Bringing Bloggers into the Journalistic Privilege Fold

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Consider a situation in which Matt Drudge was subpoenaed by the attorney general of New York to appear before a grand jury concerning the source of information printed on Drudge’s website. The information claimed that the governor had been accepting hundreds of thousands of dollars in gifts in return for handing out no-bid contracts to a large construction firm. The source of the information was an employee of the company who had been forced to sign off on the “expenditures” by her boss but wished to remain anonymous. In addition to Matt Drudge, the attorney general also subpoenaed a columnist for the *New York Times*, an investigative journalist for WABC-TV, and a soccer mom in Poughkeepsie who operates a website on government corruption.

One might think that these individuals would have some protection under the Freedom of the Press Clause of the First Amendment from revealing information given in confidence. New York’s media shield law may also protect them from revealing their confidential sources.

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2. See *U.S. CONST.* amend. I. The First Amendment provides: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” *Id.*
3. *N.Y. CIV. RIGHTS LAW* § 79-h (McKinney 1992). The law provides:
   (b) Exemption of professional journalists and newscasters from contempt: Absolute protection for confidential news. Notwithstanding the provisions of any general or specific law to the contrary, no professional journalist or newscaster presently or having previously been employed or otherwise associated with any newspaper, magazine, news agency, press association, wire service, radio or television transmission station or network or other professional medium of communicating news or information to the public shall be adjudged in contempt by any court in connection with any civil or criminal proceeding, or by the legislature or other body having contempt powers, nor shall a grand jury seek to have a journalist or newscaster held in contempt by any court, legislature or other body having contempt powers for refusing or failing to disclose any news
However, even though all of these individuals received the information they published from the same source, the more likely scenario is that the soccer mom and possibly Drudge would be unable to prevent the attorney general from dragging them before the grand jury.\footnote{\textit{Id.} § 79-h(b).} The problem for the soccer mom would be that the New York statute and other state statutes,\footnote{See infra notes 6-7 and accompanying text.} as well as the federal common law,\footnote{See, e.g., 42 PA. CONS. STAT. ANN. § 5942 (West 2000).} have not considered what protection, if any, should be given to the twenty-first century version of the “lone[ly] pamphleteer.”\footnote{In this sense, “federal common law” refers not to \textit{Erie Railroad Co. v. Tompkins}, 304 U.S. 64, 78 (1938), but to the development of privileges under the Federal Rules of Evidence. See \textit{FED. R. EVID. 501} (“Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.”).} Unlike other groups claiming a privilege, journalists deserve special protection from revealing their confidential sources because they generally are subpoenaed in cases involving “political” crimes.\footnote{See Frederick Schauer, \textit{Towards an Institutional First Amendment}, 89 MINN. L. REV. 1256, 1272 (2005); infra Part IIA-B.} The recent Valerie Plame saga\footnote{Mark Neubauer, Comment, \textit{The Newsman’s Privilege After Branzburg: The Case for a Federal Shield Law}, 24 UCLA L. REV. 160, 161 (1976).} is just another episode in a long series of cases obtained or received in confidence or the identity of the source of any such news coming into such person’s possession in the course of gathering or obtaining news for publication or to be published in a newspaper, magazine, or for broadcast by a radio or television transmission station or network or for public dissemination by any other professional medium or agency which has as one of its main functions the dissemination of news to the public, by which such person is professionally employed or otherwise associated in a news gathering capacity notwithstanding that the material or identity of a source of such material or related material gathered by a person described above performing a function described above is or is not highly relevant to a particular inquiry of government and notwithstanding that the information was not solicited by the journalist or newscaster prior to disclosure to such person.
in which the government has subpoenaed reporters in a political battle to obtain evidence of “radical [political] activity and political corruption.” Unfortunately, the Plame saga demonstrated the reluctance of the federal judiciary to provide protection for members of the traditional media from being used by the government, including administrative agencies and overzealous prosecutors. If society wants the press to continue to play the important role that the Supreme Court has long recognized in our democratic system, society must create a workable framework to protect journalists from being compelled to disclose their confidential sources.

Protecting journalists from being forced to reveal their confidential sources poses new problems as, increasingly, Americans are turning away from the network news and morning newspaper as sources of information and turning toward the Internet and blogs. As America turns to the “new media” for its information, the law should extend the protections granted to the established media to the “journalists” of the new media. The problem for courts and legislatures will be determining

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397 F.3d at 966. Miller never actually published an article including this information, but was held in contempt for failing to comply with a subpoena to testify before the grand jury. Id. at 967.

10. Neubauer, supra note 8, at 161; see discussion infra Part I.A.1-2.


12. See, e.g., Branzburg v. Hayes, 408 U.S. 665, 726 n.1 (1972) (Stewart, J., dissenting) (“We have often described the process of informing the public as the core purpose of the constitutional guarantee of free speech and a free press.”); Estes v. Texas, 381 U.S. 532, 539 (1965) (“The free press has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences . . .”).

13. See Steven Levy, Will the Blogs Kill Old Media?, NEWSWEEK, May 20, 2002, at 52. Blog is a shortened form of a “web log.” Louise Kehoe, Bloggers Slip the Surly Bonds of Print: Louise Kehoe Examines the Rise to Prominence of Web Logs—An Anarchic Form of Online Journalism, FIN. TIMES (London), Apr. 6/Apr. 7, 2002, at 11. A blogger is someone who posts a web log. Id. Originally, blogs were only “for technically savvy individuals to help others unearth useful internet sites.” Paul S. Gutman, Comment, Say What?: Blogging and Employment Law in Conflict, 27 COLUM. J.L. & ARTS 145, 145 (2003). The blog was used to direct people around the Internet in the days before efficient search engines. Id. Comments sometimes accompanied the links to other web sites to help steer people to helpful or interesting Internet sites. Id. Today, the blog has become the equivalent of an online diary or the platform upon which a person can express his views to the world. Id. at 146. The Pew Internet Project found that “[i]n 2004 . . . blog traffic skyrocketed, increasing by 58 percent in a year when overall net traffic was up only 6 percent.” Lincoln Caplan, Blawgs, LEGAL AFF., May/June 2005, at 1, available at WL 2005-JUN Legal Aff. 1. Despite the huge increase in blog traffic, “62 percent of Internet users in the Pew survey said they had never heard of blogs.” Id.

14. See David McGowan, Response, Approximately Speech, 89 MINN. L. REV. 1416, 1434-36 (2005) (contending that a privilege that is limited only to traditional institutions would disadvantage those using new institutions).
who deserves protection. Because of the increased difficulty in deciding who qualifies for the privilege, "some commentators predict an imminent end of special protections for the press and a merger of the First Amendment's Free Speech and Free Press Clauses." While some commentators relish the press' loss of special protections, merging the two clauses may result in less First Amendment protection for everyone.

One commentator has suggested that rather than defining what is news or who is a journalist, the law should extend the privilege to the journalistic process. However, if courts are unable to tackle the tough questions of differentiating between the New York Times reporter and the rumor-mongering blogger, courts are less likely to grant any protection to an individual claiming a privilege to protect confidential sources. If anyone posting information on the Internet can claim to be a journalist, a journalistic privilege to provide those actually posting newsworthy information with special protection from compelled

15. See Laurence B. Alexander, Looking Out for the Watchdogs: A Legislative Proposal Limiting the News Gathering Privilege to Journalists in the Greatest Need of Protection for Sources and Information, 20 YALE L. & POL'Y REV. 97, 100-01 (2002) (suggesting the increase in nontraditional news providers will make it increasingly difficult for judges to determine who is a journalist).


17. See, e.g., Anderson, supra note 16, at 455-57 (questioning whether it is appropriate in this new world of "interconnected media conglomerates" to extend special protections to journalists on the basis that "media corporations differ significantly from other corporations in that their resources are devoted to the collection of information and its dissemination to the public" (quoting Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 667 (1990))).


19. See id. at 1375-76.

20. See Schauer, supra note 7, at 1272. Schauer suggests that part of the Supreme Court's reluctance in this area is due to "its lack of knowledge of new and rapidly changing technologies." Id. at 1266. Schauer argues that if the Court is going to use its own knowledge and . . . research to opine about the fundamental nature of golf, the frequency of flawed ballots, and the behavior of the press in the face of potential legal liability, for example—there should be little special concern if that same Court is willing to opine about the differences—or nondifferences—between journalists and bloggers.

Id. at 1266-67 (footnotes omitted). But see Eugene Volokh, Op-Ed, You Can Blog, But You Can't Hide, N.Y. TIMES, Dec. 2, 2004, at A39 (arguing that any privilege for journalists should be the same, regardless of whether they are professional or amateur and regardless of whether they use old media or new media to publish their information).
disclosure is unlikely.\textsuperscript{21} The Free Speech Clause of the First Amendment will still protect the amateur blogger who wants to post information.\textsuperscript{22} However, it is still important that the law provide the same protection that the traditional media enjoys for those individuals who are actively engaged in gathering information that constitutes news for public dissemination exclusively through websites.\textsuperscript{23}

This Comment begins by examining the history of the reporter's privilege prior to the Supreme Court's decision in \textit{Branzburg v. Hayes},\textsuperscript{24} which rejected a First Amendment privilege allowing reporters to protect their sources when called before a grand jury. Then, this Comment discusses the Supreme Court's decision in \textit{Branzburg} and how the circuit courts of appeals have interpreted that decision to create a qualified privilege. Next, this Comment explores how states have enacted their own shield laws to protect journalists. This Comment addresses the nature of the privilege created by state laws, who they protect, and how the laws define journalists. This Comment then explores whether bloggers may already be covered under the qualified privilege at the federal level and under some state shield laws. Finally, this Comment proposes that a federal privilege be created, expressly incorporating bloggers who can qualify as journalists. This Comment concludes that bloggers who gather "news" to be disseminated to the public and who are professionally affiliated with an online news service or website should be protected as journalists under the First Amendment.

\section{I. The Evolution of the Journalistic Privilege}

\subsection{A. The Nature of the Journalistic Privilege at the Federal Level}

\textbf{1. No Recognized Journalistic Privilege Before \textit{Branzburg}}

The first reported media shield case dates back to 1848.\textsuperscript{25} A reporter for the \textit{New York Herald}, John Nugent, passed along a copy of the treaty to end the Mexican-American War, including proposed amendments by the Senate, to his editor for publication while the United States Senate

\begin{thebibliography}{99}
\bibitem{1} See Berger, \textit{supra} note 16, at 1378.
\bibitem{2} See U.S. CONST. amend. I.
\bibitem{3} See Dale Carpenter, Response, \textit{The Value of Institutions and the Values of Free Speech}, 89 MINN. L. REV. 1407, 1411 (2005) (concluding that favoring individuals connected to traditional media with special protections under the First Amendment will create a bias favoring "mainstream institutions and ideas at the expense of ‘the poorly financed causes of little people.’" (quoting Martin v. City of Struthers, 319 U.S. 141, 146 (1943))).
\bibitem{4} 408 U.S. 665 (1972).
\bibitem{5} \textit{Ex parte} Nugent, 18 F. Cas. 471 (D.C. Cir. 1848) (No. 10, 375); Neubauer, \textit{supra} note 8, at 161.
\end{thebibliography}
was in a secret session.26 When the Senate learned what had happened, it 
subpoenaed Nugent so it could find out who provided him a copy of the 
confidential draft.27 When Nugent refused to answer the Senate’s 
questions, he was thrown in jail for contempt of Congress.28 The D.C. 
Circuit denied Nugent’s writ of habeas corpus, holding that it had no 
jurisdiction over the action because “the senate of the United States has 
power, when acting in a case within its jurisdiction, to punish all 
contempts of its authority.”29

Nine years later, James Simonton, a correspondent for the New York 
Daily Times, met the same fate as Nugent.30 Simonton had alleged that 
members of the House of Representatives had taken bribes for their 
votes on land grant bills.31 He was brought before a House committee to 
“show cause why he should not be proceeded against by the House as in 
contempt.”32 When Simonton’s responses proved unsatisfactory, the 
committee resolved that “he be held in custody by the Sergeant-at-Arms 
until he make answer to said questions, or until the further order of the 
House.”33 Despite the fact that the committee investigation subsequently 
showed that members had taken bribes, Simonton was “placed in the 
custody of the Sergeant-at-Arms for the remainder of the session.”34

While these isolated events were noteworthy and spawned some action 
on the state level,35 they failed to motivate the Congress to take any 
action on proposed bills calling for a reporter’s privilege.36 It was not 
until the late 1960s, during the Nixon administration, that claims for a 
privilege dramatically increased.37 The Nixon administration began

26. Ex parte Nugent, 18 F. Cas. at 471-72; Neubauer, supra note 8, at 161.
27. Neubauer, supra note 8, at 161.
28. Id.; see also Ex parte Nugent, 18 F. Cas. at 471-72.
29. Ex parte Nugent, 18 F. Cas. at 483.
30. Sam J. Ervin, Jr., In Pursuit of a Press Privilege, 11 HARV. J. ON LEGIS. 233, 235 
(1974).
31. Id.
32. CONG. GLOBE, 34th Cong., 3d Sess. 411 (1857).
33. Id. at 412.
34. Ervin, supra note 30, at 235.
35. See discussion infra Part I.B.
36. See Ervin, supra note 30, at 241 n.23 (1973). The first bill calling for a reporter's 
privilege was introduced by Senator Arthur Capper of Kansas on October 30, 1929. Id.; see also 71 CONG. REC. 5832 (1929). The Senate failed to take any action on the bill. 
Ervin, supra note 30, at 241 n.23 (1973).
37. See Anderson, supra note 16, at 523 n.500 (“In the first two-and-one-half years of 
the Nixon administration, nearly two hundred subpoenas were served on reporters and 
news organizations, far more than had been served in all previous administrations.”) (citing JOHN J. WATKINS, THE MASS MEDIA AND THE LAW 301-02 (1990)); see also Neubauer, supra note 8, at 162 & n.13 (“[D]uring the first two and one-half years of the 
Nixon administration . . . [s]ome 124 subpoenas were served on . . . CBS [and] NBC . . . ”).
subpoenaing reporters to obtain information about leftist militants. The administration viewed the press as an investigative arm of the government that was useful for cracking down on the subversive activities of leftists. The issue of a journalist’s privilege finally came to the judiciary’s attention in 1972 with the Supreme Court’s decision to hear three cases involving journalists who claimed First Amendment protection when called to appear before a grand jury.

2. Branzburg Majority Finds No Constitutional Privilege Protecting Journalist’s Confidential Sources

Branzburg v. Hayes arrived before the Supreme Court as part of a series of cases in state and federal courts concerning journalists who had observed criminal conduct and who had been subpoenaed to testify before grand juries about what they observed. The Kentucky Court of Appeals held in Branzburg v. Pound that Kentucky’s media shield law did not permit a journalist to refuse to testify about events that he personally witnessed, or the identity of those persons that he personally observed. The Ninth Circuit, on the other hand, held in Caldwell v.

38. See Neubauer, supra note 8, at 162-63 (quoting Fred Graham, Mitchell Moves to Cool Disputes with Press, N.Y. TIMES, Aug. 16, 1970, at 9). While delivering a speech to the American Bar Association House of Delegates in 1970, then-Attorney General John Mitchell emphasized the importance of using the press to aid government investigations: “Occasionally, we have newsmen and photographers who are experts in a case we are investigating and who may have more information than the government has—factual information and photographs which the government finds difficult, if not impossible, to obtain through its own investigatory agencies.” Id. (quoting Honorable John N. Mitchell, Attorney General of the United States, Address at the American Bar Association House of Delegates (Aug. 10, 1970)).

39. See id. at 163.


43. Branzburg, 461 S.W.2d at 348; see also KY. REV. STAT. ANN. § 421.100 (LexisNexis 2005) (“No person shall be compelled to disclose in any legal proceeding or trial before any court, or before any grand or petit jury, or before the presiding officer of any tribunal, or his agent or agents, or before the General Assembly, or any committee thereof, or before any city or county legislative body, or any committee thereof, or elsewhere, 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.”).
That compelling a *New York Times* journalist to testify before a grand jury about the aims, purposes, and goals of Black Panther Party members he covered was an infringement on the journalist's First Amendment rights. In addition, the Supreme Judicial Court of Massachusetts held in *In re Pappas* that a television newsman-photographer did not have a constitutional privilege to refuse to divulge information he observed while on assignment in and around a Black Panther headquarters. The court concluded that "[t]he obligation of newsmen . . . is that of every citizen . . . to appear when summoned, with relevant written or other material when required, and to answer relevant and reasonable inquiries."

Writing for a five-four majority in *Branzburg*, Justice White found that reporters were not entitled to any privilege beyond that of an ordinary citizen when it comes to appearing before a grand jury to answer questions concerning the investigation of a crime. The Court rejected the argument that forcing newsmen to testify before grand juries would deter future informers from providing information to journalists. The majority believed that creating a constitutional privilege for journalists would be problematic because the Court would be forced to determine who qualified for the privilege on a case-by-case basis. Justice White

44. 434 F.2d 1081 (9th Cir. 1970), rev'd, 408 U.S. 665 (1972).
45.  Id. at 1083 n.2, 1089.
47.  Id. at 298, 304.
48.  Id. at 303.
49. 408 U.S. at 682, 690. Justice White announced that:

The sole issue before us is the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime. Citizens generally are not constitutionally immune from grand jury subpoenas; and neither the First Amendment nor any other constitutional provision protects the average citizen from divulging to a grand jury information he has received in confidence.

50. See id. at 693. Justice White found that "the evidence fails to demonstrate that there would be a significant constriction of the flow of news to the public if this Court reaffirms the prior common-law and constitutional rule regarding the testimonial obligations of newsmen." Id. But see id. at 731 (Stewart, J., dissenting) ("[W]hen governmental officials possess an unchecked power to compel newsmen to disclose information received in confidence, sources will clearly be deterred from giving information, and reporters will clearly be deterred from publishing it, because uncertainty about exercise of the power will lead to 'self-censorship.' The uncertainty arises, of course, because the judiciary has traditionally imposed virtually no limitations on the grand jury's broad investigatory powers.") (citations omitted).

51. Id. at 703-05 (Stewart, J., dissenting). Categorizing newsmen would create a "questionable procedure" because liberty of the press had traditionally been the right of "the lonely pamphleteer" as much as the right of the "metropolitan publisher." Id. at 704. But see Schauer, supra note 7, at 1264 ("It is . . . surprising and anomalous that the same
feared that "[b]y affording a privilege to some organs of communication but not to others, courts would inevitably be discriminating on the basis of content." 52

Nonetheless, the Court did not find that reporters lacked all First Amendment protection when called to testify before a grand jury. 53 Rather, the First Amendment would protect them in limited circumstances in which the grand jury investigation was not conducted in good faith. 54 However, without any bad faith allegations, Justice White perceived the activities in the three cases as legitimate exercises of the grand jury function. 55 The Court noted that the Attorney General of the United States had announced a set of guidelines for subpoenaing members of the media and issued a copy of the guidelines to all United States Attorneys. 56 Justice White forecast that the guidelines "may prove wholly sufficient to resolve the bulk of disagreements and controversies between press and federal officials." 57

3. Justice Powell's Concurrence and Justice Stewart's Dissent

Justice Powell's 58 "enigmatic concurring opinion" 59 has provided an opportunity for lower courts to chip away at the Branzburg holding. 60 While ostensibly joining the majority and providing the crucial fifth vote, Justice Powell's "brief statement" emphasizing the "limited nature of the Court's holding" 61 has produced inconsistency among the circuit courts. 62
Justice Powell suggested that a journalist’s ability to quash a subpoena was not limited to bad faith investigations, but also included situations where the journalist was “called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement.”

Justice Powell called for such claims of privilege to be balanced against the need for the evidence on a case-by-case basis. As a result, courts have interpreted Justice Powell’s concurrence and Justice Stewart’s dissent as creating a qualified privilege for journalists. Only the Sixth Circuit has accepted the *Branzburg* holding that no reporter’s privilege exists. Most circuits have adopted the language of Justice Powell’s opinion, calling for a case-by-case balancing of the journalists’ interest in claiming a privilege and the public’s interest in “relevant testimony with respect to criminal conduct.”

Justice Stewart’s dissent has provided a means to balance the interests at stake. To force a reporter to testify before a grand jury, the government must demonstrate: (1) “there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law”; (2) “information sought cannot be obtained...

The majority rejected the claim of a reporter’s testimonial privilege; Justice Powell seemingly recognized it. The majority rejected the call for a case-by-case, conditional balancing of interests; Justice Powell mandated it. The majority indicated that a journalist could quash a subpoena only by showing that it was issued in bad faith; Justice Powell extended the zone to good-faith subpoenas seeking “remote and tenuous” information... Yet Justice Powell joined the majority opinion. Indeed, his vote made it the majority opinion.


63. *Branzburg*, 408 U.S. at 710 (Powell, J., concurring).

64. *Id.*

65. See, e.g., Titan Sports, Inc. v. Turner Broad. Sys., Inc. (*In re Madden*), 151 F.3d 125, 128-30 (3d Cir. 1998); Shoen v. Shoen, 5 F.3d 1289, 1292-93 (9th Cir. 1993); United States v. Long (*In re Shain*), 978 F.2d 850, 852-53 (4th Cir. 1992); United States v. LaRouche Campaign, 841 F.2d 1176, 1181-82 (1st Cir. 1988); von Bulow v. von Bulow, 811 F.2d 136, 142 (2d Cir. 1987); *In re Selcraig*, 705 F.2d 789, 792 (5th Cir. 1983).


67. *Branzburg*, 408 U.S. at 710 (Powell, J., concurring); see, e.g., Titan Sports, Inc., 151 F.3d at 128-29; United States v. Smith, 135 F.3d 963, 971 (5th Cir. 1998); Shoen, 5 F.3d at 1292-93; *Long*, 978 F.2d at 852; *LaRouche Campaign*, 841 F.2d at 1181-82; *von Bulow*, 811 F.2d at 142; United States v. Caporale, 806 F.2d 1487, 1504 (11th Cir. 1986).

68. See *Branzburg*, 408 U.S. at 743 (Stewart, J., dissenting).
by means less destructive of First Amendment rights”; and (3) there is a “compelling and overriding interest in the information.”  

Justice Stewart, however, did not provide a means for determining who could qualify as a journalist under the privilege. He did not anticipate that the Court would have a problem distinguishing between journalists and non-journalists as did Justice White. Accordingly, it has been left to the lower courts to determine who qualifies as a journalist.

4. The Creation of a Qualified Privilege by Lower Courts

a. Qualified Privilege in Civil Actions

It did not take long for the lower courts to begin to limit *Branzburg*. Drawing on Justice Powell’s comment regarding the “limited nature” of the *Branzburg* holding, the lower courts began determining that a common law privilege existed when the facts of the case differed from

69. *Id.* The federal circuit courts and state courts have adopted similar standards for determining whether the qualified privilege applies. Compare, e.g., *Titan Sports, Inc.*, 151 F.3d at 128-29, with, e.g., *In re Paul*, 513 S.E.2d 219, 223 (Ga. 1999). But see United States v. Caldwell, 408 U.S. 665, 711 (Douglas, J. dissenting). Conversely, in one of the companion cases to *Branzburg*, *United States v. Caldwell*, Justice Douglas expressed his view that the First Amendment provides an absolute privilege for reporters and chastised the *New York Times* for taking the position that First Amendment rights should be balanced against the interests of the government. United States v. Caldwell, 408 U.S. 665, 711-13 (Douglas, J., dissenting). Justice Douglas believed “that all of the ‘balancing’ was done by those who wrote the Bill of Rights. By casting the First Amendment in absolute terms, they repudiated the timid, watered-down, emasculated versions of the First Amendment which both the Government and the *New York Times* advance[d] in the case.” *Id.* at 713.

70. See *Branzburg*, 408 U.S. at 744 (Stewart, J., dissenting) (referring to the need to protect “reporters” and “newsman,” but providing no definition for these terms).

71. See *id.* at 705. Justice White was concerned that “[t]he informative function asserted by representatives of the organized press in the present cases is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists.” *Id.* Thus, Justice White feared that all of these people may rely on confidential sources and therefore would be entitled to invoke such a privilege. *Id.*

72. See, e.g., *von Bulow*, 811 F.2d at 142 (finding that an individual claiming the privilege must prove “he is involved in activities traditionally associated with the gathering and dissemination of news” and that he had the intent at the beginning of the newsgathering process to disseminate the information); see also *Shoen*, 5 F.3d at 1293 (extending the journalistic privilege to a professional investigative book author); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 436-37 (10th Cir. 1977) (holding that a documentary filmmaker is entitled to status as journalist to claim the privilege).

73. See, e.g., *Baker v. F & F Inv.*, 470 F.2d 778, 780 (2d Cir. 1972) (declining to extend *Branzburg* to civil actions).

74. *Branzburg*, 408 U.S. at 709 (Powell, J., concurring).
Branzburg.75 In Baker v. F & F Investment,76 decided just months after Branzburg, the Second Circuit Court of Appeals determined that the district court judge acted within his discretion in denying a motion to compel disclosure of a journalist’s confidential sources in a class action suit brought under the Civil Rights Act.77 The Tenth Circuit followed the Second Circuit in Silkwood v. Kerr-McGee Corp.,78 finding that a defendant in a civil action could not compel a journalist to produce notes and disclose the content of interviews he conducted with confidential sources regarding the death of the plaintiff.79

The Third Circuit continued the trend in Riley v. City of Chester,80 however, rather than rely on the recent decisions in other circuits, the court found support in Rule 501 of the Federal Rules of Evidence.81 The court determined that the rule’s “flexible language was designed to encompass . . . a reporter’s privilege.”82 The court found support for its position in the legislative history of the rule, noting that “the privilege rule was revised to eliminate the proposed specific rules on privileges and to leave the law of privilege in its current state to be developed by the federal courts.”83

The D.C. Circuit and the Second Circuit put forth tests for determining whether a party can compel disclosure of a journalist’s confidential information in a civil action. In Zerilli v. Smith,84 the D.C. Circuit held that the party seeking the reporter’s testimony must demonstrate: (1) the information is more than “marginally relevant”; (2) the information “goes to ‘the heart of the matter’”; and (3) the “party has exhausted

75. See, e.g., Riley v. City of Chester, 612 F.2d 708, 716 (3d Cir. 1979) (finding qualified privilege for a journalist called as a witness in a civil suit in which neither she nor her employer had any personal interest).

76. 470 F.2d 778 (2d Cir. 1972).

77. Id. at 780-81.

78. 563 F.2d 433 (10th Cir. 1977).

79. Id. at 434, 436-37.

80. 612 F.2d 708 (3d Cir. 1979).

81. Id. at 713-14.

82. Id.

83. Id. at 714. The court pointed to the legislative history showing the revision was due to the “nationwide discussions of the newspaperman’s privilege.” Id. (quoting Proposed Rules of Evidence: Hearing on Proposed Rules of Evidence Before the Spec. Subcomm. on Reform of Fed. Criminal Laws of the H. Comm. on the Judiciary, 93d Cong. 5 (1973) (statement of Rep. Elizabeth Holtzman)); see also In re Grand Jury Subpoena, Miller, 397 F.3d 964, 989 (D.C. Cir. 2005) (Tatel, J., concurring) (stating that Rule 501 leaves discretion to the courts to determine whether journalistic privilege exists in particular cases); United States v. Weber Aircraft Corp., 465 U.S. 792, 804 n.25 (1984) (“Rule 501 was adopted precisely because Congress wished to leave privilege questions to the courts rather than attempt to codify them.”).

84. 656 F.2d 705 (D.C. Cir. 1981).
every reasonable alternative source of information." In *McGraw-Hill, Inc. v. Arizona (In re Petroleum Products Antitrust Litigation)*, the Second Circuit required the party seeking disclosure to prove: (1) the information is "highly material and relevant"; (2) "necessary or critical to the maintenance of the claim"; and (3) "not obtainable from other available sources." Other circuits have embraced some combination of these two tests.

b. The Lower Courts Have Defined Who Qualifies as a Journalist by Looking at the Intent at the Inception of the News Gathering Process

Despite the widespread acceptance of a qualified privilege by the circuit courts of appeal, there have been very "few cases that discuss who, beyond those employed by the traditional media, has status to raise the journalist's privilege." However, the circuit courts of appeals have not restricted the journalistic privilege to members of the mainstream media. Beginning with *Silkwood*, some circuits have extended the privilege to others engaged in the journalistic process. The Second Circuit, for example, set forth the following test to determine whether an

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85. Id. at 713 (quoting Carey v. Hume, 492 F.2d 631, 636 (D.C. Cir. 1974).
86. 680 F.2d 5 (2d Cir. 1982).
87. Id. at 7.
88. See, e.g., Shoen v. Shoen, 5 F.3d 1289, 1296 & n.14 (9th Cir. 1993) ("Once the privilege is properly invoked, the burden shifts to the requesting party to demonstrate a sufficiently compelling need for the journalist's materials to overcome the privilege"); United States v. Caporale, 806 F.2d 1487, 1504 (11th Cir. 1986) ("[I]nformation may only be compelled from a reporter claiming privilege if . . . it is highly relevant, necessary to the proper presentation of the case, and unavailable from other sources."); LaRouche v. Nat'l Broad. Co., 780 F.2d 1134, 1139 (4th Cir. 1986) (applying a "three part test: (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"); Miller v. Transamerican Press, Inc., 621 F.2d 721, 726 (5th Cir. 1980) (applying a "three part test . . . (1) is the information relevant, (2) can the information be obtained by alternative means, and (3) is there a compelling interest in the information?"); Riley, 612 F.2d at 716-17 (requiring that the party seeking disclosure show "relevance and necessity," that "other means of obtaining the information" have been "exhausted," and that the "material sought . . . provide[s] a source of crucial information going to the heart of" the claim (quoting Gulliver's Periodicals Ltd. v. Charles Levy Circulating Co., 455 F. Supp. 1197, 1204 (N.D. Ill. 1978))).
91. See id. at 436 (holding that documentary film-makers could invoke the protections of the journalist's privilege); *Shoen*, 5 F.3d at 1293 (holding that a professional investigative book author qualified as journalist to claim benefit of privilege).
individual qualified to claim the privilege as a journalist: the individual must prove "the intent to use [the] material . . . to disseminate information to the public and that such intent existed at the inception of the newsgathering process."\textsuperscript{92} Both the Ninth Circuit and Third Circuits have adopted the Second Circuit's test.\textsuperscript{93} The Third Circuit has stressed that "the test [did] not grant status to any person with a manuscript, a web page or a film."\textsuperscript{94} In the Third Circuit, individuals claiming the privilege have the burden of proving "that they: 1) are engaged in investigative reporting; 2) are gathering news; and 3) possess the intent at the inception of the newsgathering process to disseminate this news to the public."\textsuperscript{95}

Although courts insist that they look exclusively at the intent of the individual claiming the privilege,\textsuperscript{96} the courts also consider the individual's prior experience as a professional journalist.\textsuperscript{97} The Ninth Circuit, in \textit{von Bulow v. von Bulow},\textsuperscript{98} conceded that prior experience would be "persuasive evidence of present intent" to satisfy the requirement for claiming the privilege, but refused to accept it is the \textit{sine qua non}.\textsuperscript{99} Still, one of the primary reasons the court rejected the claim for a privilege in \textit{von Bulow} was that the individual had never published anything under her own name and lacked either a contract with a newspaper or a contract for her proposed book.\textsuperscript{100}

Likewise, the Third Circuit in \textit{Titan Sports, Inc. v. Turner Broadcasting Systems, Inc. (In re Madden)}\textsuperscript{101} focused not just on the individual's intent in seeking the information, but also on the fact that the individual claiming the privilege received all of his information from wrestling promoters.\textsuperscript{102} A competing wrestling promoter subpoenaed the individual claiming the privilege as a nonparty witness in an unfair trade practices action.\textsuperscript{103} Despite the individual's claim to be "Pro Wrestling's

\begin{itemize}
\item \textsuperscript{92} von Bulow v. von Bulow, 811 F.2d 136, 144 (2d Cir. 1987).
\item \textsuperscript{93} \textit{Shoen}, 5 F.3d at 1293; \textit{Titan Sports, Inc.}, 151 F.3d at 130.
\item \textsuperscript{94} \textit{Titan Sports, Inc.}, 151 F.3d at 129.
\item \textsuperscript{95} \textit{Id.} at 131. The \textit{Titan Sports} court held that a commentator who ran a 900-number hotline on professional wrestling did not qualify for constitutional protection because, by his own admission, he was an entertainer who was not gathering "news." \textit{Id.} at 130.
\item \textsuperscript{96} See supra text accompanying notes 92-95.
\item \textsuperscript{97} \textit{Compare Shoen}, 5 F.3d at 1290 n.1 (emphasizing the individual's credentials as an author of two previous investigative books), with \textit{von Bulow}, 811 F.2d at 145 (considering the absence of any prior publication and connection with traditional media as evidence that individual did not have status as journalist to assert privilege).
\item \textsuperscript{98} 811 F.2d 136 (2d Cir 1987).
\item \textsuperscript{99} \textit{Id.} at 144.
\item \textsuperscript{100} \textit{Id.} at 139-40, 145-46.
\item \textsuperscript{101} 151 F.3d 125 (3d Cir. 1998).
\item \textsuperscript{102} \textit{Id.} at 130.
\item \textsuperscript{103} \textit{Id.} at 126.
\end{itemize}
only real journalist,' the court determined that "hyperbolic self-proclamation will not suffice as proof that an individual is a journalist."

The court determined that gathering and disseminating information concerning "fictional wrestling characters" did not qualify as "news" and therefore did not convey status as a "journalist" who qualifies for the privilege.

B. The Nature of the Journalistic Privilege at the State Level

1. Forty-nine States Recognize Some Form of a Privilege

In 1896, Maryland became the first state to enact a statute granting a testimonial privilege to reporters. The actions of the legislature came on the heels of the jailing of a Baltimore Sun reporter, John Morris, for not revealing to a grand jury the sources for his story about bribery of public officials. A series of similar cases occurred in other states before the next state statute was enacted in 1933. More than thirty-five years later, at the time of the Branzburg decision, only seventeen states had statutes protecting journalists from revealing confidential sources.

However, by the summer of 2005, thirty-one states and the District of

104. Id. at 130 (internal quotation marks omitted).
105. Id.
106. Id.
108. See Tofani v. State, 465 A.2d 413, 415 (Md. 1983) ("His article contained information practically identical to testimony received earlier by a grand jury investigating such corruption. Suspecting a leak, the grand jury summoned Morris and demanded to know his source. When he refused, he was imprisoned; he was released when the grand jury's term expired some five days later. The Journalist's Club, alarmed at the prospect of reporters having to choose between freedom and revealing the names of confidential sources, persuaded the General Assembly to enact protective legislation."); see also Bruce L. Bortz & Laurie R. Bortz, "Pressing" Out the Wrinkles in Maryland's Shield Law for Journalists, 8 U. BALTIMORE L. REV. 461, 461-62 (1979) (describing the imprisonment of Morris and the subsequent lobbying efforts for the nation's first shield law).
109. Ervin, supra note 30, at 236; Nathan Siegel, Op-Ed, Our History of Media Protection, WASH. POST, Oct. 3, 2005, at A17 ("10 reporters in several states were jailed for periods ranging from one to six weeks for refusing to disclose sources to grand juries. One of them, a New York Tribune reporter who wrote a story about customs smugglers, lost the first attempt to persuade appellate courts to recognize a 'reporter's privilege.'");
110. Branzburg v. Hayes, 408 U.S. 665, 689 n.27 (1972). At the time of the decision, the states that provided a statutory privilege for journalists were: Alabama, Alaska, Arizona, Arkansas, California, Indiana, Kentucky, Louisiana, Maryland, Michigan, Montana, Nevada, New Jersey, New Mexico, New York, Ohio, and Pennsylvania. Id.
Columbia had enacted statutory privileges for journalists,¹¹¹ and another eighteen states had recognized a common law privilege.¹¹² Only Hawaii has explicitly rejected the existence of any privilege for reporters.¹¹³

2. Media Shield Laws

a. Scope of Privilege

States that enacted shield laws prior to *Branzburg* did so because public policy required protection for members of the press from charges of contempt.¹¹⁴ However, the scope and coverage of the shield laws varies.¹¹⁵ Some of the shield laws provide protection for all published and


113. *In re Goodfader*, 367 P.2d 472, 481-82 (Haw. 1961) (declining to create a privilege for journalists because of the general rule requiring "the disclosure of all information by witnesses in order that justice may prevail" absent action by the Legislature) (quoting *People ex rel. Mooney v. Sheriff of N.Y. County*, 199 N.E. 415, 416 (N.Y. 1936).


    Freedom of the press is one of the foundations upon which our form of government is based. A representative democracy, such as ours, cannot exist unless there is a free press both willing and able to keep the public informed of all the news.

    The threat to a newsman of being charged with contempt and of being imprisoned for failing to disclose his information or its sources can significantly reduce his ability to gather vital information.

    *Governor's Memoranda on Bills Approved, in NEW YORK STATE LEGISLATIVE ANNUAL 472, 508 (1970).*

115. *Compare NEV. REV. STAT. ANN. § 49.275 (LexisNexis 2002) ("No reporter, former reporter or editorial employee of any newspaper, periodical or press association or employee of any radio or television station may be required to disclose any published or unpublished information obtained or prepared by such person in such person's professional capacity in gathering, receiving or processing information for communication to the public, or the source of any information procured or obtained by such person, in any legal proceedings, trial or investigation: 1. Before any court, grand jury, coroner's inquest, jury or any officer thereof. 2. Before the legislature or any committee thereof. 3. Before any department, agency or commission of the state. 4. Before any local governing body or committee thereof, or any officer of a local government."); with GA. CODE ANN. § 24-9-30 (1995) ("Any person, company, or other entity engaged in the gathering and dissemination of news for the public through a newspaper, book, magazine, or radio or television broadcast shall have a qualified privilege against disclosure of any information, document, or item obtained or prepared in the gathering or dissemination of news in any proceeding where the one asserting the privilege is not a party, unless it is shown that this privilege has been waived or that what is sought: (1) Is material and relevant; (2) Cannot be reasonably obtained by alternative means; and (3) Is necessary to the proper preparation or presentation of the case of a party seeking the information, document, or item.").
unpublished material.\textsuperscript{116} Others provide protection only for confidential information.\textsuperscript{117} Furthermore, some of the shield laws provide absolute protection,\textsuperscript{118} although others only provide a qualified privilege.\textsuperscript{119} Finally, there is generally no protection for journalists if they are parties to the action, for example in a defamation suit.\textsuperscript{120}

These state shield laws, however, contain holes.\textsuperscript{121} For example, California’s shield law provides absolute protection from contempt charges and is incorporated into the state’s constitution.\textsuperscript{122} However, it does not provide a privilege against testifying, and yields to conflicting rights such as due process for criminal defendants.\textsuperscript{123} The inconsistent manner in which the California courts have interpreted the shield law has created unpredictability so that, as a practical matter, the shield law no longer provides complete protection from compelled disclosure of confidential news information.\textsuperscript{124}

\textbf{b. Who Qualifies as a Journalist for the Privilege}

The majority of the shield laws contemplate the connection between the individual claiming the privilege and the traditional forms of media.\textsuperscript{125} For example, the California shield law provides protection for “[a] publisher, editor, reporter, or other person connected with or employed

\begin{itemize}
\item \textsuperscript{116} See, e.g., \textit{CAL. CONST. art. I, § 2(b); N.Y. CIV. RIGHTS LAW § 79-h(b)-(c)} (McKinney 1992).
\item \textsuperscript{117} \textit{Commonwealth v. Bowden, 838 A.2d 740, 748 n.6} (Pa. 2003) (holding that Pennsylvania’s shield law only protected compelled disclosure of confidential sources).
\item \textsuperscript{118} See, e.g., \textit{CAL. CONST. art. I, § 2(b); NEV. REV. STAT. ANN. § 49.275}. New York’s statute provides “[a]bsolute protection for confidential news,” but only “[q]ualified protection for nonconfidential news.” \textit{N.Y. CIV. RIGHTS LAW § 79-h(b)-(c)} (McKinney 2002).
\item \textsuperscript{119} See, e.g., \textit{COLO. REV. STAT. § 13-90-119(2)-(3) (2004); GA. CODE ANN. § 24-9-30} (providing “qualified privilege against disclosure of any information, document, or item obtained or prepared in the gathering or dissemination of news in any proceeding where the one asserting the privilege is not a party”); \textit{S.C. CODE ANN. § 19-11-100} (Supp. 2005).
\item \textsuperscript{120} See, e.g., \textit{GA. CODE ANN. § 24-9-30; Brown v. Gatti, 99 P.3d 299, 309-10} (Or. Ct. App. 2004) (holding that Oregon’s shield law does not apply in defamation actions).
\item \textsuperscript{121} \textit{See infra} notes 122-23 and accompanying text.
\item \textsuperscript{122} \textit{CAL. CONST. art. I, § 2(b).}
\item \textsuperscript{123} \textit{Rancho Publ’ns v. Superior Court, 81 Cal. Rptr. 2d 274, 277} (Cal. Ct. App. 1999). State shield laws generally yield to the Sixth Amendment rights of defendants in criminal cases. The Sixth Amendment provides “in all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation [and] to be confronted with the witnesses against him.” \textit{U.S. CONST. amend. VI}.
\item \textsuperscript{124} \textit{Rancho Publ’ns, 81 Cal. Rptr. 2d at 277 n.3}.
\item \textsuperscript{125} See, e.g, \textit{OHIO REV. CODE ANN. § 2739.04} (LexisNexis 2000) (providing a privilege for those individuals connected with a “noncommercial educational or commercial radio broadcasting station” or those connected with a “noncommercial educational or commercial television broadcasting station”); \textit{id. § 2739.12} (providing the same protection to those working for newspapers and press associations).
upon a newspaper, magazine, or other periodical publication, or by a press association or wire service."\(^{126}\) The California law also protects television and radio reporters and other people connected with or employed by a television or radio station.\(^{127}\) The Pennsylvania shield law, by contrast, limits its protection to those engaged, connected, or employed by a "newspaper of general circulation," press association, radio or television station, or "magazine of general circulation."\(^{128}\)

Other state shield laws define a journalist more generally based on the process in which the individual is engaged.\(^{129}\) The Michigan shield law, for example, provides protection for a "reporter or other person who is involved in the gathering or preparation of news for broadcast or publication."\(^{130}\) Such shield laws are similar to the privilege at the federal level because they leave it to a court's discretion to determine whether the individual had the intent to publish or broadcast the information.\(^{131}\) The court also may determine whether the information qualifies as "news."\(^{132}\)

The New York shield law provides a third way for defining who is afforded the privilege.\(^{133}\) New York's shield law provides very explicit definitions of "newspaper," "magazine," "news

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126. CAL. CONST. art. I, § 2(b).
127. Id.; see also NEV. REV. STAT. ANN. § 49.275 (LexisNexis 2002) (extending protection to reporters, former reporters, and editorial employees of newspapers, periodicals, and press associations as well as employees of radio and television stations).
128. 42 PA. CONS. STAT. ANN. § 5942(a) (West 2000). The limitation of the protection to newspapers and magazines of "general circulation" appears to be a direct consequence of Justice White's concern that creation of the privilege would allow individuals to setup fake newspapers to enable criminal activity that would be free from grand jury investigations. See Branzburg v. Hayes, 408 U.S. 665, 705 n.40 (1972).
129. See, e.g., TENN. CODE ANN. § 24-1-208(a) (2000) (extending the privilege to "[a] person engaged in gathering information for publication or broadcast connected with or employed by the news media or press, or who is independently engaged in gathering information for publication or broadcast").
130. MICH. COMP. LAWS ANN. § 767.5a(1) (West 2000).
132. Schauer, supra note 7, at 1279 n.100.
133. N.Y. CIV. RIGHTS LAW § 79-h(a) (McKinney 1992).
134. Id. § 79-h(a)(1) ("'Newspaper' shall mean a paper that is printed and distributed ordinarily not less frequently than once a week, and has done so for at least one year, and that contains news, articles of opinion (as editorials), features, advertising, or other matter regarded as of current interest, has a paid circulation and has been entered at United States post-office as second-class matter.").
135. Id. § 79-h(a)(2) ("'Magazine' shall mean a publication containing news which is published and distributed periodically, and has done so for at least one year, has a paid circulation and has been entered at a United States post-office as second-class matter.").
Despite the explicit nature of the definitions, the definition of "professional journalist" seems to allow an individual to invoke the privilege, without a connection to traditional media forms, depending on the process and intent of the individual.  

C. The First Blogger Case

The first case to involve bloggers claiming a journalistic privilege was a result of Apple Computer's attempt to uncover the source of a leak of trade secrets. Apple subpoenaed the e-mail service providers of websites that hosted blogs in which trade secret information about new Apple products had been leaked. Apple sought "the identity of any person . . . who supplied information regarding an unreleased Apple product." Several non-party bloggers claiming protection under California's media shield law moved for a protective order blocking the subpoena. The California Superior Court found it unnecessary to determine whether the bloggers met the definition of a journalist to qualify for protection because the court determined that the bloggers violated valid criminal trade secret laws. However, the court suggested it would not

136. Id. § 79-h(a)(3) ("News agency' shall mean a commercial organization that collects and supplies news to subscribing newspapers, magazines, periodicals and news broadcasters.").

137. Id. § 79-h(a)(6) ("Professional journalist' shall mean one who, for gain or livelihood, is engaged in gathering, preparing, collecting, writing, editing, filming, taping or photographing of news intended for a newspaper, magazine, news agency, press association or wire service or other professional medium or agency which has as one of its regular functions the processing and researching of news intended for dissemination to the public; such person shall be someone performing said function either as a regular employee or as one otherwise professionally affiliated for gain or livelihood with such medium of communication.").

138. Id. § 79-h(a)(7) ("Newscaster' shall mean a person who, for gain or livelihood, is engaged in analyzing, commenting on or broadcasting, news by radio or television transmission.").

139. Id. § 79-h(a)(8) ("News' shall mean written, oral, pictorial, photographic, or electronically recorded information or communication concerning local, national or worldwide events or other matters of public concern or public interest or affecting the public welfare.").

140. See id. § 79-h(a)(6).


143. Id. (internal quotations omitted).

144. Id. at *1-2, 1192-93.

145. Id. at *7, 1197.
have qualified the bloggers as journalists.\textsuperscript{146} The judge indicated that the important factor to consider was the nature of the information being published by the bloggers.\textsuperscript{147} After examining this factor, the court found that the bloggers put the information on their websites "with essentially no added value."\textsuperscript{148} The Court's decision signifies that a blogger seeking status as a journalist must disseminate something more than reproduced information obtained from others.\textsuperscript{149}

II. THE UNCERTAINTY OF THE CURRENT FRAMEWORK REQUIRES ACTION

A. The Supreme Court is Unlikely to Revisit Branzburg

To the extent that the Branzburg majority relied on "the great weight of authority" to limit First Amendment protections,\textsuperscript{150} some have suggested that a constitutional privilege for journalists ought to be revisited.\textsuperscript{151} Others have criticized the weight afforded to Justice Powell's

\begin{itemize}
\item 146. Id. at *7 & n.7, 1197 & n.7.
\item 147. Id. at *7 n.7, 1197 n.7.
\item 148. Id.
\item 149. Id.
\item 151. See, e.g., id. Judge Tatel suggests that Branzburg was not dispositive of the question whether a journalistic privilege exists. Id. Judge Tatel suggests that the movement in the states to provide more protection for reporters could serve as a basis for rethinking Branzburg in the same way that the Supreme Court had reconsidered the understanding of "cruel and unusual punishment" regarding the execution of the mentally retarded "based on a consensus among 'the American public, legislators, scholars, and judges.'" Id. (quoting Atkins v. Virginia, 536 U.S. 304, 306-07 (2002)). There is also movement internationally to provide protection for reporters. See Goodwin v. United Kingdom, 7 Eur. Ct. H.R. 484, 500 (1996) (holding that "[p]rotection of journalistic sources is one of the basic conditions for press freedom. . . . Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected."); see also Amit Mukherjee, International Protection of Journalists: Problem, Practice, and Prospects, 11 ARIZ. J. INT'L & COMP. L. 339, 344 (1994). In 2002, the International Criminal Tribunal for the Former Yugoslavia unanimously held that war correspondents, under certain circumstances, could not be compelled to testify. Prosecutor v. Brdjanin, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal, ¶ 50 (Dec. 11, 2002); see also Kelly Buchanan, Freedom of Expression and International Criminal Law: An Analysis of the Decision to Create a Testimonial Privilege for Journalists, 35 VICT. U. WELLINGTON L. REV. 609, 614-16 (2004). Although it provided a two-pronged test for determining when war correspondents could be subpoenaed, the Tribunal provided no guidance to determine who would qualify as a journalist for the privilege. Brdjanin at ¶ 50; see also Anastasia Heeger, Securing a Journalist's Testimonial Privilege in the International Criminal Court, 6 SAN DIEGO INT'L L.J. 209, 212 (2005).
\end{itemize}
concurring opinion in *Branzburg* over the years because he joined the majority in holding that there was no First Amendment protection. Justice White's opinion was not a plurality opinion and therefore Justice Powell's concurrence could neither limit nor expand upon the majority's holding.

The argument for revisiting *Branzburg* is that there exists a great deal of uncertainty among the circuits as to who has status to claim the journalist's privilege and as to what types of proceedings a journalist may claim the privilege. Under the current system, a blogger working for the *Washington Post* or *National Review* would have status as a journalist to claim the privilege in the Second, Third, and Ninth Circuits against disclosure of confidential information. However, an individual

(advoicing that the International Criminal Court alter its evidentiary rules to provide a qualified privilege for journalists).

152. See *In re Miller*, 397 F.3d at 971-72 ("Justice Powell's concurring opinion was not the opinion of a justice who refused to join the majority. He joined the majority by its terms, rejecting none of Justice White's reasoning on behalf of the majority . . . . If Justice Powell in any way meant to afford more protection than was afforded by the rest of the majority, that protection cannot possibly extend to appellants . . . ."); *Storer Commc'n v. Giovan* (In re Grand Jury Proceedings), 810 F.2d 580, 585-86 (6th Cir. 1987) ("It is readily apparent, then, that Justice Powell's concurring opinion is entirely consistent with the majority opinion, and neither limits nor expands upon its holding, but that, instead, it responds to what Justice Powell perceived as an unwarranted characterization of that holding by Justice Stewart. Perhaps Justice Powell's use of the term 'privilege' has provided too great a temptation for those inclined to disagree with the majority opinion. In the sense that the balancing referred to by Justice Powell, when instigated by a reporter seeking to protect a confidential source, may result in the denial to a party of the use of evidence which is reliable, one is reminded of the invocation of a 'privilege,' as contrasted with an 'exclusion' which prohibits the introduction of evidence which is unreliable or calculated to mislead or prejudice. But, this balancing of interests should not then be elevated on the basis of semantical confusion, to the status of a first amendment constitutional privilege.").

153. See *Branzburg*, 408 U.S. at 709-10 (Powell, J., concurring); *Storer Commc'ns, Inc.*, 810 F.2d at 585.

154. See Clay Calvert, *And You Call Yourself a Journalist?: Wrestling With a Definition of “Journalist” in the Law*, 103 DICK. L. REV. 411, 414 (1999) (noting the irony "that the threshold question of whether a person who claims to be a journalist really is a journalist for the purpose of asserting the reporter’s privilege is seldom explored by courts"); Kraig L. Baker, Comment, *Are Oliver Stone and Tom Clancy Journalists? Determining Who Has Standing to Claim the Journalist’s Privilege*, 69 WASH. L. REV. 739, 740 (1994) ("There is little case law that discusses who, beyond the traditional media, is covered by journalists’s privilege.").


156. See von Bulow v. von Bulow, 811 F.2d 136, 144 (2d Cir. 1987) (acknowledging that the court will look at an individual's prior experience as a professional journalist for
with no history of working for traditional media outlets and publishing exclusively on a website could not claim status as a journalist for protection in any circuit, unless his or her purpose is to disseminate the information to the public.\footnote{157}

There is also an argument that the Department of Justice guidelines, which the Branzburg majority looked upon so favorably,\footnote{158} have failed to rectify the problem of subpoenaing members of the media.\footnote{159} Although Justice White predicted that the Department of Justice guidelines for subpoenaing media witnesses could eliminate the problem in the future,\footnote{160} the problem of subpoenaing journalists continues as journalists continue to face sanctions for refusing to testify.\footnote{161} One of the main problems with the guidelines has been that they provide no legal recourse for members of the media who believe a prosecutor has abused his discretion.\footnote{162} Lower courts have consistently held that "the guidelines . . . do 'not create or recognize any legally enforceable right in any person."\footnote{163}

\footnotetext{157}{Cf. von Bultow, 811 F.2d at 145 (concluding that the individual's lack of a contract for publication of manuscript prohibited her from claiming journalistic privilege to protect her from producing subpoenaed notes and documents).}

\footnotetext{158}{See Branzburg, 408 U.S. at 707 & n.41.}

\footnotetext{159}{See Neubauer, supra note 8, at 185 (claiming that overzealous United States Attorneys ignored, from the beginning, the requirements that the Attorney General must approve all subpoenas); see also The Reporters Committee for Freedom of the Press, Special Report: Reporters and Federal Subpoenas, http://www.rcfp.org/shields_and_subpoenas.html (last visited June 26, 2006) (describing the numerous current legal controversies between prosecutors and journalists). "Of eleven subpoenas requested by the Justice Department from August 1970 to October 1972, five were never approved by the Attorney General." Neubauer, supra note 8, at 185 (citing Newsman's Privilege Legislation: Hearings Before Subcomm. No. 3 of the H. Comm. on the Judiciary, 93d Cong. 578-80 (1973) (memorandum of the U.S. Justice Department). The trend continued between March 1973 and May 1975 when twenty-two "[o]f [the] 76 subpoenas requested by the Justice Department against news personnel . . . were never approved by the Attorney General." Neubauer, supra note 8, at 185-86 (citing Robert Walters, Sharing the News With Justice, COLUM. JOURNALISM REV., Sept.-Oct. 1975, at 18).}

\footnotetext{160}{Branzburg, 408 U.S. at 707.}

\footnotetext{161}{See The Reporters Committee for Freedom of the Press, supra note 159.}

\footnotetext{162}{Neubauer, supra note 8, at 185; see also 28 C.F.R. § 50.10 (2004) (providing only for what prosecutors may and may not do).}

\footnotetext{163}{See, e.g., In re Grand Jury Subpoena, Miller, 397 F.3d 964, 975 (D.C. Cir.) (quoting 28 C.F.R. § 50.10(n)), cert. denied, 125 S. Ct. 2977 (2005); In re Special Proceedings, 373 F.3d 37, 44 n.3 (1st Cir. 2004) (noting that the Department of Justice guidelines state that they do not create legally enforceable rights). The enactment of the guidelines was not required by any constitutional provision or statute. Id. The guidelines
Still, some commentators praise the guidelines as a “shadow federal shield law” that has been effective in protecting journalists.¹⁶⁴

However, the Supreme Court is unlikely to revisit Branzburg and establish a constitutional privilege for journalists because the Court has resisted opportunities to do so in the past.¹⁶⁵ Although there may have been a shift in the “great weight of authority,”¹⁶⁶ the strict constructionists on the Court, vociferous critics of relying on anything beyond the text of the Constitution, are highly unlikely to recognize the existence of a journalist’s privilege.¹⁶⁷

### B. State Shield Laws Do Not Provide Sufficient Protection

Although many states responded to the Branzburg decision by enacting their own shield laws to protect journalists, some state shield laws do not provide as much protection to journalists as it may appear.¹⁶⁸

For example, the California Supreme Court proclaimed in Mitchell v. Superior Court¹⁶⁹ that the California shield law, which provides journalists absolute immunity from contempt,¹⁷⁰ granted news organizations “virtually absolute protection against compelled exist merely to direct the Department of Justice when it exercises its discretion to determine whether to subpoena reporters and other media personnel. See United States v. Long (In re Shain), 978 F.2d 850, 853 (4th Cir. 1992). But see In re Grand Jury Subpoena of Williams, 766 F. Supp. 358, 370-71 (W.D. Pa. 1991) (relying on prosecutor’s failure to abide by the guidelines as reason for quashing subpoena), aff’d, 963 F.2d 567 (3d Cir. 1992).


¹⁶⁵. See, e.g., Miller v. Transamerican Press, Inc., 621 F.2d 721, 726-27 (5th Cir. 1980) (allowing the plaintiff to discover the identity of a confidential source where the informant’s identity was the only way the plaintiff could establish malice), cert. denied, 450 U.S. 1041 (1981).

¹⁶⁶. See supra notes 150-51 and accompanying text (discussing change in state and international courts).


¹⁶⁹. 690 P.2d 625 (Cal. 1984).

¹⁷⁰. See CAL. CONST. art. I, § 2(b).
disclosure.” However, lower courts in California and commentators have called into question the California Supreme Court’s assessment because the shield law provides news organizations no protection from other penalties for failing to testify and “yields to other conflicting rights in appropriate circumstances, including the due process rights of criminal defendants.”

Much of the problem stems from the tension that shield laws create between the legislative and judicial branches. The Supreme Court was concerned that a reporter’s privilege would obstruct grand jury investigative proceedings by preventing grand juries from obtaining relevant evidence. As a result, courts have interpreted state shield statutes narrowly. In criminal proceedings, courts have found that the Sixth Amendment rights of the accused trump any state statute protecting journalists from testifying. There is also a history of tension between some judges, who feel undermined by journalists who insist their constitutional rights trump judicial orders.

172. See, e.g., Rancho Publ’ns v. Superior Court, 81 Cal. Rptr. 2d 274, 277 & n.3 (Cal. Ct. App. 1999) (contending that with all the exceptions and limitations to the shield law, it could hardly provide the absolute protection from forced disclosure claimed by the Supreme Court in Mitchell); Alger, supra note 168, at 161 (claiming that courts have applied the law so inconsistently that “[o]nly an omniscient reporter could know prospectively when he or she agrees to keep a secret whether, and in what kind of proceeding, he or she will be subpoenaed”).
174. See, e.g., Branzburg v. Hayes, 408 U.S. 665, 688 (1972) (noting that “the longstanding principle that ‘the public . . . has a right to every man’s evidence’ is particularly applicable to grand jury proceedings” (quoting United States v. Bryan, 339 U.S. 323, 331 (1950))).
175. See Neubauer, supra note 8, at 169.
176. See Jascalevich, 394 A.2d at 337 (holding that the testimonial privilege created by New Jersey’s shield law yielded to Sixth Amendment protections for compulsory process); People v. Ramos, 101 P.3d 478, 501 (Cal. 2004) (observing that “a newsperson’s protection under the shield law must yield to a criminal defendant’s constitutional right to a fair trial when the newsperson’s refusal to disclose information would unduly infringe on that right.” (quoting Delaney v. Superior Court, 789 P.2d 934, 937 (Cal. 1990))). But see Jascalevich, 394 A.2d at 343-44 (Pashman, J., dissenting) (emphasizing that the shield law “reflects our Legislature’s judgment that an uninhibited news media is more important to the proper functioning of our society than is the ability of either law enforcement agencies, the courts or criminal defendants to gain access to confidential news data.”).
177. See Rosen, supra note 11, at 30-31 (explaining that some of the reporters convicted of contempt “had little or no role in reporting the story” in question). Rosen provided State v. Neulander, 801 A.2d 255 (N.J. 2002), as an example of a case where such tension existed. Rosen, supra note 11, at 30-31. The state shield law was not in question, but the Neulander court reversed the contempt convictions of the Philadelphia Inquirer reporters who published an article identifying the forewoman of a jury in violation of the judge’s orders not to identify jury members. Id. According to Rosen, at the contempt
A blogger without connections to traditional media outlets could be protected under statutes that define journalists broadly, such as Michigan's, which extends protection to "[a] reporter or other person who is involved in the gathering or preparation of news for broadcast or publication." However, such a general statute permits a court to interpret whether the blogger falls within the category of journalists to be protected and therefore provides no guarantee to a blogger that he will be able keep a promise of confidentiality. Independent bloggers would have no protection under a shield statute like Pennsylvania's, which narrowly limits protection to those "engaged on, connected with, or employed by any newspaper of general circulation or any press association or any radio or television station, or any magazine of general circulation." It is somewhat less clear whether an independent blogger would qualify for protection under the New York statute. Although the New York shield law provides an extensive definition of "professional journalist," it leaves open whether an independent blogger could claim protection under the provision that includes anyone working for any "professional medium or agency which has as one of its regular functions the processing and researching of news intended for dissemination to the public." Regardless of whether bloggers are entitled to protection under state shield laws, relying on the system of state shield laws to protect blogger-

hearing in Neulander, "[t]he tension between the judges, the reporters, and their counsel was so palpable that at one point when a defense lawyer's motion was denied and he asked to make his record, the judge actually left the courtroom while the attorney made his remarks." Id.

178. See, e.g., MICH. COMP. LAWS ANN. § 767.5a(1) (West 2000); OR. REV. STAT. § 44.520(1) (2003) ("No person connected with, employed by or engaged in any medium of communication to the public shall be required by a legislative, executive or judicial officer or body, or any other authority having power to compel testimony or the production of evidence, to disclose, by subpoena or otherwise . . . ."); TENN. CODE ANN. § 24-1-208(a) (2000) ("A person engaged in gathering information for publication or broadcast connected with or employed by the news media or press, or who is independently engaged in gathering information for publication or broadcast, shall not be required by a court, a grand jury, the general assembly, or any administrative body, to disclose before the general assembly or any Tennessee court, grand jury, agency, department, or commission any information or the source of any information procured for publication or broadcast.").

179. Cf. In re Stone, 397 N.W.2d 244, 246-48 (Mich. Ct. App. 1986) (holding that the state shield law for "reporters of newspapers or other publications" did not apply to broadcast media). The Michigan legislature subsequently amended the shield law to include broadcast media. See MICH. COMP. LAWS ANN. § 767.5a(1) (West 2000).

180. 42 PA. CONS. STAT. ANN. § 5942 (West 2000).

181. See N.Y. CIV. RIGHTS LAW § 79-h(b)-(c) (McKinney 1992).

182. Id. § 79-h(a)(6).

183. Id.
journalists is inadequate because state shield laws provide little or no help in federal proceedings. 184 Although a reporter may be certain that his promise of confidentiality will be protected under state law at least in some states, there is no certainty that he can guarantee confidentiality if he is subpoenaed in federal court. 185

C. Congress Could Take Action

1. Codify the Journalist's Privilege in the Federal Rules of Evidence

At least one commentator has suggested that Congress should codify the journalist's privilege in the Federal Rules of Evidence. 186 Although the judiciary has the right to add, delete, or amend other rules of evidence, 187 "any . . . rule creating, abolishing, or modifying an evidentiary privilege [must be] . . . approved by Act of Congress." 188 Currently, the Federal Rules of Evidence do not provide any specific nonconstitutional privileges. 189 The original draft of Rule 501 provided nine specific nonconstitutional privileges, but did not include a privilege for a reporter or journalist. 190 After outcry over the proposed privilege rules, including those concerned that reporters were being denied a privilege, 191 the rule was revised to eliminate all the specific enumerated privileges and left the federal courts to develop the law of privileges. 192

It is unlikely that Congress will attempt to codify the law of privileges again, particularly the journalistic privilege, because the first attempt


185. Id.


187. Id. at 777-78.

188. 28 U.S.C. § 2074(b) (2000); see also Broun, supra note 186, at 778 ("The judiciary, including the United States Supreme Court, may suggest new privilege rules, but any such rule would have to be adopted by Congress rather than simply allowed to come into existence as is the case with other rules of evidence.").


192. Broun, supra note 186, at 777.
drew tremendous opposition from academics and "current and former members of the judiciary." Although the codification of the Federal Rules of Evidence was controversial in itself, the "chair of the subcommittee that held hearings on the . . . rules, commented that '50 percent of the complaints in our committee related to the section on privileges.'"

2. Enact a Federal Shield Law

The uncertainty surrounding the journalistic privilege at the federal level has led some commentators to suggest that a federal shield law should be enacted to protect the press. During the six-year period following the Branzburg decision, Congress witnessed the introduction of close to one hundred proposed federal statutes to protect journalists. The failure of these bills was partially a result of Congress' "inability to reach consensus on the definition of a 'journalist' and . . . the insistence of the press on an absolute privilege, not a qualified one." It was also


194. Proposed Rules of Evidence Hearing, supra note 191, at 263-64 (statement of Henry J. Friendly, C.J., U.S. Court of Appeals for the Second Circuit) (criticizing the concept of evidence rules in general and privilege rules in particular); Proposed Rules of Evidence Hearing, supra note 191, at 156 (testimony of Arthur J. Goldberg, Former Supreme Court J.) (doubting Congress' authority to enact a code of evidence that "extends to rules of privilege").

195. See Broun, supra note 186, at 769; see also Weinberg, supra note 193, at 594.


197. See Robert Zelnick, Journalists and Confidential Sources, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 541, 552 (2005) (calling for the press "to unite behind a sensible federal shield law" that would protect confidentiality "except where one seeking access to the information can establish that it is highly relevant and material to the issue at hand, it cannot be obtained from any other source, it engages important societal values, and it clearly serves the interests of justice"); Alexander, supra note 15, at 131-32 (proposing a statute that would include journalists connected to non-traditional media); Neubauer, supra note 8, at 192 (advocating a federal statutory solution to the problem of the journalist's privilege); Ervin, supra note 30, at 267 (explaining the evolution of his position from believing that courts should develop a journalist's privilege to supporting the enactment of a federal shield law).


199. Id.
the result of opposition from the American Bar Association\textsuperscript{200} and influential members of the media.\textsuperscript{201} Currently, there are two bills before Congress which would create a federal shield law.\textsuperscript{202} However, only the Free Speech Protection Act of 2005, because of its broad definition of news media, contemplates protection of bloggers not connected to traditional media outlets.\textsuperscript{203}

The \textit{Branzburg} decision certainly left open the possibility that Congress could fashion a shield law in the future.\textsuperscript{204} It would not be the
first time that Congress responded to an unfavorable Court decision against the press by enacting a law that limited the application of the Court’s decision. For example, in Zurcher v. Stanford Daily, the Supreme Court held that a newspaper could not claim any First Amendment protection to prevent the government from searching its offices pursuant to a search warrant. Congress responded by enacting the Privacy Protection Act of 1980 prohibiting the government from using search warrants against the press when the press was not the subject of the criminal investigation. The law provides a civil cause of action for damages against the federal government for not less than $1,000. The law was enacted pursuant to Congress’ constitutional powers under the Commerce Clause.

The idea that Congress could use its powers under the Commerce Clause to enact a federal shield law to protect journalists is not new. Congress has treated the “gathering and dissemination of news as part of interstate commerce... to place the media under controls with respect to labor relations and anti-competitive activities.” In fact, the original proposed shield law following Branzburg would have applied to both federal and state proceedings.

The Supreme Court has long recognized that the federal government has the authority to regulate broadcast radio and television. With the increasing consolidation of the telecommunications industry into “media hybrids” that deliver telephone, cable television, and internet access, Congress has an even greater need and authority to provide regulation to discerned and, equally important, to refashion those rules as experience from time to time may dictate.

206. Id. at 565-68. The Court rejected the District Court’s adoption of a “per se rule forbidding [the government from conducting searches of a third-party newspaper by] search warrant and permitting only subpoena[s] duces tecum.” Id. at 563, 567-68.
208. Id. § 2000aa(a) (“Notwithstanding any other law, it shall be unlawful for a government officer or employee, in connection with the investigation or prosecution of a criminal offense, to search for or seize any work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce.”).
209. Id. § 2000aa-6(f).
210. See id. § 2000aa(a); U.S. CONST. art. I, § 8, cl. 3.
211. Neubauer, supra note 8, at 187.
212. Id. (footnote omitted).
213. Id.; see also H.R. 5928, 93d Cong. § 1843 (1973).
protect the public's First Amendment interests. Although the Supreme Court has previously determined that the Internet lacks the invasive character of broadcast television or radio to require regulation, the changing nature of the Internet makes it more akin to television and radio than to print media.

Even with the decisions in United States v. Lopez and United States v. Morrison, which have restricted Congress' power under the Commerce Clause, a federal shield law could pass judicial muster. The gathering and dissemination of news is an activity that has a substantial effect on interstate commerce, and therefore fits into the third category of activities that Congress may regulate under Lopez. The gathering and dissemination of news also satisfies the Morrison test as a commercial activity because the search for truth has been subjugated to the demand for profit. The changed nature of the institutional media from closely-held family businesses to public corporations has made the media subject to the "expectations of investors, analysts, and fund managers."

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220. See infra text accompanying notes 221-27.
222. Lopez, 514 U.S. at 558-59. The majority identified three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce . . . .

Id. (citations omitted).

223. See Morrison, 529 U.S. at 610-12. The majority laid out four factors to consider in determining whether a statute had a substantial relation to interstate commerce: (1) is the regulated activity economic; (2) does the statute contain an "'express jurisdictional element which might limit its reach to a discrete set'" of circumstances; (3) does the statute "contain[] express congressional findings regarding the effects [of the activity] upon interstate commerce"; (4) is the relation between the regulated activity and the substantial effect "attenuated." Id. (quoting Lopez, 514 U.S. at 562).
225. See id. at 454; see also Frank A. Blethen, It's Going to Get Worse, COLUM. JOURNALISM REV., May/June 2001, at 23 (noting that "[b]eing publicly traded means your fiduciary responsibility is to maximize profits, which forces you to focus on short-term
Journalism has become driven by the need to please advertisers in order to make a profit as much as it is driven by a desire to inform the public. Although journalism may have been considered a noneconomic activity at one time, today it is certainly an economic activity that would qualify for congressional regulation under the Commerce Clause.

III. CONGRESS SHOULD ENACT A FEDERAL SHIELD LAW THAT WOULD PROTECT BLOGGER-JOURNALISTS

Congress is the proper forum for determining the scope of the journalist privilege to protect confidential sources. The determinations to be made about which individuals have status as journalists "do not flow from constitutional principle[s]." Relying on the courts to make such determinations in this rapidly changing world of media will lock in place decisions that are likely to "look quite foolish a few years later," when the circumstances leading to the decision have changed. State legislatures have already shown the ability to craft "crisp" definitions in...
their own shield laws.\textsuperscript{231} There is no reason why Congress cannot do the same.\textsuperscript{232}

However, the bills currently before Congress do not provide the proper amount of protection for journalists.\textsuperscript{233} The Free Flow of Information Act of 2005 only provides qualified protection from a federal entity compelling a reporter to produce information in "any proceeding or in connection with any issue arising under Federal law."\textsuperscript{234} A journalist would have no protection under the proposal if a party sought information through discovery in a diversity action.\textsuperscript{235} The bill also fails to extend protection to an independent blogger who publishes exclusively on the Internet.\textsuperscript{236}

The Free Speech Protection Act of 2005, on the other hand, defines journalists too broadly.\textsuperscript{237} It incorporates a definition proposed by some commentators that only looks at whether the individual claiming the privilege is engaged in the journalistic process.\textsuperscript{238} Critics worry that such a broad definition of journalist would not only protect any person who sets up a blog, but would also apply to any individual employed by state-owned foreign news agencies hostile to America.\textsuperscript{239}

\begin{itemize}
\item \textsuperscript{231} Schauer, supra note 7, at 1278 n.100 (asserting that the problem of defining journalists is largely illusory when looking at existing journalist shield laws); see also 42 PA. CONS. STAT. ANN. § 5942(a) (West 2000).
\item \textsuperscript{232} Cf. Schauer, supra note 7, at 1278 n.100.
\item \textsuperscript{234} S. 1419, § 2.
\item \textsuperscript{235} See id.
\item \textsuperscript{236} See The Reporters Committee for Freedom of the Press, supra note 159.
\item \textsuperscript{237} See id.; S. 369, § 2.
\item \textsuperscript{238} S. 369; see also, Alexander, supra note 15, at 130 (defining a journalist in proposed statute as "any person who is engaged in gathering news for public presentation or dissemination by the news media"); Berger, supra note 16, at 1404-06 (advocating the protection of the journalistic process, as "defined as work that demonstrates a commitment to regular and public dissemination of 'journalistic truth'.")
\item \textsuperscript{239} See Reporters' Privilege Legislation Hearing, supra note 184, at 2-3 (statement of Sen. John Cornyn, Member, S. Comm. on the Judiciary) ("[A]s we consider what protections to afford, it is also important to consider whether bloggers, or reporters for entities such as Al Jazeera, or others whose associations perhaps are questionable or even cause for concern, ought to be covered under this type of law."); see also Reporters' Privilege Legislation Hearing, supra note 184, at 2 (statement of Chuck Rosenberg, U.S. Att'y for the Southern District of Texas, U.S. Dep't of Justice) ("[T]he Department [of Justice] objects to the broad definition of 'covered person' in section 5(2) that, inter alia, encompasses foreign media and foreign news agencies (including government-owned and operated [sic] news agencies), some of which are hostile to the United States and some of which can, and have, acted in support of foreign terrorist organizations (a reporter of the Qatari news network Al-Jazeera was recently convicted in Spain for acting as a financial courier for Al-Qaeda)").
\end{itemize}
Congress should enact a federal shield law that applies to all proceedings in federal courts. Although journalists might prefer a shield law that applies to both federal and state proceedings, there would be too much resistance to Congress "forcing federal evidentiary rules upon state courts." At the state level, most journalists enjoy at least a qualified privilege to protect confidential sources. Therefore, a federal shield law should focus on protecting journalists, especially blogger-journalists, in federal proceedings.

A proper federal shield law should explicitly define "news media," "journalist," and "news," such as those in the New York media shield law, to clarify who has status to qualify for the journalistic privilege. To protect individuals who publish exclusively on the internet, the shield law should define "media" as a "newspaper, magazine, news agency, press association, wire service, radio or television station, online news service or website which has as one of its primary functions the purpose of disseminating news." Similarly, the shield law should define "journalist" as: "a person who for gain or livelihood, is engaged in gathering, preparing, collecting, writing, filming, taping, or photographing news intended for dissemination by media and the person is professionally affiliated with the media disseminating the information." A blogger who charges a subscription fee or who is under contract with an online news service would qualify for protection because she would receive a monetary gain from her activities even if blogging is not her full-time job.

This proposed definition of journalist is a compromise between those commentators who believe the law should protect the process of journalism and those who believe that the law should provide the

240. Cf. Neubauer, supra note 8, at 187-88. In the alternative, the media could take the proposed federal shield law and use it as a model statute to propose to state legislatures in the same way that many states adopted the provisions of the Federal Rules of Evidence and the Uniform Commercial Code. Using the state by state approach could result in a uniform journalistic privilege at the state and federal level. However, the media is unlikely to spend the time and money necessary to pass a uniform shield law in each state because most journalists already enjoy at least some level of protection at the state level. See supra notes 111-12 and accompanying text.

241. See discussion supra Part I.B.

242. See supra notes 134-39 and accompanying text (highlighting New York’s equivalent definitions).


245. See id. (requiring first that a journalist receive "gain or livelihood" for his or her effort).

246. See, e.g., Berger, supra note 16, at 1404-06 (advocating that "the protected process of journalism can be defined as work that demonstrates a commitment to regular and public dissemination of 'journalistic truth'”). Berger’s definition “relies . . . on journalists’
privilege only to the traditional media institutions. The problem with using the journalistic process to define who is protected by the privilege is that bloggers do not adhere to the traditional journalistic process because they rely on their readers to serve the editorial role. Such a definition of journalist would be over-inclusive because it would protect publishers of gossip and rumor who retract the false information they publish only after readers complain. On the other hand, if a shield law was to "carve up" the First Amendment to favor journalists tied to traditional media institutions at the expense of blogger-journalists and others operating in the "new media," it would be under-inclusive of individuals who deserve the protection of the privilege. This proposed definition would certainly leave some amateur bloggers providing newsworthy information without protection; however, this unfortunate consequence would be outweighed to the extent that such a definition would satisfy those critics concerned about an overly broad journalistic privilege.

In addition, the federal shield law should distinguish between "news" and other forms of journalism in limiting the information that is protected from subpoena. Some commentators have criticized the definitions of the values, standards, mission, and work practices of their profession." Id. at 1376.

247. See, e.g., Alexander, supra note 15, at 135-36 (arguing for a limited approach to the scope of the journalist's privilege to ensure that it remains viable for traditional journalists); cf. Schauer, supra note 7, at 1276-78 (suggesting that the First Amendment ought to provide special protections for certain types of institutions without providing any evidence of what an institutional approach would look like).

248. See Berger, supra note 16, at 1415 (suggesting that bloggers may satisfy the editorial function of traditional journalism by evaluating and responding to immediate feedback from readers).

249. See Alexander, supra note 15, at 131 (rejecting a broad formulation for the journalist's privilege because it "risk[s] doing great harm to the free flow of information undergirding the concept of a journalist's privilege").

250. See Carpenter, supra note 23, at 1411 (cautioning that favoring individuals connected to traditional media will create a bias favoring "mainstream institutions and ideas at the expense of 'the poorly financed causes of little people'") (quoting Martin v. City of Struthers, 319 U.S. 141, 146 (1943)).

251. See Reporters' Privilege Legislation Hearing, supra note 184, at 2-3 (statement of Chuck Rosenberg, U.S. Att'y for the Southern District of Texas, U.S. Dep't of Justice); Reporters' Privilege Legislation Hearing, supra note 184, at 1-2 (statement of Sen. John Cornyn, Member, S. Comm. on the Judiciary).

252. See, N.Y. CIV. RIGHTS LAW § 79-h(a)(8) (McKinney 1992) (defining "news" so it is limited to "local, national, or worldwide events or other matters of public concern or public interest or affecting the public welfare"); see also Gloria Borger, "Matt Drudge Is Not My Colleague", HARV. INT'L J. PRESS/POL., Summer 1998, at 132, 133 ("Matt Drudge is the gossip you hear around the watercooler[,] . . . not what you're reading . . . on the front page of the New York Times."); cf. Janet Forgieve, Net a Fret: Cronkite Says That's Way It Is; Web Infested with People Pretending to be Journalists, Famed Newsman Says,
inclusion of the term “news” in shield laws because they believe the
government should not evaluate what qualifies as news.253 However, the
courts readily distinguish between other forms of speech under the First
Amendment; therefore, Congress and the courts should be able to
determine what is “news” and what is deserving of protection.254 While
the gripe and gossip websites may enjoy some of the same characteristics
as Pulitzer Prize-winning reporting for the Washington Post, Congress
and the courts can draw lines between the two.255 The inclusion of the
term “news” into the shield law also alleviates the concerns of those who
fear the creation of sham media in order for criminals and terrorists to
hide behind the shield law.256 It also mirrors the actions of what some
federal courts have already been doing in limiting who can qualify as a
journalist to be eligible to invoke the privilege.257

IV. CONCLUSION

Congress should take affirmative steps to protect journalists from
being used by the government in investigations by establishing a strong
shield law.258 The Valerie Plame episode demonstrated, once again, that
the federal judiciary is unwilling to provide sufficient protection for
journalists from compelled disclosure of confidential information.259
Although the states have enacted shield laws of their own to protect
journalists, they are insufficient.260 In addition, the varying standards
among the circuit courts of appeal as to what constitutes the qualified

1096912 (reporting that Walter Cronkite believes the Internet is filled with individuals
posing as journalists who publish unsubstantiated rumors without fear of penalty).

253. See Berger, supra note 16, at 1410 ("[R]equiring that the end publication contain
a particular kind of content—whether it is defined as ‘news’ or information of legitimate
public concern—is both constitutionally suspect and unworkable.") (footnote omitted); see
also Anderson, supra note 16, at 529 ("In current First Amendment thought, the idea that
government has no business evaluating the importance of various kinds of speech is, if not
an article of faith, at least a strong presumption.").

254. Schauer, supra note 7, at 1263-64 (pointing out that the Supreme Court “readily
distinguishes incitement from advocacy, commercial speech from noncommercial speech,
obscenity from indecency, public interest speech from personal interest speech”) (citations
omitted).

255. Carpenter, supra note 23, at 1408.

256. See, e.g., Reporters’ Privilege Legislation Hearing, supra note 184, at 2 (statement
of Sen. John Cornyn, Member, S. Comm. on the Judiciary).

257. See Titan Sports, Inc. v. Turner Broad. Sys., Inc. (In re Madden), 151 F.3d 125,
130 (3d Cir. 1998) (holding that dissemination of information concerning fictional
wrestling characters did not constitute “news” to confer status on individual as journalist).

258. See supra notes 37-39 and accompanying text.

259. See supra notes 9-11 and accompanying text.

260. See discussion supra Part II.B.
privilege create too much uncertainty for journalists pledging confidentiality. 261 Therefore, action on the federal level is necessary.

The Supreme Court is unlikely to act on the privilege issue; the Court has consistently refused to revisit its decision in _Branzburg_ to reject a First Amendment privilege for journalists who refuse to provide evidence to a grand jury. 262 Although it has neglected to enact a shield law in the past, the more likely source of action is Congress. 263 Congress arguably has the authority pursuant to the Commerce Clause to enact a federal shield law to protect journalists. 264 However, the problem for Congress will be determining which individuals qualify as journalists for protection. 265 The advent of the Internet and bloggers has made the job of defining journalists much harder than in the past. 266 While Congress could limit its definition of journalists to individuals in the traditional media, it will be doing a disservice to technology and progress if it produces a federal shield law that does not protect individuals who pursue the journalistic vocation exclusively online. 267 The line between journalists and non-journalists on the Internet may not be easy to draw, but Congress nevertheless must draw it. Blogger-journalists deserve to be protected as much as journalists employed by the traditional media.

261. _See supra_ Part II (discussing options that Congress can pursue to protect the journalistic privilege in the absence of sufficient protection in the circuit courts and the states).

262. _See supra_ notes 165-67 and accompanying text.

263. _See supra_ notes 199-203 and accompanying text.

264. _See supra_ text accompanying notes 211-27.

265. _See supra_ notes 246-51 and accompanying text.

266. _See supra_ note 15 and accompanying text.

267. _See supra_ note 250 and accompanying text.