Notre Dame Law Review

Volume 89 | Issue 3 Article 10

2-2014

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PROTECTING MORE THAN THE FRONT PAGE: CODIFYING A REPORTER'S PRIVILEGE FOR DIGITAL AND CITIZEN JOURNALISTS

*Kathryn A. Rosenbaum**

"'The reporters who work for the Times in Washington have told me many of their sources are petrified even to return calls,' Jill Abramson, the executive editor of The New York Times, said . . . on CBS's Face The Nation broadcast. 'It has a real practical effect that is important.'"[1]

INTRODUCTION

The stifling of investigative journalism stems in part from a torrent of stories in 2013 regarding the government's intrusive tracking of journalists' and individuals' cell phone records and e-mails without their knowledge.[2] The federal government also tracked two months of call records of more than twenty Associated Press phone lines.[3] In a leak probe regarding a news story about North Korea, the government surreptitiously obtained information about Fox News Chief Washington Correspondent James Rosen.[4] Officials monitored his "security badge access records to track the reporter's comings and goings at the State Department[,] . . . traced the timing of his

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1 Dylan Byers, *Reporters Say There's a Chill in the Air*, POLITICO (June 8, 2013, 1:59 PM), http://www.politico.com//story/2013/06/reporters-doj-obama-chilling-effect-92432.html.

2 *See, e.g.*, Siobhan Gorman et al., *U.S. Collects Vast Data Trove*, WALL ST. J., June 6, 2013, at A1, ("The National Security Agency's monitoring of Americans includes customer records from the three major phone networks as well as emails and Web searches, and the agency also has catalogued credit-card transactions, said people familiar with the agency's activities. . . .").

3 Josh Gerstein & Jennifer Epstein, *Eric Holder Gets Grilled on the Hill*, POLITICO (May 15, 2013, 2:21 PM), http://www.politico.com/story/2013/05/eric-holder-ap-doj-hill-investigation-91414.html (explaining the subpoenas of AP reporters' phone records from home, office, and cellphone lines regarding a leak about a counterterrorism investigation in Yemen).

4 Ann E. Marimow, *Records Offer Rare Glimpse at Leak Probe*, WASH. POST, May 20, 2013, at A1.

calls with a State Department security adviser suspected of sharing the classified report . . . [and] obtained a search warrant for the reporter's personal e-mails."[5] In a secret affidavit, the Department of Justice named him an aider, abettor, and/or co-conspirator in disclosing national defense information.[6] These increased intrusions into investigative journalists chill the free flow of information.[7] In response to these interferences with the government, the Department of Justice released new regulations about how it will handle subpoenas of journalists in order to balance the interests of "protecting the American people by pursuing those who violate their oaths through unlawful disclosures of information and safeguarding the essential role of a free press in fostering government accountability and an open society."[8]

Although these recent secret search warrants targeted journalists working for traditional media outlets, future search warrants or subpoenas will not be limited to traditional journalists, as digital journalists also increasingly report in-depth stories related to crime, national security, or the government in the modern media culture. Online and digital news sources continue to grow,[9] in part because traditional journalistic outlets lay off staff[10] and publish print editions less frequently as they move more content online.[11] Only 29% of people who participated in a 2013 Pew Research Survey had read a newspaper the previous day, down 18 percentage points since 2002.[12] In

5 *Id.*

6 *Id.* at A12 (asking for a sealed warrant to prevent James Rosen from destroying documents before the government could access them).

7 *Id.* at A1, A12 ("'Search warrants like these have a severe chilling effect on the free flow of important information to the public,' said First Amendment lawyer Charles Tobin, who has represented the Associated Press, but not in the current case. 'That's a very dangerous road to go down.'").

8 DEP'T OF JUSTICE, REPORT ON REVIEW OF NEWS MEDIA POLICIES (July 12, 2013), http://www.justice.gov/iso/opa/resources/2202013712162851796893.pdf, at 1 (last visited Dec. 1, 2013).

9 Jane Sasseen et al., *Digital: As Mobile Grows Rapidly, the Pressures on News Intensify*, PEW RESEARCH CENTER: THE STATE OF THE NEWS MEDIA 2013, stateofthemedia.org/2013/digital-as-mobile-grows-rapidly-the-pressures-on-news-intensify/ (analyzing news consumption survey that indicates TV, newspaper, and radio news consumption is declining as digital news consumption increases).

10 *See, e.g.*, Rick Edmonds, *Gannett Layoffs Are a Leading Indicator of a Permanently Shrinking Newspaper Business*, POYNTER (June 22, 2011, 10:31 AM), http://www.poynter.org/latest-news/business-news/the-biz-blog/136091/gannett-layoffs-are-a-leading-indicator-of-a-permanently-shrinking-newspaper-business/ ("The 700 layoffs Gannett announced at its community newspapers Tuesday can rightly be read as a vote of no confidence in the future of print by America's largest newspaper company.").

11 *See, e.g.*, Andrew Beaujon, *Patriot-News, Post-Standard Will Reduce Print Frequency to Three Days a Week*, POYNTER (Aug. 28, 2012 4:47 PM), http://www.poynter.org/latest-news/mediawire/186824/patriot-news-will-reduce-print-frequency-to-three-days-a-week/ (explaining that multiple Advanced Live newspapers will print on Sundays and two other days per week).

12 *In Changing News Landscape, Even Television Is Vulnerable*, PEW RESEARCH CENTER PUBLICATIONS (Sept. 27, 2012), http://www.people-press.org/2012/09/27/in-changing-news-landscape-even-television-is-vulnerable/.

2012, 34% of those surveyed received news online or from a mobile device.[13] Social media is also growing as a news source. Of those surveyed in 2012, 19% said they saw news stories on social networking sites the previous day, up from 9% in 2010.[14] Now, at least 50% of people in the United States have a tablet or smart phone.[15] Of those who own a tablet, 64% report getting news on a tablet, and 62% of smartphone owners said they received news on a phone.[16] These statistics highlight the reduction of barriers to gather, write, report, and share news with a broad base of people. It is now possible to write or record stories without being affiliated with a traditional news outlet. This Note argues that as digital news source access and use grow, the definition of journalists should be broadened to include individuals who are producing in-depth journalism in untraditional manners.

Journalists and other supporters of a vibrant and free press believe that the First Amendment, state constitutions, statutory protections at the federal and state level, and common law privileges should protect reporters from being forced to reveal confidential sources or information during court proceedings.[17] Thus, reporters will have the opportunity to engage in more investigative journalism, increasing citizens' knowledge of what is happening locally, nationally, and internationally.[18] Additionally, a reporter's privilege prevents journalists from becoming an "investigative arm" of the government.[19] This was exemplified in the recent AP and Rosen cases, as the government attempted to use reporters' information to investigate crimes.[20] This protection conflicts with and hinders the government's desire for information to protect national security and solve crimes.[21] However, without robust statutory protections at the federal level, journalists face jail time for

13 Sasseen et al., *supra* note 9.

14 *Id.* In the survey, 34% of 18–24-year-olds and 30% of 30–39-year-olds said they saw news on social media sites the day before being surveyed.

15 PEW RESEARCH CENTER, THE FUTURE OF MOBILE NEWS 2 (2012), http://www.journalism.org/files/legacy/Futureofmobilenews%20_final1.pdf.

16 *Id.*

17 Potter Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631, 633 (1975) ("If the Free Press guarantee meant no more than freedom of expression, it would be a constitutional redundancy."); *see id.* at 634 (discussing the Founders' emphasis on the Fourth Estate to serve as a check on government).

18 *See* Arthur Hays Sulzberger, Chairman of the Board, The New York Times, Convocation Speech for 1956 Elijah Parish Lovejoy Award at Colby College (1956), *available at* http://www.colby.edu/academics_cs/goldfarb/lovejoy/recipients/arthur-hays-sulzberger.cfm ("Freedom of the press—or to be more precise, the benefit of freedom of the press—belongs to everyone: to the citizens as well as the publisher. The publisher is not granted the privilege of independence simply to provide him with a more favored position in the community than is accorded to other citizens. . . . The crux is not the publisher's 'freedom to print'; it is rather the citizen's 'right to know.' What I would point out is that freedom of the press is your right as citizens and not mine as a publisher.").

19 Branzburg v. Hayes, 408 U.S. 665, 725 (1972) (Stewart, J., dissenting).

20 *See supra* notes 1–8.

21 David Batty, *WikiLeaks War Logs Posting 'Will Lead to Free Speech Ruling,'* THE GUARDIAN (Aug. 26, 2010), http://www.guardian.co.uk/media/2010/aug/27/wikileaks-war-logs-

being held in contempt for refusing to reveal their sources.[22] Since 1984, at least seventeen journalists have been jailed for refusing to reveal sources.[23] Without a privilege, the free flow of information from sources to reporters who disseminate information to the public has quantifiably been shown to be stifled, as sources are afraid to share information.[24]

In *Branzburg v. Hayes*, the only case in which the Supreme Court addressed the issue, the Court refused to recognize a constitutional reporter's privilege.[25] Justice Powell wrote a separate concurrence suggesting in certain cases there may be a reporter's privilege, but also joined the majority opinion, resulting in subsequent conflicting interpretations in state and federal courts.[26]

This Note will first explain, in Part I, why journalists need to be protected, and detail the history of reporters invoking a reporter's privilege in court to protect themselves from revealing their sources or information. It will then discuss *Branzburg v. Hayes* in Section II.A. Section II.B briefly examines circuits' receptivity to statutory or constitutional protections of reporters. The Supreme Court has stated that Congress could pass a law to protect reporters.[27] However, while multiple federal shield laws have been proposed, none have been passed.[28] The most recent proposal occurred in 2013, and as of December 2013, the Senate version was voted out of commit-

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free-speech-supreme-court (quoting Justice Sotomayor explaining the "'constant struggle in this society, between our security needs and our [F]irst [A]mendment rights'").

22 *Paying the Price: A Recent Census of Reporters Jailed or Fined for Refusing to Testify*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, http://www.rcfp.org/jailed-journalists (last visited Nov. 19, 2013).

23 *Id.*

24 *See* RonNell Anderson Jones, *Media Subpoenas: Impact, Perception, and Legal Protection in the Changing World of American Journalism*, 84 WASH. L. REV 317, 393 (2009) ("The breadth and depth of the qualitative and the quantitative data demonstrate that both the threat and the reality of subpoenas alter behaviors in newsrooms of all sizes."). This argument has been used in federal debate over a shield law. *See, e.g.*, *Free Flow of Information Act of 2007: Hearing on H.R. 2102 Before the H. Comm. on the Judiciary*, 110th Cong. 13 (2007) (statement of Rep. Mike Pence) ("Compelling reporters to testify and, in particular, compelling them to reveal the identity of their confidential sources is a detriment to the public interest. Without the promise of confidentiality, many important conduits of information about our Government will be shut down.").

25 Branzburg v. Hayes, 408 U.S. 665, 690 (1972) ("We [the Supreme Court] are asked to create another [privilege] by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do."). However, Justice Sotomayor has said "that [the free speech in light of national security issues] question is very likely to come before me." Batty, *supra* note 21.

26 *See Branzburg*, 408 U.S. at 710 (Powell, J., concurring) (explaining his understanding of the Court's holding); McKevitt v. Pallasch, 339 F.3d 530, 532 (7th Cir. 2003) (listing a variety of federal reporter's privilege cases); *infra* Section III.B (explaining state law privilege).

27 *Branzburg*, 408 U.S. at 706.

28 A serious attempt was the Free Flow of Information Act of 2011, but this attempt failed. *See* H.R. 2932, 112th Cong. (2011).

tee.[29] Section III.A will address Congress's attempts at enacting a statutory protection, specifically focusing on who would be covered in proposed bills. *Branzburg* did not foreclose the possibility of state statutory protections, and thirty-nine states plus the District of Columbia have codified a reporter's privilege in their shield laws.[30] This Note will briefly examine how states codify reporters' protections in Section III.B. Section III.C then considers the executive branch's self-restriction of subpoenaing reporters, which appears in the Code of Federal Regulations.

This Note argues that while the constitutional debate surrounding a reporter's privilege continues, a federal shield law is needed to provide coverage at least until the Supreme Court recognizes First Amendment protection for reporters. A shield law can provide more uniform protections to a broad range of journalists, including digital or citizen journalists, which are critical to any current iteration of a reporter's privilege. Current state protections are not sufficient because they do not protect reporters being prosecuted under federal law, which is necessary for a more comprehensive coverage that encourages meaningful reporting of nationally relevant material. As discussion over a statutory protection grows, it is important to create a statute that is relevant to the changing media landscape in which digital and citizen journalists are increasingly breaking news and investigating stories.[31] Thus, this Note, in Part IV, addresses the inadequacies of current protections and proposes the solution of a federal shield law, emphasizing the broad number of people, outside of traditional, institutional media, that the shield law should protect. The law should focus on covering those whose actions demonstrate that they are engaging in journalism. The protection should not only be extended to an individual associated with an institutional media entity. The law should cover digital or citizen journalists using Internet news sources, or even social media sites, as vehicles to publish their work. This solution is practical in light of the murky constitutional landscape that does not offer broad enough protection to the growing number of citizen and digital journalists. Although individuals should receive shield law protection from revealing sources in order to encourage investigative journalism, this should not be an absolute protection, but rather a qualified privilege subject to codified exceptions for security and safety issues.

29 *See S. 987: Free Flow of Information Act of 2013*, GovTrack.us, http://www.govtrack.us/congress/bills/113/s987 (last visited Dec. 20, 2013); *see also H.R. 1962: Free Flow of Information Act of 2013*, GovTrack.us, https://www.govtrack.us/congress/bills/113/hr1962 (last visited Dec. 20, 2013) (this version is still in committee as of December 2013).

30 *See* United States v. Sterling, 724 F.3d 482, 532 (4th Cir. 2013) (Gregory, J., dissenting).

31 *See supra* notes 9–15 (explaining statistics about the changing media landscape).

I. BACKGROUND

A. Rationale for the Privilege

Journalists and scholars empirically argue that subpoenas "'poison[ ] the atmosphere,'" leading to less effective and robust investigative journalism.[32] To justify a reporter's privilege, it may be difficult to fully understand the impact of a potential subpoena on reporters because all journalists are working in a world where government subpoena power exists.[33] As a result, in part because of the DOJ's monitoring of reporters, national security reporters said they "have seen increased caution from government sources following revelations that the DOJ had subpoenaed" information.[34]

Because of the government's subpoena power, many sources believe journalists are being used as "agents of discovery" for the government instead of an independent entity designed to watch the government.[35] Other reporters say that the recent chilling of sources is more of a "slow chill that started under the Bush Administration [and] picked up significantly under Obama."[36] The six leaks the Obama administration has investigated thus far are "more than all other administrations combined."[37]

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32 Vince Blasi, *The Newsman's Privilege: An Empirical Study*, 70 MICH. L. REV. 229, 284 (1971) (arguing that sources view source protection to be more valuable than content protection in order for reporters to appear to be independent and not a government arm).

33 *See* Randall D. Eliason, *Leakers, Bloggers, and Fourth Estate Inmates: The Misguided Pursuit of a Reporter's Privilege*, 24 CARDOZO ARTS & ENT. L.J. 385, 418 (2006) ("No one can say for certain whether any significant number of confidential sources will be deterred from coming forward in the absence of a privilege."); Jones, *supra* note 24, at 367 (recognizing the subpoena issue has been speculated upon frequently).

34 *See* Byers, *supra* note 1 ("Some formerly forthcoming sources have grown reluctant to return phone calls, even on unclassified matters, and, when they do talk, prefer in-person conversations that leave no phone logs, no emails, and no records of entering and leaving buildings, reporters and watchdogs said."); *see also* Brief for ABC Inc. et al. as Amici Curiae in Support of Intervener-Appellee James Risen and in Support of Affirmance of the Decision Below at 23, United States v. Sterling, 724 F.3d 482 (2013) (No. 11-5028), *available at* https://www.documentcloud.org/documents/296540-media-amici-brief-sterling-risen.html (emphasizing importance of journalism's role in disseminating information to the public and that revealing confidential sources would limit this role). For instance, Carl Bernstein said Mark Felt "'would not have agreed to be a source for our Watergate reporting had Mr. Woodward and I not been able to assure him total and absolute confidentiality.'" *Id.* at n.10.

35 Byers, *supra* note 1.

36 *Id.* ("'There is a chilling effect, but it's as if you were gradually lowering the temperature of your freezer. There's been a creeping, incremental phenomenon here for several years,' said Adam Zagorin, a Senior Fellow at The Project On Government Oversight. 'The chill is cumulative, and the implication is that the government believes that the chilling effect—in order to be effective—needs to be periodically applied, to be imposed on multiple occasions.'").

37 *Id.* ("'The chilling effect really started with the Bradley Manning episode,' one national security reporter told POLITICO, referring to the U.S. Army soldier" who was convicted in 2013 and is currently serving thirty-five years for "leaking classified videos, army reports, and diplomatic cables to WikiLeaks.").

As newspapers shrink and digital journalists grow, the problems with "poisoned" atmospheres and reluctant sources exist in the digital sphere as well. These threats are substantial and warrant statutory protection for journalists—traditional, citizen, and digital—from revealing confidential sources.[38] Thus, a wide protection is critical to a functioning democratic society:

> [The] protection [of confidential sources] is necessary to ensure a free and vital press, without which an open and democratic society would be impossible to maintain. . . . If reporters were routinely required to divulge the identities of their sources, the free flow of newsworthy information would be restrained and the public's understanding of important issues and events would be hampered in ways inconsistent with a healthy republic.[39]

Limitations on the press hamper a citizen's participation in the government; "[a] citizen's right to vote, our most basic democratic principle, is rendered meaningless if the ruling government is not subjected to a free press's 'organized, expert scrutiny of government.'"[40]

B. History of Reporter's Privilege

Reporters have invoked a right to keep sources confidential throughout the history of the United States. In one of the first reported cases of reporter's privilege, John Peter Zenger refused to reveal the anonymous authors of political pamphlets in a libel trial in the eighteenth century.[41] This privilege of refusing to reveal a source during legal proceedings was raised multiple times in the 1800s, in cases by traditional reporters that were part of institutional news media.[42] A reporter invoked his reporter's privilege in a court case in 1848 when he refused to disclose the name of a con-

38 Stewart, *supra* note 17, at 634 (quoting John Adams who wrote that "[t]he liberty of the press is essential to the security of the state" in the Free Press Clause of the Massachusetts Constitution).

39 Ashcroft v. Conoco, Inc., 218 F.3d 282, 287 (4th Cir. 2000); *see also* United States v. Sterling, 724 F.3d 482, 520 (4th Cir. 2013) (Gregory, J., dissenting) ("Undoubtedly, the revelation of some government secrets is too damaging to our country's national security to warrant protection by evidentiary privilege. Yet the trial by press of secret government actions can expose misguided policies, poor planning, and worse. More importantly, a free and vigorous press is an indispensable part of a system of democratic government.").

40 *Sterling*, 724 F.3d at 520–21 (quoting Stewart, *supra* note 17, at 634).

41 *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 361 (1995) (Thomas, J., concurring) (elaborating on the Zenger trial); *see also* Sandra Davidson & David Herrera, *Needed: More than a Paper Shield*, 20 WM. & MARY BILL RTS. J. 1277, 1296–97 (2012) (discussing the John Peter Zenger trial); Mary-Rose Papandrea, *Citizen Journalism and the Reporter's Privilege*, 91 MINN. L. REV. 515, 533–34 (2007) (explaining colonial examples of reporters' privilege, including John Peter Zenger, who refused to reveal one of his sources during a libel accusation in 1734).

42 Sam J. Ervin, Jr., *In Pursuit of a Press Privilege*, 11 HARV. J. ON LEGIS. 233, 235–36 (1974) (explaining early reporter's privilege cases including an 1857 case where a reporter refused to reveal sources to a House committee investigating congressmen taking bribes).

gressman who handed over documents regarding a treaty with Mexico.[43] The reporter was held in contempt for refusing to reveal this information to the Senate.[44] The privilege first received statutory protection in the nineteenth century when Maryland passed the first shield law in 1896.[45] The first U.S. senatorial bill regarding a federal shield law was not proposed until 1929.[46] Congress attempted multiple times to codify a shield law in the following decade and a half in order to promote a free press that encouraged disclosure.[47] However, Congress did not succeed.[48] Those who opposed such laws invoked the maxim that the "public 'has a right to every man's evidence.'"[49] Furthermore, Congressmen did not think that journalists should be exempt. Although assurances of confidentiality created some level of confidence between the reporter and his source, opponents of a statutory protection did not think these assurances were important enough to create legislation specifically protecting a journalist from revealing a source.[50] Rather, under this argument, the value of the information to the government in order to solve crimes or protect the safety of the American public outweighs the interest of the individual journalist.[51]

Yet, even in light of limited success of a reporter's privilege, reporters continued to occasionally raise the privilege to refuse to testify. In 1938, in *Garland v. Torre*,[52] a reporter's privilege was asserted on First Amendment grounds in the Second Circuit. The court held:

> As to the Constitutional issue, we accept at the outset the hypothesis that compulsory disclosure of a journalist's confidential sources of information may entail an abridgement of press freedom by imposing some limitation upon the availability of news. . . . But freedom of the press, precious and vital though it is to a free society, is not an absolute. What must be determined is whether the interest to be served by compelling the testimony of the witness in the present case justifies some impairment of this First Amendment freedom. . . . If an additional First Amendment liberty—the freedom of the press—is here involved, we do not hesitate to conclude that it too

43 *Ex parte* Nugent, 1 Hay. & Haz. 287, 18 F. Cas. 471 (D.C. Cir. 1848) (asking the reporter to reveal where he received a treaty).

44 *Id.* at 483.

45 Jane E. Kirtley, *Reporter's Privilege in the 21st Century*, 25 DEL. LAW. 12, 13 (Winter 2007–2008) (citing MD. CODE ANN., CTS & JUD. PROC. § 9–112 (2007)).

46 71 CONG. REC. 5832 (1929). Senator Capper introduced a bill "exempting newspaper men from testifying with respect to the source of certain confidential information." *Id.*

47 *See* Dean C. Smith, *Price v. Time Revisited: The Need for Medium-Neutral Shield Laws in an Age of Strict Construction*, 14 COMM. L. & POL'Y 235, 237–38 (2009) (scrutinizing modern shield laws).

48 *Id.*

49 Branzburg v. Hayes, 404 U.S. 665, 688 (1972).

50 LeGrand C. Tibbits, Note, *Evidence; Witnesses; Privilege of a Newspaper Reporter to Refuse to Testify Concerning Information Confidentially Received*, 22 CORN. L.Q. 115, 116–17 (1936).

51 *Branzburg*, 404 U.S. at 690–91.

52 259 F.2d 545 (2d Cir. 1958).

> must give place under the Constitution to a paramount public interest in the fair administration of justice.[53]

Invocation of reporter's privilege for traditional reporters became more pronounced in the 1960s and 1970s,[54] when the conflicts between reporters, law enforcement, and the courts became more tumultuous, and reporters believed they were being subpoenaed more frequently.[55] Congressmen revisited the effort to try to pass statutory protection for traditional media reporters in 1970, but again did not succeed.[56] Against this backdrop, a reporter's privilege case finally reached the Supreme Court.[57]

II. Courts Address Reporter's Privilege

A. *Analysis of* Branzburg v. Hayes

The Supreme Court addressed the possibility of a First Amendment freedom of the press protection for reporters only once, in *Branzburg v. Hayes*, a consolidation of four lower court cases invoking First Amendment privileges for traditional reporters.[58] Two of these cases regarded newspaper reporter Paul Branzburg's refusal to reveal the identity of two individuals making hashish from marijuana in Jefferson County, Kentucky and individuals involved in drug use in Frankfurt, Kentucky.[59] The third case involved a television reporter who had been subpoenaed for information he gathered at a Black Panther's headquarters.[60] Similarly, the fourth case involved a reporter who had covered Black Panthers groups and received a subpoena

53 *Id.* at 548–49 (footnote omitted). Justice Stewart wrote this opinion rejecting the reporter's privilege claim in this case. Later, he wrote the dissent in *Branzburg v. Hayes* recognizing a limited constitutional protection. He argued a privilege would exist in the consolidated cases of *Branzburg* and offered a three-pronged balancing test to decide whether a reporter could claim a privilege. *Branzburg*, 408 U.S. at 725–28 (Stewart, J., dissenting).

54 The Pentagon Papers, a report about Vietnam, is just one example of the tension between reporters and the government. They were leaked to the public beginning in 1971. *See, e.g.*, *Pentagon Papers*, Nat'l Archives, http://www.archives.gov/research/pentagon-papers/ (last visited Dec. 20, 2013).

55 Ervin, *supra* note 42, at 243 (explaining journalists' efforts to use courts, rather than lobby Congress to pass statutes to solidify a privilege); Jones, *supra* note 24, at 393 (addressing changing media behaviors in light of threats of subpoenas).

56 116 Cong. Rec. 6102 (1970) (statements of Sen. McIntyre). This bill proposed a conditional privilege to protect confidential information and sources if a person was a "reporter, editor, commentator" working for a "newspaper, periodical, press association, newspaper syndicate, wire service, or radio or television station." *Id.* at 6103.

57 *Branzburg*, 408 U.S. at 665.

58 The question presented was: "Whether a newspaper reporter who has published articles about an organization can, under the First Amendment, properly refuse to appear before a grand jury investigating possible crimes by members of that organization who have been quoted in the published articles." *Id.* at 679 n.16.

59 *Id.* at 667, 669.

60 *Id.* at 672–73.

for notes and recordings of the group members.[61] Analyzing the privilege from a First Amendment perspective, the Court decided in a 5-4 vote[62] that the First Amendment did not support a reporter's privilege in grand jury proceedings.[63] Justice White, writing for the majority, stated "[i]t is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statues of general applicability."[64] Thus, reporters are "not exempt from the normal duty of appearing before a grand jury and answering questions relevant to a criminal investigation," and reporters will be treated similarly to other citizens.[65] The Court cited *Garland v. Torre* and acknowledged that in that case "the claim was denied, and this [First Amendment privilege] has been almost uniformly rejected since then."[66]

The Court rejected the argument that reporters' access to confidential information and sources to report about controversial or important topics to the public outweighed the public safety interest in the disclosure of relevant information for grand jury proceedings.[67] Although the reporters raised arguments suggesting the press would be stifled without this protection, the Court believed that journalists' sources who were "not involved with criminal conduct and without information relevant to grand jury investigations"[68] would still share information with reporters just as they had in the past.[69]

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61 *Id.* at 675.

62 *Compare In re* Grand Jury Proceedings, 5 F.3d 397, 400 (9th Cir. 1993) ("It is important to note that Justice White's opinion is *not* a plurality opinion. Although Justice Powell wrote a separate concurrence, he also signed Justice White's opinion, providing the fifth vote necessary to establish it as the majority opinion of the court."), *and* N.Y. Times v. Gonzales, 459 F.3d 160, 172 (2006) ("Justice White wrote the majority opinion. Justice Powell, although concurring in the White opinion, wrote a brief concurrence."), *with In re* Grand Jury 87-3 Subpoena Duces Tecum, 955 F.2d 229, 232 (4th Cir. 1992) ("The language quoted above appears in a four-Justice plurality opinion. Justice Powell concurred in a separate opinion."). Judge Posner addressed this confusion:

> [C]asting the essential fifth vote for the "majority" opinion while also writing a separate opinion qualifying the Court's opinion is bad practice because it leaves the reader uncertain whether the majority opinion or the concurring opinion should be regarded as the best predictor of how the Court would decide a similar case in the future.

Richard A. Posner, *A Political Court*, 119 HARV. L. REV. 32, 95 (2005).

63 *Branzburg*, 408 U.S. at 685, 690. While this holding was only for criminal grand juries, lower federal and state courts used the reasoning for testimony in all stages of court proceedings. *See* Ervin, *supra* note 42, at 240.

64 *Branzburg*, 408 U.S. at 682.

65 *Id.* at 685; *see id.* at 702 (explaining that reporters should not be granted more privilege from furnishing information at grand jury proceedings than other citizens).

66 *Id.* at 686.

67 *See id.* at 692.

68 *Id.* at 699.

69 *Id.* at 691 ("Nothing before us indicates that a large number or percentage of *all* confidential news sources . . . would in any way be deterred by our holding that the Constitution does not, as it never has, exempt the newsman from performing the citizen's normal duty of appearing and furnishing information relevant to the grand jury's task."). This

The potential that a reporter would later have to reveal the source's identity and information in a court proceeding would not greatly affect that potential source's willingness to share information, according to the Court.[70]

Additionally, determining if any privilege existed in each individual case would provide the judiciary with difficult questions and decisions, especially regarding who would be covered under a constitutional protection.[71] At the time of *Branzburg*, privilege supporters focused on securing a protection for those who worked for traditional media outlets.[72] However, the court recognized that determining who was a journalist could raise issues in the future. The court explained:

> Sooner or later, it would be necessary to define those categories of newsmen who qualified 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 of the large metropolitan publisher . . . .[73]

The reporters were not claiming an absolute privilege offering unlimited protection from ever revealing their sources, but rather desired a conditional privilege that could be overcome in situations where a compelling need for the source outweighed the privilege.[74] The privilege could be overcome in situations of "compelling need."[75] This balancing inquiry also would require frequent judicial interpretation; this, too, contributed to the Court's finding against a First Amendment reporter's privilege.[76]

The Court's rejection of a constitutional reporter's privilege did not prohibit states from creating their own protections or shield laws under their own constitutions, allowing states to craft laws that applied to the relationship between the press and law enforcement.[77] The Court additionally stated that Congress could create a statutory protection of the press "as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate."[78]

Although the majority did not recognize a constitutional protection in *Branzburg* or in other situations, Justice Powell hesitated in ruling against a

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argument is used in the debate against a statutory protection for reporters' sources. *See, e.g.*, *Free Flow of Information Act of 2007: Hearing on H.R. 2012 Before the H. Comm. on the Judiciary*, 110th Cong. 54 (2007) (prepared statement of Randall D. Eliason, Professor, George Washington University Law School) ("I submit there is little or no evidence that this chilling effect [from lack of reporter's privilege] exists, and thus little reason to believe that any real benefits would flow from the passage of a privilege law.").

70 *Branzburg*, 408 U.S. at 691.

71 *Id.* at 703-04.

72 *See id.* at 704.

73 *Id.* This statement is predictive of the current debate over who is a reporter, how to determine if one is a reporter, and who reporter's privilege laws actually protect.

74 *Id.* at 702.

75 *Id.*

76 *Id.*

77 *Id.* at 706.

78 *Branzburg*, 408 U.S. at 706.

constitutional reporter's privilege.[79] Powell's brief concurrence emphasized the limited nature of the holding in *Branzburg*, noting that the majority's opinion did not establish an absolute bar on reporter's privilege protections.[80] He argued that courts should apply a case-by-case basis analysis to "balance . . . freedom of the press"[81] against "the obligation of all citizens to give relevant testimony with respect to criminal conduct."[82] When law enforcement acts in bad faith, "courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection."[83] This concurrence did not produce a recognized reporter's privilege in this case. But, the ambiguity of Justice Powell's concurrence led Justice Stewart to say the Court rejected the reporters' claims "by a vote of five to four, or, considering Mr. Justice Powell's concurring opinion, perhaps by a vote of four and a half to four and a half."[84]

Justices Stewart, Brennan, and Marshall, dissenting in *Branzburg*, did not want to corrupt the constitutional protections of the press "by attempting to annex the journalistic profession as an investigative arm of government."[85] The dissent argued that refusing to recognize the confidential relationships between reporters and sources would stifle the "free flow of information to the public."[86] Thus, the dissent developed a three-pronged test to decide whether a reporter—only those individuals part of traditional media entities—qualified for a reporter's privilege.[87] This test considered: 1) "probable cause" that a reporter has relevant information regarding the crime, perpetrators, or sources who have information about the crime; 2) the lack of alter-

79 BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 223 (1979) ("After much hesitation, Powell finally decided to give White a fifth vote for an opinion . . . . But Powell's vote came with a separate concurrence, with qualifications that suggested that the issue might have to be reconsidered if reporters were harassed by grand juries."). However, Powell's discovered notes regarding the *Branzburg* case indicate that Powell did not think that reporters should be protected under a First Amendment privilege. He wanted to "make clear in an opinion—unless the court's opinion is clear—that there is a *privilege* analogous to an evidentiary one." Adam Liptak, *A Justice's Scribbles on Journalists' Rights*, N.Y. TIMES, Oct. 7, 2007, at C4. Powell was concerned about constitutional issues regarding who are "newsmen" and "how to define" newsmen. *Id.*

80 *Branzburg*, 408 U.S. at 709 (Powell, J., concurring).

81 *Id.* at 710. Note that Powell used the word "press," which protected the institutions engaging in journalism and those working for an established institution, rather than individuals engaging in reporting. *Id.*

82 *Id.* Later analysis from Justice Powell of *Branzburg* focused on balancing the interests between freedom of the press and testimony for effective administration of justice. Saxbe v. Wash. Post Co., 417 U.S. 843, 859–60 (1974) (Powell, J., concurring) ("[A] fair reading of the majority's analysis in *Branzburg* makes plain that the result hinged on an assessment of the competing societal interests involved in that case rather than on any determination that First Amendment freedoms were not implicated.").

83 *Branzburg*, 408 U.S. at 710.

84 Stewart, *supra* note 17, at 635.

85 *Branzburg*, 408 U.S. at 725 (Stewart, J., dissenting).

86 *Id.*

87 *Id.* at 743.

native means for the government to acquire information that are "less destructive of First Amendment rights;" and 3) a "compelling and overriding interest in the information."[88] The dissent did not find issue with creating a rule that required judicial intervention in deciding when this constitutional protection could be invoked in order to "strik[e] the proper balance between the public interest in the efficient administration of justice and the First Amendment guarantee of the fullest flow of information."[89] The dissent did not specifically address who would be covered under the reporter's privilege, but referenced newsmen and reporters, thus creating a more limited scope than that of this Note's proposal.[90] Ultimately, the dissent was optimistic that some privilege would be recognized in the future because "Justice Powell's enigmatic concurring opinion gives some hope of a more flexible view in the future."[91]

Additionally, Justice Douglas filed a separate dissent.[92] Douglas went further than Stewart's dissent, arguing for an absolute constitutional privilege for reporters, unless the reporter is accused of a crime.[93] Without such a strong protection, he argued, the press would become a parrot of government facts and opinions, "pass[ing] on to the public the press releases which the various departments of government issue."[94] Justice Douglas's proposed absolute privilege would only cover traditional reporters and members of the media.[95]

B. The Circuits' Interpretation of Branzburg

Justice Powell's concurrence has led the circuits to interpret *Branzburg*'s holding in different ways: Some recognize a privilege by following the concurrence and treating the majority as only a plurality opinion; some recognize a privilege only in certain situations; and some deny a privilege and follow the majority opinion.[96] Judges recognize the confusion over interpret-

88 *Id.*

89 *Id.* at 738.

90 *See id.* at 731.

91 *Id.* at 725.

92 *See id.* at 711 (Douglas, J., dissenting).

93 *See id.* at 712. Douglas did not support a compelling need for disclosure:

> It is my view that there is no "compelling need" that can be shown which qualifies the reporter's immunity from appearing or testifying before a grand jury, unless the reporter himself is implicated in a crime. His immunity in my view is therefore quite complete, for, absent his involvement in a crime, the First Amendment protects him against an appearance before a grand jury and if he is involved in a crime, the Fifth Amendment stands as a barrier.

Id.

94 *Id.* at 722.

95 *Id.* at 711–12 (referring to "professional journalists").

96 *See* McKevitt v. Pallasch, 339 F.3d 530, 532 (7th Cir. 2003) (explaining that many cases hold "there is a reporter's privilege, though they do not agree on its scope" and listing cases accepting or repudiating reporter's privilege).

ing what *Branzburg* held. As Albert Diaz, U.S. Fourth Circuit Judge, said, the *Branzburg* holding was as "clear as mud."[97]

While a few circuits seem to recognize a broad enough privilege to cover citizen and digital journalists and bloggers, the cases have primarily focused on the existence of a reporter's privilege for traditional media outlets under First Amendment privilege. The limited focus of circuits' interpretations leads to a greater need for federal statutory protection in order to address the realities of the growing online landscape. A broad protection is needed in order to create a functional protection.

1. Limited Privilege

Circuits have recognized a qualified reporter's privilege, including the Third Circuit, which acknowledged the existence of a qualified reporter's privilege in *In re Madden*.[98] There, the court emphasized the intent of the individual in reporting news, rather than the "mode of dissemination" of news, when granting a privilege.[99] This inquiry into intent seems to be broad enough to protect various citizen and digital journalists. The Second Circuit interpreted *Branzburg* to reject only an absolute privilege.[100] It also recognized the medium was not the key issue in determining whether the privilege applied, explaining that "[t]he intended manner of dissemination may be by newspaper, magazine, book, public or private broadcast medium, handbill or the like, for '[t]he press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.'"[101] Instead "[t]he primary relationship between the one seeking to invoke the privilege and his sources must have as its basis the intent to disseminate the informa-

97 Michael Calderone & Dan Froomkin, *'Reporter's Privilege' Under Fire from Obama Administration Amid Broader War on Leaks*, HUFFINGTON POST (May 18, 2012) (internal quotation marks omitted), http://www.huffingtonpost.com/2012/05/18/reporters-privilege-obama-war-leaks-new-york-times_n_1527748.html.

98 151 F.3d 125, 128 (3d Cir. 1998) ("[W]e have recognized that when a journalist, in the course of gathering the news, acquires facts that become a target of discovery, a qualified privilege against compelled disclosure appertains. . . . [W]e have never decided who qualifies as a 'journalist' for purposes of asserting it.").

99 *Id.* at 129–30 ("This [adopted] test does not grant status to any person with a manuscript, a web page or a film, but requires an intent at the inception of the newsgathering process to disseminate investigative news to the public. As we see it, the privilege is only available to persons whose purposes are those traditionally inherent to the press; persons gathering news for publication.")

100 *See* Von Bulow v. Von Bulow, 811 F.2d 136, 142 (2d Cir. 1987) ("The Court recognized, however, that a qualified privilege may be proper in some circumstances because *newsgathering* was not without First Amendment protection.").

101 *Id.* at 144 (quoting Lovell v. City of Griffin, 303 U.S. 444, 452 (1938)). In *Lovell*, the City of Griffin tried to argue that nothing suggested the "appellant is a member of the press." Brief of Appellee at 12, *Lovell*, 303 U.S. 444 (No. 391). "But the brief cited no precedents supporting the view that the freedom of the press protected only 'member[s] of the press'—I suspect because no such precedents were available." Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459, 510 n.230 (2012).

tion to the public garnered from that relationship."[102] This language also supports a protection for a broad number of journalists.

While the Eleventh Circuit has recognized a qualified reporter's privilege, disclosure can be required if the government meets the burden of a three-part test finding "substantial evidence":

> [1] that the challenged statement was published and is both factually untrue and defamatory; [2] that reasonable efforts to discover the information from alternative sources have been made and that no other reasonable source is available; and [3] that knowledge of the identity of the informant is necessary to proper preparation and presentation of the case.[103]

In *Price v. Time*, the Eleventh Circuit focused on the second factor that information could not be compelled until "reasonable efforts to discover the information from alternative sources have been made," finding in this case the plaintiff had not met this burden.[104] However, when analyzing this issue under the state statute, the Eleventh Circuit also upheld a plain language reading of Alabama's statute, which protected "newspapers and newspapermen."[105] Thus, a reporter's privilege was rejected for a *Sports Illustrated* reporter under Alabama statute.[106]

2. Special Circumstances

While some circuits recognize a privilege in both criminal and civil cases,[107] other circuits have differentiated between criminal and civil proceedings, granting reporters greater privileges in civil proceedings.[108] These courts agree "the civil litigant's interest in disclosure should yield to the journalist's privilege."[109] Furthermore, some courts have recognized a privilege against reporters testifying regarding unpublished information or research,

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102 *Von Bulow*, 811 F.2d at 145.

103 Price v. Time, Inc., 416 F.3d 1327, 1343 (11th Cir. 2005) (quoting Miller v. Transamerican Press, Inc. (*Miller II*), 628 F.2d 932 (5th Cir. 1980)) (establishing a test similar to the test in *Branzburg*'s dissent).

104 *Id.* at 1346–47.

105 *Id.* at 1335–36 ("It seems to us plain and apparent that in common usage 'newspaper' does not mean 'newspaper and magazine.'").

106 *Id.* at 1341–42.

107 *See* United States v. Burke, 700 F.2d 70, 77 (2d Cir. 1983) ("We see no legally-principled reason for drawing a distinction between civil and criminal cases when considering whether the reporter's interest in confidentiality should yield to the moving party's need for probative evidence. To be sure, a criminal defendant has more at stake than a civil litigant and the evidentiary needs of a criminal defendant may weigh more heavily in the balance. Nevertheless, the standard of review should remain the same.").

108 *See* Lee v. Dep't of Justice, 413 F.3d 53, 56–58 (D.C. Cir. 2005) (citing Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981)) (following circuit precedent recognizing a qualified privilege in civil cases).

109 *Zerilli*, 656 F.2d at 712 (balancing civil litigant's non-disclosure interest and the public interest in disclosure while "mindful of the preferred position of the First Amendment and the importance of a vigorous press").

even if confidentiality between reporter and the source does not exist.[110] This protection has been recognized because "[i]t is their independent status that often enables reporters to gain access, without a pledge of confidentiality, to meetings or places where a policeman or a politician would not be welcome."[111]

3. No Privilege

Other circuits have deemphasized Justice Powell's concurring opinion and instead only follow the majority opinion denying a reporter's privilege during grand jury proceedings.[112] The Ninth and Sixth Circuits have held that there is no reporter's privilege in grand jury proceedings.[113] The D.C. Circuit focused on Justice White's majority opinion in *New York Times* reporter Judith Miller's case rejecting a reporter's privilege,[114] noting that regardless of "whatever Justice Powell specifically intended, he joined the majority."[115] The court provided, "Not only did he join the majority in name, but because of his joinder with the rest of a majority, the Court reached a result that rejected First Amendment privilege not to testify before the grand jury for reporters situated precisely like those in the present case."[116]

The Seventh Circuit did not see a need for a specific reporter's privilege, either based on constitutional or statutory protection.[117] As Judge Richard Posner explained, "[R]ather than speaking of privilege, courts should simply make sure that a subpoena duces tecum directed to the media, like any other subpoena duces tecum, is reasonable in the circumstances, which is the general criterion for judicial review of subpoenas."[118] For example, reporters would not have to testify in instances where the government was harassing

110 Shoen v. Shoen, 5 F.3d 1289, 1295 (9th Cir. 1993) ("Accordingly, we hold that the journalist's privilege applies to a journalist's resource materials even in the absence of the element of confidentiality. We add, however, that the absence of confidentiality may be considered in the balance of competing interests as a factor that diminishes the journalist's, and the public's, interest in non-disclosure."); United States v. Cuthbertson, 630 F.2d 139, 147 (3d Cir. 1980) ("[W]e hold that the privilege extends to unpublished materials . . . .").

111 *Shoen*, 5 F.3d at 1295.

112 *See* Papandrea, *supra* note 41, at 555 n.228 (explaining a few circuit cases that minimize Powell's concurrence "as largely irrelevant" and focus on White's majority opinion).

113 *See In re* Grand Jury Proceedings, 5 F.3d 397, 402–03 (9th Cir. 1993) (denying a First Amendment and common law privilege); *In re* Grand Jury Proceedings, 810 F.2d 580, 584–86 (6th Cir. 1987) (denying a reporter's privilege on First Amendment and Equal Protection grounds).

114 *See In re* Grand Jury Subpoena, Judith Miller, 438 F.3d 1141, 1149 (D.C. Cir. 2006).

115 *Id.*

116 *Id.*

117 McKevitt v. Pallasch, 339 F.3d 530, 533 (7th Cir. 2003) ("We do not see why there need to be special criteria merely because the possessor of the documents or other evidence sought is a journalist.").

118 *Id.*

the press rather than issuing good-faith subpoenas.[119] This opinion caused concern among the many supporters of a protection for journalists because Judge Posner did not separate journalists from other individuals.[120] The court believed protection through the consideration of the reasonableness of the subpoena would be sufficient.[121] Theoretically, this would offer only limited protection to both traditional and citizen journalists because of the reasonableness analysis.

Upholding a reporter's privilege against testifying after he directly witnesses a potential crime has not gained much support in federal court.[122] Courts have held that when reporters witness a crime, they are similar to any citizen who witnesses a crime, and they have a duty to testify before a grand jury.[123]

4. Current Case

Recently, *New York Times* reporter James Risen unsuccessfully invoked a reporter's privilege in the Fourth Circuit.[124] The DOJ was trying to force Risen to testify in the trial against former CIA employee Jeffrey Sterling, who had been charged with disclosing classified information to a reporter.[125] "While Justice Department regulations instruct prosecutors to 'ordinarily refrain' from issuing subpoenas to the news media, the rules also allow the attorney general to make exceptions," which the DOJ invoked in this case.[126] Risen fought against testifying and said:

> [The DOJ says] there is no reporter's privilege. . . . It's a fairly basic constitutional issue for the press, whether or not there is a reporter's privilege. It's something a lot of people outside the press don't really understand, don't

119 *Id.* (explaining that subpoenas with the intent "to disrupt a reporter's relationship with his news sources would have no justification" (quoting Branzburg v. Hayes, 408 U.S. 665, 707–08 (1972)).

120 *See* Michael Miner, *Reporter's Privilege in Peril; Still Not Buying It, Steve*, CHI. READER (Dec. 9, 2004), http://www.chicagoreader.com/chicago/reporters-privilege-in-peril-still-not-buying-it-steve/Content?oid=917464 ("*McKevitt* arguably overrules [the] entire body of [federal common law and First Amendment privilege] law. . . . [*Branzburg*] perched journalists on the thinnest ice imaginable, but time and custom thickened it. Or so journalists thought until Posner cracked it.").

121 *Id.*

122 *See In re* Ziegler, 550 F. Supp. 530, 532–33 (W.D.N.Y. 1982) (holding that a reporter had to testify about a crime he witnessed).

123 *Id.*

124 United States v. Sterling, 818 F. Supp. 2d 945, 959–60 (E.D. Va. 2011), *rev'd in part by* 724 F.3d 482, 497, 510 (4th Cir. 2013).

125 Charlie Savage, *Subpoena Issued to Writer in C.I.A.-Iran Leak Case*, N.Y. TIMES, May 25, 2011, at A18, *available at* http://www.nytimes.com/2011/05/25/us/25subpoena.html; *see also* Glenn Greenwald, *Climate of Fear: Jim Risen v. the Obama Administration*, SALON (June 23, 2011, 5:24 AM), http://www.salon.com/2011/06/23/risen_3/ (explaining Risen's work that prompted the Obama administration's investigation and their subsequent subpoena of Risen in the Jeffrey Sterling case).

126 Savage, *supra* note 125.

> really care about. I think the basic issue is whether you can have a democracy without aggressive investigative reporting[,] and I don't believe you can. So that's why I'm fighting it.[127]

The Fourth Circuit reversed the district court and rejected any reporter's privilege—either absolute or qualified—saying, "In *Branzburg v. Hayes*, the Supreme Court 'in no uncertain terms rejected the existence of such a privilege.'"[128] The Fourth Circuit rejected the argument that this would have a chilling effect on newsgathering, just as the *Branzburg* court did.[129] The court also held that Justice Powell's concurrence rejected Justice Stewart's dissenting view and joined in Justice White's opinion.[130]

The court acknowledged that the Fourth Circuit had previously held, in the civil context, that the court must undertake a three-part balancing test to determine whether a reporter must disclose a source.[131] The test considered "'(1) whether the information is relevant, (2) whether the information can be obtained by alternative means, and (3) whether there is a compelling interest in the information.'"[132] This test was not applicable to Risen because Sterling's trial was a criminal, not a civil, proceeding.[133] And even if the test were applicable, the court said that Risen's information was relevant, that it could not be obtained by other means, and that the government had compelling interest in the information.[134]

Next, the court rejected a privilege between a reporter and his source under Federal Rules of Evidence Rule 501.[135] "Rule 501 seems to be more

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127 Calderone & Froomkin, *supra* note 97 (quoting James Risen).

128 United States v. Sterling, 724 F.3d 482, 492 (4th Cir. 2013) (citation omitted) (quoting *In re* Grand Jury Subpoena, Judith Miller, 438 F.3d 1141, 1146 (D.C. Cir. 2006)); *see id.* at 505 ("If Risen is to be protected from being compelled to testify and give what evidence of crime he possesses, in contravention of every citizen's duty to do so, we believe that decision should rest with the Supreme Court, which can revisit *Branzburg* and the policy arguments it rejected, or with Congress, which can more effectively and comprehensively weigh the policy arguments for and against adopting a privilege and define its scope.").

129 *Id.* at 493–94, 496 ("In sum, the *Branzburg* Court declined to treat reporters differently from all other citizens who are compelled to give evidence of criminal activity, and refused to require a 'compelling interest' or other special showing simply because it is a reporter who is in possession of the evidence. . . . The *Branzburg* Court considered the arguments we consider today . . . . The reporter must appear and give testimony just as ever other citizen must. We are not at liberty to conclude otherwise.").

130 *Id.* at 495 ("Justice Powell's concurrence expresses no disagreement with the majority's determination that reporters are entitled to no special privilege that would allow them to withhold relevant information about criminal conduct without a showing of bad faith or other such improper motive, nor with the majority's clear rejection of the three-part compelling interest test advocated by the *Branzburg* reporters.").

131 *Id.* at 496.

132 *Id.* at 496–97 (quoting LaRouche v. Nat'l Broad. Co., 780 F.2d 1134, 1139 (4th Cir. 1986)).

133 *Id.*

134 *Id.* at 505–10 (using the *LaRouche* analysis to find that disclosure would be compelled).

135 *Id.* at 499–500.

notable for what it failed to do, than for what it did. The proposed Rules originally 'defined [nine] specific nonconstitutional privileges which the federal courts [would have been compelled to] recognize' . . . ."[136] However, "[t]his exclusive list of enumerated privileges was ultimately rejected," and a reporter-source privilege was not included in the enumerated list.[137] Lastly, "Risen's reliance upon state statutes and decisions that have adopted a reporter's shield also fails to persuade us that we can or should create a federal common-law privilege."[138] The court was also concerned about judicial intervention and stated:

> The *Branzburg* Court's observations regarding the practical difficulties of defining and managing a reporter's privilege, and its "unwilling[ness] to embark the judiciary on a long and difficult journey to such an uncertain destination," are well-taken, and we see nothing in "reason [or] experience" that would lead us to a contrary view today.[139]

Judge Gregory dissented from this holding and found that Powell's concurrence was about "as clear as mud."[140] He stated that the Fourth Circuit had established that the three-part balancing test that the circuit recognized in the civil context could attach to reporters in the criminal context in certain situations.[141] A qualified reporter's privilege in a criminal context would use the three-part test; in cases involving "questions of national security," the court would analyze two additional factors: "the harm caused by the public dissemination of the information, and the newsworthiness of the information conveyed."[142] Gregory did not establish who would be allowed to claim a reporter's privilege, but only that "Risen—a full-time reporter for a national news publication, *The New York Times*—falls into the category of people who should be eligible to invoke the privilege."[143] Risen's testimony about his sources was "by no means pertinent to the Government proving Sterling guilty."[144] The government could establish evidence without using Risen, "rendering Risen's testimony regarding his confidential sources

136 *Id.* at 500 (alterations in original) (quoting FED. R. EVID. 501 advisory committee's note).

137 *Id.*

138 *Id.* at 504.

139 *Id.* at 505 (alteration in original) (quoting Branzburg v. Hayes, 408 U.S. 665, 703 (1972)).

140 *Id.* at 520, 523 (Gregory, J., dissenting) (discussing the confusion over Justice Powell's concurrence in *Branzburg*); *see also id.* ("Given this confusion, appellate courts have subsequently hewed closer to Justice Powell's concurrence—and Justice Stewart's dissent—than to the majority opinion, and a number of courts have since recognized a qualified reporter's privilege, often utilizing a three-part balancing test.").

141 *Id.* at 524 ("Thus, although the reporter's privilege was not recognized in 'the circumstances of this case,' it is clear to me that we have acknowledged that a reporter's privilege attaches in criminal proceedings given the right circumstances." (quoting *In re* Shain, 978 F.2d 850, 854 (4th Cir. 1992))).

142 *Id.* at 524–25.

143 *Id.* at 525.

144 *Id.* at 526.

superfluous."[145] And "the Government has failed to demonstrate a sufficiently compelling need for Risen's testimony."[146] Because these factors favored a privilege, Gregory then determined that "the newsworthiness of the leaked information appears to be substantial."[147] The record was "not well developed" to determine the balance of the newsworthiness against the harm the leak caused.[148] There was no fact-finding in the district court, and "the Government has not clearly articulated the nature, extent, and severity of the harm resulting from the leak."[149]

Gregory agreed with the district court,[150] which held that the Fourth Circuit's qualified First Amendment protection was applicable to Risen.[151] In the district case, the judge determined that Risen met the Fourth Circuit's three-pronged test, which the court of appeals used, and that Risen should receive a qualified privilege even in a criminal case.[152] The court stated, "A criminal trial subpoena is not a free pass for the government to rifle through a reporter's notebook."[153]

III. Statutory and Administrative Responses

A. Congress

Congress attempted to respond to the Supreme Court's invitation for the passage of a federal shield law. In 1972, Senator Alan Cranston introduced a shield law bill providing an absolute privilege in federal and state proceedings.[154] This bill was among the repeated efforts to introduce a bill in the 1970s and 1980s,[155] although "[i]t appears that only one bill was voted

145 *Id.* at 527.

146 *Id.* at 528.

147 *Id.* at 528. "This information is not extraneous. Quite the opposite, it portends to inform the reader of a blundered American intelligence mission in Iran." *Id.* at 529.

148 *Id.* at 530.

149 *Id.*

150 *Id.*

151 United States v. Sterling, 818 F. Supp. 2d 945, 951–54 (E.D. Va. 2011) (citing LaRouche v. Nat'l Broad. Co., 780 F.2d 1134, 1139 (4th Cir. 1986), which recognized a qualified reporter's privilege and set forth a balancing test for disclosure), *rev'd in part by* 724 F.3d 482 (4th Cir. 2013); *see* Ashcraft v. Conoco, Inc., 218 F.3d 282, 287–88 (4th Cir. 2000) (applying *LaRouche*'s balancing test). The District Court quashed the subpoena requirements of Risen revealing his source. *Sterling*, 818 F. Supp. 2d at 959–60.

152 *See Sterling*, 818 F. Supp. 2d at 947, 959–60.

153 *Id.* at 960.

154 *See* 118 Cong. Rec. 23,598 (1972); *see also* RonNell Andersen Jones, *Avalanche or Undue Alarm? An Empirical Study of Subpoenas Received by the News Media*, 93 Minn. L. Rev. 585, 594 (2008) (describing the immediate attempts to pass a shield law after *Branzburg*'s decision).

155 *See A Short History of Attempts to Pass a Federal Shield Law*, News Media & L., Fall 2004, at 9 [hereinafter *Short History*], *available at* http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-fall-2004/short-history-attempts-pass-f; *see also* Jones, *supra* note 154, at 594–95 (explaining the numerous efforts to propose a law protecting reporters).

out of committee."[156] Similar to later debates, Congress focused on balancing reporters' rights against security and justice concerns.[157] Ultimately, Congress did not pass a law protecting journalists.[158] It did not want to extend privileges to journalists largely because it did not perceive a need for this legislation.[159] During this time, the proposed bills varied in their approach, some focusing on "granting absolute privilege against disclosing 'any news, or sources of any news,'" others offering a qualified protection to keep source identification confidential.[160] Other unsuccessful attempts to pass a shield law occurred throughout 1970s and 1980s, but attention to passing a bill waned without high-profile cases that invoked a reporter's privilege in the 1990s.[161]

The need for a federal shield law gained more attention in the 2000s,[162] in part after Judith Miller was sentenced to up to eighteen months in jail for civil contempt for refusing to reveal her source of information related to the identity of covert CIA operative Valerie Plame.[163] Congressman Mike Pence proposed the Free Flow of Information Act of 2005 to protect journalists from revealing their confidential sources.[164] This version provided a qualified reporter's privilege for "an entity that disseminates information by print, broadcast, cable, satellite, mechanical, photographic, electronic, or other means . . . [including] an employee, contractor, or other person who gathers, edits, photographs, records, prepares, or disseminates news or information for such an entity."[165] However, the bill did not make it out of committee.[166]

The Free Flow of Information Act of 2007, another bill that provided a qualified privilege, passed the House with bipartisan support[167] and was

156 Jones, *supra* note 154, at 602.

157 *See id.* at 595–606 (outlining a brief description of the Congressional debates surrounding a federal shield law).

158 *Id.* at 602.

159 *See id.* at 595–606.

160 *See Short History*, *supra* note 155 (stating that these bills protected "media groups" and the "news media, the press, and freelancers").

161 Jones, *supra* note 154, at 602–03.

162 *Id.* at 603.

163 *See* Adam Liptak, *Reporter Jailed After Refusing to Name Source*, N.Y. TIMES, July 7, 2005, at A1. Vice President Dick Cheney's chief of staff, Lewis "Scooter" Libby, was ultimately discovered to have been Miller's source. *See* Carol D. Leonnig, *Journalist Cited for Contempt in Leak Probe*, WASH. POST, Oct. 8, 2004, at A02. Miller ultimately spent twelve weeks in jail. *See Jailed Reporter Reaches Deal in CIA Leak Probe*, CNN (Oct. 28, 2005), http://articles.cnn.com/2005-09-30/politics/cia.leak_1_joseph-tate-cia-leak-judith-miller?_s=PM:POLITICS.

164 H.R. 581, 109th Cong. § 4, 7 (2005).

165 *Id.* § 7.

166 Bill Summary & Status, 109th Congress (2005–2006), H.R. 581, THOMAS Library of Congress, http://thomas.loc.gov/cgi-bin/bdquery/z?d109:h.r.00581:.

167 The bill passed by a vote of 398–21. *See* Roll Call 973, 110th Cong. (Oct. 16, 2007), *available at* http://clerk.house.gov/evs/2007/roll973.xml.

voted out of the Senate Judiciary Committee.[168] However, the Senate never voted on the bill, rejecting the cloture motion.[169] The House version covered "a person who regularly gathers, prepares, collects, photographs, records, writes, edits, reports, or publishes news or information . . . for a substantial portion of the person's livelihood or for substantial financial gain."[170] The Senate bill offered broad protection and covered "a person who is engaged in journalism."[171]

Another attempt at a federal shield bill was made in 2008, receiving bipartisan sponsorship in the Senate.[172] The definition of "journalists" focused only on protecting legitimate journalists, not those posing as journalists—a concern in light of national security issues.[173] This version of the Free Flow of Information Act also included an intent requirement, stating that the individual invoking the privilege must have "such intent [to investigate in order to report] at the inception of the newsgathering process."[174]

Congress tried yet again in 2009 to pass a bill with bipartisan sponsorship.[175] The House bill, a reintroduction of the 2007 House bill,[176] was more restrictive, only protecting a person who "gathers, prepares, . . . writes, edits, [or] reports . . . for a substantial portion of the person's livelihood or for substantial financial gain."[177] The bill, with fifty cosponsors, passed the House, but died in the Senate.[178] At least one House Representative, Congressman John Conyers of Michigan, wanted to include bloggers, both "established" and "small, local blogs."[179] He recognized that:

> [W]hile I appreciate that the current definition of "covered person" will cover many responsible, established bloggers, more and more good and sig-

168 *See* Roll Call 191, 110th Cong. (Jul. 30, 2008), *available at* http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=110&session=2&vote=00191#position.

169 *See id.*; Walter Pincus, *Vote on Journalist Shield Stalled*, WASH. POST, July 31, 2008, at A17.

170 H.R. 2102, 110th Cong. § 4 (2007).

171 S. 2035, 110 Cong. § 8 (2007).

172 *See* 154 CONG. REC. 16,782–85 (2008).

173 The Congressional Record notes that the bill "provides that even if terrorists pose as journalists, they do not qualify for the act's protections." *Id.* at 16,783.

174 *Id.* at 16,785.

175 *See* S. 448, 111th Cong. (2009); H.R. 985, 111th Cong. (2009).

176 *See H.R. 985 (111th): Free Flow of Information Act of 2009, Related*, GOVTRACK.US (last visited Nov. 20, 2013), https://www.govtrack.us/congress/bills/111/hr985#related ("This bill was a re-introduction of H.R. 2102 (110th) (May 02, 2007).").

177 H.R. 985, 111th Cong. § 4 (2009).

178 *See S. 448 (111th): Free Flow of Information Act of 2009*, GOVTRACK.US, https://www.govtrack.us/congress/bills/111/s448 (last visited Dec. 20, 2013); *H.R. 985 (111th): Free Flow of Information Act of 2009*, GOVTRACK.US, http://www.govtrack.us/congress/bills/111/hr985 (last visited Dec. 20, 2013).

179 155 CONG. REC. E853–84 (2009) (statement of Rep. John Conyers, Jr.). Representative Conyers seemed to prefer the "functional" language of the 2009 Senate test regarding identifying journalists and suggested that this language should be considered and potentially adopted in the Bill's final form. *See id.* at E854.

> nificant reporting is being done by small, local bloggers[,] or by true volunteers who engage in journalism on their own time, but do so with credibility, professionalism, and integrity. Not all bloggers meet these standards, of course, but many do, and I would hope they will be entitled to the protections of the Act in its final form. Indeed, given the sensationalistic quality of a good deal of modern professional "journalism," it strikes me as somewhat arbitrary to exclude serious political reporters and commentators from coverage simply because of the technology they use or the price they charge.[180]

The bill did not receive unanimous support, and some did not want to grant special privileges to reporters.[181]

The 2009 Senate bill proposing a reporter's privilege included a broad definition of a "covered person" as "a person who is engaged in journalism."[182] The bill described "journalism" as "the regular 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 interest for dissemination to the public."[183] However, when this broad protection faced opposition and could not pass, Senate Bill 448 was amended, narrowing the protections and creating exceptions for national security and criminal investigations.[184] The Senate's definition again focused on the regularity of an individual's actions in engaging in journalism for a substantial part of his or her livelihood.[185] Under the

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180 *Id.* at E854.

181 155 CONG. REC. 4205 (2009).

182 S. 448, 111th Cong. § 8(2)(A) (2009).

183 *Id.* § 8(5).

184 S. 448, 111th Cong. (2009) (as reported by S. Comm. on the Judiciary, Dec. 11, 2009).

185 *Id.* The bill defined "[c]overed person":

> (A) means a person who—
>
> (i) with the primary intent to investigate events and procure material in order to disseminate to the public news or information concerning local, national, or international events or other matters of public interest, regularly gathers, prepares, collects, photographs, records, writes, edits, reports or publishes on such matters by—
>
> (I) conducting interviews;
>
> (II) making direct observation of events; or
>
> (III) collecting, reviewing, or analyzing original writings, statements, communications, reports, memoranda, records, transcripts, documents, photographs, recordings, tapes, materials, data, or other information whether in paper, electronic, or other form;
>
> (ii) has such intent at the inception of the process of gathering the news or information sought; and
>
> (iii) obtains the news or information sought in order to disseminate the news or information by means of print (including newspapers, books, wire services, news agencies, or magazines), broadcasting (including dissemination through networks, cable, satellite carriers, broadcast stations, or a channel or programming service for any such media), mechanical, photographic, electronic, or other means[.]

bill, individuals had to have primary "intent to investigate and procure material in order to disseminate to the public news or information" and have this "intent at the inception of the process of gathering the news or information sought."[186] The Obama administration supported the amendments, stating that Congress had appropriately addressed national security and criminal laws.[187] Even with the amendments narrowing the afforded protections, however, the bill died without a Senate vote after it was reported by committee.[188]

Again in 2011, Congress tried to pass a shield law—House Bill 2932, the "Free Flow of Information Act of 2011"—which Congressman Mike Pence again introduced.[189] As a re-introduction of the Free Flow of Information Act of 2005, the 2011 version of the bill narrowly defined a "covered person" as one who:

> *[R]egularly* 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.[190]

The bill contained exceptions to compel disclosure, including when "the party seeking to compel production of [ ] testimony or [a] document has exhausted all reasonable alternative sources" in criminal investigations, as well as to prevent terrorism and other national security issues.[191] The bill never made it out of committee.[192]

As a result of the DOJ tracking AP phone lines and Rosen's communications,[193] serious discussion about a federal reporter's privilege resurfaced in

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Id. § 11(2)(A).

186 *Id.* § 11(2)(A)(i)–(ii).

187 Letter from Dennis C. Blair, Dir. of Nat'l Intelligence, & Eric H. Holder, Jr., Attorney Gen., to Patrick J. Leahy, Chairman of the Senate Judiciary Comm. (Nov. 4, 2009), *available at* http://www.rcfp.org/newsitems/docs/20091105_155125_letter.pdf (commending the amendment for establishing a balancing test for disclosure, but stating that in issues of terrorism or national security, the court should not undertake a balancing test but instead should mandate disclosure).

188 *See S. 448 (111th): Free Flow of Information Act of 2009*, GovTrack.us, http://www.govtrack.us/congress/bills/111/s448 (last visited Nov. 20, 2013).

189 H.R. 2932, 112th Cong. (2011).

190 *Id.* § 4(2) (emphasis added).

191 *Id.* §§ 2(a)(1), 2(a)(3)(A).

192 *H.R. 2932 (112th): Free Flow of Information Act of 2011*, GovTrack.us, http://www.govtrack.us/congress/bills/112/hr2932 (last visited Nov. 10, 2013).

193 *See supra* notes 1–8 and accompanying text. As the Newspaper Association of America, composed of more than seventy media corporations and organizations, stated, "In the wake of revelations that the Justice Department secretly obtained the communications records of AP and Fox News reporters, a federal shield law is needed now more than ever to prevent government overreach and protect the public's right to know." Letter from the Newspaper Ass'n of Am. to Patrick Leahy, Chairman Senate Judiciary Comm., Chuck Grassley, Ranking Member of the Senate Judiciary Comm., & Members of the Senate Judi-

2013, with both the House and Senate presenting Free Flow of Information Acts. The 2013 Senate bill, with nineteen cosponsors,[194] passed the Senate Judiciary Committee in a vote of 13–5.[195] The bill voted out of the Judiciary Committee included a definition of a journalist who is related to a news entity as an "employee, independent contractor, or agent of an entity or service that disseminates news or information."[196] A covered journalist must have a "primary intent to investigate events and procure material in order to disseminate for the public news or information."[197] This intent had to exist at the "inception of gathering the news or information sought."[198]

The Senate bill had exceptions to a reporter's privilege, including "criminal conduct;" "to prevent death, kidnapping, substantial bodily injury, sex offenses against minors, or incapacitation or destruction of critical infrastructure;" and "to prevent terrorist activity or harm to national security."[199] There is an exception against protection for people whose primary intent is to publish primary source documents they received without authorization.[200] The House bill was focused on "financial gain or livelihood" in order to grant an individual protection.[201]

Attempts to balance the interest of encouraging a free press against national security and safety concerns were especially pertinent in this round of debates.[202] Senators Lindsey Graham and Chuck Schumer led the effort to pass the version of the bill that more strongly protected journalists because the DOJ's guidelines regarding subpoenas were not sufficient.[203]

> "Our bill will ensure that any administration, now or later, can't make a U-turn and abandon these new guidelines," Schumer said. "We are going to

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ciary Comm. (Sept. 9, 2013), *available at* http://www.naa.org/~/media/NAACorp/Public%20Files/PublicPolicy/GovernmentAffairs/SJC-Coalition-Letter_9913.ashx.

194 *S. 987: Free Flow of Information Act of 2013*, GovTrack.us, https://www.govtrack.us/congress/bills/113/s987#overview (last visited Dec. 20, 2013) (sixteen of the cosponsors were Democrats and three were Republicans).

195 *See, e.g.*, Rem Reider, *Media Shield Moves Forward*, USA Today (Sept. 12, 2013 9:56 PM), http://www.usatoday.com/story/money/business/2013/09/12/senate-judiciary-committee-approves-media-shield-bill/2807045/.

196 S. 987, 113th Cong. § 11(1)(A)(i)(I) (2013), *available at* http://www.judiciary.senate.gov/legislation/mediashield/S987AsReported091313ALB13770.pdf.

197 *Id.* § 11(1)(A)(i)(I)(bb).

198 *Id.* § 11(1)(A)(II)(aa).

199 *Id.* §§ 3–5.

200 *Id.* § 11(1)(A)(II)(iii)(I).

201 Free Flow of Information Act of 2013, H.R. 1962, 113th Cong. § 4(2) (2013), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-113hr1962ih/pdf/BILLS-113hr1962ih.pdf.

202 *See, e.g.*, Burgess Everett, *Chuck Schumer, Lindsey Graham Introduce New Media Shield Law*, Politico (July 17, 2013, 1:44 PM), http://www.politico.com/story/2013/07/media-shield-law-chuck-schumer-lindsey-graham-94350.html.

203 *Id.* As Senator Graham said, "I'm going to be the chief co-sponsor. As much as I hate y'all, I think you should do your jobs. And my hate and disgust can't describe it. I've run out of adjectives. But you should be able to be the annoyance you are." Ginger Gibson, *Senate GOP Divided over Shield Law*, Politico (May 16, 2013, 4:46 PM), http://www.politico.com/story/2013/05/senate-gop-shield-law-91505.html.

> add new provisions to ensure that the proposals DOJ has issued aren't simply suggestions that are followed at the whim of an attorney general, but the law of the land."[204]

Representative Zoe Lofgren of California focused on the damage caused to the press and all citizens, stating,

> "It seems to me clear that the actions of the department have, in fact, impaired the First Amendment . . . . [T]he damage done to a free press is substantial and will continue until corrective action is taken," she added. "I think this is a very serious matter that concerns all of us, no matter your party affiliation."[205]

Opponents of the bill discussed concerns regarding foreign news media like Al Jazeera, which could "create a conduit to be able to move information from terrorists into the public domain or otherwise that can't be justified."[206] However, the bill specifically addressed those concerns, exempting individuals who are "member[s] or affiliate[s] of a foreign terrorist organization," "committing or attempting to commit the crime of terrorism," or "committing or attempting the crime of providing material support . . . to a terrorist organization."[207] Others oppose protection because of the difficulties in defining who would be covered.[208] Some Senators expressed concerns that creating a definition of who is and is not covered that requires the judge to use discretion to determine who receives statutory protection is equivalent to licensure of the press, prohibited under the First Amendment.[209] Concerns about judge discretion include:

> The extension of the bill's protections to a so-called "citizen blogger," a journalist who is not employed by traditional media outlets, is entirely subject to the judge's willingness to exercise discretion, after finding that doing so would be (a) in the interest of justice and (b) necessary to protect lawful and legitimate news-gathering activities. Thus, while for some the privilege is automatic and known in advance, those outside the favored status may only

204 Everett, *supra* note 202.

205 Josh Gerstein & Jennifer Epstein, *Eric Holder Gets Grilled on the Hill*, POLITICO (May 15, 2013, 2:21 PM), http://www.politico.com/story/2013/05/eric-holder-ap-doj-hill-investigation-91414_Page2.html.

206 Gibson, *supra* note 203 (quoting Alabama Republican Senator Jeff Sessions).

207 Free Flow of Information Act of 2013, S. 987, 113th Cong. § 11(1)(A)(II)(iii)(2)(2013).

208 Todd J. Gillman, *Sen. John Cornyn Still Opposes Shield Law for Journalists, After AP Phone Flap Prompts White House Push*, DALLASNEWS (May 15, 2013, 2:58 PM), http://trailblazersblog.dallasnews.com/2013/05/sen-john-cornyn-still-opposes-shield-law-for-journalists-after-ap-phone-flap-prompts-white-house-push.html/.

209 Latara Appleby, *Senate Judiciary Committee Passes a Reporter's Shield Bill*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS (Sept. 12, 2013), http://www.rcfp.org/browse-media-law-resources/news/senate-judiciary-committee-passes-reporters-shield-bill. "Sen. John Cornyn (R-Texas), who voted against the bill, said he doesn't think Congress should be able to define who is and isn't a journalist. The senator likened such an action to licensing journalists, which runs afoul of the First Amendment . . . ." *Id.*

hope that a reviewing federal judge deems them sufficiently worthy of protection.[210]

B. States' Interpretations

Branzburg encouraged further enactment of state shield statutes; thirty-nine states and the District of Columbia now have some level of statutory protection for journalists.[211] Another ten states have court-recognized protections without statute.[212] Only Wyoming does not have a statutory or court-recognized privilege.[213] Some statutes only protect those who are part of institutional media outlets, including newspapers, radio stations, or television networks.[214] A minority of statutes do not require a person to be associated with a news outlet,[215] but some require that the person must rely on journalism "for a substantial portion of the person's livelihood."[216] These statutes also vary in what information they protect. Most states protect journalists from revealing confidential sources,[217] but many do not grant an absolute

210 Steven Nelson, *Holes in Media Shield Law Worry Opponents, and Even Some Supporters*, U.S. NEWS & WORLD REPORT, Sept. 18, 2013, http://www.usnews.com/news/articles/2013/09/18/holes-in-media-shield-law-worry-opponents-and-even-some-supporters?page=3 (quoting Republican Senator Mike Lee of Utah).

211 Branzburg v. Hayes, 408 U.S. 665, 706 (1972) ("There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas. It goes without saying, of course, that we are powerless to bar state courts from responding in their own way and construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute."); United States v. Sterling, 724 F.3d 482, 532 (Gregory, J., dissenting). At the time of *Branzburg*, seventeen states had statutory protection. *Branzburg*, 408 U.S. at 689 n.27.

212 *Sterling*, 724 F.3d at 532.

213 *Id.*

214 *See, e.g.*, 735 ILL. COMP. STAT. ANN. 5/8-902(a) (West 2013) ("'[R]eporter' means any person regularly engaged in the business of collecting, writing[,] or editing news for publication through a news medium on a full-time or part-time basis; and includes any person who was a reporter at the time the information sought was procured or obtained."); N.Y. CIV. RIGHTS § 79-h (McKinney 2013) (protecting "'professional journalist[s]'" who "for gain or livelihood, [are] engaged in gathering, preparing, collecting, writing, editing, filming, taping[,] or photographing . . . news").

215 ARIZ. REV. STAT. ANN. § 12-2214(a) (2013) (explaining how a subpoena should be "issued . . . to a person engaged in gathering, reporting, writing, editing, publishing, or broadcasting news to the public, and which relates to matters within these news activities"); MICH. COMP. LAWS ANN. § 767.5a (West 2013) (protecting "[a] reporter or other person who is involved in the gathering or preparation of news for broadcast or publication").

216 W. VA. CODE ANN. § 57-3-10 (West 2013) (defining a reporter as "a person who regularly gathers, prepares, collects, photographs, records, writes, edits, reports, or publishes news or information that concerns matters of public interest for dissemination to the public for a substantial portion of the person's livelihood, or a supervisor, or employer of that person in that capacity").

217 *See, e.g.*, ARK. CODE. ANN. § 16-85-510 (West 2013) (protecting reporters from revealing sources in the absence of bad faith); KY. REV. STAT. ANN. § 421.100 (West 2013) ("No person shall be compelled to disclose in any legal proceeding or trial before any

privilege to reporters for confidential sources.[218] A minority of states protect both the source and the information gathered, absent compelling security or criminal law interests that require disclosure.[219] Similarly to federal circuit interpretations, these statutes provide inconsistent coverage; they also only protect reporters involved in issues of state law.

C. *Executive Response*

The Attorney General released regulations on the government's use of subpoenas, court orders, and search warrants to track reporters and to discover their sources through wiretaps and other methods in July 2013.[220] The Department of Justice stated that "members of the news media will not be subject to prosecution based solely on newsgathering activities,"[221] in part in response to the affidavit which sought a search warrant for James Rosen's e-mails based on allegations that he was an aider, abettor, or co-conspirator in his source's crime.[222] "No American journalist has ever been prosecuted for gathering and publishing classified information . . . ."[223] The Code of Federal Regulations contains a policy that limits the ability to subpoena the media: "Because freedom of the press can be no broader than the freedom of reporters to investigate and report the news, the prosecutorial power of the government should not be used in such a way that it impairs a reporter's responsibility to cover as broadly as possible controversial public issues."[224]

These guidelines were instituted in 1970—the same time frame as *Branzburg*.[225] At the time, Antonin Scalia, serving as Assistant Attorney General, supported the Guidelines as "the only satisfactory protection," and did

court . . . the source of any information procured or obtained by him, and published in a newspaper or by a radio or television broadcasting station by which he is engaged or employed, or with which he is connected.").

218 *See, e.g.*, ALASKA STAT. ANN. § 09.25.390 (West 2013) (granting reporters a conditional privilege for an information source); FLA. STAT. ANN. § 90.5015 (West 2013) (codifying a "qualified privilege not to be a witness concerning, and not to disclose the information, including the identity of any source, that the professional journalist has obtained while actively gathering news").

219 COLO. REV. STAT. ANN. § 13-90-119 (West 2013) (granting a privilege for "news information" absent exceptions listed in the statute); MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (West 2013) (codifying a protection against revealing "any news or information" absent circumstances that compel disclosure); N.D. CENT. CODE ANN. § 31-01-06.2 (West 2013) (protecting journalists associated with news organizations unless "the failure of disclosure of such [information] will cause a miscarriage of justice").

220 *See* DEP'T OF JUSTICE, *supra* note 8, at 1.

221 *Id.*

222 *See supra* notes 3–8 and accompanying text.

223 Charlie Savage, *Holder Tightens Rules on Getting Reporters' Data*, N.Y. TIMES, July 13, 2013, at A1, A12, *available at* http://www.nytimes.com/2013/07/13/us/holder-to-tighten-rules-for-obtaining-reporters-data.html?partner=rss&emc=rss&smid=tw-nytimes&_r=0 (stating that the government has "insisted" it was never going to prosecute James Rosen for publishing information on North Korea).

224 28 C.F.R. § 50.10 (2012).

225 *See* Jones, *supra* note 154, at 597 & n.69.

not support constitutional protection for reporters.[226] Under the Guidelines, government officials should make all reasonable attempts to obtain information from other sources before subpoenaing a reporter or his telephone records,[227] and DOJ employees should engage in negotiations with the media in order to accommodate the government's and reporter's interests.[228]

In July 2013, major changes reversed and expanded the presumption regarding advance notice.[229] Reporters presumptively receive advance notice of any subpoena to a third party for records now under 28 C.F.R. § 50.10.[230] This presumption is overcome only if "the Attorney General affirmatively determines . . . that . . . advance notice and negotiations *would* pose a clear and substantial threat to the integrity of the investigation, risk grave harm to national security, or present an imminent risk of death or serious bodily harm."[231] The government can now only delay notice and keep a search warrant secret for ninety days.[232] The Attorney General's Manual reiterates similar guidelines to attempt to use alternative sources to find information when possible and restrict subpoenas.[233]

An additional avenue for a potential reporter's privilege may be found in the Rules of Evidence, which recognize specific privileges;[234] however, this argument is beyond the scope of this Note because of the limited success in succeeding on a claim using this argument.[235]

Although statutory protections are focused on protecting individuals from forced revelation of confidential sources, reporters frequently obtain and create confidential work product in the course of their investigations.

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226 *Id.* at 600–01 (citing *Newsmen's Privilege: Hearings on H.R. 215 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the H. Comm. on the Judiciary*, 94th Cong., at 12 (1975) (testimony of Antonin Scalia, Assistant Att'y Gen. of the United States)) (explaining the government's support of the regulations over a statutory protection).

227 *See* 28 C.F.R. § 50.10(b) (2012).

228 *See id.* § 50.10(c).

229 *See* DEP'T OF JUSTICE, *supra* note 8.

230 *Id.* at 2. This is a change from the current policy, which "provides that negotiations with the news media should occur in cases where the 'responsible Assistant Attorney General determines that such negotiations *would not* pose a substantial threat to the integrity of the investigation.'" *Id.* (citing 28 C.F.R. § 50.10).

231 *Id.* Furthermore, the 2013 report states that negotiations and judicial review, which can delay the investigation, are not compelling reasons against advance notice. *Id.*

232 *Id.* Under previous regulations, the government never had to reveal a secret search warrant. *See* Savage, *supra* note 223 ("Under previous rules, the notice could be put off indefinitely.").

233 U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL, § 9-13.400 (1997, rev. ed. Oct. 2008), http://www.justice.gov/usao/eousa/foia_reading_room/usam/ (requiring the Attorney General's approval before subpoenaing the media).

234 *See* FED. R. EVID. 501–02.

235 Papandrea, *supra* note 41, at 559–64 (discussing reporter's protection under the Rules of Evidence and explaining "[t]he relatively few courts to address whether Federal Rule of Evidence 501 supports a reporter's privilege have reached mixed results").

Executive Branch guidelines outline how the government should obtain these records. The Privacy Protection Act of 1980 (PPA) protects work product of individuals who are disseminating information to the public.[236] There is a "suspect exception" when the government has "probable cause . . . that the person possessing such materials has committed or is committing a criminal offense."[237] The Department of Justice's policy allegedly will only invoke the suspect exception for a reporter's information "when the member of the news media is the focus of a criminal investigation for conduct not connected to ordinary newsgathering activities."[238] The presumption favors informing a reporter of any search warrant before the government searches a reporter's records.[239] Additionally, the Attorney General must approve all search warrants.[240]

The Federal Bureau of Investigation may obtain calling records by invoking "'national security letters,' which are exempt from the [other] guidelines," and subject to an "oversight regime."[241]

IV. Proposal for a Federal Statute

A. *Broadening Protection*

Statutory protection only for individuals who are part of an institution may have made sense when media consisted primarily of strong institutional news outlets, but that traditional landscape does not exist today. Instead, individuals not affiliated with media institutions produce investigative journalism to post online.[242] A federal shield law should protect individuals engaging in the act of producing journalism. Journalism should not be limited to association with a corporation.

The issues that threaten investigative reporting, including reluctant sources, changes in reporting policies, and the threat of becoming a government arm of investigation, exist for reporters at *The New York Times* or NBC, as well as individuals engaging in journalism outside traditional media entities.[243] Many blogs have moved from a conception of people sharing personal stories to a medium that produces investigative pieces.[244]

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236 *See* Dep't of Justice, *supra* note 8, at 3.

237 *Id.* (citing 42 U.S.C. §§ 2000aa(a)(1), (b)(1) (2006)).

238 *Id.*

239 *Id.*

240 *Id.* (stating the Attorney General would need to determine that the information is essential to the investigation, that it cannot be obtained in another manner, and that the request is as narrow as possible).

241 *See* Savage, *supra* note 223.

242 *See supra* notes 9–15 and accompanying text (highlighting a few statistics exemplifying the changing media landscape).

243 *See supra* notes 32–40 (explaining reasons behind a shield law).

244 *See Investigating the State of Investigative Journalism*, NewsLab (June 12, 2012), http://www.newslab.org/2012/06/12/investigating-investigative-journalism/ (explaining that journalists laid off from institutional media outlets are attempting to blog or create videos focused on investigative reporting). *But see* Michael Barthel, *Hold the Reddit Hype*, Salon

These individuals include Marcy Wheeler, who works from home in Michigan reading government documents regarding national security and has been consulted by journalists and national security experts as a legitimate source on national security issues.[245] Investigative bloggers revealed the falsity of documents that CBS's Dan Rather reported regarding President George W. Bush's National Guard service.[246] Citizen journalists have been central to providing information about the Arab Spring Revolutions, especially on Twitter.[247] Blogs, including Lawfare, a partnership with the nonprofit policy organization Brookings, are reporting on national security issues.[248] Twitter has become more of a self-editing platform, dispelling false stories or photos quickly.[249] Blogs and digital platforms can even have more credibility than established news outlets.[250] For example, during the initial coverage of the Supreme Court's 2012 ruling on the Affordable Care Act, SCOTUSblog accurately reported that the individual mandate was upheld, while CNN incorrectly reported that it was struck down.[251] As the Tow

(July 24, 2012, 1:30 PM), http://www.salon.com/2012/07/24/hold_the_reddit_hype/ (explaining that crowdsourced journalism breaks stories like shootings well, but does not do investigative journalism well).

245 Pema Levy, *The Woman Who Knows the NSA's Secrets*, NEWSWEEK (Oct. 4, 2013), http://mag.newsweek.com/2013/10/04/the-woman-who-knows-the-nsa-s-secrets.html. Wheeler has worked closely with media outlets on the NSA leak story:

> Experts on domestic surveillance admire Wheeler's ability to connect current revelations to past mysteries. "You'll read through these dense documents, and it's about one thing; but she'll find a clue in there to something we've all wondered about on something else entirely, and the last citing of that issue was five years ago, and somehow she still remembered," said Barton Gellman, a Pulitzer Prize-winning reporter late of *The Washington Post* who has worked with Snowden to break stories on the NSA this summer. "She's indispensable now with the NSA story, which is endlessly complex."

Id.

Note that *Newsweek*, a traditional news entity, wrote a story about Wheeler as a valuable contributor to the national security discussions.

246 *See* Gene Edward Veith & Lynn Vincent, *Year of the Blog*, WORLD MAG. (Dec. 4, 2004, 12:00 AM), http://www.worldmag.com/2004/12/year_of_the_blog/page1 (listing a variety of stories that bloggers brought to the forefront including *New York Times* reporter Jayson Blair's plagiarism that ultimately led to resignations at the paper).

247 *See* Tina Casey, *Study: Twitter Played Pivotal Role in Arab Spring*, TALKING POINTS MEMO (Sept. 23, 2011, 10:00 AM), http://talkingpointsmemo.com/idealab/study-twitter-played-pivotal-role-in-arab-spring (reporting on the central role social media played in revolutions in Egypt and Tunisia).

248 *See* LAWFARE, http://www.lawfareblog.com/about/ (last visited Dec. 20, 2013).

249 *See* Annie Colbert, *7 Fake Hurricane Sandy Photos You're Sharing on Social Media*, MASHABLE (Oct. 29, 2012), http://mashable.com/2012/10/29/fake-hurricane-sandy-photos/ (exposing photos from Hurricane Sandy as fake).

250 *See* C.W. ANDERSON ET AL., TOW CENTER FOR DIGITAL JOURNALISM, COLUMBIA JOURNALISM SCHOOL, POST-INDUSTRIAL JOURNALISM: ADAPTING TO THE PRESENT, 19–44 (2012), *available at* http://towcenter.org/wp-content/uploads/2012/11/TOWCenter-Post_Industrial_Journalism.pdf (discussing the new journalism).

251 *Id.* at 19.

Center for Digital Journalism noted, "SCOTUSblog demonstrates that journalism can be done outside traditional newsrooms, by individuals free of traditional demands of both commerce and process."[252]

B. Inadequacies of Other Protections

Existing statutory, court-created, or executive regulations are not sufficient to provide adequate protection to citizen and digital journalists from revealing confidential sources. The fear of reporters being compelled to reveal their sources leads to a chilling effect, reducing the willingness of sources to reveal information over concern the reporter will be forced to reveal the source's identity.[253] Additionally, distinct from the chilling effect, to promote the ability of independent journalists to hold the government and other corporations and individuals accountable, journalists should not become an "investigative arm of the government."[254] A federal statute is needed to provide a uniform definition of a covered journalist for courts to apply in instances of federal compulsion to avoid inconsistent coverage of who is protected.

As this Note explains in Section II.B, the varying interpretations of the circuits have made federal protection inconsistent. Recent attempts to invoke a reporter's privilege have been rejected, with courts finding no constitutional privilege and that any potential protection does not extend to criminal cases.[255] Many circuits narrowly interpret who is covered or in what kind of cases a privilege can be invoked.[256] Circuit judges are already determining who receives protection. A federal statute provides more uniform coverage throughout the circuits in cases involving federal compulsion. This will limit subjecting journalists to varying levels of protection depending on where the action occurred and in what medium it was published.

States' efforts do not supplant the need for a federal shield law. State shield laws or judicially recognized privileges are not satisfactory because state protections only can be invoked in state cases under state causes of action. The statutes also provide varying levels of protections. Current state shield laws are inadequate, for "[s]o long as there is no federal shield law,

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252 *Id.* at 19. This digital journalism can have a narrower focus that goes into more depth and has credibility, which is seen in SCOTUSblog:

> In an environment of what journalism professor Jeff Jarvis describes as "do what you do best and link to the rest," the SCOTUSblog model delivers the most consistent coverage of the Supreme Court and aims to deliver the best coverage as well. SCOTUSblog will not rush 25 journalists into Haiti in the event of an earthquake (or assign any to Lindsay Lohan's DUI hearing), so it is not replacing CNN. But it doesn't have to. SCOTUSblog has found its niche and knows what its role is.

Id. at 19–20.

253 *See supra* Section I.A (discussing the chilling rationale).

254 Branzburg v. Hayes, 408 U.S. 665, 725 (1972) (Stewart, J., dissenting).

255 *See supra* subsection II.B.4.

256 *See supra* Section II.B.

federal judges can, in effect, trump state shield laws."[257] These protections can be eviscerated if a case is brought in federal court under federal laws: "By exposing confidences protected under state law to discovery in federal courts, the lack of a corresponding federal reporter's privilege law frustrates the purposes of the state-recognized privileges and undercuts the benefit to the public that the states have sought to bestow through their shield laws."[258]

A federal statute expands a policy that is working on the state level:

> Justice Brandeis famously referred to the important function the states perform in our federal system as laboratories for democracy, testing policy innovations. Reporter shield laws, which have been adopted—through either legislation or judicial decision—by every state but one, must now be viewed as a policy experiment that has been thoroughly validated through successful implementation at the state level.[259]

The Attorneys General further explained that "Attorneys General have had significant experience with the operation of these state-law privileges; that experience demonstrates that recognition of such a privilege does not unduly impair the task of law enforcement or unnecessarily interfere with the truth-seeking function of the courts."[260]

Furthermore, executive guidelines from the DOJ are insufficient protection because they are purely advisory policy statements and are not treated as law. Additionally, these regulations are not subject to adequate oversight. Thus, when the DOJ does subpoena an individual, the subpoena cannot be appealed under the DOJ guidelines.[261] The guidelines are merely internal checks, not judicial intervention. For example, the court in *In re Grand Jury Subpoena, Judith Miller*[262] explained that it did not need to consider the claim that the Special Counsel did not follow the DOJ guidelines because the procedures were not enforceable.[263] Just as changes to the regulation occurred in 2013 in response to the Department of Justice's recent actions in subpoenaing reporter's data, the executive branch can unilaterally adjust these regu-

257 Davidson & Herrera, *supra* note 30, at 1294.

258 Letter from Nat'l Ass'n of Att'ys Gen. to Harry Reid, Senate Majority Leader, and Mitch McConnell, Senate Minority Leader (June 23, 2008), *available at* https://www.azag.gov/sites/default/files/AG%20Shield%20Letter.pdf (expressing support of forty-one Attorneys General for a federal shield law).

259 *Id.* (footnote omitted) (internal citation omitted).

260 *Id.*

261 *See* Policy with Regard to the Issuance of Subpoenas to Members of the News Media, Subpoenas for Telephone Toll Records of Members of the News Media, and the Interrogation, Indictment, or Arrest of, Members of the News Media, 28 C.F.R. § 50.10 (2013) ("[T]his policy statement is . . . intended to provide protection for the news media . . . ."); Grant Penrod, *A Problem of Interpretation*, THE NEWS MEDIA & THE LAW, Fall 2004, at 4, *available at* http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-fall-2004/problem-interpretation (stating that "DOJ guidelines for subpoenaing reporters are useful, but no substitute for a federal shield law").

262 438 F.3d 1141 (D.C. Cir. 2006).

263 *See id.* at 1152–53 (highlighting numerous cases that held the DOJ policy regarding media subpoenas was not enforceable in court).

lations and policies if public opinion favors a government that places more restrictions on the press.

Attorney General Eric Holder has also called for a statutory protection in addition to these new regulations.[264] "'While these [DOJ] reforms will make a meaningful difference, there are additional protections that only Congress can provide,'" Mr. Holder said. "'For that reason, we continue to support the passage of media shield legislation.'"[265] Furthermore, the policy statement refers only to members of the news media, and thus, is not broad enough to protect citizen or digital journalists.

A federal shield law is essential in order to provide uniform protection at least until a broad constitutional right is recognized. More importantly, a federal shield law, outside First Amendment constraints, has the ability to provide broad uniform coverage to anyone engaging in journalism. This statute can be broad enough to address changing media sources, including digital and social media, in order to provide protection to those engaging in journalism.

C. Proposed Reporter's Shield

A proposed federal shield law should adapt portions of S. 448 from the Free Flow of Information Act of 2009.[266] The law should protect individuals who are engaged in 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 interest for dissemination to the public" (covered actions).[267]

To offer some sort of limitation in order to prevent unfettered use of this privilege, the privilege should apply only to those who intend to engage in covered actions "at the inception of the process of gathering the news or information sought."[268] This means that someone cannot learn information and insulate himself from revealing it during a government proceeding simply by creating a blog post or video after the fact to demonstrate that he is engaging in journalism. Additionally, this requirement of intent would limit protection to only those times when journalists are engaging in their journalistic role. Journalists do not act as journalists in every instance, and thus the statute would only protect individuals when they are engaged in actual acts of journalism. This journalistic intent would need to be manifested outwardly to sources, as the information source would need to be aware that he was

264 *See* Savage, *supra* note 223 (discussing Eric Holder's guidelines).

265 Scott Newman, *Justice Tightens Guidelines for Obtaining Records From Media*, NPR (July 12, 2013, 4:59 PM), http://www.npr.org/blogs/thetwo-way/2013/07/12/201566829/justice-tightens-guidelines-for-obtaining-records-from-media.

266 S. 448, 111th Cong. (2009).

267 *Id.* § 8(5). This language is also similar to Nebraska's shield law, which appears broad enough to protect bloggers. "No person engaged in procuring, gathering, writing, editing, or disseminating news or other information to the public shall be required to disclose . . . ." NEB. REV. STAT. ANN. § 20-146 (West 2013).

268 S. 448, 111th Cong. § 11(2)(A)(ii) (2009) (as amended by Senate, Feb. 13, 2009).

speaking to someone engaged in journalism, regardless of the platform used. The outward manifestation and intent must limit some individuals from invoking the privilege. If every act was an act of journalism, the privilege could be abused and not used to protect journalism that contributes to a more informed citizenry.[269]

Another requirement of a federal statute would be its qualified nature.[270] An absolute privilege offers broader protection and more assurance that reporters will receive protection without judges delving into intensive fact-finding about the specific situation.[271] However, a qualified privilege better takes into account the realities of the world, where national security issues or major crimes are consistently in the news. In determining whether a privilege applies, courts should "weigh the public interest in compelling disclosure, measured by the harm the leak caused, against the public interest in newsgathering, measured by the leaked information's value."[272] A qualified privilege may be overcome in situations including national security or other bona fide health and safety concerns, including a commission of a violent crime, when the government has "exhausted all reasonable alternative sources."[273] Exceptions may occur in cases to prevent "imminent death, [or] substantial bodily harm" or "an act of terrorism against the United States or its allies or other significant and specified harm to national security."[274] Under this national security exemption, the Department of Justice may have been able to obtain the same information in both the AP and James Rosen probes using secret search warrants; however, the search warrants would have been subjected to greater judicial oversight.[275] Because journalists gather information in a multitude of ways, it should not matter if they seek information or if individuals seek out the reporter. Only protecting individuals whose sources initiate contact would force reporters to passively investigate stories, which is not the basis of a healthy and vibrant press.

To provide maximum protection for those engaging in journalism, the statute would not require regularity in reporting.[276] Even if an individual

269 Michael McGough, Editorial, *Who's a Journalist? Sen. Dianne Feinstein Wants to Draw a Line*, L.A. TIMES (Sept. 13, 2013 1:56 PM), http://www.latimes.com/opinion/opinion-la/la-ol-dianne-feinstein-congress-press-shield-law-20130913,0,5900019.story.

270 *See, e.g.*, *In re* Madden, 151 F.3d 125, 128–29 (3d Cir. 1998) (establishing a qualified privilege); H.R. 2932, 112th Cong. (2011) (listing exceptions to which the qualified privilege would not apply).

271 *See, e.g.*, Leslie Siegel, Note, *Trampling on the Fourth Estate: The Need for a Federal Reporter Shield Law Providing Absolute Protection Against Compelled Disclosure of News Sources and Information*, 67 OHIO ST. L.J. 469, 473 (2006) (explaining that an absolute protection would better foster free flow of information, encourage greater disclosure, and further judicial efficiency).

272 *In re* Grand Jury Subpoena, Judith Miller, 438 F.3d 1141, 1175 (D.C. Cir. 2006).

273 *See* H.R. 2932, 112th Cong. § 2(a)(1) (2011) (providing for exceptions that compel disclosure).

274 *Id.* § 2(a)(3)(A)–(B).

275 *See supra* notes 8–15 and accompanying text.

276 Regularity of work is a requirement of S. 448, 111th Cong. § 8(5) (2009).

does not produce a story every week, he should still receive protection when he does engage in journalism. The statute would not require that the person work in journalism for "a substantial portion of the person's livelihood or for substantial financial gain."[277] As journalists are being laid off and newsrooms run on bare bones staff,[278] financial benefit alone does not suggest the quality of journalism and investigative reporting, and similarly, a lack of payment by itself does not suggest that the source is not credible.

Involvement with an established media entity is also not required.[279] Media entities provide resources, which can enhance reporting but are not a necessary requirement. The use of editors to review journalists' work can be a factor weighing in favor of a finding that a person is engaging in journalism, but a hierarchy of editors should not be necessary to receive shield law protection.[280] As newsrooms are changing and cutting staff, extensive editing by upper level journalists is not guaranteed to occur, even at established newspapers, and an editor does not absolutely ensure accuracy or truth.[281] Media entities' internal policies and procedures for assigning stories, writing, editing, and publishing information may help define whom is a traditional journalist working for a newspaper, magazine, or television station. However, this is not inclusive enough, since a citizen journalist can write or produce a journalistic piece with the intent to distribute without following a traditional chain of command or official policies or procedures.

Regularity of reporting, a salary requirement, or association with established media entity are not critical requirements to demonstrate actual journalism, but instead are easily discernable proxies to promote efforts to quickly separate individuals who qualify or do not qualify for a reporter's privilege. Extending the journalistic privilege to anyone engaged in journalism alleviates potential questions over more established "online only" publi-

277 H.R. 985, 111th Cong. § 4(2) (2009).

278 *See, e.g.*, Gabe Bullard, *Gannett Executive Bonsuses Criticized Amid Layoffs*, WFPL NEWS (June 21, 2011), http://archives.wfpl.org/2011/06/21/gannett-executive-bonuses-criticized-amid-layoffs/ (explaining Gannett's nationwide 700 employee layoffs); Jaquetta White, *Times-Picayune Lays off Nearly One-Third of Its Staff*, TIMES-PICAYUNE (June 12, 2012, 11:57 AM), http://www.nola.com/business/index.ssf/2012/06/times-picayune_employees_to_le.html (explaining that 200 employees, or one-third of the staff, were being laid off).

279 *See* 735 ILL. COMP. STAT. 5/8-902 (West 2012) (defining "news medium"). See *supra* notes 242–52 discussing the reasons for broadening the protection, including because government intervention and a promotion of a vibrant press should not be limited to institutional media entities.

280 *But see* Laura Durity, Note, *Shielding Journalist-"Bloggers": The Need to Protect Newsgathering Despite the Distribution Medium*, 2006 DUKE L. & TECH. REV. 11, ¶ 37 ("[A] writer fails to qualify as a 'journalist' unless he or she has a substantial connection with or a relationship to an established news media organization such that there is sufficient editorial oversight.").

281 *See, e.g.*, Rem Rieder, *The Jayson Blair Affair*, AM. JOURNALISM REV. (June 2003), http://ajr.org/article.asp?id=3019 (explaining former *New York Times* reporter Jayson Blair's plagiarism and fabrication scandal).

cations that are classified as blogs, but report daily on politics, economics, education, and technology.[282]

Defining journalists by their covered actions rather than their institutional connections also decreases the concern that passing a statute protecting journalists would amount to licensing journalists, violating the First Amendment.[283] Establishing a narrow definition of journalist would restrict press freedom because the government could grant protection only to established entities it agreed with politically or ideologically.[284] With a broader functional definition, courts will have to engage in an analysis to determine if an individual is engaging in journalism. However, analyzing whether an individual is a journalist is not an unconstitutional licensing of media entities. Rather than determining what entities receive protection, the courts are analyzing if an individual—no matter what his affiliation—is engaging in journalism. Anyone engaging in reporting is qualified to receive the privilege.[285]

Additionally, passing a law to protect bloggers raises national security concerns about websites like WikiLeaks.[286] The disclosure of sources and of documents both raise issues of balancing the First Amendment against national security.[287] Scholars have argued that WikiLeaks leaders would not be covered under any reporter's privilege, in part because the person is not actually engaged in reporting, but rather is merely dumping documents, without writing, curating, or reporting.[288] Under the proposed statute, which requires more than mere dissemination alone, Julian Assange would not have been qualified to receive any protection under a reporter's privilege.[289] Furthermore, scholars contend if Assange began to report on the released documents—in attempts to receive protection—rather than simply publishing the documents without commentary or analysis or synthesis on

282 Well-known websites that are classified as blogs include The Huffington Post, BuzzFeed, The Daily Beast, and Business Insider. *Top 100 Blogs*, TECHNORATI, http://technorati.com/blogs/top100/ (last visited Nov. 20, 2013).

283 Markus E. Apelis, Note, *Fit to Print? Consequences of Implementing a Federal Reporter's Privilege*, 58 CASE. W. RES. L. REV. 1369, 1391–98 (2008) (arguing that a federal shield law would create a danger of excessive regulation of the media); *see also* Near v. Minnesota, 283 U.S. 697 (1930) (discussing licensing concerns in the context of prior restraint cases).

284 *See Near*, 283 U.S. at 730–31 (discussing censorship in the context of prior restraint cases).

285 Apelis, *supra* note 283, at 1391.

286 WikiLeaks is a website run by Julian Assange that releases thousands of diplomatic cables, U.S. military logs, and other documents regarding national security. The documents are "dumped" onto a website without analysis. The site has faced various legal issues regarding the documents it publishes. *See* Jonathon Fildes, *What Is Wikileaks?*, BBC NEWS (Dec. 7, 2010, 13:19), http://www.bbc.co.uk/news/technology-10757263.

287 Disclosure of documents from WikiLeaks and First Amendment implications are discussed in Patricia Bellia, *WikiLeaks and the Institutional Framework for National Security Disclosures*, 121 YALE L.J. 1448 (2012).

288 Jonathan Peters, *WikiLeaks Would Not Qualify to Claim Federal Reporter's Privilege in Any Form*, 63 FED. COMM. L.J. 667 (2011) (offering a strong argument against WikiLeaks receiving any reporter's privilege).

289 *Id.* at 683.

the Internet, a qualified privilege would not protect him because of the exceptions requiring disclosure upon findings that the information presents serious national security concerns.[290] In situations like WikiLeaks, a reporter's privilege would force an external check from the judiciary in determining whether the information sought raises national security issues and is beyond protection.

While politicians and scholars have previously proposed citizen journalism protections, this Note's proposal requires more than mere dissemination of information to the public for a privilege to attach to a reporter. The statute's requirements focus on the actions and intent of citizen journalists at the beginning of the process in order to promote legitimate journalism, rather than the mere avoidance of subpoenas.[291] Additionally, other proposals focus on comparing digital mediums to existing media mediums to provide protections to mediums that resemble more traditional mediums.[292] A digital source should not only be protected if it resembles a more traditional medium because in a world with evolving technologies, new platforms can provide forums to engage in journalism.[293] A platform-based approach would provide a protection with only limited useful applicability.

CONCLUSION

Branzburg v. Hayes's majority opinion refused to provide First Amendment protection to reporters to refrain from revealing their confidential sources.[294] Because of confusion arising from Justice Powell's concurrence, courts have interpreted this opinion in wildly divergent ways.[295] Thus, circuits and state legislatures have offered varying levels of protection for reporters.[296] Congress has made numerous attempts to pass a statute protecting reporters, but none have been successful.[297] The Department of Justice has released guidelines for covering subpoenas and search warrants to

290 *Id.* at 693.

291 *But see* Papandrea, *supra* note 41, at 585–86 (focusing on sharing the information with the public without explicitly requiring an individual's intent to disseminate with the public at the outset). While discussing broad coverage, Davidson and Herrera do not focus on citizen journalists specifically and do not address the intent necessary either. Davidson & Herrera, *supra* note 41, at 1360.

292 Stephanie B. Turner, Comment, *Protecting Citizen Journalists: Why Congress Should Adopt a Broad Federal Shield Law*, 30 YALE L. & POL'Y REV. 503, 516–17 (2012) (distinguishing between protecting electronic mediums including "[w]eb radio, regular podcasts, and video-sharing platforms" and not protecting "chat rooms, instant messaging platforms, and Facebook").

293 For example, CNN iReport is a site where users can share stories with CNN. iReport is not directly analogous to existing mediums, but still can provide journalism worthy of reporter's privilege protection. CNN IREPORT, http://ireport.cnn.com/ (last visited Dec. 20, 2013).

294 Branzburg v. Hayes, 408 U.S. 665, 685 (1972).

295 *Id.* at 709–10 (Powell, J., concurring).

296 *See supra* Sections II.B, III.B.

297 *See supra* Section III.A.

protect journalists. However, to adequately protect reporters, a comprehensive federal shield law needs to be passed. This statute can protect journalists until the Supreme Court addresses the issue again.

This reporter's privilege should be expansive enough to protect citizen and digital journalists and whomever is engaged in the act of journalism, regardless of the medium they utilize. In order to protect only legitimate journalistic activities, the individual should have the intent to disseminate the information from the outset. The source providing the information should also know this intent at the outset. The stipulation that an individual should be engaged in journalism throughout the process promotes journalists' interests, offers a check on the reporter's protection, and recognizes that journalists are citizens—unelected individuals who have lives outside their jobs.[298] This proposal protects journalists while they are doing their job, without affording overbroad protection when a reporter is involved in a situation outside of his journalistic function. Furthermore, the statute this Note proposes provides for a qualified privilege, subjecting individuals to subpoenas when national security or serious criminal risks are involved. Ultimately, a broader statutory protection based on an individual's action of engaging in journalism is capable of withstanding changes in how journalism is produced and consumed and protects a wide range of legitimate traditional or citizen journalists.

298 *See* Ervin, *supra* note 42, at 234–35 ("[T]he press, while comprised of ordinary citizens with no special office, has an extraordinary function, tied to the heart of the democratic process.").