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PRIVILEGE AND THE BELFAST PROJECT

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In 2001, two Irish scholars living in the United States set out to compile the recollections of men and women involved in the decades-long conflict in Northern Ireland. The result was the Belfast Project, an oral history project housed at Boston College that collected interviews from many who were personally involved in the violent Northern Irish "Troubles." To induce participants to document their memories for posterity, Belfast Project historians promised all those interviewed that the contents of their testimonials would remain confidential until they died.[1]

More than a decade later, this promise of confidentiality is at the heart of a legal dispute implicating the United States' bilateral legal assistance treaty with the United Kingdom, the so-called academic's privilege, and the First Amendment. In the summer of 2011, the U.S. Department of Justice (DOJ) issued subpoenas demanding that certain confidential interviews collected by the Belfast Project be turned over to federal prosecutors. The DOJ is pursuing these interviews in response to a request by the United Kingdom, which intends to use the subpoenaed material as evidence in a prosecution for murder. In July 2012, after an extraordinary legal battle, the First Circuit ordered Boston College to comply with the DOJ subpoenas. But on October 17, Justice Breyer stayed the First Circuit's order pending the Supreme Court's ruling on a petition for certiorari.[2]

The First Circuit's judgment and the Supreme Court's stay follow decades of uncertainty regarding the scope of the academic's privilege—the disputed right of academics to protect information that was provided to them on the condition of confidentiality. If allowed to stand, the First Circuit's decision

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1. Jim Dwyer, *Secret Archive of Ulster Troubles Faces Subpoena*, N.Y. TIMES (May 13, 2011), http://www.nytimes.com/2011/05/13/world/europe/13ireland.html.

2. Moloney v. United States, 133 S.Ct. 9, *staying In re* Request from U.K. Pursuant to Treaty Between Gov't of U.S. & Gov't of U.K. on Mutual Assistance in Criminal Matters, 685 F.3d 1 (1st Cir. 2012); *see also* Lyle Denniston, *British Subpoenas Blocked*, SCOTUSBLOG (Oct. 17, 2012, 1:26 PM), http://www.scotusblog.com/2012/10/british-subpoenas-blocked/.

threatens to confirm the worst fears of those who contend that the privilege is needed to preserve the Constitution's guarantee of free speech in the American academy.

JURISPRUDENTIAL BACKGROUND

The academic's privilege is one variant of the reporter's privilege,[3] which has long been advanced to excuse journalists from disclosing the identities of their confidential sources. Proponents of the privilege argue that many potential sources will refuse to speak to reporters absent a guarantee of anonymity—either because they worry that speaking to the press will subject them to retaliation, or will implicate them in illegal acts. These proponents further contend that uninhibited communication between journalists and their sources benefits the democratic process by ensuring that the news is robustly reported. And so they conclude that a reporter's privilege should be adopted to ensure that socially valuable communication between reporters and their sources won't be deterred by the threat of compelled disclosure.[4]

American journalists have asserted the right to keep their sources privileged since the colonial period, and courts have rebuffed these assertions for just as long. Indeed, the reporter's privilege has a distinguished legacy of rejection. No reporter's privilege was recognized at common law or in the early United States.[5] In the mid-twentieth century, arguments regarding the privilege assumed constitutional dimensions. Advocates of the privilege contended that the First Amendment's protection of freedom of the press should prevent the government from forcing journalists to disclose their confidential sources. The freedom to *report* the news, it was argued, must necessarily entail freedom to *gather* the news. The First Amendment must consequently prevent the government from interfering with journalists' ability to communicate with sources who would refuse to speak to the press absent a guarantee of confidentiality.[6]

The Supreme Court squarely addressed this argument in *Branzburg v. Hayes*.[7] *Branzburg* was a consolidation of four cases involving reporters who

3. *See* Robert M. O'Neil, *A Researcher's Privilege: Does Any Hope Remain?*, 59 LAW & CONTEMP. PROBS. 35, 37, 44 (1996).

4. *See* Geoffrey R. Stone, *Why We Need a Federal Reporter's Privilege*, 34 HOFSTRA L. REV. 39, 39 (2005) ("A strong and effective journalist-source privilege is essential to a robust and independent press and to a well-functioning democratic society.").

5. *See* Branzburg v. Hayes, 408 U.S. 665, 685 (1972); Mary-Rose Papandrea, *Citizen Journalism and the Reporter's Privilege*, 91 MINN. L. REV. 515, 533 (2007) (summarizing the history of the reporter's privilege in the United States).

6. *See* Garland v. Torre, 259 F.2d 545, 548 (2d Cir. 1958) (accepting the argument that "compulsory disclosure of a journalist's confidential sources of information may entail an abridgment of press freedom by imposing some limitation upon the availability of news").

7. 408 U.S. 665, 666-67 (1972).

refused to identify their confidential sources in response to grand jury subpoenas. Writing for a five-Justice majority, Justice White concluded that the government's interest in law enforcement categorically outweighed any First Amendment interest in protecting journalists' confidential sources. Justice White rejected the argument that forcing journalists to testify about their sources would drive "'a wedge of distrust and silence'" between the news media and its sources.[8] Noting that the press is routinely excluded from sensitive events such as Supreme Court conferences and grand jury proceedings, Justice White maintained that freedom of the press does not include the unrestrained right to gather information. According to Justice White, therefore, the press possesses no constitutional right to protect its sources from government subpoenas.

Justice Powell supplied the crucial fifth vote mandating compliance with the subpoenas, but he wrote separately to underscore what he understood to be the "limited nature" of the Court's holding.[9] Justice Powell recognized that the First Amendment provides some protection for journalists' confidential relationships. But he believed that in each case courts should balance the freedom of the press against the citizens' obligation to testify about criminal conduct. Because Justice Powell would address each claim on a case-by-case basis, he rejected the dissent's warning that the Court's decision would permit the state to annex the news media as an "investigative arm of government."[10]

Justice Powell's quixotic concurrence in *Branzburg* left litigants unclear about whether a reporter's confidential relationships are constitutionally protected, and, if so, how far this protection extends. After *Branzburg*, many states sought to clarify reporters' rights by enacting shield laws expressly excusing reporters from complying with subpoenas to protect confidential sources.[11] But no such federal law exists, and in recent years the number of subpoenas issued to reporters by the DOJ has skyrocketed.[12] The vulnerability of reporters' confidential relationships became front-page news in 2005, when Judith Miller, a reporter for the *New York Times*, spent eighty-five days in jail before finally revealing to a federal prosecutor the identity of the confidential source who outed Valerie Plame as a CIA operative (her source turned out to be

8. *Id.* at 676 (quoting the respondent's argument in favor of a reporter's privilege); *see also id.* at 698-99 (concluding that the public's interest in protecting confidential sources does not outweigh its interest in prosecuting criminal activity, particularly given that the absence of a reporter's privilege had not proven to be a "serious obstacle to either the development or retention of confidential news sources by the press").

9. *Id.* at 709 (Powell, J., concurring).

10. *Id.* at 725 (Stewart, J., dissenting).

11. *See, e.g.*, CAL. EVID. CODE § 1070(a) (West 2012); COLO. REV. STAT. § 13-90-119 (2012).

12. Papandrea, *supra* note 5, at 516 ("Over the last few years, the number of subpoenas issued to journalists has risen dramatically.").

Vice President Cheney's Chief of Staff, Scooter Libby).[13] Today, seven years after the Plame scandal and forty years after *Branzburg*, the scope of the reporter's privilege remains uncertain.

THE BELFAST PROJECT LITIGATION

Soon after the Belfast Project was established at Boston College in 2001, British authorities learned that the Project had conducted interviews with two former IRA members, Brendan Hughes and Dolours Price, who were implicated in the 1972 abduction and execution of Jean McConville, a suspected British informant.[14] Pursuant to the Mutual Legal Assistance Treaty (MLAT) between the United States and the United Kingdom, British authorities sought to obtain these interviews. The United Kingdom asked the DOJ to subpoena Boston College for all materials relating to the Hughes and Price interviews in order to assist British officials in a prosecution for McConville's murder.

The MLAT provides, among other things, that the United States and the United Kingdom will assist one another in "serving documents; locating or identifying persons; . . . [and] executing requests for searches and seizures."[15] The United States is a party to a number of such treaties, which facilitate criminal investigations by permitting one country to request that another country issue subpoenas or locate suspects within its territory. But the treaty does not require compliance with MLAT requests in all circumstances. The MLAT excuses signatories from providing the requested assistance if doing so "would be contrary to important public policy" or if the request relates to an "offence of political character."[16]

The DOJ chose not to decline Britain's request on either ground. Instead, the DOJ issued subpoenas in May and August 2011 demanding all materials related to the Hughes and Price interviews. Because Brendan Hughes had died by the time the subpoenas were issued, Boston College turned over the Hughes interviews. But it refused to release the interviews of Dolours Price. In a motion to quash the subpoenas, Boston College insisted that its guarantee of confidentiality was protected under the First Amendment, and that the interviews were therefore privileged from disclosure.

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13. Don Van Natta Jr. et al., *The Miller Case: A Notebook, a Cause, a Jail Cell, and a Deal*, N.Y. TIMES, Oct. 16 2005, at 1, *available at* http://www.nytimes.com/2005/10/16/national/16leak.html.

14. Travis Andersen, *BC Is Ordered to Turn Over IRA Materials*, BOS. GLOBE (Dec. 29, 2011), *available at* http://www.bostonglobe.com/metro/2011/12/29/judge-orders-turn-over-recordings-ira-member-federal-prosecutors/8V4ZjGgOWV1Dz3000c6VNL/story.html.

15. Mutual Legal Assistance Treaty, U.S.-U.K., art. I, ¶ 2, Jan. 6, 1994, S. TREATY DOC. NO. 104-2 (1995), *available at* http://www.state.gov/documents/organization/176269.pdf [hereinafter MLAT].

16. MLAT, art. III, ¶ 1(a), (c).

In July 2012, the First Circuit rejected the motion to quash. Writing for the court, Chief Judge Lynch concluded that, under Justice White's *Branzburg* opinion, the fact that compliance with subpoenas "would result in the breaking of a promise of confidentiality by reporters is not by itself a legally cognizable First Amendment" injury.[17] Disregarding Justice Powell's approach, Judge Lynch declined to balance the government's interest in the subpoenas with Boston College's interest in confidentiality. Instead, she suggested that the law enforcement interest at issue here might be stronger than the government's interest in *Branzburg* itself, and that Boston College only had itself to blame for promising its interviewees confidentiality that was not supported by United States law.

The subpoenas and the subsequent litigation prompted broad news coverage and a minor international scandal. Senator John Kerry penned a letter urging Secretary of State Clinton to encourage British authorities to revoke their request due to the "impact that it may have on the continued success of the Northern Ireland peace process."[18] Free speech groups and oral historians argued that the subpoenas would "have an incredible chilling effect" on endeavors to document modern conflicts.[19] And, after Boston College chose not to appeal the trial judge's initial denial of the motion to quash, the ACLU of Massachusetts filed an amicus brief strenuously defending the Belfast Project from compelled disclosure.

On October 17, Justice Breyer issued an order staying the First Circuit's decision until the Supreme Court rules on the Belfast Project's petition for certiorari. The stay order excuses Boston College from turning over the disputed interviews until the Supreme Court decides the case or denies the certiorari petition later this Term.

A BALANCED APPROACH

The First Circuit may have ultimately reached the correct result, but it unquestionably took the wrong approach to get there. The First Amendment must afford some protection against attempts by the state to advance criminal prosecutions by commandeering reporters' promises of confidentiality. Holding otherwise would disavow the principle that freedom of the press depends upon some heightened protection for seeking out the news.

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17. *See In re* Request from U.K. Pursuant to Treaty Between the Gov't of U.S. & Gov't of U.K. on Mutual Assistance in Criminal Matters, 685 F.3d 1, 16 (1st Cir. 2012).

18. Letter from John Kerry, U.S. Senator, to Hillary Clinton, U.S. Sec'y of State (Jan. 23, 2012), *available at* http://bostoncollegesubpoena.wordpress.com/2012/01/25/senator-john-kerrys-letter-to-secretary-of-state-hillary-clinton/.

19. Katie Zezima, *College Fights Subpoena of Interviews Tied to I.R.A.*, N.Y. TIMES (June 9, 2011), http://www.nytimes.com/2011/06/10/us/10irish.html.

Applying Justice Powell's balancing approach in this case yields no obvious answer, but reasonable judges could certainly conclude that the costs of complying with the subpoena outweigh the government's interest in enforcing it. Of course, the United States has an uncontestable interest in complying with MLAT requests. This interest arises not just from the desire to maintain comity with the United Kingdom, but also the need to safeguard the valuable reciprocal rights conferred by the MLAT to the United States. Further, the Belfast Project interviews may be the only source of information about McConville's murder. But the United States' interest is double-edged. The government also has an interest in protecting political dissidents from prosecution by the nation they fled. And, as Senator Kerry's letter articulates, the United States has an enduring interest in ensuring the success of the Northern Irish reconciliation process. The MLAT itself recognizes that signatories may deny requests that relate to a crime of a political nature or that would undermine public policy. And because American law has long subjected treaty obligations to constitutional safeguards, an MLAT request must be denied if compliance would be unconstitutional.[20]

On the other hand, the Belfast Project's countervailing interests are compelling. Boston College has warned that releasing the tapes could threaten the safety of the participants. Moreover, the subpoenas could seriously undermine the enterprises of journalism and oral history. Indeed, if the government may subpoena confidential information subject to virtually no judicial scrutiny, the likely result will not be that the criminal justice system benefits, but that fewer people involved in potentially illegal conduct opt to speak to the press in the first place. That result would be unfortunate. Many events of profound historical importance—not just violent conflicts like the Northern Irish Troubles, but nonviolent movements such as the Civil Rights movement—could have exposed participants to criminal liability. If participants keep silent about their experiences, the historical record and public dialogue will suffer, with no commensurate benefit to law enforcement.

Mutual legal assistance treaties render this problem international in scope. If any country with whom the United States has an MLAT agreement may require the DOJ to subpoena confidential information on its behalf, endeavors like the Belfast Project could be annexed by foreign governments whose criminal justice interests differ substantially from our own.

CONCLUSION

Given the confusion sown by *Branzburg*'s fractured opinion, the First Circuit's hardnosed decision is unsurprising. But by disavowing the balancing

20. *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 416 n.9 (2003) (noting that treaty obligations are subject "to the Constitution's guarantees of individual rights").

approach recommended in Justice Powell's concurring *Branzburg* opinion, and by overlooking the considerable interests supporting the Belfast Project's confidentiality guarantee, the First Circuit erred both as a matter of precedent and of policy. At least one Supreme Court Justice has signaled a willingness to correct the mischief done by the First Circuit, and to clarify an area of First Amendment law where the Court's guidance is sorely needed. The rest of the Court should take note.