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CHRISTINA KONINGISOR

The De Facto Reporter's Privilege

ABSTRACT. While the overwhelming majority of states have established constitutional, statutory, or common-law protections for reporters who shield the identity of a confidential source, there is no uniform, crosscutting federal reporter's privilege. As a consequence, reporters subpoenaed in federal cases often lack effective formal protections. This can have a chilling effect on news-gathering: sources—and reporters—may find little comfort in knowing that a source's anonymity is preserved only at a judge's or prosecutor's discretion or by a reporter's willingness to go to jail.

For decades, both those in favor of a formal federal reporter's privilege and those opposed to it have marshaled historical arguments. Proponents point to the imprisonment of reporters in the past and argue that a privilege will ensure that confidential sources continue to provide the press—and ultimately, the public—with information. Opponents argue that the press has long flourished without a federal source of protection and that there is no indication that this flow of information will be constricted in the future.

Yet both sides of this debate have limited their historical inquiry to a small number of published reporter's privilege cases. In this Article, I argue that such an accounting is incomplete. Focusing only on traditional black-letter law does not give us the whole picture of how reporters have fared. Drawing on a variety of historical sources, including newspaper articles, autobiographies, legislative records, and both published and unpublished cases, I conclude—contrary to the prevailing view that reporters enjoyed little protection at common law—that there is a well-established tradition in the American legal and political system of protecting the press. I argue that longstanding efforts by judges, legislators, and prosecutors to shield reporters and their sources have created a web of informal, yet functional, protections. I refer to this as the “de facto” reporter's privilege.

Illuminating the contours of this de facto privilege offers a number of insights. Most importantly, it demonstrates that merely pointing to the historical absence of a formal privilege is not a sufficient reason to oppose its creation. Such an inquiry fails to account for the full ecosystem of protections—both formal and informal—that have long protected the press. Instead, legislators and policymakers must also ask whether these informal protections remain robust. And if they do not, formalized protections may be not only appropriate, but necessary.



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ARTICLE CONTENTS

INTRODUCTION	1180
I. THE CONVENTIONAL UNDERSTANDING OF THE REPORTER’S PRIVILEGE	1186
A. The Courts’ Refusal To Recognize a Reporter’s Privilege	1186
1. The Historical Evolution of Courts’ Treatment of Reporter’s Privilege Claims in Published Cases	1187
2. <i>Branzburg</i> : The Supreme Court Speaks on Reporter’s Privilege Claims	1191
3. Post- <i>Branzburg</i> Confusion	1197
B. Congress’s Refusal To Establish a Statutory Shield	1198
C. Statutory and Judicial Protection Extended by the States	1201
II. UNCOVERING THE DE FACTO REPORTER’S PRIVILEGE	1205
A. Judicial De Facto Privilege	1205
1. Methodology	1206
a. Newspapers as Legal Sources	1207
b. Research Approach	1210
2. Uncovering an Express Privilege	1213
3. Legal Defenses	1215
a. The Fifth Amendment Defense	1215
b. The Loss-of-Livelihood Defense	1216
c. The Honor Defense	1218
4. Ad Hoc Privileges	1220
a. Reporter Testimony Held Not Material	1220
b. Declining To Hold Reporters in Contempt	1222
c. Lenient Treatment for Reporters After a Finding of Contempt	1229
B. The Legislative Branch: Protecting Reporters by Legislative Discretion	1232
C. The Executive Branch: Protecting Reporters by Prosecutorial Discretion	1237
III. THE DE FACTO REPORTER’S PRIVILEGE TODAY	1243
A. Resilient De Facto Protections	1243
B. Weakening De Facto Protections	1245
1. The Judicial Branch	1246
2. The Executive Branch	1251
3. Changing Times	1254



IV. IMPLICATIONS OF THE DE FACTO REPORTER'S PRIVILEGE FOR REFORM	
DEBATES	1258
A. Statutory Privilege	1258
B. Common-Law Privilege	1262
C. Constitutional Privilege	1264
CONCLUSION	1266

INTRODUCTION

For centuries, members of the press have refused to disclose the identities of confidential sources in judicial and legislative proceedings.¹ Today, the overwhelming majority of states and a number of federal circuits extend some form of evidentiary protection to the press.² The rationale undergirding these protections has evolved over time, but the most common justification for the reporter's privilege today is that revealing confidential information would cause reporters' sources to dry up. This, in turn, would stem the flow of information to the press—and by extension—to the public.³ Evidentiary privileges are generally rooted in such instrumental rationales. They reflect society's desire to promote open communication in situations where it is deemed especially valuable and where absent a privilege it is likely to be inhibited.⁴

And yet, no uniform, crosscutting federal reporter's privilege exists, leaving journalists and their sources without adequate defenses when reporters are called into federal court. Those who favor a federal reporter's privilege make the same instrumental arguments that buttress state evidentiary protections: a privilege will encourage communication between confidential sources and the press and ensure the continued flow of information to the public. Those who oppose a federal privilege argue that the press has never had one before and that there is little evidence that a privilege is needed now.⁵

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1. See, e.g., BENJAMIN FRANKLIN, *THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN* 19 (Houghton Mifflin & Co. 1906) (1867) (describing his brother's imprisonment in 1722 for refusing to reveal the author of an anonymous article); see also Sam J. Ervin Jr., *In Pursuit of a Press Privilege*, 11 HARV. J. ON LEGIS. 233, 234 (1974) ("James Franklin's refusal to discover the author has often been repeated by other newsmen under similar conditions.") (internal quotation marks omitted).
 2. See *infra* Sections I.A.3, I.C.
 3. See, e.g., *Branzburg v. Hayes*, 408 U.S. 665, 731 (1972) (Stewart, J., dissenting) ("[W]hen governmental officials possess an unchecked power to compel newsmen to disclose information received in confidence, sources will clearly be deterred from giving information, and reporters will clearly be deterred from publishing it, because uncertainty about exercise of the power will lead to self-censorship." (internal quotation marks omitted)).
 4. 8 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2285 (John T. McNaughton rev. ed. 1961) (arguing that to justify a privilege against disclosure, the communication must be confidential; this confidentiality must be essential to the communication; the communication must be one society wants to foster; and the injury of disclosure must be greater than the benefit); see also Geoffrey R. Stone, *Why We Need a Federal Reporter's Privilege*, 34 HOFSTRA L. REV. 39, 39-41 (2005) (describing the instrumental goals of evidentiary privileges).
 5. Other arguments are also made in favor of or in opposition to a privilege. See, e.g., *Branzburg*, 408 U.S. at 725 (Stewart, J., dissenting) (arguing that the press becomes the investigative arm

The idea that no formal privilege exists—and that such a privilege is not needed—is well entrenched in the law,⁶ in legal scholarship,⁷ and in the minds of legislators.⁸ In a recent congressional debate over a proposed federal shield, for example, one legislator opposed the bill on the basis that “[t]he press has flourished for over 200 years without a Federal privilege.”⁹ No privilege has ever existed, the congressman reasoned, and the press functions perfectly well. So why create a new privilege now?

This view, which has proven to be a powerful force opposing a federal privilege, relies on two assumptions.¹⁰ The first is that the absence of a federal privilege has not impeded the flow of information to the press. This is, of course, a difficult assertion to prove or disprove: it is impossible to determine how many more confidential sources would have come forward had a privilege existed. The second assumption is that the behavior of confidential sources is driven primarily by the formal protections enshrined in the law. Yet it seems equally likely that confidential source behavior is driven not only by whether a formal privilege exists, but also by whether such protections are extended in practice.¹¹ This Article

of the government in the absence of a privilege); David A. Anderson, *Confidential Sources Reconsidered*, 61 FLA. L. REV. 883, 903 (2009) (arguing that “[t]he most compelling objection to a comprehensive constitutional solution” is the difficulty of determining who should be able to use the privilege to protect confidential sources). But instrumental arguments are often granted primacy in the debate over the creation of a federal privilege. See discussion *infra* Section III.A.

6. See, e.g., *Branzburg*, 408 U.S. at 685 (majority opinion) (“At common law, courts consistently refused to recognize the existence of any privilege authorizing a newsman to refuse to reveal confidential information to a grand jury.”).
7. See, e.g., 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5426 (1st ed., rev. 2017); Mary-Rose Papandrea, *Citizen Journalism and the Reporter’s Privilege*, 91 MINN. L. REV. 515, 534 (2007).
8. See discussion *infra* Section III.A.
9. 153 Cong. Rec. 27308 (2007) (statement of Rep. Steve King).
10. See *infra* Part IV for further discussion of these assumptions.
11. There are many reasons why sources may decide to provide confidential information. See, e.g., *Branzburg*, 408 U.S. at 694–95 (reviewing the potential motivations of sources). David Pozen has fleshed out the contours of the ecosystem surrounding leaks and has demonstrated that the government’s upstream decision-making process about whether and to what extent the government will tolerate leaks may also have an influence on sources’ behavior. David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 587–96 (2013). However, members of the press have consistently reported that their sources’ behavior is likely influenced by their perception of a reporter’s ability to protect their identity. See, e.g., Vince Blasi, *The Newsman’s Privilege: An Empirical Study*, 70 MICH. L. REV. 229, 269 (1971) (presenting evidence that sources were more fearful of speaking with reporters in the wake of high-profile reporter’s privilege controversies); RonNell Andersen Jones, *Media Subpoenas: Impact, Perception, and Legal Protection*

argues that—although the press in the United States does not enjoy a formal federal privilege—judges, legislators, and prosecutors have long sought to protect reporters through more informal measures. Taken together, these protections create a ‘de facto’ reporter’s privilege.¹²

The idea that judges and policymakers might exercise their discretion to protect reporters and their sources, even absent a formal privilege, is not wholly new. Journalists themselves raised this possibility in their coverage of early reporter’s privilege disputes. Throughout the nineteenth century, newspapers eagerly covered contempt hearings¹³ for reporters who refused to reveal a confidential source. Members of the press often speculated that judges went out of

in the Changing World of American Journalism, 84 WASH. L. REV. 317, 367-69 (2009) (same); David McCraw & Stephen Gikow, *The End to an Unspoken Bargain? National Security and Leaks in a Post-Pentagon Papers World*, 48 HARV. C.R.-C.L. L. REV. 473, 498 (2013) (arguing that while sources’ motivations for leaking to the press are undoubtedly diverse and individualized, “[a]ttention must also be paid to the ecosystem of secrecy and transparency, and whether some legally imposed restraint on the government’s pursuit of leakers would create conditions under which employees felt more secure in making disclosures because the Department of Justice would feel less confident in bringing prosecutions”). *But see* John E. Osborn, *The Reporter’s Confidentiality Privilege: Updating the Empirical Evidence After a Decade of Subpoenas*, 17 COLUM. HUM. RTS. L. REV. 57, 74 (1985) (arguing that the press continued to rely on confidential sources through 1975, which suggested that “most of the respondents did not appear to be affected or deterred by the various court rulings and other legal developments of the past decade”). Moreover, empirical evidence proving how sources respond to perceived changes in the legal pressures on reporters is not necessary. Common-sense reasoning has long played a central role in the law surrounding privileges. *See* *Swidler & Berlin v. United States*, 524 U.S. 399, 407, 410 (1998) (noting that although the “empirical information” was “scant and inconclusive,” the attorney-client privilege should survive after death because “[k]nowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel”); *In re Grand Jury Subpoena*, *Judith Miller*, 438 F.3d 1141, 1169 (D.C. Cir. 2006) (Tatel, J., concurring) (stating that “the equally commonsense proposition that reporters’ sources will be more candid when promised confidentiality requires no empirical support”). *But see* *Branzburg*, 408 U.S. at 693 (“[T]he evidence fails to demonstrate that there would be a significant constriction of the flow of news to the public if this Court reaffirms the prior common-law and constitutional rule regarding the testimonial obligations of newsmen.”).

12. In their treatise on civil procedure, Wright and Graham refer to the protections judges extend to journalists who refuse to testify as a “de facto privilege.” *See* WRIGHT & GRAHAM, *supra* note 7, § 5426 (footnotes omitted). For a discussion of the phenomenon of de facto or unwritten law in other legal contexts, see, for example, JEFFREY S. ADLER, *FIRST IN VIOLENCE, DEEPEST IN DIRT: HOMICIDE IN CHICAGO, 1875-1920*, at 112-13 (2006), which demonstrates that between 1875 and 1920 in Chicago, approximately eighty percent of women who killed their husbands escaped punishment, and argues that this reflected the establishment of an “unwritten law” that allowed battered women to use lethal force to protect themselves.
13. When a reporter violates a court order, the court’s remedy is to hold the journalist in contempt. *See* 18 U.S.C. §§ 401-402 (2012). The court’s power to sanction bad-faith conduct is inherent. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 42 (1991). It is also codified in statutory law

their way to protect reporters by releasing them or by otherwise shielding them from testifying.¹⁴ This theory made sense: judges who imprisoned journalists often drew intensely negative media coverage.¹⁵

The idea also surfaced in the context of legislative disputes over a statutory shield¹⁶ – particularly in the immediate aftermath of *Branzburg v. Hayes*,¹⁷ the Supreme Court's canonical 1972 decision rejecting a First Amendment-based reporter's privilege. Senator Edward Kennedy, for example, argued in 1973 that “throughout our history, reporters have enjoyed a de facto privilege from subpoena in grand jury proceedings, a privilege of the sort consistently afforded to doctors, lawyers, priests, husbands and wives, and others whose special relationships of confidentiality have long received generous protection of society.”¹⁸

Yet this idea largely failed to migrate into the legal literature. One notable exception – Wright and Graham's treatise on federal procedure – reported that “it has been suggested that the ritual jailing of reporters for short terms was a form of fiction in which journalists were granted a de facto privilege by sympathetic judges who were unwilling to diminish their own powers by the creation

today, which provides that when a court or grand jury witness refuses to testify, provide information, or comply with an order, the court “may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information,” with certain exceptions and limitations. 28 U.S.C. § 1826 (2012). The court may impose civil or criminal contempt sanctions. Different procedural and substantive protections apply for each. *Int'l Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 826-27 (1994); *Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 631-32 (1988). Courts are granted broad discretion to fashion remedies for contempt, but those remedies must be narrowly tailored to achieve legitimate objectives. *Young v. United States ex rel. Vuitton & Fils S. A.*, 481 U.S. 787, 801 (1987). For a general discussion of the history of the contempt power as applied to reporters, see Daxton R. “Chip” Stewart & Anthony L. Fargo, *Challenging Civil Contempt: The Limits of Judicial Power in Cases Involving Journalists*, 16 COMM. L. & POL'Y 425, 438 (2011).

14. See, e.g., *Did He Blunder?*, NEWPORT NEWS DAILY PRESS, Jan. 7, 1932, at 6 (noting that a judge had sentenced a reporter to not more than thirty days in jail but had released the reporter after only five days in response to “an avalanche of protest”).
15. See, e.g., *infra* notes 267-273 and accompanying text.
16. See, e.g., *Newsman's Privilege: Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 93d Cong. 259 (Feb. 20, 1973) [hereinafter *Newsman's Privilege Hearings*] (statement of Rep. Jerome R. Waldie) (“[T]he ability to guarantee the confidentiality of news sources was so integral and vital a part of the functions of the press in informing society that it held a de facto status as the corollary to the general and established right of society to freedom of the press District Attorneys did not, as a matter of course, demand that confidential sources be revealed. Grand juries did not subpoena newsmen in droves to demand that pledges of confidentiality be broken. Judges did not routinely jail newsmen for the act of honoring these professional pledges of protection given to sources.”).
17. 408 U.S. 665 (1972).
18. *Newsman's Privilege Hearings*, *supra* note 16, at 13 (statement of Sen. Edward Kennedy).

of a de jure privilege.”¹⁹ Some student notes from the 1950s also took up this theme. One note colorfully observed that judges’ treatment of reporter’s privilege claims “could lead one to conclude that the contempt power is being exercised only as a matter of ritual much as a reluctant father administers a spanking in a this-will-hurt-me-as-much-as-you frame of mind.”²⁰

More recent scholarship addressing the reporter’s privilege is largely forward-looking: it addresses how to define who qualifies for a privilege in the age of bloggers and WikiLeaks, or whether the reporter’s privilege can be reconceptualized to provide more coherent and robust protection for sources or for the press.²¹ Legal scholars have also observed that the Department of Justice’s (DOJ) voluntary guidelines limiting the federal government’s ability to subpoena reporters offer many of the protections that would likely be introduced with a legislative shield.²² But few legal scholars have focused on the pre-*Branzburg* history of the reporter’s privilege.²³

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19. WRIGHT & GRAHAM, *supra* note 7, § 5426 (footnotes omitted).
 20. W.D. Lorensen, Note, *The Journalist and His Confidential Source: Should a Testimonial Privilege Be Allowed*, 35 NEB. L. REV. 562, 579 (1956). The author further observed that “sympathetic attitudes frequently reflected by judges and law officers towards those newsmen who have been held in contempt perhaps reflects a latent recognition of merit in the journalist’s position.” *Id.* (footnote omitted); see also Note, *The Right of a Newsmen To Refrain from Divulging the Sources of His Information*, 36 VA. L. REV. 61, 69-75 (1950) [hereinafter Note, *The Right of a Newsmen*] (reviewing both published and unpublished reporter’s privilege cases and noting that in many unreported cases, judges seemed to go out of their way to protect reporters and their sources).
 21. See, e.g., Laurence B. Alexander, *Looking Out for the Watchdogs: A Legislative Proposal Limiting the Newsgathering Privilege to Journalists in the Greatest Need of Protection for Sources and Information*, 20 YALE L. & POL’Y REV. 97, 130 (2002) (arguing that the privilege should be granted to anyone “engaged in gathering news for public presentation or dissemination”); RonNell Andersen Jones, *Rethinking Reporter’s Privilege*, 111 MICH. L. REV. 1221, 1226 (2013) (arguing that the privilege should be held by the source under their First Amendment right to anonymous speech); Papandrea, *supra* note 7, at 519-20 (arguing that the privilege should be conferred on anyone who contributed information to the public domain with the intention that the public access that information); Stone, *supra* note 4, at 50-51 (arguing that the privilege should be legislatively defined based on the reasonable expectations of the source rather than on the nature of the journalist or publication).
 22. See, e.g., Eric S. Fish, *Prosecutorial Constitutionalism*, 90 S. CAL. L. REV. 237, 298 (2017) (arguing that the guidelines “amount to a qualified reporters’ privilege”). The guidelines explicitly aim to promote constitutional values. See 28 C.F.R. § 50.10 (2010) (emphasizing that the guidelines are intended to promote “freedom of the press” and “news gathering functions”).
 23. Those few articles that have discussed the pre-*Branzburg* history have rarely looked beyond the published case law. Yet there are exceptions. An unpublished Ph.D. dissertation written in 1970 offers a deep and thorough examination of reporter’s privilege cases—both published and unpublished—prior to *Branzburg*. Aaron David Gordon, *Protection of News Sources: The*

This Article fleshes out that history. It demonstrates that beneath the reported case law, there exists a richer and more complex story about the reporter's privilege. It brings to light the full ecosystem of protections – both formal and informal, and from across all three branches of government – that have long worked to protect the press. Illuminating this de facto reporter's privilege will allow lawyers, judges, and policymakers to better appreciate the stakes of creating a new constitutional, statutory, or federal common-law privilege.

Part I outlines the black-letter law treatment of the reporter's privilege. It reviews the formal approach to reporter's privilege cases evident in the case law, in congressional failure to enact a statutory shield, and in the establishment of widespread state-level protections. Part II fleshes out the contours of the de facto reporter's privilege. By examining published and unpublished cases,²⁴ as well as newspaper stories, autobiographies, and legislative materials, it traces the informal – but functional – protections that have long been extended by the three branches of government. Part III examines the state of this de facto privilege today in order to shed light on whether these informal protections historically extended to reporters remain available to the modern press. And Part IV examines the implications of the de facto reporter's privilege for contemporary debates around formalization. It imports the de facto privilege lens into ongoing discussions over the enactment of a statutory shield and over the establishment of a

History and Legal Status of the Newsmen's Privilege (Dec. 17, 1970) (unpublished Ph.D. dissertation, University of Wisconsin) (on file with author). In addition, the 1973 book, *Your Right To Know*, written by former Ohio Congressman Charles Whalen, Jr., reviews the treatment of reporter's privilege claims in courts and by legislators and also mentions a handful of unpublished cases. CHARLES W. WHALEN, JR., *YOUR RIGHT TO KNOW* (1973). A second unpublished thesis from 1984 offers a detailed examination of reporters' efforts to shield the identity of a confidential source in early legislative proceedings. Leigh F. Gregg, *The First Amendment in the Nineteenth Century: Journalists' Privilege and Congressional Investigations* (Nov. 29, 1984) (unpublished Ph.D. dissertation, University of Wisconsin – Madison) (on file with author). This Article contributes to the literature by identifying a number of new reporter's privilege cases and disputes prior to *Branzburg*. It also reconciles a divide in the literature. Prior to *Branzburg*, scholars paid more attention to the question of how reporter's privilege disputes were resolved at common law. But these early scholars did not have the benefit of digitized research tools, nor could they draw upon the sprawling complexities of the post-*Branzburg* legal landscape. This Article is the first to link the pre-*Branzburg* history of reporter's privilege claims with legal and legislative developments post-*Branzburg*. It is also the first to examine both the formal and informal protections extended by all three branches of government.

24. I use the terms “reported” and “published” interchangeably to refer to any case that appears in a law reporter. I use the terms “unreported” and “unpublished” interchangeably to refer to any case that does not appear in a law reporter, including cases referred to only in newspaper articles.

constitutional or federal common-law privilege and demonstrates how this history can be used to bolster the case for a formalized shield.

I. THE CONVENTIONAL UNDERSTANDING OF THE REPORTER'S PRIVILEGE

The prevailing view of the history of the reporter's privilege is that both the judiciary and Congress have routinely rejected the press's claim to a privilege. The judiciary, the story goes, has consistently rejected reporter's privilege claims in court, culminating in the Supreme Court's decision in *Branzburg*. Meanwhile, Congress has failed repeatedly to enact a statutory shield. By contrast, the overwhelming majority of states have established robust, state-level judicial and legislative protections. This Part traces this story and outlines the contours of the formal protections extended or denied to the press.

A. The Courts' Refusal To Recognize a Reporter's Privilege

Until the mid-twentieth century, courts routinely denied the press's assertion of an evidentiary privilege.²⁵ This narrative became more complicated in the wake of *Branzburg*—the Court's canonical but enigmatic reporter's privilege case—which some lower courts read as permitting a qualified constitutional privilege in certain contexts. But overall, the treatment of reporters' claims in published cases²⁶ historically has been unfavorable to the press.

25. See *Branzburg v. Hayes*, 408 U.S. 665, 685 (1971) (discussing the common law history).

26. This Section focuses on reported cases. My research also uncovered a number of unreported cases prior to 1972 in which a court punished a reporter for refusing to reveal a confidential source or required the reporter to testify. See, e.g., *2 Newsmen Freed in Contempt Case*, N.Y. TIMES, Mar. 31, 1967, at 24 (reporting that two reporters were held in contempt and jailed for refusing to reveal sources, and were then released after surrendering the names of their informants); *The Brave Reporter's Christmas*, N.Y. TIMES, Dec. 26, 1886, at 2 (reporting that a journalist was placed on house arrest for refusing to reveal his source of information); *C.-J. Pays Fine for Reporter*, ADVOC. MESSENGER, Aug. 16, 1934, at 1 (reporting that two reporters were repeatedly jailed for several hours and fined over the course of a week for refusing to reveal the identity of two confidential sources, and were released only when the case was resolved); *Columnist Fined on Contempt Charges*, SAN BERNARDINO COUNTY SUN, Feb. 14, 1951, at 22 (reporting that a columnist was fined \$100 for refusing to disclose his source); *Court Fines Reporter \$25 for Refusing To Testify*, DETROIT FREE PRESS, Sept. 14, 1939, at 4 (reporting that a reporter was fined for refusing to reveal the identity of a source); *Dallas Reporter Freed on His Promise to Talk*, ALBUQUERQUE J., Mar. 13, 1931, at 3 (reporting that a reporter was jailed for refusing to reveal a source, then freed after naming his informant); *In the Public Interest*, LEAVENWORTH TIMES, July 21, 1915, at 4 (reporting that an editor was fined \$250 for refusing to disclose the identity of a source to a grand jury); *Judge Orders Columnist To Pay Trio*, EUGENE

1. *The Historical Evolution of Courts' Treatment of Reporter's Privilege Claims in Published Cases*

Newspapers and journalists have long asserted their right to keep authors and sources confidential, even in the face of judicial hostility toward such claims. The earliest American examples date back to the 1700s. In 1732, Benjamin Franklin's brother was jailed for refusing to reveal the author of an article published in his paper.²⁷ And in 1735, publisher John Peter Zenger was charged with seditious libel for refusing to surrender the name of an anonymous author.²⁸ But the first published case in which a journalist was punished for failing to surrender confidential information arose in 1848.²⁹ Reporter William Nugent was held in contempt and imprisoned for refusing to tell the Senate who had provided him with

GUARD, Nov. 3, 1959, at 13 (reporting that a reporter who refused to disclose his source of information in a libel case was held in contempt and was not permitted to present a defense in the libel action); *Judge Threatens Reporter: Fackelman Is Told To Answer Questions or Be Sent to Jail*, VALLEY MORNING STAR, Aug. 17, 1937, at 1 (reporting that a reporter revealed his source after being threatened with imprisonment); *Kansas Editor Is Fined*, N.Y. TIMES, Apr. 20, 1940, at 8 (reporting that an editor was fined \$25 for refusing to reveal his sources for "an editorial on gambling and liquor conditions"); *The McLean Contempt Case*, N.Y. TIMES, Apr. 9, 1874, at 1 (reporting that a reporter was jailed for refusing to reveal the identity of a confidential source in a libel case); *Newsman Yields on Source*, N.Y. TIMES, July 28, 1961, at 44 (reporting that a reporter was ordered to disclose his confidential source for a newspaper column); *Newspaper Reporter Cleared of Contempt*, MACON CHRON.-HERALD, June 10, 1954, at 1 (reporting that a reporter was held in contempt and ordered jailed for refusing to reveal a source, then subsequently cleared after he agreed to testify); *The Reporter and His Pointers*, KAN. WKLY. COMMONWEALTH, Aug. 19, 1886, at 5 (reporting that a reporter was jailed for failing to disclose a source); *Reporter Clarkson in Jail*, ATLANTA CONST., Nov. 21, 1896, at 1 (reporting that a reporter was jailed for refusing to reveal the identity of a source); *Reporters Are Freed*, LINCOLN J. STAR, Dec. 11, 1929, at 3 (reporting that three reporters were held in contempt and ordered jailed for forty-five days for refusing to reveal the identity of a confidential source before a grand jury); *Sent an Editor to Jail*, ST. PAUL GLOBE, Nov. 15, 1895, at 4 (reporting that an editor was jailed for refusing to reveal his source before a grand jury); *Texas Publisher Can't Back Corruption Charge, He Says*, COURIER-J. (Louisville, Ky.), Feb. 23, 1956, at 2 (reporting that a newspaper publisher was fined \$100 and jailed for refusing to reveal a confidential source before a grand jury, and was released after testifying that his only source was an anonymous letter); *They Must Testify*, PHILA. TIMES, Dec. 23, 1888, at 9 (reporting that a judge rejected reporters' claim to a privilege based on "professional honor"); *Two Arizona Women Testify Against Irene*, ARIZ. REPUBLIC, Mar. 18, 1930, at 1 (reporting that a reporter was released from jail only after revealing her source).

27. See *supra* note 1.

28. See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 361 (1995) (Thomas, J., concurring).

29. See *WRIGHT & GRAHAM*, *supra* note 7, § 5426.

a draft of a secret treaty.³⁰ Nugent filed a habeas petition against the Senate Sergeant at Arms. Although Nugent did not explicitly assert that his status as a reporter entitled him to protect his source, he challenged his confinement on the grounds that the Senate had exceeded its constitutional authority. The appeals court upheld his imprisonment.³¹

Throughout the second half of the nineteenth century, judges in reported cases continued to look unsympathetically upon reporter's privilege claims. The first published case in which a reporter refused to disclose a source based on his status as a member of the press occurred in 1874, when *New York Tribune* editor William Shanks refused to reveal the author of an allegedly libelous article on the grounds that it would violate his paper's internal policies.³² The New York Court of Appeals denied his claim, reasoning that "[a]s the law now is, and has for ages existed, no court could possibly hold that a witness could legally refuse to give the name of the author of an alleged libel, for the reasons that the rules of a public journal forbade it."³³

In 1897, two decisions out of California similarly rejected reporters' claims to an evidentiary privilege. In the first, the defendant in a murder trial claimed that a statement he made to a reporter was privileged – an unusual example of a confidential source asserting a privilege, rather than a reporter.³⁴ The court rejected this argument, reasoning that the reporter was "not shown to have been the wife or to have stood to the defendant in any other relation of legal confidence," and therefore "the claim scarcely merits comment."³⁵ Two weeks later, the issue arose again. Two *San Francisco Chronicle* employees were summoned before the state legislature to testify about a series of articles alleging that state legislators had accepted bribes.³⁶ Both members of the press refused to reveal their source of information, and both were cited for contempt. They filed habeas petitions, which the Supreme Court of California denied. The court reasoned that "[i]t cannot be successfully contended, and has not been seriously argued, that the

30. *Nugent v. Beale*, 18 F. Cas. 471, 471 (C.C.D.C. 1848).

31. *Id.* at 483.

32. *People ex rel. Phelps v. Fancher*, 2 Hun. 226 (N.Y. Sup. Ct. 1874).

33. *Id.* at 230.

34. *People v. Durrant*, 48 P. 75, 86 (Cal. 1897).

35. *Id.*

36. *Lorensen*, *supra* note 20, at 576.

witnesses were justified in refusing to give these names upon the ground that the communication was privileged.”³⁷

This trend continued into the early twentieth century. In 1901, an Ohio court rejected a reporter’s argument that his source of information was privileged, reasoning that the information sought was material and relevant to the case and therefore had to be surrendered.³⁸ Ten years later, the Supreme Court of Georgia rejected a reporter’s claim that surrendering a source before a board of police commissioners would cause the reporter to lose his job and would tarnish his honor.³⁹ Similar examples followed in New Jersey, Hawaii, and Colorado.⁴⁰ The federal judge in Hawaii, for example, wrote that the “canon of journalistic ethics forbidding the disclosure of a newspaper’s source of information” was “worthy of respect and undoubtedly well-founded” – yet it “must yield when in conflict with the interests of justice.”⁴¹

The next three decades saw relatively few published cases addressing the reporter’s privilege. Between 1920 and 1950, the courts handed down as few as two reported cases addressing the issue.⁴² But it arose again in earnest in the 1950s. Judges rejected privilege claims in at least six reported cases in this decade.⁴³ The most notable of these cases was *Garland v. Torre*, handed down by then-Second

37. *Ex parte Lawrence*, 48 P. 124, 125 (Cal. 1897). This case was the first of eight cited in *Branzburg* to support the claim that no privilege existed at common law. *Branzburg v. Hayes*, 408 U.S. 665, 685 (1972).

38. *Clinton v. Commercial Tribune Co.*, 8 Ohio N.P. 655, 655 (Ct. Com. Pl. 1901).

39. *Plunkett v. Hamilton*, 70 S.E. 781, 785 (Ga. 1911). The Georgia Supreme Court cited the 1874 imprisonment of William Shanks to support its conclusion that the press could not avail itself of any special evidentiary privilege. *Id.*

40. In 1913, the New Jersey Supreme Court rejected a privilege argument raised by a *Jersey Journal* reporter. The reporter refused to reveal his source for an article alleging corruption among local officials. The court reasoned that such a privilege had “no countenance in the law” and would be “detrimental to the due administration of law.” *In re Grunow*, 85 A. 1011, 1012 (N.J. 1913); accord *In re Wayne*, 4 U.S.D.C. Haw. 475, 476 (1914); *Joslyn v. People*, 184 P. 375, 379 (Colo. 1919). *Plunkett*, *Grunow*, and *Joslyn* were among the eight cases cited in *Branzburg* to support the claim that no privilege existed at common law. *Branzburg*, 408 U.S. at 685.

41. *In re Wayne*, 4 U.S.D.C. Haw. at 476.

42. *State v. Donovan*, 30 A.2d 421 (N.J. 1943); *People ex rel. Mooney v. Sheriff of N.Y. Cty.*, 199 N.E. 415 (N.Y. 1936).

43. *Garland v. Torre*, 259 F.2d 545 (2d Cir. 1958); *Brewster v. Bos. Herald-Traveler Corp.*, 20 F.R.D. 416 (D. Mass. 1957); *Rosenberg v. Carroll*, 99 F. Supp. 629 (S.D.N.Y. 1951); *In re Howard*, 289 P.2d 537 (Cal. Dist. Ct. App. 1955); *Clein v. State*, 52 So. 2d 117 (Fla. 1950); *Brogan v. Passaic Daily News*, 123 A.2d 473 (N.J. 1956). For a list of all published reporter’s privilege cases between 1911 and 1968, see Jeffrey C. Schreck, Case Comment, *Journalist’s Privilege: In re Farber and the New Jersey Shield Law*, 32 RUTGERS L. REV. 545, 546 n.7 (1979).

Circuit Judge Potter Stewart.⁴⁴ This was the first reported case in which a journalist argued for an evidentiary privilege grounded in the First Amendment.⁴⁵

In 1957, Marie Torre, a TV columnist for the *New York Herald Tribune*, wrote a column about how difficult it had been for CBS executives to complete taping for a Judy Garland special. Torre quoted one CBS executive as speculating that Garland did not want to complete the show because “she thinks she’s terribly fat.”⁴⁶ Garland sued CBS for libel and breach of contract and subpoenaed Torre to reveal the name of her source. Torre refused, and the court held her in contempt. She appealed to the Second Circuit, arguing that the court’s decision violated the First Amendment because it impeded the flow of news to the public. She also argued that a common-law evidentiary privilege applied.⁴⁷

The court did not reject the constitutional claim outright. Rather, it held that the information Garland sought was relevant, material, and went to the heart of the plaintiff’s claim, and therefore any First Amendment interest Torre might have had in protecting her source was overcome by the public’s countervailing interest in hearing Torre’s testimony.⁴⁸ The Second Circuit suggested that the outcome might have been different had the court been “dealing here with the use of the judicial process to force a wholesale disclosure of a newspaper’s confidential sources of news” or “with a case where the identity of the news source is of doubtful relevance or materiality.”⁴⁹ Torre spent ten days in jail but was ultimately released without revealing her source.⁵⁰

By the 1960s, courts had largely reached agreement that there was no reporter’s privilege at common law,⁵¹ but they continued to grapple with the more

44. 259 F.2d 545.

45. See Anthony L. Fargo, *The Year of Leaking Dangerously: Shadowy Sources, Jailed Journalists, and the Uncertain Future of the Federal Journalist’s Privilege*, 14 WM. & MARY BILL RTS. J. 1063, 1072 (2006). Yet newspaper records suggest that reporters raised this constitutional argument in unreported cases and in the context of legislative proceedings earlier than 1958 and that these constitutional arguments were occasionally successful. See *infra* note 191.

46. Joel Jacobsen, *Remembered Justice: The Background, Early Career and Judicial Appointments of Justice Potter Stewart*, 35 AKRON L. REV. 227, 244 (2002).

47. *Garland*, 259 F.2d at 550.

48. *Id.* The court also rejected Torre’s claim to a common-law evidentiary privilege. *Id.*

49. *Id.* at 549–50.

50. Nick Ravo, *Marie Torre, 72, TV Columnist Jailed for Protecting News Source*, N.Y. TIMES (Jan. 5, 1997), <http://www.nytimes.com/1997/01/05/nyregion/marie-torre-72-tv-columnist-jailed-for-protecting-news-source.html> [<http://perma.cc/W8HS-EBUU>].

51. See, e.g., *Adams v. Associated Press*, 46 F.R.D. 439, 440 (S.D. Tex. 1969) (stating that the court would follow other jurisdictions in denying a reporter’s privilege); *Brewster v. Boston Herald-Traveler Corp.*, 20 F.R.D. 416, 417 (D. Mass. 1957) (noting that no American jurisdiction had recognized a common law reporter’s privilege).

novel question of how the First Amendment might apply to these claims. In 1961, the Hawaii Supreme Court applied a balancing test to a reporter's claim that his testimony should be granted First Amendment protection.⁵² Like the Second Circuit, the Hawaii Supreme Court found that the public's interest in obtaining the reporter's testimony outweighed any competing constitutional interest in permitting the reporter to protect his source.⁵³ Other courts reached a similar conclusion.⁵⁴ But the precise scope and application of this balancing test remained unclear.

2. Branzburg: *The Supreme Court Speaks on Reporter's Privilege Claims*

The social unrest of the late 1960s and early 1970s led to a spike in reporter's privilege claims.⁵⁵ The FBI and other law enforcement agencies were often unsuccessful in their efforts to penetrate criminal drug rings and activist movements like the Black Panthers, and they began to turn to reporters as an alternative – albeit unwilling – source of information.⁵⁶ At the same time, the press pursued government misconduct at home and abroad with increased fervor, and,

52. *In re Goodfader's Appeal*, 367 P.2d 472 (Haw. 1961).

53. *Id.* at 480 (citing *Garland*, 259 F.2d 545).

54. See, e.g., *In re Taylor*, 193 A.2d 181, 185 (Pa. 1963) (holding that the “public welfare will be benefited more extensively and to a far greater degree by protection of all sources of disclosure of crime, conspiracy and corruption than it would be by the occasional disclosure”); *State v. Knops*, 183 N.W.2d 93, 99 (Wis. 1971) (applying a balancing test to find that “the appellant ha[d] a constitutional right to the privilege not to disclose his sources of information” but that “[u]nder the facts and circumstances of this case, we think the public's right to know outweighs the appellant's right of privilege”).

55. See, e.g., *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970), *rev'd sub nom.* *Branzburg v. Hayes*, 408 U.S. 665 (1972); *In re Grand Jury Witnesses*, 322 F. Supp. 573 (N.D. Cal. 1970); *Branzburg v. Pount*, 461 S.W.2d 345 (Ky. Ct. App. 1971), *aff'd sub nom.* *Branzburg*, 408 U.S. 665; *In re Pappas*, 266 N.E.2d 297 (Mass. 1970), *as modified on denial of reh'g* (1971), *aff'd sub nom.* *Branzburg*, 408 U.S. 665; *State v. Buchanan*, 436 P.2d 729 (Or. 1968); *Adams*, 46 F.R.D. 439; *Knops*, 183 N.W.2d 93; see also Ervin, *supra* note 1, at 243-46 (discussing the link between social unrest and the increase in reporter's privilege disputes); Fargo, *supra* note 45, at 1073-74 (same).

56. See Stephen Bates, *The Reporter's Privilege, Then and Now* 3-4 (Joan Shorestein Ctr. on the Press, Politics & Pub. Policy, Research Paper R-23, 2000). An appendix to an amicus brief submitted by the *New York Times* and other media companies in *Branzburg* illustrates the extent to which the government relied on press subpoenas to collect information about left-wing groups in the late 1960s and early 1970s. Brief for The N.Y. Times Co. et al. as Amici Curiae Supporting Respondent, *United States v. Caldwell*, 408 U.S. 665 (1972) (No. 70-75) (listing 123 subpoenas served upon NBC and CBS between January 1969 and July 1971, many of which sought information about left-wing groups).

in the process, began to rely more heavily on confidential sources.⁵⁷ In 1972, these tensions came to a head when the Supreme Court granted certiorari in *Branzburg v. Hayes*.⁵⁸

Branzburg consolidated four petitions involving three journalists. The first was a petition submitted by the United States out of the Ninth Circuit. In May of 1970, Earl Caldwell, a *New York Times* reporter, was subpoenaed by a grand jury to testify about his reporting on the Black Panther movement.⁵⁹ The *New York Times* was granted standing to intervene and moved to quash the subpoena on the grounds that Caldwell's testimony would destroy his relationship with Black Panther members and would "suppress vital First Amendment freedoms."⁶⁰ The district court denied the motion and directed Caldwell to appear before the grand jury.⁶¹ Caldwell refused, and the court found him in contempt.⁶² But the Ninth Circuit reversed.⁶³ "[W]here it has been shown that the public's First Amendment right to be informed would be jeopardized by requiring a journalist to submit to secret Grand Jury interrogation," the court reasoned, "the Government must respond by demonstrating a compelling need for the witness's presence before judicial process properly can issue to require attendance."⁶⁴

The second consolidated case also involved the compelled testimony of a journalist covering the Black Panther movement.⁶⁵ In July of 1970, Paul Pappas, a Rhode Island-based television reporter, was called to New Bedford, Massachusetts to cover a Black Panther protest involving "street barricades, exclusion of

57. See Jones, *supra* note 21, at 1228-29.

58. 408 U.S. 665 (1972).

59. *Id.* at 678. This May subpoena was the third one issued. Caldwell was initially served a subpoena *duces tecum* in February 1970. *Id.* at 675. This subpoena required him to bring notes and tapes from his interviews with Black Panther members "concerning the aims and purposes" of the organization. *Id.* at 676 n.12. The *New York Times* objected to the scope of the subpoena, and an agreement between the government and the paper resulted in a continuance. *Id.* at 675-76. A second subpoena served in March omitted the documentary requirement. *Id.* at 676-77. The district court denied the motion to quash, and the grand jury term expired. *Id.* at 677-78. The government issued a third subpoena in May. *Id.* at 678.

60. *Id.* at 669 n.5 (internal citation omitted).

61. *Id.* at 677-78. The court did issue a protective order providing that Caldwell would "not be required to reveal confidential associations, sources or information received, developed or maintained by him as a professional journalist in the course of his efforts to gather news for dissemination to the public through the press or other news media." *Id.* at 678.

62. *Id.* at 678.

63. *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970), *rev'd sub nom. Branzburg*, 408 U.S. 665.

64. *Id.* at 1089.

65. *Branzburg*, 408 U.S. at 672.

the public from certain streets, fires, and similar turmoil.”⁶⁶ Pappas gained access to the Black Panther office on the condition that he agree “not to disclose anything he heard or saw inside the store except an anticipated police raid.”⁶⁷ Two months later, Pappas was subpoenaed by a grand jury to testify about what he had seen and heard inside the office.⁶⁸ Pappas moved to quash the subpoena on the grounds that this information was privileged. His motion was denied.⁶⁹ Pappas appealed to the Supreme Judicial Court of Massachusetts, which affirmed the denial of his motion to quash. The court reasoned that any chilling effect that his testimony would have on the dissemination of information to the press was “indirect, theoretical, and uncertain.”⁷⁰

The final consolidated appeal resulted from two state-court judgments against the same reporter.⁷¹ In November of 1969, Paul Branzburg, a reporter for the Louisville *Courier-Journal*, published an article describing hashish production in Jefferson County, Kentucky.⁷² Branzburg was subpoenaed by a grand jury to testify about the article. He appeared, but he refused to reveal the names of the individuals he had witnessed manufacturing the drugs, arguing that the identities of his sources were protected.⁷³ The state trial court rejected his privilege claim and ordered him to testify. Branzburg petitioned the state appeals court for prohibition and mandamus, and his petition was denied.⁷⁴

In January of 1971, Branzburg published a second article describing drug use in Frankfort, Kentucky. In the course of his reporting, he “spent two weeks interviewing several dozen drug users in the capital city.”⁷⁵ He was again subpoenaed to testify before a grand jury. Branzburg moved to quash the summons,

66. *Id.* at 674.

67. *Id.* at 672.

68. *Id.* at 672-73. Pappas initially appeared before the grand jury but refused to answer questions relating to what he had witnessed inside the Black Panther office. A second summons was served, and it was this summons that he moved to quash. *Id.*

69. *Id.* at 673.

70. *Id.* at 674 (quoting *In re Pappas*, 266 N.E.2d 297, 302 (Mass. 1970), *as modified on denial of reh'g* (1971)).

71. *Branzburg v. Meigs*, 503 S.W.2d 748 (Ky. Ct. App. 1971), *aff'd sub nom. Branzburg*, 408 U.S. 665; *Branzburg v. Pound*, 461 S.W.2d 345 (Ky. Ct. App. 1971), *aff'd sub nom. Branzburg*, 408 U.S. 665.

72. *Branzburg*, 408 U.S. at 667.

73. *Id.* at 668.

74. *Id.* at 668-69.

75. *Id.* at 669 (quoting Paul M. Branzburg, *Rope Turns to Pot*, *COURIER-J.* (Louisville, Ky.), Jan. 10, 1971, at 1).

and his motion was denied.⁷⁶ He again petitioned the court of appeals for mandamus and prohibition, and his petition was again denied. In May of 1971, the Supreme Court granted Branzburg a writ of certiorari to review both judgments, as well as the other two cases.⁷⁷

In a 5-4 decision, the Supreme Court held in 1972 that reporters enjoy no First Amendment privilege when compelled to testify before a grand jury.⁷⁸ The Court noted that the only existing testimonial privilege rooted in the Constitution was the Fifth Amendment right against self-incrimination, and it declined to create a new constitutional privilege that only members of the press could enjoy.⁷⁹ The Court stressed that newspaper publishers have no special immunity from laws of general applicability,⁸⁰ and that reporters do not enjoy a special right of access to information not available to the public generally.⁸¹ Moreover, the Court emphasized the importance of the grand jury's right to secure "every man's evidence" and declined to abrogate this right in the name of protecting the free flow of information to the press.⁸² The Court argued, "[W]e cannot seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it."⁸³

The Court further emphasized that its decision was consistent with precedent. "At common law, courts consistently refused to recognize the existence of any privilege authorizing a newsman to refuse to reveal confidential information to a grand jury."⁸⁴ And nearly every claim to a First Amendment privilege had been denied since Marie Torre first advanced this argument in 1958.⁸⁵ "We are admonished that refusal to provide a First Amendment reporter's privilege will undermine the freedom of the press to collect and disseminate news," the Court

76. *Id.* The court did issue an order protecting Branzburg from revealing "confidential associations, sources or information," but requiring him to "answer any questions which concern or pertain to any criminal act, the commission of which was actually observed by [him]." *Id.* at 670 (alteration in original) (internal citation omitted).

77. *Id.* at 671; *see also* 402 U.S. 942 (1971) (granting certiorari in *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970), *rev'd sub nom. Branzburg*, 408 U.S. 665).

78. *Branzburg*, 408 U.S. at 667.

79. *Id.* at 689-90.

80. *Id.* at 682-83.

81. *Id.* at 684-85.

82. *Id.* at 688-91 (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)).

83. *Id.* at 692.

84. *Id.* at 685.

85. *Id.* at 685-86.

wrote, “[b]ut this is not the lesson history teaches us.”⁸⁶ From the very start of the nation, the press had operated without constitutional protection for confidential sources, and yet it had still “flourished.”⁸⁷ The Court concluded that the absence of a constitutional privilege “ha[d] not been a serious obstacle to either the development or retention of confidential news sources by the press.”⁸⁸

But the implications of this decision were not so clear-cut. While some of the Court’s language implied a firm refutation of reporters’ claims, at other points it seemed more equivocal. The Court concluded that there was “no basis” for extending constitutional scrutiny “[o]n the records now before us.”⁸⁹ Specifically, it noted that the record lacked sufficient information about the effect that press subpoenas had on the flow of information to the public. Yet it seemed to leave the door open to reconsideration in light of new evidence.⁹⁰

Justice Powell cast the deciding vote but wrote a concurrence that further complicated the decision. His vote suggested that he had rejected a constitutional privilege for reporters subpoenaed by a grand jury, yet his concurrence seemed to support recognition of a qualified First Amendment privilege.⁹¹ “The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct,” he wrote.⁹² The courts should balance constitutional concerns against competing societal interests on a “case-by-case basis.”⁹³

Justice Stewart penned a dissent, which Justices Brennan and Marshall joined.⁹⁴ He criticized the Court’s “crabbed view of the First Amendment,”⁹⁵ taking the position that the right to gather news is a necessary corollary to the right

86. *Id.* at 698.

87. *Id.* at 698-99.

88. *Id.* at 699 (footnote omitted).

89. *Id.* at 690-91.

90. *Id.* at 693-94. For further discussion of the apparent contradictions in the majority’s opinion, see Wesley J. Campbell, *Speech-Facilitating Conduct*, 68 STAN. L. REV. 1, 20 (2016).

91. *Branzburg*, 408 U.S. at 709-10 (Powell, J., concurring).

92. *Id.* at 710.

93. *Id.*

94. *Id.* at 725 (Stewart, J., dissenting). Justice Douglas wrote a separate dissent that focused more squarely on the *Caldwell* case. *United States v. Caldwell*, 408 U.S. 665, 711 (1972) (Douglas, J., dissenting).

95. *Branzburg*, 408 U.S. at 725 (Stewart, J., dissenting).

to publish it.⁹⁶ And the right to gather news, in turn, implies a right to confidentiality between a reporter and his source.⁹⁷ “[W]e cannot escape the conclusion that when neither the reporter nor his source can rely on the shield of confidentiality against unrestrained use of the grand jury’s subpoena power, valuable information will not be published and the public dialogue will inevitably be impoverished,” he wrote.⁹⁸

Instead, Justice Stewart advocated for a three-part test for evaluating privilege claims, one that would require the government to show that the information was “clearly relevant to a precisely defined subject of governmental inquiry”; that it was “reasonable to think the witness . . . ha[d] that information”; and that “there [wa]s not any means of obtaining the information less destructive of First Amendment liberties.”⁹⁹ He warned that denying the press at least a qualified privilege risked “annex[ing] the journalistic profession as an investigative arm of government.”¹⁰⁰

This perplexing set of opinions left the lower courts without clear guidance as to the meaning and scope of the First Amendment’s application in reporter’s privilege cases. Had Justice Powell, in his “enigmatic”¹⁰¹ concurrence, intended to limit or otherwise alter the majority’s decision?¹⁰² Justice Stewart later suggested that the vote was more like “four and a half to four and a half.”¹⁰³

96. *Id.* at 727.

97. *Id.* at 728.

98. *Id.* at 736.

99. *Id.* at 740 (emphasis omitted) (citations omitted).

100. *Id.* at 725.

101. *Id.*

102. In 2007, Eric Freedman found a handwritten note in Justice Powell’s conference notes discussing his thoughts on the case. See Adam Liptak, *A Justice’s Scribbles on Journalists’ Rights*, N.Y. TIMES (Oct. 7, 2007), <http://www.nytimes.com/2007/10/07/weekinreview/07liptak.html> [<http://perma.cc/9T9V-HJ5V>]. At conference, Justice Powell had noted: “It would be unwise . . . to give the press any constitutional privilege and we’re writing on a clean slate, so we don’t have to give constitutional status to newsmen. I’d leave it to the legislatures to create one.” BERNARD SCHWARTZ, *THE ASCENT OF PRAGMATISM: THE BURGER COURT IN ACTION* 165 (1990); see also Sean W. Kelly, *Black and White and Read All Over: Press Protection After Branzburg*, 57 DUKE L.J. 199, 209-10 (2007) (noting that in reference to *Pappas*, Justice Powell wrote, “[A]s I have concluded there is no constitutional privilege, I have no choice but to affirm”; and that in reference to *Caldwell*, he wrote, “I will make clear in an opinion . . . that there is a privilege analogous to an evidentiary one, which courts should recognize & apply in case by case to protect confidential information” (alterations in original) (footnote omitted)).

103. Potter Stewart, “*Or of the Press*,” 26 HASTINGS L.J. 705, 709 (1975).

3. *Post-Branzburg Confusion*

In the following decades, judges and scholars alike puzzled over the meaning of *Branzburg* and its tangle of opinions.¹⁰⁴ Courts have generally agreed that the government cannot compel confidential information in bad faith.¹⁰⁵ But they have diverged on virtually every other measure, causing a wide circuit split that the Supreme Court has left unremedied for nearly fifty years. Courts disagree on whether a qualified First Amendment privilege exists;¹⁰⁶ whether any qualified constitutional privilege that does exist applies to both confidential and nonconfidential information;¹⁰⁷ and whether the Court's decision should be limited to the grand jury context.¹⁰⁸

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104. There is an extensive body of legal literature examining the meaning, scope, and legacy of *Branzburg*. See, e.g., Randall D. Eliason, *The Problems with the Reporter's Privilege*, 57 AM. U. L. REV. 1341, 1342 (2008) (arguing that the *Branzburg* Court reached the right outcome and that claims supporting the push for a legislative shield “rest on a shaky or even non-existent foundation”); Monica Langley & Lee Levine, *Branzburg Revisited: Confidential Sources and First Amendment Values*, 57 GEO. WASH. L. REV. 13, 50 (1988) (arguing that *Branzburg* should not apply to privilege claims involving government sources because “[t]he years following *Branzburg* witnessed a marked transformation both in the predominant use of confidential relationships in the newsgathering process and in the Supreme Court's explication of the constitutional doctrine that undergirds its analysis in *Branzburg*”); Richard A. Posner, *A Political Court*, 119 HARV. L. REV. 31, 95 n.191 (2005) (referring to *Branzburg* as a “notorious example” of the confusion that flows when the fifth vote for the majority writes separately and qualifies the Court's opinion); Stone, *supra* note 4, at 44-45 (citing the confusion sown by *Branzburg* to make the case for establishing uniformity in the law with the enactment of a statutory shield); Sonja R. West, *Concurring in Part & Concurring in the Confusion*, 104 MICH. L. REV. 1951, 1954 (2006) (arguing that Justice Powell's concurrence should not be “relegated . . . to nothing more than judicial residue”).
105. See, e.g., *United States v. Sterling*, 724 F.3d 482, 492 (4th Cir. 2013) (finding that there is “no First Amendment testimonial privilege, absolute or qualified, that protects a reporter from being compelled to testify by the prosecution or the defense in criminal proceedings about criminal conduct that the reporter personally witnessed or participated in,” absent a showing of an illegitimate motive).
106. Compare *Farr v. Pitchess*, 522 F.2d 464, 466 (9th Cir. 1975) (“It is clear that *Branzburg* recognizes some First Amendment protection of news sources.”), with *In re Grand Jury Proceedings*, 810 F.2d 580, 583 (6th Cir. 1987) (“[T]he majority opinion in [*Branzburg*] rejected the existence of such a first amendment testimonial privilege.”).
107. Compare *Gonzales v. Nat'l Broad. Co.*, 194 F.3d 29, 35 (2d Cir. 1999) (holding that a qualified privilege for reporters “applies to nonconfidential, as well as to confidential, information”), with *United States v. Smith*, 135 F.3d 963, 972 (5th Cir. 1998) (holding that “newsreporters enjoy no qualified privilege not to disclose nonconfidential information in criminal cases”).
108. Compare *Baker v. F & F Inv.*, 470 F.2d 778, 784 (2d Cir. 1972) (limiting the Court's holding to the grand jury context), with *Sterling*, 724 F.3d at 492 (finding that *Branzburg* foreclosed any constitutional privilege in the criminal context for information sought in good faith).

The courts also disagree on how to read the various opinions in *Branzburg*. Some courts have treated *Branzburg* as a plurality decision.¹⁰⁹ Others have relied on Justice Powell's concurrence to read the case as creating a qualified constitutional privilege.¹¹⁰ Still others have rejected wholesale the idea that *Branzburg* permits a First Amendment privilege for the press in criminal cases, treating Justice Powell's concurrence as mere dicta.¹¹¹ One appellate judge recently observed that "Justice Powell's concurrence and the subsequent appellate history have made the lessons of *Branzburg* about as clear as mud."¹¹²

B. Congress's Refusal To Establish a Statutory Shield

In the aftermath of the Court's decision in *Branzburg*, dozens of shield laws were introduced in Congress. While legislative efforts to enact a federal shield law had begun as early as 1929,¹¹³ it was only in the wake of *Branzburg* that this effort took off in earnest: seventy-one bills were introduced in Congress in the year immediately following *Branzburg* alone.¹¹⁴ All of these attempts failed,¹¹⁵

109. See, e.g., *Smith*, 135 F.3d at 968–69.

110. See, e.g., *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993); *von Bulow v. von Bulow*, 811 F.2d 136, 142 (2d Cir. 1987).

111. See, e.g., *Sterling*, 724 F.3d at 492, 495.

112. *Id.* at 523 (Gregory, J., dissenting in part).

113. See Ervin, *supra* note 1, at 241 n.23.

114. RonNell Andersen Jones, *Avalanche or Undue Alarm? An Empirical Study of Subpoenas Received by the News Media*, 93 MINN. L. REV. 585, 595 (2008). One obstacle to these early shield laws was the press itself. Many members of the press believed that *Branzburg* had been wrongly decided. They eschewed any effort to create statutory protections on the grounds that protection should be based in the Constitution. See Lucy A. Dalglish & Casey Murray, *Déjà Vu All Over Again: How a Generation of Gains in Federal Reporter's Privilege Law Is Being Reversed*, 29 U. ARK. LITTLE ROCK L. REV. 13, 42 (2006).

115. Congress has enacted statutory protections for the press in related contexts. For example, in 1978 the Supreme Court held in *Zurcher v. Stanford Daily* that the government's search of Stanford's newsroom did not violate the First Amendment. 436 U.S. 547 (1978). Two years later, Congress enacted the Privacy Protection Act, which prohibits law enforcement agents from searching or seizing records or other information from those who disseminate information to the public. Pub. L. No. 96-440, 94 Stat. 1879 (1980) (codified as amended at 42 U.S.C. §§ 2000aa to 2000aa-12 (2012)). This legislation is clearly intended to protect reporters and their sources. In an effort to cabin the scope of the discussion, however, this section focuses on the narrower issue of legislative action specifically in the context of an evidentiary shield for the press.

and eventually interest in enacting a shield law abated. Throughout the 1980s and 1990s, few federal shield laws were proposed.¹¹⁶

But this legislative effort started anew after September 11,¹¹⁷ likely prompted in part by the imprisonment of well-known reporters like *New York Times* journalist Judith Miller.¹¹⁸ In 2004, Senator Christopher Dodd spearheaded the failed effort to pass the Free Speech Protection Act.¹¹⁹ A revised shield law, titled the Free Flow of Information Act, was introduced in the Senate the following year.¹²⁰ Various versions of the Free Flow of Information Act were introduced in both houses of Congress over the next eight years, and two of these bills were favorably reported out of the Senate Judiciary Committee, in 2007 and 2009.¹²¹ A version of the bill introduced in 2013 was gaining momentum when the Snowden leaks effectively derailed the process and likely robbed the bill of its support.¹²²

These shield laws evolved over time. Every version contained basic protections for reporters, extending some form of qualified privilege for confidential

116. Jones, *supra* note 114, at 602 n.100 (noting only one proposed shield law in the 1980s); Kathryn A. Rosenbaum, *Protecting More Than the Front Page: Codifying a Reporter's Privilege for Digital and Citizen Journalists*, 89 NOTRE DAME L. REV. 1427, 1447 (2014) (noting that "attention to passing a bill waned without high-profile cases that invoked a reporter's privilege in the 1990s").

117. See *The History of Shield Legislation*, 31 NEWS MEDIA & L. 8 (2007), <http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-winter-2007/history-shield-legislation> [<http://perma.cc/2UFQ-EB2P>] (noting that only two shield laws were proposed in Congress between 1979 and 2004).

118. In 2005, Judith Miller was found in contempt of court and jailed for nearly three months for refusing to reveal a source. Susan Schmidt & Jim VandeHei, *N.Y. Times Reporter Released from Jail*, WASH. POST (Sept. 30, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/19/AR2005101900795.html> [<http://perma.cc/YK96-2BRT>].

119. Free Speech Protection Act of 2004, S. 3020, 108th Cong. (2004); see also Leslie Siegel, *Trampling on the Fourth Estate: The Need for a Federal Reporter Shield Law Providing Absolute Protection Against Compelled Disclosure of News Sources and Information*, 67 OHIO ST. L.J. 469, 509 (2006) (describing the legislative history surrounding the bill).

120. Free Flow of Information Act of 2005, S. 1419, 109th Cong. (2005). While both the 2004 and 2005 proposed shield laws offered protection against compelled disclosure of sources and other confidential information, they differed in some important respects. For example, the 2005 bill focused on protecting news "entities" and their employees and contractors, *id.* § 5, while the 2004 bill built its protection around the act of newsgathering, S. 3020 § 2. The 2005 bill also distinguished between civil and criminal proceedings, S. 1419 § 2, while the 2004 bill established the same three-pronged test for both, S. 3020 § 3.

121. S. REP. NO. 113-118, at 12-16 (2013).

122. See *id.*; Randall Eliason, *The Ongoing Debate over the Reporter's Privilege*, SIDEBARS (June 22, 2015), <http://sidebarsblog.com/2015/06/22/the-ongoing-debate-over-the-reporters-privilege> [<http://perma.cc/BN6C-TRXV>].

sources and unpublished information.¹²³ But legislators revised these proposed laws over time to account for shifting political pressures and changes in the media and technology landscape.¹²⁴ The 2013 version of the Act, for example, introduced a catchall provision that permitted judges to confer protection if, “on the specific facts contained in the record, the judge determines that such protections would be in the interest of justice and necessary to protect lawful and legitimate news-gathering activities under the specific circumstances of the case.”¹²⁵ The provision was included to account for the difficulties of defining who qualifies as a “reporter” in an era of rapid technological change.¹²⁶

The implications of these failed legislative efforts are disputed. Some judges and scholars have argued that they show a clear legislative intent not to create a federal shield and that courts should not undermine Congress by recognizing a common law privilege.¹²⁷ Others have argued that the willingness of some federal judges to read *Branzburg* as creating a qualified constitutional privilege eased the pressure to enact a statutory shield, but that the courts’ recent contraction of these protections lends new urgency to the project.¹²⁸ Still others have noted that the media itself, reluctant to abandon its claim to an absolute privilege, opposed

123. See, e.g., S. 3020; S. 1419; Free Flow of Information Act of 2007, S. 2035, 110th Cong. (2007); Free Flow of Information Act of 2009, H.R. 985, 111th Cong. (2009); Free Flow of Information Act of 2013, S. 987, 113th Cong. (2013).

124. See *supra* notes 120-122 and accompanying text.

125. Free Flow of Information Act of 2013, S. 987, 113th Cong. § 11(1)(B) (2013); see also David Greene, *Senate Revises Media Shield Law for the Better, but It’s Still Imperfect*, ELECTRONIC FRONTIER FOUND. (Sept. 20, 2013), <http://www.eff.org/deeplinks/2013/09/senate-revises-media-shield-law-better-its-still-imperfect> [<http://perma.cc/EZB6-MBE4>] (endorsing the bill’s adoption of a “functional” definition of a reporter, in which protection is granted to anyone who functions as a journalist, versus a “status” definition that limits protection to individuals employed by or formally affiliated with a media organization).

126. See Lauren J. Russell, *Shielding the Media: In an Age of Bloggers, Tweeters, and Leakers, Will Congress Succeed in Defining the Term “Journalist” and in Passing a Long-Sought Federal Shield Act?*, 93 OR. L. REV. 193, 216 (2014) (explaining that the discretionary provision was inserted as a compromise between lawmakers who advocated a broader definition of a journalist and those who were concerned an overly broad definition would sweep in organizations like WikiLeaks under the umbrella of the bill).

127. See, e.g., *United States v. Sterling*, 724 F.3d 482, 505 (4th Cir. 2013) (“We decline the invitation to step in now and create a testimonial privilege under common law that the Supreme Court has said does not exist and that Congress has considered and failed to provide legislatively.”).

128. See, e.g., WRIGHT & GRAHAM, *supra* note 7, § 5426 (noting that protections extended by the Attorney General and the federal courts meant there was a “declining sense of urgency” that caused efforts to enact a legislative shield to “grind to a halt”); Jones, *supra* note 114, at 602 (arguing that the “legislative fervor” of Congress diminished due to the reading of *Branzburg* by the lower courts).

many early legislative proposals.¹²⁹ Regardless, the fact remains that Congress has yet to enact a statutory shield for the press, despite many attempts over dozens of years to do so.

C. *Statutory and Judicial Protection Extended by the States*

In contrast, the press currently enjoys widespread protection from the states. These legislative and judicial shields were often established in the wake of the high-profile jailing of a reporter. This familiar cycle—prosecutorial overreach and public backlash, followed by a state-level legislative or judicial remedy—can be traced back more than a century. The first state-level reporter's privilege statute was enacted by the Maryland legislature in 1896, partly in response to the unpopular decision to jail *Baltimore Sun* reporter John T. Morris for refusing to reveal a confidential source.¹³⁰ Other states followed suit,¹³¹ often in response to the public outcry that followed the imprisonment of a member of the press.¹³²

129. See, e.g., Dalglish & Murray, *supra* note 114, at 18; see also *id.* at 42 (claiming that the media may accept legislative proposals today that they previously opposed in recognition of “the importance of getting some protection for journalists”).

130. See *Tofani v. State*, 465 A.2d 413, 415 (Md. 1983) (noting that Maryland's shield law “was prompted by a specific event: In early 1896, John T. Morris, a *Baltimore Sun* reporter, published an article suggesting that certain elected officials and policemen were on the payrolls of illegal gambling establishments,” and, after he was jailed for refusing to reveal his source for the article, “[t]he Journalists’ Club, alarmed at the prospect of reporters having to choose between freedom and revealing the names of confidential sources, persuaded the General Assembly to enact protective legislation” (citation omitted)); cf. Gordon, *supra* note 23, at 451-87 (arguing that the incident with Morris likely played a role in the statute's enactment, but that the importance of the Morris dispute may have been overstated by judges and legal historians, and noting that the incident involving Morris may have occurred a decade prior to the enactment of the state shield law).

131. In 1933, New Jersey enacted the nation's second state shield law. Other states acted soon thereafter: Alabama and California passed shield laws in 1935; Kentucky and Arkansas in 1936; Arizona and Pennsylvania in 1937; Indiana and Ohio in 1941; and so on. John J. Watkins, *The Journalist's Privilege in Arkansas*, 7 U. ARK. LITTLE ROCK L.J. 473, 479 n.23 (1984). By June of 1972, when *Branzburg* was handed down, seventeen states had enacted shield laws. *Branzburg v. Hayes*, 408 U.S. 665, 689 n.27 (1972).

132. See, e.g., Gordon, *supra* note 23, at 597-98, 600-01 (explaining that Kentucky's shield law was passed partly in response to backlash following the imprisonment of two *Danville Advocate* reporters for contempt, and that this same incident may have influenced the enactment of Alabama's shield law as well); *id.* at 397 (noting that Louisiana's shield law may have been enacted in response to the state court's denial of a privilege for a *Baton Rouge State-Times* reporter).

Today, some state officials, including legislators and judges, have established robust state-level shields.¹³³ As of 2013, thirty-nine states and the District of Columbia had enacted legislative shields.¹³⁴ In ten additional states, courts had recognized some form of reporter's privilege.¹³⁵ State courts have located this protection in a variety of authorities, including the U.S. Constitution,¹³⁶ state constitutions,¹³⁷ common law,¹³⁸ and court rules.¹³⁹ Wyoming is the only state that has not recognized some form of privilege, and some have speculated that this is only because no reporter has ever been jailed in the state for refusing to reveal a source.¹⁴⁰

These state-level protections play a critical role in ensuring the free flow of information to the press. This is particularly true for smaller, local news outlets that may not have the resources necessary to mount costly legal battles against subpoenas. But even larger media companies receive far more state-level subpoenas than federal ones.¹⁴¹ A study of press subpoenas issued nationwide in

133. Other state officials have also acted to protect reporters. For example, Paul Branzburg was ordered jailed for six months but avoided imprisonment after the governor of Michigan refused to extradite the reporter to Kentucky. Branzburg reportedly stated, "When the legal drama ended, I still had not revealed my sources . . . I knew all along it would end that way." Kelly, *supra* note 102, at 205 (citing FRANCIS WILKINSON, *ESSAYS IN ESSENTIAL LIBERTY: FIRST AMENDMENT BATTLES FOR A FREE PRESS* 91, 93 (1992)).

134. For a list of these statutes, see *United States v. Sterling*, 724 F.3d 482, 532 (4th Cir. 2013). Hawaii's shield law has since expired. The state has not yet reinstated it, in large part due to disagreements over who should qualify for protection. See Brett Oppegaard, *Reader Rep: Hawaii Should Reinstate Shield Law Immediately*, HONOLULU CIV. BEAT (Nov. 7, 2016), <http://www.civilbeat.org/2016/11/reader-rep-hawaii-should-reinsate-its-shield-law-immediately> [<http://perma.cc/6P5K-RU94>].

135. For a list of these state court decisions, see *Sterling*, 724 F.3d at 532. These judicial protections were established relatively late. The earliest judicially-created, state-level reporter's privilege was handed down in 1974. See *Brown v. Commonwealth*, 204 S.E.2d 429 (Va. 1974).

136. See, e.g., *O'Neill v. Oakgrove Constr.*, 523 N.E.2d 277, 277-78 (N.Y. 1988) ("Article I, § 8 of the New York State Constitution and, we believe, the First Amendment of the Federal Constitution as well, provide a reporter's privilege which extends to confidential and nonconfidential materials . . .").

137. See, e.g., *id.*

138. See, e.g., *Senear v. Daily Journal-Am.*, 641 P.2d 1180, 1183-84 (Wash. 1982) (recognizing a qualified common law privilege for journalists with respect to their sources of information).

139. See, e.g., UTAH R. EVID. 509 (establishing an evidentiary privilege for reporters).

140. See Gregg Leslie, *What's Up with Wyoming and the Reporter's Privilege?*, REPORTERS COMMITTEE FOR FREEDOM OF PRESS (Fall 2008), <http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-fall-2008/whats-wyoming-and-reporters-p> [<http://perma.cc/7MJS-PB5B>].

141. Jones, *supra* note 114, at 633 (showing that roughly thirty percent of state subpoenas were issued to newspapers with a circulation of more than 250,000).

2006 found that news organizations had received 1,049 state subpoenas in criminal cases, as compared with only 153 federal subpoenas in criminal cases.¹⁴² Similarly, the press had received 588 state subpoenas in civil cases in which the news outlet was not a party, as compared with 87 federal subpoenas.¹⁴³

Moreover, news outlets in states with statutory shields were more likely to fight a subpoena. Press outlets in states without a statutory shield “complied fully, without opposing” 72.1% of all subpoenas issued.¹⁴⁴ In contrast, news organizations in states with a shield law complied with only 53.9% of subpoenas.¹⁴⁵ An amicus brief submitted in the Judith Miller case by 35 states noted that without these state-level shields, “reporters in those States would find their newsgathering abilities compromised, and citizens would find themselves far less able to make informed political, social and economic choices.”¹⁴⁶

But state-level protections, no matter how robust, extend only so far in shielding the press. In the absence of a cross-cutting federal privilege, this patchwork of protections forms an uneven stopgap that suffers from at least two limitations. First, these protections vary substantially from one state to another.¹⁴⁷ States have diverged, for example, as to whether the reporter’s privilege is absolute or qualified;¹⁴⁸ whether it extends to nonconfidential¹⁴⁹ and unpublished

142. *Id.* at 659.

143. *Id.*

144. *Id.* at 662. The study did not address the impact of state court decisions extending some form of protection to the press. *See id.* at 587-93.

145. *Id.*

146. Brief Amici Curiae of the States of Oklahoma et al. in Support of Petitioners, *Miller v. United States*, 545 U.S. 1150 (2005) (No. 04-1507), 2005 WL 1317523, at *4.

147. Some states provide an absolute privilege for all sources and newsgathering materials in every civil or criminal case, administrative agency proceeding, or grand jury. For a list of states, see Papandrea, *supra* note 7, at 546 n.177.

148. *Compare, e.g.*, MD. CODE ANN., CTS. & JUD. PROC. § 9-112(c)(1) (LexisNexis 2013) (creating an absolute privilege against compelled disclosure for “[t]he source of any news or information procured by the person while employed by the news media or while enrolled as a student, whether or not the source has been promised confidentiality”), *with* N.Y. CIV. RIGHTS LAW § 79-h(c) (McKinney 1992) (establishing a qualified privilege for nonconfidential information).

149. *Compare, e.g.*, NEV. REV. STAT. § 49.275 (2015) (protecting both confidential and nonconfidential information), *with* N.M. R. EVID. 11-514 (providing explicit statutory protection only for confidential sources).

information;¹⁵⁰ and whether and how it applies in the civil versus criminal context.¹⁵¹ States also have taken different approaches to defining who qualifies for a privilege.¹⁵²

Second, without federal protection, a reporter may be compelled to reveal a source in federal proceedings, even if the reporter would have enjoyed protection under state law. Because most high-profile cases that receive nationwide coverage today arise in federal court,¹⁵³ the goal of these state-level efforts – to incentivize sources to provide information to the press – may be undermined.¹⁵⁴ Sources may not necessarily know the exact state of reporter’s privilege law, but they will likely have a generalized awareness of high-profile cases in which a reporter is jailed for refusing to reveal a source – or, worse, reveals a source in response to a subpoena.

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150. Compare, e.g., NEV. REV. STAT. § 49.275 (2017) (providing an absolute privilege for published and unpublished information), with CAL. CONST. art. 1, § 2(b) (extending privilege only to unpublished sources), and CAL. EVID. CODE § 1070 (West 2017) (same).
151. Compare, e.g., N.J. STAT. ANN. § 2A:84A-21 (West 2011) (providing an absolute privilege in civil cases and a qualified privilege in criminal cases), with COLO. REV. STAT. § 13-90-119(2) (2015) (providing the same qualified privilege in both the civil and criminal contexts).
152. Compare, e.g., CAL. CONST. art. I, § 2(b) (protecting “[a] publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed” and “a radio or television news reporter or other person connected with or employed by a radio or television station, or any person who has been so connected or employed”), with N.C. GEN. STAT. § 8-53.11(a)(1) (2015) (extending the privilege to “[a]ny person, company, or entity, or the employees, independent contractors, or agents of that person, company, or entity, engaged in the business of gathering, compiling, writing, editing, photographing, recording, or processing information for dissemination via any news medium”).
153. For example, when *New York Times* reporter Judith Miller was jailed for refusing to reveal a confidential source in federal proceedings, the *Times* ran sixty-four stories and letters mentioning Miller in three months. And on July 7, 2005, the day after Miller was imprisoned, 285 newspapers in the Newspapers.com archives database ran stories about Judith Miller. Roughly a third of those stories ran on the newspaper’s front page. See *285 Matches for Judith Miller on July 7, 2005*, NEWSPAPERS.COM, http://go.newspapers.com/results.php?query=judith+miller&s_place=&date_field=july+7%2C+2005 [<http://perma.cc/SGD6-UCZ9>].
154. See *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1170 (D.C. Cir. 2006) (Tatel, J., concurring) (noting that denial of a federal privilege “would . . . buck the clear policy of virtually all states”); Brief Amici Curiae of the States of Oklahoma et al., *supra* note 146, at *3 (arguing that “increasing conflict has undercut the State shield laws just as much as the absence of a federal privilege”); cf. *Jaffee v. Redmond*, 518 U.S. 1, 13 (1996) (noting that “any State’s promise of confidentiality [between therapists and patients] would have little value if the patient were aware that the privilege would not be honored in a federal court,” and “[d]enial of the federal privilege therefore would frustrate the purposes of the state legislation that was enacted to foster these confidential communications”).

In sum, despite the substantial protections offered by the states, there are still yawning gaps in the formal protections covering the press. Reporters subpoenaed in federal court have few effective defenses to shield confidential information. And yet surprisingly few reporters have been jailed for contempt. The next Part helps resolve this apparent contradiction, by illuminating the complex web of informal protections the government has long extended to shield the press.

II. UNCOVERING THE DE FACTO REPORTER'S PRIVILEGE

Prior to *Branzburg*, courts consistently declined to confer an express privilege in published cases. Yet these decisions represent only part of the story. This Part looks past the published case law on the reporter's privilege and asks how reporters *actually* fared when pressed to reveal a confidential source. It reviews an array of historical records—including published and unpublished cases, newspaper stories, and legislative materials—to demonstrate that beneath the official, black-letter legal history, there exists a richer and more complex narrative.

It first argues that judges, legislators, and prosecutors have long sought to protect reporters in ways short of conferring an express privilege, and it fleshes out these de facto protections. It then surveys the current state of the de facto reporter's privilege and concludes that some de facto protections may be weakening.¹⁵⁵

A. *Judicial De Facto Privilege*

While judges rarely conferred an express reporter's privilege prior to *Branzburg*, they often extended protection in other ways. This Section looks to both published case law and newspaper accounts of legal proceedings to identify these less formal modes of protection. It first outlines the methodology used and examines the benefits and limitations of relying on newspaper accounts as a source of legal history. It then identifies the various ways by which courts have protected reporters and their sources. It argues that judges have protected reporters by conferring an express privilege or by recognizing a Fifth Amendment, loss-of-livelihood, or honor defense in both reported and unreported cases. It

155. In this way, this Article attempts an approach similar to what David Pozen has referred to as a “positive theory in the middle range,” in that it is focused less on “higher-level normative accounts of the information state” and more on how the surrounding ecosystem actually works. Pozen, *supra* note 11, at 634.

then argues that judges have also protected the press by extending ad hoc privileges, such as finding the reporter's testimony immaterial or declining to hold a reporter in contempt.¹⁵⁶

1. Methodology

To understand how reporter's privilege claims were treated on a day-to-day basis, we must look beyond the black-letter canon of reporter's privilege cases. This requires looking to contemporaneous secondary sources like newspapers, as well as to reported cases in which a judge extended functional protection to a reporter without conferring an express privilege. Only a handful of reporter's privilege disputes were enshrined in the law reports in early America. These secondary sources and examples of functional protections extended to the press add flesh to the more skeletal history found in the reported case law.

Newspaper accounts of legal proceedings, in particular, are uniquely poised to help fill the gaps in our understanding of how early reporter's privilege claims were resolved. This is especially true when judges merely released a reporter without punishment, because in these instances often no appeal was taken and no formal record of the proceeding survives.¹⁵⁷ Further, newspaper accounts of

¹⁵⁶. This Section confines itself to judicial treatment of direct privilege claims. The courts have also extended protections in other realms that bear on press protections in this arena. The most significant example of this is the 1971 decision in *New York Times Co. v. United States (Pentagon Papers)*, 403 U.S. 713 (1971). There, the Court held that the government could not issue a prior restraint against publication of classified material unless the information in question would result in "direct, immediate, and irreparable damage to our Nation or its people." *Id.* at 730 (Stewart, J., concurring). Thirty years later, the Court ruled in *Bartnicki v. Vopper* that the press is not liable for publishing information unlawfully obtained if the information is of public importance. 532 U.S. 514, 535 (2001). These decisions obviously limit the risk and exposure of the press when publishing leaked information and therefore offer the press an important source of protection. But they do not squarely implicate the question of whether a reporter is protected when compelled to reveal a confidential source. For a general discussion of the yawning gap in protections between source and distributor, see Pozen, *supra* note 11, at 516.

¹⁵⁷. There is a rich body of law and economics literature grappling with this problem of selection bias in litigation. See, e.g., Theodore Eisenberg, *Testing the Selection Effect: A New Theoretical Framework with Empirical Tests*, 19 J. LEGAL STUD. 337 (1990); Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319 (1991); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984). In *The Selection of Disputes for Litigation*, Priest and Benjamin demonstrate that "the disputes selected for litigation (as opposed to settlement) will constitute neither a random nor a representative sample of the set of all disputes." Priest & Klein, *supra*, at 4.

reporter's privilege disputes offer invaluable context to legal scholars. They provide insight into how the public reacted to a decision, how long a reporter was jailed, or whether a judge expressed dismay or regret over the decision to jail a reporter. Such narrative accounts help illuminate the multitude of ways in which judges exercised their discretion to protect the press.

a. Newspapers as Legal Sources

The findings of this Article illustrate how newspaper sources can challenge accepted historical narratives generated on the basis of published case law. Newspapers are uniquely able to provide a contemporaneous historical account of unreported cases, and relying on newspapers as a source of legal knowledge is consistent with broader trends in scholarship. In recent decades, both judges¹⁵⁸ and scholars¹⁵⁹ have been more willing to look beyond the confines of law reports for legal authority. And technological developments offer the legal histo-

158. A number of scholars have tried to determine the extent to which the internet has opened the door for judges to rely on authority outside of published case reports. For example, Frederick Schauer and Virginia Wise argued in 1997 that “[a]s numerous technological, economic, and institutional developments make lawyers’ use of so-called ‘nonlegal’ sources more and more prevalent, the informational line between law and nonlaw becomes increasingly tenuous.” Frederick Schauer & Virginia J. Wise, *Legal Positivism as Legal Information*, 82 CORNELL L. REV. 1080, 1082 (1997). They noted that there was no significant increase in the Supreme Court’s reliance on “nonlegal” sources, such as nonlegal journals and books, from 1950 to 1990, but a substantial increase in the use of nonlegal sources from 1991 to 1997. *Id.* at 1108; see also Robert C. Berring, *Legal Information and the Search for Cognitive Authority*, 88 CALIF. L. REV. 1673, 1689-90 (2000) (describing the significant expansion of the number and type of legal authorities cited in Supreme Court decisions from 1899 to 1999).

159. For examples of legal scholars relying on newspaper accounts of legal proceedings, see, for example, Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957 (2000), who relied on newspaper accounts of a single trial to examine the evolution of the doctrine of common-law marriage; James Oldham, *Law Reporting in the London Newspapers, 1756-1786*, 31 AM. J. LEGAL HIST. 177 (1987), who reviewed newspaper accounts of legal proceedings in London from 1756-1786 to understand the way the press covered trials; Jeremy Patrick, *Beyond Case Reporters: Using Newspapers To Supplement the Legal-Historical Record (A Case Study of Blasphemous Libel)*, 3 DREXEL L. REV. 539 (2011), who examined two newspaper archives from 1898-1945 and from 1882-2003 to supplement the existing legal historical record on blasphemous libel prosecutions and discovered twenty-one new cases of blasphemous libel; and Kim Stevenson, *Unearthing the Realities of Rape: Utilising Victorian Newspaper Reportage To Fill in the Contextual Gaps*, 28 LIVERPOOL L. REV. 405 (2007), who reviewed newspaper archives to fill in key information about sexual rape and sexual offenses, which were often elided or obscured in the case reports.

rian a wealth of new possibilities: the digitization of millions of pages of historical newspapers has opened up new methods and avenues of legal research that were not available to scholars even a decade ago.¹⁶⁰

Newspapers are particularly useful when studying the colonial era, when there was virtually no organized case reporting system. The first comprehensive compilation of American law reports—federal, state, or colonial—was a collection of Connecticut cases published in 1789.¹⁶¹ But the reporting system in the Nation's early years was haphazard and remained that way for nearly a century.¹⁶² It was only after John B. West brought some semblance of uniformity and order to publishing with the establishment of the West Reporter System in the late 1870s that some law reporters began to publish lower court decisions with greater regularity.¹⁶³ Overall, however, the publication of lower state and federal court decisions remained inconsistent, even through the nineteenth century.¹⁶⁴

160. For example, Google began digitizing microfilm from newspapers' archives in 2008. Miguel Helft, *Google To Digitize Newspaper Archives*, N.Y. TIMES (Sept. 8, 2008), <http://www.nytimes.com/2008/09/09/technology/09google.html> [<http://perma.cc/K2NE-9RFP>].

161. EPHRAIM KIRBY, REPORTS OF CASES ADJUDGED IN THE SUPERIOR COURT OF THE STATE OF CONNECTICUT FROM THE YEAR 1785 TO MAY 1788 WITH SOME DETERMINATIONS IN THE SUPREME COURT OF ERRORS (1789).

162. See Thomas J. Young, Jr., *A Look at American Law Reporting in the 19th Century*, 68 LAW LIBR. J. 294, 300 (1975).

163. For example, the *Federal Reporter*, which John B. West started publishing in 1880, contained appellate and district court decisions. 1 FEDERAL REPORTER: CASES ARGUED AND DETERMINED IN THE CIRCUIT AND DISTRICT COURTS OF THE UNITED STATES (1880); Thomas A. Woxland, *Forever Associated with the Practice of Law: The Early Years of the West Publishing Company*, 5 LEGAL REFERENCE SERV. Q. 115, 116 (1985).

164. New York established a reporting system for lower court decisions in 1892. Gary D. Spivey, *Two Centuries of Law Reporting*, 1 JUD. NOTICE (The Historical Soc'y of the Courts of the State of N.Y., White Plains, N.Y.), Spring/Summer 2004, at 7, 9. But it was not until the mid-twentieth century that lower court decisions were routinely preserved. See Charles J. Stiegler, *The Precedential Effect of Unpublished Judicial Opinions Under Louisiana Law*, 59 LOY. L. REV. 535, 539 (2013). And it was not until the 1970s that unpublished decisions were recorded in the law reports with any consistency. FED. JUDICIAL CTR., STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS: A REPORT OF THE COMMITTEE ON USE OF APPELLATE COURT ENERGIES OF THE ADVISORY COUNCIL ON APPELLATE JUSTICE, FJC RESEARCH SER. NO. 73-2, 13-14 (1973).

Occasionally, a reporter or an enterprising lawyer would transcribe lower court decisions in a particular district, but coverage was geographically and temporally spotty.¹⁶⁵ Many decisions were still only issued orally.¹⁶⁶ And while the outcome of an oral decision may have been recorded if a law reporter was present in the courtroom, the language of the opinion was usually not preserved. As a result, in the vast majority of early cases, the only record of the court's reasoning was a newspaper account of the proceeding.¹⁶⁷ Even then, these newspaper stories captured a mere fraction of the decisions that were issued daily in courtrooms across America.¹⁶⁸

Of course, there are downsides to relying on newspaper articles as a historical tool. Newspaper accounts of legal decisions may be more prone to flawed or biased coverage.¹⁶⁹ Journalists in the nineteenth and early twentieth centuries were often more concerned with the newsworthiness of a particular court proceeding than with its legal importance. In turn, legal coverage often skewed in favor of the sensational: cases involving murders, scandals, and acts of violence represented a disproportionate amount of the legal stories printed in this era.¹⁷⁰ Critical, yet dry, legal developments often went unmentioned.

165. John O. McGinnis & Steven Wasick, *Law's Algorithm*, 66 FLA. L. REV. 991, 1003 (2014). Many written legal records from this era were also lost to fires. See, e.g., KURT X. METZMEIER, WRITING THE LEGAL RECORD: LAW REPORTERS IN NINETEENTH-CENTURY KENTUCKY (2016) (describing how a fire in 1865 destroyed virtually all legal records from the Kentucky Court of Appeals).

166. See Danaya C. Wright, *De Manneville v. De Manneville: Rethinking the Birth of Custody Law Under Patriarchy*, 17 LAW & HIST. REV. 247, 286 n.141 (1999) (noting that for much of the nineteenth century, decisions were issued orally and preserved only if someone was present at the proceedings to transcribe them). Lawyers would sometimes keep and circulate their written notes on legal decisions. Some judges also kept internal records of their decisions, and would occasionally publish a compilation. See METZMEIER, *supra* note 165 (explaining that “[j]udges also kept notebooks, called bench books, that contained copies of decisions rendered during their time on the court,” and noting that occasionally judges published a volume of reports based on these books).

167. See Jenni Parrish, *A Guide to American Legal History Methodology with an Example of Research in Progress*, 86 LAW LIBR. J. 105, 111 (1994) (noting that “[f]requently, newspaper accounts are the only source of information about trials in the nineteenth century”); Patrick, *supra* note 159, at 540-41.

168. This changed in the early to mid-twentieth century, with the continued expansion of West Publishing and the reduced costs of maintaining court records. More lower court decisions were preserved, and the publishing process began to become standardized, allowing lawyers to cross-reference cases and legal issues more easily. Stiegler, *supra* note 164, at 538-39.

169. See *infra* note 224.

170. See Patrick, *supra* note 159, at 546-47.

The sensationalism of these stories also points to a powerful argument in favor of using newspaper accounts. The drive to cover newsworthy moments in the law yielded a diverse cross section of cases at every level of the legal system, involving every manner of plaintiff, defendant, and issue.¹⁷¹ Because of this impulse, early newspapers serve as a surprisingly rich source of information about legal and legislative proceedings.¹⁷² Newspaper accounts often chronicled not only the legal arguments raised, but also the ways in which the judge or jury responded to these claims, the reactions of the parties to a judge's decision, the length of a reporter's imprisonment, and the conditions of the reporter's confinement.¹⁷³ They were also often accompanied by editorials that shed light on how these decisions were received and interpreted by the public. Taken together, these accounts offer a window into the color and complexity of the early American legal system.

Because this Article spans a wide temporal and geographic range, it is impossible to identify every relevant source and hard to confirm the accuracy of some newspaper reports. It is also difficult to contextualize each example presented and consider the unique regional or temporal conditions that may have influenced the outcome of any particular reporter's privilege dispute. This raises questions about the generalizability of these examples. However, many of the cases cited here were picked up by a wire service or were otherwise reported widely in papers across the country. As a result, some of these incidents likely influenced public perceptions of the privilege on a national scale, even if the events were purely local.

b. Research Approach

When structuring this Article's methodological approach, I sought to define the category of "reporter's privilege" cases broadly. I included cases in which a

171. See, e.g., *id.*

172. See *id.* at 541; Parrish, *supra* note 167, at 114-15 ("Newspapers from the time period in question are often an excellent source of information about the major figures and major legal events, such as trials."); see also Oldham, *supra* note 159 (noting that the London newspapers of the second half of the eighteenth century "contained a surprising amount of information about court proceedings" (footnote omitted)).

173. Examples of such articles are discussed *infra* Sections II.A.2-4. See also Patrick, *supra* note 159, at 540-41 (describing the different types of information newspaper accounts of legal proceedings can provide in comparison with more traditional legal sources); Stevenson, *supra* note 159, at 406 ("The extent to which social and moral factors were and are taken into account when determining guilt or innocence, and how that might affect the application of doctrinal legal rules and principles, cannot be fully uncovered or evaluated using singular preferred traditional sources such as the law reports and critique of judicial opinions.").

reporter declined to reveal the identity of a confidential source, declined to reveal confidential information, declined to respond to a subpoena, and declined to reveal nonconfidential information. The selection includes both cases in which a reporter refused to reveal a source and cases in which a newspaper editor refused to reveal an author. This approach complements the black-letter canon of reporter's privilege cases, which similarly includes examples of cases involving both anonymous sources and authors.¹⁷⁴

The fact patterns and procedural postures of these cases vary.¹⁷⁵ I included examples from both civil and criminal proceedings, as well as cases in which formal contempt proceedings were initiated and those in which contempt was not even threatened. For the purposes of this Section, I excluded cases resolved on the basis of a state statute granting protection.¹⁷⁶

174. This canon also includes cases in which an action was brought directly against the reporter or newspaper. In *Branzburg*, the Court cited eight cases involving reporter's privilege disputes to support its conclusion that "[a]t common law, courts consistently refused to recognize the existence of any privilege authorizing a newsman to refuse to reveal confidential information to a grand jury." *Branzburg v. Hayes*, 408 U.S. 665, 685 (1972). In one of those eight cases, the court held that a reporter must surrender the name of his confidential source in the context of a defamation case against his employer. See *Adams v. Associated Press*, 46 F.R.D. 439, 441 (S.D. Tex. 1969).

175. Many of these historical examples involve reporter's privilege claims that arose in the course of local proceedings or disputes – in other words, in contexts in which national security concerns are not implicated. I contend that this should not be a bar to applying the de facto lens to the national security context. First, the published and unpublished case law is equally devoid of cases involving national security claims, so cabining off the historical judicial de facto privilege to the non-national security context would necessarily require cabining the reported case law as well. See *Pozen*, *supra* note 11, at 534 & n.114 (explaining that "common wisdom" is that there have been eleven national security-related leak investigations, the first brought in 1973, but noting that the 1945-1946 pursuit of individuals involved with the left-wing magazine *Amerasia* and the 1957 court martial of John C. Nickerson, Jr. for leaking classified information about the Army's ballistic missile project could arguably qualify as well). Second, there is little clear policy rationale for limiting the de facto privilege to the non-national security context. The de facto privilege lens, broadly conceived, reveals a long history and tradition of protecting reporters who are pressed to reveal confidential information. The motivations driving this protection – in particular, the desire to protect the public's access to information – apply equally in the context of national security cases. While the public interest in determining the source of a national security leak is presumably higher than in the non-national security context, the public's interest in learning about the government's covert activities is often heightened as well. See *In re Grand Jury Subpoena*, 438 F.3d 1141, 1173-74 (Tatel, J., concurring) (noting that some leaks "caus[e] harm far in excess of their news value," and "[i]n such cases, the reporter privilege must give way," while "in some cases a leak's value may far exceed its harm, thus calling into question the law enforcement rationale for disrupting reporter-source relationships").

176. Cases in which a judge gave an exceptionally broad or favorable reading to state statutory shields arguably qualify as a form of judicial protection. I refrained from including these cases

To identify relevant cases, I searched a variety of online newspaper archives, including Newspapers.com; the Library of Congress's database, Chronicling America; NewspaperArchive.com; ProQuest Historical Newspapers; Google's Historical Newspaper archives; and the *New York Times* historical archives. I also searched dozens of editions of *Editor & Publisher* and the *Fourth Estate*, two weekly trade newspapers that covered the publishing industry. Finally, I searched Google Books and the HathiTrust Digital Library.¹⁷⁷

My search revealed both cases in which reporters were protected and cases in which they were held in contempt and granted no special treatment. I have enumerated these latter cases in a footnote for the sake of completeness.¹⁷⁸ But because these examples are consistent with the reported case law – in other words, they do not challenge the prevailing view of reporter's privilege claims – I have not described them in greater depth.¹⁷⁹

Defining the precise contours of the de facto privilege can be difficult, as a judge's motivations in any particular case may be hard to discern. Although there is no perfect solution to this problem, I have attempted to mitigate the issue by highlighting examples where the text of the decision indicates that the judge was sympathetic to a reporter's position; where outside observers suggested that a desire to protect the reporter may have animated the decision; or where the circumstances of the decision signal in some other way that the judge was motivated to protect a reporter or source.

in my review in order to avoid conceptual confusion between the protections extended by the judicial branch versus those extended by state legislatures.

177. The search functions for many of these databases are crude, and searching disconnected words like "editor" and "privilege" yielded too many results. To overcome this, I searched for phrases, such as "reporter imprisoned" or "reporter released." I tried a wide variety of combinations of terms – for example, matching "reporter," "journalist," "editor," and "newspaperman," with "jailed," "in contempt," "freed," or "released." I also tried phrases such as "refuses to reveal" or "protects source." This approach is undoubtedly underinclusive. It did not, for example, capture relevant results like "editor John Doe released."

178. See *supra* note 26.

179. This Article does not provide a detailed comparison of the number of unpublished cases granting favorable versus unfavorable treatment to reporters for two reasons. First, these categories are not mutually exclusive – for example, cases in which a reporter was initially jailed but quickly released due to public outcry arguably fall within both categories. See, e.g., *infra* notes 267-273. Second, I identified cases by plugging a wide variety of search terms into various historical newspaper databases. See *supra* note 177 and accompanying text. This trial-and-error approach does not lend itself well to strict empirical conclusions – a new combination of terms could turn up new sets of relevant cases. That being said, these searches did not yield a significantly larger number of examples on either side of the ledger. Broadly speaking, these searches turned up very roughly the same number of examples of favorable treatment extended to the press as unfavorable treatment.

2. *Uncovering an Express Privilege*

Prior to *Branzburg*, judges occasionally conferred an express reporter's privilege, although these cases were rarely, if ever, published. Such unpublished accounts are both few and scattered, but they nonetheless challenge the notion that reporter's privilege claims were uniformly rejected at common law.

One of the first recorded instances of an express reporter's privilege took place in the spring of 1912. A reporter for the *Philadelphia Record* published a series of articles alleging widespread corruption in the city's property selection process. When subpoenaed to testify, the reporter refused to reveal his source.¹⁸⁰ According to newspaper accounts of the proceeding, the judge then "ruled in effect that a newspaper man's confidence is inviolable, and decided that he had no power to require the reporter to be sworn or examined unless the reporter volunteered."¹⁸¹

Newspapers around the country celebrated the decision as a vindication of their right to protect confidential informants. The *Cincinnati Enquirer* wrote:

A question involving newspaper men and the inviolability of a confidence bestowed in a newspaper man has been definitely settled in Milwaukee, when a local Circuit Judge announced that he would refuse to require a reporter to testify as to the source of his information in regard to a news article that he wrote.¹⁸²

In a similar vein, the Kansas *Leavenworth Post* ran the headline, "Inviolability of Confidence Question Is Settled, Reporter Cannot Be Compelled To Reveal His Source."¹⁸³ The Minnesota *Brainerd Daily Dispatch's* headline read, "Need Not Break Confidence: Judge Holds Testimony of Newspaper Men Cannot Be Forced."¹⁸⁴ And in Alabama, the *Muskogee Times-Democrat* reported, "Newspaper Men Are Protected."¹⁸⁵

180. *Milwaukee Judge Refuses To Make a Newspaper Man Disclose His Source of Information*, CINCINNATI ENQUIRER, May 26, 1912, at 1; *Need Not Break Confidence: Judge Holds Testimony of Newspaper Men Cannot Be Forced*, BRAINERD DAILY DISPATCH, May 27, 1912, at 1.

181. *Confidence Held Inviolable*, FOURTH EST. (New York), June 1, 1912, at 3.

182. *Milwaukee Judge Refuses To Make a Newspaper Man Disclose His Source of Information*, *supra* note 180.

183. *Newspaper Etiquette: Inviolability of Confidence Question Is Settled, Reporter Cannot Be Compelled To Reveal His Source of Information Rules Milwaukee Court*, LEAVENWORTH POST, May 31, 1912, at 3.

184. *Need Not Break Confidence*, *supra* note 180.

185. *Newspaper Men Are Protected*, MUSKOGEE TIMES-DEMOCRAT, May 29, 1912, at 1.

Other accounts of successful privilege claims soon followed. In March of 1917, a judge in Chicago accepted a journalist's privilege claim. The *Chicago American* had printed a story alleging that the vice president of the garment workers' union had instructed union members to strike in violation of a court injunction. An editor at the paper was subpoenaed to testify, but he refused to reveal his source, arguing that a reporter could not be compelled to reveal the identity of his confidential informants.¹⁸⁶ The judge agreed, ruling that "[n]ewspaper reporters do not have to divulge the source of information if they do not desire to do so."¹⁸⁷

Over the next three decades, similar successes were reported in New York, Tennessee, and Mississippi. In August of 1935, a judge in Queens, New York accepted a privilege claim from a reporter at the *Brooklyn Eagle*. "[T]his court recognizes the right of a newspaperman to refrain from divulging sources of his information," he reportedly ruled from the bench. "If you feel that in doing this (taking the stand), it may interfere with this right you are at liberty not to take the stand at this time."¹⁸⁸ A Tennessee judge similarly extended a testimonial privilege to a writer for the Nashville *Tennessean*. The reporter refused to divulge his source for a story about bootleggers, arguing that doing so would violate journalists' code of ethics.¹⁸⁹ The judge declined to hold him in contempt. The press "must of necessity get its information through others. Much is given in confidence and I am unable to hold the witness in contempt on this matter."¹⁹⁰ And in 1949, a judge in Hattiesburg, Mississippi, allowed a reporter to protect a source on novel grounds: the freedom of the press.¹⁹¹

186. *Chi. American Staff May Be Dragged into Strike Mess*, DAY BOOK, Mar. 8, 1917.

187. *News Sources Confidential Says Chicago Judge*, FOURTH EST. (New York), Mar. 17, 1917, at 2; see also *Chicago Circuit Court Makes Important Ruling*, CHESTER TIMES, Mar. 9, 1917, at 9 ("That no newspaper can be forced to disclose the source of its information concerning articles it publishes and that no one can be forced to tell who wrote the article was the ruling made by Judge Baldwin of the Circuit Court.").

188. *Prosecution Rests in Trial of Rifle Gang: Court Backs Eagle Man Refusing To Testify on Events After Arrests*, BROOKLYN DAILY EAGLE, Aug. 20, 1935, at 2. The journalist had written a series of stories about a local rifle gang, and he was summoned as a witness at the trial of four of the gang's members. The reporter refused to testify on the grounds that his sources of information were privileged. The judge agreed. *Reporter's Data Held Privileged by Court: Queens Judge Rules He Need Not Testify on Methods of Police in Robbery Case*, N.Y. TIMES, Aug. 20, 1935, at 6.

189. *Court Upholds Press on Shielding Source*, N.Y. TIMES, June 1, 1948, at 25. Parts of the state were dry at the time.

190. *Id.*; *Court Upholds, Praises Tennessean Reporter in East State Inquiry*, TENNESSEAN, June 1, 1948, at 1.

191. When reporter Charles Pierce refused to reveal his source for a story about movie theaters showing films on Sunday evenings (in violation of Mississippi state law), the judge reportedly

3. *Legal Defenses*

Judges also protected the press by recognizing various defenses against disclosure. This Section reviews examples of this trend. It describes cases in which judges recognized a Fifth Amendment defense, a loss-of-income or -livelihood defense, and an honor defense. It argues that these defenses were occasionally used as a way to shield reporters and their sources.

a. *The Fifth Amendment Defense*

There are a number of examples of reporters successfully invoking a Fifth Amendment defense to protect the identity of a source – even when it seemed unlikely that the reporter had been implicated in any crime.¹⁹² The most prominent example is a 1915 Supreme Court case, *Burdick v. United States*.¹⁹³ Although this case is reported, it nonetheless fits within the de facto privilege narrative because the Court declined to extend an express reporter's privilege in *Burdick* but nonetheless found a way to protect the reporter and his source in practice.

In May of 1915, the *New York Tribune* published an article detailing widespread fraud in the nation's customs department.¹⁹⁴ A grand jury investigating these allegations summoned George Burdick, the *Tribune's* city editor, to testify about the newspaper's source of information. Burdick refused, arguing that this testimony would be self-incriminatory. In an effort to unmask Burdick's source,

held that “to force Pierce to reveal his source of information would be an encroachment upon the freedom of the press.” *Protection of News Sources Upheld*, DELTA DEMOCRAT-TIMES, Aug. 17, 1949, at 1; *Theaters and Police Wage Sunday Battle*, STATESVILLE DAILY REC., July 25, 1949, at 9. Even prior to the Mississippi case, a reporter had raised a First Amendment defense in the context of a legislative hearing. In August 1938, an editor for the *New Mexico Examiner* refused to reveal to the state legislature his source of information for an editorial alleging that the state's governor was involved in an effort to buy congressional votes. An article reporting on the hearing noted that the editor “based his refusal on the constitutional freedom of the press.” *House Inquiry of Charges Is Completed*, ALBUQUERQUE J., Aug. 30, 1938, at 1. The 1958 case *Garland v. Torre* is often cited as the first case in which a reporter claimed a privilege rooted in constitutional protections for the press. 259 F.2d 545 (2d Cir. 1958); see, e.g., Fargo, *supra* note 45, at 1072. And yet the newspaper accounts of the Mississippi and New Mexico cases suggest that reporters were raising First Amendment claims in court decades earlier.

192. For a discussion of contemporary examples of a reporter invoking a Fifth Amendment defense, see *infra* Section III.A.

193. 236 U.S. 79 (1915).

194. See *id.* at 85.

President Woodrow Wilson granted the editor a full pardon. Still, Burdick refused.¹⁹⁵ District Court Judge Learned Hand held him in contempt, reasoning that “[i]t would be preposterous to let [Burdick] keep on suppressing the truth.”¹⁹⁶ On appeal, the Supreme Court held that Burdick was not compelled to accept the pardon and could continue relying on a Fifth Amendment defense.¹⁹⁷

Observers have noted that it is unlikely that Burdick had been implicated in any crime and that his Fifth Amendment claim was almost certainly intended to protect his sources.¹⁹⁸ Legal scholar Zechariah Chafee reasoned that despite the contorted legal defense offered, Burdick secured “all the practical advantage of a special newspaper privilege by dressing himself up in the United States Constitution.”¹⁹⁹ Chafee argued that “[t]he prosecution would have been just as well off and saved much trouble for many persons if Burdick had been quietly dismissed from the stand as soon as he declined to betray a confidence.”²⁰⁰ Regardless of the Court’s reasoning, he noted, “the fact remains that the city editor did not talk.”²⁰¹

The *New York Times*’ editorial writers agreed, concluding that the Court had extended the privilege in fact, if not in law. While the decision “did not go into the right of newspaper men to receive confidential information and protect their informants,” it did “ha[ve] the effect of settling that question, since in [the] future any newspaper man interrogated concerning the source of his information may not only plead his constitutional immunity, but refuse a pardon.”²⁰²

b. *The Loss-of-Livelihood Defense*

Reporters and editors in the nineteenth and early twentieth centuries often argued that revealing a confidential source in court would threaten their livelihood. They argued that unmasking one informant would cause all of their

195. *Id.* at 86.

196. *United States v. Burdick*, 211 F. 492, 494 (S.D.N.Y. 1914).

197. *Burdick*, 236 U.S. at 93-94.

198. See, e.g., Note, *The Right of a Newsmen*, *supra* note 20, at 68 n.50 (noting that “there appeared to be little ground for believing that Burdick was involved in the frauds he had exposed”).

199. 2 ZECHARIAH CHAFEE, JR., *GOVERNMENT AND MASS COMMUNICATIONS* 498 (1947).

200. *Id.*

201. *Id.*

202. *A Misused Pardon*, N.Y. TIMES, Jan. 27, 1915, at 8. Curiously, five years later, a Seventh Circuit case presented a very similar fact pattern to *Burdick*, but the court rejected the reporter’s Fifth Amendment claim. *Elwell v. United States*, 275 F. 775 (7th Cir.), *cert denied*, 257 U.S. 647 (1921). The Seventh Circuit never even cited *Burdick*, and the Supreme Court denied certiorari.

sources to dry up, rendering them incapable of engaging in the business of news-gathering. Such claims usually failed; most judges reasoned that the pursuit of truth in the courtroom outweighed any negative impact on the reporter's business interests.²⁰³

But these claims were not always rejected outright. In 1933, for example, a reporter from the *Philadelphia Record* was subpoenaed to testify about his source of information for a story alleging corruption in the state alcohol licensing board. The reporter refused on the grounds that he would lose his job if he revealed his source, and the judge accepted his defense.²⁰⁴

While these loss-of-livelihood defenses were usually cast as threatening the individual business interests of the journalist, they sometimes strayed into larger claims about the importance of ensuring that reporters could engage in the work of newsgathering more broadly. For example, in 1914, the editor of a Hawaii newspaper argued the reporter's privilege should be recognized for the same reason as "any gentleman of the jury" would have "against giving his private business secrets publicity. It is our source of news that we rely on to enable us to get out a newspaper; and if we break confidence with the source of news we would lose all of our sources and would have no newspaper."²⁰⁵

In some ways, these arguments can be viewed as precursors to similar claims explicitly grounded in the First Amendment. When reporters described the harms that would flow from revealing a source, they did not always draw clear lines between the personal harm – or the negative impact to their business – and the public harm, or the fact that such disclosure would staunch the flow of information to the public.

203. See, e.g., *Plunkett v. Hamilton*, 70 S.E. 781, 785-86 (Ga. 1911) (rejecting a forfeiture of estate defense).

204. See *Distillery Seeks Alcohol Permit*, HARRISBURG TELEGRAPH, Dec. 1, 1933, at 1. One commentator wrote that there are different explanations for the court's lenient attitude. The fact that the testimony was relevant to a civil rather than a criminal proceeding may have compelled the court to expand the scope of the traditional forfeiture of estate defense to provide an alternative ground for protecting the reporter. Alternatively, the witness who took the stand after the reporter revealed that the deputy attorney general had been the confidential source, and the court may have protected the journalist on the ground that testimony was available from another source. See Talbot D'Alemberte, *Journalists Under the Axe: Protection of Confidential Sources of Information*, 6 HARV. J. LEGIS. 307, 316-17 (1969).

205. *In re Wayne*, 4 U.S.D.C. Haw. 475, 475-76 (1914).

c. *The Honor Defense*

In rare instances, reporters were also excused from testifying on the grounds that they had promised confidentiality to a source. The privilege was articulated in humanistic rather than instrumental terms: it was seen as morally necessary for a man to be permitted to keep his word.²⁰⁶ This “honor defense” – which permitted witnesses to withhold testimony on the grounds that violating an oath tarnished a man’s reputation – undergirded many early evidentiary privileges, including the attorney-client and doctor-patient privileges.²⁰⁷

As scholars have noted, early British cases emphasized that “[a] gentlemen does not give away matters confided to him.”²⁰⁸ But by the eighteenth century, British courts started to reject this defense. In 1776, a British court rejected the claim that it would violate an attorney’s obligations as a “man of honor” to be compelled to reveal a client confidence.²⁰⁹ A year later, the court wrote, “[T]he law knows nothing of that point of honour.”²¹⁰ The desire for uncovering the truth in judicial proceedings had won out over the desire to protect the honor of witnesses, and several evidentiary privileges disappeared in the late eighteenth century as a result.²¹¹ This also marked the moment at which many privileges were first justified on instrumental grounds. The attorney-client privilege, for example, survived in this way – without a privilege, the courts reasoned, clients would not speak freely, and lawyers would be unable to provide adequate representation.²¹²

206. See Melanie B. Leslie, *The Costs of Confidentiality and the Purpose of Privilege*, 2000 WIS. L. REV. 31, 48. But see JONATHAN AUBURN, *LEGAL PROFESSIONAL PRIVILEGE: LAW AND THEORY* 7-8 (2000) (arguing that early privileges “may from the start have been grounded on fairly straight-forward considerations of practicality that are closer to the modern instrumental rationale”).

207. Edward Livingston, writing in the early 1800s, explained that “[e]very feeling of justice, honour and humanity would be shocked” by an attorney’s disclosure of a client’s secrets. EDWARD LIVINGSTON, *A SYSTEM OF PENAL LAW, FOR THE STATE OF LOUISIANA* 277 (1833).

208. Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CALIF. L. REV. 1061, 1070 (1978).

209. EDWARD J. IMWINKELRIED, *THE NEW WIGMORE: A TREATISE ON EVIDENCE: EVIDENTIARY PRIVILEGES* § 2.4 (citing *The Duchess of Kingston’s Case* (1776) 168 Eng. Rep. 175 (HP)).

210. *Id.* (citing *Trial of James Hill*, 20 HOW. ST. TR. 1317, 1362-63 (1777)).

211. See *In re Colton*, 201 F. Supp. 13, 15 (S.D.N.Y. 1961), *aff’d sub nom.* *Colton v. United States*, 306 F.2d 633 (2d Cir. 1962).

212. *Id.* (explaining that the attorney-client privilege remained “on the new theory that it was necessary to encourage clients to make the fullest disclosures to their attorneys, to enable the latter properly to advise the clients”).

While the honor defense was formally eliminated in British courts in the late eighteenth century, it continued to animate judicial decisions in early America. For example, the Supreme Court of Connecticut accepted an honor defense in 1792.²¹³ And even in the nineteenth and early twentieth centuries, after the honor defense had been formally eliminated in the United States,²¹⁴ reporters often continued to raise some form of an honor argument. These efforts were almost always rejected, but occasionally a judge would be sympathetic to an honor claim.

Such was the situation in an 1887 case arising from a story published in the *Atlanta Constitution*, which provided a detailed account of secret grand jury proceedings.²¹⁵ The reporter, E.C. Bruffey, refused to reveal the identity of his source. He was found in contempt and ordered jailed for ten days.²¹⁶ The decision was overturned on appeal, with the appellate court reasoning, in part, that “[h]ad the respondent testified, his testimony would have tended to incriminate himself and bring upon himself disgrace and public contempt.”²¹⁷

Once again, some observers viewed this decision as conferring broader protections on the press. “Mr. Bruffey is entitled to the thanks of the newspaper men in this country for his courageous and successful defense of his professional rights,” the *Atlanta Constitution* wrote.²¹⁸

His conduct in this matter proves that he was faithful to the newspaper he represents, true to his relations to the public as a gatherer of news, and determined to stand up to his duty as a man. By pursuing these clearly defined lines of conscientious conduct, Mr. Bruffey has done much to settle a long disputed question.²¹⁹

And like the forfeiture of estate defense, this loss-of-honor argument often surfaced broader questions about the importance of newsgathering writ large.

213. *Mills v. Griswold*, 1 Root 383, 383 (Conn. 1792) (holding that confidential communications that are “necessary in the course of business” will be honored).

214. See *In re Colton*, 201 F. Supp. at 15 (noting that “[i]n the eighteenth century, when the desire for truth overcame the wish to protect the honor of witnesses . . . several testimonial privileges disappeared”).

215. *A Pen Picture of the Inside of the Grand Jury Room, As Given by a Member of the Jury*, ATLANTA CONST., Sept. 25, 1887.

216. *Bully Boy Bruff. The “Little Giant” Refuses To Betray an Informant. Is Sent to Jail in Consequence*, ATLANTA CONST., Nov. 9, 1887.

217. *Bruffey Free Again. Judge Marshall J. Clarke Renders His Decision: The Reporter Is Congratulated*, ATLANTA CONST., Nov. 12, 1887. This was one of three grounds offered for reversal.

218. *Rights of a Newspaper Man*, ATLANTA CONST., Nov. 20, 1887.

219. *Id.*

Reporters who argued that the privilege was necessary to protect their honor occasionally raised larger claims about the importance of the privilege to the newsgathering process.²²⁰

4. *Ad Hoc Privileges*

Judges also cobbled together various ad hoc protections as a way to shield reporters who refused to reveal confidential information before the court. This Section offers some examples. It describes judicial efforts to protect reporters by deeming their testimony immaterial to the proceedings or by declining to hold them in contempt. It then chronicles the ways in which judges conferred special treatment on reporters who had been held in contempt—for example, by granting reduced jail time or by permitting special conditions of confinement.

a. *Reporter Testimony Held Not Material*

Cases turning on the materiality or relevance of a reporter's confidential information have not traditionally been considered part of the reporter's privilege canon—with good reason. The bounds of this category can be porous and hard to draw. It can be difficult to distinguish between a decision motivated by a desire to protect the press and one motivated by a sincere belief that the reporter's testimony was immaterial to the proceeding. Nonetheless, this Article's methodology casts at least some of these cases in a new light. In some, news commentary surrounding the case, combined with the text of the decision itself, suggests that the judge may have relied on the relevance or materiality requirements as a means of protecting reporters.

For example, in 1891, the *Helena Daily Journal* published an article criticizing a local judge. The judge targeted in the article pressed the editor of the paper to reveal the identity of the source quoted in the story. The editor refused, and the judge held him in contempt and sentenced him to jail.²²¹ The Montana Supreme Court subsequently granted the editor's habeas petition, reasoning that even if

220. See, e.g., *Elwell v. United States*, 275 F. 775, 779 (7th Cir. 1921) (noting that the following exchange occurred between an editor and the grand jury over the identity of the author of an article: “Q. Will you tell the grand jury the name of that man? A. I will not. I decline to give the name of the writer of that article, because I feel in honor bound to protect him, because, if newspapers do not protect people who furnish them news, it would be impossible for them to get news.”).

221. *In re MacKnight*, 27 P. 336, 337 (Mont. 1891).

the article were libelous, the identity of the source would not be relevant because the editor of the paper could be held liable.²²²

The court then went further, admonishing the lower court judge for using his contempt power to achieve political ends. Judicial contempt authority should not be used “to enforce sentimental respect” for the courts, the Montana Supreme Court wrote. “That must be gained by other means, and will flow . . . where law and justice is administered with able, fearless, and impartial fidelity.”²²³ While the decision nominally turned on the court’s determination that the source’s identity was not material, newspapers from the time cast the decision as one intended to protect the press. One newspaper ran a story about the reporter’s release under the headline: “A case of press privilege.”²²⁴

The press took a similar view of an 1884 case out of Massachusetts. The Massachusetts judge had found that a grand jury could not compel a reporter to reveal his source for an article recounting secret grand jury proceedings.²²⁵ The source of the leaks, the judge reasoned, was not relevant to the grand jury’s underlying murder investigation.²²⁶ But dozens of newspaper articles cast the decision as one intended to ensure that the press would be protected in court. The *Boston Globe*, for example, wrote an editorial analogizing the reporter’s privilege to the attorney-client privilege:

222. *Id.* at 337-39.

223. *Id.* at 339.

224. *A Case of Press Privilege, Russell Harrison’s Paper Wins Against Judge McHatton*, KALAMAZOO GAZETTE, Aug. 12, 1891, at 8. Observers sometimes interpreted decisions that turned on the materiality of a source’s identity as granting an express privilege. From an instrumental perspective, this perception matters. If the public believes the privilege exists, the instrumental benefits of a privilege are enjoyed, even if such privilege does not exist in the law. Of course, this also raises the question of the accuracy and reliability of news reports about reporter’s privilege cases. I have tried, where possible, to cross-reference reports about a case across various outlets and with other historical sources to verify their accuracy. But it is possible that there are some inaccuracies in the news reports cited in this Article. See discussion *supra* Section II.A.1.a (discussing the limitations of relying on newspapers as a source of legal history).

225. *Charles F. Jones’ Bail Reduced*, CHI. DAILY TRIB., Dec. 4, 1884; *The Contumacious Reporters Sustained*, PHILA. TIMES, Dec. 5, 1884; *The Lane Murder. Dorchester’s Tragedy of Twelve Years Ago. Alleged Confession of the Murderer in a Western Jail. The Matter Before the Suffolk County Grand Jury*, BOS. DAILY GLOBE, Nov. 30, 1884.

226. *The Contumacious Reporters Sustained*, *supra* note 225. Some judges ruled differently on this question, holding that a grand jury was empowered to subpoena a reporter for his source of information about the grand jury proceedings themselves, rather than about the underlying crime that the grand jury was empaneled to investigate. See, e.g., *In re Grunow*, 85 A. 1011, 1012 (N.J. 1913) (articulating a broad view of a grand jury’s power to subpoena witnesses).

The decision is important as establishing and recognizing the principle that newspapers to do successful work must be permitted if they so desire to keep their sources of information secret. That principle enables them to ferret out and secure valuable news for the people and oftentimes for the authorities which otherwise they would be unable to get. It places journalists in somewhat the same relation to those who give them news that a lawyer bears to his client and is qui[te] as important for the general good.²²⁷

These and other cases demonstrate that judges and judicial observers may have looked to the materiality requirement as an important source of protection for the press. They also serve as early examples of the idea that confidential sources play a critical role in holding government officials and others in power accountable.

b. Declining To Hold Reporters in Contempt

While judges occasionally conferred an express privilege on the press, they more often protected reporters by simply declining to hold them in contempt. In these cases, no express privilege was granted, but reporters were able to protect their sources nonetheless. As these examples mounted, outside observers began to argue that judges were acting out of a desire to protect the press. They reasoned that reporters who were able to protect their sources without consequence had secured the same benefits as they would have with a formal privilege. Whether the judge expressly conferred this privilege, they reasoned, mattered little – the source was shielded either way.

The earliest example of such leniency can be seen in one of the most celebrated cases in American legal history – and a rare case in which protection came in the form of a sympathetic jury, rather than a judge. In 1735, John Peter Zenger, the publisher of the *New York Weekly Journal*, refused to reveal the identity of the anonymous author of articles criticizing the British Governor of New York.²²⁸ In response, the Governor charged Zenger for seditious libel.²²⁹ It was a difficult charge to fight. At the time, truth was not a defense to libel, and the jury only

²²⁷. *An Important Decision*, BOS. DAILY GLOBE, Dec. 5, 1884.

²²⁸. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 361 (1995) (Thomas, J., concurring) (describing the case of John Peter Zenger).

²²⁹. *Id.*

needed to find that Zenger had published the offending material. A judge would then determine whether the publications were in fact libelous.²³⁰

Zenger's attorney decided to pursue a risky legal strategy. He conceded to the jury that Zenger had published the material—the only factual inquiry that the jury was charged with resolving. But he urged jury members to consider the stakes of the case. “[I]t is not the cause of a poor printer, nor of New York alone, which you are now trying,” he told them.²³¹ “No! It may, in its consequence, affect every freeman that lives under a British government on the main of America. It is the best cause; it is the cause of liberty”²³²

In one of the earliest and most famous examples of jury nullification in U.S. history, the jury returned a verdict of not guilty. Zenger was freed.²³³ This case offers the earliest recorded American example of a jury stretching the bounds of the law to shield the identity of a confidential source or author. As Justice Thomas wrote in the landmark First Amendment case *McIntyre v. Ohio Elections Commission*, the Zenger trial “signified at an early moment the extent to which anonymity and the freedom of the press were intertwined in the early American mind.”²³⁴

The question of a reporter's ability to shield a confidential source surfaced again nearly a century later in *United States v. Sheldon*.²³⁵ In January of 1829, the *Detroit Gazette* published an article claiming that the Supreme Court of the Territory of Michigan had erred in its selection of jury members for a burglary trial.²³⁶ The court ordered the editor of the *Gazette* to demonstrate why he should not be held in contempt for the publication. The editor argued that the court lacked jurisdiction to hold him in contempt, that the offending article was not contemptuous, and that his right to publish the article was protected by the First

230. Frederick Schauer, *The Role of the People in First Amendment Theory*, 74 CALIF. L. REV. 761, 763 n.4 (1986).

231. T.B. HOWELL, XVII A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER MISDEMEANORS 722 (1816).

232. *Id.*

233. *Id.* at 723; see also WILLIAM LOWELL PUTNAM, JOHN PETER ZENGER AND THE FUNDAMENTAL FREEDOM (1997) (chronicling the Zenger trial and its effect on the development of First Amendment law).

234. 514 U.S. at 361 (Thomas, J., concurring). Constitutional protections for anonymous speech are also intertwined with reporter's privilege claims. Most recently, one scholar has argued that the privilege should be reconceptualized as the right of a source to speak anonymously, rather than the right of a reporter to protect the source's identity. See Jones, *supra* note 21.

235. 5 Blume Sup. Ct. Trans. 337 (Mich. Terr. 1829).

236. *Id.* at 338-39.

Amendment.²³⁷ The court rejected all three claims. It held that the article “is upon the face of it an open, undisguised, and disingenuous attack upon the official character of the judges of this court.”²³⁸ And it further held that any First Amendment protections granted to the press did not extend so far as to permit the publication of “what is false or malicious, or of unlawful tendency.”²³⁹ The case stands out as an early example of the courts’ long struggle to define the contours of the First Amendment. The editor raised a First Amendment defense at a time when members of the press rarely looked to the Bill of Rights as a source of protection.²⁴⁰

Although the literature has never characterized it as such, the case is also notable because the court declined to find the reporter in contempt for refusing to reveal a source. Prior to its decision, the court had submitted a series of interrogatories to the editor. They included the following: “Whether you was the author or writer of the [article], or any part thereof, and what part; and if you was not the author or writer thereof, state who was such author or writer, and whether the same was composed and written by you request or procurement [sic].”²⁴¹

The editor responded that he had written some parts of the offending article and that other parts were “communicated to me at my request.”²⁴² But, he wrote,

I cannot inform this court or any other individuals from whom I obtained the matters and information contained in the aforementioned 4th & 5th paragraphs and extracts [of the article], without rendering myself obnoxious to the contempt of all honorable men—I can only say, that that information and those extracts were given me by a respectable and intelligent citizen, or by respectable and intelligent citizens.²⁴³

The court explained that it had the power to press the issue, but that it would not do so. “You have confessed that you have had other aid:—And we cannot

237. *Id.* at 339-40, 346.

238. *Id.* at 356.

239. *Id.* at 346.

240. This was in large part because the Supreme Court had not yet held that the Bill of Rights applied to the states. *Cf.* David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 *YALE L.J.* 514, 557 (1981).

241. *Sheldon*, 5 Blume Sup. Ct. Trans. at 340.

242. *Id.* at 341.

243. *Id.*

avoid the suspicion, painful as the reflection may be, that your anonymous correspondent, is some vain – some recreant member of the bar!”²⁴⁴ But, the court noted:

We do not feel disposed to exercise, further than our duty may compell us, any inquisitorial power to obtain that knowledge; – for if we were possessed of it, public justice – self respect – respect for the laws of the land, would impose upon us a duty, so painful, that, if practicable, we could wish to avoid it.²⁴⁵

The court’s decision not to compel the editor to reveal his source was motivated by a desire to avoid punishing a lawyer, rather than by a desire to protect a member of the press.²⁴⁶ But the decision nonetheless offers a glimpse into how early American courts may have conceived of reporters’ efforts to protect the identities of their confidential sources. It suggests that these courts may not have considered a reporter’s refusal to reveal a source as an affront to their authority and power. The court was outraged by the source’s behavior. And yet the reporter’s refusal to answer the interrogatory warranted barely a mention.

With the exception of *Sheldon* and *Ex Parte Nugent*, discussed above,²⁴⁷ the jury’s decision in *Zenger* was followed by nearly 150 years of relative silence on the issue of a reporter’s privilege.²⁴⁸ Questions surrounding the existence and

^{244.} *Id.* at 363.

^{245.} *Id.*

^{246.} The court fined Sheldon one hundred dollars for writing contemptuous articles, which he refused to pay. The court then ordered him to jail. The city was outraged. A public dinner was arranged at the jail in his honor. Nearly three hundred people attended, at a time when Detroit had only 2,200 residents. According to a history of the state of Michigan, “[t]he meeting was both serious and hilarious. Songs, toasts, and speeches were the order of the day, and the old jail rang and rang again with the cheers of the gathered throng. The first toast, for John P. Sheldon, was offered by Major Kearsley; the second, ‘The Press,’ by D. C. McKinstry; and the third, ‘Liberty of speech and of the press guaranteed to every citizen by our laws and constitution – a jury must decide on the abuse of either,’ was offered by John Farmer.” SILAS FARMER, *THE HISTORY OF DETROIT AND MICHIGAN OR THE METROPOLIS ILLUSTRATED: A CHRONOLOGICAL CYCLOPÆDIA OF THE PAST AND PRESENT* 672 (2d. ed. 1889).

^{247.} See *supra* notes 29-31 and accompanying text.

^{248.} Claims of privilege arose in the course of congressional investigations at this time. See *infra* Section II.B. But the courts seem to have addressed few privilege claims. One explanation for the dearth of case law on this issue is that there were relatively few reported cases in this era overall. Another is that efforts to identify the source or author of an article during this era arose most often in the course of libel charges. A publisher was equally liable for any libel, obviating the need to ascertain the identity of an author or the source in order to win a libel claim. See, e.g., *Pugh v. Starbuck*, 1 Ohio Dec. Reprint 143, 145-46 (Super. Ct. Cincinnati 1845); *Dexter v. Spear*, 7 F. Cas. 624, 625 (C.C.D.R.I. 1825) (No. 3,867).

scope of a reporter's privilege only began to resurface in the wake of the Civil War. In the early 1870s, the *New York Times* became embroiled in a two-front war with powerful Tammany Hall boss William Tweed on one side and rival newspaper the *New York Tribune* on the other. It was a historic moment—the *Times*' efforts to expose Tweed would become a turning point in American political and journalistic history.²⁴⁹ Both fights would also raise important questions about the existence and scope of a reporter's privilege.

Throughout the summer and fall of 1871, the *Times* published a series of articles alleging that Tweed's campaign of graft, corruption, and extortion had robbed the city of somewhere between \$30 and \$200 million.²⁵⁰ That fall, prompted by the *Times*' exposé, a federal grand jury opened an investigation into the city's mayor, who was a member of the four-man "lunch club" that Tweed used to control the city's finances.²⁵¹ George Jones, the co-founder and publisher of the *Times*, was subpoenaed to testify before the grand jury. The *Times* reported that Jones was asked to give the names of the paper's confidential sources but that he declined, arguing that the information was privileged. He was then released.²⁵²

The incident is notable for the leniency granted to Jones. But it also stands out as an early example of the ways in which newspapers publicly grappled with the scope of the privilege they asserted. The following year, Jones was again subpoenaed to testify. This time, he was called before a legislative committee investigating the *Times*' reports that the city's insurance superintendent had committed fraud. Once again, Jones refused to reveal the names of the *Times*'

249. N.R. Kleinfield, *150th Anniversary: 1851-2001; Investigative Reporting Was Young Then*, N.Y. TIMES (Nov. 14, 2001), <http://www.nytimes.com/2001/11/14/news/150th-anniversary-1851-2001-investigative-reporting-was-young-then.html> [<http://perma.cc/8CQC-UDU8>].

250. Robert C. Kennedy, *On This Day: August 19, 1871*, N.Y. TIMES (Aug. 19, 2001), <http://www.nytimes.com/learning/general/onthisday/harp/0819.html> [<http://perma.cc/4PAB-L553>]. In the summer of 1871, one of Tweed's subordinates approached George Jones, the co-founder and publisher of the *New York Times*. The man offered Jones \$5 million (the equivalent of nearly \$100 million today) if the *Times* would stop exposing Tweed's corruption. "Why, with that sum, you can go to Europe and live like a prince," the man reportedly said to Jones. "Yes, but I should know that I was a rascal," Jones replied. David W. Dunlap, *A Happy 200th to The Times's First Publisher, Whom Boss Tweed Couldn't Buy or Kill*, N.Y. TIMES: CITY ROOM (Aug. 16, 2011, 1:06 PM), <http://cityroom.blogs.nytimes.com/2011/08/16/a-happy-200th-to-the-times-first-publisher-whom-boss-tweed-couldnt-buy-or-kill> [<http://perma.cc/3FHK-MJYH>].

251. Pete Hamill, *'Boss Tweed': The Fellowship of the Ring*, N.Y. TIMES (Mar. 27, 2005), <http://www.nytimes.com/2005/03/27/books/review/boss-tweed-the-fellowship-of-the-ring.html> [<http://perma.cc/7NYS-8UVA>].

252. *Journalistic Responsibility*, N.Y. TIMES, Nov. 3, 1873, at 4.

confidential informants on the grounds that this information was privileged.²⁵³ At the time, the *Tribune* criticized Jones for his stance, insinuating that the *Times* editor was motivated not by a sense of professional duty, but instead by a desire to protect corrupt New York officials.²⁵⁴

A year later, however, the *Tribune* found that the tables had turned. In the fall of 1873, the *Tribune*'s own editor, William Shanks, found himself in the court's crosshairs for refusing to reveal the author of an allegedly libelous article.²⁵⁵ After Shanks was jailed for this refusal, the *Tribune* penned a full-throated defense of the reporter's privilege. "A free press is one of the chief safeguards of a free government, and it is owing in no slight degree to the watchfulness of the newspapers that some virtue remains in public officers," the *Tribune* wrote.²⁵⁶

But the press is not really free if an editor can be forced to tell the secrets of his office, or a subordinate questioned about matters which ought to be confidential between him and his employers. Journalists could never obtain news unless it were an understood thing that they would shield their contributors, and take the full responsibility for whatever they publish.²⁵⁷

The benefits of these early accounts are twofold. They reveal that judges could be lenient with reporters who refused to reveal a source, even in very early reporter's privilege disputes. But they also reveal important insights into the evolution of the press's conception of the privilege. The *Times-Tribune* dispute

253. *Miller's Defense. Examination of Two Conductors of the Times*, N.Y. TIMES, Mar. 7, 1872, at 2.

254. *See Harboring Bad Characters*, N.Y. TRIB., November 28, 1871, <http://chroniclingamerica.loc.gov/lccn/sn83030214/1871-11-28/ed-1/seq-4.pdf> [<http://perma.cc/7VV2-N2YJ>]. The *Tribune* argued that Jones's refusal served as evidence that the *Times* was protecting the Tammany Hall mayor. *Id.*; see also *The Other Side. Some Necessary but Hard Lessons for Mr. Greeley—Candid Opinions of the Independent Press About the New York Tribune*, N.Y. TIMES, Nov. 22, 1871, at 5. The *Tribune* reported that during Jones's grand jury testimony, Jones whitewashed the corrupt mayor and became so agitated by the questioning that he nearly threw an inkstand at one of the members of the jury and calmed down only after a pail of water was dumped over his head. *The Mayor's Case. The Jones Inquest*, N.Y. TRIB., Nov. 21, 1871, at 1.

255. *People ex rel. Phelps v. Fancher*, 4 N.Y. Sup. Ct. 467 (App. Div. 1874); see also *supra* notes 32-33 and accompanying text.

256. *Personal Liberty*, N.Y. TRIB., Oct. 29, 1873, at 4. The *Times* criticized the *Tribune*'s hypocrisy by republishing the *Tribune*'s 1872 column criticizing the reporter's privilege alongside the *Tribune*'s 1873 column defending the privilege. *Journalistic Responsibility*, *supra* note 252, at 4. The *Times* noted that the contrast allowed for a "better understanding of [the *Tribune*'s] present humiliating position," and that the *Times* would "leave our readers to draw their own conclusions." *Id.*

257. *Personal Liberty*, *supra* note 256, at 4.

marks a critical shift in how the privilege was formulated. Arguments that the privilege was necessary to protect the individual reputational or business interests of a reporter had begun to give way to broader claims about the role of the press and their sources in the democratic system.

Judges in subsequent decades continued to quietly dismiss, without punishment, reporters who refused to reveal their sources. Presumably, many of these instances were never recorded at all.²⁵⁸ But examples of such leniency can be found scattered throughout the newspapers of this era and of the early twentieth century.²⁵⁹ In 1891, a New Orleans reporter successfully argued that he could not “jeopardize his chances of securing news by telling what took place.”²⁶⁰ The local newspaper reported that “for a time it looked as if [the reporter] would be sent to jail for contempt; but after being out for a few minutes the jury reported it had dropped the matter.”²⁶¹ In 1896, a reporter from the *Oswego Daily Times* was released without punishment after refusing to reveal his source to a grand jury.²⁶²

258. See discussion *supra* note 157 and accompanying text.

259. Some of these cases do not fit neatly into a single category. For example, in January of 1921, two editors who refused to reveal their sources were jailed “for a few minutes,” and then released. *Editor Jailed for His Silence*, NEW CASTLE HERALD, Jan. 28, 1921, at 11. Other privilege cases of this era fell somewhere between the right to invoke a reporter’s privilege and the right to publish anonymously. For example, in April of 1894, the editorial team of the *New Haven Register* was summoned before a judge “to show cause why they should not be held for contempt for inaccurately reporting the proceedings in a recent murder trial.” *Reporters in Trouble*, COLUMBIAN (Bloomsburg, Pa.), Apr. 27, 1894, at 1. The editors refused to reveal who wrote the story, and the judge, frustrated, temporarily dismissed the case.

260. *The Grand Jury at Work: A New Orleans Reporter Refuses To Tell What He Knows*, SALT LAKE TRIB., Apr. 11, 1891, at 1. To provide another example from this era, in 1879, a reporter with the *St. Louis Globe-Democrat* was initially jailed for refusing to reveal who had leaked the contents of secret grand jury proceedings. The judge soon relented. After confirming that the source was not a member of the grand jury, he allowed the reporter to be released. *St. Louis Items*, DAILY COMMONWEALTH (Topeka, Kan.), Feb. 1, 1879, at 1 (“Morris Renshaw, the *Globe-Democrat* reporter who was sent to jail some days ago for contempt of court in refusing to answer certain questions of the Grand Jury, was before that body again to-day, and in reply to a question asking if he obtained the information he published from any member of the grand jury, he answered No, whereupon he was discharged, and is now breathing the air of freedom.”).

261. *New Orleans Grand Jury: A Reporter Sternly Refuses To Tell What He Knows*, PITTSBURGH PRESS, Apr. 11, 1891, at 1.

262. *Reporter Would Not Tell: Grand Jury Could Not “Pump Him” and Let Him Go*, FOURTH EST. (New York), Oct. 22, 1896, at 3 (noting that the grand jury “made a desperate effort to make [the reporter] reveal how and from whom he has been getting inside information about the business of the grand jury,” but that the reporter refused, “saying that the matter came to him in his professional capacity and was what might be termed a privileged communication,” and that “[a]fter trying for some time to ‘pump’ him, with no success, he was allowed to depart”).

In 1903, a *Detroit Journal* reporter was permitted to shield his source of information from a grand jury without penalty.²⁶³ In 1905, the editor of a newspaper in Pennsylvania was permitted to protect his source of information for a story alleging embezzlement of public funds.²⁶⁴ And in 1923, a reporter from the *Miami Daily Metropolis* successfully refused to reveal his confidential sources for a story about a ring of con artists that was preying on winter tourists.²⁶⁵

c. *Lenient Treatment for Reporters After a Finding of Contempt*

The final category of cases is the broadest and most difficult to define. It consists of cases in which a reporter was formally held in contempt but was subsequently granted some form of special treatment by the judge, such as early release or lenient conditions of confinement.²⁶⁶ There are inherent difficulties with identifying and cabining such cases. Unless a judge explicitly acknowledged that he was granting special treatment to a reporter, it is hard to prove that he was motivated by a desire to protect the press. In the examples below, either the judge's language or the commentary surrounding the incident suggests that the court may have extended special treatment based on a reporter's status as a member of the press.

Through the decades, one familiar pattern in this kind of case emerged: after a judge jailed a reporter for refusing to reveal a source, the press would grow outraged, and the judge would quickly release the journalist, often without explanation. Such was the case of John Dennis, Jr., a Rochester-based *Democrat and Chronicle* reporter. In 1885, Dennis published an article alleging that city officials had been bribing jury members. He was subpoenaed to testify before a grand

263. The judge dismissed the journalist without punishment, reportedly on the grounds that "the grand jury could not investigate itself." *Contempt Case Was Dismissed: Proceeding Against Schmedding Came to Nothing*, DETROIT FREE PRESS, Sept. 16, 1903, at 4.

264. The attorney conducting the investigation "several times characterized the witness'[s] silence as 'contempt' and intimated that there might be serious consequences if refusal to testify was persisted in." The editor "replied that the ethics of journalism did not permit him to reveal his sources of information." The county controller overseeing the proceedings excused the editor without punishment. *The Almshouse Probe: Investigation Being Continued in the County Controller's Office After the Manner of the Grand Jury*, READING TIMES, Apr. 18, 1905, at 3.

265. *Miami Daily's Editors Get Subpoenas for "Inside" Wiretapping Story*, FOURTH EST. (New York), Jan. 6, 1923, at 22.

266. In some cases, the language in the decision or the circumstances surrounding the case suggest that the judge is acting out of sympathy for the reporter. In others, the judge seems to be acting out of a desire to avoid or put an end to negative publicity.

jury.²⁶⁷ When he refused to disclose his source, the judge held him in contempt and sent him to jail until he agreed to reveal the informant's identity.²⁶⁸

The press was appalled. By that afternoon, "a majority of the journalists of the city assembled at the jail, and being granted the use of the sheriff's parlors, held a meeting" in which they drafted a resolution "approving Mr. Dennis' position and criticising a law that would condemn an innocent man to incarceration, without bail, for refusing to divulge sources of information while engaged in the work of exposing corruption."²⁶⁹ As one paper reported, "At the jail, Mr. Dennis held a levee in the afternoon. Lawyers, business men, physicians, clergymen, and others, called on him, and his apartment was strewn with remembrances from personal friends."²⁷⁰ The *Democrat and Chronicle* reported that the police commissioner and chief of police both visited Dennis to "extend their sympathy."²⁷¹

Dennis was released the next day. Under the headline "An Imprisonment Quickly Ended," the *New York Times* reported that Dennis's incarceration "came to an unexpectedly sudden termination," and noted that the judge who committed Dennis "departed suddenly from his home [that same day], leaving a case unfinished and a jury out."²⁷² Although the case nominally refuted the existence of a privilege, the reporter's swift release seemed to observers to legitimate Dennis's claim to a testimonial privilege. Indeed, years later, in Dennis's obituary, one newspaper wrote, "[i]t was Mr. Dennis who established, some years ago, the principle that in New York State a newspaper reporter need not divulge the source of information given him."²⁷³

In other cases, the judicial system afforded reporters particularly lenient conditions of confinement. For example, in 1886, *Baltimore Sun* reporter John T. Morris refused to disclose his source of information about secret grand jury proceedings.²⁷⁴ The judge rejected Morris's claim to a privilege, explaining that he was "extremely sorry that it [was his] duty to have to do anything," but that he

267. SAMUEL MERRILL, *NEWSPAPER LIBEL: A HANDBOOK FOR THE PRESS* 123 (1888).

268. *No Information Obtained: A Reporter with a Secret Sent to Jail for Contempt of Court*, N.Y. TIMES, Jan. 30, 1885, at 6. Curiously, a second reporter who refused to reveal a source that same afternoon was released without punishment. *Id.*

269. MERRILL, *supra* note 267, at 123.

270. *Id.*

271. *He Breathes the Air Again: Unconditional Release of the Obstinate Democrat and Chronicle Reporter*, DEMOCRAT & CHRON. (Rochester), Jan. 31, 1885, at 7.

272. *An Imprisonment Quickly Ended*, N.Y. TIMES, Jan. 31, 1885.

273. *Well Known Newspaper Man Passes Away*, FOURTH EST. (New York), Jan. 10, 1920, at 30.

274. Gordon, *supra* note 23, at 449.

could not permit the reporter to withhold his source simply because he had given his word.²⁷⁵ The judge ordered Morris into the sheriff's custody until he answered the grand jury's questions.

The sheriff, however, took pity on Morris. Rather than detain the reporter in jail, the sheriff took Morris to his own home and held him there for the duration of his term of confinement. The papers reported that Morris was permitted to spend Christmas with his family and to entertain guests, and that he received a bottle of champagne from a friend each night of his two-week confinement.²⁷⁶ One paper reported, "He has spent the time pleasantly, receiving many calls and getting a good rest. He was congratulated right and left today upon his manliness and determination."²⁷⁷ Morris's detention was widely condemned by the press, and backlash from the incident eventually contributed to Maryland's enactment of the nation's first statutory shield law.²⁷⁸

Similarly, when William Nugent was imprisoned in 1848 for refusing to reveal the identity of a confidential source to the Senate, his conditions of imprisonment were hardly spartan.²⁷⁹ Nugent spent his days locked in a committee room in the Senate and his nights at the home of the Senate's Sergeant at Arms. Eventually, the Senate released him for "health reasons."²⁸⁰ In a subsequent congressional dispute over whether to compel a member of the press to surrender confidential information, one senator argued that it would be futile for them to punish reporters who refused to testify, citing Nugent's case as an example. The senator reminded Congress that when Nugent was imprisoned, "the Sergeant-at-Arms took him to his house, gave him the best room in his house, the best meat and the best liquor that the city afforded, and boarded him, and we paid the bill."²⁸¹

275. *Id.* at 455. There are other examples of a judge expressing sympathy for a reporter's position. In one case, a judge ordered two reporters jailed for contempt for refusing to disclose the identity of a source. But he did so with the following lament: "It is unfortunate to see two young men such as you are with splendid records go to jail, but if you feel you are fighting for a cause and upholding your code of honor, that is for you to determine. The law leaves nothing else for me to do." *Id.* at 258.

276. *The Brave Reporter's Christmas*, N.Y. TIMES, Dec. 26, 1886.

277. *Reporter Morris Free*, WILKES-BARRE REC., Jan. 10, 1887, at 1.

278. Although Morris's imprisonment was a factor in the enactment of the subsequent legislative shield, the link was not as direct as is often reported. See Gordon, *supra* note 23, at 462-71.

279. See *supra* notes 30-31 and accompanying text.

280. Mark Bowden, *Lowering My Shield*, COLUM. JOURNALISM REV., July/Aug. 2004, at 24, 28.

281. CONG. GLOBE, 34th Cong., 3d Sess. 438 (1857).

In this way, two distinct tracks of reporter's privilege cases emerge. In the reported case law, reporter's privilege disputes are infrequent and almost uniformly rejected. The unpublished case law, however, tells a more complex story. These cases reveal that judges often exercised their discretion to protect the press. And for a time, these parallel tracks functioned smoothly; until the 1960s, reporter's privilege disputes surfaced only sporadically, and reporters were rarely jailed for refusing to surrender a source.

But the number of reporter's privilege controversies began to increase in the late 1960s and 1970s, fueled by a confluence of social and political factors.²⁸² During this era, judges also shifted from using their discretion to protect reporters implicitly towards grappling more seriously with reporters' claims to a constitutional privilege. Some even conferred a First Amendment privilege in reported cases.²⁸³ This trend was reflected in unreported decisions as well, where judges began to hold that the First Amendment conferred some form of testimonial privilege on members of the press—a pattern that continued until the *Branzburg* decision.²⁸⁴

B. *The Legislative Branch: Protecting Reporters by Legislative Discretion*

The judicial branch has long discovered creative ways to shield reporters. But the role of the legislative branch in protecting the press has been largely overlooked. While the legislative branch has the power to compel reporters to reveal confidential information in the context of legislative proceedings, it has often declined to do so. And this exercise of prosecutorial discretion to shield reporters and their sources historically has operated as an important, yet underexamined, protection for the press.

Congress has the power to hold uncooperative witnesses in contempt,²⁸⁵ and in the first decades of the new republic, it held recalcitrant reporters in contempt

282. See *supra* text accompanying note 55-57.

283. See, e.g., *Caldwell v. United States*, 434 F.2d 1081, 1083-86 (9th Cir. 1970), *rev'd sub nom. Branzburg v. Hayes*, 408 U.S. 665 (1972).

284. For example, in May 1969 a judge in Kansas ruled that three reporters were not required to reveal their sources, despite the absence of a state statutory shield. *Judge Protects Newsmen Status*, DAILY INDEP. J. (San Rafael, Cal.), May 28, 1969, at 28. The author of a PhD thesis on the reporter's privilege wrote the following year that the District Attorney told the reporters that the judge had been "trying to build a constitutional case for the defendant's right to information." Gordon, *supra* note 23, at 699.

285. When a witness refuses to respond to a subpoena to hand over documents or testify before Congress, the legislative body can rely on its inherent powers to punish a nonmember for contempt. *Anderson v. Dunn*, 19 U.S. 204, 229 (1821). Congress may either take the individual directly into custody, certify the contempt to the U.S. Attorney, or seek a civil judgment from

on a number of occasions.²⁸⁶ Though rarely mentioned in reporter's privilege discussions today, disputes over the reporter's privilege surfaced more often in Congress than in the courts in the early years of the new republic. Legislators sometimes opted not to escalate these conflicts to the point of legal action, instead permitting reporters to simply withhold confidential information.

These early battles over a reporter's privilege led to highly publicized debates over the rights and duties of the press more broadly.²⁸⁷ Because these debates often received substantial public attention, they likely exerted an outsized influence on popular conceptions of the reporter's privilege.²⁸⁸ In 1800, for example, the publisher of the *Aurora* newspaper in Philadelphia printed the leaked text of a proposed Federalist bill. Subsequent debates over whether to hold the publisher in contempt for refusing to reveal his source forced members of Congress to grapple with their role in relation to the press. One senator asked what Congress proposed to do if the publisher refused to say where he obtained the bill: what pressure would it apply? And in the process of forcing the reporter to reveal his source, the senator asked, "[W]hat becomes of the grand palladium of American freedom? Where is the liberty of the press, which is secured to the citizens of the Union against Federal usurpation?"²⁸⁹

a federal court stating that the individual has a legal obligation to comply with a congressional subpoena. Michael A. Zuckerman, *The Court of Congressional Contempt*, 25 J.L. & POL. 41, 42 (2009); Todd Garvey, *Congress's Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure*, CONG. RES. SERV. 1 (May 12, 2017), <http://fas.org/sgp/crs/misc/RL34097.pdf> [<http://perma.cc/K3C8-FSZQ>]. Congress has not exercised its inherent powers of contempt since 1935. Garvey, *supra*, at 12. But when it certifies the contempt to the U.S. Attorney, the Executive then has the discretion to determine whether to prosecute. *United States v. Nixon*, 418 U.S. 683, 693 (1974) (noting that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case").

286. See *infra* notes 289-292 and accompanying text.

287. See Gregg, *supra* note 23, at 47-48, 57.

288. For this reason, this Section focuses on these disputes at the federal level. But controversies over the scope and existence of the privilege flared in state legislative bodies across the country over many decades. State legislatures, like Congress, often permitted reporters to protect their sources. See, e.g., *Bribery Investigation Stirs Hooker Session*, N.Y. TIMES, July 13, 1905 (reporting that a journalist was released without consequences after refusing to reveal his source to the New York legislature); Gordon, *supra* note 23, at 551 (reporting that a journalist was permitted to withhold the identify of a source in an impeachment trial of a state corporation commissioner).

289. 2 ABRIDGMENT OF THE DEBATES OF CONGRESS, FROM 1789 TO 1856, at 416 (Thomas Hart Benton ed., N.Y., D. Appleton & Co. 1857). This same senator argued that the text of the bill should never have been made secret in the first place, declaring:

You are to inquire how [the editor of the *Aurora*] became possessed of a certain bill which he published; what kind of an inquiry is this? How he procured the sight of

In subsequent decades, reporters were occasionally successful in protecting their sources in the face of congressional pressure. In 1820, two publishers of the *National Intelligencer* were permitted to protect the identity of an anonymous author: a resolution to hold them in contempt failed by a vote of 8-140.²⁹⁰ In 1850, Congress voted not to hold an editor in contempt after he refused to reveal who wrote a story about congressional interference in elections.²⁹¹ In the ensuing debate, one congressional representative compared the reporter's privilege to the priest-penitent and attorney-client privileges.²⁹²

In the decades that followed, Congress did not maintain a uniform response to reporter's privilege claims. Some reporters were jailed for refusing to reveal a

a bill, while it was pending in Senate. Why, is there any crime in printing a minute of our transactions?

Id.

290. 36 ANNALS OF CONG. 1694-95 (1820). The publishers explicitly linked their efforts to protect the author's identity with individual rights. To reveal the author's identity in the face of congressional pressure, they argued, would lead to "a labyrinth of doctrines, dangerous in the extreme to the rights of the citizen." *Id.* at 1698.

291. ASHER C. HINDS, 3 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES 68 (1907).

292. CONG. GLOBE, 31st Cong., 1st Sess. 1693 (1850) (statement of Rep. Fitch) (responding to the claim that an editor must reveal his correspondents by noting that "a priest is not compelled to betray the secrets of the confessional, nor a physician the ailment of his patient"). Not all such efforts succeeded. In 1857, the House of Representatives imprisoned *New York Times* reporter James Simonton for refusing to reveal a source. They released him after nineteen days out of the belief that Simonton would never reveal the identity of his informant. See WHALEN, *supra* note 23, at 20-21; Opinion, *Judith Miller Goes to Jail*, N.Y. TIMES, July 7, 2005, at A22; *News of the Day*, N.Y. TIMES, Feb. 10, 1857, at 4. But the controversy led Congress to enact a statute expanding its powers to punish witnesses who refused to testify. This, in turn, led to a fierce public debate over whether Congress had enacted the statute specifically to silence the press. See *The New Law of the Press*, N.Y. TIMES, Jan. 24, 1857 (arguing that the "ostensible purpose of this bill is to favor the ends of justice," but that one "must be particularly blind who does not see that its real design is to cripple and muzzle the Public Press"). It also led some papers to argue that Simonton's imprisonment implicated the First Amendment. This is surprising, given that the articles were written in an era when the First Amendment was widely viewed as serving only as a limit against prior restraint. See, e.g., *Patterson v. Colorado ex rel. Att'y Gen.*, 205 U.S. 454, 462 (1907). These constitutional arguments were also raised a full century before Marie Torre would argue that the First Amendment protected her right to shield a source. See Gregg, *supra* note 23, at 384 (quoting the *Alexandria Gazette and Virginia Advertiser* as quoting the *Richmond Examiner*, which argued that Congress's action "is a gross and palpable violation of the Constitution, in so far as it is intended to, and shall in practice, be enforced upon those connected with the press" (emphasis omitted)).

source.²⁹³ But many others were permitted to withhold a source without punishment. In 1870, for example, a *New York Evening Post* reporter refused to reveal his source of information. A congressional committee argued against ejecting the reporter from the proceedings, reasoning that the reporter's "fault is not of such flagrant character as to justify his expulsion from the gallery, or even to warrant any formal resolution of censure."²⁹⁴ In 1882, a reporter who refused to reveal his source was simply "permitted to retire."²⁹⁵ In 1890, a Senate committee voted not to hold five reporters who published the proceedings of secret committee sessions in contempt.²⁹⁶ In 1906, a reporter pressured to reveal his sources declared that the legislators "can put me on bread and water" but "can not make me give away people who have not given me authority to quote them."²⁹⁷ He was also released. And in 1920, the chairman of a Senate subcommittee told a reporter who refused to surrender confidential information that "these newspaper men whom we subpoenaed, where they have said to us that they secured it in confidence, and could not reveal the name, we have not asked to do it. We do not want to ask anybody to break the faith."²⁹⁸ Two months later, a member of that same subcommittee argued that a reporter who refused to reveal a confidential source, "in view of the well-known ethics of the profession, is justified in assuming the stand he has taken, whatever side it affects."²⁹⁹

These disputes continued to spark broader debates about the role of the press in the American political system. The legislative controversy that had perhaps the greatest impact in this respect involved a privilege claim raised by *United Press*

293. See, e.g., *Nugent v. Beale*, 1 Hay & Haz. 287, 291 (C.C.D.D.C. 1848). Another notable privilege dispute in 1871 led to the jailing of two reporters, but it also sparked a broader debate over the roles and responsibilities of the press. The *New York Tribune* published a copy of a secret treaty then under consideration in the Senate. Two reporters for the paper refused to reveal their source on grounds of "professional honor." They were found in contempt and committed to the sergeant at arms until the end of the legislative session. This led some members of Congress to argue that the text should not have been secret in the first place. WHALEN, *supra* note 23, at 22. It also prompted the *Tribune* to argue that "[i]f the government can't keep its own secrets, we do not propose to undertake for it the contract." *Id.* at 24.

294. WHALEN, *supra* note 23 at 22.

295. *A Case of Sun-Stroke: An Editor Refuses To Divulge*, NEWS J. (Wilmington), June 16, 1882, at 3.

296. 27 J. EXECUTIVE PROC. SENATE 487-88 (1890); *Dolph's Labors in Vain*, N.Y. TIMES, Apr. 19, 1890, at 1; *The Dolph Committee's Recommendations Rejected*, TIMES-PICAYUNE (New Orleans), Apr. 19, 1890, at 1.

297. *Investigation of Panama Canal Matters: Hearing Before the S. Comm. on Interoceanic Canals*, 59th Cong. 2d Session 109 (1907) (statement of Poultney Bigelow, reporter before the committee).

298. *Presidential Campaign Expenses: Hearing on S. Res. 357 Before the S. Subcomm. on Privileges & Elections*, Part I, 66th Cong. 399 (1920) (statement of the Chairman).

299. *Id.* at Part II, 1818.

reporter Paul Mallon. In 1929, Mallon published an article in the *United Press* revealing the tally behind the closed-door vote on a presidential nominee.³⁰⁰ The tally was inaccurate, and several senators, angered by both the leak and the factual error, called for an investigation. In a subsequent debate, one senator defended the reporter, arguing:

The conflict between secrecy and publicity has gone forward through the ages, with men in power asserting their privilege to conceal their acts from the people, and a free press, wherever it has existed in any country in the civilized world, challenging that right, and newspaper men often suffering imprisonment to give the people the facts concerning their own representatives and their own government.³⁰¹

The Senate Rules Committee subsequently voted to amend the rules to allow for open executive sessions.³⁰² The press had secured a major victory in its repeated battles with the legislature.

As the Senate continued to accede to reporters' refusals to reveal their sources, the belief that reporters had a right to protect confidential sources grew more entrenched.³⁰³ In April of 1963, *Parade* magazine correspondent Jack Anderson, who appeared voluntarily before the House Administration Committee,

300. From 1789 to 1795, the Senate conducted all legislative debates behind closed doors. Beginning in 1795, it opened up many of these proceedings to the public, but it continued to hold "executive sessions" in secret for nearly a century and a half longer. Executive sessions included any session in which the Senate debated "issues and other business received from the president," including providing advice and consent to treaties and confirming presidential nominees. *The Senate in Executive Session*, U.S. SENATE, http://www.senate.gov/artandhistory/history/common/generic/Feature_Homepage_ExecutiveSessions.htm [http://perma.cc/5QK7-FFWR]. Notes from these secret proceedings were invariably leaked to the press, inciting a number of disputes over a reporter's ability to maintain the confidentiality of his source of information about the sessions. Many high-profile controversies in Congress over the reporter's privilege occurred when the Senate attempted to press a reporter to reveal his source of information about a secret executive session. It was this fact pattern that precipitated the arrest of reporter William Duane in 1800; *New York Herald* reporter John Nugent in 1848; and *New York Tribune* reporters Zebulon White and Hiram Ramsdell in 1871, among others. See ROBERT C. BYRD, *THE SENATE 1789-1989: ADDRESSES ON THE HISTORY OF THE UNITED STATES SENATE* 439 (1991) (describing examples of reporters being questioned about their source of information from a closed executive session).

301. *United Press, Can't Enforce Secrecy, View of La Follette*, PITTSBURGH PRESS, June 2, 1929.

302. PATRICK J. MANEY, *YOUNG BOB: A BIOGRAPHY OF ROBERT M. LA FOLLETTE, JR.* 64-65 (2003). These sessions can be closed with a vote of two-thirds of the Senate.

303. In December 1931, a *Washington Post* reporter was allowed to protect a confidential source before a House subcommittee investigation. Gordon, *supra* note 23, at 535-36. In 1943, two reporters with the *Akron Beacon-Journal* were permitted to protect a confidential source after

refused to reveal his source of information for a story about a corrupt congressional representative.³⁰⁴ According to news reports, Anderson told the Committee that members of the press had a constitutional right to protect their sources. The chair of the Committee “agreed, and said that since Mr. Anderson took that position, there was nothing further to say.”³⁰⁵

While the legislative branch initially took an aggressive stance toward reporter’s privilege claims, congressional demands for confidential press sources abated over time. By the mid-twentieth century, legislators had largely abandoned their efforts to compel reporters to reveal press sources.³⁰⁶ One explanation for this divergence between judicial and legislative treatment of reporter’s privilege claims is that the “search for truth” may be more pressing in the context of judicial proceedings.³⁰⁷ An alternative explanation may be that elected officials proved more sensitive than unelected judges to the political backlash that often follows the jailing of a reporter.

C. *The Executive Branch: Protecting Reporters by Prosecutorial Discretion*

When the executive branch chooses to protect reporters, it does so most often via prosecutorial discretion.³⁰⁸ Prosecutors may determine, for example, that

a House subcommittee acknowledged “the customary practice of newspapers in not revealing the source of such stories.” *Id.* at 640-41. And in 1945, when a House subcommittee voted to hold a reporter in contempt for refusing to reveal a source, some objected. *Associated Press, House Group Holds Reporter in Contempt; He Refused To Name Veterans’ News Sources*, N.Y. TIMES, May 19, 1945, at 8. In the course of that 1945 dispute, one congressional representative argued that the press merited a testimonial privilege similar to that granted to doctors and lawyers, and that to “compel a member of the newspaper profession to expose the source of his information would, in many cases, revolt against the public good.” 91 CONG. REC. 4859 (daily ed. May 22, 1945) (statement of Rep. O’Toole). A few days later, the committee rescinded the contempt charge. *Reporter Cleared in Contempt Case*, N.Y. TIMES, May 29, 1945, at 17.

304. *List of ‘Cheaters’ Spurned in House*, N.Y. TIMES, Apr. 10, 1963, at 22.

305. *Id.*

306. For a discussion of congressional treatment of reporter’s privilege claims from the 1990s to the present, see discussion *infra* note 342.

307. See *Branzburg v. Hayes*, 408 U.S. 665, 690 n.29 (1972).

308. Of course, such discretion can extend even further to protect the sources themselves. For example, a Government Accountability Office audit reviewed sixty-eight Department of Defense leak investigations between 1975 and 1982. It found that “[i]n no case was there any indication that an individual was removed from a position of trust.” Pozen, *supra* note 11, at 541 (citing U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-83-15, REVIEW OF THE DEPARTMENT OF DEFENSE

the cost of compelling a reporter to reveal a confidential source is too high—perhaps because the public backlash will be significant, or because initiating legal action will force the government to reveal additional pieces of confidential information.³⁰⁹ This discretion can be extended in different ways, and, critically, at different junctures in the prosecutorial process. The executive branch can protect reporters by declining to initiate an investigation or legal proceeding against a source or reporter, or by deciding not to compel a reporter’s testimony even after winning a protracted legal battle to do so.³¹⁰ This discretion extends beyond the prosecutorial context as well. The executive branch can protect the press by, for example, adhering to longstanding norms and practices governing press access to executive officials. The current de facto system grants substantial decisionmaking authority to the executive branch, which presents both benefits and drawbacks.

While federal prosecutors have long exercised their prosecutorial discretion to protect reporters, parts of this practice were codified in the early 1970s,³¹¹ when the DOJ adopted a policy addressing the use of subpoenas to obtain information from the press.³¹² These guidelines, which have been updated regularly, impose a number of obligations on the DOJ, including the requirements that the Attorney General (or another senior official) sign off on all subpoenas to report-

INVESTIGATION OF LEAK OF CLASSIFIED INFORMATION TO THE *WASHINGTON POST* 5 (1982)). Internal, administrative sanctions are rarely used to punish suspected leakers or to deter future leakers. *Id.* at 558.

309. For a comprehensive examination of the many reasons why the executive branch declines to prosecute leakers, see *id.* at 516. The press may also take measures to increase the political costs of issuing or enforcing a subpoena. For example, Carl Bernstein has said that when he received a subpoena in a civil suit brought by the Nixon reelection committee against the Democratic National Committee, he transferred all of his notes to the custody of Katherine Graham, the *Washington Post*’s publisher, so that “if anybody was going to go to jail, she was going to go also. As [Editor Ben] Bradlee said: ‘Wouldn’t that be something? Every photographer in town would be down at the courthouse to look at our girl going off to the slam.’” *Interview: Carl Bernstein*, FRONTLINE (July 10, 2006), <http://www.pbs.org/wgbh/pages/frontline/newswar/interviews/bernstein.html> [<http://perma.cc/CR3B-RM4Q>]. Bernstein explained that the government then “backed off . . . They didn’t want to take on Katherine Graham.” *Id.*

310. This was the case with the government’s decision not to compel *New York Times* reporter’s James Risen’s testimony even after securing a favorable appellate court decision. See *United States v. Sterling*, 724 F.3d 482, 492 (4th Cir. 2013); Sari Horwitz, *Justice Department Won’t Compel Times Reporter Risen To Reveal Source in Leak Case*, WASH. POST (Dec. 12, 2014), http://www.washingtonpost.com/world/national-security/attorney-general-revokes-initial-approval-of-subpoena-for-cbs-journalist/2014/12/12/2aa11c5c-823a-11e4-81fd-8c4814dfa9d7_story.html [<http://perma.cc/E5CD-ZUKJ>].

311. Pozen, *supra* note 11, at 538. The regulations were announced in 1970 and codified in 1973. *Id.*

312. S. REP. NO. 113-118, at 11 (2013).

ers; that prosecutors exhaust all alternative sources of information before subpoenaing a member of the press; and that the government provide notice to members of the press when their records are requested by a third party.³¹³

A longstanding question is whether these guidelines offer sufficient protection to the press. In *Branzburg*, the Court suggested that they might. “These rules are a major step in the direction the reporters herein desire to move,” the Court reasoned.³¹⁴ “They may prove wholly sufficient to resolve the bulk of disagreements and controversies between press and federal officials.”³¹⁵ Others advanced this argument as well. During Edward Levi’s 1975 Attorney General confirmation hearings, for example, Levi noted that while the guidelines did not offer an absolute privilege, they provided “certainly, presumptively a privilege, and therefore one would be very careful before abusing the limited right to call newspaper men or women before the grand jury.”³¹⁶ And Wright and Graham have noted that “the combined effect of the federal decisions and the Attorney-General’s guidelines meant that most of the post-*Branzburg* conflicts over compulsory disclosure of sources arose in state courts.”³¹⁷

This favorable view of the guidelines was largely reinforced by DOJ’s practices in the following decades. Two scholars have argued that in the years following the *Pentagon Papers* decision in 1971, the press and the government reached an “informal détente,” in which “leaks of government information took place, secrets were judiciously disclosed, national security was not obviously harmed, and the courts and Congress remained on the sidelines.”³¹⁸ There was,

313. 28 C.F.R. § 50.10 (2016).

314. *Branzburg v. Hayes*, 408 U.S. 665, 707 (1971).

315. *Id.* Indeed, some evidence suggests that the number of subpoenas issued to journalists had fallen around the time of *Branzburg*. See Pozen, *supra* note 11, at 538 (“All evidence suggests that this policy substantially depresses the number of subpoenas issued, and that the lack of access to journalists’ records and testimony makes it substantially more difficult to identify and build cases against leakers.”).

316. *Nomination of Edward Hirsch Levi To Be Attorney General: Hearing Before the S. Comm. on the Judiciary*, 93d Cong. 96 (1975) (statement of Edward Levi).

317. WRIGHT & GRAHAM, *supra* note 7, § 5426. David Pozen has noted that there is little indication that past presidents or attorneys general have sought to amend the guidelines. Pozen, *supra* note 11, at 557. One former DOJ official told Pozen that the policy is “respected more than resented.” *Id.*

318. McCraw & Gikow, *supra* note 11, at 473.

they argued, “an unspoken bargain of mutual restraint in which the press embraced an ethos of responsibility and the government generally treated the leaks as an accepted, if not fully condoned, part of modern governance.”³¹⁹

The executive branch has also protected the press by declining to impose criminal penalties for publishing classified information,³²⁰ in spite of broad statutory authority to do so.³²¹ This norm of non-enforcement is so entrenched that its significance is often overlooked. Jack Goldsmith has noted that the belief that publishing classified materials plays a vital role in the democratic process is now so deeply rooted that “even the theoretical legal possibility” of prosecuting a journalist for publishing classified information has “evaporated.”³²²

Whether such a prosecution would violate the First Amendment remains an open question.³²³

319. *Id.* at 473; see also Cass R. Sunstein, *Government Control of Information*, 74 CALIF. L. REV. 889, 899 (1986) (setting forth the equilibrium theory of justice, which postulates that a competitive but undefined relationship between the press and government “ensures that if both follow their self-interest, the resulting system will work, as if by an invisible hand, to benefit the public as a whole”).

320. JENNIFER K. ELSEA, CONG. RESEARCH SERV., R41404, CRIMINAL PROHIBITIONS ON THE PUBLICATION OF CLASSIFIED DEFENSE INFORMATION 16 (2013). Members of the Bush administration mentioned the possibility of prosecuting the *New York Times* for disclosing the Terrorist Surveillance Program in 2005, but they never seriously considered such prosecution a viable option. Jack Goldsmith, *Extraordinary U.S. Press Freedom To Report Classified Information*, LAWFARE (Dec. 2, 2013, 8:05 AM), <http://www.lawfareblog.com/extraordinary-us-press-freedom-report-classified-information> [<http://perma.cc/K2FW-XLLE>]. It appears the closest the government has come to prosecuting the press for publishing classified information was in 1942, when the *Chicago Tribune* published information that had the potential to alert Japan to the fact that the United States had broken its secret codes. Geoffrey R. Stone, *Government Secrecy vs. Freedom of the Press*, 1 HARV. L. & POL’Y REV. 185, 197 n.38 (2007).

321. For discussions of the overlapping patchwork of statutes that protect against the disclosure of classified information, see ELSEA, *supra* note 320, at 26-30; and Stephen I. Vladeck, *Inchoate Liability and the Espionage Act: The Statutory Framework and the Freedom of the Press*, 1 HARV. L. & POL’Y REV. 219 (2007). Vladeck notes that “there are numerous statutes under which the press may find itself liable for the gathering and reporting of stories implicating governmental secrecy.” Vladeck, *supra*, at 221. These include 18 U.S.C. § 798(a) (2012), which relates to cryptography and communication intelligence and provides that “[w]hoever knowingly and willfully . . . publishes . . . in any manner prejudicial to the safety or interest of the United States . . . any classified information . . . concerning the communication intelligence activities of the United States . . . [s]hall be fined under this title or imprisoned not more than ten years, or both.”

322. Goldsmith, *supra* note 320. This may now be changing. In February 2017, President Trump reportedly asked then-FBI Director James Comey to punish reporters for publishing classified information. See *infra* note 309 and accompanying text.

323. In *Pentagon Papers*, Justice White suggested that reporters could be prosecuted for publishing classified information, and a majority of the Justices seemed to agree. *N.Y. Times Co. v.*

The executive branch has extended protection in less explicit ways as well. Theoretically, the executive branch has a variety of other, less punitive tools at its disposal, such as denying access to uncooperative reporters and outlets or making public statements intended to delegitimize the press.³²⁴ Historically, such measures have been infrequently invoked.³²⁵ Reporters who routinely publish confidential information have still been granted access to the highest levels of government. For example, Bob Woodward continued to be granted access to the

United States (Pentagon Papers), 403 U.S. 713, 733 (1971) (White, Stewart, J. concurring) (noting that “terminating the ban on publication of the relatively few sensitive documents the Government now seeks to suppress does not mean that the law either requires or invites newspapers or others to publish them or that they will be immune from criminal action if they do”); *id.* at 745-57 (Marshall, J., concurring) (noting that Justice White’s interpretation of the application of the Espionage Act to the press was valid); *id.* at 752 (Burger, C.J., dissenting) (noting that he was “in general agreement with much of what Mr. Justice White has expressed with respect to penal sanctions concerning communication or retention of documents or information relating to the national defense”); *id.* at 759 (Harlan, J., dissenting) (noting, in a dissent joined by Chief Justice Burger and Justice Blackmun, that he was in “substantial accord” with Justice White’s opinion). But the Court has subsequently emphasized that any penal sanction imposed on the press for publishing truthful information that was lawfully obtained “requires the highest form of state interest to sustain its validity.” *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 102 (1979). Other subsequent cases emphasizing the importance of press immunity include *Bartnicki v. Vopper*, 532 U.S. 514 (2001), and *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978). The Court has held that there are strong First Amendment protections for the publication of truthful information lawfully obtained by the press. *See Bartnicki*, 532 U.S. at 515; *Daily Mail*, 443 U.S. at 103. This holds true even when the party that provides the information to the press obtained that information by unlawful means. *Bartnicki*, 532 U.S. at 540. The Court has not addressed whether the same protections apply when the publisher itself has acquired information unlawfully. *Cf. Fla. Star v. B.J.F.*, 491 U.S. 524, 534 (1989) (“[T]he *Daily Mail* formulation only protects the publication of information which a newspaper has ‘lawfully obtain[ed],’” (quoting *Daily Mail*, 443 U.S. at 103)). A separate, related question is whether constitutional protection differs in the context of the act of publishing classified information versus the act of soliciting it. For a discussion of this issue, see generally Vladeck, *supra* note 321. The Court has also yet to squarely address this question. Goldsmith, *supra* note 320.

324. RonNell Anderson Jones and Lisa Grow Sun have argued that while every presidential administration criticizes the press, the executive branch has rarely engaged in statements and actions intended to undermine the very legitimacy of the press as an institution. They characterize such efforts as “enemy construction” of the press, and argue that it should be distinguished with more traditional tensions between the executive and the press. *See RonNell Anderson Jones & Lisa Grow Sun, Enemy Construction and the Press*, 49 ARIZ. ST. L.J. 1301 (2018).

325. Pozen, *supra* note 11, at 549. However, President Trump has proved far more willing than past presidents have been to deny access to reporters or outlets based on the content of their coverage. *See, e.g., Callum Borchers, White House Blocks CNN, New York Times from Press Briefing Hours After Trump Slams Media*, WASH. POST (Feb. 24, 2017), <http://www.washingtonpost.com/news/the-fix/wp/2017/02/24/white-house-blocks-cnn-new-york-times-from-press-briefing-hours-after-trump-slams-media> [<http://perma.cc/W3FA-WCXP>].

highest levels of government in the aftermath of Watergate.³²⁶ And even President Nixon, in the midst of the Watergate scandal, issued his harshest criticisms of the press only in private.³²⁷

Finally, the press derives substantial benefits from the executive branch's upstream protection of leakers themselves. The vast majority of leaks of classified information violate at least one criminal statute, and such leaks occur almost daily.³²⁸ But agencies refer roughly only forty suspected leak reports per year to the DOJ for further investigation.³²⁹ Of those referred reports, the DOJ actually opens an investigation into about fifteen percent of cases.³³⁰ In other words, the vast majority of leaks of classified information are simply ignored. The forces and motivations driving this tolerance for leaks are varied and complex and involve considerations beyond the potential impact on the press.³³¹ Regardless, such upstream protection for sources has the effect of protecting reporters who might otherwise have been dragged into legal proceedings further down the line.

There are benefits to the current system of protecting reporters through prosecutorial discretion. The substantial amount of discretion granted to the

326. See, e.g., John Cassidy, *Bob Woodward Throws an Interception*, NEW YORKER (Feb. 28, 2013), <http://www.newyorker.com/news/john-cassidy/bob-woodward-throws-an-interception> [<http://perma.cc/QE76-A94V>] (noting that “[e]ver since he and Carl Bernstein shot to fame with their Watergate reporting, he’s been trooping in and out of the offices of senior officials, writing down (and presumably taping) what they say”).

327. See Jones & Sun, *supra* note 324.

328. Pozen, *supra* note 11, at 524-25 (noting that for the past few decades, “virtually any deliberate leak of classified information to an unauthorized recipient is likely to fall within the reach of one or more criminal statutes”).

329. When an agency believes confidential information has been leaked, its members may submit a crime report to the Department of Justice (DOJ), which will then decide whether to open an investigation. *Id.* at 537-38. In 2000, Attorney General Janet Reno reported that the “overwhelming majority” of such referrals came from the CIA and NSA. *Id.* at 537. The DOJ reported that it received about fifty such referrals per year in the 1990s and thirty-seven per year on average from 2005-2009. *Id.* The Department opens an investigation into roughly fifteen percent of these referrals on average. *Id.* at 538. The FBI also has the authority to pursue leakers but rarely invokes it. *Id.* at 537.

330. *Id.*

331. The broader ecosystem surrounding leaks and the substantial slack in this system offers the government a wide variety of benefits. See Pozen, *supra* note 11, at 513 (arguing that few leakers are prosecuted as part of an adaptive response to external liabilities and internal pathologies). These two ecosystems—those surrounding leakers and the reporters who publish these leaks—are intertwined. But they are nonetheless distinct; for example, there are ways to pursue leakers without pursuing reporters, such as using new technological methods to identify a confidential source solely through an electronic record of their interactions. As a result, shifting the ecosystem around leakers to more aggressively pursue government officials who reveal confidential information may not necessarily increase the pressure on reporters.

government preserves flexibility in the system.³³² But there are also drawbacks. By definition, protection extended by a grant of prosecutorial discretion can be withdrawn at any time. There are no formal barriers preventing the attempted prosecution of a reporter for publishing classified information. The DOJ guidelines situate the decision of whether to subpoena a reporter firmly within the executive branch. And these guidelines lack the force of law – they can be overridden whenever the Attorney General deems it necessary.³³³

III. THE DE FACTO REPORTER'S PRIVILEGE TODAY

Historically, these de facto protections have played a critical role in shielding the press and preserving the flow of information to the public. Yet this web of de facto privileges has not remained static; it has continually shifted and evolved over time. A final piece of the de facto privilege puzzle, then, is determining the extent to which these de facto protections shield reporters and their sources today. This Part addresses that question. It describes which historical protections remain available to the press today and which have been weakened or eliminated. Specifically, it describes how the executive and legislative branches have recently withdrawn many of the protections once conferred on the press. It then examines the extent to which broader societal change may be further undermining the de facto privilege today.

A. Resilient De Facto Protections

Many forms of protection historically extended to the press remain available today. In the judicial branch, confidential information sought by a jury still must be relevant and material.³³⁴ Many circuits extend a qualified reporter's privilege in some contexts.³³⁵ And some reporters facing a subpoena may still rely on a

332. For a discussion of the benefits of preserving flexibility in the system, see *id.* at 559-86.

333. For example, in 2005 the United States Attorney for the Southern District of Texas argued before Congress that the primary drawback of a statutory shield is that it would eliminate prosecutors' ability to override the guidelines. He testified that the law would harm national security because it would "impose[] inflexible, mandatory standards in lieu of existing, voluntary guidelines that can be adapted to changing circumstances." *Reporter's Privilege Legislation: An Additional Investigation of Issues and Implications: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 111 (2005) (statement of Chuck Rosenberg, U.S. Attorney for the Southern District of Texas).

334. *Branzburg v. Hayes*, 408 U.S. 665, 707 (1972).

335. See discussion *supra* Section II.A.3.

Fifth Amendment defense.³³⁶ Because the federal criminal code contains extensive penalties for eliciting, reviewing, or publishing classified information³³⁷ — and given the government’s tendency to classify even routine information³³⁸ — this defense may be available in cases where the government cannot or will not grant immunity.³³⁹ The Fifth Amendment defense has already been successful in some circuits in shielding reporters subpoenaed by a grand jury. In 2009, for example, David Ashenfelter, a Pulitzer Prize-winning reporter for the *Detroit Free Press*, was subpoenaed to reveal his source for a series of articles about the DOJ’s investigation into the alleged misconduct of a prosecutor during the first post-September 11 terrorist trial.³⁴⁰ Ashenfelter successfully invoked a Fifth Amendment defense. One of the *Detroit Free Press*’s lawyers later suggested that Ashenfelter’s case showed that reporters should recognize the Fifth Amendment as a key “weapon in the arsenal of their defenses.”³⁴¹

Legislative and executive protections also persist. Congress has not held a reporter in contempt for failing to surrender a confidential source in decades.³⁴²

336. See discussion *supra* Section II.A.3.a.

337. For a discussion of the ways in which the Espionage Act criminalizes the receipt and retention of information, see Vladeck, *supra* note 321, at 231-32.

338. For a discussion of the increase in classified records since September 11, see McCraw & Gikow, *supra* note 11, at 485-87.

339. *Id.* When the government offers immunity, the reporter is no longer excused from testifying on Fifth Amendment grounds. Peter Scheer, *Take the Fifth*, SLATE (July 6, 2006, 6:58 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2006/07/take_the_fifth.html [<http://perma.cc/939J-JNBJ>].

340. Latara Appleby, *Judge Rules Reporter Can Claim Fifth Amendment and Keep Source Secret*, REPS. COMMITTEE FOR FREEDOM OF THE PRESS (Nov. 26, 2013), <http://www.rcfp.org/browse-media-law-resources/news/judge-rules-reporter-can-claim-fifth-amendment-and-keep-source-secre> [<http://perma.cc/H4X2-JUFL>].

341. Kimberly Chow, *Taking the Fifth To Protect a Source*, 39 NEWS MEDIA & L. 60 (2015), <http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-summer-2015/taking-fifth-protect-source> [<http://perma.cc/B95U-24LR>]. Reporters and their lawyers may consider other forms of protection as well. See, e.g., Susan Webber Wright, *A Trial Judge’s Ruminations on the Reporter’s Privilege*, 29 U. ARK. LITTLE ROCK L. REV. 103, 116 (2006) (arguing that judges who want to avoid reaching the question of a constitutional privilege might be willing to provide protection under evidentiary rules and reminding reporters to “[k]eep in mind that federal judges have discretion under the rules of evidence with respect to the evidence”).

342. James J. Mangan, *Contempt for the Fourth Estate: No Reporter’s Privilege Before a Congressional Investigation*, 83 GEO. L.J. 129, 146 (1994) (“Congress historically has failed to vote for contempt proceedings against a reporter who asserts such a privilege.”). In 1992, an attorney investigating leaks surrounding Justice Clarence Thomas’s Supreme Court nomination hearings urged the Senate to hold NPR legal correspondent Nina Totenberg in contempt for declining

And the DOJ guidelines governing press subpoenas still urge prosecutors to take certain measures and precautions prior to issuing subpoenas to the press. The government has yet to prosecute a reporter for publishing classified information. And there are also political and institutional checks in place to prevent the government from pursuing leak investigations.³⁴³ For example, the political costs of investigating and identifying those who leak confidential information can still be significant,³⁴⁴ and the government still derives substantial benefits from certain types of leaks.³⁴⁵ Moreover, reporters may still rely on the press at large to pressure judges and prosecutors. Today, as in the time of *Branzburg*, the press is not wholly lacking protection.³⁴⁶

B. Weakening De Facto Protections

Yet, while some facets of the de facto privilege remain available to the press today, both courts and the executive branch have significantly curtailed their traditional protections. There are two central forms of protection that the courts extended in the wake of *Branzburg*: (1) reading the Supreme Court's decision to permit some form of qualified privilege, and (2) either declining to punish or granting special treatment to reporters who refused to reveal confidential information. This Section shows that both forms of judicial protection are eroding. At the same time, the executive branch is withdrawing protections long conferred upon the press. This Section presents evidence that the number of subpoenas issued to reporters has increased, as has the number of leak prosecutions.

to answer legislators' questions. The Senate refused, and the Chairman of the Rules Committee explained that such an action "could have a chilling effect on the media" and "close a door where more doors need opening." *Id.* at 129-30 (quoting Editorial, *Misguided Business; Senate Committee Decides To Quit Abusing Reporters*, HOUS. CHRON., Mar. 27, 1992, at B10).

343. For a discussion of the various reasons why the executive branch may decline to prosecute leakers, see Pozen, *supra* note 11, at 544-59.

344. *Id.* at 550 (explaining the institutional barriers and political costs of investigating the source of leaks).

345. By declining to prosecute all leakers, for example, the executive branch preserves its ability to effectively communicate information through intentional leaks, or "plants." *Id.* at 563-64. Pozen outlines additional benefits as well, such as enhancing the government's legitimacy and credibility by signaling to the public that despite the official secrecy measures in place, the public will eventually be permitted access to the government's internal decisions and inner workings. *Id.* at 573-77. Another benefit to this strategy is that it avoids addressing the difficult problem of overclassification head-on. *Id.* at 582.

346. *Branzburg v. Hayes*, 408 U.S. 665, 706 (1972) ("[T]here is much force in the pragmatic view that the press has at its disposal powerful mechanisms of communication and is far from helpless to protect itself from harassment or substantial harm.").

It then argues that the effect of these diminished protections is compounded by broader changes in society and in the role of the press.

1. *The Judicial Branch*

The Court's decision in *Branzburg* left the lower courts with more questions than answers. For the past forty-five years, the Court has rejected petitions asking for clarification of its decision.³⁴⁷ After decades of lower court rulings, the circuits are now split on both the meaning and scope of *Branzburg*.³⁴⁸ The central point of confusion concerns Justice Powell's concurrence.³⁴⁹ Uncertainty over how this concurrence should be read has spawned dozens of opinions and nearly as many different interpretations of the case. This Section examines these cases in light of the de facto reporter's privilege lens.

In the years following *Branzburg*, the lower courts tended to read the case in a way that was favorable to the press. Some courts treated the concurrence as ancillary and emphasized that the meaning of the decision was spelled out in the Court's opinion.³⁵⁰ But many other lower courts narrowed the majority's holding to the corners of Justice Powell's concurrence, analogizing it to a plurality opinion.³⁵¹ In the five years following *Branzburg*, lower courts granted reporters immunity in fifteen of the twenty-seven reported cases where disclosure was sought; they required disclosure in only nine cases.³⁵² In 1977, the Tenth Circuit declared that the existence of a qualified constitutional privilege for the press was

347. See, e.g., *United States v. Sterling*, 724 F.3d 482 (4th Cir. 2013) *cert. denied*, 134 S.Ct. 2696 (2014); *Lee v. Dep't of Justice*, 428 F.3d 299 (D.C. Cir. 2005), *cert. denied*, 547 U.S. 1187 (2006); *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141 (D.C. Cir. 2005), *cert. denied*, 545 U.S. 1150 (2005); *von Bulow v. von Bulow*, 811 F.2d 136 (2d Cir. 1987), *cert. denied*, 481 U.S. 1015 (1987).

348. See discussion *supra* Section I.A.3.

349. See *McKevitt v. Pallasch*, 339 F.3d 530, 532 (7th Cir. 2003) ("Some of the cases that recognize the privilege, such as [*In re*] *Madden*, essentially ignore *Branzburg*; some treat the 'majority' opinion in *Branzburg* as actually just a plurality opinion, such as [*United States v.*] *Smith*; some audaciously declare that *Branzburg* actually created a reporter's privilege, such as [*Shoen v.*] *Shoen* and *von Bulow v. von Bulow*." (internal citations omitted)).

350. See, e.g., *Sterling*, 724 F.3d at 492.

351. See *id.* at 523 (Gregory, J., dissenting) (providing an overview of the circuit split regarding the meaning and application of *Branzburg*); *United States v. Smith*, 135 F.3d 963, 968-69 (5th Cir. 1998).

352. Stephen R. Hofer, *The Fallacy of Farber: Failure To Acknowledge the Constitutional Newsmen's Privilege in Criminal Cases*, 70 J. CRIM. L. & CRIMINOLOGY 299, 320-21, 321 n.131 (1979). The remaining cases did not involve a final determination of the reporter's privilege question. *Id.*

“no longer in doubt.”³⁵³ These post-*Branzburg* decisions are consistent with a much longer history and tradition of judges conferring protection upon the press when possible. In other words, to the extent that the lower courts’ interpretation of *Branzburg* has been doctrinally anomalous, the de facto reporter’s privilege offers at least a partial explanatory theory.

Yet more recent case law indicates that federal courts may be less willing to read *Branzburg* to create a qualified constitutional privilege today.³⁵⁴ In 2005, the Chair of the American Bar Association’s Litigation Section issued a report asserting that “[f]or decades, federal prosecutors and courts have rarely tried to punish reporters for protecting confidential sources. However, recent actions by the courts and prosecutors, including special prosecutors, have threatened that protection.”³⁵⁵

Judicial treatment of privilege claims has only become more hostile in the decade since. The central voice of dissent leading this shift was Seventh Circuit Judge Richard Posner, who criticized many lower court decisions for failing to hew closely enough to binding precedent. In a 2003 decision, Judge Posner argued that *Branzburg* clearly rejected a constitutional privilege and that some court decisions to the contrary had stretched the permissible zone of legal interpretation.³⁵⁶ Surveying the circuits’ application of *Branzburg*, Judge Posner noted that some decisions “essentially ignore” the decision; others “treat the ‘majority’ opinion in *Branzburg* as actually just a plurality opinion”; and some go so far as to “audaciously declare that *Branzburg* actually created a reporter’s privilege.”³⁵⁷ He reserved his strongest language for courts that had recognized a reporter’s privilege for nonconfidential information in order to prevent the government from harassing reporters, thereby using the press as an investigative arm of the government. “Since these considerations were rejected by *Branzburg* even in the context of a confidential source,” Posner warned, “these courts may be skating on thin ice.”³⁵⁸

353. *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 437 (10th Cir. 1977).

354. This is not the only area of the law where the press is less likely to find protection from the courts. For a discussion of other areas of law where the courts are less likely to protect the press, including privacy and defamation law, see RonNell Andersen Jones & Sonja R. West, *The Fragility of the Free American Press*, 112 NW. U. L. REV. 567 (2017).

355. DENNIS J. DRASCO, AM. BAR ASS’N, HOUSE OF DELEGATES, RECOMMENDATION 104B, at 5 (2005), http://www.americanbar.org/content/dam/aba/migrated/litigation/standards/docs/fslr_report.authcheckdam.pdf [<http://perma.cc/3QVJ-ZPQB>].

356. *McKevitt v. Pallasch*, 339 F.3d 530, 532 (7th Cir. 2003).

357. *Id.*

358. *Id.* at 533.

Judge Posner's opinion seemed to elicit, or at least presage, a broader shift in the lower courts' views.³⁵⁹ In 2004, the First Circuit held that the *Branzburg* Court "flatly rejected any notion of a general-purpose reporter's privilege for confidential sources, whether by virtue of the First Amendment or of a newly hewn common law privilege."³⁶⁰ In 2005, the D.C. Circuit applied a weaker balancing test in a civil case, declining to weigh the need for disclosure against the First Amendment interests at stake. Instead, the court concluded that the plaintiff overcame the qualified privilege by demonstrating a bare need for the information and exhaustion of all reasonable alternative sources of information³⁶¹ — an approach that Judge Tatel criticized for "allow[ing] the exigencies of even the most trivial litigation to trump core First Amendment values."³⁶² That same year, the D.C. Circuit again took a dim view toward privilege claims when it addressed *New York Times* reporter Judith Miller's claim to a constitutional and common-law reporter's privilege.³⁶³ Although the panel was split on its reasoning, Judge Sentelle, writing for the court, emphasized that Justice Powell's concurrence should not be read as a vote for the dissent.³⁶⁴ And in 2013, the Fourth Circuit

359. See, e.g., Pozen, *supra* note 11, at 526 (noting that Judge Posner's decision in *McKevitt* "appears to have anticipated a swing in the doctrinal pendulum back toward the more restrictive view"). For a discussion of the impact of Judge Posner's decision on other lower courts, see Dalglish & Murray, *supra* note 114, at 37.

360. *In re Special Proceedings*, 373 F.3d 37, 44 (1st Cir. 2004) (citation omitted). The case involved a reporter's refusal to identify his source in the context of an investigation by a special prosecutor into video footage leaked in violation of a protective order. The court noted that while "[t]he three leading cases in this circuit require 'heightened sensitivity' to First Amendment concerns and invite a 'balancing' of considerations (at least in situations distinct from *Branzburg*)," those cases "in substance" suggest only that "the disclosure of a reporter's confidential sources may not be compelled unless directly relevant to a nonfrivolous claim or inquiry undertaken in good faith; and disclosure may be denied where the same information is readily available from a less sensitive source." *Id.* at 45. The court held that these constraints had been satisfied in the present case. *Id.*

361. *Lee v. Dep't of Justice*, 428 F.3d 299, 301 (D.C. Cir. 2005) (Tatel, J., dissenting from denial of rehearing en banc). Judge Tatel criticized the court for departing from its precedent in *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981), which required the court to balance the public and private interests at stake when considering a reporter's privilege claim in the civil context. *Id.* Also in a dissent from the denial of rehearing en banc, Judge Garland argued that the court's approach in *Lee* was "inconsistent with the commitment we made in *Zerilli*." *Id.* at 303 (Garland, J., dissenting from denial of rehearing en banc).

362. *Id.* at 301 (Tatel, J., dissenting from denial of rehearing en banc).

363. *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1149 (D.C. Cir. 2005) (limiting *Zerilli* to the civil context).

364. *Id.* at 1148 ("Justice White's opinion is not a plurality opinion of four justices joined by a separate Justice Powell to create a majority, it is the opinion of the majority of the Court. As such

strongly rejected *New York Times* reporter James Risen's privilege claim, holding that there is no First Amendment or federal common-law privilege available to shield reporters from testifying in criminal proceedings, so long as the information is relevant and sought in good faith.³⁶⁵

This shift in interpreting *Branzburg* is not the only way that judges are withdrawing protection. There are also indications that judges today are more willing to find reporters in contempt for refusing to reveal confidential information.³⁶⁶ During his 2007 testimony before the House Judiciary Committee, media lawyer Lee Levine stated that he had not found a single example of a reporter being held in contempt for refusing to disclose a confidential source in federal court between 1976 and 2000; by contrast, "at least a dozen" were held in contempt between 2001 and 2007.³⁶⁷ Moreover, when reporters are jailed for contempt, judges appear more willing to impose lengthy terms of confinement. Prior to *Branzburg*, judges rarely jailed reporters for more than a month, often ordering reporters jailed for mere days.³⁶⁸ By contrast, from 2001 to 2007, federal appeals

it is authoritative precedent. It says what it says. It rejects the privilege asserted by appellants.").

365. *United States v. Sterling*, 724 F.3d 482, 492, 499 (4th Cir. 2013). The *Sterling* court limited the three-part test for reporter's privilege claims outlined in *LaRouche v. National Broadcasting Co.*, 780 F.2d 1134 (4th Cir. 1986), to the civil context. *Sterling*, 724 F.3d at 496-97.
366. One explanation for the judiciary's more hostile treatment of reporter's privilege claims is that these disputes increasingly involve classified information, and judges are less likely to protect the press when national security interests are involved. If so, this trend could be viewed as a gap in the de facto privilege, which would seem to lend weight to the argument in favor of formalization: a formal shield could theoretically help close this gap. However, many national security reporters have opposed recently-proposed shield laws on the grounds that they provide insufficient protection. See, e.g., Eric Newton, *Paying Attention to the Shield Law's Critics*, COLUM. JOURNALISM REV. (Sept. 24, 2013), http://archives.cjr.org/behind_the_news/paying_more_attention_to_the_s.php [<http://perma.cc/7WUR-MQWS>] (quoting investigative journalist Scott Armstrong as arguing that "[t]here's not a national security reporter I can find who supports the shield law . . . We're going to get exempted out of it one way or another"). For a discussion of the national security exemption in the 2013 Free Flow of Information Act, see generally Brad A. Greenberg, *The Federal Media Shield Folly*, 91 WASH. U. L. REV. 437 (2013). For further discussion of how the de facto privilege applies in the context of national security disputes, see *supra* note 175.
367. *Free Flow of Information Act of 2007: Hearing Before the Comm. on the Judiciary H.R.*, 110th Cong. 36, 75 (2007) [hereinafter *FFIA Hearing*] (statement of Lee Levine, Partner, Levine Sullivan Koch & Schulz, LLP).
368. Judges may have been more willing to jail reporters for longer around the time of *Branzburg*. See, e.g., *State v. Knops*, 183 N.W.2d 93, 93 (Wis. 1971) (noting that a Wisconsin district court judge ordered a university newspaper editor to serve five months and seven days in prison for his refusal to reveal his source of information about a university bombing—the longest known sentence for a reporter at the time). But reports of members of the press receiving very long jail sentences were rare in the period between the late 1970s and September 2001.

courts issued a series of harsh punishments for reporters found in contempt, with “each court imposing prison sentences on reporters more severe than any previously known in American history.”³⁶⁹ In 2007, for example, videographer Joshua Wolf spent seven months in jail for refusing to turn over unpublished footage from a G-8 protest.³⁷⁰

There is also evidence that judges today are more willing to impose very large fines. In 2005, for example, five reporters were held in contempt for refusing to reveal the identities of confidential sources, and their respective employers paid \$750,000 to avoid the imposition of judicial sanctions.³⁷¹ In 2008, a judge ordered a reporter to pay up to \$5,000 a day for a week for refusing to disclose a confidential source, and took the “unprecedented step”³⁷² of barring anyone else from helping to pay the reporter’s fines.³⁷³ By contrast, a federal district court in 1980 fined CBS one dollar per day for refusing to comply with a court order to surrender unpublished video and audio tape.³⁷⁴ Commenting on this case, Wright and Graham observed that “[o]ne may suspect that some . . . charade is being enacted when a wealthy television network that refuses to produce material needed by a criminal defendant on grounds of privilege is subjected to civil contempt with a sanction of a \$1 per day fine.”³⁷⁵ And, at least anecdotally, the harshest penalties today far exceed the costliest fines imposed prior to *Branzburg*, even accounting for inflation.³⁷⁶

Faced with this evidence, some members of the press have concluded that they can no longer rely on the judiciary for protection. In a 2006 *New York Times* column, David Carr observed, “Within the news business, there is a consensus

369. *FFIA Hearing*, *supra* note 367, at 32 (statement of Lee Levine, Partner, Levine Sullivan Koch & Schulz, LLP).

370. *Id.* at 37.

371. *Id.* at 32.

372. Ken Paulson, *The Real Cost of Fining a Reporter*, USA TODAY (Mar. 12, 2008), <http://usatoday30.usatoday.com/printedition/news/20080312/opcomwednesday.art.htm> [<http://perma.cc/Y8HS-MRKB>].

373. Samantha Fredrickson, *Nearly in the Clear?*, NEWS MEDIA & L. (2009), <http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-winter-2009/nearly-clear> [<http://perma.cc/YD3M-U6NC>]. The order was vacated when the case settled.

374. *United States v. Cuthbertson*, 630 F.2d 139, 143 (3d Cir. 1980).

375. WRIGHT & GRAHAM, *supra* note 7, § 5426 n.28.

376. For example, when editor John Sheldon was fined \$100 in 1829, it caused a public uproar. See *supra* note 246. That amount appears to equal, very roughly, around \$2,300 today. See *Consumer Price Index (Estimate) 1800-*, FED. RES. BANK MINN., <http://www.minneapolisfed.org/community/teaching-aids/cpi-calculator-information/consumer-price-index-1800> [<http://perma.cc/7E5H-JDEA>].

that the roof is caving in on the legal protections for working journalists.”³⁷⁷ Some legal scholars agree. In 2014, David Pozen noted that in the wake of September 11, courts have “pulled back on the reporter’s privilege,” particularly in the national security context.³⁷⁸

2. *The Executive Branch*

There is also evidence that the executive branch is less willing today to exercise its prosecutorial discretion to protect reporters. The number of subpoenas issued to reporters appears to have increased in recent years.³⁷⁹ In 2005, First Amendment lawyer Floyd Abrams testified before Congress that in the previous year and a half,

more than 70 journalists and news organizations ha[d] been embroiled in disputes with federal prosecutors and other litigants seeking to discover unpublished information. Dozens ha[d] been asked to reveal their confidential sources. Some are or were virtually at the entrance to jail.³⁸⁰

A 2013 Senate Judiciary Committee report on a proposed shield law argued that the recent trend toward subpoenaing reporters in civil cases represented “a break from a nearly 50-year precedent of not requiring journalists to disclose confidential sources in civil cases to which they are not parties.”³⁸¹

377. David Carr, *Subpoenas and the Press*, N.Y. TIMES (Nov. 27, 2006), <http://www.nytimes.com/2006/11/27/business/media/27carr.html> [<http://perma.cc/D6DR-LAV9>].

378. Anna Stolley Persky, *50 Years After New York Times v. Sullivan, Do Courts Still Value Journalists’ Watchdog Role?*, ABA J. (Mar. 2014), http://www.abajournal.com/magazine/article/50_years_after_new_york_times_v_sullivan_do_courts_still_value_journalists [<http://perma.cc/WZM6-WU9M>].

379. Structural changes within the executive branch may have contributed to an increase in the number of subpoenas issued to reporters. The creation of the National Security Division (NSD) of the DOJ in 2006 altered the process for referring and investigating alleged leaks. Pozen, *supra* note 11, at 537. The NSD now coordinates these investigations and prosecutions with the FBI, and this restructuring may have brought “additional resources or a more aggressive mindset to the Department of Justice’s work on leak matters.” *Id.* at 630. The establishment of the Office of the Director of National Intelligence in the mid-2000s to coordinate the work of the CIA, NSA, and other actors within the intelligence community may have also contributed to a more aggressive mindset with regards to leaks. *Id.* at 590 n.361, 630 n.532.

380. *Reporters’ Privilege Legislation: Issues and Implications: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 18 (2005) (statement of Floyd Abrams, Partner, Cahill, Gordon & Reindel LLP).

381. S. REP. NO. 113-118, at 5 (2013).

The 2013 Senate Judiciary report also found it likely that far more subpoenas for confidential information had been issued to reporters than the DOJ had acknowledged. The report noted that while the DOJ claimed that it had approved only nineteen subpoenas seeking confidential source material from reporters between 1991 and 2007,³⁸² an independent survey found that it had issued thirty-four subpoenas for confidential information in 2006 alone.³⁸³ The report also noted that the DOJ's official subpoena tallies failed to count subpoenas issued in civil cases.³⁸⁴ It compared the recent uptick in subpoenas to the late 1960s, "when subpoenas to reporters had become not only frequent but virtually *de rigueur*."³⁸⁵

This tally is bound to increase. Recently, Attorney General Sessions announced that he plans to "review" the DOJ guidelines governing press subpoenas.³⁸⁶ There is also evidence that the government has begun to rely more heavily on other legal tools to identify leakers, such as search warrants, warrants issued by the Foreign Intelligence Surveillance Court, and border searches of reporters' electronic devices.³⁸⁷ Such efforts may have a chilling effect on potential sources but fall outside of the DOJ guidelines regulating subpoenas to the press.

In addition, the executive branch has increased the amount and type of information it classifies, which in turn has had an impact on the reporters who receive and publish classified information. Nearly twice as many documents were classified in 2004 as in 2001.³⁸⁸ Simultaneously, the declassification process

382. *Id.* at 4. The 2013 Senate Judiciary report also argued that the DOJ figures did not take into account incidents like the secret subpoenas obtained in 2013 for two months of all Associated Press call records, which affected an estimated one hundred reporters around the country. *Id.* at 5. One scholar has argued that this numerical discrepancy arose out of differences in how both sides were defining the universe of relevant subpoenas. Jones, *supra* note 114, at 609.

383. S. REP. NO. 113-118, at 5 (2013).

384. *Id.*

385. *Id.* at 6-7.

386. Charlie Savage & Eileen Sullivan, *Leak Investigations Triple Under Trump*, *Sessions Says*, N.Y. TIMES (Aug. 4, 2017), <http://www.nytimes.com/2017/08/04/us/politics/jeff-sessions-trump-leaks-attorney-general.html> [<http://perma.cc/K4N9-5Y47>].

387. See Sarah Ellison, *What Was New York Times Reporter James Risen's Seven-Year Legal Battle Really For?*, VANITY FAIR (Apr. 2015), <http://www.vanityfair.com/news/2015/03/james-risen-anonymous-source-government-battle> [<http://perma.cc/DV6D-BTM7>]; *Sources and Subpoenas (Reporter's Privilege)*, REPS. COMMITTEE FOR FREEDOM OF THE PRESS, <http://www.rcfp.org/digital-journalists-legal-guide/sources-and-subpoenas-reporters-privilege> [<http://perma.cc/J9Z8-AGN3>].

388. Scott Shane, *Increase in the Number of Documents Classified by the Government*, N.Y. TIMES (July 3, 2005), <http://www.nytimes.com/2005/07/03/politics/increase-in-the-number-of-documents-classified-by-the-government.html> [<http://perma.cc/99UZ-PBHW>]. These high rates of classification began to decrease under the Obama Administration. See *Info. Sec.*

has slowed: 204 million pages were declassified in 1997, compared with 28 million pages in 2004.³⁸⁹ This over-classification makes it more likely that sources sharing information with the press will be “leaking” secret information, which in turn increases the chance of conflict between the press and the executive.³⁹⁰

Finally, recent administrations have been more aggressive regarding enforcement. The Obama Administration prosecuted nine cases involving whistleblowers and leakers—three times as many as all past administrations combined.³⁹¹ Attorney General Sessions announced in August 2017 that the Department of Justice is pursuing three times as many leak investigations as the number of investigations open at the end of the Obama Administration.³⁹² In November, he testified before Congress that the government had twenty-seven leak investigations open.³⁹³ And a September 2017 memo from National Security Advisor H.R. McMaster requested that the head of every federal agency organize a training on the “importance of protecting classified and controlled unclassified information, and measures to prevent and detect unauthorized disclosures.”³⁹⁴ Such efforts “remind[] us of the responsibilities that come with access to, and penalties for unauthorized disclosure of, classified information,” the memo continued.³⁹⁵

Oversight Office, NAT'L ARCHIVES AND RECORDS ADMIN., 2014 REPORT TO THE PRESIDENT 2 (2014), <http://www.archives.gov/files/isoo/reports/2014-annual-report.pdf> [<http://perma.cc/YB4R-NSXB>].

389. Shane, *supra* note 388.

390. Mary-Rose Papandrea, *Leaker Traitor Whistleblower Spy: National Security Leaks and the First Amendment*, 94 B.U. L. REV. 449, 485-86 (2014).

391. James Risen, *If Donald Trump Targets Journalists, Thank Obama*, N.Y. TIMES (Dec. 30, 2016), <http://www.nytimes.com/2016/12/30/opinion/sunday/if-donald-trump-targets-journalists-thank-obama.html> [<http://perma.cc/LW56-8Q27>]. For a discussion of the forces that helped drive this uptick in leak investigations under the Obama administration, see Papandrea, *supra* note 390, at 455-64.

392. Savage & Sullivan, *supra* note 386. Although there is some confusion in how Sessions arrived at this ratio, Sessions was not the only member of the executive branch to take an aggressive stance toward the press. *Id.* In that same news conference, Director of National Intelligence Dan Coats stated: “Understand this: If you improperly disclose classified information, we will find you, we will investigate you, we will prosecute you to the fullest extent of the law, and you will not be happy with the results.” *Id.*

393. Brian Stelter, *Jeff Sessions: We're Investigating 27 Leaks of Classified Information*, CNN (Nov. 14, 2017, 2:03 PM), <http://money.cnn.com/2017/11/14/media/leak-investigations-jeff-sessions/index.html> [<http://perma.cc/GBN8-ZLPR>].

394. Matthew Yglesias, *The Trump Administration's Big New Anti-Leak Memo Leaked Last Night*, VOX (Sept. 14, 2017, 10:00 AM), <http://www.vox.com/policy-and-politics/2017/9/14/16305384/mcmaster-memo-leaks> [<http://perma.cc/D88L-XV84>].

395. *Id.*

The Trump Administration has also demonstrated an increased willingness to penalize uncooperative reporters in ways short of invoking legal proceedings. President Trump has engaged in a range of efforts to deny access to specific journalists or outlets as a form of political retaliation.³⁹⁶ He has also demonstrated substantial animosity toward the press more broadly.³⁹⁷

Such actions may damage the credibility of the press and undermine longstanding democratic traditions and norms.³⁹⁸ But they also raise the specter that these smaller threats are merely the precursors to more aggressive action against the press, such as the selective enforcement of laws criminalizing the publication of classified information or the selective subpoenaing of reporters as a means of silencing political dissent. Indeed, former FBI Director James Comey disclosed that in a February 2017 meeting, President Trump criticized leaks to the news media and asked Mr. Comey to consider imprisoning reporters for publishing classified information.³⁹⁹ Such an action would break with a century-long tradition of declining to prosecute reporters for receiving or disseminating classified material.⁴⁰⁰

3. *Changing Times*

De facto protections for reporters are not conferred in a vacuum. Changes in the press and in society – ushered in against a background of rapid technological change – have influenced the behavior of both the press and the government. The internet has facilitated the rise of new information-sharing entities, like

396. For a summary of the ways that the Trump Administration has denied access to the press, see Jones & West, *supra* note 354, at 585-89. For a discussion of the ways in which the current administration's efforts to exclude and demonize the press are uniquely harmful, see Jones & Sun, *supra* note 324, at 7-20.

397. See, e.g., Julie Hirschfeld Davis & Michael M. Grynbaum, *Trump Intensifies His Attacks on Journalists and Condemns F.B.I. "Leakers,"* N.Y. TIMES (Feb. 24, 2017), <http://www.nytimes.com/2017/02/24/us/politics/white-house-sean-spicer-briefing.html> [<http://perma.cc/B7X3-XCWL>] (reporting that prominent news outlets were barred from a White House press briefing); Donald Trump (@realDonaldTrump), TWITTER (Feb. 17, 2017, 1:48 AM), <http://twitter.com/realDonaldTrump/status/832708293516632065> [<http://perma.cc/52WS-VH2V>] ("The FAKE NEWS media (failing @nytimes, @NBCNews, @ABC, @CBS, @CNN) is not my enemy, it is the enemy of the American People!").

398. For a discussion of the harmful effects of the Trump Administration's efforts to deny access to the press, see generally Jones & West, *supra* note 354.

399. Michael S. Schmidt, *Comey Memo Says Trump Asked Him To End Flynn Investigation,* N.Y. TIMES (May 16, 2017), <http://www.nytimes.com/2017/05/16/us/politics/james-comey-trump-flynn-russia-investigation.html> [<http://perma.cc/HN4J-75FV>].

400. See *supra* notes 308-313 and accompanying text.

WikiLeaks, which do not abide by the same norms and ethical rules that the institutional press has long followed.⁴⁰¹ The willingness of WikiLeaks to release large troves of documents to the public has prompted the government to take a more aggressive stance towards all leakers⁴⁰² and has most likely prompted the traditional press to grow more sophisticated in its own pursuit of leaked information, which in turn increases the likelihood of confrontation with the government over the identity of sources.⁴⁰³ This has most likely also led to reduced de facto protections for reporters.⁴⁰⁴

Moreover, while government officials once relied almost exclusively on the institutional press to communicate with the public, they can now turn to media platforms like Facebook and Twitter to communicate directly with constituents.⁴⁰⁵ This reduces elected officials' dependence on the press, and this reduced dependence, in turn, lowers the cost of punishing uncooperative reporters or outlets.⁴⁰⁶ When an elected official no longer needs traditional news outlets to communicate with his or her constituents, it becomes easier to advocate for harsher treatment of the press.

The internet has also disrupted the institutional press's advertising model. This has led to financial upheaval throughout the industry, hitting print news

401. McCraw & Gikow, *supra* note 11, at 496. WikiLeaks also does not face the same pressure as the institutional press to report stories that have strong narrative value. See Pozen, *supra* note 11, at 615.

402. Pozen, *supra* note 11, at 608 (explaining that by eschewing targeted leaks by high-ranking officials in favor of large document dumps from lower-level dissenters, WikiLeaks has placed "enormous pressure on the source/distributor divide").

403. Nausicaa Renner, *The Symbiotic Relationship Between WikiLeaks and the Press*, COLUM. JOURNALISM REV. (Nov. 18, 2016), http://www.cjr.org/tow_center/wikileaks_trump_election_julian_assange.php [<http://perma.cc/9EVR-TT9U>].

404. See Pozen, *supra* note 11, at 631 (describing the various social and technological factors that may have contributed to the Obama Administration's more aggressive pursuit of leakers, and noting that "[o]n account of such exogenous shocks, the downside of lax enforcement may seem qualitatively scarier now" and may be disrupting the balance between plants – which are beneficial to the government – and leaks, which, generally, are not).

405. See, e.g., *Trump Uses Twitter To Bypass Media*, PBS (Dec. 8, 2016), http://www.pbs.org/newshour/extra/daily_videos/trump-uses-twitter-to-bypass-media [<http://perma.cc/FSK4-J6ME>].

406. For a discussion of how the decline of the institutional media as a middleman between the government and the public affects the press more broadly, see Jones & West, *supra* note 354, at 582-84. See also Jones & Sun, *supra* note 324, at 33 (arguing that the President's ability to communicate directly with the public "is perhaps the most important factor in opening the door to a president constructing the press as a public enemy").

outlets particularly hard.⁴⁰⁷ Such financial difficulties make it harder for media organizations to fund protracted legal battles against the government. The reduced economic strength of the institutional press also reduces the power and authority of the press more broadly.⁴⁰⁸ In *Branzburg*, the Court confronted the press's claim that it needed special judicial protection with skepticism. At the time, the nation's media organizations were among the most powerful institutions in the country⁴⁰⁹: "[T]he press has at its disposal powerful mechanisms of communication and is far from helpless to protect itself from harassment or substantial harm," the Justices noted.⁴¹⁰ The power and position of the media has since changed. While the institutional press undoubtedly remains influential, the reduced economic position of many news organizations today undermines the press's ability to protect itself against government overreach or misconduct.

In some cases, the full effect of these technological changes is not yet wholly clear. For example, it is now easier to track leaks electronically, either directly to the source or by tracing the reporter's electronic communications.⁴¹¹ On the one

407. See, e.g., Rick Edmonds, *Newspaper Declines Accelerate, Latest Pew Research Finds, Other Sectors Healthier*, POYNTER (June 15, 2016), <http://www.poynter.org/2016/newspaper-declines-accelerate-latest-pew-research-finds-other-sectors-healthier/416657> [<http://perma.cc/JN3F-V9J6>].

408. See Ronnell Andersen Jones, *Litigation, Legislation, and Democracy in a Post-Newspaper America*, 68 WASH. & LEE L. REV. 557, 571 (2011) (discussing the financial decline of newspapers and the negative impact that this has on American democracy); Jones & West, *supra* note 354, at 575, 576-78 (demonstrating how the reduced economic strength of the press has reduced the media's ability to "take on governmentally created obstacles to newsgathering through manpower, time, and effort").

409. See Robert G. Kaiser, *The Bad News About the News*, BROOKINGS INST. (Oct. 16, 2016), <http://csweb.brookings.edu/content/research/essays/2014/bad-news.html> [<http://perma.cc/4BW6-XXD7>] (describing the power and wealth enjoyed by print and broadcast media in the 1970s).

410. *Branzburg v. Hayes*, 408 U.S. 665, 706 (1972).

411. See, e.g., Sari Horwitz, *Feds Have Interviewed More Than 100 People in Two Leak Investigations*, WASH. POST (June 15, 2012), http://www.washingtonpost.com/world/national-security/feds-have-interviewed-more-than-100-people-in-two-leak-investigations/2012/06/15/gJQA5u21fV_story.html [<http://perma.cc/GV8Z-XGFY>] (noting that administration officials had stated the process of investigating leaks has been made easier by "the proliferation of technology, especially email, which allows investigators to track contacts between reporters and alleged leakers"). The government has also turned to other legal tools to identify sources, such as search warrants, warrants issued by the FISA court, and border searches of reporters' electronic devices. See Ellison, *supra* note 387; *Sources and Subpoenas*, REPS. COMMITTEE FOR FREEDOM OF THE PRESS, <http://www.rcfp.org/digital-journalists-legal-guide/sources-and-subpoenas-reporters-privilege> [<http://perma.cc/X3BL-ECZG>]. Some have argued that the government relies on these alternative legal and technological tools so heavily as to render the reporter's privilege issue moot. See, e.g., Elizabeth L. Robinson, Note, *Post-Sterling Developments: The Mootness of the Federal Reporter's Privilege Debate*, 95 N.C. L. REV. 1314, 1315 (2017).

hand, when the trail to a source can be illuminated using these alternative investigative tools, a reporter's compelled testimony may no longer be as relevant.⁴¹² The underlying concern that pursuing confidential sources will have a chilling effect on the flow of information to the public persists. But strengthening the reporter's privilege may not necessarily offer a cure. On the other hand, reporters are increasingly relying on tactics such as encrypted secure drops and burner phones to protect sources.⁴¹³ This may leave enough of a digital trail to raise suspicion, but not enough for the government to prosecute the source of a leak without obtaining corroborating testimony from reporters.⁴¹⁴

A variety of additional factors, including the disaggregation of the media in the internet age, has reduced the public's confidence in the press today.⁴¹⁵ In September 2016, a Gallup poll reported that Americans' trust and confidence that the mass media will "report the news fully, accurately, and fairly" had dropped to its lowest level in Gallup polling history.⁴¹⁶ President Trump's verbal attacks on the press have likely contributed to this decline.⁴¹⁷ As the press becomes less trusted, the public may be less willing to support and defend it. This,

I would argue this view underplays the extent to which the government still can and does rely on reporter subpoenas, as well as the threat that these subpoenas and the anticipatory fear of such subpoenas pose to the reporter-source relationship.

412. McCraw & Gikow, *supra* note 11, at 495.

413. News outlets are increasingly relying on encrypted sources of information. The homepage of the *New York Times* now prominently features a section describing how to securely provide the paper with a news tip, including an encrypted SecureDrop. *Got a Confidential News Tip?*, N.Y. TIMES, <http://www.nytimes.com/newsgraphics/2016/news-tips> [<http://perma.cc/8CT7-P94W>]. And Human Rights Watch has reported that U.S. reporters are increasingly relying on burner phones and encryption to protect sources. *With Liberty To Monitor All: How Large-Scale US Surveillance Is Harming Journalism, Law, and American Democracy*, HUM. RTS. WATCH (July 28, 2014), <http://www.hrw.org/report/2014/07/28/liberty-monitor-all/how-large-scale-us-surveillance-harming-journalism-law-and> [<http://perma.cc/5CJS-XKVN>].

414. It may also lead reporters to simply avoid using technology altogether. *See, e.g., With Liberty To Monitor All, supra* note 413 (noting that U.S. journalists report "abandoning all online communication and trying exclusively to meet sources in person").

415. *See, e.g., Jones, supra* note 11, at 335-36.

416. Art Swift, *Americans' Trust in Mass Media Sinks to New Low*, GALLUP (Sept. 14, 2016), <http://www.gallup.com/poll/195542/americans-trust-mass-media-sinks-new-low.aspx> [<http://perma.cc/62Z7-SLMB>].

417. *See, e.g., Joel Simon, Trump Is Damaging Press Freedom in the U.S. and Abroad*, N.Y. TIMES (Feb. 25, 2017), <http://www.nytimes.com/2017/02/25/opinion/trump-is-damaging-press-freedom-in-the-us-and-abroad.html> [<http://perma.cc/HVA2-4PRN>] (arguing that Trump's attacks on the press were "part of a deliberate strategy to undermine public confidence and trust" in the institution); Margaret Talbot, *Trump and the Truth: The "Lying" Media*, NEW YORKER (Sept. 28, 2016), <http://www.newyorker.com/news/news-desk/trump-and>

in turn, reduces incentives for government officials to rely on the functional tools at their disposal to protect the press.⁴¹⁸

IV. IMPLICATIONS OF THE DE FACTO REPORTER'S PRIVILEGE FOR REFORM DEBATES

Understanding the importance – and the limits – of the de facto reporter's privilege allows law and policy makers to understand what is at stake in the creation of more formal protections. It suggests that simply pointing to the historical absence of a formal privilege is not a sufficient reason to oppose its creation. Rather, judges and legislators must ask whether these other, oft-overlooked forms of protection remain sufficiently robust to ensure the continued flow of information to the press. Fleshing out the scope of the de facto reporter's privilege allows for a more accurate and informed debate about the extent to which reporters have been protected throughout U.S. history – and the extent to which this protection has engendered a more robust press.

This Part applies the lessons of the de facto privilege to ongoing debates over the establishment of formal protections for the press. These debates often focus on establishing a formal federal reporter's privilege in one of three ways: 1) a congressionally-enacted statutory privilege, 2) a judicially-recognized federal common-law privilege under Federal Rule of Evidence 501, or 3) a judicially-recognized constitutional privilege rooted in the First Amendment.

A. Statutory Privilege

In the immediate aftermath of *Branzburg*, a number of federal shield laws were introduced in quick succession. These proposed bills appeared to garner widespread congressional support.⁴¹⁹ The few dissenting voices, however, opposed the bills largely on the grounds that the press had never before enjoyed a

-the-truth-the-lying-media [<http://perma.cc/U5SY-3BFZ>] (noting that Trump referred to the media as “slime” and “lying, disgusting people”).

418. Declining popularity of the press has been cited as a factor in the executive's decision to serve more subpoenas. See, e.g., WRIGHT & GRAHAM, *supra* note 7, § 5426 (arguing that “the political power of the press, which had previously made prosecutors reluctant to try to compel newsmen to disclose sources, was substantially diminished during the Nixon administration,” which may have explained the increase in number of subpoenas issued to reporters during that time). For a further discussion of the drop in public confidence in the press, see Jones & West, *supra* note 354, at 580-81.

419. The idea that protection was conferred in *fact*, if not in law, surfaced repeatedly in the context of legislative debates in the wake of *Branzburg*. See *supra* notes 16-18 and accompanying text; see also *Newsmen's Privilege: Hearings on H.R. 717 Before Subcomm. No. 3 of the H. Comm. on the*

privilege. During the 1972 legislative hearings on a proposed shield law, for example, Assistant Attorney General Roger Cramton argued that the “news media have functioned effectively and efficiently in this country for almost two hundred years without a reporter’s privilege.”⁴²⁰ Since the early days of the new republic, he continued, anonymous sources have faced “the remote possibility that a grand jury investigating criminal activity might require the reporter to divulge the identity of his source.”⁴²¹ Yet, in spite of these risks, these informants were not deterred, he argued. “Indeed, the flow of confidential information to the media has continued unabated if not increased.”⁴²²

This argument reemerged in the wake of September 11, when the high-profile jailing of prominent reporters infused the issue with new urgency. A number of shield laws were proposed in Congress between 2004 and 2013.⁴²³ Once again, much of the opposition to these bills was rooted in the view that a statutory shield was unnecessary because the press had never enjoyed such protection in the past. In a 2007 congressional debate on a proposed shield law, for example, Texas Representative Lamar Smith argued that the bill was “simply a solution in search of a problem.”⁴²⁴ “For 200 years, information has flowed freely to the press. Congress need not enact [the bill] when the status quo is working and the legislation’s potential harm to our national security is so significant.”⁴²⁵ In other words, he argued, “[t]he system is not broken. So why are we trying to fix it?”⁴²⁶

Judiciary, 93d Cong. 295 (1973) (statement by Stanford Smith, President of the American Newspaper Publishers Association) (noting that “[w]e thought we had lived through 200 years of history in this country where the news media were exempt from this type of subp[ro]na”); *id.* at 395 (statement of Rep. Glenn M. Anderson) (“For nearly 200 years, we rarely challenged the right of the press to investigate and report to the American people. Today that is no longer true.”); *Newsman’s Privilege: Hearings on H.R. 837, H.R. 1084, H.R. 15891, H.R. 15972, H.R. 16527, H.R. 16713, and H.R. 16542 Before Subcomm. No. 3 of the H. Comm. on the Judiciary*, 92d Cong. 236 (1972) [hereinafter *Newsman’s Privilege I*] (statement of Victor S. Navasky, American Civil Liberties Union) (arguing that “journalists, like doctors, lawyers and priests, were able to have a confidential relationship with their client, their source,” and “[w]hat we are asking Congress to do is restore a situation that existed before”); *id.* at 165 (statement of Rep. William S. Moorhead) (stating that “[a] few years ago it was generally assumed that freedom of the press protected not only the right to publish information but the right to gather information”).

420. *Newsman’s Privilege I*, *supra* note 419, at 24.

421. *Id.*

422. *Id.*

423. See *supra* notes 119-123.

424. 153 CONG. REC. 27302 (2007) (statement of Rep. Smith).

425. *Id.* at 27309.

426. *Id.* at 27302. Iowa Representative Steve King echoed this view. “[The bill] would protect journalists in most circumstances from having to reveal their sources or produce documents and

Similarly, in a 2009 House Judiciary Committee report on a proposed shield law, representatives opposing the bill argued that such a privilege “has no precedent in American legal history.”⁴²⁷ That same year, Iowa Congressman Steve King echoed this view in congressional debates over the privilege. “This goes on and on, 200-plus years, and now we have journalists that have to have special protection without having at least a breadth of statistical data that would support this advocacy that is part of this bill.”⁴²⁸ King then touched upon the very idea that this Article fleshes out. “The protections are there,” he argued. “There is already sufficient judicial restraint on moving to bring to cause these journalists who speak. Their sources are protected substantially by the tradition and effects of the court.”⁴²⁹ But he did not describe the scope of those traditions and effects, nor did he ask whether there has been any meaningful change in these protections that would necessitate a statutory shield.

This Article demonstrates that the assumption that reporters lacked any protection at common law is inaccurate.⁴³⁰ This misperception has skewed the legislative debate surrounding the creation of a statutory privilege, and this Article attempts to serve as a corrective. Legislators should not confine their inquiry to whether formal protections were afforded in the past. Rather, they should ask also whether the functional protections once extended to the press are still working. If these functional protections are so weak that they no longer sufficiently protect the press, legislators must consider whether a statutory shield will serve as an effective remedy.

But how weak is too weak? The question defies an easy answer. For decades, the press itself has been divided over whether a statutory shield would be helpful or harmful. Initially, much of this opposition was rooted in the belief that anything short of an absolute constitutional privilege would be insufficient.⁴³¹ Over time, many members of the press have concluded that even limited protection in

notes to government,” he stated. “This is not a problem. The press has flourished for over 200 years without a Federal privilege.” *Id.* at 27308.

427. H.R. REP. NO. 111-61, at 12 (2009).

428. 155 CONG. REC. 922 (2009) (statement of Rep. King).

429. *Id.*

430. It is not always clear from the record whether legislators were arguing that the press has never enjoyed a formal shield or whether they were arguing that the press has never enjoyed any federal protection of any kind. But ultimately, this distinction matters little: the former argument is normatively flawed because the broader ecosystem of less formal protections matters, while the latter argument is factually wrong.

431. See Timothy L. Alger, *Promises Not To Be Kept: The Illusory Newsgatherer's Privilege in California*, 25 LOY. L.A. L. REV. 155, 172 n.102 (1991); Dalglish & Murray, *supra* note 114, at 18-19. One reporter described the media's lobbying efforts for a federal shield law as “convicts building gallows from which they will hang.” Jones, *supra* note 114, at 603.

statutory form is better than no formal protection at all. The most recent proposed shield law – the Free Flow of Information Act of 2013 – elicited broad, if tepid, support from the press.⁴³² The *Washington Post*, for example, published an editorial noting that while critics argued the bill defined the press too narrowly, the judicial catch-all provision would nonetheless “build flexibility into the system to recognize those who don’t fit neatly into the mold.”⁴³³ And Bill Keller wrote in the *New York Times* that he supported the bill even though it featured “an intolerably large loophole for cases in which the government claims national security is at risk.”⁴³⁴ Despite such flaws, he reasoned, “[e]ven an imperfect shield law would restore a little balance in the perpetual struggle between necessary secrets and democratic accountability.”⁴³⁵ Even so, opposition to the bill remained fierce in some corners. National security reporters, in particular, expressed concern that the national security carve-out was so large that much of their reporting efforts would not be covered.⁴³⁶

Ultimately, a shield law in any form is likely to garner some criticism. But critical questions at the heart of the statutory shield debate – whether weak legislative protections are better than none at all, whether the de facto shield has degraded to the point where formalization is needed – can only be answered once the full scope of protections conferred upon the press, both formal and informal, are illuminated. The de facto privilege lens suggests that legislators have been blind to the full ecosystem of protections used to shield the press and their sources, and that this myopic view of the reporter’s privilege history has distorted the legislative debate.

432. See, e.g., Michael Calderone, *Media Coalition Endorses Journalist Shield Law*, HUFFINGTON POST (Sept. 12, 2013), http://www.huffingtonpost.com/michael-calderone/newspaper-association-america-media-shield-law_b_3915192.html [<http://perma.cc/Y8C4-T8LH>].

433. Editorial, *A Shield Law Is Necessary To Protect U.S. Journalists*, WASH. POST (Sept. 22, 2013), http://www.washingtonpost.com/opinions/a-shield-law-is-necessary-to-protect-us-journalists/2013/09/22/a3449104-20af-11e3-966c-9c4293c47e_story.html [<http://perma.cc/89JR-PQJ9>].

434. Bill Keller, *Secrets and Leaks*, N.Y. TIMES (June 2, 2013), <http://www.nytimes.com/2013/06/03/opinion/keller-secrets-and-leaks.html> [<http://perma.cc/TLD4-GSKQ>].

435. *Id.*

436. See, e.g., Newton, *supra* note 366. The bill provided that the government could obtain confidential source material from a covered journalist when it could show by a preponderance of the evidence that the information would “materially assist . . . in preventing or mitigating an act of terrorism or other acts that are reasonably likely to cause significant and articulable harm to national security.” See S. REP. NO. 113-118, at 7 (2013). In any other case involving national security, the government could obtain the information if it showed by a preponderance of the evidence that it would “materially assist in preventing, mitigating, or identifying the perpetrator of an act of terrorism or other acts that have caused or are reasonably likely to cause significant and articulable harm to national security.” *Id.* at 7-8.

But this history is also applicable to the legislative shield debate in other, smaller ways. Legislators have long debated how to define legislative protection for the press, and whether protection should be extended to broad segments of the population, such as the part-time blogger, or tailored more narrowly to confer protection on those who fit the traditional mold of a reporter.⁴³⁷ In 2013, legislators struck a bargain in the shield law then pending in the Senate: protection would be conferred more narrowly, but judges would be permitted to extend the privilege more broadly when they saw fit.⁴³⁸ The latter half of this bargain finds some support in the de facto privilege. This history reveals that judges have long relied on their discretion to confer ad hoc protections tailored to the needs of the particular reporter and the particular case; and it suggests that for many decades, this approach worked remarkably well. These and other lessons can be used to inform the legislative process and the construction of any statutory shield.

B. Common-Law Privilege

In 1975, Congress enacted Federal Rule of Evidence 501, which provides that “the common law – as interpreted by United States courts in the light of reason and experience – governs a claim of privilege unless any of the following provides otherwise: the United States Constitution; a federal statute; or rules prescribed by the Supreme Court.”⁴³⁹ This rule vested federal courts with the power to create new evidentiary privileges as the courts saw fit, consistent with “reason and experience.”⁴⁴⁰ The legislative history of Rule 501 reveals that Congress expressly contemplated the creation of a reporter’s privilege with this new rule.⁴⁴¹

437. See, e.g., S. REP. NO. 113-118, at 36-38 (2013) (criticizing the proposed shield law for defining “journalist” to cover “criminals and other individuals with countless opportunities to leak damaging information without worrying about any sort of consequence”).

438. Free Flow of Information Act of 2013, S. 987, 113th Cong. § 11(1)(B) (2013) (“In the case of a person that does not fit within the definition of ‘covered journalist’ described in subclause (I) or (II) of paragraph (A)(i), a judge of the United States may exercise discretion to avail the person of the protections of this Act if, based on specific facts contained in the record, the judge determines that such protections would be in the interest of justice and necessary to protect lawful and legitimate news-gathering activities under the specific circumstances of the case.”).

439. FED. R. EVID. 501. It also provides that “in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.”

440. *Id.*

441. WRIGHT & GRAHAM, *supra* note 7, § 5426 & n.4 (noting that the legislative history of Rule 501 “read like an invitation to courts to create” a reporter’s privilege and that the chairman of the House subcommittee that drafted the rules stated expressly that “[t]he language of Rule 501 permits the courts to develop a privilege for newspaper-people on a case-by-case basis.”).

As a result, one plausible avenue for establishing a federal source of protection for the press is through a judicially-crafted federal common-law privilege under Rule 501.

The Supreme Court has indicated that it takes an expansive approach to the “reason and experience” prong of Rule 501.⁴⁴² In 1995, for example, the Supreme Court established a new federal common-law therapist-patient privilege under the evidentiary rule.⁴⁴³ In its decision, the Court explicitly rejected the government’s recommendation that it adopt a more rigid understanding of what information and practice may be considered in the context of Rule 501. Instead, the Court extended its inquiry beyond the judicial branch to consider state legislative practice as well.⁴⁴⁴ The Court has also examined whether changing circumstances or beliefs warrant a corresponding change in other common-law evidentiary rules, like the spousal privilege.⁴⁴⁵

Some of this history and practice surely cuts against the establishment of a federal common-law reporter’s privilege under Rule 501. For example, the Supreme Court has suggested that when Congress contemplates but rejects a proposed privilege, the courts should refrain from stepping in where Congress has declined to act.⁴⁴⁶

But other examples of history and practice cut the other way. In the executive branch, the DOJ guidelines have enshrined special protections for reporters in the federal code. In the legislative context, state and federal legislators have consistently permitted reporters to withhold confidential sources during legislative proceedings, even where their names could have been legally compelled. And in the judicial context, there is a pattern of extending protections in other ways,

442. The origins of this phrase can be traced back to *Woffle v. United States*, 291 U.S. 7, 12 (1934), in which the Court held that federal common law privileges should be subject to revision over time as society evolved and changed; and to Rule 26 of the Federal Rules of Criminal Procedure, adopted in 1944, which provides that “[i]n every trial the testimony of witnesses must be taken in open court, unless otherwise provided by a statute or rules adopted” by statute. Rule 26’s committee notes clarify that the rule permits courts to apply federal common law rules interpreted by the courts “in the light of reason and experience.”

443. *Jaffee v. Redmond*, 518 U.S. 1, 7-8 (1996).

444. *Id.* at 13; *see also* *Trammel v. United States*, 445 U.S. 40, 48-50 (1980) (placing substantial weight on evidence of state practice when deciding whether to revisit the spousal privilege rule articulated in *Hawkins v. United States*, 358 U.S. 74 (1958)).

445. *Hawkins v. United States*, 358 U.S. 74, 77 (1958) (finding that “time and changing legal practices” had not undermined the rule barring testimony of one spouse against the other).

446. *Univ. of Pa. v. EEOC*, 493 U.S. 182, 189 (1990) (declining to construct a federal common law privilege under Rule 501 against the disclosure of peer review materials).

short of conferring an express privilege.⁴⁴⁷ These practices emphasize the importance of ensuring that reporters and their sources are shielded.

Moreover, as of 2013, all states but one had established some form of evidentiary privilege for the press.⁴⁴⁸ The Court has previously indicated that such overwhelming state consensus supports the creation of a federal common-law privilege.⁴⁴⁹ Taken together, this web of de facto protections demonstrates that the impulse to privilege the relationship between the press and its sources has long been a facet of the American legal and political systems. This information could be marshaled in favor of a common-law privilege for the press under Rule 501.

C. Constitutional Privilege

The extent to which the de facto lens affects the debate over a First Amendment-based privilege is perhaps less clear. In *Branzburg*, the Court acknowledged the press's argument that changes in society had placed new demands on reporters:

It is said that currently press subpoenas have multiplied, that mutual distrust and tension between press and officialdom have increased, that reporting styles have changed, and that there is now more need for confidential sources, particularly where the press seeks news about minority cultural and political groups or dissident organizations suspicious of the law and public officials.⁴⁵⁰

Even if true, the Court reasoned, such developments are “treacherous grounds for a far-reaching interpretation of the First Amendment fastening a

447. In his concurrence in *In re Miller*, Judge Tatel relied on much of this history and practice in determining that the courts should create a federal common law privilege under Rule 501. *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1172 (D.C. Cir. 2006) (Tatel, J., concurring). He invoked the near-uniformity among the states and the DOJ press subpoena guidelines in support of his argument for a common law privilege. *Id.*; see also Theodore J. Boutrous, Jr. & Seth M.M. Stodder, *Retooling the Federal Common-Law Reporter's Privilege*, COMM. LAWYER, Spring 1999, at 24-25 (arguing that DOJ policy should be factored into the courts' consideration of whether a privilege is warranted “in light of reason and experience”).

448. *In re Miller*, 438 F.3d at 1164 (Tatel, J., concurring) (listing legislative and judicial protections by state). Hawaii's shield law expired in 2013, and the state has not yet reinstated it. See *supra* note 134 and accompanying text.

449. *Jaffee v. Redmond*, 518 U.S. 1, 12 (1996) (noting that “it is appropriate for the federal courts to recognize a psychotherapist privilege under Rule 501” given that “all 50 States and the District of Columbia have enacted into law some form of psychotherapist privilege”).

450. *Branzburg v. Hayes*, 408 U.S. 665, 699 (1972) (citation omitted).

nationwide rule on courts, grand juries, and prosecuting officials everywhere.”⁴⁵¹ This language suggests that the Court did not consider these changing circumstances to be relevant to the question of a constitutional privilege.

On the other hand, the *Branzburg* Court also explicitly considered the protections extending from other branches and levels of government when it decided not to establish a constitutional privilege. Declining to recognize a First Amendment-based privilege would not leave the press defenseless, the Court reasoned. It noted that Congress still had the power to formulate a legislative privilege; state legislatures remained free to enact statutory protections; and the Attorney General had already written discretionary rules extending certain protections to the press.⁴⁵² This language implies that the Court may have considered these other forms of protection as mitigating the need for constitutional protection. In other words, the extent to which constitutional protections are required may depend in part on the extent to which protection emanates from other sources.

If so, then the question of whether these other sources of protection are still available to the press today is a relevant one. Because, as this Article demonstrates, these protections now may be weakening, the Court’s reasons for rejecting a constitutional shield may no longer hold true. The factual landscape since *Branzburg* has shifted. The press no longer enjoys the financial stability and deep and widespread support of the public that it enjoyed in 1972.⁴⁵³ And other, more alarming changes may be on the horizon: the Trump administration will likely scale back the Attorney General guidelines, and it has threatened to pursue leakers far more aggressively and prosecute reporters for publishing classified information.⁴⁵⁴ And if the factual foundation upon which the *Branzburg* decision rests begins to crumble, then the case for revisiting the question of a First Amendment privilege grows more persuasive.

There are other indications that the Court may be more amenable today to the idea that changing circumstances alter how constitutional protections are formulated. For example, Justice Sotomayor’s concurrence in the GPS-tracking case *United States v. Jones* suggests that the Fourth Amendment’s third-party doctrine should be revisited in light of technological changes. She argues that the third-party doctrine “is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks.”⁴⁵⁵ If recent technological changes warrant a reexamination

451. *Id.*

452. *Id.* at 706-07.

453. See *supra* notes 407-408 and accompanying text.

454. See *supra* notes 399-400 and accompanying text.

455. *United States v. Jones*, 132 S. Ct. 945, 957 (2012) (Sotomayor, J., concurring).

of core Fourth Amendment principles, then other changing circumstances might similarly warrant a reevaluation of the First Amendment protections offered to the press.

In sum, the de facto privilege lens offers two central conclusions: first, those with decisionmaking authority over whether to establish a formal shield have long ignored the critical role that informal protections have played in shielding the press; and second, many of the informal protections historically extended to the press are now contracting. On the one hand, these conclusions, taken together, bolster the case for a formal shield. As this section shows, this history can be used to amplify or even generate new legal arguments in favor of a statutory, common law, or constitutional shield. On the other hand, the lessons of the de facto privilege history are not so determinative. The de facto privilege lens also illuminates the benefits of the current approach—and, in turn, what might be lost with the establishment of a formal shield.

CONCLUSION

Whether a formal federal reporter's privilege is necessary is a long-disputed question. Congress—by refusing to craft a shield—and the Supreme Court—by declining to revisit the *Branzburg* decision—have “profoundly minimize[d] the rule of law” in this realm.⁴⁵⁶ A threshold question in the debate over enacting a formal shield is whether the present approach—eschewing strict legal boundaries in favor of softer, more malleable norms—is working.

There are strong indications that a formal shield would offer more robust and consistent protections for the press across both the executive and judicial branches. Formalizing the privilege would likely increase uniformity and predictability in the law. In the context of the executive branch, the Attorney General guidelines are not binding—failure to follow them results in only an “administrative reprimand” or some other “appropriate disciplinary action.”⁴⁵⁷ And while the Obama Administration aggressively pursued whistleblowers in the name of

456. McCraw & Gikow, *supra* note 11, at 479 (noting that the Court's decision in *New York Times Co. v. United States*, 403 U.S. 713 (1971), together with the FOIA regime, have likewise contributed to “minimiz[ing] the rule of law” in this area).

457. 28 C.F.R. § 50.10(i) (2017). In the Judith Miller case, the government's Special Counselor did not follow the guidelines for issuing subpoenas to reporters. But the court found that this had little relevance to Miller's case because the guidelines create no enforceable right. *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1152 (D.C. Cir. 2006).

national security,⁴⁵⁸ it also exercised substantial prosecutorial discretion to protect them in other contexts.⁴⁵⁹ This is all likely to change. Indeed, there are already signs that the current administration will be far less protective of the press.⁴⁶⁰ Formalizing the privilege will ensure that protection of the media will not be left to the whims of executive-branch decision makers. The mere existence of a formal shield may have a deterrent effect on the issuance of subpoenas to the press.⁴⁶¹

A formal shield will likely have similar benefits in the judicial context. Judges appear less likely today to read *Branzburg* to permit a qualified privilege and more likely to impose harsh sanctions on a reporter who refuses to surrender a source. Formalizing a privilege—in statutory, constitutional, or common law form—would likely reduce judicial discretion. It would also provide sympathetic judges with firmer grounds on which to extend protections to the press.

A formalized privilege also would allow for a more accurate calculation *ex ante*—by both reporter and source—of whether a reporter will be permitted to withhold the identity of an informant. Those who advocate for a federal shield statute argue that without clear protections, the mere threat of exposure may be enough to deter a source. As Geoffrey Stone has noted, the current discrepancy between state and federal protections “generates uncertainty, and uncertainty breeds silence.”⁴⁶²

But not all press advocates support formalization. Some argue that leaving the law underdefined preserves much-needed flexibility for judges and prosecutors, particularly in light of the growing difficulty of defining who qualifies for a privilege.⁴⁶³ And some scholars and reporters have criticized proposed shield

458. Risen, *supra* note 391.

459. The director of the D.C.-based Government Accountability Project, which advocates for whistle-blowers, has called the Obama years the “golden age” for whistle-blower reform. Eyal Press, *Obama Leaves Trump a Mixed Legacy on Whistle-Blowers*, NEW YORKER (Dec. 7, 2016), <http://www.newyorker.com/news/daily-comment/obama-leaves-trump-a-mixed-legacy-on-whistle-blowers> [<http://perma.cc/Z2EZ-AWYC>]. Major legislative initiatives under Obama, including the Affordable Care Act and the economic stimulus plans, all included strengthened protections for whistleblowers. *Id.*

460. See *supra* note 399-400 and accompanying text.

461. See Newton, *supra* note 366 (quoting Charlie Savage, arguing that moving decisionmaking authority on the issuance of a subpoena from an attorney general’s office to a judge’s chambers “alone is a deterrent to frivolously or overly broad requests and it may in fact have a significant change in how often such a subpoena is issued”).

462. Stone, *supra* note 4, at 43.

463. For a discussion of the difficulties of defining who qualifies for the privilege, see, for example, Eliason, *supra* note 104, at 1366-70. For a more general discussion of the benefits of preserving

laws for providing insufficient protection for the press, particularly for journalists who cover national security issues.⁴⁶⁴

There is also the risk that formalizing the privilege would make it more difficult for the press to rely on the persuasive power of public opinion. David Pozen has argued that the downside of a statutory shield is that it risks legitimizing the practice of subpoenaing reporters and distributing responsibility for the subpoena across multiple branches, which may have the paradoxical effect of reducing protections for the press.⁴⁶⁵ He argues that “[a]ccusations of overreach would have less bite within a legal framework that had been blessed by all three branches of government plus the Fourth Estate.”⁴⁶⁶

Ultimately, whether and how to establish a formal shield will depend on a wide array of factors – including the form the privilege takes and which branch of government represents the most significant threat to the press. A full accounting of these many legal and factual considerations is beyond the scope of this Article. But the benefit of the *de facto* lens constructed here is that it illuminates the many diverse ways that protection is and has been conferred upon the press – it fleshes out the full ecosystem of protections, both formal and informal, that the press has long enjoyed. Judges and legislators must carefully evaluate and continually monitor the health and robustness of these *de facto* protections. If they determine that the *de facto* privilege has buckled under the weight of increasing pressures, these law and policymakers must take measures to ensure the continued protection of the press.

ambiguity in the law, see Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 7 (1996) (describing the benefits of “decisional minimalism”).

464. See, e.g., Newton, *supra* note 366.

465. David Pozen, *Why a Media Shield Law May Be a Sieve*, JUST SEC. (Oct. 21, 2013, 10:20 AM), <http://www.justsecurity.org/2232/media-shield-law-sieve-david-pozen> [<http://perma.cc/K3TY-B49K>].

466. *Id.*