



Spring 3-1-1989

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Recommended Citation

I. Communications Law, 46 Wash. & Lee L. Rev. 447 (1989).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol46/iss2/7>

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I. COMMUNICATIONS LAW

Extending The Common-Law Official Report Privilege To Foreign Governments: Chang-Sin Lee v. Dong-A-Ilbo

The evolution of defamation law reflects the tension between society's competing interests in encouraging the free flow of information about matters of public concern and protecting an individual's reputation from injury.¹ The common law attempted to reconcile the competing interests by creating a general rule that a defendant publishes defamatory statements at his peril unless the defendant can prove that the statement is true or the defendant made the statement on a privileged occasion.² The common-law

1. *See Dairy Stores, Inc. v. Sentinel Publishing Co.*, 104 N.J. 125, 135-36, 516 A.2d 220, 225 (1986) (discussing evolution of common law of defamation). Historically, the common law regarded as so socially significant an individual's interest in the enjoyment and maintenance of a good reputation that English and American courts imposed strict liability on persons who published defamatory statements. *See* W.P. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER & KEETON ON TORTS § 113, at 804 (5th ed. 1984) (discussing early history of state defamation law) [hereinafter PROSSER & KEETON]. In direct contrast to courts' interest in protecting reputation, English and American courts also have recognized that, for a free society to function effectively, the public must have access to all relevant information about all types of government activity. *See id.* (discussing history of defamation law); *see also Dairy Stores*, 104 N.J. at 136, 516 A.2d at 225 (noting courts' increasing awareness of need for public information on wide variety of issues); Comment, *Constitutional Privilege to Republish Defamation*, 77 COLUM. L. REV. 1266, 1266-1267 (1977) (discussing competing values of reputation and public's right to information about government) [hereinafter Comment]. The interests of protecting an individual's reputation and safeguarding the free flow of information are incompatible to the extent that the protection of private reputation by the imposition of liability deters the press from reporting important information to the public. *See* Note, *Privilege to Republish Defamation*, 64 COLUM. L. REV. 1102, 1102 (1964) (discussing tension between reputation and freedom of the press) [hereinafter Note].

2. PROSSER & KEETON, *supra* note 1, § 113, at 804. Traditionally, the common law has accommodated the public need for certain information by recognizing that some otherwise defamatory statements should be privileged. *See Dairy Stores*, 104 N.J. at 136, 516 A.2d at 225 (discussing the common law republication privilege). A "privileged" defamatory statement does not create liability for the publisher. *Id.* An absolute privilege provides to publishers of certain statements complete immunity from liability. *Id.* The common law has granted an absolute privilege to statements made in judicial, legislative, or administrative proceedings because unfettered expression is crucial to the public welfare. *See id.* (discussing common-law defamation privileges); *Ranier's Dairies v. Raritan Valley Farms, Inc.*, 19 N.J. 552, 558, 117 A.2d 889, 892-94 (1955) (discussing rationale behind common-law absolute privilege); *Story v. Norfolk-Portsmouth Newspapers, Inc.*, 202 Va. 588, 590, 118 S.E.2d 668, 669-70 (1961) (distinguishing between absolute and qualified privilege in defamation law). Other statements, such as those made outside government proceedings but for the public welfare, enjoy a qualified or conditional privilege. *Swede v. Passaic Daily News*, 30 N.J. 320, 333-34, 153 A.2d 36, 43-44 (1959) (recognizing qualified privilege to report statements made in public municipal council "conference room" meeting). *See Dijkstra v. Westerink*, 168 N.J. Super. 128, 134-36,

rule of republication liability and the official report privilege exception to the republication rule reflect a delicate balance between protecting individual reputation and the media's reporting about events of a public concern.³ Under the republication rule, a person who republishes a libelous statement is subject to the same liability as the person who originally made the statement.⁴ The official report privilege permits a person to republish without liability accounts of public proceedings or official government reports even if portions of the account or report are defamatory.⁵ In *Chang-Sin Lee v.*

401 A.2d 1118, 1120-22 (granting qualified privilege to statements made to authorities for prevention and detection of crime), *cert. denied*, 81 N.J. 329, 467 A.2d 1203 (1979). To rely on the qualified privilege, a publisher must provide a fair and substantially true account of the particular government proceeding or report. *See Mills v. Kingsport Times-News*, 475 F. Supp. 1005, 1011 (W.D. Va. 1979) (stating that privileged newspaper report must be impartial and accurate account of event as recorded in public record); *Alexandria Gazette Corp. v. West*, 198 Va. 154, 159-60, 93 S.E.2d 274, 279 (1956) (discussing qualified privilege); *infra* note 53 (discussing attribution requirement). A libel plaintiff may overcome a qualified privilege and impose liability on the publisher if the plaintiff proves that the defendant published the defamatory statement with malice. *See Dairy Stores*, 104 N.J. at 136, 516 A.2d at 225 (discussing generally common-law qualified privilege). The plaintiff must prove common-law malice to overcome a qualified privilege. *See Gazette, Inc. v. Harris*, 229 Va. 1, 15, 325 S.E.2d 713, 727 (1985) (discussing burden of proof when defendant invokes official report privilege). Common-law malice is behavior that involves an intent or motive arising from personal spite or ill-will. *See id.* (defining common-law malice). The qualified privilege has emerged as one of the prime mechanisms for balancing the interest in reputation and the interest in the publication of information of public concern. *See Dairy Stores*, 104 N.J. at 137, 516 A.2d at 226 (discussing contexts in which courts have applied qualified privilege).

3. *See Comment, supra* note 1, at 1267-69 (discussing development of republication rule and official report privilege).

4. *See Medico v. Time, Inc.*, 643 F.2d 134, 137 (3d Cir.) (stating that person who repeats defamatory statement is as liable as original defamer), *cert. denied*, 454 U.S. 836 (1981); *Dixson v. Newsweek*, 562 F.2d 626, 631 (10th Cir. 1977) (stating that republication of false, defamatory statement is a tort as much as publication of original statement); RESTATEMENT (SECOND) OF TORTS § 578 (1977) (defining republication rule). A person who republishes a libel is subject to liability even if he attributes the libelous statement to the original publisher or expressly disavows the truth of the statement. *See Medico*, 643 F.2d at 137 n.5 (discussing common-law rule of republication); R. SACK, LIBEL, SLANDER AND RELATED PROBLEMS 86-87 (1980) (discussing general principles of republication rule). The concern underlying the republication rule is simple: each time a publisher reprints a libelous matter the target of the report suffers another serious injury. RESTATEMENT (SECOND) OF TORTS § 578, comment b (1977).

5. *Medico*, 643 F.2d at 137; *Alexandria Gazette*, 198 Va. at 159-60, 93 S.E.2d at 279; *see also* R. SACK, *supra* note 4, at 316 (discussing official report privilege). The official report privilege is a limited exception to the republication rule. R. SACK, *supra* note 4, at 316. Courts also have called the official report privilege the fair report privilege, the record privilege, the reporter's privilege, or the public eye doctrine. *Id.* The Restatement (Second) of Torts defines the official report privilege as:

[t]he publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.

RESTATEMENT (SECOND) OF TORTS § 611 (1977).

Courts have applied the official report privilege to various official actions and proceedings of the United States government and its subdivisions. *See, e.g., Medico*, 643 F.2d at 137-

*Dong-A-Ilbo*⁶ the United States Court of Appeals for the Fourth Circuit addressed for the first time whether to extend the official report privilege to reports of official actions of foreign governments.⁷

In *Chang-Sin Lee* two South Korean intelligence agencies, the National Security Planning Agency and the Military Security Command, issued a press release announcing the disruption of two North Korean espionage rings operating in the United States and West Germany.⁸ Six Virginia newspapers, including the *Dong-A-Ilbo*, and one Virginia public television station reported the announcement, relying on accounts that had appeared in the South Korean press.⁹ The reports identified Chang-Sin Lee, a South Korean citizen living in New York, as a North Korean spy.¹⁰ In response

43 (applying privilege to report containing United States Federal Bureau of Investigation documents); *Pulvermann v. A.S. Abell Co.*, 228 F.2d 797, 802 (4th Cir. 1956) (concerning report of comment by presidential candidate on dismissal of high party official); *Mathis v. Philadelphia Newspapers, Inc.*, 455 F. Supp. 406, 416 (E.D. Pa. 1978) (concerning republication of police suspect's photograph); *Coleman v. Newark Morning Ledger Co.*, 29 N.J. 357, —, 149 A.2d 193, 206-07 (1959) (concerning report of testimony at secret Senate subcommittee meeting); *Sciandra v. Lynett*, 409 Pa. 595, —, 187 A.2d 586, 592 (1963) (concerning study commissioned by governor of New York on activities of organized crime figures); *Alexandria Gazette*, 198 Va. at 163-64, 93 S.E.2d at 281-82 (concerning report of judicial proceedings). Newspapers, broadcasting stations, and other persons in the business of reporting news to the public commonly exercise the official report privilege. RESTATEMENT (SECOND) OF TORTS § 611, comment c (1977).

6. 849 F.2d 876 (4th Cir.), *reh'g denied*, (Oct. 14, 1988), *petition for cert. filed*, 57 U.S.L.W. 3497 (U.S. Jan. 11, 1989) (No. 88-1145).

7. *Chang-Sin Lee v. Dong-A Ilbo*, 849 F.2d 876, 879-80 (4th Cir. 1988). The *Chang-Sin Lee* decision marked the first time that a United States court considered whether the official report privilege extends to reports about official actions of foreign governments. *Id.* at 878.

8. *Id.* at 877. In *Chang-Sin Lee* a South Korean intelligence agency press release announced that the South Korean government had arrested 22 persons on charges of spying for North Korea. Brief for Appellee at 4, *Chang-Sin Lee v. Dong-A Ilbo*, 849 F.2d 876 (4th Cir. 1988) (No. 87-2578). The press release also provided details about other North Korean agents who allegedly were operating a student-run espionage network at Western Illinois University. *Chang-Sin Lee*, 849 F.2d at 877. The description of the espionage network was a major news story in South Korea, extensively reported by all of the major newspapers and broadcast on the state-sponsored television station, the Korean Broadcasting System. Record at 6, *Chang-Sin Lee* (No. 87-2578).

9. *Chang-Sin Lee*, 849 F.2d at 877. In *Chang-Sin Lee* some of the defendant newspapers simply reprinted the story about the Korean espionage ring as the story appeared in Korea. *Id.* The Virginia television station aired a rebroadcast from the Korean Broadcasting System. *Id.* With the exception of one newspaper, all of the stories were in Korean, targeted for the Korean-American community. *Id.*

10. *Id.* The plaintiff, Chang-Sin Lee, emigrated to the United States from the Republic of Korea with members of his family in October 1975. Brief for Appellant at 3, *Chang-Sin Lee v. Dong-A Ilbo*, 849 F.2d 876 (4th Cir. 1988) (No. 87-2578). Chang-Sin Lee graduated from Western Illinois University in 1984 with a Bachelor of Arts degree. *Id.* The United States government had admitted Chang-Sin Lee as a permanent resident alien to the United States. *Id.* At the time of the alleged libel, the plaintiff was studying television production full-time in New York City. *Id.* The South Korean courts subsequently convicted *in absentia* on charges of espionage the individual allegedly misidentified in the press release and media accounts as Chang-Sin Lee. *Id.* at 5 n.2.

to the reports, Chang-Sin Lee filed in the United States District Court for the Eastern District of Virginia a libel action against the newspapers and the public television station alleging that the news reports damaged Chang-Sin Lee's reputation.¹¹ Extending the official report privilege to the republication of all government reports, foreign and domestic, the district court granted the defendants' motion for summary judgment.¹² Chang-Sin Lee appealed the district court's decision to the United States Court of Appeals for the Fourth Circuit.¹³

Reviewing the district court's decision, the Fourth Circuit reversed the district court's grant of summary judgment and held that the official report privilege does not apply to reports based on a South Korean government press release.¹⁴ The Fourth Circuit first noted that while the Supreme Court has not explicitly recognized the official report privilege as a constitutional privilege, the Supreme Court has recognized the existence of first amendment considerations in press reports of official government proceedings.¹⁵ The

11. *Chang-Sin Lee*, 849 F.2d at 877. Although the plaintiff in *Chang-Sin Lee* lived in New York and first learned of the spy story from New York newspapers, he filed suit in Virginia because Virginia has one of the fastest legal processes in the country. Brief for Appellee at 10, *Chang-Sin Lee v. Dong-A Ilbo*, 849 F.2d 876 (4th Cir. 1988) (No. 87-2578).

12. *Chang-Sin Lee*, 849 F.2d at 877. To overcome the official report privilege, the plaintiff in *Chang-Sin Lee* had to show that the defendants published the reports with common-law malice. *Id.*; see *supra* note 2 (defining common-law malice). The plaintiff in *Chang-Sin Lee* did not prove common-law malice to overcome the official report privilege and, therefore, the district court granted the media defendants' motion for summary judgment. *Chang-Sin Lee*, 849 F.2d at 877.

13. *Chang-Sin Lee*, 849 F.2d at 877.

14. *Id.* at 880. In *Chang-Sin Lee* the Fourth Circuit applied Virginia law because the alleged libel occurred in Virginia. *Id.* at 877.

15. *Chang-Sin Lee*, 849 F.2d at 877. *Id.*; see *Landmark Communications v. Virginia*, 435 U.S. 829, 837-46 (1978) (striking down as unconstitutional portion of Virginia statute imposing criminal sanctions for reporting confidential proceedings of judicial review commission); *Cox Broadcasting v. Cohn*, 420 U.S. 469, 496-97 (1975) (granting summary judgment for media defendant in invasion of privacy action for publication of public record that named a deceased rape victim). In *Cox Broadcasting* the Supreme Court seemingly gave constitutional stature to a limited version of the official report privilege. See *Cox Broadcasting*, 420 U.S. at 491-97 (discussing importance to public of information concerning court proceedings); Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1219-20 (arguing that first amendment mandates official report privilege) (1977); Comment, *supra* note 1, at 1269-70 (discussing constitutional protection accorded to official report privilege). In *Cox Broadcasting* a television station accurately reported the name of a rape victim that the station had obtained from public court records. *Cox Broadcasting*, 420 U.S. at 473-74. The Supreme Court held that in a privacy suit a state may not impose sanctions on an accurate report that the broadcaster based on public records. *Id.* at 491. Furthermore, in *Time, Inc. v. Firestone* the Court indicated in dictum that the rule of *Cox Broadcasting* applies to defamation suits because the *Cox Broadcasting* decision protects the public interest in receiving accurate reports of judicial proceedings. *Time, Inc. v. Firestone*, 424 U.S. 448, 457 (1976). Arguably, the first amendment protects from defamation liability the accurate republication of material contained in public court records. See *Firestone*, 424 U.S. at 457 (granting constitutional stature to limited version of official report privilege); *Cox Broadcasting*, 420 U.S. at 495-97 (applying record privilege in invasion of privacy action); Comment, *supra* note 1, at 1270 (discussing

Fourth Circuit discussed next the three policy rationales that support the official report privilege: the agency rationale, the public supervision rationale, and the informational rationale.¹⁶ According to the agency rationale, a person who republishes government reports that are available to the public acts as an agent for persons that could inform themselves about the content of government reports.¹⁷ The public supervision rationale recognizes that the public's review of official government actions keeps the government accountable to the people.¹⁸ The informational rationale focuses on the public's right to know about newsworthy events.¹⁹ The Fourth Circuit

first amendment considerations underlying common-law defamation privileges). The Supreme Court in *Firestone*, however, issued a cautionary note by stating that the details of most courtroom proceedings would add almost nothing toward advancing the uninhibited debate on public issues, *Firestone*, 424 U.S. at 457. *But see* *Edwards v. Nat'l Audubon Soc'y*, 556 F.2d 113, 120 (2d Cir.) (creating constitutional privilege of neutral reportage to cover publication of newsworthy events), *cert. denied*, 434 U.S. 1002 (1977); *infra* notes 92-93 and accompanying text (discussing *Edwards*).

16. *Chang-Sin Lee*, 849 F.2d at 878-79. The policy rationales that justify the official report privilege are important in *Chang-Sin Lee* because of the lack of case law addressing whether the privilege applies to acts of foreign governments. *Id.* at 878. However, despite recognizing a privilege of the press to republish defamation uttered in certain contexts, courts have failed to state adequately the rationale for deciding whether to invoke the official report privilege in a particular case. *See* Note, *supra* note 1, at 1102 (discussing possible theoretical justifications for official report privilege).

17. *Chang-Sin Lee*, 849 F.2d at 878; *see also* *Fairbanks Publishing Co. v. Francisco*, 390 P.2d 784, 793 (Alaska 1964) (basing fair report privilege on assumption that member of public could inquire and learn about government proceedings if proceedings or reports of proceedings are available to public). The agency rationale for the official report privilege rests on the assumption that one who reports what happens in a public, official proceeding acts as an agent for persons who had a right to attend the proceeding. *See* *Medico v. Time, Inc.*, 643 F.2d 134, 140-41 (3d Cir.) (explaining agency rationale for official report privilege), *cert. denied*, 454 U.S. 836 (1981). The agent informs the public of what it might have seen for itself. *See* Note, *supra* note 1, at 1116 (discussing agency rationale). The agency rationale, however, cannot explain application of the official report privilege to proceedings or reports not open to the public. *See* *Medico*, 643 F.2d at 141 (explaining policy rationales underlying official report privilege).

18. *Chang-Sin Lee*, 849 F.2d at 878. The public supervision rationale for the official report privilege rests on the assumption that public review of official actions is beneficial to the democratic control of institutions that are responsible for carrying out the public will. *See* Note, *supra* note 1, at 1103-11 (discussing public supervision rationale). The right of a citizen to supervise government action is paramount in a democracy. *Id.* at 1106. The citizenry is the final judge of the proper conduct of public business. *Medico*, 643 F.2d at 143. For example, exposing the content of a government agency's records such as the Federal Bureau of Investigation's records may help to ensure impartial enforcement of the laws. *Id.* at 141.

19. *Chang-Sin Lee*, 849 F.2d at 878. Courts have cited most frequently the informational rationale to justify the application of the official report privilege. *See* R. SACK, *supra* note 4, at 316-17 (discussing significance of informational rationale). The general social and political interest in permitting citizens to learn about the operations of government without the courts imposing a risk upon persons who report the information to the public persuasively supports the official report privilege. *Id.* at 317. *See generally* D. ELDER, *THE FAIR REPORT PRIVILEGE* 3-4 (1988) (discussing policy rationales underlying official report privilege); Note, *The Developing Privilege of Neutral Reportage*, 69 VA. L. REV. 853, 856-58 (1983) (explaining various rationales that support common law privileges of libel law); Note, *supra* note 1, at 1102-20 (discussing policy rationales that justify official report privilege).

explained that the informational rationale most directly applied to the facts of *Chang-Sin Lee* because Americans, and Korean-Americans in particular, have a strong interest in learning that South-Korea, an American ally, had disrupted a spy ring that was operating in the United States.²⁰

Although the Fourth Circuit recognized that the three policy rationales for the official report privilege are important because of the lack of prior case law extending the privilege to reports of foreign government activities, the Fourth Circuit in *Chang-Sin Lee* declined to extend the privilege to the Korean government reports for three primary reasons.²¹ First, the Fourth Circuit stated that the three policy rationales were not persuasive in the context of foreign government activities.²² The Fourth Circuit explained that the agency rationale was not applicable to the reports of Korean government activities.²³ The Fourth Circuit determined that the media defendants were not acting as agents for those who could inform themselves because the media defendants, readers, and viewers did not have access to information available only in Korea.²⁴ The Fourth Circuit also explained that the public supervision rationale did not apply to the South Korean government press release because the American public could not influence directly the South Korean government.²⁵ Finally, in explaining why the rationales were not persuasive in the foreign government context, the Fourth Circuit discounted the importance of the informational rationale.²⁶ The Fourth Circuit reasoned that while the agency and public supervision rationales are less important when reports involve foreign governments, the informational rationale applies to all matters of public importance whether the press receives the information from a foreign government report or a private individual.²⁷ The *Chang-Sin Lee* majority, however, failed to discuss further the reasons for

20. *Chang-Sin Lee*, 849 F.2d at 878-79. The Fourth Circuit in *Chang-Sin Lee* stated that an espionage ring operating in the United States clearly is a legitimate matter of public concern. *Id.* at 879.

21. *Id.*

22. *Id.* The *Chang-Sin Lee* majority did not explain in detail why the policy rationales for the official report privilege are not persuasive in the foreign government context nor did the majority cite any authority to support the conclusion that the rationales do not apply in the foreign government context. *See supra* note 16 (discussing courts' general failure to address adequately policy rationale in deciding whether to apply official report privilege in particular case).

23. *Chang-Sin Lee*, 849 F.2d at 879.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* The majority in *Chang-Sin Lee* seemed to suggest that a court can justify in almost any case the official report privilege by using the informational rationale. *See id.* (stating reasons for not extending official report privilege to Korean government press release). Therefore, the *Chang-Sin Lee* majority reasoned that a court should take into account other factors to determine whether a court should extend the privilege to acts of foreign governments. *See id.* (discussing why informational rationale supporting official report privilege is not persuasive in foreign government context).

finding that the informational rationale does not support the extension of the official report privilege to foreign government reports.²⁸

Second, the Fourth Circuit in declining to extend the official report privilege to the Korean reports determined that providing a blanket privilege to the media for reports of foreign government activities might cause incidental defamation to private individuals.²⁹ The Fourth Circuit reasoned that, when the news media receives official reports from foreign governments, the information in the reports may contain inaccuracies that could cause defamation because information from foreign governments is not necessarily more reliable than information that the media receives from nonofficial domestic sources.³⁰ Thus, the Fourth Circuit was reluctant to extend the official report privilege to the Korean government reports.³¹ Third, the Fourth Circuit declined to extend the official report privilege because Virginia libel law, which places on the plaintiff the difficult burden of proving falsity and negligence, already affords media defendants sufficient protection.³² Consequently, the Fourth Circuit concluded that extending a blanket official report privilege in *Chang-Sin Lee* was unnecessary.³³

After declining to extend a blanket privilege to the reports of foreign government activities, the Fourth Circuit addressed a case-by-case approach that the dissent proposed.³⁴ Under the dissent's case-by-case approach, a court, in deciding whether to extend the official report privilege to reports of foreign government activities, would make a case-by-case determination based on the public importance of the information and the reliability of the report.³⁵ The Fourth Circuit majority found that the dissent's approach

28. *See id.* (explaining inapplicability in foreign government context of policy rationales that support official report privilege).

29. *Id.* at 880.

30. *Id.* at 879. According to the Fourth Circuit in *Chang-Sin Lee*, the underlying reason in the United States for the official report privilege is the relationship between the American people and the government. *Id.* The Fourth Circuit stated that Americans consider their government to be open and reliable. *Id.* The Fourth Circuit also noted that reports of government acts, proceedings, and investigations keep the government accountable for its actions. *Id.* On the other hand, the Fourth Circuit noted that the American people are not very familiar with foreign government operations, and many foreign governments are not as reliable and open as the United States government. *Id.* For example, the Fourth Circuit reasoned that some countries may take advantage of the liberal press rights in America by maliciously defaming private individuals. *Id.* at 880. Furthermore, the *Chang-Sin Lee* majority found that the American people cannot hold foreign governments accountable for a foreign government's malicious actions. *Id.* at 879.

31. *Id.* at 880.

32. *Id.* at 879. In a libel action, the plaintiff bears a considerable burden to prove negligence by a preponderance of the evidence and falsity by clear and convincing evidence. *Id.* Moreover, the libel plaintiff also must prove malice by clear and convincing evidence to overcome the official report privilege. *See Great Coastal Express, Inc. v. Ellington*, 230 Va. 142, 151-52, 334 S.E.2d 846, 852-53 (1985) (discussing plaintiff's burden of proving malice under Virginia libel law); *supra* note 2 (defining malice).

33. *Chang-Sin Lee*, 849 F.2d at 879.

34. *Id.* at 879-80.

35. *Id.* at 879.

would present a number of problems.³⁶ The majority first reasoned that courts would have difficulty establishing criteria for determining case-by-case which governments exhibit the reliability and accountability that are necessary to justify extending the privilege.³⁷ The majority explained that reasonable persons could differ in objectively applying the criteria.³⁸ Second, the majority disagreed with the dissent's emphasis on the public's right to information about foreign government activity even if some of the information in a foreign government report is defamatory.³⁹ The majority emphasized that the protection against injury to individual reputation remains a strong state interest that courts must balance against the first amendment interest in reporting matters of public concern.⁴⁰ The Fourth Circuit further explained that the dissent's approach might result in a blanket application of the privilege, thus affording virtually no protection to individuals that foreign government reports defame.⁴¹ Third, the majority explained that proper attribution of the source of a report would not prevent false or undeserved reliance by the reader on a foreign government's report.⁴² The majority was unwilling to impute to most Americans sufficient knowledge about foreign governments to determine from attribution whether a report from a foreign government agency is reliable.⁴³ The majority reasoned that because Americans lack knowledge about foreign governments, the average reader would believe that the official reports of an unreliable foreign government were trustworthy even if proper attribution were present in the news report.⁴⁴ Thus, the Fourth Circuit reasoned that the press must verify

36. *Id.* at 879-80.

37. *Id.* at 879.

38. *Id.* But see *infra* notes 73-80, 101-04 and accompanying text (discussing merits of dissent's case-by-case approach).

39. *Chang-Sin Lee*, 849 F.2d at 879. The United States Supreme Court has held that a newspaper or broadcaster who publishes defamatory material may not claim constitutional protection from liability because the defamatory statement concerned a matter of public concern. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343 (1974) (balancing public importance of information and individual reputation in public figure case). Similarly, the Fourth Circuit in *Chang-Sin Lee* stated that, because a defamatory expression concerns a matter of public interest, the public's right to know about the information alone should not entitle the defendant to shield himself from liability by using the common law official report privilege. *Chang-Sin Lee*, 849 F.2d at 879.

40. *Chang-Sin Lee*, 849 F.2d at 879; see *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 757 (1985) (balancing individual reputation against first amendment interest in free press).

41. *Chang-Sin Lee*, 849 F.2d at 879-80. Because the reports of foreign governments always will be important to a certain individual or group in a diverse society, the Fourth Circuit in *Chang-Sin Lee* believed that courts automatically would characterize all foreign government reports as matters of public importance. *Id.* at 880. Therefore, the Fourth Circuit feared that foreign government reports always would fall under the official report privilege. *Id.*

42. *Id.* at 880; see *infra* note 53 (discussing significance of proper attribution).

43. *Chang-Sin Lee*, 849 F.2d at 880.

44. *Id.* Before extending the official report privilege to acts of foreign governments, the dissent in *Chang-Sin Lee* would have remanded the case to the district court to determine

foreign government reports in the same manner that the press verifies reports from private sources.⁴⁵ The Fourth Circuit in *Chang-Sin Lee* concluded that the potential harm to the reputation of private citizens outweighed the burden on the press to verify foreign government reports.⁴⁶ Accordingly, the Fourth Circuit reversed the district court's grant of summary judgment for the media defendants by declining to extend the official report privilege to the Korean government reports.⁴⁷

While agreeing with the majority that a blanket privilege for reports of foreign government activities would be unwise, the *Chang-Sin Lee* dissent stated that a qualified privilege extended on a case-by-case basis would provide to courts a more appropriate mechanism for balancing the interests of personal reputation and the public's right to know about foreign government activities.⁴⁸ The dissent first argued that, when a court considers whether to apply the official report privilege in a given context, the court may give greater weight to one of the three rationales supporting the privilege.⁴⁹ In *Chang-Sin Lee* the dissent, like the majority, noted that the agency and public supervision rationales are less important than the informational rationale in cases involving reports of foreign government activities.⁵⁰ The dissent, instead, focused on the public's right to know about

whether each of the media defendants properly attributed the reports. *Id.* at 880 (Kaufman, J., dissenting); see *infra* note 53 (discussing importance of attribution requirement to official report privilege).

45. *Chang-Sin Lee*, 849 F.2d at 880. The majority believed that information from a foreign government is not any more reliable than information from private sources. *Id.*

46. *Id.* The *Chang-Sin Lee* majority's language suggests that the majority may have feared that extending the official report privilege to the foreign government context would discourage the press from properly verifying the accuracy of foreign government reports. See *id.* (stating that potential harm to one's reputation outweighs burden on press to confirm sources of information in foreign government reports). The Fourth Circuit in *Chang-Sin Lee*, however, also acknowledged that the decision not to extend the official report privilege to the foreign government context could cause some newspapers and television stations to reduce their reporting of foreign government activities. *Id.*; see *infra* notes 95-100 (discussing chilling effect on press of majority's decision).

47. *Chang-Sin Lee*, 849 F.2d at 880.

48. *Id.* at 880 (Kaufman, J., dissenting); see *supra* notes 2-5 and accompanying text (discussing common-law privileges).

49. *Chang-Sin Lee*, 849 F.2d at 881 (Kaufman, J., dissenting); see also *Medico v. Time, Inc.*, 643 F.2d 134, 142 (3d Cir.) (stating that informational rationale for official report privilege was most applicable to article that focused on organized crime), *cert. denied*, 454 U.S. 836 (1981).

50. *Chang-Sin Lee*, 849 F.2d at 881 (Kaufman, J., dissenting). The dissent in *Chang-Sin Lee* did not deny the importance of the public supervision rationale in certain contexts. *Id.* The dissent noted that, while citizens of one state cannot directly supervise governmental activities of another state, courts, nevertheless, have extended the official report privilege to government reports issued by one state and republished by another state. *Id.* Courts wisely have recognized the arbitrariness of any attempt to restrict geographically, by declining to apply the privilege to publications occurring in other parts of the national jurisdiction, the sphere of applicability of the common-law fair report privilege. See *Brown v. Globe Printing Co.*, 213 Mo. 611, —, 112 S.W. 462, 467-68 (1968) (stating that court correctly applied

foreign government activities.⁵¹

Stressing the importance of the informational rationale, the dissent suggested that courts could assess on a case-by-case basis whether to grant a qualified privilege to reports of foreign government activities.⁵² The dissent reasoned that in determining whether to extend the privilege in a given case courts should focus on the reliability of the foreign government and, more significantly, on the importance of the publication to a particular audience.⁵³

official report privilege to Missouri account of New York gubernatorial proceeding); *Webb v. Times Publishing Co.*, 2 All E.R. 789, 800 (1960) (stating that English citizens have strong interest in British judicial proceedings that occur in any British court). *See generally* D. ELDER, *supra* note 19, at 135-36 (1988) (discussing extension of official report privilege to nonlocal and foreign government proceedings). Moreover, the Supreme Court has stated that the constitutional limits of free expression cannot vary from state to state. *See Rosenblatt v. Baer*, 383 U.S. 75, 84 (1966) (public figure case); *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946) (free speech case).

The dissent in *Chang-Sin Lee* also questioned the relevance of the agency rationale in instances when the government report is not available for public inspection because a person cannot obtain for himself the government document. *Chang-Sin Lee*, 849 F.2d at 881; *see Medico*, 643 F.2d 134, 140-41 & n.23 (discussing inapplicability of agency rationale in case concerning republication of defamatory secret FBI report); *supra* note 17 and accompanying text (explaining agency rationale). In *Chang-Sin Lee* the South Korean government press release was available only in South Korea. *Chang-Sin Lee*, 849 F.2d at 878.

51. *Chang-Sin Lee*, 849 F.2d at 881 (Kaufman, J., dissenting); *see supra* notes 19-20 and accompanying text (discussing informational rationale).

52. *Chang-Sin Lee*, 849 F.2d at 882 (Kaufman, J., dissenting).

53. *Id.* at 881. Although the *Chang-Sin Lee* dissent recognized problems courts might encounter while assessing case-by-case the credibility of foreign government agencies, the dissent stated that the public's interest in certain information about foreign government activity outweighs the risks that courts could violate principles of international comity or that the information would be unreliable. *Id.* at 881-82. The *Chang-Sin Lee* majority, however, argued that the American people will assume that official reports of foreign governments are trustworthy. *Id.* at 880. The dissent, nevertheless, maintained that many Americans likely will discredit a foreign government press release if the United States government perceives the foreign government to be unreliable and, therefore, republishing foreign government reports would not damage the reputations of private individuals. *Id.* at 882.

The *Chang-Sin Lee* dissent also stressed the importance of the attribution requirement to a court's determination of whether to apply the qualified official report privilege in a particular case. *Id.* at 884. If the source of the story is not apparent from specific attribution or from the overall context of the article, the defendant cannot evoke the official report privilege. *See Dameron v. Washington Magazine, Inc.*, 779 F.2d 736, 739 (D.C. Cir. 1985) (explaining importance of proper attribution), *cert. denied*, 476 U.S. 1141 (1986). Thus, if an author fails to indicate that an official government report was the source of the story, the author has failed to meet the attribution requirement. *See Chang-Sin Lee*, 849 F.2d at 885 (explaining attribution requirement) (Kaufman, J., dissenting); *Dameron*, 779 F.2d at 739 (discussing need for proper attribution); *infra* note 59 (discussing *Dameron* court's decision not to extend official report privilege to article based on National Transportation Safety Board report). According to the *Chang-Sin Lee* dissent, proper attribution will decrease the risk of incidental defamation because attribution will enable the reader to evaluate the reliability of a statement. *Chang-Sin Lee*, 849 F.2d at 885. The dissent found that proper attribution protects individuals from incidental defamation and the news media from liability because attribution ensures that the press will publish reliable stories. *Id.* In *Chang-Sin Lee* the dissent found from the district court record that proper attribution was present only with respect to three

The dissent also noted that the lack of case law concerning the application of the official report privilege to reports of foreign government activities indicates that media defendants would not assert the privilege frequently in the foreign government context.⁵⁴ Thus, the dissent concluded that deciding case-by-case whether to extend the official report privilege to reports of foreign governments would not overburden the judiciary.⁵⁵

In addition to noting that courts seldom have considered whether to extend the official report privilege to the foreign government context, the dissent further noted that case-by-case analysis is common in libel law.⁵⁶ For example, courts frequently have decided on a case-by-case basis whether a particular plaintiff is a public figure for the purposes of libel law.⁵⁷ In *Dameron v. Washington Magazine, Inc.*⁵⁸ the United States Court of Appeals for the District of Columbia considered whether an air traffic controller was a public figure.⁵⁹ In *Dameron* an air traffic controller sued Washington Magazine, Inc. for libel following the publication of a *Washingtonian* magazine article about a National Transportation Safety Board report that blamed an air traffic controller for a particular airplane accident.⁶⁰ Consid-

of the seven media defendants' stories. *Id.* at 885-86. Proper attribution was a factual issue which the district court did not address and which the dissent could not determine for all the defendants from the record. *Id.* at 886; *see also Dameron*, 779 F.2d at 739 (stating that attribution must be apparent from overall context of article). The dissent, therefore, would have remanded the case to the district court to determine the question of attribution. *Chang-Sin Lee*, 849 F.2d at 886.

54. *Chang-Sin Lee*, 849 F.2d at 881.

55. *Id.*

56. *Id.*; *see infra* notes 57-80 and accompanying text (discussing case-by-case analysis in libel law).

57. *See Dameron v. Washington Magazine, Inc.*, 779 F.2d 736, 740-43 (D.C. Cir. 1985) (analyzing from facts of case whether plaintiff is public or private figure), *cert. denied*, 476 U.S. 1141 (1986); *Waldbaum v. Fairchild Publications*, 627 F.2d 1287, 1293 (D.C. Cir.) (stating that courts must look at facts of case to determine whether plaintiff in defamation suit is public figure), *cert. denied*, 449 U.S. 898 (1980); *Frakt, The Evolving Law of Defamation: New York Times v. Sullivan to Gertz v. Robert Welch, Inc. and Beyond*, 6 RUT.-CAM. L.J. 471, 487 (1985) (stating that determination of public figure entails case-by-case determination of what constitutes public issue); *see also infra* notes 101-04 and accompanying text (discussing manageability of case-by-case analysis in cases similar to *Chang-Sin Lee*).

58. 779 F.2d 736 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1141 (1986).

59. *Dameron v. Washington Magazine, Inc.*, 779 F.2d 736, 740-43 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1141 (1986). In addition to addressing the public figure issue, the District of Columbia Circuit in *Dameron* considered whether the official report privilege applied to a magazine article based on a National Transportation Safety Board report of an airline disaster. *Id.* The district court found that the official report privilege shielded from liability the publisher of the magazine article. *Id.* at 743. The District of Columbia Circuit, however, held that the official report privilege did not apply because a reader of the magazine article would not recognize that the article concerned a National Transportation Safety Board report. *Id.* at 740. The *Dameron* court reasoned that, because the magazine article did not necessarily relate to the National Transportation Safety Board report, the author left the reader with a conclusion which the author may not have based on the National Transportation Safety Board report. *Id.*; *see supra* note 53 (discussing attribution requirement of official report privilege).

60. *Dameron*, 779 F.2d at 738. The plaintiff in *Dameron* was the sole air traffic controller

ering the particular facts of the case, the *Dameron* court found that the air traffic controller played a central role in a public controversy.⁶¹ The *Dameron* court, therefore, held that the plaintiff was an involuntary, limited-purpose public figure.⁶² In reaching the decision, the *Dameron* court noted that the circumstances in which courts must determine on a case-by-case basis whether a plaintiff is an involuntary, limited-purpose public figure seldom will arise.⁶³ In *Chang-Sin Lee* the dissent advocated a similar case-by-case approach because courts rarely hear cases in which defendants attempt to extend the official report privilege to reports of foreign government activities.⁶⁴ Accordingly, the dissent concluded that a court reasonably could consider the particular facts of a case to determine whether the court should extend the official report privilege to a particular report of foreign government activity.⁶⁵

To further support the case-by-case approach, the dissent in *Chang-Sin Lee* discussed the English case *Webb v. Times Publishing Co.*⁶⁶ In *Webb* the Court for the Queen's Bench considered whether English newspapers were privileged to print details of a Swiss trial.⁶⁷ In *Webb Hume*, a British citizen on trial for murder in the Swiss courts, admitted that he had killed the father of his wife's child.⁶⁸ Hume's wife, the plaintiff in the English case, asserted that the publication of Hume's admissions was libelous because the admissions imputed to her the crime of adultery.⁶⁹ Balancing the English public interest in the Swiss judicial proceeding and the interest in protecting Hume's reputation, the *Webb* court refused to extend a blanket fair report privilege to foreign government proceedings.⁷⁰ The court explained, however, that foreign government proceedings sometimes will have

on duty at Dulles International Airport in Virginia on the day a TWA plane crashed into Mt. Weather in Virginia. *Id.* The *Washingtonian* magazine article at issue in *Dameron* discussed various airplane accidents and reported that the plaintiff partially was responsible for the Mt. Weather airplane accident. *Id.*

61. *Id.* at 741.

62. *Id.* The District of Columbia Circuit concluded that the plaintiff in *Dameron* was an involuntary public figure for the limited purpose of discussing the Mt. Weather airplane accident. *Id.*

63. *Id.* at 743.

64. *Chang-Sin Lee*, 849 F.2d at 881 (Kaufman, J., dissenting); see *infra* notes 73-104 and accompanying text (discussing merits of dissent's case-by-case approach to official report privilege in foreign government context).

65. *Id.* at 882 (Kaufman, J., dissenting).

66. 2 All E.R. 789 (1960).

67. *Webb v. Times Publishing Co.*, 2 All E.R. 789, 794, (1960). *Webb* is the only case that has extended the official report privilege to a foreign government proceeding. See D. ELDER, *supra* note 19, at 138 n.12 (discussing *Webb* holding).

68. *Webb*, 2 All E.R. at 791.

69. *Id.*

70. *Id.* at 800. Because of the court's concern for individual reputation, the *Webb* court refused to extend a blanket privilege to foreign government reports because the *Webb* court correctly recognized that official reports of foreign governments do not necessarily contain as high a degree of reliability as reports from domestic government agencies. *Id.*

special connections with English affairs and will create for English readers legitimate and proper interest in reports of the proceedings.⁷¹ Accordingly, the *Webb* court held that the common law requires a qualified official report privilege to protect from liability the publishers of certain newspaper articles concerning foreign government proceedings that are of public concern to English readers.⁷²

Similarly, the Fourth Circuit should have recognized the qualified privilege that the dissent proposed instead of holding that the official report privilege never applies to reports of foreign governments.⁷³ In proposing the qualified privilege, the dissent in *Chang-Sin Lee* correctly adopted the *Webb* court's reasoning.⁷⁴ The dissent, like the *Webb* court, recognized that a court should consider the newsworthiness of an event and the audience for which the news has interest when determining whether an article is of public concern.⁷⁵ In *Chang-Sin Lee* the interested audience consisted of Korean-Americans who were living in the United States and members of the general public that wished to be well-informed about matters of national and international security such as foreign espionage.⁷⁶ The *Chang-Sin Lee* majority and dissent acknowledged that Americans, especially Korean-Americans, have a legitimate public interest in learning about a North Korean espionage ring operating in the United States.⁷⁷ However, the majority, by reasoning that the dissent's emphasis on the public's right to know about foreign government reports would result in the blanket application of the privilege in future cases, failed to consider adequately the importance to

71. *Id.* at 805, 2 Q.B. at 569-70. The *Webb* court noted that a report about a United States Supreme Court decision on an important question of commercial law has legitimate and proper interest for English readers. *Id.* On the other hand, the *Webb* court noted that a report of a judicial proceeding that concerned a scandalous affair between two unmarried people would not have a legitimate public interest and appeals only to idle curiosity and a desire to gossip. *Id.*

72. *Id.* at 805.

73. See *Chang-Sin Lee*, 849 F.2d, 877, 880-86 (4th Cir. 1988) (Kaufman, J., dissenting) (criticizing majority's failure to adopt qualified privilege); *infra* notes 74-104 and accompanying text (discussing reasons *Chang-Sin Lee* court should have recognized qualified privilege).

74. *Chang-Sin Lee*, 849 F.2d at 882-83. Compare *Webb*, 2 All E.R. at 804-06 (applying qualified official report privilege to report of Swiss judicial proceeding) with *Chang-Sin Lee*, 849 F.2d at 882-84 (Kaufman, J. dissenting) (extending qualified official report privilege to report of South Korean government press release); see also *supra* notes 67-72 and accompanying text (discussing *Webb* court's rationale for extending qualified privilege to foreign government proceeding).

75. See *Webb v. Times Publishing Co.*, 2 All E.R. 789, 805 (1960) (stating that foreign government proceedings sometimes have special connection to English affairs and, therefore, are of legitimate public interest for English readers); *infra* notes 76-78 and accompanying text (acknowledging legitimate public interest in information about espionage in United States).

76. See *Chang-Sin Lee*, 849 F.2d at 884 (stating that report in *Chang-Sin Lee* had appeal to Korean-Americans); Brief for Appellee at 23, *Chang-Sin Lee v. Dong-A-Ilbo*, 849 F.2d 876 (4th Cir. 1988) (No. 87-2578) (stressing importance of report for Korean-Americans).

77. See *Chang-Sin Lee*, 849 F.2d at 879 (finding legitimate public interest in information about espionage ring); *id.* at 884 (Kaufman, J., dissenting) (discussing importance of information about foreign espionage).

the public of information from foreign countries.⁷⁸ By contrast the *Chang-Sin Lee* dissent, like the *Webb* court, recognized that, because future cases would involve subject matter of varying degrees of importance, courts could employ a case-by-case balancing of interests to decide whether to extend the official report privilege to a particular foreign government report.⁷⁹ Consequently, the dissent's case-by-case approach will not lead to a blanket application of the official report privilege in the foreign government context if courts properly balance in each case the importance and reliability of foreign government reports against the interest in protecting individual reputation.⁸⁰

In addition to discounting the public importance of information about foreign government activities, the majority in *Chang-Sin Lee* failed to consider other contexts in which courts have recognized the official report privilege.⁸¹ For example, courts have applied the privilege to a newspaper account based on an official police report alleging that a former sponsor mistreated two Cuban refugees.⁸² Courts also have extended the privilege to protect news reports based on records of drunk driving convictions.⁸³ One

78. See *id.* at 879-80 (stating that blanket application of official report privilege in foreign government context would afford no protection to defamed private persons); *supra* note 41 (discussing majority's fear of extending qualified privilege to foreign government reports).

79. See *Chang-Sin Lee*, 849 F.2d at 882 (Kaufman, J., dissenting) (discussing qualified privilege approach to official report privilege in foreign government context); *Webb*, 2 All E.R. at 804-06 (discussing merits of qualified privilege approach).

80. See *Webb*, 2 All E.R. at 800 (stating that courts should give due regard to interests of individual when carrying out balancing operation); *supra* note 70 (discussing *Webb* court's concern for individual reputation).

81. See *infra* notes 82-87 and accompanying text (discussing various contexts in which state courts have applied official report privilege).

82. See *Wilson v. Birmingham Post Co.*, 482 So. 2d 1209, 1213 (Ala. 1986) (extending official report privilege to police incident report). In *Wilson* the former sponsor of Cuban refugees sued the defendant newspaper alleging defamation in the newspaper's publication of statements that the refugees made to police concerning the sponsor's alleged mistreatment of the refugees. *Id.* at 1210. The Supreme Court of Alabama affirmed the Jefferson County Circuit Court's grant of summary judgment for the newspaper. *Id.* at 1214. The Alabama Supreme Court held that the official report privilege applied to the news report because the reporter relied on an official police incident report and accurately reported the refugees' statements. *Id.* at 1211-13.

83. See *Lani v. Pulitzer Publishing Co.*, 723 S.W.2d 458, 459 (Mo. Ct. App. 1987) (holding that official report privilege protects state licensing suspension reports). In *Lani* the plaintiff brought a libel action against a newspaper publisher for printing a story based on an erroneous government report that the state suspended the plaintiff's driver's license for drunk driving. *Id.* at 459. After plaintiff's trial, the clerk of the court reported to the Missouri Department of Revenue that the trial court had convicted plaintiff of driving while intoxicated. *Id.* at 458. The Missouri Department of Revenue subsequently suspended plaintiff's license and issued a license suspension report. *Id.* The defendant newspaper received a copy of the report and published a story based on the report. *Id.* The trial court, however, actually had convicted the plaintiff only of careless driving. *Id.* The Missouri Court of Appeals affirmed the circuit court's grant of summary judgment on the basis of the official report privilege. *Id.* at 459-60. The Court of Appeals held that, despite the defamatory nature of the report, the

court has applied the privilege to reports of sanitary code violations that a city health department issued.⁸⁴ Thus, the contexts in which courts have applied the official report privilege support the extension of the privilege to the facts of *Chang-Sin Lee*.⁸⁵ If Americans have a right to be informed about matters of national and international security, information about foreign espionage in the United States is equally important to the public as information concerning health department violations, drunk driving convictions, and statements by Cuban refugees.⁸⁶ Therefore, the *Chang-Sin Lee* majority's decision not to extend case-by-case a qualified privilege to official reports of a foreign government is impractical because courts have applied the official report privilege to protect news reports concerning American government activities of varying degrees of importance.⁸⁷

Although the dissent emphasized that the American people have a right to know about matters of public interest, the *Chang-Sin Lee* dissent failed to address the existence of first amendment considerations in press reports of official government proceedings.⁸⁸ For example, the United States Su-

newspaper accurately reported the license suspension report, which was an official public record. *Id.*

84. See *Lulay v. Peoria Journal-Star*, 34 Ill. 2d 112, 115, 214 N.E.2d 746, 747 (1966) (applying official report privilege to city health department report). In *Lulay* the plaintiff brought a libel action against a newspaper for printing a story about violations of the city sanitary code in the plaintiff's restaurant. *Id.* at 113-14, 214 N.E.2d at 747. The plaintiff obtained a jury verdict for \$150,000 in compensatory damages and \$90,000 in punitive damages. *Id.* at 112-13, 214 N.E.2d at 747. On appeal the Supreme Court of Illinois reversed the jury's verdict and held that an official report privilege applies to newspapers that report the activities of municipal corporations including agencies like the city health department. *Id.* at 115, 214 N.E.2d at 747.

85. See generally *Borg v. Boas*, 231 F.2d 788 (9th Cir. 1956) (extending privilege to nonofficial public meeting about local law enforcement); *Jackson v. Record Publishing Co.*, 175 S.C. 211, 178 S.E. 833 (1935) (extending privilege to political rally); *supra* note 5, notes 82-84 (citing cases in which courts have applied official report privilege).

86. Cf. *Chang-Sin Lee*, 849 F.2d at 884 (Kaufman, J., dissenting) (stating that information about foreign espionage is of great importance); *supra* notes 75-80 and accompanying text (discussing importance of foreign government information to the public); *supra* notes 49-51 and accompanying text (discussing importance of informational rationale).

87. See *supra* note 79 and accompanying text (using case-by-case analysis because future cases extending official report privilege to foreign government context may involve matters of varying degrees of importance to public). Although foreign government reports arguably are not as reliable as American government reports and domestic nonofficial sources of information, the adoption of a case-by-case qualified official report privilege helps ensure that courts will extend the official report privilege only to reliable foreign government reports of significant importance to the public. See *Chang-Sin-Lee*, 849 F.2d at 881 (Kaufman, J., dissenting) (stating that courts are capable of assessing public importance of particular foreign government report). Furthermore, the dissent in *Chang-Sin Lee* believed that many American readers discredit news accounts of foreign government reports if the report originated from an unreliable foreign government. See *id.* at 882 (refuting majority's assertion that Americans will assume that official reports of unreliable foreign governments are trustworthy).

88. See *Chang-Sin Lee*, 849 F.2d at 881-82 (Kaufman, J., dissenting) (emphasizing informational rationale for official report privilege); *infra* notes 89-94 and accompanying text (discussing constitutional considerations in reporting of official government activities).

preme Court has acknowledged that speech regarding matters of public concern lies at the heart of the first amendment.⁸⁹ Although the Supreme Court has never explicitly recognized a constitutional privilege of official report, the Supreme Court in two cases outside the field of defamation law recognized the first amendment value of reports of official proceedings.⁹⁰ According to the Supreme Court, a major purpose of the first amendment is to inform the public about governmental affairs and to assist the citizenry in supervising government activities.⁹¹ Furthermore, the United States Court of Appeals for the Second Circuit has created a constitutional privilege for the press to republish defamatory comments of public figures and prominent organizations while reporting on newsworthy events.⁹² The Second Circuit held that the first amendment unconditionally guarantees the right of the press to make accurate and disinterested reports on controversies concerning sensitive issues without assuming responsibility for statements of opinion that other persons make.⁹³ Thus, courts have provided a constitutional

89. See *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1974) (stating that publication of matters of public interest lies at core of first amendment); *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761-63 (1985) (discussing notion that matters of public interest lie at core of first amendment).

90. See *Landmark Communications v. Virginia*, 435 U.S. 829, 837-46 (1978) (extending protection of first amendment to reporting of confidential proceedings of judicial review commission); *Cox Broadcasting v. Cohn*, 420 U.S. 469, 491-97 (1975) (holding that first amendment precludes cause of action for invasion of privacy for publication of name of deceased rape victim); *supra* note 15 (discussing first amendment implications for official report privilege). *Landmark Communications* and *Cox Broadcasting*, however, do not control the issue before the *Chang-Sin Lee* court because *Cox* and *Landmark* are not defamation cases. See *Medico v. Time, Inc.*, 643 F.2d 134, 143-44 (3d Cir.) (discussing implications of *Cox Broadcasting* and *Landmark Communications* for official report privilege), *cert. denied*, 454 U.S. 836 (1981). *Landmark* arose when the state of Virginia attempted to impose criminal sanctions on those who publish information about a confidential, state judicial review commission. See *Landmark Communications*, 435 U.S. at 832 (discussing Virginia statute closing public from proceedings of judicial review commission). *Cox Broadcasting* was an invasion of privacy action, not a libel action like *Chang-Sin Lee*. See *supra* note 15 (discussing *Cox Broadcasting*).

91. See *Cox Broadcasting*, 420 U.S. at 495 (stating that, by reporting the true contents of government records, news media performs public benefit); *Landmark Communications*, 435 U.S. at 838 (stating that promoting free discussion of governmental affairs is goal of first amendment).

92. See *Edwards v. Nat'l Audubon Soc'y*, 556 F.2d 113, 120-22 (2d Cir.) (granting to press constitutional privilege to report controversies concerning sensitive public issues), *cert. denied*, 434 U.S. 1002 (1977); *Barry v. Time, Inc.*, 584 F. Supp. 1110, 1124 (N.D. Cal. 1984) (endorsing *Edwards* holding); *infra* note 93 (discussing *Edwards* case).

93. See *Edwards*, 556 F.2d at 120 (stating that first amendment protects reporting of charges that certain scientists were "paid liars"). In *Edwards* the Environmental Protection Agency's 1972 investigation of the insecticide DDT invoked widespread debate over DDT. *Id.* at 115-16. In the April 1972 issue of *American Birds*, a National Audubon Society publication, an editor claimed that, to prove the harmlessness of DDT, the pesticide industry paid scientists to prepare distorted analyses of the results of the National Audubon Society's Christmas Bird Count. *Id.* at 116. A *New York Times* reporter subsequently obtained the names of the scientists from the National Audubon Society editor and reported the allegations and the names

framework for applying the official report privilege to a case that, like *Chang-Sin Lee*, arises from a private figure's libel action for publication of a defamatory foreign government report.⁹⁴

Although the *Chang-Sin Lee* majority acknowledged that first amendment considerations exist in the reporting of official government activities, the Fourth Circuit's unwillingness to enlarge the scope of the official report privilege to include reports of foreign government activities could have a chilling effect on the news media.⁹⁵ For example, the dissent noted that relatively small news publishers, like the defendants in *Chang-Sin Lee*, may have problems obtaining access to the facts necessary to establish the truth or falsity of information contained in foreign government reports.⁹⁶ Because news publishers may find it difficult to verify the truth of foreign news reports, the dissent found that small news organizations that target a specific audience may decide for two reasons not to publish reports of foreign governments.⁹⁷ First, without the official report privilege as a defense, a publisher may not want to face the prospect of a potentially devastating lawsuit.⁹⁸ Second, the difficulty of confirming the accuracy of the story may be too costly for the publisher to undertake or may take so long that the report no longer will be meaningful to the public.⁹⁹ By disregarding the

of the scientists in the *New York Times*. *Id.* at 118. Three of the scientists sued the National Audubon Society and the *New York Times* for libel. *Id.* at 119. In dismissing the complaint, the Second Circuit articulated a press right of neutral reportage. *Id.* at 120. The privilege of neutral reportage applies when a prominent organization like the National Audubon Society makes serious charges against a public figure. *Id.* The *Edwards* court held, therefore, that the first amendment protects the accurate and disinterested reporting of the National Audubon Society charges, regardless of the reporter's private views regarding the validity of the charges. *Id.*

94. See *Medico v. Time, Inc.*, 643 F.2d 134, 143-46 (3d Cir. 1981) (discussing first amendment implications for official report privilege after *Cox Broadcasting*, *Landmark Communications*, and *Edwards*); *id.* at 145 n.39 (stating that Pennsylvania courts frequently have taken account of constitutional principles while fashioning common-law rules of defamation law).

95. See *Chang-Sin Lee v. Dong-A Ilbo*, 849 F.2d 877, 880 (4th Cir. 1988) (acknowledging chilling effect of failure to extend official report privilege to foreign government reports); *id.* at 884 (Kaufman, J., dissenting) (discussing potential chilling effect on press of failure to extend qualified official report privilege to reports of foreign governments); see also *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) (comparing chilling effect of civil sanction after publication with freezing effect of prior restraint on speech); *Cox Broadcasting v. Cohn*, 420 U.S. 469, 495-96 (1974) (discussing chilling effect on press in invasion of privacy action); *Howard v. Des Moines Register & Tribune Co.*, 283 N.W.2d 289, 297 (Iowa 1979) (noting chilling effect on first amendment rights in false light invasion of privacy action).

96. See *Chang-Sin Lee*, 849 F.2d at 884 (Kaufman, J., dissenting) (discussing difficulty in confirming accuracy of foreign government reports).

97. See *id.* (Kaufman, J., dissenting) (discussing problems newspapers have verifying foreign government information).

98. See *id.* (Kaufman, J., dissenting) (stating that publishers fear potentially costly libel suits).

99. See *id.* (Kaufman, J., dissenting) (stating that verifying foreign government information takes time). According to the *Chang-Sin Lee* dissent, the record disclosed that at least

significance of the chilling effect, the *Chang-Sin Lee* majority also failed to address adequately the constitutional concern that matters of public interest lie at the core of the first amendment.¹⁰⁰

Finally, although the majority stated that a case-by-case approach for extending the privilege is difficult, a case-by-case approach is manageable in the foreign government context because so few official report privilege cases arise in the foreign government context.¹⁰¹ *Chang-Sin Lee*, for example, is the first case in which a United States court has considered whether the official report privilege should protect reports of foreign government activities.¹⁰² Moreover, the Supreme Court has noted that occasions arise in defamation law in which courts must make similar case-by-case determinations concerning the importance of information pursuant to the approach outlined by the *Chang-Sin Lee* dissent.¹⁰³ In fact, courts, as the ultimate arbiters of all disputes concerning competing interests and clashing constitutional values, would be performing one of the judiciary's traditional functions by determining whether the public interest in a particular foreign government report outweighs the potential injury to individual reputation.¹⁰⁴

As a result of the *Chang-Sin Lee* decision not to extend the official report privilege to reports of foreign governments, the Fourth Circuit may deprive the American public of access to information of great importance.¹⁰⁵ More generally, the Fourth Circuit's failure to extend the privilege to reports of foreign governments could have a chilling effect on the press.¹⁰⁶ Accordingly, the Fourth Circuit should have extended a qualified official report

two of the defendants did not have the resources to confirm the accuracy of the South Korean government press release. *Id.* at 884 n.6. The *Sae Gae Times*, a weekly newspaper, attempted to verify the story, but the newspaper was unable to contact the plaintiff, Chang-Sin Lee, before publishing the article. *Id.*

100. See *supra* notes 88-94 and accompanying text (discussing United States Supreme Court's concern that public learn about newsworthy events).

101. See *Chang-Sin Lee*, 849 F.2d at 881 (Kaufman, J., dissenting) (discussing case-by-case approach to official report privilege) *supra* notes 52-55 and accompanying text (discussing dissent's analysis in applying a case-by-case balancing of interests).

102. See *Chang-Sin Lee*, 849 F.2d at 878 (stating that until *Chang-Sin Lee* American courts never have addressed whether official report privilege extends to foreign government reports).

103. See *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 774-78 (1986) (focusing on facts of particular case to decide the importance of published information); *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 761-62 (1985) (Powell, J., plurality) (deciding whether certain information was of public or private concern). Justice Powell in *Dun & Bradstreet* noted that judges must determine by the content, form, and context of a given statement whether the statement addresses a matter of public concern. *Dun & Bradstreet*, 472 U.S. at 461 (quoting *Connick v. Myers*, 461 U.S. 138 (1983)); see *supra* notes 56-65 (discussing case-by-case approach in deciding whether person is public figure).

104. Cf. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 369 (1974) (Brennan, J., dissenting) (discussing role of court in public figure cases).

105. See *supra* notes 75-94 and accompanying text (discussing public's right to receive information about important matters of public concern).

106. See *supra* notes 95-100 and accompanying text (discussing potential chilling effect of Fourth Circuit's decision in *Chang-Sin Lee*).

privilege to foreign government reports by employing a case-by-case balancing of the interests in protecting an individual's reputation and the public's right to know about foreign government activities.¹⁰⁷ By an appropriate balancing of the interest in reputation and the public's right to know, courts best will preserve the freedom of the press and protect the individual against incidental defamation.¹⁰⁸

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107. *See supra* notes 73-104 and accompanying text (discussing merits of extending case-by-case qualified official report privilege to foreign government reports).

108. *See supra* notes 1-3 and accompanying text (discussing balancing of interest in individual reputation and public's right to know about important matters of public concern).

