

## The Reporter's Privilege is Essential to Checks and Balances Being Accessible to the American Electorate

*Amanda A. Konarski*<sup>†</sup>

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<sup>†</sup> J.D. Candidate, Seton Hall University School of Law, 2015; B.A. Spanish and Linguistics, New York University, 2012. I would like to thank my parents, Mary and Richard Konarski for their never ending love, support, and guidance. You have made me the person I am today and I owe all of my success to you both. I would also like to thank Professor Jonathan Hafetz for his guidance and insight throughout the writing process. Finally, I would like to thank the *Seton Hall Circuit Review* for your edits, suggestions, and encouragement.

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#### INTRODUCTION

As any builder knows, a breach in the cornerstone of a foundation compromises the integrity of the entire structure. The Constitution is the foundation on which the United States was built, and the First Amendment's guarantee of free speech and freedom of the press are two cornerstones of that foundation. Since the Constitution was enacted, countless efforts have been made to limit the protection of free speech and freedom of the press.<sup>1</sup> Most recently these efforts have been focused on an articulated need to battle terrorism, threats, and violence in the interests of "national security."<sup>2</sup> If great care is not taken to protect the First Amendment, we may "protect" ourselves to the point where the foundation of our democracy is disintegrated.

For decades the common law has recognized a "reporter's privilege," a shield that protects a reporter from being forced to testify regarding the identity of his source, or the contents of his source's information.<sup>3</sup> Sources feel protected by this "reporter's privilege," confident that they can trust a reporter to keep their identities secret.<sup>4</sup> The existence of this shield encourages ordinary citizens to come forth with newsworthy information, albeit unpopular, for the good of the public.<sup>5</sup> In 1972, however, the United States Supreme Court chiseled away a layer of this shield in the landmark case, *Branzburg v. Hayes*, by interpreting that the Constitution does not support the existence of a reporter's privilege.<sup>6</sup> In *Branzburg* the Supreme Court held that a reporter must appear and respond to a grand jury subpoena to testify regarding the source of his information.<sup>7</sup> A circuit split has emerged regarding the existence or absence of a reporter's privilege, and the time is now ripe for the United States Supreme Court to revisit this issue.<sup>8</sup>

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<sup>1</sup> John F. Burns & Ravi Somaiya, *Who is Julian Assange?*, in OPEN SECRETS: WIKILEAKS, WAR AND AMERICAN DIPLOMACY 25, 33 (Alexander Star, ed., 2011).

<sup>2</sup> *Id.* at 33–34.

<sup>3</sup> SCOTT GANT, WE'RE ALL JOURNALISTS NOW 79–80 (2007) (the "reporter's privilege" is also known as a "journalists' privilege").

<sup>4</sup> *Id.* at 118.

<sup>5</sup> *Id.*

<sup>6</sup> *Branzburg v. Hayes*, 408 U.S. 665 (1972).

<sup>7</sup> *Id.* at 698–99.

<sup>8</sup> Nicholas J. Wagoner, *Split Over Reporter's Privilege Highlights Tension Between National Security and the First Amendment*, CIRCUIT SPLITS (July 12, 2012),

Some circuits have upheld the reporter's privilege in civil cases, while other circuits have refused to recognize a privilege in criminal cases. The recent case, *United States v. Sterling* has brought these issues to the forefront.<sup>9</sup> In *Sterling*, the United States government successfully obtained a grand jury subpoena to compel James Risen, a *New York Times* reporter, to testify about the identity of his source and to confirm the accuracy of Risen's journalism.<sup>10</sup> The United States government believed that ex-CIA operative Jeffrey Sterling disclosed information about a botched CIA operation to Risen who subsequently published the story in both the *New York Times* and in his own book titled STATE OF WAR.<sup>11</sup>

The operation was designed to have a Russian engineer working with the CIA "leak" nuclear blueprints to Iran; however the Russian engineer quickly discovered that the blueprints were faulty and offered to help the Iranians discover the flaw.<sup>12</sup> Nuclear experts posited that the Iranians may have still been able to extract valuable information from the blueprints, and that the botched operation may have aided, not hindered Iran's development of nuclear bombs.<sup>13</sup> The *Sterling* decision reveals that the most clandestine organization in the United States has effectively forced Risen to testify through the prosecutorial process, vis-à-vis a subpoena.

Furthermore, this decision will likely have a chilling effect by discouraging ex-operatives and other sources from speaking out against unsuccessful clandestine operations.<sup>14</sup> Government accountability is a necessary element of a successful democracy. Therefore, there must be a process whereby the public, perhaps through Congress or the Judiciary, can have access to information about secret missions the government wages that compromise, not secure national security. Risen filed a petition for *certiorari* which the Supreme Court has denied, leaving the reporter's privilege issue open for interpretation and discussion.<sup>15</sup>

The Supreme Court must revisit this issue to address concerns that have emerged in the modern age, particularly in cases where citizens

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<http://www.circuitsplits.com/2012/07/in-2010-before-an-audience-of-college-students-justice-sotomayor-remarked-that-the-supreme-court-is-likely-to-have-to-rule.html>.

<sup>9</sup> *United States v. Sterling*, 724 F.3d 482 (4th Cir. 2013).

<sup>10</sup> *Id.* at 490.

<sup>11</sup> *Id.* at 488–90.

<sup>12</sup> JAMES RISEN, *STATE OF WAR: THE SECRET HISTORY OF THE CIA AND THE BUSH ADMINISTRATION 200–15* (2006).

<sup>13</sup> *Id.* at 212.

<sup>14</sup> See Sandra Davidson, *Federal Shield Protection Needed to Protect Investigative Journalism*, JURIST (Sept. 16, 2013, 8:00 AM), <http://jurist.org/forum/2013/09/sandra-davidson-shield-law.php>.

<sup>15</sup> SCOTUSBLOG, *Risen v. United States*, <http://www.scotusblog.com/case-files/cases/risen-v-united-states/> (last visited Oct. 27, 2014).

reveal information that demonstrates negligence on the part of clandestine United States government agencies. Private First Class Bradley Manning's<sup>16</sup> leak of State Department and Pentagon documents<sup>17</sup> and Edward Snowden's leak of national surveillance programs by the National Security Agency<sup>18</sup> demonstrate a troublesome trend that is developing in the United States, a trend that indicates a lack of government accountability for its actions.

Both Manning and Snowden jeopardized their reputations and risked jail time to give the public access to information "drawn from the darkest recesses of power" in an attempt to allow "a global audience to judge the facts for itself" and to effectuate a positive change in government.<sup>19</sup> There is a distinction, which must be drawn between Manning and Snowden on one hand and Sterling on the other. A confidante leaked Manning's identity, while Snowden admitted to his leaks because he was formerly employed by the National Security Agency.

In contrast, Sterling disclosed information to a reporter, an individual who is entitled to invoke the Reporter's Privilege.<sup>20</sup> This protection is grounded in the First Amendment to the United States Constitution.<sup>21</sup> Manning, Snowden, and Sterling may be regarded as traitors by some and heroes by others; however what unites these three individuals is their attempt to achieve government accountability.

Sterling's situation is necessarily different because his means of attaining government accountability was through a reporter. The First Amendment should protect Risen from being compelled to reveal the identity of his source, because this protection is consonant with the common law tradition.<sup>22</sup> Specifically, the Freedom of the Press and Freedom of Speech clauses should be interpreted to include a "reporter's privilege" that allows reporters to publish sensitive issues that their confidential sources relay to them without being forced to reveal the source. There is no freedom of the press without the freedom to protect the confidentiality of sources.

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<sup>16</sup> Ginger Thompson, *Who is Bradley Manning?*, in *OPEN SECRETS: WIKILEAKS, WAR AND AMERICAN DIPLOMACY* 45, 48 (Alexander Star, ed., 2011).

<sup>17</sup> *E.g.*, Burns & Somaiya, *supra* note 1 at 33.

<sup>18</sup> Mark Memmott, *Who is Edward Snowden, the Self-Styled NSA Leaker?*, NPR (Jun. 10, 2013), <http://www.npr.org/blogs/thetwo-way/2013/06/10/190293209/who-is-edward-snowden-the-nsa-leaker>.

<sup>19</sup> *See also* Burns & Somaiya, *supra* note 1, at 33.

<sup>20</sup> *See* Davidson, *supra* note 14.

<sup>21</sup> U.S. CONST. amend. I.

<sup>22</sup> *See generally* GANT, *supra* note 3, at 79–80 (generally discussing the common law tradition of the journalist's privilege).

Part I of this Comment describes the background of the landmark United States Supreme Court case *Branzburg v. Hayes*. It also explains why *Branzburg* is not dispositive, and has created a circuit split with regard to whether reporters can protect the confidentiality of their sources by asserting a reporter's privilege. Finally, Part I examines how *United States v. Sterling* is an articulation of the challenges that courts today have faced when seeking to apply this forty-two year old precedent in modern times. Part II analyzes why *Sterling* is ripe for Supreme Court review and why the Supreme Court should revisit *Branzburg*. It also examines the historical background of the First Amendment and explains why both the Freedom of the Press and Freedom of Speech clauses support the existence of a Reporter's Privilege. Finally, Part II challenges the critics' views who argue that reporters should not be afforded a privilege. Part III concludes this Comment by discussing the implications of continuing on a trajectory of government secrecy and unaccountability without Supreme Court intervention to inform the plain meaning of the Constitution.

## I. BACKGROUND

### A. Overview of *Branzburg v. Hayes*

In 1972 the United States Supreme Court granted *certiorari* to two consolidated cases involving a Kentucky newspaper reporter named Branzburg.<sup>23</sup> The Supreme Court decision also involved the consolidation of two other similarly situated reporters, Pappas and Caldwell.<sup>24</sup> This Comment will focus on the facts of Branzburg's individual case, and the court's subsequent analysis and holding for the reporters as a group.

The first case against Branzburg emerged after he published a story in November of 1969 about two Jefferson County residents who made hashish from marijuana.<sup>25</sup> Branzburg's article described his observations in detail, and included a picture of his sources' hands making hashish.<sup>26</sup> Branzburg promised the two hashish-makers that he would not reveal their identities; however, shortly after the publication of this story Branzburg was served a grand jury subpoena and was expected to reveal the identity of his sources.<sup>27</sup> Branzburg appeared in response to the subpoena, but he refused to identify the people he witnessed in possession of marijuana or the identity of the hashish makers by invoking a Kentucky reporter's

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<sup>23</sup> *Branzburg*, 408 U.S. at 667.

<sup>24</sup> *Id.* at 672, 675.

<sup>25</sup> *Id.* at 667-68.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 668-69.

privilege statute and the First Amendment to the United States Constitution.<sup>28</sup> The state trial judge rejected these arguments, and ordered that Branzburg reveal the identity of his sources.<sup>29</sup> The judge also ordered that Branzburg reveal the individuals he observed possessing marijuana.<sup>30</sup>

On appeal, the court rejected Branzburg's arguments and construed the Kentucky reporter's privilege statute as "affording a newsman the privilege of refusing to divulge the identity of an informant who supplied him with information" but found that the reporter's statute did not allow a reporter to "refuse to testify about events he had observed personally, including the identities of those persons he had observed."<sup>31</sup>

The second consolidated case involving Branzburg emerged from a later story he published in January of 1971.<sup>32</sup> In this story, Branzburg described illegal drug use in Frankfort, Kentucky, including conversations with individual drug users and Branzburg's own observations of drug use in his presence.<sup>33</sup> Branzburg was again summoned to appear before a grand jury regarding the use and sale of drugs that he witnessed.<sup>34</sup> After his motion to quash the summons was denied, an order was entered which protected Branzburg from revealing "confidential associations, sources or information."<sup>35</sup> Branzburg was required, nonetheless, to answer questions regarding criminal acts that he personally observed.<sup>36</sup> This "protective" order did not protect Branzburg's sources and Branzburg argued that his "effectiveness as a reporter would be greatly damaged" if he were required to testify.<sup>37</sup> The Supreme Court certified Branzburg's cases as well as two other similarly situated reporters, deciding how to address the invocation of a Reporter's Privilege in this context.<sup>38</sup>

The Supreme Court held that requiring newsmen to testify and appear before both state and federal grand juries does not abridge First

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<sup>28</sup> *Id.* at 668 n.4; K.y. Rev. Stat. § 421.100 (1962) ("No person shall be compelled to disclose in any legal proceeding or trial before any court, or before any grand or petit jury, or before the presiding officer of any tribunal, or his agent or agents, or before the General Assembly, or any committee thereof, or before any city or county legislative body, or any committee thereof, or elsewhere, the source of any information procured or obtained by him, and published in a newspaper or by a radio or television broadcasting station by which he is engaged or employed, or with which he is connected").

<sup>29</sup> *See Branzburg*, 408 U.S. at 668.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 669.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Branzburg*, 408 U.S. at 669–70.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 667.

Amendment protections of free speech and freedom of the press.<sup>39</sup> The Court declined to recognize a federal newsman's privilege on the grounds that the legislature, not the Court, is in the best position to tailor such a privilege, if at all.<sup>40</sup> While Justice White wrote the opinion for the court, Justice Powell's concurrence has generated much uncertainty in the four decades since *Branzburg* came down.<sup>41</sup> Justice Powell's concurrence has stymied circuits across the nation, leading to the existing conflict among the Circuits.<sup>42</sup>

*B. Impact of Justice Powell's Concurrence in Branzburg*

Justice Powell's concurrence in *Branzburg* recognized the "limited nature of the Court's holding" and sought to emphasize that "no harassment of newsmen will be tolerated."<sup>43</sup> Justice Powell emphasized that "if a newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy."<sup>44</sup> It is unclear if Justice Powell "simply *added* separate remarks or whether the decision was effectively a 4-1-4, without any majority opinion" rendering Justice White's opinion a "plurality" opinion, as opposed to a "majority" decision.<sup>45</sup> This distinction may seem nuanced; however, majority decisions carry much more weight than plurality decisions.<sup>46</sup>

After the Supreme Court decides a case on the basis of a plurality precedent, lower courts "struggle to determine and apply [the] plurality precedent[]." <sup>47</sup> Often plurality decisions are the product of cases that present emotionally charged or controversial issues.<sup>48</sup> Perhaps Justice Powell's elusive concurrence is the reason that "*Branzburg* gave rise to

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 705–06.

<sup>41</sup> GANT, *supra* note 3, at 63.

<sup>42</sup> Matthew L. Shafer, *Fourth Circuit Orders Reporter to Testify as to Source of National Security Leaks*, LIPPMANN WOULD ROLL BLOG (Jul. 19, 2013), <http://lippmannwouldroll.com/2013/07/19/fourth-circuit-orders-reporter-to-testify-as-to-source-of-national-security-leaks/> (last visited Nov. 16, 2014).

<sup>43</sup> See *Branzburg*, 408 U.S. at 709–10.

<sup>44</sup> *Id.*

<sup>45</sup> GANT, *supra* note 3, at 63.

<sup>46</sup> *Id.*

<sup>47</sup> W. Jesse Weins, *A Problematic Plurality Precedent: Why the Supreme Court Should Leave Marks over Van Orden v. Perry*, 85 NEB. L. REV. 832 (2011) (citing Note, *Plurality Decisions and Judicial Decisionmaking*, 94 HARV. L. REV. 1127, 1130 (1981) (demonstrating that many plurality decisions are "incomprehensible" to courts which must interpret same)).

<sup>48</sup> Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756, 759 (1980).

more questions than it answered” and has contributed to the creation of the current circuit split.<sup>49</sup>

Decisional law regarding reporter’s rights since *Branzburg* came down demonstrates that the Supreme Court’s attempt to resolve this issue in 1972 was unsuccessful. Put simply, “Justice Powell’s concurrence and the subsequent appellate history have made the lessons of *Branzburg* about as clear as mud.”<sup>50</sup> A circuit split has emerged with regard to the existence or absence of a reporter’s privilege, demonstrating that *Branzburg* was not dispositive.<sup>51</sup>

Before discussing the issues that will be the focus of this Comment, namely those articulated in *Sterling*, it is necessary to first delineate both sides of the circuit split. Understanding the existing split with regard to a reporter’s privilege is critical to understanding why the Supreme Court must revisit its *Branzburg* decision. Furthermore, the existence of the split demonstrates why the Supreme Court must intervene to resolve it by interpreting the Constitution. The Supreme Court should decide that the First Amendment *does* protect reporters from being compelled to reveal the identity of their sources, a decision that will be consistent with the foundation of the American democracy—the Constitution.

### C. Circuit Split in the Wake of *Branzburg*

Circuit Courts have interpreted *Branzburg* in many different ways. A majority of circuits have recognized at least some form of a First Amendment “press privilege.”<sup>52</sup> The split exists with regard to the “scope of such a [reporter’s] privilege, including to whom it might pertain” and in what contexts the privilege should apply, if at all.<sup>53</sup>

In the civil context, the D.C. Circuit, Ninth, Eighth, Fifth, Fourth, Third, Second, and First Circuits and have all found that a reporter’s privilege exists.<sup>54</sup> The Fourth Circuit recognizes a reporter’s privilege in civil cases after considering: “(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.”<sup>55</sup> This three-

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<sup>49</sup> GANT, *supra* note 3, at 64.

<sup>50</sup> *United States v. Sterling*, 724 F.3d 482, 523 (4th Cir. 2013).

<sup>51</sup> *See generally* Wagoner, *supra* note 8.

<sup>52</sup> GANT, *supra* note 3, at 69.

<sup>53</sup> *Id.*

<sup>54</sup> Shafer, *supra* note 42.

<sup>55</sup> *United States v. Sterling*, 724 F.3d 482, 496–97 (4th Cir. 2013) (citing *LaRouche v. Nat’l Broad. Co.*, 780 F.2d 1134, 1139 (4th Cir. 1986)).



part test adopted by the Fourth Circuit in civil cases is the same test that the Supreme Court rejected in *Branzburg* in criminal cases.<sup>56</sup>

Similarly, the Fifth Circuit held that “*Branzburg* did not preclude recognition of a qualified reporter’s privilege or application of the three-part test in civil cases.”<sup>57</sup> The D.C. Circuit has upheld a reporter’s privilege in civil contexts because “the public interest in effective criminal law enforcement is absent.”<sup>58</sup> However, the stakes in civil cases are not as high as they are in criminal cases, as Due Process rights are not implicated in civil cases.<sup>59</sup>

In the criminal context, the “Fourth . . . Fifth, Sixth, Seventh, and arguably D.C. Circuits” have rejected the existence of a reporter’s privilege.<sup>60</sup> In a criminal case involving a subpoena for a videotaped interview with a criminal suspect, the Fifth Circuit decisively held that “newsreporters [sic] enjoy no qualified privilege not to disclose nonconfidential information in criminal cases.”<sup>61</sup> Accordingly, the Fifth Circuit ordered that the reporter produce the tape of the interview to the government.<sup>62</sup> Similarly, the Seventh Circuit affirmed the district court’s grant of an order to produce a videotaped interview with an individual being prosecuted overseas.<sup>63</sup> Despite the fact that an Illinois state statute created such a reporter’s privilege, the Sixth Circuit maintained that the statute had no application because the reporters in the case were more concerned about the suspect appropriating their intellectual property rather than the confidentiality of their source.<sup>64</sup>

To complicate the issue even further, some circuits have recognized the existence of a reporter’s privilege in criminal cases. The Eleventh Circuit has maintained the reporter’s privilege in criminal cases where the party seeking to compel a reporter’s testimony has “failed to show that [the reporter’s] information was otherwise unavailable and that there was a compelling interest in securing his testimony.”<sup>65</sup> The Second Circuit has

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<sup>56</sup> *Id.* at 496.

<sup>57</sup> *Id.* at 497(citing *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, *modified*, 628 F.2d 932 (5th Cir. 1980)).

<sup>58</sup> *Id.* (citing *Zerilli v. Smith*, 656 F.2d 705, 711–12 (D.C. Cir. 1981)).

<sup>59</sup> Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL’Y REV. 1, 34 (2006).

<sup>60</sup> Shafer, *supra* note 42.

<sup>61</sup> *United States v. Smith*, 135 F.3d 963, 972 (5th Cir. 1998).

<sup>62</sup> *Id.*

<sup>63</sup> *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003).

<sup>64</sup> *Id.* at 533–34 (the reporters in this case intended to use the tape recordings as the basis for a biography they intended to publish about the suspect, which is arguably an intellectual property dispute rather than a First Amendment dispute).

<sup>65</sup> *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986).

gone so far as to state that it sees no “legally-principled reason for drawing a distinction between civil and criminal cases when considering whether the reporter’s interest in confidentiality should yield to the moving party’s need for probative evidence.”<sup>66</sup>

The Second Circuit recognizes the fact that criminal defendants have constitutional rights which may weigh more heavily than the rights of parties to a civil suit.<sup>67</sup> A criminal defendant has the constitutional right to face his or her accusers, a right which the second circuit, and other circuits, seem to have deemed more important than a “reporter’s privilege.”<sup>68</sup> A distinction should be drawn between defendants seeking to compel reporters’ testimony and prosecutors who protect the government’s interest in proceedings. The government has resources at its disposal that criminal defendants do not, and has the capability to obtain information needed to prosecute through alternate means, without compromising reporters’ constitutional rights in an effort to punish the source of the information.

To make the circuit split even more confusing, one Circuit has even interpreted *Branzburg* as completely denying a reporter’s privilege under the First Amendment.<sup>69</sup> The inconsistencies in Circuit Court decisions regarding a reporter’s privilege enumerated above highlight the fact that the United States Supreme Court must revisit *Branzburg* and examine the issues surrounding the reporter’s privilege in contemporary American society.

With this brief overview of the existing circuit split, we may now examine the recent Fourth Circuit decision that has catapulted this split to the forefront, *United States v. Sterling*.<sup>70</sup> *Sterling* also fits into a troublesome trend that has evolved in this nation in the last five years.<sup>71</sup> In 2010, Bradley Manning leaked hundreds of thousands of confidential diplomatic cables to Julian Assange’s Wikileaks.<sup>72</sup> This resulted in

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<sup>66</sup> *United States v. Burke*, 700 F.2d 70, 77 (2d Cir. 1983).

<sup>67</sup> *Id.*

<sup>68</sup> *Cf. id.* at 70 (by forcing reporters to testify as to the identity of their sources in criminal cases, the second circuit effectively placed Due Process rights of criminal defendants above First Amendment rights of reporters).

<sup>69</sup> 1–3 MOORE’S ANSWERGUIDE: FEDERAL DISCOVERY PRACTICE § 3.32 (citing *Storer Communs. Inc. v. Giovan*, 810 F.2d 580, 584 (6th Cir. 1987) (denying existence of a reporter’s privilege)).

<sup>70</sup> *See generally* Schafer, *supra* note 42; *see also* *United States v. Sterling*, 724 F.3d 482 (4th Cir. 2013).

<sup>71</sup> *See* Schafer, *supra* note 42.

<sup>72</sup> *Bradley Manning Sentenced to 35 Years in Wikileaks Case*, BBC NEWS (Aug. 21, 2013), <http://www.bbc.co.uk/news/world-us-canada-23784288>.

sentencing Manning to thirty-five years in prison.<sup>73</sup> Manning felt that he had the right to do two things: 1) to show the American people the atrocities he witnessed; and 2) he hoped to cause the American people to question their government and its clandestine operations.<sup>74</sup> In June of 2013, Edward Snowden revealed National Security Agency surveillance programs.<sup>75</sup> Since then the United States government has vigorously attempted to prosecute Snowden, who has successfully evaded United States jurisdiction.<sup>76</sup>

If James Risen cannot invoke a reporter's privilege, Jeffrey Sterling's name will join the ranks of Manning and Snowden, despite the fact that Sterling made his disclosures to a reporter who is entitled to First Amendment protection. Manning, Snowden, and Sterling each attempted to give the public access to valuable information. However, each of these men used different platforms to disseminate this classified information. Accordingly, the factual circumstances that surround their disclosures must be treated differently. This Comment does not make a value judgment about the disclosures, but rather argues that Sterling's disclosure is necessarily dissimilar from Manning and Snowden, and must accordingly be treated differently.

The Reporter's Privilege exists to avoid a chilling effect<sup>77</sup> on free speech, recognizing that a free press is the ultimate articulation of the Constitutional right to free speech. Reporters represent the public and give the public access to information to achieve accountability.<sup>78</sup> If the Constitution does not protect Risen, and Sterling in turn, the United States government will not be accountable for its actions and will be seen to have

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.*; see also Eyder Peralta, *What the Manning Verdict Says about Edward Snowden's Future*, NATIONAL PUBLIC RADIO (Jul. 30, 2013, 5:28 PM), <http://www.npr.org/blogs/thetwo-way/2013/07/30/207042272/what-the-manning-verdict-says-about-edward-snowdens-future>.

<sup>75</sup> *Edward Snowden: Timeline*, BBC NEWS, (Aug. 20, 2013, 15:21 ET), <http://www.bbc.com/news/world-us-canada-23768248>.

<sup>76</sup> See *Why One Expert Says Edward Snowden Deserves Clemency*, NATIONAL PUBLIC RADIO Clemency (Jan. 8, 2014 4:19AM), <http://www.npr.org/2014/01/08/260648155/why-edward-snowden-deserves-clemency>.

<sup>77</sup> See generally Note, *The Chilling Effect in Constitutional Law*, COLUMBIA L. REV. 808-09 (1968) (discussing the "chilling effect" doctrine generally and its impact on First Amendment rights).

<sup>78</sup> See also DENNIS MCQUAIL, *MEDIA ACCOUNTABILITY AND FREEDOM OF PUBLICATION* 174, 184-85 (2003) (discussing freedom for the press as an institution and the interrelation between freedom of publication and accountability, concluding that "[a]ccountability can threaten freedom if it is enforced by censorship and repressive measures applied by the state . . .").

adopted an architecture of oppression to silence dissenters. The silencing of dissenters will lead to the disintegration of the American democracy.

*D. United States v. Sterling as an Articulation of the Challenges of Interpreting Branzburg Today*

Jeffrey Sterling is a former CIA agent that was indicted for disclosing and retaining national defense information in violation of the Espionage Act.<sup>79</sup> Sterling was indicted after a grand jury determined that Sterling disclosed classified top-secret information to James Risen, a *New York Times* reporter.<sup>80</sup> Risen used the information that Sterling allegedly disclosed to him in various *New York Times* articles that he published.<sup>81</sup> Risen also based a chapter of his book, *STATE OF WAR*, on the alleged disclosures that Sterling “leaked” to Risen about the CIA’s top-secret “Classified Program No. 1.”<sup>82</sup>

Sterling was hired by the CIA in 1993 as a case officer, and was immediately given a “top secret security clearance.”<sup>83</sup> As a condition to his employment, Sterling signed agreements acknowledging that he was not allowed to disclose, retain, or disseminate confidential information that he learned throughout his employment.<sup>84</sup> The only way Sterling could legally reveal confidential information was if he sought and successfully obtained express authorization from the CIA.<sup>85</sup>

In November of 1998, Sterling was assigned to “Classified Program No. 1,” which was a top-secret operation that the CIA used to impede Iran’s ability to acquire and develop nuclear weapons.<sup>86</sup> Sterling was also the case officer for another CIA operation, called “Human Asset No. 1.”<sup>87</sup> In May of 2000, Sterling was reassigned and terminated from “Classified Program No. 1” because he had not met “performance targets.”<sup>88</sup>

In August of 2000, Sterling filed an equal opportunity claim against the CIA, in which Sterling alleged that he was denied assignments because he was African American.<sup>89</sup> Then in August of 2001, Sterling filed a

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<sup>79</sup> *United States v. Sterling*, 724 F.3d 482, 488 (4th Cir. 2013).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 490.

<sup>83</sup> *Id.* at 488.

<sup>84</sup> *Id.*

<sup>85</sup> *United States v. Sterling*, 724 F.3d 482, 488 (4th Cir. 2013).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

federal lawsuit against the CIA for racial discrimination.<sup>90</sup> The suit was dismissed in 2004, after the government invoked the “state secrets doctrine.”<sup>91</sup> Sterling was officially terminated on January 31, 2002, but had been effectively removed and “outprocessed” from the CIA since October 2001.<sup>92</sup> Following his termination, Sterling refused to sign an acknowledgement stating and reiterating his legal obligation to not disclose any classified information that he obtained while working for the CIA.<sup>93</sup>

In November of 2001, Risen published his first of many *New York Times* articles about Sterling’s alleged experiences titled “Secret C.I.A. Site in New York Was Destroyed on Sept 11.”<sup>94</sup> Risen also published another story titled “Fired by C.I.A., He Says Agency Practiced Bias.”<sup>95</sup> The ninth chapter of Risen’s book, *STATE OF WAR*, titled “A Rogue Operation,” was even more controversial.<sup>96</sup> In this chapter, Risen described “Classified Program No. 1” as a “failed attempt by the CIA to have a former Russian scientist provide flawed nuclear weapon blueprints to Iran.”<sup>97</sup> Risen categorized this botched operation as one of the “most reckless operations in the modern history of the CIA,” a plan that aided Iran in obtaining nuclear weapons.<sup>98</sup> Sterling was the suspected “leak” of this information, and the government launched a suit against Sterling for revealing top-secret information.<sup>99</sup>

While Risen does not reveal the identity of his source or sources in his publications, that chapter in *STATE OF WAR* is told from the point of view of a CIA case officer handing the clandestine operation.<sup>100</sup> A federal grand jury has concluded that Sterling is Risen’s source, and has subsequently charged Sterling with six counts of “unauthorized retention and communication of national defense information” and various other federal violations.<sup>101</sup> The government subsequently issued a grand jury subpoena to Risen.<sup>102</sup> The subpoena required that Risen testify and reveal

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<sup>90</sup> *Id.*

<sup>91</sup> Sterling, 724 F.3d at 488.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 490.

<sup>97</sup> Sterling, 724 F.3d at 490.

<sup>98</sup> RISEN, *supra* note 12, at 207.

<sup>99</sup> Sterling, 724 F.3d at 490.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

the identities of the sources that revealed top-secret information about “Classified Program No. 1” to him.<sup>103</sup>

Risen moved to quash the subpoena and filed for a protective order.<sup>104</sup> Risen’s argument was twofold. He argued that the First Amendment protected him from being compelled to testify in Sterling’s case.<sup>105</sup> Alternatively, Risen argued that the federal common-law reporter’s privilege protected him from being compelled to testify as to the identity of his sources.<sup>106</sup> The District Court agreed with Risen’s argument in part, and quashed the subpoena “except to the extent that Risen [would] be required to provide testimony that authenticates the accuracy of his journalism, subject to a protective order.”<sup>107</sup>

The District Court applied the *LaRouche* test, which requires that the government satisfy a three-part burden before compelling a reporter to testify regarding confidential sources.<sup>108</sup> The *LaRouche* test requires that before compelling a reporter to testify, the government must prove “(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.”<sup>109</sup> This is a version of the three-part test that the Supreme Court in *Branzburg* rejected in a criminal context.<sup>110</sup> The District Court in *Sterling* found that the government did not satisfy the second two prongs of the *LaRouche* test, and found that the federal common-law reporter’s privilege did protect Risen from testifying as to the identity of his sources.<sup>111</sup>

On appeal, the Fourth Circuit reversed the District Court’s decision, holding that the First Amendment does not grant a privilege to reporters that protects them from being forced to testify “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.”<sup>112</sup> The Fourth Circuit also refused to recognize a federal common-law reporter’s privilege, holding that the United States Supreme Court in *Branzburg* “plainly observed that the common law recognized no such testimonial privilege

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<sup>103</sup> *Id.*

<sup>104</sup> *United States v. Sterling*, 724 F.3d 482, 490 (4th Cir. 2013).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *United States v. Sterling*, 818 F. Supp. 2d 945, 947 (E.D. Va. 2011).

<sup>108</sup> *La Rouche v. National Broadcasting Co.*, 780 F.2d 1134, 1139 (4th Cir. 1986).

<sup>109</sup> *Id.*

<sup>110</sup> *United States v. Sterling*, 724 F.3d 482, 496 (4th Cir. 2013).

<sup>111</sup> *Id.* at 490–91.

<sup>112</sup> *Id.* at 492.

[for reporters].”<sup>113</sup> To the contrary, this Comment argues that the *Branzburg* court neither “plainly observe[d]” nor barred the recognition of a reporter’s privilege. Judge Gregory’s dissenting opinion in *Sterling* supports both the existence of a reporter’s privilege and Risen’s constitutional right to assert same.<sup>114</sup>

The *Branzburg* decision asserted “the existing constitutional rules have not been a serious obstacle to either the development or retention of confidential news sources by the press.”<sup>115</sup> This assertion is no longer viable, as the *Sterling* case demonstrates that the government’s issuance of such subpoenas affects a newsman’s ability to procure important information about clandestine governmental operations.<sup>116</sup> Risen filed a petition for a *writ of certiorari* to the United States Supreme Court earlier this year.<sup>117</sup> The Supreme Court has denied Risen’s petition,<sup>118</sup> leaving this issue open for interpretation and discussion. If Risen is compelled to testify, no CIA agent will come forward with information about botched plans such as “Classified Program No. 1.” If clandestine agencies are allowed to continue along this path, the government will continue on an infinite trajectory of secrecy and unaccountability for its actions.<sup>119</sup> This trajectory will compromise the integrity of the American democracy.

## II. ANALYSIS

### *A. United States v. Sterling Demonstrates Why Branzburg Must be Revisited*

If the *Branzburg* decision was dispositive, there would be no circuit split with regard to whether or not reporters can be compelled to reveal their sources’ identities. In the forty-two years since *Branzburg* was decided, the Federal Circuit Courts of Appeals have resolved cases implicating the reporter’s privilege in divergent ways.<sup>120</sup> Some Circuits have recognized a reporter’s privilege in civil cases while others have refused to recognize such a privilege in criminal cases.<sup>121</sup>

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<sup>113</sup> *Id.* at 499.

<sup>114</sup> *United States v. Sterling*, 724 F.3d 482, 520 (4th Cir. 2013) (Gregory, J. dissenting).

<sup>115</sup> *Branzburg v. Hayes*, 408 U.S. 665, 699 (1972).

<sup>116</sup> *See Davidson*, *supra* note 14.

<sup>117</sup> Rosanna A. Cavanagh, *James Risen’s Litigation: A Turning Point for Press Freedoms*, NEW ENGLAND FIRST AMENDMENT COALITION, (Feb. 1, 2014, 1:21 am), <http://knownewengland.org/james-risens-litigation-a-turning-point-for-press-freedoms/>.

<sup>118</sup> SCOTUSBLOG, *supra* note 15.

<sup>119</sup> *See Burns & Somaiya*, *supra* note 1, at 32–33.

<sup>120</sup> *See also Schafer*, *supra* note 42 (elucidating the existence of the circuit split and delineating both sides of the split).

<sup>121</sup> *Id.*

Contrary to the Fourth Circuit's recent decision in *Sterling*, the *Branzburg* Court did not "plainly observe" that there is no common-law reporter's privilege.<sup>122</sup> The Fourth Circuit's decision was flawed, as "the majority exalts the interests of the government while unduly trampling those of the press, and in doing so, severely impinges on the press and the free flow of information in our society."<sup>123</sup> Furthermore, in the aftermath of *Branzburg*, thirty-six states and the District of Columbia have enacted their own versions of "press shield laws" providing some level of First Amendment protection for reporters.<sup>124</sup> *Sterling* is the appropriate vehicle within which the United States Supreme Court can both resolve the Circuit Split and interpret the true meaning of the First Amendment to the United States Constitution.

The existence of nearly widespread state-adopted shield laws demonstrates the fact that that American society's values have evolved since *Branzburg*.<sup>125</sup> The American people recognize the importance of a reporter's shield for newsgathering purposes.<sup>126</sup> Furthermore, "the absence of a federal privilege undermines the state privileges because a potential source does not know, *ex ante*, whether the reporter to whom he speaks will end up in a federal or a state court."<sup>127</sup> This provides a serious limitation on information that sources are willing to disclose to reporters.<sup>128</sup>

Some scholars have proposed that Congress codify a federal shield law, which would define the protections reporters and sources would be afforded in situations that implicate national security and other national concerns.<sup>129</sup> In fact, Congress is considering a bill called The Free Flow of Information Act of 2013, which would protect reporters from being forced

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<sup>122</sup> *Contra* United States v. Sterling, 724 F.3d 482, 499 (4th Cir. 2013).

<sup>123</sup> *Id.* at 530 (Gregory, J. dissenting).

<sup>124</sup> KATHLEEN M. SULLIVAN & GERALD GUNTHER, *FIRST AMENDMENT LAW*, 494 n.1 (Foundation Press (4th ed. 2010)).

<sup>125</sup> See Michael C. Dorf, *A Federal Appeals Court Rejects a New York Times Reporter's Plea to Shield His Source, Highlighting the Need for Action by the Other Branches*, Verdict by Justicia.com (Jul. 13, 2013), <http://verdict.justia.com/2013/07/31/a-federal-appeals-court-rejects-a-new-york-times-reporters-plea-to-shield-his-source-highlighting-the-need-for-action-by-the-other-branches> (last visited Nov. 16, 2014).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* (emphasis added).

<sup>128</sup> *Id.*

<sup>129</sup> E.g. Joseph W. Tursi, Comment, *The Reporter's Privilege in the 21<sup>st</sup> Century: The Need for a Qualified Federal Media Shield Law that Balances Freedom of Speech with National Security Concerns*, 54 SANTA CLARA L. REV. 201, 228–31 (2014); Kathryn A. Rosenbaum, Note, *Protecting More than the Front Page: Codifying a Reporter's Privilege for Digital and Citizen Journalists*, 89 NOTRE DAME L. REV. 1427, 1460–65 PAGE (2014).



to reveal their sources.<sup>130</sup> However, this bill has a long and arduous journey ahead of it before it successfully passes through the labyrinths of the legislative process, including congressional approval and presidential approval, before becoming law.<sup>131</sup>

Supreme Court intervention is needed now, before Risen's Constitutional rights as a reporter and American citizen are compromised. The Judiciary is in the best position to provide immediate protection to reporters by interpreting the Freedom of Press and Freedom of Speech Clauses of the First Amendment to include a reporter's privilege. The role of the Supreme Court and the judicial branch is to interpret the Constitution, as "[i]t is emphatically the province and duty of the judicial department to say what the law is."<sup>132</sup>

On a micro level, any promise or assurance that a reporter makes to his source is meaningless without the law recognizing the existence of a reporter's privilege.<sup>133</sup> On a macro level, individuals like Manning and Snowden, who seek to expose clandestine United States government practices and operations, also have no assurance that their identity will be protected.<sup>134</sup> The United States government has made these men, and will likely make Sterling, scapegoats, marking them with a scarlet letter. Manning's litigation and the revocation of Snowden's passport demonstrates that the United States government will punish these men and force all who wish to follow in their footsteps into silence.<sup>135</sup> Furthermore, Fox News Chief James Rosen's emails, telephone records, and movements were placed under surveillance when the news correspondent was accused of being a "co-conspirator" in a criminal leak case.<sup>136</sup> Without the protection of a reporter's privilege, the United States people will not know what their government is *actually* doing.

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<sup>130</sup> Free Flow of Information Act of 2013, H.R. 1962, 113th Cong. (2013–2014).

<sup>131</sup> See generally Robert Longley, *The U.S. Legislative Process: How Bills Become Laws*, ABOUT NEWS, <http://usgovinfo.about.com/od/uscongress/a/legprocess.htm> (last visited Oct. 28, 2014) (solely describing the process of how a bill becomes a law).

<sup>132</sup> MARK C. ALEXANDER, *A SHORT AND HAPPY GUIDE TO CONSTITUTIONAL LAW* 7–12 (2013) (quoting *Marbury v. Madison*, 5 U.S. 137, 180 (U.S.1803)).

<sup>133</sup> See Dorf, *supra* note 125.

<sup>134</sup> See generally Davidson, *supra* note 14 (discussing the implications of not recognizing shield protection for reporters and their sources).

<sup>135</sup> Daniel Sandford, *Edward Snowden Still Stuck in Airport*, BBC (Jul. 24, 2013, 9:54 PM), <http://www.bbc.co.uk/news/world-europe-23437059> (revealing that Snowden's passport was revoked by the United States government).

<sup>136</sup> Glenn Greenwald, *Obama DOJ Formally Accuses Journalist in Leak Case of Committing Crimes*, THE GUARDIAN (May 20, 2013, 8:16 AM), <http://www.theguardian.com/commentisfree/2013/may/20/obama-doj-james-rosen-criminality>.

Therefore, the Freedom of the Press Clause of the First Amendment should be interpreted to include a reporter's privilege that protects reporters from being forced to testify about the identity of their sources. The scope of this privilege should encompass situations where reporters seek to reveal information regarding clandestine operations that the United States government has mismanaged, mishandled, or poorly executed. The Judiciary is in the best position to interpret the scope of this protection, as its role is to interpret the plain meaning of the Constitution.<sup>137</sup>

The public has the right to have access to information about operations like "Classified Program No. 1," particularly when such operations have gone awry as the result of CIA blunders. Jeffrey Sterling was not the one who breached national security, rather, the CIA breached national security when it botched "Classified Program No. 1" and revealed faulty blueprints to Iran. The American people have a right to challenge clandestine branches of its government and to hold these organizations accountable for mistakes that compromise *their* national security.<sup>138</sup>

If Risen is forced to testify, the government will have successfully sent a message to all potential sources who wish to speak out against clandestine operations, effectively silencing the press. Without access to such information, the American public is denied the means to effect change in a nation predicated on democracy, transparency, and the ability to speak out and express discontent.<sup>139</sup> There is no freedom of the press without the freedom to protect the confidentiality of sources.

### *B. The First Amendment Supports the Existence of a Reporter's Privilege*

This section first examines the colonial history of the United States, and examines how the freedom to speak freely was an important value in the founding of this nation. Second, this section will examine how both clauses of the First Amendment support the existence of a reporter's privilege. Finally, this section presents and counters critics' views, demonstrating that a reporter's privilege is part and parcel to democracy.

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<sup>137</sup> See generally ALEXANDER, *supra* note 132 (explaining the role of the courts).

<sup>138</sup> See generally Burns & Somaiya, *supra* note 1, at 32–33; Thompson, *supra* note 16, at 48.

<sup>139</sup> See generally Thompson, *supra* note 16, at 48 (describing access to information as a "public good" and discussing Bradley Manning's quotation "because without information, you cannot make informed decisions as a public.")

### 1. Vestiges of a Repressive Colonial Regime

The First Amendment of the United States Constitution protects free speech and freedom of the press, among other liberties.<sup>140</sup> The history of these protections is rooted in the colonial leather that was imposed upon thirteen young colonies in the eighteenth century.<sup>141</sup> Colonial printers in America were constrained by stringent seditious laws and taxes, which rendered “any criticism of authorities risky.”<sup>142</sup> The founders of this nation recognized that Britain’s suppression of ideas through speech and the press destroyed the colonies’ strength and had a divisive effect on the young nation as a whole.<sup>143</sup> For this reason, the ability to express ideas through speech and print has become the cornerstone of the American democracy, articulated by the First Amendment of the Constitution.

The founders lead the American Revolution in opposition to the oppressive regime that curtailed the free-flow of ideas.<sup>144</sup> A few years later, the First Amendment was written into the Constitution to protect free speech and freedom of the press, among other rights.<sup>145</sup> Understanding the history of First Amendment protections allows the American people to ensure that the very rights that form the foundation of this nation are not compromised in the present moment, where secret government operations may have compromised the ideals this nation champions.

Despite the fact that centuries have passed since the American Revolution, we have learned that history tends to repeat itself.<sup>146</sup> The very freedoms that were so important to our founders, who catalyzed a Revolution against Britain, are once again in danger of being compromised. But there is one major difference between the colonial regime that the founders waged war against and the current power that seeks to abridge free speech and freedom of the press. The government is attempting to chisel away at the protections afforded by the First Amendment by refusing to recognize a reporter’s privilege, under the guise of “national security.”

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<sup>140</sup> U.S. Const. amend. I.

<sup>141</sup> See SABLEMAN, *MORE SPEECH NOT LESS: COMMUNICATIONS LAW IN THE INFORMATION AGE 2* (1997).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 5–6.

<sup>146</sup> See generally GEORGE SANTANAYA, *THE LIFE OF REASON: OR, THE PHASES OF HUMAN PROGRESS, VOLUME 1*, at 284 (1920) (articulating the well-known adage, “Those who cannot remember the past are condemned to repeat it”).

## 2. The Freedom of Speech and Freedom of the Press Clauses of the First Amendment Necessarily Include a Reporter's Privilege

It is well settled that freedom of speech and freedom of the press are “fundamental personal rights and liberties.”<sup>147</sup> All publications, national or local, newsworthy or entertaining, are accordingly afforded the same constitutional protections.<sup>148</sup> The Freedom of Speech Clause and the Freedom of the Press Clause are distinct clauses that are not redundant.<sup>149</sup> Every word in the Constitution and its Amendments is deliberate and precise; therefore, the Freedom of the Press Clause carries its own interpretation that is distinct from the Freedom of Speech Clause.<sup>150</sup> Both clauses should be interpreted to provide protection to reporters who assert a reporter's privilege protecting the confidentiality of their sources.<sup>151</sup>

Free speech is a necessary element of democracy, as “we cannot intelligently make decisions required of a self-governing people unless we are permitted to hear all possible views bearing on such decisions.”<sup>152</sup> Free speech allows for the free-flow of ideas into what has been described as “the free market-place of ideas.”<sup>153</sup> This theory holds that “the maximum flow of, and competition between, diverse kinds of information and opinions will also maximize the chances of truth being recognized.”<sup>154</sup> The more informed the American people are, the stronger the American nation is as a whole.<sup>155</sup> Free speech ensures that individuals can express their views, albeit controversial, without having to resort to violence to get attention.<sup>156</sup> History has shown us that having access to alternate viewpoints, theories, and arguments is part and parcel to democracy.<sup>157</sup>

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<sup>147</sup> *Lovell v. Griffin*, 303 U.S. 444, 450 (1938).

<sup>148</sup> See JOEL M. GORA, *THE RIGHTS OF REPORTERS, AN AMERICAN CIVIL LIBERTIES UNION HANDBOOK* 13–14 (1974).

<sup>149</sup> Melville B. Nimmer, *Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?*, in *FREE BUT REGULATED: CONFLICTING TRADITIONS IN MEDIA LAW* 18, 19 (Daniel L. Brenner & William L. Rivers eds., 1982).

<sup>150</sup> GANT, *supra* note 3, at 73.

<sup>151</sup> Cf. GANT, *supra* note 3, at 72–73 (explaining that despite the fact that the Supreme Court has continued to evade “hard questions concerning the nature of press freedom and the meaning of the Press Clause” the Court will have to revisit and reassess the nature of First Amendment freedoms).

<sup>152</sup> Nimmer, *supra* note 149, at 27 (citing *Whitney v. California*, 274 U.S. 357, 372 (1927)).

<sup>153</sup> DENNIS MCQUAIL, *MEDIA ACCOUNTABILITY AND FREEDOM OF PUBLICATION* 63 (2003) (internal quotation marks omitted).

<sup>154</sup> *Id.* at 176.

<sup>155</sup> See also MCQUAIL, *supra* note 153, at 174.

<sup>156</sup> Nimmer, *supra* note 149, at 28.

<sup>157</sup> MCQUAIL, *supra* note 153, at 52.

The press provides a method by which these views are given legitimacy and can be disseminated on a widespread basis.<sup>158</sup>

Freedom of the press also ensures that reporters can provide the public with important and necessary information. We cannot forget that “the right to free publication . . . [is] an essential instrument for achieving democracy and [is] a precondition of its adequate practice, especially as the means for holding those who have power accountable” for their actions.”<sup>159</sup> Manning, Snowden, and now Sterling each sought to expose the American government’s actions to force the government to be accountable for its actions and not forsake the democratic ideals America champions.<sup>160</sup> The American public at large is made aware of such actions through the work of reporters.

Reporters can be likened to insurers, “surrogate servants” or “guardian[s]” of the public interest, who insure that the public is given access to information necessary to make informed decisions.<sup>161</sup> Furthermore, reporters provide the American people with the means necessary to effectuate change in a political climate marked by government secrecy and clandestine operations.<sup>162</sup> Scholars have termed the press the “Fourth Estate,” which implies that the press has as much power in the government as the other three traditional branches.<sup>163</sup> By informing the public of operations of the three “official” branches of the government, the press as the “fourth” branch insures that the American public is aware of what transpires in the nation and abroad on a global scale.<sup>164</sup>

All three branches of the United States government are given discretion, trust, and latitude to carry out their operations. As an essential aspect of government, the press should be given the power and latitude it needs to inform the American people of important news. Former United States Attorney General Eric Holder revised Department of Justice

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<sup>158</sup> Nimmer, *supra* note 149, at 28.

<sup>159</sup> MCQUAIL, *supra* note 153, at 51.

<sup>160</sup> See Douglas Kim, *Government Accountability Project Statement on Verdict in United States v. Bradley Manning*, GOVERNMENT ACCOUNTABILITY PROJECT BLOG (Jul. 30, 2013), <http://www.whistleblower.org/press/gap-statement-verdict-united-states-v-bradley-manning> (this article does not specifically mention Jeffrey Sterling, but rather focuses on Manning, Snowden, and former NSA Senior Executive Thomas Drake) (last visited Nov. 16, 2014).

<sup>161</sup> MCQUAIL, *supra* note 153 at 174.

<sup>162</sup> See generally DONNA A. DEMAC, KEEPING AMERICA UNINFORMED: GOVERNMENT SECRECY IN THE 1980S 142 (1984) (focusing on government secrecy during the Reagan administration, but demonstrating that government secrecy has a longstanding history).

<sup>163</sup> MCQUAIL, *supra* note 153, at 52.

<sup>164</sup> *Id.*

guidelines on press subpoenas in July of 2013, in the wake of recent leaks of classified information.<sup>165</sup> One of Holder's revisions remains that federal prosecutors can only obtain search warrants for information journalists obtained if the journalists themselves are under criminal investigation for conduct that is not related to newsgathering.<sup>166</sup> News organizations must also be given advance notice of such subpoenas, unless the advance notice would threaten an investigation, national security, or would cause immediate bodily harm.<sup>167</sup> Holder's revisions take affirmative steps toward granting reporters the rights they need to carry out their professions and give news organizations hope that the federal government may soon recognize a federal reporter's shield law.<sup>168</sup>

At times, the press may need to inform the American people about botched plans and secret operations that the government undertakes which compromise the integrity of this nation. Without being able to protect the identity of their sources, reporters will not be able to effectively gather and disseminate news to the public.<sup>169</sup> In the words of Private First Class Bradley Manning, "without information, you cannot make informed decisions as a public."<sup>170</sup> Open access to information is the only way that the American people can be informed and effectuate change in their government.<sup>171</sup> Reporters and "principled leakers" like Manning, Snowden, and Sterling together provide the American people with access to the truth.<sup>172</sup> How can this implied "fourth branch" operate when faced with grand jury subpoenas forcing them to testify regarding the sources of the information that the government tries so hard to conceal?

The reality is that the press cannot function with such oppressive restrictions on its newsgathering capabilities. Without the protection of confidential sources, individuals like Sterling, who wish to speak out against the government, will be too afraid to do so.<sup>173</sup> Freedom of the press must be protected because America's "Founders established the First Amendment's guarantee of a free press as a recognition that a government unaccountable to public discourse renders that essential element of

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<sup>165</sup> Carol Cratty, *Justice Department Tightens Rules on Subpoenas, Warrants Involving Journalists*, CNN (Jul. 13, 2013, 8:51 AM), <http://www.cnn.com/2013/07/12/politics/doj-journalist-leaks/>.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *E.g.*, Dorf, *supra* note 125.

<sup>170</sup> Thompson, *supra* note 16, at 48.

<sup>171</sup> *Id.*

<sup>172</sup> See WIKILEAKS, <http://wikileaks.org/About.html> (last visited Oct. 8, 2014).

<sup>173</sup> See generally Davidson, *supra* note 14 (stating that "sources may dry up without a reporter's privilege").

democracy - the vote - meaningless.”<sup>174</sup> To hold otherwise would lead to a chilling effect on newsgathering and would severely compromise the public’s ability to access information.<sup>175</sup> Without protecting the confidentiality of a reporter’s source, “the cutting edge of this valuable societal instrument would be severely dulled and public participation in decision-making severely restricted.”<sup>176</sup> When interpreted together, both the Freedom of Speech and the Freedom of the Press clauses maximize the rights conferred on reporters who seek to expose the blunders of clandestine government operations.

### C. Critics of the Reporter’s Privilege

Opponents of this view argue that the administration of a reporter’s privilege “would present practical and conceptual difficulties of a high order” because there would have to be a delineation of who could qualify for such a privilege, if at all.<sup>177</sup> Critics argue that reaching a thorough definition of “the press” would be painstakingly difficult as such a definition would necessarily make a value judgment between the institutional press and solo or nonprofessional journalists.<sup>178</sup> It is true that the definition of “journalism” has evolved immensely, to include “citizen journalists” who publish local newspapers and write blogs, other “non-professional journalists” as well as professional journalists who work for large news organizations.<sup>179</sup>

Just because it will be difficult to define “journalist” does not mean that we should avoid doing it. The drafting of the Constitution and its Amendments was difficult. If the framers gave up because it was “too difficult” to declare our rights as a nation, we would still be under the colonial yoke subjected to sedition laws and taxes for expressing discontent against the government as a whole. Therefore, a broad definition of “journalist” or “reporter” is necessary to ensure that a maximum number of individuals can be protected by a reporter’s privilege.<sup>180</sup>

By narrowly defining who would “qualify” for such a privilege, the Supreme Court would in essence be issuing licenses for select individuals

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<sup>174</sup> *United States v. Sterling*, 724 F.3d 482, 520 (4th Cir. 2013) (Gregory, J. dissenting).

<sup>175</sup> *MCQUAIL*, *supra* note 153, at 185.

<sup>176</sup> *United States v. Criden*, 633 F.2d 346, 356 (3d Cir. 1980).

<sup>177</sup> *GANT*, *supra* note 3, at 82 (citing *Branzburg v. Hayes*, 408 U.S. 665, 703–04 (1972)).

<sup>178</sup> *GANT*, *supra* note 3, at 83.

<sup>179</sup> *See id.* at 196–97.

<sup>180</sup> *See id.* at 200–02.

to exercise First Amendment rights.<sup>181</sup> Furthermore, if we start narrowly defining who can exercise the freedom of the press, then we are asking for permission to speak.<sup>182</sup> We would be asking for permission to be protected by the First Amendment by virtue of our participation in a government-sanctioned class of individuals who can exercise this right, to the exclusion of other classes of people. Free speech is a basic tenet of American democracy and is woven into the very fabric of this country. A narrow definition of the press would not just be difficult to ascertain.<sup>183</sup> It would unlawfully exclude individuals who should be protected by the First Amendment at all times.<sup>184</sup>

Critics opposed to the recognition of a reporter's privilege also argue that reporters should not be granted preferential treatment from other American citizens.<sup>185</sup> Critics argue that reporters are members of society just as all others, and when served with subpoenas to testify in proceedings regarding their sources, reporters should be compelled to appear.<sup>186</sup> In building a case against defendants, critics argue that the government should be entitled to "every person's evidence" which includes information that reporters gained in confidence from sources.<sup>187</sup> This argument is also flawed, as "the power to compel the press to testify . . . is the power to harass a reporter out of his or her job as a watchdog of the [g]overnment."<sup>188</sup> The government should not be allowed to call off the press "watchdogs" because the government prefers to operate in secret and keep the American people unapprised of its operations.

As Risen has demonstrated, the threat of contempt for publishing controversial information about clandestine government operations is an occupational hazard. Without the "vital two-pronged spear of the investigative arsenal," namely "the ability to promise broad dispersal of otherwise concealed information as well as absolute silence as to [the identity of the] source" the harsh reality is that "a reporter becomes an impotent steward of the public interest."<sup>189</sup> If the status quo is maintained, and the Supreme Court does not resolve the existing circuit split, reporters

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<sup>181</sup> *Id.* at 84.

<sup>182</sup> *Id.*

<sup>183</sup> GANT, *supra* note 3, at 83.

<sup>184</sup> *See id.* at 83–84.

<sup>185</sup> Fred P. Graham & Jack C. Landau, *The Federal Shield Law We Need*, in *FREE BUT REGULATED: CONFLICTING TRADITIONS IN MEDIA LAW* 65, 78–79 (Daniel L. Brenner & William L. Rivers eds., 1982).

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 76–77.

<sup>189</sup> *Id.* at 76.



will continue to be imprisoned to protect their livelihoods.<sup>190</sup> Hundreds of reporters have preferred imprisonment to forcibly renege on their assurances of confidentiality to their sources as a result of government pressure.<sup>191</sup> Reporters have also been fined for their refusal to cooperate with the government when pressed for information about their sources.<sup>192</sup> Reporters' word is their bond. By refusing to recognize a reporter's privilege, the government is stripping the "fourth estate" of a necessary element of their jobs—confidentiality.

### III. CONCLUSION

The United States Supreme Court must resolve the circuit split that has emerged in the wake of its 1972 *Branzburg v. Hayes* decision. *United States v. Sterling* has brought the issues that *Branzburg* first articulated to the forefront. *Sterling* demonstrates that the issue of whether a reporter should be protected from being compelled to reveal the confidentiality of his source is pervasive. Furthermore, an adverse judgment in *Sterling* has the potential to compromise rights that the First Amendment to the United States Constitution is supposed to guarantee.

The Judiciary is charged with interpreting the Constitution<sup>193</sup>, which includes the First Amendment. The Reporter's Privilege is necessary to protect the public's access to information needed to make informed and intelligent decisions about the American government. The government should not be given carte blanche to compel testimony from reporters who have promised confidentiality to their sources.

Neither James Risen nor Jeffrey Sterling compromised America's national security by telling the American people about the CIA's botched "Classified Program No. 1." The true culprit is the CIA—the very agency that is supposed to be protecting America's national security, within the framework of the United States Constitution. The American people's response to Manning and Snowden's leaks demonstrates that the people cannot support a government which is unaccountable for its decisions and actions. Instead of providing an explanation to the American people for its actions, the government vigorously prosecutes individuals who speak out against its questionable practices. This effectively strips reporters of

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<sup>190</sup> See *Paying the Price: A Recent Census of Reporters Jailed or Fined for Refusing to Testify*, REPORTER'S COMMITTEE FOR FREEDOM OF THE PRESS, <http://www.rcfp.org/jailed-journalists> (tracking subpoena challenges and tallying fines and jail sentences issued to reporters for refusing to disclose and testify regarding their sources) (last visited Nov. 16, 2014).

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> See generally ALEXANDER, *supra* note 132 (explaining the role of the courts).

their First Amendment right to protect their sources and compromises the foundation of the American democracy.