Ten Years After: Bartnicki v. Vopper as a Laboratory for First Amendment Advocacy and Analysis

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Ten Years After: *Bartnicki v. Vopper* as a Laboratory for First Amendment Advocacy and Analysis

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How many ways can one approach a First Amendment analysis? What influences a lawyer or a judge to select one analytical approach over another? And what is the long-term effect of a court’s choosing one over another? In *Bartnicki v. Vopper*, a 2001 case in which the United States Supreme Court considered federal and state statutes prohibiting the disclosure of illegally intercepted telephone conversations, we are privileged to have a small laboratory through which to study the first two questions. And, from the vantage point of ten years, we ought to be able to make some informed predictions as to the third.

In *Bartnicki*, the United States Supreme Court held that the First Amendment gave the news media a right to publish truthful information on matters of public concern, even if unlawfully acquired, provided the publisher did not participate in the unlawful conduct. How the Court ultimately reached that conclusion is one principal focus of this article, precisely because the story of this litigation reveals so much about alternative

2 Federal Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2511(1)(2010)(“Except as otherwise specifically provided in this chapter, any person who (c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; … shall be punished…..”); Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 Pa. Cons. Stat. § 5703 (2010) (“Except as otherwise provided in this chapter, a person is guilty of a felony of the third degree if he (2) intentionally discloses or endeavors to disclose to any other person the contents of any wire, electronic or oral communication, or evidence derived therefrom, knowing or having reason to know that the information was obtained through the interception of a wire, electronic or oral communication…..”).
3 Id. at 535 (“…a stranger’s illegal conduct does not suffice to remove the *First Amendment* shield from speech about a matter of public concern.”).
First Amendment analyses and the process of influencing the courts’ choices among those analyses.

In this one case, the district court framed the issue as a battle between conflicting and potentially controlling precedents. The circuit court selected a doctrinal formula called “intermediate scrutiny,” and applied it in textbook fashion to reach its conclusion. And the United States Supreme Court resorted to an “ad hoc balancing” of interests in personal privacy versus publicly significant information, ultimately ruling in favor of the latter.

Even more interesting are the reasons why the courts made the decisions they did. Did they track the arguments of the party litigants? How influential was the United States government’s intervention to defend the federal statute at issue? And what role did the media defense bar play? Bartnicki provides an excellent opportunity to study the press’s increasing sophistication in helping to shape First Amendment doctrine through litigation in the Supreme Court.

Some 70 years earlier, the press’s first serious effort in Near v. Minnesota established the supremacy of the right to publish. Forty years later, the disastrous decision in Branzburg v. Hayes stunted any First Amendment right to gather news and

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4 See infra Part II.
5 See infra Part III.
6 See infra Part IV.
8 283 U.S. 697 (1931).
9 See Easton, McCormick, supra note 7.
revealed the need for coordinated media attention to doctrinal litigation. Now, after another 30 years, the Bartnicki case brought publishing and newsgathering issues together, and this time the press proved to be up to the challenge.

As interesting as this case may be from analytical and strategic perspectives, the implications of Bartnicki’s contribution to First Amendment doctrine are difficult to discern. The Court allowed a law-abiding press to publish with impunity truthful, important information, regardless of its initial unlawful acquisition, but did it significantly expand the public’s right to receive newsworthy information?

The question actually presented by this case was whether the broadcaster could, consistent with the First Amendment, be punished for his dissemination of publicly significant information initially acquired from an unknown person who had illegally intercepted a private telephone conversation. Both federal and state statutes provided a civil cause of action for, not only the interception, but also the further disclosure of the intercepted conversation.

In declaring the disclosure provision unconstitutional as applied, however, the Court declined to abstract its holding to a legal principle. The ambiguity of the decision suggests that a different balance could be struck if the subject matter of the disclosure were, say, national security rather than labor relations matters. The conclusion of this article looks to the contemporary WikiLeaks.com controversy to illuminate this issue.

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11 See Easton, Caldwell, supra note 7.
12 Id. at 525.
18 U.S.C. § 2520(a)(2010)(“… any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate.”); 18 Pa. Cons. Stat. § 5725(a)(2010)(“Any person whose wire, electronic or oral communication is intercepted, disclosed or used in violation of this chapter shall have a civil cause of action against any person who intercepts, discloses or uses or procures any other person to intercept, disclose or use, such communication….”).
Part I of this article recounts the underlying facts of the *Bartnicki* case and its procedural posture up to certiorari. Part II examines the two contending precedents initially asserted by the parties and accepted as the basis for analysis in the district court. Part III looks at the shift to doctrinal analysis in the Court of Appeals, prompted at least in part by the federal government’s entry into the case. Part IV studies the proceedings before the United States Supreme Court, with emphasis on the participation and analytical approach of prominent media lawyers. Part V dissects the opinion and the shift to an ad hoc balancing approach, particularly in light of the press arguments, while Part VI ventures some predictions about the significance of the decision with the WikiLeaks.com controversy as a backdrop.

I. “Blow Off Their Front Porches”?

The Wyoming Valley of Pennsylvania encompasses the cities of Scranton, Pittston, and Wilkes-Barre,\(^\text{14}\) and numerous smaller towns, including the boroughs of Courtdale, Edwardsville, Forty Fort, Larksville, Luzerne, Plymouth, Pringle, Kingston, and Swoyersville. These towns, all hard by Interstate Highway 81 and just a little northwest of Wilkes-Barre, are served by the Wyoming Valley West School District.\(^\text{15}\) The district boasts seven elementary schools, a middle school, and a high school, with about 5,000 altogether.\(^\text{16}\)

From mid-1992 until November 1993, the district was torn by a contract dispute between the Wyoming Valley West School Board and the Wyoming Valley West Education Association, the union representing the district’s 341 teachers. Five months of


\(^{16}\) *Id.*
hard bargaining for a new teachers contract turned nasty in October 1992, when the board decided to warn teachers that they might be subject to furlough a week before the next scheduled bargaining session.\textsuperscript{17} By March 1993, the teachers had halted all volunteer work, including chaperoning school activities,\textsuperscript{18} and in May the union threatened to strike in early June unless their salary demands were met.\textsuperscript{19}

The union was asking for six percent increases each year for the next three years, raising the average salary from $40,000 to $47,640 in 1994.\textsuperscript{20} The board was standing firm at three percent per year for three years.\textsuperscript{21} The teachers’ health insurance plan was also in dispute.\textsuperscript{22} At 10:30 p.m. on May 27, 1993, the union delivered a strike notice to Superintendent Dr. Norman Namey,\textsuperscript{23} and, on June 4, the teachers launched their first strike in the 27-year history of the district.\textsuperscript{24}

\begin{itemize}
  \item \textsuperscript{17} \textit{Union Head: Furlough Slips Add Tension to WVW Contract Talks; Teachers and Board Directors in the Wyoming Valley West School District Returning to Bargaining Table This Week}, TIMES LEADER (Wilkes-Barre), Oct. 19, 1992, available at http://www.timesleader.com/archive/6865272.html.
  \item \textsuperscript{18} \textit{Volunteer Work Halted by Teachers at WVW; Activities and Chaperoning are Falling Victim to a Contract Dispute Between Teachers and the School District}, TIMES LEADER (Wilkes-Barre), March 19, 1993, available at http://www.timesleader.com/archive/6865272.html.
  \item \textsuperscript{19} \textit{Teachers at WVW Threaten to Strike; The Situation Appears ‘Bleak,’ A School Director Concedes}, TIMES LEADER (Wilkes-Barre), May 22, 1993, available at http://www.timesleader.com/archive/6865272.html.
  \item \textsuperscript{20} Id.
  \item \textsuperscript{21} Id.
  \item \textsuperscript{22} \textit{Contract Offer Best We Can Do, Says WVW Board Member; Under the Proposal, Teachers would receive a 3-Percent Raise Each Year for the Next Three Years}, TIMES LEADER (Wilkes-Barre), June 7, 1993, available at http://www.timesleader.com/archive/6865272.html.
  \item \textsuperscript{23} \textit{WW Could See Strike in Exam Week; Salary Increases and a Health Insurance Plan are the Two Chief Points of Contention, the Head of the Teachers’ Union Says}, TIMES LEADER (Wilkes-Barre), May 29, 1993, available at http://www.timesleader.com/archive/6865272.html.
  \item \textsuperscript{24} Id.
  \item \textsuperscript{25} \textit{Striking Wyoming Valley West Teachers Picket the High School Friday in Plymouth While Seniors File into the Cafeteria; Economics Lesson; Valley West Strike to End Tuesday, But Battle Over Contract Will Continue}, TIMES LEADER (Wilkes-Barre), June 6, 1993, available at http://www.timesleader.com/archive/6865272.html. The teachers picketed on Friday and Monday, then went back to school on Tuesday in compliance with a state statute. Id.
\end{itemize}
The timing of that strike was the subject of one particular cellular telephone conversation between Gloria Bartnicki and Anthony Kane, Jr., sometime in May. Bartnicki was employed by the Pennsylvania State Education Association (PSEA) and assigned as a negotiator in the Wyoming Valley West School District contract dispute. Kane was a teacher at Wyoming Valley West High School and president of the PSEA local, the Wyoming Valley West Education Association.

But it was another remark by Kane that captured the attention of the public – and the legal system – when the conversation was broadcast several months later: ‘If they’re not going to move for three percent, we’re gonna have to go to their, their homes … to blow off their front porches, we’ll have to do some work on some of those guys…’

How the public came to know of this conversation forms the factual predicate of this case.

The contentious contract negotiations prompted the formation a citizens’ group called the Wyoming Valley West Taxpayers’ Association to oppose the teachers’ union proposals. Sometime after the conversation took place, still during the spring of 1993, the president of that organization, Jack Yocum, allegedly found a five-minute tape of the conversation in his mailbox. Yocum claimed not to know who made the tape or why, but he listened to it, identified the voices, played it for some school board members, and

25 A transcript of the conversation between Bartnicki and Kane was prepared by WILK Radio, one of the defendant’s in Bartnicki v. Vopper, and a copy of the transcript is attached to the Media Defendants’ Answer (29a-30a) and their Motion for Summary Judgment, as Exhibit “A” (315a-326a). Amended Brief of Appellants, Bartnicki v. Vopper, 200 F.3d 109 (3d Cir. 1999) (No. 98-7156), 1998 WL 34082380 at *8. The exact date of the conversation is not in the record.
26 Id. at *3.
27 Id.
28 Id. at *8.
29 Id. at *6.
30 Id. at *7 (citing Yocum’s deposition).
31 Id.
gave copies of the tape to Frederick W. Vopper. Vopper had a news and public affairs talk show under the name “Fred Williams” that was broadcast on WILK Radio and simulcast on WGBI-AM. By all accounts, Vopper did nothing with the tape until late September. By then, contract negotiations had completely broken down, the dispute had been submitted to non-binding arbitration, the arbitrator had sided with the teachers’ union, and the school board had rejected the arbitrator’s decision. About the same time, Vopper, who had been critical of the teachers’ union in the past, began airing the tape repeatedly, while adding bomb-like sound effects. Intended or not, the tapes had the effect of further inflaming the contract dispute, and the Luzerne County District Attorney launched an investigation at the behest of the school board. In the end, neither his investigation nor another undertaken by the PSEA could determine who actually made

32 Id. Yocum also gave copies to Rob Neyhard at WARM Radio, and Kane’s deposition states that copies were given to the Times Leader and Citizens’ Voice newspapers, as well as television stations WNEP-TV and WBRE-TV. Only Yocum, Vopper, and the two radio stations that carried Vopper’s program were named as defendants in the subsequent lawsuit. Id. at *7-8.
33 Id. at *8.
34 Id. at *8.
35 ______, Arbitrator Suggests Raises at WVW; The Negotiator Says Teachers Should Receive their Requested Salary Increase, but Directors Seem Unwilling to Sway from their Offer, TIMES LEADER (Wilkes-Barre), Sept. 28, 1993, available at http://www.timesleader.com/archive/6865272.html. The Supreme Court opinion says the parties accepted the arbitrator’s proposal, 512 U.S. at 519, but the contemporaneous news reports seem more reliable on this point.
36 512 U.S. at 519.
the tape.\footnote{Amended Brief of Appellants, Bartnicki v. Vopper, 200 F.3d 109 (3d Cir. 1999) (No. 98-7156), 1998 WL 34082380 at *7.} According to Vopper’s first attorney, the question remains unanswered to this day.\footnote{Interview with Donald H. Brobst, Rosenn, Jenkins & Greenwald, L.L.P., Wilkes-Barre, Pa. (June 25, 2010).}

The contract dispute was ultimately settled in November after the school board offered salary increases of four percent per year over four years,\footnote{______, The Battle Ends; Valley West Board OKs Pact on 5-4 Vote, TIMES LEADER (Wilkes-Barre), Nov. 4, 1993, available at http://www.timesleader.com/archive/6865272.html.} but the controversy over Vopper’s broadcasts continued; in August 1994, Bartnicki and Kane filed a complaint in the U.S. District Court for the Middle District of Pennsylvania against Vopper and the parent companies of the stations that carried his show (the “media defendants”) under civil suit provisions of Federal and state wiretap laws.\footnote{See supra note 16.} The unknown persons who intercepted the conversation were also named as John Doe and Jane Doe.\footnote{Amended Brief of Appellants, Bartnicki v. Vopper, 200 F.3d 109 (3d Cir.1999) (No. 98-7156), 1998 WL 34082380 at *3.}

The media defendants retained Donald H. Brobst of the Wilkes-Barre law firm Rosenn, Jenkins & Greenwald, L.L.P., to represent them in district court. Brobst had long represented WILK and its then-parent company, Keymarket of NEPA (Northeastern Pennsylvania), Inc., and this was neither the first nor the last case he had involving Fred Vopper. In addition to his defamation and other media law work, Brobst specialized in employment law cases, and he both initiated and defended cases brought under Section 1983 of the U.S. Code, which gives plaintiffs a federal cause of action when deprived of a constitutional right under color of state law.
The media defendants filed their answer in September. The following February, they consented to Plaintiffs’ amending their complaint to add Yocum as a defendant. Yocum answered on June 30, 1995. After extensive discovery, plaintiffs and defendants moved for summary judgment, with both defendants asserting a First Amendment right to disclose the conversation. By Memorandum and Order dated June 17, 1996, the District Court denied both motions, ruling that the circumstances of the interception and the defendants’ knowledge of them represented genuine issues of material fact, but that imposing liability on the defendants would not violate the First Amendment.

The court denied defendants’ subsequent motion to reconsider in November, and in January 1998 certified that its orders were appealable. On Jan. 14, the Media Defendants filed an appeal in the U.S. Court of Appeals for the Third Circuit with the concurrence of the other parties to the litigation. The Third Circuit granted the petition

45 Id.
46 Id. at *4.
47 Id.
48 Id.
50 Amended Brief of Appellants, Bartnicki v. Vopper, 200 F.3d 109 (3d Cir. 1999) (No. 98-7156), 1998 WL 34082380 at *5. The court ruled that the orders denying summary judgment involved “controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal… will materially advance the ultimate determination of this litigation.” Id. As articulated by the Third Circuit, those questions were:

(1) whether the imposition of liability on the media Defendants under the [wiretapping statutes] solely for broadcasting the newsworthy tape on the Defendant Fred Williams’ radio news/public affairs program, when the tape was illegally intercepted and recorded by unknown persons who were not agents of the Defendants, violates the First Amendment; and (2) whether imposition of liability under the aforesaid [wiretapping statutes] on Defendant Jack Yocum solely for providing the anonymously intercepted and recorded tape to the media Defendants violates the First Amendment.

200 F.3d at 113-114.
on Feb. 26, and after receiving briefs from the parties and the PSEA as amicus curiae, heard oral arguments on Oct. 5. The United States, which intervened as of right and at the invitation of the court to defend the constitutionality of the federal statute, filed a brief on Nov. 17, 1998, but to no avail. On Dec. 27, 1999, the Third Circuit reversed the District Court, and the United States Supreme Court granted certiorari on June 26, 2000.

II. District Court: Battle of the Precedents

In his motion for summary judgment, Brobst had argued for the media defendants that Bartnicki and Kane could not prove that their telephone conversation had been illegally, that is, intentionally and not inadvertently, intercepted, or that Vopper knew or had reason to know that the telephone conversation was illegally intercepted. He also argued that Bartnicki had no reasonable expectation of privacy in the conversation, which took place on a cellular telephone that she acknowledged was susceptible of interception. Brobst later conceded that neither of these factual arguments was persuasive, and that he staked everything on the First Amendment argument from the

52 Id.
56 200 F.3d at 129.
59 Id. at 22.
beginning.\textsuperscript{60} Brobst’s First Amendment argument relied almost exclusively on \textit{Landmark Communications v. Virginia} and the line of constitutional privacy cases, beginning with \textit{Cox Broadcasting v. Cohn} and ending with \textit{Florida Star v. BJF};\textsuperscript{61} to which \textit{Landmark} belongs. Those cases held that “where the media lawfully obtains truthful information about a matter of public significance or concern, government officials may not constitutionally punish the publication of that information absent the need to further a government interest of the highest order.”\textsuperscript{62} Brobst later said he focused on \textit{Landmark} in particular because the governmental interests there – maintaining the reputation of the judges and the institutional integrity of the courts – were far greater than the privacy interests protected in this case.\textsuperscript{63}

To United States District Court Judge Edwin M. Kosik, however, the \textit{Bartnicki} case essentially countered Brobst’s \textit{Landmark} rule with another well established First Amendment principle: that “generally applicable laws ‘do not offend the First Amendment, simply because their enforcement against the press has incidental effects on its ability to gather and report the news.’” Kosik referred to this principle as the \textit{Cohen} doctrine, after \textit{Cohen v. Cowles Media}, the only case cited for that proposition in his opinion,\textsuperscript{64} despite much earlier origins.\textsuperscript{65} A closer examination of the two conflicting precedents follows.

\begin{footnotesize}
\begin{enumerate}
\item Brobst Interview, \textit{supra} note 41.
\item Brief in Support of Media Defendants’ Motion for Summary Judgment, \textit{supra} note 58, at *12-18. See, \textit{infra} Part I.A. for a discussion of this line of cases. Throughout this article, the lawyers and judges will variously reference this line, and the principle derived from it, as the \textit{Landmark}, \textit{Daily Mail}, or \textit{Florida Star} rule or principle.
\item Brobst Interview, \textit{supra} n. 41.
\end{enumerate}
\end{footnotesize}
A. The Constitutional Privacy Cases

The genesis of the notion that plaintiffs ought to be able to recover for an invasion of their privacy was an 1890 Harvard Law Review article by Louis Brandeis and his law partner Samuel Warren. The concept did not exist in English common law, and invasion of privacy is often called the only truly American tort. Dean William L. Prosser’s classification scheme for the American common law privacy torts included the right of publicity or misappropriation, false light, intrusion on seclusion, and disclosure of private facts. Apart from the five cases that substantively parallel the tort of disclosure of private facts – which are the central focus of this section – only three privacy cases involving the press ever reached the U.S. Supreme Court.

In the 1967 case of *Time v. Hill*, the Court declined to award damages in a false light privacy claim under a New York statute absent a showing of actual malice. In the 1974 case of *Cantrell v. Forest City Publishing Co.*, the Court upheld a jury verdict finding that a Cleveland *Plain Dealer* reporter had knowingly placed the Cantrell family in a false light through numerous inaccuracies and false statements in his article about them. And in the 1977 case of *Zacchini v. Scripps-Howard Broadcasting Co.*, the Court held that an Ohio television station misappropriated the entire act of a circus “human cannonball” by filming and broadcasting his entire, 15-second act.

Of far greater importance, however, was the series of five privacy-related cases that reached the Court between 1975 and 1989. None of these cases directly implicated
the tort of public disclosure of private facts; the press rarely lost those cases in the state courts because of an absolute “newsworthiness” defense that was said to have “swallowed” the tort itself. The cases that did get to the Court, however, were all based, directly or indirectly, on statutes that criminalized the publication of truthful, but embarrassing, information. Sometimes they were characterized as prior restraints, sometimes as subsequent punishment.

On Aug. 18, 1971, Cynthia Leslie Cohn, 17, was raped and suffocated to death by six high school boys following a drinking party in Sandy Springs, Fulton County, Georgia. In April 1972, when the six perpetrators were arraigned, five pled guilty to rape, murder charges against them having been dropped, and a date was set for the trial of the youth who pled not guilty. A reporter covering the case for WSB-TV duly broadcast the story later that day, including, for the first time in any media, the name of the victim. The reporter had learned the name from personal observation of the proceedings and from the indictments, which were public records available to anyone who asked. The next month, Martin Cohn, Cynthia Cohn’s father, filed a lawsuit against the Cox Broadcasting Corp., the owner of WSB-TV, for invasion of privacy and for violating a Georgia statute that prohibited the publication or broadcasting of the name of any rape victim.

The trial court held that the statute gave Cohn a private right of action against Cox, notwithstanding the broadcaster’s constitutional claims, and granted Cohn summary judgment as to liability, with damages to be considered at a later jury trial. On appeal, the Georgia Supreme Court held that the statute did not give Cohn a private right of action, so summary judgment was inappropriate, but also that Cohn’s common law
invasion of privacy claim was not precluded by the First Amendment. On a motion for rehearing the state supreme court held that the statute was an authoritative declaration of state policy to the effect that the name of a rape victim was not a matter of public concern, so the right to disclose that information was not protected by the First Amendment. The U.S. Supreme Court reversed in *Cox v. Cohn*.71

Writing for a nearly unanimous Court – only Justice Rehnquist dissented – Justice White got to the heart of the matter. “Because the gravamen of the claimed injury is the publication of information, whether true or not, the dissemination of which is embarrassing or otherwise painful to an individual, it is here that claims of privacy most directly confront the constitutional freedoms of speech and press.”72 Determined to approach the constitutional balance cautiously, White largely restricted his holding to the facts at hand. “We are convinced that the State may not ... impose sanctions on the accurate publication of the name of a rape victim obtained from public records – more specifically, from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection.”73 If the state wanted to keep such information from the press, the Court said, it would have to find some way to avoid public documentation or other exposure of private information, possibly by sealing court records containing such facts. Only Justice Douglas would have ruled on broader grounds: that “there is no power on the part of government to suppress or penalize the publication of ‘news of the day.’” Rehnquist’s dissent turned on jurisdiction, not the merits.74

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72 420 U.S. at 489.
73 410 U.S. at 491.
74 410 U.S. at 501.
While only regional media companies participated in the *Cox* case, the next privacy case to reach the Court drew the attention of the American Newspaper Publishers Association (ANPA). *Oklahoma Publishing Co. v. District Court in and for Oklahoma County*[^75] was not a tort case at all, but rather challenged an injunction issued by the county court prohibiting the news media from “‘publishing, broadcasting, or disseminating, in any manner, the name or picture’” of an 11-year-old boy alleged to have shot and killed a railroad switchman. Reporters were able to learn his name and take his photograph during and after an open detention hearing, and they used both the in newspaper, radio, and television stories that followed. A few days later, when the boy appeared in court again for arraignment, the judge closed the proceeding and issued the injunction. On appeal, the Oklahoma Supreme Court affirmed the judge’s order, but the U.S. Supreme Court stayed the order. It granted certiorari and, in the same per curiam opinion, reversed.[^76]

As if to illustrate the relationship between prior restraint and privacy cases, the Court relied on both *Nebraska Press v. Stuart*[^77] and *Cox* to hold that “the First and Fourteenth Amendments will not permit a state court to prohibit the publication of widely disseminated information obtained at court proceedings which were in fact open to the public.”[^78] The Court’s very brief opinion closely tracked the arguments made by ANPA in its amicus brief, but did not follow ANPA’s suggestion for a general rule to avoid “a constant stream of minor fact variations which will needlessly take up the time of this Court and of the press in preventing encroachments upon the First and Fourteenth

[^76]: 430 U.S. at 309-10.
[^77]: 427 U.S. 539 (1976)(reversing a court order prohibiting publication of facts adduced in open trial).
[^78]: 420 U.S. at 311.
Amendments by trial judges who do not yet believe or perhaps understand the teachings of this Court ….”  The Court continued to resist formulating a broad, general rule in the next privacy-related case the following year.

On October 4, 1975, Landmark’s Virgini-an-Pilot published an article that accurately reported on a pending inquiry by the Virginia Judicial Inquiry and Review Commission and identified the state judge whose conduct was being investigated. A month later, a grand jury indicted Landmark for violating a state statute by “unlawfully divulging the identification of a Judge of a Court not of record, which said Judge was the subject of an investigation and hearing” by the Commission. Landmark was convicted of a misdemeanor in a bench trial and fined $500. The Virginia Supreme Court affirmed the conviction, citing the need to protect the judge’s reputation from the publicity that might attend frivolous claims; preserving public confidence in the judicial system; and protecting complainants and witnesses before the Commission. Landmark appealed to the U.S. Supreme Court, which granted certiorari.

In contrast to Cox and even Oklahoma Publishing, Landmark Communications, Inc. v. Virginia at attracted the attention of a substantial number of media companies and press associations. The media companies argued that, under the Constitution, none of

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80 435 U.S. at 831.
the purported interests cited by the Virginia Supreme Court could be protected by imposing criminal sanctions on the press, and called for a rule barring accurate reports of government affairs. The press associations similarly argued that the Constitution barred states from imposing criminal sanctions for publishing information on the public duties of public officials. As before, the Court shied away from any generalized pronouncement. Writing for a nearly unanimous Court, Chief Justice Burger found it “unnecessary to adopt this categorical approach to resolve the issue before us. …

The narrow and limited question presented, then, is whether the First Amendment permits the criminal punishment of third persons who are strangers to the inquiry, including the news media, for divulging or publishing truthful information regarding confidential proceedings of the Judicial Inquiry and Review Commission. We are not here concerned with the possible applicability of the statute to one who secures the information by illegal means and thereafter divulges it. * * *

We conclude that the publication Virginia seeks to punish under its statute lies near the core of the First Amendment, and the Commonwealth's interests advanced by the imposition of criminal sanctions are insufficient to justify the actual and potential encroachments on freedom of speech and of the press which follow therefrom. 83

Even without propounding the general rule sought by the press, the Court had, in these three cases, begun to make clear that privacy interests – including the name of a rape victim, a juvenile offender, or even a judge merely accused of wrongdoing – would not be enough to overcome the presumptive right of the press to publish truthful

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83 435 U.S. at 838.
information, lawfully acquired, on matters of public concern, even where the publication
was otherwise prohibited by a state’s legislature or its courts. In Smith v. Daily Mail, the Court would make that rule explicit.

That 1979 case, like Oklahoma Publishing, involved an indictment against two
West Virginia newspapers for violating state law by publishing the name of a 14-year-old
who had shot and killed a high school classmate without a court’s permission. In this
case, however, the reporters did not obtain the name in open court, but by monitoring the
police band radio frequency, going to the scene, and interviewing witnesses, police, and a
prosecutor. The papers sought and won a writ of prohibition against prosecution from the
West Virginia Supreme Court, which held that prosecution would be unconstitutional
under recent U.S. Supreme Court decisions, but the attorney general of West Virginia
filed a successful petition for certiorari on behalf of the trial judge, Robert K. Smith.

Once again, the press amici came out in force to support the newspapers. Once again, the
ACLU added its voice to that of the press. Once again, Floyd Abrams, who had
represented Landmark Communications, was representing the newspaper. Once again,
the Chief Justice wrote the opinion for a nearly unanimous Court.

Because of the language of the statute requiring a court order before publishing
the name of a juvenile offender, the press amici tended to characterize the statute as a

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85 Motion of the Am. Civil Liberties Union for Leave to File, and Brief Amicus Curiae, Smith v. Daily
Mail, 443 U.S. 97 (1979)(No. 78-482), 1979 WL 213634; Motion of Chi. Trib. Co. for Leave to File Brief
Amicus Curiae and Brief Amicus Curiae, Smith v. Daily Mail, 443 U.S. 97 (1979)(No. 78-482), 1979 WL
199841; Motion of Am. Newspaper Publishers Ass’n for Leave to File Brief Amicus Curiae and Brief
Amicus Curiae, Smith v. Daily Mail, 443 U.S. 97 (1979)(No. 78-482), 1979 WL 199845; Motion of Am.
Soc’y of Newspaper Editors; Radio-Television News Dirs. Ass’n; Nat’l Newspaper Ass’n; Nat’l Ass’n of
Broadcasters; the Soc’y of Prof’l Journalists, Sigma Delta Chi; Reporters Comm. for Freedom of the Press;
Nat’l Press Club; Associated Press Managing Editors; W. Va. Press Ass’n; Ill. Press Ass’n; and Clarksburg
Publ’g Co. for Leave to File Brief, Amici Curiae. In Support of Affirmance, and Brief Amici, Smith v.
prior restraint – even though the information had already been published and the case reached the Court through a criminal prosecution. Burger agreed after a fashion:

Whether we view the statute as a prior restraint or as a penal sanction for publishing lawfully obtained, truthful information is not dispositive because even the latter action requires the highest form of state interest to sustain its validity. Prior restraints have been accorded the most exacting scrutiny in previous cases. However, even when a state attempts to punish publication after the event it must nevertheless demonstrate that its punitive action was necessary to further the state interests asserted. Since we conclude that this statute cannot satisfy the constitutional standards defined in *Landmark Communications, Inc.*, we need not decide whether, as argued by respondents, it operated as a prior restraint.  

But Burger went further and gave the press the general rule it had been seeking. Burger pointed out that in the previous cases – *Cox, Oklahoma Publishing*, and *Landmark Communications* – the press received the information from the government or government sources, so those cases did not directly control the outcome here, where the press gathered the information through routine reporting techniques. Asserting that it made no difference – “A free press cannot be made to rely solely upon the sufferance of government to supply it with information” – Burger said those cases “suggested” the general rule: “if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.”

Articulation of a rule seemed to put an end to this kind of litigation, as Justice White had once predicted, but ten years later, another, similar case again reached the

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86 443 U.S. at 101-102.
87 443 U.S. at 103-104.
88 See *Nebraska Press Ass’n v. Stuart*, 427 U.S. at 517 (White, J., concurring).
Court. In *Florida Star v. B.J.F.*, a novice reporter picked up a police report that identified sexual assault victim B.J.F. by her full name from the Jacksonville police press room. The unedited report had been left there inadvertently. When the paper ran a brief item using her full name, contrary to its own editorial policy and a Florida statute, B.J.F. sued on a theory of negligence per se. The trial judge agreed that the newspaper’s violation of the statute gave rise to a negligence per se claim, and a jury awarded B.J.F. $75,000 in compensatory and $25,000 in punitive damages. That was affirmed per curiam by an intermediate court; the Florida Supreme Court declined to review. The newspaper petitioned successfully for certiorari.

Perhaps the change in court personnel over the decade – Justices Burger, Stewart, and Powell were gone; Justices Scalia, O’Connor, and Kennedy had arrived – made this a much tougher decision. Or perhaps it was the change in leadership from Burger to Rehnquist. On its facts, this case did not look all that different from the previous cases. But Justice White, who dissented along with Chief Justice Rehnquist and Justice O’Connor, declared that the 6-3 *Florida Star* decision was the “bottom of the slippery slope” created by the previous decisions – in each of which he had concurred.

Writing for the majority, Justice Marshall said *Cox* did not control the case because a police report is not a court document and does not carry with it the constitutionally significant notions of open trials. *Daily Mail* provided the proper rule, Marshall said, but he tweaked Burger’s formulation to add a “narrowly tailored” requirement: “where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the

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highest order.” And that was not the case here.\textsuperscript{90} In an opinion that reasonably tracked the substance of the press amici briefs, which were substantial,\textsuperscript{91} Marshall pointed out that a rape victim’s privacy might be a state interest of the highest order under some circumstances, but not where the government itself provided the information, albeit inadvertently; where the statute covered only the mass media, and not other forms of dissemination, including neighborhood gossip; and where the no fault was required for liability, making the publication of truthful information even less protected than publication of a libelous falsehood.\textsuperscript{92}

\textbf{B. Cohen v. Cowles Media}\textsuperscript{93}

Dan Cohen was a Minneapolis public relations executive associated with the 1982 gubernatorial campaign of Independent-Republican Wheelock Whitney.\textsuperscript{94} In late October 1982, just six days before the general election, Cohen contacted a number of journalists in the St. Paul- Minneapolis area, offering to give them information concerning a Democratic-Farmer-Laborite (DFL) candidate in exchange for a promise of confidentiality.\textsuperscript{95} Among the journalists accepting the offer were reporters for the St. Paul \textit{Pioneer Press} and the Minneapolis \textit{Star Tribune}.\textsuperscript{96}

\textsuperscript{90} 491 U.S. at 541.
\textsuperscript{92} 491 U.S. at 538-41.
\textsuperscript{94} Id. at 665. \textit{See also} Bill Salisbury, \textit{Burning the Source}, \textit{WASH. JOURNALISM REV.}, Sept. 1991, at 18. Much of this history and analysis is adapted from Eric B. Easton, \textit{Two Wrongs Mock a Right: Overcoming the Cohen Maledicta That Bar First Amendment Protection for Newsgathering}, \textit{58 OHIO ST. L.J.} 1135 (1997) [hereinafter \textit{Two Wrongs}].
\textsuperscript{95} Salisbury, \textit{supra} note 94, at 19-20. According to Salisbury, the \textit{Pioneer Press} reporter involved, Cohen refused even to describe the information until he received a promise of confidentiality.
Cohen provided the reporters with public court records showing that Marlene Johnson, the DFL candidate for Lieutenant Governor, had previously been arrested for unlawful assembly and petit theft. The unlawful assembly charges, which grew out of a civil rights demonstration, were ultimately dismissed. The candidate had been convicted on the theft charge, which involved a minor shoplifting offense while she had been emotionally distraught, but the conviction was later vacated.  

Editors at both the Pioneer Press and the Star Tribune independently decided to print the story and, over their reporters’ protests, to include the name of the source. While the Pioneer Press editors buried Dan Cohen's name deep in the story, the Star Tribune editors featured it, apparently reasoning that the value of the story, if any, lay in Cohen’s conduct, not Johnson’s. The Star Tribune also attacked Cohen in its editorial pages, but neither paper reported that it had broken a promise of confidentiality with Cohen.  

When the story broke, Cohen lost his job and later sued the newspapers’ publishers alleging fraudulent misrepresentation and breach of contract. Overcoming the publishers’ First Amendment claims, Cohen won $200,000 in compensatory damages and $500,000 in punitive damages at trial. The Minnesota Court of Appeals struck down the punitive damage award after finding that Cohen had failed to establish a fraud.

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96 Id. Associated Press reporter Gary Nelson and WCCO-TV reporter Dave Nimmer also received the information. Nelson’s stories did not name Cohen, while Nimmer decided the story was not newsworthy. Id.
98 Salisbury, supra note 94, at 21-22.
99 Cohen, 501 U.S. at 666. Cohen said he was fired, and that position was adopted by the Supreme Court. According to Salisbury, his supervisor said he resigned. Salisbury, supra note 94, at 22.
100 Cohen, 501 U.S. at 666.
The Minnesota Supreme Court struck down the compensatory damage award, holding a contract action "inappropriate" under the circumstances.\(^{102}\)

During oral argument before the Minnesota Supreme Court, one of the justices had asked a question about estoppel, a cause of action in equity that might serve as an alternative to Cohen’s contract claim in enforcing the reporters’ promises.\(^{103}\) Addressing that issue in its opinion, the court found it necessary to “balance the constitutional rights of a free press against the common law interest in protecting a promise of anonymity.”\(^{104}\) In this case, the court said, enforcing the promise would violate the newspapers’ First Amendment rights. The United States Supreme Court granted certiorari “to consider the First Amendment implications of this case.”\(^{105}\)

Writing for a five to four majority,\(^{106}\) Justice White rejected the newspapers’ argument that this case was controlled by the line of cases holding that “if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.”\(^{107}\) Instead, Justice White said, the case was controlled “by the equally well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news.”\(^{108}\)


\(^{103}\) In a successful promissory estoppel action, one who makes, then breaks, a promise is prevented from denying the existence of contract, despite the absence of a contract formality. See Cohen, 501 U.S. 663 (1991).

\(^{104}\) Id. at 205.

\(^{105}\) Cohen, 501 U.S. at 667.

\(^{106}\) Dissenting opinions were written by Justice Blackmun, joined by Justices Marshall and Souter, and Justice Souter, joined by Justices Marshall, Blackmun, and O’Connor. Id. at 672, 676.

\(^{107}\) Id. at 668-69 (quoting Smith v. Daily Mail Pub’l’g, 443 U.S. 97, 103 (1979)).

\(^{108}\) Id. at 669.
Justice White proceeded to list a number of cases – starting with *Branzburg v. Hayes*\(^{109}\) – purporting to demonstrate that enforcement of general laws against the press is not subject to any stricter scrutiny than would be applied to enforcement against other persons or organizations.\(^{110}\) Finding Minnesota’s doctrine of promissory estoppel just such a “law of general applicability,” Justice White had no problem applying it to the press.\(^{111}\) He even suggested that the newspapers’ breaking their promises might serve as a predicate for finding their conduct unlawful, thus arguably negating First Amendment protection for the information itself.\(^{112}\)

Justice White further distinguished Cohen’s situation from that of a plaintiff seeking to avoid the strict requirements for establishing a libel claim by stating an alternative cause of action. Specifically citing *Hustler Magazine, Inc. v. Falwell*, where the Court denied a claim for intentional infliction of emotional distress without a showing of actual malice,\(^{113}\) Justice White pointed out that Cohen had not sought damages for injury to his reputation or state of mind, but rather for the loss of his job and his lowered earning capacity.\(^{114}\)

Finally, Justice White tackled the argument that allowing the promissory estoppel claim would inhibit the press from disclosing the identity of a confidential source when, as in Cohen, that information is newsworthy.\(^{115}\) If true, he said, the “chilling effect” would be “no more than the incidental, and constitutionally insignificant, consequence of

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\(^{109}\) 408 U.S. 665 (1972).

\(^{110}\) *Cohen*, 501 U.S. at 669.

\(^{111}\) *Id.* at 670.

\(^{112}\) *Id.* at 671.


\(^{114}\) *Cohen*, 501 U.S. at 671.

\(^{115}\) *Id.*
applying to the press a generally applicable law that requires those who make certain kinds of promises to keep them.” 116

Writing for Justices Marshall and Souter in dissent, Justice Blackmun argued that Hustler should have controlled the outcome in this case, that First Amendment protection applies to published speech regardless of the cause of action asserted. Blackmun saw no meaningful distinction between the kinds of damages sought by Jerry Falwell and those sought by Daniel Cohen. 117 Justice Souter also filed a separate dissenting opinion, joined by Justices Marshall, Blackmun, and O’Connor, that rejected White’s reliance on the doctrine of “generally applicable laws,” denying any “talismanic quality” in such laws. Souter would have found the state’s interest in protecting the promise of confidentiality insufficient to outweigh the value of the information revealed in this case. 118 Nevertheless, the case was remanded to the Minnesota Supreme Court, which reversed its previous position and held the newspapers liable for Cohen’s damages on a theory of promissory estoppel. 119

In his account of this case, Cohen’s lawyer, Elliot Rothenberg, called the decision “the worst defeat the media had ever suffered in the Supreme Court.” 120 Even allowing for some self-indulgent boasting, Rothenberg was not far off the mark. 121 How had the press blown such a big one? Clearly, there was no lack of legal talent applied to the case. Both newspapers brought in new legal teams for the Supreme Court contest – “heavy

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116 501 U.S. at 671-72.
117 501 U.S. at 672-76 (Blackmun, J., dissenting).
118 501 U.S. at 676-679 (Souter, J., dissenting).
121 In the interest of full disclosure, Rothenberg cites my own (“A pro-media law professor”) appraisal of this case as “cutting short the natural evolution of First Amendment protection for newsgathering and setting the stage for many wrongheaded opinions coming out of the lower courts today.” Id. at 254 (quoting Easton, Two Wrongs, supra note 94, at 1153).
artillery,” Rothenberg called them. Supreme Court specialist Stephen M. Shapiro became lead counsel for the Pioneer Press, and eight lawyers signed its brief. Minneapolis lawyer John French – Harvard Law School and clerk for Justice Felix Frankfurter – took over the Star Tribune campaign, and four lawyers signed its brief. Rothenberg’s description of the press amici is particularly apt:

Shapiro and French were not the only blue-ribbon lawyers joining the case on the other side. In fact, a battalion of the nation’s leading lawyers and most prominent media organizations entered the Supreme Court appeal supporting the Star Tribune and Pioneer Press. Nineteen attorneys from leading law firms in New York, Washington, and Los Angeles filed a third brief opposing mine. Their amicus curiae brief represented the big leagues of American media….

Nor were the press’s arguments off track. Indeed, they paralleled, if not influenced, the arguments of the four dissenting justices. Apart from Rothenberg himself, there was no outstanding opposition to the press’s position; heavy hitters like the United States and the ACLU did not have a dog in the hunt, and even those in or involved with the media who thoroughly disapproved of the newspapers’ conduct stayed out of the Supreme Court action.

Nevertheless, it is not difficult to identify reasons why the press lost this case. Arguably, the case should have ended with the first state supreme court opinion; the state court rejected Cohen’s contract claim, and Cohen had not raised promissory estoppel. The First Amendment question, essential to getting the case to the U.S. Supreme Court, need never have been reached. Timing, too, was a problem for the press. Justice Brennan retired just before the case was heard, and although his successor, Justice Souter, 

also supported the press’s position, Brennan’s voice would have been a far more powerful counterweight to Justice White’s hostility. But perhaps the most serious problem of all was the nature of the case itself and the dissention it engendered within the media establishment.

It was, after all, in the nature of Cohen that the press was forced to argue that promises of confidentiality to sources were not serious enough to be considered contracts without weakening the central argument in Branzburg that such promises deserved constitutional protection. If not altogether untenable, the press’s position was at best precarious. It was also highly contentious. Rothenberg quotes University of Minnesota journalism professor Ted Glasser as characterizing the trial as more “between reporters and editors” than between plaintiff and defendants,123 and urged reporters to oppose the newspapers in any appeal.

To claim to have a First Amendment right to renege on a reporter’s promise not only places the press above the law but denies reporters the very freedom they need to operate in the day-to-day world of journalism. Reporters have every reason to file a friend-of-the-court brief on behalf of Cohen.124

There was no reporters’ brief at any level, and the Reporters Committee for Freedom of the Press was not a signatory to the press’s amicus brief. The Washington Post also declined to join, as did a number of other media companies who might otherwise have been expected to participate. Rothenberg’s petition for certiorari had capitalized on that dissention by quoting star media lawyer Floyd Abrams calling the newspapers’ conduct in breaking their reporters’ promises of confidentiality “reprehensible and damaging to

123 ROTHENBERG, supra note 120, at 180.
124 Id. at 134 (quoting Theodore L. Glasser, Reporters Seen as Winners in Cohen Verdict, MINN. J., Oct. 4, 1988, at 1).
all journalists.” Shortly before the decision came down, Abrams again spoke out publicly in a speech and op-ed column, charging that the newspapers acted in a fashion contrary to core principles of journalistic ethics. They also invited the lawsuit now awaiting decision by the Supreme Court, one that offers enemies of the press a particularly inviting target. What the Minnesota newspapers did was wrong; they should have said so. Why is any defender of the press unwilling to say as much.

There is no direct evidence that the division within the press over the Cohen case had a significant or even marginal influence on the outcome. Nor was there any direct evidence that differences among media organizations played a significant role in the Court’s rejection of constitutional protection for confidential sources in Branzburg v. Hayes, although those differences certainly weakened the campaign for federal shield legislation. There is no doubt, however, that the two most important newsgathering cases ever to reach the U.S. Supreme Court did not show the press in the best light as a constitutional litigator.

C. The District Court Opinion

For the District Court, the conflict between Landmark and Cohen was easily resolved. According to the court, Landmark only applies where “a state actor attempted to place a prior restraint on specified speech or where the intentional interception was legal but the disclosure was illegal.” Here, the court said without further explanation, “there exist no statutory provisions specifically designed to chill free speech.” Thus finding Landmark inapplicable, the court went on to find Cohen controlling. “In

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125 Id. at 166.
126 Id. at 214 (quoting Floyd Abrams, Battles Not Worth Fighting, WASH. POST, June 13, 1991, A21).
128 Id.

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reviewing both the federal and the state electronic surveillance laws, we conclude that both acts are matters of general applicability.”

In his motion for reconsideration, Brobst argued that the court’s reliance on *Cohen* was misplaced and that *Landmark* did not involve a prior restraint. The Virginia statute at issue in *Landmark* was “generally applicable” and did not “single out the press,” yet the Supreme Court reversed the newspaper owner’s conviction on First Amendment grounds. This case, Brobst argued, is indistinguishable. Moreover, he said, by breaking its promise to Cohen, the press arguably obtained its information unlawfully; here, there was no question that the press obtained its information lawfully from Yocum, whatever might have happened earlier. Perhaps recognizing that engaging in a serious analysis of the issue before it on a motion for summary judgment was probably a waste of time and effort, the District Court denied Brobst’s motion and kicked the can down the road. Brobst asked Judge Kosik to certify the case up to the Third Circuit and he agreed.

While Brobst might have taken the case to trial instead of appealing Kosik’s denial of his motion, he acknowledges that there would have been no point in going that route. Apart from the constitutional claim, Brobst says, “We didn’t have much [in the way of another] defense in this case. They had us dead to rights on what we did. We clearly had broadcast the tape many times. There was no doubt about that. It was pretty hard for us to claim that we didn’t know that it had been a surreptitiously recorded tape.” In fact, Brobst says, “we had a settlement agreement with the other side that the outcome of the appeal would decide the outcome of the case because there was no sense going to

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129 *Id.* at *12.
131 *Id.* at 7.
trial…. If we win [on the constitutional issue], we don’t have to pay them anything, obviously, and if they win, it was a fixed amount of money that we would pay them.” While the agreement reserved the right of either party to petition the Supreme Court for review, Brobst said neither side really expected the case to go that far.  

III. Circuit Court: Applying Intermediate Scrutiny

On appeal, the parties agreed that no factual issues barred the Third Circuit from resolving the legal issues, which boiled down to one: Does the First Amendment bar the imposition of liability for publishing truthful information of public significance, where both the acquisition and publication of that information are prohibited by statute and where the publisher was not involved in the unlawful acquisition?  

As might be expected, Appellants continued to rely on the Landmark doctrine and related cases, asserting that the government’s interest in the privacy of cellular telephone communications is “significantly less[]” than the interest at stake in Landmark. Appellants also cited a remarkably similar case in which the U.S. District Court for the Northern District of Texas ruled that the First Amendment protected the press from civil liability for reporting the contents of an illegally recorded telephone conversation of a

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132 Brobst Interview, supra note 41.  
134 Id. at *19. One could argue the opposite position, of course: that the government’s interest in protecting government speech is lower than its interest in protecting private speech, albeit private speech on a public matter. But see Boettger v. Loverro, 597 A.2d 712, 720-21 (Pa. 1991) (“Thus, the legislature intended for the public interest in a free press to supersede the interests of an individual whose private conversation regarding his illegal activities had been lawfully intercepted and lawfully obtained by a newspaper.”).
school board trustee, where the tape had been recorded anonymously, delivered to certain school board members, and played at a public school board meeting.\textsuperscript{135}

Perhaps even more interesting was Appellants’ attempt to distinguish \textit{Cohen} by reciting many of the arguments used against the media companies in that case: that the newspapers determined the scope of their own legal obligations by contract, that any restriction on publication was thus self-imposed, and that the newspapers may not have acted lawfully in acquiring the information by reneging on a promise of confidentiality.\textsuperscript{136} Appellants also argued that the impact of enforcing the disclosure provisions of the wiretapping statutes would be far greater than “incidental,” as required to impose the \textit{Cohen} doctrine.\textsuperscript{137}

Appellees also framed the case as a contest between the \textit{Landmark} and \textit{Cohen} principles, although of course they asserted that \textit{Cohen} applies to this case.\textsuperscript{138} Appellees also found a similar case in which a state trial court had distinguished the \textit{Landmark} line on two grounds: (1) that the information in those cases had been properly part of the public record, albeit protected by statutory confidentiality; and (2) that the information in this case had been a private conversation, rather than governmental records.\textsuperscript{139} That case

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{135}] Amended Brief of Appellants, Bartnicki v. Vopper, 200 F.3d 109 (3d Cir.1999) (No. 98-7156), 1998 WL 34082380 at *22 (citing Peavy v. New Times, Inc., 976 F. Supp. 532 (N.D. Tex. 1997)). The following year, however, the Peavy decision would be reversed in pertinent part by the United States Court of Appeals for the Fifth Circuit, which applied an intermediate scrutiny test. Peavy v. WFAA-TV, Inc., 221 F.3d 158, 193 (1999).
\item[\textsuperscript{136}] Amended Brief of Appellants, Bartnicki v. Vopper, 200 F.3d 109 (3d Cir.1999) (No. 98-7156), 1998 WL 34082380 at *25.
\item[\textsuperscript{137}] \textit{Id.} at *25-26.
\item[\textsuperscript{138}] Brief of Appellees, Bartnicki v. Vopper, 200 F.3d 109 (3d Cir. 1999) (No. 98-7156), 1998 WL 34083465 at *11.
\item[\textsuperscript{139}] \textit{Id.} at *11-12 (citing Natoli v. Sullivan, 606 N.Y.S.2d 504 (N.Y. Sup. Ct. 1993), \textit{aff’d}, 616 N.Y.S.2d 318 (N.Y. App. 1994)).
\end{itemize}
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never mentioned the Cohen doctrine at all, but the Appellees devoted a section to amplifying the District Court’s assertions.\textsuperscript{140}

Appellees added some new arguments as well. First, they asserted that the Landmark-related holdings were very narrow and limited to their specific facts.\textsuperscript{141} Specifically, Appellees pointed to the famous footnote 8 in Florida Star in which the Court declined to address the question of “unlawfully” acquired information,\textsuperscript{142} suggesting the Appellants’ reliance on those cases was therefore “misplaced.”\textsuperscript{143} Appellants, of course, would find that footnote irrelevant, since they committed no unlawful act in acquiring the information.

But even if the strict scrutiny of Landmark controlled, Appellees argued, the wiretapping statutes would pass muster because they were narrowly tailored to protect privacy rights of the highest order.\textsuperscript{144} Drawing on legislative history, the Appellees asserted that Congress was aware of and increasingly concerned about the impact of modern communications technology on personal privacy and the law’s failure to keep up with that technology.\textsuperscript{145}

\textsuperscript{141} Id. at *20.
\textsuperscript{142} Florida Star, 491 U.S. at 535 n. 8:

The Daily Mail principle does not settle the issue of whether, in cases where information has been acquired unlawfully by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well. This issue was raised but not definitively resolved in New York Times Co. v. United States, 403 U.S. 713 (1971), and reserved in Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978). We have no occasion to address it here.

\textsuperscript{144} Id. at *13.
\textsuperscript{145} Id. at *15.
Appellant Yocum had claimed the status of news gatherer in his less-than-coherent brief to the Third Circuit, citing *Branzburg v. Hayes* for the proposition that he was therefore entitled to First Amendment protection.\textsuperscript{146} Appellees pointed out that, if anything, *Branzburg* stands for the proposition that news gatherers enjoy very limited protection, supporting their argument based on the *Cohen* principle, and that in any case Yocum’s case would succeed or fail on the same grounds as the other Appellants’ case.\textsuperscript{147}

The only amicus brief in the Third Circuit was filed by the PSEA on behalf of Appellees, and that brief largely echoed the appellees’ analysis. It raised – and criticized – another new decision based on similar facts,\textsuperscript{148} and it added another argument analogizing the imposition of civil liability for violation of copyright law and for violation of the wiretap law’s disclosure provisions.\textsuperscript{149} Two aspects of the PSEA brief, however, bear mention because of their emphasis in the government’s brief and the Third Circuit opinion. Unlike either the district court opinion or the appellees’ brief, the PSEA brief put particular emphasis on the wiretap statute’s prohibition of “uses” of the intercepted materials other than disclosure to show its more general applicability\textsuperscript{150} and characterized the *Landmark* line as involving “heightened scrutiny” dependent upon the lawfulness of information’s initial acquisition.\textsuperscript{151} Both of these arguments would be

\textsuperscript{146} Brief on Behalf of Appellant Jack Yocum, Bartnicki v. Vopper, 200 F.3d 109 (3d Cir. 1999) (No. 98-7156), 1998 WL 34082376 at *15 (citing 408 U.S. 665 (1972)).

\textsuperscript{147} Brief of Appellees, Bartnicki v. Vopper, 200 F.3d 109 (3d Cir. 1999), 1998 WL 34083465 at 28-29.


\textsuperscript{150} Id. at *14, *18-19.

\textsuperscript{151} Id. at *16.
substantially amplified in the federal government’s brief and addressed, albeit negatively for the most part, in the Third Circuit opinion.

There were no amicus briefs supporting Vopper’s position. Brobst does not know why there was no support from other media organizations at this stage – “they certainly would have been aware of the case” – but he acknowledges that he did not solicit any amicus briefs from those organizations. Given the outcome in the Third Circuit, there was no apparent need for such support.

Following oral argument before the Third Circuit, the United States filed a brief – signed by the Assistant Attorney General for the Justice Department’s Civil Division, the U.S. Attorney for the Middle District of Pennsylvania, and two staff appellate attorneys – defending the constitutionality of the wiretap statute’s disclosure provision against Appellants’ as-applied challenge. Under federal law, the United States has the right to defend the constitutionality of any federal statute challenged on constitutional grounds. Although Brobst argued that his “as-applied” challenge did not rise to that level, the Third Circuit saw the case otherwise, and immediately after the argument, duly issued a letter inviting the government to file a post-argument brief in this case. The government’s brief points out that its filing was both “at the invitation of the Court” and pursuant to its motion to intervene as of right under the law to defend the constitutionality of the wiretap statute.

152 Brobst Interview, supra note 41.
155 Brobst Interview, supra note 41.
The United States can be something of an 800-pound gorilla when it litigates or intervenes in a constitutional challenge. In an analysis of 24 Supreme Court decisions in which the press litigated against the federal government, the press won only eight or 33.3%. In this case, the United States framed the issue, less in terms of competing precedents, as the parties had done, than in terms of levels of First Amendment scrutiny to be applied. The Third Circuit’s opinion would track the government’s approach.

Following a focused description of the wiretap statute allegedly violated by Vopper, and a synopsis of the proceeding thus far, the government summarized its argument: the First Amendment does not prohibit the application of the wiretap statute’s “use prohibitions” to the defendants in this case. As applied, those provisions are “subject only to intermediate scrutiny under the First Amendment, rather than strict scrutiny, and the statute readily satisfies the requirements of intermediate scrutiny.”

Thus, one argument among others suggested in the PSEA brief had become the foundation for the government’s position.

The government argued that the statute’s ban on disclosure had to be read as part of a comprehensive ban on all uses of intercepted material; thus, the prohibition did not single out speech for any special burden. Where that is so, where any burden on speech is merely incidental to the purpose of the law, First Amendment precedent dictates the application of intermediate, rather than strict scrutiny in determining its constitutionality. A statute satisfies intermediate scrutiny if it furthers an “important” or “substantial”

158 Easton, Interest Group, supra note 7 at 257-58.
governmental interest (in contrast to strict scrutiny’s “compelling” interest); if that interest is unrelated to the suppression of free expression; and if the incidental restriction on speech is not unnecessarily great (in contrast to strict scrutiny’s “no less restrictive alternative available”).\textsuperscript{160}

Intermediate scrutiny is also appropriate, the government said, where the prohibitions on the use of illegally intercepted communications are not related to the content of the communications. Pointing out that the appellants would be free to broadcast the very same tape if acquired lawfully, the government noted that such content-neutral restrictions on speech also require courts to apply intermediate, rather than strict, scrutiny in evaluating their constitutionality. The restrictions at issue in the \textit{Landmark} line of cases asserted by the appellants required strict scrutiny because they singled out speech for special burdens and restricted speech because of its content, among other reasons.\textsuperscript{161}

Having established the appropriateness of intermediate scrutiny, the government then proceeded to show how the wiretap statute satisfied that standard. The privacy interest to be protected is “manifestly substantial. Moreover, by protecting the confidentiality of communications, the regulations encourage, rather than suppress, free expression. And, finally, the regulations are tailored carefully enough that they would even satisfy a strict scrutiny standard.\textsuperscript{162}

It was a powerful argument, invoking not merely competing analogies, but basic principles of First Amendment analysis; indeed, the Third Circuit adopted just such an approach. Writing for herself and Judge Robert Cowan, Judge Dolores Sloviter rejected

\textsuperscript{160} \textit{Id.} at *19.
\textsuperscript{161} \textit{Id.} at *21-25.
\textsuperscript{162} \textit{Id.} at *33-38.
appellants’ argument that *Landmark* was controlling, noting that the question before this court had been expressly reserved by the Supreme Court. “[W]e will resolve the present controversy not by mechanically applying a test gleaned from *Cox* and its progeny, but by reviewing First Amendment principles in light of the unique facts and circumstances of this case.”¹⁶³ But Sloviter also rejected the District Court’s application of *Cohen*. Expressing some doubt that the wiretap statute’s disclosure provision was a law of general applicability, she pointed out that, even if it were, *Cohen* did not stand for the proposition that laws of general applicability are not subject to First Amendment scrutiny. Rather, the Supreme Court held only that “‘enforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations.’”¹⁶⁴

As if to emphasize the importance of the United States as a party in this case, Sloviter’s analysis all but ignores the original parties and addresses the government’s brief directly. Briefly summarizing its argument for intermediate scrutiny, Sloviter proceeded to mock the government’s assertion that the statute’s ban on “disclosure” is merely an aspect of its ban on “use,” that is, conduct, rather than speech, and thus meriting intermediate scrutiny. “A statute that prohibited the ‘use’ of evolution theory would surely violate the First Amendment if applied to prohibit the disclosure of Charles Darwin’s writings.”¹⁶⁵

On the other hand, the court found the content-neutrality argument more persuasive, based on the Supreme Court’s definition of content-neutral restrictions on speech as restrictions that “‘are justified without reference to the content of the regulated

¹⁶³ 200 F.3d at 117.
¹⁶⁴ *Id.* at 118 (quoting *Cohen*, 501 U.S. at 669).
¹⁶⁵ 200 F.3d at 121.
speech.’”\textsuperscript{166} Had the act’s only purpose been to prevent the disclosure of private facts, Sloviter suggested, its content-neutrality might be doubted. But the government did not rely on that justification; rather, she said, insofar as the act’s purpose was to deny the illegal interceptor a market for the “fruits of his labor,” it was properly treated as content-neutral and intermediate scrutiny applied.\textsuperscript{167}

After reviewing various interpretations of the intermediate scrutiny standard, Sloviter formulated the question before the court as “whether the government has shown that its proffered interest” – eliminating the demand for intercepted communications – is sufficiently furthered by imposing liability on the defendants in this case to justify the restrictions on their First Amendment interests.\textsuperscript{168} Finding the connection “indirect at best,” the court concluded that “it would be a long stretch indeed” to conclude that imposing damages here would even peripherally promote the government’s effort to deter interception. Since the wiretap act already provides punishment for illegal interception, it would be more effective to enforce those provisions than to impose liability here.\textsuperscript{169}

Writing in dissent, District Judge Louis Pollack agreed with the majority’s analytical approach to the case, but not with its application. Pollack took issue with the court’s assertion that the connection between prohibiting disclosure and preventing interception was “indirect at best,” citing a recent decision, \textit{Boehner v. McDermott}, from the U.S. Court of Appeals for the District of Columbia Circuit to the contrary. In that case, the court opined that, “[u]nless disclosure is prohibited, there will be an incentive

\textsuperscript{166} \textit{Id.} at 122 (quoting Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1985)).
\textsuperscript{167} \textit{Id.} at 123.
\textsuperscript{168} \textit{Id.} at 125.
\textsuperscript{169} \textit{Id.} at 126.
for illegal interceptions… and the damage caused… will be compounded.”\textsuperscript{170} The majority distinguished \textit{Boehner} on the ground that the newspapers reporting the intercepted conversation were not defendants in that case, and that defendant McDermott, who provided the tape to the newspapers, knew who had intercepted the conversation and had a political interest in its disclosure.\textsuperscript{171}

Following the judgment, Bartnicki and Kane moved for a rehearing by the entire Third Circuit court. According to Brobst, the motion failed by only one vote, suggesting the case was much closer than the panel decision would indicate.\textsuperscript{172}

\section*{IV. Before the Supreme Court: The Press Takes Notice}
\subsection*{A. The Certiorari Process}

On April 19, 2000, Bartnicki and Kane filed a petition for a writ of certiorari, asking the United States Supreme Court to review the Third Circuit decision.\textsuperscript{173} Their original lawyer, Wilkes-Barre attorney Raymond P. Wendolowski, was still listed on the brief supporting their petition, but with the stakes now that much higher and the venue shifting to Washington, Wendolowski was no longer listed as counsel of record. That responsibility was assumed by Robert H. Chanin and Jeremiah A. Collins of the Washington, D.C., firm of Bredhoff & Kaiser, a 33-lawyer firm that specialized in representing unions. Collins had been part of the team that wrote the Pennsylvania State Education Association’s amicus brief for the Third Circuit.\textsuperscript{174} The Bredhoff firm was far

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\item\textsuperscript{170} Id. at 133 (Pollock, J., dissenting)(quoting Boehner v. McDermott, 191 F.3d 463, 470 (D.C. Cir. 1999)).
\item\textsuperscript{171} Id. at 128.
\item\textsuperscript{172} Brobst Interview, \textit{supra} note 41.
\item\textsuperscript{174} \textit{See supra} nn. 148-51 and accompanying text.
\end{enumerate}
\end{footnotesize}
more experienced in Supreme Court litigation and styles itself “the voice of labor.”\textsuperscript{175}

Taking a cue from the dissent below, Bartnicki argued that the Supreme Court should review the case because the Third Circuit’s decision conflicted with \textit{Boehner}, setting up a conflict between two circuits that the Supreme Court ought to resolve.\textsuperscript{176} That kind of argument is considered one of the most effective at this stage of the process; if four justices agree that a conflict exists, the Court will invariably take the case.\textsuperscript{177} Bartnicki also argued that the decision below not only struck down an important provision of a federal statute, but also called into question similar statutes enacted by a majority of the states.\textsuperscript{178} The Third Circuit majority had disparaged that argument as hyperbole when raised by the dissent, pointing out that its “as applied” decision was expressly limited to the facts of this case.\textsuperscript{179}

Finally, Bartnicki asserted that the Third Circuit opinion was just wrong as to an important question of constitutional law that had been reserved by the Supreme Court in prior decisions. The petition asserts that this case provides “an ideal vehicle” for determining whether “a statute that protects privacy interests by making it unlawful for a person to disclose information \textit{unlawfully obtained by another} violates the First Amendment.”\textsuperscript{180} The following week, the United States weighed in, seeking certiorari on its own behalf as an intervenor in the case, with Solicitor General Seth P. Waxman listed

\textsuperscript{175} See http://www.bredhoff.com.
\textsuperscript{179} 200 F.3d at 128.
as counsel of record.\textsuperscript{181} The government’s argument closely paralleled Bartnicki’s.

When Vopper’s brief in opposition to certiorari was filed on May 30, the radio host was also represented by new counsel. According to Donald Brobst, Vopper’s employer, Keymarket of NEPA, the owner of radio station WILK, had been acquired by Sinclair Broadcast Group sometime during the pendency of the case. While Sinclair initially kept Brobst on as outside counsel, he had what he describes as a “falling out with in-house counsel for Sinclair that had nothing to do with this case”\textsuperscript{182} although part of the problem involved Fred Vopper.

In one case, Brobst said, Sinclair wanted him to defend Vopper in a case brought by a district attorney who also happened to be running for judicial office. One of the Rosenn, Jenkins & Greenwald partners was campaign treasurer, raising a potential conflict of interest for any lawyer in the firm. Another case involved Vopper’s challenging the integrity of two judges before whom RJG had other cases pending. Sinclair’s in-house counsel was “not happy about that,” Brobst said, and the relationship started to go downhill. After another, unrelated dispute arose, “we decided to have a parting of the ways on all cases,”\textsuperscript{183} and Brobst lost the chance to take Bartnicki v. Vopper to the U.S. Supreme Court.

Instead, that honor went to Lee Levine, even then a major star in the media law firmament, having founded his own Washington law firm – Levine, Sullivan & Koch, L.L.P. – only three years earlier.\textsuperscript{184} This would be Levine’s second argument before the

\begin{footnotesize}
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\item[182] Brobst Interview, supra note 41.
\item[183] Id.
\item[184] Levine’s biography shows just how plugged into the media defense bar he is:
\end{footnotes}
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Supreme Court; he had previously represented the newspaper defendant in *Harte-Hanks Communications, Inc. v. Connaughton.* Levine also taught media law at Georgetown University Law Center and had co-authored a major treatise on newsgathering. Brobst recalls that he had some initial contact with the new litigation team – “we sent them everything they wanted” – then bowed out of the case.

Levine’s brief in opposition to certiorari rejected all of the reasons for judicial review raised in the Bartnicki and United States petitions. The Third Circuit decision “constitutes an unremarkable assessment of whether the imposition of civil liability” on the media defendants under the Wiretap Acts “survives intermediate scrutiny. In making this fact-bound assessment,” the brief asserted, “the Third Circuit expressly declined to address the ‘important question of constitutional law’ referenced by Petitioners, ‘struck down’ no provision of either statute, and applied the same standard of First Amendment scrutiny embraced by the majority of the District of Columbia Circuit in *Boehner.*”

Those arguments were echoed in respondent Yocum’s brief in opposition, but

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Mr. Levine has served as Chair of the American Bar Association’s Forum on Communications Law, as President of the Defense Counsel Section of the Media Law Resource Center, as Chair of both the Media Law Committee and the Publications Committee of the District of Columbia Bar, … and as an ABA Advisor to the Uniform Defamation Act Drafting Committee of the Conference of Commissioners on Uniform State Laws. He currently serves as co-chair of the Practising Law Institute’s annual Communications Law conference, as a member of the Board of Directors of Fred Friendly Seminars, Inc., … and as a member of the Advisory Board of the Bureau of National Affairs’ *Media Law Reporter.*

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187 Brobst Interview, *supra* note 41.
successfully rebutted in reply briefs from Bartnicki\(^{190}\) and the United States.\(^ {191}\) On June 26, 2000, the United States Supreme Court granted the petition for certiorari.\(^ {192}\)

In contrast to the Third Circuit proceeding, amicus briefs began flowing into the Court in September; three of them were filed by litigants in cases representing nearly identical issues. Representative John Boehner (R-Ohio), whose victory in the D.C. Circuit had prompted Bartnicki’s “split in the circuits” argument, argued for petitioners that “there is no First Amendment right to distribute someone else’s pilfered speech.”\(^ {193}\) Boehner’s opponent, Representative James McDermott (D-Wash.), whose petition for certiori was still pending at the time, argued that disclosure provisions of the wiretap statute should be subject to strict scrutiny.\(^ {194}\) WFAA-TV of Dallas, Tex., which was poised to file its own petition seeking review of an adverse Fifth Circuit decision,\(^ {195}\) sought to push the Court to the ultimate rule – further than any other participant:

This case should be decided according to a simple, bright line rule: if a journalist breaks the law to obtain information, she is subject to whatever generally applicable legal penalties may be triggered by the act of misappropriation. However the journalist has obtained information, she may be punished only for any impropriety in obtaining it, and not for publishing it, absent a countervailing governmental interest of the highest order.\(^ {196}\)

Only one other amicus brief was filed on behalf of Bartnicki and Kane; the cellular telephone industry argued that ensuring the privacy of wireless communications


\(^{192}\) 530 U.S. 1260 (2000).


\(^{195}\) Peavy v. WFAA-TV, Inc., 221 F.3d 158 (5th Cir. 2000).

would further federal policies favoring the free speech of cell phone subscribers and encouraging the industry’s growth.\(^{197}\) In addition to McDermott’s and WFAA-TV’s briefs, four briefs were filed on behalf of the media defendants. Both the American Civil Liberties Union and the Liberty Project argued that strict scrutiny, rather than intermediate scrutiny, was the appropriate standard to apply.\(^{198}\) And Wall Street Journal owner Dow Jones, with a brief signed by Supreme Court veteran Theodore Olson, called for “straightforward application of the \textit{Daily Mail} test” – essentially Brobst’s argument in the district and circuit courts.\(^{199}\)

But the media’s principal amicus brief, with Floyd Abrams as counsel of record, was filed on behalf of more than 20 “media entities and organizations,” including newspaper and magazine publishers, television and cable networks, and journalism trade and professional associations.\(^{200}\) The list of attorneys representing the amici read like a “Who’s Who” of media law. It is impossible to say with any certainty how much influence any brief may have had on the Court, but the similarity between the media entities’ brief and the Court’s majority opinion is striking.

\textbf{B. The Amicus Brief Process}

Before discussing the content of the various briefs filed with the Court, a brief digression is warranted to explore the process through which the media bar participates as amici curiae in Supreme Court litigation today. According to Lucy Dalglish, executive
director of Reporters Committee on Freedom of the Press, the process is an informal one.\textsuperscript{201} For example, RCFP first got involved in the \textit{Bartnicki} case in June 2000. Legal defense director, Gregg Leslie, had put out an email message to a number of prominent media lawyers, among them Laura Handman of Davis Wright Tremaine, Bruce Sanford of Baker Hostetler, and Lee Levine, asking, “Does anyone know of an amicus effort underway in \textit{Bartnicki}? We’ve always been available to write one, or at least coordinate efforts, but I assume that there will be big companies willing to pay a firm for a brief now that it’s before the high court. If you have any information that you’re able to share, I’d be happy to hear it.”\textsuperscript{202}

Soon after, Adam Liptak, then in-house counsel for the \textit{New York Times}, now its Supreme Court reporter, replied, “Gregg, yes, there is an amicus effort. \textit{The Times} and others have asked Floyd Abrams to prepare a brief and I’m sure the Reporters Committee will be welcome [to join the brief] on the usual terms.” By “usual terms,” Liptak was referring to the informal arrangement through which signatories to the brief help the lead organization (here, the \textit{Times}) pay for it. RCFP and other nonprofits usually ride along for free, and when RCFP lawyers write the brief, all others in the media world are invited to join at no charge. Typically, however, the private entities pay for the privilege. According to Dalglish, the cost can vary.\textsuperscript{203}

“It depends on how much time it’s going to take, how many people [the lawyers] think they need to do it. They’ve been cutting their rates a little bit lately. In the summertime, they want to do it more because they can use their summer associates if they have them. I’d say anywhere from $10,000 to $30,000 these days is what it would

\textsuperscript{201} Interview with Lucy Dalglish, June 15, 2010 (recording on file with author).
\textsuperscript{202} Id.
\textsuperscript{203} Id.
cost.” Once the cost is established, the lead organization would begin “trolling” for signers. If, for example, the sign-on price is $1,500, Dalglish said, “if you get a whole pile of people to sign on, you’re doing OK, but if you only get five, you’ve rolled the dice and you’ve lost.”

As to the content of the briefs, Dalglish said amici first figure out what the party they are supporting has already argued, then identify other issues that the party did not have room for. “Usually, what we try to do is present a national perspective, do some public policy stuff, or brief an issue that the parties would have loved to have briefed if they had time or space. Sometimes they will ask you specifically, could you do this issue.” Other times, amici will suggest the focus of the brief. In either event, amici will try to avoid simply repeating the party’s arguments. “No court wants to put up with that,” Dalglish said. “I just have no interest in parroting back the party’s brief.”

The relationship between amici and the parties varies somewhat depending upon the court hearing the case. Under Supreme Court rules, and throughout the federal system, all parties must consent to the filing of an amicus brief; where consent is withheld, amici may petition the court to receive the brief anyway. So there is always some communication between the amici and the party they are supporting. Dalglish described the typical process: “You let them know you’re going to do it, and they say… that would be great… we’ll sign the letter and give it to you.” On the other hand, Supreme Court rules require amici to disclose whether counsel for a party had a hand in

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204 Id.
205 Id.
206 SUP. CT. R. 37.2.
207 FED. R. CIV. P. 29.
208 Dalglish Interview, supra note 201.
writing the brief or paying for it. 209

Still, the parties often ignite the amicus process. If the case gets to the Supreme Court, it has already been percolating through the media defense bar. By the time they have won or lost in the appellate courts, the parties will have talked about it in one of several forums where members of the media defense bar get together. Among these are the Practising Law Institute’s annual Communications Law Conference, founded and managed for some 35 years by James Goodale, now conducted by Lee Levine as Communications Law in the Digital Age; 210 the biennial conference and other meetings of the Media Law Resource Center, formerly the Libel Defense Resource Center, also based in New York; 211 the annual conference and various workshops of the American Bar Associations Forum on Communications Law; 212 and the annual Media and the Law Seminar at the University of Kansas. 213

One of the most important of these forums is the District of Columbia Bar Association’s Media Law Committee, which meets informally once a month for lunch at the offices of one of the participating law firms. The meetings were started by Davis Wright’s Handman, who chaired them for two years. Lee Levine has also chaired the meetings, as have RCFP’s Gregg Leslie, Covington & Burling’s Kurt Wimmer, and Holland & Knight’s Chuck Tobin. Lawyers from Washington and often New York come to talk about their strategy in cases that have been argued or to preview upcoming cases.

209 SUP. CT. R. 37.6.
211 See http://www.medialaw.org/Template.cfm?Section=Home.
212 See http://new.abanet.org/forums/communication/Pages/default.aspx.
213 See http://www.continuinged.ku.edu/programs/media_law/.
They are not, Dalglish said, strategy sessions to plan how the bar might get involved.\footnote{Dalglish Interview, supra note 201.}

That happens more informally, Dalglish said. Frequently, the \textit{New York Times} takes the lead, or the \textit{Washington Post}, or the Associated Press. “They tend to sort of rotate. Sometimes it’s the individual lawyer [who is interested in a particular case]… Sometimes it’s geographic. Sometimes they have a similar case percolating and they want to jump on it…. Sometimes it’s driven by who’s interested in covering a story.”

Dalglish says the informal system works so well because the bar is so small. “It’s a very small group of people. Very tight knit. … So you’re seeing these people frequently, and you’re staying on top of things frequently. … Everybody knows everybody else.”\footnote{Id.}

As for the Reporters Committee itself, Dalglish noted that she has former fellows working all over the country. “I will hire a fellow [who] will spend a year working here. I will work [at] getting him a job at one of the firms. And then some of those folks end up going in house because they don’t like the law firm atmosphere. Right now, I’ve got former fellows in house at the \textit{Washington Post} [and] National Public Radio…. [In] the last couple of years, my folks have been snatched up by the government… as FOIA officers.”\footnote{Id.}

Dalglish said RCFP used to be a lot more involved in direct litigation, pointing out that “the last time we were actually involved as a party was … when we went in with the Center for National Security Studies… to get a list of the 1,500 or so foreign nationals who were snatched off the streets and put in detention centers” after Sept. 11, 2001. The U.S. Court of Appeals for the District of Columbia ultimately reversed an initially
favorable decision by the district court.\textsuperscript{217} During the past decade or so, since Dalglish has been executive director, RCFP has been doing more amicus briefs.\textsuperscript{218}

“We look for cases that will have potential to have an impact on what journalists are able to do, either in their home state or on the federal level, and that can be in regards to an open meetings or open records violation… it can be getting involved in a libel case, or certainly in a reporter’s privilege case. We tend not to get involved at the trial level,” Dalglish said, citing lack of need, cost, and the potential to irritate trial judges. “That’s not to say we haven’t done it, but at the trial level we usually get involved if it is an issue that can be of great relevance to the media, but neither of the parties is a media entity…. We may look at some of the pleadings and decide that it may be of benefit to having a media lawyer write the brief and raise some issues that perhaps [another lawyer would see differently].”\textsuperscript{219}

Dalglish said she also tries “not to get involved at the cert. petition stage at the U.S. Supreme Court, unless there’s a compelling reason to, like if it’s a case we really, really want them to take, or if a case that we know they’re going to take and we want to get the issue teed up right away. And, quite honestly, there’s one other very important factor, and that has to do with journalism politics. We want to stake our territory. We want to do a brief and show that the Reporters Committee is on top of it.”\textsuperscript{220}

“If [the case is] at the intermediate court level at the federal level, we’re almost certainly going to get involved if it involves anything to do with the media. Sometimes, they slip by us.” In Bartnicki, where no media amicus briefs were filed in the Third

\textsuperscript{218} Dalglish Interview, supra note 201.
\textsuperscript{219} Id.
\textsuperscript{220} Id.
Circuit proceeding, Dalglish recalls that other, similar cases were being “teed up” at about the same time.221 “Hopefully, we've gotten a little better at spotting them on the circuit level, but that doesn’t mean we always catch them…. Certainly, when the Supreme Court took [Bartnicki], we got involved in force.”222

C. The Briefs

Most of the arguments in the parties’ briefs had been auditioned below. Bartnicki and Kane began their argument for reversing the Third Circuit opinion by urging the Court to adopt an intermediate scrutiny standard – a point on which the Third Circuit agreed. It next walked the Court through an unremarkable analysis to show that the statutes, as applied, satisfy that standard.223 The federal government’s brief made essentially the same case.224 For Vopper and the other media defendants, Levine argued that the case required application of the Daily Mail principle, another way of arguing for strict scrutiny, but he added that the statutes in question would not even satisfy intermediate scrutiny.225 Yocum, who had by now retained his own Supreme Court specialist, Thomas C. Goldstein, made the same arguments in reverse order.226

221 Referring to Boehner v. McDermott, 191 F.3d 463 (D.C. Cir. 1999) (upholding the disclosure provisions of the wiretap act where the defendant congressman allegedly knew the interceptors and promised them immunity for their illegal conduct) and Peavy v. WFAA-TV, Inc., 221 F.3d 158 (5th Cir. 2000) (upholding the disclosure provisions where the defendant television station not only knew the interceptions were illegal, but participated in their acquisition).
222 Dalglish Interview, supra note 201.

Floyd Abrams’s amicus brief for the “media entities” also argued that the Third Circuit opinion should be affirmed on a \textit{Florida Star} (i.e., \textit{Landmark} or \textit{Daily Mail}) analysis,\footnote{228}{Brief Amici Curiae of Media Entities and Organizations in Support of Respondents, Bartnicki v. Vopper, 532 U.S. 514 (2001) (No. 99-1687 & -1728), 2000 U.S. S.Ct. Briefs LEXIS 579 at *15-19.} noting only in a footnote that the statute would fail intermediate scrutiny as well.\footnote{229}{Id. at *48 n. 34.} But Abrams prefaced his legal argument with a much broader policy appeal:

> From the time individuals first consider becoming journalists, two principles are drilled into them.

> The first is that telling the truth about matters of public interest is what journalism, at its best, is all about. … [J]ournalists who read opinions of this Court find unsurprising this Court’s repeated reference to “the overarching public interest, secured by the Constitution in the dissemination of truth.” That public interest is directly imperiled in this case.

> So is the journalistic norm that in the course of gathering news, journalists should affirmatively seek the truth from those who have it…. For journalists, then, the notion that liability may be imposed upon them for doing nothing more or less than reporting truthfully about newsworthy events is deeply disturbing.\footnote{230}{Id. at *8-14.}

> Although the Third Circuit had viewed the government’s interest in deterring unlawful interceptions as the most, albeit insufficiently, compelling justification for the statute’s non-disclosure provisions, Abrams focused on the privacy interest. The privacy interests held insufficient in the \textit{Florida Star} line of cases, he said, were no less powerful than the privacy interests in this case. “[W]hy, after all, is the right of a rape victim not to have her name disclosed less significant than that of a union official not to have a
telephone call disclosed in which he threatened to engage in criminal conduct?"  

Abrams moved on to reject the notion, advanced by Bartnicki, that the *Florida Star* line of cases was limited to content-based restrictions on speech and, thus, not applicable to the content-neutral disclosure restrictions of the wiretap laws. Rather, he said, that line of authority is firmly grounded in the public interest in truth-telling. Abrams also made the seemingly unnecessary argument that the media defendants acted lawfully in obtaining the tape, then returned to balance of privacy and truth-telling interests. In the very last paragraph of the argument, almost as an afterthought, Abrams struck the precise theme that would dominate the Supreme Court’s opinion:

> We offer the final thought that there is, in the end, a certain lack of equivalence between the First Amendment interests at stake here and the privacy interests that underlie the wiretapping statute. Both are important but only one is in the written Constitution. It should not be too late to assert that when the First Amendment’s protection of truth-telling is pitted against an interest that was only first identified just over a century ago, some deference should be given to the Framer’s expressed intentions.

Oral arguments were held on Dec. 5, 2000. Collins led off for petitioners Bartnicki and Kane, and his responses to the Court’s questions emphasized the content-neutrality of the anti-disclosure statutes. When a content-neutral statutory regime protects important governmental interests would be harmed by disclosure, he said, “we believe and we have argued that that in essence exhausts the First Amendment concerns…” Solicitor General Waxman, who argued next, contradicted Collins’s “suggestion” that no heightened scrutiny is required here. “That’s not our position,” he

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231 *Id.* at *29.
232 *Id.* at *30.
said; “we submit that the appropriate level of scrutiny is intermediate scrutiny.”\(^{234}\)

Justice Anthony Kennedy and others expressed concern that the statutes created a class of speech that was forever tainted and could not be repeated by anyone. Waxman countered that, once the speech became publicly known, the statutes would no longer apply. Thus a newspaper was free to comment on the conversation once Vopper broadcast it.\(^ {235}\) He also defended the argument that enforcing the anti-disclosure statutes would deter unlawful interceptions.\(^ {236}\)

Levine began his oral argument by calling attention to the threat contained in the intercepted conversation, which led to a distracting colloquy with Justice John Paul Stevens and others about whether he wanted to win his case on that narrow ground or on principle. Insisting, as he was bound to do, that he would take the win “any way I can get it,” Levine focused on the \textit{Daily Mail} principle as the proper basis for decision.\(^ {237}\) Levine denied that the statutes’ content neutrality would require an intermediate scrutiny analysis, but asserted that the anti-disclosure provisions would not survive even that modest test.\(^ {238}\)

The balance of Levine’s time was taken up with an inconclusive discussion of the statutes’ deterrence value, and that was where Yocum’s counsel, Thomas Goldstein, began his appearance before the Court. “Even if [the anti-disclosure provisions] add some deterrent, that prohibition is too crude a weapon, effectively a thermonuclear bomb of sorts, to be sustained in the sensitive area of… free speech.”\(^ {239}\) Goldstein endorsed the

\(^{234}\) \textit{Id.} at *16-17.  
\(^{235}\) \textit{Id.} at *21-23.  
\(^{236}\) \textit{Id.} at *22.  
\(^{237}\) \textit{Id.} at *26-27.  
\(^{238}\) \textit{Id.} at *30.  
\(^{239}\) \textit{Id.} at *39.
Third Circuit’s intermediate scrutiny approach,240 and took issue with Waxman’s assertion that the statutes’ effectively immunized down-stream commentary on the intercepted conversation.241 Waxman, in a brief rebuttal, defended the deterrence argument and distinguished the Daily Mail line of cases.242 At 12:03 p.m., Chief Justice Rehnquist declared the case submitted.243

V. The Supreme Court Opinion: Ad Hoc Balancing

In his opinion for the Court, delivered May 21, 2001, Justice Stevens adopted the frame that Abrams had urged – a conflict between the “full and free dissemination of information concerning public issues” and “individual privacy.” Stevens’s formulation of the issue, however, labeled both interests “of the highest order,” and he appeared to accept the idea, advanced by petitioners, that the disclosure provisions of the statute would “foster[] private speech.”244 Nevertheless, Stevens promptly declared that the disclosures made in this case were protected by the First Amendment.245

The opinion that followed was unusually disjointed, shifting from doctrinal analysis, to interrogation of precedents, and ultimately to ad hoc balancing. Stevens began by accepting petitioners’ characterization of the disclosure provisions as “content-neutral law of general applicability.”246 Unlike the trial court, however, he did not find that dispositive. “On the other hand,” he said, the “naked prohibition against

240 Id.
241 Id. at *42.
242 Id. at *52-55.
243 Id. at *55.
245 Id.
246 Id. at 526.
disclosure… as a regulation of pure speech,” as if that somehow negated or counterbalanced the general applicability doctrine as applied in *Cohen v. Cowles Media.*

Seeming to reach a dead end with this doctrinal inquiry, Stevens shifted abruptly to interrogating precedent. Here, too, the analysis ended without resolution, with Stevens pointing out that neither the Pentagon Papers case, nor the *Landmark-Daily Mail-Florida Star* line of cases, resolved the question presented here. The only lesson Stevens seemed to take from these precedents was the need to balance, on the facts of this case, the interests served by the law against its restrictions on speech.

Like the Third Circuit, Stevens ultimately rejected the government’s asserted interest in deterring interception of private conversations as a bona fide interest of the “highest order.” Unlike the Third Circuit, Stevens found the privacy interest compromised here to be a “valid independent justification for prohibiting such disclosures….” Nevertheless, those privacy interests had to “give way when balanced against the interest in publishing matters of public importance.” Drawing principally on libel cases for support, Stevens held that a “stranger’s illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern.”

In a concurring opinion, joined by Justice Sandra Day O’Connor, Justice Stephen Breyer emphasized the narrowness of the Court’s holding. Breyer, well known for his

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247 *Id.*
248 *See supra* Part II.B.
250 *See supra* Part II.A.
251 *Barmicki*, 532 U.S. at 532.
252 *Id.* at 533.
253 *Id.* at 534.
254 *Id.* at 535.
255 *Id.* (Breyer, J., concurring).
ad hoc balancing approach to First Amendment cases, cautioned that this case was
decided on the facts that the broadcasters acted lawfully in obtaining the information and
the information involved the threat of physical harm to others. It did not signal a
“significantly broader constitutional immunity for the media,” Breyer warned.

Breyer asserted that concepts like “strict scrutiny” are inappropriate to resolve
competing interests. Breyer also seemed to put far more value in the deterrent effect of
the anti-disclosure provisions than either the majority or Third Circuit opinion. But on
these facts, Breyer said, the speakers had no “legitimate” interest in the privacy of a
threat to harm others – even where the danger had passed. Breyer also emphasized that
Bartnicki and Kane were “limited public figures” with a “lesser” interest in privacy.

Breyer concluded that the Court did “not create a ‘public interest’ exception that
swallows up the statutes’ privacy-protecting general rule.” Rather, he said, these
speakers’ privacy expectations were unusually low, while the public interest in “defeating
those expectations” was unusually high. “I would not extend that holding beyond
these present circumstances.”

Of course, the dissenters would not have gone even that far. Writing for Justices
Antonin Scalia and Clarence Thomas, Chief Justice William Rehnquist correctly
identified the contradiction in Justice Stevens’s acknowledgment that the anti-disclosure
provisions were “content-neutral laws of general applicability” and the outcome that

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256 See, e.g., James C. Goodale, Caught in Breyer’s Patch, N.Y. L.J., July 23, 1996, at 1; Bruce Ennis,
Courtside, COMM. LAWYER, Fall 1999, at 14, available at A.B.A. FORUM ON COMM. L.,
257 Bartnicki, 532 U.S. at 536.
258 Id.
259 Id. at 537.
260 Id. at 539.
261 Id.
262 Id. at 540.
263 Id. at 541.
Stevens ultimately reached. But he inexplicably mischaracterizes Stevens’s analytical approach as a kind of strict scrutiny derived from “the Daily Mail string of newspaper cases,” which he proceeds to read as narrowly as possible. As noted above, Stevens paid very little attention to that line of cases, and barely mentioned strict scrutiny doctrine. Breyer’s characterization of a fact-bound balancing came far closer to the essence of the majority opinion.

Rehnquist also took issue with Stevens’s rejection of the government’s deterrence argument, calling “[r]eliance upon the ‘dry up the market’ theory …both logical and eminently reasonable….” And he emphasized the First Amendment right of Bartnicki and Kane keep their conversation from the public domain. Finally, he castigated the Court for relying on the Pentagon Papers case and “other inapposite cases” to subordinate the right to communications privacy “to the claims of those who wish to publish the intercepted conversations of others.”

VI. Conclusion: A Mixed Blessing?

In assessing the impact of Bartnicki on future development of First Amendment doctrine, one may choose to adopt the expansive reading given the majority opinion by the dissent or the narrow reading given in the concurrence. Ironically, the press would surely favor the former; indeed, they argued all along for strict scrutiny and the invocation of the constitutional privacy cases. The concurring opinion is far more problematic: can one broadcast an intercepted conversation that does not threaten

264 Id. at 544 (Rehnquist, J., dissenting).
265 Id. at 545-49.
266 Id. at 552-53.
267 Id. at 553.
268 Id. at 555-56.
physical harm? Stevens’s opinion is so poorly crafted as to leave in doubt, not merely the answer, but even the proper analytical approach.\textsuperscript{269}

To take one hypothetical “ripped from the headlines” as this article was being drafted, consider the prospective case against WikiLeaks.com for publishing hundreds of thousands of military and diplomatic documents allegedly downloaded from a government database by a disaffected soldier.\textsuperscript{270} As of this writing, no indictment had been handed up by a grand jury, but assuming \textit{arguendo} that no one associated with WikiLeaks participated in the unlawful leaking except as beneficiary, there is only one difference between the case against WikiLeaks and the case against Fred Vopper: national security versus personal privacy as the subject matter of the unlawfully acquired information.\textsuperscript{271}

Thus, if one reads \textit{Bartnicki} as imposing strict scrutiny when reviewing any restrict on the dissemination of unlawfully obtained, but publicly important information, where the disseminator did not participate in the unlawful acquisition, then WikiLeaks is home free. On the other had, if one reads Bartnicki as a case of ad hoc balancing, then the Court will ultimate have to decide whether freedom to publish without fear of sanction is outweighed in this case by national security, as opposed to personal privacy, considerations.

So far, the lower courts’ application of \textit{Bartnicki} have not been particularly

\textsuperscript{269} See Rodney A. Smolla, \textit{Information as Contraband: The First Amendment and Liability for Trafficking in Speech}, 96 NW. U. L. REV. 1099, 1118 (2002) (“Astonishingly, at no point in Justice Stevens’s opinion does the Court come right out and say what standard of review or doctrinal test it is applying to the laws before it.”)


\textsuperscript{271} There are no legally meaningful differences between the web site and the radio station as platforms or between Assange and Vopper as communicators, absent Assange’s complicity in the unlawful leaking of the information.
helpful in that regard. Several cases have distinguished Bartnicki on the ground that the disclosures were not a matter of public concern.\textsuperscript{272} Others have distinguished Bartnicki on the ground that the disseminator participated in the illegal conduct that led to disclosure.\textsuperscript{273} Still others have distinguished Bartnicki where the disclosures involved trade secrets,\textsuperscript{274} copyrights,\textsuperscript{275} or data mining.\textsuperscript{276} In no case reported to date has the holding in Bartnicki been applied to reach a similar conclusion in an analogous case.\textsuperscript{277}

The scholarly literature has been rather more enlightening. In his article on 

\textit{Information as Contraband}, published shortly after the Court issued its opinion in Bartnicki, and clearly inspired by that case, Rodney Smolla saw Bartnicki as an immediate victory for the press, but a longer term victory for privacy interests.\textsuperscript{278} With a majority of justices (two concurring and three dissenting) accepting an effective

\begin{footnotesize}
\textsuperscript{272} See, e.g., Quigley v. Rosenthal, 327 F.3d 1044 (10\textsuperscript{th} Cir. 2003) (distinguishing Bartnicki where intercepted conversations regarding one family’s anti-Semitic remarks about another family in the neighborhood were not matters of public concern); Trans Union Corp. v. FTC, 267 F.3d 1138, 1140 (D.C. Cir. 2001) (distinguishing Bartnicki where speech at issue – target marketing lists comprising names, addresses, and financial information – involved only matters of private concern); Doe v. Luster, 2007 Cal. App. Unpub. LEXIS 6042 at *16 (2007) (distinguishing Bartnicki where speech at issue – a videotape of woman being raped – is not a matter of public concern); M. G. v. Time Warner, Inc., 107 Cal. Rptr. 2d 504, 512 (Cal. Ct. App. 2001) (distinguishing Bartnicki where speech at issue – photo of team coached by child molester – was not a matter of public concern).

\textsuperscript{273} See, e.g., Boehner v. McDermott, 441 F.3d 1010, 1017 (2006), aff\textsuperscript{d} en banc, 484 F.3d 583 (2007) (defendant’s actual knowledge of the circumstances of the illegal interception made this case distinguishable from Bartnicki); Bowens v. Ary, 2009 Mich. App. LEXIS 2000 at *20-21 (2009) (distinguishing Bartnicki where the defendant directed the recording of a private conversation without consent); Wisconsin v. Baron, 769 N.W.2d 34, 48 (2009) (distinguishing Bartnicki where the defendant illegally accessed the email account of a public official to disseminate truthful information about him).

\textsuperscript{274} See DVD Copy Control Ass’n v. Bunner, 75 P.3d 1, 15 (Cal. 2003) (Bartnicki inapplicable, by its own terms, where disclosure in question involved trade secrets).

\textsuperscript{275} See Barclay’s Capital, Inc. v. Thyeflyonthewall.com, 700 F. Supp. 2d 310, 354 n. 15 (2010) (distinguishing Bartnicki where cause of action is copyright infringement and misappropriation of hot news).

\textsuperscript{276} See IMS Health Inc. v. Ayotte, 550 F.3d 42, 51 (1\textsuperscript{st} Cir. 2008) (Bartnicki inapplicable where disclosure and use of personally identifiable information by a data mining company was found to be conduct, not speech).

\textsuperscript{277} Indeed, in \textit{SEC v. Rajaratnam}, the court quoted Bartnicki for the proposition that “‘disclosure of the contents of a private conversation can be an even greater intrusion on privacy than the interception itself.'” 622 F.3d 159, 169 (2010) (quoting Bartnicki, 532 U.S. at 533 (emphasis added)).

\textsuperscript{278} Smolla, \textit{supra} note 269, at 1149-50.
\end{footnotesize}
intermediate scrutiny standard,\textsuperscript{279} albeit with a “newsworthiness” safety-valve,\textsuperscript{280} Smolla saw the case as elevating personal privacy to an interest of constitutional dimension on a par with freedom of speech and press.\textsuperscript{281}

Nevertheless, Smolla drew exactly the opposite conclusion with respect to classified information. Hypothesizing a new “Official Secrets Act” of the kind enacted by Congress to punish journalists for disclosing leaked classified information, and vetoed by President Clinton,\textsuperscript{282} Smolla drew a sharp distinction between the “steal” considered in \textit{Bartnicki} and the “leak” contemplated by the new law. Quoting both Laurence Tribe\textsuperscript{283} and Potter Stewart,\textsuperscript{284} Smolla asserted that “[r]espect for the structural independence of the media contemplated by the Constitution prohibits courts from conscripting journalists as leak-police.” Thus, to Smolla, even the narrowest reading of \textit{Bartnicki} poses no danger for a Julian Assange – assuming his hands are otherwise clean and WikiLeaks is found to share that “structural independence.”\textsuperscript{285}

Of course, the Court has changed since Smolla wrote in 2002, and so has the temper of the times. It may be that the best that can be said for the \textit{Bartnicki} decision is that, absent participation in the unlawful acquisition of newsworthy information, the press is as free to publish it as changing societal values will allow. At the very least, the “content-neutral law of general applicability” no longer presents the insurmountable

\textsuperscript{279} \textit{Id.} at 1119.
\textsuperscript{280} \textit{Id.} at 1170.
\textsuperscript{281} \textit{Id.} at 1150.
\textsuperscript{282} \textit{Id.} at 1166-67.
\textsuperscript{283} \textit{Id.} at 1167 (“There may be some rough ‘law of the jungle’ notion at work here: even if no sweeping right to know will be recognized as a limit on government's power to try to keep matters bottled up, an outsider who manages to obtain otherwise confidential information cannot then be prevented from disseminating it - or punished for having done so.” \textsc{Laurence H. Tribe, American Constitutional Law} 965 (2d ed. 1988)).
\textsuperscript{284} \textit{Id.} at 1168 (“So far as the Constitution goes the autonomous press may publish what it knows, and may seek to learn what it can.” Potter Stewart, \textit{Or of the Press}, 26 HASTINGS L.J. 631, 636 (1975)).
\textsuperscript{285} \textit{Id.} at 1168.
obstacle to First Amendment protection that it was under Cohen v. Cowles Media. The Landmark-Daily Mail-Florida Star line of cases has emerged none the worse for wear – Justice Rehnquist’s crabbed reading garners only three votes. And, most importantly, Fred Vopper and his media allies got the outcome they wanted, if not the mandate, taking the press a small step closer to the ultimate goal of protection for all truthful information of public importance.