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LEARNING FROM OUR MISTAKES: THE BELFAST PROJECT LITIGATION AND THE NEED FOR THE SUPREME COURT TO RECOGNIZE AN ACADEMIC PRIVILEGE IN THE UNITED STATES

*Kathryn L. Steffen**

INTRODUCTION

“History must not be a weapon against those trying to seize the opportunity of today to build a more promising tomorrow.”¹

Senator John F. Kerry

In the United States, we hail the freedom of expression and the right to education as cornerstones of our democracy. Under our belief system, academia is the oasis in an ever-changing world where people from various backgrounds flock to freely exchange information. Not only is this exchange of information intrinsically valuable, but it also has extrinsic worth. History is compiled through the shared experiences of others and becomes a guide to creating a better future when new generations heed the lessons of the past. However, the Supreme Court recently denied a controversial petition for writ of certiorari, which presented the Court with an opportunity to solidify and protect these ideals by recognizing a constitutional privilege for academic researchers.

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¹ John Kerry, Op-Ed, *Irish Future Shouldn't Get Lost in Violent Past*, BOSTON HERALD, April 4, 2012, <http://bostoncollegesubpoena.wordpress.com/category/congressional-action/senator-kerry-op-ed-unedited/> [hereinafter Kerry Op-Ed].

In 2001, researchers sponsored by Boston College began to compile an oral history of “The Troubles,” a decades-long period of violent political conflict in Northern Ireland.² Through this oral history, titled the Belfast Project, the researchers hoped to gain insight into the thought processes of individuals who become personally engaged in violent conflict by interviewing people who took up arms during “The Troubles.”³ The interviewees’ participation was conditioned on a strict promise of confidentiality.⁴

Based on its suspicion that the interviews contained evidence of criminal activity,⁵ the United Kingdom requested that the United States subpoena the controversial materials on its behalf, pursuant to a mutual legal assistance treaty.⁶ Boston College and the individual researchers involved in the Belfast Project challenged the subpoena, asserting an academic privilege that would allow them to protect confidential information from compelled disclosure.⁷ The First Circuit denied the existence of this privilege,⁸ and the lead Belfast Project researchers petitioned the Supreme Court for a writ of certiorari in November 2012.⁹ The Supreme Court denied the

² *In re* Request from the U.K., 685 F.3d 1, 4 (1st Cir. 2012); United States v. Trs. of Boston Coll., 831 F.Supp.2d 435, 440 (D. Mass. 2011), *aff’d*, 685 F.3d 1 (1st Cir. 2012).

³ Request from the U.K., 685 F.3d at 4; Trs. of Boston Coll., 831 F.Supp.2d at 440.

⁴ *See* Request from the U.K., 685 F.3d at 5 (explaining that interviewees were required to contract with Boston College to protect their anonymity).

⁵ Trs. of Boston Coll., 831 F.Supp.2d at 452.

⁶ Request from the U.K., 685 F.3d at 3, 12. Generally, mutual legal assistance treaties allow for the state parties to exchange evidence and information about criminal matters. BUREAU OF INT’L NARCOTICS AND LAW ENFORCEMENT AFFAIRS, 2012 *INCSR: Treaties and Agreements*, U.S. DEPT. OF STATE (Mar. 7, 2012), <http://www.state.gov/j/inl/rls/nrcrpt/2012/vol2/184110.htm>.

⁷ Trs. of Boston Coll., 831 F.Supp.2d at 453.

⁸ Request from the U.K., 685 F.3d at 16.

⁹ Petition for Writ of Certiorari at 37, *Moloney v. United States*, No. 12-627 (*petition for cert. denied* April 15, 2013).

petition in April 2013,¹⁰ and the case returned to the First Circuit, which limited the amount of interview materials to be surrendered.¹¹

Anthony McIntyre,¹² one of the lead researchers, also petitioned the High Court in Belfast to protect the interviews from compelled disclosure.¹³ The sitting judge dismissed the case upon his belief that McIntyre's life would not be jeopardized by satisfaction of the subpoena, and McIntyre expressed his intention to appeal.¹⁴

This comment argues that compelling academics to disclose confidential information significantly obstructs the free flow of information that is essential to a thriving democratic society. Through the lens of the Belfast Project controversy, this comment examines the state of an academic privilege in American jurisprudence and then advocates that the U.S. adopt the reasoning of the European Court of Human Rights when the right to freedom of expression is implicated. A license to disregard confidentiality agreements would imperil all individuals involved in high-intensity research and would threaten to tarnish the integrity of academic endeavors.

At first blush, the United States appears to be the ideal forum to champion researchers' rights. However, considering the applicable law and the context of the Belfast Project, had certiorari been granted, the Supreme Court likely would have found against the researchers and declined to recognize an academic privilege. Instead, this issue should be more favorably litigated in the United Kingdom, where the European Convention on Human Rights applies. Finally, if

¹⁰ *Boston College Project: PSNI Get Dolours Price Interviews Access*, BBC, Apr. 15, 2013, <http://www.bbc.co.uk/news/uk-northern-ireland-22158392>.

¹¹ *The Belfast Project, Boston College, and a Sealed Subpoena*, BOSTON COLLEGE SUBPOENA NEWS, <http://bostoncollegesubpoena.wordpress.com/> (last visited January 8, 2013) ("The ruling reduced the amount of material to be handed over from 85 interviews (roughly half of the archive) to segments of 11 interviews.").

¹² McIntyre's role in the Belfast Project and the subsequent litigation is explained in depth *infra* Part I.A.2.

¹³ *McIntyre Loses IRA Tapes Case*, UTV (Oct. 2, 2012), <http://www.utv.tv/News/McIntyre-loses-IRA-tapes-case/7a7ec609-006e-4608-870e-a44a393e7104>.

¹⁴ *Id.* This decision was based on Article 2 of the European Convention of Human Rights, not on Article 10, the focus of this comment. At the time of writing, there has been no update given about the anticipated appeal.

the researchers are unsuccessful in both American and European courts, the comment suggests that the U.S. Secretary of State should decline to enforce the British authorities' request because it contravenes public policy.

I. THE BELFAST PROJECT

A. Purpose and Design of the Belfast Project

1. *The purpose of the Belfast Project*

In 2001, Boston College initiated its sponsorship of the Belfast Project,¹⁵ an oral history project dedicated to gathering and preserving the recollections of members of the paramilitary organizations actively engaged in both the Republican and Loyalist sides of the conflict during “The Troubles” in Northern Ireland from 1969 forward.¹⁶

“The Troubles” refers to the violent conflict between the Republican Nationalists and the Loyalist Unionists that plagued Northern Ireland from 1969 until 1998,¹⁷ when the parties finally reached the Good Friday Agreement.¹⁸ The seeds of “The Troubles” were planted in 1920, when Great Britain granted home rule to Northern Ireland, releasing it from its former dependence on London.¹⁹ Protestant Unionists who wanted Northern Ireland to remain unified with Great Britain comprised the majority of the Northern Irish population.²⁰ Contrarily, the Nationalist, mainly Catholic, minority wanted to unite Northern Ireland and the Republic of Ireland to create an all Irish state.²¹ “Republican” and

¹⁵ Trs. of Boston Coll., 831 F.Supp.2d at 440. Boston College has a continued academic interest in Irish Studies. The College was also involved in the peace process in Northern Ireland, following “The Troubles.”

¹⁶ Request from the U.K., 685 F.3d at 4 (1st Cir. 2012); Trs. of Boston Coll., 831 F.Supp.2d 435 at 440 (D. Mass. 2011), *aff'd*, 685 F.3d 1 (1st Cir. 2012).

¹⁷ Lorenzo Bosi, *Explaining Pathways to Armed Activism in the Provisional Irish Republican Army, 1969-1972*, 36 SOC. SCI. HIST. 347, 356 (2012).

¹⁸ Petition for Writ of Certiorari, *supra* note 9, at 26-27.

¹⁹ Bosi, *supra* note 17, at 355.

²⁰ *Id.* at 378.

²¹ *Id.* at 355, 378.

“Loyalist” are the terms given to those sympathizers who were prepared to use political violence to further their respective causes.²²

Tensions erupted in 1969 when interactions between Nationalist civil rights activists, the Royal Ulster Constabulary (RUC), and the Loyalist countermovement became violent.²³ The violence spread rapidly to Belfast, where Nationalists were a distinct minority.²⁴ There, the RUC and Loyalist mobs attacked the Nationalist communities, hoping to quell an anticipated Nationalist rebellion.²⁵ Considering the worsening upheaval in Northern Ireland, the British Government ended its longstanding policy of non-involvement and deployed British troops to restore order in Northern Ireland.²⁶ The Republicans and Loyalists took up arms to protect their interests, characterizing the tense and violent political climate of Northern Ireland until the Good Friday Agreement in 1998.²⁷

In addition to creating a historical account of “The Troubles,” the Boston College researchers also aspired to gain insight into the personality and mindset of an individual who engages in violent conflict.²⁸ According to the project’s creators, the Belfast Project is a vital step toward understanding not only the conflict in Northern Ireland, but also the dynamics of conflicts worldwide.²⁹

²² *Id.* at 378.

²³ Bosi, *supra* note 17, at 355. The Royal Ulster Constabulary (RUC) was the state police force in Northern Ireland from 1922 until the initiation of the Good Friday Agreement reforms, and it was closely associated with the British government during “the Troubles.” Per the Good Friday Agreement, the RUC was renamed the Police Service of Northern Ireland in 2001. *Royal Ulster Constabulary*, in ENCYCLOPAEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/511633/Royal-Ulster-Constabulary-RUC> (last updated June 11, 2013).

²⁴ Bosi, *supra* note 17, at 356.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id. passim.*

²⁸ Trs. of Boston Coll., 831 F.Supp.2d at 440.

²⁹ *Id.*

2. *The Belfast Project's design evinces the importance of confidentiality*

Because of the continuing sensitivity and danger characterizing the conflict in Northern Ireland,³⁰ the Belfast Project's structure was essential to its success.³¹ Ed Moloney, the journalist and writer who initially proposed the project, entered into an agreement with Boston College to become the project's director.³² Moloney's contract required him to ensure that the interviewers and interviewees signed and adhered to a strict confidentiality agreement.³³ The agreement prohibited all participants from disclosing the existence and scope of the project without the permission of Boston College.³⁴ Furthermore, the contract mandated that interviewers use a coding system when documenting their research to protect the anonymity of interviewees.³⁵ Only Ed Moloney and Robert K. O'Neill, the librarian of the Burns Library where the project was stored, had access to the coding system's key.³⁶ Therefore, they were the only persons able to identify the interviewees.³⁷

³⁰ See *id.* at 441 (indicating that, because of the continued tensions in Northern Ireland, the Belfast Project leaders determined that the interviews could not safely be housed in Ireland). See also Petition for Writ of Certiorari, *supra* note 9, at 9 (discussing a report from the Police Ombudsman for Northern Ireland, stating that there are significant risks to the lives of people who are publicly revealed to be, or suspected of being, paramilitary informants).

³¹ See Trs. of Boston Coll., 831 F.Supp.2d at 441 (“In general, Boston College believes that interviewees conditioned their participation on the promises of strict confidentiality and anonymity”).

³² *Id.* at 440.

³³ Request from the U.K., 685 F.3d at 4.

³⁴ *Id.* at 4-5.

³⁵ *Id.* at 5.

³⁶ Trs. of Boston Coll., 831 F.Supp.2d at 440-41. Boston College's Burns Library of Rare Books and Special Collections houses many valuable documents. *Id.* at 440. In July 2013, it was reported that Boston College might have lost the coded keys to the Belfast Project interviews, rendering the interviewees unidentifiable. Ed Moloney denies responsibility for the mistake. Jim Dee, *Boston Tapes Gaffe: Confessions May Be Useless After Identity Codes Lost*, BELFAST TELEGRAPH, July 29, 2013, <http://www.belfasttelegraph.co.uk/news/local-national/northern-ireland/boston-tapes-name-gaffe-confessions-may-be-useless-after-identity-codes-lost-29455178.html>.

³⁷ Trs. of Boston Coll., 831 F.Supp.2d at 441.

In addition to Moloney and O'Neill, the Belfast Project employed two researchers to interview members of paramilitary groups associated with both sides of the conflict.³⁸ Antony McIntyre, the Lead Project Researcher³⁹ who himself was a former member of the Irish Republican Army (IRA),⁴⁰ entered into a contract with Moloney, which was governed by the same terms as Moloney's contract with Boston College.⁴¹ Under the contract's terms, McIntyre was likewise legally bound to protect the privacy of the project and the identities of its subjects.⁴² By the project's end in 2006, McIntyre had conducted twenty-six interviews of individuals associated with the Republican side of the conflict in Northern Ireland.⁴³

Interviewees also contracted with Boston College to protect their anonymity and the contents of their interviews.⁴⁴ Specifically, interviewees signed donation agreements, which transferred possession and absolute title to their interview recordings and transcripts to Boston College upon their deaths.⁴⁵ The following clause contained in the donation agreements restricts access to the interview materials:

Access to the tapes and transcripts shall be restricted until after my death except in those cases where I have provided prior written approval for their use following consultation with the Burns Librarian, Boston College. Due to the sensitivity of the content, the ultimate power of release shall rest with me. After

³⁸ *Id.*

³⁹ Petition for Writ of Certiorari, *supra* note 9, at 2.

⁴⁰ Request from the U.K., 685 F.3d at 5.

⁴¹ Trs. of Boston Coll., 831 F.Supp.2d at 441.

⁴² *See id.* (explaining that Moloney's contract prohibited him from disclosing the existence or scope of the Belfast Project to anyone without the permission of Boston College. Additionally, Moloney was required to use a strict coding system to preserve the interviewees' anonymity).

⁴³ Request from the U.K., 685 F.3d at 5 (noting that the Belfast Project ended in 2006. In total, the Belfast Project is comprised of a forty-one interview series, each of which may contain multiple interviews with the same individual).

⁴⁴ *See id.*

⁴⁵ *Id.* (explaining that the donation agreement included a provision that also transferred the rights to whatever copyright an interviewee may own in the contents of the interview).

my death, the Burns Librarian of Boston College may exercise such power exclusively.⁴⁶

Per the agreement, only the signing participant has the authority to release information pertaining to his or her interview.⁴⁷ Neither the interviewer nor Boston College was permitted to disclose the identities of the participants or the contents of their interviews until the interviewees either gave permission or died.⁴⁸ Therefore, the Belfast Project researchers assumed a duty of confidentiality to protect the identities of the participants and the contents of the interviews.

B. Litigation Surrounding the Belfast Project

In 2011, two sets of subpoenas requesting information related to the Belfast Project were issued to Boston College⁴⁹ on behalf of the Police Service of Northern Ireland⁵⁰ pursuant to the Mutual Legal Assistance Treaty between the United States and the United Kingdom (US-UK MLAT).⁵¹ The US-UK MLAT, which was signed in 1994, is a bilateral treaty intended to improve law enforcement cooperation between the United States and the United Kingdom.⁵² A request for a subpoena under the US-UK MLAT is a direct request by the Executive Branch on behalf of a foreign power—in this case, on behalf of the United Kingdom.⁵³

⁴⁶ *Id.* (noting that this quoted portion of the agreement was executed by Brendan Hughes, a deceased interviewee). Although the other interviewees' agreements were not part of the record, the First Circuit reasonably extrapolated that each interviewee signed the same agreement.

⁴⁷ *Id.* at 5-6.

⁴⁸ See Request from the U.K., 685 F.3d at 5-6.

⁴⁹ See *id.* at 3.

⁵⁰ Petition for Writ of Certiorari, *supra* note 9, at 1.

⁵¹ Request from the U.K., 685 F.3d at 3, 12 (noting that the statutory authority to be applied as the procedural mechanism for executing subpoenas under the US-UK MLAT is codified as 18 U.S.C. § 3512). Section 3512 was enacted as part of the Foreign Evidence Request Efficacy Act of 2009. This is the first court of appeals decision to interpret a mutual legal assistance treaty and § 3512 together.

⁵² Trs. of Boston Coll., 831 F.Supp.2d at 442.

⁵³ *Id.* at 452.

According to the United Kingdom, the requested information from the Belfast Project is connected to the abduction and murder of Jean McConville, which occurred in 1972.⁵⁴ McConville was believed to be an informant to the British, making her a prime target for the Republicans in Northern Ireland during “The Troubles.”⁵⁵

The first set of subpoenas, issued in May 2011, requested the recorded interviews and documents associated with interviewees Brendan Hughes and Dolours Price,⁵⁶ two former IRA members.⁵⁷ The May 2011 subpoenas did not mention McConville specifically.⁵⁸ Rather, the request stated that the materials were needed to assist the United Kingdom’s investigation of alleged crimes.⁵⁹ Boston College supplied the information associated with Brendan Hughes because his confidentiality was not at issue, as he died prior to the request.⁶⁰ However, the College moved to quash or modify the subpoena for information related to Dolours Price, who was still living at the time.⁶¹

Later, in August 2011, Boston College was served with another set of subpoenas requested by the United Kingdom pursuant to the US-UK MLAT, this time demanding the recordings, transcripts, and records of all interviews containing information about the death and abduction of Jean McConville.⁶² Boston College promptly moved to quash the August 2011 set of subpoenas as well.⁶³

⁵⁴ Request from the U.K., 685 F.3d at 6.

⁵⁵ *Id.*

⁵⁶ *Id.* at 3; Trs. of Boston Coll., 831 F.Supp.2d at 440.

⁵⁷ Petition for Writ of Certiorari, *supra* note 9, at 11.

⁵⁸ See Request From the U.K., 685 F.3d at 6.

⁵⁹ *Id.* (listing the crimes under investigation as murder, conspiracy to murder, incitement to murder, aggravated burglary, false imprisonment, kidnapping, and causing grievous bodily harm with intent to cause such harm).

⁶⁰ *Id.* at 3.

⁶¹ *Id.*; Trs. of Boston Coll., 831 F.Supp.2d at 440. Dolours Price passed away in January 2013. Paul Vitello, *Dolours Price, Defiant I.R.A. Bomber, Dies at 61*, N.Y. TIMES, Jan. 25, 2013, <http://www.nytimes.com/2013/01/26/world/europe/dolours-price-defiant-ira-bomber-dies-at-61.html>.

⁶² Trs. of Boston Coll., 831 F.Supp.2d at 441.

⁶³ Request from the U.K., 685 F.3d at 3.

In support of its motions to quash, Boston College asserted an academic privilege, arguing that the First Circuit has recognized protections for confidential academic research material⁶⁴ and that those protections apply to the information at issue.⁶⁵ Under the case law of the First Circuit, a subpoena to obtain information from a confidential source in a criminal case implicates First Amendment concerns and, therefore, calls for a balancing of considerations before it is executed.⁶⁶ The general rule is that confidential information cannot be compelled from a reporter or an academician unless it is directly relevant to a serious claim made in good faith, and the same information is not available from a less sensitive source.⁶⁷ If these threshold conditions are met, a court must then balance the government's need for the evidence against the risk of potential harm to the free flow of information between informants and academicians if confidentiality is broken.

The District Court of Massachusetts denied the existence of an academic privilege, but proceeded to apply the case law of the First Circuit to determine if the subpoenas should be executed.⁶⁸ The district court found that, although the targeted materials were indeed confidential, they were relevant to a serious claim, requested in good faith, and were not available from a less sensitive source.⁶⁹ Next, the district court conducted the balancing test and found that the considerations weighed strongly in favor of disclosing the confidential information to the government.⁷⁰

Ed Moloney and Anthony McIntyre moved to intervene, claiming an interest not only in defending their pledge of confidentiality, but also in guarding their personal safety and the

63. Trs. of Boston Coll., 831 F.Supp.2d at 453.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 457.

⁶⁹ *Id.* at 456.

⁷⁰ Request from the U.K., 685 F.3d at 4 (noting Boston College appealed the order regarding the August subpoenas, but it did not appeal the order regarding the May subpoena requesting the interviews of Dolours Price. Presently, the Boston College portion of the litigation is over, and only Moloney and McIntyre's claims continue); Tr. of Boston Coll., 831 F.Supp.2d at 457.

safety of their sources.⁷¹ The district court denied the motion to intervene on the ground that Moloney and McIntyre did not have a private right of action under the US-UK MLAT.⁷² Furthermore, the district court concluded that Boston College adequately represented any interests that Moloney or McIntyre may have relating to their involvement in the Belfast Project.⁷³

After the district court denied their motion to intervene, Moloney and McIntyre filed an original complaint, which the district court dismissed for the same reasons it denied their motion to intervene.⁷⁴ Moloney and McIntyre appealed to the Court of Appeals for the First Circuit, challenging the district court's denial of their motion to intervene⁷⁵ and the dismissal of their original complaint.⁷⁶

The First Circuit affirmed the district court's ruling as it pertained to a private right of action.⁷⁷ The Court held that Moloney and McIntyre could not assert a legally cognizable claim under the US-UK MLAT because the treaty specifically disclaims the existence of a private right of action upon which relief can be granted.⁷⁸ Furthermore, the First Circuit dismissed Moloney and McIntyre's claim of academic privilege under the First Amendment, holding that the Supreme Court decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972), was controlling.⁷⁹

⁷¹ Trs. of Boston Coll., 831 F.Supp.2d at 458.

⁷² Request from the U.K., 685 F.3d at 7, 8 (explaining that Article 1 of the US-UK MLAT specifically states that the Treaty is intended solely for mutual legal assistance between the United States and the United Kingdom, and that the Treaty does not give rise to a right of private action on the part of an individual to obtain, suppress, or exclude any evidence, or to impede the execution of a request).

⁷³ *Id.* at 7.

⁷⁴ *Id.* (assuming arguendo that Moloney and McIntyre had standing, the District Court dismissed their complaint for lack of subject matter jurisdiction and for failure to state a claim).

⁷⁵ *Id.*

⁷⁶ Request from the U.K., 685 F.3d at 4.

⁷⁷ *Id.* at 20.

⁷⁸ *Id.* at 13.

⁷⁹ *Id.* at 16 (noting that, in *Branzburg*, the Supreme Court rejected the existence of a reporters' privilege. *Branzburg* is developed in sufficient detail in Part II).

In *Branzburg*, the Supreme Court held that a reporter does not have the privilege to withhold information from criminal justice authorities in the face of a grand jury subpoena, even if the reporter has promised confidentiality to his source.⁸⁰ Although Moloney and McIntyre were not claiming a press privilege, the First Circuit has established that academic researchers are entitled to the same protections that the law provides for journalists.⁸¹ Moreover, the First Circuit found that the rationale behind *Branzburg*, although it involved a reporter being subpoenaed to testify before a grand jury, applied to Moloney and McIntyre's action under the US-UK MLAT.⁸²

In *Branzburg*, the Supreme Court held that the government's interest in law enforcement outweighed the risk that compelling the press to disclose confidential sources would freeze the free flow of communication.⁸³ Similarly, the First Circuit explained that the US-UK MLAT serves the strong law enforcement interests of the United States and the United Kingdom, and the court agreed with the district court's holding that compelling the information from the Belfast Project would not severely inhibit the success of the Belfast Project or future academic endeavors.⁸⁴

⁸⁰ *Branzburg v. Hayes*, 408 U.S. 665, 690 (1972). *See also* Request from the U.K., 685 F.3d at 16.

⁸¹ *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 714 (1st Cir. 1998) (“Academicians engaged in pre-publication research should be accorded protection commensurate to that which the law provides for journalists[.]”).

⁸² Request from the U.K., 685 F.3d at 16.

⁸³ *Branzburg*, 408 U.S. at 690.

⁸⁴ *See* Request of U.K., 685 F.3d at 19. *Branzburg* and its progeny took the risk of the potential chilling effect into account and came to the same determination. In its application of the balancing test, the district court gave weight to the fact that the Belfast Project concluded in 2006, arguing that the subpoena would not inhibit the Belfast Project researchers to gain information.

II. ACADEMIC PRIVILEGE IN AMERICAN JURISPRUDENCE

A. The Supreme Court Denied the Existence of a Journalists' Privilege

1. *The background of Branzburg v. Hayes*

To fully understand the progression of the Belfast Project litigation, one must first understand the important precedent set by the Supreme Court in *Branzburg v. Hayes*. In *Branzburg*, the Supreme Court granted certiorari to decide four separate appeals, each of which raised the proposition that the confidentiality of a reporter's sources is privileged under the First Amendment.⁸⁵ Specifically, the reporters asserting the privilege in *Branzburg* argued that their First Amendment rights were abridged when they were required to testify to confidential information before grand juries.⁸⁶

Two of the four appeals heard in *Branzburg* concerned publications by Petitioner-Branzburg, a staff reporter for a daily newspaper published in Louisville, Kentucky.⁸⁷ On two occasions, Branzburg was subpoenaed to testify before grand juries in Kentucky, and he moved to quash the subpoenas each time on the grounds that, if required to testify, he would be forced to disclose information revealed to him in confidence.⁸⁸

In Branzburg's first controversial story, he recounted his observations of two individuals synthesizing marijuana into hashish.⁸⁹ Shortly after the story's publication, Branzburg was subpoenaed to testify as to the identities of the drug users before the grand jury.⁹⁰ Although he appeared before a county grand jury, Branzburg refused to name the individuals he saw in possession of the drugs.⁹¹ Branzburg claimed that his refusal to answer was authorized by the

⁸⁵ See *Branzburg*, 408 U.S. at 667.

⁸⁶ *Id.* at 667.

⁸⁷ *Id.*

⁸⁸ *Id.* at 668-70.

⁸⁹ *Id.* at 667; *Branzburg v. Pound*, 461 S.W.2d 345, 345-36 (Ky. Ct. App. 1970).

⁹⁰ *Branzburg*, 408 U.S. at 668; *Branzburg v. Pound*, 461 S.W.2d at 346.

⁹¹ *Id.*

First Amendment to the United States Constitution, in addition to other laws.⁹² The trial court disagreed and required Branzburg to answer.⁹³ Thereafter, Branzburg sought prohibition and mandamus from the Kentucky Court of Appeals on the same grounds, but the court denied his petitions.⁹⁴

Branzburg's second appeal was sparked by a later story describing the use of drugs in another Kentucky town.⁹⁵ While researching the story, Branzburg spent two weeks interviewing drug users.⁹⁶ Once more, Branzburg was summoned to appear before a county grand jury to testify about the statutory violations concerning the sale and use of drugs, to which he was made privy.⁹⁷ Branzburg's motion to quash the subpoena was denied.⁹⁸ Branzburg then petitioned the court of appeals for writs of prohibition and mandamus, as he had in his earlier case concerning the use of drugs.⁹⁹ Again, Branzburg's petitions were denied.¹⁰⁰

The next judgment under review in *Branzburg* was *In re Pappas*.¹⁰¹ Petitioner-Pappas was a television newsman and a photographer for a Massachusetts television station.¹⁰² Pappas was called to New Bedford, Massachusetts, to report on civil disorders in

⁹² Branzburg, 408 U.S. at 668; Branzburg v. Pound, 461 S.W.2d at 347. The other laws under which Branzburg sought relief were the Kentucky reporters' privilege statute (Ky.Rev.Stat. § 421.100) (1962) and several sections of the Kentucky Constitution.

⁹³ *Id.*

⁹⁴ *Id.* at 668-69 (explaining that the Kentucky Court of Appeals interpreted Kentucky's reporters' privilege statute to afford a reporter the privilege of refusing to disclose the identity of an informant, but held that the statute did not authorize a reporter to refuse to testify about events he had observed personally, including the identities of those persons he had observed).

⁹⁵ Branzburg, 408 U.S. at 669; Branzburg v. Meigs, 530 S.W.2d 748, 749 (Ky. Ct. App. 1971).

⁹⁶ Branzburg, 408 U.S. at 669.

⁹⁷ Branzburg, 408 U.S. at 669; Branzburg v. Meigs, 530 S.W.2d at 749.

⁹⁸ *Id.*

⁹⁹ *Id.* at 670.

¹⁰⁰ Branzburg, 408 U.S. at 671.

¹⁰¹ *Id.* at 672.

¹⁰² Branzburg, 408 U.S. at 672; *In re Pappas*, 266 N.E.2d 297, 298 (Mass. 1971).

the area, which were related to activity of the Black Panther Party.¹⁰³ Pappas gained access to the Black Panther headquarters in the area, where he recorded and photographed a prepared statement read by one of the group's leaders.¹⁰⁴ The Black Panther leaders admitted Pappas to their meeting place on the strict condition that he promised not to disclose anything he heard or saw inside of the headquarters.¹⁰⁵

Two months later, Pappas was called before a county grand jury as part of an investigation into the criminal acts during the period of civil disorder on which he had reported in New Bedford.¹⁰⁶ Although he appeared and willingly answered questions regarding his name, address, employment, and observations outside of the Black Panther headquarters, Pappas refused to testify about his observations during his stay inside the headquarters.¹⁰⁷ Like Branzburg, Pappas claimed that he, as a reporter, had a First Amendment privilege to protect confidential information he received in the course of investigative work.¹⁰⁸ After Pappas refused to answer, he was served with a second summons to appear before the grand jury and to provide all evidence connected to the matters about which he was questioned.¹⁰⁹ Pappas claimed a First Amendment

¹⁰³ Branzburg, 408 U.S. at 672, 674; *In re Pappas*, 266 N.E.2d at 298, 299. While reviewing Pappas' case, the Supreme Judicial Court of Massachusetts took judicial notice that, in July 1970, New Bedford, Massachusetts, was rife with civil disorder, which included "street barricades, exclusion of the public from certain streets, and similar turmoil."

¹⁰⁴ Branzburg, 408 U.S. at 672; *In re Pappas*, 266 N.E.2d at 298. The Black Panther headquarters was located in a boarded-up store. The streets surrounding the store were barricaded, but Pappas was eventually able to enter the area.

¹⁰⁵ Branzburg, 408 U.S. at 672; *In re Pappas*, 266 N.E.2d. at 298 (noting that, per his agreement with the Black Panthers, Pappas was at liberty to photograph and report the anticipated police raid).

¹⁰⁶ Branzburg, 408 U.S. at 672-73, 674. The Supreme Judicial Court of Massachusetts did not have a record of the hearing below, but the court assumed that the grand jury investigation at issue was an effort to identify and indict those responsible for the criminal acts that occurred during the period of civil disorder in New Bedford.

¹⁰⁷ Branzburg, 408 U.S. at 673; *In re Pappas*, 266 N.E.2d at 298.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

privilege and moved to quash the subpoena, but the trial court denied his motion.¹¹⁰

Reviewing Pappas' appeal, the Supreme Judicial Court of Massachusetts specifically rejected the holding of the Ninth Circuit in *Caldwell v. United States*, described below, and held that reporters do not have a constitutional privilege authorizing them to refuse to appear and testify before a court or a grand jury.¹¹¹ Additionally, the court reaffirmed its prior holdings that testimonial privileges must be limited.¹¹² According to Massachusetts's precedent, the principle that the public has a right to every man's evidence has traditionally outweighed competing interests.¹¹³ Furthermore, the court went on to conclude that any adverse effect on the free flow of news by requiring reporters to testify would be indirect, theoretical, and uncertain.¹¹⁴

Finally, the last decision under the Supreme Court's review in *Branzburg* was the Ninth Circuit's holding in *United States v. Caldwell*.¹¹⁵ Caldwell, a reporter for *The New York Times*, had written stories covering the Black Panthers and other black militant groups in California.¹¹⁶ In a fact pattern similar to that surrounding the Belfast Project litigation, Caldwell was subpoenaed to testify before a federal grand jury regarding various potential criminal violations committed by the militants.¹¹⁷ The first summons served on Caldwell ordered him to bring all notes and tape recordings from his interviews with the officers and spokespeople of the Black Panther Party regarding

¹¹⁰ *Branzburg*, 408 U.S. at 673 (noting that, in contrast to Kentucky, Massachusetts did not have a statutory reporters' privilege at the time of Pappas's motion.)

¹¹¹ *Branzburg*, 408 U.S. at 674; *In re Pappas*, 266 N.E.2d at 302-03.

¹¹² *Branzburg*, 408 U.S. at 674.

¹¹³ *Branzburg*, 408 U.S. at 674; *In re Pappas*, 266 N.E.2d at 299-300.

¹¹⁴ *Branzburg*, 408 U.S. at 674 (quoting *In re Pappas*, 266 N.E.2d at 302)

¹¹⁵ *Branzburg*, 408 U.S. at 675.

¹¹⁶ *Branzburg*, 408 U.S. at 675; *Caldwell v. U.S.*, 434 F.2d 1081, 1083 (9th Cir. 1970).

¹¹⁷ *Branzburg*, 408 U.S. at 675-76, 677. Possible violations included threats against President Nixon, assassination, conspiracy to assassinate, and interstate travel to incite a riot.

the organization's aims, purposes, and activities.¹¹⁸ After Caldwell objected to the scope of the subpoena, the government modified its request, calling only for the reporter to appear before the grand jury.¹¹⁹

Caldwell and *The New York Times* moved to quash the subpoena, arguing that, if required to testify, Caldwell's working relationship with the Black Panther Party would be destroyed, effectively suppressing essential First Amendment freedoms by chilling the flow of communication between the press and the militants.¹²⁰ The District Court denied the motion to quash¹²¹ but instituted a protective measure allowing the journalist to refuse to disclose confidential information in the absence of a showing by the government of a compelling and overriding interest in disclosure.¹²² A second subpoena was issued, and Caldwell filed another motion to quash, which was subsequently denied.¹²³

In the face of the order, Caldwell refused to testify before the grand jury and was held in contempt of court.¹²⁴ Caldwell appealed the contempt order, and the Ninth Circuit reversed, holding that requiring a journalist to testify before a grand jury would dissuade informants from communicating with him in the future.¹²⁵ Furthermore, the Ninth Circuit recognized the potential chill to the free flow of information as a threat great enough to require the government to show necessity before compelling a reporter to appear before a grand jury.¹²⁶

¹¹⁸ *Id.* at 675.

¹¹⁹ *Id.* at 675-76.

¹²⁰ *Branzburg*, 408 U.S. at 676; *Caldwell*, 434 F.3d at 1084.

¹²¹ *Branzburg*, 408 U.S. at 677.

¹²² *Id.* at 678; *Caldwell*, 434 F.3d at 1083.

¹²³ . *Id.* (noting that, during the time the district court was reviewing Caldwell's first motion to quash, the grand jury's term expired, and a new grand jury was convened. After the second grand jury was assembled, the second subpoena was issued to Caldwell. Caldwell's new motion to quash was submitted on the prior record).

¹²⁴ *Id.*

¹²⁵ *Branzburg*, 408 U.S. at 679; *Caldwell*, 434 F.2d at 1084.

¹²⁶ *Branzburg*, 408 U.S. at 697; *Caldwell*, 434 F.2d at 1085-86.

The Ninth Circuit's holding that requiring a reporter to testify would substantially deter future communications between the media and informants marked a stark split from the perspectives of the appellate courts in *Branzburg I*, *Branzburg II*, and *Pappas*, which found that any negative effect of requiring a journalist to disclose confidential information on the free flow of communication was tenuous and indirect.¹²⁷ The Supreme Court granted the writ of certiorari to address the disputed journalists' privilege claimed by *Branzburg*, *Pappas*, and *Caldwell*.¹²⁸

2. *Summary of the argument for a privilege before the U.S. Supreme Court in Branzburg v. Hayes*

In *Branzburg*, the Supreme Court considered the newsmen's contention that a reporter should not be required to appear or testify before a grand jury or at a trial unless the government sufficiently shows that: (1) the reporter is privy to evidence relevant to the crime under investigation; (2) the evidence is not available from another source; and (3) the government's need for the evidence is sufficiently compelling to outweigh the First Amendment interests at stake.¹²⁹ Journalists Petitioner-*Branzburg*, Petitioner-*Pappas*, and Respondent-*Caldwell* each refused to respond to grand jury subpoenas and testify about evidence relevant to criminal investigations.¹³⁰ Generally, citizens are not exempt from answering a grand jury subpoena;¹³¹ however, a constitutional provision may authorize a citizen to refuse to appear and testify.¹³²

The *Branzburg* journalists submitted that the First Amendment freedom of the press authorized their refusal to appear and testify before a grand jury because, if they were forced to respond and divulge confidential sources, future informants would withhold important, newsworthy information.¹³³ Essentially, if journalists could be required to divulge their confidential sources,

¹²⁷ *See id.* at 671, 674, 679.

¹²⁸ *Id.* at 679.

¹²⁹ *Id.* at 680.

¹³⁰ *Branzburg*, 408 U.S. at 682.

¹³¹ *Id.*

¹³² *See id.*

¹³³ *Id.*

then sources would not come forward with information.¹³⁴ Without the participation of informants, newsworthy information would be unavailable for dissemination to the public, placing a burden on the free flow of communication in violation of the First Amendment.¹³⁵

3. *Why the Branzburg majority refused to recognize a journalists' privilege under the First Amendment*

To arrive at its conclusion that journalists do not have a constitutional privilege to keep confidences in the face of a grand jury subpoena, the Court first reviewed other, well-accepted limitations on the freedom of the press.¹³⁶ For example, journalists do not have the right to violate the liberties of others,¹³⁷ nor may journalists publish any story they wish with impunity.¹³⁸ Although the journalist's task is to disseminate news to the public, the journalist is not granted special access, constitutional or otherwise, to judicial conferences, grand jury proceedings, or crime scenes.¹³⁹

Despite these limitations, the Majority was compelled to acknowledge the importance of the freedom of the press in the United States and in American jurisprudence.¹⁴⁰ The Court recognized that newsgathering is indeed protected by the First Amendment.¹⁴¹ In fact, the court asserted that the freedom of the press would be eviscerated without the protection of the First Amendment.¹⁴² However, the Majority determined that Petitioner-

¹³⁴ *See id.*

¹³⁵ *See Branzburg*, 408 U.S. at 682.

¹³⁶ *See id.* at 683-86.

¹³⁷ *Id.* at 683. In *Associated Press v. NLRB*, 301 U.S. 103 (1937), the Supreme Court held that the Associated Press was bound by the standards of the National Labor Relations Act.

¹³⁸ *Id.* at 683-84 (elaborating that, for example, the press may be subject to liability for circulating knowing or reckless falsehoods. In such cases, journalists may be held responsible for compensatory and punitive damages. Moreover, journalists may also be criminally prosecuted for publications of this nature).

¹³⁹ *Id.* at 684-85. Notably, the press may also be prohibited from publishing information about trials if such publications threaten to prejudice a defendant's right to a fair and impartial trial.

¹⁴⁰ *See Branzburg*, 408 U.S. at 681.

¹⁴¹ *Id.*

¹⁴² *Id.*

Branzburg, Petitioner-Pappas, and Respondent-Caldwell's claims did not implicate the First Amendment because (1) the journalists were not subject to any restraint on the contents of their publications, (2) they were not forced to publish stories they wished to conceal, and (3) they were not penalized for the contents of their publications.¹⁴³

The fact that the journalists were not prohibited from using confidential sources in their task of newsgathering was also crucial to the Court's decision.¹⁴⁴ Although the journalists' access to confidential informants was not explicitly restricted, the Court did not find that requiring journalists to appear before grand juries would pose a significant threat to the newsmen's access to information from confidential sources.¹⁴⁵

Rather than recognizing the utility of receiving important information from confidential sources and crediting legitimate reasons for an informant's desire for discretion, the Majority's perception was that informants seek confidentiality chiefly to avoid criminal prosecution.¹⁴⁶ The Majority failed to see the utility in transmitting controversial news to the public and failed to give adequate import to a journalist's integrity in his attempts to keep a confidence.¹⁴⁷

In situations where the confidential informant is not a criminal offender but has knowledge of illegal activity, the Court posited that the informant may want to protect his reputation, keep his job, or avoid becoming involved in criminal litigation.¹⁴⁸ In its list

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 681-82.

¹⁴⁵ *See* Branzburg, 408 U.S. at 681-82, 693 (“[T]he evidence fails to demonstrate that there would be a significant construction of the flow of news to the public. . .”).

¹⁴⁶ *See id.* at 691 (“The preference for anonymity of those confidential informants involved in actual criminal conduct is presumably a product of their desire to escape criminal prosecution, and this preference, while understandable, is hardly deserving of constitutional protection”).

¹⁴⁷ *See id.* at 692 (“Thus, we cannot seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it[]”).

¹⁴⁸ *Id.* at 693.

of considerations, the Majority also casually noted that the informant may fear for his personal safety, but failed to acknowledge the reality of this concern and how it could affect the free flow of information between informants and the media, and, in turn, between the media and the public.¹⁴⁹

Reaching its holding, the Majority was unwavering in concluding that the public interest in prosecuting a crime outweighs any interest the public may have in receiving information obtained from a confidential informant.¹⁵⁰

III. THE PERSPECTIVE OF THE COUNCIL OF EUROPE

A. The European Convention on Human Rights

Unlike the *Branzburg* Majority, the Council of Europe has recognized that the interest in protecting confidentiality may outweigh other concerns, including the prevention of crime.¹⁵¹ The Council of Europe's main purpose is to achieve unity¹⁵² between its forty-seven member nations.¹⁵³ In furtherance of its progressive goals, the Council of Europe developed the European Convention on Human Rights to promote and protect the human rights and fundamental freedoms of the citizens of its member nations.¹⁵⁴ The Convention is a binding international agreement,¹⁵⁵ and all member

¹⁴⁹ *Id.*

¹⁵⁰ *See* *Branzburg*, 408 U.S. at 695.

¹⁵¹ *See generally* *Voskuil v. Netherlands*, 2007-III Eur. Ct. H.R. 1, 14, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-83413>.

¹⁵² European Convention on Human Rights art. 10, Nov. 4, 1950, 213 U.N.T.S. 222, http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention_ENG.pdf [hereinafter Article 10].

¹⁵³ *Impact in 47 Countries*, COUNCIL OF EUROPE, <http://human-rights-convention.org/impact-of-the-european-convention-on-human-rights/> (last visited Jan. 9, 2014).

¹⁵⁴ Article 10, *supra* note 152.

¹⁵⁵ DEP'T FOR CONSTITUTIONAL AFFAIRS, A GUIDE TO THE HUMAN RIGHTS ACT 1998 5 (Dep't for Constitutional Affairs ed., 3d ed. 2006), <http://www.dca.gov.uk/peoples-rights/human-rights/pdf/act-studyguide.pdf>.

nations, including the United Kingdom, have ratified or acceded to it.¹⁵⁶

The Convention both enshrines the fundamental rights that are guaranteed to all citizens and is legally binding, similar to the Bill of Rights of the United States Constitution.¹⁵⁷ When an individual feels that his rights under the Convention have been violated or restricted, he can lodge an application with the European Court of Human Rights.¹⁵⁸

1. *A journalistic privilege exists under Article 10 of the Convention on Human Rights*

Article 10 of the Convention on Human Rights protects the individual's right to express himself. Specifically, Article 10 provides:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such

¹⁵⁶ Council of Europe Human Rights Convention Website, <http://human-rights-convention.org/impact-of-the-european-convention-on-human-rights/> (last visited Jan. 10, 2013).

¹⁵⁷ U.S. CONST. amends. I-X; accord European Convention on Human Rights art. 10, Nov. 4, 1950, 213 U.N.T.S. 222. For more on the European Convention on Human Rights and its role in European courts, see Frank Murray, *Boston College's Defense of the Belfast Project: a Renewed Call for a Researcher's Privilege to Protect Academia*, 2 INT'L J. ACAD. RES. BUS. AND SOC. SCI. 1, 18-19 (2012).

¹⁵⁸ DEP'T FOR CONSTITUTIONAL AFFAIRS, *supra* note 155, at 5. The European Court of Human Rights is located in Strasbourg, France. Before lodging an application with the European Court of Human Rights, the applicant must first exhaust all available state remedies. The applicant has six months from the date of the final domestic court decision to petition the European Court of Human Rights. EUROPEAN COURT OF HUMAN RIGHTS, QUESTIONS & ANSWERS 6 (undated), http://www.echr.coe.int/Documents/Questions_Answers_ENG.pdf.

formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.¹⁵⁹

Relevantly, the European Court of Human Rights has interpreted Article 10 to protect journalists from being compelled to disclose the identities of their sources.¹⁶⁰ Furthermore, the Committee of Ministers of the Council of Europe has specifically declared that Article 10 protects a journalist's right to maintain the confidentiality of his sources.¹⁶¹

2. *Analyzing a cause of action under Article 10.*

Like the *Branzburg* Court,¹⁶² the European Court of Human Rights noted in *Goodwin v. United Kingdom* that compelling journalists to disclose the identities of their confidential sources could have a chilling effect on the free flow of communication between the media and the public.¹⁶³ However, the European Court of Human Rights found the threat to be more palpable, explaining that the important public watchdog function served by the press would be undermined

¹⁵⁹ Article 10, *supra* note 152.

¹⁶⁰ See *Goodwin v. United Kingdom* (No. 7), 1996-II Eur. Ct. H.R. 483, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57974>.

¹⁶¹ COUNCIL OF EUROPE, 4TH EUROPEAN MINISTERIAL CONFERENCE ON MASS MEDIA POLICY 35 (Council of Europe ed., 1994), <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=411463&SecMode=1&DocId=517420&Usage=2>. The Committee of Ministers enumerated this Principle at the 4th European ministerial Conference of Mass Media Policy in 1994.

¹⁶² See *Branzburg*, 408 U.S. at 681-82, 693.

¹⁶³ *Goodwin v. United Kingdom* (No. 7), 1996-II Eur. Ct. H.R. 483, 500.

if journalists were unable to obtain accurate and reliable information from sources who wish to remain unnamed.¹⁶⁴

When evaluating a cause of action under Article 10, the European Court of Human Rights will first look to the facts of a particular case to determine if a public authority has interfered with the applicant's right to freedom of expression guaranteed under paragraph 1 of Article 10.¹⁶⁵ For example, in *Voskuil v. The Netherlands*, the Court found that the Court of Appeal, a public authority, interfered when it ordered the detention of the applicant in an attempt to compel him to name his source for a news story.¹⁶⁶

If the Court finds that a public authority has interfered with the applicant's right of expression, then the Court will proceed to analyze the facts of the case under paragraph 2 of Article 10 to determine if the interference was justified.¹⁶⁷ Analysis under the second paragraph of Article 10 requires an assessment of three prongs.¹⁶⁸ First, the Court will determine if law prescribed the interference.¹⁶⁹ In other words, the Court inquires whether the government's action had a lawful basis in domestic law.¹⁷⁰

Second, if the Court determines that the government's mode of interference had an adequate basis in the relevant domestic law, the Court will consider whether the interference pursued a legitimate aim.¹⁷¹ According to the Committee of Ministers of the Council of Europe, the legitimate aims that justify interference with the journalistic freedom of expression are set forth in the exhaustive list

¹⁶⁴ *Id.* at 693. The *Branzburg* court did not find that requiring disclosure would significantly obstruct the free flow of communication.

¹⁶⁵ *See id.* at 496.

¹⁶⁶ *Voskuil v. Netherlands*, 2007-III Eur. Ct. H.R. 1, 14, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-83413>.

¹⁶⁷ *See Goodwin v. United Kingdom* (No. 7), 1996-II Eur. Ct. H.R. 483, 496.

¹⁶⁸ *See* Article 10, *supra* note 152.

¹⁶⁹ *See* Article 10, *supra* note 152; *see also* *Goodwin v. United Kingdom* (No. 7), 1996-II Eur. Ct. H.R. 483, 496.

¹⁷⁰ *See* *Voskuil v. Netherlands*, 2007-III Eur. Ct. H.R. 1, 14.

¹⁷¹ *See* *Goodwin v. United Kingdom* (No. 7), 1996-II Eur. Ct. H.R. 483, 498; *See* *Voskuil v. Netherlands*, 2007-III Eur. Ct. H.R. 1, 15.

contained in paragraph 2 of Article 10.¹⁷² A public authority need only pursue one of the enumerated aims to satisfy this prong of the test.¹⁷³ Furthermore, the interference must have been foreseeable by the applicant in light of the stipulated restrictions.¹⁷⁴

Finally, the Court must determine whether the interference is necessary in a democratic society.¹⁷⁵ If the interference is necessary, it must also be proportionately calculated to achieve the legitimate aim pursued by the restriction.¹⁷⁶ If the limiting authority cannot establish proportionality and relevance to an extent sufficient to override the vital public interest in a free press, then interference is not necessary in a democratic society, and the applicant's rights under Article 10 will be deemed violated.¹⁷⁷

According to case law from the European Court of Human Rights, necessity is a difficult standard for the government to prove when it restricts journalistic confidentiality.¹⁷⁸ The Council of Europe acknowledges that freedom of expression is a cornerstone of democracy and declares that protecting the freedom of the press is an important and fundamental requirement in this regard.¹⁷⁹

In *Goodwin*, the European Court of Human Rights expressed that the protection of journalistic sources is so essential to a free press that an order compelling a journalist to disclose his source's identity must be justified by an overriding requirement in the public interest.¹⁸⁰ Restrictions on journalistic confidentiality require the Court's strictest scrutiny, and the scales weigh heavily in favor of

¹⁷² COUNCIL OF EUROPE, *supra* note 161, at 35.

¹⁷³ *See Goodwin v. United Kingdom* (No. 7), 1996-II Eur. Ct. H.R. 483, 498.

¹⁷⁴ COUNCIL OF EUROPE, *supra* note 161, at 35.

¹⁷⁵ *See Goodwin v. United Kingdom* (No. 7), 1996-II Eur. Ct. H.R. 483, 498-500; *Voskuil v. Netherlands*, 2007-III Eur. Ct. H.R. 1, 15.

¹⁷⁶ *Goodwin v. United Kingdom* (No. 7), 1996-II Eur. Ct. H.R. 483, 500.

¹⁷⁷ *See id.* at 502-03.

¹⁷⁸ *See id.* at 500-01.

¹⁷⁹ *Id.* at 500.

¹⁸⁰ *Id.*

maintaining a free press.¹⁸¹ The test of necessity is fact-intensive, and the court must look to the totality of the circumstances to determine if the government's reason for interfering with the freedom of the press is both relevant and sufficient.¹⁸²

3. *What if the interference was intended to prevent crime?*

The Convention considers the prevention of crime to be a potential justification for restricting journalistic confidentiality.¹⁸³ Although specified in Article 10, the goal of preventing crime or disorder will not always justify a restriction on expression.¹⁸⁴ For instance, in *Voskuil v. The Netherlands*, a police officer informed a journalist that the police staged a flood to gain access into an apartment belonging to a group of individuals who were subsequently prosecuted for arms trafficking after the officers' entry revealed weapons.¹⁸⁵

The journalist was called as a trial witness for the defendants, but he refused to disclose the identity of the police officer who had tipped him off.¹⁸⁶ When he refused, he was held in contempt and sentenced to a detention for a maximum of 30 days.¹⁸⁷ The journalist then filed a complaint with the European Court of Human Rights, alleging a violation of his rights under Article 10.¹⁸⁸

Evaluating the journalist's Article 10 claim, the Court accepted the Government's contention that it interfered to further the prevention of crime, a legitimate aim under paragraph 2 of Article 10.¹⁸⁹ The confidential information that the journalist held, the Court explained, implicated the integrity of the Netherlands police force

¹⁸¹ *Goodwin v. United Kingdom* (No. 7), 1996-II Eur. Ct. H.R. 483, 500-01.

¹⁸² *Id.*

¹⁸³ Article 10, *supra* note 152.

¹⁸⁴ *See Voskuil v. Netherlands*, 2007-III Eur. Ct. H.R. 1, 15-16.

¹⁸⁵ *Id.* at 2.

¹⁸⁶ *Id.* at 15.

¹⁸⁷ *Id.* at 3.

¹⁸⁸ *See id.* at 14.

¹⁸⁹ *Voskuil v. Netherlands*, 2007-III Eur. Ct. H.R. 1, 15.

and contained facts that could secure the defendants a fair trial.¹⁹⁰ Regardless, the Court held that the Government's interest in the informant's identity could not overcome the journalist's interest in protecting his source's confidentiality.¹⁹¹

The *Branzburg* Court differed fundamentally in its analysis of journalistic privilege in the context of criminal activity. While the European Court of Human Rights placed great significance on the journalist's integrity and livelihood, as well as the public's right to information,¹⁹² the Supreme Court was preoccupied with the source's motives behind his wish to remain confidential.¹⁹³ The European Court of Human Rights is willing to conduct the balancing of interests under Article 10, even in the context of high stakes criminal cases,¹⁹⁴ but the Supreme Court in *Branzburg* tersely concluded that the public's interest in the prosecution of crime almost always outweighs its interest in information.¹⁹⁵

IV. THE UNITED KINGDOM PRESENTS THE BEST AVAILABLE FORUM TO SEEK PROTECTION OF THE BELFAST PROJECT MATERIALS

A. The Council of Europe Takes a More Practical Approach Toward Protecting Freedom of Expression than the United States

Although Article 10 of the Convention on Human Rights specifically protects journalistic freedom of expression,¹⁹⁶ academic privilege may properly be analogized to a journalistic privilege. Like journalists, academic researchers are devoted to collecting and analyzing information, then disseminating their findings to an audience with the hope that the audience will be enriched as a

¹⁹⁰ *Id.* at 17.

¹⁹¹ *Id.* at 18.

¹⁹² *See id.*

¹⁹³ *See Branzburg*, 408 U.S. at 691.

¹⁹⁴ *See Voskuil v. Netherlands*, 2007-III Eur. Ct. H.R. 1 *passim*.

¹⁹⁵ *See Branzburg*, 408 U.S. at 695.

¹⁹⁶ *See* Article 10, *supra* note 152; *Goodwin v. United Kingdom* (No. 7), 1996-II Eur. Ct. H.R. 483 *passim*; *Voskuil v. Netherlands*, 2007-III Eur. Ct. H.R. 1 *passim*.

result.¹⁹⁷ The value of academic research, like the news, hinges on the availability, reliability, and accuracy of sources.¹⁹⁸ The U.S. Supreme Court and the European Court of Human Rights agree that a free press is a cornerstone of democracy.¹⁹⁹ However, the two authorities diverge in their perspectives on how to protect the press's freedom of expression.²⁰⁰

In *Branzburg*, the Supreme Court articulated that public authorities must not place restrictions on the content of publications, force journalists to publish stories against their will, or prohibit the use of confidential sources.²⁰¹ From the Supreme Court's perspective, requiring a journalist to disclose the identity of a confidential source does not constitute a prohibition on the use of confidential sources.²⁰² Furthermore, the *Branzburg* Court and the First Circuit²⁰³ determined that compelled disclosure of a confidential source would have only a theoretical and uncertain chilling effect on the free exchange of information between the press and the public.²⁰⁴

The European Court of Human Rights takes a more practical approach. Rather than accept at face value the fact that journalists were not forbidden from obtaining information from confidential sources,²⁰⁵ the Court stressed that, under Article 10, a journalist's right to use and keep a confidence is vital to a thriving, free press.²⁰⁶

¹⁹⁷ See Murray, *supra* note 157, at 3-9, for an in depth discussion of the functions researchers perform in society, both historically and contemporarily, and why an academic privilege is essential to the successful performance of these functions.

¹⁹⁸ See Cusumano, 162 F.3d at 714.

¹⁹⁹ See *Branzburg*, 408 U.S. at 681; *Goodwin v. United Kingdom* (No. 7), 1996-II Eur. Ct. H.R. 483, 500.

²⁰⁰ See *Branzburg*, 408 U.S. at 681-82; *but cf.* *Goodwin v. United Kingdom* (No. 7), 1996-II Eur. Ct. H.R. 483, 500.

²⁰¹ See *Branzburg*, 408 U.S. at 681-82.

²⁰² See *id.*

²⁰³ See *Request of U.K.*, 685 F.3d at 19.

²⁰⁴ See *Branzburg*, 408 U.S. at 674 (quoting *In re Pappas*, 226 N.E.2d at 302). Although it is quoting the Massachusetts decision here, the Supreme Court adopts the proposition in its own analysis and conclusion on appeal.

²⁰⁵ *But cf.* *Branzburg*, 408 U.S. at 681-82.

²⁰⁶ See *Goodwin v. United Kingdom* (No. 7), 1996-II Eur. Ct. H.R. 483, 496,500.

While the United States federal courts have characterized the chilling effect as an uncertain harm,²⁰⁷ the European Court of Human Rights more accurately observed that if journalists were compelled to divulge confidences, then sources who wish to remain anonymous would be discouraged from coming forward with information, thereby undermining the ability of the press to present useful and reliable news to the public.²⁰⁸ For the press to be truly free, they must be protected from the threat of compelled disclosure of their confidential sources.

B. Applying Article 10 Jurisprudence to the Belfast Project Litigation

When assessing whether a public authority's attempt to compel a journalist to disclose a confidential source violates Article 10, the European Court of Human Rights begins with the understanding that a journalist's right to keep a confidence is so essential to democracy that the disclosure must be justified by an overriding public interest.²⁰⁹ The law is positioned in favor of nondisclosure, and the public authority must satisfy the difficult standard of necessity.²¹⁰ Regarding McIntyre's application in Belfast, the High Court based its analysis—and subsequent denial—of the petition on Article 2 of the Convention, not Article 10.²¹¹ This comment argues that the writ should have been decided in his favor. Considering that it was not, the following analysis predicts how the Court of Appeal or European Court of Human Rights would review McIntyre's Article 10 claim.

²⁰⁷ *See In re Pappas*, 226 N.E.2d at 302. For a detailed discussion of cases addressing a scholarly privilege in the United States federal courts, see also Murray, *supra* note 157, at 9-18.

²⁰⁸ *See Goodwin v. United Kingdom* (No. 7), 1996-II Eur. Ct. H.R. 483, 500.

²⁰⁹ *See id.*

²¹⁰ *See id.* at 500-01.

²¹¹ In the Matter of Application by Anthony McIntyre for Leave to Apply for Judicial Review, [2012] NIQB 65 (N. Ir.), http://www.courtsni.gov.uk/en-GB/Judicial/Decisions/PublishedByYear/Documents/2012/%5B2012%5DNIQB65/j_j_TRE8601FINAL-PUBLISH.htm.

1. *Applying the Article 10 test to the facts of the Belfast Project Litigation*

a. *Did a public authority interfere with the Belfast Project researchers' right to freedom of expression?* - Yes, the government of the United Kingdom interfered with the rights of Boston College, Moloney, and McIntyre to keep the Belfast Project sources and interview materials confidential when it requested the materials on behalf of the Police Service of Northern Ireland.²¹²

b. *Was the interference prescribed by law?* - Yes, the United Kingdom, on behalf of the Police Service of Northern Ireland, was acting within the bounds of domestic law when it interfered with the researchers' right to maintain confidentiality because it requested the Belfast Project interview materials to pursue a criminal investigation.²¹³

c. *Was the interference directed toward the pursuit of a legitimate aim?* - To meet this prong of the test, the Government must show (1) that it subpoenaed the information in pursuit of the public interest²¹⁴ and (2) that the researchers could have foreseen the interference for that particular purpose.²¹⁵ Under Article 10, the prevention of crime or disorder is a legitimate aim.²¹⁶ In the case of the Belfast Project, the United Kingdom requested the interviews on behalf of the Police Service of Northern Ireland²¹⁷ because the police suspected that the materials contained information essential to the investigation of a variety of crimes.²¹⁸ Taken at face value, the prevention and prosecution of criminal activity are clearly legitimate pursuits for the

²¹² See Request from the U.K., 685 F.3d at 3; cf. Voskuil v. Netherlands, 2007-III Eur. Ct. H.R. 1, 14.

²¹³ See Request from the U.K., 685 F.3d at 3.

²¹⁴ See Voskuil v. Netherlands, 2007-III Eur. Ct. H.R. 1, 15; Goodwin v. United Kingdom (No. 7), 1996-II Eur. Ct. H.R. 483, 498.

²¹⁵ COUNCIL OF EUROPE, *supra* note 161, at 35.

²¹⁶ Article 10, *supra* note 152.

²¹⁷ Petition for Writ of Certiorari, *supra* note 9, at 1.

²¹⁸ Request of U.K., 685 F.3d at 6.

good of the public. However, stating a legitimate motive does not necessarily justify an interference with the right to free expression.²¹⁹

Foreseeability on the parts of Moloney and McIntyre is more challenging to establish. Considering the highly political nature of “The Troubles” and the amnesty provision under the Good Friday Agreement,²²⁰ the researchers could have reasonably concluded that the Police Service of Northern Ireland would not attempt to prosecute cold cases, such as the 1972 murder and abduction of McConville.²²¹ Furthermore, Moloney and McIntyre have described the McConville situation as a “longstanding ‘non-investigation,’” further supporting the proposition that they could not have foreseen that the United Kingdom would request the interviews to inquire into 40-year-old crimes.²²²

d. Was the interference necessary in a democratic society? - An analysis under *Branzburg* would have ended when the Government established that its purpose for compelling disclosure was to prevent and prosecute criminal activity.²²³ However, the European Court of Human Rights takes the analysis a step further. In fact, the European Court of Human Rights performs the very test that the petitioners argued for in *Branzburg*: the government must show that its interest in disclosure is compelling enough to outweigh the value of the fundamental right to expression.²²⁴ In making this showing, the Government must also establish that the level of interference is proportionately calculated to achieve the legitimate aim pursued and that the information is not reasonably available from an alternative source.²²⁵

²¹⁹ See *Goodwin v. United Kingdom* (No. 7), 1996-II Eur. Ct. H.R. 483, 502-03.

²²⁰ Petition for Writ of Certiorari, *supra* note 9, at 26-27. Under the terms of the Good Friday Agreement, almost all prisoners, including many who had been convicted of murder, were released by the British government.

²²¹ *Id.*

²²² *Id.* at 26.

²²³ See *Branzburg*, 408 U.S. at 695.

²²⁴ See *id.* at 680; *cf.* *Goodwin v. United Kingdom* (No. 7), 1996-II Eur. Ct. H.R. 483, 502-03.

²²⁵ *Voskuil v. Netherlands*, 2007-III Eur. Ct. H.R. 1, 15.

This approach is similar to that adopted in *Branzburg*; however, the European Court of Human Rights places greater weight on the journalist's right to nondisclosure.²²⁶ Moreover, the totality of the circumstances must be carefully considered, with weight placed in favor of protecting the right to freedom of expression.²²⁷ Regarding the Belfast Project litigation, the U.S. District Court for Massachusetts determined that the requested information was not available to be readily obtained from another, less sensitive source.²²⁸ Considering the secrecy shrouding the paramilitary groups involved in "The Troubles,"²²⁹ the courts of the United Kingdom would likely reach the same conclusion.

The main point of contention, however, is on the proportionality of the request.²³⁰ The United Kingdom sought information to aid in the investigation of crimes; however, the crimes in question occurred in 1972—almost 40 years prior to the request.²³¹ Additionally, the Police Service of Northern Ireland elected not to pursue this particular investigation for a long period of time.²³² Moreover, pursuant to the terms of the Good Friday Agreement between the United Kingdom and the IRA, many prisoners,

²²⁶ See *Goodwin v. United Kingdom* (No. 7), 1996-II Eur. Ct. H.R. 483, 500-01.; *but cf.* *Branzburg*, 408 U.S. at 695 ([W]e cannot accept the argument that the public interest in possible future news about crime from undisclosed, unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future.”).

²²⁷ *Goodwin v. United Kingdom* (No. 7), 1996-II Eur. Ct. H.R. 483, 500-01.

²²⁸ *Trs. of Boston Coll.*, 831 F.Supp.2d at 456.

²²⁹ See *id.* at 441. The code of silence is evident through the extreme measures taken by the Belfast Project researchers to ensure that the participants' identities would be concealed.

²³⁰ Anthony McIntyre himself claimed that the compelled disclosure would disproportionately interfere with his right to life under Article 2 and his right to prevent the disclosure of information received in confidence under Article 10. Statement Filed Pursuant to Order 53, Rule(3)(2)(a) of the Rules of the Court of Judicature (NI) 1980 at ¶ 3(b)-(d), *In re* Application by Anthony McIntyre for Leave to Apply for Judicial Review, [2012] NIQB 65 (N. Ir.), http://www.scribd.com/fullscreen/99166414?access_key=key-jadvo5q2krzoyln48yc&allow_share=true&escape=false&view_mode=scroll.

²³¹ Request from the U.K., 685 F.3d at 6.

²³² Petition for Writ of Certiorari, *supra* note 9, at 26.

including those convicted of murder during “The Troubles,” have been released.²³³

Contrary to the current, ongoing criminal activity at issue at the time of the *Branzburg* litigation,²³⁴ the criminal activity at issue in the Belfast Project litigation was long over, and the actors were given amnesty in furtherance of the political peace process.²³⁵ The participants came forward to share the ghosts of their past with the hope of providing insight and preventing future harm.²³⁶ In fact, if the United Kingdom truly wishes to prevent future harm, crime, and disorder, then it should strive to protect the participants’ identities.²³⁷ The IRA, of which McIntyre, Hughes, Price, and many other participants were members, enforces a strict code of silence.²³⁸ If the interviewees are revealed to have breached this code, their own safety and the safety of the researchers involved in the Belfast Project likely will be threatened.²³⁹

Furthermore, the inevitable chill to the free flow of information is startling. Although the aim of prosecuting and preventing crime is venerable, the consequences are too great to justify a violation of the researchers’ right to keep their sources confidential. If the disclosure is compelled, the United Kingdom may have clues about their 40-year-old investigation; however, in so doing, they will have placed their own citizens in harm’s way, compromised the ongoing peace process in Northern Ireland, inhibited the success of valuable research to prevent future conflict,

²³³ *Id.* at 26-27.

²³⁴ *See Branzburg*, 408 U.S. *passim*.

²³⁵ *See* Request from the U.K., 685 F.3d at 6; *see also* Petition for Writ of Certiorari, *supra* note 9, at 26-27.

²³⁶ *See* Request from U.K., 683 F.3d at 4 (noting that this was the goal of the Belfast Project: to understand the minds of those engaged in violent conflict, with the hope of preventing it in the future).

²³⁷ *See* Trs. of Boston Coll., 831 F.Supp.2d at 441 (explaining that tensions still exist in Northern Ireland).

²³⁸ *See id.* (noting that interviewees conditioned their participation on strict promises of confidentiality in order to protect their safety); *see also* Petition for Writ of Certiorari, *supra* note 9 (explaining that IRA members are forbidden from sharing anything about IRA membership or operations with anyone, at penalty of punishment at the hands of the Army).

²³⁹ *See* Trs. of Boston Coll., 831 F.Supp.2d at 441.

and tarnished the reputation of the Belfast Project researchers.²⁴⁰ Therefore, compelled disclosure of the Belfast Project participants' identities is not necessary in a democratic society. Conclusively, courts in the United Kingdom, which are bound by Article 10, should find that the researchers' Article 10 rights were violated.

V. FULFILLING THE UNITED KINGDOM'S REQUEST CONTRAVENES PUBLIC POLICY

If the researchers cannot protect the confidentiality of the interview materials through the European court system, Article 3 of the US-UK MLAT, which lists limitations on assistance, presents another solution.²⁴¹ Under Article 3, the United States may refuse its assistance if the Attorney General, the treaty's designated Central Authority for the U.S., determines that the request, if granted, would impair essential American interests or contravene United States public policy.²⁴² In this case, the United Kingdom's request would compromise the peace process in Northern Ireland, put the lives of many at risk, and jeopardize the success of future academic endeavors.²⁴³ Considering that the United States played a key role in the Northern Ireland peace process and has a vested interest in the safety and progress of British and American citizens, fulfilling the United Kingdom's request would impair the essential interests of the United States and contravene public policy.²⁴⁴

Because the Belfast Project implicates foreign relations, it falls under the purview of Secretary of State John Kerry. Secretary Kerry has evinced a special interest in the Belfast Project litigation, both as

²⁴⁰ See Petition for Writ of Certiorari, *supra* note 9 *passim*.

²⁴¹ Mutual Legal Assistance Treaty Between the United States of America and the United Kingdom of Great Britain and Northern Ireland, U.S.-U.K., art. 3, Jan. 6, 1994, T.I.A.S. No. 96-1202, <http://www.state.gov/documents/organization/176269.pdf> [hereinafter US-UK MLAT].

²⁴² *Id.* art. 3.1(a), art. 2.2.

²⁴³ See Kerry Op-Ed, *supra* note 1 (expressing concern about the consequences of fulfilling the United Kingdom's request under the US-UK MLAT).

²⁴⁴ See *id.* (acknowledging that the Good Friday Agreement was signed under the "enormous leadership" of President Clinton and Prime Minister Blair).

a Senator of Massachusetts and as the Chairman of the Senate Foreign Relations Committee.²⁴⁵ In January 2012, he urged former Secretary of State Hillary Clinton to work with British authorities to revoke their request for the Belfast Project materials.²⁴⁶ Senator Kerry was concerned that the United Kingdom's request would disturb the fragile Northern Ireland peace process and offend the spirit of the Good Friday Agreement because any crimes recounted in the interviews would have occurred prior to the accords.²⁴⁷ In addition to the inherent political dangers, Senator Kerry also acknowledged the threats to the Belfast Project participants and academia in general: "It is my great hope that the academic integrity of these documents is maintained and that these transcripts remain confidential because for some this has become a matter of life and death."²⁴⁸

According to Senator Kerry, the US-UK MLAT is a "vital" instrument; however, it was "never meant to be used as a method of reaching far back into a difficult history and perhaps eroding a delicate truce that could lead to more lives being lost."²⁴⁹ Based on his earlier statements, Secretary Kerry has acknowledged that fulfillment of the United Kingdom's request would contravene important public policy concerns and impair the United States's

²⁴⁵ See Kerry Op-Ed, *supra* note 1; Letter from John Kerry, Mass. Senator and Chairman of the Senate Foreign Relations Comm., to Hillary Clinton, Sec'y of State (Jan. 23, 2012), <http://htmlimg2.scribdassets.com/9nepmj1w8w1d29hd/images/1-c3ae96f326.jpg> [hereinafter Letter from John Kerry].

²⁴⁶ Letter from John Kerry, *supra* note 245. Secretary Kerry is not alone in his efforts. Other members of Congress who have written to Secretary Clinton on the matter include Congressman Ackerman, Congressman Crowley, Senator Menendez, Congressman O'Flaherty, Senator Schumer, Senator Brown, Congressman Pascrell, Congressman Rothman, Congressman Doyle, Senator Lautenberg, Congressman Murphy, Senator Lugar, Congressman Critz, Senator Casey, Congressman Sires, Senator Cardin, Congressman Neal, Congressman Pallone, Senator Gillibrand, and Congressman Higgins. *Congress*, BOSTON COLLEGE SUBPOENA NEWS, <http://bostoncollegesubpoena.wordpress.com/congress/> (last visited Jan. 22, 2013).

²⁴⁷ See Letter from John Kerry, *supra* note 245; Kerry Op-Ed, *supra* note 1.

²⁴⁸ Kerry Op-Ed, *supra* note 1.

²⁴⁹ *Id.*

interest in a peaceful Northern Ireland.²⁵⁰ To protect the integrity of the Belfast Project and the lives of those involved, Secretary Kerry should work toward an agreeable resolution with the United Kingdom that does not involve compelled disclosure of the participants' identities.

Although declining to enforce the United Kingdom's request would not create a constitutional privilege for academic researchers, it would be a major step toward recognition of such a right. The executive branch would demonstrate that the protection of confidentiality in academic research could outweigh the prosecution of crimes. Additionally, the decision would further legitimize endeavors like the Belfast Project as important tools in American culture, moving the standard of protection of researchers closer to that for journalists.

CONCLUSION

The time is ripe to recognize an academic privilege in the United States. In their petition for certiorari, Moloney and McIntyre indicated that the circuit courts have inconsistently applied *Branzburg*, disagreeing whether and to what extent the First Amendment protects against compelled disclosure of confidential information.²⁵¹ When the Belfast Project litigation was before the First Circuit initially, Circuit Judge Torruella explained that he concurred in the judgment of the First Circuit only because he was compelled to do so by the Supreme Court's holding in *Branzburg*.²⁵²

Although the Belfast Project will not be the vehicle for the Supreme Court to revisit its holding in *Branzburg*, the controversy surrounding the project indicates that the trend, both nationally and internationally, is in favor of affording more, not less, protection to journalists, academics, and other professionals who promise

²⁵⁰ See Kerry Op-Ed, *supra* note 1; Letter from John Kerry, *supra* note 245.

²⁵¹ See *id.* at 13.

²⁵² Request of U.K., 685 F.3d at 20 (Torruella, C.J., concurring).

confidentiality in exchange for information on important matters of public interest.²⁵³

After examining academic privilege through the lens of the Belfast Project, it is evident that compelling academicians to divulge their confidential sources will inevitably and significantly obstruct the free flow of information between researchers and their participants, thereby depriving the public of valuable information. The protection of academic confidentiality agreements is essential in two important ways. Firstly, when individuals are encouraged to share their life experiences in a safe, academic environment, researchers are able to transmit the wisdom they glean to the public. Enlightening society affords future generations the ability to learn from the mistakes of the past and craft a better future. Simply put, if researchers cannot promise anonymity to those informants who require it, then informants will be hesitant to participate in studies, and researchers will never be able to gather true and accurate information to disseminate to the public.

Secondly, the safety of researchers and their sources hinges on their ability to enter into and enforce confidentiality agreements. As this comment has explained in its discussion of the Belfast Project, research participants put themselves at risk when they share their experiences regarding high-stakes, controversial, and dangerous topics. Furthermore, academicians who conduct such projects also expose themselves to peril. For endeavors like the Belfast Project, confidentiality is virtually mandatory, not optional, for many research participants. When considering claims such as those of Moloney and McIntyre, courts should conduct the appropriate balancing test with the understanding that an academic's right to maintain confidentiality is essential to a thriving, free society. If courts fail to do so, policy makers must use the tools at their disposal to protect this vital interest.

²⁵³ See Petition for Writ of Certiorari, *supra* note 9, at 14.