Pondering Privilege: What Would Archival Privilege Look Like and How Would We Get It?

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Abstract: In light of the litigation surrounding the Belfast Project—an oral history collection of Northern Irish paramilitaries involved in the Troubles—the concept of archival privilege has resurfaced. First invoked in the 1980s to protect a collection from subpoena, archival privilege harkens to the idea that the importance of the historic record is greater than legal process. But what exactly is archival privilege? Unlike journalists shielding their sources or spouses preserving their relationship, archival privilege is about protecting information and documentation. With the focus on information and documentation, it becomes apparent that perhaps State Secrets Privilege or the work-product doctrine should serve as models for the privilege itself. However, when it comes to bringing archival privilege into existence, there is no better example to follow than that of the journalists who willed their privilege into existence, not just through common law, but through legislative action. In this paper, I will first discuss the possible extent and application of archival privilege based on existing privileges, and then, using New York's Shield Laws as an example, I will outline the legislative push necessary to make archival privilege a reality.

Introduction

Archives contain a wealth of knowledge. The knowledge in the collections is why archives are so important to historians and other scholars. However, historians and scholars are not the only ones with interest in the knowledge from archives. When news came from Boston that U.S. Attorneys were subpoenaing oral histories from a Boston College collection known as the Belfast Project, the world took notice. The Belfast Project was an effort sponsored by Boston College to collect oral histories from Northern Irish paramilitaries involved in a period of sectarian violence known as The Troubles.[1] The interviewees were promised absolute confidentiality—their interviews would not be released until they died or gave express permission—which turned out to be problematic. Promises of confidentiality for archival collections within the United States can only be made to the extent of U.S. law. In other words, the promises made in a donor agreement or contract will not hold up against a federal subpoena.

While the legal battle over the Belfast Project centered on interpretation of an international treaty, another issue appeared on the periphery: archival privilege. In this instance, privilege is meant in the legal sense, meaning that there is a relationship or piece of information that is considered more important to protect than the legal process, and not in the colloquial sense that it is an honor to use archival collections. First invoked in 1986 when the FBI attempted to subpoena activist Ann Braden's papers,[2] archival privilege is

[1] For more information about the Belfast Project the subsequent litigation, please refer to Christine Anne George, "Archives Beyond the Pale: Negotiating Legal and Ethical Entanglements After the Belfast Project," *American Archivist* 76, no. 1 (2013): 47.

[2] The FBI was investigating the National Committee Against Repressive Legislation, whose papers were at the Wisconsin Historical Society. Ann Braden's papers were also at the Historical Society, and the FBI noticed that some items from her papers might be relevant to their investigation. Braden had a condition in her donor agreement that stipulated anyone who wanted to access her papers had to have written permission from her. When the FBI

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the acknowledgement that archival holdings should be afforded an extra legal protection. Archival privilege is not a recognized legal privilege—the court in 1986 refused to support its creation—but does have ties to journalist's privilege.[3] Though the Society of American Archivists did not take a position on the litigation surrounding the Belfast Project, the now defunct Government Affairs Working Group[4] did write a position paper that included a call for professional discussion.[5]

As I took part in discussions concerning archival privilege, one thing became abundantly clear—discussion of a particular concept is difficult when the concept is not clearly defined. How can one truly be for or against something without knowing the exact parameters of it? Without a model to critique, the discussion of archival privilege will remain theoretical. The desire to move past theoretical, to the nuts and bolts of the matter, was the driving force for this research.

Problem Statement

As the title of this piece suggests, I have two questions that I hope to address: what would archival privilege look like and how would archivists be able to obtain it? In terms of specifics for archival privilege, my hope was to find examples of currently recognized legal privileges and see if any could be modified to fit the circumstances that would require archival privilege. Because this is a new form of privilege, I have taken pieces of recognized legal privileges and pieced them together in the hope that the reality of archival privilege would be more palpable if analogies could be drawn to existing privileges. In addressing the how, I will analyze the circumstances in which a special interest group attempted to gain their own privilege, and lessons from the past should shape future action for archivists.

Methodology

While the research required for how to gain archival privilege seemed rather straightforward—look for special interest groups that were able to convince legislatures and courts to recognize their particular privilege—the question of what privilege to emulate was daunting. There are a variety of types of privilege. Some recognize relationships, some protect information, and others protect certain information within a relationship. Before beginning my research, I made several decisions concerning how I envisioned archival privilege:

- **Archival privilege will only apply to private collections not addressed by existing U.S. law.** In this instance, I took to heart the circumstances surrounding the Belfast Project, and, to a degree, Ann Braden's papers,[6] which were the center of the 1986 litigation concerning archival privilege. The Belfast Project was a collection of oral histories from various individuals who gave those histories to a private institution. They were not elected officials or government workers.

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requested access, Braden refused. The FBI then got a subpoena for her papers, which she then challenged. See Wilkinson v. Federal Bureau of Investigation, 111 F.R.D. 432 (1986).

[3] The tie to journalist's privilege is through scholar's privilege. Although scholar's privilege is not recognized, it has been invoked several times and appears to have some legitimacy with the courts.

[4] On September 18, 2013, the SAA Council approved the creation of the Committee on Advocacy and Public Policy (CAPP). The Government Affairs Working Group has been disbanded. "Council Creates Committee on Advocacy and Public Policy," Society of American Archivists, accessed November 1, 2013, http://www2.archivists.org/news/2013/council-creates-committee-on-advocacy-and-public-policy.

[5] Soon after releasing its position paper, the Government Affairs Working Group withdrew the position paper to be revised. To date, no revised version has been released. A copy of the original document from the Government Affairs Working Group can be found on the Society of American Archivists Oral History Section's Belfast Case information page at http://www2.archivists.org/groups/oral-history-section/the-belfast-case-information-for-saa-members.

[6] See note 2 for a brief background on Ann Braden.

They were not patients or students. Their paramilitary organizations were not government agencies. Instead, these were individuals whose histories and stories would not be collected unless they willingly participated in the process.

- **Archival privilege will be a qualified privilege.** There are types of privileges that are absolute, provided they are not broken or waived.[7] There are other privileges that are qualified, meaning that there are factors that are weighed to determine whether or not the privilege will take effect. To use the Belfast Project as an example, there are two sides to an issue. Paramilitaries in Northern Ireland—particularly the Irish Republican Army—have a code of silence. Being labeled an informer carries harsh and sometimes deadly penalties. Even with the promise of confidentiality it is remarkable that any were willing to speak. On the opposite side, are victims' families. The Police Service of Northern Ireland was seeking information concerning the murder of Jean McConville, which led to the subpoenas. McConville is one of the Disappeared, a group of individuals who were kidnapped, murdered, and buried in secret during the Troubles. While McConville's body has been recovered—there are still a number of the Disappeared whose bodies have not—her family wants more information. Putting the legal issues aside, this situation proves to be an ethical conundrum. On the one hand, archivists are the keepers of the historical record. We want to gather information and documentation of dissident groups to have a more complete record. In order to do that, we have to be willing to think of future generations, which may mean restricting materials for now. On the other hand, archivists want to make their collections accessible. We want researchers to come in and discover what our collections have to offer. It is a difficult ethical situation to balance, and in acknowledgment of that fact, I do not believe that any privilege regarding archival materials should be absolute.

- **Archival privilege will not be based on the First Amendment.** When Braden invoked archival privilege in 1986, she based it in the First Amendment.[8] Within the First Amendment there are promises of freedom of speech, freedom of association, and freedom of the press. Journalist's privilege has its basis in the First Amendment. While journalist's privilege has been recognized,[9] other advocates for a new privilege that have attempted to follow that First Amendment path—namely scholar's privilege, which would allow a scholar to protect his research and notes[10]—have not been successful. Although the judge in Braden's case did not dismiss the concept of archival privilege entirely, he was not convinced of the need for it at that time.[11] The judge did mention

[7] Typically, to break privilege, one need only tell a third party the protected information.

[8] Within the opinion, the court summarized Braden's argument for privilege by stating her claim that:

> . . . she has a qualified First Amendment privilege against disclosure, on the basis that the subpoena infringes her rights of free association, free speech and privacy, and cannot meet the heightened level of scrutiny mandated by that privilege. . . . [And] because the documents are deposited in an archive and used by scholars, access to the government should only be granted if such discovery meets the criteria applicable to a claim of Frist Amendment privilege. *Wilkinson*, at 435.

[9] As will be discussed later in this article, that recognition was not easily obtained. The Supreme Court refused to recognize journalist's privilege in the case *Branzberg v. Hayes*. In reaction to that, states across the country enacted shield laws to provide the privilege.

[10] For further discussion of scholar's privilege and how it relates to archival privilege, please refer to George, "Archives Beyond the Pale."

[11] The court summarizes its position stating:

> Neither Braden nor the amici could cite any case applying an archival privilege, and the Court has found none indeed, this question appears to be one of first impression. Instead, Braden and the amici argue by analogy citing statutory law regarding archival restrictions, cases mentioning the right to academic

that the facts of the case did not warrant it, but given the fact that scholar's privilege has also had difficulty clinging to the First Amendment, I want to look beyond that particular privilege provider.

Findings and Discussion

There were two particular privileges—though one is considered a protection rather than a privilege—that struck me as potential examples for archival privilege: Work Product Doctrine and State Secrets Privilege. Neither is absolute and both deal with information. Though both were first fully articulated in court cases, I will make the argument that it would be better for archivists to follow the journalists' example and advocate for legislation to get archival privilege recognized.

Work Product Doctrine

At times, it can seem like the Work Product Doctrine is similar to attorney-client privilege,[12] but it is a distinct protection in its own right. There are a number of differences between Work Product Doctrine and attorney-client privilege. The first is that Work Product Doctrine applies to materials prepared in anticipation of litigation—interviews, memos, observations, etc.—while attorney-client privilege refers to communications between the attorney and his or her client. The second is that Work Product Doctrine is a qualified privilege while attorney-client privilege is absolute.[13]

Although the Work Product Doctrine is codified in the Federal Rules of Civil Procedure[14] and the Federal Rules of Criminal Procedure,[15] the protection originated in the 1947 case *Hickman v. Taylor*.[16] When a

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freedom, and opinions discussing the possible creation of a researcher's privilege not to disclose his sources and confidential notes. However . . . none of the authorities cited mandates the creation of an archival privilege and most are distinguishable from the case at hand. Therefore, in view of the absence of persuasive authority on this point, the Court holds that the facts of this case are simply not sufficiently compelling to justify the creation of a wholly new archival privilege. *Wilkinson*, at 437–38.

[12] Attorney-client privilege refers to the absolute privilege between an attorney and his or her client, which recognizes the importance of communication between client and attorney for proper legal representation.
[13] So long as the parameters for attorney-client privilege are met and it is not waived, it cannot be broken.
[14] In the Federal Rules of Civil Procedure, the Work Product Doctrine can be found in Rule 26(b)(3), which reads:

> **(3)** ***Trial Preparation: Materials*****.**
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> > **(A)** *Documents and Tangible Things*. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:
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> > > **(i)** they are otherwise discoverable under Rule 26(b)(1); and
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> > > **(ii)** the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.
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> > **(B)** *Protection Against Disclosure*. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.
> >
> > **(C)** *Previous Statement*. Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:
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> > > **(i)** a written statement that the person has signed or otherwise adopted or approved; or
> > >
> > > **(ii)** a contemporaneous stenographic, mechanical, electrical, or other recording--or a transcription of it—that recites substantially verbatim the person's oral statement.
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> Fed. Rul. Civ. P. § 26(b)(3) (Thomson Reuters 2013).

tugboat accident in 1943 led to the death of five crew members, the tug owners hired a law firm to represent them in case of potential lawsuits resulting from the accident.[17] After the United States Steamboat Inspectors had a public hearing on the matter, Samuel B. Fortenbaugh, Jr., lawyer for the owners, "privately interviewed the survivors and took statements from them with an eye toward anticipated litigation . . . [and] also interviewed other persons believed to have some information relating to the accident and in some cases he made memoranda of what they told him."[18] A few months later there was a lawsuit and, during the discovery period, opposing counsel sent thirty-nine interrogatories[19] to Fortenbaugh. The thirty-eighth of those interrogatories requested exact copies of any statements made by the survivors that were in writing or "if oral, set forth in detail the exact provisions of any such oral statements or reports."[20] Fortenbaugh refused, claiming "that answering these requests 'would involve practically turning over not only the complete files, but also the telephone records and, almost, the thoughts of counsel'" and should be privileged.[21] The issue of the interrogatory was heard in the District Court for the Eastern District of Pennsylvania, which held that there was no privilege; and then in the Third Circuit Court of Appeals, which reversed the district court's ruling.[22] The case made its way to the Supreme Court of the United States which upheld the Third Circuit's ruling, stating:

> When Rule 26 [of the Federal Rules of Civil Procedure] and the other discovery rules were adopted, this Court and the members of the bar in general certainly did not believe or contemplate that all the files and mental processes of lawyers were thereby opened to the free scrutiny of their adversaries. And we refused to interpret the rules at this time so as to reach so harsh and unwarranted a result.[23]

This was an acknowledgment by the Supreme Court that there was a circumstance that had not been considered during the drafting of the rules that would govern discovery. Though not governed by attorney-client privilege since the information at issue had come from third parties,[24] there seemed to be an innate sense of unfairness about the situation, which is apparent in the majority opinion's summary of the situation:

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[15] In the Federal Rules of Criminal Procedure, the Work Product Doctrine can be found in Rule 16(b)(2) which reads:

> **(b) Defendant's Disclosure**
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> **(2) Information Not Subject to Disclosure.** Except for scientific or medical reports, Rule 16(b)(1) does not authorize discovery or inspection of:
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> **(A)** reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent, during the case's investigation or defense; or
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> **(B)** a statement made to the defendant, or the defendant's attorney or agent, by:
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> **(i)** the defendant;
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> **(ii)** a government or defense witness; or
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> **(iii)** a prospective government or defense witness.
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> Fed. Rul. Crim. P. § 16(b)(2) (Thomson Reuters 2013).

[16] 329 U.S. 495 (1947).

[17] *Hickman*, 498.

[18] *Hickman*, 498.

[19] Interrogatories are a way to gather more information during the discovery process. They are a formal list of questions that an attorney requests opposing counsel answer.

[20] *Hickman*, 499.

[21] *Hickman*, 499.

[22] *Hickman*, 499–500.

[23] *Hickman*, 514.

[24] Justice Jackson highlights this point in his concurring opinion when he states: "It seems equally clear that discovery should not nullify the privilege of confidential communication between attorney and client, But those principles give us no real assistance here because what is being sought is neither evidence nor is it a privileged communication between attorney and client." *Hickman*, 516.

> We are . . . dealing with an attempt to secure the production of written statements and mental impressions contained in the files and the mind of the attorney . . . without any showing of necessity or any indication or claim that denial of such production would unduly prejudice the preparations of petitioner's case or cause him any hardship or injustice.[25]

Within that statement, the Court laid out the factors that could overcome the protection of the Work Product Doctrine, which are similar to the factors considered in the Federal Rules.

Does the Work Product Doctrine provide a potential blueprint for archival privilege? There certainly seem to be some similarities. The first is that protection from the Work Product Doctrine was something that was not foreseen when discovery rules were being written, but was deemed necessary and thus created. The second is that Work Product Doctrine applies to documents and information gathered for a narrow purpose. In terms of archival privilege, the purpose would be preservation of the historical record. If a collection is necessary to help create a full and diverse historical record, it should be given extra protection. Finally, the Work Product Doctrine is a conditional protection that is decided by a judge. The statutory language allows for the disclosure of information if there is no other means for opposing counsel to obtain it, or if they would face a hardship. The burden is upon opposing counsel to prove the necessity to the judge. In the Federal Rules of Civil Procedure, there is also a duty upon the court upon ordering disclosure to ensure that "mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation" are not passed on to opposing counsel."[26] So even though the protection of the Work Product Doctrine is not absolute, it is still rather substantial.

Should archival privilege emulate the Work Product Doctrine, there would be no absolute guarantee against materials being used in litigation, potentially against the donor. However, following the example of the Work Product Doctrine, there would be a serious discussion about whether it is necessary to provide requested materials. Could they be found in another location? Would there be a hardship to form a case without them? The party requesting the materials would have to make his or her case to a judge, who would then decide whether or not the materials should stay protected.

State Secrets Privilege

State Secrets Privilege was articulated in the 1953 Supreme Court case *U.S. v. Reynolds*.[27] The widows of three civilians who were killed in a military plane crash brought suit against the government to access the Air Force's official report on the accident, as well as testimony from the surviving crew members.[28] The government refused to provide the materials, claiming that they were privileged.[29] The district court did not accept the claim of privilege and an appellate court affirmed the ruling.[30] The government appealed to the Supreme Court, which granted certiorari. In its opinion, the Court wrestled with the balance needed to protect both state secrets and the legal process, before remanding the case to the district court to allow the widows to pursue another means of obtaining the information necessary for their case.[31] In *Reynolds*, the Court faced a difficult problem in determining whether or not information was a state secret—too many questions into the nature of the information and it would no longer remain a secret. The Court likened the situation to the "privilege of self-incrimination" because "[t]oo much judicial inquiry into the claim of

[25] *Hickman*, 509.
[26] Fed. Rul. Civ. P. § 26(b)(3)(b) (Thomson Reuters 2013).
[27] 345 U.S. 1 (1953).
[28] *Reynolds*, 3.
[29] *Reynolds*, 3.
[30] *Reynolds*, 4–5.
[31] *Reynolds*, 6–12.

privilege would force disclosure of the thing the privilege was meant to protect, while a complete abandonment of judicial control would lead to intolerable abuses."[32]

In *Reynolds*, there was certainly a delicate balancing act required to ensure "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers" while also avoid having "the court . . . automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case."[33] From the precedent set in *Reynolds* as well as subsequent litigation, it has been established that the "court does not determine what information should be secret, but it does have the responsibility to determine what information legitimately has the status of a state secret."[34] However, in instances where "the public record sufficiently establishes the need to keep the evidence secret," then it is accepted that the "court's review of classified evidence or arguments is not necessary . . . "[35] Still, although the Court in *Reynolds*—and more recent decisions[36]—recognizes State Secrets Privilege, "the claim of privilege should not be lightly accepted."[37]

As a model for archival privilege, State Secrets Privilege is not a perfect fit. Though it offers a broad protection with a secret judicial review of the information, invoking the privilege is a serious matter. Should the court decide that there are state secrets at stake, the privilege then becomes an absolute privilege. In terms of archival privilege, State Secrets Privilege may be too rare and grave a privilege to emulate.

The Journalist Example

Although creation of the above two privileges was rooted in litigation, it might be better for archivists to follow the journalists' example in how to gain a privilege, which is to advocate for legislation. If you are looking to change a law through the courts, it is essential that you have the perfect test case. The test case is meant to set a precedent[38] to have a law considered in a particular way, given a set of circumstances. Test cases are meant to pave the way for similar cases down the line. If a case has complicated circumstances—such as interpretation of an international treaty and a highly charged political situation, as with the Belfast Project—it may not be a good test case. Having a court—especially the Supreme Court—recognize your privilege can be a victory. However, if the court instead chooses to reject the privilege, it can be a huge blow because that ruling sets a precedent that will affect future cases in that line of litigation. This is the reason why special interest groups are very concerned with test cases that come up in the courts. Having a case heard is essentially a gamble—once it is being heard in the court, it is out of the group's control. An example of a negative ruling that affects a privilege is the 1972 Supreme Court decision *Branzberg v. Hayes*,[39] which invalidated journalist's privilege.

In *Branzberg*, which is a consolidated case,[40] the Court had to address the issue:

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[32] *Reynolds*, 8.
[33] *Reynolds*, 9–10.
[34] Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide for Judges on the State-Secrets Privilege, the Classified Information Procedures Act, and Court Security Officers* (Federal Judicial Center: 2007): 5.
[35] Reagan, *Keeping Government Secrets*, 5–6.
[36] See, e.g., General Dynamics Corp. v. United States, 131 S.Ct. 1900 (2011).
[37] *Reynolds*, 11.
[38] Precedent is a legal term that refers to a prior decision made by a court that is either binding or persuasive on future cases concerning similar issues. It is a part of the legal principle *stare decisis*, which is that judges are obligated to respect the precedent set by other judges. Basically, this assures people that if you have two cases with similar facts, the outcomes should be consistent.
[39] 408 U.S. 665 (1972).
[40] When there are multiple cases that concern a similar question of law, a court may consolidate them and only issue one ruling. In this particular instance, there were three cases concerning the issue of journalists and grand juries:

> . . . that to gather news it is often necessary to agree either not to identify the source of information published or to publish only part of the facts revealed, or both; that if the reporter is nevertheless forced to reveal these confidences to a grand jury, the source so identified and other confidential sources of other reporters will be measurably deterred from furnishing publishable information, all to the detriment of the free flow of information protected by the First Amendment.[41]

Essentially the Court was being asked to create a new privilege for journalists—not an absolute privilege, but a conditional one.[42] The majority opinion, which was only just a majority with five justices in favor,[43] while lengthy in discussion, does offer a succinct answer to the request to create a new privilege: "This we decline to do."[44] The majority opinion saw no reason why journalists should be granted rights that the ordinary citizen was not allowed:

> On the records now before us, we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.[45]

However, the majority opinion did not sit well with everyone. In his dissenting opinion, Justice Stewart had harsh words for those who had a "crabbed view of the First Amendment" when he wrote:

> The question whether a reporter has a constitutional right to a confidential relationship with his source is of first impression here, but the principles that should guide our decision are as basic as any to be found in the Constitution . . . The Court . . . invites state and federal authorities to undermine the historic independence of the press by attempting to annex the journalistic profession as an investigative arm of government. Not only will this decision impair performance of the press' constitutionally protected functions, but it will, I am convinced, in the long run harm rather than help the administration of justice.[46]

In an interesting twist, there was fallout from the *Branzberg* decision that showed that there were many who agreed with Justice Stewart. State legislatures across the country began to enact shield laws,[47] which gave journalists their privilege through legislation rather than a court ruling. Shield laws can vary from

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Branzberg v. Hayes and Meigis (which concerned two separate judgments); *In re Pappas*; and *United States v. Caldwell*. *Branzberg*, 667–676.

[41] *Branzberg*, 679–680.

[42] *Branzberg*, 680. The Court acknowledged:

> . . . they [the journalists] assert that the reporter should not be forced either to appear or to testify before a grand jury or at trial until and unless sufficient grounds are shown for believing that the reporter possesses information relevant to a crime the grand jury is investigation, that the information the reporter has is unavailable from other sources, and that the need for the information is sufficiently compelling to override the claimed invasion of First Amendment interests occasioned by the disclosure. *Branzberg*, at 680.

[43] In this particular opinion, while there were five justices in favor of the decision, one of those five wrote a concurring opinion. A concurring opinion appears when a justice agrees with the majority ruling, but for a different reason. There were four justices who dissented, meaning that they did not agree with the majority's decision. A justice who dissents may write a dissenting opinion or sign on to another justice's dissenting opinion.

[44] *Branzberg*, 690.

[45] *Branzberg*, 690

[46] *Branzberg*, 725.

[47] There were states enacting shield laws prior to *Branzberg*, such as New York, which did so in 1970.

state to state, with some offering more protection than others. Enacting a shield law does not mean that the debate over journalist's privilege is done—the shield laws are state laws, not federal, and there are plenty of examples of instances where the interpretation of shield laws winds up in courts—it is just a different way to go about procuring that particular protection.

For archival privilege, seeking legislation first may be beneficial. Once a case is heard, the options for advocacy are extremely limited. It is possible to file an amicus brief[48] to present your position on an issue, but once the case is being heard, the general public is not allowed to interact with the court. When it comes to legislation, you can actively lobby your representative by calling, writing, or signing a petition. There may be hearings in which you can participate. That element of direct interaction is not available with the courts. Legislatures can be swayed by public opinion, but courts are set apart in that regard.

In 1970, New York enacted its shield law, Civil Rights Law § 79-h. This statute provides absolute protection for confidential sources and conditional protection for non-confidential sources.[49] In the bill

[48] An amicus brief refers to a brief fielded by someone who is a "friend of the court" (translation of *amicus curiae*) who has knowledge of an issue and could potentially be affected by the outcome of a case. The rules for filing an amicus brief vary depending on the court.

[49] Sections (b) and (c) of New York Civil Rights Law § 79-h protection both confidential and non-confidential sources and state:

> (b) Exemption of professional journalists and newscasters from contempt: Absolute protection for confidential news. Notwithstanding the provisions of any general or specific law to the contrary, no professional journalist or newscaster presently or having previously been employed or otherwise associated with any newspaper, magazine, news agency, press association, wire service, radio or television transmission station or network or other professional medium of communicating news or information to the public shall be adjudged in contempt by any court in connection with any civil or criminal proceeding, or by the legislature or other body having contempt powers, nor shall a grand jury seek to have a journalist or newscaster held in contempt by any court, legislature or other body having contempt powers for refusing or failing to disclose any news obtained or received in confidence or the identity of the source of any such news coming into such person's possession in the course of gathering or obtaining news for publication or to be published in a newspaper, magazine, or for broadcast by a radio or television transmission station or network or for public dissemination by any other professional medium or agency which has as one of its main functions the dissemination of news to the public, by which such person is professionally employed or otherwise associated in a news gathering capacity notwithstanding that the material or identity of a source of such material or related material gathered by a person described above performing a function described above is or is not highly relevant to a particular inquiry of government and notwithstanding that the information was not solicited by the journalist or newscaster prior to disclosure to such person.
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> (c) Exemption of professional journalists and newscasters from contempt: Qualified protection for nonconfidential news. Notwithstanding the provisions of any general or specific law to the contrary, no professional journalist or newscaster presently or having previously been employed or otherwise associated with any newspaper, magazine, news agency, press association, wire service, radio or television transmission station or network or other professional medium of communicating news to the public shall be adjudged in contempt by any court in connection with any civil or criminal proceeding, or by the legislature or other body having contempt powers, nor shall a grand jury seek to have a journalist or newscaster held in contempt by any court, legislature, or other body having contempt powers for refusing or failing to disclose any unpublished news obtained or prepared by a journalist or newscaster in the course of gathering or obtaining news as provided in subdivision (b) of this section, or the source of any such news, where such news was not obtained or received in confidence, unless the party seeking such news has made a clear and specific showing that the news: (i) is highly material and relevant; (ii) is critical or necessary to the maintenance of a party's claim, defense or proof of an issue material thereto; and (iii) is not obtainable from any alternative source. A court shall order disclosure only of such portion, or portions, of the news sought as to which the above-described showing has been made and shall support such order with clear and

jacket,[50] there are letters explaining why various individuals, companies, and organizations believed that having a shield law (or the Betros Bill, as it was known before it was passed) was important. The New York State Broadcasters Association wrote a memorandum stating, "Newsmen, if they are to report anything beyond the routine events of the community, must, of necessity, seek out information which many times may be of a confidential nature. The confidences of a news source are sometimes essential to fully delve and explore the extent of an event."[51] L. Ken Peet and Chester E. Rondomanski, general managers of the New York State Publishers Association and New York Press Association, wrote a letter to then New York governor Nelson A. Rockefeller, in support, stating:

> Support for this legislation has been building for forty years. . . . The independent news reporter is a valuable ally of the law, both by informing the public of illegal activities and, frequently, by unearthing and providing the police facts leading to crime solutions. To do this, however, he must remain truly independent; if he becomes known merely as an informer for the policy, his sources of information are soon frightened away.[52]

Archival privilege would probably have a lot to gain from a lobbying campaign like that for the shield law. One important reason is that the general public is not terribly familiar with archives or archival principles. Writing a letter, having archivists and archives supporters reach out, can help educate legislators. Unlike the news, most people—including legislators—may not be familiar with archives or archival policies. Lobbying for legislation also allows for a somewhat flexible timeframe. Unlike having to wait for the ideal—or as close to ideal as you may think you are going to get—test case to arise, the legislative calendar offers more certainty.

Conclusion

At the end of my research, I am not ready to definitively say what archival privilege should look like, and the best way we can hope to achieve it. However, I do think that the Work Product Doctrine, particularly the language included in the Federal Rules of Civil Procedure, offers a good guide for archival privilege. It is a qualified privilege, created out of necessity, to offer additional protection to information that had not been previously anticipated. In theory, State Secrets Privilege seemed like it might also be a good guide, but the hesitation that the courts feel towards it would best be avoided. As for how to get archival privilege, the journalists do provide a good example. When efforts for their privilege failed in the courts, they turned to the legislatures. The direct advocacy required for such a campaign may work to the archivists' advantage because it provides a greater opportunity to educate the public and legislatures about archives and archival policies.

This article should only be the beginning of the discussion concerning the practicalities of archival privilege. There are other privileges that some might think would work better, and arguments to be made why archivists should wait for a test case. It is my hope that more research and debate spring from this article to help archivists decide what stance we want to take on archival privilege.

> specific findings made after a hearing. The provisions of this subdivision shall not affect the availability, under appropriate circumstances, of sanctions under section thirty-one hundred twenty-six of the civil practice law and rules.
>
> NY Civ. Rts § 79-h (Thomason Reuters 2013).

[50] Bill jackets are supplementary material, such as letters or memoranda, that discuss the pros and cons of the bill. They are used for legislative history purposes.

[51] New York State Broadcasters Association, Inc., Memorandum Submitted in Support of Assembly No. 5478-B (Betros), taken from 1970 c. 615 bill jacket.

[52] Letter from L. Ken Peet & Chester E. Rondomanski to Nelson A. Rockefeller, April 22, 1970, from 1970 c. 615 bill jacket.

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