[NSL p. 1309. Insert at the end of Note 6.]

United States v. Sterling

United States Court of Appeals, Fourth Circuit, July 19, 2013
--- F.3d ---, 2013 WL 3770692

[Jeffrey Sterling was a CIA case officer with a top secret security clearance, assigned to a highly classified program intended to impede Iran's efforts to acquire or develop nuclear weapons ("Classified Program No. 1"). Sterling also served as the case officer for a covert asset ("Human Asset No. 1") who was assisting the CIA with this program.

After unsuccessfully suing the CIA twice for employment discrimination, Sterling met with staff of the Senate Select Committee on Intelligence ("SSCI"), raised concerns about the CIA's handling of Classified Program No. 1 and "threatened to go to the press," although it was unclear whether he was referring to the program or his lawsuits. He then called *New York Times* reporter James Risen seven times and emailed him, referencing an article from CNN's website entitled, "Report: Iran has 'extremely advanced' nuclear program," and asking, "quite interesting, don't you think? All the more reason to wonder . . . ."

Risen subsequently warned the Administration that he intended to publish an article about Classified Program No. 1. In response, senior administration officials met with Risen and *Times* officials, after which the *Times* advised the administration that the newspaper would not publish the story.

Subsequently, Sterling allegedly telephoned and emailed Risen on multiple occasions, and the emails revealed that Sterling and Risen were meeting and exchanging information. Risen then published a book, *State of War: The Secret History of the CIA and the Bush Administration* ("*State of War*"), which disclosed classified information about Classified Program No. 1, which he described as a "failed attempt by the CIA to have a former Russian scientist provide flawed nuclear weapon blueprints to Iran."

Sterling was thereafter indicted on six counts of unauthorized retention and communication of national defense information in violation of the Espionage Act, 18 U.S.C. §793(d) & (e), and other provisions. When the government subpoenaed Risen seeking testimony about the identity of and statements by his source, Risen moved to quash the subpoena and for a protective order, asserting that he was protected from compelled testimony by the First Amendment or, in the alternative, by a federal common-law reporter's privilege.]

TRAXLER, Chief Judge, writing for the court on [the First Amendment and reporter's privilege claims]:

II. *The Reporter's Privilege Claim . . .*

B. *The First Amendment Claim*

1.

There is no First Amendment testimonial privilege, absolute or qualified, that protects a reporter from being compelled to testify by the prosecution or the defense in criminal proceedings about criminal conduct that the reporter personally witnessed or participated in, absent a showing of bad faith, harassment, or other such non-legitimate motive, even though the reporter promised

confidentiality to his source. In *Branzburg v. Hayes,* 408 U.S. 665 (1972), the Supreme Court "in no uncertain terms rejected the existence of such a privilege." *In re Grand Jury Subpoena, Judith Miller,* 438 F.3d 1141, 1146 (D.C. Cir. 2006).

Like Risen, the *Branzburg* reporters were subpoenaed to testify regarding their personal knowledge of criminal activity. One reporter was subpoenaed to testify regarding his observations of persons synthesizing hashish and smoking marijuana; two others were subpoenaed to testify regarding their observations of suspected criminal activities of the Black Panther Party. All resisted on the ground that they possessed a qualified privilege against being "forced either to appear or to testify before a grand jury or at trial." . . .

. . . [T]he Court proceeded to unequivocally reject [their claim]. Noting "the longstanding principle that the public . . . has a right to every man's evidence, except for those persons protected by a constitutional, common-law, or statutory privilege," *id.* at 688, the Court held as follows:

> Until now the only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against compelled self-incrimination. We are asked to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. *This we decline to do.*

Id. at 689-90 (emphasis added).

The First Amendment claim in *Branzburg* was grounded in the same argument offered by Risen — that the absence of such a qualified privilege would chill the future newsgathering abilities of the press, to the detriment of the free flow of information to the public. And the *Branzburg* claim, too, was supported by affidavits and amicus curiae memoranda from journalists claiming that their news sources and news reporting would be adversely impacted if reporters were required to testify about confidential relationships. However, the *Branzburg* Court rejected that rationale as inappropriate in criminal proceedings:

> The preference for anonymity of . . . confidential informants *involved in actual criminal conduct* is presumably a product of their desire to escape criminal prosecution, [but] this preference, while understandable, is hardly deserving of constitutional protection. It would be frivolous to assert — and no one does in these cases — that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws. Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news. Neither is immune, on First Amendment grounds, from testifying against the other, before the grand jury or at a criminal trial.

Id. at 691 (emphasis added). . . .

Although the Court soundly rejected a First Amendment privilege in criminal proceedings, the Court did observe, in the concluding paragraph of its analysis, that the press would not be wholly without protection:

> [N]ews gathering is not without its First Amendment protections, and grand jury investigations if *instituted or conducted other than in good faith,* would pose wholly different issues for resolution under the First Amendment. *Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification.*

Id. at 707-08 (majority opinion) (emphasis added). This is the holding of *Branzburg,* and the Supreme Court has never varied from it. . . .

. . . The *Branzburg* Court considered the arguments we consider today, balanced the respective interests of the press and the public in newsgathering and in prosecuting crimes, and held that, so long as the subpoena is issued in good faith and is based on a legitimate need of law enforcement, the government need not make any special showing to obtain evidence of criminal conduct from a reporter in a criminal proceeding. The reporter must appear and give testimony just as every other citizen must. We are not at liberty to conclude otherwise. . . .

3.

Like the *Branzburg* reporters, Risen has "direct information . . . concerning the commission of serious crimes." *Branzburg,* 408 U.S. at 709. Indeed, he can provide the *only* first-hand account of the commission of a most serious crime indicted by the grand jury — the illegal disclosure of classified, national security information by one who was entrusted by our government to protect national security, but who is charged with having endangered it instead. The subpoena for Risen's testimony was not issued in bad faith or for the purposes of harassment. *See id.* at 707-08. Risen is not being "called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation," and there is no "reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement." *Id.* at 710 (Powell, J., concurring). Nor is the government attempting to "annex" Risen as its "investigative arm." *Id.* at 709. Rather, the government seeks to compel evidence that Risen alone possesses — evidence that goes to the heart of the prosecution.

The controlling majority opinion in *Branzburg* and our decision in [*In re Shain*, 978 F.2d 850 (4th Cir. 1992)] preclude Risen's claim to a First Amendment reporter's privilege that would permit him to resist the legitimate, good faith subpoena issued to him. The only constitutional, testimonial privilege that Risen was entitled to invoke was the Fifth Amendment privilege against self-incrimination, but he has been granted immunity from prosecution for his potential exposure to criminal liability. . . .

III. *The Common-Law Privilege Claim*

Risen next argues that, even if *Branzburg* prohibits our recognition of a First Amendment privilege, we should recognize a qualified, federal common-law reporter's privilege protecting confidential sources. We decline to do so.

A.

In the course of rejecting the First Amendment claim in *Branzburg,* the Supreme Court also plainly observed that the common law recognized no such testimonial privilege:

> It is thus not surprising that the great weight of authority is that newsmen are not exempt from the normal duty of appearing before a grand jury and answering questions relevant to a criminal investigation. At common law, courts consistently refused to recognize the existence of any privilege authorizing a newsman to refuse to reveal confidential information to a grand jury.

Branzburg, 408 U.S. at 685; *see also Judith Miller*, 438 F.3d at 1154 (Sentelle, J., concurring)

(*Branzburg* is "as dispositive of the question of common law privilege as it is of a First Amendment privilege").

B.

Risen does not take issue with the clarity of *Branzburg's* statements regarding the state of the common law. Rather, he argues that Federal Rule of Evidence 501 . . . grants us authority to reconsider the question and now grant the privilege. We disagree.

Federal Rule of Evidence 501, in its current form, provides that:

> [t]he common law — *as interpreted by United States courts in the light of reason and experience* — governs a claim of privilege unless [the United States Constitution, a federal statute, or the rules prescribed by the Supreme Court] provide[ ] otherwise.

Fed. R. Evid. 501 (emphasis added). . . .

"In . . . enacting Rule 501, Congress manifested an affirmative intention not to freeze the law of privilege," but "rather . . . to provide the courts with the flexibility to develop rules of privilege on a case-by-case basis." *Trammel v. United States,* 445 U.S. 40, 47 (1980). Rule 501 thus leaves the door open for courts to adopt new common-law privileges, and modify existing ones, in appropriate cases. But nothing in Rule 501 or its legislative history authorizes federal courts to ignore existing Supreme Court precedent. . . .

Here, "[t]he Supreme Court has rejected a common law privilege for reporters" and "that rejection stands unless and until the Supreme Court itself overrules that part of *Branzburg." Judith Miller,* 438 F.3d at 1155 (Sentelle, J., concurring). Just as the Supreme Court must determine whether a First Amendment reporter's privilege should exist, *see Judith Miller,* 438 U.S. at 1166 (Tatel, J., concurring), "only the [Supreme Court] and not this one . . . may act upon th[e] argument" that a federal common-law privilege should now be recognized under Rule 501, *id.* at 1155 n.3 (Sentelle, J., concurring).

C.

Even if we were at liberty to reconsider the existence of a common-law reporter's privilege under Rule 501, we would decline to do so.

. . . [T]he federal courts' latitude for adopting evidentiary privileges under Rule 501 remains quite narrow indeed. Because they "contravene the fundamental principle that the public has a right to every man's evidence," *University of Pa.* [*v. EEOC,* 493 U.S. 182 (1990),] at 189, such privileges "are not lightly created nor expansively construed, for they are in derogation of the search for truth," [*United States v. Nixon,* 418 U.S. 683 (1974),] at 710. "When considering whether to recognize a privilege, a court must begin with 'the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule." *Virmani v. Novant Health Inc.,* 259 F.3d 284, 287 (4th Cir. 2001). New or expanded privileges "may be recognized 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'" [*United States v. Dunford,* 148 F.3d 385 (4th Cir. 1998),] at 391 (quoting *Trammel,* 445 U.S. at 50).

Risen contends that the public and private [interests] recognizing a reporter's privilege "are

surely as significant [as the] public interest at stake in patient and psychotherapist communication." But we see several critical distinctions.

1.

First, unlike in the case of the spousal, attorney-client, and psychotherapist-patient privileges that have been recognized, the reporter-source privilege does not share the same relational privacy interests or ultimate goal. The recognized privileges promote the public's interest in full and frank communications between persons in special relationships by protecting the confidentiality of their private communications. A reporter's privilege might also promote free and full discussion between a reporter and his source, but Risen does not seek to protect from public disclosure the "confidential communications" made to him. Risen *published* information conveyed to him by his source or sources. His primary goal is to protect the *identity* of the person or persons who communicated with him because their communications violated federal, criminal laws. In sum, beyond the shared complaint that communications might be chilled in the absence of a testimonial privilege, Risen's proffered rationale for protecting his sources shares little in common with the privileges historically recognized in the common law and developed under Rule 501. . . .

We are admonished that refusal to provide a First Amendment reporter's privilege will undermine the freedom of the press to collect and disseminate news. But this is not the lesson history teaches us. As noted previously, the common law recognized no such privilege, and the constitutional argument was not even asserted until 1958. From the beginning of our country the press has operated without constitutional protection for press informants, and the press has flourished. The existing constitutional rules have not been a serious obstacle to either the development or retention of confidential news sources by the press.

Branzburg also weighed the public interest in newsgathering against the public's interest in enforcing its criminal laws:

> More important, it is obvious that agreements to conceal information relevant to commission of crime have very little to recommend them from the standpoint of public policy. Historically, the common law recognized a duty to raise the "hue and cry" and report felonies to the authorities. Misprison of a felony — that is, the concealment of a felony "which a man knows, but never assented to . . . [so as to become] either principal or accessory," 4 W. Blackstone, Commentaries, was often said to be a common-law crime. . . . It is apparent from [the federal statute defining the crime of misprison], as well as from our history and that of England, that concealment of crime and agreements to do so are not looked upon with favor. Such conduct deserves no encomium, and we decline now to afford it First Amendment protection. . . .

[408 U.S.] at 695-97.

We fail to see how these policy considerations would differ in a Rule 501 analysis. . . .

2.

Risen's reliance upon state statutes and decisions that have adopted a reporter's shield also fails to persuade us that we can or should create a federal common-law privilege. . . .

[The opinion of GREGORY, Circuit Judge, writing for the court on the admission of testimony from two government witnesses and on the withholding of witness information under the Classified Information Procedures Act, is omitted].

GREGORY, Circuit Judge, dissenting as to [the existence of a reporter's privilege]: . . .

A.

The freedom of the press is one of our Constitution's most important and salutary contributions to human history. *See* U.S. Const. amend. I ("Congress shall make no law ... abridging the freedom of speech, or of the press [.]"). Reporters are "viewed 'as surrogates for the public,'" *United States v. Criden,* 633 F.2d 346, 355 (3d Cir. 1980) (quoting *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 573 (1980)), who act in the public interest by uncovering wrongdoing by business and government alike. Democracy without information about the activities of the government is hardly a democracy. The press provides "a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve." *Mills v. Alabama,* 384 U.S. 214, 219 (1966). A citizen's right to vote, our most basic democratic principle, is rendered meaningless if the ruling government is not subjected to a free press's "organized, expert scrutiny of government." Justice Potter Stewart, *Or of the Press,* 26 Hastings L.J. 631, 634 (1975).

The protection of confidential sources is "necessary to ensure a free and vital press, without which an open and democratic society would be impossible to maintain." *Ashcraft v. Conoco, Inc.,* 218 F.3d 282, 287 (4th Cir. 2000). If reporters are compelled to divulge their confidential sources, "the free flow of newsworthy information would be restrained and the public's understanding of important issues and events would be hampered in ways inconsistent with a healthy republic." *Id.*

Yet if a free press is a necessary condition of a vibrant democracy, it nevertheless has its limits. "[T]he reporter's privilege . . . is not absolute and will be overcome whenever society's need for the confidential information in question outweighs the intrusion on the reporter's First Amendment interests." *Ashcraft,* 218 F.3d at 287. And we must be mindful of the "fundamental maxim that the public . . . has a right to every man's evidence." *Jaffee v. Redmond,* 518 U.S. 1, 9 (1996).

The public, of course, does not have a right to see all classified information held by our government. But public debate on American military and intelligence methods is a critical element of public oversight of our government. Protecting the reporter's privilege ensures the informed public discussion of important moral, legal, and strategic issues. Public debate helps our government act in accordance with our Constitution and our values. . . .

A reporter's need for keeping sources confidential is not hypothetical. . . . Scott Armstrong, executive director of the Information Trust and former *Washington Post* reporter, points to three ways in which investigative journalism uses confidential sources: "developing factual accounts and documentation unknown to the public," "tak[ing] a mix of known facts and new information and produc[ing] an interpretation previously unavailable to the public," and "publiciz[ing] information developed in government investigations that has not been known to the public and might well be suppressed." Joint App'x (J.A.) 531. "It would be rare," Armstrong asserts, "for there not to be multiple sources — including confidential sources — for news stories on highly sensitive topics." *Id.* In turn, "[m]any sources require such guarantees of confidentiality before any extensive exchange of information is permitted." J.A. 350. Such guarantees of confidentiality enable sources to discuss "sensitive matters such as major policy debates, personnel matters, investigations of improprieties, and financial and budget matters." *Id.* Even in ordinary daily reporting, confidential sources are

critical. "[O]fficial government pronouncements must be verified before they are published," and this is frequently done through discussion with officials not authorized to speak on the subject but who rely on assurances of confidentiality. J.A. 352. These discussions can often lead to "unique and relevant, contextual comments" made by the confidential source, comments that deepen the story. *Id.*

. . . [Affidavits submitted by the defendant] also recount numerous instances in which the confidentiality promised to sources was integral to a reporter's development of major stories critical to informing the public of the government's actions. *See, e.g.,* J.A. 378-80 (affidavit of Dana Priest) (noting, among many stories, her reporting on the existence and treatment of military prisoners at Guantanamo Bay, Cuba; the abuse of prisoners in Abu Ghraib, Iraq; the existence of secret CIA prisons in Eastern Europe; and the "systematic lack of adequate care" for veterans at Walter Reed Army Medical Center relied upon confidential sources). Carl Bernstein, who has worked for the *Washington Post* and ABC News, writes that without his confidential source known as "Deep Throat," the investigation into the Watergate scandal — the break-in of the Democratic National Committee's offices in the Watergate Hotel and Office Building that led to the resignation of President Nixon — would never have been possible. J.A. 361-62. "Total and absolute confidentiality" was essential for Bernstein to cultivate the source. J.A. 362. . . .

B.

Any consideration of the reporter's privilege must start with *Branzburg,* where the Supreme Court upheld, by a vote of five to four, the compulsion of confidential source information from reporters. *Branzburg v. Hayes,* 408 U.S. 665 (1972). . . . The opinion also stated that "news gathering is not without its First Amendment protections," *id.* at 707, but the Court did not specify exactly what those protections might encompass, although it indicated that "[o]fficial harassment of the press" and bad faith investigations might fall within the parameters of the First Amendment's protection of reporters. *Id.* at 707-08.

Further complicating matters is Justice Powell's "enigmatic concurring opinion," *id.* at 725 (Stewart, J., dissenting), which is in part at odds with the majority opinion he joined. In the concurrence, Justice Powell emphasized "the limited nature of the Court's holding," and endorsed a balancing test, according to which "if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation," then courts should consider the applicability of the reporter's privilege on a "case-by-case basis" by "the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct." *Id.* at 709-10 (Powell, J., concurring).

The full import of Justice Powell's concurrence continues to be debated. Some analogize the *Branzburg* majority opinion to a plurality opinion, and therefore assert Justice Powell's concurrence as the narrowest opinion is controlling. Others, like my good friends in the majority, treat Justice Powell's concurrence as ancillary . . . .

Given this confusion, appellate courts have subsequently hewed closer to Justice Powell's concurrence — and Justice Stewart's dissent — than to the majority opinion, and a number of courts have since recognized a qualified reporter's privilege, often utilizing a three-part balancing test. *See, e.g., United States v. Caporale,* 806 F.2d 1487, 1504 (11th Cir. 1986) (applying the reporter's privilege in the criminal context); *United States v. Burke,* 700 F.2d 70, 76-77 (2d Cir. 1983) (recognizing the qualified privilege in criminal cases); *Zerilli v. Smith,* 656 F.2d 705, 711-13 (D.C. Cir. 1981) (applying the reporter's privilege in a civil case). Indeed, a mere five years after *Branzburg,* a federal court of appeals confidently asserted that the existence of a qualified reporter's

privilege was "no longer in doubt." *Silkwood v. Kerr-McGee Corp.,* 563 F.2d 433, 437 (10th Cir. 1977). In short, Justice Powell's concurrence and the subsequent appellate history have made the lessons of *Branzburg* about as clear as mud.

The Fourth Circuit, like our sister circuits, has applied Justice Powell's balancing test in analyzing whether to apply a reporter's privilege to quash subpoenas seeking confidential source information from reporters. We first explicitly adopted Justice Powell's balancing test in an en banc opinion in *United States v. Steelhammer,* 539 F.2d 373, 376 (4th Cir. 1976) (Winter, J., dissenting), *adopted by the court en banc,* 561 F.2d 539, 540 (4th Cir. 1977). Then in *LaRouche* [*v. National Broadcasting Co.*, 780 F.2d 1134 (4th Cir. 1986)], we applied the reporter's privilege doctrine to a civil case, again citing Justice Powell's concurrence in *Branzburg* for authority. 780 F.2d at 1139. Following the lead of the Fifth Circuit, we applied a three-part test to help us balance the interests at stake in determining whether the reporter's privilege should be applied; that is, we considered "(1) whether the information is relevant, (2) whether the information can be obtained by alternative means, and (3) whether there is a compelling interest in the information." *Id.* . . .

In a subsequent case in the criminal context, *In re Shain,* four reporters in South Carolina asserted the reporter's privilege to protect information gleaned from interviews with a state legislator. 978 F.2d 850, 851-52 (4th Cir.1992). But applying Justice Powell's principles, we rejected the reporters' claim on the ground that none of the reporters asserted that the interviews were confidential, that there were agreements to refuse revealing the identity of the interviewee, or that the government sought to harass the reporters. *Id.* at 853. Thus, although the reporter's privilege was not recognized in "the circumstances of this case," *see id.* at 854, it is clear to me that we have acknowledged that a reporter's privilege attaches in criminal proceedings given the right circumstances.

The most recent federal appellate court decision to address the reporter's privilege at length is *In re Grand Jury Subpoena, Judith Miller,* 438 F.3d 1141, 1145-49 (D.C. Cir. 2006). In that case, the court rejected the reporter's privilege claim asserted by Judith Miller of *The New York Times,* stating that the *Branzburg* decision was dispositive. The majority there — as in this case — reasoned that the Supreme Court had not revisited the question of a reporter's privilege under the First Amendment after *Branzburg,* and that Justice Powell's concurrence did not detract from the precedential weight of the majority's conclusion that there was no First Amendment reporter's privilege, at least when there was no suggestion that the reporter was being pressed for information as a means of harassment or intimidation. *Id.* at 1145-49. In a thoughtful concurrence, though, Judge Tatel pointed to the ambiguities of the *Branzburg* decision, and noted that nearly every state and the District of Columbia has recognized a reporter's privilege. Nevertheless, Judge Tatel concluded that "if *Branzburg* is to be limited or distinguished in the circumstances of this case, we must leave that task to the Supreme Court." *Id.* at 1166 (Tatel, J., concurring). And although he felt constrained to deny applying a First Amendment privilege, Judge Tatel would have held that Rule 501 of the Federal Rules of Evidence provides for a reporter's privilege (though on the facts of that case, the privilege would have given way due to the extraordinary national security issue involved). *See id.* at 1177-78 (Tatel, J ., concurring).

C.

. . . Are there circumstances in which a reporter may refuse to testify as to the identity of one of his confidential sources, when the government seeks this information as part of a criminal investigation, and there is no evidence of prosecutorial bad faith or harassment? Some appellate

courts have used a three-part test, essentially identical to the test we announced in *LaRouche* in the civil context, to help determine whether to apply the reporter's privilege in criminal cases. They require the moving party, i.e. the government, "to make a clear and specific showing" that the subpoenaed information is "highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources." [*United States v. Burke,* 700 F.2d 70 (2d Cir.1983),] at 77.

I, too, would recognize a qualified reporter's privilege in the criminal context, and evaluate the privilege using the three-part test enunciated in *LaRouche* as an "aid" to help "balance the interests involved." 780 F.2d at 1139. I would add a caveat to this general rule, however; in cases involving questions of national security, *if* the three-part *LaRouche* test is satisfied in favor of the reporter's privilege, I would require consideration of two additional factors: the harm caused by the public dissemination of the information, and the newsworthiness of the information conveyed. . . .

D.

[Here Judge Gregory reviews the record to conclude that the *LaRouche* test, augmented by his two additional factors, is satisfied.] . . .

E.

Even if I were not inclined to recognize a First Amendment privilege for a reporter in the criminal context given *Branzburg,* I would recognize a common law privilege protecting a reporter's sources pursuant to Federal Rule of Evidence 501. . . . In light of *Branzburg's* insistence that "Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned," 408 U.S. at 706, a full discussion of the reporter's privilege must reckon with Rule 501. . . .

The Supreme Court has stated that "the policy decisions of the States bear on the question [of] whether federal courts should recognize a new privilege or amend coverage of an existing one," and "[i]t 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." [*Jaffee,* 518 U.S.] at 12-13. When the *Branzburg* decision issued, only seventeen states had recognized some protection for a reporter regarding his or her confidential sources. Today, only one state, Wyoming, has not enacted or adopted a reporter's privilege. Thirty-nine states and the District of Columbia have shield laws for reporters, whether those shields are absolute or qualified. In ten states without statutory shield laws, the privilege has been recognized in some form or another by the courts. . . . The landscape in regards to the reporter's privilege has changed drastically since *Branzburg.* The unanimity of the States compels my conclusion that Rule 501 calls for a reporter's privilege. . . .