No.

IN THE

Supreme Court of the United States

MATTHEW COOPER AND TIME INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The D.C. Circuit upheld grand jury subpoenas and contempt citations seeking to compel TIME magazine reporter Matthew Cooper and Time Inc. to reveal confidential source information regarding an alleged leak by government officials identifying Valerie Plame as a CIA operative.

Reflecting the conflict and confusion over whether the courts should recognize a reporter's confidential source privilege under Federal Rule of Evidence 501—or whether they even have the power to do so in light of this Court's decision in *Branzburg v. Hayes*—the three panel members below offered three different analyses of these issues, while agreeing that *Branzburg* precluded them from recognizing a First Amendment-based privilege.

The panel ultimately declined to quash the subpoenas based on information contained in secret evidence submitted by the prosecutor and considered *ex parte*.

The following questions are presented:

1. Whether a reporter's privilege exists under Federal Rule of Evidence 501 and the common law, or under the First Amendment, that provides protection against compelled disclosure of confidential source information.

2. Whether the Due Process Clause provides protection against imprisonment or fines for contempt based on secret evidence presented *ex parte* by a prosecutor.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The parties to the consolidated proceeding below included Matthew Cooper, Time Inc., Judith Miller, and the United States of America.

Time Inc., the publisher of TIME magazine, is wholly owned by Time Warner Inc., a public company.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS AND ORDERS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 8

I. THE QUESTION WHETHER A FEDERAL REPORTER'S PRIVILEGE EXISTS IS IMPORTANT, RECURRING, HAS DIVIDED THE CIRCUITS, AND WARRANTS REVIEW 10

A. This Court Should Resolve The Conflicts And Recognize A Common Law Privilege. 13

1. The Circuits Have Adopted Inconsistent And Conflicting Approaches To A Common Law Reporter's Privilege. 14

2. *Jaffee* And Rule 501 Support The Recognition Of A Common Law Privilege. 16

3. This Court Should Grant Review To Resolve The Tension Between *Branzburg* And *Jaffee* 20

B. This Court Should Resolve The Conflicts And Clarify *Branzburg* By Recognizing That The First Amendment Provides Protection For Confidential News Sources 21

1. Courts Have Divided Over The Meaning Of *Branzburg* And The Scope Of A First Amendment Privilege. 21

2. This Court's Recent First Amendment Decisions Call *Branzburg* Into Question And Support Recognition Of A Privilege. 23

C. The Existence Of A Reporter's Privilege Is A Recurring Issue Of Substantial Public Importance. 25

II. REVIEW IS WARRANTED TO RESOLVE WHETHER DUE PROCESS PROHIBITS IMPRISONING OR FINING WITNESSES BASED ON SECRET EVIDENCE. 27

CONCLUSION 30

TABLE OF AUTHORITIES

Pages

CASES

Bartnicki v. Vopper, 532 U.S. 514 (2001)............................24

Branzburg v. Hayes, 408 U.S. 665 (1972) ....*passim*

Bruno & Stillman, Inc. v. Globe Newspaper Co.,
633 F.2d 583 (1st Cir. 1980) 16

Butterworth v. Smith, 494 U.S. 624 (1990)..........................29

Cervantes v. Time Inc., 464 F.2d 986
(8th Cir. 1972) 22

Estes v. Texas, 381 U.S. 532 (1965)....................................18

Funk v. United States, 290 U.S. 371 (1933).........................14

Gonzales v. National Broadcasting Co.,
194 F.3d 29 (2d Cir. 1999).......................................15, 23

Greene v. McElroy, 360 U.S. 474 (1959).............................27

Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004)...................27, 28

In re Grand Jury Proceedings, 5 F.3d 397
(9th Cir. 1993) 12, 15, 22

In re Grand Jury Proceedings, 810 F.2d 580
(6th Cir. 1987) 23

In re Grand Jury Subpoena to Williams, 766
F. Supp. 358 (W.D. Pa. 1991), *aff'd by an equally divided court*, 963 F.2d 567
(3d Cir. 1992) (en banc) 12, 14, 21

In re Guantanamo Detainee Cases,
355 F. Supp. 2d 443 (D.D.C. 2005) 29

In re Kitchen, 706 F.2d 1266 (2d Cir. 1983)..................28, 29

In re Letellier, 578 A.2d 722 (Me. 1990).............................21

In re Motions of Dow Jones & Co.,
142 F.3d 496 (D.C. Cir. 1998) 29

In re Oliver, 333 U.S. 257 (1948) 27

In re Pennington, 581 P.2d 812 (Kan. 1978) 22

In re Shain, 978 F.2d 850 (4th Cir. 1992)............................22

Jaffee v. Redmond, 518 U.S. 1 (1996)...........................*passim*

LaRouche v. National Broad. Co.,
780 F.2d 1134 (4th Cir. 1986)..22

McKevitt v. Pallasch, 339 F.3d 530
(7th Cir. 2003)...11, 12, 23

McKoy v. North Carolina, 494 U.S. 433 (1990)..................24

Miller v. Transamerican Press, Inc.,
621 F.2d 721 (5th Cir. 1980)..22

Mills v. Alabama, 384 U.S. 214 (1966)................................25

New Hampshire v. Siel, 444 A.2d 499
(N.H. 1982)..22

New York Times Co. v. Gonzales, No. 04-7677,
2005 WL 427911 (S.D.N.Y. Mar. 2, 2005) ....*passim*

New York Times Co. v. Sullivan, 376 U.S. 254
(1964) 25

Riley v. City of Chester, 612 F.2d 708
(3d Cir. 1979) 14, 16, 22

*Rodriguez de Quijas v. Shearson/American
Express, Inc.*, 490 U.S. 477 (1989) 25

Schoen v. Schoen, 5 F.3d 1289 (9th Cir. 1993)....................22

Silkwood v. Kerr-McGee Corp., 563 F.2d 433
(10th Cir. 1977)...22

State Oil Co. v. Khan, 522 U.S. 3 (1997).............................24

Swidler & Berlin v. United States,
524 U.S. 399 (1998) 19

Time Inc. v. Hill, 385 U.S. 374 (1967) 18

Trammel v. United States, 445 U.S. 40 (1980)............. *passim*

Turner Broadcasting System v. FCC,
512 U.S. 622 (1994) 24

United States v. Alter, 482 F.2d 1016
(9th Cir. 1973) 28, 29

United States v. Calandra, 414 U.S. 338 (1973).................. 16

United States v. Caporale, 806 F.2d 1487
(11th Cir. 1986) 22

United States v. Cuthbertson, 630 F.2d 139
(3d Cir. 1980) .... *passim*

United States v. LaRouche Campaign, 841 F.2d
1176 (1st Cir. 1988).. 16

United States v. Moussaoui, 382 F.3d 453
(4th Cir. 2004) 29

United States v. Smith, 135 F.3d 963
(5th Cir. 1998) 12, 22

United States v. Steelhammer, 539 F.2d 373
(4th Cir. 1976), *rev'd*, 561 F.2d 539
(4th Cir. 1977) (en banc) 15

Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981)............. 19, 23

CONSTITUTIONAL PROVISIONS

U.S. CONST., AMEND. I .... *passim*

U.S. CONST., AMEND. V .... *passim*

STATUTES

18 U.S.C. App. III § 3... 29

28 U.S.C. § 1254(1)..1

50 U.S.C. § 421 3

D.C. Code Ann. §§ 16-4701 *et seq*...............................17, 26

RULES

FED. R. EVID. 501 ....*passim*

FED. R. EVID. 1101 ....16, 23

OTHER AUTHORITIES

A. Bickel, *The Morality of Consent* (1975)..........................18

Matthew Cooper *et al*., *A War on Wilson?*,
Time.com (July 17, 2003) 2, 3, 25

Michael Duffy *et al*., *A Question of Trust*, TIME
(July 21, 2003)..3

Robert Novak, *The Mission to Niger*, Chi. Sun-
Times, July 14, 2003 2

Reporters' Committee for Freedom of the Press,
Special Report: Reporters and Federal
Subpoenas, March 2005 10

R. Smolkin, *Under Fire*, 27 Am. Journalism
Review 18 (2005) 26

Potter Stewart, *"Or of the Press,"* 26 HASTINGS
L.J. 631 (1975) 12

John W. Strong, *McCormick on Evidence* § 76.2
(5th ed. 1999) 24

Joseph C. Wilson, *What I Didn't Find in Africa*,
N.Y. Times, July 6, 2003...2

PETITION FOR A WRIT OF CERTIORARI

Petitioners Matthew Cooper and Time Inc. ("Time") respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS AND ORDERS BELOW

The D.C. Circuit's opinion (Pet. App. 1a) is reported at 397 F.3d 964, and its order denying rehearing en banc (Pet. App. 116a) is reported at ___ F.3d ___, 2005 WL 889719. Orders of the district court are reported at 332 F. Supp. 2d 26 (Pet. App. 86a), 332 F. Supp. 2d 33 (Pet. App. 98a), 338 F. Supp. 2d 16 (Pet. App. 101a), and 346 F. Supp. 2d 54 (Pet. App. 111a).

JURISDICTION

The D.C. Circuit filed its opinion on February 15, 2005, and denied petitioners' timely request for rehearing en banc on April 19, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Rule of Evidence 501 provides: "Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press."

The Fifth Amendment's Due Process Clause provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

This case presents important, substantial and recurring questions concerning the reporter's privilege that have confused and divided courts throughout the country since this Court's 5-4 decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972), more than thirty years ago.

1. In the summer of 2003, a public controversy arose over the justification for the invasion of Iraq, including whether Iraq possessed, or had been seeking to develop, weapons of mass destruction. In the midst of that controversy, on July 6, 2003, the *New York Times* published an op-ed piece by former Ambassador Joseph Wilson challenging the Bush Administration's justifications for the invasion. Wilson asserted that the CIA had dispatched him to Niger in February 2002 to investigate whether Iraq had attempted to purchase uranium from Niger as part of its effort to develop nuclear weapons. He stated that he had found no credible evidence of such efforts, and had reported that conclusion to the CIA. *See* Joseph C. Wilson, *What I Didn't Find in Africa*, N.Y. TIMES, July 6, 2003, § 4, at 9.

On July 14, 2003, the *Chicago Sun-Times* published a column by Robert Novak reporting that "two senior administration officials" had told him that the CIA had selected Wilson for the Niger mission at the suggestion of Wilson's wife, Valerie Plame, described by Novak as "an agency operative on weapons of mass destruction." Robert Novak, *The Mission to Niger*, CHI. SUN-TIMES, July 14, 2003, at 31.

Three days later, TIME magazine published an article on its website, co-authored by reporter Matthew Cooper, stating that "some government officials have noted to TIME in interviews . . . that Wilson's wife, Valerie Plame, is a CIA official who monitors the proliferation of weapons of mass destruction." Matthew Cooper *et al.*, *A War on Wilson?*, TIME.com (July 17, 2003), available at www.time.com/time/nation/article/0,8599,465270,00.html. The article, based in part on confidential sources, suggested potential misconduct by government officials in that the leak may have been made to re-

taliate against and discredit Wilson for his op-ed in the *Times*. Cooper later contributed reporting to a second article, also based in part on confidential sources, that reported on the Iraq/uranium controversy but did not mention Plame. Michael Duffy *et al.*, *A Question of Trust*, TIME, July 21, 2003, at 22.

2. The Department of Justice opened an investigation into whether the leak of Plame's identity to the media violated federal law barring certain unauthorized disclosures of the identity of covert operatives. *See* 50 U.S.C. § 421 (criminalizing the intentional and knowing disclosure of information identifying a covert agent by anyone having authorized access to classified information, with knowledge that the United States is taking affirmative measures to conceal that covert agent's intelligence relationship to the United States). In December 2003, the Attorney General recused himself from that investigation and delegated that responsibility to the Deputy Attorney General. The Deputy Attorney General, in turn, appointed Patrick Fitzgerald as Special Counsel and delegated to him the full authority of the Attorney General over the investigation.

The Special Counsel convened a grand jury in January 2004, and on May 21, 2004, issued a grand jury subpoena to Cooper seeking his testimony and production of "[a]ll notes, tape recordings, e-mails, or other documents of Matthew Cooper relating to the July 17, 2003 Time.com article entitled, 'A War on Wilson?' and the July 21, 2003 Time magazine article entitled, 'A Question of Trust.'" A21.[1]

3. Cooper moved to quash the subpoena, invoking a reporter's privilege under the common law and First Amendment, and arguing that the subpoena sought to force him to reveal the identity of his confidential source or sources and other information provided in confidence. A61. In an affidavit he stated that his ability to obtain and report informa-

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[1] "A" refers to the Appendix filed in the D.C. Circuit.

tion to the public depended in large part on his ability "to promise confidentiality to [his] sources." Pet. App. 126a.

In a July 20, 2004 opinion, the district court denied Cooper's motion, concluding that *Branzburg* "rejected any reporter's privilege rooted in the First Amendment or common law in the context of a grand jury acting in good faith." Pet. App. 86a. The court also stated that the Special Counsel "would be able to meet even the most stringent of balancing tests," based solely on an affidavit that the Special Counsel had submitted *ex parte* and under seal. Pet. App. 97a. The Special Counsel refused to share the affidavit with Cooper or his counsel, and the district court denied Cooper's request that he or his counsel be permitted to review it.

The Special Counsel had served a substantially similar subpoena on Time, requesting the same documents sought from Cooper. Time moved to quash, and the district court denied Time's motion on August 6, 2004.

Cooper and Time informed the Special Counsel that they would decline to comply with the subpoenas insofar as they sought testimony or documents that would identify confidential sources. On August 9, 2004, the court issued an order holding Cooper and Time in contempt. Pet. App. 98a. The court directed that Cooper be imprisoned for up to 18 months, and that Time pay a fine of $1,000 per day, until they complied with the subpoenas. *Id*. at 100a.

Cooper and Time noticed appeals, but shortly thereafter reached an agreement with the Special Counsel whereby Time agreed to produce certain documents and Cooper agreed to answer certain questions pertaining to his conversations with a particular individual. (Cooper and Time reached this agreement only after that individual had explicitly and unambiguously informed Cooper that he had no objection to Cooper identifying him.) On August 23, 2004, Cooper answered all questions from the Special Counsel in a deposition and Time produced the documents. On the Special Counsel's motion, the district court then vacated the contempt orders.

4. Less than three weeks later, the Special Counsel served a second round of subpoenas on Cooper and Time. These subpoenas were broader than the initial subpoenas, and sought all documents "reflecting conversations between Matthew Cooper and official source(s) prior to July 14, 2003" relating to Wilson, Plame, or her affiliation with the CIA—whether or not those documents related to the two articles in question. A314-15. Cooper and Time again moved to quash based on the reporter's privilege. On October 7, 2004, the district court denied the motions and ordered Cooper and Time to comply.[2]

Cooper and Time advised the Special Counsel that they would not comply insofar as the subpoenas sought information that would divulge the identity of confidential sources. On October 13, 2004, the court held Cooper and Time in contempt and once again ordered Cooper to be imprisoned up to 18 months, and Time to be fined $1,000 per day, until they complied with the subpoenas. The court adhered to its earlier ruling, holding that *Branzburg* foreclosed any claim of privilege, either under the First Amendment or federal common law. Finding that Cooper's and Time's appeals "are brought in good faith and raise substantial issues of law," the court granted Cooper bail and stayed the fine imposed on Time pending appeal. Pet. App. 109a.

5. The Special Counsel was simultaneously seeking to force disclosure of confidential source information from *New York Times* reporter Judith Miller.[3] The grand jury subpoenas issued to Miller on August 12 and 14, 2004, demanded her confidential source information relating to Valerie Plame or Iraqi efforts to obtain uranium. As with Cooper and Time,

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[2] On November 10, 2004, the district court issued an opinion explaining that the motion was denied for the reasons given in the July 20, 2004 and September 9, 2004 orders, among other reasons. Pet. App. 111a.

[3] The Special Counsel also caused grand jury subpoenas to be issued to several other reporters in connection with this investigation, including Tim Russert of NBC and Walter Pincus and Glenn Kessler of the *Washington Post*.

the district court rejected Miller's reporter's privilege claims and denied her motion to quash. In a September 9, 2004 order, the court adopted and relied upon the reasoning of its July 20, 2004 order in rejecting the privilege. Pet. App. 101a. The court included a more detailed explanation of its reasons for rejecting a common law privilege, concluding that because the *Branzburg* Court supposedly "undertook the analysis" in 1972 and did not recognize a common law privilege, the district court was foreclosed from doing so today. Pet. App. 105a.

As with Cooper and Time, the court held Miller in contempt and ordered her to be jailed when she refused to comply with the subpoenas. The court granted bail to Miller, specifically finding that an appeal would be brought in good faith and would raise substantial issues of law.

6. Cooper, Time, and Miller brought a consolidated appeal. A panel of the D.C. Circuit, composed of Judges Sentelle, Henderson and Tatel, affirmed. Pet. App. 2a. The court interpreted *Branzburg* as an absolute bar to any First Amendment protection for confidential sources, rejected decisions from other circuits that have recognized a First Amendment privilege, and held that because "[t]he Supreme Court has not overruled *Branzburg*," it "has already decided the First Amendment issue before us today." Pet. App. 10a, 16a. Only the Supreme Court has "the prerogative of overruling its own decisions." Pet. App. 16a (quotation omitted).

The panel could not reach a similar consensus on whether a reporter's privilege existed as a matter of federal common law, splintering three ways in separate concurrences totaling 60 pages. Judge Sentelle stated that, in his opinion, *Branzburg* rejected a common law privilege and "that rejection stands unless and until the Supreme Court itself" clarifies or overrules *Branzburg*. Pet. App. 26a.

Judge Henderson stated that "I cannot agree with Judge Sentelle's conclusion that the United States Supreme Court has answered the question" whether a common law privilege exists. Pet. App. 38a. She noted that this Court's opinion in

Branzburg, as well as Justice Powell's concurrence, "hint ambiguously at the existence" of a common law privilege, and emphasized that "we are not bound by *Branzburg*'s commentary on the state of the common law in 1972." *Id*. at 38a-39a. Nonetheless, she concluded that because the Special Counsel's *ex parte* "evidentiary proffer overcomes any hurdle, however high, a federal common-law reporter's privilege may erect," the court "need not, and therefore should not, decide anything more today than that." *Id*. at 35a.

Judge Tatel disagreed with both Judge Sentelle and Judge Henderson. He explained that he found *Branzburg* "more ambiguous than do my colleagues" and stated that he would recognize a common law privilege, rejecting the district court's and Judge Sentelle's argument that "*Branzburg* already performed the analysis required by Rule 501" of the Federal Rules of Evidence. Pet. App. 45a, 58a. Judge Tatel noted "the shift in favor of the privilege since [*Branzburg* was decided]—from seventeen states with statutory privileges then to thirty-one plus D.C. today, with another eighteen providing common law protection," and concluded that "[t]o disregard this modern consensus in favor of decades-old views . . . would not only imperil vital newsgathering, but also shrink the common law function assigned by Rule 501 and 'freeze the law of privilege' contrary to Congress's wishes." *Id*. at 59a, 62a (quoting *Trammel v. United States*, 445 U.S. 40, 47 (1980)). He set forth his formulation of the reporter's privilege, and concluded that it would be overcome in this case, based solely on the prosecutor's *ex parte* submission. Pet. App. 62a-83a.

The panel as a whole noted the differing views of each panel member as to the existence and scope of a common law privilege, but concluded that "if [a common law] privilege applies here, it has been overcome" by the Special Counsel's secret evidentiary proffer. Pet. App. 16a. The panel stated that on this point it was adopting the reasoning of Judge Tatel's concurring opinion, which devoted eight pages to explaining how the Special Counsel, with his "voluminous classified filings," had "met his burden of demonstrating that

the information [sought from the reporters] is both critical and unobtainable from any other source." Pet. App. 16a, 75a. Those eight pages, as released to petitioners and to the public, are blank. Pet. App. 76a-82a.

Finally, the court held that Cooper's and Time's due process rights had not been violated by "the refusal of the Special Counsel and the District Court to provide them access to the Special Counsel's secret evidentiary submissions." Pet. App. 17a. The court concluded that the government's interest in grand jury secrecy outweighed any rights an alleged contemnor may have to respond to the evidence purporting to defeat a claim of privilege. *Id*. at 17a-18a.[4]

With two of the nine active judges not participating, the court of appeals denied rehearing en banc. Pet. App. 116a-117a. Judge Tatel issued a separate statement concurring in the denial, acknowledging that "this court's decisions concerning [*Branzburg*] are somewhat conflicted," but concluding that "[o]nly the Supreme Court can limit or distinguish *Branzburg* on these facts," and that no other issue warranted the full court's review. Pet. App. 118a-119a.

REASONS FOR GRANTING THE WRIT

The four separate opinions issued by the D.C. Circuit's three-judge panel are a microcosm of the law in this area, which is undeniably in serious disarray. This Court's guidance is necessary to determine the existence and scope of a reporter's privilege under the common law and the First Amendment.

This Court has not considered the issue whether federal law provides protection for confidential sources since its sharply divided and perplexing decision more than 30 years ago in *Branzburg v. Hayes*, 408 U.S. 665 (1972). Since that time, the *Branzburg* majority opinion and Justice Powell's

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[4] The court also rejected petitioners' arguments that the Department of Justice Guidelines for issuing subpoenas to reporters, 28 C.F.R. § 50.10, were judicially enforceable and thus declined to reach the issue whether the Special Counsel had complied with them. Pet. App. 20a.

"enigmatic" concurrence have been subject to sharply differing interpretations. The courts of appeals have been vexed by whether there is any common law or constitutional privilege at all, and how to apply the privilege in varying contexts. Some courts have found *Branzburg* to bar recognition of a privilege, while many have read the collection of opinions affirmatively to support it, and still others have held that the privilege applies in some proceedings but not others.

The intervening three decades have witnessed significant changes in the legal landscape that strongly support recognition of a federal reporter's privilege. In 1975, Congress adopted Federal Rule of Evidence 501, instructing federal courts to recognize new privileges as appropriate in light of "reason and experience." In embracing this flexible approach, Congress declined to adopt the privilege rule originally promulgated by this Court—which had set forth nine specific, enumerated privileges—in favor of an open-ended grant of lawmaking authority that "directed federal courts to 'continue the evolutionary development of testimonial privileges.'" *Jaffee v. Redmond*, 518 U.S. 1, 8-9 (1996) (quoting *Trammel*, 445 U.S. at 47).

Moreover, at the time *Branzburg* was decided—in the pre-Watergate era—only 17 States recognized a reporter's privilege. Today, 49 States and the District of Columbia do. This fact is highly relevant to the question whether a federal common law privilege should be recognized under Rule 501. As this Court held in *Jaffee*, which itself was decided more than 20 years after *Branzburg*, "the existence of a consensus among the States indicates that 'reason and experience' support recognition of the privilege." 518 U.S. at 9.

The sharp disagreements among the lower courts, and the many changes in the law over the last 30 years, have resulted in inconsistent and conflicting legal standards throughout the country. This uncertainty, in turn, frustrates and defeats the nearly unanimous policies of the States in this area. It also leads to confusion by sources and reporters, and the specter of jail and other harsh penalties for reporters who

do not know what promises they can make to their sources when engaged in newsgathering.

Confidential sources are critical to reporting on matters of public importance. This case, for example, involves a news story about the validity of the government's justification for war in Iraq, and alleged misconduct by senior officials aimed at discrediting critics of the war. Yet in recent months there has been a wave of reporters being subpoenaed and held in contempt for declining to reveal their sources. For example, a Rhode Island television reporter was held in civil and criminal contempt for refusing to disclose to a grand jury the source of a leak, and five reporters were held in contempt in connection with the Wen Ho Lee civil case. *See* Reporters' Committee for Freedom of the Press, *Special Report: Reporters and Federal Subpoenas*, March 2005, available at www.rcfp.org/shields_and_subpoenas.html.

As the panel in this case recognized, only this Court can resolve the reigning conflict and confusion among the federal courts regarding *Branzburg* and the existence and scope of a reporter's privilege. The Court should grant review and do so in this case.

The Court should also grant review to resolve the important due process questions presented by the lower courts' reliance on the prosecutor's *ex parte* submissions in holding Cooper and Time in contempt. The D.C. Circuit's holding—that a witness may be imprisoned based on secret evidence—conflicts with rulings from the Second and Ninth Circuits, as well as decisions of this Court recognizing the due process right of defendants to review and challenge the evidence against them.

I. THE QUESTION WHETHER A FEDERAL REPORTER'S PRIVILEGE EXISTS IS IMPORTANT, RECURRING, HAS DIVIDED THE CIRCUITS, AND WARRANTS REVIEW.

In *Branzburg*, this Court, by a 5-4 vote, declined to recognize a reporter's privilege under the First Amendment in a

case involving reporters subpoenaed by a grand jury. The Court, in an opinion authored by Justice White, recognized that "news gathering is not without its First Amendment protections," 408 U.S. at 707, but went on to reject protection in that case. Although the Court noted that, as of 1972, no privilege had been recognized "[a]t common law," it obviously could not have resolved the question whether such a privilege should be recognized under Rule 501, which would not be enacted for another three years. *Id*. at 685-86, 693. In fact, the Court specifically observed that "[a]t the federal level, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate." *Id*. at 706. The Court emphasized that its analysis was based "[o]n the records now before us" at a time when "the majority" of States had not "provided newsmen a statutory privilege." *Id*. at 689-90.

In a concurring opinion, however, Justice Powell—whose vote was essential to the judgment—seemed to endorse some form of privilege by recommending "the striking of a proper balance between freedom of the press" and the needs of law enforcement. 408 U.S. at 710. Justice Stewart's dissent described Justice Powell's opinion as "enigmatic," *id*. at 725, and the lower courts are deeply split over whether it should be construed to limit—or even replace—the majority's holding, compounding the confusion over *Branzburg*'s meaning and scope. *See, e.g.*, *McKevitt v. Pallasch*, 339 F.3d 530, 531-32 (7th Cir. 2003) ("[s]ince the [four] dissenting Justices would have gone further than Justice Powell in recognition of the reporter's privilege, and preferred his position to that of the majority opinion . . ., maybe his opinion should be taken to state the view of the majority of the Justices—though this is uncertain, because Justice Powell purported to join Justice White's 'majority' opinion"). Some courts and commentators have even gone so far as to label Justice White's opinion in *Branzburg* a "plural-

ity," while others have noted that Justice Powell joined that opinion despite writing a concurrence that seemed to question its fundamental conceptual underpinnings.[5] As Justice Stewart wrote three years after *Branzburg*, "the Court rejected the [reporters'] claims by a vote of five to four, or, considering Mr. Justice Powell's concurring opinion, perhaps by a vote of four and a half to four and a half." Potter Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631, 635 (1975).

Branzburg ignited a remarkable 33-year nationwide judicial debate that is ripe for this Court's resolution. What Judge Tatel termed the "internal confusion" of *Branzburg*, Pet. App. 47a, has resulted in courts taking wildly diverging approaches to the reporter's privilege. Many courts have recognized a common law privilege and, in some cases, a First Amendment privilege in the criminal context despite *Branzburg*. *See, e.g.*, *In re Grand Jury Subpoena to Williams*, 766 F. Supp. 358 (W.D. Pa. 1991), *aff'd by an equally divided court*, 963 F.2d 567 (3d Cir. 1992) (en banc). Other courts have reached the opposite conclusion, agreeing with Judge Sentelle's view that *Branzburg* forecloses a common law privilege as well as a First Amendment privilege. *See, e.g.*, *In re Grand Jury Proceedings*, 5 F.3d 397, 399 (9th Cir. 1993). Still other courts have recognized the privilege in the civil context, while rejecting it in the criminal context.

Judge Posner recently surveyed the confused state of the law in *McKevitt v. Pallasch*, where he noted that "[a] large number of cases conclude, rather surprisingly in light of *Branzburg*, that there is a reporter's privilege, though they do not agree on its scope." 339 F.3d at 532. At the same time,

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[5] The confusion generated by Justice Powell's concurrence has persisted for more than three decades now, and shows no signs of abating, as courts cannot agree on Justice Powell's exact position, and how (if at all) it modifies Justice White's opinion for the Court. *Compare, e.g.*, *United States v. Smith*, 135 F.3d 963, 968-69 (5th Cir. 1998) ("we have previously construed *Branzburg* as a plurality opinion") with *In re Grand Jury Proceedings*, 5 F.3d 397, 400 (9th Cir. 1993) ("It is important to note that [*Branzburg*] is *not* a plurality opinion.").

other courts "refuse to recognize the privilege, at least in cases . . . that involve grand jury inquiries." *Id.* This bafflement over *Branzburg* has been noted time and again. *See, e.g.*, *New York Times Co. v. Gonzales*, No. 04-7677, 2005 WL 427911, at *31 (S.D.N.Y. Mar. 2, 2005) ("the proper interpretation of *Branzburg* is an issue that has divided those circuits that have had occasion to consider it").

Guidance from this Court is needed to resolve the many circuit splits involving *Branzburg*, and the general confusion in the lower courts concerning the existence and scope of a reporter's privilege under the common law and the First Amendment. Whatever the intended meaning of *Branzburg*, the lower courts have been interpreting the decision, and Justice Powell's concurrence, in radically, intolerably different ways, resulting in a patchwork of inconsistent and conflicting legal standards that—as the panel below recognized—only this Court can resolve. *See* Pet. App. 27a & n.3 (Sentelle, J., concurring) ("I think [the common law privilege] argument should appropriately be made to the Supreme Court" as "it is only the High Court and not this one that may act upon that argument."); *id*. at 49a (Tatel, J., concurring) ("if *Branzburg* is to be limited or distinguished in the circumstances of this case, we must leave that task to the Supreme Court"). These issues have now reached the boiling point and warrant resolution by this Court.

A. This Court Should Resolve The Conflicts And Recognize A Common Law Privilege.

Since *Branzburg* was decided in 1972, the law in this area has changed dramatically. Congress enacted Federal Rule of Evidence 501; this Court decided *Jaffee* and established a framework for recognizing new common law privileges under Rule 501; and there has developed an overwhelming consensus among the States to enshrine the reporter's privilege in statutes or through judicial decision.

Rule 501 "authorizes federal courts to define new privileges by interpreting 'common law principles . . . in the light of reason and experience.'" *Jaffee v. Redmond*, 518 U.S. 1, 8

(1996). As this Court has explained, "'the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions.'" *Id*. (quoting *Funk v. United States*, 290 U.S. 371, 383 (1933)). Congress, in promulgating Rule 501, "did not freeze the law governing the privileges of witnesses in federal trials at a particular point in our history, but rather directed federal courts to 'continue the evolutionary development of testimonial privileges.'" *Jaffee*, 518 U.S. at 8-9 (quoting *Trammel*, 445 U.S. at 47). Courts have followed this congressional mandate and recognized many privileges under Rule 501, including the psychotherapist privilege, the spousal privilege, the settlement privilege, the cleric-communicant privilege, the military secrets privilege, and many others.

1. The Circuits Have Adopted Inconsistent And Conflicting Approaches To A Common Law Reporter's Privilege.

In the decision below, each panel member reached a different conclusion on the common law privilege question. Relying largely on *Branzburg*, Judge Sentelle concluded that no privilege existed and suggested that this Court's guidance may be needed; Judge Tatel would have recognized a qualified privilege; and Judge Henderson, while disagreeing with Judge Sentelle that *Branzburg* foreclosed recognition of a common law privilege, declined to resolve the question. Pet. App. 16a ("the Court is not of one mind on the existence of a common law privilege"). The differing conclusions of the three panel members reflect the confusion in the lower courts, which are divided over the existence and scope of a common law reporter's privilege.

The Third Circuit, for example, has recognized the privilege in civil cases, *see Riley v. City of Chester*, 612 F.2d 708, 715 (3d Cir. 1979) ("journalists have a federal common law privilege, albeit qualified, to refuse to divulge their sources"), as well as in criminal trials. *See United States v. Cuthbertson*, 630 F.2d 139, 146 (3d Cir. 1980) ("journalists have a federal common-law qualified privilege arising under Fed. R.

Evid. 501 to refuse to divulge their confidential sources"). Courts within the Third Circuit have also recognized the privilege in the grand jury context. *See In re Grand Jury Subpoena to Williams*, 766 F. Supp. 358, 371 (W.D. Pa. 1991) (finding a "qualified news gatherer's privilege against compelled disclosure of his or her news sources in a Grand Jury proceeding"), *aff'd by an equally divided court*, 963 F.2d 567 (3d Cir. 1992) (en banc).

The Ninth Circuit, on the other hand, has held that there is no reporter's privilege in cases involving grand jury subpoenas. In *In re Grand Jury Proceedings*, 5 F.3d 397, 399 (9th Cir. 1993), a graduate student refused to testify before a grand jury, asserting a "scholar's privilege" that the court described as "akin to that of a reporter." The court rejected the privilege, explaining that "*Branzburg* cast doubt on [its] ability to recognize a news gathering privilege in the grand jury context as a matter of common law." *Id*. at 402-03.

The Second Circuit has "long recognized the existence of a qualified privilege for journalistic information" in civil cases, although its decisions "have expressed differing views on whether the journalists' privilege is constitutionally required, or rooted in federal common law." *Gonzales v. National Broad. Co*., 194 F.3d 29, 36 & n.6 (2d Cir. 1999). District courts within the circuit have applied the privilege in cases involving grand jury subpoenas. In *New York Times v. Gonzales*, 2005 WL 427911 (S.D.N.Y. Mar. 2, 2005), the court expressly recognized a common law reporter's privilege in the grand jury context—notably, in another case involving Mr. Fitzgerald's attempted use of subpoenas to force Judith Miller to disclose confidential sources. The court held that *Branzburg* "do[es] not preclude this Court from finding a federal common law privilege to have developed in the decades since *Branzburg* was issued" and that "[t]o conclude otherwise would be contrary to the mandate of Rule 501 and the congressional intent underlying that Rule." *Id.* at *43.

For its part, the Fourth Circuit appears to recognize a qualified reporter's privilege in civil cases. *See United States*

v. Steelhammer, 539 F.2d 373, 376-77 & n.* (4th Cir. 1976) (Winter, J., dissenting) (applying balancing test based on Justice Powell's *Branzburg* concurrence and stating that "[u]nder Federal Rule of Evidence 501, [reporters] should be afforded a common law privilege not to testify in civil litigation between private parties"), *rev'd*, 561 F.2d 539 (4th Cir. 1977) (en banc order adopting position of Judge Winter).

Finally, the First Circuit has taken inconsistent and confusing positions. *Compare Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 596 (1st Cir. 1980) (quoting with approval the Third Circuit's holding in *Riley* that "'journalists have a federal common law privilege, albeit qualified, to refuse to divulge their sources'" and that "the flexibility of Rule 501 left ample room for the development of a finely honed, 'ad hoc' approach") *with United States v. LaRouche Campaign*, 841 F.2d 1176, 1178 n.4 (1st Cir. 1988) (rejecting argument that "a federal common law privilege [exists] wholly apart from the First Amendment").

These conflicts cannot be avoided by trying to distinguish this case because it arises in the grand jury context. There is no privilege known to law that varies depending on the nature of the legal proceeding in which it is asserted, and, in fact, Federal Rule of Evidence 1101(c) expressly provides that "[t]he rule with respect to privileges applies *at all stages* of *all actions*, cases, and proceedings" (emphases added). *See also* FED. R. EVID. 1101(d)(2) (providing that Federal Rules of Evidence do not apply to grand jury proceedings "other than with respect to privileges"); *United States v. Calandra*, 414 U.S. 338, 346 (1974) ("[A grand jury] may consider incompetent evidence, but it may not itself violate a valid privilege, whether established by the Constitution, statutes, or the common law.") (citing *Branzburg*).

2. *Jaffee* And Rule 501 Support The Recognition Of A Common Law Privilege.

This Court's analysis in *Jaffee* strongly supports recognition of a common law reporter's privilege under Rule 501. In *Jaffee*, the Court recognized a psychotherapist-patient privi-

lege, applicable to social workers, by reference to three factors: (1) whether such a privilege is widely recognized by the States; (2) whether the proposed privilege serves significant public and private interests; and (3) whether recognition of those interests outweighs the burden on truth-seeking that might be imposed by the privilege.

Each *Jaffee* factor supports recognition of a reporter's privilege. *First*, the reporter's privilege is overwhelmingly recognized by the States. Whereas the *Branzburg* Court noted that the majority of the States had not recognized the privilege as of 1972, forty-nine States, as well as the District of Columbia, have now recognized a reporter's privilege. Pet. App. 59a (Tatel, J., concurring) (emphasizing "the shift in favor of the privilege" since *Branzburg*). Thirty-one of these States and the District of Columbia have done so by enacting statutes, commonly referred to as "shield laws." *See, e.g*., D.C. Code Ann. §§ 16-4701 *et seq*. The remainder have done so by judicial decision. To be sure, the precise scope of the privilege differs from State to State, but the *Jaffee* Court recognized that such limited "variations in the scope of the protection" cannot "undermine the force" of the States' judgment that some form of privilege is warranted. 518 U.S. at 14 n.13.

Jaffee further recognized that because "any State's promise of confidentiality would have little value if the patient were aware that the privilege would not be honored in a federal court," the "[d]enial of the federal privilege . . . would frustrate the purposes of the state legislation that was enacted to foster these confidential communications." 518 U.S. at 13 (footnote omitted). So too here: any State's promise of confidentiality has little value if the source and reporter cannot rely with a high degree of certainty on the fact that the privilege will also be honored in federal court. But right now, federal law is highly uncertain and unpredictable, effectively nullifying state-law protections.

Second, freedom of the press furthers important public and private interests and was established "not for the benefit

of the press so much as for the benefit of all of us." *Time Inc. v. Hill*, 385 U.S. 374, 389 (1967). As this Court has recognized, the press "has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences." *Estes v. Texas*, 381 U.S. 532, 539 (1965). The First Amendment freedoms at stake—and the undeniable importance of a free press to an informed citizenry—are at least as important as the mental health interests at issue in *Jaffee*.

In performing this public function, journalists often must rely on promises of confidentiality to their sources. In many cases this is the only way they can obtain and report information of great public interest. Throughout the nation's history, confidential communications to reporters have resulted in news stories of the greatest public importance, with Watergate perhaps the most famous example. If prosecutors can invoke the power of the courts to compel reporters to reveal their confidential sources, such forced disclosure "would dam the flow to the press, and through it to the people, of the most valuable sort of information: not the press release, not the handout, but the firsthand story based on the candid talk of a primary news source." A. Bickel, *The Morality of Consent*, at 84 (1975). *See also Branzburg*, 408 U.S. at 693 ("The argument that the flow of news will be diminished by compelling reporters to aid the grand jury in a criminal investigation is not irrational."); *Cuthbertson*, 630 F.2d at 147 ("The compelled production of a reporter's resource materials can constitute a significant intrusion into the newsgathering and editorial processes."); Affidavits of Matthew Cooper, Judith Miller, Scott Armstrong and Jack Nelson (Pet. App. 123a, 130a; A287, A433 and A445). Reason and experience thus demonstrate that a reporter's privilege serves powerful public and private interests. Pet. App. 51a (Tatel, J., concurring).

Third, these important interests outweigh any likely evidentiary benefits that would result from denial of the privilege. As this Court explained in *Jaffee*:

> If the [psychotherapist's] privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled. . . . Without a privilege, much of the desirable evidence to which litigants . . . seek access . . . is unlikely to come into being. This unspoken "evidence" will therefore serve no greater truth-seeking function than if it had been spoken and privileged.

518 U.S. at 11-12. *See also Swidler & Berlin v. United States*, 524 U.S. 399, 407-08 (1998) ("the loss of evidence admittedly caused by the [attorney-client] privilege is justified in part by the fact that without the privilege, the client may not have made such communications in the first place").

The same is true regarding the reporter's privilege. "Unless potential sources are confident that compelled disclosure is unlikely, they will be reluctant to disclose any confidential information to reporters." *Zerilli v. Smith*, 656 F.2d 705, 712 (D.C. Cir. 1981). In short, given the amount of "evidence" that is "unlikely to come into being" absent a reporter's privilege, "the likely evidentiary benefit that would result from the denial of the privilege is modest." *Jaffee*, 518 U.S. at 11, 24. The majority of jurisdictions have been applying a form of reporter's privilege since *Branzburg*, with no discernible effect on law enforcement.

The court below erred, and misapplied *Jaffee*, in declining to recognize a common law privilege. Judge Sentelle concluded that *Branzburg* "rejected a common law privilege" and stated that "[i]n my view that rejection stands unless and until the Supreme Court itself overrules that part of *Branzburg*." Pet. App. 26a. But *Branzburg* dealt only with the First Amendment issue, *see* Pet. App. 69a (Tatel, J., concurring), and the view that the common law is frozen *circa* 1972 cannot be reconciled with Rule 501, *Jaffee* and *Trammel*, all of which emphasize that Congress intended the common law to be evolutionary and that new privileges can and should be recognized over time. In fact, Judge Hender-

son specifically rejected Judge Sentelle's conclusion, explaining that "we are not bound by *Branzburg*'s commentary on the state of the common law in 1972." Pet. App. 38a.

3. This Court Should Grant Review To Resolve The Tension Between *Branzburg* And *Jaffee*.

To the extent it can be interpreted to analyze the common law issue, the Court's analysis in *Branzburg* contradicts its analysis twenty-four years later in *Jaffee.* In *Branzburg*, the Court concluded that newsgathering was of constitutional importance and deserved protection, but found it "uncertain" whether there truly would be any consequent "burden on news gathering" if it declined to establish a clear and specifically delineated constitutional privilege. 408 U.S. at 690-91. The Court effectively demanded empirical proof that the lack of such a privilege would deter confidential communications. *Id.* at 690-91, 693. The four *Branzburg* dissenters believed the Court was demanding far too much in the way of proof. *Id.* at 733, 735-36 (Stewart, J., dissenting).

In *Jaffee*, however, the Court made clear that the burden is far less demanding under Rule 501. The Court was content to rest on the prospect that "the *mere possibility* of disclosure may impede development of the confidential relationship" between a psychotherapist and her patient. *Jaffee*, 518 U.S. at 10 (emphasis added); *cf. id*. at 24 (Scalia, J., dissenting) (criticizing majority for not requiring enough evidence that potential disclosure would chill communications). As noted above, many courts in the years since *Branzburg* have concluded that compelling journalists to disclose information obtained from confidential sources *does* harm the flow of information from sources to journalists and, through journalists, to the public, and the record on these points stands clear and unrebutted in this case, making it an ideal vehicle for resolving these issues. *See* Reporters' Affidavits at Pet. App. 123a, 130a; A287, A433 and A445).

In short, while courts are citing *Branzbur*g as authority to reject a common law privilege, *Branzburg*'s analysis has

been superseded by *Jaffee*'s approach. The Court should grant review to reconcile these decisions.

B. This Court Should Resolve The Conflicts And Clarify *Branzburg* By Recognizing That The First Amendment Provides Protection For Confidential News Sources.

The same conflicting morass engulfing a common law privilege exists regarding a First Amendment privilege. Although the courts below held that *Branzburg* resolved this question, many courts disagree and have recognized a First Amendment protection against the compelled disclosure of confidential sources. Moreover, this Court's more recent First Amendment decisions undermine *Branzburg* and strongly support recognition of First Amendment protection, as well as a common law privilege, in these circumstances.

1. Courts Have Divided Over The Meaning Of *Branzburg* And The Scope Of A First Amendment Privilege.

The overwhelming majority of courts have interpreted *Branzburg* as recognizing some form of reporter's privilege under the First Amendment. The panel in this case, however, was unanimous in rejecting a First Amendment privilege—a result it believed was compelled by *Branzburg* and one that could only be changed by this Court. Pet. App. 7a-16a. This holding directly conflicts with *Williams*, as well as with Judge Sweet's recent ruling in *New York Times v. Gonzales*, both of which construed *Branzburg* differently and recognized a First Amendment privilege in the context of a grand jury proceeding. It also conflicts with decisions from federal courts recognizing a privilege in criminal trials and state courts of last resort that have specifically recognized a First Amendment reporter's privilege in grand jury proceedings. *See, e.g.*, *In re Letellier*, 578 A.2d 722, 726 (Me. 1990) ("The First Amendment thus requires that we balance the competing societal and constitutional interests on a case-by-case basis, weighing any possible injury to the free flow of informa-

tion against the recognized obligation of all citizens to give relevant evidence regarding criminal conduct.").[6]

This Court's review is needed to resolve the deep divisions among the federal and state courts regarding the meaning of *Branzburg* and whether a First Amendment reporter's privilege exists in criminal cases, including grand jury matters, as well as civil cases.

The Third and Eleventh Circuits hold, in conflict with the panel's decision here, that reporters have a First Amendment privilege in both civil *and* criminal cases. *See Riley v. City of Chester*, 612 F.2d 708, 715 (3d Cir. 1979); *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980); *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986).

In contrast, at least three circuits—the Fourth, Fifth, and Ninth—hold that a First Amendment privilege exists in civil cases, but not in criminal cases. *See LaRouche v. National Broad. Co.*, 780 F.2d 1134, 1139 (4th Cir. 1986) and *In re Shain*, 978 F.2d 850, 853 (4th Cir. 1992); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 726 (5th Cir. 1980) and *United States v. Smith*, 135 F.3d 963, 969 (5th Cir. 1998); *Schoen v. Schoen*, 5 F.3d 1289, 1296 (9th Cir. 1993) and *In re Grand Jury Proceedings*, 5 F.3d 397, 401-02 (9th Cir. 1993).

Two circuits—the Eighth and Tenth—have recognized a First Amendment privilege in civil cases, but have not directly addressed it in the criminal context. *See Cervantes v. Time Inc.*, 464 F.2d 986, 992 n.9 (8th Cir. 1972); *Silkwood v.*

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[6] *See also New Hampshire v. Siel*, 444 A.2d 499, 502 (N.H. 1982) ("Our review of *Branzburg* . . . convinces us that a majority of the justices on the United States Supreme Court recognized that a reporter had a qualified first amendment privilege to protect confidential sources."); *In re Pennington*, 581 P.2d 812, 815 (Kan. 1978) ("Courts applying *Branzburg* to criminal cases have generally concluded that the proper test for determining the existence of a reporter's privilege in a particular criminal case depends upon a balancing of the need of a defendant for a fair trial against the reporter's need for confidentiality.").

Kerr-McGee Corp., 563 F.2d 433, 437 (10th Cir. 1977). The Second Circuit recognizes a privilege, but has not specified whether it is rooted in the common law or the First Amendment (or both). *See Gonzales v. National Broad. Co*., 194 F.3d 29, 36 & n.6 (2d Cir. 1999).

The Sixth and Seventh Circuits have taken an entirely different position, and hold that there is no First Amendment privilege in either civil *or* criminal cases. *See In re Grand Jury Proceedings*, 810 F.2d 580, 584 (6th Cir. 1987); *McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003).

The need for this Court's review is demonstrated by the fact that many courts recognize a First Amendment-based reporter's privilege in one context but not in others. For example, the D.C. Circuit, while rejecting a First Amendment privilege in the grand jury context, nonetheless recognizes it in civil cases. *See Zerilli*, 656 F.2d at 711. As discussed above, federal law does not alter privileges based on the nature of the proceeding and specifically contemplates application of privileges in the grand jury context. *See* FED. R. EVID. 1101(c), (d)(2).

Thus, while the nature of the proceeding may have relevance to whether the privilege can be *defeated*, it has no relevance to whether the privilege *exists*. *See, e.g*., *Gonzales*, 194 F.3d at 34 n.3 (there is "no legally-principled reason" for recognizing the privilege in one context but not another, but noting that the threshold to overcome the privilege may be "lower" in criminal cases). The public interest "in protecting confidential sources . . . does not change because a case is civil or criminal." *Cuthbertson*, 630 F.2d at 147.

2. This Court's Recent First Amendment Decisions Call *Branzburg* Into Question And Support Recognition Of A Privilege.

In rejecting a First Amendment privilege, the D.C. Circuit misread *Branzburg* and discounted the significance of Justice Powell's concurrence, which "narrow[s] what the majority opinion holds, by explaining the more limited interpre-

tation adopted by a necessary member of that majority." *McKoy v. North Carolina*, 494 U.S. 433, 462 n.3 (1990) (Scalia, J., joined by Rehnquist, C.J. and O'Connor, J., dissenting). Justice Powell's opinion makes clear that *Branzburg* did *not* preclude the assertion of a "claim to privilege" based on a reporter's "constitutional rights with respect to the gathering of news or in safeguarding their sources." 408 U.S. at 709-10 (Powell, J., concurring). *See* 1 John W. Strong, *McCormick on Evidence* § 76.2, at 288 (5th ed. 1999) (in *Branzburg*, the rejection of the First Amendment privilege "did not command an absolute majority of the Court").

But even if the D.C. Circuit's reading of *Branzburg* is correct, this Court has since rendered a series of First Amendment decisions that demonstrate that the law has developed in a way that strongly supports recognition of some form of privilege today. In cases where generally-applicable laws are applied to intrude on legitimate First Amendment interests, this Court has applied a heightened level of scrutiny and struck down government action that unjustifiably encroaches on those interests. *See, e.g.*, *Turner Broadcasting System v. FCC*, 512 U.S. 622, 642 (1994) (reviewing cable television must-carry law); *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (reviewing a radio station's distribution of information obtained from third parties who had unlawfully recorded cell phone calls). The rigorous level of scrutiny applied in these more recent cases stands in stark contrast to what the D.C. Circuit believed was *Branzburg*'s rejection of any First Amendment protection for confidential sources, with the result that the needs of law enforcement *always* trump the First Amendment interests at stake.

This Court has emphasized that where, as here, jurisprudential foundations have shifted, the power to bring the Court's earlier precedent in line with new authorities is reserved to this Court alone. Thus, even if the D.C. Circuit's reading of *Branzburg* were correct, the change in First Amendment law since that time makes this case uniquely appropriate for this Court's review. *See State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (overruling case that rested on "in-

creasingly wobbly, moth-eaten foundations") (quotation omitted); *Rodriguez de Quijas v. Shearson/American Express, Inc*., 490 U.S. 477, 481 (1989) (overruling precedent that had "fallen far out of step" with recent decisions).

C. The Existence Of A Reporter's Privilege Is A Recurring Issue Of Substantial Public Importance.

The questions presented by this petition are substantial and important. This Court has repeatedly recognized the important role of the press in obtaining and communicating information to the public in light of our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). The press, acting on behalf of the public, "serves and was designed to serve as a powerful antidote to any abuses of power by government officials as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve." *Mills v. Alabama*, 384 U.S. 214, 219 (1966).

As shown above, *supra* p.18, the compelled disclosure of reporters' confidential sources endangers their ability to perform their constitutionally-recognized duties, and would stem the flow of information on public events that is vital to an informed citizenry and a healthy democracy. In this case, Cooper's story *A War on Wilson?* focused on the question whether government officials improperly retaliated against a critic of the Administration's decision to go to war. Yet Cooper now faces prison because the court of appeals concluded that a privilege it refused to define was overcome by evidence it refused to let him see.[7]

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[7] The panel's conclusion that any privilege would have been "overcome" by the Special Counsel's secret evidence, Pet. App. 16a, is deeply flawed. First, it makes no sense to deem the privilege "overcome" without having *defined* the privilege. Second, as discussed in Part II *infra*, it violates due process to deem the privilege "overcome" based on secret, *ex*

These issues are recurring with increased frequency. In the last two years, dozens of reporters have been subpoenaed to reveal their confidential sources, many of whom face the prospect of imminent imprisonment. *See* R. Smolkin, *Under Fire*, 27 Am. Journalism Review 18 (2005).

Given the unsettled state of the law in this area, reporters and their sources are subject to a patchwork of differing privilege rules depending on the jurisdiction in which they are subpoenaed. These differing rules can lead to arbitrary and conflicting outcomes, as illustrated by the experience of Judith Miller in the District of Columbia, where she was held in contempt for refusing to divulge her sources in this case, and in New York, where the district court held that the First Amendment and common law protected her from such compelled disclosure in another grand jury investigation being conducted by Mr. Fitzgerald. *See Gonzales*, 2005 WL 427911.[8] This uncertainty also has a chilling effect on speech, and ultimately results in less information reaching the public, as many individuals will hesitate in communicating with a reporter if a promise of confidentiality is respected in some jurisdictions but not others. In the end, differing standards defeat the very purpose of the privilege, as a state-law privilege is of little value if it offers no reliable protection from forced disclosure in federal court.

[Footnote continued from previous page]

parte evidence that neither petitioners nor their counsel were permitted to review.

[8] The identity of a source in the District of Columbia, for example, would be protected by the District's shield law in cases brought in the District of Columbia's courts, but not in federal courts. The shield law, D.C. Code § 16-4703(b), provides that "[a] court may not compel disclosure" of a reporter's sources. Notably, Congress could have "vetoed" the shield law via joint resolution, *see* D.C. Code Ann. § 1-233, but did not exercise its prerogative to do so.

II. REVIEW IS WARRANTED TO RESOLVE WHETHER DUE PROCESS PROHIBITS IMPRISONING OR FINING WITNESSES BASED ON SECRET EVIDENCE.

This Court should also grant review to determine whether the Due Process Clause forbids a court from imprisoning or fining witnesses for contempt based on secret *ex parte* evidence. The court of appeals' decision is incorrect and inconsistent with decisions of this and other courts.

The decision below conflicts with decisions of this Court holding that defendants must be given the opportunity to review and challenge the government's evidence against them before they may be imprisoned. In *In re Oliver*, 333 U.S. 257, 273-75 (1948), this Court reversed a contempt conviction where the district court had denied the defendant the "right to examine the witnesses against him," on the theory that the interest in maintaining grand jury secrecy justified the truncation of the alleged contemnor's right to present a defense. Although "[m]any reasons have been advanced to support grand jury secrecy . . . those reasons have never been thought to justify secrecy in the trial of an accused charged with violation of law for which he may be fined or sent to jail." *Id*. at 264. *See also Greene v. McElroy*, 360 U.S. 474, 496 (1959) ("where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue").

This Court again recognized the primacy of due process in *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), in which it evaluated the procedural rights of an alleged enemy combatant in a case where substantial national security interests were at issue. The plurality held that the individual was entitled to "a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker," and emphasized that "[a]ny process in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct

without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short." *Id*. at 2648, 2651. *Hamdi* makes clear that when freedom is at stake, due process is not satisfied simply by compelling the government to meet a burden of production—indeed, this Court specifically rejected the government's proffered "some evidence" standard—but rather requires that an accused have the opportunity to challenge and rebut the government's evidence. Cooper and Time enjoyed no such opportunity here.

The D.C. Circuit's decision also conflicts with the Second Circuit's decision in *In re Kitchen*, 706 F.2d 1266 (2d Cir. 1983) and the Ninth Circuit's decision in *United States v. Alter*, 482 F.2d 1016 (9th Cir. 1973).

In *Kitchen*, the Second Circuit reversed a contempt order that was based on evidence the contemnor was not shown, just as in this case. *Kitchen* involved a grand jury witness who claimed he could not remember key events, and the government—believing his testimony was false and evasive—sought to hold him in contempt. The district court issued a contempt order, relying in part on transcripts from another witness's grand jury testimony—even though the government had disclosed only portions of that transcript to the alleged contemnor. The Second Circuit held that this use of secret evidence denied the witness his "basic right to a fair hearing before he is imprisoned." 706 F.2d at 1272. The court explained that due process includes "the right to confront the government's evidence," a right which "ordinarily includes the right to examine all documents considered by the court in reaching a decision." *Id*. at 1272-73.

In *Alter*, the Ninth Circuit reversed a contempt order involving a witness who refused to answer questions before a grand jury. The witness claimed that the questions were based on the government's illegal surveillance of him and his attorney. The government denied the charge, and the district court held the witness in contempt without convening an evidentiary hearing. The Ninth Circuit held that the contemnor's due process rights were violated because he was denied

the opportunity to demonstrate just cause for his refusal to testify and thereby "deprived of a meaningful opportunity to present his defense." 482 F.2d at 1024.[9]

Nor does grand jury secrecy justify a departure from these basic due process principles, especially since such secrecy is far from absolute. *See In re Motions of Dow Jones & Co.*, 142 F.3d 496, 498 (D.C. Cir. 1998) (grand jury witnesses may disclose the fact and substance of their testimony). In fact, this Court has "recognized that the invocation of grand jury interests is not 'some talisman that dissolves all constitutional protections.'" *Butterworth v. Smith*, 494 U.S. 624, 630 (1990). Even in cases involving classified information that directly implicates national security—such as enemy combatant cases—the government has made this information available to defendants or their security-cleared counsel. *See United States v. Moussaoui*, 382 F.3d 453, 475 (4th Cir. 2004) (defendant has due process right to review all evidence in government's possession that is material to his defense); *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 468 (D.D.C. 2005) (military tribunals violated due process because "[n]o detainee . . . was ever permitted access to any classified information").

In this case, any government interest in secrecy arising from the nature of grand jury proceedings or the use of classified information could have been vindicated through protective orders limiting review to petitioners or their counsel. Such protective orders are routinely issued under the Classified Information Procedures Act, 18 U.S.C. App. III § 3, and could easily be employed in this case to protect petitioners' due process rights.

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[9] Judge Tatel, in his statement concurring in the denial of rehearing en banc, noted that *Kitchen* and *Alter* did not "involve compulsion of testimony due to failure of an asserted privilege." Pet. App. 120a-121a. This factual distinction makes no constitutional difference. The relevant question is whether alleged contemnors may review and challenge the evidence used against them, and in that regard the D.C. Circuit's decision is inconsistent with decisions from this and other courts.

CONCLUSION

The time has come for this Court to dispel the conflict and confusion that have plagued the lower courts for more than thirty years. This case squarely presents important questions of law that have divided the circuits and left reporters and their sources in a state of uncertainty, jeopardizing the free flow of information to the public. This Court should grant review and recognize a federal reporter's privilege.

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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May 10, 2005