

# SHIELDING SOURCES: SAFEGUARDING THE PUBLIC'S RIGHT TO KNOW

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## JOINT HEARING

BEFORE THE

SUBCOMMITTEE ON HEALTHCARE,  
BENEFITS, AND ADMINISTRATIVE RULES

AND THE

SUBCOMMITTEE ON  
INTERGOVERNMENTAL AFFAIRS

OF THE

COMMITTEE ON OVERSIGHT  
AND GOVERNMENT REFORM  
HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTEENTH CONGRESS

SECOND SESSION

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## SHIELDING SOURCES: SAFEGUARDING THE PUBLIC'S RIGHT TO KNOW

Tuesday, July 24, 2018

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON HEALTH CARE, BENEFITS AND  
ADMINISTRATIVE RULES, JOINT WITH THE SUBCOMMITTEE  
ON INTERGOVERNMENTAL AFFAIRS,  
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,  
*Washington, D.C.*

The subcommittee met, pursuant to call, at 2:45 p.m., in Room 2154, Rayburn House Office Building, Hon. Jim Jordan [chairman of the subcommittee] presiding.

Present: Representatives Jordan, Palmer, Walker, Grothman, Meadows, Krishnamoorthi, Raskin, DeSaulnier, and Norton.

Mr. JORDAN. The subcommittees will come to order. We welcome our guests today, we will introduce you here in a few minutes. You know how this works. You typically got to listen to politicians talk first. It is crazy the way we do things here.

But we'll have some opening statements from the chairman of the respective subcommittees and the ranking members and we will get right to your testimony. We'll swear you in and then of course get to the questions on this important important subject matter that's been in the news of late.

And this is an ongoing series of hearing we're doing on First Amendment liberties and protecting those first amendments, whether on college campuses, whether it's from the pulpit in some of our churches or whether it's now today about the freedom of the press. So again, we thank you for being here and we'll start with our opening statements

When the—Jefferson once said when the people fear the government there is tyranny, when governments fear the people there is liberty. And I would like to kind of offer that as a context for evaluating this issue today as we move through it, this important hearing.

Critical freedom of the press is pursuit of truth without government entanglements or intimidation, yet we have seen previous administrations wiretapping journalist phones and issuing subpoenas for the identity of their sources. For this reason we signed on to, my good friend professor Raskin's Free Flow of Information Act which limits the government in compelling a journalist to reveal his or her sources.

Professor Raskin and I may not agree often, but we are both committed to reaffirming our First Amendment freedoms, especially the guarantee, government cannot intimidate or sensor the

town crier, be it the chief contributor to The New York Times or a freelancer in the Fourth District of Ohio. But it should come as no surprise that advocate for government having the least consequential impact on American's lives, especially at the Federal level where politicized prosecutors are unaccountable to the electorate.

The creation of the Federal shield law like H.R. 4382, is the reassurance for journalists and Americans alike that their government cannot stifle the flow of information. This legislation acts as a powerful antidote to government encroachment for placing a more stringent check on their investigative powers.

And those that improperly release classified information that jeopardizes national security and public safety should of course be prosecuted, but we cannot look the other way while our government intimidates journalists and tries to get their confidential sources. We need to keep the focus on that issue.

Yesterday committee staff were briefed by the Justice Department related to their internal policies for obtaining information from reporters, this was in response to a briefing request from Chairman Gowdy and fellow cosponsor of the Free Flow of Information Act, Congressman Meadows.

I, along with members of the committee, on both sides of the aisle, aim to continue our Justice Department to live up to the ideals set forth in the First Amendment. And I want to thank Professor Raskin again for his leadership on such an important legislative effort. And I'm glad to be working together in a bipartisan manner on this piece of legislation.

I will just further add, you think about what we witnessed in the last few years where you had the agency with the power and influence that it has over American's lives, the Internal Revenue Service systemically and for a sustained period of time target people for their political beliefs. And then you see what's taken place recently, what we've recently learned, at the Department of Justice and the FBI relative to the previous campaign and what was taken to the FISA court. This is serious.

And then when you add to it what we saw just a couple months ago with the reporter from The New York Times who had everything grabbed by the government. This is a serious issue, that's why we have the discussion in the hearing today and it's why we have our witnesses and that's why I am pleased to be working with my colleagues in a bipartisan fashion. And with that I would yield to the gentleman from Maryland for his comments.

Mr. RASKIN. Mr. Chairman, thank you very much for your leadership on this crucial legislation and for calling this hearing today.

My dad wrote shortly before his death in 2017 these words, democracy in its operating principle the rule of law require a ground to stand on and that ground is the truth. The Founders of American democracy were obsessed with giving the American people the means to acquire the truth. Madison said the people who need to be their own governors must arm themselves with the power that knowledge brings.

Jefferson identified the central role of the press in preserving democracy. He said, the only security of all is in a free press so the First Amendment established a preferred place for freedom of the



press since it established a preferred place for freedom of speech and freedom of religion.

The Supreme Court has held that government can reasonably accommodate religious free exercise and worship, which is why Federal law can exempt Native American Indians using peyote for sacramental purposes when it bans it generally. It is why public schools can create exemptions for students and employees who observe religious holidays on official school days while not releasing other students and employees.

These laws are not constitutionally necessary, but the courts have found them to be constitutionally permissible as a reasonable accommodation of religious liberty which occupies a high place in our pantheon of constitutional values.

While the right of free press occupies a similarly exalted perch in our constitutional hierarchy. In theory, the specific command in the First Amendment that Congress will make no law of bridging the freedom of press was unnecessary, because press freedom already covered under freedom of speech. But the Framers insisted upon protecting the distinctive and indispensable role that the press plays as a free institution in our Democratic society.

Not everyone can go to congressional hearings, not everyone can go to State and legislative sessions where city or county council meetings go late into the night, not everyone can travel into war zones in Iraq, or Afghanistan, or Vietnam to determine the reality and the meaning of our foreign policies.

Not everyone can personally uncover torture at Abu Ghraib, or Guantanamo Bay, or obtain the Pentagon papers, or break the Watergate scandal, or determine how much oil leaked from the BP oil spill in the Gulf of Mexico. Or figure out what the President and President Putin talked about in their secret meeting in Helsinki. But as citizens we are all equally implicated by these events and we are all equally invested in ascertaining the truth of what is happening in our name as citizens. This is why we need professional journalists and newspapers to get the information for us.

The First Amendment protects the free press, but that abstract guarantee means nothing if reporters cannot protect confidential sources and whistleblowers or if they have to live in fear of criminal prosecution and jail time. When reporters cannot do their jobs our ability to function as a reflective democracy suffers, the free press is not the enemy of the people, it is the people's best friend. And it is the enemy of tyrants everywhere.

Jefferson said were it left to me to decide whether we should have a government without newspapers or newspapers without a government, he said I would not hesitate a moment to choose the latter.

As in other times of sharp political division, like the period of the Alien and Sedition Acts of 1798 the press in America is under ferocious attack today. Reporters are berated and castigated daily. Journalists have been arrested, punched, attacked and even murdered, including in my home State of Maryland simply for doing their jobs.

We cannot afford as a society that reporters attacked or intimidated or fearful. We cannot have them afraid that they will be thrown into jail just for doing their jobs. Congress must defend ac-

tively the free press and the American public's right to know what exactly the government is doing you in our name. It is time to pass a Federal shield law to protect the press whose work is essential to democracy.

America favors shield laws to protect the media watchdogs. Only 49 States and the District of Columbia have passed shield laws or adopted some sort of reporter's privilege. What more evidence do we need that the American people want to see a free and aggressive press to expose corruption and safeguard the workings of democracy.

Mr. Chairman you and I introduced the Free Flow of Information Act of 2017 last November after Attorney General Sessions, in testimony before the House Judiciary Committee, refused to commit not to jail journalists for doing their jobs. I approached you on the spot and asked you whether you would introduce this measure with me, and I will never forget your immediate and enthusiastic response. It has given me hope that we can indeed come together as citizens, and lovers of the Constitution across party lines to defend the basic institutions of our democracy.

Throughout our history dozens of journalists have served or have been threatened with jail time for protecting their sources, one of these journalists I know quite well, Brian Karem who is one of my constituents and the current Montgomery County Sentinel executive editor. In 1990, and 1991, Brian went to jail four different times to protect confidential sources while working as a TV reporter. The last time he went to jail for nearly 2 weeks while the Supreme Court considered his case and was only spared a long sentence when his confidential source, once she had moved from Texas to California and no longer feared for her life, came forward and revealed her own identity.

Confidential sources like this are essential not only in investigative journalism, whether these sources shed light on government abuse and corruption, as was the case with Watergate, the Pentagon Papers or the abuse of detainees at Abu Ghraib in Iraq, but also in routine news gathered and the daily reporting of local news stories that immediately and directly influenced the lives of our people.

The Free Flow of Information Act is long overdue, but there could be no better time to pass it than now, a time of peril to the republic, a time of corruption when foreign governments are trying to subvert our elections and when the basic values of society are in danger.

Mr. Chairman this exact same Federal shield legislation passed the House with overwhelming bipartisan support in 2007 and the bill was championed by none other than Congressman, now Vice President Mike Pence. It provides covered reporters with the qualified privilege and contains exceptions for compelled disclosure resource. Whenever national security is threatened or when there is a threat of eminent bodily harm or death and in other discrete and limited situations. It would not cover reporters who are suspected of committing a crime themselves nor would it give reporters the right to interfere with law enforcement working to solve a crime.

This is an area I think where we can all come together across party lines to defend the basic pillars of American democracy. I

agree very strongly with Vice President Pence who said it's not a Democratic or Republican issue, it's an issue for all Americans. And I urge my colleagues to support it.

Mr. Chairman, I yield back and I thank you again for your leadership.

Mr. JORDAN. You bet. It looks like we have got some students who are leaving. We want to thank you all for being here. Thank you so much.

Mr. RASKIN. It takes a professor to drive them out of the room.

Mr. JORDAN. It wasn't the professor, it was the nine pages in your speech. No, it was all good. It was all good.

The gentleman from Alabama, of the subcommittee chair is recognized.

Mr. PALMER. Thank you, Mr. Chairman. An inform citizenry is the hallmark American representative democracy. And without the free flow of information, we fail to hold those in power accountable.

At the core of American exceptionalism is the liberty granted to its people to scrutinize its own government as first witnessed by Thomas Paine in Common Sense. I want to thank Chairman Jordan for joining with the Intergovernmental Affairs subcommittee on holding this hearing today. Our subcommittees have held a series of First Amendment hearings examining how certain rights like the right to speak freely at college campuses must be protected and reaffirmed.

The American press has the freedom report on matters of importance to the public without fear of recourse from the government. Yet over several administrations the Justice Department has wielded tactics like threatening subpoenas and even imprisonment in an attempt to compel journalists to reveal their confidential sources, while these tactics may be used in good faith, investigation of criminal matters, it does demonstrate why a Federal shield law is critical.

The Supreme Court addressed the freedom of the press in a seminal 1970 case *Branzburg v. Hayes*, in this case the justice rights said Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and the fashion standards and rules as narrow or broad as they deemed necessary.

Meanwhile, in the absence of Federal shield law, States have rolled out their own. As chairman of the Intergovernmental Affairs subcommittee, I see the necessity of States detail laws and practices to fit the unique needs of their citizenry, but the emerging patchwork of State laws and Federal circuit Court have left journalists unsure of their protections from the Federal Government and sends a chilling effect throughout the press.

A Federal shield law like H.R. 4382 will further empower journalists to pursue the truth and hold the government accountable. As Ranking Member Raskin pointed out, this is not the first time that a law like this has been introduced. It was introduced by then Representative Mike Pence, but also by Ted Poe, and now jointly by Chairman Jordan and Ranking Member Raskin.

I want to thank my friend Chairman Jordan and my friend ranking member professor Raskin for their leadership in this effort. And I yield back.

Mr. JORDAN. I thank the gentleman. The gentleman from Illinois is recognized. I got to spend some time with you in Ohio over the 4th of July. Did a great job at the event with Doctors from an Indian American heritage.

Mr. Krishnamoorthi is recognized.

Mr. KRISHNAMOORTHI. Thank you. Thank you, Mr. Chairman. Thank you, Chairman Palmer, thank you Ranking Member Raskin for your leadership on this issue and thank you to our witnesses for coming in today.

A free and flourishing press is a cornerstone of our democracy. Our Founding Fathers understood the importance of an independent press and that's why they embedded this particular right within the First Amendment to the Constitution. A free press informs the public and holds leaders to account. I know because I get a lot of letters based on what was written in the newspaper about me and so I know firsthand that the free press holds us to account.

In order for the press to truly be free however, reporters must be able to protect their sources, whether they are government whistleblowers or corporate insiders. This crucial ability to protect confidential sources has been eroding over the past several years. As our government has sought to crack down on leaks, more and more reporters have been pressured to reveal their sources. The current administration is no exception to that trend. In fact, last August Attorney General Sessions announced that the Department of Justice had tripled, had tripled the number of active leak investigations saying, and I quote, "This culture of leaking must stop." There is no question that classified or other legally protected information must be properly handled. But our government should not prosecute the journalists who expose corporate and government wrongdoing with the information that whistleblowers bring them. Although almost all States have shield laws, they vary in scope and do not apply in Federal cases where courts have issued conflicting rulings. That is why a Federal shield bill is so important.

Vice President Pence, as mentioned before, sponsored such a bill in 2007 which passed the House with broad bipartisan support. I'm glad that Representatives Raskin and Jordan have introduced a shield bill this Congress and I hope it will be given full consideration. But we have a lot of work do.

In the world press freedom index the United States ranked itself at 45th in the world. According to Reporters Without Borders which compiles this particular index our President Trump has fostered further decline in journalists right to report. He has called the press, quote unquote, "the enemy of the American people," and labeled unfavorable coverage, quote unquote "fake news." He has also called for revoking broadcasting licenses of certain mainstream news outlets. President Trump has expressed hostility to a free press, but undermining legitimate journalism is dangerous. It makes us less informed and erodes our trust in government. It wears away the fabric of our society. That is why I'm glad we are holding this hearing. We must work together on a bipartisan basis to strengthen our commitment to a robust free press.

Thank you, Mr. Chairman.

Mr. JORDAN. I thank the gentleman. I am now pleased to introduce our witnesses. We have first Mr. Lee Levine, senior counsel

at Ballard Spahr, and secondly we have Ms. Sharyl Attkisson, investigative correspondent and host of Full Measure, someone whose story I'm familiar with, what Ms. Attkisson went through. And I'm sure you're going to tell us about that, it's simply unbelievable. And then of course we have Mr. Rick Blum, policy director of the Reporters' Committee for Freedom of the Press.

Welcome to all of you. What we normally do in this committee is we swear you in. So if you will please stand up and raise your right-hand.

Do you solemnly swear or affirm the testimony you are about to give is the truth, the whole truth and nothing but the truth so help you God?

Let the record show each witness answered in the affirmative. And we're going to move right down the aisle. Mr. Levine you go first and then Sharyl and then Mr. Blum.

## **WITNESS STATEMENTS**

### **STATEMENT OF LEE LEVINE**

Mr. LEVINE. Thank you, Mr. Chairman and members of the subcommittees.

I last appeared before a committee of this House 11 years ago. The topic was the Free Flow of Information Act of 2007, which has been mentioned was cosponsored by now Vice President Mike Pence. It passed this chamber with overwhelming bipartisan support, but never received a vote in the Senate. My message to you today is a simple one, the time has come to enact just such legislation codifying a reporter's privilege in the Federal courts.

You should do so based on the unassailable historical fact that confidential sources are often essential to the press's ability to inform the American people about matters of vital public concern. While there is, as there should be, healthy ongoing debate within with the journalism profession about the appropriate use of confidential sources. All sides of that debate agree that they are at times essential to effective news reporting.

As then Congressman Pence testified before the House Judiciary Committee in 2007 and I quote, "compelling reporters to testify and in particular compelling them to reveal the identity of their confidential sources is a detriment to the public interest."

Indeed for almost 3 decades following the Supreme Court's 1972 decision in *Branzburg v. Hayes*, subpoenas issued by Federal court seeing disclosure of journalist's confidential sources were rare. Since that time however, the situation has changed dramatically. In the last 15 years, a period that spans three separate Presidential administrations, a substantial number of subpoenas seeking the identities of confidential sources have been issued by Federal courts to a variety of media organizations, the journalists they employ and the third parties that provide them with telephone and email services.

In my 2007 testimony, I described in some detail the significant increase in the number of such subpoenas in the immediately preceding years. Unfortunately, since that testimony the drum beat has continued unabated. In 2008 for example the Department of Justice issued the first of what became multiple grand jury and

trial subpoenas to Pulitzer Prize winning journalist James Risen, seeking to compel his testimony in the criminal prosecution of former CIA employee Jeffrey Sterling.

Two separate Presidential administrations pursued Mr. Risen's testimony over a period of 5 years. Ultimately, the United States Court of Appeals held that there is no reporters privilege in criminal cases in the Federal courts of fourth circuit and that Mr. Risen was therefore obliged to testify.

Significantly following the fourth circuit's ruling and Mr. Risen's ongoing refusal to betray his promises to his sources, the Justice Department decided not to call him to testify at Mr. Sterling's trial. Nevertheless, even without Mr. Risen's testimony, Mr. Sterling was convicted. Which makes you question how necessary Mr. Risen's testimony was in the first place.

In 2013 the Justice Department seized 2 months worth of phone records connected to more than 20 telephone lines in the Associated Press' offices and journalists, including their home phones and their cell phones. It did so not by seeking such information directly from the AP or the journalists involved, but rather by issuing without their knowledge subpoenas to their telephone service providers. That same year in the course of a criminal investigation of alleged leaks involving North Korea the Department secured warrants authorizing prosecutors to monitor the phone calls and emails of Fox News correspondent James Rosen, again without his knowledge.

The public outcry that resulted from the AP subpoena and the Rosen search warrant prompted the Department to revise substantially its internal guidelines governing the use of such compulsory process. Nevertheless, the practices apparently continued, despite the change in the administrations in the interim.

Earlier this year the Justice Department revealed that it had secretly procured years worth of phone and email records of New York times reporter. It remains unclear whether the Department complied with its own guidelines when it did so, although that is largely an academic question since most courts have held that the guidelines are not judicially enforceable in any event.

Things were not always this way. In the almost 3 decades immediately following the Supreme Court's decision in *Branzburg*, both the Federal courts and DOJ largely construed that precedent to provide to journalists a privilege grounded either in First Amendment or in Federal common law that protected them in most Federal court proceedings, civil and criminal. In recent years however, that judicial consensus has broken down.

As I've noted, Mr. Risen was authoritatively informed by the fourth circuit that he had no lawful ability to protect the identities of his confidential sources in response to a subpoena issued by a Federal court sitting in Virginia. But if that same subpoena had been issued by a Federal court in Delaware, less than 120 miles to the north, he would have enjoyed a privilege grounded in Federal common law as construed by the third circuit. And if the subpoena had been issued by a Federal court in Georgia, some 300 miles to the south, he would have been protected by a First Amendment base privilege recognized in the 11th circuit.

Make no mistake, the drum beat of subpoenas, coupled with the lack of clear guidance concerning the recognition and scope of a re-

porter's privilege in the Federal courts has impaired the ability of the American people to receive information about the operations of their government and the state of world in which we live.

I respectfully submit that the time has long since time for congressional action. Thank you.

[Prepared statement of Mr. Levine follows:]

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

**“Shielding Sources: Safeguarding The Public’s Right To Know”**

**July 24, 2018**

**Introduction**

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

**The Necessity of Confidential Sources**

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

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

<sup>2</sup> *Mills v. Alabama*, 384 U.S. 214, 219 (1966).



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

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

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

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

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

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

<sup>5</sup> *Free Flow of Information Act of 2007: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. 32-34 (June 14, 2007) (Rep. Mike Pence), available at <https://www.gpo.gov/fdsys/pkg/CHRG-110hrg36019/html/CHRG-110hrg36019.htm>; see also *id.* (“As a conservative who believes in limited Government, I know that the only check on Government power in real-time is a free and independent press. The ‘Free Flow of Information Act’ is not about protecting reporters. It is about protecting the public’s right to know.”).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I also believe, based on my professional experience, that compelled disclosure of confidential information will cause irrevocable damage to the quality of information the public receives.

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

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

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

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

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

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<sup>14</sup> See *New York Times Co. v United States*, 403 U.S. 713 (1971).

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

<sup>16</sup> *New York Times Co.*, 403 U.S. at 717 (Black, J., concurring).

<sup>17</sup> Solicitor General Erwin N. Griswold, who argued the government’s case, wrote some twenty years later that he had not “seen any trace of a threat to the national security from the publication.” Erwin N. Griswold, *Secrets Not Worth Keeping: The Courts and Classified Information*, WASH. POST, Feb. 15, 1989, at A25.

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

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

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

which were used to hide corporate debt from the company's investors.<sup>21</sup>

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

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

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

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

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

<sup>23</sup> Hersh, *supra* note 22.

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

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

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

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

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

### **The Current State of the Privilege in the Federal Courts**

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

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2, 2014, [https://www.huffingtonpost.com/2014/10/02/washington-post-secret-service-scandal\\_n\\_5913366.html](https://www.huffingtonpost.com/2014/10/02/washington-post-secret-service-scandal_n_5913366.html). Leonnig won the 2015 Pulitzer Prize for National Reporting for her work.

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

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

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

<sup>29</sup> 408 U.S. 665 (1972).

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

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

### Frequency of Subpoenas

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

<sup>39</sup> *The Justice Department's seizure of a reporter's records could signal a dangerous campaign*, WASH. POST, June 13, 2018, [https://www.washingtonpost.com/opinions/the-justice-departments-seizure-of-a-reporters-records-could-signal-a-dangerous-campaign/2018/06/13/ba3aa04a-6d9b-11e8-afd5-778aca903bbe\\_story.html?utm\\_term=.84b56c1ad4e3](https://www.washingtonpost.com/opinions/the-justice-departments-seizure-of-a-reporters-records-could-signal-a-dangerous-campaign/2018/06/13/ba3aa04a-6d9b-11e8-afd5-778aca903bbe_story.html?utm_term=.84b56c1ad4e3) (“Under Justice guidelines, hammered out between 2013 and 2015, the government should use subpoena power, court orders or search warrants for journalists’ records only as extraordinary measures, not as normal investigatory tools, and, except in unusual circumstances, the government should give reporters advance notice of a bid for records, to allow sufficient time for a protest or negotiation. . . . In light of the guidelines, was the broad sweep for Ms. Watkins’s communications really necessary? Or is the Justice Department using a vacuum-cleaner approach?”). The uncertainty surrounding DOJ’s seizure of Ms. Watkins records is compounded by its failure even to acknowledge it had done so in response to an inquiry from Senator Ron Wyden regarding the number of times in the last five years the Department used “subpoenas, search warrants, national security letters, or any other form of legal process authorized by a court” to collect information about journalists in the United States or American journalists abroad. See Ramya Krishnan, *More questions than answers from DOJ letter about journalist surveillance*, COLUMBIA JOURNALISM REVIEW, July 13, 2018, [https://www.cjr.org/united\\_states\\_project/surveillance-justice-department-reporters-sessions.php](https://www.cjr.org/united_states_project/surveillance-justice-department-reporters-sessions.php); Letter from

academic question since most courts to have considered the issue have held that the guidelines are not judicially enforceable in any event.<sup>40</sup>

### Legal Uncertainty

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

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

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

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

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

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

<sup>42</sup> See *United States v. Sterling*, 724 F.3d 482, 492-96 (4th Cir. 2013).

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

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

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

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

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

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

<sup>45</sup> See, e.g., *United States v. Treacy*, 639 F.3d 32, 42 (2d Cir. 2011).

<sup>46</sup> See *Gonzales v. Nat’l Broad. Co.*, 194 F.3d 29, 35 (2d Cir. 1993).

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

<sup>48</sup> See, e.g., *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980).

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

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

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

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

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

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

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

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

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

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

#### **The Reporters' Privilege in the States**

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

<sup>53</sup> *Branzburg*, 408 U.S. at 706.

<sup>54</sup> *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d at 979.

<sup>55</sup> *Id.* at 981.

<sup>56</sup> *United States v. Sterling*, 724 F.3d 482, 505 (4th Cir. 2013).

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

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

the uniform determination by the States that, in most cases, compelling newsgatherers to disclose confidential information is contrary to the public interest.”<sup>59</sup>

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

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

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

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

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

<sup>60</sup> *See id.*

<sup>61</sup> *See id.* (citing *Jaffee v. Redmond*, 518 U.S. 1, 13 (1996)).

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

<sup>63</sup> *Brief Amici Curiae of The States of Oklahoma, et al., supra* note 59.

<sup>64</sup> *Id.* (citing *Jaffee*, 518 U.S. at 18) (additional citation omitted).

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

### **Conclusion**

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

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

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

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

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

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

<sup>67</sup> *Goodwin*, 22 EHRR at 143.

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



If I violate that trust, then I believe I can no longer work as a journalist.<sup>69</sup>

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

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

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

Mr. JORDAN. Thank you, Mr. Levine, that was good, good history. We appreciate that.

Ms. Attkisson, you're recognized for your 5 minutes.

#### STATEMENT OF SHARYL ATTKISSON

Ms. ATTKISSON. Thank you. Thank you for inviting me. I remember a few years ago reporting on a story at CBS news and I always asked our lawyers there to vet my stories for fairness and legality. And on this particular day, I was going over some documents with them, provided by an inside source exposed corporate wrongdoing. I had vetted the documents and gotten other sources to appear on camera for a story.

The attorneys wanted to know if we're challenged in court on this story, can we disclose the insider's name? I said, no. He would lose his job. It would ruin him. Why? They explained that the law had been changing and it was not to the benefit of journalists or our sources. They told me that we can no longer guarantee protection of the identity of our sensitive sources if challenged in court by say the company we were doing the story about. You'd have to give up the name my lawyers told me. Or else what? I said. You'd probably go to prison. That made getting truthful information that is in the public's interest that much harder. I could no longer promise people who were willing to expose corporate or government wrongdoing that I could protect their identities at all costs.

Obviously, I'm just one reporter, but you can multiply my experience by so many others. Here are just a couple of examples of stories I covered over the years that might not get told today because sources feel threatened.

My investigation into fraud inside the Red Cross after all the 9/11 donations, which was recognized with an Investigative Emmy award, was possible only with assistance from inside sources who provided me with audits and information. Stories exposing wrongdoing with Ford and Firestone and covering up long known deadly tire dangers, another Emmy nominated investigation might have gone untold. Same with my investigations into Enron, Halliburton, prescription drugs and countless others, stories that arguably let to lives saved and taxpayer money saved.

It was with help from inside intelligence sources that I broke the story at CBS of the Chinese stealing our most sensitive nuclear secrets. I was also able to break the news that the FBI lied about evidence in that case against their suspect Wen Ho Lee. They claimed he had failed a lie detector test when I was able to get the polygraph and show that he had actually passed with flying colors.

Without the ability to protect confidential sources, I probably wouldn't have been able to report that the CDC was alarming our Nation with a swine flu epidemic, but the vast majority of cases blamed on swine flu were not swine flu or any sort of flu at all. And I wouldn't have been able to break the stories about how BP and the government provided false information about how much oil was really leaking into the ocean after the BP oil spill.

In the past decade we've see the government attack sources with a zeal that should be applied to those committing the wrongdoing

exposed. Instead, the wrongdoers are often protected. In some cases, they are the ones prosecuting the whistleblowers.

The greatest offense a government insider can commit today is not for example improperly unmasking names of U.S. citizens for political purposes. It is providing information of wrongdoing to a journalist. Someone could go to jail over the so-called leak, but not the actual wrongdoing exposed. And sadly, we now have ample evidence that bad actors in government will go to shocking extremes, violating constitutional rights and possibly laws to hunt down our sources.

In my case, I'm still litigating against the FBI and others connected to the intel community for their intrusions into my computers when I was at CBS news. The honest intel connected sources who helped me discover this include former FBI unit chief. The actions of the computer intruders, which we can trace forensically, imply that they were desperate to learn who my sources are and what I might be about to report. Talk about chilling. After that information became public, everyone one from intelligence community sources to corporate whistleblowers have told me that they hesitate to communicate with me because they believe I'm being monitored.

And nothing has happened to the computer intruders to this day. Instead, the Justice Department simply uses unlimited taxpayer money to fight my case in court. And the big picture I can't help but see this is part of a growing and organized effort to control a free press. I'm concerned about new movements to force schools to teach media literacy and to invite third parties to curate our information and determine what's fakes news and what's true.

My research shows that these efforts are often the opposite of what they seem. The forces behind them may be trying to actually shape public opinion by preventing us from seeing certain facts and views. If these trends weren't effected in the past, we might not know that cigarettes are bad for you. The whistleblower wouldn't talk, the studies would be varied by algorithms at Google and Facebook because curators and media literacy experts would declare the research to be conspiratorial. They'd point to settled science to prove cigarettes are perfectly safe, maybe even good for you. News outlets and reporters daring the pierce the narrative would be controversialized, bullied on social media and forced out of their jobs.

Make no mistake the ongoing government and corporate crack-down on whistleblowers and journalists who report their stories is a war. Our truthful information threatens the persistent bureaucracy and powers that be like nothing else and they are increasingly desperate to control information and narratives. We can only guess what important stories in the public interest will never be told because of a less free press.

[Prepared statement of Ms. Attkisson follows:]

Sharyl Attkisson, Investigative Journalist  
Formerly CNN, PBS CBS; Currently host of weekly news program: “Full Measure”  
Opening Statement

Thank you to Democrat and Republican members of this and the full committee — including previous iterations, which include over the past 24 years I’ve been in town— many deeply committed to a free press.

I remember a few years ago reporting on a story at CBS News. I always asked our lawyers to review my stories for legality and fairness. On this particular day, I was going over some documents with them provided by an inside source who exposed corporate wrongdoing. I had vetted the documents and gotten other sources to appear on camera.

The attorneys wanted to know— “If we’re challenged on this story in court, can we disclose the insiders’ name?”

I said, “No, he would lose his job, it would ruin him. Why?”

They explained that the law had been changing and it wasn’t to the benefit of journalists or our sources. They told me that we could no longer guarantee protection of the identity of our sensitive sources if challenged in court by, say, the company we were doing the story about.

“You would have to give up the name,” my lawyers told me.

“Or else what?” I asked.

“You’d probably go to prison,” they answered.

That made getting truthful information in the public’s interest — that much harder. I could no longer promise people who were willing to expose corporate or government wrongdoing that I could protect their identities at all costs.

Obviously, I’m just one reporter—multiply my experience by so many others. Here are just a few examples of stories I covered over the years that might not get told today because sources are threatened:

My investigation into fraud inside the Red Cross after all the 9/11 donations— which was recognized with an investigative Emmy award...was possible only with assistance from inside sources who provided me audits and information.

([Alleged waste, fraud or abuse of 9/11 donated funds July 29, 2002](#)

[www.cbsnews.com/news/red-faces-at-the-red-cross/](http://www.cbsnews.com/news/red-faces-at-the-red-cross/)

[www.cbsnews.com/stories/2002/07/31/eveningnews/main517045.shtml](http://www.cbsnews.com/stories/2002/07/31/eveningnews/main517045.shtml))

Stories exposing wrongdoing within Ford and Firestone in covering up long-known, deadly tire dangers—another Emmy nominated investigation—might have gone untold.

Same with my investigations into Enron, Halliburton, prescription drugs and countless others. Stories that arguably led to taxpayer money and lives saved.

It was with help from inside intelligence sources, I broke the story at CBS of the Chinese stealing our most sensitive nuclear secrets. I was also able to break the news that the FBI lied about evidence against their suspect Wen Ho Lee. They claimed he'd failed his lie detector test when I obtained the polygraph and found out he'd passed with flying color.

Without the ability to protect confidential sources, I probably wouldn't have been able to report that when the CDC was alarming our nation about a swine flu epidemic... the vast majority of cases blamed on swine flu were not swine flu.. or any sort of flu at all.

And I wouldn't have been able to break the stories about how BP and the government provided false information about how much oil was really leaking into the ocean after the BP oil spill.

In the past decade, we've seen the government attack sources with a zeal that should be applied to those committing the wrongdoing exposed. Instead, the wrongdoers are often protected—in some cases they're the ones prosecuting the whistleblowers.

The greatest offense a government insider can commit today is not, for example, improperly unmasking names of US citizens for political purposes... it's providing information of wrongdoing to a journalist... someone could go to jail over the so-called leak, but not the actual wrongdoing exposed.

And sadly, we now have ample evidence that bad actors in government will go shocking extremes, violating constitutional rights and possibly laws, to hunt down our sources.

In my case, I'm still litigating against the FBI and others connected to the intel community for their intrusions into my computers while I was at CBS. The honest, intel-connected sources who helped me discover this include a former FBI Unit chief.

The actions of the computer intruders, which we can trace forensically, imply they were desperate to learn who my sources are and what I might report. Talk about chilling— after that news became public, everyone from intelligence community sources to corporate whistleblowers have told me they hesitate to communicate with me because they believe I'm being monitored.

And nothing has happened to the computer intruders to this day; instead the Justice Department simply uses unlimited taxpayer money to fight my case in court.

In the big picture, I can't help but see all of this as part of a growing, organized effort to control a free press.

I'm concerned about new movements to force schools to teach "media literacy," and to invite third parties to "curate" our information and determine what's "fake news" and what's true.

My research shows these efforts are often the opposite of what they seem... the forces behind them are actually trying to shape public opinion by preventing us from seeing certain facts and views.

If these trends were in effect in the past, we might not now know that cigarettes are bad for you. The whistleblower wouldn't talk. The studies would be buried by algorithms at Google and Facebook because curators and media literacy experts would declare the research to be conspiratorial.

They'd point to settled science that shows cigarettes are perfectly safe—maybe even good for you. News outlets and reporters daring to pierce the narrative would be controversialized, bullied on social media, and forced out of their jobs.

Make no mistake: the ongoing government and corporate crackdown on whistleblowers, and journalists who report their stories is a war. Our truthful information threatens the persistent bureaucracy and powers-that-be like nothing else, and they are increasingly desperate to control information and narratives.

We can only guess what important stories in the public interest will never be told because of a less free press.

Mr. JORDAN. Thank you. Very good as well.

#### STATEMENT OF RICK BLUM

Mr. BLUM. Thank you, Mr. Chairman. Thank you, Chairman Jordan, Chairman Palmer, Ranking Member Krishnamoorthi and Ranking Member Raskin, thank you for holding the hearing and for the opportunity to testify today. And thank you as well to you for your leadership on the issue, especially the constituents of Mr. Raskin, I appreciate you working on this.

Today I am testifying in my capacity as policy director for the Reporters' Committee for Freedom of the Press which has existed for almost 5 decades and subpoenas is something that we've been working on for a very long time. And on behalf of News Media for Open Government, a coalition of news media associations.

I want to highlight three points. First, confidential sources are vital to keeping citizens informed about our communities as well as about national stories that impact us and our lives and I will mention a few examples.

Second conflicts continue as Mr. Levine mentioned over subpoenas and other demands for information obtained during the news gathering process, including the identities of sources.

And third, the Free Flow of Information Act is a commonsense approach that sets that clear legal standards recognizing that the need to protect sources can coexist with the government's responsibility to protect human life and enforce the law. And as you've heard confidential sources are essential to an informed public and accountable government.

Journalists prefer to attach identities to their sources and a story. There are times however when to bring a story to the public, sources must be protected, even though in many cases the source's identity is known to the reporter. When checked with multiple sources, authenticated and vetted for accuracy. Information for unnamed sources has been critical for journalists to keep the public informed about problems facing veterans, who are trying to obtain medical care, police misconduct, investigations into suspected fraud and the policy choices facing Presidents in the face of global challenges. Coverage of the current administration is no different in that respect.

Many subpoenas and other demands for journalists' notes and sources relate to news gathering on topics that have nothing do with national security. An unnamed source is critical to get getting to the truth about the 2014 shooting of Laquan McDonald in Chicago. One reporter, Jamie Kalvan, used a confidential source, a witness, to corroborate that the official police accounting of the shooting did not match what the autopsy showed. His reporting led to an investigation into the police officer's conduct, the release of a video of the shooting, a murder charge against one of the police officers in an effort to compel Mr. Kalvan's testimony to identify his source. Kalvan benefitted from legal and institutional support, including from my attorney colleagues at the reporter's committee which enabled him to successfully fight to quash the subpoena. He was fortunate.

In another now infamous example, the startup company Theranos gained widespread attention for its claims of a breakthrough in testing blood using only a few drops of blood at a fraction of the cost of traditional methods. When reporters dug into the story, they discovered sources who knew the company could not back up its claims with scientific evidence. That reporting unraveled the story and led to fraud charges against the company's founder.

No topic of news coverage is immune to demands for journalist sources and material. From my witness observation of an execution in Alabama, to interviews with individuals who occupied a Federal wildlife refuge in Oregon a few years ago, and I'll add an investigation into steroid use in baseball.

A Federal shield law wide would protect a wide range of news coverage. The Free Flow of Information Act provides a qualified, as you've heard, but not absolute privilege that sets strong standards for courts to follow when deciding whether to compel a journalist to reveal his source.

In media—so I want to make one other point, media lawyers I have spoken with tell me that, in the 49 States that recognize a journalist's source privilege, something interesting happens. Even the existence of the shield law goes a long way to avoid have unnecessary litigation.

So to conclude, Chairman Jordan and Chairman Palmer, enacting the Free Flow of Information Act would strengthen the independence for the press and the sources upon which the public relies to be fully informed on a daily basis.

Thank you for the chance to testify and I look forward to your questions.

[Prepared statement of Mr. Blum follows:]



Testimony of  
Rick Blum, Policy Director  
Reporters Committee for Freedom of the Press

on behalf of  
News Media for Open Government

before the

House Oversight and Government Reform Committee

Subcommittee on Health Care, Benefits, and Administrative Rules and  
Subcommittee on Intergovernmental Affairs

"Shielding Sources: Safeguarding the Public's Right to Know"  
July 24, 2018

Chairman Jordan, Chairman Palmer, Ranking Member Krishnamoorthi, and Ranking Member Raskin,

Thank you for holding this hearing, and for the opportunity to testify today. Thank you as well, Chairman Jordan and Ranking Member Raskin, for your support for a federal shield law to protect the confidentiality of journalists' sources.

Today I am testifying in my capacity as policy director of the Reporters Committee for Freedom of the Press (RCFP) and on behalf of News Media for Open Government, a coalition of news media associations promoting press freedom and transparency, of which the Reporters Committee is a member. The Reporters Committee was created nearly a half century ago by reporters to provide legal assistance to journalists. At that time, journalists faced subpoena requests to reveal sources who wished to remain anonymous, so this is an issue central to our work.

Beyond RCFP, other members of the coalition include the **American Society of News Editors, The Associated Press, Association of Alternative Newsmedia, National Association of Broadcasters, National Newspaper Association, News Media**

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**Alliance, Online News Association, Radio Television Digital News Association,  
and Society of Professional Journalists.**

Our coalition supports the bipartisan Free Flow of Information Act of 2017 (H.R. 4382), which would provide a qualified privilege for journalists to protect the identity of sources who wish to remain anonymous.

In my testimony today, I'd like to highlight three points. First, confidential sources are vital to keeping citizens informed about our communities -- our local government, schools, and workplaces -- as well as about national stories that impact us and our lives. Second, conflicts continue over subpoenas and other demands for information obtained during the newsgathering process, including the identities of sources, despite 49 states and the District of Columbia recognizing some privilege for journalist-source communications. Third, the Free Flow of Information Act is a commonsense approach that sets out clear legal standards recognizing that the need to protect sources can co-exist with the government's responsibility to protect human life and enforce the law.

**Confidential sources are essential to an informed public and accountable government**

Journalists prefer to attach identities to the names of sources. There are times, however, when to bring a story to the public, sources must be protected even though in many cases the source's identity is known to the reporter. When checked with multiple sources, authenticated, and vetted for accuracy, information from unnamed sources can be vital to provide accurate reporting on events. To give the reader, listener or viewer some additional basis to judge the credibility of the story, media outlets may attempt to provide additional context or explain why a source sought confidentiality. A story may include the number of people interviewed, for example.

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Unnamed sources have been key to documenting problems veterans face obtaining medical care promised after their military service.<sup>1</sup> Unnamed sources help bring to the public police misconduct and suspected fraud, and I will mention two recent examples. Throughout our nation's history, unnamed sources have helped inform the public about the complicated choices presidents face, including life-and-death decisions to put men and women in harm's way, or about novel national security tools such as drones in military conflict. Coverage of the current administration is no different in that respect.

At the same time, disputes over demands to reveal sources and subpoenas for journalists' records mostly center around newsgathering that has nothing to do with our nation's security.

An unnamed source was critical to getting to the truth about the 2014 shooting of Laquan McDonald in Chicago. Jamie Kalven used a confidential sources (or sources) to learn that the official police account of the shooting did not match what the autopsy showed. His reporting led to an investigation into the police officers' conduct, the release of a video of the shooting, and a murder charge against one of the police officers, Jason Van Dyke, who sought to compel Kalven's testimony to identify his source.

Protecting the identity of his source was critical to bringing an accurate account of the shooting to the public and to securing his ability to do this work in the future. Kalven benefitted from legal and institutional support, including from my attorney colleagues at the Reporters Committee, which enabled him to successfully fight to quash the subpoena, so he was fortunate.<sup>2</sup>

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<sup>1</sup> Dennis Wagner, "The Doctor Who Launched the VA Scandal," *The Arizona Republic*, May 31, 2014. Available at: <https://www.azcentral.com/story/news/arizona/investigations/2014/05/31/va-scandal-whistleblower-sam-foote/9830057/>; accessed July 22, 2018.

<sup>2</sup> "Court quashes subpoena of reporter Jamie Kalven," RCFP press release, December 13, 2017. Available at: <https://www.rcfp.org/court-quashes-subpoena-reporter-jamie-kalven>; accessed July 21, 2018.

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Sources in the business community at times need confidentiality to expose wrongdoing. Several years ago, Theranos, a startup company, gained widespread attention for its claims of a breakthrough in medical research, but sources wishing to remain confidential in order to protect their careers helped bring to the public the truth. The company's founder would explain she feared needles and developed an alternative method that required only a pin prick and a few drops of blood to accurately test blood at a fraction of the cost of traditional methods. Theranos used those claims to attract millions in investments. When reporters dug into the claims, they discovered sources who wished for anonymity but knew the company could not back up its claims with scientific evidence. That reporting unraveled the story and led to fraud charges against the company's founder.<sup>3</sup>

#### **Disputes over compelled disclosures are an ongoing problem**

Beyond Jamie Kalven's experience, in a little more than a year, reporters have been subpoenaed on a wide range of coverage. For example, in the U.S. District Court for the Middle District of Alabama, three reporters faced subpoenas seeking their testimony about their observations while witnessing executions. In a separate case, a reporter formerly with Oregon Public Broadcasting, John Sepulveda, fought a federal subpoena requiring his testimony detailing his interviews with individuals who in 2016 occupied the Malheur National Wildlife Refuge.<sup>4</sup>

What is clear from these examples is reporters continue to face efforts to obtain their news, recordings, and other information. Sometimes the journalists have expressly agreed to keep the information confidential, and at other times there is no express agreement but the information should still remain confidential to protect newsgathering.

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<sup>3</sup> "John Carreyrou and the Bad Blood at Theranos," *Corporate Crime Reporter*, July 5, 2018. Available at: <https://www.corporatecrimereporter.com/news/200/john-carreyrou-bad-blood-theranos/>; accessed July 20, 2018.

<sup>4</sup> A summary of briefs and comments filed by RCFP is available at <https://www.rcfp.org/topics/briefs/10/All>; accessed July 21, 2018.

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**H.R. 4382 Provides Balanced, Qualified Journalist-Source Protection**

H.R. 4382 provides a qualified privilege that sets strong standards for courts to follow when deciding whether to compel a journalist to reveal the identity of a source. The House approved this legislation in a previous Congress with strong bipartisan support, and the Senate Judiciary Committee in 2013 approved a version of the Free Flow of Information Act.

The bill's provisions set clear standards for protecting sources and journalists' information gathered in the course of newsgathering and compelling journalists to testify. The qualified privilege would not generally apply for testimony required to prevent acts of terrorism, to provide eyewitness accounts of criminal activity, and to prevent death, kidnapping or significant bodily harm. The government could not compel testimony in a leak investigation unless the government could show significant and specific harm would result.

Beyond the specific provisions in the bill, even the existence of a federal shield law would go a long way to avoid unnecessary litigation. Our nation's experience with state shield laws shows that when criminal defendants or subjects of unflattering news stories pursue meritless efforts to identify sources or obtain a reporter's notes, and learn their state has a shield law, they often quickly end litigation efforts.

To conclude, Chairman Gowdy and Chairman Palmer, enacting the Free Flow of Information Act would go a long way to protecting journalists and the sources upon which the public relies to be fully informed on a daily basis. Thank you for the opportunity to testify today. I look forward to your questions.

Mr. JORDAN. You bet.

The gentleman from Alabama is recognized for 5 minutes of questioning.

Mr. PALMER. Thank you, Mr. Chairman.

Mr. Levine, what does it mean for journalists to have qualified privileges?

Mr. LEVINE. Well, there are two important words there, one is qualified and one is privilege. Privilege means that at least presumptively they will not have to disclose the identity of their confidential sources or published information that they chose for journalistic reasons not to publish in response to compulsory process like a subpoena.

The qualified part means that that is not absolute. So that this bill and I think most reasonable people recognize that there have to be narrowly drawn exceptions to that, like—are set forth in this bill with respect to terrorism or eminent threats to national security. I think one of the geniuses of this bill is that it really does articulate very well those limited exceptions and articulates how limited they are and need to be.

Mr. PALMER. Well, I thank you for that answer, because it lead into what I was going to come to next, because a lot of people are going to be concerned about whether or not we go to such great lengths to protect the confidentiality between a journalist and their source, even to the extent that we might not get information to defend us against an attack or that might compromise our national security. But even with a law that we have here or the bill that we have here, that's not an issue. Would you agree with that?

Mr. LEVINE. I do agree with that. And in fact, the exceptions to the application of the privilege, that is the issue—the instances in which the qualified privilege would yield are taken almost verbatim from the Department of Justice's own guidelines, as the Department has itself purported to govern itself by over the last 40, 50 years. The only difference here is that the decisions the Department's made will now be reviewable a court instead of being undertaken in their unbridled discretion.

Mr. PALMER. Ms. Attkisson, you have broken—you've been involved in some major stories Fast and Furious, Benghazi. Obviously, your ability to report on those, to conduct your own investigations have been greatly enhanced by being able to protect confidential sources. But in your testimony, you said that your activities were being monitored. Am I correct? Is that how you said that?

Ms. ATTKISSON. Yes.

Mr. PALMER. Okay. Can you elaborate on that, you know, how you were being monitored, you believe you were being wiretapped or that there were other intrusive methods that were being utilized?

Ms. ATTKISSON. According to our forensics reports.

Mr. PALMER. Would you hit your mic, please.

Ms. ATTKISSON. According to our forensics reports and we have four separate independent reports that give similar pieces of the puzzle. There was a long-term effort to monitor my computers and phone devices, both my personal computers and my CBS computers.

Mr. PALMER. So how would they monitor them without a warrant?

Ms. ATKISSON. Well, we don't know that they didn't have a warrant, although I have two sources tell me that there was no FISA warrant. So the way I'm told that sometimes works they identify someone in the orbit of the person they want to watch and then they capture you on incidental surveillance, meaning they pretend it was sort of an accident, and then they kind of reverse engineer it so they can actually get the information from the person who was really target that they didn't think they can get a warrant from.

So as we've conducted our investigations forensically, there have been a lot of questions about who I might have contacted in foreign countries which would create a pretext or a pretense to make it look as though someone needed to be watched on that end, which would then sweep up my communications as well.

Mr. PALMER. All right. I just wondered if you had filed a Freedom of Information Act request on that to try to determine the extent of the intrusive—

Ms. ATKISSON. Yes, sir. The FBI has repeatedly denied my Freedom of Information Act request or not fulfilled them properly claiming they do not have information they provably do have. And there's, as you may know from your previous FOIA work, very little that can be done about that.

Mr. PALMER. Mr. Blum, I don't want you to feel left out in the questions from the gentleman from Alabama, one of things I'm looking at are all of States that have basically a patchwork of laws that cover this. And one of things that I was wondering about is you can be in one State and be covered, and be in another State and not be covered, you might be an out-of-state journalists and not be covered by any State law. Can you elaborate on that, please?

Mr. BLUM. Well I think as Mr. Levine mentioned, depending on which court you're fighting the subpoena you may get a different result. We also have the First Amendment, but at the current state of affairs you may be in Alabama and you may be able to successfully fight a request for a murder suspect to want to interview you about the kind of interviews you've done. The problem with that is you are also going to be cross examined, so a reporter doesn't want to be put in a position of providing all their notes, but it is true that it is very much a patchwork.

Mr. PALMER. I generally am not for extending Federal power. But I think this when it comes to constitutional issues and I really think this is an area where the Federal Government does have a legitimate need to intervene. And again, I want to thank Ranking Member Raskin and Chairman Jordan for their work on this. I think this is important work.

And with that, Mr. Chairman, I yield back.

Mr. JORDAN. I thank the gentleman. The gentleman from Maryland is recognized.

Mr. RASKIN. Thank you, Mr. Chairman and thanks to Chairman Palmer for his excellent questions there. So I just want to ask some questions to help illuminate exactly what our bill is going to do.

Mr. Levine, let me start with you. If we adopt a press shield bill like this, and the reporter were walking down the street and saw

a crime, would they owe the sovereign their testimony or would they be able to get out of it because of the reporter shield bill?

Ms. LEVINE. There is a provision in the bill that deals with eyewitness observations of criminal conduct differently than the normal source reporter relationship.

Mr. RASKIN. Okay.

Ms. LEVINE. There are still some hoops to jump through but as a rule a request for testimony of eyewitness observation of a crime other than a crime that would be committed by giving information to a journalist.

Mr. RASKIN. Exactly. But the point is that as long as they are not operating in their professional capacity as a journalist, they would be able to testify about criminal activity they witnessed like everybody else and would be required to.

Ms. LEVINE. That's true too, because the definition of a covered person only applies to people who are engaged in the process of doing their jobs as—

Mr. RASKIN. Okay. Ms. Attkisson, let me get to you. A lot of people seem to think that investigative journalism only rarely depends on anonymous sources and it's only investigative journalism, it's not other types. And I wonder if you could shed some light on this for us. How important are confidential sources to the work of journalists?

Ms. ATTKISSON. Yes, sir. In my case and I've done both kinds of reporting extensively, even when we are not using in a finished story anonymous sources are confidential sources, they are often the genesis of the story. We may find other people on the record to confirm, and be the voices, and the face of a story after somebody who is confidential flagged us to the story or maybe flagged us to some original information.

So in my experience in both kinds of reportings it is absolutely critical to be able to speak to people and have them believe that they are not going to be—their identity is not going to be revealed.

Mr. RASKIN. Great. Mr. Blum, let me come to you. Is there anything illegitimate about people speaking on and off the record or a deep background basis for reporters. I confess, I think I've done that myself certainly as a State Senator, I don't know if I've ever done it in Congress. Is anonymous speech protected under our constitution?

Mr. BLUM. Anonymous speech is protected and often times there is great utility in having a conversation with a source about, because they can give you some background—they can give you—here's what's really happening, you know, you may not—I don't want my name attached to it because if it gets out, then I'm going to get in trouble with my supervisor, but you learn a lot of detail that you wouldn't otherwise know about what's really happening.

It is also very useful for journalists, if they have a story they are going to go to an agency. This happened with national security stories, to say here is he a story, here's what we have. Let us know, we'd like to see if you have any national security concerns about reporting and they might change a word, they might delay the story for a day, but there are those conversations and it is important that they be done.



Mr. RASKIN. Great. All of us grow up with the wisdom of the Founding Fathers about the importance of the press as a watchdog and the importance of the sunlight that the media brings as a disinfectant to potential corruption in government. But beyond those things that we learn in school, I wonder if any of you or all of you would care to share a contemporary example of a place where you think the press has played a really important role and confidential sources have been critical to the ability of the press to inform the public of something that it needs to know about.

Ms. ATTKISSON. I gave quite a few examples, including the BP oil spill, I don't know if that's contemporary anymore.

Mr. RASKIN. Yeah. But, well what exactly happened in that one?

Ms. ATTKISSON. Well, when I was asked to cover that story for CBS news, it was several weeks into it the story and there had not been a lot of news under us, so they felt that I needed to dig into that. And one of first things I asked was where was the video, because I realized intuitively there was probably a video, an undersea camera.

And with the help actually of Senator Markey and actually then Representative Markey and Senator Nelson and another Senator whose name I can't remember, we worked together with FOIA and pressure to get the government who had these tapes but didn't want to release them to release them. But it was only from the help from some inside sources connected to the government that I was able to with some precision report that the flow as reported by the government and its experts and by BP was false by a factor that was incredibly wildly wrong.

Mr. RASKIN. They underestimated? Or understated?

Ms. ATTKISSON. By far, by far. And I couldn't have had the confidence to report that. I did have on-camera sources that do that sort of thing that did confirm it, but I couldn't have reported that story. And that was a major story. Ultimately I believe that was part of the criminal fraud conviction against BP was then misleading the public on the size of the spill and the flow.

Mr. RASKIN. Thank you. I yield back, Mr. Chairman.

Mr. JORDAN. I thank the gentleman. The gentleman from North Carolina, Mr. Meadows is recognized.

Mr. MEADOWS. Thank you, Mr. Chairman. And I want to thank both of you for working in a bipartisan way on this particular piece of legislation. And my recommendation is is that we get together in a bipartisan way and use a little leverage to make sure that it gets a vote on the floor of the House. And so I'm sure there are a few critical pieces of legislation. If you Mr. Jordan and you Mr. Raskin are willing to join forces, I think we can probably—

Mr. JORDAN. I'm always willing to join forces with the gentleman from North Carolina.

Mr. MEADOWS. I thank the gentleman.

Ms. Attkisson, let me come to you because I'm troubled. What you're saying is the FBI or DOJ or some entity actually surveilled your computer records and phone records, but specifically your computer records, and you had that forensically looked into and they with a high degree of confidence suggested there had been intrusion. Is that correct?

Ms. ATTKISSON. Yes, sir. There is no doubt about that from what the forensics people say who know a lot more about this than I do and have worked in the intelligence agencies in some in some cases. There is an actual fingerprint on the software that is used for this that they recognize themselves or that can be recognized. It is very unique, it is a government proprietary software.

And not only that, they didn't just look at my computer records, according to forensics, they planted three classified documents in my computer, they had a keystroke monitoring program in there. They used Skype which was on my computer to secretly activate it to exfiltrate files and listen in on audio. People probably don't know that Skype—actually, I didn't know Skype could be used for that. So there are a lot of techniques they use and that they can use and access remotely to do this sort of thing.

And I don't believe I was unique in terms of the only journalist this happened to. I was just one who found out about it because I had Intel sources.

Mr. MEADOWS. So how has that affected your reporting since that time. Since you found that out do you take different precautions? Do you not report on certain things? How has that affected you?

Ms. ATTKISSON. It's definitely affected some of the stories I get. I can tell you I've had a Senator who wouldn't answer is direct question to me on the phone after that and I was asking him why and he said, Sharyl, your phone is bugged. You know, people once they've heard that, they are less likely to talk to me about sensitive topics, as well as sources inside government corporations.

A lot of people still will talk surprisingly because they assume that they are being monitored anyway, if they are sort of a government insider. It has made a difference. And I do tell people cause I ask the question can I protect their identity or would it ever be necessary to be revealed. And when I tell them I would protect it as best that I could, but that I may have to if sued by an entity or charged with something. And it has definitely chased away at least several stories and sources that I know of.

Mr. MEADOWS. So you mentioned a lawsuit earlier and you said with the unlimited budget of the Federal Government, they continue to I guess obstruct any settlement on this particular issue. Can you share with this committee—here's my concern, a free press that has been articulated so eloquently by some on the minority side of this aisle is shared by both the majority and minority and it should be.

And yet, if you're trying to fight back and there is no accountability with regards to what was done to you, we've got an issue. And we should have an issue in a bipartisan way to say at that particular point you were working for CBS, so they are not normally associated with perhaps the broad brush that's painted for MSNBC or Fox or any—they are seen as a down-the-road mainstream media network. So why—tell me about your lawsuit and where you are with that, if you can.

Ms. ATTKISSON. The lawsuit's been going on over 3 years. And I have a wonderful attorney who's been helping me tirelessly. If I were him I would be tired by now, because the Department of Justice under Trump has been no different than the Department of Justice under Obama for this purpose. And instead of trying to find

out after looking at our forensics which are undeniable who might have been responsible for this, they simply litigate and try to get the case dismissed and protect us—protect themselves from having discovery.

And suddenly maybe 5, 6 weeks ago after 3 years of us surviving things like sovereign immunity, the judge dismissed the case, which we have now appealed to the fourth circuit and my attorney hopes to take it to the Supreme Court. Not that we will necessarily win because as he said, the facts are on our side but the law is not. Government officials are well protected for duties that they commit as government workers.

I would argue that when it comes to constitutional violations of the press and the public that that falls outside of what should be protected, but it's up to the courts to decide. And I might mention, a case that was not—had anything to do with me in 2017, but impacted my case, the finding as legal analyst examined it said that Congress needed to pass a law to make government officials beholden or responsible for actions like what they did to me, that it was a law that was needed. I don't know how something like that becomes generated and I'm doubtful that that can get going just from knowing how things work.

Mr. MEADOWS. I thank you. I yield back, Mr. Chairman.

Mr. JORDAN. I Thank the gentleman. The gentleman from Illinois is recognized for 5 minutes.

Mr. KRISHNAMOORTH. Thank you, Mr. Chairman.

You know we can't hold a hearing about the importance of the freedom of the press without acknowledging what the Trump administration is doing with regard to the fourth estate. They have been highly critical of journalists. Just as an example, President Trump has singled out, mocked, and vilified reporters covering his campaign and his administration. He threatened to cancel the broadcast licenses of news organizations. He has labeled any unfavorable coverage, of which there is no shortage, fake news.

He has called journalists, quote, and this is a direct quote, the enemy of the people. He even Tweeted a video clip of himself tackling and individual with a super imposed CNN on to the ground. Now some people might dismiss these as jokes or empty gestures, but I want to hear your opinion on what this has done, if anything, to journalists and their ability to cover the news or to report from confidential sources and so forth.

Mr. Blum, your organization represents the legal interest of journalists. How has President Trump's attitude towards the press affected journalists able to cover his administration?

Mr. BLUM. You know, I would say, you know, journalists have thick skin. I don't know what they are doing in journalism schools, but journalists are ready to be criticized for their stories. And much of what this President does is no different from what other Presidents have done in terms of wanting to shape a story, wanting to get better coverage in the future. But a lot of what this President does goes well beyond that. And it's a lot harder for a journalist in a local community to go write a story if their audience or the people they want to talk to about the story don't believe that they are going to get a fair shake in the story.

And I think the biggest concern that we have is that the public is going to have a much harder time knowing what's accurate and what's not and what's true and happening with current events in their communities and what's not. And I think that rises above partisanship and I think that this bill is a way to strengthen the ability of journalists to tell important stories and it is critical that we do more to protect journalists and protect the flow of information to the public.

Mr. KRISHNAMOORTHY. What did you mean when you say he's gone beyond, what other Presidents have done? Can you elaborate on that?

Mr. BLUM. Sure. I think it is a very strong contrast between Presidents who will traditionally remind the public and remind ourselves about the vital role that our press plays, about the constitutional securities, that or the places that the Constitution has for free press. This President does not do that and tries at every turn to remind the public or to tell the public not to believe things like that. And I don't think that that's just a game and I don't think it just has short-term benefits. I think it could be over the long-term of great concern.

Mr. KRISHNAMOORTHY. It has been reported to us that some folks feel that they have been physically assaulted in part because of a culture that's developed against the press. Can you talk a little bit about that?

Mr. BLUM. Sure. Our organization works with a couple of other organizations including the committee to protect journalists and a few others to track press freedom. And one of the things they look at is physical assaults. And the most dangerous place that they found for a reporter is at a protest. That's the place where physical assaults happen. And so obviously, there's things that we advise our reporters to do to take care, to work together, to know where you are to protect oneself.

But it's a very big concern when journalists are out there doing their jobs reporting in the field and they may be subject to some kind of physical attack. We don't know whether the rhetoric has anything to do with any particular event, but it sure doesn't help.

Mr. KRISHNAMOORTHY. And how does this have an impact, if at all, on how governments in other countries treat journalists?

Mr. BLUM. I think it is very clear that other countries who are looking to the United States for leadership in our principles and our visions that we have traditionally espoused and that we hold dear. Other countries that may be—dictators in other places may be more emboldened to crack down on their own press and to crack down on their own citizenry. And I think that that is very real danger that we have.

We hosted a number of journalists throughout the Americas to come to the United States because they were concerned with press freedoms in the United States, it was the first time that the Inter American Press Association came to the United States. They have visited other countries where press freedom is endangered. And I think in their—for them to witness and talk with some of the folks on Capitol Hill and elsewhere, journalists, they are concerned, they are concerned about the impact back home.

Mr. KRISHNAMOORTHY. Thank you.

Mr. JORDAN. Mr. Blum, do journalists ever get it wrong?

Mr. BLUM. Sure. And they like to correct the record.

Mr. JORDAN. Do journalists have a bias?

Mr. BLUM. In the general sense I would say the bias is for the truth.

Mr. JORDAN. Well, that's accurate too. But there's been all kinds of examinations, all kinds of studies, all kinds of surveys, all kinds of polling which indicate that they have a bias. And so what I'm asking is if journalists get it wrong and they have a bias, is it—should journalists be immune when they get wrong from any type of criticism?

Mr. BLUM. Absolutely not, certainly not.

Mr. JORDAN. I just wanted to be clear because this shield law is about protecting journalist sources. It is not about protecting journalists who get it wrong and maybe display a bias, from criticism that may in fact be appropriate. Is that accurate?

Mr. BLUM. I would 100 percent agree with that, journalists are open to being criticized for getting things wrong, for getting things wrong in stories. If it's inaccurate, they should correct it and the industry is very committed to that kind of accountability, and this goes beyond that.

Mr. JORDAN. That's important.

All right. The gentleman from Wisconsin is recognized.

Mr. GROTHMAN. Thank you. That wasn't exactly on point, but I'll just make a point for you.

I love journalists. Always feel I have a good relationship with journalists in Wisconsin. I think I still do.

Our country right now is, of course, divided, as it usually is. You know, about one-half of the people voting for the Republican candidate, about one-half the Democrat candidate every 2 years.

And one would think given that, if you cover the average newsroom or the faculty of the average journalism school, you got about the same in the last election, about one-half voting for Donald Trump and one-half voting for Hillary Clinton.

Insofar as the total number of journalism professors, say, wavered from that 50/50 rule, I think you're going to get distrust in the media. And that's unfortunate. I don't know why it shouldn't be 50/50. But, you know, it's something for you to think about. It's obviously not the purpose of the topic here today. But I think there's a general public perception that something less than 50 percent of the journalism professors in our schools voted for Donald Trump last year.

And I'll give you some question. If it is, you know, you can say it's a problem or not, but I'd argue, you know, it shouldn't wonder from that 50/50 divide that much.

A couple questions for you. I'm going to focus here a little bit about university newspapers, because sometimes they break a surprising number of important stories.

Do State shield laws afford student journalists the same protections as traditional journalists? For anyone of the three of you.

Mr. LEVINE. It varies depending on the State and the definition of who's covered under the particular statute. Some States define who a journalist is by reference to whether they get a paycheck and

whether it's a full-time job, or something like that, and others are more general. So it would vary from State to State.

Mr. GROTHMAN. Do you think it should matter?

Mr. LEVINE. My own view is that, especially college journalists are entitled to the full protections of what I understand the First Amendment to mean, which includes a protection for confidential sources.

Mr. GROTHMAN. Okay. Next question. Let me give you three different students, and you can tell me whether they should be treated differently under the law.

You have one student who is writing for his local student newspaper. You have another student who is maybe interning or somehow writing for a national news organization. And another student forms his own newspaper, kind of a, you know, opinion blog or a print page.

Do you think those three students should be treated differently at all?

Mr. LEVINE. I do not think they should be treated differently.

Mr. GROTHMAN. Ms. Attkisson.

Ms. ATTKISSON. I'm sorry, sir. I don't have an opinion. I haven't looked into that or—I can't give a thoughtful opinion about that.

Mr. GROTHMAN. Mr. Blum.

Mr. BLUM. I agree with Mr. Levine. They should not be treated differently.

Mr. GROTHMAN. Okay. Well, we'll give you a—following up on that. Let's say I'm writing for a student newspaper, and I write a story on Greek life. And in that story I talk—give an anonymous source saying that such-and-such incident of hazing happened or such-and-such drinking under age 21 happened, and that I've been told this by members of a fraternity or sorority.

Should that student be protected if they try to reveal his source for these things?

Mr. LEVINE. I hate to ask you for more details, but—

Mr. GROTHMAN. Okay.

Mr. LEVINE. For what kind of lawsuit are they being subpoenaed?

Mr. GROTHMAN. One of the newspapers say—I went to the University of Wisconsin in Madison. The Badger Herald was the newspaper. If they write an article saying pro or con on Greek life, and say I was talking to a prominent member of the Greek community last weekend who told me about drinking at a football game, or told me about hazing, both of which could be illegal, should that journalist be forced to reveal his sources for these stories.

Mr. LEVINE. It's hard for me to envision a lawsuit in which a subpoena would be issued for that testimony. But if there was, it's also hard for me to conceive of a situation in which there wouldn't be ample alternative sources for the kind of information that the person—

Mr. GROTHMAN. Right. Well, let's say the university itself brings in the reporter and says, Hey, we thought there was no hazing going on at these frats. You said there is. Tell us, what do you know.

Do you think they should be able to compel them to give that information or not?

Mr. LEVINE. Under those circumstances, no, largely because there would be ample alternative sources for the university to go to and investigate on its own whether or not there's hazing at fraternities.

Mr. GROTHMAN. And once we get done making these journalism schools have, say, at least 30/70 ratios, people voted for Trump and Hillary, should the journalism students be educated on their protections under the shield laws?

Mr. LEVINE. Absolutely. I think most journalism schools in this country do have media law courses where journalists do learn about their legal rights and responsibilities.

Mr. GROTHMAN. Thank you very much.

Mr. JORDAN. I thank the gentleman.

Mr. Levine, earlier you were asked about the qualified privilege. Do you think we've got it right in this bill, hit the right balance on protecting this fundamental liberty and yet have the exceptions that may be needed in case of national security or terrorist threat or that sort of thing?

Mr. LEVINE. I do. And I commend the committee. I mean, this obviously was the same bill that was introduced back in 2007, but I thought it had it right then, and I think it has it right now.

Mr. JORDAN. And would our other two witnesses? Ms. Attkisson and Mr. Blum, would you agree we've hit it pretty good.

Ms. ATTKISSON. I would defer to the opinions of the experts who can read bills and make more legal sense of them and so on—

Mr. JORDAN. Would you agree, Mr. Blum?

Mr. BLUM. I would. It's a very strong bill.

Mr. JORDAN. Let me ask you where the previous gentleman was from Wisconsin talking about college campuses. We've had a hearing here on some of the shenanigans going on on college campuses. And I pose the question to one of the professors there. This is more in a broader, just First Amendment Free speech rights. I asked the question: Are you familiar with the safe spaces and free speech zones, some of these things going on on college campuses?

Mr. Levine, are you familiar with all of this?

Mr. LEVINE. Yes.

Mr. JORDAN. So I just asked the question, can a safe and a free speech zone be in the same location?

Mr. LEVINE. I think that's an enigma wrapped in conundrum, or something like that.

Mr. JORDAN. But isn't that sort of the point?

Mr. LEVINE. Yes. Absolutely.

Mr. JORDAN. Yeah. And you—I think you would agree that, yes, they should be, could be, and are supposed to be under the First Amendment; is that right?

Mr. LEVINE. Absolutely.

Mr. JORDAN. Yeah.

And, Ms. Attkisson, you would agree with that as well?

Ms. ATTKISSON. Yes, sir.

Mr. JORDAN. And Mr. Blum?

Mr. BLUM. That's an easy one. Yes.

Mr. JORDAN. Yeah. Because, I mean, I remember asking.

And should you be able to say things on—I asked—literally asked one professor this. Professor Raskin, I think you might re-

member this. Asked a professor: In a safe space on a college campus, could you make this statement, Donald Trump is President. And do you know what the guy said? He started his answer by saying, It depends.

Think about that. That is scary. So this is why we are so focused on this First Amendment, not just the shield law for the press. But, I mean, this is—when the government comes after you—I'm going to ask Ms. Attkisson to tell more of the details of her story, because I want to know, frankly, how you found out, what made you first suspect that the government was spying on you. I think that's a pretty important question as well. But I've got a host of things, and I'm going to let Mr. Raskin kind of finish up here.

But, Ms. Attkisson, let's go to that question, because this scares me. Literally, this is why we've done so many hearings. When pastors in the pulpit are saying you got to be careful what you say, it'll jeopardize your tax exempt status. When students are saying on campus, You can't say certain things that are fact, like who the President of the United States is, you can't say that in certain safe spaces on campus. And now when we find out maybe—or not maybe, but we find out a journalist was being spied on, this is scary stuff.

So, Ms. Attkisson, tell me how you first figured out the government was watching you.

Ms. ATTKISSON. Well, sir, I never suspected that because it sounds so wildly crazy.

Mr. JORDAN. No. It sounds crazy for me to even say it here, but—

Ms. ATTKISSON. And this was before Edward Snowden, and Associated Press, and James Risen, and Jim Rosen. So it sounded even stranger. But I was actually approached by two different people who I don't think know each other in the intelligence community who flagged me that they thought I might be surveilled because of practices that they saw or became aware of in the intelligence agency they used to be, they said, strictly forbidden or controlled that were now being done more liberally.

Mr. JORDAN. So you had a confidential inside source come to you and say—

Ms. ATTKISSON. Yes, sir.

Mr. JORDAN. —we think this is going on. And not just going on in general but going on with you personally.

Ms. ATTKISSON. Yes, sir.

Mr. JORDAN. Okay.

Ms. ATTKISSON. And then through—with help of another confidential source and a former FBI unit chief who helped connect me, we were able to get the first forensics exam. And they were literally blown away, according to them, when they saw this evidence, that they were so shocked, because there was a time when this would never have been done, they said.

Mr. JORDAN. I want to be clear. The people who did the forensic exam were people—background in government who know what they're looking for; is that right?

Ms. ATTKISSON. We've had many forensic exams, but that first one, I can't say who it is, and you can't make me.

Mr. JORDAN. I understand. We wouldn't want to make you.



Ms. ATTKISSON. But it's a government-connected person who knows exactly what government surveillance software does and looks like. The proprietary software and flagged it and identified it with very—

Mr. JORDAN. So not to sound too Black Helicopter here, but was this software installed on your computer remotely, or do you think someone actually broke into your home or your office or both?

Ms. ATTKISSON. This went on for a long time, but we were able to forensically look at instances of remote intrusions. We have dates, times, and seconds, and methods. For example, they used something called a BGAN satellite terminal, one time at least. They also used a hotmail email account, a friendly email, attached something to it that downloaded in the background when I clicked on something that day.

Mr. JORDAN. You've presented all this material to a court, and they've dismissed the case?

Ms. ATTKISSON. We never got so far as to present all of it. We presented some overviews. And it was considered, at the time, plausible. And we survived many motions to dismiss along the way.

But after we added a telephone company to the lawsuit a few—couple months back, there was new considerations and the case was dismissed.

Mr. JORDAN. Okay. I've got a few more things but okay.

Ms. ATTKISSON. Yes sir. But I would say anybody who wants to look at some of these forensics, especially at the Department of Justice, for the sake of trying to find who did it or identify for their own purposes, because I think they should be concerned, and I don't think I was the only one, I think they really ought to be on that, personally.

Mr. JORDAN. Yeah. Well, we're trying to get all kind of information from the Department of Justice, and we find it extremely difficult.

Let me ask you about the—one of the catalysts for this hearing. And I think for Mr. Raskin and I, he and I have been working on this legislation. This is Ali Watkins, the reporter for the New York Times and what happened to her.

So, Mr. Levine, can you tell me—give me your thoughts on that situation, just in a general sense.

Mr. LEVINE. Well, as I said in my testimony, Mr. Chairman, I do not know whether the Justice Department followed its own guidelines when it procured her records. It doesn't seem to me, from what I've read in the press, that it's likely that they did. I could be wrong about that. But if they didn't, that's a serious concern, because they have guidelines that they're supposed to be following.

If they did follow them, I have a hard time understanding, given what I know has been reported in the popular press about the nature of the investigation that led to the indictment that is now a criminal prosecution, that the guidelines were complied with substantively. That is that there was enough of a substantive case that could have been made to authorize the seizure of her records.

But I'm hesitant to really opine on that, because I don't know the facts.

Mr. JORDAN. No. I understand.

Mr. Blum.

Mr. BLUM. I think for us the reporters organization also, you know, looking at what they did. We are concerned, you know, the media organizations were concerned about the breadth of information that was taken, the delayed notice to her. And those are the kinds of things that, overtime, we're going to want to understand. How did the guidelines apply and were they applied fairly.

And we have worked on other cases, on other issues, to unseal court records of how leak investigations work so that we have a better public record—the public has a better understanding of how this works. And that's what we'll be doing in this case as well. And that's what we're—we're involved in the news media dialogue working with the Justice Department on that. And through that we're hoping that, overtime, we'll have a better understanding of whether the guidelines were really followed or not.

Mr. JORDAN. Yeah. Thank you.

Let me just finish with one last question. In her opening statement, Ms. Attkisson used the word chilling. The chilling impact that not having a shield law and some of the other things that we have witnessed in the last few years in this country relative to the First Amendment, what that has for a free society for our—I would argue for our country.

So talk to me a little bit about what you're seeing in the broader context, because I think the term Ms. Attkisson uses is right on target. I do feel there's a chilling impact. I think Ms. Attkisson even referenced in one of her answers, she was talking to—I believe you said a Member of Congress who said I don't want to answer that question, Sharyl, because your phone's bugged.

If that's actually going on, that is as chilling as it gets. So fill me in on that, and then I'll yield the balance of the committee's time to the gentleman from Maryland.

Mr. LEVINE. Let's just go down the line.

Mr. LEVINE. A lot of it is documented in my written testimony, but there have been multiple examples of journalists who have gone on the record and said not only that I couldn't have reported on this story if I couldn't rely on confidential sources but also that I didn't report on this story because people were afraid to come forward.

There's a particular example that I cite in my written testimony about a story in the Cleveland Plain Dealer—or that would have been in the Cleveland Plain Dealer. But the editor spiked the story because he was afraid that he wouldn't be able to protect the identities of the confidential sources.

Mr. JORDAN. All right. Ms. Attkisson.

Ms. ATTKISSON. I would say that I find myself more concerned not about whether the Justice Department followed the letter of its own guidelines. But the stuff that they're doing, to say cynically, that fall outside all guidelines and scrutiny at all. The secret stuff that they may be doing or politicizing in tell tools. And I don't blame an administration for this. I blame what I've come to call myself the persistent bureaucracy, because I think this happens under the administrations that I have covered in 24 years, and it seems to tighten up a little more with each one.

I also would put part of the blame in the lap of the media. We haven't done a good job at making—clawing back our own rights

when they're taken from and us. And I have some experience with that. I don't need to go into detail in my job where we have been challenged but maybe not been as aggressive as we could have or should have at fighting that, partly because we're just too busy covering the news to devote a lot of bandwidth and resources to making sure we retain our rights.

Mr. JORDAN. Well said. I mean, what—Lois Lerner wasn't the person running the IRS. She wasn't confirmed by the Senate. Doug Shulman was the guy running it. He's not the one who orchestrated the targeting that took place of innocent conservative groups across this country.

So you're exactly right. Persistent bureaucracy I think is a good way to phrase it. She was at that near high level, but she was in the bureaucracy. Not the one who faces—not the one who comes in front of the committee until we found out what she was doing. So I'm very concerned about that. And as you well say, the things that have happened that we're in the midst of, and I know Mr. Raskin and I would have some disagreement on, but things that happened at the FISA court. This is the scary stuff, and we got to get to the bottom of all this as we're looking at First Amendment liberties.

Mr. Blum, you get the last word—

Mr. BLUM. Say briefly.

You know, journalists and media outlets around the country are facing enormous and economic pressures. And so if you can challenge and try to threaten and undermine that economic stability of the local news outlet with—just by dragging someone into court trying to get a subpoena for their information or suing them for libel when you know you don't have a case, that's troubling. And that provides it.

So the lack of those kind of legal protections like we're talking about today, really undermining the ability of the press to report freely and without concern.

Mr. JORDAN. I've taken a lot of time here, so I'll let Mr. Raskin ask a few more questions, if the gentleman has some

Mr. RASKIN. Thank you, Mr. Chairman. Thank you. You posed an interesting question of whether or not a free speech zone can be a safe space at the same time. And I got to thinking about it, and I suppose my answer is, yes, because, under the First Amendment, the whole country's a free speech zone.

Mr. JORDAN. Exactly. Exactly.

Mr. RASKIN. And it is a safe space in the sense that it's safe for Democratic discussion and dialogue.

You know, the First Amendment doesn't guarantee that nobody's feelings are ever going to be hurt or that people aren't going to be offended or disagree by other people's thoughts. I remember reading about the great comedian Lenny Bruce who kept getting arrested for his comedy, which was very risqué at the time. And he used words some people didn't like and so on.

But somebody said to him—he said he had a right of free speech. Someone said, Well, not if your speech is offensive. And he said, My parents came to America in order to be offensive and not get thrown into jail for it.

And, of course, everybody gets offended by something different. I tell my students that free speech is like an apple, and everybody

wants to take just one bite out of it. You know, somebody doesn't like left wing speech, and somebody doesn't like right wing speech, and somebody doesn't like pro-monarchical speech and somebody doesn't like anti-monarchical speech and racist speech and sexist speech and obscene speech and pornographic speech, and so on. And You take all these bites and pretty soon there's nothing left of it because everybody's been able to get rid of the thing that they like the least.

And so the true test of the First Amendment, of course, is if we're willing to stand up for even the speech that we abhor, even the speech that we hate.

Well, 49 States—all the States except for Wyoming, and I don't know that the issue's come up in Wyoming. But 49 States have passed press shield laws, exactly the kind that Chairman Jordan and I are introducing now, or they've simply adopted the privilege as a matter of judicial interpretation.

Would you guys agree that that's a pretty fair statement of the sentiments of the American people about this? Would you agree that the people recognize the critical role that the press plays, not for the press themselves. People might love or hate particular media outlets. But the critical role that the press plays for Democracy. Would you agree that that is a pretty fair statement of where the public would be on our legislation?

Mr. Blum.

Mr. BLUM. Yes.

Ms. ATKISSON. It would seem so, sir.

Mr. RASKIN. Yeah.

Mr. Levine.

Mr. LEVINE. Absolutely. I think that—when I was back here in 2007, the vice president said that this isn't a pro press bill. It's a good government bill. And that's really what we're talking about.

Mr. RASKIN. Yeah.

I want to close just by invoking the terrible incident that just took place in Annapolis, Maryland, where five staffers of a famed local newspaper were killed by an assailant. And the community rallied passionately to the support of the newspaper and the families of the slain. And I think that the whole State has stood up very strongly for the rights of journalists and for people who do the often unsung work that local journalists do.

But they really create and continue a sense of community in so many of our small towns and small cities across the country. They don't make a lot of money. People get mad at them. People send them hate mail and so on. But, really, they are the lifeblood of American political culture.

And so I hope that the three of you speak for journalists and media employees across the country in being very vigorous, in standing up for your rights. You know, people love to kick around the press at different points. But when you really stand back and think about it, we would not have much of a democracy without the work that you reporters do, so I want to thank you all of you.

And I yield back, Mr. Chairman.

Mr. JORDAN. Thank you.

We're set to close, but I'll be happy to give a minute or two to the gentleman from Alabama if he has some closing thoughts or a question.

Mr. PALMER. Mr. Chairman, I've never gotten a complaint about a short hearing, so I yield back.

Mr. JORDAN. We want to again thank you all very much. You were all tremendous. And great opening testimony and good responses to the questions from the members. And we're going to keep working see if we can actually get this passed.

Thank you all.

We're adjourned.

[Whereupon, at 4:05 p.m., the subcommittees were adjourned.]

