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UNCERTAINTY LEADS TO JAIL TIME: THE STATUS OF THE COMMON-LAW REPORTER'S PRIVILEGE

The forced disclosure of reporters’ confidences will abort the gathering and analysis of news, and thus, of course, restrain its dissemination. The reporter’s access is the public’s access.¹

INTRODUCTION

Special Prosecutor Patrick Fitzgerald’s investigation into who leaked the name of CIA operative Valerie Plame to the press appears to be coming to a close. Fitzgerald spent roughly two-and-a-half years questioning reporters and digging into the conversations they had with their sources of information. The investigation has focused on many White House officials,² all of whom seem to be at least tangentially involved, but it appears that the original source of the information was Richard Armitage, the former Assistant Secretary of State to Colin Powell.³

Fitzgerald’s investigation resulted in the jailing of reporter Judith Miller and the indictment of now-former Vice Presidential Chief of Staff I. Lewis “Scooter” Libby.⁴ Miller has agreed to disclose her source in exchange for her release,⁵ and the press’s and public’s attention to the story has died down, but the damage to the profession of journalism has already been done. Compelling reporters to disclose

² As of May 2006, the focus appeared to be on Vice President Dick Cheney. See R. Jeffrey Smith & Jim VandeHei, Filings in CIA Leak Case Paint Cheney as Determined to Counter Critic, WASH. POST, May 27, 2006, at A6. At other points during the investigation, political advisor Karl Rove also appeared to be the focus. See Rick Klein, Democrats’ Reid Urges Bush to Oust Rove, BOSTON GLOBE, Oct. 31, 2005, at A1. Valerie Plame believes Vice President Cheney, I. Lewis “Scooter” Libby, Karl Rove, and Richard Armitage were all involved, and has named them all in a civil lawsuit regarding the leak. Outed CIA Agent Plame Adds Armitage to Lawsuit, CNN.com, Sept. 13, 2006, http://www.cnn.com/2006POLITICS/09/13/cia.leak/index.html.
⁴ See Adam Liptak, Reporter Jailed After Refusing to Name Source, N.Y. TIMES, July 7, 2005, at A1 (reporting the jailing of Judith Miller); see also Michael Kranish, Cheney Aide Indicted; Libby Resigns over Perjury Charges in CIA Leak Case; Rove Probe Goes on, BOSTON GLOBE, Oct. 29, 2005, at A1 (reporting the indictment of Scooter Libby).
⁵ See Susan Schmidt & Jim VandeHei, Reporter in CIA Leak Case Released from Jail, CHI. TRIB., Sept. 30, 2005, at 12.
their sources has seriously injured the essential relationship between reporters and the confidential sources they use for so many of their stories.

While the press plays a fundamental role in society, it is equally important that the government be able to enforce the law. When these two essential interests collide, it becomes very difficult to determine which should yield. But when the government seeks to compel reporters to reveal the confidential sources on which they rely, the press must prevail.

The issue of compelled disclosure of reporters' sources has been a subject of controversy for many years. Some argue that the press must be protected, while others argue that this protection prevents other institutions, such as a grand jury, from functioning. Reporters generally argue that both the First Amendment and the common law provide them with protection. This Comment focuses only on the common law and argues that a recent D.C. Circuit decision, which refused to protect Matthew Cooper and Judith Miller, incorrectly analyzed the common-law issue. The D.C. Circuit should have taken the approach of the Southern District of New York, fully analyzed the issue, and found that there is a common-law privilege for reporters and their sources. This Comment concludes by evaluating the dangerous effect that the D.C. Circuit's approach will have on both reporters and the press in general. The best way to stave off the inevitable damage is for the Supreme Court to recognize a reporter's privilege under Federal Rule of Evidence 501.

Part II reviews the background of the reporter's privilege, discussing Rule 501 and the Supreme Court cases that have applied the rule. It also discusses In re Grand Jury Subpoena and New York Times Co. v. Gonzales. Part III evaluates both of those cases and asks which court took the better approach. Part IV discusses the effect these decisions will have on reporters and their sources, and suggests that the Supreme Court should resolve the question of the

10. See infra notes 20–85 and accompanying text.
11. See infra notes 86–120 and accompanying text.
12. See infra notes 121–150 and accompanying text.
13. See infra notes 151–259 and accompanying text.
common-law reporter's privilege by recognizing its existence under Rule 501.14

II. BACKGROUND

This Part explains the history of the law of privilege, how the reporter's privilege has evolved, and where the law currently stands. It begins with a discussion of the development of common-law privileges and their codification into Federal Rule of Evidence 501.15 Next, it discusses the Supreme Court's interpretation of Rule 501 through an explanation of Jaffee v. Redmond.16 This Part then briefly discusses the Supreme Court's protection of the press and the history of the reporter's privilege.17 Finally, it introduces two current cases, In re Grand Jury Subpoena and New York Times Co. v. Gonzalez.18

A. The History of Privilege and Rule 501

Privilege is a familiar concept. The idea that privileges should protect relationships has its basis in Roman law, which provided that "the basis for exclusion [of testimony] was the general moral duty not to violate the underlying fidelity upon which the protected relationship was built."20 Most people, both inside and outside of the legal field, know that there are some situations in which a person cannot be compelled to testify.21 The oldest recognized courtroom privilege is the attorney-client privilege, which has been acknowledged since the time of Queen Elizabeth I.22 Although the attorney-client privilege was first accepted as part of "an attorney's code of honor as a gentleman,"23 it is now well understood that rules of privilege exist to

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15. See infra notes 20–32 and accompanying text.
16. See infra notes 33–42 and accompanying text.
17. See infra notes 43–48 and accompanying text.
18. See infra notes 49–85 and accompanying text.
19. See infra notes 86–150 and accompanying text.
21. See, e.g., U.S. CONST. amend. V (stating that no person "shall be compelled in any criminal case to be a witness against himself").
23. Id.
"promote trust, confidence, and full disclosure between two parties." This understanding is an essential element of privilege jurisprudence today.

Until 1974, the federal law of privilege remained stagnant, recognizing only the attorney-client privilege, the spousal privilege, the government-information privilege, and the voting privilege. In 1961, however, Congress authorized Chief Justice Earl Warren to create a committee to determine whether a federal code of evidence should be drafted. The committee returned a set of proposed rules that would have codified nine separate privileges: the attorney-client privilege, the psychotherapist-patient privilege, the husband-wife testimonial privilege, the clergyman privilege, the voting privilege, the trade secrets privilege, the state secret privilege, the informant privilege, and reports privileged by statute. Congress, however, rejected the proposed rule as too rigid, and instead enacted the more flexible version that stands today.

That decision was prompted by two considerations. First, there was some concern that the proposed law would "freeze the law of privilege as it existed." Second, there were some privileges that the nine proposed rules did not recognize, including a physician-patient privilege, a general spousal privilege, and a reporter's privilege. If the original version were enacted, it might have foreclosed the possible development of those, or any other, privileges. In the end, Congress placed the burden of creating and recognizing privileges on federal courts by adopting Rule 501, which endorsed a case-by-case approach governed by "reason and experience."


25. Lauderdale, supra note 22, at 261-71 (discussing cases recognizing the various types of privileges); see also id. at 271-73 (stating that few courts had recognized other privileges, but that they were recognized in state statutory law rather than federal common law).

26. Id. at 273.

27. Miller, supra note 20, at 773 n.10.

28. See Lauderdale, supra note 22, at 275-76.

29. Id. at 275 (alterations omitted) (quoting 120 CONG. REC. 40891 (1974) (statement of Rep. Hungate)).

30. Developments in the Law—Privileged Communications, 98 HARV. L. REV. 1450, 1465 (1985). There was also concern over inconsistencies in the proposed rules, such as protecting communication between a psychotherapist and his patient, but not a physician and his patient. Id. at 1468.

31. See Lauderdale, supra note 22, at 274 ("[T]he Advisory Committee proposed codification of the 'every man's evidence' rule, under which privilege would not exist under federal law except as it was provided in Proposed Rules 502 through 510 . . . . ").

32. FED. R. EVID. 501 ("Except as otherwise required by the Constitution of the United States or provided by Act of Congress . . . the privilege of a witness . . . shall be governed by the
B. Rule 501 Applied

Since the rule was approved, federal courts have been reluctant to create new privileges. Since the rule was approved, federal courts have been reluctant to create new privileges.33 The Supreme Court faced a few privilege cases after Rule 501 was passed,34 but it was not until twenty-two years later, in *Jaffee v. Redmond*,35 that the Court used Rule 501 to recognize a new privilege. In *Jaffee*, the Court was asked to determine whether the family of a man who was killed by a police officer was entitled to notes taken by the officer's therapist in counseling sessions after the shooting.36 The officer claimed that the contents of her conversations with her psychotherapist were privileged.37 The Court analyzed the question under Rule 501, but recognized that the ability to create new privileges should not be taken lightly; "the public has a right to every man's evidence,"38 and privileges are antithetical to that general maxim. Therefore, a privilege would only be recognized if it furthered a public interest that was more important than the evidence itself.39 To determine whether a privilege between psychotherapists and their patients met this requirement, the Court analyzed the public and private interests at stake, balanced those interests against the evidentiary benefit, and asked whether the states had recognized the privilege.40 The Court concluded that important public and private interests that would be furthered by the privilege outweighed any evidentiary benefit that might result if the privilege were not recognized.41 This conclusion was bolstered by the fact that every state, as well as the District of Columbia, had recognized the privilege.42 In light of these considerations, the Court adopted the privilege.

C. Supreme Court Protection of the Press

The Supreme Court has long protected the press, most notably in *New York Times Co. v. United States*43 In that case, the Government sought to prevent the *New York Times* and the *Washington Post* from
printing information leaked to them by a source inside the Pentagon.\textsuperscript{44} The Supreme Court issued a per curiam opinion stating that there was a presumption of unconstitutionality for prior restraints on speech. Consequently, the Government had to carry a heavy burden to overcome that presumption, which it failed to do.\textsuperscript{45} The decision included six concurrences and three dissents, each of which discussed the importance of the press. Justices Hugo Black, William Douglas, and Potter Stewart believed that one of the most important functions of the press was to keep the public informed. Justice Black stated that "[t]he press was protected so that it could bare the secrets of government and inform the people."\textsuperscript{46} This belief was echoed by Justice Stewart, who proclaimed that "without an informed and free press there cannot be an enlightened people."\textsuperscript{47} Although the Court has yet to recognize a privilege for reporters, it has continued to protect the press in other ways because the interests recognized in \textit{New York Times Co. v. United States} are still present today.\textsuperscript{48}

\textbf{D. The History of the Reporter's Privilege}

The Supreme Court's protection of the press has not extended into the area of the reporter's privilege. The concept of a reporter's privilege is based on a perceived ethical duty of reporters to uphold

\textsuperscript{44} \textit{Id.} at 714. For a background discussion of the case, see William R. Glendon, \textit{The Pentagon Papers—Victory for a Free Press}, 19 \textit{Cardozo L. Rev.} 1295 (1998). The documents that the papers sought to print have become known as the "Pentagon Papers." \textit{Id.} at 1295. The documents were the result of a secret task force created by then-Secretary of Defense Robert McNamara to study the U.S. involvement in the Vietnam War. \textit{Id.} Daniel Ellsberg, a former military man, government employee, and government consultant, obtained one of only fifteen copies of the top secret documents, copied them, and leaked them to the \textit{New York Times} and \textit{Washington Post} for publication. \textit{Id.} at 1296.

\textsuperscript{45} \textit{N.Y. Times Co.}, 403 U.S. at 714.

\textsuperscript{46} \textit{Id.} at 717 (Black, J., concurring). This position has been echoed in later Supreme Court cases, such as \textit{Cox Broadcasting Corp. v. Cohn}, 420 U.S. 469 (1975), in which Justice Byron White stated that "[w]ithout the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally." \textit{Id.} at 492.

\textsuperscript{47} \textit{N.Y. Times Co.}, 403 U.S. at 728 (Stewart, J., concurring).

\textsuperscript{48} See, e.g., Bartnicki v. Vopper, 532 U.S. 514 (2001) (permitting media broadcast of a lawfully received tape of a cellular phone conversation that was retrieved in violation of federal and Pennsylvania wiretap acts, because the First Amendment interest in publishing matters of public interest outweighed the individual's privacy rights); \textit{Richmond Newspapers, Inc. v. Virginia}, 448 U.S. 555 (1980) (protecting the press's right of access to criminal trials); \textit{Landmark Commc'ns, Inc. v. Virginia}, 435 U.S. 829 (1978) (invalidating a state statute that prohibited divulging information relating to confidential matters pending before the Virginia Judicial Inquiry and Review Commission, as applied to a newspaper that reported the Commission was planning an investigation of a state court judge); \textit{Neb. Press Ass'n v. Stuart}, 427 U.S. 539 (1976) (invalidating an order from a state court prohibiting newspapers and broadcasters from publishing or broadcasting accounts of confessions made by a murder suspect).
promises not to reveal the names of their sources. As early as 1934, the American Newspaper Guild stated that "[n]ewspapemen shall refuse to reveal confidences or disclose sources of confidential information in court or before judicial or investigating bodies." This has been described "as a duty 'not only to the source, but to journalism as well.'"

The question of whether reporters should be afforded a privilege against the compelled disclosure of their sources is not new. The Supreme Court has addressed the issue, but not within the context of Rule 501. The last time the Court confronted the issue was in \textit{Branzburg v. Hayes}, two years before Rule 501 was enacted. \textit{Branzburg} combined four cases involving reporters asked to reveal their sources. The Supreme Court granted certiorari to answer a single question: "Whether a newspaper reporter who has published articles about an organization can, under the First Amendment, properly refuse to appear before a grand jury investigating possible crimes by members of that organization who have been quoted in the published articles." The Court recognized that the First Amendment protects newsgathering, but to avoid answering the question of privilege, it characterized the issue as whether news reporters have the same obligation as other citizens to answer questions before a grand jury. In essence, the Court balanced the protection provided by the First Amendment against the importance of the grand jury's function, and found the importance of the grand jury to be controlling. In the Court's view, the purpose of the grand jury—to determine "if there is probable cause to believe that a crime has been committed and [to protect] citizens against unfounded criminal prosecutions"—could

\begin{itemize}
\item 50. \textit{Id.} (quoting \textit{JEFFREY OLEN, Ethics in Journalism} 41 (1988)).
\item 52. \textit{Id.}
\item 53. The case combined \textit{Caldwell v. United States}, 434 F.2d 1081 (9th Cir. 1970); \textit{Branzburg v. Meigs}, 503 S.W.2d 748 (Ky. Ct. App. 1971); \textit{Branzburg v. Pound}, 461 S.W.2d 345 (Ky. Ct. App. 1971); and \textit{In re Pappas}, 266 N.E.2d 297 (Mass. 1971). In the \textit{Branzburg} cases, a reporter was asked to reveal sources for two stories on drug use and production in Kentucky. 408 U.S. at 668. \textit{In re Pappas} and \textit{Caldwell} both involved reporters who were asked to reveal the identities of members of the Black Panther Party. \textit{Id.} at 673, 675.
\item 54. \textit{Branzburg}, 408 U.S. at 679 n.16 (emphasis added).
\item 55. \textit{Id.} at 681–82.
\item 56. \textit{Id.} at 682–92.
\item 57. \textit{Id.} at 686–87.
\end{itemize}
not be outweighed by the protection of the First Amendment.\textsuperscript{58} The Court refused to find that the First Amendment reached "so far as to override the interest of the public in ensuring that neither reporter nor source is invading the rights of other citizens through reprehensible conduct forbidden to all other persons."\textsuperscript{59}

\textit{Branzburg} has proven difficult for courts to interpret and apply with uniformity.\textsuperscript{60} Some have read the decision to say that there is no privilege for reporters under any theory, rather than just under the First Amendment.\textsuperscript{61} Others, however, have relied on Justice Lewis Powell's concurrence—the fifth and deciding vote—to support the conclusion that a reporter can invoke a privilege in some situations.\textsuperscript{62} Justice Powell's concurrence stated that there would be some protection for reporters under the Court's decision.\textsuperscript{63} He qualified the Court's decision by stating "that no harassment of newsmen [would] be tolerated."\textsuperscript{64} If the reporter believed that "the grand jury investigation [was] not being conducted in good faith," or he was "called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation," he could file a motion to quash and the court could enter a protective order.\textsuperscript{65} The concurrence advocated a case-by-case approach, which would allow courts to strike "a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct."\textsuperscript{66} This case-by-case balancing approach has given courts the flexibility needed to find a reporter's privilege in some situations.

\textsuperscript{58} The Court noted that "the First Amendment does not invalidate every incidental burdening of the press." \textit{Id.} at 682. In addition, the press was not free to print everything that it wanted to and did not have a special right to information that was not generally accessible to the general public. \textit{Id.} at 683-84.

\textsuperscript{59} \textit{Branzburg}, 408 U.S. at 691-92.

\textsuperscript{60} \textit{N.Y. Times Co. v. Gonzales}, 382 F. Supp. 2d 457, 486 (S.D.N.Y. 2005), \textit{vacated}, 459 F.3d 160 (2d Cir. 2006).


\textsuperscript{62} \textit{See Shoen v. Shoen}, 5 F.3d 1289, 1292 (9th Cir. 1993) (stating that \textit{Branzburg} recognized a qualified privilege for reporters); \textit{LaRouche v. Nat'l Broad. Co.}, 780 F.2d 1134, 1139 (4th Cir. 1986) (stating that \textit{Branzburg} established that, to determine whether there is a privilege, the court has to "balance the interests involved"); \textit{Miller v. Transamerican Press, Inc.}, 621 F.2d 721, 725 (5th Cir. 1980) (stating that \textit{Branzburg} held that reporters have to disclose information in grand jury proceedings unless there is an abuse of power).

\textsuperscript{63} \textit{Branzburg}, 408 U.S. at 709-10 (Powell, J., concurring).

\textsuperscript{64} \textit{Id.}

\textsuperscript{65} \textit{Id.} at 710.

\textsuperscript{66} \textit{Id.}
One such court is the Third Circuit, which has found that there is a privilege for reporters under Rule 501.67 In Riley v. City of Chester,68 a reporter refused to testify as to the name of the source she used to write an article about an investigation of a mayoral candidate.69 The court based its decision on Rule 501, rather than the First Amendment.70 Unlike the Supreme Court in Branzburg, the Third Circuit was convinced that there was a danger in damaging the relationship between a reporter and his confidential source if the privilege were not recognized.71 Instead of finding that Branzburg precluded recognition of the privilege, the Third Circuit used the public policy articulated in Branzburg to support its conclusion that reporters do have a qualified privilege under Rule 501 to refuse to divulge their sources.72 After acknowledging the important public interests at play, the court asked whether those interests were more important than the evidence that could be gathered if the privilege were not recognized.73 This approach draws directly from Justice Powell's concurrence in Branzburg.74 The Riley court emphasized that the case was a civil matter and "not a situation where the reporter [was] alleged to possess evidence relevant to a criminal investigation,"75 and that "the in-

67. Riley v. City of Chester, 612 F.2d 708, 718 (3d Cir. 1979). The Third Circuit has been joined by the First, Second, Fourth, Fifth, Eighth, Tenth, and Eleventh Circuits in finding some kind of privilege held by reporters. See, e.g., United States v. LaRouche Campaign, 841 F.2d 1176 (1st Cir. 1988) (extending the privilege to criminal cases); Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980) (recognizing a qualified privilege); Gonzales v. Nat'l Broad. Co., 194 F.3d 29 (2d Cir. 1999) (finding a qualified privilege for nonconfidential information in civil cases under the First Amendment); United States v. Burke, 700 F.2d 70 (2d Cir. 1983) (finding a qualified privilege for confidential information under the First Amendment); LaRouche v. Nat'l Broad. Co., 780 F.2d 1134 (4th Cir. 1986) (recognizing a qualified privilege based on a balancing test); Miller v. Transamerican Press, Inc., 621 F.2d 721 (5th Cir. 1980) (finding a qualified First Amendment privilege in a libel case); Cervantes v. Time, Inc., 464 F.2d 986 (8th Cir. 1972) (recognizing a privilege as long as there is no actual malice); Shoen v. Shoen, 5 F.3d 1289 (9th Cir. 1993) (finding that the privilege protects investigative authors); Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977) (finding a qualified privilege depending on whether alternative sources have been exhausted, whether the information goes to the heart of the matter, whether it is relevant, and the nature of the controversy); United States v. Caporale, 806 F.2d 1487 (11th Cir. 1986) (finding a privilege unless the information is highly relevant, necessary to the case, and not available from other sources). But see McKevitt v. Pallasch, 339 F.3d 530 (7th Cir. 2003) (finding no reporter's privilege when the source was known and had no objection to the disclosure, and the reporter had no valid interest in maintaining confidentiality).
68. 612 F.2d 708.
69. Id. at 711.
70. See id. at 713.
71. Id. at 714.
72. Id. at 715 (noting that the Branzburg Court realized that it was important to further "unfettered communication to the public of information, comment and opinion").
73. Id. at 716.
74. Riley, 612 F.2d at 715–16.
75. Id. at 716.
formation sought to be disclosed appear[ed] to have only marginal relevance to the plaintiff’s case.” 76 Consequently, the court recognized a qualified privilege for reporters in civil cases.77

One year later, the Third Circuit extended this holding to criminal cases in United States v. Cuthbertson.78 In Cuthbertson, a restaurant chain, indicted on conspiracy and fraud charges, sought to discover notes taken by CBS reporters while they were investigating the restaurant for a report on fast-food franchising.79 CBS moved to quash the subpoena by asserting a privilege not to divulge unpublished information.80 The defendants argued that the privilege recognized in Riley was inapplicable to criminal cases.81 The court disagreed, finding that “the interests of the press that form the foundation for the privilege are not diminished because the nature of the underlying proceeding out of which the request for the information arises is a criminal trial.”82

The courts are not the only place where a privilege protecting reporters can be created. Some state legislatures have enacted so-called shield laws, which protect reporters from forced testimony. As of March 2005, thirty states and the District of Columbia had adopted some kind of protection for reporters.83 Some shield laws provide absolute protection; others apply only in specific situations.84 When Branzburg was decided, only seventeen states had enacted shield laws.85

E. The Current Cases

In the past year, two federal courts decided high-profile cases addressing the common-law reporter’s privilege. The courts take entirely different analytical approaches, come to contrary conclusions, and thus highlight the need for the Supreme Court to clarify whether reporters are protected from the compelled disclosure of their sources.

76. Id. at 718.
77. Id.
78. 630 F.2d 139, 147 (3d Cir. 1980).
79. Id. at 142.
80. Id. at 144.
81. Id. at 146.
82. Id. at 147.
84. Id.
85. deRoos Rood & Grossman, supra note 6, at 794.
I. In re Grand Jury Subpoena

On February 15, 2005, the D.C. Circuit decided In re Grand Jury Subpoena against the background of a growing government controversy. The appeal combined the cases of reporters Matthew Cooper of Time Magazine and Judith Miller of the New York Times. The controversy grew out of President George W. Bush's State of the Union Address on January 28, 2003, in which he claimed that “[t]he British government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa.” Roughly six months later, former Ambassador Joseph Wilson penned an op-ed piece in the New York Times claiming that he was sent to investigate the President’s assertion but found no credible evidence to support it. On July 14, 2003, reporter Robert Novak published a column on the controversy, in which he stated that Wilson’s wife, Valerie Plame, was a CIA agent, and that “[t]wo senior administration officials told [Novak that Wilson’s] wife suggested sending Wilson to Niger to investigate” the claim. After that, other authors wrote articles stating that they also had been given the same information from official sources. Cooper and Miller were subpoenaed because both of them allegedly received the same information from administration officials.

In the midst of this controversy, the Department of Justice began to investigate whether any Bush administration official had in fact leaked the name of a CIA operative—an action which would have violated federal law. As a part of the investigation, Special Prosecutor Patrick Fitzgerald subpoenaed Time, Cooper, and Miller for any information relating to Cooper’s and Miller’s articles which claimed that an administration official had also told them about Plame’s identity.

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87. Id. at 967.
88. Id. at 965.
89. Id. at 966.
91. In re Grand Jury Subpoena, 397 F.3d at 966.
92. Id. at 966-67.
93. See id. at 966. It is illegal for anyone with “authorized access to classified information that identifies a covert agent” to “intentionally disclose[] any information identifying such covert agent to any individual not authorized to receive classified information, knowing that the information disclosed so identifies such covert agent and that the United States is taking affirmative measures to conceal such covert agent’s intelligence relationship to the United States.” 50 U.S.C. § 421(a) (2000).
94. In re Grand Jury Subpoena, 397 F.3d at 966-67. Many believe that the investigation is partly motivated by the concern that the government may have intentionally leaked Valerie Plame’s name to retaliate against Wilson’s critique of the Administration. See, e.g., Jeffrey Toobin, Name That Source, NEW YORKER, Jan. 16, 2006, at 30 (quoting Martin Kaplan, the
All parties moved to quash the subpoenas, but those motions were denied.\textsuperscript{95} The parties refused to comply, and the district court held them in contempt.\textsuperscript{96} All parties then appealed that decision, arguing that there was a First Amendment privilege against compulsion, that there was a common-law privilege against compulsion, that their due process rights were violated, and that the Special Counsel had failed to comply with Department of Justice guidelines regarding the subpoena of reporters.\textsuperscript{97}

The D.C. Circuit published a majority opinion and three separate concurrences, one by each of the judges who heard the case.\textsuperscript{98} The majority opinion addressed the common-law question in a single paragraph, which contained almost no analysis.\textsuperscript{99} It stated simply that "[t]he Court [was] not of one mind on the existence of a common law privilege,"\textsuperscript{100} but that "if there [was] any such privilege, it [was] not absolute and may be overcome by an appropriate showing."\textsuperscript{101} The court found that the Government had succeeded in overcoming any privilege.\textsuperscript{102} Therefore, the circuit court affirmed the district court's decision.\textsuperscript{103} Each judge then wrote a concurring opinion detailing his or her own approach to the common-law privilege.

Judge David Sentelle wrote that reporters enjoyed no special privilege when called to testify in front of a grand jury "beyond the protection against harassing grand juries conducting groundless investigations that [was] available to all other citizens."\textsuperscript{104} He based his approach on \textit{Branzburg}, which he believed had decided that there was no common-law privilege, even though that case was premised on a constitutional question.\textsuperscript{105} Assuming that \textit{Branzburg} did foreclose the possibility of a common-law privilege, he believed that the D.C.

\begin{footnotesize}
\begin{enumerate}
\item[95.] \textit{In re Grand Jury Subpoena}, 397 F.3d at 966–67.
\item[96.] \textit{Id}.
\item[97.] \textit{Id}. at 967–68. Although this Comment focuses only on the common-law privilege, it is necessary in the interest of completeness to mention that the court found that there was no First Amendment Privilege based on \textit{Branzburg}, that the due process argument was without merit, and that the Department of Justice guidelines were inapplicable in this situation.
\item[98.] See infra notes 104–120.
\item[99.] See \textit{In re Grand Jury Subpoena}, 397 F.3d at 972–73.
\item[100.] \textit{Id}. at 973.
\item[101.] \textit{Id}.
\item[102.] \textit{Id}.
\item[103.] \textit{Id}. at 972–73, 976.
\item[104.] \textit{Id}. at 976 (Sentelle, J., concurring).
\item[105.] \textit{In re Grand Jury Subpoena}, 397 F.3d at 977 (Sentelle, J., concurring).
\end{enumerate}
\end{footnotesize}
Circuit was bound by that decision. He also believed that Rule 501 did not supersede the Court's decision in _Branzburg_. Moreover, the question of a common-law privilege for reporters necessarily required the resolution of a number of policy questions, which he believed were better placed in the hands of the legislature. Judge Sentelle concluded that there was no common-law privilege protecting reporters from grand jury subpoenas.

Judge Karen Henderson's concurrence did not resolve the question of whether there was a common-law privilege protecting reporters. Instead, she argued that the court should never have reached the question of whether a privilege exists because all three judges agreed that the Government had overcome the privilege. She concluded by commenting on the approaches taken by her fellow judges.

Finally, Judge David Tatel argued that there is a common-law privilege for reporters, which has its foundation in Rule 501. Judge Tatel focused his discussion primarily on Rule 501, which he believed obligated the court to evaluate the arguments for and against the requested privilege and make a determination "in the light of reason and experience." To do this, the court had to follow the Supreme Court's ruling in _Jaffee_, which detailed the factors to be examined when determining whether a common-law privilege exists under Rule 501. Moreover, it was necessary for the court to resolve this issue because it would come up again, and it was therefore vital to provide guidance to lower courts faced with the issue. Relying on the _Jaffee_ case, Judge Tatel determined that refusing to recognize the privilege would have the detrimental effect of chilling discussions between reporters and their confidential sources, a relationship which had been extremely important to reporters in the past. This would diminish

106. _Id._ at 978.

107. _Id._ (stating that, because the language of Rule 501 comes from cases decided before _Branzburg_, the rule does not give courts anymore power than they had at the time of _Branzburg_).

108. _Id._ at 979–81 (noting that if the court were to create a privilege, it would also have to create the scope of the privilege).

109. _Id._ at 981.

110. _Id._ at 981–82 (Henderson, J., concurring).

111. _In re Grand Jury Subpoena_, 397 F.3d at 983 (Henderson, J., concurring) (stating that, contrary to Judge Sentelle's conclusion, _Branzburg_ did not decide the issue of the common-law privilege); see also _Id._ at 984 (stating that _Jaffee_ and Rule 501 do not give the court the power to create a privilege "for any group . . . that demands one").

112. _Id._ at 986–89 (Tatel, J., concurring).

113. _Id._ at 989 (quoting FED. R. EVID. 501).

114. _Id._

115. _Id._ at 990.

116. _In re Grand Jury Subpoena_, 397 F.3d at 995 (Tatel, J., concurring).
the quality of news available to the public.\textsuperscript{117} Moreover, as the Court recognized in \textit{Jaffee}, without a privilege it would be unlikely that the evidence the prosecution was seeking would ever come into being in the first place. The evidentiary benefit would therefore be low.\textsuperscript{118} The fact that forty-nine states had extended some level of protection for reporters "confirm[ed] that 'reason and experience' support[ed] recognition of the privilege."\textsuperscript{119} In light of these factors, Judge Tatel concluded that there was a common-law privilege protecting reporters.\textsuperscript{120}


Less than one month later, the Southern District of New York confronted the same issue in \textit{New York Times Co. v. Gonzales}.\textsuperscript{121} In \textit{Gonzales}, the \textit{New York Times} sought to prevent the Government from compelling the production of two of its reporters’ phone records.\textsuperscript{122} The two reporters, Judith Miller and Philip Shenon, wrote articles on two Islamic charities, the Global Relief Foundation, Inc. and the Holy Land Foundation for Relief and Development.\textsuperscript{123} The Government claimed that both reporters tipped off the organizations to government activity when, consistent with the newspaper’s policy, the reporters called the organizations to obtain comments for an upcoming article.\textsuperscript{124} The reporters each used information obtained from confidential sources to write their articles.\textsuperscript{125} As in \textit{In re Grand Jury Subpoena}, the Government began an investigation to determine the source of the leaks.\textsuperscript{126} As part of the investigation, the Government sought to obtain the reporters’ records, hoping that their notes would

\textsuperscript{117} \textit{Id.} at 991.
\textsuperscript{118} \textit{Id.} In \textit{Jaffee}, the Court reasoned that if patients thought their psychiatrists could be compelled to testify to what they said, then patients would not confide in their psychiatrists in the first place. 518 U.S. 1, 11–12 (1996). Similarly, if confidential sources believe that the reporters they talk to could be compelled to give up their names, they will be less likely to come forward, and there would be no evidence for the prosecution to uncover.
\textsuperscript{119} In \textit{re Grand Jury Subpoena}, 397 F.3d at 993 (Tatel, J., concurring) (internal quotation marks omitted) (quoting \textit{Jaffee}, 518 U.S. at 13).
\textsuperscript{120} Id. at 995. Judge Tatel went on to conclude that the privilege is limited, however, and only exists when the information is more newsworthy than harmful. \textit{Id.} at 1001. In this case, the leak was extremely harmful and had marginal news value, and therefore the privilege had been overcome. \textit{Id.} at 1002–03.
\textsuperscript{121} 382 F. Supp. 2d 457, 464 (S.D.N.Y. 2005), \textit{vacated}, 459 F.3d 160 (2d Cir. 2006).
\textsuperscript{122} \textit{Id.} at 464.
\textsuperscript{123} \textit{Id.} at 465.
\textsuperscript{124} \textit{Id.} at 466–67.
\textsuperscript{125} \textit{Id.}
\textsuperscript{126} \textit{Id.} at 467.
reveal the sources. After a series of letters between the New York Times and the Government, the New York Times sought a declaratory judgment that the phone records were protected by the First Amendment, a common-law privilege, and the Department of Justice guidelines.

Unlike the D.C. Circuit, the Southern District of New York confronted the issue of a common-law privilege head on. The court decided to fully evaluate the issue, in part because Rule 501 was drafted in a way that allowed courts the flexibility to analyze a privilege question when one was presented. That, combined with the fact that the Supreme Court had not analyzed the reporter's privilege question since Rule 501 was enacted, gave the court leeway to address the issue.

The court analyzed the question both under Rule 501 and within the framework presented by Jaffee. Jaffee required the court to first ask whether private interests would be furthered by the privilege. Second, the court had to ask whether public interests would be furthered by the privilege. If recognition of the privilege would further both private and public interests, then the court had to determine if those interests outweighed the evidentiary benefit that would occur if no privilege were recognized. Finally, the court had to look for a consensus amongst the states because its existence would indicate that the privilege was supported by "reason and experience."

The court realized the importance of allowing reporters to maintain the confidentiality of their sources without fear that they may be compelled to reveal those sources. Without the protection, there would be a chilling effect on speech that would diminish a reporter's ability to do his or her job. In fact, both Miller and Shenon "testified that

128. Id. at 464. The court found that the Department of Justice Guidelines "confer no substantive rights," and therefore provided the New York Times with no protection. Id. at 484.
129. Id. at 492–513. The court also addressed the First Amendment privilege, and found that Branzburg did not prevent a finding that there is a First Amendment privilege, particularly in light of the way the Second Circuit had interpreted the case. Id. at 484–92. Therefore, the court found that there was "a qualified First Amendment reporter's privilege with respect to confidential sources." Id. at 492.
131. Id. at 493–94.
132. Id. at 494.
133. Id.
134. Id.
135. Id.
137. Id. at 497.
138. Id.
without information they have obtained in the past on condition that the identity of their sources would be kept in confidence, neither journalist would have been able to report on a wide range of issues of national significance."  \(^{139}\) In addition, to the extent that confidential sources allow reporters to provide the public with better information, the privilege would serve an important public interest.  \(^{140}\) That interest was exemplified by the fact that news stories ranging from Watergate to Abu Ghraib made it to the public only because people close to the scandals were willing to speak on the condition of anonymity.  \(^{141}\) The importance of those stories made it clear to the court that “[t]he public ends achieved through recognition of a reporter’s privilege are . . . vital to our democracy and of ‘transcendent importance.’”  \(^{142}\) The court acknowledged that the Government would enjoy an evidentiary benefit if the privilege were not recognized, but decided it did not outweigh the public and private interests that the privilege would protect.  \(^{143}\) Like the Court in Jaffee, the Gonzales court noted that the evidentiary benefit would decrease in time as more potential sources realized that their identity may not be kept secret.  \(^{144}\) Once that realization set in, “fewer sources [would] provide information of a sensitive nature to reporters where doing so [would] place[ ] them at risk of losing their job or otherwise incurring some penalty should they be identified.”  \(^{145}\) That refusal to talk would mean that the evidence the Government was so intent on discovering would never come into existence.  \(^{146}\) Therefore, any evidentiary benefit to the Government in Gonzales would not carry on to other cases.  \(^{147}\) Finally, the court reiterated that “the existence of a consensus among the States indicates that reason and experience support recognition of the privilege,”  \(^{148}\) noting that forty-eight states, as well as the District of Columbia, had recognized some level of protection for reporters.  \(^{149}\)

\(^{139}\) Id.

\(^{140}\) Id. at 498.

\(^{141}\) Id.

\(^{142}\) Gonzales, 382 F. Supp. 2d at 500 (quoting Jaffee v. Redmond, 518 U.S. 1, 11 (1996)).

\(^{143}\) Id. at 500–01.

\(^{144}\) Id. at 501.

\(^{145}\) Id. at 500.

\(^{146}\) Id. at 501.

\(^{147}\) Id. at 502. The Gonzales court stated that thirty-one states had adopted shield laws. Id. Fourteen had recognized a privilege in either the state’s highest court or an appellate court. Id. at 503. Meanwhile, in three other states, the reporter’s privilege had been recognized by lower courts. Id.
court found that there was a common-law privilege for reporters under Rule 501.150

III. ANALYSIS

Within one month, two courts faced the issue of whether a reporter's privilege exists, but came to opposite conclusions.151 Because the freedom of the press and the enforcement of criminal laws are both extremely important, it is easy to understand why such different outcomes could result.152 The D.C. Circuit, however, arrived at the wrong outcome by failing to fully analyze the issue of a common-law reporter's privilege, and in doing so, simply increased the ambiguity of an already nebulous area.153 The Southern District of New York, on the other hand, took the proper approach and reached the correct conclusion; future courts should follow suit.154

A. The Conflicting Interests

The issue of a reporter's privilege is particularly vexing because it involves two important and fundamental aspects of American society: the enforcement of criminal laws and the freedom of the press.155 The grand jury is a fundamental part of the American criminal justice system and is regarded as one of the most important steps towards indicting a person charged with a crime.156 The institution is so fundamental that it is mentioned in the Fifth Amendment of the Con-

150. Id. at 508. The court went on to find that the Government had not overcome the privilege because it could not show that the documents were necessary or that the information could not be found elsewhere. Gonzales, 382 F. Supp. 2d at 510–12.

151. See supra notes 86–150 and accompanying text.

152. See infra notes 155–172 and accompanying text.

153. See infra notes 173–187 and accompanying text.

154. See infra notes 188–259 and accompanying text.

155. See infra notes 259–86 and accompanying text.

156. See Branzburg v. Hayes, 408 U.S. 665, 687 (1972) (discussing the role of the grand jury in federal criminal prosecutions). The Supreme Court had previously elaborated on the role of the grand jury:

Historically, [the grand jury] has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused . . . to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.

Id. at 687 n.23 (alterations in original) (quoting Wood v. Georgia, 370 U.S. 375, 390 (1962)). The Court went on to discuss its scope:

It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime.

Id. at 688 (quoting Blair v. United States, 250 U.S. 273, 282 (1919)).
The freedom of the press, however, is equally important to a functioning democratic society. The press can serve many purposes and can be defined many ways—more so now due to ever-increasing advances in technology—but the true purpose of the press is to provide information. This function was obviously important to the drafters of the Constitution because, like the grand jury, the freedom of press was also referred to in the Bill of Rights. When these two interests conflict, the task becomes finding "the proper relationship between two vitally important aspects of our democracy: the free press on the one hand and the fair and full administration of criminal justice on the other." It is extremely difficult to determine which one should prevail.

Judge Tatel acknowledged the difficulty inherent in analyzing these two institutions in his concurrence in *In re Grand Jury Subpoena*. While freedom of the press "is basic to a free society," he wrote, "basic too are courts of justice." In *In re Grand Jury Subpoena*, the investigation centered on the leak of a CIA agent's name. If there was in fact a leak, federal law may have been violated. To determine whether there was a leak, the prosecutor called on the reporters who had been given the agent’s name to testify about their sources. Acquiring that information became exceedingly more difficult when both of the reporters refused to testify, claiming a privilege against compelled revelation of their sources. If their claim prevailed, then the privilege would, in effect, prevent the prosecutor from enforcing the law, which contradicts the important public interest of criminal law enforcement.

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157. U.S. Const. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . .")
160. U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .")
162. Id.
164. Id. at 966 (majority opinion).
165. Id.; see also 50 U.S.C. § 421 (2000) (making it a felony for individuals with classified information to knowingly disclose the identity of a covert agent).
167. Id.
168. See Branzburg v. Hayes, 408 U.S. 665, 688 (1972) (stating that privileges challenge "the longstanding principle that 'the public . . . has a right to every man's evidence,' except for those
Even though recognition of the reporter's privilege may hamper the grand jury process, the freedom of the press is equally, if not more, important. The reporters in both In re Grand Jury Subpoena and Gonzales relied on the idea that the press should be protected from government intrusion. This issue was particularly important in In re Grand Jury Subpoena because it appeared to some that the government had used the press as a means to retaliate against an opponent who spoke out against it. If that were true, the best way to protect the press may have been to require the reporters to reveal their sources so that the government would be deterred from using the press for malicious purposes. Even if that reasoning is valid, the D.C. Circuit followed the wrong path to reach its intended outcome. Its decision did compel the reporters to reveal their sources, but did not make clear that the situation was rare and that, in most other cases involving reporters and their confidential sources, the court should not be able to compel disclosure. Had the D.C. Circuit taken the approach of the Southern District of New York, it could have recognized the privilege and still found that it had been overcome in that particular situation. That, at least, would have sent the message that it is generally improper to compel reporters to reveal their sources. Rather, the D.C. Circuit decision provides no guidance and leaves reporters open to further government intrusion.

B. The Approach Taken by the D.C. Circuit Added to the Confusion

The judges deciding In re Grand Jury Subpoena were divided on whether a common-law privilege between reporters and their confidential sources exists under Rule 501. Therefore, the majority opinion essentially stated that the court did not know whether the privilege existed. This approach provides no guidance to a lower


170. See, e.g., Evan Thomas & Michael Isikoff, Sources of Confusion, Newsweek, Nov. 28, 2005, at 40 (opinions vary on whether “the leak was (1) an insidious smear by the White House to retaliate against a critic of the Iraq war or (2) mildly interesting gossip”).

171. In re Grand Jury Subpoena, 397 F.3d at 1003 (Tatel, J., concurring) (“[Cooper’s] story itself makes the case for punishing the leakers. While requiring Cooper to testify may discourage future leaks, discouraging leaks of this kind is precisely what the public interest requires.”).

172. Id. at 976 (majority opinion) (affirming the district court’s decision that the reporters must reveal their sources).

173. Id. at 973.
court faced with the same issue. Rather than being able to refer to the circuit court’s decision in deciding whether the privilege exists, a lower court is left to follow whichever of the three concurrences it finds most compelling. Effectively, the D.C. Circuit left the lower court with no more guidance than they had prior to its decision.

Judge Henderson’s concurrence takes a different view, stating that if the court did not have to reach the issue, it should not have. While this may be true, it is not applicable to the tactic that the D.C. Circuit used because the court did reach the issue. Judge Henderson’s argument could be compelling if the court had held that, because it had already found that the First Amendment did not provide the privilege, it did not need to go further and decide the common-law issue, but that is not what the court did. Rather, the court decided the issue, and provided a confusing nonstandard for the lower courts to follow.

Some scholars advocate the cautious approach taken by the D.C. Circuit. Most commonly, it is referred to as “decisional minimalism.” Decisional minimalism can be defined as “the phenomenon of saying no more than necessary to justify an outcome, and leaving as much as possible undecided.” Professor Cass Sunstein argues that decisional minimalism is preferred in some situations because it “can be democracy-forcing,” in that it forces debate and decisionmaking by politically accountable actors. Further, in highly controversial or complex areas, it may be proper to avoid having judges decide the issue incorrectly or ineffectively. Proponents of the minimalist approach may argue that the reporter’s privilege is an area primed for judicial minimalism because the issue may be better suited for Congress and because, particularly in the context of In re Grand Jury Subpoena, the issue is highly controversial and complex. Although that reasoning has merit, journalistic privilege is an area of law which would benefit from bright-line rules. All parties involved should have clear notice of the potential consequences of using confidential sources or providing confidential information to a reporter.

174. Id. at 981-82 (Henderson, J., concurring).
175. The court reached the issue by finding that, regardless of whether the common-law privilege existed or not, it had been overcome. See id. at 973 (majority opinion).
177. Id. Sunstein acknowledges that this definition is extremely simplistic, but it will suffice for the scope of this Comment. See id. at 7 n.2.
178. Id. at 7.
179. Id.
180. Id.
181. See deRoos Rood & Grossman, supra note 6, at 803 (stating that the most important aspect of a privilege is that it allows people to predict when they will be protected).
Although he believes in minimalism, Sunstein also recognizes that “[m]inimalism is appropriate only in certain contexts” and that “[i]t is hardly a sensible approach for all officials, or even all judges, all of the time.” Even though minimalist decisions may force democracy and avoid mistakes, there are some situations where there is a larger danger created “through dissimilar treatment of the similarly situated.” The reporter’s privilege is an example. If courts are applying different standards to questions of the common-law privilege, and individuals in similar situations are being treated differently depending on where their case is being tried, then no reporter or source is going to want to engage in a confidential relationship anywhere, because there is no way to tell whether they may be subject to penalties for their conduct. That situation is far more problematic than a court making the “wrong” decision and recognizing, or not recognizing, the privilege.

Given these considerations, it becomes clear that the question of the reporter’s privilege is ill-suited for the minimalist approach the D.C. Circuit took. In fact, this area of law may be better suited for “judicial maximalism.” Maximalism is defined “as an effort to decide cases in a way that establishes broad rules for the future and that also gives deep theoretical justifications for outcomes.” If the outcome sought by a maximalist decision is a clear rule that may be applied easily in the future, then a maximalist decision is ideal for the area of the reporter’s privilege.

182. Sunstein, supra note 176, at 28.
183. Id.
184. Id. at 29.
185. Sunstein recognizes that “it may be even worse to allow cases to be decided by multiple district court judges thinking very differently about the problem at hand.” Id. Judge Harry Edwards generally agrees with the minimalist position. He argues that courts should usually take a limited approach and decide only those issues that are necessary. See Harry T. Edwards, The Role of a Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Adjudication, 32 CLEV. ST. L. REV. 385, 413–20 (1983–1984). In cases involving “specific types of recurring problems,” cases involving “potentially enormous problem[s],” and those which “allow for thorough clarifications of existing case law or detailed statements in anticipation of future case problems,” however, the court should use “wide-angle adjudication.” Id. at 413–14 (emphasis omitted). This will provide guidance to lower courts and will force the judges to “‘think out’ all the various implications of their actions as fully and as carefully as possible and to accept responsibility for their judgments and choices.” Id. at 419.
186. The D.C. Circuit’s approach is minimalist because it answers the question without going into any detail about the reasoning it used to get to its decision. See In re Grand Jury Subpoena, Judith Miller, 397 F.3d 964 (D.C. Cir.), cert. denied sub nom. Cooper v. United States and Miller v. United States, 125 S. Ct. 2977 (2005).
187. Sunstein, supra note 176, at 15.
C. The Court Should Find a Qualified Reporter’s Privilege

The D.C. Circuit could have avoided adding to the confusion surrounding the reporter’s privilege if it had followed the approach taken by the Southern District of New York. Both courts decided cases dealing with a reporter’s privilege, but they came to completely different results. The courts addressed similar fact patterns, but their different analytical strategies lead them to different conclusions. The D.C. Circuit erred in its approach and ultimate conclusion; it should have analyzed the common-law privilege pursuant to the framework laid out in Jaffee, and concluded that there is a qualified privilege under the common law.

As previously stated, the Supreme Court has not analyzed whether reporters are protected by a privilege under Rule 501. However, the Jaffee Court established the framework for analyzing whether such a privilege should be recognized. The D.C. Circuit was presented with the question of a reporter’s privilege under Rule 501, but it made no attempt to analyze the issue under Jaffee. Such an approach was improper. Clearly, “there is an absolute duty to apply the law as last pronounced by superior judicial authority.” Jaffee spoke directly to the issue facing the D.C. Circuit, yet incredibly, the court failed to even mention the case in the majority opinion. Certainly, the D.C. Circuit understood that it was bound by Supreme Court precedent, because the court, and Judge Sentelle in particular, based its opinion on Branzburg. The court’s analysis was inconsistent and irresponsible.

I. The Private Interests

Had the D.C. Circuit applied the Jaffee test, it may have come to the same conclusion as the Gonzales court and found that there is a common-law privilege for reporters. The first factor of the Jaffee test ana-

189. See Branzburg v. Hayes, 408 U.S. 665 (1972); see also supra note 51 and accompanying text.
191. See In re Grand Jury Subpoena, 397 F.3d at 972–73.
193. Jaffee is not mentioned until the middle of Judge Sentelle’s opinion, in a footnote. In re Grand Jury Subpoena, 397 F.3d at 979 n.4 (Sentelle, J., concurring).
194. Id. at 968 (majority opinion) ("[T]he Highest Court considered and rejected the same claim of First Amendment privilege on facts materially indistinguishable from those at bar."); id. at 977 (Sentelle, J., concurring) ("I find Branzburg v. Hayes to be as dispositive of the question of common law privilege as it is of a First Amendment privilege." (citation omitted)).
lyzes whether the privilege would serve private interests. In *Jaffee*, the Court looked at the relationship between the patient and her psychotherapist and whether the privilege would protect that relationship. Like a relationship between a psychotherapist and patient, that between a reporter and her confidential source also relies on trust. If this trust is eroded, the relationship will no longer thrive. Confidential sources are of such importance to reporters that if the relationships disintegrate, reporters will no longer be able to perform their jobs as they currently do. *In re Grand Jury Subpoena* completely ignores this possibility, and in doing so, fails to show any concern for the potential degradation of the press, which is a fundamental institution in a democratic society.

That the reporter's profession would completely change if reporters could no longer rely on confidential sources is supported by the affidavits filed in *Gonzales*. Two of the affidavits were filed by former reporters Russell Scott Armstrong and Jack Nelson. They stated that confidential sources usually require "guarantees of confidentiality before any extensive exchange of information is permitted." They also stated that confidential sources have been behind some of the biggest news stories in recent history, including Watergate, the pardon of President Nixon, the improper activities of the Office of Management and Budget Director during the Carter presidency, the Iran-Contra Affair, and the Monica Lewinsky scandal. It is mind-boggling to think that, without confidential sources, some of those scandals may have never reached the light of day. What would society be like today if those scandals had never been revealed? Will society continue to move forward if future scandals of the same magnitude are never made public? As Jack Nelson noted, denying the privilege "would undoubtedly have a ripple effect, silencing whistleblowers and

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198. *Id.*
199. *Id.* (discussing the effect that losing confidential sources would have on Miller's and She- non's jobs).
200. *Id.* at 470–71.
201. *Id.* at 470.
202. *Id.*
203. *Gonzales*, 382 F. Supp. 2d at 470 (discussing the experience of Jack Nelson). Historian Anna Nelson also filed an affidavit in the case. She stated that "confidential sources are often the only sources available to the journalist and thus the original source for historians seeking to unravel public policy or foreign policy," noting that "[a] journalist's exposure of the My-Lai incident is just such an example." *Id.* at 471.
other government employees who might otherwise cooperate with the press in exposing government wrongdoing.\textsuperscript{204}

Reporters are not the only professionals to understand the importance of confidential sources, nor are they the only professionals to benefit from the relationship. Jeffrey H. Smith, a government lawyer, filed an affidavit in \textit{Gonzales} discussing the benefit that the government receives from the reporter-confidential source relationship.\textsuperscript{205} Smith stated that "federal agencies benefit from the ability to have official [sic] speak confidentially" because it "permits the government to get information to the public without attribution to a named official or without publicly declaring the statement as official policy."\textsuperscript{206} This may not always be the case, particularly when a government employee is acting as a whistleblower, but one can imagine situations in which the administration may want to leak a story to soften the blow.\textsuperscript{207}

Upon review of this information, the \textit{Gonzales} court recognized the importance of the reporter's privilege:

\begin{quote}
[It] would serve significant private interests by permitting investigative reporters to continue to secure information from confidential sources with greater assurance that they would not be compelled to reveal the information obtained or the source of that information or run the risk of court-imposed sanctions, either option posing a threat to the reporters' ability to obtain confidential information in the future or to publish investigative stories at all.\textsuperscript{208}
\end{quote}

Had the judges taken the time to fully review the claim under the framework created by the Supreme Court in \textit{Jaffee}, the D.C. Circuit may have reached these same conclusions.

2. \textit{The Public Interests}

As the Court in \textit{Jaffee} stated, in order for a court to recognize a privilege, it must also serve public interests.\textsuperscript{209} The psychotherapist-patient privilege protects a vital public interest: "The mental health of our citizenry, no less than its physical health, is a public good of tran-
The reporter's privilege would protect an equally important interest—an informed public.

Most legal and political science scholars are familiar with philosopher Alexander Meiklejohn's "enlightened public" argument.\textsuperscript{211} The enlightened public argument holds that one of the reasons for protecting speech is that free speech allows all of the ideas to reach the public, which in turn leads to a more enlightened society.\textsuperscript{212} Meiklejohn states that "all facts and interests relevant to the problem shall be fully and fairly presented to the meeting so that all alternative lines of action can be wisely measured in relation to one another."\textsuperscript{213} This argument applies with special force to the First Amendment, but its reasoning is also relevant to the common-law reporter's privilege. One of the most prevalent sources of the "ideas" that Meiklejohn speaks about is the press.\textsuperscript{214} Taking away one of the primary sources of a reporter's information would prevent certain ideas from being disseminated in the public discourse. Discussion would be stifled and, as a result, a less enlightened public would emerge.\textsuperscript{215} To avoid this result, the best course of action is to recognize the privilege and protect this important relationship, and in turn protect the press itself.

Recognition of this privilege will further yet another important public interest that stems from the concept of free speech—placing a check on the government.\textsuperscript{216} The American system of democratic government is a system of checks and balances.\textsuperscript{217} One of the most important checks—recognized in the Constitution, though not for this purpose—is free speech. The press is in the best position to enforce that check because it has access to the government that normal citi-

\textsuperscript{210} Id.
\textsuperscript{212} Id.
\textsuperscript{213} ALEXANDER MEIKLEJOHN, FREE SPEECH: AND ITS RELATION TO SELF-GOVERNMENT 25 (Kennikat Press 1972) (1948) (quoted in GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1019 (2d ed. 1991)).
\textsuperscript{214} Id.
\textsuperscript{215} Members of the Supreme Court have recognized this issue. Most notably, Justice Douglas attributed his belief to Meiklejohn in his dissent regarding \textit{Caldwell v. United States}, one of the cases addressed by the Court in \textit{Branzburg}, 408 U.S. 665, 713 (1972) (Douglas, J., dissenting) (citing Meiklejohn, \textit{supra} note 211, at 254).
\textsuperscript{216} Vincent Blasi, \textit{The Checking Value in First Amendment Theory}, 1977 \textit{Am. B. Found. Res. J.} 521, 527 ("This is the value that free speech, a free press, and free assembly can serve in checking the abuse of power by public officials."). If the speculation that the leak of Valerie Plame's name was part of a White House-orchestrated smear campaign is correct, then it illustrates the press's ability to check the government by bringing to light its unethical actions.
\textsuperscript{217} See Myers v. United States, 272 U.S. 52, 119 (1926) (discussing Congress's power to create a provision for the removal of executive officers); see also Am. Fed'n of Labor v. Am. Sash & Door Co., 335 U.S. 538, 545 (1949) ("Even the Government—the organ of the whole people—is restricted by the system of checks and balances established by our Constitution.").
zens do not. The press has the ability to bring unwise or corrupt government actions to light, but it is able to do so only because it is protected by the First Amendment. To truly do its job in maintaining government accountability, the press "requires independence from government; it requires rights that give [it] a defense against government intrusions." This includes protection of the relationship between reporters and their confidential sources within the government, so that the press's ability to check government abuse will not be diminished. A court which is interested in maintaining that ability should find a reporter's privilege.

In Gonzales, the Southern District of New York recognized that the press is important in keeping the public informed. Most of the court’s decision was based on an analysis of the monumental news stories that relied on confidential sources, such as Watergate, the Iran-Contra Affair, and Monica Lewinsky. In contrast, in In re Grand Jury Subpoena, the D.C. Circuit did not discuss any public interests that may be served by the privilege. Like the Southern District, the D.C. Circuit should have recognized that the privilege would serve the public interests discussed above.

3. The Balancing Test

After determining that the privilege will serve private and public interests, a court applying Jaffee must ask whether those interests outweigh the harm that would occur if the privilege were recognized and applied. If so, then the privilege should be recognized. If, however, the harm will exceed the benefit served by recognizing the inter-

218. Cf. Christopher Cooper & John D. McKinnon, White House Press Room as Political Stage, Wall St. J., Feb. 25, 2005, at B1 (stating that one of the requirements for permanent clearance into the White House is a congressional press pass, but that daily clearance may be granted after a security check).
219. U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ").
221. N.Y. Times Co. v. Gonzales, 382 F. Supp. 2d 457, 499–500 (S.D.N.Y. 2005) (noting that the Supreme Court has recognized this importance in past decisions), vacated, 459 F.3d 160 (2d Cir. 2006).
222. Id. at 498.
225. See 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2285 (John T. McNaughton ed. 1961) (1904) (noting that for the court to recognize a privilege "[i]the injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation").
ests, then the court should refrain from recognizing the privilege.\textsuperscript{226} This balancing test is important because privileges necessarily hamper the truth-seeking objective of the judicial system.\textsuperscript{227} Privileges are therefore only justified on the basis of an interest in protecting a relationship or a greater societal goal.

This balancing test is the most difficult part of the court’s analysis. The D.C. Circuit did not attempt to balance the issues at all.\textsuperscript{228} This is unfortunate, particularly when the interests involved are so important. Had the court fully analyzed the issue, it would have balanced the relationship between a reporter and his source—and the press in general—against obtaining information that might help the prosecutor discover who leaked the name of a covert CIA agent, an act which potentially could have placed the lives of many people in danger.\textsuperscript{229} In \textit{In re Grand Jury Subpoena}, the court refused to recognize the privilege and permanently injured the relationship between reporters and their sources. In \textit{Gonzales}, however, the court recognized the privilege even though the government would be placed at a disadvantage.\textsuperscript{230} As in Judge Tatel’s concurrence in \textit{In re Grand Jury Subpoena}, the \textit{Gonzales} court recognized that the effect on the reporter’s relationship with the confidential source, and on the reporter’s job in general, would be so severe that the privilege must be recognized despite the evidentiary benefit to the government.\textsuperscript{231} Without the privilege, “[r]eporters could reprint government statements, but not ferret out underlying disagreements among officials; they could cover public governmental actions, but would have great difficulty getting potential whistleblowers to talk about government misdeeds; they could report arrest statistics, but not garner first-hand information about the criminal underworld.”\textsuperscript{232}

In \textit{Jaffee}, the Court argued that even if a privilege was not recognized, the future evidentiary benefit would be miniscule—patients would stop talking to their psychiatrists, and the evidence would never

\textsuperscript{226} See id.

\textsuperscript{227} See Kenneth S. Broun, \textit{Giving Codification a Second Chance—Testimonial Privileges and the Federal Rules of Evidence}, 53 HASTINGS L.J. 769, 792 (2002) (“[P]roponents have sought to justify the rules on the ground that they serve to protect some relationship or other societal goal.”).

\textsuperscript{228} See \textit{In re Grand Jury Subpoena}, 397 F.3d at 972–73.

\textsuperscript{229} See Scott Shane, \textit{Private Spy and Public Spouse Live at Center of Leak Case}, N.Y. TIMES, July 5, 2005, at A12 (“Disclosing the [CIA] employment of officers under cover can endanger the officers, their operations and their agents . . . .”).

\textsuperscript{230} N.Y. Times Co. v. Gonzales, 382 F. Supp. 2d 457, 500 (S.D.N.Y. 2005), vacated, 459 F.3d 160 (2d Cir. 2006).

\textsuperscript{231} See id. at 501; see also \textit{In re Grand Jury Subpoena}, 397 F.3d at 991 (Tatel, J., concurring).

\textsuperscript{232} \textit{In re Grand Jury Subpoena}, 397 F.3d at 991 (Tatel, J., concurring).
exist in the first place. Therefore, there would be little evidentiary benefit, but a significant harm would result because people would no longer turn to psychotherapists for assistance. As a result, the psychotherapists' job would all but disappear. This reasoning applies to the reporter's privilege as well. As discussed above, without the privilege, the confidential sources that reporters so heavily rely upon will begin to disappear. Therefore, the evidence will also disappear, and the privilege will not provide the party seeking the information with any evidentiary benefit. Failing to recognize the privilege, however, will cause great harm to reporters and the media profession in general.

Of course, the privilege does not have to be absolute. Both the D.C. Circuit and the Southern District of New York were hesitant to recognize an absolute privilege, preferring a qualified privilege or none at all. This concern is well founded. Recognizing that the privilege is limited is still acceptable under this Comment's analysis. As long as the privilege that is recognized would protect reporters and their sources in most situations, then both the private and public interests would be protected. Both the reporter and the source would be placed on notice that, if the topic of discussion is extremely important or dangerous, the reporter may be compelled to give up the source's name. The most important thing about the privilege is "outcome predictability." The privilege is useless "[u]nless sources can predict that their identities will be protected under the law." Even a limited privilege would provide some guidelines with which a source could predict whether there would be a possibility that his or her identity could be revealed. A limited privilege is also consistent with

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234. See id.
236. See supra notes 199-206.
238. In re Grand Jury Subpoena, Judith Miller, 397 F.3d 964, 973 (D.C. Cir.) ("[A]ll believe that if there is any such privilege, it is not absolute and may be overcome by an appropriate showing."), cert. denied sub nom. Cooper v. United States and Miller v. United States, 125 S. Ct. 2977 (2005); Gonzales, 382 F. Supp. 2d at 501 ("[N]o basis is found here to recognize anything more than a qualified privilege.").
239. See Jaffee, 518 U.S. 1 (recognizing a limited privilege between psychotherapists and their patients); see also Trammel v. United States, 445 U.S. 40 (1980) (recognizing a limited privilege between spouses).
240. deRoos Rood & Grossman, supra note 6, at 803.
241. Id.
242. See, e.g., In re Grand Jury Subpoena, 397 F.3d at 996-97 (Tatel, J., concurring). Judge Tatel proposes balancing the harm caused by the leak against the importance of the news story. If the story had only marginal news value, but the leak could create a great deal of harm, then
Rule 501,243 Supreme Court precedent,244 and other evidentiary privileges.245

4. State Consensus

The final factor that the D.C. Circuit should have considered in its analysis is the existence of state laws recognizing the privilege. State laws matter because they are indicators that the proposed privilege is supported by "reason and experience," as Rule 501 requires.246 Moreover, there are federalism concerns. If a federal court were to refuse to recognize the privilege, state laws would be frustrated.247 Both the Gonzales court and Judge Tatel's concurrence in In re Grand Jury Subpoena recognized that the majority of states provide a qualified privilege for reporters.248 Not all fifty states have recognized the privilege, but there is a consensus in its favor.249

State shield laws provide various levels of protection for reporters. The level of privilege varies in each state, from near-complete protection250 to protection only in very specific situations.251 California has enacted a shield law as part of its constitution.252 Many states have also enacted statutory balancing tests to determine whether the privi-


244. N.Y. Times Co. v. United States, 403 U.S. 713, 726-27 (1971) (Brennan, J., concurring) (stating that "only governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order").

245. See, e.g., Clark v. United States, 289 U.S. 1, 15 (1933) (discussing the crime-fraud exception to the attorney-client privilege).


247. See id.

248. See N.Y. Times Co. v. Gonzales, 382 F. Supp. 2d 457, 502 (S.D.N.Y. 2005) (stating that forty-eight states and the District of Columbia have recognized the privilege), vacated, 459 F.3d 160 (2d Cir. 2006); see also In re Grand Jury Subpoena, Judith Miller, 397 F.3d 964, 993 (D.C. Cir.) (Tatel, J., concurring) (stating that forty-nine states and the District of Columbia have recognized the privilege), cert. denied sub nom. Cooper v. United States and Miller v. United States, 125 S. Ct. 2977 (2005).

249. Gonzales, 382 F. Supp. 2d. at 504 ("[T]he near unanimous consensus of the states as to the importance of offering qualified, and in some cases absolute, protection to reporters with respect to confidential sources leads to the same conclusion as Jaffee here.").

250. See, e.g., OR. REV. STAT. § 44.520 (2005) (providing protection from being compelled to testify, as well as protection against having papers and office searched unless there is reason to suspect that the reporter has committed a crime).

251. See, e.g., FLA. STAT. ANN. § 90.5015 (West 1999) (extending a privilege "only to information or eyewitness observations obtained within the normal scope of employment").

252. CAL. CONST. art. I, § 2(b).
lege has been overcome. In states whose legislatures have not enacted shield laws, courts have taken the initiative to recognize the privilege.

Deference to states' policies was also recognized in Rule 501. The rule provides that "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law." The rationale for this was that "[f]ederal law should not supersede that of States in substantive areas such as privilege absent a compelling reason." The fact that Rule 501 affords deference to state law provides further reason for courts to look to state law to support their decisions.

When states recognize a privilege that is not recognized in many federal courts, or by federal law as a whole, the potential for confusion is quite high. A reporter who is using a confidential source may not know whether the relationship will be protected under state law, or unprotected under federal law. This kind of inconsistency, particularly when it is present across the country, indicates that the issue needs to be addressed—especially when the consequences include jail time.

IV. IMPACT

_in re Grand Jury Subpoena_ and _Gonzales_ only exacerbated the confusion about the reporter's privilege caused by the combination of the open-ended nature of Rule 501, the variety of state shield laws, and

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253. See, e.g., _GA. CODE ANN._ § 24-9-30 (1999) (stating that the privilege can be overcome when the information "(1) [i]s material and relevant; (2) [c]annot be reasonably obtained by alternative means; and (3) [i]s necessary to the proper preparation or presentation of the case of a party seeking the information, document, or item").

254. _See Gonzales_, 382 F. Supp. 2d at 502 n.36 (collecting cases).

255. _FED. R. EVID._ 501.


257. _See Brief Amici Curiae of the States of Oklahoma et al. in Support of Petitioners at_ *3, _Miller v. United States_, 125 S. Ct. 2977 (2005) (Nos. 04-1507, 04-1508), 2005 WL 1317523 ("Uncertainty and confusion ... have marked this area of the law in the three decades that have passed since this Court decided Branzburg [sic] and the Congress enacted Rule 501 of the Federal Rules of Evidence.").

258. _Id._ at *2–3 ("A federal policy that allows journalists to be imprisoned for engaging in the same conduct that these State privileges encourage and protect 'buck[s] file clear policy of virtually all states' and undermines both the purpose of the shield laws, and the policy determinations of the State courts and legislatures that adopted them." (alteration in original) (citation omitted)).

259. Don Van Natta Jr., _et al._, _The Miller Case: A Notebook, a Cause, a Jail Cell and a Deal_, _N.Y. TIMES_, Oct. 16, 2005, at A1 (stating that Miller "spent 85 days in jail").
the disparate interpretations of *Branzburg*. *In re Grand Jury Subpoena*, in particular, provided no standard for lower courts to apply, and set forth at least three different perspectives on the issue.\textsuperscript{260} *Gonzales* created a clear rule that was consistent with Rule 501 and *Jaffee*, but lacks power to change the law in this area because it is only a district court decision. The polarity of the decisions will further confuse those who may be affected by the existence, or lack thereof, of a reporter's privilege. This confusion will lead to the erosion of the press by taking away one of the reporter's most important sources of information—the confidential source.\textsuperscript{261} The reporter's profession will change, and the press will no longer be able to fulfill its fundamental purpose of providing information to the public.\textsuperscript{262} The most appropriate solution to these problems is for the Supreme Court to address the issue and recognize a federal reporter's privilege.\textsuperscript{263} This action would erase the inconsistency and clarify the state of affairs for reporters and confidential sources alike.

**A. Confidential Sources Will Vanish**

One result of the unclear decision handed down by the D.C. Circuit is also a theme of this Comment: without the reporter's privilege, the sources that reporters rely on so heavily will begin to vanish.\textsuperscript{264} The high publicity surrounding *In re Grand Jury Subpoena*, in particular, will begin to have that effect, because reporters and sources are now clearly aware that their relationship could result in jail time if the material shared is sufficiently sensitive.\textsuperscript{265} At this point, at least one Bush Administration official has lost his job and is facing jail time,\textsuperscript{266} and Fitzgerald has yet to rule out the possibility that more indictments may be handed down.\textsuperscript{267} To all potential confidential sources, this

\textsuperscript{260}. See supra notes 86–120.

\textsuperscript{261}. See infra notes 264–267.

\textsuperscript{262}. See infra notes 268–272.

\textsuperscript{263}. See infra notes 273–282.

\textsuperscript{264}. See, e.g., Jeffrey S. Nestler, Comment, *The Underprivileged Profession: The Case for Supreme Court Recognition of the Journalist's Privilege*, 154 U. PA. L. REV. 201, 250 (2005) (discussing studies which "have shown that news informants are dissuaded from divulging information to reporters, and that reporters are less likely to pursue such stories, if there is not a high degree of certainty that the confidentiality cannot be pierced").

\textsuperscript{265}. The news of Miller being jailed for refusing to name her source, and the indictment of Libby after she finally did, was all over the media. As of September 6, 2006, a search of the Westlaw news database for "Judith Miller" and "C.I.A." turned up 3677 documents while a search for "Judith Miller" and "Libby" turned up 7587 documents.


\textsuperscript{267}. After indicting Libby, special prosecutor Patrick Fitzgerald continued his investigation, which seemed centered on political strategist Karl Rove. *See* Jim VandeHei & Carol D. Leon-
sends a clear message—speak to reporters at your own risk. No amount of talking or speculating could send a more clearly stated message. Even though the Southern District of New York protected the relationship between reporters and their sources, it is not sufficient to quell the concerns that In re Grand Jury Subpoena created.

B. The Reporters' Profession Will Change

The obvious impact on the reporters' profession is that reporters may have to devise new methods for getting their story. If, as this Comment suggests, the number of individuals willing to serve as confidential sources diminishes due to a fear that their identity will not be protected, then reporters will have to alter their research methods. Given the perception that confidential sources are in some instances unreliable, this may not seem like a bad thing. In many situations, however, the confidential source provides information which enriches and develops a story beyond what the reporter would have been able to do on his own.

Watergate provides a good example. It was clear that something was amiss in the Nixon White House after the break-in at the Democratic National Committee headquarters on June 17, 1972, but without the help of Mark Felt—also known as Deep Throat—Bob Woodward and Carl Bernstein never would have discovered everything they did. Felt's involvement started with simply "confirming or denying confidential information for the reporter[s]," but soon he "began providing leads and outlining an administration-sanctioned conspiracy." Felt "lived in solitary dread, under the constant threat of being summarily fired or even indicted." Therefore, the most important part of the relationship between Woodward, Bernstein, and Felt was the agreement of confidentiality. Without the help of Felt, or another feasible way to obtain the information, Woodward and Bern-
stein would have been left at a standstill. That paralysis is precisely what reporters face today. Without the protection of a privilege, reporters will be unable to promise anonymity to their sources. If the sources will no longer talk, then the reporters will have to change their approach and face the fact that they will no longer be able to get the information they need to write complete stories.

C. The Supreme Court Should Recognize a Federal Privilege

The solution this Comment proposes is federal recognition of the privileged relationship between reporters and their confidential sources in most situations. This proposal recognizes that privileges, especially absolute privileges, "interfere[] with the fair administration of justice."273 The most important function of the recognized privilege is that it would provide predictability to both the reporter and to the source about when their communication would or would not be protected.274 By providing some kind of parameters for the relationship, sources will still feel free to share information with reporters without fearing disclosure, and the reporters will feel free to discuss the information with the sources without fear of being placed in jail.

The question then becomes whether the privilege should be created by a federal statute or whether the Supreme Court should simply grant certiorari in one of the cases and recognize the privilege. There are arguments in favor of both approaches. Some have argued that a federal statute is more appropriate for this task.275 The argument is that the privilege is substantive law, which "entails the weighing of competing policy interests,"276 and that this is a legislative function, not a judicial one.277 Congress has tried in the past

273. deRoos Rood & Grossman, supra note 6, at 805.
274. Id. at 803.
275. Id. at 782 ("It is important that the legislature and not the judiciary establish this privilege.").
276. Id.
277. Id. There is also a question of whether the court has the power to create federal common law. Federal common law may be defined as "any federal rule of decision that is not mandated on the face of some authoritative federal text." Thomas W. Merrill, The Common Law Powers of Federal Courts, 52 U. Chi. L. Rev. 1, 5 (1985) (emphasis omitted). Rule 501 does not declare that a privilege exists, but it does direct that courts should decide whether a privilege exists. Court-created common law raises concerns of federalism, separation of powers, and electoral accountability. Id. at 13–17. However, when Congress has expressly delegated lawmaker authority to the courts, and the "delegation has taken place with enough specificity to notify the states and electorally accountable bodies about the sorts of issues as to which lawmakers authority has been transferred to federal courts," then the court may permissibly create the law without crossing any barriers. Id. at 42. Rule 501 is an example of a permissive delegation of lawmaker authority because "[t]he intent to delegate is unmistakable, and the area of testimonial privilege
to enact a federal reporter’s privilege statute but failed for various reasons.\textsuperscript{278}

This Comment, however, takes the position that Supreme Court recognition of the privilege would be more appropriate than a congressionally created federal statute. In creating Rule 501, Congress delegated the power to create new privileges to the courts rather than keeping that power for itself.\textsuperscript{279} That decision was based in part on the fact that Congress believed that the law of privilege should be given space to develop and therefore should be created on a case-by-case basis, which is more the province of courts.\textsuperscript{280} Rule 501 instructed that the rules of privilege should “be governed by the principles of the common law \textit{as they may be interpreted by the courts of the United States} in the light of reason and experience.”\textsuperscript{281} Given that delegation of power to the courts, it would seem contradictory for Congress to now take on a question of privilege and create a new rule. Further, the Supreme Court has in the past used Rule 501 to recognize new privileges.\textsuperscript{282} Clearly, the procedure created in Rule 501 works; there is no reason for Congress to take the issue away from the Court.

\section*{V. Conclusion}

The Supreme Court denied certiorari in \textit{In re Grand Jury Subpoena.}\textsuperscript{283} Considering the ramifications of the D.C. Circuit’s decision, and the highly controversial nature of the matter, this was a mistake.

\begin{footnotesize}
\begin{enumerate}
\item 278. See deRoos Rood & Grossman, supra note 6, at 794-95 (discussing a bill which was proposed the day after \textit{Branzburg} was decided). Twenty-eight privilege bills were introduced that year, with twenty-four following the next year. \textit{Id}. Some of the reasons that those bills were not passed include dwindling press support after it became clear the privilege would not be absolute, the appearance that the courts would read \textit{Branzburg} liberally to find a qualified privilege, new restraint seen coming from the prosecutor’s office, and the fact that the Watergate scandal took Congress’s attention away from enacting a privilege. \textit{Id}.

279. See Nestler, supra note 264, at 253; see also Miller, supra note 20, at 774-75 (“Congress declared that the development of privilege law should not be codified by the legislature, but instead should be continually developed and modified by the courts.”).

280. See S. REP. No. 93-1277, at 13 (1974), as reprinted in 1974 U.S.C.C.A.N. 7051, 7059 (“[O]ur action should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case-by-case basis.”).


\end{enumerate}
\end{footnotesize}
One must assume that the Court had reasons for deciding not to grant certiorari, though we may never know what they were.

The Second Circuit decided the Gonzales appeal on August 1, 2006.\(^{284}\) Unfortunately, the Second Circuit, like the D.C. Circuit in \textit{In re Grand Jury Subpoena}, decided that any privilege that would be recognized would be overcome on the facts presented, and therefore "[t] [w]as] unnecessary . . . to rule on whether such a privilege exist[ed] under Rule 501."\(^{285}\) Hopefully, the \textit{New York Times} will petition for a writ of certiorari, and the Supreme Court will not make the same mistake twice.

This Comment has highlighted the policy concerns which must be taken into account when considering the common-law reporter's privilege. Most important among these concerns is the need for clarity, so reporters and their sources will be aware of the consequences of their actions. There is clearly disagreement among the courts about the proper approach to analyzing the issue; the best way to address that is for the Supreme Court to grant certiorari and recognize a common-law reporter's privilege.

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\footnotesize{\(^{284}\) N.Y. Times Co. v. Gonzales, 459 F.3d 160, 169 (2d Cir. 2006).  
\(^{285}\) Like Judge Tatel, Judge Robert Sack filed a dissent explaining why the privilege should be recognized. \textit{See id.} at 174–89 (Sack, J., dissenting).  
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