Keeping the News Domestic:
Why a Toxic Environment for the American Press and Ready Access to Foreign Media Organizations Like WikiLeaks Compel the Rapid Adoption of a Federal Reporters’ Privilege

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In 2008, the U.S. Department of Justice subpoenaed James Risen, a Pulitzer Prize winning New York Times journalist, to testify against one of his confidential sources in a criminal proceeding against that source. After Risen fought the subpoena and it expired in 2009, the Justice Department renewed it in 2010. The saga that followed brought a mass of media attention to the debate over the idea of a testimonial privilege for news reporters. While debates over the reporters’ privilege have raged since the Supreme Court first denied the privilege in 1972, this Note examines the overlooked effect that WikiLeaks has on this decades old argument, and proposes a solution to the problem.

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INTRODUCTION

In the wake of the terrorist attacks on September 11, 2001, the ever-present tension between civil liberty and national security erupted into an unprecedented level of conflict. Civil liberties were limited due to fear they would stand in the way of preventing the next attack. The rights of news reporters were not excluded from this circumscription, and reporters have steadily seen their ability to effectively report the news chilled by a government response driven by national security fears. To effectively report on the “War on Terror,” reporters must use confidential sources to delve into national security information. As a result, reporters’ rights to protect their sources are being questioned, and repeatedly denied. Over forty years ago, Justice Stewart warned that the failure to recognize a news reporters’ privilege would force a reporter to “choose between being punished for contempt if he refuses to testify, or violating his profession’s ethics and impairing his resourcefulness as a reporter if he discloses confidential information.”

1. Branzburg v. Hayes, 408 U.S. 665, 732 (1972) (Stewart, J., dissenting). Justice Stewart also predicted a situation similar to the recent Edward Snowden disclosures, claiming, “A public-spirited person inside government, who is not implicated in any crime, will now be fearful of revealing corruption or other governmental wrongdoing, because he will now know he can subsequently be identified by use of compulsory process.” Id. at 731.

missing not only a chance to fix this problem, but also to clear up a notoriously unclear area of law. Despite the loss, Risen was willing to be jailed instead of testifying and claims he “will always protect [his] sources.” While the Department of Justice (“DOJ”), bending under the great weight of political pressure, has ultimately decided not to continue to seek Risen’s testimony, Risen was nonetheless forced to litigate this issue for nearly two years after the District Court initially granted him the privilege not to testify. Furthermore, the exact state of the law on this issue remains remarkably unclear and illogical.

Part I of this Note discusses the government’s intense investigation of Risen, how it illustrates the toxic environment reporters are confronted with today, and the policy problems it creates. That environment, coupled with easy access to foreign media organizations like WikiLeaks, creates an incentive and a means for leakers and sources to outsource any potentially controversial news. This outsourcing places sensitive information, often implicating national security, in the hands of less responsible and accountable news outlets than the American media.

National security concerns are less severe when sensitive information is in the hands of the American Press, which has a history of cooperation with the U.S. government. Part II examines why the Fourth Circuit rejected Risen’s claim of privilege, which reveals the inconsistent and problematic current state of the law regarding the reporters’ privilege. Part III reviews the potential remedies for this problem and argues that the Supreme Court should adopt a reporters’ privilege under the authority of Federal Rule of Evidence 501. Part III also argues that, although all three branches of government have the ability to address this issue, the judicial remedy is the most feasible option. Finally, Part IV proposes the contours of this new reporters’ privilege based on states’ experiences with their own shield laws. Although the reporters’ privilege has been argued and applied in a broad array of circumstances, this Note deals chiefly with compelled testimony in the context of criminal prosecutions, which presents the most direct threat to reporters’ ability to obtain sensitive information from confidential sources.

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I. THE PROBLEM WITH THE TREND OF OUTSOURCING TO ORGANIZATIONS SUCH AS WIKILEAKS.

The concept of a reporters’ privilege is that if a reporter uses a confidential source, she cannot later be forced to testify against that source by compulsory judicial proceedings. Historically, the argument over whether such a privilege should exist surrounded the so-called “chilling effect” of preventing reporters from being able to guarantee sources’ confidentiality. Simply put, the argument is that sources will not come forward if they fear their identity could be revealed. Thus, forcing reporters to testify against sources prevents them from gathering news, which abridges the freedom of the press in violation of the First Amendment. Conversely, opponents of the reporters’ privilege argue that there is no chilling effect, or even if there is, the public interest served in forcing a reporter to testify outweighs that burden. Both sides of this debate, however, presume that leakers or sources have only two options: stay silent or leak to the American press. This dichotomy, while it may have been historically true, is no longer accurate in an increasingly globalized world where a leaker can bypass the American press and provide information directly to news organizations outside of the United States that publish news on the internet, such as WikiLeaks.

The availability of foreign media organizations like WikiLeaks allows leakers and sources to send their information to news outlets that will not be subject to the laws of the United States. The current harassment of reporters in the United States demonstrates why a source would choose to go to such organizations. The case of James Risen illustrates the beleaguered conditions that American reporters face today, as it reveals an aggressive attempt to derail a reporter who has a history of publishing stories unflattering to the American government. Future leakers and sources who desire to release such information to the public will attempt to avoid harassment, and therefore, be pushed away from reputable reporters like Risen, and turn to news outlets that are outside the reach of the DOJ. Technological advances in data storage and communication over the Internet enable leakers to easily send information to organizations like WikiLeaks, which generally operate outside the United States. The history of cooperation between the U.S. government and American press shows why this trend of outsourcing to foreign organizations is a problem that increases the need for a clear and uniform reporters’ privilege.

6. U.S. Const. amend I.
A. A Toxic Environment for American Reporters

The challenging conditions for reporters are compounded by the increasingly secretive nature of the government, and the increasingly draconian attempts of the government to keep those secrets from ever being published. The Obama Administration’s aggressive investigation and prosecution of leakers is extraordinary in scope.8 Members of the press have accused President Obama of waging the most aggressive “war on leaks” since the Nixon administration.9 This characterization is supported by the DOJ’s recent admission that for two months in 2012, it “secretly subpoenaed and seized all records for 20 [Associated Press] telephone lines and switchboards.”10 Even though the investigation was a response to a story that only five reporters and one editor worked on, the DOJ seized the phone records for more than one hundred reporters.11

Risen is an example of the manner in which the Obama Administration has targeted reporters. Risen, who won a Pulitzer Prize in 2006 for his work with Eric Lichtblau that informed the public that the U.S. government was conducting warrantless domestic “eavesdropping,” was again in the limelight, but this time for an entirely different reason.12 In 2003, Risen acquired confidential information, presumably from former Central Intelligence Agency (“CIA”) agent James Sterling, that in 2000 the CIA had instituted a harebrained attempt to derail the Iranian nuclear program.13 The CIA operation involved using a former Soviet nuclear scientist to send Iran blueprints for a nuclear device, which were supposed to contain a hidden flaw that would prevent the device from becoming operational.14 According to Risen, the operation backfired and helped Iran obtain valuable information that accelerated its nuclear program.15 Initially, Risen planned to publish the story in the New York Times, but the Times did not publish the story pursuant to a CIA request.16 Three years later, in 2006, Risen published the story in a chapter of his book State of War.17

9. Id. (internal quotation marks omitted).
10. Id.
11. Id.
14. Id.
15. Id.
16. Id.
As a result of publishing the story, Risen was dragged into the legal quagmire of fighting a subpoena by arguing a reporters’ privilege. The government persisted in its attempts to subpoena Risen to testify against Sterling, a former CIA agent being prosecuted for leaking confidential information until January 2015, when then-Attorney General Eric Holder said that prosecutors would not force Risen to reveal his sources. 

In United States v. Sterling, the Fourth Circuit held that Risen must testify before a grand jury regarding the source of confidential material included in State of War. The district court previously held that Risen did not have to testify because he had “a qualified First Amendment reporter’s privilege that may be invoked when a subpoena either seeks information about confidential sources or is issued to harass or intimidate the journalist.” The Fourth Circuit reversed the district court and held that “[t]here is no First Amendment testimonial privilege, absolute or qualified, that protects a reporter from being compelled to testify . . . absent a showing of bad faith, harassment, or other such non-legitimate motive, even though the reporter promised confidentiality to his source.” If the DOJ had continued to seek Risen’s testimony, he could have been jailed for his refusal to comply with the request.

The government did not limit the harassment of Risen to a subpoena; it also conducted an extensive investigation of his personal background. Federal agents “obtained extensive records about his phone calls, finances, and travel history.” Agents acquired his credit card records, his credit report, his airline travel records, phone records, and emails. The government will not confirm when it began investigating Risen, or reveal the full extent of its investigation. Risen lamented, “They basically tried to get everything about me. I’m not sure what else they could have gotten except my kids’ birth certificates.”

Apart from the intrusions on Risen’s privacy, it is doubtful that the government actually needs his testimony to convict Sterling. Judge Gregory, dissenting from the Fourth Circuit’s ruling, summarized the information connecting Sterling to the leak and noted that, “[t]he Government’s efforts

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19. 724 F.3d 482, 496 (4th Cir. 2013). Risen’s book contains information the government believes to have come from former CIA agent Jeffery Sterling, who is currently being prosecuted for unauthorized retention and disclosure of national defense information. See generally Risen, supra note 17.
21. Sterling, 724 F.3d at 492.
23. Id.
24. Id.
25. Id.
26. Id. (internal quotation marks omitted).
have yielded multiple evidentiary avenues that, when presented together, may be used to establish what the Government sought to establish solely with testimony from Risen—that Sterling leaked classified information, rendering Risen’s testimony regarding his confidential sources superfluous.\footnote{27} Pursuing Risen’s testimony seems to be actually hurting the Sterling prosecution by dragging out the case. The prosecution is now over thirteen years removed from the operation itself, and ten years removed from the leak. The prosecution appears to have accomplished nothing by seeking Risen’s testimony other than to drag a reporter into prolonged litigation and delaying proceedings in the Sterling case.

B. The Increasing Reliance on Foreign Organizations Such as WikiLeaks

The dogged pursuit of Risen illustrates how the lack of a defined reporters’ privilege opens reporters to the potential of government harassment and keeps them from being able to guarantee sources’ confidentiality. This is undesirable not only because the pressure alone might discourage aggressive reporting about the government, but also because the lack of a clear and uniform reporters’ privilege could have the unintended consequence of encouraging sources or leakers to provide their information to reporters and news agencies outside of the jurisdiction of the United States. If a source knew she could leak information to a publisher who would not be forced to testify against her, that route would be preferable to the uncertain confidentiality of a domestic reporter. This dynamic, along with easy access to the Internet, has made foreign organizations like WikiLeaks the destination of choice for leakers.

Unlike reporters in the United States, WikiLeaks is able to guarantee sources’ confidentiality with almost near certainty. On their website, WikiLeaks explains that they “provide an innovative, secure and anonymous way for sources to leak information.”\footnote{28} This is done through the use of an encrypted “drop box,” which allows sources to secretly submit sensitive information to WikiLeaks.\footnote{29} WikiLeaks claims that it has “never revealed any of its sources.”\footnote{30} This guarantee of confidentiality stands in stark contrast to the uncertain process currently offered by American reporters.

This outsourcing effect can be seen in Israel, where the law allows a court to issue a gag order, pursuant to a formal government request, on any news story that potentially harms national security.\footnote{31} In response, the

Israeli press routinely sends controversial news to foreign news sources to avoid judicial scrutiny.\textsuperscript{32} Although the Israeli government has the burden of proving that the article would endanger national security, the burden of having to go to court and argue for their right to publish a story is enough to push these reporters to circumvent the laws by going outside of Israel’s jurisdiction with their stories.\textsuperscript{33} The desire to publish, even without the threat of jail time, diverts stories to foreign news organizations.

The outsourcing of American news to foreign organizations is increasingly common. In the past, when leakers had nowhere else to turn, they went to reporters in their home country so that those reporters could publish the story. Many of the most important news articles in the history of the United States, such as the Watergate scandal, were published because of confidential sources going to reporters. Now, however, these influential stories break on WikiLeaks rather than through reporters. Notable stories sent by U.S. citizens to WikiLeaks include Private Chelsea Manning’s disclosure of the video “Collateral Murder,” evidence of abuses at Guantanamo Bay, and revelations regarding the Pentagon’s misinformation concerning wars in Iraq and Afghanistan.\textsuperscript{34} Clearly, there is a trend of organizations such as WikiLeaks publishing articles containing sensitive information, not established American newspapers.

In addition to undermining effective news gathering by American reporters, this outsourcing problem also raises national security concerns. The American press is not indifferent to national security and has refrained from publishing stories when the government asserts that doing so will truly pose a threat to national security. For example, the New York Times did not publish the Iranian nuclear disaster story at the request of the CIA.\textsuperscript{35} Additionally, Risen waited three years for pressing national security concerns to subside before he published the story in his book. The Times also delayed or withheld other stories at the direct request of the government. In 1961, it withheld a story about plans for the Bay of Pigs invasion at the request of President Kennedy.\textsuperscript{36} The Times also delayed publishing a story about warrantless wiretapping for over a year at the

\begin{itemize}
  \item \textsuperscript{32} Id.
  \item \textsuperscript{33} Id.
  \item \textsuperscript{34} Greg Mitchell, \textit{Why WikiLeaks Matters}, NATION (Jan. 13, 2011), http://www.thenation.com/article/157729/why-wikileaks-matters. Although the Edward Snowden disclosures certainly fit this mold somewhat, Snowden is unique because he did not wish to remain confidential and asked the Guardian to reveal his identity. Snowden did, however, express to the journalists he worked with that they were potentially opening themselves up to be targeted by the government. Roy Greenslade, \textit{How Edward Snowden Led Journalist and Film-maker to Reveal NSA Secrets}, GUARDIAN (Oct. 19, 2013, 4:52 PM), http://www.theguardian.com/world/2013/aug/19/edward-snowden-nsa-secrets-glenn-greenwald-laura-poitras.
  \item \textsuperscript{35} Emily Bazelon & Eric Posner, \textit{Secrets and Scoops, Part 2}, SLATE (July 22, 2013, 3:54 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/07/should_james_risen_have_to_testify_against_jeffrey_sterling_in_the_government.html.
\end{itemize}
request of the government. There are numerous other examples of cooperation between the government and the press, and there are likely countless examples of such cooperation that never become public. Members of the American press are not blind or unsympathetic to the occasional need for discretion to protect national security interests.

In contrast to the American press, foreign outlets, like WikiLeaks, have no such track record of responsibility in avoiding publishing information that could undermine U.S. national security. It is unclear that President Obama could even directly contact Julian Assange, the founder and leader of WikiLeaks, let alone get him to delay publishing information that could potentially put Americans in danger. Surely the American people would be better served having sensitive information in the hands of a reporter like Risen, an experienced journalist writing for a globally respected news organization, than with Assange and WikiLeaks. WikiLeaks answers to nobody and is far less likely to be receptive to security concerns. Thus, denying reporters protection may actually hurt national security and law enforcement by pushing the information out of mainstream national news agencies and into the hands of uncontrollable international operations.

The combination of the “war on leakers,” the aggressive investigation of American reporters, and the proliferation of foreign organizations like WikiLeaks, forces potential sources to make a choice—share their story with an American reporter who could be harassed and later forced to testify against them, or provide it to a foreign organization who will never be forced to testify against them. It is in the interest of a source to do the latter. Providing meaningful protection for American reporters could take away the incentive to leak to foreign sources and reduce risks to national security.Leaks are inevitable, but it would be preferable, from a policy perspective, if the leakers did not feel compelled to go to foreign organizations with no stake in U.S. national security, but instead to American journalists who are more willing to cooperate with the government. For that to become the norm again, reporters need to be able to guarantee confidentiality to their sources based on a uniform and clear federal reporters’ privilege. However, the current state of the law is anything but clear.

II. HOW UNCLEAR AND INCONSISTENT CASE LAW BOTH CREATED AND EXACERBATES THIS PROBLEM

The Fourth Circuit ruling in Sterling, and the arguments advanced by Risen, illustrate the inconsistent and unpredictable state of the law regarding the reporters’ privilege. The Fourth Circuit ruled against Risen on the authority of Branzburg v. Hayes, a 1972 decision, which was the
last time the Supreme Court addressed the reporters’ privilege.\textsuperscript{38} As the different interpretations by the district court and Fourth Circuit in the Risen case suggest, lower courts interpret \textit{Branzburg} in wildly different ways.\textsuperscript{39} By failing to grant certiorari in the Risen case, the Supreme Court missed a chance to clarify an area of law that has been unsettled for decades.

The \textit{Branzburg} decision consolidated three cases involving reporters refusing to testify before grand juries.\textsuperscript{39} The facts of the case alone show how outdated the opinion is and why it is difficult to apply the holding to modern facts. Petitioner Branzburg published several exposé pieces about drug use, which included pictures of hashish being made and observations about people smoking marijuana.\textsuperscript{40} Petitioner Pappas attended a Black Panther Party meeting on the condition that he not disclose anything he saw or heard inside the meeting except the details of an expected police raid.\textsuperscript{41} Petitioner Caldwell was a reporter for the \textit{New York Times} who developed a close working relationship with members of the Black Panther Party and refused to comply with a subpoena that ordered him to appear before the grand jury to “testify and to bring with him notes and tape recordings of interviews given . . . concerning the aims, purposes, and activities of that organization.”\textsuperscript{42}

A five-Justice majority of the Court ruled that all three reporters must testify before the grand jury.\textsuperscript{43} The Court relied on the “longstanding principle that ‘the public . . . has a right to every man’s evidence’” to deny the reporters a testimonial privilege.\textsuperscript{44} Justice White, writing for the Court, concluded that the only testimonial privilege is the Fifth Amendment right against self-incrimination.\textsuperscript{45} The Court was unwilling to create a First Amendment testimonial privilege for reporters because any burden placed on news gathering was outweighed by the public interest in law enforcement served by forcing reporters to testify.\textsuperscript{46} Justice White cited the unwillingness of the states to enact a similar statutory privilege to bolster his opinion.\textsuperscript{47}

\begin{thebibliography}{99}
\bibitem{} 38. 408 U.S. 665 (1972).
\bibitem{} 40. \textit{Branzburg}, 408 U.S. at 668–79.
\bibitem{} 41. \textit{Id.} at 667–68.
\bibitem{} 42. \textit{Id.} at 672.
\bibitem{} 43. \textit{Id.} at 675.
\bibitem{} 44. \textit{Id.} at 708–09.
\bibitem{} 45. \textit{Id.} at 688 (quoting United States v. Bryan, 339 U.S. 323, 331 (1950)).
\bibitem{} 46. \textit{Id.} at 689–90.
\bibitem{} 47. \textit{Id.}
\bibitem{} 48. \textit{Id.} at 689.
\end{thebibliography}
Although the Court rejected the privilege, the majority conceded that “news gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution . . . . Official harassment of the press . . . would have no justification.”\textsuperscript{49} The Court failed, however, to provide any guidance as to when a grand jury investigation would be considered to be in bad faith.

In a concurring opinion, apparently intended to flesh out the “good faith” requirement that the majority suggested, Justice Powell caused a great deal of confusion for lower courts interpreting \textit{Branzburg}.\textsuperscript{50} Justice Powell “emphasize[d] . . . the limited nature of the Court’s holding. The Court [did] not hold that newsmen . . . are without constitutional rights with respect to the gathering of news or in safeguarding their sources.”\textsuperscript{51} Justice Stewart’s dissent noted that Justice Powell’s concurrence provided “some hope of a more flexible view in the future,” but warned that the Court had “invite[d] state and federal authorities to undermine the historic independence of the press by attempting to annex the journalistic profession as an investigative arm of government.”\textsuperscript{52} While a narrow majority rejected the privilege, it is clear that the issue divided the court greatly and led to an unclear opinion.

Lower courts are split over how to interpret Justice Powell’s “enigmatic concurrence” and how much precedential weight it carries.\textsuperscript{53} Some courts treat the majority opinion as a plurality and boldly call Justice Powell’s concurrence the narrowest and controlling opinion.\textsuperscript{54} Others rightfully note that \textit{Branzburg} was not a plurality and that Justice Powell’s balancing test does not control.\textsuperscript{55} While some courts hold that \textit{Branzburg} rejected any First Amendment-based privilege in the grand jury context, some have nonetheless recognized such a privilege. In \textit{In re Williams}, the district court quashed subpoenas requiring reporters to produce documents relating to a leak in a criminal trial because the government failed to demonstrate that it attempted to obtain that information from other sources, which is required in order to override a qualified privilege against compelled disclosure of news sources in grand jury proceedings.\textsuperscript{56} Similarly, the Second Circuit held that reporters can only be forced to disclose confidential information when there has been a “clear and specific showing” that the information is “highly material and

\textsuperscript{49} Id. at 707–08.
\textsuperscript{50} Id. at 709 (Powell, J., concurring).
\textsuperscript{51} Id.
\textsuperscript{52} Id. at 725 (Stewart, J., dissenting).
\textsuperscript{53} Id.
\textsuperscript{54} See, e.g., \textit{In re Selcraig}, 705 F.2d 780, 792 (5th Cir. 1983).
\textsuperscript{55} See, e.g., McKevitt v. Pallasch, 339 F.3d 530, 532 (7th Cir. 2003).
\textsuperscript{56} \textit{In re Williams}, 766 F. Supp. 358 (W.D. Pa. 1991), aff’d sub nom. 963 F.2d 567 (3d Cir. 1992) (en banc).
relevant, necessary or critical to the maintenance of that claim, and not obtainable from other available sources.”

Likewise, the Ninth Circuit weighs the interest of a reporter in keeping information confidential against the interests of the criminal justice system on a case-by-case basis. Finally, the D.C. Circuit recognizes a qualified reporters’ privilege that can only be overcome when the reporter’s testimony is “essential and crucial.”

The D.C. Circuit’s approach comports with the Branzburg Court’s “good faith” requirement that the testimony must be crucial.

In contrast, other courts have found that Branzburg requires reporters to submit to grand jury subpoenas, as was the case for Risen in Sterling. The Fourth Circuit rejected Risen’s First Amendment claim, relying on the Branzburg proposition that there is no First Amendment reporters’ privilege. The court also rejected the argument that Justice Powell’s concurrence was “a tacit endorsement of Justice Stewart’s dissenting opinion” and held that Justice Powell’s concurrence does not allow for recognition of a reporters’ privilege because he concurred in Justice White’s majority opinion. Finally, the court held that the promulgation of Federal Rule of Evidence 501 did not grant the court authority to reconsider the question and recognize the privilege. The court held that although Rule 501 has been used to provide testimonial privilege in other contexts, the court would not create a reporters’ privilege because only the Supreme Court can take that “critical step.”

The inconsistent interpretations of Branzburg demonstrate that lower courts need additional guidance on whether reporters have a right to refuse to testify about confidential sources. One court begrudgingly reflected: “To date, the Supreme Court has not overruled Branzburg. Thus, the Court is bound by that opinion.” Other courts are bolder and either limit Branzburg to an extremely narrow set of facts, or ignore it completely. These inconsistencies subject a reporter’s ability to gather

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57. United States v. Burke, 700 F.2d 70, 77 (2d Cir. 1983).
58. United States v. Pretzinger, 542 F.2d 517, 520 (9th Cir. 1976).
60. Id.
62. Id. at 483.
63. Id. at 495.
64. Id. at 499–500. Federal Rule of Evidence 501 provides: “The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless [the United States Constitution, a federal statute, or the rules prescribed by the Supreme Court] provide[] otherwise.” Fed. R. Evid. 501.
67. See, e.g., Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972) (reversing contempt judgments against two reporters who refused to answer questions put to them in front of a grand jury). Bursey was
news to vastly different legal standards depending on the district where she resides. Beyond the inconsistency problem, it is especially significant that the Fourth Circuit, which has jurisdiction over the home of the CIA, the Federal Bureau of Investigation, and the National Security Agency, does not recognize the privilege. As demonstrated, *Branzburg* created legal uncertainty that the Supreme Court must address before more reporters are subjected to this legal quagmire.

### III. Federal Rule of Evidence 501 Provides the Court the Most Viable Means to Implement a Reporters’ Privilege

Either legislative action or judicial intervention can remedy the problems the Court created in *Branzburg*, but the judicial remedy is the most viable and it could be effectively orchestrated by the use of Federal Rule of Evidence 501. By granting certiorari in *Sterling*, the Court could have used Rule 501 as legal basis to recognize the reporters’ privilege without having to overrule *Branzburg*. As for a legislative remedy, the passage of a federal reporters’ shield law is unlikely—Congress has repeatedly failed to enact any such legislation and currently proposed legislation is insufficient to provide reporters’ with any meaningful protection. For any meaningful legislation to pass, the makeup of Congress would need a radical change.

Nor is executive action the solution. The Obama Administration appears to recognize the problem of the inconsistent application of a reporter’s privilege and has tried to ease the tension through a new set of guidelines for the DOJ to follow when subpoenaing reporters. The DOJ guidelines, however, are insufficient, as they still allow reporters to be subpoenaed so long as prosecutors assert that certain conditions are met. Additionally, these guidelines have no legally binding effect, and reporters have no recourse if the DOJ violates these self-imposed restrictions. Even former Attorney General Eric Holder noted that Congress must take the next steps. As these guidelines are neither binding nor effective, only legislative and judicial remedies are considered here as viable.

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decided one day after the Court issued *Branzburg*, and the Ninth Circuit reaffirmed the decision after being asked to reconsider in light of *Branzburg*.

69. Id.
70. Id.
71. Id.
A. LEGISLATIVE ENACTMENT

Although federal legislation could solve the reporters’ privilege problem by creating a federal reporters’ shield law, Congress has repeatedly failed to enact such a law and seems unlikely to do so anytime soon. Professors Tucker and Wermiel reviewed the numerous attempts by Congress to create a federal shield law and observed:

“...For over three decades, Congress considered numerous federal reporters’ shield bills... All told, approximately one hundred bills to create a shield law were introduced by 1978. None of the bills made it to a floor vote. Despite the acknowledged need for congressional action, no federal reporters’ shield law had been enacted for thirty-five years after Branzburg." 

Although many thought the passage of a federal shield law was “inevitable” in 2007, that bill died after a filibuster led to it to be withdrawn. Therefore, Congress seems unable to generate the political support necessary to pass a bill to provide reporters broad and reliable protection from harassment.

Despite the repeated failure to enact such a bill, the Senate Judiciary Committee recently passed a bill that would provide journalists with some protection from having to disclose information about sources, but the limited scope of the bill fails to fix many of the problems caused by the Branzburg decision. The bill, which has not been enacted as of the date this Note was published, has several broad exceptions that render it meaningless in the face of the problems discussed above. The scope of this bill may actually hurt reporters by narrowly defining the field of protection as to take away any protection they currently receive in select jurisdictions.

The bill provides that a federal entity may not compel a reporter to comply with a subpoena or other compulsory legal process seeking to compel the disclosure of protected information unless a federal court determines the reporter must comply. A federal court may determine that the reporter must comply with the court order if the party seeking to compel disclosure has exhausted all reasonable alternative sources and the government has instigated a criminal investigation or prosecution. The bill also requires reporters to demonstrate “by clear and convincing

72. Tucker & Wermiel, supra note 5, at 1310–11.
73. Id. at 1294. The Free Flow of Information Act of 2007 was withdrawn after it failed cloture by a vote of fifty-one to forty-three, falling nine votes shy of the sixty needed to end the filibuster. S. 2035, 110th Cong. (2007).
76. Id. § 2(a).
77. Id. § 2(a)(1)–(2).
evidence that disclosure of the protected information would be contrary to the public interest.”78 This effectively forces reporters to argue that the benefits of news gathering outweigh the public interest in compelling disclosure any time they are subpoenaed. The time and litigation costs of this process alone serve as a barrier to reporters gathering news. Additionally, as the Supreme Court has recognized, “[a]n uncertain privilege . . . is little better than no privilege at all.”79 The point of the privilege is so that a reporter can assure confidential sources that compulsory processes will not later be used to identify them, but this bill would not allow reporters to make such a guarantee given the uncertain outcome of any judicial proceedings that could be commenced.

In addition to the problem of having to argue for the privilege on a case-by-case basis, the bill contains several exceptions that would make it inapplicable to cases like Risen’s. The bill exempts reporters when the federal government is the party seeking to compel disclosure and the court finds that the information for which disclosure is sought would assist the government in preventing or mitigating “acts that are reasonably likely to cause significant and articulable harm to national security.”80 Courts are required to give deference to any showing submitted to the court by the head of any executive agency or department regarding whether any harm to national security can be mitigated by compelled disclosure.81 Therefore, all the government needs to do is make some rudimentary showing to the court that the alleged leaks hurt national security and the court is required to defer to the government’s position and the reporter would be stripped of any legal protection from testifying. Under this proposed law, Risen would be in no better position than he is now—having to decide between a possible jail sentence or violating his profession’s ethical code and undermining his credibility as a reporter. This proposed bill fails to provide any meaningful protection to reporters, and in light of Congress’s track record, Congress is unlikely to enact a reporters’ privilege any time soon.

B. Judicial Adoption of a Privilege

Due to the low probability of any meaningful protection coming from Congress, the judicial branch must fix the problems that flow from Branzburg. The judicial route to recognizing a reporters’ privilege could come in two forms, both of which would have been available to the Court if it had decided to grant certiorari in United States v. Sterling. First, the Court could simply overrule Branzburg. Although there may be some

78. Id. § 2(a)(2)(A)(iv).
81. Id. § 5(b).
support among the Justices for this option, the Court generally loathes overturning its own precedent, so, despite the many problems with \emph{Branzburg}, it seems unlikely the Court would go that far. However, the Court can still recognize a reporters’ privilege, without overruling \emph{Branzburg}, based on Rule 501 of the Federal Rules of Evidence, which postdated \emph{Branzburg}. While the Court missed a chance to enact this change with \emph{Sterling}, it is inevitable that another case providing a similar opportunity will arise.

Although Justice White’s opinion in \emph{Branzburg} held that the Fifth Amendment is the only constitutional source of a testimonial privilege, Rule 501 of the Federal Rules of Evidence now empowers the Court to recognize additional testimonial privileges as a matter of common law. Federal testimonial privileges recognized by the Court as a matter of common law include: spousal privilege, attorney-client privilege, and psychotherapist-patient privilege. While the Court missed a chance to enact this change with \emph{Sterling}, it is inevitable that another case providing a similar opportunity will arise.

Rule 501 of the Federal Rules of Evidence allows federal courts to define new privileges by “interpreting ‘common law principle . . . in the light of reason and experience.’” The Court in \emph{Jaffee v. Redmond}, which held there is an unqualified psychotherapist-patient testimonial privilege, explained that “[e]xceptions from the general rule disfavoring testimonial privileges may be justified, however, by a ‘public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.’” Justice Stevens, writing for the majority of the Court, adopted the reasoning proposed by the Judicial Conference Advisory Committee, which observed that the ability of a psychotherapist to do her job “is completely dependent upon [the patients’] willingness and ability to talk freely. This makes it difficult if not impossible for [a psychiatrist] to function without being able to assure . . . patients of confidentiality and, indeed, privileged communication.” The Court’s reasoning precisely mirrors the argument for adopting a reporters’ privilege. Substituting “patient” for “source” and “psychiatrist” for “reporter” yields the exact argument made by the reporters in \emph{Branzburg}. Plainly, a need

\begin{footnotes}
83. \emph{See In re Grand Jury Investigation}, 918 F.2d 574 (3d Cir. 1990) (clergy privilege); \emph{Jaffee}, 518 U.S. 1 (psychotherapist-client privilege); \emph{Upjohn}, 449 U.S. 383 (attorney-client privilege).
84. \emph{Jaffee}, 518 U.S. at 9–10.
85. \emph{Id.} at 8 (quoting \emph{Wolfle v. United States}, 291 U.S. 7, 12 (1934)).
86. \emph{Id.} at 9 (quoting \emph{Trammel v. United States}, 445 U.S. 40, 50 (1980)).
87. \emph{Id.} at 10 (alterations in original) (quoting Proposed Rule of Evidence 501 Advisory Committee’s Note, 56 F.R.D. 183, 242 (1972)).
\end{footnotes}
to perform one’s job under a condition of confidentiality can provide a legal basis for the recognition of a testimonial privilege.

_Jaffee_ also noted that the public policy argument in favor of a psychotherapist’s privilege was bolstered by the fact that every state had enacted some form of similar protection in varying degrees. As Justice Stevens explained, “policy decisions of the States bear on the question whether federal courts should recognize a new privilege or amend the coverage of an existing one.” The Court found that “[d]enial of the federal privilege therefore would frustrate the purposes of the state legislation that was enacted to foster these confidential communications.”

Further, the Court explained that when there is a consistent body of state legislation on an issue, it reflects both the “reason” and “experience” mentioned in Rule 501 that may bolster the recognition of the privilege. In _Branzburg_, the Court noted that very few states had adopted any statute providing testimonial protection to reporters, but in the forty years since _Branzburg_, an overwhelming majority of states have enacted statutory protections for reporters. As of 2013, forty states and the District of Columbia have enacted reporters’ shield laws. The reasons the Court expressed in _Jaffee_ regarding deference to state statutes applies similarly to the argument for a reporters’ privilege—not recognizing such a privilege on the federal level would clearly frustrate the purposes of the states that decided to recognize some level of protection for reporters. Additionally, the consensus among the majority of states that reporters need testimonial privileges reflects the “reason and experience” that provides a basis for the recognition of a privilege by the Court under Rule 501.

The reporters’ privilege, however, does not perfectly parallel the psychotherapist-patient privilege in one material way. Unlike the psychotherapist’s privilege, the reporters’ privilege was not included in the Advisory Committee’s proposed privilege rules. The Court in _Jaffee_ asserted that its conclusion was “reinforced” by the inclusion of the psychotherapist’s privilege in those proposed privilege rules. As the Fourth Circuit noted in _Sterling_, the Advisory Committee did not mention the reporters’ privilege in the proposed privilege rules for Federal Rule

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88. Id. at 14.
89. Id. at 12–13.
90. Id. at 13.
91. Id.
93. _Number of States with Shield Laws Climbs to 40_, supra note 92.
94. _Jaffee_, 518 U.S. at 14.
95. Id.
of Evidence 501.66 However, this is by no means dispositive of the issue because the proposed guidelines were not adopted. The Senate Judiciary Committee rejected those guidelines in favor of “a more open-ended Rule 501.”97 In Trammel v. United States, the Court acknowledged that “Congress manifested an affirmative intention not to freeze the law of privilege.”98 Congress clearly anticipated the recognition of privileges not listed by the Advisory Committee, and therefore, recognizing a privilege is not dependent on whether that privilege was included in the proposed rules.

In Sterling, the Fourth Circuit also held that because the reporters’ privilege was not recognized at common law, it could not be recognized under Rule 501.99 This conclusion is incorrect. Rule 501 does not require that the privilege originally existed in common law, but rather only that the court develop a common law privilege “in light of reason and experience.”100 Rule 501 allows courts to “create new privileges or develop existing privileges.”101 In In re Grand Jury Investigation, the Third Circuit recognized the clergy-communicant privilege despite the fact that courts had “never formally recognized the clergy-communicant privilege” at common law.102 The recognition of a clergy-communicant privilege demonstrates that a privilege did not have to be recognized at common law for the Court to recognize such a privilege under Rule 501.

Rule 501, particularly as interpreted in Jaffee, gives the Court authority to recognize a reporters’ privilege while still respecting the principle of stare decisis. With the need for a reporters’ privilege established and the Court having a legal basis for recognizing it, the question of how to structure the privilege remains. This prospect was daunting to the Court in Branzburg, with Justice White declaring that the Court was “unwilling to embark the judiciary on a long and difficult journey to such an uncertain destination.”103 Today, however, this destination is far less uncertain given that states have provided guidance to the Court by experimenting with several different forms of reporters’ shield laws.104

66. United States v. Sterling, 724 F.3d 482, 500 (4th Cir. 2013). The Fourth Circuit accepted the Branzburg Court’s assertion that no such privilege existed at common law.
99. Sterling, 724 F.3d at 500.
102. Id.
IV. Contours of a Federal Reporters’ Privilege

Neither the legislative nor judicial proposals provide a clear blueprint for the legal contours of a reporters’ privilege. The several states, however, have effectively served “as a laboratory” whose experiences suggest a reasonable solution to this problem. Although the scope of state shield laws vary widely, they fall into three general categories: an absolute privilege, a qualified privilege, and a hybrid model. The Court should follow the hybrid model, as it provides meaningful protection for reporters, but recognizes that, under some circumstances, society is better served by compelling their testimony, so long as the identity of their confidential source is not compromised.

Several states grant reporters an absolute privilege that provides that reporters cannot be compelled to testify regarding confidential sources of information. The absolute privilege is problematic, because it fails to recognize that there may be circumstances in which “the reporters’ privilege must yield to other competing concerns.” Its extreme approach also makes it less likely to be embraced by a majority of the Court.

The majority of states with shield laws allow for a qualified reporters’ privilege, which may be overcome by a variety of factors in select circumstances. Some states simply require that to overcome the privilege, the court must find that enforcing the privilege will cause “a miscarriage of justice.” Other states, such as Louisiana, have a much more stringent test and require the court find that disclosure is “essential to the public interest” and that the party seeking to force disclosure made a clear and specific showing that the disclosure is, “(a) . . . highly material and relevant; (b) . . . critical or necessary to the maintenance of the party’s claim, defense or proof of an issue material thereto; and (c) . . . not obtainable from any alternative source” before revoking the reporters’ privilege. Other states have implemented various forms of a qualified privilege ranging in scope broadly between these models.

Although these qualified privileges do provide some protection for reporters, they are insufficient because they do not allow reporters to guarantee sources confidentiality and may require them to fight subpoenas through lengthy and expensive court proceedings. These burdens alone make a qualified privilege insufficient to combat the outsourcing problems.

107. Tucker & Wermiel, supra note 5, at 1316.
110. Id. § 45:1459.
discussed in Part I. As the Court has repeatedly recognized, “[a]n uncertain privilege . . . is little better than no privilege at all.”\textsuperscript{112} An effective reporters’ privilege must enable reporters to ensure sources confidentiality.

The hybrid model seeks to reconcile the benefits of the absolute and qualified privilege by granting the reporter an absolute privilege as to the identity of her source, but a qualified privilege as to other information.\textsuperscript{113} The Delaware shield law, for example, grants reporters a privilege not to testify regarding the identity of a source, but a court may compel a reporter to testify about confidential information if the court finds “the public interest in having the reporter’s testimony outweighs the public interest in keeping the information confidential.”\textsuperscript{114} This testimony cannot be compelled, however, if disclosure of the information would “substantially increase the likelihood that the source of the information will be discovered.”\textsuperscript{115}

The hybrid model, like the one implemented in Delaware, is an effective shield because it enables reporters to guarantee the confidentiality of sources, but still recognizes that some information may be compelled under certain circumstances, such as when national security may be threatened by allowing such a privilege. This model compromises two competing ideologies and allows reporters to protect their sources while still accommodating an alternate interest in national security. This accommodation should serve to temper any national security concerns involving the implementation of the privilege. After citing Rule of Evidence 501 as the legal basis for recognizing a reporters’ privilege, the Court should consider state models, like Delaware’s shield law, for guidance in shaping a federal reporters’ privilege. The hybrid model is the best compromise of all competing interests.

\section*{Conclusion}

The need for reporters to gather news from confidential sources becomes exceedingly important as government operations become increasingly secret. The Supreme Court could have provided much needed protection for reporters by granting certiorari in \textit{United States v. Sterling} and using Federal Rule of Evidence 501 to create a federal reporters’ shield based upon the “hybrid model” of state shield laws. While the Court may have missed this chance, it is likely they will not have to wait very long before a similar case arises. A federally recognized reporters’

privilege will take away the incentive for sources to go to organizations like WikiLeaks, but until reporters have meaningful protection, sources will increasingly be pressured to go to WikiLeaks. Although many fear the security implications of a reporters' privilege, a reasonable reporters' privilege can actually support national security goals by keeping sensitive information in the hands of more trustworthy news outlets and away from WikiLeaks. As Justice Kennedy once proudly declared, “Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law.”
