The Court observed that Congress, as well as state legislatures and state courts, are free to adopt privileges for reporters.[957] Although efforts in Congress have failed, 49 states have done so—33 (plus the District of Columbia) by statute and 16 by court decision, with Wyoming the sole holdout.[958] As for federal courts, Federal Rule of Evidence 501 provides that "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."[959] The federal courts have not resolved whether the common law provides a journalists' privilege.[960]

Nor does the status of an entity as a newspaper (or any other form of news medium) protect it from issuance and execution on probable cause of a search warrant for evidence or other material properly sought in a criminal investigation.[961] The press had argued that to permit searches of newsrooms would threaten the ability to gather, analyze, and disseminate news, because searches would be disruptive, confidential sources would be deterred from coming forward with information because of fear of exposure, reporters would

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"[C]ourts in almost every circuit around the country interpreted Justice Powell's concurrence, along with parts of the Court's opinion, to create a balancing test when faced with compulsory process for press testimony and documents outside the grand jury context." Association of the Bar of the City of New York, The Federal Common Law of Journalists' Privilege: A Position Paper (2005) at 4–5 [http://www.abcny.org/pdf/report/White%20paper%20on%20reporters%20privilege.pdf] (citing examples).

[957] 408 U.S. at 706.

[958] The 33rd state statute enacted was the State of Washington's, which took effect on July 22, 2007. See the website of the Reporters Committee for Freedom of the Press for information on the state laws. The greatest difficulty these laws experience is the possibility of a constitutional conflict with the Fifth and Sixth Amendment rights of criminal defendants. *See Matter of Farber*, 78 N.J. 259, 394 A.2d 330, *cert. denied sub nom.* New York Times v. New Jersey, 439 U.S. 997 (1978). *See also* New York Times v. Jascalevich, 439 U.S. 1301, 1304, 1331 (1978) (applications to Circuit Justices for stay), and id. at 886 (vacating stay).

[959] Rule 501 also provides that, in civil actions and proceedings brought in federal court under state law, the availability of a privilege shall be determined in accordance with state law.

[960] See, e.g., *In re*: Grand Jury Subpoena. Judith Miller, 397 F.3d 964, 972 (D.C. Cir. 2005) (Tatel, J., concurring) (citation omitted), *rehearing en banc denied*, 405 F.3d 17 (D.C. Cir. 2005 (Tatel, J., concurring), *cert. denied*, 545 U.S. 1150 (2005), *reissued with unredacted material*, 438 F.3d 1141 (D.C. Cir. 2006) (U.S. Court of Appeals for the District of Columbia "is not of one mind on the existence of a common law privilege").

[961] Zurcher v. Stanford Daily, 436 U.S. 547, 563–67 (1978). Justice Powell thought it appropriate that "a magistrate asked to issue a warrant for the search of press offices can and should take cognizance of the independent values protected by the First Amendment" when he assesses the reasonableness of a warrant in light of all the circumstances. Id. at 568 (concurring). Justices Stewart and Marshall would have imposed special restrictions upon searches when the press was the object, id. at 570 (dissenting), and Justice Stevens dissented on Fourth Amendment grounds. Id. at 577.