



THE TRUTH ABOUT MEDIA SUBPOENAS

BY RONNELL ANDERSEN JONES

As a legislative tug-of-war between the Justice Department and the media enters a new era, a recent BYU study on subpoena frequency promises to inform the shield law debate.

In the early days of his presidency, Barack Obama's pen may well sign into law a number of significant pieces of legislation. If journalist organizations have their way, among the bills that cross his desk will be one that enacts a federal reporter's privilege giving members of the mainstream media a right to refuse to reveal certain information when subpoenaed to do so.



After several years of fits and starts on Capitol Hill—and a threatened veto from former president George W. Bush—some members of the media hope that Obama's apparent support of the privilege will mean that this will be the year that the legislative hope becomes a reality.

Depending on which version of the facts one believes, the federal shield law would either promote the free flow of information in a wide variety of situations or be a waste of legislative effort—"a solution in search of a problem."¹ Unfortunately, though, it has been nearly impossible to know which is the case.

On the one hand, journalists across the country have testified that they have witnessed an alarming trend—an "avalanche" of recent cases in which members of the media have faced subpoenas seeking material they do not believe they should be compelled to provide. They report great concern at a perceived change in legal climate and have contended that subpoenas are on the increase and that federal subpoenas in particular present an ever-growing threat to important journalism in the public interest.²

On the other hand, deputy attorneys general also have taken the stand at legislative hearings, and their testimony is in entire disagreement with that of the journalists. The avalanche, they have said, is imaginary—built of rhetoric and fear generated from a handful of exceptionally high-profile cases in which reporters from large national news media asserted a reporter's privilege in response to subpoenas and lost. In reality, they say, reporters are being subpoenaed only rarely, in numbers and scope not warranting any major federal legislation. Standing in ardent opposition to every proposed federal shield law in the last generation, Justice Department officials have insisted that internal departmental guidelines are sufficient to ensure that reporters will not face subpoenas with any meaningful frequency. Recently they have testified that, under these guidelines, the department has "approved subpoenas to the media seeking source-related information in only 19 cases since 1991," only four of which "have occurred since 2001"³—an empirical assessment that seems to stand in stark contrast to the reporters' tales of a deluge of subpoenas.

In the end, however, neither the media's testimony of the avalanche nor the Department

of Justice's testimony claiming undue alarm is very useful. The former is almost entirely anecdotal. The latter has cited only data narrowly focused on confidential-source materials and the prosecutorial setting—essentially responding to journalists' claims about an orchard of apples with an assertion about a carton of oranges. The number of subpoenas the Department of Justice cites does not include, for example, subpoenas from special prosecutors, who have been the sources of the highest-profile media subpoenas in recent history, and does not include subpoenas issued in a wide variety of civil settings or those that seek something other than completely confidential material. In short, the two sides of the debate are speaking past one another in ways that have proven wholly unhelpful.

Indeed, for more than 30 years, the legislative battle over the need for a federal shield law for journalists has turned largely on assertions about the frequency of media subpoenas, and yet has been fought in the absence of any useful data on the question. As hearings on Capitol Hill last year continued to reverberate with journalists' allegations of high numbers of subpoenas and Department of Justice representatives' allegations of low numbers of subpoenas, a neutral, empirical assessment of the number of subpoenas actually received by members of the mainstream press was completely missing from the dialogue.

But this year, when debate on the Hill resumes, the data will exist. An article recently published in the *Minnesota Law Review*⁴ presents the results of the 2007 Media Subpoena Survey, a nationwide survey of newspaper editors and television news directors conducted by this article's author. The survey aimed to assess the frequency and impact of media subpoenas by tallying the self-reported numbers of subpoenas received during 2006 at daily newspapers and network television news affiliates and by comparing those numbers to similar data collected before the recent spate of high-profile cases.

The survey data reveal that while the numbers of media subpoenas may not constitute an avalanche in scale, they do appear to justify federal legislation. Overall increases in subpoenas in the last five years are not as drastic as some media organizations have contended, but the number, scope, and nature of subpoenas—particularly those in federal proceedings and those related to confiden-

tial information—appear to be significantly broader than opponents have claimed, suggesting that the alarm is not entirely undue.

A Brief History of the Debate

The modern story of reporter's privilege begins with the case of *Branzburg v. Hayes*, a 1972 Supreme Court decision in which a deeply divided Court held that there was no privilege under the First Amendment for journalists to refuse to testify before a grand jury.⁵ The case launched the most remarkable legal development in the history of media law, with the creative attorneys of a then-popular press turning a losing decision into a winning line of precedent that lasted for three decades.

The Supreme Court in *Branzburg* split 5-4, or, more accurately, 4-1-4, with Justice Lewis Powell providing the critical fifth vote for the majority's denial of a constitutional privilege to reporters who had been subpoenaed to testify before grand juries. Powell did not join the plurality opinion authored by Justice Byron White, which flatly rejected the argument that the subpoenas implicated First Amendment concerns. Nor did he join the *Branzburg* dissenters, who would have recognized a qualified privilege rooted in the First Amendment.⁶ Justice Powell's brief, tie-breaking, and legendarily nebulous concurrence agreed that the petitioners were unprotected by a constitutional privilege, but emphasized the narrowness of the holding. "In short," he wrote, "the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection."⁷

Seizing upon that language, media attorneys crafted an argument that legitimate First Amendment interests required a privilege for journalists in a wide variety of cases and that *Branzburg* was limited only to its very facts: assertions of reporter's privilege in the grand jury setting. For three decades after *Branzburg*, a strong majority of state and federal courts found some form of qualified First Amendment or common-law privilege embodied in Justice Powell's concurrence. Indeed, within a decade,⁸ nearly every federal circuit had interpreted that case to give rise to some form of qualified reporter's privilege, and federal courts across the country had consistently recognized the existence of a

First Amendment–based privilege in both civil and criminal cases.

State courts followed suit in finding a qualified privilege,⁹ either as a matter of common law, or as a constitutional matter relying either on Powell's concurrence or on the reporter-friendly standards of the applicable federal circuit. Some also recognized a privilege rooted in state constitutional law.¹⁰ In spite of *Branzburg*, the privilege was alive and well.

A Recent Shift?

Notwithstanding the significant success that media attorneys had in invoking a qualified privilege after *Branzburg*, recent developments have reminded these attorneys that what the courts give, the courts may take away. In 2003 one particularly prominent federal appellate judge authored an opinion that was seen by many as marking the beginning of the end for the court-created privilege. In *McKevitt v. Pallasch*,¹¹ Judge Richard Posner roundly criticized the journalist-friendly readings of *Branzburg* adopted by courts across the country and held that a subpoena for material not obtained under a promise of confidentiality could not raise First Amendment issues.

McKevitt sent waves of fear throughout the media world, in part because it came at a time in which journalists also were taking a beating in the court of public opinion. All told, in the five-year period between 2002 and 2007, journalists in the United States faced an unprecedented spurt of exceptionally high-profile cases in which subpoenaed reporters asserted a privilege, lost their arguments, and then either relented and testified or were jailed for contempt.

The nation watched closely as Rhode Island broadcast journalist James Taricani was sentenced for contempt. He was followed by a number of reporters who were thought to have information critical to the Federal Privacy Act suits brought against the federal government by physicist Wen Ho Lee and germ-weapons expert Steven Hatfill. Likewise, great attention was given to two *San Francisco Chronicle* reporters who were believed to have knowledge about the Bay Area Laboratory Co-Operative's alleged distribution of illegal steroids to athletes. Most notoriously, *New York Times* reporter Judith Miller spent 85 days in jail in 2005 for refusing to reveal the "senior [Bush] administration officials" who had outed covert



CIA agent Valerie Plame to her and to other reporters from national news organizations.

The Push for a Federal Shield Law

Statements of media advocates that are peppered throughout the coverage of these high-profile cases, coupled with the strong assertions of reporters' advocacy groups in the ongoing legislative debates, strongly suggest that journalists now believe that this string of cases adversely affected their legal climate. Journalists believe that prosecutors and civil litigants now feel much more comfortable subpoenaing the press. The conventional wisdom holds that attorneys who would not have subpoenaed the press five years ago now view a media subpoena as both more socially acceptable and more likely to be legally permissible.

The inevitable consequence of this emboldening, journalists suggest, is an increase in media subpoenas. The consequence of this uptick, they continue, is a change for the worse in the practices of American journalism. Not only are subpoenas believed to divert time and energy from news gathering, they also are said to deter good reporting. The theory is that reporters who feel threatened by subpoenas and the real possibility of jail time or substantial individual fines for noncompliance shy away from stories that might give rise to subpoenas—especially those involving confidential sources, who expect them to go to jail or pay the fines rather than revealing their identities.¹² Meanwhile, sources who see that journalists increasingly lose subpoena battles are increasingly unwilling to speak on condition of confidentiality. In either instance, the result is a

[Whether] reporters . . . shy away from stories that might give rise to subpoenas, [or] sources . . . are increasingly unwilling to speak, . . . the result is a chilling of the free press and a hampering of the ability to uncover important stories in the public interest.

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Supporters of a shield law point to the avalanche of subpoenas and to the string of consequences arising from that avalanche as evidence that legislation is needed to protect the free flow of information. But has the avalanche really happened? Or, as the Justice Department consistently has asserted in its opposition to the shield law, is this much ado about nothing? Is the practice of subpoenaing the media widespread, or has intense publicity surrounding cases that involved mostly very large national news organizations—reporting mostly on very sensitive national security-related topics—brought about undue alarm over an issue that is limited to those kinds of organizations and those sorts of topics? The Subpoena Survey sought to investigate these

questions, and the ongoing debate over the propriety of a federal shield law provided the framework for the survey's central inquiry: Do the number, scope, and nature of media subpoenas warrant federal legislation?

Comparisons Over Time

Although no neutral academic study had been conducted on the empirical question of subpoena frequency before the Subpoena Survey, there was not a total absence of data. Before the most recent string of high-profile cases, the Reporters Committee for Freedom of the Press, a nonprofit group formed to support newspaper and television reporters, conducted six biennial surveys attempting to document the incidence of subpoenas served on the media. The final of these studies gathered data for 2001. That study's results represent a baseline of data that is ideal as to topic and timing, if imperfect as to structure or statistical significance.

The current Subpoena Survey was sent to the same population targeted by the Reporters Committee: every editor of a U.S. daily newspaper, regardless of circulation or geographic location, and every news director of a U.S. television news station affiliated with ABC, NBC, CBS, or FOX. Respondents were asked to report the number of subpoenas received during calendar year 2006. With a few nonsubstantive alterations in format, the present Subpoena Survey adopted verbatim the questions from the Reporters Committee survey.

The response rate was 38 percent. The final report included both actually reported numbers and estimated numbers for the total population, produced using statistical software that weighted actual responses by the inverse of the probability of response.

Data analysis also was performed on a group of respondents who participated in both the 2001 study and the current study. This "comparison group" analysis provided an additional mechanism for tracking numerical trends over the five-year period and for confirming apparent changes in frequency suggested by other data.

The Frequency of Media Subpoenas

With its snapshot of the national experience for a single year, the survey provides a look at both the depth and the breadth of the media

subpoena situation. The data suggest that, while the news media is not experiencing the avalanche of subpoenas that some have described, there does appear to have been some increase in subpoenas over the five-year period of the study. Among the most important findings were as follows:

- **More than 7,000 subpoenas were received by the media in a single calendar year:** The 761 responding news organizations participating in the study reported that their "reporters, editors, or other news employees" received a total of 3,062 "subpoenas seeking information or material relating to newsgathering" in calendar year 2006. Weighting responses to estimate actual values for the entire population suggests that a total of 7,244 subpoenas were received by all daily newspapers and network-affiliated television news operations in the United States that year.

- **The subpoenas were geographically dispersed:** Subpoenas were reported by media organizations in Washington, D.C., and all 49 reporting states and by newspapers of every circulation category and broadcasters in every market size.

- **The distribution of subpoenas was greater than has been indicated by shield law opponents:** An analysis of the distribution of subpoenas among media organizations shows that greater than half of the 761 responding organizations reported receiving one or more subpoenas. The vast majority of those received subpoenas in single-digit amounts, although almost 10 percent received greater than 10, and two survey respondents—both broadcasters—reported receiving more than one hundred subpoenas. The largest total number reported was 160. When responses are weighted and generalized to the entire population, the data suggest 32.1 percent of all media organizations received between 1 and 5 subpoenas, 8.0 percent received between 6 and 10, 6.3 percent received between 10 and 25, and 2.3 percent received greater than 25.

- **The risk of receiving a subpoena appears to have increased:** Newsroom leaders' responses lean heavily toward a belief that both raw numbers and subpoena risk have increased. Sixty-four percent of all newsroom leaders believe the frequency of media subpoenas to be greater than it was five years ago. Nearly half believe the risk of their own organization receiving a subpoena is greater than it was five years ago, while only 6 percent believe the risk to be less. Some rudimentary trend data

appear to support this belief. The average number of subpoenas reported per respondent in this study was 4.02. Weighted to account for nonresponses, the data suggest that the average number of subpoenas received per news organization in the United States in 2006 was 3.6. The 144 members of the comparison group reported a total of 464 subpoenas, for an average of 3.22 subpoenas per respondent. In answers to identical numerical questions asked in the Reporters Committee study five years earlier, the average number of subpoenas per respondent was 2.6.

Federal Subpoena Data

Because the recent high-profile cases and current legislative debates have been federal in their focus, the numerical portion of the survey asked respondents to categorize the received subpoenas as arising out of federal proceedings or state proceedings. Consistent with past trends, and as would be expected given the significantly larger number of state courts than federal courts, subpoenas issued in connection with state proceedings greatly outnumbered those issued in connection with federal proceedings. However, analysis of the survey data suggests that federal subpoenas may be both more frequent than they were five years ago and more common than opponents of a federal shield law have suggested.

Ninety-one responding media organizations reported receiving one or more federal subpoenas in calendar year 2006. Sixteen organizations reported receiving five or more. All told, in actual numbers from the 38 percent of the nation's media outlets that responded to the survey, there were a reported 335 federal subpoenas issued in 2006. (Because an additional 529 reported subpoenas were not specified as either federal or state, the true number of federal subpoenas may well be even greater.) Sixty-four federal subpoenas were reported by newspapers; 271 were reported by television broadcasters. Extrapolating to the larger population, the statistically weighted data suggest that at least 774 federal subpoenas were issued to the press in 2006—132 to newspapers and 642 to television news operations.

• **Substantially greater numbers of federal subpoenas are being reported than were reported five years ago:** While the overall numbers do not seem monumental, they rep-

resent a notable increase in reported federal subpoenas. Nearly twice as many federal subpoenas per respondent were reported in the current survey than in the 2001 study. Moreover, the survey results and respondent commentary indicate that federal subpoenas in the United States are having an increasing impact on newsroom practices across the country and are casting a wider net than the high-profile media organizations involved in the recently publicized cases. Weighted responses suggest that 10.3 percent of all media organizations in the country received at least one federal subpoena in 2006.

• **Federal subpoenas are not limited to the largest media:** To be sure, larger media organizations face federal subpoenas with much greater frequency. Close to 70 percent of the federal subpoenas reported by newspapers were reported by the one hundred largest of the more than 1,400 daily newspapers in the country, and more than half of the federal subpoenas issued to broadcasters were issued to those in markets of one million households or more. But federal subpoenas were not exclusive to those major news outlets. Midsized organizations are receiving them with some regularity. Nearly 10 percent of newspapers with circulations between 50,000 and 100,000 received a federal subpoena in 2006; so did more than 20 percent of television newsrooms in markets of between 250,000 and 500,000 households. In all, federal subpoenas were issued to media organizations in 32 states and the District of Columbia and to newspapers and television news outlets in every circulation and market size.

• **The substance of federal subpoenas is greatly varied:** Beyond the high-profile national security stories and governmental leaks that result in Privacy Act cases—the stuff of which the recent headlines were made—media organizations in the United States report facing federal subpoenas related to immigration matters, employment discrimination suits, the prosecution of federal drug crimes, securities cases, civil rights actions, and even civil suits arising out of automobile accidents that took place in Washington, D.C. If 2006 is a representative year, it would appear that reporters and their organizations are spending time, energy, and money dealing with subpoenas in a wide variety of federal cases and that a federal shield law—even one with a strong national security exception—could

be expected to have a meaningful impact upon journalism.

• **The Department of Justice's subpoena activity may be greater than has been suggested:** Survey respondents were given the option of specifying the kind of proceeding in which the subpoena arose and the entity that issued the subpoena. A total of 160 federal subpoenas were specified as having arisen in connection with federal criminal matters. Of those, 78 were reported to have been issued by federal prosecutors, 3 by special prosecutors, 60 by defense attorneys, and 1 by federal law enforcement. These raw number totals, if weighted to account for nonresponses, suggest that *at least* 175 subpoenas were issued by the Department of Justice's Criminal Division in calendar year 2006 alone—a number that sheds greater light on the activity of the department than does the Justice Department's narrow testimony that the division has “approved subpoenas to the media seeking source-related information in only 19 cases since 1991,” only 4 of which “have occurred since 2001.”¹⁴

Subpoenas for Confidential Material

Another clear trend appearing in the data relates to subpoenas seeking confidential material.

• **The results suggest a dramatic increase since 2001 in reported subpoenas seeking material that a reporter obtained under a promise of confidentiality:** The Reporters Committee 2001 study indicated that just two of the 823 reported subpoenas in that survey had demanded the identity of a confidential source and that four had requested other information obtained under a promise of confidentiality, for a total of just six instances of subpoenas seeking confidential material. These subpoenas represented well under 1 percent of the total subpoenas reported. In contrast, respondents in the present survey reported 97 instances in which subpoenas sought information obtained under a promise of confidentiality. Although the percentage of total subpoenas seeking this information remains small, this number represents a more than four-fold increase from 2001 in the percentage of requests for confidential material.

Extrapolating with weighted values to account for nonresponses, the current data suggest there were a total of 213 instances in



which confidential information was sought in media subpoenas in calendar year 2006 alone, 92 of which sought the name of a confidential source. The conclusion that confidential-material subpoena requests have increased is further supported by an analysis of the comparison group. These 144 respondents, who represent just 45 percent of the participants of the 2001 study, report a total of 19 instances in which subpoenas sought confidential material in 2006—more than three times as many as were reported by the full 319 respondents in the earlier study.

• **Confidential-material subpoenas are a particular concern on a federal level:** It is worth noting that while federal subpoenas represent only about 10 percent of the total reported subpoenas, federal subpoenas seeking the names of confidential sources represent nearly 50 percent of the total subpoenas seeking the names of confidential sources, meaning reporters are facing this situation in federal courts as often as they are facing it in the state courts of all 50 states, where even the barest of reporter's privilege regimes provide a privilege for material obtained under a promise of confidentiality.

• **Federal subpoenas seeking confidential material were received by news organizations outside the major national media:** Demographic data gathered in connection with the numerical responses show that recipients of this kind of subpoena included, for example, midsize television news operations, 50,000-circulation newspapers, and media organizations in Georgia, Colorado, Kentucky, and Arizona—all of which, again, suggests that a federal shield law's protection would serve journalists nationally, and not merely the handful of top-tier news organizations that have been involved in the highest profile cases in recent years.

• **The data on confidential-material subpoenas suggest that these subpoenas are more widespread than has been reported:** These numbers, representing a single calendar year, stand in stark contrast to the 19 incidents in the past 15 years in which the Department of Justice's Criminal Division reports it has sought source-related information—particularly because a large percentage of federal subpoenas appear to have arisen in the criminal setting. At a minimum the numbers indicate that the incidence of federal subpoenas in general and federal subpoenas seeking source-

related material in particular may not be as rare as opponents of a shield law suggest.

• **Journalists fear an impact on news gathering:** In response to open-ended questions, survey respondents told of a noticeable uptick in subpoenas seeking confidential material and of a concomitant increase in time, resources, and money spent dealing with them. If confidential sources can be integral to the acquisition of the news—as courts,¹⁵ commentators,¹⁶ and legislators¹⁷ routinely have recognized—these trends may be cause for concern. If the press needs to utilize confidential sources and information in order to act as a watchdog of government, or if, as many within the industry have suggested, it is only by making meaningful connections with the most significant confidential sources that investigative reporters are able to uncover governmental wrongdoing and produce stories that serve the public interest, then an increase in confidential-material subpoenas might signal a trend warranting legislative remedy.

Citing major historical examples like Watergate and more recent examples like the stories exposing Abu Ghraib misdeeds, and revealing mismanagement at Walter Reed Hospital, journalists have argued that major stories come to the public attention only when confidential sources talk to reporters. Even while agreeing that credibility dictates that confidential information be used with great caution, many argue that it is critically important to preserve the freedom to use it. Although some have contended that the ongoing ability of the media to produce these major investigative pieces—all in the absence of a federal shield law—suggests that the legal climate is not unduly oppressive and that the federal legislation is unnecessary,¹⁸ the data pointing to an increase in confidential-material subpoenas remain notable, in that even the most limited of state reporter's privilege regimes protect this kind of material. Indeed, some state shield laws protect reporters only from having to reveal confidential information.

Conclusion

Opponents and proponents of a federal shield law have offered empirical estimates of subpoena frequency that are either too narrow or too anecdotal to be helpful. The Subpoena Survey's data flesh out the empirical side of

the debate and provide a more useful starting point for the policy dialogue: subpoenas to the media are issued with some regularity; they are not limited to the media organizations or the substantive issues involved in the highest-profile recent cases; and, at least in some key categories, they appear to be on the increase.

The current study only begins to expose the depth and the breadth of media subpoenas. The studied population—daily newspapers and major-network-affiliated television news operations—comprises only one portion of the vast set of organizations in the country with employees who would be covered by even a narrow legislative definition of journalist. It excludes, among others, all radio journalists; the wide array of cable television news operations; reporters at newspapers with anything less than a daily circulation; journalists at all magazines, journals, and newsletters; and the ever-increasing number of journalists who make a living publishing exclusively online. If, as the statistically extrapolated data suggest, the limited population of news organizations studied here received more than 7,000 state and federal subpoenas in a single calendar year—and if, as common sense and reporter experience suggest, the determination of whether a future subpoena will arise in a federal or a state forum is nearly impossible to make in the course of ordinary reporting—a federal law addressing subpoenas would be relevant to a large amount of news gathering by a large number of reporters each year.

More specifically, survey data on federal subpoenas and on subpoenas seeking material obtained under a promise of confidentiality clearly indicate that a federal statute—even one applying only to confidential material—would have more than isolated applicability. Likewise, because the data indicate that the nature, source, and substance of federal subpoenas are diverse, even a shield law with a strong national security exception would be germane and useful to journalists in newsrooms that are widely varied in geography and organizational size.

Overall, the data do not reveal an avalanche of subpoenas, and it may well be that journalists are alarmed about subpoenas to a greater degree than is warranted by the actual numerical increases. But this apprehension might be expected, given the simultaneous signals that court-based privileges

may be on the decline. Even an incrementally larger number of subpoenas results in a larger number of opportunities for courts to continue to unravel a judicially created privilege. And with each high-profile case that rejects the privilege, the tone of the legislative debate turns ever more desperate for media organizations fearing that courts will retreat entirely from recognizing a privilege for journalists.

Ultimately, of course, there are many more arguments to be made for and against the creation of a federal legislative privilege for members of the press. Certainly, policy preferences should be aired, societal implications should be weighed, and the merits and drawbacks of enacting a federal shield for reporters should be debated in full. However, with the survey's new empirical evidence now available, lawmakers and interested parties should be able to turn their attention more fully to the substantive contours of legislative proposals, ending the "numbers game"¹⁹ that has occupied too much of the debate to date.

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NOTES

- 1 *Reporters' Privilege Legislation: Preserving Effective Federal Law Enforcement*, 109th Cong. 2-8 (2006) (statement of Paul J. McNulty, deputy att'y gen. of the United States).
- 2 See, e.g., *Hearing on Reporters' Shield Legislation Before S. Comm. on the Judiciary*, 109th Cong. (July 20, 2005) (testimony of Matthew Cooper, White House correspondent, *Time* magazine referencing "a run of federal subpoenas of journalists"); *id.* (testimony of Norman Pearlstine, editor in chief, *Time*, Inc. citing a "disturbing trend" of subpoenas against the press); *Free Flow of Information Act of 2007: Hearing on H.R. 2102 Before the H. Comm. on the Judiciary*, 110th Cong. (2007) at 101 (statement of the National Association of Broadcasters that "[i]ncreasingly, subpoenas to journalists have become a weapon of first resort for those seeking information concerning confidential sources"); *id.* at 29 (testimony of William Safire that "the process of gathering of the news has been under unprecedented attack"); *id.* at 32 (testimony of media attorney Lee Levine that "this deluge of subpoenas in the federal courts has now reached epidemic proportions").
- 3 2007 *Free Flow of Information Act of 2007: Hearing on H.R. 2102 Before the H. Comm. on the Judiciary*, 110th Cong.

- (2007) at 18 (testimony of Rachel Brand, assistant att'y gen. of the United States). See also *Reporters' Privilege Legislation: Preserving Effective Federal Law Enforcement*, 109th Cong. 113 (2006) (statement of Paul J. McNulty, deputy att'y gen. of the United States) ("[O]nly rarely has the Department determined that the interests of justice warranted seeking to compel a journalist to reveal information obtained from a confidential source.")
- 4 Jones, RonNell Andersen, "Avalanche or Undue Alarm? An Empirical Study of Subpoenas Received by the News Media," 93 Minn. L. Rev. 101 (2008).
- 5 *Branzburg v. Hayes*, 408 U.S. 665, 667 (1972).
- 6 See *id.* at 743 (Stewart, J., dissenting).
- 7 *Id.* at 710 (Powell, J., concurring).
- 8 See John E. Osborn, *The Reporter's Confidentiality Privilege: Updating the Empirical Evidence After a Decade of Subpoenas*, 17 COLUM. HUM. RTS. L. REV. 57, 67 (1985).
- 9 See, e.g., *State v. Sandstrom*, 581 P.2d 812, 814-15 (Kan. 1978) (applying *Branzburg* and opinions from various other state courts); *State ex rel. Classic III Inc. v. Ely*, 954 S.W.2d 650, 653-60 (Mo. Ct. App. 1997) (relying on various state and federal cases, including *Branzburg*); *Brown v. Commonwealth*, 204 S.E.2d 429, 431 (Va. 1974); *State v. St. Peter*, 315 A.2d 254, 256 (Vt. 1974).
- 10 See, e.g., *In re Contempt of Wright*, 700 P.2d 40, 45 (Idaho 1985); *Winegard v. Oxberger*, 258 N.W.2d 847, 852 (Iowa 1977); Opinion of the Justices, 373 A.2d 644, 647 (N.H. 1977); *Zelenka v. State*, 266 N.W.2d 279, 286-87 (Wis. 1978). Indeed, nearly all states now recognize some form of reporter's privilege in state court, either as a common-law or constitutional matter or through statutory shield laws.
- 11 339 F.3d 530 (7th Cir. 2003).
- 12 See Casey Murray, *Sparring over a Shield*, NEWS MEDIA & L., Fall 2005, at 16 (quoting ABC News president David Westin as insisting that "[e]here are some stories . . . that we could not report without the ability to give some protection to sources"); *id.* at 18 (quoting *Washington Post* reporter Howard Kurtz as asserting that "[e]very journalist is going through a bit of soul-searching about whether to grant anonymity to sources," because "the prospect of going to jail is no longer a hypothetical possibility").
- 13 See Anna Badkhen, *TV Reporter Gets Confined to Home*, S.F. CHRON., Dec. 10, 2004, at A6 (quoting Frank Smyth of the New York-based Committee to Protect Journalists as asserting that one high-profile case was "going to have a chilling effect for sources to come forward with sensitive information, and it's going to result in less information to the public domain"); Paul Moore, *The Squeeze Is on for Reporters Asked to Reveal Sources*, BALTIMORE SUN, May 21, 2006, at 2F ("[I]t is hard to deny that the independence that keeps journalists from becoming part of the prosecutorial process is under more pressure than ever."); Jacques Steinberg, *Setbacks on Press Protections Are Seen*, N.Y. TIMES, Aug. 18, 2004, at

A16 (telling of "what legal experts characterize as an ominous trend for journalists: the weakening of fundamental protections for the gathering and publishing of news that had been generally viewed as settled since the Watergate era.").

- 14 2007 *Free Flow of Information Act of 2007: Hearing on H.R. 2102 Before the H. Comm. on the Judiciary*, 110th Cong. (2007) at 18 (testimony of Rachel Brand, assistant att'y gen. of the United States).
- 15 See, e.g., *Gonzales v. Nat'l Broadcasting Co.*, 194 F.3d 29, 32 (2d Cir. 1999) (noting that confidential sources should have greater protection than nonconfidential sources while also recognizing a qualified privilege for nonconfidential sources); *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981) ("Compelling a reporter to disclose the identity of a source may significantly interfere with this news-gathering ability; journalists frequently depend on informants to gather news, and confidentiality is often essential to establishing a relationship with an informant").
- 16 See, e.g., Laurence B. Alexander, *Looking Out for the Watchdogs: A Legislative Proposal Limiting News-gathering Privilege to Journalists in the Greatest Need of Protection for Sources and Information*, 20 YALE L. & POL'Y REV. 97, 101 (2002) at 102 ("Journalists use confidential sources to gather important news and information that they would not be able to obtain through other means."); William E. Lee, *The Priestly Class: Reflections on a Journalist's Privilege*, 23 CARDOZO ARTS & ENT. L.J. 635 (2006) at 685 ("Coverage of national security is an area where confidential sources are especially vital").
- 17 See, e.g., *Reporters' Privilege Legislation: Preserving Effective Federal Law Enforcement*, 109th Cong. 96 (2006) (statement of Sen. Leahy, member, S. Comm. on the Judiciary) ("[I]nvestigative journalism is the essence of the First Amendment. Investigative journalism is how whistleblowers, skeptics, and dissenters get out the facts that they know to the public."); *Hearing on Reporters' Shield Legislation Before S. Comm. on the Judiciary*, 109th Cong. (July 20, 2005) (statement of Sen. Feingold, member, S. Comm. on the Judiciary) (noting that "anonymous sources have been too important to exposing government and corporate wrongdoing" to not protect them).
- 18 *Free Flow of Information Act of 2007: Hearing on H.R. 2102 Before the H. Comm. on the Judiciary*, 110th Cong. (2007) at 52 (testimony of Randall Eliason, professor, George Washington University Law School). ("Major stories from Watergate and Iran Contra up through Abu Ghraib, secret CIA prisons, and unlawful surveillance by the Government, all have been reported without a Federal privilege law.")
- 19 *Free Flow of Information Act of 2007: Hearing on H.R. 2102 Before the H. Comm. on the Judiciary*, 110th Cong. (2007) at 88 (statement of Rep. Pence, member, H. Comm. on the Judiciary).