

**THE FEDERAL COMMON LAW OF JOURNALISTS' PRIVILEGE:
A POSITION PAPER**

BY COMMITTEE ON COMMUNICATIONS & MEDIA LAW

I. INTRODUCTION

In *Branzburg v. Hayes*, 408 U.S. 665 (1972), the Supreme Court declined to quash a number of subpoenas that had been issued to journalists by grand juries. Whether in doing so the *Branzburg* Court rejected any First Amendment privilege for journalists, or actually recognized a general First Amendment protection for newsgathering that had been overcome by the specific circumstances before the Court, is an issue that has been debated in court opinions ever since. Compare, e.g., *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981) (finding First Amendment protection of newsgathering), with, e.g., *In re Grand Jury Proceedings (Storer Communications, Inc. v. Giovan)*, 810 F.2d 580 (6th Cir. 1987) (rejecting any First Amendment privilege). Regardless of any uncertainty about its recognition of a constitutional privilege, however, *Branzburg* plainly poses no obstacle to judicial recognition of a federal common law privilege for journalists under Rule 501 of the Federal Rules of Evidence, and such a privilege should plainly be recognized.

In declining to quash the subpoenas then before the Court, the *Branzburg* majority contemplated other measures to protect the confidentiality of journalists' sources:

At the federal level, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed

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necessary to deal with the evil discerned and, equally important, to refashion those rules as experience may from time to time dictate.

Id. at 706. Congress did exactly this in 1975. At that time it rejected nine enumerated privileges that had been proposed to become part of the Federal Rules of Evidence, and directed the courts instead to create a federal common law of privilege. *See* Federal Rule of Evidence 501.

Congress rejected the draft rules defining certain specific privileges because they would limit the flexibility of the courts, drew privilege lines too rigidly and too narrowly, and, the legislative history shows, because certain privileges were left out, including the journalists' privilege. (See Section IIIA, below.)

Notwithstanding the concern of both the Court and Congress to protect, in some situations, the confidential sources of journalists, a recent unprecedented rise in the number of subpoenas addressed to journalists has been met by some federal courts with disturbing new rulings rejecting altogether the notion of *any* privilege—constitutional or common law—protecting journalists and their confidential sources. *E.g., In re Special Counsel Investigation*, Misc. No. 04-407 (TFH) (D.D.C. Sept. 9, 2004) (subpoena to Judith Miller of The New York Times); *In re Special Counsel Investigation*, 332 F. Supp. 2d 26 (D.D.C. 2004) (subpoenas to Matthew Cooper of Time Magazine and Tim Russert of NBC News); *Lee v. United States Department of Justice*, 287 F. Supp. 2d 15 (D.D.C. 2003) (subpoenas to five different journalists). These courts have turned away from decades of precedent finding a qualified First Amendment privilege for newsgathering necessarily contained within Justice Powell's concurring opinion in *Branzburg*, and reinterpret *Branzburg* to preclude any First Amendment protection at all for a journalist called before a grand jury, absent a prosecutor's abuse of the grand jury process. *E.g., In re Special Counsel Investigation*, 332 F. Supp. 2d 26. One court has gone further still, holding that *Branzburg* also precludes the recognition of a common law

journalists' privilege because the *Branzburg* Court weighed the competing societal values at issue when a reporter's confidential source information is sought by a grand jury, and found the need for protection lacking. *In re Special Counsel Investigation*, Misc. No. 04-407 (TFH).

The Committee believes these recent rulings misread *Branzburg* and misapply the relevant law. If followed by other courts, these rulings could cause serious, long-term damage to the ability of the press to report on important issues concerning our government and other powerful institutions in our society. Particularly given the federal government's recent, more expansive use of press subpoenas as an investigatory tool,¹ the federal courts should adopt a journalists' privilege as a matter of federal common law.

II. BRANZBURG AND THE DEVELOPMENT OF FIRST AMENDMENT PRIVILEGE

A. The Supreme Court's Decision in *Branzburg v. Hayes*

In *Branzburg v. Hayes*, the Supreme Court was faced with claims from three journalists who had been subpoenaed to reveal confidential information and, in some instances, sources before state and federal grand juries investigating possible criminal activity including synthesizing of hashish, conversations with drug users, and observations by a reporter of events at Black Panther headquarters incident to civil unrest in the surrounding neighborhood, and information held by another reporter concerning the aims, purposes, and activities of the Black Panthers. (Only the last involved a federal grand jury; the others were Massachusetts and Kentucky grand juries). 408 U.S. 665. In each instance, the journalist had claimed a privilege under the First Amendment to the United States Constitution not to appear or answer questions

¹ E.g., Scott Shane, *Anthrax Figure Wins Round on News Sources*, NEW YORK TIMES, Oct. 22, 2004 (reports that as a precursor to subpoenas of the press, the Justice Department required dozens of investigators to sign waivers in the 2001 anthrax case); Adam Liptak, *Times Sues Prosecutor on Phone Records*, NEW YORK TIMES, Sept. 29, 2004, at 19 (reporters' telephone records subpoenaed in a Muslim charity investigation).

concerning confidential information or confidential sources. The majority opinion declined to quash the subpoenas on that ground, with a concurring opinion by Justice Powell (necessary to make up the five justice majority) setting out the limits of the Court's ruling. *Id.*

One significant aspect of the Court's opinion in *Branzburg* is the prudential reasons why the Court was reluctant to adopt a federal constitutional privilege. *Id.* at 703-09. In describing the various issues that the courts would have to resolve if the Court adopted a constitutional privilege, the Court observed that the courts would become involved in legislative judgments outside the tasks of judges – “not to make the law, but to uphold it in accordance with their oaths.” *Id.* at 706. The Court stated that Congress was free to determine whether a statutory newsman's privilege is necessary and desirable and said, “There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas.” *Id.*

Justice Powell, in his concurring opinion in *Branzburg*, very clearly limited the scope of the Court's opinion: he stated that “[t]he Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources.” *Id.* at 709. Justice Powell went on to say that journalists would have access to the courts “where legitimate First Amendment interests require protections.” *Id.* at 710.

B. Development of the First Amendment Privilege Post-*Branzburg*

Following the Supreme Court's decision in *Branzburg*, courts in almost every circuit around the country interpreted Justice Powell's concurrence, along with parts of the Court's opinion, to create a balancing test when faced with compulsory process for press testimony and

documents outside of the grand jury context. *E.g.*, *Bruno & Stillman, Inc. v. Globe Newspaper Corp.*, 633 F.2d 583 (1st Cir. 1980); *United States v. Burke*, 700 F.2d 70 (2d Cir. 1983); *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980); *LaRouche v. NBC*, 780 F.2d 1134 (4th Cir. 1986); *Miller v. Transamerican Press*, 621 F.2d 721 (5th Cir. 1980); *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972); *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977); *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981). In doing so, the courts relied on the strong societal interests reflected in the protection of a free press under the First Amendment.

The reasoning of the courts that have recognized such a privilege is instructive. In *Baker v. F & F Investment*, 470 F.2d 778 (2d Cir. 1972), the court relied upon the core societal values reflected by the First Amendment to find a journalists' privilege under the First Amendment: "It is axiomatic, and a principle fundamental to our constitutional way of life, that where the press remains free so too will a people remain free." *Id.* at 785. As the D.C. Circuit succinctly put it in *Zerilli*, "news gathering is essential to a free press" and

[t]he press was protected so that it could bare the secrets of government and inform the people. Without an unfettered press, citizens would be far less able to make informed political, social, and economic choices. But the press' function as a vital source of information is weakened whenever the ability of journalists to gather news is impaired.

656 F.2d at 710-11 (quoting *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring)).

Other courts, however, have read *Branzburg* more restrictively especially in the grand jury context and declined to adopt such a privilege or allowed only a very limited balancing of interests. *E.g.*, *In re Grand Jury Proceedings (Storer Communications, Inc. v. Giovan)*, 810 F.2d 580 (6th Cir. 1987); *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir 2003). In both of these cases, the

courts reasoned that special press protection was not necessary and that the general powers of the federal courts to limit abuse of compulsory process would be a sufficient safeguard.

III. ADOPTION OF RULE 501 AND RECOGNITION OF NEW PRIVILEGES UNDER *JAFFEE v. REDMOND*

A. Adoption of Rule 501

The original version of the Federal Rules of Evidence, proposed in 1972 by the Advisory Committee on Rules of Evidence and promulgated by the Supreme Court, recognized nine specific non-constitutional privileges. *See* Proposed Federal Rules of Evidence 501-510, 56 F.R.D. 183, 230-56 (1972); *see generally Trammel v. United States*, 445 U.S. 40, 47 (1980) (discussing history of Rule 501).² Public response to the proposed privilege rules resulted in unfavorable scrutiny, and its history has been widely acknowledged to be “stormy.” *See, e.g., In re Grand Jury Impaneled January 21, 1975*, 541 F.2d 373, 379 n.11 (3d Cir. 1976) (citing 2 J. Weinstein & M. Berger, EVIDENCE ¶ 501 (01) – (05) at 501-1 to 49 (1975)). In order to defuse criticism that threatened delay of implementation of the Federal Rules of Evidence or might possibly even have prevented the Rules’ passage, Congress rejected the proposed rules and instead adopted a more open-ended Rule 501 modeled after former Rule 26 of the Federal Rules of Criminal Procedure.

Rule 501 has not been altered since its original enactment. It provides as follows:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a

² The nine enumerated privileges were: (1) required reports, (2) lawyer-client, (3) psychotherapist-patient, (4) husband-wife, (5) communications to clergymen, (6) political vote, (7) trade secrets, (8) secrets of state and other official information, and (9) identity of informer. *See* Michael H. Graham, HANDBOOK OF FEDERAL EVIDENCE § 501.1 (5th ed. 2001) (“Graham, HANDBOOK OF EVIDENCE”) (citing H.R. Rep. No. 93-650 at 8 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7075, 7082 (reporting House Judiciary Committee’s recommended passage of Rules of Evidence, P.L. 93-595)).

witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, 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.

Rule 501 thus provides that “in federal criminal cases and in civil cases where federal law provides the rule of decision, privileges should continue to be developed by the courts of the United States under a uniform standard applicable both in civil and criminal cases.” Graham, HANDBOOK OF EVIDENCE § 501.1, at 642. Moreover, Rule 501’s legislative history indicates that the rule was intended, in federal question and criminal cases, to allow the law of privileges to be developed by the judiciary through resort to the “principles of the common law as . . . interpreted . . . in the light of reason and experience.” See *In re Grand Jury Impaneled January 21, 1975*, 541 F.2d at 379 (citing S. Rep. No. 93-1277 at 43 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7053-54, 7058; H.R. Rep. No. 93-650 at 72 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7075, 7082-83). See also Krattenmaker, *Interpersonal Testimonial Privileges Under the Federal Rules of Evidence: A Suggested Approach*, 64 GEO. L.J., 613, 645 (1976).

In a departure from the often murky genesis of federal legislation, Congressman William Hungate – who served as principal draftsman of the Rule – expressed a frank assessment of the underlying intentions of Congress for future generations:

The House rule on privilege is intended to leave the Federal law of privilege where we found it. The Federal courts are to develop the law of privilege on a case-by-case basis. Rule 501 is not intended to freeze the law of privilege as it now exists. The phrase ‘governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience,’ is intended to provide the courts with the flexibility to develop rules of privileges on a case-by-case basis. For example, the Supreme Court’s rule of evidence contained no rule of

privilege for a newspaperperson. The language of Rule 501 permits the courts to develop a privilege for newspaperpeople on a case-by-case basis. The language cannot be interpreted as a congressional expression in favor of having no such privilege, nor can the conference action be interpreted as denying to newspaperpeople any protection they may have from State newspaperperson's laws.

120 Cong. Rec. H 12253-54 (daily ed. Dec. 18, 1974) (explaining the final Conference Report version of the Rules).³ In one of the seminal treatises on the Federal Rules of Evidence the authors conclude that “[t]he legislative history suggests that Congress expected that Rule 501 would be used to create a privilege for newsmen.” 23 Wright & Graham, FEDERAL PRACTICE AND PROCEDURE § 5426, at 749 (1980 & Supp. 2004).

B. Judicial Recognition of Common Law Privilege After *Jaffee*

In *Jaffee v. Redmond*, 518 U.S. 1 (1996), the Supreme Court for the first time recognized a psychotherapist-patient privilege as part of the federal common law of privilege under Rule 501 and articulated the principles governing recognition of privileges under Rule 501. It recognized three considerations: (1) the significant public and private interests that would be served by any proposed privileges, (2) weighing the public and private interest to be served by and the burden on truth-seeking that might be imposed by any privilege, and (3) “reason and experience” – the breadth of recognition of any proposed privilege by the states.

The Court in *Jaffee* held that the development of a privilege under Rule 501 “may be justified . . . by a ‘public good transcending the normally predominant principle of utilizing all

³ See *Jaffee v. Redmond*, 518 U.S. 1, 7-9 (1996) (“The Senate Report accompanying the 1975 adoption of the Rules indicates that Rule 501 ‘should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship . . . should be determined on a case-by-case basis.’ S. Rep. No. 93-1277 at 13, *reprinted in* 1974 U.S.C.C.A.N. 7051, 7059. The Rule thus did not freeze the law governing the privileges of witnesses in federal trials at a particular point in our history, but rather directed federal courts to ‘continue the evolutionary development of testimonial privileges’” (citation omitted)).

rational means for ascertaining the truth.” *Id.* at 9 (quoting *Trammel*, 445 U.S. at 50) (internal quotation omitted). In other words, recognition of a privilege is justified if it “‘promotes sufficiently important interests to outweigh the need for probative evidence.’” *Id.* at 9-10 (quoting *Trammel*, 445 U.S. at 51).

The Court began its analysis of common law privilege under Rule 501 by emphasizing that, “[l]ike the spousal and attorney-client privileges, the psychotherapist-patient privilege is ‘rooted in the imperative need for confidence and trust.’” *Id.* at 10 (quoting *Trammel*, 445 U.S. at 51). “Effective psychotherapy,” the Court continued, “depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears.” *Id.* The Court pointed out that “disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace” and reasoned that “the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.” *Id.*

The Court emphasized that a confidential psychotherapist-patient relationship serves important private and public interests. It serves important private interests by protecting the interests of particular patients who might not seek treatment absent an assurance of confidentiality or who might be embarrassed or disgraced in the event confidential communications were disclosed. *Id.* at 10-11. And it serves a significant public interest insofar as it might maintain “[t]he mental health of our citizenry.” *Id.* at 11.

The Court held that these interests outweighed the need for probative evidence that might be produced absent the privilege. The Court found that “the likely evidentiary benefit that would result from the denial of the privilege is modest” because in the absence of a privilege there likely would be fewer confidential communications and thus less of the very evidence at issue.

Id. at 11-12. The Court was untroubled by some variation in the scope of the state privileges in this area. The fact that some states' privilege covered therapeutic social workers, while other states limited coverage to psychiatrists and psychologists was not a sufficient variation "in the scope of the protection" to "undermine the force of the States' unanimous judgment that some form of psychotherapist privilege is appropriate." *Id.* at 14 n.13.

Finally, the Court emphasized the consensus among the states and the District of Columbia regarding recognition of a psychotherapist-patient privilege in one form or another. "That it is appropriate for the federal courts to recognize a psychotherapist privilege under Rule 501 is confirmed by the fact that all 50 States and the District of Columbia have enacted into law some form of psychotherapist privilege." The Court looked at the language of Rule 501 that directs the federal courts to develop the law of privilege in light of "reason and experience." The Court reasoned that "the existence of a consensus among the States" about the need to recognize the privilege indicated that "'reason and experience' support recognition of the privilege." *Id.* at 13. Furthermore, where there is such a consensus, the Court concluded, the federal courts' failure to recognize a privilege would "frustrate the purposes of the state legislation that was enacted" to meet the goals of the privilege. *Id.*

IV. A REPORTER'S PRIVILEGE EXISTS UNDER THE FEDERAL COMMON LAW AND RULE 501

Principles of common law informed by "reason and experience" furnish the relevant guide for determining whether Rule 501 recognizes a reporter's privilege. History, precedent, and logic establish that the common law encompasses a privilege protecting a reporter from compelled disclosure of confidential information. *See Riley v. City of Chester*, 612 F.2d 708, 713-16 (3d Cir. 1979). In *Riley*, one of the earliest cases in which the federal courts recognized a common law privilege, the Third Circuit held that the "strong public policy which supports the

unfettered communication to the public of information, comment and opinion and the Constitutional dimension of that policy, expressly recognized in *Branzburg v. Hayes*, lead us to conclude that journalists have a federal common law privilege, albeit qualified, to refuse to divulge their sources.” *Id.* at 615; *see also Cuthbertson*, 630 F.2d 139; *In re Williams*, 766 F. Supp. 358, 367-69 (W.D. Pa. 1991) *aff’d by an equally divided en banc court*, 963 F.2d 567 (3d Cir. 1991); *Gulliver’s Periodicals, Ltd. v. Chas. Levy Circulating Co.*, 455 F. Supp. 1197, 1201 (N.D. Ill. 1978) (“[C]ourts have fashioned a testimonial privilege which inures to the benefit[] of news gatherers and enhances the free flow of information to the public at large.”).

A. *Branzburg* Is No Barrier to Recognition of Federal Common Law Privilege

As a preliminary matter, recognition of a federal common law reporter’s privilege is fully consistent with *Branzburg*. That decision held that “the public . . . has a right to every man’s evidence, except for those persons protected by a constitutional, *common law* or statutory privilege.” 408 U.S. at 688 (emphasis added; citation and internal quotation marks omitted). *Branzburg* involved only the first of those potential grounds for a reporter’s privilege and did not (because it could not) address the applicability of Rule 501, which was enacted three years later.⁴

⁴ An examination of the briefing submitted to the Court in *Branzburg* makes clear that only First Amendment issues were presented to and decided by the Court:

- I. Whether the First Amendment to the Constitution of the United States prohibits a grand jury from compelling a newspaper reporter to disclose confidential information received by him in the course of his newsgathering activities?
- II. Whether the First Amendment to the Constitution of the United States prohibits a grand jury from compelling a newspaper reporter to enter the grand jury room to respond to inquiry into confidential information received by him in the course of his newsgathering activities?

Brief for Petitioner at 3, *Branzburg v. Hayes* (No. 70-85). Indeed, the Questions Presented in the companion cases of *United States v. Caldwell* and *In re Pappas* were no different. In *Caldwell*, the Question Presented was “Whether a newspaper reporter who has published articles about an organization can properly refuse, under the First Amendment, to appear before a Grand Jury investigating possible crimes by members of that organization who have been quoted in the

Three of the four cases consolidated in *Branzburg* were on writ of certiorari to state courts, where the issue of the scope of the privilege under federal common law could not even have arisen. And, as noted above, part of the concern expressed in the opinion in *Branzburg* was that if the Court established an immutable constitutionally based privilege, Congress and the States would be unable to adapt the contours of the privilege in light of changing circumstances, reason, and experience. 408 U.S. at 706. No such conundrum is presented by recognizing a journalists' privilege under federal common law, which as the Supreme Court has stated "is not immutable but flexible, and by its own principles adapts itself to varying conditions." *Jaffee*, 518 U.S. at 8 (quoting *Funk v. United States*, 290 U.S. 371, 383 (1933)). *Branzburg* did not purport to answer, and could not have answered, the question whether the federal courts should now recognize a testimonial privilege for journalists under Rule 501.

B. The Public Interest Would Be Served by Recognition of Federal Common Law Reporters' Privilege

Applying the *Jaffee* framework, the federal common law should recognize the reporter's privilege. Such a privilege would clearly serve the public interest. *Jaffee*, 518 U.S. at 11 (quoting *Trammel*, 445 U.S. at 53); *see also United States v. Nixon*, 418 U.S. 683, 705 (1974) and noting that public interest is central to recognition of federal privilege); *Wofle v. United States*, 291 U.S. 7, 14 (1934) (same). Nearly every federal court has confirmed the "'important public interest'" in preserving the ability of reporters to keep confidential the identity of their sources. *E.g., Bruno & Stillman, Inc.*, 633 F.2d 583; *Burke*, 700 F.2d 70; *Cuthbertson*, 630 F.2d

reporter's published articles." Brief of *Amicus Curiae* Nat'l Dist. Att'ys Ass'n, *United States v. Caldwell* (No. 70-57). In *Pappas*, the Question Presented was "Whether, consistently with the First Amendment (made applicable to the states through the Fourteenth Amendment), a professional newsman may be compelled to appear and testify about what he saw and heard while at a Black Panther headquarters." Pet'n for a Writ of Certiorari at 3, *In re Pappas* (No. 70-94).

139; *LaRouche*, 780 F.2d 1134 ; *Miller*, 621 F.2d 721; *Cervantes*, 464 F.2d 986; *Farr*, 522 F.2d 464; *Silkwood*, 563 F.3d 433; *Zerilli*, 656 F.2d 705. Emphasizing those interests, courts in civil cases have rarely granted attempts to compel production of such information. As the D.C. Circuit has recognized, “[c]ompelling a reporter to disclose the identity of a source may significantly interfere with this news gathering ability,” because “journalists frequently depend on informants to gather news, and confidentiality is often essential to establishing a relationship with an informant.” *Zerilli*, 656 F.2d at 711.

Similarly, in the context of criminal litigation, courts have recognized that a journalist has a right not to testify about newsgathering activities, and in particular to avoid compelled disclosure of confidential source identity. *E.g.*, *Cuthbertson*, 630 F.2d 139. Accordingly, upon a motion to quash, these courts have typically undertaken a searching assessment of the competing interests at stake, in particular the necessity for the particular subpoena and the extent to which alternative sources that do not trench on First Amendment rights have been exhausted. Far more often than not, this review has led to the quashing of the subpoena.

The journalists’ privilege implicates values at the core of the First Amendment and therefore furthers the highest aspirations of public policy. In the constitutional scheme, “[t]he press was protected” precisely for those purposes – “so that it could bare the secrets of government and inform the people.” *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring). The Supreme Court recently reaffirmed the fundamental nature of the press freedom in our constitutional scheme in striking down as unconstitutional provisions of the Federal Wiretap Statute as they applied to publication by the press of the contents of illegally intercepted wiretaps. In *Bartnicki v. Vopper*, 532 U.S. 514, 534 (2001), the Court reiterated “our ‘profound national commitment to the principle that debate on public issues

should be uninhibited, robust and wide-open” (quoting *New York Times v. Sullivan*, 376 U.S. 254 (1964)). The press “serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were elected to serve.” *Mills v. Alabama*, 384 U.S. 214, 219 (1966). The press “has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences.” *Estes v. Texas*, 381 U.S. 532, 539 (1965).

In this time of increasing secrecy in government, *see, e.g., A Zeal for Secrecy*, The American Editor (May-June-July 2004); Bill Moyers, Speech, *Journalism Under Fire* (Society of Professional Journalists, Sept. 11, 2004), validating such substantial and direct government disruption of the journalists’ ability to keep their confidential sources confidential strikes at the heart of the newsgathering function. Indeed, there are indications that the recent high profile government activities seeking the press’s sources may already be having a negative impact on the press’ ability to report the news. *E.g., Seth Sutel, Journalists, Sources Face Legal Scrutiny*, ASSOCIATED PRESS, Oct. 24, 2004. The ability of the press to report on routine governmental functions will be severely curtailed absent an ability to protect sources, particularly given increased government secrecy on a number of fronts. In just the past few years, Attorney General John Ashcroft has reversed the previous policy on the treatment of Freedom of Information Act requests by encouraging the rejection of such requests if there is a legal basis, with the promise to defend the rejections in court. *See Adam Clymer, Government Openness at Issue as Bush Holds on to Records*, NEW YORK TIMES, Jan. 3, 2003, at A1. Additionally, in 2001, the number of classified documents rose 18%, and since 2001, three new agencies were

given the power to classify documents. *Id.* Both Republicans and Democrats in Congress have expressed concern about such overbroad classification of documents. *Id.*

Confidential sources have played an integral role in the development of many stories of great public importance; without the ability of reporters to use these types of sources, many stories would have gone unreported. Many examples could be provided of newspaper stories made possible only through unnamed sources. Here are just a few that demonstrate the importance of confidential sources to the news we all rely upon:

After trouble getting access to public documents, information from valuable confidential sources led to the reporting of a scandal that resulted in the head of a top engineering firm pleading guilty to fraud -- a scandal that would have been buried without the media attention. Brendan Lyons, *Laberge Admits Role in Bribery Case*, ALBANY TIMES UNION, Oct. 14, 2004, at A1.

Sealed court documents, tape recordings, and other materials provided confidentially led to a series of stories concerning world-class athletes' use of illegal drugs, including one world-record sprinter admitting to a grand jury that he used performance-enhancing drugs. Mark Fainaru-Wada and Lance Williams, *Sprinter Admitted Use of BALCO 'Magic Potion'*, SAN FRANCISCO CHRONICLE, June 24, 2004.

Brock Adams, the powerful U.S. Senator, was exposed as a rapist - a story in which the victims would not have told their stories without confidentiality, *see* Eric Nadler, *et al.*, *Accusers Glad Adams Out of Race*, SEATTLE TIMES, Mar. 2, 1992, at A4; Editorial, *'Brock's Problem' - A Final, Sad Chapter to 31-Year Public Career*, SEATTLE TIMES, Mar. 2, 1986, at A6; Susan Gilmore, *et al.*, *8 More Women Accuse Adams - Allegations of Two Decades of Sexual Harassment, Abuse - And a Rape*, SEATTLE TIMES, Mar. 1, 1992, at A1; Michael Fancher, *A Story That Had To Be Told*, SEATTLE TIMES, Mar. 1, 1992, at A1; Susan Gilmore, *et al.*, *Why Women Are Reluctant to Accuse Powerful Men - Therapist: 'We Live In a Culture That Stigmatizes Victims,'* SEATTLE TIMES, Mar. 1, 1992, at A4.

A jury convicted the former county executive of Albany County on six felony counts after a series of articles alleging kickbacks and payoffs, all of which were sparked by a tip from a confidential source. *See* Greg B. Smith, *A Civic Center Contractor is Said to Talk of Payoffs*, ALBANY TIMES UNION, MAY 7, 1989, at A1; Michael McKeon, *Kickback Inquiry Sought*, ALBANY TIMES UNION, May 8, 1989, at A1; Kenneth C. Crowe II & Michael McKeon, *Coyne Denies Payoffs*, ALBANY TIMES UNION, May 9, 1989, at A1; John Caher,

Second Time Around: Coyne Guilty on 6 Counts, ALBANY TIMES UNION, August 6, 1992 at A1.

In Houston, a county executive announced that he would not seek re-election after the publication of a series of articles detailing allegations of misconduct made possible by various confidential sources. *See* Bob Sablatura & Andrea D. Greene, *Lindsay Scraps Re-election Plans*, HOUSTON CHRONICLE, Aug 1, 1993 at A1.

The cultural scene in upstate Saratoga was preserved after anonymous members of the board of the Saratoga Performing Arts Center confidentially revealed that financial concerns threatened the New York City Ballet's ongoing use of the Center for as its summer home. A reporter was able to break the story just hours after the board had secretly voted to end the relationship with the Ballet - and a public outcry followed. *See* Timothy Cahill, *Curtains to Close on Ballet at SPAC*, ALBANY TIMES UNION, Feb. 14, 2004, at A1; *Ballet Already Mulling Offers*, ALBANY TIMES UNION, Feb. 20, 2004, at B1.

Three prominent trustees of a hospital board resigned after a series of articles based on a confidential source revealed their misconduct, and the hospital was later fined \$1 million for abusing its tax exempt status. *See* Bob Sablatura, *Former Gov. White Leaves Hermann Hospital Board*, HOUSTON CHRONICLE, Jan. 1, 1992, at A1; *IRS Fines Herman \$1 Million*, HOUSTON CHRONICLE, Oct. 25, 1994, at 17A.

Major facilities at a nuclear weapons plant in Oregon were shutdown, and shutdowns of other plants around the nation soon followed, after reporting based on unnamed confidential sources -- one of whom was an inspector on contract from the U.S. Department of Energy. *See, e.g.*, Alex MacLeod, *Hanford Lies at Center of Much Larger Story*, SEATTLE TIMES, Dec. 14, 1986, at A19; Eric Nadler, *et al.*, *The Bomb Factories*, SEATTLE TIMES, Dec. 14, 1986, at B4; Eric Nadler, *Contamination Abounds at DOE's Ohio Uranium Mill*, SEATTLE TIMES, Dec. 15, 1986, at A1; Eric Nadler, *Politicians, Public Questioning Candor of Hanford Officials*, SEATTLE TIMES, Dec. 16, 1986, at A1; Eric Nadler, *Seeds of Nuclear Age May Be Bearing Bitter Fruit* SEATTLE TIMES, Dec. 15, 1986, at A11; Eric Nadler, *"Earthquake Could Topple Hanford Plant - Despite Risk, DOE Restarted*, SEATTLE TIMES, Jan. 11, 1987, at A1.

Without a reporter's ability to promise confidentiality, and keep that promise, these stories and countless others just like them that are published every day would disappear. Important information the public relies upon would simply dry up.

C. The Evidentiary Benefit Resulting from the Denial of the Reporters' Privilege is Modest

Jaffee's next factor is of limited relevance to the most recent grand jury subpoenas to journalists, but is of relevance to many more routine subpoenas for outtakes, notes and the like. *Jaffee* looked to "the likely evidentiary benefit that would result from the denial of the privilege." In the vast majority of subpoenas to the press, this evidentiary benefit is "modest" at best. *Jaffee*, 518 U.S. at 11. In *Jaffee*, the Court recognized the psychotherapist-patient privilege because

[i]f the privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled. . . . Without a privilege, much of the desirable evidence to which litigants . . . seek access . . . is unlikely to come into being. This unspoken 'evidence' will therefore serve no greater truthseeking function than if it had been spoken and privileged.

Id. at 11–12. As the courts have previously recognized, the same reasoning applies to many journalistic situations: "Unless potential sources are confident that compelled disclosure is unlikely, they will be reluctant to disclose any confidential information to reporters." *Zerilli*, 656 F.2d at 712. "As a result of this deterrence, the flow of information to the public will be diminished regardless of whether disclosure could have actually been compelled." *Id.* at 712, n.46 (internal quotation marks omitted).

Of course when the communication to the press itself is the crime being investigated, as is the case with certain of the subpoenas most recently at issue, this factor may arguably be less conducive to recognition of the journalists' privilege. But it is worth remembering in this regard that the conduct being investigated as criminal is that of the government officials, not of the press. (In fact in many of the most recent subpoenas, no articles or other information had been published by the journalist who was subpoenaed.) It is troubling that one leak investigation has resulted in at least 10 separate demands for journalists' confidential sources, although the exact

number cannot be known because of grand jury secrecy. Obviously, this kind of investigation could be subject to abuse and might be seen, rightly or wrongly, as reflecting intent to punish the press for its reporting.

D. Most Importantly, a Majority of States Have Recognized a Reporters' Privilege

The strongest and clearest expression of the public interest in confidentiality of source identity is reflected in the law of the vast majority of American jurisdictions. There is an overwhelming consensus among the States that “reason and experience” favor the protection of a reporter’s confidential sources. The vast majority of the States, as well as the District of Columbia, have now established some form of reporter’s privilege. At least 30 jurisdictions have done so through statute.⁵ And at least 14 more states have recognized the privilege through judicial decision.⁶ “It is of no consequence that recognition of the privilege in the vast majority of States is the product of legislative action rather than judicial decision. Although common law

⁵ Ala. Code § 12-21-142; Alaska Stat. § 09.25.300 *et seq.*; Ariz. Rev. Stat. Ann. § 12-2237; Ark. Code Ann. § 16-85-510; Cal. Const. Art I, § 2(b); Cal. Evid. Code § 1070; Colo. Rev. Stat §§ 13-90-119, 24-72.5-101 *et seq.*; Del. Code. Ann. Tit. 10, §§ 4320 *et seq.*; D.C. Code §§ 16-4701 *et seq.*; Fla. Stat. § 90.5015; Ga. Code Ann. § 24-9-30; 735 Ill. Comp. Stat. 5/8-901 *et seq.*; Ind. Code Ann. § 34-46-4-2; Ky. Rev. Stat. Ann. § 421.100; La. Rev. Stat. Ann. § 45:1451 *et seq.*; Md. Code Ann. Cts. & Jud. Proc. § 9-112; Mich. Comp. Laws § 767.5a; Minn. Stat. §§ 595.021 *et seq.*; Mont. Code Ann. §§ 26-1-901 *et seq.*; Neb. Rev. Stat. §§ 20-144 *et seq.*; Nev. Rev. Stat. Ann. § 49.275; N.J. Stat. Ann. §§ 2A:84A-21 *et seq.*; N.M. Stat. Ann. § 38-6-7; N.Y. Civ. Rights Law § 79-h; N.D. Cent. Code § 31-01-06.2; Ohio Rev. Code. Ann. § 2739.12; Okla. Stat. Ann. Tit. 12, § 2506; Or. Rev. Stat. §§ 44.510 *et seq.*; 42 Pa. Cons. Stat. Ann. § 5942; R.I. Gen. Laws §§ 9-19.1-1 *et seq.*; S.C. Code Ann. § 19-11-100; Tenn. Code Ann. § 24-1-208.

⁶ *Connecticut State Bd. of Labor Relations v. Fagin*, 370 A.2d 1095, 1097 (Conn. Super. Ct. 1976); *State v. Salsbury*, 924 P.2d 208 (Idaho 1996); *Winegard v. Oxberger*, 258 N.W.2d 847 (Iowa 1977); *State v. Sandstrom*, 581 P.2d 812 (Kan. 1978); *In re Letellier*, 578 A.2d 722, 726 (Me. 1990); *In re John Doe Grand Jury Investigation*, 574 N.E.2d 373 (Mass. 1991); *State ex rel. Classic III v. Ely*, 954 S.W.2d 650, 653 (Mo. Ct. App. 1997); *State v. Siel*, 444 A.2d 499 (N.H. 1982); *Hopewell v. Midcontinent Broad. Corp.*, 538 N.W.2d 780, 782 (S.D. 1995); *State v. St. Peter*, 315 A.2d 254 (Vt. 1974); *Brown v. Commonwealth*, 204 S.E.2d 429 (Va. 1974); *State v. Rinaldo*, 689 P.2d 392, 395 (Wash. 1984); *State ex rel. Hudok v. Henry*, 389 S.E.2d 188, 193 (W. Va. 1989); *State v. Knops*, 183 N.W.2d 93, 98–99 (Wis. 1971).

rulings may once have been the primary source of new developments in federal privilege law, that is no longer the case.” *Jaffee*, 518 U.S. at 13. In almost all of these 44 jurisdictions, the privilege applies in the grand jury context. Over half of the state shield statutes render *absolute* a reporter’s privilege not to disclose confidential sources.⁷ And in virtually all of the remaining statutes, the standard for piercing the reporter’s privilege is a high one, requiring more than simple relevancy to the proceeding.⁸

⁷ Alabama, Arizona, California, Delaware, District of Columbia, Indiana, Kentucky, Maryland, Montana, Nebraska, Nevada, New York, Ohio, Oklahoma, Oregon, Pennsylvania.

⁸ Alaska Stat. § 09.25.310(b) (withholding of the testimony would (1) result in a miscarriage of justice or the denial of a fair trial to those who challenge the privilege; or (2) be contrary to the public interest); Ark. Code Ann. § 16-85-510 (“Before any editor, reporter, or other writer for any newspaper, periodical, or radio station, or publisher of any newspaper or periodical, or manager or owner of any radio station shall be required to disclose to any grand jury or to any other authority the source of information used as the basis for any article he may have written, published, or broadcast, it must be shown that the article was written, published, or broadcast in bad faith, with malice, and not in the interest of the public welfare.”); Colo. Rev. Stat. § 13-90-119(3) (information must be (a) “directly relevant to a substantial issue involved in the proceeding”; (b) “the news information cannot be obtained by any other reasonable means”; and (c) “a strong interest of the party seeking to subpoena the newsperson outweighs the interests under the first amendment to the United States constitution of such newsperson in not responding to a subpoena and of the general public in receiving news information.”); Fla. Stat. § 90.5015(2) (information must be “relevant and material to unresolved issues that have been raised in the proceeding for which the information is sought; (b) The information cannot be obtained from alternative sources; and (c) A compelling interest exists for requiring disclosure of the information”); Ga. Code Ann. § 24-9-30 (information must be (1) material and relevant, (2) unavailable by reasonable alternative means, and (3) necessary to the proper preparation of the case); 735 Ill. Comp. Stat. 5/8-907 (all other available sources of information have been exhausted and disclosure of the information is essential to the public interest); La. Rev. Stat. Ann. § 45:1453 (must be essential to the protection of the public interest); Mich. Comp. Laws § 767.5a (privilege absolute except for investigations of crime punishable by imprisonment for life); Minn. Stat. §§ 595.024 (there must be probable cause that the information the specific information sought (i) is clearly relevant to a gross misdemeanor or felony, (2) that the information cannot be obtained by alternative means or remedies less destructive of first amendment rights, and (3) that there is a compelling and overriding interest requiring the disclosure of the information where the disclosure is necessary to prevent injustice); N.J. Stat. Ann. §§ 2A:84A-21 *et seq.* (party seeking enforcement of subpoena must show by a preponderance of the evidence that there is a reasonable probability that the subpoenaed materials are relevant, material and necessary to the defense, that they could not be secured

This widespread state recognition of the journalist's privilege reflects the considered judgments of the states about the value of protecting journalists' ability to report on information that the government or important public figures would rather not see reported. In *Beach v. Shanley*, 62 N.Y.2d 241, 245 (1984), the court announced the broad scope of the statutory privilege:

In enacting the so-called 'Shield Law,' the Legislature expressed a policy according reporters strong protection against compulsory disclosure of their sources or information obtained in the news-gathering process. As the statute is framed, the protection is afforded notwithstanding that the information concerns criminal activity and, indeed, even when revealing the information to the reporter might itself be a criminal act.

Accord O'Neill v. Oakgrove Construction, Inc., 71 N.Y.2d 521, 528-529 (1988) (in instances not covered by the New York Shield Law, the New York Constitution creates a journalists privilege consistent the "tradition in this State of providing the broadest possible protection to 'the sensitive role of gathering and disseminating news of public events'" requiring "particular vigilance by the courts of this State in safeguarding the free press against undue interference") (citations omitted); *In re Schuman*, 114 N.J. 14 (1989); *State v. Davis*, 720 So. 2d 220 (Fla. 1998) (in construing journalists' privilege under Florida constitution and shield law, "courts must

from any less intrusive source, that the value of the material sought as it bears upon the issue of guilt or innocence outweighs the privilege against disclosure, and that the request is not overbroad, oppressive, or unreasonably burdensome); N.M. Stat. Ann. § 38-6-7 (disclosure must be essential to prevent injustice); N.D. Cent. Code § 31-01-06.2 (failure to disclose will cause miscarriage of justice); R.I. Gen. Laws § 9-19.1-3 (substantial evidence that disclosure of the information or of the source of the information is necessary to permit a criminal prosecution for the commission of a specific felony, or to prevent a threat to human life, and that the information or the source of the information is not available from other prospective witnesses); Tenn. Code Ann. § 24-1-208(c)(2) (must be shown by clear and convincing evidence that: (A) There is probable cause to believe that the person from whom the information is sought has information which is clearly relevant to a specific probable violation of law; (B) The person has demonstrated that the information sought cannot reasonably be obtained by alternative means; and (C) The person has demonstrated a compelling and overriding public interest of the people of the State of Tennessee in the information).

protect the press from government intimidation and from laws that effectively constitute a prior restraint on the publication of information”); *In re Paul*, 513 S.E.2d 219 (Ga. 1999) (“The rationale for the privilege is that ‘compelling disclosure of unpublished material or confidential sources chills the free flow of information to the public.’ News stories based on confidential sources and information enable citizens to make more informed decisions about the conduct of government and its respect for individual rights; at times the stories have aided the investigation and prosecution of organized crime and government corruption.”); *Lamberto v. Brown*, 326 N.W.2d 305, 308 (Iowa 1982) (“To override a privilege, the need for the evidence must be substantial; an individual's constitutional rights cannot be subordinated by a ‘remote, shadowy threat’ to a countervailing state interest....One of the reasons for requiring a strict showing of necessity is to avoid fishing expeditions by litigants who, in effect, seek to use reporters as investigative tools.”) (citations omitted); *In re Ridenhour*, 520 So. 2d 372 (1988) (“Consideration should also be given to the idea that the press’ most important function is to question and investigate the government. Therefore, additional weight should be given to the reporter’s interest when the information concerns his investigation of or criticism of the government”); *Diaz v. Eighth Judicial District Court*, 993 P.2d 50 (Nev. 2000) (“The policy rationale behind this privilege is to enhance the newsgathering process and to foster the free flow of information encouraged by the First Amendment to the U.S. Constitution”); *Taylor v. Miskovsky*, 640 P.2d 959 (Okla. 1981) (holding that “the information sought by Appellee was not relevant to a significant issue in the defamation action, and thus Appellant was entitled to invoke his First Amendment rights embodied in the newsman’s privilege statute”).

In addition to the overwhelming number of States that have recognized a reporter’s privilege, the protections offered by the Federal Executive Branch confirm the existence of a

consensus that journalists should be protected from being required to reveal information obtained in the course of newsgathering. The Department of Justice has adopted policy guidelines “intended to provide protection for the news media from forms of compulsory process, whether civil or criminal, which might impair the news gathering function.” 28 C.F.R. § 50.10.⁹

This national consensus is important for two reasons. First, as the Supreme Court has explained,

the policy decisions of the States bear on the question whether federal courts should recognize a new privilege or amend the coverage of an existing one. Because state legislatures are fully aware of the need to protect the integrity of the fact finding functions of their courts, the existence of a consensus among the States indicates that ‘reason and experience’ support recognition of the privilege.

Jaffee, 518 U.S. at 12–13 (citing *Trammel*, 445 U.S. at 48–50; *United States v. Gillock*, 445 U.S. 360, 368, n.8 (1980)). And second, because “any State’s promise of confidentiality would have little value if the patient were aware that the privilege would not be honored in a federal court,” “[d]enial of the federal privilege . . . would frustrate the purposes of the state legislation that was enacted to foster these confidential communications.” *Jaffee*, 518 U.S. at 13. Thus, as in *Jaffee*, the fact that the large majority of States, the District of Columbia, and the Department of Justice have established a reporter’s privilege in all litigation contexts counsels strongly in favor of

⁹ The guidelines specify that “all reasonable attempts should be made to obtain information from alternative sources before considering issuing a subpoena” and that “negotiations with the media shall be pursued in all cases in which a subpoena to a member of the news media is contemplated.” 28 C.F.R. § 50.10. Additionally, the Attorney General must authorize the subpoena, and in criminal cases, there must be reasonable grounds to believe that a crime has occurred; in civil cases, there should be reasonable ground to believe that the “information sought is essential to the successful completion of the litigation in a case of substantial importance.” *Id.* The Attorney General also must authorize the questioning of a member of the news media in relation to an offense he is suspected of committing while reporting a story, and the Attorney General must authorize any arrest warrants. *Id.* None of the regulations apply to “demands for purely commercial or financial information unrelated to the news gathering function.” *Id.*

recognizing a similar privilege under Rule 501. *Cf., Hawkins v. United States*, 358 U.S. 74 (1958) (retaining federal common law privilege because “most American states” continued to recognize it); *Atkins v. Virginia*, 536 U.S. 304, 317 (2002) (holding that the existence of similar laws in 31 states “reflects widespread judgment” about the impermissibility of the banned practice). Finally, as in *Jaffee*, “variations in the scope of the protection” are less important than the judgment of the vast majority of United States jurisdictions, as well as the Federal Executive Branch and foreign jurisdictions, “that some form of . . . privilege is appropriate.” 518 U.S. at 14 n.13.¹⁰

V. SCOPE OF RULE 501 JOURNALISTS’ PRIVILEGE

There are two levels of protection both of which are accorded to journalists under the privilege as it has been generally recognized. The first level is a qualified privilege, usually applied to nonconfidential sources and material, involving a balancing of factors by the courts to decide if disclosure is required. *E.g., In re CBS, Inc.*, 648 N.Y.S.2d 443, 443-444 (App. Div., 1st Dept. 1996) (“a qualified privilege exists as to nonconfidential materials obtained by journalists during newsgathering which may be overcome if the party seeking the disclosure makes a clear and specific showing that the three-pronged test of the statute has been met”); *In re Subpoena Duces Tecum to Mike Ayala v. Soto*, 616 N.Y.S.2d 575 (Sup. Ct. 1994) (discussing factors of

¹⁰ This established consensus in the United States is consistent with developments abroad. The European Court of Human Rights has provided reporters a high degree of protection from revealing the identity of sources and other intrusions into the newsgathering function. *See, e.g., Goodwin v. United Kingdom* (1996) 22 E.H.R.R. 123. In *Goodwin*, the European Court of Human Rights stated that “[p]rotection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest.”

balancing test). The second is an absolute privilege for confidential sources. The federal courts should adopt this two tiered approach.

According confidential sources absolute protection is in line with numerous state statutes and constitutional provisions. *See* n.8, *supra*. Moreover, as the Court explained in *Jaffee* when it explicitly rejected the lower court's adoption of only a qualified psychotherapist's privilege:

[I]f the purpose of the privilege is to be served, the participants in the confidential conversation 'must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.'

518 U.S. at 17-18 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981)). *Jaffee*'s logic applies with equal, if not greater, force to a reporter's confidential sources.

With respect to unpublished information that does not relate to the identity of a source, many state laws recognizes a *qualified* privilege, which require a court to balance competing interests on a case-by-case basis and closely resembles the familiar three-prong test adopted under the First Amendment by the D.C. Circuit in *Zerilli* and in the other circuits as well. The balancing test evaluates whether: (1) the information "is relevant to a significant legal issue"; (2) the information "could not, with due diligence, be obtained by any alternative means"; and (3) there is an "overriding public interest in the disclosure." This approach also resembles the policy endorsed by the Justice Department, and the methodology employed by state legislatures and state and federal courts throughout the country.

Finally, the privilege should be applied in the same manner irrespective of the type of proceeding at issue, be it a criminal trial, a grand jury proceeding or a civil trial. Rule 501 on its face applies to criminal and civil proceedings as well as grand juries. *Jaffee* did not distinguish between criminal and civil cases, or between criminal trials and grand jury proceedings, in

fashioning a common law psychotherapist's privilege. The District's shield law, the law of most states and the DOJ policy guideline do not make such distinctions either.¹¹ A journalist's interest

in protecting confidential sources, preventing intrusion into the editorial process, and avoiding the possibility of self-censorship created by compelled disclosure of sources and unpublished notes does not change because a case is civil or criminal.

Cuthbertson, 630 F.2d at 147.

CONCLUSION

The adoption of Rule 501, its legislative history, the policies articulated by the multiple courts that have recognized the need for protection of the newsgathering process, the *Jaffee* factors, and the broad consensus among the states, which have overwhelmingly acted to recognize a journalists' privilege, all support the recognition of a federal common law journalists' privilege. Particularly given the increased trend toward secrecy in the federal government, and the increased willingness of some federal prosecutors to seek the compelled testimony of reporters, a need exists for the federal courts to recognize and clearly articulate the scope of a federal common law privilege for journalists to protect their sources.

¹¹Like the District's statute, all of the other state shield laws by their terms apply to both criminal and civil cases, and all but two apply to grand jury proceedings. See authorities cited in note 3, *supra*; see, e.g., Ala. Code § 12-21-142 (privilege applies, among other places, "in any legal proceeding or trial, before any court or before a grand jury of any court").

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