

The Reporter's Privilege and Government Employee Confidential Sources

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In the course of gathering news, journalists frequently rely on confidential sources. Prosecutors or parties in civil litigation may [seek to compel reporters](#) to reveal these confidential sources through subpoenas for testimony or documents. Reporters have at times argued that such requests violate their [First Amendment](#) rights by burdening the news gathering and reporting process. The Supreme Court has addressed this argument once, in its 1972 opinion [Branzburg v. Hayes](#), in which the Court held that the First Amendment does not guarantee journalists absolute immunity from providing evidence to the government in a grand jury proceeding. Since *Branzburg*, [many lower federal courts](#) have recognized a qualified constitutional privilege, known as the reporter's privilege, that allows members of the press a right to keep their sources confidential in the face of legal proceedings. [Most states](#) have enacted statutes that codify some protection for journalists against compelled production of sources, but such statutes might not apply in federal litigation, and the scope of the protections varies from state to state. The scope of the reporter's privilege depends on the jurisdiction as well as the type and circumstances of the relevant subpoena. (This report uses the terms "reporter" and "journalist" interchangeably as the privilege, if it exists at all, likely applies to both groups.)

In 2025 and 2026, the U.S. Department of Justice (DOJ) has [reportedly](#) subpoenaed several journalists (including from the [Washington Post](#), the [Wall Street Journal](#), and the [New York Times](#)) to testify before grand juries regarding their confidential sources for certain reporting related to national security, in an attempt to identify government employees who allegedly leaked information to the press in violation of federal law. Reportedly, the DOJ withdrew the subpoenas in [June 2026](#) and [July 2026](#) after they were challenged by the news organizations. The development may raise questions for federal policymakers on how to examine the tension between permitting federal prosecutors to investigate and prosecute government employees who have violated the law by leaking classified or sensitive information and safeguarding the freedom and independence of the press.

This Legal Sidebar provides a summary of the Supreme Court's holding in *Branzburg v. Hayes* and an overview of lower court opinions applying *Branzburg* in various contexts. It then summarizes two federal appellate opinions in which the courts considered the scope of the reporter's privilege with respect to investigations into government officials or employees who allegedly leaked confidential information to the press. The Legal Sidebar concludes with some considerations for Congress. A [separate Legal Sidebar](#) discusses Fourth Amendment protections related to searches and seizures of news media materials.

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Overview of *Branzburg v. Hayes*

The Supreme Court addressed the existence of a First Amendment-based reporter's privilege in *Branzburg v. Hayes*. In that opinion, the Supreme Court recognized that “news gathering” qualifies for some First Amendment protection. Though the Court has only addressed the privilege protecting reporters from providing evidence in response to a subpoena in *Branzburg*, in other cases it has delineated the protections—or lack thereof—afforded reporters and newspapers by the Free Speech and Free Press Clauses of the First Amendment. For example, the Court has cited the Free Speech and Free Press Clauses when requiring heightened constitutional scrutiny before allowing limitations on or punishments for newspapers sharing information. At the same time, the Court has held in a number of cases that the Free Press Clause does not grant reporters special immunity from complying with generally applicable laws (i.e., contract laws, copyright laws) solely on the grounds that those laws might affect news gathering.

In *Branzburg*, the Court considered whether the government could compel journalists to testify before a grand jury about alleged crimes that the journalists had witnessed. A 5-4 majority of the Justices determined that there is no constitutional privilege that allows journalists to refuse to testify about confidential sources in a criminal grand jury proceeding. In its reasoning, the Court emphasized that the First Amendment does not grant the press “special immunity from the application of general laws” and also recognized the “high place” the grand jury holds “as an instrument of justice.” The Court weighed the strength of the First Amendment interests, but concluded there was insufficient evidence that any “inhibiting effects” of allowing subpoenas in criminal cases would lead to “significant constriction of the flow of news to the public.” It therefore concluded that reporters could be subject to grand jury subpoenas on the same terms as ordinary citizens.

Justice Powell joined the majority opinion, but wrote separately to emphasize “the limited nature” of the holding and to make clear that journalists were not “without constitutional rights” when called to testify before a grand jury. In his concurrence, Justice Powell argued that a privilege exempting a reporter from being compelled to testify might be available “if the newsmen is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that this testimony implicates confidential source relationships without a legitimate need of law enforcement.” In these circumstances, Powell argued that a reviewing court could engage in a balancing of the competing interests. Four Justices dissented from the majority's opinion, writing that they would not have compelled the journalists to testify.

The Reporter's Privilege and Lower Courts

Since *Branzburg*, various jurisdictions have interpreted the opinion differently and have thus developed different approaches to applying the privilege. At least one federal court of appeals has interpreted the *Branzburg* majority opinion to foreclose the existence of any reporter's privilege at all under the First Amendment. This position is the minority view. Most circuits (including the Second, Third, Fourth, Fifth, Ninth, Tenth, Eleventh, and D.C. Circuits) have recognized some qualified First Amendment reporter's privilege, interpreting *Branzburg* to either “recognize[] some First Amendment protection of news sources” or at least to not preclude application of a limited privilege in certain contexts. Specifically, some of these courts only recognize the existence of the privilege in civil litigation, while others recognize the privilege in both civil and criminal matters. No circuit appears to recognize a reporter's privilege in the context squarely at issue in *Branzburg* (i.e., compelled testimony before a grand jury), at least unless the subpoena was issued in bad faith. Courts that have recognized the privilege have typically employed a balancing test to decide when to mandate disclosure, weighing factors that may include the press's need to protect its sources, the relevance of the information being sought by the government, the strength of the government's interest in obtaining that information, and whether the information is

available through other, less intrusive means. Some [courts](#) have based this balancing test on the approach described in Justice Powell’s *Branzburg* concurrence.

Most federal appellate courts that recognize the reporter’s privilege describe it as originating from the First Amendment, but at least [one federal appellate court](#) has described the privilege as also deriving from federal common law (i.e., rules originating in federal court jurisprudence as opposed to the Constitution or a statute). The scope of what is protected by the reporter’s privilege also varies across jurisdictions. In those courts that have recognized a qualified reporter’s privilege, the qualified privilege has [generally been held](#) to apply to the identity of a confidential source. Other [courts](#) have applied the privilege to protect both confidential sources and other confidential information. While the privilege has generally applied to traditional journalists, some courts have also applied the reporter’s privilege to others—such as [book authors](#), [academics](#), or [authors of newsletters](#)—in certain circumstances.

Grand Juries Investigating Disclosures by Government Employees

At least [two](#) appellate [courts](#) considered whether journalists can invoke a First Amendment or common law privilege to shield themselves from revealing their sources in response to subpoenas investigating unauthorized disclosures by government employees. While the courts both held that the First Amendment privilege does not apply, the judges disagreed on whether a common law privilege offers any protection in this context, determining instead that any common law privilege would be overcome on the respective facts.

In re Grand Jury Subpoena, Judith Miller

In 2006, the D.C. Circuit considered whether the reporter’s privilege shields reporters from complying with grand jury subpoenas seeking, among other things, the identity of government officials who allegedly leaked confidential information to the press in *In re Grand Jury Subpoena, Judith Miller*. In that case, the three-judge panel issued four opinions—a majority opinion and three separate concurrences—on the question of whether the reporter’s privilege protected the journalists from divulging their confidential sources. The case [involved](#) several grand jury subpoenas issued to news media organizations and journalists who had publicly revealed the identity of a U.S. Central Intelligence Agency (CIA) operative in an article. The subpoenas [sought](#) the identity of the “two senior administration officials” who allegedly committed a crime by disclosing this information to the media. The reporters [refused](#) to comply with the grand jury subpoenas, and the district court held them in civil contempt.

The majority opinion, which was joined by two out of the three panelists, held that *Branzburg* [clearly foreclosed](#) any First Amendment privilege protecting confidential sources or information in a grand jury proceeding. The majority also considered whether a federal common law privilege protected the journalists from disclosing the confidential sources, and [concluded](#) that even if there was any such common law privilege (a point on which the judges disagreed), it had been [overcome](#) in this case. In the [first concurrence](#), one of the judges opined that, in the grand jury context, there is no federal common law privilege for reporters. The [second judge](#) wrote separately to emphasize “adherence to the principle of judicial restraint,” or the idea that the court should not determine whether a common law privilege exists because the panel could resolve the case without doing so. The third judge [opined](#) that a qualified common law privilege protects reporters in the grand jury context, and that it might protect confidential sources “were the leak at issue either less harmful or more newsworthy” than the leak at issue here. Although the third judge did not join the majority opinion, he concurred in the judgment because he thought that the privilege would have been overcome in this case, noting the national security interests involved and the risks to CIA operatives. The D.C. Circuit [affirmed](#) the district court orders holding the news defendants in contempt for failing to respond to the subpoenas.

New York Times v. Gonzalez

Also in 2006, the U.S. Court of Appeals for the Second Circuit [considered](#) whether reporters' phone records possessed by third party providers were shielded from a grand jury subpoena by the reporter's privilege to protect the identity of confidential sources. The phone records [were subpoenaed](#) in connection with a federal grand jury investigation seeking to identify who disclosed the government's plans to freeze the assets of two organizations suspected of funding terrorist activities to journalists at the *New York Times*. Those journalists allegedly published stories and made telephone calls to the organizations, which alerted the organizations to the government's plans before the government effected searches of the organizations, impeding the governments' searches.

The Second Circuit [determined](#) that there is no First Amendment reporter's privilege in this context because *Branzburg* is "concededly the governing precedent." The court did not determine whether a common law privilege existed, instead [deciding](#) that any such privilege "would be a qualified one" and "would be overcome as a matter of law on these facts." When weighing whether the privilege would be overcome, the court [noted](#) the "serious law enforcement concerns" involved and the government's "compelling interest in maintaining the secrecy of imminent asset freezes" so that the targets cannot hide assets. The court [emphasized](#) that this holding was "limited to the facts . . . namely the disclosures of upcoming asset freezes/searches and informing the targets of them."

One judge dissented, [opining](#) in part that the government did not demonstrate that the common law privilege was overcome. The dissenting judge [opined](#) that the traditional qualified privilege analysis must be revised for "leak" investigations to account for the fact that, unlike in a typical criminal investigation, the reporter is not merely a repository for information but likely an eyewitness to the alleged crime, and therefore a prosecutor too often would be able to make a showing that the information is necessary and not obtainable from other available sources. According to the [dissent](#), this does "not strike a proper balance between the needs of law enforcement and of the press because, typically, it strikes no balance at all." The dissent therefore [stated](#) that overcoming the qualified privilege in the "leak" context requires a showing that nondisclosure would be "contrary to the public interest, taking into account both the public interest in compelling disclosure and the public interest in newsgathering and maintaining a free flow of information to citizens," in addition to showing that the information is necessary and not obtainable from other sources.

Because the majority determined that any privilege was overcome on the facts of this case, the court [vacated](#) the district court's declaration that the disclosure of records was barred by the common law and First Amendment reporter's privilege.

Considerations for Congress

The decisions in *In re Grand Jury Subpoena*, *Judith Miller* and *New York Times v. Gonzalez* demonstrate that *Branzburg* did not conclusively resolve questions regarding the existence, scope, and nature of the reporter's privilege. Courts, such as the D.C. Circuit and Second Circuit, likely will continue to face questions on the scope of the reporter's privilege, whether under the common law or the First Amendment.

In addition to the First Amendment and common law, a statute may be the source of a reporter's privilege. Indeed, most states have enacted statutes, known as shield laws, that codify some protection for journalists in the face of a subpoena seeking confidential information. The scope of shield laws varies by state, with [some state statutes](#) providing reporters with an absolute privilege from divulging confidential sources, while [other state statutes](#) provide more limited protection. These state shield laws would generally apply in state court proceedings and in certain federal proceedings, depending on how the federal court has [jurisdiction](#) over the case. For example, if the court has [diversity jurisdiction](#) over the

case—meaning the parties are from different states and the amount in controversy exceeds a certain amount—the substantive law of the state applies and may allow a journalist to invoke the protections of a state shield law. If the court has [federal question jurisdiction](#) over the case—meaning it is in federal court due to a question of federal law—then the court generally applies federal law, and the state shield law protections likely may not be invoked by the journalist. Although Congress has not passed a federal shield law, Members have expressed interest in creating a federal reporter’s privilege since at least the 1970s. In recent years, federal policymakers have introduced bills (e.g. [S. 2074](#) and [H.R. 4250](#) in the 118th Congress, [H.R. 4382](#) in the 115th Congress) that would have codified a privilege protecting journalists from disclosing confidential information pursuant to a subpoena under certain circumstances.

Congress may consider codifying a privilege for reporters through legislation to create a federal shield law. A federal shield law may provide some uniformity in federal courts with respect to what protections journalists receive when subpoenaed. Although the First Amendment may impose some limits on Congress’s power to legislate, Congress may define that privilege broadly or narrowly when weighing competing interests of the press, civil litigants, federal prosecutors, and the public. A broad reporter’s privilege would facilitate journalists’ reporting on issues of public concern without government interference. If journalists are required to turn over confidential sources, there may be a [chilling effect](#) on their ability to gather and report on important news because individuals may not be willing to speak with reporters. On the other hand, in the grand jury context, a narrower privilege would [facilitate federal criminal investigations](#). Specifically, as the privilege pertains to government employees as confidential sources, a narrow privilege would disincentivize government employees from divulging confidential, privileged, or sensitive information to the press. Congress may also continue to allow the courts to determine what protection reporters have from compulsory process under the First Amendment and the common law.

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