

# The Reporter's Privilege Under Fire: Is the American Press Still Free?

Natalie West

**The First Amendment's guarantee** of an independent press that may freely collect and disseminate news is often considered the bedrock of American democracy. Yet more than a century and a half after the *New York Herald's* John Nugent became the first American reporter jailed for refusing to identify a confidential source, reporters continue to face difficult choices when attempting to protect sources and preserve the confidentiality of the reporting process. In the wake of several recent high-profile cases in which reporters have been fined or jailed, Congress and state legislatures have considered measures that would add to existing protections for reporters. This article discusses the source, scope, and history of the reporter's privilege, as well as recent cases and legislative developments relating to it.

## I. Source and Scope of the Reporter's Privilege

### A. The First Amendment

#### 1. *The Supreme Court's View: Branzburg v. Hayes*

The Supreme Court has decided only one reporter's privilege case—*Branzburg v. Hayes*, in 1972. The *Branzburg* case involved three investigative reporters who had refused to testify before grand juries regarding the identities of their confidential sources, claiming protection under the First Amendment of the Constitution. Justice Byron White, writing for the 5–4 majority, rejected the reporters' claim of privilege. He emphasized the critical role of the grand jury in the American criminal justice system, arguing that the grand jury's broad subpoena power was essential to its investigative task. He also questioned the necessity of a reporter's privilege, contending that investigative journalism had "flourished" in the absence of a constitutional privilege.

Although joining the 5–4 majority, Justice Lewis Powell wrote a separate concurring opinion to "emphasize...the limited nature of the Court's holding." According to Justice Powell, legal recourse would be available to the press "under circumstances where legitimate First Amendment interests require protection," such as when the information sought bears "only a remote and tenuous relationship to the subject of the investigation." Powell suggested that courts must balance freedom of the press with the obligation of all citizens to give relevant testimony to a grand jury.

#### 2. *In Branzburg's Wake: From Consensus to Confusion*

In the wake of *Branzburg*, most lower courts interpreted the case as supporting the existence of a qualified reporter's privilege under the First Amendment. Noting that Powell and the four dissenters had all recognized the need for some limited protection, lower courts applied a case-by-case balancing of interests that weighed the relevancy of the information sought from the reporter,

the importance of that information in the underlying case or grand jury proceeding, and the ability to obtain the information from other sources. By 2000, almost all federal courts and most states recognized some form of reporter's privilege.

In the last few years, however, subpoenas for journalists' sources and contempt charges against reporters who refuse to reveal such information have become increasingly common. Following the Seventh Circuit's 2003 decision in *McKevitt v. Pallasch*, courts have begun to show a greater willingness to enforce these subpoenas and impose penalties for noncompliance, rejecting assertions of a reporter's privilege. In the *McKevitt* case, Judge Richard Posner, an influential judge on the U.S. Court of Appeals for the Seventh Circuit, challenged the judicial consensus that *Branzburg* created at least some level of constitutional protection for reporters who refused to reveal sources. *McKevitt* involved the prosecution in Ireland of Michael McKevitt, a leader of the outlawed paramilitary organization responsible for a 1998 bombing in Northern Ireland. To prepare his defense, McKevitt subpoenaed interview tapes in the possession of several American journalists who had interviewed the prosecution's key witness. In ordering the reporters to turn over their interview tapes, Posner questioned other courts' interpretations of *Branzburg*, holding instead that the Supreme Court had unequivocally rejected the existence of *any* First Amendment privilege, particularly in circumstances like those presented in the *McKevitt* case.



Jeff Z. Klein, an editor at *The New York Times*, protests with colleagues outside the paper's offices in New York on July 6, 2005. Federal prosecutor Special Counsel Patrick Fitzgerald proclaimed that *Time* magazine reporter Matthew Cooper and *New York Times* reporter Judith Miller should be jailed for refusing to reveal their confidential sources to a grand jury investigating the leak of a covert CIA operative's name to the news media. REUTERS/Mike Segar MS/DY

Since 2003, several federal courts have followed in *McKevitt's* footsteps, ordering investigative reporters and other journalists to reveal their sources or face jail or monetary fines:

- In 2004, a federal district court held several reporters in contempt for refusing to reveal sources in the civil case brought by Wen Ho Lee, a nuclear physicist at Los Alamos National Laboratory who alleged that government leaks to the media violated his federal privacy rights. After an appeals court upheld the contempt citations, the government and the five news organizations involved settled with Lee for \$1.6 million, with the news organizations contributing \$750,000 to the settlement.
- In 2005, reporter Judith Miller spent 85 days in jail after refusing to reveal her source to the grand jury investigating the unauthorized disclosure of CIA operative Valerie Plame's identity.
- In 2006, citizen journalist Josh Wolf spent 226 days in prison after refusing to hand over to a grand jury unpublished video outtakes of a protest during which a police officer was allegedly assaulted.
- In 2008, a federal court held reporter Toni Locy in contempt for refusing to reveal her sources in connection with the civil suit by Steven Hatfill, who alleged that government officials violated his federal privacy rights by leaking his name to the press as a "person of interest" in the investigation of the 2001 Anthrax

attacks. The court ordered Locy to pay monetary fines for each day she refused to comply with the court's order and barred her employer from bearing any portion of the responsibility of the fines.

Despite these recent developments, most courts still provide some protection of journalists' confidential sources and unpublished materials. Nevertheless, these recent cases have created jurisprudential confusion and resulted in an increase in the number of subpoenas being served on reporters and citizen journalists.

### ***B. Statutory Protection***

To address the uncertainty created by *Branzburg* and its recent progeny, the press has lobbied legislatures at the state and fed-

eral levels to provide a statutory reporter's privilege. At the time *Branzburg* was decided, only 17 states had enacted statutes codifying a reporter's privilege, often referred to as "shield laws." Today, 36 states and the District of Columbia offer some form of statutory protection for reporters. Similar to the case law surrounding the constitutional privilege, the contours of this statutory protection vary widely across jurisdictions. About half of the state shield laws provide a qualified privilege that compels disclosure under certain circumstances, forcing those who seek the information to demonstrate its relevance and inaccessibility through other means. The remaining state shield laws offer an absolute privilege, but most have clear exceptions, primarily in the context of criminal cases in which a criminal defendant's Sixth Amendment rights are implicated. State shield laws also vary in the types of information protected and in who qualifies for protection. Although there is no federal shield statute protecting journalists, Congress is once again considering a proposed measure,

entitled the "Free Flow of Information Act of 2009," that would establish a qualified privilege for reporters under federal law. President Barack Obama and Attorney General Eric Holder have both pledged their support for some form of a federal shield law.

## II. The Policy Debate

In light of the changing judicial and legislative landscape, there has been a vigorous debate between supporters and opponents of a reporter's privilege. The goal of the reporter's privilege, according to supporters, is to enhance the free flow of information to the public. It is indisputable that the press has historically relied on confidential sources to gather and disseminate news, particularly when reporting on government and private sector corruption and illegality. For example, through the use of anonymous sources, *Washington Post* reporters Bob Woodward and Carl Bernstein uncovered the Watergate scandal, Pulitzer Prize winning journalist Walter Pincus exposed the Iran-Contra affair, and *New York Times* reporters informed the

public about the National Security Agency's domestic wiretapping program without judicial approval in the wake of September 11, 2001. Supporters of the privilege further argue that the sources for important stories like these would face serious consequences if their identities were revealed. Accordingly, they argue, journalists must be allowed to maintain their confidentiality.

Opponents of the reporter's privilege contend that the privilege is neither necessary nor useful. These arguments typically adopt Justice White's skepticism of the potential "chilling effect" that results from forcing reporters to reveal confidential sources. In addition, critics contend that a qualified privilege—the application of which depends on a case-by-case balancing of several factors—offers little, if any, meaningful encouragement for sources to come forward. Critics further argue that the reporter's privilege offers little assurance of confidentiality, while coming at great cost to law enforcement and, ultimately, the public. They point out that, as with all testimonial and evidentiary

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## *The goal of the reporter's privilege, according to supporters, is to enhance the free flow of information to the public.*

privileges, the reporter's privilege can sometimes operate to keep potentially relevant information from judges and juries. In this regard, critics claim, the privilege obstructs truth and encumbers judicial proceedings.

Given such competing concerns, it is no surprise that courts and legislatures have struggled to define the proper scope and application of the reporter's privilege. For example, some jurisdictions recognize a reporter's privilege only in civil matters, whereas others also recognize a privilege in grand jury and other criminal proceedings. Additionally, courts and legislatures have grappled with questions regarding how significant societal concerns, such as national security, should be allowed to limit the privilege's application. Controversy also surrounds the meaning of "journalist" for purposes of the privilege, particularly given the rise of bloggers and other citizen journalists. Another point of debate concerns the types of sources and materials to which the privilege applies, with some limiting the privilege to protection of confidential sources while others extend it to unpublished, but not confidential, information such as reporter's notes and video outtakes. Courts and legislatures have reached different conclusions on all of these issues, with the level of protection often varying depending on which courthouse—state or federal—a reporter finds herself in.

In light of this uncertainty and its consequences for investigative journalism, the reporter's privilege remains one of the most important issues in communications law today. 📱

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## EXTENSION ACTIVITIES

Tiffany Willey

**1.** Research legal cases involving members of the press. PBS's *Frontline* website offers a summary of the press's recent legal battles, [www.pbs.org/wgbh/pages/frontline/newswar/part1/](http://www.pbs.org/wgbh/pages/frontline/newswar/part1/). The Reporters Committee for Freedom of the Press offers a state-by-state outline of reporter privilege statutes for quick reference, [www.rcfp.org/privilege/](http://www.rcfp.org/privilege/). Task students with reviewing reporter shield laws in their community and state. Use either the cases on the Frontline website or local cases to examine how shield laws and other issues relating to reporter privilege have been challenged in local or state courts. Students might consider the following questions:

- How do shield laws protect both reporters and their sources?
- Do shield laws entitle reporters and their sources to extra legal protections that would otherwise not be available to average Americans?
- Do shield laws help guarantee Americans' First Amendment right to a free press?
- How has the "press" changed since the eighteenth century? What do these changes mean for Americans living in a nation that promises a free press?

**2.** The Federal Judicial Center offers a summary of the 1799 trial of Matthew Lyon, who was arrested for violating the 1798 Sedition Act, [www.fjc.gov/history/home.nsf](http://www.fjc.gov/history/home.nsf). Assign students to research this trial. What was the role of the media? Research other instances in American history where a free press was influential in inspiring political or social change—e.g., Progressive Era muckrakers, Watergate, the Pentagon Papers, the Iraq War. How important was a free press to these historic events?

**3.** Should journalists be forced to reveal their sources? If so, under what circumstances? *New York Times* reporter Judith Miller was jailed in 2005 for refusing to reveal the source of one of her stories. PBS's *Newshour with Jim Lehrer* has created a mock trial using the Miller case, available for free download, [www.pbs.org/newshour/extra/teacehrs/lessonplans/media/cia\\_leak.html](http://www.pbs.org/newshour/extra/teacehrs/lessonplans/media/cia_leak.html).

Supplemental resources include a *New York Times* online summary of the case, [www.nytimes.com/2005/10/16/national/16leak.html](http://www.nytimes.com/2005/10/16/national/16leak.html).

**4.** Take a poll in your classroom and ask students how many of them read or contribute to blogs. Find out if they consider themselves "journalists." Scott Gant has written a book titled *We're All Journalists Now*, arguing that our understanding of who should be considered a "journalist" should change to reflect new technologies, such as bloggers, in addition to "traditional journalists." Should some bloggers be considered journalists? Why or why not? Should bloggers be entitled to the same protections as traditional journalists? Why or why not? Do you think blogs contribute to our freedom of the press?

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