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# When the Fourth Estate's Well Runs Dry

“When the Well’s dry, we know the Worth of Water.”<sup>1</sup>  
Benjamin Franklin, 1746

## INTRODUCTION

On June 8, 1789, James Madison introduced to the first Congress a list of proposed amendments to the U. S. Constitution.<sup>2</sup> The list, which would eventually evolve into the Bill of Rights, included the following: “The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, *as one of the great bulwarks of liberty*, shall be inviolable.”<sup>3</sup> Though these words went through several further rounds of revision,<sup>4</sup> it was Madison’s proposal that gave birth to the First Amendment, the single sentence in the Constitution that, among other things, bestows freedom upon the press.<sup>5</sup>

Since its drafting, courts, legislators, and scholars have all debated the Framers’ purpose for the Press Clause—whether its placement within the First Amendment intentionally separates the institutional press from the everyday speaker, or, instead, whether the phrase simply broadens the scope of a citizen’s freedom to speak.<sup>6</sup> And while essentially no evidence can point directly to the Framers’ intent with respect to the inclusion of “or of the press” in the First Amendment, our

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<sup>1</sup> BENJAMIN FRANKLIN, POOR RICHARD’S ALMANACK AND OTHER WRITINGS (eds., Bob Blaisdell) 17 (2013).

<sup>2</sup> LUCAS A. POWE, JR., THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA 45 (1991).

<sup>3</sup> *Id.* at 45–47 (emphasis added).

<sup>4</sup> *Id.* at 46–47; LYRISSA BARNETT LIDSKY & R. GEORGE WRIGHT, FREEDOM OF THE PRESS: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 4 (2004).

<sup>5</sup> U.S. CONST. amend. I; POWE, JR., *supra* note 2, at 23.

<sup>6</sup> U.S. CONST. amend. I; LIDSKY & WRIGHT, *supra* note 4, at 2–8. For purposes of the forthcoming analysis, “the press” refers to the institutional press, including newspapers, magazines, television broadcasts, and other similar news organizations.

nation's history has made one thing explicitly clear: a free press was, and continues to be, crucial to the success of a democracy.<sup>7</sup>

Often referred to more colloquially as the Fourth Estate, the traditional press is an impartial body responsible for informing the public; it is *the* institution that must serve as a check on the three branches of government.<sup>8</sup> The press must therefore be free "to gather news, write it, publish it, and circulate it."<sup>9</sup> No step of the journalistic process is more important than another, so preserving this "full and free flow of information to the general public has long been recognized as a core objective of the First Amendment."<sup>10</sup>

It is particularly unsettling, then, that the First Amendment ultimately affords the press varying levels of legal protection.<sup>11</sup> Take, for example, a newspaper's right to publish content compared to its right to gather valuable information. As is axiomatic, a citizen (here, a journalist) has the right to speak free of censorship.<sup>12</sup> The Supreme Court has even held that government censorship of a news publication, also referred to as prior restraint, is presumptively unconstitutional.<sup>13</sup> Even though the Court has made clear that journalists are not necessarily entitled to a special status under the rule of law, it has found ways to treat reporters with a certain reverence, particularly in cases where it confronts prior restraints.<sup>14</sup> On the other hand, courts are not at all decisive when it comes to newsgathering itself,

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<sup>7</sup> LIDSKY & WRIGHT, *supra* note 4, at 8. See, e.g., *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 719–20 (1931) (ruling in favor of a media organization on the grounds that society needs "a vigilant and courageous press"); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936) ("A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves."); *Estes v. Texas*, 381 U.S. 532, 539 (1965) ("The free press has been a mighty catalyst in awakening public interest in governmental affairs . . ."); S. Rep. No. 113–118, at 3 (2013) ("A free press is vital to a healthy democracy, and a journalist's ability to effectively gather information is, in turn, central to a free press.").

<sup>8</sup> Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 633–34 (1975). For a more detailed account of the origin of the Fourth Estate, see THOMAS CARLYLE, *ON HEROES, HERO-WORSHIP, & THE HEROIC IN HISTORY* 257–58 (4th ed., 1852) ("Burke said there were Three Estates in Parliament; but, in the Reporters' Gallery yonder, there sat a Fourth Estate more important far than they all. It is not a figure of speech, or a witty saying; it is a literal fact . . . Whoever can speak, speaking now to the whole nation, becomes a power, a branch of government, with inalienable weight in law-making, in all acts of authority." (emphasis in original)).

<sup>9</sup> *In re Mack*, 126 A.2d 679, 689 (Pa. 1956) (Musmanno, J., dissenting) (noting that when the press cannot carry out one of its fundamental operations, "freedom of the press becomes a river without water").

<sup>10</sup> *Houchins v. KQED, Inc.*, 438 U.S. 1, 30 (1978) (Stevens, J., dissenting).

<sup>11</sup> See *infra* Sections I.A–C.

<sup>12</sup> *New York Times Co. v. United States (The Pentagon Papers)*, 403 U.S. 713, 717 (1971).

<sup>13</sup> See *infra* Part IV.

<sup>14</sup> See *infra* Section I.A.

making it difficult for a reporter to even access critical information in the first place, let alone keep it confidential.<sup>15</sup>

Arguably the least protected—and most complicated—aspect of the journalistic process is a reporter's relationship with her source.<sup>16</sup> Members of the press often face subpoenas or similar court orders, compelling the disclosure of a source's identity, and journalists have relied on the First Amendment as a defense.<sup>17</sup> For decades, journalists have responded by asserting a "reporter's privilege," a testimonial privilege similar to that of a physician or an attorney.<sup>18</sup> Journalists argue that refusing to comply with a subpoena or court order is well within the constitutional protection afforded by the First Amendment.<sup>19</sup>

Today, the recognition of a reporter's privilege is far from well-settled law.<sup>20</sup> Not a single jurisdiction—across both the state and federal levels—approaches the privilege analysis the same way,<sup>21</sup> and the doctrine has evolved in a way that is "uniformly regarded as confusing, resulting in a privilege that is ambiguous, inconsistent, and the subject of significant criticism."<sup>22</sup> While practically all state jurisdictions recognize at least a qualified privilege for the press, there exists no such privilege at the federal level.<sup>23</sup> The Supreme Court has only heard one reporter's privilege case;<sup>24</sup> denying petitions for certiorari in all other similar instances.<sup>25</sup>

A number of high-profile cases on the privilege issue made headlines in 2005, followed shortly thereafter by an

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<sup>15</sup> See *infra* Section I.A.

<sup>16</sup> RonNell Andersen Jones, *Rethinking Reporter's Privilege*, 111 MICH. L. REV. 1221, 1223–25 (2013).

<sup>17</sup> See *id.* at 1224–25.

<sup>18</sup> *Id.* at 1223–24.

<sup>19</sup> See *Branzburg v. Hayes*, 408 U.S. 665, 667 (1972).

<sup>20</sup> See *infra* Parts II, III.

<sup>21</sup> See *infra* Section II.A.

<sup>22</sup> Jones, *supra* note 16, at 1225 (footnotes omitted) (internal quotation marks omitted).

<sup>23</sup> See *infra* Section II.A.

<sup>24</sup> See *generally* *Branzburg v. Hayes*, 408 U.S. 665 (1972) (refusing to acknowledge the existence of a privilege for reporters at a federal level).

<sup>25</sup> See *Garland v. Torre*, 259 F. 2d 545 (2d Cir. 1958), *cert. denied*, 358 U.S. 910 (1958); *Baker v. F & F Inv.*, 470 F. 2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *Cervantes v. Time, Inc.*, 464 F. 2d 986 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); *Farr v. Pitchess*, 522 F. 2d 464 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); *Miller v. Transamerican Press*, 621 F. 2d 721 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *LaRouche v. Nat'l Broad. Co.*, 780 F.2d 1134 (4th Cir. 1986), *cert. denied*, 479 U.S. 818 (1986); *Wen Ho Lee v. Dep't of Justice*, 413 F. 3d 53 (D.C. Cir. 2005), *cert. denied*, 547 U.S. 1187 (2006); *In re Grand Jury Subpoena, Judith Miller*, 397 F. 3d 964 (D.C. Cir. 2005), *cert. denied sub nom. Cooper v. United States*, 545 U.S. 1150 (2005), *opinion superseded*, 438 F. 3d 1141 (D.C. Cir. 2006).

outpouring of subpoenas being issued upon the press.<sup>26</sup> And as a result of the “varying privilege protections available in different jurisdictions as well as the unpredictable outcomes when judges engage in ad hoc balancing’ create[ing] uncertainty for both sources and journalists,”<sup>27</sup> reporters now fear that sources will stop coming forward with information integral to the free flow of information.

Absent a framework in which members of the press can consistently protect their confidential information, sources will stop disclosing valuable information for fear of legal punishment, leaving journalists with less accurate and less timely facts from which to report to the public.<sup>28</sup> The ambiguities at a federal level have significantly burdened the newsgathering process and effectively censored the press, which is entirely inconsistent with the First Amendment.<sup>29</sup>

Part I of this note offers a brief overview of First Amendment jurisprudence as it applies to the press. Part II focuses on the development of reporter’s privilege. This Part argues that federal law must permit journalists to protect their sources, as it is not only demanded by decades of First Amendment case law, but absolutely necessary in today’s legal and political landscape. Part III examines the more recent cases that have shed light on the doctrinal inconsistencies at the federal level. Part IV then proposes a solution: the federal judiciary must begin analyzing media subpoenas—the very tools that continue to strip the press of their sources—as prior restraints. If courts apply the prior restraint balancing test, which permits censorship only under extremely compelling circumstances, the federal judiciary can accommodate the interests of the government without silencing the press.

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<sup>26</sup> Victor Kovner, Panel Discussion, *Are Journalists Privileged?*, 29 CARDOZO L. REV. 1353, 1365 (2008) (“Prosecutors will feel, because of the notoriety of the Miller case, that they are not doing their job effectively unless they subpoena the press. This has virtually turned the relationship on its head.”).

<sup>27</sup> William E. Lee, *A Revisionist View of Journalist’s Privilege: Justice Powell, Branzburg and the “Proper Balance,”* 34 CARDOZO ARTS & ENT. L.J. 113, 160 (2016) (quoting William E. Lee, *The Priestly Class: Reflections on a Journalist’s Privilege*, 23 CARDOZO ARTS & ENT. L.J. 635, 664–65 (2006)).

<sup>28</sup> Jonathan Peters, *Shield Laws and Journalist’s Privilege: The Basics Every Reporter Should Know*, COLUM. JOURNALISM R. (Aug. 21, 2016), [http://www.cjr.org/united\\_states\\_project/journalists\\_privilege\\_shield\\_law\\_primer.php](http://www.cjr.org/united_states_project/journalists_privilege_shield_law_primer.php) [<https://perma.cc/7BFF-YCBB>].

<sup>29</sup> See generally Ronnell Andersen Jones, *Media Subpoenas: Impact, Perception, and Legal Protection in the Changing World of American Journalism*, 84 WASH. L. REV. 317 (2009) (reporting the results of a large-scale empirical study which presented the quantitative and qualitative effects that subpoenas have on the news media press).

I. THE PRESS' FIRST AMENDMENT: A FULL AND FREE FLOW OF INFORMATION

A. *A Full and Free Right of Access*

Generally, the Supreme Court has held that the public has a right to access information and ideas. In *Red Lion Broadcasting Co. v. FCC*, for example, the Court held that “[i]t is the right of the public to receive suitable access to” information that is newsworthy and crucial.<sup>30</sup> The Court reaffirmed this rule when it decided *Stanley v. Georgia*: “[t]his right to receive information and ideas, regardless of their social worth, is fundamental to our free society.”<sup>31</sup>

While it has also addressed the First Amendment right of access specifically as it relates to the press, the Court largely maintains the position that all information open to the general public is equally open to the press.<sup>32</sup> Rightly so, as inhibiting the publication of information that should reach the public is inconsistent with well-established First Amendment precedent. The press *must* report on issues of public concern, “whatever the source, without censorship, injunctions, or prior restraint.”<sup>33</sup> If the First Amendment *does* truly protect the free flow of information, then failing to provide federal protection to the journalist-source relationship halts the necessary flow of information to the public. This argument is further supported by the Court’s stance on the presumptive unconstitutionality of government censorship.<sup>34</sup>

B. *Flow: Publishing Free of Censorship*

A citizen’s right to speak free of censorship is the true foundation to the First Amendment. It is the most basic right, and the Supreme Court has unequivocally held that prior restraints—a government action or regulation that restricts speech in advance of its publication—is “the most serious and the least tolerable infringement on First Amendment rights.”<sup>35</sup>

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<sup>30</sup> *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

<sup>31</sup> *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

<sup>32</sup> *Richmond Newspapers v. Virginia*, 448 U.S. 555, 598–601 (1980).

<sup>33</sup> *The Pentagon Papers*, 403 U.S. 713, 717 (1971).

<sup>34</sup> *Id.* at 714.

<sup>35</sup> *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976).

### 1. *Near v. Minnesota*

The Supreme Court first addressed prior restraints in 1931.<sup>36</sup> The case, *Near v. Minnesota*, dealt with the publishing of a pamphlet-like newspaper that targeted local Minneapolis officials and their alleged wrongdoings.<sup>37</sup> The trial court immediately banned further publication, relying on a Minnesota law which restricted the publication of “malicious, scandalous and defamatory” newspapers without official approval from the state government.<sup>38</sup> On appeal to the Supreme Court, the newspaper argued that the state violated the publisher’s First Amendment rights by prohibiting the publication of the allegedly defamatory newspaper.<sup>39</sup>

In this landmark case for press freedoms, the Court held that the government may not prohibit a publication in advance.<sup>40</sup> Focusing primarily on the First Amendment’s rich history—namely the Framers’ deliberate protection against government censorship—the Court determined that the Minnesota law constituted a system of prior restraint.<sup>41</sup> In an attempt to further elucidate the prior restraint doctrine, the Court majority wrote that “[t]he exceptional nature of its limitations places in a strong light the general conception that liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship.”<sup>42</sup>

The Court also noted the difference between censorship and punishment: subsequent punishment for a criminally libelous article could be permissible under other First Amendment doctrines, but a statute that allowed for an injunction to halt publication *before* the potentially criminal words are spoken was wholly inconsistent with the Constitution.<sup>43</sup> Even though the Court noted that there might exist circumstances where prior restraints could be acceptable (notably, where national security is at risk), the *Near* decision was a resounding win for the press: the government could not prevent a newspaper from publishing its content.

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<sup>36</sup> See *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931).

<sup>37</sup> *Id.* at 701–03.

<sup>38</sup> *Id.* at 701–02.

<sup>39</sup> See *id.* at 705–07.

<sup>40</sup> *Id.* at 722–23.

<sup>41</sup> See *id.* at 712–22 (holding that the Minnesota state law was “effective censorship”).

<sup>42</sup> *Id.* at 716.

<sup>43</sup> *Id.* at 715.

## 2. *The Pentagon Papers*

The Supreme Court did not again confront the issue of government censorship on such a large scale until forty years later. On June 13, 1971, the front page of the *New York Times* read: “VIETNAM ARCHIVE: PENTAGON TRACES 3 DECADES OF GROWING U.S. INVOLVEMENT.”<sup>44</sup> Over the next two days, the *Times* published a series of classified documents detailing American involvement in Vietnam.<sup>45</sup> These documents soon became known as the Pentagon Papers.<sup>46</sup> Upon their release, the Nixon administration immediately filed suit in the United States District Court for the Southern District of New York against the *Times* and moved for a restraining order to prevent any further publication of the classified material.<sup>47</sup> The government claimed that the publication of these confidential documents would cause irreparable injury to the country, the security of its citizens and its relationships overseas.<sup>48</sup> The district court ruled in the government’s favor, enabling it to file for a restraining order against the *Times*.<sup>49</sup>

Meanwhile, the *Washington Post* received a copy of the Pentagon Papers.<sup>50</sup> The *Post* released its own installment of the documents on June 18 of that year, the *Boston Globe*, *Chicago Sun-Times*, and thirteen other newspapers followed suit.<sup>51</sup> Though the federal government did successfully file an injunction against the *Post* days later, the Court of Appeals for the District of Columbia’s dissent gave the press hope, with an opinion that reaffirmed the long-standing notion that any restraint on publication is a “cut [to] the heart of our free institutions and system of government.”<sup>52</sup> The dissent opened with firm disagreement:

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<sup>44</sup> Neil Sheehan, *Vietnam Archive: Pentagon Study Traces 3 Decades of Growing U. S. Involvement*, N.Y. TIMES, June 13, 1971, at 1, col. 1, <http://www.nytimes.com/1971/06/13/archives/vietnam-archive-pentagon-study-traces-3-decades-of-growing-u-s.html> [https://perma.cc/Y79T-CNKG].

<sup>45</sup> See *United States v. New York Times*, 328 F. Supp. 324, 325–26 (S.D.N.Y. 1971).

<sup>46</sup> For the full and archived coverage of “The Pentagon Papers,” see *Pentagon Papers*, N.Y. TIMES, <https://www.nytimes.com/topic/subject/pentagon-papers> [https://perma.cc/5CBC-6RBX].

<sup>47</sup> *New York Times*, 328 F. Supp. at 326.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 325.

<sup>50</sup> John T. Correll, *The Pentagon Papers*, AIR FORCE MAG. (Feb. 2007), <http://www.airforcemag.com/MagazineArchive/Pages/2007/February%202007/0207pentagon.aspx> [https://perma.cc/HG8B-LA58].

<sup>51</sup> *Id.*

<sup>52</sup> Notes and Comments, *The Purloined Pentagon Papers and Prior Restraint: The Press Prevailed!*, 46 ST. JOHN’S L. REV. 81, 84 (2012). See *United States v. Washington Post Co.*, 446 F.2d 1322, 1325 (D.C. Cir. 1971) (Wright, J. dissenting).



This is a sad day for America. Today, for the first time in the two hundred years of our history, the executive department has succeeded in stopping the presses. It has enlisted the judiciary in the suppression of our most precious freedom. As if the long and sordid war in Southeast Asia had not already done enough harm to our people, it now is used to cut out the heart of our free institutions and system of government.<sup>53</sup>

For the first time in over a decade, the Supreme Court extended its term to hear the case. On June 30, 1971, the Court reversed both injunctions issued upon both the *Times* and the *Post*, holding that prior restraints were unconstitutional absent a particularized showing of harm to national security.<sup>54</sup> The unsigned, per curiam opinion ruled in favor of the press, noting, of course, that history indicates a "heavy presumption" against government censorship.<sup>55</sup> Prior restraints, the Court stressed, could only be imposed where the speech the government sought to suppress would cause "grave and irreparable danger."<sup>56</sup>

The press had not only won the battle over *The Pentagon Papers*, but the war against government censorship. In the years that followed, the Court continued to rule in favor of the press on matters of censorship and prior restraint.

### 3. *Nebraska Press Association v. Stuart*

Only a few years later, the Supreme Court handed down a decision that further developed the scope of the prior restraint doctrine.<sup>57</sup> *Nebraska Press Association v. Stuart*, a case which arose from the press' coverage of the brutal killing of an entire family in Sutherland, Nebraska, addressed whether the government could prevent members of the media from publishing information gathered during criminal proceedings.<sup>58</sup>

The defendant's arrest sparked media interest in both the local and national arenas, leading both the local county attorney and the defense attorney to enter into a court order to restrict the press from further covering the trial; both parties argued that the "reasonable likelihood of prejudicial news . . . would make difficult, if not impossible, the impaneling of an impartial jury and tend to prevent a fair trial."<sup>59</sup> The state trial judge granted the order, completely chilling any subsequent coverage of the criminal trial.<sup>60</sup>

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<sup>53</sup> *Washington Post Co.*, 446 F.2d at 1325 (Wright, J. dissenting).

<sup>54</sup> *The Pentagon Papers*, 403 U.S. 713, 714 (1971).

<sup>55</sup> *Id.* at 723 (quoting *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)).

<sup>56</sup> *Id.* at 732.

<sup>57</sup> See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

<sup>58</sup> *Id.* at 540-42.

<sup>59</sup> *Id.* at 559.

<sup>60</sup> *Id.* at 542-48.

The Supreme Court heard the case in 1976 and ultimately sided with the press.<sup>61</sup> While much of the opinion simply reaffirmed the same ideals used to support its holdings in *Near* and *New York Times*, the Court held that “the damage can be particularly great when the prior restraint falls upon the communication of news and commentary on current events.”<sup>62</sup> Notably citing to one of its own decisions deciding a separate First Amendment matter, the Court stated that “[r]egardless of how beneficent-sounding the purposes of controlling the press might be, [the Court] . . . remain[s] intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this [n]ation’s press.”<sup>63</sup>

### C. *The Press’ Well of Information*

Journalists have been protecting confidential information gathered during the pre-publication process since the early days of the printing press,<sup>64</sup> but it was not until 1972 that the Supreme Court addressed whether a journalist could invoke the First Amendment to protect himself and his source from a grand jury subpoena.<sup>65</sup> The Court had previously declined to hear the issue in an earlier case, where an entertainment reporter for the *New York Herald Tribune* was the first to assert a reporter’s privilege in federal court.<sup>66</sup>

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<sup>61</sup> *Id.* at 570 (“We hold that, with respect to the order entered in this case prohibiting reporting or commentary on judicial proceedings held in public, the barriers have not been overcome; to the extent that this order restrained publication of such material, it is clearly invalid.”).

<sup>62</sup> *Id.* at 529–62 (“A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.”).

<sup>63</sup> *Id.* at 560–61 (quoting *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 259 (1974) (White, J., concurring)).

<sup>64</sup> See POWE, *supra* note 2, at 7–13.

<sup>65</sup> See *Branzburg v. Hayes*, 408 U.S. 665 (1972).

<sup>66</sup> *Garland v. Torre*, 259 F.2d 545, 547 (2d Cir. 1958). Marie Torre had written a column in the *Tribune* about Judy Garland, in which Torre quoted an anonymous CBS executive. *Id.* Garland, unhappy with the coverage, sued the television network, demanding that Torre disclose the name of her source. *Id.* Torre invoked her First Amendment right to protect the source’s identity, asserting that compelling disclosure of the source’s identity would “impose an important practical restraint on the flow of news from news sources to the news media and would thus diminish pro tanto the flow of news to the public.” *Id.* at 547–48. Torre protected the identity of her source until her death in 1997. 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> [https://perma.cc/VUF4-65RG].

*Branzburg v. Hayes* is the consolidation of three cases in which the Court first evaluated this issue.<sup>67</sup> Three individual reporters had been issued separate grand jury subpoenas, compelling them each to reveal their sources in connection with their respective reporting on the Black Panther Party.<sup>68</sup>

The journalists refused to appear before grand juries, and argued that the First Amendment afforded them the right to protect their confidential sources and the information that those sources had disclosed.<sup>69</sup> The three reporters also claimed that requiring a member of the press to disclose any confidential information would place a severe, distinct burden on newsgathering, which would undoubtedly outweigh any public interest in the information that could potentially assist in the criminal justice process.<sup>70</sup>

In a plurality opinion written by Justice White, the Court denied the existence of a reporter's privilege in any capacity, and effectively rejected the reporters' argument that the First Amendment could protect the press from a subpoena or a similar court order.<sup>71</sup> Essentially, the Court held that journalists could not circumvent their legal obligation to respond to grand jury subpoenas simply because of a job title.<sup>72</sup> Justice White's opinion categorically rejected the notion that the First Amendment or any other constitutional privilege exists to protect the press from a subpoena or a similar court order.<sup>73</sup>

It was Justice Powell's concurrence, though, that ultimately breathed life into the reporters' First Amendment arguments;<sup>74</sup> his opinion set forth the framework that many jurisdictions now use for providing its journalists with some kind of protection.<sup>75</sup> Though Justice Powell noted the "limited nature" of the Court's opinion, the concurrence seemed to plainly contradict

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<sup>67</sup> *Branzburg v. Hayes*, 408 U.S. 665, 667 (1972).

<sup>68</sup> *Id.* at 668, 672–73, 675.

<sup>69</sup> *Id.* at 668, 673, 676.

<sup>70</sup> *Id.* at 676.

<sup>71</sup> *Id.* at 689–704.

<sup>72</sup> *Id.* at 697.

<sup>73</sup> See Paul Marcus, *The Reporter's Privilege: An Analysis of the Common Law, Branzburg v. Hayes, and Recent Statutory Developments*, 25 ARIZ. L. REV. 815, 823 (1983) ("Strangely, Justice White either misconstrued the reporters' position, or chose to interpret it as encompassing an assertion of absolute privilege . . . The reporters' argument, though, was straightforward and hardly advocated an absolute privilege.")

<sup>74</sup> See *Branzburg v. Hayes*, 408 U.S. 665, 709–10 (1972) (Powell, J., concurring).

<sup>75</sup> Michele Bush Kimball, *The Intent Behind the Cryptic Concurrence That Provided a Reporter's Privilege*, 13 COMM. L. & POL'Y 379, 379–80 (2008). Though the concurring opinion was a brief one, academics, attorneys, and judges alike have analyzed the meaning of Justice Powell's intent in writing separately, as well as the implications his concurrence had on the Court's decision as a whole. See, e.g., Lee, *supra* note 27, at 115–20; Sean W. Kelly, *Black and White and Read All Over: Press Protection After Branzburg*, 57 DUKE L.J. 199, 208–10 (2007).

the majority's ruling.<sup>76</sup> Justice Powell wrote that the Court's decision did *not* mean "that newsmen . . . [were] without constitutional rights with respect to the gathering of news or in safeguarding their sources," or that government authorities would be permitted to "annex" the press "as 'an investigative arm of government.'"<sup>77</sup> He insisted that the news media must still have remedies for safeguarding its sources.<sup>78</sup> His concurrence suggested that issues like the one before the Court called for a fact-specific test that should strike a balance between press freedom and a citizen's duty to testify regarding criminal conduct when under court order.<sup>79</sup> He reasoned that such a case-by-case balancing approach would be consistent "with the tried and traditional way of adjudicating such questions."<sup>80</sup>

Justices Stewart and Douglas wrote separate dissenting opinions. In his, Justice Stewart suggested the implementation of a separate three-prong balancing test to determine whether a journalist could qualify for this special privilege.<sup>81</sup> The proposed judicial analysis would impose a particularly heavy burden on the government to:

- (1) show that there is probable cause to believe that the [reporter] has information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.<sup>82</sup>

Notably, Justice Stewart recognized the existence of a reporter's privilege and expressed concern about the very issue that this note seeks to address: if the Court were to establish that there was no privilege, then sources with useful information would refuse to share that information with the press.<sup>83</sup> Justice Douglas echoed these concerns, concluding in his dissent that by refusing to acknowledge a reporter's privilege, the Court deprived—and will continue to deprive—the public of its right to a free flow of information.<sup>84</sup> According to Justice Douglas, a

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<sup>76</sup> See *Branzburg*, 408 U.S. at 709–10 (Powell, J., concurring). During his tenure on the Supreme Court, Justice Powell never approved of writing a concurring or dissenting opinion solely for the purpose of supplementing a majority opinion. Kimball, *supra* 75, at 405. During an interview, years after the *Branzburg* decision, one of Justice Powell's law clerks stated that "[w]hen [Justice Powell] chose to write something . . . he did it because he thought it was important." *Id.*

<sup>77</sup> *Branzburg*, 408 U.S. at 709 (Powell, J., concurring).

<sup>78</sup> *Id.* at 709–10.

<sup>79</sup> *Id.* at 710.

<sup>80</sup> *Id.*

<sup>81</sup> *Branzburg v. Hayes*, 408 U.S. 665, 743 (1972) (Stewart, J., dissenting).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 731.

<sup>84</sup> *Id.* at 723 (Douglas, J., dissenting).

fervent, long-time supporter of the First Amendment and the rights accompanying it, “all of the ‘balancing’ was done by those who wrote the Bill of Rights.”<sup>85</sup>

Even though the journalists did not prevail on the constitutional front in 1972, Justice Powell’s concurrence actually opened the door to a federal reporter’s privilege, and “the battle over the right of journalists to protect their confidential sources has raged ever since on a number of fronts.”<sup>86</sup>

## II. THE DEVELOPMENT OF THE REPORTER’S PRIVILEGE

### A. *Lower Courts Respond to Branzburg*

In the immediate wake of *Branzburg*, dozens of reporters were cited for contempt and many jailed for refusing to comply with government subpoenas.<sup>87</sup> States eventually began to react. Some legislatures implemented “shield laws” to codify a press privilege into their jurisdictional framework,<sup>88</sup> while other states’ courts acknowledged a protection akin to the limited privilege proposed by the *Branzburg* dissent.<sup>89</sup> Today, forty-nine states and the District of Columbia recognize some kind of reporter’s privilege, whether by statute or by court decision.<sup>90</sup> Even though the state protections vary in scope,<sup>91</sup> the almost unanimous acknowledgement of a reporter’s privilege at the state level further supports the argument that the First Amendment should extend to a reporter’s privilege.

Beyond state courts, federal circuit courts began to interpret *Branzburg* in an inconsistent manner. The United States Court of Appeals for the Sixth and Seventh Circuits, on one hand, immediately rejected Justice Powell’s concurrence and

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<sup>85</sup> *Id.* at 713.

<sup>86</sup> Joel M. Gora, *The Source of the Problem of Sources: The First Amendment Fails the Fourth Estate*, 29 CARDOZO L. REV. 1399, 1404 (2008).

<sup>87</sup> David K. Shipler, *30 Cases Cited in Which Police or Courts Allegedly Threatened Free Press*, N.Y. TIMES (Feb. 18, 1973), <http://www.nytimes.com/1973/02/18/archives/30-cases-cited-in-which-police-or-courts-allegedly-threatened-free.html> [<https://perma.cc/QJY3-927F>].

<sup>88</sup> See, e.g., N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1990) (creating an absolute privilege to refuse disclosure of confidential sources and information, but allowing for disclosure of non-confidential information in certain circumstances); D.C. CODE § 16-4702 (1995); D.C. CODE § 16-4703 (1992) (recognizing an absolute privilege against compelled disclosure of sources and a qualified privilege against compelled disclosure of information ascertained during an investigation); FLA. STAT. § 90.5015 (1998) (granting reporters a qualified privilege in connection with “actively gathering news”).

<sup>89</sup> *State-By-State Guide to the Reporter’s Privilege for Student Media*, STUDENT PRESS LAW CTR., <http://www.splc.org/article/2010/09/state-by-state-guide-to-the-reporters-privilege-for-student-media?id=60> [<https://perma.cc/D87C-7PED>].

<sup>90</sup> *Id.* At the time of this writing, the only state that does not acknowledge any reporter’s privilege is Wyoming.

<sup>91</sup> See *supra* notes 9–12 and accompanying text.

the existence of a reporter's privilege.<sup>92</sup> Other circuits looked *only* to Justice Powell's concurrence to develop their own separate and distinct judicial balancing tests for deciding whether a member of the news media must reveal a source.<sup>93</sup>

Take the United States Court of Appeals for the Fourth Circuit, for example. It recognizes a narrow qualified privilege, insisting that there must be evidence of "governmental harassment or bad faith" before the press can successfully invoke a reporter's privilege.<sup>94</sup> Implementing a different approach, the Ninth Circuit has utilized a balancing test that lends itself to a relatively broad qualified privilege: "the process of deciding whether the privilege is overcome requires that 'the claimed First Amendment privilege and the opposing need for disclosure be judicially weighed in light of the surrounding facts, and a balance struck to determine where lies the paramount interest.'"<sup>95</sup> The United States Court of Appeals for the First Circuit, using yet another analysis, applies a "constitutionally sensitized balancing process" to subpoenas issued upon the press, holding that "[w]hether or not the process of taking First Amendment concerns into consideration can be said to represent recognition by the Court of a 'conditional[]' or 'limited' privilege is . . . largely a question of semantics."<sup>96</sup>

Despite the doctrinal inconsistencies running throughout federal circuit courts, protections did exist to some degree, allowing members of the press to rely on a qualified reporter's

<sup>92</sup> See, e.g., *U.S. Dep't of Educ. V. Nat'l Collegiate Athletic Ass'n*, 481 F.3d 936, 938 (7th Cir. 2007) (holding that there need not be special criteria merely because the holder of the documents or other information is a journalist); *In re Grand Jury Proceedings*, 810 F.2d 580, 584 (6th Cir. 1987) (noting that if the court were to accept the existence of a reporter's privilege, it would squarely be agreeing with the *Branzburg* dissent).

<sup>93</sup> See, e.g., *United States v. Smith*, 135 F.3d 963, 968–69 (5th Cir. 1998) (relying on Justice Powell's opinion in *Branzburg* to establish a balancing test that applies only in the civil context); *United States v. LaRouche Campaign*, 841 F.2d 1176, 1181–82 (1st Cir. 1988) (implementing a judicial balancing test that weighs the demanding party's need for the information against the reporter's First Amendment interests); *Coughlin v. Westinghouse Broad. & Cable Inc.*, 780 F.2d 340, 350 & n.14 (3d Cir. 1985) (holding that privilege inquiries are best handled on a case-by-case basis, which is "precisely the course" Justice Powell instructed that lower courts take).

<sup>94</sup> See, e.g., *United States v. King*, 194 F.R.D. 569, 583 (E.D. Va. 2000) (quoting *In re Shain*, 978 F.2d 850, 852 (4th Cir. 1992)); see also *United States v. Lindh*, 210 F. Supp. 2d 780, 783 (E.D. Va. 2002).

<sup>95</sup> *Crowe v. Cty of San Diego*, 242 F. Supp. 2d 740, 750 (S.D. Cal. 2003) (quoting *Shoen v. Shoen*, 5 F.3d 1289, 1292–93 (9th Cir. 1993)).

<sup>96</sup> *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 595 & n.13 (1st Cir. 1980) ("[T]he possibility that the unlimited or unthinking allowance of such requests will impinge upon First Amendment rights.").

privilege in most jurisdictions to protect their sources.<sup>97</sup> This protection has eroded in recent years.<sup>98</sup>

### B. *Attempts to Pass a Federal Shield Law*

While state and circuit court decisions began confronting the privilege issue, Congress also tried to step in to clarify the Court's decision in *Branzburg* by proposing a federal shield law.<sup>99</sup> These early efforts were unsuccessful, though, foreshadowing a number of failed attempts to pass federal legislation intended to protect journalists and their sources.<sup>100</sup>

Foundational issues hampered Congress's progress. First, how could legislators clearly define the scope of a federal shield law without a legal definition of a journalist?<sup>101</sup> Second, and perhaps more pertinent to this current analysis, how would such a law account for the governmental interest in national security?<sup>102</sup>

When prosecutors subpoena a member of the press in connection with a criminal investigation, the government often argues that the journalist's testimony is necessary for purposes of national security.<sup>103</sup> Some scholars suggest that the legislature could simply carve a national security exception into the federal shield law, meaning that reporters *would* have to testify if a judge determined that the information was necessary to protect against a threat to national security.<sup>104</sup> But the issue with such

<sup>97</sup> Gora, *supra* note 86, at 1406 ("One could accurately say that the press had lost the battle in *Branzburg*, but won the war in three decades of lower court rulings giving a narrow interpretation to that ruling and finding broad room for First Amendment protection of confidential sources.").

<sup>98</sup> See *infra* Part III.

<sup>99</sup> See *Newsman's Privilege: Hearings on H.R. 837 and H.R. 1084 Before the Subcom. No 3, H. Comm. On the Judiciary*, 92nd Cong. 1 (1972).

<sup>100</sup> Anthony Lewis, Panel Discussion, *Are Journalists Privileged?*, 29 CARDOZO L. REV. 1353, 1356, 1361 (2008) (arguing that one of the difficulties in drafting and passing a federal shield law is the government's compelling interest of national security). See S. 987, 113th Cong. (2013); H.R. 1962, 113th Cong. (2013); H.R. 2932, 112th Cong. (2011); H.R. 985, 111th Cong. (2009); S. 448, 111th Cong. (2009).

<sup>101</sup> Gora, *supra* note 86, at 1399. The bill proposed by the House of Representatives in 2007 provided a definition for the type of person entitled to a qualified privilege: a "covered person" is one who "regularly . . . publishes news or information . . . for dissemination to the public for a substantial portion of the person's livelihood or for substantial financial gain." H.R. 2102, 110th Cong. § 4(2) (2007). Years later, the 2013 Senate bill defined "covered person" differently, as a person who, "with the primary intent to investigate events and procure material in order to disseminate to the public news . . . or matters of public interest, regularly gathers, prepares, collects, photographs, records, writes, edits, reports or publishes on such matters . . ." S. 987, 113th Cong. (2013).

<sup>102</sup> Gora, *supra* note 86, at 1416.

<sup>103</sup> Lewis, *supra* note 100, at 1357 (arguing that one of the difficulties in drafting and passing a federal shield law is the government's compelling interest of national security).

<sup>104</sup> Geoffrey R. Stone, *Half a Shield Is Better than None*, N.Y. TIMES (Feb. 21, 2007), <http://www.nytimes.com/2007/02/21/opinion/21stone.html> [<https://perma.cc/LD24-P2AY>].

an exception is clear: it would undermine the purpose of the shield itself.<sup>105</sup> History suggests that the American public relies on the news media in times of national crisis and political unrest; press freedom cannot be fettered in the very circumstances that reporters are needed the most.<sup>106</sup>

In November 2017, two U.S. Senators introduced the Free Flow of Information Act of 2017 into Congress.<sup>107</sup> As written, the bill would only require journalists to disclose their newsgathering materials if the government could prove that: (1) it had exhausted all other options for obtaining the information; (2) the information sought by subpoena is “critical” to the matter at hand; and (3) the “public interest in compelling disclosure of the information or document involved outweighs the public interest in gathering or disseminating news or information.”<sup>108</sup> While the enactment of such legislation would be of great benefit to the press, the current political climate suggests that such a stringent rule will prove difficult to pass in both the House and the Senate.

### C. *Potential Federal Evidentiary Support*

Notwithstanding the constitutionally-based argument, the press has recently begun relying on the Federal Rules of Evidence (Federal Rules) to support the existence of a reporter’s privilege.<sup>109</sup> Initially, Rule 501 of the Federal Rules listed nine specific testimonial privileges that were, at the time, commonly-accepted reasons or relationships allowing a person to refuse to testify in a federal proceeding: (1) required reports, (2) lawyer-client, (3) psychotherapist-patient, (4) husband-wife, (5) communications to clergymen, (6) political vote, (7) trade secrets, (8) secrets of state and other official information, and (9) identity of informer.<sup>110</sup>

Just three years after the Supreme Court decided *Branzburg*, however, Congress rejected the use of an articulated list of privileges and instead adopted a broad, open-ended

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<sup>105</sup> Lewis, *supra* note 100, at 1357.

<sup>106</sup> *Id.* (“The most important press disclosures have had to do with what the government says is national security: the *Pentagon Papers* case, warrantless wiretapping, secret CIA prisons.”).

<sup>107</sup> See H.R. 4382, 115th Cong. (2017).

<sup>108</sup> *Id.*

<sup>109</sup> See, e.g., Notice of Motion & Motion to Quash Subpoenas by Mark Fainaru-Wada & Lance Williams; Memorandum of Points & Authorities in Support Thereof at 18, *In re Grand Jury Subpoenas* (Fainaru-Wada), 438 F. Supp. 2d 1111 (N.D. Cal. 2006) (Case No. CR 06 90225), 2006 WL 1545207.

<sup>110</sup> See FED. R. EVID. 501 advisory committee’s note to 2011 amendment for a more in-depth discussion of testimonial privileges and the House Judiciary Committee’s analysis of their evidentiary merit. These privileges were those that had been acknowledged by common law, not privileges that had been at all granted by the U.S. Constitution.



version of Rule 501.<sup>111</sup> Today, the rule provides that testimonial privileges “shall be governed by the principles of the common law . . . in the light of reason and experience. . . .”<sup>112</sup> The rule’s flexibility “leaves open the possibility that courts will interpret the rule to either *foreclose* the development or expansion of privileges or *encourage* such development or expansion.”<sup>113</sup>

Journalists that invoke Rule 501 to bolster their arguments for a federal privilege rely almost exclusively on the precedent established in *Jaffee v. Redmond*, where the Supreme Court identified factors for federal courts to consider when presented with the patient-therapist privilege issue.<sup>114</sup> The *Jaffee* Court urged lower courts to examine whether the privilege promotes “sufficiently important” private *and* public interests, while also assessing the evidentiary benefits of denying the privilege.<sup>115</sup> The *Jaffee* opinion also made clear that when confronted with a new testimonial privilege that is widely-provided for in state jurisdictions, the analysis should tip in favor of recognizing such a privilege on a federal level.<sup>116</sup>

Considering that all but one state acknowledges the existence of a reporter’s privilege to some extent, it would seem that both reason and experience do, in fact, indicate that the common law encompasses a privilege protecting the reporter-source relationship. Even though the Supreme Court has failed to decisively rule on the issue, those in favor of a press privilege are optimistic that Rule 501 could eventually serve to mitigate the burdens that subpoenas and court orders impose (and will continue to impose) upon the press.<sup>117</sup>

#### D. *The Demise of the Department of Justice Guidelines*

The Department of Justice (DOJ) even followed suit in attempting to put limits on federal prosecutors’ taking action against journalists.<sup>118</sup> Reminiscent of many of the judicial balancing tests utilized in lower courts, the DOJ’s *Guidelines for Subpoenas to the News Media* (the Guidelines) required that the government weigh any harm to First Amendment interests

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<sup>111</sup> FED. R. EVID. 501 advisory committee’s note to 2011 amendment; H.R. Rep. No. 93-650, at 8 (1973).

<sup>112</sup> FED. R. EVID. 501 advisory committee’s note to 2011 amendment.

<sup>113</sup> Anthony L. Fargo & Paul McAdoo, *Common Law or Shield Law? How Rule 501 Could Solve the Journalist’s Privilege Problem*, 33 WM. MITCHELL L. REV. 1347, 1364 (2007).

<sup>114</sup> See *Jaffee v. Redmond*, 518 U.S. 1, 4 (1996).

<sup>115</sup> *Id.* at 11.

<sup>116</sup> *Id.* at 16–17.

<sup>117</sup> Fargo & McAdoo, *supra* note 113, at 1379.

<sup>118</sup> 28 C.F.R. § 50.10 (2017).

against the government's need for the information being asked of the press through a subpoena or court order.<sup>119</sup> The Guidelines also required federal authorities to accommodate these kinds of varied interests by negotiating with the media before they can even issue a subpoena.<sup>120</sup> These regulations, as originally written, helped "form[] part of the protective legal culture in which broader legal recognition . . . could occur."<sup>121</sup>

In 2015, then Attorney General Eric Holder revised the Guidelines in a way that would, per Holder, "strike an appropriate balance between law enforcement's need to *protect* the American people, and the news media's role in ensuring the free flow of information."<sup>122</sup> The traditional press remained hopeful that changes made under the Obama administration would help protect journalists from federal subpoenas, but the more recent rhetoric from the Trump administration has called any such optimism into question.<sup>123</sup>

On August 4, 2017, Attorney General Jeff Sessions held a press conference to address the DOJ's commitment to investigating and prosecuting any classified leaks.<sup>124</sup> After noting that the administration would review the policies relating to media subpoenas, he delivered a threat to all informants:

[H]ere is what I want to tell every American today: This nation must end the culture of leaks. We will investigate and seek to bring criminals to justice. We will not allow rogue anonymous sources with security clearances to sell out our country any longer . . . [C]ases will be made, and leakers will be held accountable.<sup>125</sup>

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<sup>119</sup> See *id.* § 50.10(a) ("In determining whether to request issuance of a subpoena to a member of the news media, or for telephone toll records of any member of the news media, the approach in every case must be to strike the proper balance between the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice.").

<sup>120</sup> *Id.* § 50.10(c)(4)(iv)(A).

<sup>121</sup> Gora, *supra* note 86, at 1404 (emphasis added).

<sup>122</sup> Press Release, Dep't of Just., Office of Public Affairs: Attorney General Holder Announces Updates to Justice Department Media Guidelines (Jan. 14, 2015), <https://www.justice.gov/opa/pr/attorney-general-holder-announces-updates-justice-department-media-guidelines> [<https://perma.cc/DN2G-H69W>].

<sup>123</sup> See Press Release, Dep't of Just., Office of Public Affairs: Attorney General Jeff Sessions Delivers Remarks at Briefing on Leaks of Classified Materials Threatening National Security (Aug. 4, 2017) [hereinafter Attorney General Jeff Sessions Delivers Remarks], <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-delivers-remarks-briefing-leaks-classified-materials> [<https://perma.cc/8NYZ-MUFB>].

<sup>124</sup> *Id.* ("No one is entitled to surreptitiously fight their battles in the media by revealing sensitive government information. No government can be effective when its leaders cannot discuss sensitive matters in confidence or to talk freely in confidence with foreign leaders."). Notably, these sweeping statements flatly contradict centuries of well-settled First Amendment case law. See *supra* Part I.

<sup>125</sup> Attorney General Jeff Sessions Delivers Remarks, *supra* note 123.

Though no one from the Executive branch has addressed the privilege issue directly since, the Trump Administration's general distaste for the press indicates that journalists have some serious reason for concern.<sup>126</sup>

### III. A PROBLEMATIC PRESENT

So yes, journalists may have had some potential legal remedies at their disposal: in the years proceeding *Branzburg*, practically every state jurisdiction recognized the existence of a press privilege and even some circuit courts showed signs of coming around to the idea of allowing reporters to protect their confidential sources.<sup>127</sup> The privilege debate was reignited in 2003, though, when the United States Court of Appeals for the Seventh Circuit, in an opinion authored by the renowned Judge Richard Posner, refused to acknowledge the existence of a reporter's privilege in a case involving journalists' refusal to turn over information regarding their interview of a witness involved in a criminal trial outside of the United States.<sup>128</sup> There, the press was an uninterested third party in the prosecution, yet the Seventh Circuit still demanded the release of the interview materials, flatly rejecting the press' argument that Justice Powell's opinion provided a qualified privilege for journalists.<sup>129</sup> *McKevitt v. Pallasch* did not make major news headlines, but in just a matter of years, a landslide of other reporter's privilege cases did.

In 2005, a federal district court ordered that Judith Miller, a Pulitzer-Prize winning reporter for the *New York Times*, reveal the identity of one of her confidential sources.<sup>130</sup> Miller's compliance with the subpoena and disclosure of her source, the government argued, was necessary for its investigation into the unauthorized leak of an undercover FBI agent's identity.<sup>131</sup> Miller refused, and she spent eighty-five days in jail.<sup>132</sup>

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<sup>126</sup> See Joel Simon, *Assessing Trump's Press Freedom Record, One Year On*, COLUM. JOURNALISM R. (Jan. 19, 2018), <https://www.cjr.org/analysis/trump-press-freedom.php> [<https://perma.cc/HTE4-97U2>].

<sup>127</sup> See *supra* Section II.A.

<sup>128</sup> See *McKevitt v. Pallasch*, 339 F.3d 530, 531–33 (7th Cir. 2003).

<sup>129</sup> *Id.* at 532–33 (“[A] large number of cases conclude, rather surprisingly in light of *Branzburg*, that there is a reporter's privilege,” but “rather than speaking of privilege, courts should simply make sure that a subpoena duces tecum directed to the media, like any other subpoena duces tecum, is reasonable in the circumstances.”).

<sup>130</sup> See *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141 (D.C. Cir. 2006).

<sup>131</sup> *Id.* at 1142–44.

<sup>132</sup> *Id.*; see also David Johnston & Douglas Jehl, *Times Reporter Free From Jail; She Will Testify*, N.Y. TIMES (Sept. 30, 2005), <http://www.nytimes.com/2005/09/30/politics/times-reporter-free-from-jail-she-will-testify.html> [<https://perma.cc/4Q2Q-GWN2>].

In the years following the jailing of Judith Miller, subpoenas and court orders were issued upon the press left and right. Some subpoenas were more severe than others, and the demands on each journalist or news organization varied in scope.<sup>133</sup> The government called upon journalists to give up their notes in connection with criminal matters and lawsuits alike, even in situations where the reporter was merely a third-party witness to an action.<sup>134</sup>

For example, Steven Hatfill, a “person of interest” in the infamous anthrax investigation, filed a lawsuit under the Privacy Act for defamation against the federal government.<sup>135</sup> In connection with his defamation claim, Hatfill subpoenaed eleven news organizations for any information its journalists might have in connection with his case.<sup>136</sup> Two of the subpoenaed reporters did not comply, and as a result they faced federal contempt citations, and were ordered to pay extravagant fines.<sup>137</sup>

In 2008, a federal grand jury issued a subpoena to James Risen, an investigative reporter for the *New York Times*.<sup>138</sup> The subpoena ordered Risen to disclose the identity of his source for a particular chapter in his book, *State of War*.<sup>139</sup> Risen moved to have the subpoena quashed, invoking the reporter’s privilege.<sup>140</sup> The government was able to establish probable cause without Risen’s help and they arrested Jeffrey Sterling, an intelligence official, for charges under the Espionage Act of 1917.<sup>141</sup>

For years, Risen continued to battle subpoenas throughout Sterling’s trial.<sup>142</sup> Irrespective of the fact that there did exist circumstantial evidence connecting Sterling to the leak,

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<sup>133</sup> *How Many Reporters Receive Subpoenas Each Year?*, REPS. COMM. FOR FREEDOM OF PRESS, <https://www.rcfp.org/browse-media-law-resources/digital-journalists-legal-guide/how-many-reporters-receive-subpoenas-each> [<https://perma.cc/RXQ6-4STW>].

<sup>134</sup> Between 2006 and 2011, the Attorney General approved eighty-nine government requests for media subpoenas. The subpoenas involved, among other things, charges of extortion, private health information, insider trading, securities and wire fraud, kidnapping, murder, threats to the President, leaks of sealed and classified grand jury information, and the manufacture and distribution of marijuana. *Id.*

<sup>135</sup> See Complaint, *Hatfill v. Ashcroft*, 2003 WL 23780292, at \*38 (D.C. Cir. 2003) (No. 03-1793). For a more detailed discussion of Hatfill’s claim against the federal government and against the *New York Times*, see Ben Battles, *Terror, Tort, and the First Amendment: Hatfill v. New York Times and Media Liability for Intentional Infliction of Emotional Distress*, 72 BROOK. L. REV. 237 (2006).

<sup>136</sup> David Willman, *Anthrax Subject Receives Payout*, L.A. TIMES (June 28, 2008), <http://articles.latimes.com/2008/jun/28/nation/na-anthrax28> [<https://perma.cc/6GEN-9KL6>].

<sup>137</sup> Eric Lichtblau, *Reporter Held in Contempt in Anthrax Case*, N.Y. TIMES (Feb. 20, 2008), <http://www.nytimes.com/2008/02/20/us/20anthrax.html> [<https://perma.cc/T4L2-M872>].

<sup>138</sup> *United States v. Sterling*, 818 F. Supp. 2d 945, 947 (E.D. Va. 2011).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> Matt Apuzzo, *Times Reporter Will Not Be Called to Testify in Leak Case*, N.Y. TIMES (Jan. 12, 2015), <https://www.nytimes.com/2015/01/13/us/times-reporter-james-risen-will-not-be-called-to-testify-in-leak-case-lawyers-say.html> [<https://perma.cc/25G9-HFWT>].

the government continued to argue that Risen was the only witness able to actually identify Sterling as the source of the illegal leak.<sup>143</sup> In a 2–1 decision, the Fourth Circuit refused to acknowledge the existence of a First Amendment reporter’s privilege and forced Risen to testify during Sterling’s trial.<sup>144</sup> But as many reporters had done in the past—and as many reporters will surely do in the future—Risen remained firm in his position: he would not disclose any information gathered in connection with his pre-publication reporting efforts.<sup>145</sup> The DOJ ultimately chose not to jail Risen, a decision that was made at the discretion of the attorney general.<sup>146</sup>

Most recently, military prosecutors threatened to subpoena Oscar-winning screenwriter Mark Boal, the reporter who had interviewed U. S. Army Sergeant Bowe Bergdahl in the months following his repatriation.<sup>147</sup> Boal recorded twenty-five hours of his conversations with Sgt. Bergdahl, only a small portion of which was ultimately broadcast in the renowned podcast, *Serial*.<sup>148</sup> The government planned to demand disclosure of the unedited interview tapes in their entirety, which contained both confidential and personal information that Boal had never intended to release to the public.<sup>149</sup>

Boal immediately filed suit against the Obama administration, seeking both declaratory and injunctive relief to prevent the issuance of the subpoena, arguing that the First Amendment protected him from releasing any information that he had obtained in his capacity as a reporter.<sup>150</sup> Shortly thereafter,

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<sup>143</sup> Sterling, 724 F.3d at 507.

<sup>144</sup> *Id.* at 491.

<sup>145</sup> Matt Apuzzo, *Defiant on Witness Stand, Times Reporter Says Little*, N.Y. TIMES (Jan. 5, 2015), <https://www.nytimes.com/2015/01/06/us/james-risen-in-tense-testimony-refuses-to-offer-clues-on-sources.html> [<https://perma.cc/N3CB-5CSK>].

<sup>146</sup> Apuzzo, *supra* note 142; Charlie Savage, *Holder Hints Reporter May Be Spared Jail in Leak*, N.Y. TIMES (May 27, 2014), <https://www.nytimes.com/2014/05/28/us/holder-hints-reporter-may-be-spared-jail-in-leak.html> [<https://perma.cc/3MZY-2XAM>]. When speaking about the DOJ’s decision not to punish Risen, Attorney General Holder stated: “As long as I’m attorney general, no reporter who is doing his job is going to go to jail. As long as I’m attorney general, someone who is doing their job is not going to get prosecuted.” *Id.*

<sup>147</sup> Richard A. Oppel Jr., *Hollywood Screenwriter Subpoenaed for Hours of Bergdahl Tapes*, N.Y. TIMES (July 21, 2016), <https://www.nytimes.com/2016/07/22/us/hollywood-screenwriter-subpoenaed-for-hours-of-bergdahl-tapes.html> [<https://perma.cc/MAA3-5J6C>].

<sup>148</sup> *Id.* (“The only time the public has heard Sgt. Bowe Bergdahl explain in his own voice why he left his base in Afghanistan . . . was on taped interviews broadcast on the podcast.”); See *Serial: Season 2* (2015–16), <https://serialpodcast.org/season-two> [<https://perma.cc/N4UE-RHR4>].

<sup>149</sup> Matt Reynolds, *Screenwriter Settles Fight Over Bowe Bergdahl Tapes*, COURTHOUSE NEWS (Dec. 14, 2016), <https://courthousenews.com/screenwriter-settles-fight-over-bowe-bergdahl-tapes/> [<https://perma.cc/73N4-KRWG>].

<sup>150</sup> Complaint, Mark Boal v. United States, No. 16-05407 (Cal. Ct. App., July 29, 2016).

thirty-six of the country's most prominent news organizations filed an amicus brief in support of Boal.<sup>151</sup> As had been argued by journalists many times before, the press maintained that a subpoena like the government had considered issuing upon Boal would completely rid him of his First Amendment right to newsgathering.<sup>152</sup> The subpoena, as contemplated, would "negatively affect [a reporter's] ability to report future news stories, and the public's corresponding ability to receive information."<sup>153</sup>

The judge ultimately refused to rule on the issue, relying primarily on an opinion that the United States Court of Appeals for the District of Columbia Circuit had recently handed down relating to civilian courts' interference with military courts.<sup>154</sup> The parties eventually settled the case, and Boal was able to protect the tapes.<sup>155</sup>

#### IV. APPLYING A PRIOR RESTRAINT ANALYSIS TO MEDIA SUBPOENAS: A PROPOSED ANALYSIS

In an editorial written during the unfolding of Judith Miller's case, Max Frankel, the Executive Editor of *The New York Times* wrote:

So there I sat, watching the United States government in all its majesty dragging into court the American press (in all its piety), forcing reporters to betray confidences, rifling their files and notebooks, making them swear to their confused memories and motives and burdening their bosses with hefty legal fees—all for the high-sounding purpose, yet again, of protecting our nation's secrets.<sup>156</sup>

The failure to clarify the murky water of reporter's privilege at the federal level has left the press completely vulnerable and completely open to attack. Sources will stop coming forward, the

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<sup>151</sup> See Brief for Plaintiffs as Amicus Curiae, *Mark Boal v. United States of America*, No. 16-05407 (Cal. Ct. App., July 29, 2016).

<sup>152</sup> *Id.* at 19–20 (citing to both Ninth Circuit and Supreme Court decisions to argue that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury").

<sup>153</sup> *Id.* at 6.

<sup>154</sup> Ashley Cullins, *Judge Urges Mark Boal and U.S. Government to "Informally" Resolve Bergdahl Tapes Dispute*, THE HOLLYWOOD REPORTER (Sept. 12, 2016), <https://www.hollywoodreporter.com/thr-esq/judge-urges-mark-boal-us-927925> [<https://perma.cc/C5J3-RC42>].

<sup>155</sup> Dan Lamothe, *Filmmaker Behind Bowe Bergdahl's 'Serial' Interviews Settles Lawsuit, Avoids Army Subpoena*, WASH. POST (Dec. 13, 2016), [https://www.washingtonpost.com/news/checkpoint/wp/2016/12/13/filmmaker-behind-bowe-bergdahls-serial-interviews-settles-lawsuit-with-army-avoids-subpoena/?utm\\_term=.1c8032ac8972](https://www.washingtonpost.com/news/checkpoint/wp/2016/12/13/filmmaker-behind-bowe-bergdahls-serial-interviews-settles-lawsuit-with-army-avoids-subpoena/?utm_term=.1c8032ac8972) [<https://perma.cc/SSD8-KJEH>].

<sup>156</sup> Max Frankel, *The Washington Back Channel*, N.Y. TIMES MAG. (Mar. 25, 2007), <http://www.nytimes.com/2007/03/25/magazine/25Libby.t.html> [<https://perma.cc/45A5-PYV5>].

production of our news will become inaccurate, and the general public *will* stop putting its trust in the press, making it impossible for the press to fulfill its role as the Fourth Estate.

### A. *The Analysis*

By issuing media subpoenas, the government has effectively censored the press—the exact type of censorship that the Supreme Court held presumptively unconstitutional over eight decades ago in *Near v. Minnesota* and more plainly reaffirmed in *New York Times v. United States* and *Nebraska Press Association v. Stuart*.<sup>157</sup>

Importantly, in *Nebraska Press Association*, the Supreme Court examined whether “the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.”<sup>158</sup> To do so, it articulated a three-part analytical framework, which imposed a heavy burden on the party seeking to restrain the press (most frequently, the government).<sup>159</sup> The Court held that government censorship demanded weighing the following factors: (1) the extent of the pretrial news coverage, (2) whether other less restrictive measures would have alleviated the effects of pretrial publicity, and (3) the restraining order’s effectiveness in preventing the threatened danger.<sup>160</sup>

Federal courts utilize this judicial balancing when faced with issues of government censorship, indicating that prior restraints can only be issued in the most extreme of circumstances. And when it decided the *Pentagon Papers* case, the Court even noted that, in cases where the government interest at issue was one of national security, a prior restraint would still very rarely survive judicial scrutiny.<sup>161</sup>

### B. *The Proposal*

In the midst of the prosecution against him, subpoenaed reporter James Risen wrote in his affidavit: “If I aided the Government in its effort to prosecute my confidential sources for providing information to me under confidentiality, I would inevitably be compromising my own ability to gather news in the

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<sup>157</sup> See Section I.B.

<sup>158</sup> *Id.* (quoting *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950) (Learned Hand, J.)).

<sup>159</sup> *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 562 (1976).

<sup>160</sup> *Id.*

<sup>161</sup> *The Pentagon Papers*, 403 U.S. 713, 726–27 (1971).

future.”<sup>162</sup> These sentiments are shared by many journalists, again illuminating the grave negative impact that media subpoenas and court orders have had—and will continue to have—upon the press. The only way for federal courts to rehabilitate the press from years of this messy, convoluted jurisprudence is to apply a more appropriate balancing test.

Though it is possible for such tests to be favorable to the press, such outcomes cannot be consistent under balancing tests that require judges to balance the interests of the reporter and the interests of the justice system. Applying the balancing test used in the prior restraint analysis would satisfy both the government’s oft-expressed concern of national security and the press’ interest in promoting the free flow of information. The prior restraint analysis does not mirror other judicial balancing tests that require a judge to weigh the importance of societal issues against the interests of the government.<sup>163</sup> Instead, the prior restraint balancing test focuses primarily on the government’s administration of censorship, the methods by which the censorship is enforced, and the effect that the censorship has on the ideals at the heart of the First Amendment.<sup>164</sup>

## CONCLUSION

“If we don’t fight for the First Amendment, who will?”<sup>165</sup>

Toni Locy, former reporter for *USA Today*

Now more than ever, our press is under fire.<sup>166</sup> In the wake of an historic presidential election and the tumultuous

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<sup>162</sup> United States v. Sterling, 818 F. Supp. 2d 945, 954 (E.D. Va. 2011) (quoting the affidavit of James Risen).

<sup>163</sup> Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648 (1955).

<sup>164</sup> *Id.*

<sup>165</sup> Aimee Edmondson, *Toni Locy Keynote*, NAT’L FREEDOM OF INFO. COAL., <https://www.nfoic.org/toni-locy-keynote> [https://perma.cc/UUQ5-V4C2]. Toni Locy was one of the reporters ordered to reveal the identities of her confidential sources in connection with a privacy lawsuit resulting from the government’s investigation into the anthrax attacks of 2001. See Lichtblau, *supra* note 137. Locy refused to name her sources, and the U.S. Court of Appeals for the District of Columbia Circuit ordered that she personally pay up to \$5,000 per day until her next court appearance. Clark Hoyt, *Squeezed by the Courts*, N.Y. TIMES (Apr. 20, 2008), <http://www.nytimes.com/2008/04/20/opinion/20pubed.html> [https://perma.cc/9CYL-FCQZ]. The court also prohibited her former employer, *USA Today*, friends, or family from assisting Locy in paying the mounting daily fees. *Id.*

<sup>166</sup> Sen. John McCain, *Mr. President, Stop Attacking the Press*, WASH. POST (Jan. 16, 2018), [https://www.washingtonpost.com/opinions/mr-president-stop-attacking-the-press/2018/01/16/9438c0ac-faf0-11e7-a46b-a3614530bd87\\_story.html?utm\\_term=.7ae1a418202d](https://www.washingtonpost.com/opinions/mr-president-stop-attacking-the-press/2018/01/16/9438c0ac-faf0-11e7-a46b-a3614530bd87_story.html?utm_term=.7ae1a418202d) [https://perma.cc/YTB2-MRZB].



first year of the Trump administration, the traditional press has lost—and will continue to lose—its constitutional freedoms.<sup>167</sup>

*Branzburg v. Hayes*, the opinion that gave life to a reporter's privilege, was examined at a time in history when an investigative press and its sources were necessary for "revealing government corruption, uncovering corporate misbehavior, and illuminating injustices."<sup>168</sup> Then, like now, the nation was recovering from a presidential election amid a time where political scandals were becoming commonplace.

Yet, since *Branzburg*, the Supreme Court has denied every petition of certiorari in cases relating to the reporter's privilege.<sup>169</sup> Today's chaotic political climate demands that the Supreme Court address the fragmented framework currently used to analyze the existence of a reporter privilege. By not clarifying the murky waters of today's federal reporter's privilege, sources will stop coming forward with the facts and information vital to the free flow of information.

During his final press conference, former White House Press Secretary Josh Earnest advised that the press "protect the things that are worth protecting."<sup>170</sup> Now, more than ever, a journalist's relationship with her source is worth protecting. For without its well of sources, the press cannot serve as our Fourth Estate.

Megan L. Shaw†

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<sup>167</sup> See, e.g., *id.*; Jim Rutenberg, *In Revoking Press Credentials, Trump Casts Himself as Punisher in Chief*, N.Y. TIMES (June 14, 2016), [https://www.nytimes.com/2016/06/15/business/media/donald-trump-washington-post.html?\\_r=0](https://www.nytimes.com/2016/06/15/business/media/donald-trump-washington-post.html?_r=0) [<https://perma.cc/NLK2-8HKF>].

<sup>168</sup> Jones, *supra* note 16, at 1222–23.

<sup>169</sup> See *supra* note 25 and accompanying text.

<sup>170</sup> Press Briefing from Press Secretary Josh Earnest, Office of the Press Secretary (Jan. 17, 2017), <https://obamawhitehouse.archives.gov/the-press-office/2017/01/17/press-briefing-press-secretary-josh-earnest-11717> [<https://perma.cc/2LUN-U7NW>].

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