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Before the Joint Hearing of the Subcommittee on Intergovernmental Affairs and the Subcommittee on Healthcare, Benefits, and Administrative Rules of the United States House of Representatives Committee on Oversight and Government Reform

"Shielding Sources: Safeguarding The Public's Right To Know"

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Introduction

Mr. Chairmen, and Members of the Subcommittees. Thank you for inviting me to testify today. In this written statement, I will address the current state of the so-called "reporters' privilege" in the federal courts, including (1) the historical record concerning the crucial role that confidential sources have played in informing the American people; (2) the need for Congress to step in to provide guidance in an area of law that is presently in disarray; and (3) the experience of the states with respect to their recognition of a journalist's right to maintain a confidential relationship with his or her sources.[1]

The Necessity of Confidential Sources

I respectfully submit that the time has come for Congress to enact federal legislation codifying a reporters' privilege. Congress should do so based on the simple and unassailable historical fact that confidential sources are often essential to the press's ability to inform the public about matters of vital concern. As the Supreme Court has recognized, the press "serves and was designed to serve [by the Founding Fathers] as a powerful antidote to any abuses of power by governmental officials."[2] The historical record demonstrates that the press cannot effectively perform this constitutionally recognized role without some assurance that it will be able to maintain its promises to those sources who will speak about the public's business only following a promise of confidentiality.

[1] Any opinions expressed in this testimony are my own and are not necessarily those of my law firm or its clients. My testimony is substantially derived from "friend-of-the-court" briefs submitted by my colleagues and me on behalf of coalitions of media organizations to the United States Supreme Court in *Risen v. United States*, No. 13-1009, available at 2014 WL 1275185, and *Miller v. United States* and *Cooper v. United States*, Nos. 04-1507, 04-1508, available at 2005 WL 1199075, as well as from my prior testimony before committees of both the House and the Senate considering analogous legislation, *see Reporters' Privilege Legislation - Issues and Implications: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 19-21 (July 20, 2005) (Statement of Lee Levine); *Free Flow of Information Act of 2007: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. 32-34 (June 14, 2007) (Statement of Lee Levine). It also relies on relevant chapters from the forthcoming Fifth Edition of a treatise co-authored by me entitled *Newsgathering and the Law*. The Media Law Resource Center in 2004 published a comprehensive treatment of issues related to the privilege entitled *White Paper On The Reporters' Privilege* and provides updates of developments in federal law, available at www.medialaw.org (last visited July 15, 2018). In addition, the Reporters Committee for Freedom of the Press offers summary and analysis of cases in which journalists have been subpoenaed, entitled *Special Report: Reporters and Federal Subpoenas* on its website at https://www.rcfp.org/topic-search?topic=10&state=All (last visited July 15, 2018).

[2] *Mills v. Alabama*, 384 U.S. 214, 219 (1966).

There can be no real question that journalists must occasionally depend on confidential sources to report stories about the operation of government and other matters of public concern. An examination of roughly 10,000 news media reports, conducted in 2005 by the Pew Research Center, concluded that fully thirteen percent of front-page newspaper articles relied at least in part on confidential sources.[3] While there is healthy ongoing debate within the journalism profession about the appropriate uses of confidential sources, all sides of that debate agree that they are at times essential to effective news reporting.[4] As then-Congressman Mike Pence testified before the House Judiciary Committee in 2007, "[c]ompelling reporters to testify and, in particular, compelling them to reveal the identity of their confidential sources is a detriment to the public interest. Without the promise of confidentiality, many important conduits of information about our Government will be shut down."[5]

Indeed, in proceedings in the federal courts in recent years, journalist after journalist has convincingly testified about the important role confidential sources play in enabling them to report about matters of manifest public concern. As Rhode Island television reporter James Taricani, who had exposed government corruption in his home state, testified before being sentenced to house arrest because he refused to comply with a court order requiring him to reveal a confidential source:

> In the course of my 28-year career in journalism, I have relied on confidential sources to report more than one hundred stories, on diverse issues of public concern such as public corruption, sexual abuse by clergy, organized crime, misuse of taxpayers' money, and ethical shortcomings of a Chief Justice of the Rhode Island Supreme Court.[6]

Mr. Taricani described a host of important stories that he could not have reported without providing "a meaningful promise of confidentiality to sources," including a report on organized

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[3] *See The State of the News Media*, at 20 (2005), http://assets.pewresearch.org.s3.amazonaws.com/files/journalism/State-of-the-News-Media-Report-2005-FINAL.pdf. The following year, Pew observed that newspapers, compared to other media, tend to showcase "more and deeper sourcing on major stories" while also tending "to rely more on anonymous sourcing." *See The State of the News Media*, at 130 (2006), http://assets.pewresearch.org.s3.amazonaws.com/files/journalism/State-of-the-News-Media-Report-2006-FINAL.pdf.

[4] Much of the debate regarding confidential sources concerns whether such sources are overused or misused. At bottom, while it is undoubtedly true that "[t]he right to remain anonymous may be abused when it shields fraudulent conduct," it remains the case that, "in general, our society accords greater weight to the value of free speech than to the dangers of its misuse." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995).

[5] *Free Flow of Information Act of 2007: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. 32-34 (June 14, 2007) (Rep. Mike Pence), available at https://www.gpo.gov/fdsys/pkg/CHRG-110hhrg36019/html/CHRG-110hhrg36019.htm; *see also id.* ("As a conservative who believes in limited Government, I know that the only check on Government power in real-time is a free and independent press. The 'Free Flow of Information Act' is not about protecting reporters. It is about protecting the public's right to know.").

[6] *See Appendix B to the Brief Amici Curiae of ABC, Inc, et al.*, in *Miller v. United States* and *Cooper v. United States*, *supra* note 1.

crime's role in the illegal dumping of toxic waste that sparked a grand jury investigation and a report on the misuse of union funds that led to the ouster of the union president.

Washington Post reporter Dana Priest in a sworn affidavit likewise recounted examples of the essential role of confidential sources, observing that her reporting based on information provided by such sources had "resulted in significant, thoughtful and on-going public debate . . . including within Congress":

> The subjects that I have been able to cover, based on information provided by confidential sources, include the existence and conditions of hundreds of prisoners, some later to be found innocent, held at the military prison at Guantanamo Bay, Cuba; the capture, treatment and interrogation of prisoners in Afghanistan and Iraq; the workings of the joint CIA-Special Forces teams in Afghanistan responsible for toppling the Taliban and Al Qaeda; the use of the predator unmanned aerial vehicle to target suspected terrorist leaders; the wasteful spending of tens of billions of dollars in taxpayer funds on an outdated and redundant satellite system; the legal opinions supporting the "enhanced interrogation techniques" of prisoners captured in the war on terror; the specifics of those techniques, including waterboarding; the rendition of multiple suspected terrorists by the CIA in cooperation with foreign intelligence services to third countries; the lack of success in capturing Osama bin Laden; the absence of human sources in Iraq, Iran and Pakistan by the CIA despite the high priority put on those countries by the U.S. intelligence services; the abuse of prisoners at the Abu Ghraib prison in Iraq; the accidental death of an innocent Afghan prisoner at the hands of an inexperienced CIA officer; the imprisonment of innocent Afghans sold for bounties to the U.S. military by Pakistan police and others; the mistaken capture, rendition, abuse and detention of Khalid al-Masri, an innocent naturalized German citizen of Lebanese extraction by the CIA and its allies; the mistaken rendition of Maher Arar, a Canadian citizen, into Syrian hands and his subsequent torture there; and the existence and evolution of the CIA's secret prisons in the countries of Eastern Europe. (These prisons were illegal in those countries, the very countries that the United States had worked so long to liberate from their Soviet-dominated and allied intelligence agencies and to welcome into the world of nations governed by the rule of law.) All of the revelations in my stories on these subjects were at one point secret from the American public. None of them could have been reported without the help of confidential sources.[7]

Journalist Pierre Thomas, who was held in contempt for declining to reveal the identities of his confidential sources in the federal Privacy Act case brought by Dr. Wen Ho Lee,[8] has testified that information received from confidential sources enabled him to report on the

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[7] Pet. for a Writ of Cert., *Risen v. United States*, No. 13-1009 (Jan. 13, 2014) at 272a-279a (Decl. of Dana Priest in *In re Grand Jury Subpoena to James Risen*, No. 1:08dm61 (E.D. Va.)).

[8] *See Lee v. U.S. Dep't of Justice*, 327 F. Supp. 2d 26 (D.D.C. 2004), *aff'd in relevant part*, 413 F.3d 53 (D.C. Cir. 2005); *Lee v. U.S. Dep't of Justice*, 287 F. Supp. 2d 15 (D.D.C. 2003), *aff'd in relevant part*, 413 F.3d 53 (D.C. Cir. 2005).

progress of the Oklahoma City bombing investigation in a manner that proved instrumental in helping a nervous public understand that the bombing was not the work of foreign terrorists, and his award-winning coverage of the September 11 attacks unearthed important information, provided by confidential sources, about the FBI's advance knowledge of the activities of those responsible for that tragedy. As Mr. Thomas testified: "If I had no ability to promise confidentiality to these sources, they would not have furnished vital information for these articles."[9]

This practical reality was confirmed by distinguished national security reporter Scott Armstrong, who has testified that:

> The purpose of [confidential reporter-source] relationships is to get and verify accurate information. In order to promote a free and candid relationship with confidential sources, I have frequently found it necessary to guarantee them anonymity in regard to information provided about classified or otherwise confidential and sensitive information. Much of the verification process could not be done without the guarantee of anonymity. Over the course of three decades, such guarantees of confidentiality when used to confirm information with multiple confidential sources, have proven to my satisfaction that this process yields more candid and accurate information than to rely solely or predominantly on public or official comments or documentation.[10]

Confidential sources are not only critical to investigative journalists like Mr. Armstrong, but are equally important to the daily reporting of more routine news stories. Reporters regularly consult background sources to confirm the accuracy of official news pronouncements and to understand their broader context and significance. Without the ability to speak off the record to sources in the government who are not officially authorized to do so, there is substantial evidence that reporters would often be relegated to spoon feeding the public the "official" statements of public relations officers. For this reason, among others, news reporting based on confidential source material regularly receives the nation's most coveted journalism awards, including the Polk Awards for Excellence in Journalism[11] and the Pulitzer Prize.[12]

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[9] *See Appendix B to the Brief Amici Curiae of ABC, Inc, et al.*, in *Miller v. United States* and *Cooper v. United* States, *supra* note 1.

[10] Pet. for a Writ of Cert., *Risen v. United States*, No. 13-1009 (Jan. 13, 2014) at 233a-251a (Decl. of Scott Armstrong in *In re Grand Jury Subpoena to James Risen*, No. 1:08dm61 (E.D. Va. Feb. 16, 2008)).

[11] Numerous recipients of the Polk Award, which honors enterprise reporting across various media and disciplines, have incorporated material or information provided by confidential sources into their reporting. *See* http://liu.edu/George-Polk-Awards/Past-Winners. In 2016, for example, the International Consortium of Investigative Journalists received the Polk Award for Financial Reporting, for its series on "The Panama Papers," relying on leaked documents to uncover corruption and money laundering. *See* International Consortium of Investigative Journalists, Panama Papers Investigation Wins George Polk Award, Feb. 19, 2017, https://www.icij.org/blog/2017/02/panama-papers-investigation-wins-george-polk-award/. The next year, an 18-month investigation by the AP that similarly relied on confidential sources yielded numerous published reports about slave labor in the seafood industry and went on to win both a Polk Award for Foreign Reporting and the 2016 Pulitzer Prize for Public Service. *See* Associated Press, Seafood from Slaves: An AP investigation helps free slaves in the 21st century, https://www.ap.org/explore/seafood-from-slaves/.

The history of the American press provides ample evidence that the information confidential sources make available to the public through the news media is often vitally important to the operation of our democracy and the oversight of our most powerful institutions, both public and private. While the *Washington Post's* "Watergate" reporting is perhaps the most celebrated example of journalists' reliance on such sources,[13] there are countless other compelling examples of valuable journalism that would not have been possible if a reporter

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[12] For example, the 1996 Pulitzer Prize for National Reporting was awarded to the *Wall Street Journal* for its articles reporting on the use of ammonia to heighten the potency of nicotine in cigarettes, which was based on information revealed in confidential, internal reports prepared by a tobacco company. *See, e.g.*, Alix M. Freedman, *'Impact Booster': Tobacco Firm Shows How Ammonia Spurs Delivery of Nicotine*, WALL ST. J., Oct. 18, 1995, at A1. In 2002, the Prize was awarded to the staff of the *Washington Post* "for its comprehensive coverage of America's war on terrorism, which regularly brought forth new information together with skilled analysis of unfolding developments." *See* Princeton University, Gellman wins Pulitzer Prize for team coverage of war on terrorism, Apr. 2, 2002, https://www.princeton.edu/news/2002/04/09/gellman-wins-pulitzer-prize-team-coverage-war-terrorism. The *Post*'s series was based, in significant part, on information provided by unnamed public officials, both here and abroad. *See, e.g.*, Barton Gellman, *U.S. Was Foiled Multiple Times in Efforts To Capture Bin Laden or Have Him Killed*, WASH. POST, Oct. 3, 2001, at A1. In 2016, a South Florida *Sun-Sentinel* investigation about the death toll attributable to speeding police officers, often off-duty and in their personal vehicles, which was based in part on information provided by confidential sources, received Pulitzer's highest prize, for Public Service reporting. *See* Sally Kestin et al, *Speeding cops get special treatment*, SUN-SENTINEL, Feb. 13, 2012, http://www.sun-sentinel.com/news/speeding-cops/fl-speeding-cops-culture-20120213-story.html. And, in 2018, *The New York Times* and *The New Yorker* shared the Public Service award for their articles, similarly based in significant part on information provided by confidential sources, exposing allegations of sexual assaults and related abuses in the motion picture industry. *See* Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, THE NEW YORKER, Oct. 2017, https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories; Jodi Kantor et al, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES, Oct. 5, 2017, https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html.

[13] Notably, several journalists, including Bob Woodward and Carl Bernstein, were subpoenaed to reveal their confidential sources in 1973 in the context of a civil action in federal court brought by the Democratic National Committee against those allegedly responsible for the burglary of the committee's offices at the Watergate building. *See Democratic Nat'l Comm. v. McCord*, 356 F. Supp. 1394, 1397 (D.D.C. 1973). One year after the Supreme Court's decision in *Branzburg*, the district court quashed the subpoenas, explaining that it "cannot blind itself to the possible 'chilling effect' the enforcement of these broad subpoenas would have on the flow of information to the press, and so to the public." *Id.* In an affidavit submitted to the Supreme Court years later, Bernstein testified:

> I am greatly concerned about the federal government's drive in recent years to subpoena reporters to testify about their confidential sources. Not only do I believe it is an assault on the First Amendment and the press freedoms we are guaranteed, but on an individual level, compelling the disclosure of confidential information by any reporter is certain to obstruct his future newsgathering and make it nearly impossible to do his job effectively. In my experience, confidential sources will speak only to a journalist they trust and one whom they believe is sufficiently independent of government influence and authority. If an investigative reporter is compelled by the government to testify as to confidential information, his trustworthiness, integrity and independence will likely be forever tainted and any potential sources who might have previously approached him with important information may very well be deterred.
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> I also believe, based on my professional experience, that compelled disclosure of confidential information will cause irrevocable damage to the quality of information the public receives.

Pet. for a Writ of Cert., *Risen v. United States*, No. 13-1009 (Jan. 13, 2014) at 253a-257a (Decl. of Carl Bernstein in *In re Grand Jury Subpoena to James Risen*, No. 1:08dm61 (E.D. Va.)).

could not credibly have pledged confidentiality to a source. Consider the following examples:

Pentagon Papers – The Pentagon's secret history of America's involvement in Vietnam was, of course, provided by a confidential source to *The New York Times* and *The Washington Post*.[14] In refusing to enjoin publication of the leaked information, several members of the Supreme Court noted that the newspapers' sources may well have broken the law, and they were in fact prosecuted, albeit unsuccessfully, after later coming forward.[15] Nevertheless, as Justice Black emphasized at the time, "[i]n revealing the workings of the government that led to the Vietnam war, the newspapers nobly did precisely that which the Founders had hoped and trusted they would do,"[16] and there is now a broad consensus that there was no legitimate reason to hide the Papers from the public in the first place.[17]

Neutron Bomb – Journalist Walter Pincus of *The Washington Post* relied on confidential sources in reporting that President Carter planned to move forward with plans to develop a so-called "neutron bomb," a weapon that could inflict massive casualties through radiation without extensive destruction of property.[18] The public and congressional outcry in the wake of these news reports spurred the United States to abandon plans for such a weapon and no Administration has since attempted to revive it.[19] Mr. Pincus, who never received a subpoena concerning the neutron bomb or any other matter in his distinguished, decades-long career, has received *two* in recent years.

Enron – In a series of articles, the *Wall Street Journal* relied on confidential sources and leaked corporate documents provided by tem to reveal the illegal accounting practices of a corporation that had "routinely made published lists of the most-admired and innovative companies in America."[20] Among other things, confidential sources provided the *Journal* with "confidential" information about two partnerships operated by Enron's Chief Financial Officer,

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[14] *See New York Times Co. v United States*, 403 U.S. 713 (1971).

[15] *See, e.g., id.* at 754 (Harlan, J., dissenting); Sanford J. Ungar, *Federal Conduct Cited As Offending 'Sense of Justice'; Charges Dismissed in 'Papers' Trial*, WASH. POST, May 12, 1973, at A1.

[16] *New York Times Co.*, 403 U.S. at 717 (Black, J., concurring).

[17] Solicitor General Erwin N. Griswold, who argued the government's case, wrote some twenty years later that he had not "seen any trace of a threat to the national security from the publication." Erwin N. Griswold, *Secrets Not Worth Keeping; The Courts and Classified Information*, WASH. POST, Feb. 15, 1989, at A25.

[18] *See, e.g.*, Walter Pincus, *Carter Is Weighing Radiation Warhead*, WASH. POST, June 7, 1977, at A5; Walter Pincus, *Pentagon Wanted Secrecy On Neutron Bomb Production; Pentagon Hoped To Keep Neutron Bomb A Secret*, WASH. POST, June 25, 1977, at A1.

[19] *See* Don Phillips, *Neutron Bomb Reversal; Harvard Study Cites '77 Post Articles*, WASH. POST, Oct. 23, 1984, at A12 (quoting former Defense Secretary Harold Brown as stating that "[w]ithout the [*Post*] articles, neutron warheads would have been deployed").

[20] Rebecca Smith & John R. Emshwiller, *Trading Places: Fancy Finances Were Key to Enron's Success, And Now to its Distress*, WALL ST. J., Nov. 2, 2001, at A1.

which were used to hide corporate debt from the company's investors.[21]

Abu Ghraib – In 2004, CBS News and Seymour Hersh, writing for *The New Yorker*, first reported accounts of abuse of detainees at Abu Ghraib prison in Iraq.[22] Relying on photographs graphically depicting such abuse in the possession of Army officials and a classified report that was "not meant for public release,"[23] CBS and Mr. Hersh documented the conditions of abuse in the Iraqi prison. After these incidents became public, other military sources who had witnessed abuse stepped forward, but only "on the condition that they not be identified because of concern that their military careers would be ruined."[24]

Walter Reed Army Medical Center – In 2007, Dana Priest and Anne Hull of the *Washington Post* revealed the plight of outpatient soldiers at Walter Reed Army Medical Center, who were being kept in squalid conditions while waiting to be treated, discharged, or returned to duty.[25] The report, which relied extensively on information provided by patients and staff members who insisted that their identities be kept confidential, resulted almost immediately in the dismissal of the Medical Center's commander, and prompted efforts to improve conditions at Walter Reed and other military medical facilities.[26]

The Secret Service – From 2011 to 2015, the *Washington Post's* Carol Leonnig, among others, published a series of reports chronicling performance lapses by the Secret Service, including its handling of several trespasses on White House property, improper behavior involving prostitutes and use of alcohol by agents on presidential trips, and its failure to prevent an armed individual from riding in an elevator with the president. Many of these incidents were concealed from the public and Congress and ultimately brought to light in large part because of the *Post*'s ability to secure such information from confidential sources.[27]

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[21] Rebecca Smith & John R. Emshwiller, *Enron CFO's Partnership Had Millions in Profit*, WALL ST. J., Oct. 19, 2001, at C1; John R. Emshwiller & Rebecca Smith, *Corporate Veil: Behind Enron's Fall, A Culture of Operating Outside Public's View*, WALL ST. J., Dec. 5, 2001, at A1.

[22] 60 Minutes II, Apr. 28, 2004, www.cbsnews.com/ stories/2004/04/27/60II/main614063.shtml?CMP=ILC-SearchStories; Seymour M. Hersh, *Torture at Abu Ghraib*, THE NEW YORKER, May 10, 2004, at 42.

[23] Hersh, *supra* note 22.

[24] *See, e.g.*, Todd Richissin, *Soldiers' Warnings Ignored*, BALT. SUN, May 9, 2004, at A1 (interviewing anonymous soldiers who had witnessed abuse at Abu Ghraib); Miles Moffeit, *Brutal Interrogation in Iraq*, DENVER POST, May 19, 2004, at A1 (relying on confidential "Pentagon documents" and interview with a "Pentagon source with knowledge of internal investigations into prisoner abuses").

[25] *See* Dana Priest & Anne Hull, *Soldiers Face Neglect, Frustration at Army's Top Medical Facility*, WASH. POST, Feb. 18, 2007 at A01.

[26] *See, e.g.*, Steve Vogel & William Branigin, *Army Fires Commander of Walter Reed*, WASH. POST, Mar. 2, 2007 at A01.

[27] *See* David A. Graham, *The Secret Service Disaster: A Timeline*, THE ATLANTIC, Mar. 13, 2015, https://www.theatlantic.com/politics/archive/2015/03/secret-service-disaster-timeline/387643/; Michael Calderone, *How The Washington Post's Carol Leonnig Broke Open The Secret Service Scandal*, THE HUFFINGTON POST, Oct.

Harvey Weinstein – In 2017, journalists with the *New Yorker* and *The New York Times* broke Hollywood's collective silence regarding the predatory behavior of powerful motion picture executive Harvey Weinstein, due in significant part to confidential sources who feared retaliation should they go public with allegations of his misconduct.[28]

The Current State of the Privilege in the Federal Courts

For almost three decades following the Supreme Court's decision in *Branzburg v. Hayes*,[29] subpoenas issued by federal courts seeking the disclosure of journalists' confidential sources were rare. It appears that no journalist was finally adjudged in contempt or imprisoned for refusing to disclose a confidential source in a federal criminal matter during the last quarter of the twentieth century. And there appear to have been only two published decisions from 1976-2000 arising from subpoenas issued by federal grand juries or prosecutors to journalists seeking confidential sources. Both involved alleged leaks to the media and, in both, the subpoenas were quashed.[30]

2, 2014, https://www.huffingtonpost.com/2014/10/02/washington-post-secret-service-scandal_n_5913366.html. Leonnig won the 2015 Pulitzer Prize for National Reporting for her work.

[28] *See supra* note 12. Such reliance by the press on confidential sources is by no means a modern phenomenon. When the First Amendment was enacted, the Founders understood their importance to maintaining an informed citizenry:

> Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts. Along about that time the Letters of Junius were written and the identity of their author is unknown to this day. Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names.

Talley v. California, 362 U.S. 60, 64-65 (1960). Indeed, the controversy that is credited with first establishing uniquely American principles of freedom of the press – the prosecution and acquittal of New York publisher Jon Peter Zenger on charges of seditious libel – arose out of Zenger's refusal to identify the source(s) of material appearing in his newspaper harshly criticizing New York's royal government. Even after Zenger was arrested and charged with criminal responsibility as the publisher, he maintained his refusal to disclose his "sources." *McIntyre*, 514 U.S. at 361 (Thomas, J., concurring). Similarly, in 1779, Elbridge Gerry and other members of the Continental Congress sought to institute proceedings to compel a Pennsylvania newspaper publisher to identify the author of a column criticizing the Congress. Ultimately, arguments that "'[t]he liberty of the Press ought not to be restrained'" prevailed and the Congress did not take action to compel such disclosure. *Id.* at 361-62 (citation omitted). In 1784, the New Jersey Legislature embarked on another unsuccessful effort to compel a newspaper editor to identify the author of a critical article. *Id.* at 362-63. These episodes were fresh in the mind of the Framers who, as Justice Thomas chronicled in *McIntyre*, unanimously "believed that the freedom of the press included the right to publish without revealing the author's name." *Id.* at 367.

[29] 408 U.S. 665 (1972).

[30] *See, e.g.*, *In re Williams*, 963 F.2d 567 (3d Cir. 1992) (en banc); *In re Grand Jury Subpoenas*, 8 Media L. Rep. 1418 (D. Colo. 1982). No reported judicial decisions address subpoenas to reporters until roughly the beginning of the twentieth century. Only a half-dozen can be found prior to the 1950s, and several of those arose because the journalist himself was the target of a criminal investigation. *See Branzburg*, 408 U.S. at 685-86 (citing cases). Indeed, prior to the late 1960s, there appear to be only two federal court decisions related to federal grand jury or criminal trial subpoenas issued to journalists, and both excused the reporters from testifying on grounds

Since the turn of the century, however, that situation has changed significantly. For one thing, in the last fifteen years, a period that spans three presidential Administrations, a substantial number of subpoenas seeking the identities of confidential sources have been issued by federal courts to a variety of media organizations, the journalists they employ, and the third parties that provide them with telephone and email services. For another, the federal courts have increasingly found themselves in conflict over whether, and the extent to which, either the First Amendment or federal common law provides journalists with a privilege to resist such subpoenas, a conflict that the Supreme Court has repeatedly declined to resolve. As a result of these twin phenomena, at the very moment in our history when journalists are most in need of such protection, they are justifiably uncertain whether the law will honor the commitments they have made to protect the confidentiality of their sources.

Frequency of Subpoenas

I last testified on this issue before a committee of this House in 2007. In that testimony, I described in some detail the significant increase in the number of subpoenas issued to journalists, news organizations and their service providers in the immediately preceding years.[31]

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unrelated to privilege. *See Burdick v. United States*, 236 U.S. 79 (1915) (journalist was entitled to assert a Fifth Amendment privilege); *Rosenberg v. Carroll*, 99 F. Supp. 629 (S.D.N.Y. 1951) (excusing journalist because information sought was not sufficiently relevant). And, during those brief, exceptional periods in American history when subpoenas were issued to reporters with some frequency, most notably in the years immediately surrounding the Supreme Court's decision in *Branzburg*, both the states and most lower federal courts promptly responded by recognizing a formal legal privilege. *See, e.g.*, *infra* note 62.

[31] *See Free Flow of Information Act of 2007: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. 32-34, *supra* note 1. In that testimony, I explained that, in the preceding few years alone, four federal courts of appeals had affirmed contempt citations issued to reporters, each imposing prison sentences more severe than any previously known to have been experienced by journalists in American history: (1) In 2001, a writer covering a notorious murder served nearly six months in prison for declining to reveal her sources of information, almost four times longer than any prison term previously imposed on any reporter by any federal court. *See In re Grand Jury Subpoenas*, 29 Media L. Rep. 2301 (5th Cir. 2001) (per curiam); (2) In 2005, a Rhode Island television reporter who exposed state government corruption completed a four-month sentence of home confinement for declining to reveal who provided to him a videotape that captured alleged corruption by public officials. *See In re Special Proceedings*, 373 F.3d 37 (1st Cir. 2004); (3) That same year, Judith Miller, then a reporter at *The New York Times*, was incarcerated for 85 days for declining to reveal the identity of her confidential source in response to a grand jury subpoena, and was released only when her source waived the protection of the promise she had extended to him. *See In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D.C. Cir. 2005); *see also* David Johnston & Douglas Jehl, *Times Reporter Free from Jail; She Will Testify*, N.Y. TIMES, Sept. 30, 2005 at A1; Adam Liptak, *Reporter Jailed After Refusing to Name Source*, N.Y. TIMES, July 7, 2005, at A1; (4) In 2007, a videographer was incarcerated for seven months after he declined to provide federal authorities with unpublished video footage of a protest he covered at a G-8 summit. *See In re Grand Jury Subpoena (Joshua Wolf)*, 201 Fed. App'x 430 (9th Cir. 2006); *see also, e.g.*, Associated Press, *Videographer is freed after cutting a deal*, KANSAS CITY STAR, April 14, 2007, at A4. And although it was ultimately not enforced because the identity of their confidential source was discovered through other means, two *San Francisco Chronicle* reporters were sentenced to up to 18 months in prison in 2006 for refusing to reveal who gave them information revealed to a federal grand jury about steroid use in professional sports. *See In re Grand Jury Subpoenas to Mark Fainaru-Wada & Lance Williams*, No. CR 06-90225 (JSW), 2006 U.S. Dist. LEXIS 73134 (N.D. Cal. Sept. 25, 2006); *see also* Bob Egelko, *Lawyer Who Leaked Athletes' Testimony Seeks Less Prison Time*, S.F.CHRONICLE, June 7, 2007, at B2.

Such decisions also emboldened private litigants and the federal courts adjudicating their cases to subpoena confidential source information from reporters in similarly unprecedented fashion. In 2005, five reporters employed by *The New York Times*, *Los Angeles Times*, *The Washington Post*, Associated Press and CNN were held in

Unfortunately, since that testimony, and Congress' subsequent failure to pass a federal shield law, the drumbeat of such subpoenas has continued. In 2008, for example, the Department of Justice issued the first of what became multiple grand jury and trial subpoenas to Pulitzer Prize-winning journalist James Risen seeking to compel his testimony in the criminal prosecution of former CIA employee Jeffrey Sterling.[32] The Department believed that Mr. Sterling had been a source for Mr. Risen's reporting on the CIA. Two separate presidential Administrations pursued Mr. Risen's testimony over a period of five years. Indeed, even after the trial court largely precluded DOJ from securing Mr. Risen's testimony, on the ground that the First Amendment afforded him a privilege to protect his confidential sources, it appealed to the U.S. Court of Appeals for the Fourth Circuit, which reversed the trial judge and held that there is no reporters' privilege to withhold such testimony in criminal cases in the federal courts of that circuit.[33] Significantly, despite its persistence in pursuing Mr. Risen's testimony, following the Fourth Circuit's ruling—and Mr. Risen's ongoing refusal to reveal his sources—the Justice Department decided *not* to call him to testify at Mr. Sterling's trial, at the conclusion of which he was nevertheless convicted of the charges against him.

In 2013, the same year that the Fourth Circuit rebuffed Mr. Risen's assertion of a reporters' privilege, the Justice Department—in the course of a separate leak investigation—seized two months of phone records connected to more than twenty telephone lines of the Associated Press' offices and journalists, including their home phones and cellphones.[34] It did so, not by seeking such information directly from the AP or the journalists involved, but rather by issuing, without their knowledge, subpoenas to their telephone service providers.

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contempt for declining to reveal their confidential sources of information about Dr. Wen Ho Lee, who had sued several federal agencies claiming that such information was provided to the press by government officials in violation of the Privacy Act. *See Lee v. U.S. Dep't of Justice*, 327 F. Supp. 2d 26 (D.D.C. 2004), *aff'd in relevant part*, 413 F.3d 53 (D.C. Cir. 2005); *Lee v. U.S. Dep't of Justice*, 287 F. Supp. 2d 15 (D.D.C. 2003), *aff'd in relevant part*, 413 F.3d 53 (D.C. Cir. 2005). They were spared the imposition of judicial sanctions only because the news organizations for which they worked collectively paid $750,000 to Dr. Lee, even though neither the reporters nor their employers were, or lawfully could have been, defendants in his case against the government. Subsequently, Dr. Steven Hatfill, the plaintiff in another civil suit alleging violations of the Privacy Act, issued subpoenas to and/or moved to compel disclosure of the identities of confidential sources from eight news organizations and six reporters. *See* Eric Lichtblau, *Reporter Held in Contempt in Anthrax Case*, N.Y. TIMES, Feb. 20, 2008,https://www.nytimes.com/2008/02/20/us/20anthrax.html; Carol D. Leonnig, *Source Disclosure Ordered in Anthrax Suit*, WASH. POST, Aug. 14, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/08/13/AR2007081300991.html.

[32] *United States v. Sterling*, 818 F. Supp. 2d 945, 947-50 (E.D. Va. 2011), *rev'd*, 724 F.3d 482 (4th Cir. 2013).

[33] *United States v. Sterling*, 724 F.3d 482, 492-96 (4th Cir. 2013). The threat posed by government-issued subpoenas to journalists extends beyond the Justice Department. In 2016, for example, a filmmaker was forced to initiate his own federal action after a military prosecutor sought all 25 hours of unpublished interviews he had conducted. *See* Josh Gerstein, *Feds fight bid to head off 'Serial' Bergdahl subpoena*, POLITICO, Aug. 7, 2016, https://www.politico.com/blogs/under-the-radar/2016/08/feds-fight-bid-to-head-off-serial-bergdahl-subpoena-226772.

[34] Charlie Savage, *Phone Records of Journalists Seized by U.S.*, N.Y. TIMES, May 13, 2013, https://www.nytimes.com/2013/05/14/us/phone-records-of-journalists-of-the-associated-press-seized-by-us.html.

That same year, the Department, in the course of a criminal investigation of alleged leaks related to North Korea, secured warrants authorizing prosecutors to monitor the phone calls and emails of James Rosen, a Fox News correspondent, without his knowledge.[35] The public outcry that resulted from the AP subpoenas and the Rosen search warrant[36] prompted the Department to revise substantially its internal guidelines governing the use of compulsory process to secure such records from a journalist's or news organization's service providers.[37]

Nevertheless, the practice has apparently continued, despite the change in Administrations in the interim. Earlier this year, the Justice Department revealed that it had secretly procured years' worth of phone and email records of *New York Times* reporter Ali Watkins in furtherance of its investigation of a Congressional aide.[38] It remains unclear whether the Department complied with its own guidelines when it did so,[39] although that is a largely

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[35] Application for Search Warrant dated May 28, 2010 & Aff. of Reginald Reyes in Support, USA v. Email Account Redacted@Gmail.com, No. 1:10-mj-00291 (D.C. Cir., unsealed Nov. 7, 2011) (Dkt. Nos. 20 & 20-1); *see also* Jonathan Capehart, *Regrets, Eric Holder has a few*, Oct. 31, 2014, WASH. POST, https://www.washingtonpost.com/blogs/post-partisan/wp/2014/10/31/regrets-eric-holder-has-a-few/?utm_term=.afb411750c1a.

[36] *Another Chilling Leak Investigation*, N.Y. TIMES, May 21, 2013, https://www.nytimes.com/2013/05/22/opinion/another-chilling-leak-investigation.html?_r=0.

[37] *See* Department of Justice Report on Review of News Media Policies (July 12, 2013), https://www.justice.gov/sites/default/files/ag/legacy/2013/07/15/news-media.pdf. The guidelines were revised in February 2014 and again in January 2015. *See* 28 C.F.R. § 50.10; *see also* Office of the Attorney General, Updated Policy Regarding Obtaining Information From, or Records of, Members of the News Media, and Regarding Questioning, Arresting, or Charging Members of the News Media (Jan. 14, 2015), https://www.justice.gov/file/317831/download; UNITED STATES ATTORNEYS' MANUAL § 9-13.400 (Oct. 2016), https://www.justice.gov/usam/usam-9-13000-obtaining-evidence#9-13.400.

[38] *See* Adam Goldman, et al, *Ex-Senate Aide Charged in Leak Case Where Times Reporter's Records Were Seized*, N.Y. TIMES, June 7, 2018, https://www.nytimes.com/2018/06/07/us/politics/times-reporter-phone-records-seized.html. According to the *Times*, the records were obtained through subpoenas to telecommunications companies, including Google and Verizon, and that "[i]t appeared that the F.B.I. was investigating how Ms. Watkins learned that Russian spies in 2013 had tried to recruit Carter Page, a former Trump foreign policy adviser," a subject on which she had published reports. *Id.*

[39] *The Justice Department's seizure of a reporter's records could signal a dangerous campaign*, WASH. POST, June 13, 2018, https://www.washingtonpost.com/opinions/the-justice-departments-seizure-of-a-reporters-records-could-signal-a-dangerous-campaign/2018/06/13/ba3aa04a-6d9b-11e8-afd5-778aca903bbe_story.html?utm_term=.84b56c1ad4e3 ("Under Justice guidelines, hammered out between 2013 and 2015, the government should use subpoena power, court orders or search warrants for journalists' records only as extraordinary measures, not as normal investigatory tools, and, except in unusual circumstances, the government should give reporters advance notice of a bid for records, to allow sufficient time for a protest or negotiation. . . . In light of the guidelines, was the broad sweep for Ms. Watkins's communications really necessary? Or is the Justice Department using a vacuum-cleaner approach?"). The uncertainty surrounding DOJ's seizure of Ms. Watkins records is compounded by its failure even to acknowledge it had done so in response to an inquiry from Senator Ron Wyden regarding the number of times in the last five years the Department used "subpoenas, search warrants, national security letters, or any other form of legal process authorized by a court" to collect information about journalists in the United States or American journalists abroad. *See* Ramya Krishnan, *More questions than answers from DOJ letter about journalist surveillance*, COLUMBIA JOURNALISM REVIEW, July 13, 2018, https://www.cjr.org/united_states_project/surveillance-justice-department-reporters-sessions.php; Letter from

academic question since most courts to have considered the issue have held that the guidelines are not judicially enforceable in any event.[40]

Legal Uncertainty

The Supreme Court has addressed the question of whether federal law, including most especially the First Amendment, safeguards a journalist's ability to protect his or her confidential sources only once, in its 1972 decision in *Branzburg*. The controversy and uncertainty surrounding the significance of that case is well known, but nevertheless explainable by the fact that (1) the 5-4 decision was directed specifically to fact patterns in which journalists were subpoenaed to testify before grand juries about criminal conduct they had personally observed and (2) Justice Lewis Powell issued a separate concurring opinion (in which he provided the fifth vote for the majority) that appeared to endorse recognition of a First Amendment-based privilege in other contexts (such as subpoenas seeking the identities of confidential sources in criminal prosecutions and civil litigation).[41] As a practical matter, however, in the almost three decades immediately following that decision, both the federal courts and the Justice Department largely construed *Branzburg* in the limited manner apparently intended by Justice Powell and, as a result, an impressive body of precedent developed in the federal circuits recognizing a reporters' privilege in most circumstances outside the grand jury context.

In recent years, however, that judicial consensus has broken down in significant respects. As referenced above, in the wake of its decision in the *Risen/Sterling* case, a journalist in the Fourth Circuit (encompassing Maryland, Virginia, West Virginia, North Carolina and South Carolina) is protected by a qualified privilege grounded in the First Amendment, in the manner apparently conceived by Justice Powell in *Branzburg*, when seeking to shield confidential sources and otherwise unpublished information in civil cases, but enjoys no such protection in criminal proceedings.[42] And based on that court's understanding of *Branzburg*, there is no protection at all afforded to journalists in such circumstances under federal common law.

In contrast, in the First Circuit, a "constitutionally sensitized balancing process" derived from Justice Powell's opinion continues to be applied to subpoenas seeking to compel the disclosure of even non-confidential information in both civil and adversarial criminal proceedings.[43] In requiring that such balancing take place in every case in the federal courts of

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Stephen E. Boyd, Assistant Attorney Gen., U.S. Dep't of Justice, to Hon. Ron Wyden, U.S. Senate (Mar. 5, 2018), https://www.cjr.org/united_states_project/surveillance-justice-department-reporters-sessions.php.

[40] *See, e.g.*, *In re Grand Jury Subpoena (Miller)*, 397 F.3d 964, 974-75 (D.C. Cir. 2005); *In re Special Proceedings*, 373 F.3d 37, 44 (1st Cir. 2004); *In re Shain*, 978 F.2d 850, 853-54 (4th Cir. 1992).

[41] *See Branzburg v. Hayes*, 408 U.S. 665, 707-10 (1972) (Powell, J. concurring); *see also* James Goodale, *A Sigh of Relief*, N.Y.L.J. (Oct. 1, 1999); James Goodale, *Branzburg v. Hayes and the Developing, Qualified Privilege for Newsmen*, 26 HASTINGS L.J. 709 (1975).

[42] *See United States v. Sterling*, 724 F.3d 482, 492-96 (4th Cir. 2013).

[43] *See, e.g., Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 595-96 & n.13 (1st Cir. 1980); *United States v. LaRouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988).

Massachusetts, New Hampshire, Rhode Island, Maine and Puerto Rico, except in non-adversarial proceedings akin to the grand jury investigations at issue in *Branzburg*, the First Circuit has explained that "[w]hether or not the process of taking First Amendment concerns into consideration can be said to represent recognition by the Court of a 'conditional' or 'limited' privilege is … largely a question of semantics."[44]

In the Second Circuit, encompassing all federal courts sitting in New York, Connecticut and Vermont, reporters are similarly protected by a presumptive privilege in both civil and adversarial criminal proceedings, although that circuit, while also grounding its decision in Justice Powell's concurring opinion in *Branzburg*, has not decided whether the privilege is derived from the First Amendment or federal common law.[45] The scope of protection available in the Second Circuit varies depending on whether the information sought is the identity of a confidential source or unpublished, non-confidential journalistic work product.[46] Moreover, although the judges of that circuit "see no legally-principled reason for drawing a distinction between civil and criminal cases when considering whether the reporter's interests in confidentiality should yield to the moving party's need for probative evidence," they have not reached consensus as to whether such protection is available when the challenged subpoena is issued by a grand jury.[47]

In the Third Circuit, reporters seeking to safeguard the identities of confidential sources and unpublished work product in both civil and criminal cases are protected by a privilege derived from federal common law and grounded in Federal Rule of Evidence 501.[48] Thus, in the federal courts of Pennsylvania, Delaware, New Jersey and the Virgin Islands, the availability of the privilege is assessed on a "case-by-case" basis.[49]

For its part, the District of Columbia Circuit has been unable to decide whether there is a common-law privilege, finding itself at loggerheads based on its judges' conflicting views concerning whether such a privilege is foreclosed by *Branzburg.*[50] At the same time, based on

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[44] *Bruno & Stillman, Inc.*, 633 F.2d at 595; *see In re Request from United Kingdom (Price)*, 718 F.3d 13, 23 (1st Cir. 2013).

[45] *See, e.g., United States v. Treacy*, 639 F.3d 32, 42 (2d Cir. 2011).

[46] *See Gonzales v. Nat'l Broad. Co.*, 194 F.3d 29, 35 (2d Cir. 1993).

[47] *United States v. Burke*, 700 F.2d 70, 77 (2d Cir. 1983); *see New York Times Co. v. Gonzales*, 459 F.3d 160, 172-73 (2d Cir. 2006).

[48] *See, e.g., See United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980).

[49] *Coughlin v. Westinghouse Broad. & Cable Inc.*, 780 F.2d 340, 350 & n.14 (3d Cir. 1985).

[50] *See In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1154 (D.C. Cir. 2006) (Sentelle, J., concurring) (*Branzburg* is "as dispositive of the question of common law privilege as it is of a First Amendment privilege"); *id.* at 1160 (Henderson, J., concurring) (asserting circuit courts are "not bound by *Branzburg*'s commentary on the state of the common law in 1972" but declining to decide whether to recognize common law privilege); *id.* at 1170 (Tatel, J., concurring) (applying common law privilege in grand jury context). *See also* Tr. of Oral Arg. at 13, *Hatfill v. Balt. Sun Co.*, No. 08-5049 (D.C. Cir. May 9, 2008) (Kavanaugh, J.) (noting that, at "[t]he

its reading of Justice Powell's opinion in *Branzburg*, that circuit has embraced a privilege grounded in the First Amendment that applies in civil proceedings but rejected any such First Amendment-based privilege protecting journalists from appearing or testifying before a grand jury.[51] The remaining circuits are similarly in conflict.[52]

The lack of consensus among the circuits has obvious consequences for working journalists and, accordingly, for the public interest. A journalist subpoenaed in one jurisdiction will receive no protection for the confidentiality of his sources, yet if the same reporter was subpoenaed by a federal court sitting in another state, the result would be entirely different. Thus, for example, Mr. Risen was authoritatively informed by the Fourth Circuit that he had no lawful ability to protect the identities of his confidential sources in response to a subpoena issued by a federal court sitting in Virginia. If that same subpoena had been issued by a federal court in Delaware, less than 120 miles to the north, he would have enjoyed a presumptive privilege grounded in federal common law as construed by the Third Circuit. And, if the subpoena had been issued by a federal court in Georgia, some 300 miles to the south, he would have been presumptively protected by the First Amendment-based privilege recognized in the Eleventh

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time of *Branzburg* not many states had a reporter's privilege. Now, 49 states do. Under [applicable law], that means the federal courts are supposed to recognize the common law reporter's privilege.").

[51] *See Zerilli v. Smith*, 656 F.2d 705, 712 (D.C. Cir. 1981); *Miller*, 438 F.3d at 1147.

[52] The Fifth Circuit, encompassing those federal courts sitting in Texas, Louisiana and Mississippi, has recognized a privilege, grounded in the First Amendment, that presumptively protects both confidential sources and non-confidential journalistic work product in civil cases, but it has rejected any such privilege in criminal cases involving non-confidential information. *See Miller v. Transamerican Press, Inc.*, 621 F.2d 721, *modified*, 628 F.2d 932 (5th Cir. 1980); *United States v. Smith*, 135 F.3d 963, 972 (5th Cir. 1998). It has, however, signaled that the outcome may be different in criminal cases in which the information sought is the identity of a confidential source. *See Smith*, 135 F.3d at 972**.** Since its creation as a court distinct from the Fifth and encompassing the federal courts of Florida, Georgia and Alabama, the Eleventh Circuit has gone its own way, holding that "[o]ur Circuit recognizes a qualified privilege for journalists, allowing them to resist compelled disclosure of their professional newsgathering efforts. This privilege shields reporters in both criminal and civil proceedings." *United States v. Capers*, 708 F.3d 1286, 1303 (11th Cir. 2013). The Sixth Circuit has addressed the availability of a First Amendment-based privilege in the federal courts of Ohio, Michigan, Kentucky and Tennesseed only in the grand jury context, considering itself bound by *Branzburg* to reject any privilege in that circumstance. *In re Grand Jury Proceedings*, 810 F.2d 580, 583-84 (6th Cir. 1987). The Seventh Circuit has similarly addressed the subject directly only once, holding that no First Amendment-based privilege protects a journalist in the federal courts of Illinois, Indiana and Wisconsin from the compelled disclosure of non-confidential journalistic work product in criminal cases, but indicating that its conclusion would likely be different "[w]hen the information in the reporter's possession" comes "from a confidential source." *McKevitt v. Pallasch*, 339 F.3d 530, 531-33 (7th Cir. 2003). The Ninth Circuit recognizes a qualified privilege, grounded in the First Amendment, which protects both the identities of confidential sources and unpublished, non-confidential materials in civil and adversarial criminal proceedings in the federal courts of California, Arizona, Washington, Oregon, Nevada, Alaska, Idaho, Montana and Hawaii. *See Farr v. Pitchess*, 522 F.2d 464, 466, 469 (9th Cir. 1975); *Shoen v. Shoen*, 48 F.3d 412, 418 (9th Cir. 1995). In the Tenth Circuit, encompassing those federal courts sitting in Colorado, New Mexico, Kansas, Oklahoma, Utah and Wyoming, a privilege has been recognized in civil cases, although its contours remain undefined, *see Silkwood v. Kerr-McGee Corp*., 563 F.2d 433, 437 (10th Cir. 1977), while in the Eighth Circuit, although the court has suggested the existence of a privilege of some dimension in the federal courts of Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota and South Dakota, *see Cervantes v. Time, Inc.*, 464 F.3d 986 (8th Cir. 1972), a subsequent decision observed that the question of whether a reporters' privilege exists at all "is an open one in this circuit." *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 918 n.8 (8th Cir. 1997).

Circuit. Simply put, neither reporters nor the news organizations for which they work can predict with any reasonable degree of certainty what, if any, rights they possess to protect their sources and unpublished work product when pursuing any given story, especially one that involves national reporting.

Journalists have over the years looked to the Supreme Court to address the confusion that surrounds the scope and application of the reporters' privilege in the federal courts. The Court, however, has consistently declined to intervene, most recently in the context of the case involving Mr. Risen. As a result, it has now been almost half a century since the Court's decision in *Branzburg*, the first and last time it addressed this important issue.

In *Branzburg* itself, Justice White's opinion for the Court indicated that recognition of a reporters' privilege more naturally falls within the province of the Congress. "At the federal level," Justice White wrote, "Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate."[53] More recently, Judge Sentelle of the U.S. Court of Appeals for the District of Columbia Circuit expressed the similar view that "reasons of policy and separation of powers counsel against" the courts exercising whatever authority they may possess to recognize a reporters' privilege as a matter of federal common law.[54] Instead, Judge Sentelle recommended that "those elements of the media concerned about this privilege[] would better address those concerns to the Article I legislative branch … [rather] than to the Article III courts."[55] Likewise, Chief Judge Traxler, writing for the Fourth Circuit in the *Risen/Sterling* case, observed that it was Congress, not the lower federal courts, that are in the best position to "effectively and comprehensively weigh the policy arguments for and against adopting a privilege and define its scope."[56]

The Reporters' Privilege in the States

The situation that currently exists in the federal courts has not been replicated in the States. In fact, forty-nine states and the District of Columbia recognize some form of reporters' privilege.[57] Of those jurisdictions, forty, in addition to the District, have enacted shield laws.[58] Although these statutes vary in the degree of protection they provide to journalists, they "rest on

[53] *Branzburg*, 408 U.S. at 706.

[54] *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d at 979.

[55] *Id*. at 981.

[56] *United States v. Sterling*, 724 F.3d 482, 505 (4th Cir. 2013).

[57] *See generally The Reporter's Privilege*, Reporters Comm. for Freedom of the Press, http://www.rcfp.org/privilege/index.php (last visited July 15, 2018). It does not appear that a Wyoming state court or that state's legislature has yet addressed the issue. *See id*.

[58] *See, e.g.*, West Virginia acting governor signs reporter shield law, Apr. 6, 2011, https://www.rcfp.org/browse-media-law-resources/news/west-virginia-acting-governor-signs-reporter-shield-law (last visited July 15, 2018); Lee Levine et al., *Newsgathering and the Law* § 19.01 n.14 (5th ed. 2018).

the uniform determination by the States that, in most cases, compelling newsgatherers to disclose confidential information is contrary to the public interest."[59]

In addition, the Attorneys' General of thirty-four states and the District of Columbia – each of whom is, by definition, ultimately accountable for the enforcement of the criminal law in their respective states – have urged the Supreme Court to recognize a federal reporters' privilege.[60] In doing so, the Attorneys' General noted that the States "'are fully aware of the need to protect the integrity of the factfinding functions of their courts,'" yet they have reached a nearly unanimous consensus that some degree of legal protection for journalists against compelled testimony is necessary.[61]

Perhaps most significantly, the experience of the States demonstrates that shield laws have had no material impact on law enforcement or on the discovery of evidence in judicial proceedings, criminal or civil.[62] As the Attorneys' General explained, a "federal policy that allows journalists to be imprisoned for engaging in the same conduct that these State privileges encourage and protect" serves to undermine "both the purpose of the [States'] shield laws, and the policy determinations of the State courts and legislatures that adopted them."[63] Indeed, the Attorneys' General aptly observed that

> [t]he consensus among the States on the reporter's privilege issue is as universal as the federal courts of appeals decisions on the subject are inconsistent, uncertain and irreconcilable. … These vagaries in the application of the federal privilege corrode the protection the States have conferred upon their citizens and newsgatherers, as an "'uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.'"[64]

The experience of the States is by no means unique. Particularly in other democratic

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[59] *Brief Amici Curiae of The States of Oklahoma, et al., Miller v. United States; Cooper v. United States*, Nos. 04-1507, 04-1508, available at 2005 WL 1317523.

[60] *See id*.

[61] *See id*. (citing *Jaffee v. Redmond*, 518 U.S. 1, 13 (1996)).

[62] In 1896, Maryland became the first state to pass a shield law, spurred by the jailing of a *Baltimore Sun* reporter who refused to identify his sources for a story about public corruption to a grand jury. In the late 1920s and early 1930s, several reporters in various states were similarly imprisoned for refusing to appear before grand juries. Ten states responded by enacting laws similar to Maryland's. In the early 1970s, federal prosecutors began regularly issuing grand jury subpoenas to journalists, a development that culminated in the *Branzburg* decision. At the time, seventeen states had statutory privileges. *Branzburg*, 408 U.S. at 689 n.27. Ten more states passed shield laws in its immediate wake and still others recognized the privilege by judicial decision. Today, as noted, forty states and the District of Columbia have shield laws, with nine others affording common law protection.

[63] *Brief Amici Curiae of The States of Oklahoma, et al., supra* note 59.

[64] *Id*. (citing *Jaffee*, 518 U.S. at 18) (additional citation omitted).

nations that consider freedom of speech and of the press to be an essential liberty, there is a clear consensus that the protection of journalists' confidential sources "is one of the basic conditions for press freedom."[65] Perhaps most notably, the European Court of Human Rights has held that requiring a journalist to disclose confidential sources of information, in the absence of an "overriding requirement in the public interest," violates Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[66] "Without such protection," the court explained, "sources may be deterred from assisting the press in informing the public in matters of public interest."[67]

Conclusion

The lack of a reliable reporters' privilege in the federal courts has had tangible consequences. As Jeff Gerth, another Pulitzer Prize-winning reporter who was held in contempt by the trial court in the *Wen Ho Lee* case has testified:

> Compelling journalists to testify about their conversations with confidential sources will inevitably hinder future attempts to obtain cooperation from those or other confidential sources. It creates the inevitable appearance that journalists either are or can be readily converted into an investigative arm of either the government or of civil litigants. . . . Persons who would otherwise be willing to speak to me would surely refuse to do so if they perceived me to be not a journalist who keeps his word when he promises confidentiality. . . .[68]

Or as *Los Angeles Times* reporter and Pulitzer Prize recipient Bob Drogin, who was also held in contempt of a federal court for protecting his sources, testified in the *Wen Ho Lee* litigation:

> I have thought long and hard about this, and unlike you attorneys here in the room, I do not have subpoena power or anything else to gather information. I have what credibility I have as a journalist, I have the word that I give to people to protect their confidentiality.

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[65] *Goodwin v. United Kingdom*, 22 EHRR 123, 143 (1996). *See generally* Floyd Abrams & Peter Hawkes, *Protection of Journalists' Sources Under Foreign and International Law*, *Media Law Resource Center White Paper On The Reporters' Privilege*, available at www.medialaw.org. As Messrs. Abrams and Hawkes demonstrate, "protection for journalists' sources is recognized in countries on every inhabited continent, under very diverse legal systems, based on sources ranging from statutes to constitutional interpretation to the common law." *Id*. (citing, *inter alia*, legal protections afforded under the laws of Australia, Canada, France, Germany, Japan, Nigeria, and Sweden).

[66] *See Goodwin*, 22 EHRR at 143; *Financial Times Ltd. v. United Kingdom*, App. No. 821/03, Eur. Ct. H.R. (2009); *see also* Lee Levine et al., *Newsgathering and the Law* § 19.08 (5th ed. 2018) (collecting authorities).

[67] *Goodwin*, 22 EHRR at 143.

[68] *See Appendix B to the Brief Amici Curiae of ABC, Inc, et al.* in *Miller v. United States* and *Cooper v. United States*, supra note 1. The trial court order holding Mr. Gerth in contempt was ultimately reversed. *See Lee v. U.S. Dep't of Justice*, 413 F.3d 53 (D.C. Cir. 2005).

> If I violate that trust, then I believe I can no longer work as a journalist.[69]

In short, the potential chilling effect occasioned by the current state of affairs in the federal courts cannot be understated.[70] The ongoing drum beat of subpoenas, coupled with the lack of clear guidance concerning the recognition and scope of a reporters' privilege in the federal courts, has impaired the ability of the American public to receive information about the operation of its government and the state of the world in which we live. There is, therefore, now a palpable need for congressional action to preserve the ability of the American press to engage in the kind of important, public-spirited journalism that is often possible only when reporters are free to make meaningful commitments of confidentiality to their sources.

[69] Dep. of R. Drogin, *Lee v. U.S. Dep't of Justice*, Civ. A. No. 99-3380, Jan. 8, 2004, at 38:2-9.

[70] In one widely cited case, the *Cleveland Plain Dealer* decided that it was obliged to withhold from publication two investigative news stories because they were predicated on documents provided to the newspaper by confidential sources. Robert D. McFadden, *Newspaper Withholding Two Articles After Jailing*, N.Y. TIMES, July 9, 2005, at A10. As the editor of the newspaper explained to his readers, "these two stories will go untold for now. How many more are out there?"