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STATE OF THE FEDERAL REPORTERS' PRIVILEGE

A. Fallout from *United States v. Sterling*, 724 F.3d 482, 492 (4th Cir. 2013).

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

Ultimate impact of this holding will depend on extent to which other courts accept its reading of *Branzburg v. Hayes,* 408 U.S. 665 (1972). *Sterling* interprets *Branzburg* to hold that there is no privilege in a criminal proceeding absent "bad faith, harassment or other such non-legitimate motive…" But the *Branzburg* holding depends on the concurrence of Justice Powell, who wrote:

> "The Court does not hold that newsman, subpoenaed to testify before a grand jury are without constitutional rights with respect to the gathering of news or the safeguarding of sources…. The asserted claim to privilege should be judged by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony…The balance of these vital constitutional and societal interests on a case by case basis accords with the tried and traditional way of adjudicating such questions." 408 U.S. at 709-10.

Other courts have earlier rejected the *Sterling* proposition that whether to scompell a reporter to testify is purely up to the prosecutor. *See In re Grand Jury Subpoena (Judith Miller),* 438 F.3d 1141 (D.C. Cir. 2006) (Tatel, J., concurring) (stressing that a "court must weigh the public interest in compelling disclosure, measured by the harm the leak caused, against the public interest in newsgathering, measured by the leaked information's value."); *N.Y. Times v. Gonzales,* 459 F.3d 160 (2d Cir. 2006) (Sack, J., dissenting) (noting that "the Court today reaffirms the role of federal courts in mediating between the interests of law enforcement… and the interests of the press in maintaining source confidentiality….")

B. 2014 Revisions to Department of Justice Guidelines, 28 C.F.R. §50.10 (a*vailable at* https://www.documentcloud.org/documents/1020977-final-rule-28-cfr-50-10-ag-order.html)

In aftermath of public uproar following a secret subpoena of AP phone records and search warrant for a Fox News reporter's email in connection with national security leak investigations, the Department of Justice amended its guidelines for obtaining information from the press in 2014 and again in 2015. Basic framework of Guidelines functions like a qualified reporter's privilege, Before 2014, Guideline's required that:

- Information sought from a reporter or a reporter's telephone service provider must be essential to success of the investigation;
- "All reasonable alternatives" must be pursued before seeking information from the press;
- A subpoena to compel information must be drawn "as narrowly as possible;"
- A subpoena may not be issued without the personal approval of the Attorney General; and
- Prior notice will be given to the reporter where notice "would not pose a substantial threat to the integrity of investigation."

Amendments in 2013 and 2014 made a number of improvements, most significantly:

- Expands scope to cover third-party subpoenas seeking all types of communications records of reporters, nut just telephone records (covers email, text messages, *etc*.)
- Bars the use of a search warrant to obtain records unless the reporter is a suspect or target of a criminal investigation;
- Reverses the presumption concerning notice, and requires notice in all cases *unless* compelling evidence demonstrates that notice would create a clear and substantial threat to the integrity of the investigation; and
- Imposes limits on who make access information obtained from a reporter and how it may be used by the government.

Who is a journalist?

Neither original Guidelines nor the amendments define the "members of the media" to which they apply. The amendments in an exclusion make reference to a member of the news media who is reasonably believed to have "a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication," quoting the definition of a journalist in the Privacy Protection Act of 1980, 42 U.S.C. §2000aa.

Privilege in national security investigations?

The original Guidelines made no mention of national security investigations. The amended Guidelines state that in considering whether to issue a subpoena to a reporter the Attorney General may consider input from the Director of National Intelligence certifying the significance of the harm caused by the leak under investigation.

C. Federal Shield Law Update

Another fallout of the many leaks investigations was a major impetus to pass a federal shield law in 2014, that fell short.

Who is a journalist?

S. 987. The Senate bill adopted a functional test to define who was a "covered person" eligible to assert the privilege The Senate bill did not require that the journalistic activity constitute a substantial portion of the person's livelihood or be for substantial financial gain.

HR 1962. A "covered person" is a person "who, for financial gain or livelihood, is engaged in journalism and includes a supervisor, employer, parent, subsidiary, or affiliate of such covered person."

Both bills had exceptions to excludes foreign agents and terrorists

Privilege in national security investigations?

S. 987. Confidential source information could be compelled if a court finds, by a preponderance of the evidence, that "the evidence would assist in preventing an act of terrorism" or "other significant and articulable harm" to national security. In assessing potential harm, the court "shall give appropriate deference to a specific factual showing submitted to the court by the head of any executive branch agency or department concerned." A potential future leak by the unknown source would not be sufficient "by itself" to establish that disclosure would "materially assist" preventing an act of terrorism.

H.R. 1962. Source-identifying information could be compelled under an exception for national security. The court must find that "disclosure of the identity of such a source is necessary to prevent an act of terrorism against the United States or its allies or other significant and specified harm to national security with the objective to prevent such harm." The court must also find that "the public interest in compelling disclosure of the information or document involved outweighs the public interest in gathering or disseminating news or information."