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The Underprivileged Profession:

The Case for Supreme Court Recognition of the Journalist's Privilege*

by

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Abstract:

This article argues that the Supreme Court, under the power granted it by Federal Rule of Evidence 501, should recognize an evidentiary privilege allowing journalists to refuse to divulge confidential information. It explores the theoretical underpinnings (and potential differences) of the First Amendment's Press and Speech Clauses to conclude that the notion of a journalist's privilege has constitutional support. After tracing the rise of the press as an institution--and the rise of journalism as a profession--over the course of American history, it explains why no privilege existed for journalists at common law, especially when Blackstone wrote his Commentaries and when Wigmore penned his famous Treatise.

Next, the article makes the case that the role of the journalist in today's society--serving as an important check on the increasingly centralized power of government--creates a more compelling justification for a journalist's privilege than perhaps at earlier times in our nation's history. The number of subpoenas issued to news organizations (and the number of reporters being held in contempt) is rapidly increasing, and the relationship between the government and the press is becoming more adversarial. In addition, reporters are often unable to guarantee confidentiality to their sources due to the widely varying levels of protection in different states and circuits and uncertainties about the forum in which they might be subpoenaed.

The article then examines the protections journalists are afforded in various venues. Internationally, most of America's fellow common law countries have recognized privileges for journalists. Forty-nine states and the District of Columbia have created protections for journalists, either legislatively or judicially. Congress has also introduced legislation to this end on numerous occasions. The primary obstacle to federal recognition of the privilege is the 1972 case of *Branzburg v. Hayes*, in which the Supreme Court, by a 5-4 vote (and a very telling concurrence by Justice Powell), held that journalists were entitled to no such privilege and were required to give testimony to a grand jury. Though the circuit courts of appeal that have been presented with the issue vary widely in their interpretation of *Branzburg*, most have noted that the common law has evolved significantly since *Branzburg's* time, and that it is the province of the Supreme Court, if it so desires, to distinguish its prior precedent and recognize a journalist's privilege under Rule 501.

In the final section, the article looks to Congress' intent in enacting Federal Rule of Evidence 501 and analyzes the Supreme Court's use of the Rule to create a federal psychotherapist-patient privilege in *Jaffee v. Redmond* (1996). The article concludes that the reasons for recognition of a journalist's privilege are stronger than those supporting a psychotherapist-patient privilege: the former is rooted in the Constitution, serves a more important role in our system of government, and has received significantly more support from courts and legislatures at the state, federal, and international levels. Therefore, the Supreme Court should use its prerogative to recognize a privilege for journalists to refuse to give evidence.

NB: On June 27, 2005, the Supreme Court denied certiorari in the Judith Miller case, and she was quickly jailed for contempt by the trial court; however, the arguments made in the article are still relevant. Indeed, it is not surprising that the Court denied certiorari because the facts of Miller's case so closely resemble those in *Branzburg*, namely a reporter refusing to provide evidence to a federal grand jury. However, the Supreme Court, following the lead of several circuit courts of appeal, might still be persuaded to recognize a journalist's privilege in other contexts, namely during the course of a trial.

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