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Drafting a Workable Federal Journalist Privilege: the News Media Confidentiality Act of 2013

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"[I]f journalists cannot be trusted to guarantee confidentiality, then journalists cannot function and there cannot be a free press." – Judith Miller[1]

I. Introduction

Over the past few years, as the number of subpoenas against members of the press has risen and as the Obama Administration has engaged in an unprecedented crackdown against leakers of purportedly classified information, a familiar story has arisen: A journalist gets a great tip from an unnamed source and publishes an article based on the information. Shortly thereafter, the information becomes the subject of a criminal probe, and a prosecutor subpoenas the journalist to testify. The journalist refuses, claiming a privilege to refuse to identify the identity of the confidential source or any other information gathered in the course of reporting the story. In the end, the journalist winds up behind bars.[2]

The courts, state legislatures, and Congress have wrestled for years with whether the law should afford the journalist-protagonist in that story with any form of protection from compelled disclosure. Because neither the Supreme Court nor Congress has definitively answered the question, a hodgepodge of different rules has been developed, with a dizzying array of balancing tests, definitions, and exceptions. The result is that a source's identity might be protected in one federal circuit and unprotected in another; it might be protected in state proceedings, but unprotected in the federal courts. What is more, the uncertainty created by the lack of a uniform standard destroys the effectiveness of any one state's or court's guarantee of confidentiality.

With the federal courts of appeals becoming increasingly less likely to provide

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1. Jason M. Shepard, PRIVILEGING THE PRESS: CONFIDENTIAL SOURCES, JOURNALISM ETHICS, AND THE FIRST AMENDMENT 1 (2011).

2. *See, e.g., id.* (describing former *New York Times* reporter Judith Miller, who spent 85 days in prison for failing to identify a confidential source).

journalists with protection, the time has come for Congress to settle this uncertainty by enacting a federal shield law, providing journalists with a statutory privilege from divulging their sources or other information obtained while newsgathering. This paper provides lawmakers with a framework to follow in drafting a law that best promotes the underlying purpose of the privilege – maintaining the free flow of information to the public – while recognizing the need to compel journalists to testify in certain extraordinary situations. Part II will explore the history of the journalist privilege, tracking its journey to the Supreme Court in *Branzburg v. Hayes*[3] and explaining how the privilege has gained wide recognition despite the Supreme Court's rejection of it in *Branzburg*. This Part also examines the shield laws that exist in 40 states and the various proposals that Congress has considered since 2005. Part III analyzes the current state of the law and lays out the arguments in favor of enacting a statutory shield law, as opposed to leaving this issue for resolution in the federal courts. Part IV attempts to answer the most difficult questions lawmakers will face in crafting a workable shield law, namely how to define "journalists" for purpose of the privilege and which exceptions should be recognized. Finally, a draft version of the proposal, the News Media Confidentiality Act of 2013, is set forth in Appendix A.

II. Brief History

Journalists have asserted an interest in maintaining confidentiality with their sources since at least colonial times.[4] Notably, in the 1720s, Benjamin Franklin's older brother James, a newspaper editor, was jailed for a month when he declined to divulge

3. 408 U.S. 665 (1972)
4. Shepard, *supra* note 1, at 106.

the name of the author of an article that criticized the Massachusetts assembly.[5] Ten years later, New York editor John Peter Zenger was indicted for seditious libel after publishing a series of anonymous articles critical of the colonial governor of New York.[6] At trial, Zenger steadfastly refused to identify the articles' authors because, in his view, doing so would disrupt his freedom to "oppose arbitrary power . . . by speaking and writing truth."[7]

The earliest parallel to the modern journalist privilege cases came in 1812, when Congress held an *Alexandria Herald* editor in contempt for failing to reveal his confidential source during a Congressional hearing.[8] The first reported case, however, did not arise until 1848.[9] In that case, *Ex Parte Nugent*, a *New York Herald* reporter was held in contempt of the Senate when he refused to disclose the name of the person who had leaked him a confidential draft of a proposed treaty to end the Mexican-American War.[10] When asked how he had obtained the secret document, the reporter responded, "I consider myself bound in honor not to answer."[11] According to one author, the case "had all the hallmarks of privilege cases of a later era" and the reporter eventually became "a martyr among his colleagues while holding fast to his promise of confidentiality."[12]

Similar cases appeared with some regularity in the latter half of the 19th century,

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5. *Id.* at 110 (citing THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN, 23-24 (1936)).
6. *Id.* at 111.
7. *Id.* at 112.
8. Peri Z. Hansen, Comment, *"According to an Unnamed Official": Reconsidering The Consequences of Confidential Source Agreements when Promises are Broken by the Press*, 20 PEPP. L. REV. 115, 125 (1992).
9. *Ex Parte Nugent*, 18 F. Cas. 471, 471 (D.C. Cir. 1848).
10. *Id.*
11. Stephen Bates, *Getting to the Source: The Curious Evolution of Reporters' Privilege*, SLATE (Dec. 23, 2003, 11:51 a.m.), http://www.slate.com/articles/news_and_politics/jurisprudence/2003/12/getting_to_the_source.html.
12. Shepard, *supra* note 1, at 122.

as both the courts and legislatures demanded disclosure of confidential sources in a variety of proceedings.[13] Like the *Nugent* case, these cases drew ire from journalists and solidified support for a journalist privilege analogous to that afforded to other professionals.[14] By the early-to-mid-20th century, journalists had advanced several legal theories in support of the privilege, most of which were grounded in their ethical duty to maintain promises of confidentiality.[15] The courts, however, were generally not receptive to the journalists' arguments, as there was without question no journalist privilege under the common law.[16] Having been faced with those defeats, in the 1950s, journalists sought to ground the privilege in something less fleeting, and for the first time took refuge in the First Amendment's Freedom of the Press clause in support of the privilege.[17]

A. *Branzburg v. Hayes*

In 1972, the Supreme Court seemingly sounded a death knell for a First Amendment-based journalist privilege in *Branzburg v. Hayes*.[18] The named petitioner, Paul Branzburg, was a reporter for the *Louisville Courier-Journal* who had written an article describing his firsthand account of two men making hashish.[19] Branzburg published the article on the condition that he not reveal the identities of the article's subjects, and when Branzburg was subpoenaed by a state grand jury, he refused to name the men.[20] The Kentucky courts eventually compelled him to testify.[21] Two years after

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13. 23 Charles Alan Wright & Kenneth W. Graham, Jr., FEDERAL PRACTICE & PROCEDURE: FEDERAL RULES OF EVIDENCE § 5426 (1st ed.).
14. *See generally* Shepard, *supra* note 1, at 123-125.
15. *Id.*
16. Wright & Graham, *supra* note 13.
17. *See* Garland v. Torre, 259 F.2d 545, 547-48 (2d Cir. 1958)
18. 408 U.S. 665 (1972).
19. *Id.* at 667.
20. *Id.* at 668.
21. *Id.* at 668-69.

Branzburg's first story appeared, he published another exposé on the "drug scene" in Frankfurt, Kentucky, which was based on interviews with anonymous drug users.[22] When called before a second grand jury, Branzburg again refused to reveal his sources' identities, and the Kentucky Court of Appeals again found that he had no basis for doing so.[23]

On appeal to the Supreme Court, Branzburg's two cases were combined with two others involving reporters who had covered the Black Panthers and refused to divulge information they learned through their reporting.[24] All three reporters claimed that the First Amendment afforded them a privilege from having to offer testimony concerning confidential information and confidential sources. The heart of their argument was that sources would be deterred from talking to them in the absence of a privilege, and thus, their ability to keep the public aware of important news would be restricted.[25]

In a sweeping decision written by Justice Byron White, a 5-4 Court rejected the reporters' claim and held that the First Amendment does not allow journalists to refuse to testify before a grand jury.[26] According to Justice White, the reporters' argument that confidential sources would be deterred from coming forward in the future was largely speculative and "fail[ed] to demonstrate that there would be a significant construction of the flow of news to the public if this Court reaffirms the prior common-law and constitutional rule regarding the testimonial obligations of newsmen."[27] As the Court explained, the journalist privilege had no historical antecedent in the Constitution or the

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22. *Id.*
23. *Id.*
24. *Id.* at 672, 679.
25. *Id.* at 679-80.
26. *Id.* at 690.
27. *Id.* at 693-94.

common law, yet the press remained vibrant.[28] The Court also reasoned that the reporters' argument rested on a simplistic view of the journalist-source relationship because their argument ignored that confidential sources often rely on the press to amplify their views or get a certain message out to the public.[29] Thus, even without a privilege, they would need to continue to come forward. The Court noted, however, that even if the reporters could have substantiated their claims with hard data, the public's interest in law enforcement outweighed any incidental and uncertain effect on the newsgathering that might result in the absence of a privilege.[30]

After dismantling much of the reporters' argument, Justice White offered them a bit of consolation. First, he made clear that Congress was permitted to enact a statutory journalist privilege,[31] and the same was true for the states.[32] Second, Justice White explained that, even without a privilege, the press does still have certain First Amendment protections in the grand jury context.[33] Bad faith grand jury investigations, the Justice reasoned, run afoul of those protections, and courts should quash subpoenas "undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources . . . ."[34]

Justice Powell joined the majority in rejecting the reporters' privilege argument but authored an "enigmatic,"[35] one-paragraph concurring opinion to underscore the

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28. *Id.* at 698-99 ("From the beginning of our country the press has operated without constitutional protection for press informants, and the press has flourished.").
29. *Id.* at 694-95. The Court described the relationship between journalists and their sources as "a symbiotic one which is unlikely to be greatly inhibited by the threat of subpoena: quite often, such informants are members of a minority political or cultural group that relies heavily on the media to propagate its views, publicize its aims, and magnify its exposure to the public." *Id.*
30. *Id.* at 690-91, 695.
31. *Id.* at 706.
32. *Id.*
33. *Id.* at 707.
34. *Id.* 707-08
35. *Id.* at 725 (Stewart, J., dissenting).

narrowness of the majority's holding.[36] After reiterating the majority's view that official government abuse of the press is intolerable,[37] Powell further explained that journalists who believe they are the subjects of such abuse must have access to the courts on a motion to quash.[38] Then, in a passage that has confounded lawyers, judges, and scholars alike for forty years, Powell appeared to invite courts to employ a balancing test to determine whether a privilege should be recognized in future cases:

> The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions. In short, the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection.[39]

B. The Courts of Appeals' Retreat from *Branzburg*

In the years following *Branzburg*, something curious happened.[40] Despite the Supreme Court's clear rejection of the three journalists' claim of privilege in *Branzburg*, a number of the federal circuit courts of appeals nonetheless afforded journalists some form of First Amendment-based protection from having to reveal the identities of their confidential sources.[41] Some courts did so by treating *Branzburg* as a plurality opinion and looking to Justice Powell's concurrence for guidance.[42] According to these courts,

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36. *Id.* at 709 (Powell, J., concurring).
37. *Id.* at 709-10.
38. *Id.* at 710.
39. *Id.* at 710.
40. Wright & Graham, *supra* note 13. As Wright and Graham explained, "while Congress was contemplating some legislative answer to Branzburg, the federal courts were responding to the decision in a most remarkable fashion. The ink was scarcely dry on Justice White's majority opinion when the process of distinguishing it began." *Id.*
41. *See, e.g.*, Bruno & Stillman, Inc. v. Globe Newspaper Corp., 633 F.2d 583, 595-96 (1st Cir. 1980); von Bulow v. von Bulow, 811 F.2d 136, 142 (2d Cir. 1987); Riley v. City of Chester, 612 F.2d 708, 715 (3d Cir. 1979); Shoen v. Shoen, 5 F.3d 1289, 1292-93 (9th Cir. 1993).
42. *See* In re Selcraig, 705 F.2d 789, 792 (5th Cir. 1983) (recognizing a qualified journalist privilege based on a "careful reading of the plurality and concurring opinions in *Branzburg*").

because Justice Powell's vote was needed to achieve a majority, his opinion was actually controlling and provided journalists with at least some First Amendment-based protection.[43] Other courts suggested that, even setting aside Justice Powell's opinion, the *Branzburg* majority actually outright created a privilege.[44] Still others simply disregarded *Branzburg* and recognized a journalist privilege without ever squaring it with the Supreme Court's holding.[45] As Charles Alan Wright has observed, "[s]o complete was the denigration of White's opinion that five years after it was written, a federal court could say that the existence of the First Amendment privilege is no longer in doubt."[46]

More recently, the courts have also looked beyond the Constitution in order to afford journalists protection. In particular, Federal Rule of Evidence 501, which was enacted three years after *Branzburg* was decided, provides that courts may look to the common law, as interpreted in light of "reason and experience," to decide a claim of privilege in criminal cases and civil cases arising under federal law.[47] The rule, as originally proposed by the Advisory Committee on the Rules of Evidence, provided nine enumerated privileges that the federal courts would be required to recognize.[48] In response to intense public scrutiny, however, Congress expressly rejected the Advisory Committee's draft rule and opted to leave the rule open-ended instead of freezing the

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43. *See id.*; *but see* McKevitt v. Pallasch, 339 F.3d 530, 531-32 (7th Cir. 2003) ("[M]aybe [Powell's] opinion should be taken to state the view of the majority of the Justices – though this is uncertain, because Justice Powell purported to join Justice White's "majority" opinion.").
44. *See, e.g.*, *Shoen*, 5 F.3d at 1292; *von Bulow*, 811 F.2d at 142.
45. *See, e.g.*, In re Madden, 151 F.3d 125, 128-29 (3d Cir. 1998) (making no mention of *Branzburg* in its discussion of the journalist privilege).
46. Wright & Graham, *supra* note 13 (internal quotation omitted).
47. FED. R. EVID. 501.
48. In re Grand Jury Impaneled January 21, 1975, 541 F.2d 373, 379 n.11 (3d Cir. 1976).

law of privileges at a certain point.[49] The rule's legislative history makes clear that its proponents believed the rule would allow courts to adopt the privilege that the *Branzburg* Court had recently rejected.[50] Several courts of appeals have accepted Congress' invitation and adopted a journalist privilege rooted in the common law.[51]

However, because the lower courts have been left to their own devices, with no guidance from the Supreme Court besides *Branzburg,* the scope of the privilege differs greatly among the circuits. Some of the courts of appeals have limited the privilege only to civil cases.[52] Others have applied it in criminal trials, but have refused to allow reporters to withhold testimony or other relevant evidence from a good faith grand jury investigation.[53] At least one federal district court has sidestepped *Branzburg* completely and held that a qualified journalist privilege applies in grand jury proceedings, as well.[54]

Furthermore, although the courts uniformly agree that if the privilege exists, it is a qualified one that can be overcome by a proper showing of relevancy and need,[55] the application of the privilege often varies depending on the type of case. For example, courts in the Third Circuit have stressed that the privilege is much more difficult to

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49. *Id.*; Jaffee v. Redmond, 518 U.S. 1, 8 (1996) ("The Rule thus did not freeze the law governing the privileges of witnesses in federal trials at a particular point in our history, but rather directed federal courts to continue the evolutionary development of testimonial privileges.") (Internal quotation omitted).

50. Riley v. City of Chester, 612 F.2d 708, 714 n.6 (3d Cir. 1979) (quoting 120 Cong. Rec. H12253-54 (daily ed. Dec. 18, 1974) (statement of Rep. Hungate)) (explaining that Rule 501 "'permits the courts to develop a privilege for newspaperpeople on a case-by-case basis'").

51. *Id.* at 715.

52. *See, e.g.*, United States v. Smith, 135 F.3d 963, 969 (5th Cir. 1998).

53. *Compare* Farr v. Pitchess, 522 F.2d 464, 468 (9th Cir. 1975) (recognizing privilege in criminal trials but holding that it had to yield to the defendant's right to a fair trial) *with* In re Grand Jury Proceedings, 5 F.3d 397, 400 (9th Cir. 1993) (refusing to apply privilege in grand jury proceeding).

54. *See* In re Williams, 766 F. Supp. 358, 367 (W.D. Pa. 1991), *aff'd without opinion*, 963 F.2d 567 (3d Cir. 1992).

55. *See, e.g.*, N.Y. Times v. Gonzales, 459 F.3d 160, 169 (2d Cir. 2006) (declining to reach question of existence of privilege but holding that "any such privilege would be qualified one"); United States v. Cuthbertson, 630 F.2d 139, 148 (3d Cir. 1980) (recognizing qualified privilege in criminal cases).

overcome in civil cases than in post-indictment criminal cases.[56] The Ninth Circuit Court of Appeals has likewise explained that the privilege will generally not be overcome in civil cases.[57]

The lower federal courts have also disagreed on the type of information covered by the privilege. Every federal appellate court that has recognized the privilege has held that it at least protects the identity of a confidential source.[58] At the other end of the spectrum, the courts have also determined that a reporter who actually witnesses a crime subject to a grand jury investigation may not invoke the privilege and refuse to testify as to what she saw.[59] In between those two poles, there is no consensus as to whether the privilege covers both confidential and non-confidential information and sources,[60] or whether the privilege extends to unpublished journalist "work product," such as notes, recorded interviews, drafts of articles, and video outtakes produced in the course of reporting a news story.[61]

Moreover, the courts of appeals have adopted different standards depending on the status of the person seeking to compel disclosure. When a criminal defendant seeks to compel a reporter to testify as to the identity of a confidential source, he typically has

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56. *See* Parsons v. Watson, 778 F. Supp. 214, 218 (D. Del. 1991) (internal citation omitted) (stating that courts "require a stronger showing in civil cases than in criminal cases"); Altemose Constr. Co. v. Bldg. & Constr. Trades Council of Phila., 443 F. Supp. 489, 491 (E.D. Pa. 1977) (same).

57. *See* Shoen v. Shoen, 48 F.3d 412, 416 (9th Cir. 1995) (explaining that "in the ordinary case the civil litigant's interest in disclosure should yield to the journalist's privilege") (internal quotation omitted).

58. *See, e.g.*, *Cuthbertson*, 630 F.2d at 147.

59. *See, e.g.*, United States v. Cutler, 6 F.3d 67, 73 (2d Cir. 1993) (holding that the privilege does not protect a reporter who witnesses criminal activity); Riley v. City of Chester, 612 F.2d 708, 716 (3d Cir. 1979) (internal citation omitted) (quashing subpoena against journalists but noting that "[t]his is not a case where the reporter witnessed events which are the subject of grand jury investigations into criminal conduct").

60. *Compare* Gonzales v. Nat'l Broadcasting Co., 194 F.3d 29, 33 (2d Cir. 1998) (holding that the privilege protecting press materials from disclosures applies to non-confidential as well as to confidential materials) *with* United States v. Smith, 135 F.3d 963, 972 (5th Cir. 1998) (refusing to recognize a reporter's privilege for non-confidential information because "the existence of confidential relationship that the law should foster is critical to the establishment of a privilege").

61. *See* United States v. LaRouche Campaign, 841 F.2d 1176, 1181 (1st Cir. 1988).

a lesser burden of proof out of concern for preserving his Fifth Amendment rights.[62] Similarly, the privilege will usually give way in a defamation lawsuit where the plaintiff must present evidence of the journalist's state of mind at the time of publication.[63] However, in cases in which the government or an ordinary civil litigant seeks disclosure, most courts apply a variation of a heightened standard, under which the person seeking to compel disclosure must show that the information sought (1) is relevant, (2) is not available by other means, and (3) necessary to properly develop the case.[64]

The final point of contention among the courts involves determining who is covered by the privilege. Few courts have actually wrestled with the difficult task of defining the term "journalist" for purposes of applying the privilege.[65] In one fairly recent case, however, *Obsidian Finance Group, LLC v. Cox*,[66] a federal court in Oregon concluded that an "investigative blogger" was not entitled to invoke the privilege because she was not affiliated with a traditional media outlet.[67] Other courts have taken a broader, more functional approach, reasoning that the journalist privilege is not designed to protect only the institutional media like newspapers or television networks, but instead to protect the process of investigative journalism, more broadly.[68] Accordingly, some courts have held that as long as the person claiming protection under the privilege is "engaged in investigative reporting, gathering news," and intends to

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62. *See* United States v. Criden, 633 F.2d 346, 358 (3d Cir. 1980).
63. *See* Miller v. Transamerican Press, Inc., 621 F.2d 721, 725 (5th Cir. 1980) (holding the journalist privilege must yield in a libel case where plaintiff sought to compel disclosure of the identity of a confidential source of the defendant journalists).
64. LaRouche v. Nat'l Broadcasting Co., 780 F.2d 1134, 1139 (4th Cir. 1986).
65. *See* In re Madden, 151 F.3d 125, 128 (3d Cir. 1998) ("We have found few cases that discuss who, beyond those employed by the traditional media, has status to raise the journalist's privilege.")
66. 2011 WL 5999334 (D. Oregon Nov. 30, 2011).
67. *Id.* at *1.
68. *In re Madden*, 151 F.3d 125, 129 (3d Cir. 1998).

disseminate what he gathers to the public, he is covered by the privilege.[69]

C. Re-finding *Branzburg*

In the past decade, judicial support for the journalist privilege has begun to fade.[70] For example, in an influential 2003 case, *McKevitt v. Pallasch*, the Seventh Circuit Court of Appeals refused to recognize a privilege for non-confidential material obtained during a journalistic investigation.[71] Writing for the Court, Judge Richard Posner called the rationale of his sister circuits that have recognized the privilege into direct question; in light of *Branzburg*, "these courts may be skating on thin ice," he wrote.[72] Moreover, Judge Posner seemed generally dismissive of the idea that journalists should be afforded greater protection in any circumstances – even in cases involving confidential sources – and noted that a journalist, like anyone else, may always seek to quash a subpoena that is issued in bad faith.[73] As a result, Judge Posner's decision may have significantly altered the state of federal law regarding the journalist privilege.[74]

Three years later, in a case involving *New York Times* reporter Judith Miller, the D.C. Circuit relied on *Branzburg* and declined to recognize a First-Amended based journalist privilege in the grand jury context.[75] Miller also claimed protection under Federal Rule of Evidence 501, and the three-judge panel could not agree on the

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69. *Id.* at 130.

70. *See* Lucy Daiglish & Casey Murray, *Déjà Vu All Over Again: How a Generation of Gains in Federal Reporter's Privilege Law Is Being Reversed*, 29 U. ARK. LITTLE ROCK L. REV. 13, 39 (2006) (explaining that "[s]ince [2003], the media has lost much of the ground it gained since *Branzburg*"). This diminished support is partially born of the courts' growing concern about leaks to the media of highly classified counterterrorism information. *See, e.g.*, In re Grand Jury Subpoena, Judith Miller, 438 F.3d 1141, 1142-43 (D.C. Cir. 2006).

71. McKevitt v. Pallasch, 339 F.3d 530, 532-33 (7th Cir. 2003).

72. *Id.* at 533.

73. *Id.* at 533.

74. Daiglish & Murray, *supra* note 70, at 39.

75. *Miller*, 438 F.3d at 1145.

existence of a common law privilege.[76] One judge rejected the privilege outright, finding that *Branzburg* was as decisive as the Rule 501 issue as it was the First Amendment issues.[77] The other two judges on the panel disagreed, but nonetheless found that if the privilege existed, it would be subject to a balancing test and disclosure would still be compelled.[78] Finally, in 2012, the First Circuit Court of Appeals joined the growing list of courts that have interpreted *Branzburg* as foreclosing the journalist privilege under either the First Amendment or the common law.[79]

D. State Shield Laws

In *Branzburg*, the Court noted that there was "merit in leaving state legislatures free . . . to fashion their own standards" regarding the journalist privilege.[80] In the past forty years, the states have done just that. When the *Branzburg* Court was writing in 1972, just seventeen states recognized a journalist privilege.[81] In the immediate wake of *Branzburg*, nine more states adopted statutory privileges.[82] Today, forty states along with the District of Columbia have statutory shield laws.[83] Under Federal Rule of Evidence 501, these laws apply in state proceedings as well as proceedings in federal court based on diversity jurisdiction.

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76. *Id.* at 1150 (explaining that "[t]he Court is not of one mind on the existence of a common law privilege").

77. *Id.* at 1154 (Sentelle, J., concurring). Judge Sentelle found *Branzburg* "to be as dispositive of the question of common law privilege as it is of a First Amendment privilege." *Id.* He argued that it would make "little sense" for the Supreme Court to "reach[] out to take a constitutional question" that would not need answering if a common law privilege existed. *Id.* Thus, he called it "indisputable that the High Court rejected a common law privilege in the same breath as its rejection of such a privilege based on the First Amendment." *Id.*

78. *Id.* at 1150.

79. In re Request from United Kingdom Pursuant to Treaty Between Gov't of U.S. & Gov't of United Kingdom on Mut. Assistance in Criminal Matters in the Matter of Dolours Price, 685 F.3d 1, 16 (1st Cir. 2012).

80. Branzburg v. Hayes, 408 U.S. 665, 706 (1972).

81. *Id.* at 689 n.27.

82. Wright & Graham, *supra* note 13.

83. *Number of States with Shield Law Climbs to 40*, RCFP.ORG, http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-law-summer-2011/number-states-shield-law-climbs (last visited April 20, 2013).

The statutes differ from state to state in terms of their coverage and scope. Sixteen states provide absolute protection for the identity of a confidential source, or information that could enable someone to determine the source's identity.[84] In the remaining states, the standard for piercing the privilege is fairly high, typically requiring a showing of some combination of relevance and need.[85] Exceptions for eyewitness observations by journalists and for libel defendants also exist in many states.[86]

The state shield laws also diverge widely in their definition of covered entities. A number of the laws define "journalist" so that the privilege protects only those who work full-time for a newspaper or radio or television station.[87] In these states, freelancers, authors, bloggers, and others are left out in the cold without any protection. Several states have more expansive definitions, specifically covering persons who are not reporters in the traditional sense but nonetheless earn a significant portion of their livelihood disseminating information to the public.[88]

E. Federal Shield Law Proposals

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84. ALA. CODE 1975 § 12-21-142 (2012); ARIZ. REV. STAT. ANN. § 12-2237 (2012); CAL. EVID. CODE § 1070 (2012); DEL. CODE. ANN. TIT. 10, § 4322 *et seq.* (2012); D.C. CODE ANN. § 16-4702 (2012); IND. CODE ANN. §§ 34-46-4-2 (2012); KY. REV. STAT. ANN. § 421.100 (2012); MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (2012); MONT. CODE. ANN. §§ 26-1-902 (2012); NEB. REV. STAT. §§ 20-146 (2012); NEV. REV. STAT § 49.275 (2012); N.Y. CIV. RIGHTS LAW § 79-H (McKinney's Consol. 2004); OHIO REV. CODE ANN. § 2739.04 (Baldwin's Ohio Revised Code 2004); OKLA. STAT. ANN. TIT. 12, § 2506 (2004), WEST'S OR. REV. STAT. §§ 44.520 (2012); 42 PA. CONS. STAT. ANN § 5942 (Purdon's 2004).

85. *See, e.g.*, COLO. REV. STAT. § 13-90-119(3) (providing that disclosure may be compelled upon a showing that (a) the information is "directly relevant to a substantial issue involved in the proceeding"; (b) "the news information cannot be obtained by any other reasonable means"; and (c) there is "a strong interest of the party seeking to subpoena the newsperson outweighs the interests under the first amendment to the United States constitution of such newsperson in not responding to a subpoena and of the general public in receiving news information").

86. *See, e.g.*, OKLA. STAT. ANN. TIT. 12, § 2506(B)(2) (providing that the privilege is inapplicable in defamation cases); WEST'S N.C. GEN. STAT. ANN. § 8-53.11(d) (2012) (providing that "a journalist has no privilege against disclosure of any information . . . obtained as a result of the journalist's eyewitness observations . . .").

87. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-2237 (defining journalist as "[a] person engaged in newspaper, radio, television or reportorial work, or connected with or employed by a newspaper, radio, or television station . . .").

88. *See* DEL. CODE ANN. TIT. 10, § 4320.

While the attempts to enact a federal journalist privilege began in the 1920s, the movement did not begin in earnest until the Supreme Court rejected the privilege in *Branzburg* and called on Congress to take action.[89] In the immediate aftermath of *Branzburg*, Congress considered a rush of proposals. Only a day after the Supreme Court issued its opinion, the Senate considered a bill that would have created an absolute journalist privilege in both federal and state cases.[90] Three more bills were proposed later in the 92nd Congress, none of which gained much support.[91] Another fifty-six proposals followed in the first month of the 93rd Congress, alone, and by the end of 1973, Congress had considered more than seventy draft bills in total.[92] In the end, none of these bills were ever given a vote in either the full House or the Senate; apparently, only one ever survived a vote in committee.[93] By the early 1980s, thanks in part to the acceptance the privilege was gaining in the federal courts, the movement for a federal shield law began to recede.[94]

However, a string of high-profile cases in the mid-2000s seemingly revived the movement.[95] In 2004, then-senator Christopher Dodd of Connecticut proposed the Free Speech Protection Act of 2004,[96] which would have created an absolute privilege for the identity of confidential sources and a qualified privilege when reporters' "work product" was sought. In the next Congress, five additional bills were introduced, including the Free Flow of Information Act of 2005.[97] Although none of these proposals

89. Wright & Graham, *supra* note 13.
90. RonNell Anderson Jones, *Avalanche or Undue Harm? An Empirical Study of Subpoenas Received by the News Media*, 93 MINN. L. REV. 585, 594 (2008).
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* at 602.
95. *See* Wright & Graham, *supra* note 13.
96. S. 3020, 108th Cong. (2004).
97. H.R. 581, 109th Cong. (2005).

ever made it out of committee, they reignited the discussion on the need for federal legislation and ushered in a wave of Congressional hearings in which journalists and media advocates decried the current state of affairs.[98] They would also form the basis for many of the subsequent legislative efforts.

In 2007, supporters of a federal shield law saw their first minor legislative victory. In response to the D.C. Circuit Court of Appeals' decision in the *Miller* case, identical bills known as the Free Flow of Information Act of 2007[99] were introduced in the House and Senate. The House passed the measure with overwhelming support in October 2011.[100] Its version of the bill would have both covered confidential and non-confidential information, and defined a "journalist" as

> a person who regularly gathers, prepares, collects, photographs, records, writes, edits, reports, or publishes news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public for a substantial portion of the person's livelihood or for substantial financial gain and includes a supervisor, employer, parent, subsidiary, or affiliate of such covered person.[101]

Importantly, the privilege would have only been qualified: a covered journalist could have been compelled to testify if a court determined that the party seeking disclosure had exhausted all reasonable alternative sources for the information.[102] Furthermore, in criminal matters, the party seeking disclosure would have been required to show that there was a reasonable basis for believing a crime had occurred and that the information was critical to the investigation, prosecution, or defense of the crime.[103] In all other cases, the party seeking to compel disclosure would have only had to prove that the

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98. *See* Anderson Jones, *supra* note 90, at 606-08 (describing House and Senate hearings on the various shield law proposals).
99. H.R. 2102, 110th Cong. (2007); S. 1268 110th Cong. (2007).
100. *See* Anderson Jones, *supra* note 90, at 604-05.
101. H.R. 2102.
102. *Id.*
103. *Id.*

information was "critical" to its case.[104]

The House bill also contained a several discrete exceptions under which disclosure of the identity of a confidential source would have always been compelled.[105] The first exception involved situations where disclosure would be necessary to prevent an act of terrorism or other "specified harm to national security."[106] Second, disclosure would be required to identify a person who unlawfully leaked classified government information.[107] Even if the information satisfied any of the enumerated exceptions, however, a court would have still been required to undertake a balancing test, weighing the interest in compelled disclosure against the public interest in newsgathering.[108]

Instead of adopting S. 1267, which was identical to the House version of the bill, the Senate Judiciary Committee eventually approved a somewhat narrower measure, S. 2035.[109] Specifically, the Senate bill, which never received a full floor vote, would have created three exceptions. First, the privilege would have been unavailable if the journalist obtained the information through eyewitness observations of criminal or tortious conduct.[110] This exception would not have applied, however, in classified leak cases; instead, disclosure in such cases could be compelled if the government proved that the leak caused significant harm to national security.[111] Second, the privilege would not have been available if a court found that the information would help in preventing an act of terrorism or significant harm to national security.[112] Third, a court could have

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104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. S. 2035, 110th Cong. (2007-2008).
110. *Id.*
111. *Id.*
112. *Id.*

compelled disclosure if it was necessary to prevent death, kidnapping, or bodily harm.[113] Furthermore, the Senate bill differed from the House bill in that it would have only protected information received upon a promise of confidentiality.[114] The Senate's proposal also contained a different definition of "covered entity," eliminating the House's "substantial portion of the person's livelihood" requirement.[115]

Additional bills were proposed in the 111th and 112th Congresses,[116] which were largely identical to the earlier House and Senate proposals. The most recent bill, proposed by Rep. Mike Pence, was referred to committee in September 2011, where it has languished ever since without ever receiving a vote.[117]

III. The Problem

Why – after the vacillating treatment the privilege has received in the courts and Congress over the last forty years – is now the time to finally provide a definitive answer to the question Paul Branzburg and his two fellow journalists first brought to national attention back in the early 1970s? After all, journalists have achieved some level of success in the courts, and have won nearly every legislative battle in the states. Is the status quo really that bad?

The short answer to that question is yes, and as the pendulum in the courts swings back in favor of compelled disclosure, things might be getting even worse. It is thus as important as ever that Congress takes up this cause anew, and this time with renewed vigor. This section will first set forth the fundamental arguments in favor of affording journalists protection. Next, it will argue that the uncertainty created by the

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113. *Id.*
114. *Id.*
115. *Id.*
116. Free Flow of Information Act of 2009, H.R. 985, 111th Cong. (2009-2010); Free Flow of Information Act of 2009, S. 448, 111th Cong. (2009-2010).
117. Free Flow of Information Act of 2011, H.R. 2932, 112th Cong. (2011).

hodgepodge of different standards in the circuits and the states undermines the very purpose behind the privilege, thereby requiring that Congress step in to adopt a uniform rule for all federal judicial proceedings.

A. A Federal Shield Law Would Serve Important Public Interests

Three main arguments support enacting a federal shield law. First, journalists rely heavily on confidential sources to report important stories, and journalist-source relationship must be preserved in order to maintain the free flow of information to the public. Second, requiring disclosure of confidential sources runs afoul of journalistic professional standards, and thus, without protection, journalists are faced with a Catch-22: go to jail or uphold their ethics. Third, the spike in the number of subpoenas against the press seeking confidential information, along with the Obama Administration's increased emphasis on prosecuting government whistleblowers, warrants federal legislation.

1. The Importance of Preserving the Journalist-Source Relationship

Because of the importance of maintaining confidentiality between journalists and their sources, the journalist privilege satisfies the high standard for recognizing an exception to the general rule that the courts are entitled to hear every man's evidence.[118] Testimonial privileges are rooted in the belief that certain relationships require confidence and trust in order to thrive.[119] For example, as the Supreme Court explained in *Jaffee v. Redmond*, in which it recognized the psychotherapist-patient privilege, effective psychiatric treatment depends on developing a relationship in which the

118. *See Jaffee v. Redmond*, 518 U.S. 1, 7-9 (1996)
119. *Id.* at 10 (discussing the attorney-client, spousal, and psychotherapist-patient privileges).

patient feels comfortable making intimate disclosures.[120] The Court observed that the revelation of a patient's communications could cause embarrassment and shame, and even the bare possibility of disclosure could inhibit the development of the rapport required for effective psychiatric treatment.[121]

That same rationale is applicable with respect to the journalist privilege.[122] Journalists have come to rely heavily on confidential sources. Professor Vincent Blasi's definitive 1971 study on the press found that the reporters surveyed relied upon confidential sources in 22.2 percent to 34.4 percent of their stories.[123] Others estimate that the number is much higher.[124] No matter what the actual figure is, confidential sources are "embedded in journalism," in small towns and big cities alike and spanning every medium.[125]

Confidential sources allow journalists to do their jobs effectively.[126] Especially in the context of political, national security, and military reporting, journalists must regularly rely on confidential sources to gain a better understanding of the background of the issues on which they report, which places their reporting in a more meaningful context.[127] These reporters devote a significant amount of their time attempting to cultivate relationships and develop rapport with government officials to gather

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120. *Id.*

121. *Id.*

122. *See* Zerilli v. Smith, 656 F.2d 705, 711 (D.C. Cir. 1981) ("Compelling a reporter to disclose the identity of a source may significantly interfere with this news gathering ability," because "journalists frequently depend on informants to gather news, and confidentiality is often essential to establishing a relationship with an informant.").

123. Vincent Blasi, *The Newsman's Privilege: An Empirical Study*, 70 MICH. L. REV. 229, 247 (1971-1972).

124. Michael Dicke, *Promises and the Press: First Amendment Limitations on News Source Recovery for Breach of a Confidentiality Agreement*, 73 MINN. L. REV. 1553, 1563 (1989) (explaining that "studies show that eighty percent of national news magazine articles and fifty percent of national wire service stories rely on confidential sources").

125. Shepard, *supra* note 1, at 3 (quoting Normal Pearlstine, OFF THE RECORD: THE PRESS, THE GOVERNMENT, AND THE WAR OVER ANONYMOUS SOURCES 259 (2007)).

126. *See id.* at 4.

127. *Id.*

information that is not included in press releases or official statements.[128] As Justice Douglas cautioned in his dissent in *Branzburg v. Hayes*,[129] without being able to ensure confidentiality, a journalist's main role would be passing along government press releases and official statements.[130]

In addition to adding a depth of understanding to government reporting, confidential sources also serve an arguably more important function: that of whistleblowers, leaking confidential information about institutional misdeeds to the public. The public has a strong interest in learning about information related to government wrongdoing and corruption, which can often come only from those working in government who are typically willing to talk only if they receive a promise of confidentiality.[131] Of course, the quintessential example of government whistleblower who would not have come forward in the absence of confidentiality is "Deep Throat," the source who leaked information to the *Washington Post*'s Bob Woodward and Carl Bernstein that helped to expose Watergate.[132] In recent years, government workers have continued to play a substantial role in unearthing government misfeasance. Anonymous government officials exposed the United States' use of secret prisons known as "black sites," which housed alleged-terrorist detainees in foreign countries.[133] The abuse of detainees at Iraq's Abu Ghraib prison and the Bush Administration's unlawful domestic

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128. *Id.*
129. 408 U.S. 665 (1972).
130. *Id.* at 729 (Douglas, J., dissenting).
131. *Id.* ("[A government employee] may have information valuable to the public discourse, yet each may be willing to relate that information only in confidence to a reporter whom he trusts, either because of excessive caution or because of a reasonable fear of reprisals or censure for unorthodox views.")
132. *See* Shepard, *supra* note 1, at 9.
133. Mary-Rose Papandrea, *Citizen Journalism and the Reporters' Privilege*, 91 MINN. L. REV. 515, 537-38 (2007).

wiretap program were also uncovered via confidential informants.[134] Since 2010, the international anti-secrecy organization Wikileaks, though arguably not a "journalist" in the traditional sense,[135] has relied on leaks to reveal a host of other abuses, ranging from the murder of Iraqi civilians by the United States military to what goes on inside Guantanamo Bay.[136]

Were journalists unable to rely on confidential sources, much of this information would have never been exposed. Many people inside government who leak potentially damaging information would face personal, professional, or even legal consequences if they were publicly identified.[137] As veteran *Washington Post* reporter Walter Pincus has explained, every time a source talks to him off the record, the source takes a risk that could cost him his job or worse.[138] A grant of confidentiality enables a source to talk freely, reducing the chilling effect that might otherwise result.[139] There are indications that the spate of high-profile cases dating to the mid-2000s has already detrimentally affected the media's investigative abilities.[140] In fact, former Knight-Ridder Washington Bureau Chief Clark Hoyt reported that his newsroom saw two stories die because

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134. *Id.*

135. *See generally* Jonathan Peters, *WikiLeaks Would Not Qualify to Claim Federal Reporter's Privilege in Any Form*, 63 FED. COMM. L. J. 667, 683 (2011).

136. David Leigh *et al.*, *Guantánamo Leaks Lift Lid on World's Most Controversial Prison*, THE GUARDIAN (April 24, 2011), *available at* http://www.guardian.co.uk/world/2011/apr/25/guantanamo-files-lift-lid-prison; Michael Moore & Oliver Stone, *WikiLeaks and Free Speech*, N.Y. TIMES (Aug. 20, 2012), *available* at http://www.nytimes.com/2012/08/21/opinion/wikileaks-and-the-global-future-of-free-speech.html.

137. *Judith Miller Goes to Jail*, N.Y TIMES (July 7, 2005), *available at* http://www.nytimes.com/2005/07/07/opinion/07thu1.html?pagewanted=all.

138. Adam Liptak, *Reporters Put Under Scrutiny in C.I.A. Leak*, N.Y. TIMES (Sept. 28, 2005), *available at* http://www.nytimes.com/2004/09/28/politics/28leak.html?Pagewanted=print&position=&_r=0.

139. *See* Shepard, *supra* note 1, at 4; *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1168 (2005) (Tatel, J., concurring) (explaining that important news stories would go unreported in the absence of a reporter's privilege because "just as mental patients who fear embarrassment or disgrace, will surely be chilled in seeking therapy, so will sources who fear identification avoid revealing information that could get them in trouble").

140. *See* Liptak, *supra* note 138.

sources got cold feet.[141] The sources apparently feared that the reporter or the newspaper's phone records would be subpoenaed in an effort to uncloak their identities.[142]

Critics argue that there is no empirical evidence that this chilling effect is real.[143] Admittedly, the journalist-source relationship is a complex one,[144] and there is little question that some sources will continue to come forward, with or without the privilege, just as they have for hundreds of years. As critics have argued, sources probably do care most about not having their names appear in the newspaper or on the Internet the next morning.[145] Nonetheless, the critics' argument ignores that it would be incredibly difficult, if not impossible, to quantify why sources come forward and how the absence of a privilege affect their decisions.[146] If sources are afraid to come forward, we never learn about them, and we cannot know why they chose to keep the information to themselves. Of course, the easiest way of answering the empirical question would be by comparing the experience of the states with a privilege with the experience of the states without a privilege, but only Wyoming lacks a privilege.[147] Thus, such a comparison would be impossible.[148] Furthermore, the lack of empirical proof of the efficacy of a

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141 *Journalists Fear Legal Pressure will Affect Newsgathering*, USA TODAY (Oct. 24, 2004), *available at* http://usatoday30.usatoday.com/news/nation/2004-10-24-legal-news_x.htm.

142 *Id.*

143. *See* Randall D. Eliason, Leakers, Bloggers, and Fourth Estate Inmates: the Misguided Pursuit of a Reporters Privilege, 24 CARDOZO ARTS & ENT. L.J. 385, 418 (2006).

144 *See* Branzburg v. Hayes, 408 U.S. 665, 694-95 (1972).

145. *See* Lillian R. BeVier, *The Journalist's Privilege – A Skeptic's View*, 32 OHIO N.U. L. REV. 467, 476 (2006).

146. *See Branzburg*, 408 U.S. at 733 (Douglas, J., dissenting) ("The impairment of the flow of news cannot, of course, be proved with scientific precision, as the Court seems to demand.").

147. *Reporter's Privilege Legislation: Issues and Implications Before the S. Comm. on the Judiciary*, 109th Cong. 148 (2005) (statement of Geoffrey Stone, Distinguished Service Professor of Law, University of Chicago Law School).

148 . *Id.*

privilege has not been fatal in other contexts.[149] Instead, courts and commentators have acknowledged that evidentiary privileges are generally premised on a common sense understanding of human nature that is not necessarily subject to empirical proof.[150] It would defy common sense to suggest that there are not situations in which potential sources, possessing information of public concern, do not hesitate when they ask themselves if they want to risk prosecution, embarrassment, prison, or some other form of retribution if they follow through with their plan.

Furthermore, the use of journalists as witnesses could lead to abuses that would further harm the freedom of the press.[151] Media outlets may end up having to spend more time complying with or fighting subpoenas than gathering the news. Thanks to the recent uptick in the number of media subpoenas, media organizations have already been forced to expend a great deal of time and money responding to subpoenas.[152] The media's independence is also at stake. When the public sees a journalist hauled into court to testify, the media's credibility takes a hit.[153] The public might start to believe that the press is nothing more than the government's investigative arm.[154]

2. The Catch-22

Not only do journalists believe that confidential sources help them successfully

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149. *See, e.g.*, Swidler & Berlin v. United States, 524 U.S. 399, 410 (1998) (finding the "empirical information . . . scant and inconclusive," but nonetheless holding that the attorney-client privilege survives the client's death because "[k]nowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel").

150. *See* Dillinbeck v. Hess, 73 N.Y.2d 278, 285-86 (1989); Wright & Graham, *supra* note 13, at § 5422 (explaining that privileges need not be based on empirical proof, when "the disclosure is itself thought to be wrong").

151. Laurence B. Alexander, *Looking Out for the Watchdogs: A Legislative Proposal Limiting the Newsgathering Privilege to Journalists in the Greatest Need of Protection for Sources and Information*, 20 YALE L. & POL'Y REV. 97, 102 (2002) ("[T]he proximity of reporters to news events and the professional observation, recording, and recall skills they exercise daily as news gatherers have made them . . . easy subpoena targets for their eyewitness testimony, notes, film, documents, and other information.").

152. Anderson Jones, *supra* note 90, at 639-40.

153. *See* Liptak, *supra* note 138.

154. *Id.*

do their jobs, but they also believe that they have an ethical duty to protect their sources. While the press has argued against having to identify their sources since the 1700s,[155] the belief that this was somehow an ethical obligation did not come until later. In the mid-1850s, the newspaper industry was experiencing important changes. No longer were newspapers mere mouthpieces for the political parties, with editors reprinting materials produced by political supporters and friends.[156] Instead, a convergence of forces – technological advances such as the advent of the telegraph, the launch of the Associated Press, a rise in political democracy, and increased emphasis of political and social equality – led editors to expound the need for objectivity and independence in reporting to attract a broader base of readers.[157] At the same time, newspaper publishers began to believe that rather than serving partisan or sectarian ends, their work should be in the entire public's interest.[158]

Reporters, too, saw their roles evolving.[159] As the number of reporters with college degrees increased throughout the late 1800s, the occupation grew in stature and respect.[160] Reporters went from physically manning the presses and cobbling together stories from other newspapers and witness accounts to emphasizing dispassionate, eyewitness reporting.[161] They started to view themselves as investigators pulling back a curtain on reality, focused above all on factual accuracy.[162] More than that, for the first time, they asserted that they served an important institutional role in American society

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155. *See supra* notes 4 through 7 and accompanying text.
156. *See* Shepard, *supra* note 1, at 114-15.
157. *Id.* at 114.
158. *Id.*
159. *Id.* at 116.
160. *Id.*
161. *Id.* at 115-16.
162. *Id.*

– that of watchdogs, out to hold the powerful to account.[163]

With the growing sense of professionalism came a belief that journalistic practices and ethics should be standardized.[164] Near the turn of the century, trade magazines began publishing articles on professional standards and values.[165] Colleges and universities offered an increasing number of journalism classes and developed schools of journalism, which focused on ethics and professionalism in addition to the nuts and bolts of reporting.[166] Textbooks of the era also dealt extensively with the need to maintain high ethical standards and placed particular emphasis on upholding promises of confidentiality with sources.[167] In the 1920s, industry associations began to propound codes of ethics.[168]

Although none of the early codes specifically addressed the ethical responsibility to protect sources, by this time, journalists widely recognized a duty to do so.[169] Later versions of the professional codes, therefore, incorporated that principle, and today, all of the major ethical guidelines address the journalist-source relationship to some extent. For instance, the American Society of Newspaper Editors' "Statement of Principles" provides that "[p]ledges of confidentiality to news sources must be honored at all costs . . . ."[170] Likewise, the Society of Professional Journalism's "Code of Ethics" advises journalists to "question sources' motives before providing anonymity," but once

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163. *Id.* According to Shepard, "the 'impartiality and independence' claimed by the penny press allowed newspaper journalists to be viewed as defenders of natural rights and the public good." *Id.*

164. *Id.*

165. *Id.* at 116.

166. *Id.* The University of Missouri launched the first school of journalism in 1908. *Id.*

167. *Id.*

168. *Id.* at 118.

169. *Id.* ("By 1940, scholars accepted the premise that journalist-source protection was a canon of journalistic ethics.")

170. *Statement of Principles*, AM. SOC. OF NEWS EDS., http://asne.org/content.asp?pl=24&sl=171&contentid=171 (last visited April 20, 2013).

anonymity is given, journalists must "[k]eep promises."[171] Internal newsroom policies have reflected the importance of protecting source relationships, as well.[172]

Today, the belief that maintaining the anonymity of confidential sources has become firmly entrenched in the culture of American journalism. As one author concluded, "[i]f there is a bedrock principle among journalists, it is that a commitment to a source's anonymity must be honored at all costs."[173] Journalists who wish to uphold that commitment should not be required to risk jail time for choosing to do so.

3. Rise in the Number of Subpoenas against the Press and the Crackdown Against Whistleblowers

Journalists and the sources that provide them with important scoops about government abuse and dysfunction are working under unprecedented circumstances, to the point that federal legislation is warranted. First, some background: it is generally accepted that there are two periods in which subpoenas against the media have issued with the greatest frequency.[174] The first period spanned the late 1960s and early 1970s.[175] At the time, the war in Vietnam was raging and the Nixon Administration was growing concerned about increasing instability at home.[176] The early months of the Nixon Administration ushered in a "rash of subpoenas," with "CBS and NBC alone receiv[ing] 121 . . . ."[177] In hearings before Congress in 1973 on the need for a federal shield law, the law's proponents testified that subpoenas against the media had recently

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171. *SPJ Code of Ethics*, SOC. OF PROF. JOURNALISTS, http://www.spj.org/ethicscode.asp (last visited April 20, 2013).

172. Shepard, *supra* note 1, at 136.

173. *Id.* at 9 (explaining that less than 10 percent of journalists believe that it is ever appropriate to identify a confidential source).

174. Jeffrey Toobin, *Annals of Law: Name that Source*, THE NEW YORKER (Jan. 16, 2006), *available at* http://www.newyorker.com/archive/2006/01/16/060116fa_fact.

175. *Id.*

176. *Id.*

177. *Newsmen's Privilege: Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 93rd Cong. (1973) (statement of Sen. Ervin) ("*Newsmen's Privilege Hearings*").

"assum[ed] epidemic proportions."[178] Prosecutors and others had customarily treated the press differently from ordinary citizens when it came to issuing subpoenas, but that was no longer the case.[179] As one newspaper editor recounted, "[w]e have become a lawyer's grab bag . . . We are subpenaed [sic] in every conceivable kind of case, and we never know where the assault is going to come from."[180] Furthermore, increased use of press subpoenas by the Justice Department and United States Attorneys emboldened state and local governments to engage in similar actions.[181]

After a letup in the 1980s-and-90s, the number of subpoenas against the press rose again in the early 2000s, highlighted by a number of high-profile cases.[182] Most notably, in 2005, FBI Special Counsel Patrick Fitzgerald subpoenaed several prominent Washington reporters to appear before a grand jury investigating the leak of the identity of former CIA operative Valerie Plame Wilson.[183] When the reporters refused to comply, they were held in civil contempt.[184] One of the reporters, Judith Miller of the *New York Times*, eventually spent eighty-five days behind bars before finally agreeing to testify after she secured a confidentiality waiver from her source, Scooter Libby.[185] In 2006, two *San Francisco Chronicle* sportswriters, Lance Williams and Mark Fainaru-Wada, likewise grabbed headlines when they nearly landed in prison after refusing to identify the persons who leaked them secret grand jury testimony from Barry Bonds and other

178. Anderson Jones, *supra* note 90, at 595 (internal citations omitted).
179. *Newsmen's Privilege Hearings*, *supra* note 177 (statement of William F. Thomas, Editor, Los Angeles Times).
180. *Id.*
181. *Id.*
182. *See* Toobin, *supra* note 174; Anderson Jones, *supra* note 90, at 615 ("In the five-year period between 2002 and 2007, journalists in the United States faced an unprecedented wave of exceptionally high-profile cases in which subpoenaed reporters asserted a privilege, lost their arguments, and then either relented and testified or were jailed for contempt.").
183. *See In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1142-45 (D.C. Cir. 2005).
184. *Id.* at 1142.
185. Toobin, *supra* note 174; Shepard, *supra* note 1, at 1.

star professional athletes.[186] Around the same time, two Privacy Act[187] lawsuits involving the alleged leaks of personal information about two high-level government employees accused of criminal behavior led resulted in contempt proceedings after several prominent national security reporters refused to name the individuals responsible for the leaks.[188]

Just as they had three decades before in the wake of *Branzburg*, media advocates and journalists took to Capitol Hill to decry the apparent surge of subpoenas against them, after the sponsors of a federal shield law proposal called them to testify on the merits of affording journalists added protection.[189] *Time*'s then-editor-in-chief, Norman Pearlstine, described the rise in subpoenas as "a profound departure" from the prior practice, noting that the Nixon-era prosecutors never sought to reveal the identity of "Deep Throat."[190] The distinguished First Amendment lawyer Floyd Abrams echoed Pearlstine's testimony.[191] "In the last year and a half," he explained, "more than 70 journalists and news organizations have been embroiled in battles with Federal prosecutors. Dozens have been asked to reveal their confidential sources."[192] Others testifying in favor of the privilege referred to the "more than two dozen reporters" who had been subpoenaed in federal court over the past few years.[193] According to one attorney, the number of subpoenas on the press had one again approached "epidemic

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186. Bob Egelko, *Silence Means Prison, Judge Tells Reporters,* SAN FRANCISCO CHRONICLE (Sept. 22, 2006), http://www.sfgate.com/news/article/Silence-means-prison-Judge-tells-reporters-He-2488258.php.

187. Privacy Act of 1974, 5 U.S.C. § 552a (2012).

188. *See* Lee v. Dep't of Justice, 287 F. Supp. 2d 15 (D.D.C. 2003), *aff'd in part and vacated in part*, 413 F.3d 53 (D.C. Cir. 2005); Hatfill v. Ashcroft, 404 F. Supp. 2d 104 (D.D.C. 2005).

189. *See Reporter's Privilege Legislation*, *supra* note 147 (statement of Matthew Cooper) (describing the "run of Federal subpoenas of journalists").

190. *Id.* (statement of Norman Pearlstine).

191. *Id.* (statement of Floyd Abrams).

192. *Id.*

193. *Reporter's Privilege Legislation*, *supra* note 147 (statement of testimony of Anne K. Gordon, Managing Editor, Philadelphia Inquirer) (hereinafter, "Oct. 2005 Hearing").

proportions."[194]

Opponents of a federal shield law argue that point out that, aside from the self-serving statements of journalists, there is little firm evidence on how frequently the Government subpoenas members of the news media.[195] The Department of Justice ("DOJ" or "Department") has contended that the doomsday scenario described by journalists is not accurate.[196] In testimony before Congress in 2005, for example, a DOJ official explained that between 1991 and 2005, the Department issued just 12 subpoenas seeking access to confidential source information.[197] Two years later in another Congressional hearing, the Department reiterated that it had a "record of restraint" in terms of issuing subpoenas on the press.[198] Stressing its scrupulous adherence to its internal guidelines,[199] which expressly limit the use of media subpoenas, the Department reported that the Attorney General had approved only 19 subpoenas seeking the identity of confidential sources since 1991, and that just four of those cases came after 2001.[200]

The Department's numbers, however, do not withstand scrutiny.[201] First, the Department's figures do not include subpoenas issued by special prosecutors, including

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194. Anderson Jones, *supra* note 90, at 611.

195. *See id.* at 611-12.

196. *See, e.g.*, October 2005 Hearing, *supra* note 195 (statement of Chuck Rosenberg, Asst. United States Att'y) ("Over the last 14 years, . . . we have issued subpoenas to the media seeking confidential sources 12 times.")

197. *Id.*

198. *Free Flow of Information Act of 2007: Hearing on H.R. 2102 Before the H. Comm. on the Judiciary*, 110th Cong. 19 (2007) (statement of Rachel Brand, Asst. United States Attorney).

199. 28 C.F.R. § 50.10 (2013)

200. *Free Flow of Information Act of 2007: Hearing on H.R. 2102 Before the H. Comm. on the Judiciary*, supra note 198, at 18.

201. *See* Casey Murray, *Sparring over a Shield*, RCFP.ORG (Fall 2005), http://*www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-fall-2005/sparring-over-shield.*

those issued after the Valeria Plame incident.[202] Second, journalists have pointed out that the figures offered by the Justice Department before Congress conflict with the Department's prior reports.[203] For example, a 2001 report stated that, the Department stated that the Attorney had authorized the use of eighty-eight subpoenas since 1991, with seventeen of those seeking information that could be used to identify a confidential source.[204] Eight cases involved violations of the Department's own guidelines.[205] Another report, compiled by the nonprofit group Reporters Committee for Freedom of the Press through Freedom of Information Act requests, indicates that in criminal cases, the Attorney General approved eighty-nine media subpoenas between 2001 and 2010.[206] The DOJ Civil Rights Division issued three additional subpoenas, bringing the total to ninety-two.[207]

The only in-depth study attempting to answer the "empirical question of subpoena frequency" further suggests that the DOJ is attempting to downplay the issue.[208] While that study concluded that journalists might not be experiencing a drastic surge in subpoenas, as some supporters of a federal shield law had suggested before Congress, the study also found that there has been a definitive increase in both the number and effect of subpoenas between 2001 and 2006.[209] In particular, ninety-one of the 761 media-organization respondents reported having received at least one federal

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202. *See* Anderson Jones, *supra* note 90, at 611; *see also supra* notes 54 through 58 and accompanying text.
203. *Id.*
204. *Id.*
205. *Id.*
206. *How Many Reporters Receive Subpoenas Each Year?*, RCFP.ORG, http://www.rcfp.org/node/98970/ (last visited April 20, 2013).
207. *Id.*
208. Anderson Jones, *supra* note 90, at 620, 626.
209. *Id.*

subpoena in 2006.[210] Sixteen media outlets reportedly received five or more subpoenas each.[211] In total, respondents reported that 335 federal subpoenas were issued in 2006, which is nearly double the number reported in 2001.[212] The DOJ Criminal Division alone issued seventy-five subpoenas.[213] Large media outlets in major markets were the most likely to receive federal subpoenas.[214] However, small-to-midsize organizations received them with some frequency, as well.[215]

Moreover, the Anderson Jones study found that there has been a clear increase in the number of subpoenas seeking confidential information.[216] In 2001, two of the 823 subpoenas issued to the media sought the identity of a confidential source and another four subpoenas requested information that was otherwise confidential.[217] By contrast, in 2006, there were ninety-seven reported instances involving subpoenas that sought confidential information.[218] Forty-three of those sought to reveal the identity of confidential sources.[219] In other words, the number of subpoenas seeking confidential information nearly quadrupled in five years.[220]

Since the Anderson Jones study was conducted, there has not been any letup. In fact, the Obama Administration has taken an incredibly hard line when it comes to prosecuting classified leaks, and journalists have suffered the collateral damage of that

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210. *Id.* at 637.
211. *Id.*
212. *Id.*
213. *Id.* at 640-41.
214. *Id.* at 638 ("Close to 70% of the federal subpoenas reported by newspapers were reported by the one hundred largest of the more than 1400 daily newspapers in the country . . . .").
215. *Id.* ("Nearly 10% of newspapers with circulations between 50,000 and 100,000 received a federal subpoena in 2006; so did more than 20% of television newsrooms in markets of between 250,000 and 500,000 households.").
216. *Id.* at 642-43.
217. *Id.* at 643.
218. *Id.*
219. *Id.*
220. *Id.*

unprecedented crackdown.[221] The Espionage Act of 1917,[222] a law originally enacted to punish spies and critics of World War I who turned over sensitive information intending to harm the war effort, has been central to the Administration's crackdown. Prior to 2008, the law had only been invoked three times.[223] In its first five years alone, however, the Obama Administration has charged six government officials accused of leaking classified information to the media under the Act.[224] In 2010, the DOJ accused former National Security Agency ("NSA") Thomas Drake with retaining top-secret defense documents for the purpose of leaking them to a *Baltimore Sun* reporter who eventually wrote a series of articles describing financial waste and dysfunction within the NSA.[225] In 2011, CIA officer Jeffrey Sperling was indicted under the Act for disclosing national defense information to *New York Times* reporter James Risen, which Risen used in drafting a chapter of his 2006 book "State of War."[226] In another recent case, the Obama DOJ went after former CIA agent John Kiriakou for sharing potentially damaging classified material to the press; he was eventually sentenced to two and a half years in prison.[227]

It would be hard to argue that these prosecutions are not meant to chill government whistleblowers and the journalists who publish their stories. Indeed, the

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221. Michael Calderone and Dan Froomkin, *"Reporter's Privilege" Under Fire From Obama Administration Amid Broader War on Leaks*, HUFFINGTONPOST.COM (May 18, 2012), http://www.huffingtonpost.com/2012/05/18/reporters-privilege-obama-war-leaks-new-york-times_n_1527748.html.

222. 18 U.S.C. § 792 *et seq.* (2012).

223. Lilly Chapa, *Obama Administration Plugs Up Leaks*, RCFP.org (Winter 2013), http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-winter-2013/obama-administration-plugs-.

224. Calderon & Froomkin, *supra* note 221.

225. Jane Mayer, *The Secrete Sharer*, THE NEW YORKER (May 23, 2011), http://www.newyorker.com/reporting/2011/05/23/110523fa_fact_mayer.

226. Greg Miller, *Former CIA Officer Jeffrey A. Sperling Charged in Leak Probe*, WASHINGTON POST (Jan. 6, 2011), http://www.washingtonpost.com/wp-dyn/content/article/2011/01/06/AR2011010604001.html.

227. Chapa, *supra* note 223.

government does not even attempt to hide its motives. At Thomas Drake's sentencing hearing, at which the government sought to impose a $50,000 fine, the Assistant U.S. Attorney asked the judge to "send a message" to the intelligence community that a violation of its obligation to protect government information has real "meaning."[228] Although the judge decided against imposing the requested fine, Drake's prosecution nonetheless cost him his job, his federal pension, and $80,000 in attorney fees.[229] That message will probably not be lost on federal employees who need to put food on their families' tables.

The Administration is trying to send a message to journalists, as well. In the Sterling case, for instance, the Obama Justice Department subpoenaed *Times* reporter James Risen, seeking access to the notes from his conversations with his source (who is believed to be Sterling).[230] The district court recognized a qualified privilege and held that Risen's need to protect his source outweighed the government's need for the documents.[231] The DOJ has appealed that decision to the Fourth Circuit Court of Appeals. On appeal, the Department has taken the absolutist position that there is no "reporter's privilege" in any case – always placing the words inside quotation marks – and that Risen, as "the only eyewitness to the crime . . . is inextricably linked to the criminal conduct."[232] Another leak investigation is currently underway that could result

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228. Transcript of Sentencing Hearing at 12, 17-18, United States v. Drake, No. 10-CR-181 (D. Md. July 15, 2011), *available at* http://www.fas.org/sgp/jud/drake/071511-transcript.pdf. The Espionage Act charges were dropped, but Drake pleaded guilty to a lesser offense.

229. *Id.* at 37.

230. United States v. Sperling, 818 F. Supp. 2d 945 (D.D.C. 2011).

231. *Id.* at 960.

232. Brief of Appellant at 14, United States v. Sperling, No. 11-5028 (4th Cir. Jan. 13, 2012), *available at* http://www.fas.org/sgp/jud/sterling/011312-govbrief.pdf.

in the Administration seeking to compel journalists to turn over their sources.[233] In that case, the FBI is trying to determine who leaked information regarding an "underwear bomb" plot stemming from Yemen to the Associated Press.[234] The leak purportedly led to the shutdown of an undercover operation inside the terror group Al Qaeda in the Arabian Peninsula.[235] The White House has blamed the AP for the operation's closing and warned that it fully supports efforts to prevent leaks like this from occurring again in the future.[236] That means that the Administration's crackdown against whistleblowers and the press who rely on them will likely continue throughout the rest of Obama's second term. It also sends a clear message to journalists: work with government whistleblowers at your own peril.

This situation calls for new Congressional action. The Whistleblower Protection Enhancement Act of 2012,[237] which significantly strengthened the protections given to federal government employees who report infractions of the law and gross mismanagement or abuse up the chain of command, is a step in the right direction. However, the Whistleblower Act specifically excludes employees working in national security and intelligence agencies and does not protect anyone who leaks information to the press, even if the employee has passed the information to their superiors and gotten rebuffed.[238] Unfortunately, that is all too often the case, as government agencies are

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233. Mark Hosenball, *Exclusive: Did White House "Spin" Tip a Covert Op?*, REUTERS.COM (May 18, 2012), http://www.reuters.com/article/2012/05/18/us-usa-security-plot-spin-idUSBRE84H0OZ20120518.
234. *Id.*
235. *Id.*
236. *Id.*
237. Pub. L. No. 112-199, 26 Stat. 1465.
238. *Id.*

insular institutions that do not encourage their employees to voice their concerns.[239] There is, thus, a gaping hole in the law that invites the executive branch to abuse power and then lawfully seek retribution against those who expose its abuses and the journalists who help to tell their stories. A carefully drafted federal shield law, which also protects whistleblowers from prosecution when they reveal information to the press honestly intending to serve the public's interest, would help to close that gap.

B. Congress Should Bring Uniformity to this Area of the Law

As the law now stands, a journalist's ability to protect the identity of his source in a judicial proceeding depends entirely on the jurisdiction in which the proceeding is brought. For example, suppose that a confidential source reveals information related to a criminal conspiracy based in Washington, D.C. Because the conspiracy involves potential violations of D.C. and federal law, the local police department and the FBI are conducting simultaneous investigations. If the authorities decide to bring the case in federal court, our hypothetical reporter would be out of luck, as the D.C. Circuit Court of Appeals generally requires disclosure.[240] If, however, the charges are filed in the D.C. court system, the D.C. shield law would apply and the reporter and his source would be protected.[241]

This hypothetical highlights the problem with the current state of the law. A federal policy that allows journalists to be jailed for engaging in the same conduct that the state shield laws actually promote undermines the policy judgments of nearly all of

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239. Chapa, *supra* note 223. For example, John Kiriakou described "the atmosphere within the CIA," where he worked, as "very aggressive" and explained that coming forward with concerns was not encouraged. *Id.*

240. Theodore Campagnolo, *The Conflict Between State Press Shield Laws and Federal Criminal Proceedings: The Rule 501 Blues*, 38 GONZ. L. REV. 445, 479 (2002/03).

241. *Id.*

the states.[242] The same is true with regard to the judicial determinations of a majority of the courts of appeals. The lack of a coherent federal standard leads to immeasurable uncertainty as to whether a meaningful promise of confidentiality can be made.[243] Any state's promise of confidentiality would prove hollow if the source knew that a federal court would not be required to honor the journalist's promise.[244] It thus becomes less likely that a source will cooperate, and a chilling effect results. Indeed, as the Supreme Court has recognized, "[people] must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege . . . is little better than no privilege at all."[245]

Congress should stop waiting for the courts and the states to sort this issue out on their own and should instead end the confusion by finally passing a federal shield law. The Supreme Court seems to have no problem with the current state of law. The Court has not engaged in any significant discussion on the issue since *Branzburg*, and it denied certiorari in the Judith Miller case.[246] Furthermore, after *Branzburg*, the success journalists achieved in pressing for a judicially created privilege helped to dampen the calls for a federal shield law.[247] Now, however, with the courts retreating, Congress may present journalists with their best hope for obtaining uniform, lasting protection.

Congress is also the more appropriate institution to undertake the task of

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242. *Cf.* Jaffee v. Redmond, 518 U.S. 1, 13 (1996) ("Denial of the federal [psychotherapist-patient] privilege therefore would frustrate the purposes of the state legislation that was enacted to foster these confidential communications.").

243. *See* N.Y. Times Co. v. Gonzales, 382 F. Supp. 2d 457, 505 (S.D. N.Y. 2005) (citing *Jaffee*, 518 U.S. at 13).

244. *See Jaffee*, 518 U.S. at 13.

245. Upjohn Co. v. United States, 449 U.S. 383, 393 (1981).

246. Miller v. United States, 125 S. Ct. 2977 (2005).

247. *See* Wright & Graham, *supra* note 13.

creating a workable journalist privilege. That most of the states have enacted statutory shield laws indicates that the issue is not well suited for judicial treatment.[248] In particular, Congress is better able to consider the benefits of adopting one definition of journalist over another.[249] It is also more capable of balancing the "competing interests – prosecuting criminal acts versus constricting the flow of information to the public – that inform any reporter's privilege . . . ."[250] Furthermore, Congress has already determined that certain disclosures of classified information purportedly jeopardize national security to such an extent that they constitute felonies. A journalist privilege that covers illegal disclosures would conflict with those federal laws by essentially providing leakers with immunity from prosecution. That is, if the journalist – the only eyewitness to the crime –can refuse to identity the leaker, the prosecution might be unable to ever identify the source. Congress, and not the courts, should determine whether public policy supports creating such an exemption from its criminal laws.

IV. Challenges in Drafting a Workable Federal Shield Law

Although Congress is more capable of creating a workable journalist privilege than the courts, its task will not be an easy one. As the preceding discussion makes clear, legislators will have to overcome a number of challenges in order to create a shield law that effectively promotes the policy underlying the privilege – preserving journalist-source relationships and maintaining the flow of important news to the public – while also taking into consideration the public's strong interest in obtaining evidence relevant

248. *See Jaffee*, 518 U.S. at 26 (Scalia, J., dissenting); In re Grand Jury Subpoena, Judith Miller, 438 F.3d 1141, 1158 (2005) (Sentelle, J., concurring) ("[T]he experience of the states is most instructive. The creation of a reporter's privilege, if it is to be done at all, looks more like a legislative than an adjudicative decision.").

249. *Id.*

250. *Miller*, 438 F.3d at 1161 (Henderson, J., concurring).

to a criminal investigation or other legal proceeding. Fortunately, because forty states and dozens of courts have already undertaken that balancing test, Congress will not be without guidance.

This section will elucidate some of the challenges that Congress will face, specifically focusing on the difficulties of creating a definition of "journalist" and deciding the scope of the privilege. It will also attempt to offer solutions to those challenges that best comport with the spirit of the privilege.

A. Who is a Journalist?

In *Branzburg*, the Supreme Court presciently observed how difficult it would be to decide who qualifies for protection under a journalist privilege.[251] Rapid advances in technology and the rise of new media and citizen journalism have only compounded this problem.[252] In fact, much has been made about whether the privilege should extend to a pajama-clad blogger typing away in his parents basement.[253] Congress' inability to resolve that question probably led to the failure of the last federal shield law proposal.[254] If, however, the privilege is to serve its stated purpose, the definition of covered entity should extend far enough to cover that much-maligned blogger.

The approach adopted by most of the states, which ties coverage to employment

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251. Branzburg v. Hayes, 408 U.S. 665, 703-04 (1972). The Court stated: "sooner or later, it [will] become necessary to define those categories of newsmen who qualify for the privilege-a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer just as much as the large, metropolitan publisher."

252. *See* Lee v. Dep't of Justice, 401 F. Supp. 2d 123, 140 (D.D.C. 2005) (internal citation omitted) (refusing to recognize the privilege in part because "[t]he proliferation of communications media in the modern world makes it impossible to construct a reasonable or useful definition of who would be a 'reporter' eligible to claim protection from a newly minted common law privilege.").

253. *Miller*, 438 F.3d at 1156 (Sentelle, J., concurring) ("[D]oes the privilege also protect the proprietor of a web log: the stereotypical 'blogger' sitting in his pajamas at his personal computer posting on the World Wide Web his best product to inform whoever happens to browse his way?").

254. Papandrea, *supra* note 133, at 516.

with an established media outlet like a newspaper or television or radio station,[255] is overly narrow in light of the changing media landscape. Because technology is constantly changing, the medium of communication used should not determine whether the privilege applies. Congress' most recent attempt to define "journalist" is likewise too restrictive in that it limits coverage to a person who gathers news "for a substantial portion of the person's livelihood or for substantial financial gain."[256] Most bloggers and non-traditional journalists would fall outside that definition because blogging is not their primary source of income.[257] Indeed, many freelancers who are not employed full-time would also be unprotected.

These definitions further ignore the important role that non-traditional journalists and bloggers serve in today's society. The Internet has broken down the barriers that once substantially limited the number of people who could publish information for public consumption.[258] As a result, more and more people are contributing to the national dialogue each day.[259] As of July 2011, there were 164 million blogs worldwide, with about half of those coming from the United States.[260] The derisive image of the pajama-clad blogger invoked by Judge Sentelle in *Miller* does not entirely reflect who is behind all those blogs. While "hobbyists" do make up the bulk of the blogosphere, the number of professional bloggers is growing.[261] More importantly, "the creativity, knowledge, and expertise of bloggers often dwarf that of journalists in

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255. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-2237 (West 2012).
256. Free Flow of Information Act of 2011, H.R. 2932, 112th Cong. (2011).
257. *State of the Blogosphere 2011: Introduction and Methodolgy*, TECHNORATI.COM (Nov. 4, 2011), http://technorati.com/social-media/article/state-of-the-blogosphere-2011-introduction/.
258. Papandrea, *supra* note 133, at 523.
259. *Id.*
260. *How Big is the Blogosphere?*, INVESPBLOG (Nov. 12, 2011), http://www.invesp.com/blog/business/how-big-is-blogsphere.html.
261. *State of the Blogosphere*, *supra* note 258 ("The backbone of the blogosphere, and representing 60% of the respondents to this survey, Hobbyists say that they 'blog for fun' and do not report any income.").

traditional media outlets."[262] Today, bloggers and other non-traditional journalists produce original content. They break important news stories.[263] And they lead the dialogue on important issues of public concern, probably even more so than small-town newspapers or the 6 o'clock news.[264] Thus, any federal shield law should explicitly include blogs and other non-traditional media within its coverage.

Organizations like WikiLeaks present another problem entirely. WikiLeaks essentially operates as a conduit between confidential sources and the public, passing along leaked materials without making any editorial judgments.[265] The organization considers what it does is "journalism" and considers itself a media outlet.[266] However, because WikiLeaks merely dumps documents on the public and does not engage in "investigative journalism" in the traditional sense, it would probably not fall within any of the definitions of "journalist" adopted by the states or the federal courts of appeals.[267]

Under this paper's proposal, the News Media Confidentiality Act of 2013, that is not the case. Instead, the proposal recognizes that over the past few years, WikiLeaks has played an important role in the "ecosystem of journalism."[268] Traditional media outlets, including the *New York Times* and *The Guardian*, have relied heavily on documents it obtained in reporting several major stories, such as the abuses at Guantanamo Bay.[269] Protecting the *Times* from having to identify its sources but not protecting the entity that actually obtained the information would not promote the

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262. Papandrea, *supra* note 133, at 523 (internal citation omitted).
263. *Id.* at 524-25.
264. *Id.* at 524.
265. Kellie C. Clark and David Barnette, *The Application of the Reporter's Privilege and the Espionage Act to WikiLeaks*, 37 U. DAYTON L. REV. 165, 178 (2012).
266. *Id.*
267. Jonathan W. Peters, *WikiLeaks Shows Need for Legal "Watchdog Privilege"*, WIRED.COM (May 20, 2011), http://www.wired.com/threatlevel/2011/05/oped-wikipriviledge/.
268. *Id.*
269. *Id.*

general purposes of the privilege: to protect the free flow of information by prohibiting the government from turning the press into its investigative arm.[270] The privilege should, therefore, extend to organizations that, although not technically journalists, nonetheless gather information for dissemination to the public.

While the privilege must be broad enough to cover non-traditional journalists and other entities that have become vital to the way the public consumes information and learns about important issues, there still must be limits. My proposal strikes the proper balance by adopting the intent-based standard adopted by the Third Circuit Court of Appeals in *In re Madden*.[271] This test is consistent with the purpose underlying the privilege, which is designed to promote the dissemination of information to the public no matter where that information is coming from. The focus should be on whether the person claiming protection under the statute intended to disseminate the information to the public at the start of the newsgathering process, and not whether he is employed by an established media outlet or gaining a livelihood from their work. However, to prevent sources and "journalists" from being able to quickly set up a blog and claim the privilege in order to frustrate legitimate investigative efforts, the News Media Confidentiality Act also incorporates a "periodicity" requirement.[272] In order to invoke the privilege, the individual must regularly or periodically write for or otherwise contribute to a media outlet (which includes blogs).[273]

The Act's definition of covered entity also contains a provision for organizations like WikiLeaks. This subsection covers any entity that receives information related to a

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270. *Id.* ("A reporter's privilege that excludes WikiLeaks while including the outlets that later use the leaked material is a bit irrational. It's like an electrical wire that burns up to protect a fuse.").
271. In re Madden, 151 F.3d 125, 128-29 (3d Cir. 1998).
272. Wright & Graham, *supra* note 13.
273. *Id.*

matter of public concern or government abuse from a confidential source and intends to disseminate that information to the public or other covered entities for their use, with or without adding value to the content. Information pertains to a matter of public concern if it relates to an issue of political or social to the community or nation, as a whole.[274] The definition of "government abuse" is borrowed from the Whistleblower Protection Enhancement Act of 2012.[275] To be sure, this definition is broad, but it is not without limits. The entity must still intend to pass the information to the public. For example, the privilege would not apply if the entity received sensitive materials related to government dysfunction and intended to pass it along to a foreign enemy. It would also exclude purely private matters.

In sum, contrary to most of the existing state statutes and the most recent bills considered in Congress, the proposal adopts a broad definition of the term "journalist." Ultimately, a court will be forced to engage in a fact-intensive inquiry to determine whether the intent and periodicity requirements are met, focusing on whether extending or denying coverage to a particular individual will serve the underlying aims of the privilege.

B. Absolute vs. Qualified?

In adopting a federal shield law, Congress should reject the balancing test incorporated into the most recent Congressional proposals and adopted in several of the states. As the Supreme Court has recognized, "[m]aking the promise of confidentiality

274. Camp v. Corr. Med. Servs., 668 F. Supp. 2d 1338, 1355 (M.D. Ala. 2009) (internal citation omitted).

275. Whistleblower Protection Enhancement Act, *supra* note 237. Under the Whistleblower Protection Enhancement Act, a covered disclosure means "any violation of any law, rule, or regulation; or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." *Id.*

contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege."[276] This is especially true with regard to the journalist privilege. The government is prone to exaggerate threats to "national security," and courts have become increasingly willing to hold that a purported interest in maintaining security outweighs a reporter's interest in preserving confidentiality with her sources.[277]

Instead of making the existence of the privilege dependent on the outcome of an easily overcome balancing test, the privilege should apply in every cases but contain narrow exceptions that serve important societal interests. The Senate's most recent attempt at a federal shield is a good starting point.[278] First, the privilege should not apply when a journalist observes criminal or tortious conduct. Second, there should be an exception in circumstances where death or substantial bodily harm may occur in the absence of the journalist's testimony. Third, the privilege should be inapplicable if a court finds that the evidence is necessary to prevent an imminent, significant and articulable threat to national security. Finally, insofar as the privilege might encourage people to set up "sham" websites or blogs in order to avoid a subpoena, Congress should recognize an exception for an individual who publishes information online for the first time around the same time he receives a subpoena and who cannot demonstrate that he would have published the information so in the absence of the subpoena.[279]

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276. Jaffee v. Redmond, 518 U.S. 1, 17 (1996).
277. *See, e.g.*, In re Grand Jury Subpoena, Judith Miller, 438 F.3d 1141, 1142-43 (D.C. Cir. 2006).
278. Free Flow of Information Act of 2009, *supra* note 118.
279 Papandrea, *supra* note 133, at 590.

Any federal shield law should also contain a special provision for leaks of classified information relating to matters of public concern or uncovering government abuse. Even though leaks to the press "have become an essential means by which the public learns about government activities,"[280] whistleblowers are woefully under-protected. Under the current whistleblower laws, even if a government employee is repeatedly rebuffed in his efforts to pass information of government abuse or dysfunction up the chain of command, he is unprotected if he goes to the press with the information.[281] The proposed federal shield law would correct that by excluding certain leaks of classified information from the crime/tort exception. That is, that exception will not apply if the crime at issue is the leak of supposedly classified information. Borrowing the definition of "covered disclosure" from the Whistleblower Protection Act,[282] a journalist could not be compelled to testify under the News Media Confidentiality Act if he demonstrates that that the leak came from a federal employee who "reasonably believes" the leak shows "a violation of any law, rule, or regulation" or "gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety."[283] This provision would give a federal employee the option of either complying with the Whistleblower Protection Act or, if he believes that such attempts will be futile, going to the press and still being protected.

Furthermore, the special whistleblower provision would not unreasonably frustrate

280 *Id.* at 589.
281. *See* Whistleblower Protection Enhancement Act of 2012, *supra* note 237.
282. 5 U.S.C. § 1201 (2012).
283. *Id.* § 2302(b)(8)(A).

the government's ability to prosecute legitimate leak cases.[284] The federal government has only recently started to subpoena reporters in leak investigations, and it has failed to show that there are not alternative means of successfully prosecuting such cases.[285] The government might have "to work a bit harder to identify the leakers,"[286] but that is a small price to pay for encouraging more government whistleblowers to come forward.

V. Conclusion

The Supreme Court's landmark decision in *Branzburg v. Hayes*[287] ushered in 40 years of uncertainty with respect to the existence of a journalist privilege at the federal level. The courts of appeals have done their best to distinguish *Branzburg* into oblivion, but the unfortunate result has been a lack of uniformity among the circuits that undermines the very purpose the privilege is meant to promote. Worse yet, though the courts of appeals once seemed destined to continue expanding the scope of the privilege, that trend has clearly reversed in the last ten years. The government's propensity to play the "national security" card and the Obama Administration's crackdown against leaks of purportedly classified information signals that the trend is not likely to swing in the other direction any time soon. The number of subpoenas issued against the press, which are already at an all-time high, will likely continue to rise.

With the Supreme Court unlikely to address these issues any time soon, Congress should take up the cause. This paper's proposal, albeit aspirational and broader in scope than anything that Congress would likely ever pass, provides the proper

284. Papandrea, *supra* note 133, at 589.
285. *Id.*
286. *Id.*
287. 408 U.S. 665 (1972).

framework for doing so. It would enable anyone intending to disseminate important information to the public to make a meaningful "guarantee of confidentiality," and thereby allow journalists to function to the fullest extent of their abilities and the press to remain free from potentially disruptive government intrusion.[288]

288. *See* Shepard, *supra* note 1, at 1.

Appendix A: Final Text of the Proposed Statute

A BILL

To maintain the free flow of information to the public by providing that communications between covered entities associated with the news media and their confidential sources are exempt from disclosure in federal judicial proceedings.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'News Media Confidentiality Act of 2013'.

SEC. 2. COMPELLED DISCLOSURE FROM COVERED ENTITIES

(a) Exemption of Newsgathering Persons from Disclosing Identity of Confidential Sources - In any legal proceeding arising under Federal law, before any court or grand jury, a Federal court may not compel a covered entity to disclose any information or documents that could reveal the identity of a confidential source or any information or document that a reasonable person could expect to lead to the discovery of the identity of a confidential source.

(b) Exemption of Newsgathering Persons from Providing Testimony or Producing Documents Related to Newsgathering – In any legal proceeding arising under Federal law, before any court or grand jury, a Federal court may not compel a covered entity to provide testimony or produce any document related to information obtained or created by a covered person while engaging in journalism, unless a court determines by a preponderance of the evidence, after providing notice and an opportunity to be heard to such covered person—

(1) that the party seeking to compel production of such testimony or document has exhausted all reasonable alternative sources (other than the covered person) of the testimony or document;

(2) that—

(A) in a criminal investigation or prosecution, based on information obtained from a person other than the covered person—

(i) there are reasonable grounds to believe that a crime has occurred; and (ii) the testimony or document sought is critical to the investigation or prosecution or to the defense against the prosecution; or

(B) in a matter other than a criminal investigation or prosecution, the party seeking to compel disclosure demonstrates that the testimony or document sought is critical to the party's claim or defense; and

(3) that the public interest in compelling disclosure of the testimony or document outweighs the public interest in gathering or disseminating news or information.

(c) Limitations on Disclosure - If the court compels disclosure under subsection (b), it shall ensure that the disclosure is—

(1) not be overbroad, unreasonable, or oppressive and, as appropriate, ~~be~~ limited to the purpose of verifying published information or describing any surrounding circumstances relevant to the accuracy of the ~~such~~ published information; and

(2) narrowly tailored in subject matter and period of time.

(d) Rule of Construction- The court shall not construe this Act as applying to civil defamation, slander, or libel claims or defenses arising under State law, regardless of whether the claims or defenses-are raised in a State or Federal court.

SEC. 3. COMPELLED DISCLOSURE FROM COMMUNICATIONS SERVICE PROVIDERS.

(a) Conditions for Compelled Disclosure- When testimony or a document is sought from a communications service provider with whom the covered entity has engaged in a business transaction, section 2 shall apply to the testimony or document in the same manner that the section applies to any testimony or document sought from a covered entity.

(b) Notice and Opportunity Provided to Covered Entities - A court may compel the testimony or disclosure of a document under this section only after the party seeking the testimony or document provides the covered entity that is a party to the business transaction described in subsection (a)--

(1) notice of the subpoena or other compulsory request for the testimony or disclosure from the communications service provider not later than the time when the subpoena or request is issued to the communications service provider; and

(2) an opportunity to be heard before the court before the testimony or disclosure is compelled.

(c) Exception to Notice Requirement- Notice under subsection (b)(1) may be delayed

only if the court determines by clear and convincing evidence that providing notice would pose a substantial threat to the integrity of a criminal investigation.

SEC. 4. EXCEPTIONS

(a) A court may compel disclosure of any information or document protected from disclosure under section (2), including the identity of a confidential source, if the party seeking the information or document establishes by a preponderance of the evidence that:

(1) the information or document was obtained through the eyewitness observation of criminal or tortious conduct by the covered entity or any of its agents or employees, except this subsection shall not apply –

(i) if substantially similar information can reasonably be obtained by alternative means; or

(ii) if the alleged criminal conduct is the act of disclosing the information or document at issue to the covered entity, in which case section 5 shall apply.

(2) disclosure of the information or document is necessary to prevent imminent death or severe bodily injury; or

(3) disclosure of the information or document is necessary to prevent –

(A) an imminent act of terrorism against the United States of America, or

(B) other imminent and significant harm to national security that outweighs the covered entity's interest in maintaining confidentiality.

(b) Section 2 shall not apply if the court determines by a preponderance of the evidence that the party claiming the protections of this Act –

(1) published or broadcasted information in any medium for the first time immediately before or after receiving a subpoena or other compulsory request for documents or information; and

(2) that cannot demonstrate that it would have published or broadcasted the information even if the subpoena or other compulsory request had not been issued.

SEC. 5. WHISTLEBLOWER PROTECTIONS

(a) Notwithstanding section 4(a)(1), the court may not compel a covered entity to

disclose the identity of a confidential source in a criminal investigation or prosecution of a person who unlawfully disclosed properly classified information, if the covered entity establishes that –

(1) the confidential source is a 'covered employee' under the Whistleblower Protection Act (5 U.S.C. § 2302(a)(2)(B)); and

(2) the information obtained from the confidential source relates to a matter of public concern or uncovers government abuse.

(b) Even if the requirements of subsection (a) are not met, the court may not compel disclosure of the identity of a confidential source unless it finds by a preponderance of the evidence –

(1) that the party seeking to disclose the identity of the confidential source has exhausted all reasonable alternative sources (other than the covered entity) of identifying the source; and

(2) that the public's interest in disclosure of the identity of the confidential source outweighs the covered entity's interest in maintaining confidentiality.

(c) The court shall conduct an in camera of the information or documents involved in order to make its determination under subsection (a).

(c) Even if the requirements of subsection (a) are not met, the court may not compel disclosure of the identity of a confidential source unless it finds by a preponderance of the evidence –

(1) the party seeking to disclose the identity of the confidential source has exhausted all reasonable alternative sources (other than the covered entity) of identifying the source

SEC. 6. DEFINITIONS.

In this Act, the following words and phrases shall have the meanings ascribed to them in this section:

(1) COMMUNICATIONS SERVICE PROVIDER- The term 'communications service provider'—

(A) means any person that transmits information of the customer's choosing by electronic means; and

(B) includes a telecommunications carrier, an information service provider, an interactive computer service provider, and an information content provider (as such terms are defined in sections

3 and 230 of the Communications Act of 1934 (47 U.S.C. 153, 230)).

(2) COVERED ENTITY - The term 'covered entity' means –

(A) a person who regularly or periodically –

(i) engages in investigative journalism,

(ii) gathers news, and

(iii) intends at the inception of the newsgathering process to disseminate the information to the public; and

(B) a person or entity that –

(i) receives information or documents relating to a matter of 'public concern' or 'government abuse' from a third party, and

(ii) intends to disseminate the information or document to the public or to another covered entity under this Act, without regard to whether the person or entity engages in investigative journalism or otherwise writes, edits or alters the information before disseminating it to the public or other covered entity; and

(C) the supervisors, employees, agents, or affiliates of a covered entities defined in subsections (B) and (C).

The determination of whether a person is a 'covered entity' shall be made without reference to –

(A) whether the person derives a substantial portion of the person's livelihood engaging in investigative journalism or gathering news; and

(B) whether the person is employed by or connected with a newspaper, magazine, or other periodical publication; radio broadcasting or television station; or any other established medium of communications.

The term 'covered entity' shall not include—

(A) any person who is a foreign power or an agent of a foreign power, as such terms are defined in section 101 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801);

(B) any organization designated by the Secretary of State as a foreign terrorist organization in accordance with section 219 of the Immigration and Nationality Act (8 U.S.C. 1189);

(C) any person included on the Annex to Executive Order No. 13224, of September 23, 2001, and any other person identified under section 1 of that Executive order whose property and interests in property are blocked by that section;

(D) any person who is a specially designated terrorist, as that term is defined in section 595.311 of title 31, Code of Federal Regulations (or any successor thereto); or

(E) any terrorist organization, as that term is defined in section 212(a)(3)(B)(vi)(II) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(vi)(II)).

(3) DOCUMENT- The term 'document' means writings, recordings, and photographs, as those terms are defined by Federal Rule of Evidence 1001 (28 U.S.C. App.).

(4) JOURNALISM- The term 'journalism' means the gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing of news or information that concerns local, national, or international events or other matters of public concern for dissemination to the public.

(5) PUBLIC CONCERN - Information pertains to a matter of 'public concern' if it relates to a matter of political, social or other concern for the community, state or country.

(6) GOVERNMENT ABUSE – The term 'government abuse' means information that evidences a violation of any law, rule, or regulation; or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

Appendix B: Original Content in Statute

A BILL

that communications between covered entities associated with the news media and their confidential sources are exempt from disclosure in federal judicial proceedings.

SECTION 1.

'News Media Confidentiality Act of 2013'

SEC. 2. ENTITIES

Exemption of Newsgathering Persons from Disclosing Identity of Confidential Sources - In any legal proceeding arising under Federal law, before any court or grand jury, a . . . entity . . . any information or documents that could reveal the identity of a confidential source or any information or document that a reasonable person could expect to lead to the discovery of the identity of a confidential source.

(b) Exemption of Newsgathering Persons from Providing Testimony or Producing Documents Related to Newsgathering – In any legal proceeding arising under Federal law, before any court or grand jury, a Federal court may not compel a covered entity to provide testimony or produce . . . while . . .

(1)

(2)

(A)

(B) the party seeking to compel disclosure demonstrates that . . . the party's claim or defense; and

(3) testimony

(c) Disclosure - If the court compels disclosure under subsection (b), it shall ensure that the disclosure is

(d) The court . . . not . . . this Act . . . arising . . .the

SEC. 3.

(a) When . . . is sought from a communications service provider with whom the covered entity has engaged in a business transaction . . . the . . . the . . .entity

(b) Entities – the testimony or . . . entity that

(c) providing

SEC. 4. EXCEPTIONS

(a) A court may compel disclosure of any information or document protected from disclosure under section (2), including the identity of a confidential source, if the party seeking the information or document establishes by a preponderance of the evidence that:

(1) the information or document was obtained through the eyewitness observation of criminal or tortious conduct by the covered entity or any of its agents or employees, except this subsection shall not apply –

(i) if substantially similar information can reasonably be obtained by alternative means; or

(ii) if the alleged criminal conduct is the act of disclosing the information or document at issue to the covered entity, in which case section 5 shall apply.

(2) disclosure of the information or document is necessary to prevent imminent death or severe bodily injury; or

(3) disclosure of the information or document is necessary to prevent –

(A) an imminent act of terrorism against the United States of America, or

(B) other imminent and significant harm to national security that outweighs the covered entity's interest in maintaining confidentiality.

(b) Section 2 shall not apply if the court determines by a preponderance of the evidence that the party claiming the protections of this Act –

(1) published or broadcasted information in any medium for the first time immediately before or after receiving a subpoena or other compulsory request for documents or information; and

(2) that cannot demonstrate that it would have published or broadcasted the information even if the subpoena or other compulsory request had not been issued.

SEC. 5. WHISTEBLOWER PROTECTIONS

(a) Notwithstanding section 4(a)(1), the court may not compel a covered entity to disclose the identity of a confidential source in a criminal investigation or

prosecution of a person who unlawfully disclosed properly classified information, if the covered entity establishes that –

(1) the confidential source is a 'covered employee' under the Whistleblower Protection Act, 5 U.S.C. § 2302(a)(2)(B); and

(2) the information obtained from the confidential source relates to a matter of public concern or uncovers government abuse.

(b) Even if the requirements of subsection (a) are not met, the court may not compel disclosure of the identity of a confidential source unless it finds by a preponderance of the evidence –

(1) that the party seeking to disclose the identity of the confidential source has exhausted all reasonable alternative sources (other than the covered entity) of identifying the source; and

(2) that the public's interest in disclosure of the identity of the confidential source outweighs the covered entity's interest in maintaining confidentiality.

(c) The court shall conduct an in camera of the information or documents involved in order to make its determination under subsection (a).

(c) Even if the requirements of subsection (a) are not met, the court may not compel disclosure of the identity of a confidential source unless it finds by a preponderance of the evidence –

(1) the party seeking to disclose the identity of the confidential source has exhausted all reasonable alternative sources (other than the covered entity) of identifying the source.

SEC. 6.

the following words and phrases shall have the meanings ascribed to them in this section:

(1)

(2) Entity – entity . . .

(A) a person who regularly or periodically –

(i) engages in investigative journalism,

(ii) gathers news, and

(iii) intends at the inception of the newsgathering process to disseminate the information to the public; and

(B) a person or entity that –

(i) receives information or documents relating to a matter of 'public concern' or 'government abuse' from a third party, and

(ii) intends to disseminate the information or document to the public or to another covered entity under this Act, without regard to whether the person or entity engages in investigative journalism or otherwise writes, edits or alters the information before disseminating it to the public or other covered entity; and

(C) the supervisors, employees, agents, or affiliates of a covered entities defined in subsections (B) and (C).

The determination of whether a person is a 'covered entity' shall be made without reference to –

(A) whether the person derives a substantial portion of the person's livelihood engaging in investigative journalism or gathering news; and

(B) whether the person is employed by or connected with a newspaper, magazine, or other periodical publication; radio broadcasting or television station; or any other established medium of communications.

The . . . 'covered entity' . . .

(3)

(4) concern

(5) PUBLIC CONCERN - Information pertains to a matter of 'public concern' if it relates to a matter of political, social or other concern for the community, state or country.

(6) GOVERNMENT ABUSE – The term 'government abuse' means information that evidences –

(A) a violation of any law, rule, or regulation; or

(B) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.