

132. Barrett, supra note 4, at 634.
133. Id.
134. Id.
135. Id.
that they will be drawn into a long and damaging siege that they probably cannot win. Prosecutors and defense counsel are not on a level playing field in this game. Prosecutors are hampered in their responses to defense attacks not only by the constraints discussed above, but also by the widespread public belief that prosecutors must hew to a higher standard. To the extent that prosecutors are perceived to be engaging in a public relations battle with the targets of what is supposed to be a dispassionate search for truth and justice, they have lost the war in public perception. Further, if a prosecutor begins with, and is consistent in implementing, no matter the temptation, a policy that he will not comment on the investigation, he will be much less vulnerable when accusations of leaking fly. Once prosecutorial tongues start wagging, however, it is difficult to draw, let alone police, the appropriate lines of commentary. No one—least of all the press, to whom prosecutors have been chatting—will necessarily credit denials of improper leaks. In sum, it appears that the more prosecutors talk, the more likely they are to feed the credibility war rather than dampen it.

Whatever the scope, form, or wisdom of appropriate prosecutorial commentary, it is important to note that the justification asserted by Mr. Starr rests on the reactive quality of such commentary: discussions with the press are only warranted to clean up damage caused by unfair or misleading charges by those under investigation. Many of the attacks in this case were overt—Mr. Starr and the President’s counsel engaged in highly public, lengthy, recurring, and very bitter skirmishing over the source of leaks. Some caught up in this war claim that the defense also employed a more subtle tactic—what I refer to as the “reverse-spin-leak.” The defense in this scenario desires not only to leak information to the press in a way that lessens its negative impact while remaining anonymous, but also to get the story out in a way that leaves the impression that it was leaked by prosecutors. Thus, the leaker may score points by presenting to the press, in a more sympathetic light or at a more advantageous time, damaging facts that the leaker anticipates will become public in any case. Fur-

136. See, e.g., Susan Schmidt, Clintons’ Lawyer Alleges Ethics Breach by Starr; Article Cited; Whitewater Investigator Says No Secrecy Rules Were Violated, WASH. POST, June 4, 1997, at A7 (discussing David Kendall’s accusation that Mr. Starr is running a “leak-and-smear” campaign against the Clintons and Mr. Starr’s response); Kendall: ‘A Deluge of Illegal Leaks,’ WASH. POST, Feb. 7, 1998, at A13 (reprinting a letter from David Kendall, President Clinton’s personal attorney, to Kenneth Starr, accusing the OIC of leaking inaccurate grand jury information, and Mr. Starr’s response).

137. That this type of leaking occurs seems uncontested. See, e.g., Howard Kurtz, Someone’s Always Spilling Something in Washington, WASH. POST, Sept. 23, 1998, at D1 (stating that
ther, the leaker aims to rack up additional points by accusing the pros-
ecutors of inappropriate or illegal leaking. That the facts leaked were
damaging (though not as harmful as they would have been if they had
come to light under different circumstances or at another time) en-
hances the credibility of the charge that the facts must have come
from prosecutors.

This strategy obviously depends upon the leaker’s ability to main-
tain her anonymity. It thus depends upon the reporter’s willingness
to run the story without specific attribution. More fundamentally, it
counts (with substantial justification in recent experience) upon the
media’s refusal to disclose the identity of confidential sources and
others’ inability or unwillingness to root out or force such a
disclosure.

The “reporter’s privilege” to refuse to disclose confidential
sources is, at best, a qualified one in the context of a criminal inves-
tigation. However, as a matter of reporters’ ethics, “[o]nce [they]
have taken information off the record, they are obligated—by per-
sonal honor, traditions of their craft, and a pragmatic desire to pre-
serve reputations of trustworthiness, but certainly not by law—never

“White House aides, meanwhile, are so practiced in this realm [of leaking] that they have leaked damaging information about their boss as a way of putting it behind them, sometimes doing the deed on a busy news day or a Friday night to minimize the publicity”).

Certainly prosecutors thought that this was happening:

Starr asserted that defense lawyers have their own motives to secretly disclose in-
formation. “The ‘leaks’ that you complain about, thus, may have come from
sources close to those under investigation,” Starr said. “Those sources would have
a clear and manifest motivation to release harmful information with carefully
crafted defenses in order to lessen the painful impact of such evidence when it is
revealed through official proceedings.”


138. See Branzburg v. Hayes, 408 U.S. 665, 667 (1972) (plurality opinion) (holding that
requiring reporters to appear before a federal grand jury does not abridge First Amend-
ment rights). The Branzburg Court explained:

[W]e perceive no basis for holding that the public interest in law enforcement
and in ensuring effective grand jury proceedings is insufficient to override the
consequential, but uncertain, burden on news gathering that is said to result from
insisting that reporters, like other citizens, respond to relevant questions put to
them in the course of a valid grand jury investigation or criminal trial.

Id. at 690-91. Subsequent cases affirmed the principles set forth in Branzburg. See Cohen v.
Cowles Media Co., 501 U.S. 663, 669 (1991) (citing Branzburg and stating that “the First
Amendment [does not] relieve a newspaper reporter of the obligation shared by all citi-
zens to respond to a grand jury subpoena and answer questions relevant to a criminal
investigation, even though the reporter might be required to reveal a confidential
source”); Univ. of Penn. v. EEOC, 493 U.S. 182, 201 (1990) (stating that “[i]n Branzburg,
the Court rejected the notion that under the First Amendment a reporter could not be
required to appear or to testify as to information obtained in confidence without a special
showing that the reporter’s testimony was necessary”).

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to reveal the identity of the source.”139 "Leak investigators know this and, if they also understand the value of free and aggressive reporting in a constitutional democracy, they tend not even to ask reporters, much less seek to enforce subpoenas that might compel them to describe who told them what and when."140 As a consequence of these and other factors, leak investigations are notoriously unsuccessful in definitively isolating the source of leaks—or in clearing innocent parties accused of leaking.141 Finally, despite isolated calls to arms,142 reporters apparently have been disinclined to throw themselves into investigations of their fellow journalists’ sources—even where the source of press leaks is major news.143

Was this reverse-spin-leak strategy actually employed by President Clinton’s defense team? Maybe some persons aligned with the administration undertook this approach, but I personally do not believe that the President’s legal team did so. One could as easily accuse the prosecution of a nefarious “reverse-reverse-spin-leak” attack, under which prosecutors falsely accuse the defense of employing a reverse-spin-leak strategy in order to make the defense look like cynical manipulators of public opinion (and guilty as hell). I also do not believe that this was the case. But the point is that we will never know just how far the spin game spun out of control because the guardian of the secret is

139. BRUCE M. SWAIN, REPORTERS’ ETHICS 52 (1978).
140. Barrett, supra note 4, at 624 (footnote omitted).
141. See id. at 623; Richman, supra note 4, at 341 (explaining that “in the absence of a confession by a law enforcement source (or, even less likely, a reporter with no interest in being a future beneficiary of leaked information) leaks are virtually impossible to prove” (footnote omitted)).
142. For example, an editorial in the Washington Post questioned the absence of reporting on the sources of leaks and stated that:

there would seem to be a very good reason for reporters to try to learn the source of their competitors’ leaks. After all, we are investigating a possible political and legal scandal here, and the leaks—fortified both by statute and by judicial prohibition—are an integral aspect of that illegality. Why should journalists conspire to cover up such crimes?

143. For example, the Washington Post reported:

[T]here was a bizarre quality to the weekend coverage of White House charges that independent counsel Kenneth Starr was illegally leaking in the Monica Lewinsky case. At least some journalists at each major news organization know whether Starr’s staff is in fact dishing on background, but the stories are written as though this were an impenetrable mystery.

Howard Kurtz, With Leaks, Reporters Go with the Flow, WASH. POST, Feb. 9, 1998, at B1; see also Howard Kurtz, The Media’s Starr Turn; Independent Counsel Draws Increased Scrutiny, WASH. POST, Feb. 4, 1998, at D1 (discussing allegations that Starr “received relatively gentle treatment [by the press] until now . . . [because] reporters depend on his office for crucial leaks”).
the press, and the press is not telling. This press silence had a central role in the escalation of the bitter battle for public relations advantage. In other words, the lack of real-time information about who was leaking to the press fueled the perceived need to meet leak with leak, spin with spin. Because of each side’s apparent conviction that the other was employing unattributed leaking (and perhaps reverse-spin and reverse-reverse-spin leaking) to strategic effect, the dynamic was considerably magnified to the point where it became a very important and consuming story in its own right.

B. The Role of the Press in Responding to Parties’ Leaking and Spinning

Which brings us, at last, to the subject of this Article: What does this state of affairs imply for journalists’ practice of their craft? There are a number of levels that may warrant examination—proceeding from the very general to the specific case of Mr. Bakaly.

1. Consideration of the General Systemic Consequences of Leaks on the Administration of Justice.—Reporters obviously seek to report that which is news; they are most interested, then, in obtaining and publishing the very nonpublic information that traditional prosecutorial practice—as well as, in some circumstances, federal law—proscribes law enforcement sources from sharing. When seeking to elicit such information, one may first ask whether reporters should consider the generalized public policy reasons for maintaining the secrecy of this information prior to publishing it.

Some, but apparently not all, journalists may be concerned about the consequences of their reporting. It seems, however, that the default position of the media generally, and most reporters in particular, is that news-gathering and dissemination in the grand jury context is in the public interest—virtually without limit. The criminal justice system’s emphatic protection of investigatory information notwith-

144. See, e.g., Rotunda, supra note 4, at 882-83 (the author, a consultant employed by the OIC, discussing strategic leaking by the defense); Baker & Schmidt, supra note 123, at A1 (reporting that in response to defense charges that “someone else is leaking unlawfully out of the grand jury proceeding,” Mr. Starr “fired back with his own statement last night, saying leaked information about the investigation could have come from numerous people—including Clinton’s own attorneys—and accusing the president’s camp of trumping up complaints about leaks as part of ‘an orchestrated plan to deflect and distract this investigation’”).

145. See, e.g., Swain, supra note 139, at 54-59. To be clear, the above discussion focuses on considerations implicated in reporting on investigative information, and particularly grand jury functioning. I do not mean to suggest that the media never considers public policy concerns—such as national security concerns—when making decisions regarding whether to publish particular pieces of news.
standing, many reporters seem to believe that in the overwhelming majority of cases, there is no cognizable individual interest and no real societal cost to publication of such information—or at least no interest or cost that reporters should be required to consider.

The Supreme Court has determined that in most circumstances where there is a real conflict between the criminal justice system's need to obtain evidence from the press and the press's interest in maintaining the confidentiality of its sources, any First Amendment interests implicated must take a back seat to those of the criminal process.\textsuperscript{146} The Court, however, might strike a different balance when the conflict is between the criminal system's interest in keeping information from the press and the press's responsibilities in informing the public. Indeed, one could argue that the law has implicitly resolved this tension. In general, the rules against provision of investigatory details to the press are far from airtight, and even Rule 6(e) does not purport to impose an obligation of secrecy on those not expressly bound by the rule who receive improperly shared information.\textsuperscript{147} First Amendment interests, then, generally trump law enforcement interests in this context, and perhaps rightly so. Asking reporters to forego a story in light of public policy considerations at this level of abstraction invites too great a compromise of their essential function.

In any case, whatever the legal or policy resolution of this tension, it is exceedingly unrealistic to expect the press to decide in high-profile cases that the generalized reasons why investigatory secrecy may be important to the functioning of the system as a whole are sufficient to kill a story that otherwise seems newsworthy. Thus, although I throw this suggested topic out in the interest of completeness, consideration of the general public policy concerns implicated by disclosure of sensitive investigative data—even grand jury material—is not a topic over

\textsuperscript{146} See Branzburg v. Hayes, 408 U.S. 665, 667 (1972) (plurality opinion); \textit{supra} note 138.

\textsuperscript{147} \textit{Fed. R. Crim. P. 6(e)(2)} (stating that "[n]o obligation of secrecy may be imposed on any person except in accordance with this rule"); \textit{see also} United States v. Jeter, 775 F.2d 670, 675 (6th Cir. 1985) (stating that "[b]y its own terms, . . . Rule 6(e) applies . . . only to individuals who are privy to the information contained in a sealed document by virtue of their positions in the criminal justice system."); \textit{(quoting Worrell Newspapers of Ind., Inc. v. Westhafer, 739 F.2d 1219, 1223 (7th Cir. 1984)); Fund for Constitutional Gov't v. Nat'l Archives & Records Serv., 656 F.2d 856, 870 n.33 (D.C. Cir. 1981) (stating that "Rule 6(e)'s prohibition on disclosure applies only to individuals who have had access to that information by virtue of their relationship to the grand jury investigation or under another provision of the rule"); In re Polypropylene Carpet Antitrust Litig., 181 F.R.D. 680, 693 (N.D. Ga. 1998) (noting that none of the cases cited by the parties "holds that a private party—whether a newspaper reporter, an attorney, or a disinterested citizen—is obliged under the literal terms of Rule 6(e)(2) to refrain from releasing information when that party, through no affirmative act of his own, comes into possession of grand jury materials").
which reporters would spend much time struggling and thus is not one upon which I will dwell further.

2. Consideration of the Results of the Leak-and-Spin Dynamic Witnessed in High-Profile Cases.—The second layer of inquiry deals more specifically with the particular dynamic discussed in Part II.A above, which raises at least two challenges for journalists that may be worthy of more prolonged discussion. The first challenge concerns how the parties’ efforts to use the press to achieve strategic advantage in high-profile (particularly politically sensitive) cases affects journalists’ pursuit of their basic task—to seek the facts and credibly report them. The question is how this unattributable leaking and spinning affects both reporters’ ability to accurately report matters of vital public interest and the trust invested in reporters by their readers. The second challenge concerns how journalists should, in slogging through the swamp of spin, behave when they have become, in essence, the heart of the story. What responsibilities do reporters and news organizations have to their public when they, as receivers and purveyors of leaks, become central to a dynamic that has important ramifications for the fair and effective administration of criminal justice—both in systemic terms and in individual cases?

Journalists might acknowledge the above-described dynamic and respond, “so what?” They would no doubt assert that despite the machinations of politicians, lawyers, or investigatory targets, the press’s fundamental obligation remains constant—to report the news. The coverage of the Lewinsky grand jury investigation may have set new (and I hope final) records for the extent to which reporters relied upon unnamed sources.148 Decisions to report news that con-

148. See, e.g., Kurtz, supra note 137, at D1 (discussing the proliferation of leaks that has coincided with the Lewinsky scandal, stating that “the sheer velocity of the Lewinsky saga makes it hard to follow the anonymous action without a scorecard”). *Washington Post* reporter Howard Kurtz again touched on this phenomenon, reporting that:

[what’s remarkable, for a secret grand jury investigation, is how quickly reporters are obtaining sensitive information about Lewinsky’s discussions with prosecutors. . . .

... But everyone seems to be talking without names attached. The *Washington Post* yesterday cited “sources close to the Lewinsky team” (along with “a lawyer familiar with her account”) in reporting that the former White House intern had spilled the alleged beans about a sexual relationship with Clinton and their discussions about keeping it secret. *USA Today* (“two people with knowledge of the deal”), the *New York Times* (“two lawyers familiar with her account”), the *Washington Times* (“lawyers close to the probe”) and other news organizations reported similar details.

cerns not only the substance of an unresolved criminal investigation, but also details of the most intimate sort, based on unnamed sources, have been justified on the ground that it was the only way to get the story. Members of the media, relying on such precedents as Watergate, contend with justification that the fact that this information is being leaked by persons who will not go on record cannot bar reporters from pursuing the facts and reporting them. Responsible reporters, the argument goes, recognize their sources' not-so-hidden agendas and respond accordingly. A good journalist will play the spinning sides off of each other, talk to a variety of sources, corroborate the facts leaked, and record the result. This is what reporters would say they always do—regardless of the subject-matter under consideration.

Further, one could argue that as long as the information is accurate the press should not care whose ox is being gored by its release. If the defense is leaking for damage control or for more nefarious purposes, it is of little moment as long as the story is true. Similarly,

The furious pace of the coverage of alleged sexual misconduct in the White House has all but shattered traditional media standards and opened the floodgates to a torrent of thinly sourced allegations and unrestrained speculation. . . .

That is the view of some media critics, academics and journalists, such as James Fallows, editor of U.S. News & World Report, who argued that much of the reporting has "gotten out of control."

Kurtz, supra note 126, at E1.

149. See, e.g., Kurtz, supra note 143, at B1. Post reporter Howard Kurtz noted:

Those who defend leaks (which is to say, most journalists) point to their value in ferreting out malfeasance: the Pentagon Papers, Watergate, and so on. Unless reporters are free to vacuum up leads from whistle-blowers, disgruntled officials, police sources and so on, much important information would never become public.

Id.; see also Robert G. Kaiser, A Word to Post Readers; More About Our Sources and Methods, Wash. Post, Mar. 15, 1998, at C1 (acknowledging that readers and many journalists are "infuriated by anonymous sourcing," but stating that "we also think our readers should know that sometimes granting anonymity to sources is the only way to acquire publishable information on matters of interest and importance to them. So, if we have confidence in our information, we will print it.").

150. See, e.g., Howard Kurtz, The Sources of the Leaks; Anonymous Tipsters Duel It Out in the Newspapers, Wash. Post, Feb. 7, 1998, at B6 (quoting Michael Oreskes, the New York Times' Washington bureau chief as stating that "whenever you use unidentified sources, there is an even higher threshold than when you name your sources to be certain you've checked the information and you're certain you're not being used, and we do it").

151. See, e.g., id. (quoting Michael Oreskes as stating, when asked about differences between the Times account and the Post's account of the same story, "We called the White House early in the day and gave them plenty of time to react and we published every word of that reaction."); Kurtz, supra note 143, at B1 (stating that "[m]ost prosecutors don't simply call reporters and hand them neatly packaged evidence. In the real world, journalists collect bits and pieces and then seek guidance or confirmation from those running an investigation.").
whether prosecutors choose to share nonpublic facts to counter misinformation or to taint the jury pool, what matters is that the public gets the information it needs. Indeed, once the credibility of the information is established, the only reason that the leaker’s motivation is relevant is if it turns out to be independently newsworthy—for example, where (as the opposing camp inevitably charges) the leak is designed to mislead the public or undermine its confidence in the good faith of the Government’s or defense’s efforts.

Finally, one could point to the degree to which the stories that relied on unnamed sources proved accurate to justify reporters’ decisions to report what and as they did.152 Does the fact that much (although by no means all) of the information reported proved true—the existence of a semen-stained dress, the cigar story, the phone sex—demonstrate that no further soul-searching is in order?153 Does this establish that the press did its job and need have no further concern about its role in the scandal or the effect of its choices on the administration of criminal justice?

I think these are substantial questions because the ultimate accuracy of the facts derived from unnamed sources is not the only consideration here. Given the public controversy surrounding how those facts were obtained, and the potential consequences of that controversy, the sourcing of the stories had an importance separate from the facts reported.

There are two principal reasons why a continuing discussion of reporters’ sourcing decisions in the Lewinsky scandal is worthwhile. First, being vindicated in hindsight is all well and good, but many reporters may have done lasting damage to their credibility by relying so extensively on unnamed sources while the investigation was ongoing. To put it bluntly: readers noticed and were perturbed.154 Judging from what I read, many members of the public (and some members of

152. See Howard Kurtz, Reporters, Questioning Themselves, WASH. POST, Dec. 21, 1998, at C1 (stating that “[s]ome journalists view the impeachment vote as some sort of validation” and quoting Newsweek’s managing editor, Ann McDaniel, as stating “[w]hereas we’ve been criticized for coverage of the facts, virtually all of that proved to be true.”).

153. For a critique of the press’s performance in the scandal, see Steven Brill, Pressgate, in BRILL’S CONTENT, Parts 1-6 (July/Aug. 1998). For objections to Mr. Brill’s analysis, see, for example, Letters from Susan Schmidt, Reporter, the Washington Post, and Kenneth W. Starr, Independent Counsel, to Steven Brill, Editor, Brill’s Content, reprinted in BRILL’S CONTENT (July/Aug. 1998).

154. See, e.g., Kaiser, supra note 149, at C1 (acknowledging that “many readers are infuriated by anonymous sourcing”); Geneva Overholser, Editorial, How About Some Restraint?, WASH. POST, Feb. 8, 1998, at C6 (discussing readers’ concerns and noting that “[t]he Lewinsky story calls for particular care first because of the sourcing—thin at the onset and, as the sources grew more numerous, very problematic”).
The press thought, at the time, that this was shoddy journalism, and after-the-fact vindication may not completely erase the taint. The *Washington Post* responded to its readership's complaints about the overuse of anonymous sources in reporting on the Lewinsky investigation by saying, basically: "We are pros. Trust us." The *Post* asserted that "[w]e know we will be accountable for our accuracy. We hope that readers will judge *The Post* by its reliability. Nothing is more important to us than our credibility." But are the *Post* and the press in general truly accountable in these circumstances?

Because of the exceptional circumstances of this case—the publication of the grand jury transcripts, the disclosure of the Starr referral, and the congressional impeachment proceedings—the public was able to evaluate the press's accuracy in recounting the facts leaked. What is worth remembering, however, is that these media practices were ongoing long before it became clear that a full account would be forthcoming. Real-time accountability, then, was not a foregone conclusion. If we are concerned here with the lessons of this scandal and its legacy, one may wonder whether we will be so "lucky" in the future and whether reporters should reconsider their practices in the face of a future in which such accountability may not be so promptly or extensively available—and thus the damage done to public trust may be more lasting.

Further, the "accountability" made possible by the public record is confined to the facts, not the sourcing, in these articles. And those who followed the press coverage closely have reason to question whether some of the attributions used were entirely accurate or provided readers with a fair basis for evaluating the information provided. For example, at least one associate of the OIC has suggested that reporters used attributions that tended to imply that the facts came

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> If you listen carefully, you can hear the sound of journalists slapping themselves on the back. After all, 99.5 percent of what they reported about President Clinton and Monica Lewinsky was right there in Ken Starr's report. Vindication city! . . .

> Well, not so fast. True, the media bloodhounds deserve credit for staying on the trail while White House aides scolded them for being out of control. But a flimsy, thinly sourced story is still shoddy journalism—even if the reporter lucks out and the charge turns out to be accurate. Good reporting is about nailing down facts, not publishing secondhand suspicions.

*Id.*

156. See, e.g., Kaiser, *supra* note 149, at C1 (responding to reader criticism of the *Post*’s extensive use of unidentified sources).

157. *Id.*
from anonymous sources within or associated with the OIC when they actually came from persons unaffiliated with that office.\footnote{See Rotunda, supra note 4, at 875-77, 882-87 (discussing examples of leaks attributed to sources within or associated with the OIC that actually came from other sources).} Certainly the \textit{Times} article at the heart of the Bakaly case—one of the few instances in which readers had the opportunity to examine sourcing decisions—creates serious issues regarding the potentially misleading nature of unnamed attributions.

Mr. Bakaly concedes that he faxed to Mr. Van Natta a redacted, internal OIC memorandum often referred to as the “Bates Memorandum.”\footnote{Bakaly’s Pre-Trial Brief, supra note 18, at 7-8.} The Bates Memorandum consisted of quotations from, and descriptions of, debates (all derived from public sources) among the Watergate prosecutors as to whether and when to indict President Nixon.\footnote{Id.} Mr. Van Natta attributed at least three of these quotations to “associates of Mr. Starr,”\footnote{Van Natta, supra note 6, at 1.} making it appear that the quotations described an ongoing discussion within the OIC, rather than a debate that happened long before in the Watergate prosecutors’ office.\footnote{See Bakaly’s Pre-Trial Brief, supra note 18, at 8. The historical excerpts (underscored) were contained in the following excerpts from the \textit{Times} piece: (1) Those in favor [of indicting a sitting President] have cited a view held by some prosecutors in Mr. Jaworski’s office that “a failure to indict the incumbent President, in the face of evidence of his criminal activity, would seriously impair the integrity of the criminal process,” an associate of Mr. Starr said; (2) Another argument in favor is that “prosecutors should pay no heed to considerations of national interest,” an associate of Mr. Starr said. As a prosecutor in Mr. Jaworski’s office said in 1974: “We have a duty to act without regard for external factors. It is not for us to weigh the political effects;” (3) But several of Mr. Starr’s prosecutors have also said that the Nixon-era prosecutors considered both the risk that the Supreme Court would ultimately strike down an indictment and the impact on the nation. Van Natta, supra note 6, at 1 (underscore added); see also Bakaly’s Pre-Trial Brief, supra note 18, at 9 (citing the above mentioned passages and noting those portions taken from the Bates Memorandum).} Perhaps I am alone in this, but such an attribution strikes me as obviously incorrect. Perhaps Mr. Van Natta had a knowledgeable source associated with the OIC who confirmed that such statements were being echoed (\textit{verbatim}) in debates then being held in Mr. Starr’s office; unfortunately, we are unlikely to ever know whether such a source existed.

The same \textit{Times} piece points up another problem, which (I am told) arises with some frequency when reporters accept off-the-record information, particularly from institutional sources. The \textit{Times} article stated that Mr. Bakaly “declined to discuss the matter” and then
quoted Mr. Bakaly as stating that “[w]e will not discuss the plans of this office or the plans of the grand jury in any way, shape or form.”\(^{163}\) This seems to the uninitiated (me) as inaccurate—regardless of whether one adopts the Government’s view of the Bakaly case or Mr. Bakaly’s own position—because Mr. Bakaly did in fact “discuss the matter” extensively with Mr. Van Natta.

I understand that reporters covering institutions may confront a dilemma when their institutional sources give them on-the-record responses of “no comment” while providing them newsworthy material off-the-record or on background. Reporters in such a situation may feel obliged to report the official “no comment,” and will further use the other information and attribute it to anonymous “sources.” Viewed from the perspective of the reader, this is misleading; the story implies that the anonymous “source” is separate and apart from the institutional actor purportedly refusing comment. However, the commitment to letting both sides be heard while providing all relevant information puts reporters in a real bind. They may feel that they cannot, in a straightforward way, provide the necessary news and pertinent sourcing without compromising the anonymity promised the source (and their relationship with that source).

Whatever one’s resolution of this dilemma in the normal case, the Times piece exacerbated the problem by both including quotes (attributed to an “associate” of Mr. Starr) from the very source who purportedly “declined to comment” and then quoting that source to state, “[w]e will not discuss the plans of this office or the plans of the grand jury in any way, shape or form.”\(^{164}\) Although, if you accept Mr. Bakaly’s version of his interaction with Mr. Van Natta, the latter statement is probably literally true, it strikes me as even more misleading than the “declined to discuss the matter” given the context. Its emphatic tone and wide-ranging scope implies that the office had imposed a complete blackout on information relating to the article, when in fact Mr. Bakaly had spoken to Mr. Van Natta at length about the piece and had, at the least, provided him the memorandum from which Mr. Van Natta drew quotations that he attributed to the office.

The opportunity to examine the sourcing decisions in the Times piece is unusual. Although it is also hardly reassuring, I am willing to accept that sourcing decisions are generally more straightforward. The point is, however, that questions about the accuracy of descriptions of anonymous sources have been raised, and readers will never

\(^{163}\) Van Natta, supra note 6, at 1.

\(^{164}\) Id.
know whether such attributions were fair. The brutal pressures of the twenty-four-hour news cycle and the superheated competition to report on the unfolding mega-story may explain some mistakes or misjudgments. It may also be, however, that some misleading sourcing flowed from conscious decisions made to enhance the credibility of reports, to shield sources or reporters, to curry favor with important sources of information, or to achieve other ends. Certainly the reader is not generally privy to how individual reporters or news organizations resolve the dilemma discussed above with respect to the simultaneous provision of information and on-the-record refusals to comment. What we do know is that the suggestion that the characterization or treatment of the leaking sources may not have been entirely honest or straightforward creates large credibility issues for the press.

Another credibility issue is raised when the recipient of the leaked information subsequently reports on responses to the leak—particularly where a reporter documents accusations as to the sources of leaks when she knows those accusations to be untrue. A recent controversy illustrates the point. On the day that Vice President Al Gore was scheduled to speak to the Democratic National Convention, Pete Yost of the Associated Press reported that, according to "legal sources... who are outside [Independent Counsel Robert] Ray's office," Mr. Ray had empaneled a new grand jury to hear evidence against President Clinton in the Monica Lewinsky scandal. 165 Mr. Yost later reported on the outraged reactions of Democrats who believed that Republicans intent on hurting Vice President Gore were the source of the leak. 166 Shortly thereafter, Judge Richard Cudahy admitted that he had inadvertently divulged the grand jury secret to a reporter (presumably Mr. Yost) during a press inquiry (although what prompted the inquiry is still subject to examination). 167 Did Mr. Yost, as one member of the press has charged, 168 act unethically? Mr. Yost "kept a poker face, reported the facts, and protected his sources" 169—all to the good. Mr. Yost also made clear that his sources were not within Mr. Ray's office, so readers were in a position to judge for themselves charges that the leaks came from Mr. Ray. But what about charges that the leaks came simply from "Republicans"? As it appears,

169. Id.
but is not yet completely established because we do not know if Mr. Yost was tipped to the story and Judge Cudahy merely confirmed it, if the Democrats' speculations about Republican leaking were false, and Mr. Yost knew that, was he justified in reporting them? What inferences might careful readers be warranted in drawing from the fact that Mr. Yost, who presumably knows the source of his own story, is reporting such accusations? Would a reader be correct in assuming that Mr. Yost would not print information he (apparently) knew was false? This assumption would appear to be incorrect, but absent Judge Cudahy's unusual public concession of responsibility, the public would not know that.

Given the spinning dynamic discussed above, one would imagine that reporters, and thus readers, are not infrequently faced with such questions. Asking reporters to recuse themselves from follow-up stories regarding their own sources may be impractical and an illusory solution in view of their news organizations' probable knowledge of the sources. Absent such recusals, however, one might argue that the reporters invite a public backlash. While readers may understand reporters' unwillingness to disclose their sources, they may come to conclude that the media is acting simply as a conduit for leaks and spin, with predictable consequences for the credibility of news reports.

There is a second reason—apart from the accountability and credibility concerns discussed above—that I believe sourcing has continuing importance even where disclosures by anonymous sources are later proved factually true. Where the parties are leaking, spinning, and attacking each other for the same (i.e., when the dynamic described in Part II.A is in full swing), it is no longer true that the sourcing of an article matters "only" in providing readers some basis for judging the value or credibility of the information offered and thus becomes irrelevant once the information is proved accurate. In this context, public battle is joined over "leaking"—over the sourcing, as well as the facts. The public, one would think, had a right to know whether the defense camp's bitter attacks on Mr. Starr's alleged abuse of his office through illegal leaking were correct, in whole, in part, or not at all. Conversely, the public had an interest in knowing whether these charges by the President's defenders were, as members of Mr. Starr's office implied, attempts to divert and even obstruct a legitimate investigation, or whether they represented the honest outrage of dedicated defenders. The failure of the press to get to the bottom of these issues at the time, while continually airing the cycle of lawyerly spinning and leaking, had important consequences.
Leaks stories certainly consume a great deal of public attention. At the very least, they are (and, some would argue, are designed to be) a distraction. Questions of “who told what to whom and when” divert scarce resources to largely futile leak-hunts. If one were to tote up the amount of time, money, and attention that investigators, lawyers, judges, court personnel, executive branch officials, and others devoted to the pursuit, discussion, litigation, and adjudication of issues relating to leaks in the Lewinsky matter, I am sure that the totals would be a disgrace—measured at least in terms of what other criminal justice ends could have been served with those resources.

When attributions are not entirely forthright—for example, suggesting that the source of the “leaked” information has a closer nexus to the prosecutor than is true—there also exists the possibility that leak investigators and courts asked to adjudicate contempt sanctions against the government will be misled. Even if sanctions are not ultimately imposed on an innocent party, the misleading quality of attributions may result in litigation that damages innocent persons and diverts the parties from the real business at hand—the investigation and defense of alleged criminal wrongdoing.

The constant attacks and counter-attacks by counsel for both sides also have a very real effect on the lawyering in these cases. The charges are no doubt demoralizing to government lawyers, and may well deter professional personnel from joining investigations such as Mr. Starr’s. Further, many tactical decisions regarding how an investigation should be conducted—and, on the defense side, what approach one should take in responding to it—are influenced to a large

170. Eds.—The district court, in acquitting Mr. Bakaly, felt compelled to note that it found “deeply disturbing” the evidence that Mr. Van Natta attributed to Mr. Starr’s staff quotes that actually came from the Bates Memorandum, which cited the quoted statements as coming from Watergate-era sources. In re Grand Jury Proceedings, 117 F. Supp. 2d 6, 25 n.3 (D.D.C. 2000). The court explained:

Mr. Bakaly has made a persuasive showing that historical debates and quotes were lifted verbatim out of the Bates Memorandum and falsely described as present day debates within the OIC. The misimpression that this journalistic sleight of hand produced is quite troubling for what it shows about the reliability of anonymously attributed information. More important for the purpose of the present inquiry, the fraudulent attribution of historical information to present day members of the OIC could have had an impact on the Court’s determination of the second prong of [the test for determining whether a prima facie showing has been made of a violation of Federal Rule of Criminal Procedure 6(e)]. At the prima facie stage of [that] inquiry, the Court often has no evidence that goes beyond the attribution on the face of the article. The use of the redacted Bates Memorandum in the Times article demonstrates how easily the parties and a court can be led astray by an inaccurate and misleading attribution.

Id.
extent by the trust one believes one may repose in the integrity and fairness of one's opposing number. The polarizing atmosphere of mutual recrimination and distrust will therefore necessarily change the parties' decision-making—perhaps in ways that do not always serve either the government's or the investigatory target's best interests.

Finally, the atmosphere of attacks may well, if things get as out of control as they did during the Clinton scandals, make the public throw up its hands with both sides. Stated in the terms that the combatants would use in the heat of the contest, the battle, at its heart, is about whether the administration of justice is being subverted by a political partisan masquerading as a prosecutor, or whether a president charged with administering justice is attempting through scurrilous obfuscation to obstruct that administration. Because of the perceived special obligations of prosecutors, it would seem that the attack campaigns do greater damage to the credibility of the government investigation\(^{171}\) than to the target of the investigation, who may be expected to publicly resist imputations of wrongdoing. The evisceration of public confidence in the fair conduct of an investigation may extend far beyond the independent counsel at issue, with predictably adverse consequences for public confidence in prosecutors generally. In any case, to the extent that neither side is vindicated, the result is public disgust with a system in which no one seems interested in arriving at the truth, or a just result, so much as in playing public relations games and scoring points.

What, then, of the public's "right to know" in this situation, where what is at issue is, among other things, the efficient administration of justice, the perceived fairness of the investigation, and, at least in some circles, the credibility of the press? I, and I assume most members of the public, fully understand and support the rationale underlying individual reporters' protection of their confidential sources. Journalists' interest in maintaining the confidentiality of their sources is both obvious and weighty. Accepting, then, reporters' absolute obli-

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\(^{171}\) See, e.g., Editorial, Legal Ethics and Spin, Wash. Post, May 24, 2000, at A36 (stating that "[t]he allegations of prosecutorial misconduct did . . . divert attention from Mr. Clinton's own behavior and greatly weakened public confidence in Mr. Starr's investigation"); Editorial, Mr. Starr and Leaks, Wash. Post, Sept. 15, 1999, at A24 (opining that "Mr. Starr was attacked throughout the Lewinsky episode in a coordinated smear campaign that accused him publicly of a variety of types of misconduct. These accusations seriously undermined his investigation and distracted people from sober discussion either of the president's conduct or of Mr. Starr's probe."); id. ("The allegations [of misconduct against Mr. Starr] took a great deal of time to investigate and sort out. Now, one by one, they are proving meritless, but only long after they have done their job of eroding confidence in his investigation.")
igation to preserve the confidentiality of sources to which they have promised anonymity, is there anything that reporters can or should do to address the above concerns? Should journalists consider the actual consequences of their choices when making decisions about whether to accept information on a condition of anonymity, whether to go with a story based on unidentified sources, or whether to use an attribution that may protect the source, but is less than forthright?

I wonder, in particular, whether the rationale for a reporter's protection of her sources should mean that the entire press corps is disabled from pursuing that which is a story of great social import. Should all leakers get a pass from all reporters? And, if so, on what theory? That if reporters were to successfully go after other reporters' sources, leakers will be deterred? Presumably, reporters do not wish to kill the fatted calf—singly or collectively—by going after leakers and reporting on them. 172 Yet in declining these stories, journalists are not only declining to inform the public on matters of importance, but they are also furthering their own interests by ensuring that both leaking and reports about leaking (but not about the actual identity of leakers) continue.

Add, then, to the list of ironies that attend the Clinton scandals the fact that the media, in covering matters like the Lewinsky investigation, are subject to some of the tensions that inhere in the difficulties of finding a credible and effective way to investigate alleged wrongdoing at the highest reaches of the executive branch. The press, like the attorney general, labors under a fairly hefty appearance of a conflict of interest. Reporters' conflict lies in their attempt (or failure) to report on the leaks that are their bread and butter. 175 And the press in this situation seems subject to the same trade-off between independence and accountability that independent counsel experience. Reporters' independence and effectiveness in ferreting out news—by relying in part on persons they know will leak and lie about it and by protecting those persons singly and as a group—is in conflict with the accountability of the press to the public. The press's credibil-

172. See, e.g., Kurtz, supra note 143, at B1 (asking “[w]hy . . . journalists raise all sorts of questions about everyone else’s behavior but give themselves a pass when it comes to obtaining illicit material” and explaining that “[o]n one level, the answer is obvious: Journalists live off leaks. They are reluctant to bite the hands that keep feeding them. Many would just as soon not worry about how the information got to them if it is solid and sufficiently juicy.”).

173. See Editorial, Independent Counsel Implosion, WASH. POST, March 13, 1999, at A20 (opining that “[t]he subject of leaks is one on which we cannot comment dispassionately. Soliciting leaks, after all, is part of what a vibrant free press does. And it would be rather hypocritical for an organization that thrives on such disclosures also to denounce them.”).
ity—which would seem to me at the heart of its mission—depends to some extent on how it addresses these tensions in future cases.

One reporter has assured me that many journalists would emphatically disagree with my observations. Their view would be that reporters simply are not in the business of making the government, or the criminal justice system, function effectively or efficiently. If they report well on matters of public concern, that is the extent of their obligation. The fact that their reporting may have a pernicious effect, or may feed an unfortunate dynamic such as that suggested above, is not their concern. Further, their promises to protect their sources are ethical or even moral commitments and are not simply the result of a pragmatic evaluation of the likely deterrent effect that disclosure might have on future sources. Thus, the practical consequences of going after other reporters’ sources is just not something that they would worry about. Journalists do not pursue these stories, I am assured, because they believe that it is not an appropriate mission for reporters to report on how other reporters get stories from sources. Just as it is none of the government’s business who the sources are, it is none of the public’s business either. Stories about sources and their spinning, this view holds, simply aren’t newsworthy.

At bottom, my source and I disagree over whether there is a legitimate public “right to know” in this context. I would submit that even if individual reporters believe that such stories are not news the majority of news organizations do. Given the extensive and front-page coverage accorded to reports of leaks, leaks investigations, and the accusations of the opposing sides regarding the propriety of those leaks, as well as the consequences of this coverage described above, I believe there is indeed a manifest public interest in how stories are obtained and in the sourcing of the stories.

3. Consideration of the Impact on Governmental Decisions About Whether Alleged Leakers Should Be Sanctioned.—Thus far I have explored more general questions regarding the interaction between the press and the administration of justice in high-profile cases. Let us return to Mr. Bakaly and some of the more specific questions raised by his case. Many editorial writers have condemned the decision to refer or proceed with the Bakaly prosecution.174 What these writers have not

174. Editorials in the Washington Post and the Washington Times provide adequate examples. The Post editorialized:

We don’t condone anyone’s lying to a court. As we stressed throughout the Clinton-Lewinsky scandal, one cannot waive the duty of candor to the judicial system when it is inconvenient. At the same time, it would be truly absurd for Mr.
acknowledged is that the above-described dynamic—in which the press plays a defining role—made the Bakaly prosecution virtually inevitable.

We do not yet know what motivated Mr. Starr to make the Bakaly referral to the Department of Justice. Mr. Starr, who hired Mr. Bakaly to talk to the press, could not have been surprised that he had done so. Mr. Starr would no doubt state that it was the lies, not the leaks, that did in Mr. Bakaly. One may query whether, even assuming that falsehoods were uttered, they were so egregious that referral for criminal prosecution and all that entails was the appropriate response. As discussed above, this case, even after it was fully investigated and formally presented at trial, was a very thin one. And Mr. Starr, by virtue of his position, was no doubt aware of the enormous personal trauma and cost that inevitably befall the subject of a criminal referral. What moved Mr. Starr to throw a colleague to the DOJ wolves on such a foundation?175

Bakaly—alone among the figures in the Clinton-Lewinsky ordeal—to be found criminally culpable for his behavior. The evidence that he lied is not overpowering. And even were it stronger, the bizarre situation in which he found himself presents strongly mitigating circumstances. Mr. Bakaly surely should have been more candid when asked about his role. But he has already lost his job over his failure to do so. That is a heavier price than President Clinton has paid for far more egregious deceptions of the federal courts.

See, e.g., Editorial, Mr. Bakaly's Trial, WASH. POST, July 20, 2000, at A24. An editorial in the Times similarly argued:

[It]’s hard to summon the requisite outrage to clamor for putting [Mr. Bakaly] behind bars. . . .

. . . .

. . . . Does the phrase “frivolous case” begin to form in the cranial cavity? As even Julian Epstein, the Democratic counsel on the House Judiciary Committee and one of Mr. Starr’s harshest critics, put it, this is a “terrible” case, a “semantical game of gotcha. There is no real underlying offense here. . . .”

Editorial, ‘No Underlying Offense,’ WASH. TIMES, July 12, 2000, at A22.

175. At the time of the referral, Mr. Starr’s office was “battling [with the DOJ] over how [the Department would] conduct a separate disciplinary inquiry into the independent counsel’s alleged misconduct in the investigation that led to Clinton’s impeachment.” Roberto Suro, Starr Aide Resigns, May Face Prosecution; Justice Dept. Gets Referral in Leaks Probe, WASH. POST, Mar. 12, 1999, at A1. The level of animosity between the two offices appeared remarkably high, underscoring the extraordinary nature of Mr. Starr’s referral of his former colleague for DOJ investigation. See id. (reporting that “[t]he already tense dealings between Starr and the Justice Department reached a new rhetorical pitch yesterday as Deputy Attorney General Eric H. Holder Jr. angrily dismissed as ‘crap’ accusations by one of Starr’s former deputies that disciplinary action against Starr was designed to disrupt Starr’s investigation of Clinton.” And that this response was provoked by Robert J. Bittman, a former member of Starr’s team, who publicly “accused Justice officials of leaking information damaging to Starr and said, ‘obviously someone at the department has it in for the Office of Independent Counsel’”).
It seems to me that the best light one could put on the referral is that the OIC had an underdeveloped record and felt enormous pressure to do something—and fast. Because the allegations of OIC leaks had played so prominently in the press, and because Mr. Starr had issued such strong public denials of improper leaking, the office probably felt that it had no choice but to refer, and quickly. Mr. Starr’s referral is not necessarily obviously craven—Mr. Starr would no doubt argue that the referral was necessary to guard the credibility of the OIC and its eventual result, not to avoid personal criticism. The theory may well have been that the press would report claims that the withdrawal of Mr. Bakaly’s declaration and a portion of Mr. Starr’s brief, in the absence of a referral, demonstrated that the OIC condoned leaking. No doubt editorials would point out that Mr. Starr, by failing to pursue criminal action against Mr. Bakaly, objected to some lies to judges—but only those made by the President and not by Mr. Starr’s own staff. All of which would have been entirely appropriate commentary, but for, perhaps, the facts.

Was the media responsible for Mr. Bakaly’s predicament? No. Obviously there were a number of factors at work. But would this case ever have been brought if the controversy over leaks had not been so publicly and persistently reported with no resolution of the identity of the leakers? In other words, if the press had investigated the leaks as assiduously as it did the existence of Ms. Lewinsky’s dress, would Mr. Bakaly be on trial? That we will never know the answer to this question does not make it less worthy of consideration. It certainly points up what seems to me evident—that the case against Mr. Bakaly ultimately was about leaking, not lying.

176. Indeed, in a breathtaking display of chutzpah, on February 2, 1999, the New York Times published an editorial excoriating Mr. Starr for debating criminal prosecution of the President “at a time when the Senate deserves a calm decision-making atmosphere” and calling upon the Senate to “slap Mr. Starr back into line.” Editorial, Ken Starr’s Meddling, N.Y. Times, Feb. 2, 1999, at A18. The Times argued:

Mr. Starr is already regarded by his critics as an obsessive personality. Now he seems determined to write himself into the history books as a narcissistic legal crank. Once the Senate started the second Presidential impeachment trial in American history, that was Mr. Starr’s cue not only to shut up but to stop any activity by his office that would direct attention away from the Senate or reduce its bargaining room.

Id. Instead of acknowledging that the condemned distraction flowed not from Mr. Starr’s deliberative activity, but rather from the reporting of it on the front page of the New York Times, the Times addressed its own role simply by stating that “[t]he issue of who leaked news of Mr. Starr’s indictment research to The New York Times is a phony one. What is needed here is not an investigation of journalistic sources, but attention to the substance of Mr. Starr’s legal mischief. It seems designed to disrupt these solemn deliberations into Presidential misconduct of a serious if undeniably sordid kind.” Id.
4. Consideration of the Impact on Individuals Threatened with Jail Time.—The final layer of considerations raised by Mr. Bakaly's case concerns the very specific question of reporters' interaction with—and perhaps responsibilities to—their leaking sources (or those alleged to be the leaking sources). Journalists might well say that they cannot be taxed with worrying about the issues discussed above—the general systemic consequences of leaks on the administration of justice, the results of the leak-and-spin dynamic witnessed in high-profile cases, or governmental decisions about whether alleged leakers should be sanctioned. Yet they may be troubled by the effects that a particular decision to obtain and publish information will have on individuals—especially where a source or a non-source is threatened with jail time as a result of a reporter's judgment.

Those subject to Rule 6(e) and bound by professional and ethical obligations may not share much investigatory information. Yet reporters may, in most situations, freely obtain and publish it. Absent breaking and entering or other obviously illegal means of access, reporters may quite legally receive internal investigative information that is not grand jury material. Further, as noted, Rule 6(e) does not preclude the recipients of grand jury information from using it. Although individuals not affiliated with the press have been pursued criminally under a variety of theories, including obstruction of justice, for improperly sharing or soliciting the sharing of grand jury materials, I have been unable to find a reported case in which reporters have been pursued criminally for inducing persons covered by Rule

177. See Branzburg v. Hayes, 408 U.S. 665, 691 (1972) (plurality opinion) (stating that "[i]t would be frivolous to assert—and no one does in these cases—that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws" and that "[a]lthough stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news.").

178. See supra note 147 and accompanying text.

179. See, e.g., United States v. Brenson, 104 F.3d 1267, 1272 (11th Cir. 1997) (affirming defendant grand juror's conviction for conspiracy and obstruction of justice based on his disclosure of grand jury information to the investigation's target); United States v. Saget, 991 F.2d 702, 718 (11th Cir. 1993) (affirming convictions of two investigatory targets for obstruction of justice where the targets, when approached by a grand juror, "actively solicited information relating to the grand jury proceedings"); United States v. Jeter, 775 F.2d 670, 683 (6th Cir. 1985) (affirming convictions for conspiracy, obstruction of justice, and theft of government property of a defendant (who was not bound by Rule 6(e)(2)) for illicitly obtaining and distributing grand jury information); United States v. Howard, 569 F.2d 1331, 1337 (5th Cir. 1978) (affirming the convictions of persons (apparently only one of whom was a court reporter covered by Rule 6(e)(2)) for obstruction based on a scheme to sell grand jury transcripts to targets of an investigation); United States v. Friedman, 445 F.2d 1076, 1078 (9th Cir. 1971) (affirming convictions of defendants (some of whom were not constrained by Rule 6(e)(2)) for conspiracy, contempt, receiving and concealing sto-
6(e) to disclose materials covered by that rule. Why may reporters do without fear that which others may not?

Although I have found no definitive explanation, one could posit many. First Amendment interests spring immediately to mind. Also, as a legal matter, prosecutors will likely conclude that, whereas investigatory targets' "need to know" can be deemed a "corrupt" attempt to obstruct justice if it causes an invasion of grand jury secrecy, the public's "need to know" means that reporters do not have a "corrupt" intent in following a story into the grand jury room. It may also be that participants in the criminal justice system should be charged with a special obligation to adhere to its rules and further its interests. Congress and individual prosecutors may be reluctant to expend resources pursuing leaks beyond those persons chargeable with this special obligation. They may also be reluctant to antagonize a powerful press. Whatever the rationale, the fact remains that while we condemn those who leak, we reward those who scoop.

Should the privilege that reporters enjoy to induce—with probable impunity—others to breach their ethical, professional, or legal obligations create a responsibility to those others? When a reporter can clear up allegations that the source lied in the course of a leaks investigation, what obligation, if any, does the reporter or the news organization have to the source or to the justice system generally? In particular, the "reporter's privilege" is said to be held by the reporter, not the source.\textsuperscript{180} Although this appears to be the law, does this make sense? If the source waives the protection of the privilege, what legitimate reason(s) may the press posit for continued silence?

Many would no doubt argue that leakers leak for their own purposes. They seek to use the press at their peril, and the press owes them nothing but accuracy and whatever protection the "reporter's privilege" offers in the circumstances. Although reporters offer their sources anonymity, they are not responsible for their sources' lies—even if reporters may recognize that the two often go hand in hand. As a public policy matter, the "reporter's privilege" is founded on the

\textsuperscript{180} See Branzburg, 408 U.S. at 695 (stating that "the privilege claimed is that of the reporter, not the informant, and . . . if the authorities independently identify the informant, neither his own reluctance to testify nor the objection of the newsman would shield him from grand jury inquiry, whatever the impact on the flow of news or on his future usefulness as a secret source of information"); United States v. Cuthbertson, 630 F.2d 139, 147 (3d Cir. 1980) (finding that waivers obtained by the Government from its witnesses were not effective to remove the privilege because "[t]he privilege belongs to [the news organization], not the potential witnesses, and it may be waived only by its holder").
need to avoid deterring informants from providing information to the press181 and rendering the press an "investigative arm of the government."182 The privilege is not intended to protect leakers from the consequences of their actions. Even where a leaker wishes to waive the privilege, rather than to hide behind it, many reporters would argue that she should not have that prerogative. She entered into a deal with the reporter and should have understood that that deal included absolute protection of the source by the reporter—regardless of whether that protection is convenient to the source. Further, if the person seeking vindication is not a source, the reporter owes that person nothing. Finally, the press has an institutional interest in resisting source-initiated waivers. A reporter may piece a story together using multiple sources. If one source wishes to waive the privilege's protections to demonstrate that she was not the source of a given leak, it may imperil the anonymity of the other sources. Still and still, where an individual may go to prison because a reporter wishes to rely on the privilege, do these arguments sound empty?

Let us examine in particular one of the counts brought against Mr. Bakaly in which he was charged with lying about a statement he attributed to Mr. Van Natta. Specifically, the Government charged that Mr. Bakaly lied when he stated in his declaration that "‘Mr. Van Natta again assured me that he was “working on his sourcing” and that he intended to make it clear in his article that his sources were not within the OIC.’"183 In adjudicating whether this was a false statement, whose testimony—aside from Mr. Bakaly's own—could be more central than Mr. Van Natta's? The Times has apparently taken the position that it will not discuss the sources for the article.184 To my knowledge, Mr. Van Natta has not volunteered his view of the accuracy of this representation. In cataloguing the ironies of the Bakaly case, one should add the possibility that the information that could

181. See, e.g., Branzburg, 408 U.S. at 693 (recounting the argument that "[t]he available data indicate that some newsmen rely a great deal on confidential sources and that some informants are particularly sensitive to the threat of exposure and may be silenced if it is held by this Court that, ordinarily, newsmen must testify pursuant to subpoenas").

182. See, e.g., id. at 708-09 (Powell, J., concurring).

183. Amended Notice, supra note 41, ¶ 12(c), at 7 (quoting Bakaly Declaration, supra note 16, ¶ 11, at 4). As discussed supra note 46, the Government also charged that Mr. Bakaly's actions caused the following false statement to be included in the OIC brief: "‘Mr. Van Natta further told Mr. Bakaly that all his information came from sources “outside” the OIC.’" Id. ¶ 13, at 8 (quoting Opposition Brief, supra note 20, at 13). This count raises similar issues.

184. See Adam Clymer, Justice Dept. Details Its Case Against Former Starr Spokesman, N.Y. TIMES, July 11, 2000, at A16 ("Editors at the Times have said they do not and will not discuss the sources for the article.").
vindicate Mr. Bakaly lies in the hands of the press, and it is guarding the truth as zealously as any FOIA officer, grand juror, or Pentagon official. Just as those guardians do, the press presumably cites an overriding public interest in support of its silence—the important reasons for recognition of a "reporter's privilege." But just as the press is wont to do, it is appropriate to question whether this silence is merely convenient, and whether it is consonant with other values.

The fundamental question is this: what obligation, if any, do Mr. Van Natta and the Times have to Mr. Bakaly? As a preliminary matter, one could argue that the parties, if they deemed Mr. Van Natta's testimony sufficiently important, could have subpoenaed him and (absent Mr. Van Natta's willingness to be jailed for contempt) secured his testimony even over a claim of privilege. In particular, from an idealistic, but not very practical perspective, one could contend that the Government, which is supposed to be serving justice and not merely seeking a conviction, should have pursued Mr. Van Natta's testimony regardless of whether it would incriminate or exculpate Mr. Bakaly. Presumably the parties did not subpoena Mr. Van Natta because they did not know what he would say. Without the chance to debrief him in advance of his taking the stand, neither party was willing to ask him to try on the bloody glove at trial. It may also be that even if Mr. Bakaly's counsel felt fairly confident of what Mr. Van Natta's answer should have been, they were still unwilling to call him because of the possibilities that Mr. Van Natta or Mr. Bakaly honestly disagreed or one misremembered the conversation at issue. In short, sound lawyering precluded calling Mr. Van Natta to the stand without an opportunity to talk to him beforehand—an opportunity that apparently was not volunteered. Should it have been?

One may wish to break the question down further and ask if the existence of an obligation depends upon whether Mr. Bakaly is innocent or guilty of knowingly making a false statement. Let us begin with the assumption that Mr. Bakaly's statement regarding his conversation with Mr. Van Natta was false. Should the New York Times and Mr. Van Natta come forward to provide the Government with that information?

To ask the question is probably to answer it. In general, witnesses have no legal obligation to volunteer evidence. In addition, these

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185. "[A]greements to conceal information relevant to commission of crime have very little to recommend them from the standpoint of public policy." Bransburg, 408 U.S. at 696. However, the criminal provision used to address this public policy concern—misprison of a felony, see 18 U.S.C. § 4 (1994)—requires proof of more than a simple failure to volunteer relevant information. To prove misprison, the Government must demonstrate
witnesses have a weighty interest in not providing such evidence. Presumably in this circumstance, were the New York Times or Mr. Van Natta to volunteer their story, their public-spiritedness would impair their future effectiveness. That is, if sources were to understand that the press would stand as volunteer witnesses against them if they lie about leaking, they may well not leak in the first instance. In other words, it is very much in the press’s interest to avoid assisting the parties in arriving at the truth where the leaker is a liar.

What of the public interest here? The press would rightfully claim that it cannot effectively do the prosecutor’s job and its own. The public interest in a conviction must be vindicated by the Government and the Government alone so that the press can pursue the public interest in news-gathering and reporting.

Does the result differ in the more distressing circumstance that the person on trial is, in fact, telling the truth? Assume that Mr. Bakaly accurately recounted the conversation in question. Once again, the press may argue that it has no obligation to volunteer information and that the obligation to ensure a just result rests with the Government, not with the press. These assertions have a decidedly less appealing ring when an individual’s liberty is at stake.

Of course, the extent of a reporter’s ethical dilemma in this circumstance depends to some extent on the facts. For example, if Mr. Bakaly is accurately remembering the conversation at issue, the extent of Mr. Van Natta’s testimony on the subject could be brief; he could simply state that he did in fact say the things Mr. Bakaly attributed to him. The corresponding incursion on the principles underlying the “reporter’s privilege” would be limited. It would seem, then, that this is the strongest case for a volunteered exoneration because it is difficult to imagine how a reporter’s willingness to vindicate his source’s recollection of a specific conversation would create a disincentive for future leakers.

The consequences of a decision to permit an innocent source to waive the privilege may not always be so limited or containable. For that “(1) the principal committed and completed the felony alleged . . . ; (2) the defendant had full knowledge of that fact; (3) the defendant failed to notify the authorities; and (4) the defendant took an affirmative step to conceal the crime.” United States v. Ciambrone, 750 F.2d 1416, 1417 (9th Cir. 1985). “Mere silence, without some affirmative act, is insufficient evidence” of the crime of misprison of felony. Thus, a person who witnesses a crime does not violate 18 U.S.C. § 4 if he simply remains silent.” Id. at 1418 (citation omitted); see also United States v. Adams, 961 F.2d 505, 508-09 (5th Cir. 1992) (“[U]nder the misprison statute, the defendant must commit an affirmative act to prevent discovery of the earlier felony. ‘MERE failure to make known does not suffice.’” (alteration in original) (quoting United States v. Warters, 885 F.2d 1266, 1275 (5th Cir. 1989)).
example, suppose the issue was whether a defendant had lied to investigators in denying that he was the source of a particular leak. By volunteering to exonerate the falsely accused leaker, the reporter may well threaten her actual source—either by narrowing the list of potential candidates or by testifying (obviously under duress) to the name of the real leaker. Thus, by vindicating the defendant and serving justice, the reporter may, in individual cases, disserve the ultimate interests of her vocation. Similarly, suppose that the case concerned one alleged false statement in a leaks investigation and that the reporter, in fact, pieced the story together using a number of unnamed sources. It is conceivable that the reporter may be forced to discuss all of her sources in order to vindicate the one, thus more seriously impairing the credibility of future assurances of anonymity.

In evaluating these issues, the systemic consequences of individual decisions cannot be ignored. News organizations may well argue that they cannot take case-specific positions based on the innocence or guilt of the particular party accused for fear of prejudicing the next informant in the next case. Thus, for example, if the media were to take the position that it would waive the privilege in order to exonerate those who have been unfairly charged, what would it be implicitly communicating when it refuses to waive? Would such refusals be deemed tacit admissions that the leaker did, in fact, lie? Although it may be difficult to swallow in individual cases, news organizations may contend that in order to protect the guilty—and thus safeguard the press’s interest in encouraging future leakers—the reporter must sacrifice the innocent.

Were a court to address the question, it likely would conclude that the defendant’s and the criminal justice system’s interests are paramount. If evaluated solely as a matter of what best serves the press’s news-gathering interests, it would seem that silence is the appropriate course. In my informal poll of journalists, I have discovered an interesting range of opinions. For example, one reporter indicated that silence in this context would present no ethical dilemma for many journalists. Another opined that where the actual source would not be threatened, it would be the right thing to do to seek, in consultation with the source and probably counsel for the news organization, to prevent a miscarriage of justice.

CONCLUSION

My apologies to those readers who will be frustrated by my unwillingness to stake out an unequivocal position on this issue. I have not attempted to resolve this dilemma—or many of the other questions
posited in this Article—because I am not sure that there are hard and fast answers. I hope, however, that the above discussion provides some fodder for conversation about issues that I believe to be important legacies of the Clinton scandals.