FEDERAL SHIELD LAW: PROTECTING FREE SPEECH OR ENDANGERING THE NATION?

Michael D. Saperstein, Jr.†

I. INTRODUCTION

A New York Times reporter, involved in a situation of national security, received several subpoenas from a federal prosecutor in order to establish the identity of a confidential source. After refusing to appear before the grand jury, the judge ordered the reporter to be held in contempt of court and jailed. Given the heightened state of national security, one observer of the situation noted:

It is said currently press subpoenas have multiplied, that mutual distrust and tension between press and officialdom have increased, that reporting styles have changed, and that there is now more need for confidential sources, particularly where the press seeks news about minority cultural and political groups or dissident organizations suspicious of the law and public officials.

This observation by Justice White in *Branzburg v. Hayes* came thirty-three years ago, but the situation described could easily have been ripped from the headlines of 2005. The case of Judith Miller, the New York Times reporter who was jailed for contempt of court because she refused to testify before a grand jury about the identity of her confidential sources, provides an excellent parallel. The current climate of terrorism, at home and abroad, has created

† Candidate for J.D., Catholic University of America, Columbus School of Law, 2007. I would like to dedicate this article to my parents for their unending support and my grandfather, Samuel A. Schrader, who has shown me the value of perseverance.


2 *Id.* at 678.

3 *Id.* at 699.

4 See, e.g., Clarence Page, *These Are Risky Times for Hard News and Views*, Chi. Trib., Nov. 27, 2005, at C1. This article provides a comprehensive summary of the entire Judith Miller affair, detailing the background of how she came to be subpoenaed in federal court to disclose a confidential source, her subsequent jail time for refusing

5 See Don Van Natta Jr. et al., *The Miller Case: A Notebook, a Cause, a Jail Cell and a Deal*, N.Y. Times, Oct. 16, 2005, § 1, at 1. This article provides a comprehensive summary of the entire Judith Miller affair, detailing the background of how she came to be subpoenaed in federal court to disclose a confidential source, her subsequent jail time for refusing
extraordinary and unprecedented issues, giving the debate over journalistic privileges an even greater importance. The controversy over a journalist's privilege to conceal the identity of confidential sources seems just as relevant today but with one important difference: if precedent is to be followed, it should be well-settled law that a journalist has no constitutional privilege against divulging sources in a criminal proceeding.

_Branzburg v. Hayes_, a landmark 1972 Supreme Court case, stated in unambiguous terms that the Constitution does not grant journalists a privilege; reporters have the same duty as the average citizen to testify before a grand jury for the purpose of indicting those who have committed crimes. Many states have created shield laws to protect journalists either through statute or through common law. A “shield law” is defined as “[a] statute that affords journalists the privilege not to reveal confidential sources.” Black’s Law Dictionary 1410 (8th ed. 2004).


As shall be discussed, the _Branzburg v. Hayes_ decision provides no constitutional privilege for journalists, though subsequent court decisions have not always followed this opinion, focusing instead on the concurring and dissenting opinions. For a history of _Branzburg_, see Glenn A. Browne, _Just Between You and Me . . . For Now: Reexamining a Qualified Privilege for Reporters to Keep Sources Confidential in Grand Jury Proceedings_, 1988 U. ILL. L. REV. 739, 741–753.

Currently, thirty-one states have shield laws in place. New Jersey provides an example of a state statute granting journalists a protective shield against revealing confidential sources. The New Jersey statute states:

Subject to Rule 37, a person engaged on, engaged in, connected with, or employed by news media for the purpose of gathering, procuring, transmitting, compiling, editing or disseminating news for the general public or on whose behalf news is so gathered, procured, transmitted, compiled, edited or disseminated has a privilege to refuse to disclose, in any legal or quasi-legal proceeding or before any investigative body, including, but not limited to, any court, grand jury, petit jury, administrative agency, the Legislature or legislative committee, or elsewhere.

gence of sources in a grand jury setting in various contexts, depending upon where the grand jury takes place and whether it is a state or federal crime. Currently, there is no federal shield law to protect journalists, but that may be changing.12

A bill, entitled the “Free Flow of Information Act,” has been introduced simultaneously in both the Senate and House. If enacted, the legislation would serve as a federal shield law.13 According to Senator Lugar, one of the bill’s proponents, the Free Flow of Information Act “[would provide] journalists with certain rights and abilities to seek sources and report appropriate information without fear of intimidation or imprisonment.”14

Inherent in this discussion is the public policy that freedom of the press is essential to maintaining democracy as we know it.15 Thomas Jefferson once said that because our government is based on public opinion, “were it left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter.”16 This statement was frequently quoted in a 2005 hearing before the Senate Judiciary Committee on the proposed federal shield law.17 While the quote certainly portrays a noble and grand ideal, is it really relevant at all to whether journalists should be immune from testifying about a crime—something that every other citizen is called to do?18
The proponents of the federal shield law argue that continuing to require journalists to reveal their confidential sources will create a "chilling effect." The term "chilling effect" is defined as "1. The result of a law or practice that seriously discourages the exercise of a constitutional right, such as the right to appeal or the right of free speech. 2. Broadly, the result when any practice is discouraged." Thus, sources who provide journalists with the information they need to report on matters of great public importance, but who require a pledge of confidentiality to do so, may grow extremely hesitant about revealing information. In turn, many important issues may never be brought to light.

Supporters of a federal shield law may argue that the first definition is more appropriate. This utilization is questionable because journalistic privileges are not recognized in the Constitution. More appropriate is the second definition, which is explicitly, and necessarily, broad. There is ample room for debate as to whether a lack of guaranteed confidentiality would have a "chilling effect" on future sources who would be afraid to reveal information if they knew they would somehow be implicated in the matter.

The lack of constitutional protection, however, does not mean that there is no basis for protecting the confidentiality agreement between a journalist and his or her source. Congress recognizes many protections for those who are not literally shielded by the Constitution. The time has come for a federal shield

---

19 The term "chilling effect" is often used in the debate on journalistic privilege by those parties that wish to see a journalist-source privilege enacted. See, e.g., Branzburg v. Meigs, 503 S.W.2d 748, 750 (Ky. 1971); Caldwell v. United States, 434 F.2d 1081, 1084 (9th Cir. 1970). Both cases led up to, and are included in, the Court's Branzburg decision.

20 BLACK'S LAW DICTIONARY 257 (8th ed. 2004).

21 As Senator Dodd notes, "Imagine for a moment what would happen if citizens with knowledge of wrongdoing would not or could not come forward to speak confidentially with members of the press. Serious journalism would virtually cease to exist in my view. Wrongdoing would not be uncovered." Senate Hearing, supra note 14, at 5 (testimony of Sen. Christopher Dodd).

22 The First Amendment provides that "Congress shall make no law... abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The argument that a journalist has a constitutional right to confidentiality was specifically rejected by the Branzburg majority. See discussion infra Part II.B.

23 Compare Rowan Scarborough, Probes Could Have Chilling Effect, WASH. TIMES, Nov. 9, 2005, at A04 (suggesting that the increase of government probes and subpoenas of reporters about government leaks may cause a chilling effect on government newspaper sources), with Michael Isikoff, New York Times Investigative Correspondent, Remarks at National Press Club Panel Discussion, Confidentiality and the Press (Nov. 11, 2005) ("I have not seen a big impact from this case, not that this is scientific or anything other than anecdotal. A lot of jokes with sources about, oh yeah, now I know you'd be willing to go to jail, right? But when it comes down to it, people tell you stuff for a reason. They leak for a reason—because they think it’s important that you know something, or they want something out or whatever.").

24 The Federal Rules of Evidence recognize many privileges (such as attorney-client,
law that, with certain exceptions for cases of national security, would protect a journalist’s confidential communications. Such a protection would enable an era of unfettered truth to be presented in the press, which would, consequentially lead to an era of truth in our society and ultimately in our government.  

This Comment explores the need, usefulness, and desirability of a federal shield law. In exploring the issue, it is necessary to first discuss Branzburg v. Hayes, including incidents leading up to the decision and subsequent treatment.  

After discussing Branzburg’s impact, this Comment will examine state shield laws, both those enacted through statute and through the common law, in an effort to determine their ability to protect journalists and what characteristics make them effective.

After analyzing what the states have done, this Comment will discuss the proposed federal shield law and analyze it section by section for its strengths and weaknesses and offer a revised federal shield law. Finally, this Comment will conclude with an analysis of how the proposed shield law would play out in “real world” terms, using the Judith Miller fact pattern as a hypothetical situation to show the strengths of the proposed statute.

II. HISTORICAL DISCUSSION: BRANZBURG V. HAYES

A. Background—Bringing the Issue to a Head

The Branzburg v. Hayes case is a compendium of four cases decided on the issue of whether a journalist may be compelled to testify before a grand jury and reveal confidential sources. The decision included Branzburg v. Pound, doctor–patient) traditionally available at common law. Fed. R. Evid. 501.

The House Committee notes to Federal Rule of Evidence 501 state that “the Committee, through a single Rule, 501, left the law of privileges in its present state and further provided that privileges shall continue to be developed by the courts of the United States under a uniform standard applicable both in civil and criminal cases.” Id. It seems apparent that Congress intended the law of privileges to be an evolving one and, though the note states that it is leaving the courts free to develop the law, Congress also has the authority to enact such a change.


461 S.W.2d 345 (Ky. 1970), aff’d, 402 U.S. 665 (1972).
Branzburg v. Meigs, In re Pappas, and Caldwell v. United States. The Branzburg cases involve Paul Branzburg, a journalist for the Louisville, Kentucky based Courier-Journal. In Pound, Branzburg wrote a story “describing in detail his observations of two young residents of Jefferson County synthesizing hashish from marihuana, an activity which, they asserted, earned them about $5,000 in three weeks.” As a condition of gathering the information for the story he promised to, and did, change the names of the individuals involved.

Branzburg received a subpoena to testify before a grand jury regarding his source of information for the article. In court, Branzburg argued that the Kentucky Reporters Privilege Statute and the First Amendment protected him from revealing his sources’ identities. The judge presiding over the case denied Branzburg’s arguments, leading Branzburg to sue the judge and appeal to the Kentucky Court of Appeals for prohibition and mandamus. The Kentucky Court of Appeals rejected Branzburg’s claim, holding that the statute “did not permit a reporter to refuse to testify about events he had observed personally, including the identities of those persons he had observed.”

Branzburg found himself in trouble again for refusing to identify a confidential source in a grand jury setting, leading to the case of Branzburg v. Meigs. Branzburg wrote a story about observed drug use in Frankfort, Kentucky. After receiving a subpoena from the state prosecutor, which he unsuccessfully moved to quash, the court provided Branzburg partial protection for his sources except that the court required him to testify about illegal events he ac-

---

29 503 S.W.2d 748 (Ky. 1971), aff’d, 402 U.S. 665 (1972).
33 Id. at 668.
34 KY. REV. STAT. ANN. § 421.100 (LexisNexis 2005). The text of the statute is as follows:

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.

Id.
36 Branzburg, 408 U.S. at 668. As a procedural note, the case that came before the Supreme Court was known as Branzburg v. Hayes instead of Branzburg v. Pound because Judge Hayes succeeded Judge Pound, who presided over Branzburg’s original hearing. Id. at 669 n.3.
37 Id. at 669.
38 503 S.W.2d 748, 749 (Ky. 1971), aff’d, 402 U.S. 665 (1972).
39 Id.
tually observed.\textsuperscript{40} Branzburg once again appealed to the Kentucky Court of Appeals and once again lost. The Court of Appeals held that “sources of information of a newspaper reporter are not privileged under the First Amendment.”\textsuperscript{41}

While Branzburg dealt with his legal troubles in Kentucky, another journalist faced the same problem in Massachusetts. \textit{In re Pappas} involved a situation where the Black Panthers allowed a television news journalist from Rhode Island to tape one of their meetings, but only on the condition that he not report on any of the information he saw or heard—he was only allowed to tape an anticipated police raid of their meeting.\textsuperscript{42} Pappas received a subpoena to testify before the grand jury about the details of the meeting but refused to testify, claiming First Amendment privilege.\textsuperscript{43} The trial judge ruled that the law of Massachusetts (where the meeting took place) did not provide a statutory privilege for reporters and further held that there is no privilege created by the First Amendment.\textsuperscript{44} Though the petitioner argued that such a forced testimony would damage all journalists’ ability to gather news, the Supreme Judicial Court of Massachusetts ruled that any adverse effect upon the ability to gather news was merely theoretical and held that “the public has a right to every man’s evidence.”\textsuperscript{45}

Meanwhile in California, \textit{New York Times} reporter Earl Caldwell was covering the Black Panthers when state prosecutors subpoenaed him, ordering him to “testify and to bring with him notes and tape recordings of interviews given him for publication by officers and spokesmen of the Black Panther Party concerning the aims, purposes and activities of that organization.”\textsuperscript{46} After refusing to testify and repeated motions to quash the subpoena, the court held Caldwell in contempt and incarcerated him.\textsuperscript{47} The U.S. Court of Appeals for the Ninth Circuit heard Caldwell’s case and ruled, unlike the courts of Kentucky and Massachusetts, that “the First Amendment provided a qualified testimonial privilege to newsmen; in its view, requiring a reporter like Caldwell to testify would deter his informants from communicating with him in the future and would cause him to censor his writings in an effort to avoid being subpoenaed.”\textsuperscript{48}

\begin{footnotes}
\item[40] Branzburg, 408 U.S. at 669–70.
\item[41] Id. at 670.
\item[43] Id.
\item[44] Branzburg, 408 U.S. at 673.
\item[45] \textit{In re Pappas}, 266 N.E.2d at 299.
\item[46] Branzburg, 408 U.S. at 675.
\item[47] Id. at 678.
\item[48] Id. at 679.
\end{footnotes}
The facts of the four cases are extremely similar and all took place near the same timeframe. One common bond among them is that all four of the journalists had actually observed the events in question before the grand jury, making them prime witnesses for an indictment. The Ninth Circuit’s decision created a circuit split between jurisdictions and the Supreme Court granted certiorari to settle the dispute.

B. A Divided Court Rules That There Is No Reporter Privilege

The Branzburg Court weighed the argument of freedom of the press against the necessity of furnishing a grand jury with the maximum amount of information to decide whether an indictment is necessary. With a five-four split, the Court concluded that there is no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.

Accordingly, the Court upheld the decisions of Kentucky and Massachusetts and overruled the Ninth Circuit Court of Appeals, stating, “We are asked to create another [privilege] by interpreting the First Amendment to grant news- men a testimonial privilege that other citizens do not enjoy. This we decline to do.” The Court’s rationale expressed a disfavor for creating new testimonial privileges as well as a belief that society’s best interest is served by a comprehensive grand jury trial.

The Court specifically addressed and rejected any notion of a “chilling effect” that the decision may have upon reporters. The Court determined that estimates on how its decision would affect the number of confidential sources

---

49 Branzburg published his first article that led to a subpoena in 1969 and his second in 1971, while the events surrounding Caldwell and Pappas both took place in 1970. Id. at 668–72.

50 Id. at 668–77.

51 See cases cited supra note 27.

52 Branzburg, 408 U.S. at 682–83.

53 Id. at 690–91.

54 Id. at 690.

55 Id. at 690 n.29.

56 Id. at 701 (“When the grand jury is performing its investigatory function into a general problem area . . . society’s interest is best served by a thorough and extensive investigation.” (quoting Wood v. Georgia, 370 U.S. 375, 392 (1962))).

57 The Court did not use the specific term “chilling effect” but described and rejected the general concept of the chilling effect. Id. at 693–94. The only time the term “chilling effect” appears is as the title of a source cited in a footnote in Justice Stewart’s dissent. Id. at 741 n.29 (Stewart, J., dissenting). For a definition of “chilling effect,” see supra note 20 and discussion Part I.
were speculative and therefore nearly impossible to prove. Further, the Court questioned the credibility of the evidence that confidential sources would dry up if reporters were not afforded protection because the evidence was provided by reporters who were trying to preserve their own resources. The Court also suggested that if the story was important enough, the source could always seek assistance from the proper public officials. The majority rejected the idea of a chilling effect, ultimately stating,

[W]e cannot accept the argument that the public interest in possible future news about crime from undisclosed, unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future. This issue still looms large today, with the advent of non-traditional forms of Internet journalism such as blogs blurring the line of whom should actually be treated as a journalist.

Additionally, while the Court acknowledged that several states have enacted their own shield laws of varying degrees, it specifically remarked that “none has been provided by federal statute.” The Court also observed that Congress had considered several federal shields yet never enacted one. The Court’s effort to spell out all of the failed congressional proposals suggested a reluctance to legislate a reporter’s privilege from the bench when Congress would not legislate the privilege itself. Thus, given a strict reading of the majority

---

58 *Branzburg*, 408 U.S. at 693–94.
59 *Id. at 694* (“It would be difficult to canvass the views of the informants themselves; surveys of reporters on this topic are chiefly opinions of predicted informant behavior and must be viewed in the light of the professional self-interest of the interviewees.”).
60 *Id. at 695.*
61 *Id. at 695.*
62 *Id. at 704.*
63 A “blogger” is someone who posts a “web log” or an online diary on various topics ranging from the blogger’s personal life to politics. Louise Kehoe, *Bloggers Slip the Surly Bonds of Print*, Fin. TIMES (London), Apr. 6, 2002, at 11.
64 *Branzburg*, 408 U.S. at 689. At the time the Court wrote the opinion, seventeen states had enacted a shield law, leading the Court to emphasize that the majority of states had not. *Id. at 689 n.27.* If the Court were deciding this case today, the fact that a vast majority of states have either a common law or statutory shield law on the books may have influenced the outcome.
65 *Id. at 689 n.28.*
opinion, a reporter has no right to confidentiality of sources.\(^{66}\)

C. The Powell Concurrence—A Glimmer of Hope for Journalists

Justice Powell, the fifth swing vote for the majority, offered his own take on a reporter’s privilege.\(^{67}\) Though very brief, Powell’s opinion has a much different tone than the majority opinion, beginning with the opening sentence: “I add this brief statement to emphasize what seems to me to be the limited nature of the Court’s holding.”\(^{68}\) That he would limit the opinion from the outset is indicative of his belief that the majority’s rejection of any kind of reporter’s privilege is overly harsh.

The concurrence proceeds to state, “If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy.”\(^{69}\) As part of this remedy, Powell proposed that the courts consider each case on its merits via a motion to quash and that the “asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.”\(^{70}\) This is a stark contrast to the majority justices who specifically declined to grant any privilege.\(^{71}\) It is also notable that the concurrence gives no guidance regarding the factors a court should consider when striking this balance—Powell merely states that it should be done.\(^{72}\)

Many courts have seized upon the Powell concurrence to circumvent the harsh reading of the majority opinion.\(^{73}\) Indeed, a majority of courts follow

\(^{66}\) See McKevitt v. Pallasch, 339 F.3d 530, 532 (7th Cir. 2003) (“[I]t is evident from the result in [Branzburg] that the interest of the press in maintaining the confidentiality of sources is not absolute.”).

\(^{67}\) Branzburg, 408 U.S. at 709–10 (Powell, J., concurring).

\(^{68}\) Id. at 709.

\(^{69}\) Id. at 710.

\(^{70}\) Id.

\(^{71}\) Id. at 690.

\(^{72}\) See Richard Rosen, Comment, A Call for Legislative Response to New York’s Narrow Interpretation of the Newperson’s Privilege in Knight-Ridder Broadcasting Inc. v. Greenburg, 54 BROOK. L. REV. 285, 308 (1988) (“[Powell’s balancing test] has become a three-part test which attempts to strike a balance among the relevance of the material sought, its availability from alternative sources, and the importance of the harm potentially brought to the press by compelled disclosure.”).

\(^{73}\) See, e.g., LaRouche v. Nat’l Broad. Co., Inc., 780 F.2d 1134, 1139 (4th Cir. 1986) (citing the Powell concurrence and stating that it is necessary for a district court to balance the interests in deciding whether a journalist’s privilege exists); see also Nancy V. Mate, Comment, Piercing the Shield: Reporter Privilege in Minnesota Following State v. Turner, 82 MINN. L. REV. 1563, 1574 n.68 (1998) (“[N]ine out of the ten circuits that have addressed the issue have interpreted Branzburg as recognizing a qualified First Amendment privilege for journalists to resist compelled disclosure.”).
Powell’s opinion instead of the majority opinion when faced with cases on this point. Yet a minority of courts have not given reporters any additional source protection, and these decisions have created the uproar that led to the calls for a federal shield law.

D. Branzburg Dissent: A Precursor to the Federal Shield Law

The dissent in Branzburg tracks recent arguments in favor of a federal shield law, both in rationale and practicality. Written by Justice Stewart, the dissent is extremely cognizant that the majority’s opinion may bring a “chilling effect” upon the field of journalism and is fearful that it will result in a diminished ability of the press to function in its proper role. Justice Stewart further commented, “Finally, and most important, when 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.’” Though the dissent does not explicitly refer to this as a chilling effect, it is in all practicality what Justice Stewart is arguing, and is the same rationale used by current proponents of a federal shield law.

Justice Stewart does not, however, propose an absolute privilege for journalists. Instead, he creates an explicit balancing test—as opposed to Powell’s...
ambiguous test—that clearly leans towards establishing the rights of the journalist. Stewart's balancing test consists of three parts:

-In order to compel a journalist to testify, governmental officials must ... demonstrate that the information sought is clearly relevant to a precisely defined subject of governmental inquiry. They must demonstrate that it is reasonable to think the witness in question has that information. And they must show that there is not any means of obtaining the information less destructive of First Amendment liberties.

The federal shield law proposed by the bi-partisan group of Senators and Representatives is based very much on the same principles espoused in Stewart’s balancing test. The government cannot compel a journalist’s testimony without meeting certain clear standards that show the information is so vital as to outweigh the First Amendment rights of the journalist—rights which were denied by the majority opinion. The dissent and the proposed federal shield law are also similar since both place the burden upon the government of proving that a journalist should have to testify. In contrast, the majority, and even Powell’s concurrence, leaves the burden upon the subpoenaed journalist. The drafters of the proposed shield law have sided with the Court’s four justice minority in the Branzburg case and seek to enact the minority opinion into law.

III. STATE SHIELD LAWS

Thirty-one states and the District of Columbia have enacted shield laws and eighteen states have a common law equivalent. In order to get a sense of what is typically included in a shield law, it will be useful to examine two state statutes that are representative of the state shield law statutes. One of the statutes the journalist’s privilege is not absolute by stating, “When an investigation impinges on First Amendment rights, the government must not only show that the inquiry is of ‘compelling and overriding importance’ but it must also ‘convincingly’ demonstrate that the investigation is ‘substantially related’ to the information sought.” Id. By tacitly acknowledging that investigations can impinge on First Amendment rights, Stewart thereby recognizes that the privilege he proposes is not applicable in all circumstances. See id.

See id. at 728 (“[A] right to gather news, of some dimensions, must exist.”).

See id. at 740 (citations and footnotes omitted) (emphasis added).


Id. § 2(a).

See id. (stating that covered persons cannot be compelled to testify unless a court determines that certain conditions have been met). Presumably, the evidence to compel such testimony would come from the government. This is similar to the dissent’s balancing test which states that government officials must demonstrate the relevance in order to compel testimony. Cf. Branzburg, 408 U.S. at 731 (Stewart, J., dissenting).

See Branzburg, 408 U.S. at 708 (“Grand juries are subject to judicial control and subpoenas to motions to quash.”). The burden to bring a motion to quash would therefore rest upon the subject of the subpoena. See id. Justice Powell also points out that the journalist has the ability to bring a motion to quash as a remedy. Id. at 709 (Powell, J., concurring).

See supra note 11 and accompanying text.
Federal Shield Law

provides an absolute privilege for journalists while the other provides a qualified privilege.

A. Absolute Privilege: Complete Protection for a Narrow Class of Journalists

Pennsylvania is an example of a state shield law that provides an absolute privilege to its reporters. The statute states:

No person 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, for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit.

The only qualification that Pennsylvania provides to this rule is that television and radio broadcasters must keep a copy of the actual broadcast on file for one year after its original airdate. Therefore, in Pennsylvania, under no circumstances would a journalist ever be required to testify about his or her source. Additionally, there is no requirement of confidentiality between the reporter and his or her source in order for the statute to apply—all newsgathering work is automatically protected. While a minority of states recognize an absolute privilege, the majority of states recognize that circumstances could arise where it could be vital to extract this information.

It is important to note, however, the narrow definition of “journalist” in the statute. Pennsylvania does not take up the “lonely pamphleteer” approach contemplated in Branzburg v. Hayes, but instead limits protection to journalists employed by a radio station, television station, or newspaper or magazine of “general circulation.” This categorization is ambiguous at best, but does convey the sense that a publication must be of some substance, be published reg-

---

89 An “absolute privilege” is defined as “[a] privilege that immunizes an actor from suit, no matter how wrongful the action might be, and even though it is done with an improper motive.” BLACK’S LAW DICTIONARY, supra note 20, at 1234.
90 42 PA. CONS. STAT. ANN. § 5942 (West 2000).
91 Id. § 5942(a).
92 Id. § 5942(b). Case law connected with the statute reveals that in the case of radio and television, only the material actually broadcast is subject to government use; outtakes are privileged. See Coughlin v. Westinghouse Broad. & Cable, Inc., 603 F. Supp. 377, 383 (E.D. Pa. 1985).
93 See Campagnolo, supra note 26, at 450 (noting that nine states provide an absolute privilege).
94 Id. at 450 (“Twenty-eight states provide by statute or caselaw for the possible disclosure of media sources and information obtained from confidential sources . . . .”).
95 Branzburg v. Hayes, 408 U.S. 665, 704 (1972) (“[T]he traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods.”).
96 42 PA. CONS. STAT. ANN. § 5942(a).
larly, and have a fairly wide readership. This narrow reading of the definition of a journalist is necessary for a statute granting absolute privilege. If the statute has a wide definition of what is covered, then there is a large potential for abuse, which hopefully is mitigated by narrowly tailoring a broad statute to a specific group.

Statutes such as this that grant absolute privilege were rejected by all three levels of the Branzburg Court, as even the dissent proposed a balancing test to determine if a journalist should be forced to reveal his or her sources, a test that would not be necessary should an absolute privilege exist. The absolute privilege, though viable at the state level, would not work on the federal level where the stakes of national security are potentially much greater.

---

97 See Clay Calvert, And You Call Yourself a Journalist?: Wrestling With a Definition of "Journalist" in the Law, 103 DICK. L. REV. 411, 448 (1999) (referring to Pennsylvania’s use of “general circulation” as suggesting that the size of the audience and the content of the publication are relevant to the determination of whether the publication qualifies for protection).

98 The Branzburg majority was concerned about a criminal’s ability to hide behind a sham press if a reporter's privilege was granted:

Such a privilege might be claimed by groups that set up newspapers in order to engage in criminal activity and to therefore be insulated from grand jury inquiry . . . . It might appear that such 'sham' newspapers would be easily distinguishable, yet the First Amendment ordinarily prohibits courts from inquiring into the content of expression.

Branzburg, 408 U.S. at 704 n.40.

99 See 42 PA. CONS. STAT. ANN. § 5942(a); see also ALA. CODE § 12-21-142 (2005). This statute provides another example of an absolute shield for journalists and, like the Pennsylvania statute, also narrowly defines who is protected. The sweeping broadness of absolute protection cannot be achieved without creating the specifically defined category of protected persons.

100 See generally Branzburg, 408 U.S. 665. As discussed, the majority refused to extend any kind of privilege to journalists, while the concurring opinion and dissent suggested ways in which a journalist’s privilege could become more palatable. See discussion supra Part II.A.

101 See source cited supra note 89 (defining “absolute privilege”).

102 “National security” is not defined in the proposed federal shield law. The term generally relates to national defense and foreign relations, though it is a nebulous term and the definition can change to reflect varying circumstances. See David B. McGinty, The Statutory and Executive Development of the National Security Exemption to Disclosure Under the Freedom of Information Act: Past and Future, 32 N. KY. L. REV. 67, 80 (2005) (noting that the definitions offered by the government of “national security” are only slightly more helpful than no definition at all).
B. Qualified Privilege on the State Level Presents a Model for the Federal Shield Law

The majority of states that have enacted shield legislation for journalists only provide a qualified privilege. These statutes resemble the proposed federal shield law, which grants a qualified, not absolute, privilege to journalists. Consequently, these state statutes provide a greater basis of comparison to the proposed federal law. While the terms of the statutes vary greatly, the North Carolina shield law is a representative of a statute providing a qualified privilege.

The North Carolina statute provides journalists with a “qualified privilege against disclosure... of any confidential or nonconfidential information, document or item obtained or prepared while acting as a journalist.” Of note in this clause is that the privilege extends to both confidential and nonconfidential sources, much as the Pennsylvania statute does. The term “journalist” is defined as “[a]ny person, company, or entity, or the employees, independent contractors, or agents of that person, company, or entity, engaged in the business of gathering, compiling, writing, editing, photographing, recording, or processing information for dissemination via any news medium.” This definition is overly broad since, through the “agents” clause, it includes all persons remotely connected with a news agency for “business” to publish their reports. This definition would certainly include “bloggers” who can write almost anything they want. The fact that bloggers are “writing” and generating revenues from their website “publications” brings them within the protection

---

103 See Campagnolo, supra note 26, at 450 (citing twenty-eight states that have dealt with media source disclosure either by statute or case law).
104 A “qualified privilege” is defined as “[a] privilege that immunizes an actor from suit only when the privilege is properly exercised in the performance of a legal or moral duty.” BLACK’S LAW DICTIONARY, supra note 20, at 1235.
105 For instance, some statutes provide for a balancing test. See, e.g., FLA. STAT. § 90.5015 (1999) (enumerating three elements necessary to overcome the privilege). Others provide absolute privilege for confidential news and a qualified privilege with a balancing test for non-confidential news. See, e.g., N.Y. CIV. RIGHTS LAW § 79-h(b)-(c) (McKinney 1992).
106 N.C. GEN. STAT. § 8-53.11(c) (2005).
107 Id. § 8-53.11(b).
109 N.C. GEN. STAT. § 8-53.11(a)(1) (emphasis added). The statute later defines “news medium” as “[a]ny entity regularly engaged in the business of publication or distribution of news via print, broadcast or other electronic means accessible to the general public.” Id. § 8-53.11(b)(3).
110 Though the term “business” is certainly ambiguous, in this Comment it will mean “[a] commercial enterprise carried on for profit.” BLACK’S LAW DICTIONARY, supra note 20, at 211.
111 Kehoe, supra note 63 (defining bloggers).
of the North Carolina shield law. This issue will be discussed further in the context of the federal shield law.

Another intriguing part of the North Carolina shield statute is the balancing test necessary for the journalist to be compelled to testify in a legal proceeding. The balancing test included in the statute mirrors the essential philosophy of the balancing test that the dissent provided in Branzburg, with the exception that the language in the North Carolina statute is more broad so as to apply to civil as well as criminal disputes.

Yet perhaps the most noteworthy part of the statute, and something that goes unmentioned in the proposed federal shield law, is the language providing that "a journalist has no privilege against disclosure of any information, document or item obtained as the result of the journalist’s eyewitness observations of criminal or tortious conduct.” The statute in one way seems to support the majority decision in Branzburg, where all of the reporters were eyewitnesses to an illegal act and were forced to testify about it, and at the same time supports the dissent by using the essence of the balancing test laid out therein.

The state shield law statutes struggle, as we will see, with many of the same problems as the proposed federal shield law. However, by picking and choosing the best parts of various state shield law statutes, Congress can enact a fair and balanced federal shield law.

IV. THE PROPOSED FEDERAL SHIELD LAW: PROTECTING THE COUNTRY AND THE PRESS

A. A Federal Shield Law Will Protect Journalists Who Have Come Under Increased Pressure to Divulge Confidential Sources

Recently, the American Bar Association ("ABA") noted the fact that reporters are receiving more subpoenas to testify about their confidential sources. As noted in the ABA Journal:

112 See N.C. GEN. STAT. § 8-53.11(a)(1)-(3). To date, no case has been brought in North Carolina or any other state challenging whether “bloggers” are covered persons in state shield laws.

113 See discussion infra Part IV.B.i.

114 See N.C. GEN. STAT. § 8-53.11(c) (establishing the test necessary to “overcome the qualified privilege”).

115 See Branzburg v. Hayes, 408 U.S. 665, 733–34 (1972) (Stewart, J., dissenting). In the Branzburg dissent, Justice Stewart refers to those forcing the journalist to testify as “the government” while the North Carolina statute refers to “any person seeking to compel.” Compare N.C. GEN. STAT. § 8-53.11(c), with Branzburg, 408 U.S. at 734.

116 N.C. GEN. STAT. § 8-53.11(d).

For more than 30 years, federal courts generally have been deferential toward journalists when it came to having them testify about information learned while reporting. But over the last year, the tide appears to have turned. In a series of well-publicized cases, journalists from major media have been held in contempt of court for refusing to testify before grand juries . . . Five reporters—from the New York Times, the Los Angeles Times, CNN, the Associated Press and the Washington Post—were held in contempt last year [2004] . . . and fined $500 a day for declining to reveal sources who gave them information [about a government scientist suing the government for violating his privacy rights].

When the U.S. Court of Appeals for the Seventh Circuit’s decision of McKevitt v. Pallasch ruled against the reporter’s right to special protections, it opened a floodgate of litigation in federal courts with a rising tide of holding journalists in contempt. Given the Seventh Circuit decision, journalists are in danger of being more exposed now than ever before, creating the need for a federal shield law.

Wendy N. Davis points out that the proposed federal shield law is far from the first attempt by Congress to pass a federal shield law, noting that “[n]inety-nine separate bills were introduced between 1973 and 1978” that did not succeed because media advocates “disagreed about what the bills should include.” The situation has changed, however, and journalists appear united in an effort to pass the pending federal shield legislation. Numerous newspapers around the country have published articles and editorials in support of a federal shield law, many of which seem to indicate that such a law would be in keeping with the journalist’s code of ethics. The Radio-Television News Directors Association (“RTNDA”), for example, has adopted the policy that professional electronic journalists, including “bloggers,” should “[i]dentify sources whenever possible. Confidential sources should be used only when it is clearly in the public interest to gather or convey important information or when a person providing information might be harmed. Journalists should keep all com-
mitments to protect a confidential source." The constitution of the American Society of Newspaper Editors ("ASNE") similarly espouses that "[p]ledges of confidentiality to news sources must be honored at all costs, and therefore should not be given lightly.")

In addition to arguing that the federal shield law would protect a journalist's ethical duty, proponents of the federal shield law argue time and time again that without it, the "chilling effect" found in the Branzburg v. Hayes dissent will become widespread throughout the nation and hurt the press' news reporting ability. The Oregonian, for example, argues that sending Judith Miller to jail has "chill[ed] reporters and sources throughout the nation."

Matthew Cooper, a reporter for Time magazine, testified that "[i]f journalists routinely promise anonymity and routinely are forced to break those promises, this will, indeed, create a general chilling effect on leaks." William Safire, a noted political columnist for the New York Times, comments that:

[T]here is a more specific chilling effect taking place right now. It imposes a mental prior restraint on the gathering of news and the expression of opinion. I have always been able to write what I've learned and what I believe without "fear or favor," in the Times' phrase, freely taking on the high and mighty. But I cannot do that this morning.

It is not surprising that journalists are testifying to the fact that there has been a "chilling effect," but the Branzburg majority required more, indicating that without some empirical data it would be difficult to verify the "chilling effect":

Estimates of the inhibiting effect of such subpoenas on the willingness of informants to make disclosures to newsmen are widely divergent and to a great extent speculative. It would be difficult to canvass the views of the informants themselves; surveys of reporters on this topic are chiefly opinions of predicted informant behavior and must be viewed in the light of the professional self-interest of the interviewees.

However, the first signs of empirical data to support the claim of a chilling effect are appearing. Time magazine Editor-in-Chief Norman Pearlstein testified before the Senate Judiciary Committee Hearing that after agreeing to turn over subpoenaed confidential materials to prosecutors, "[s]ome of [my reporters] showed me e-mails and letters from valuable sources who insisted that

128 Senate Hearing, supra note 14, at 9 (testimony of Matthew Cooper, White House Correspondent, Time Magazine); see also id. (testimony of Norman Pearlstine, Editor-In-Chief, Time, Inc.) (arguing that the current conditions in which journalists find themselves chills the newsgathering ability of his staff).
129 Id. at 12 (testimony of William Safire, Columnist, New York Times).
they no longer trusted the magazine. The chilling effect is obvious."

Perhaps the most startling evidence of the chilling effect comes from Cleveland. In June 2005, the editor of the Cleveland Plain Dealer issued an editorial in which he stated that:

As I write this, two stories of profound importance languish in our hands. The public would be well served to know them, but both are based on documents leaked to us by people who would face deep trouble for having leaked them. Publishing the stories would almost certainly lead to a leak investigation and the ultimate choice: talk or go to jail. Because talking isn't an option and jail is too high a price to pay, these two stories will go untold for now. How many more are out there?"

Almost all examples of the chilling effect point either to the fact that sources will no longer feel secure revealing information without the guarantee of confidentiality, which could limit the amount of vital information available to the press, or that the journalist will be hesitant to address certain topics for fear of being subpoenaed. In this instance a newspaper effectively “chilled” itself; the lack of confidential sources was not the problem, the issue was one of an editorial board protecting its journalists from potential jail time. A new era has dawned, different from the ones in which attempts at federal shield laws were made in the past; there is now actual evidence of the public being denied access to important information because of the lack of a federal shield law.

B. Examining the Proposed Federal Shield Law

The proposed federal shield law, officially named the Free Flow of Information Act of 2005, protects journalists from revealing their sources in federal investigations. The bill contains certain exceptions, such as in the case of imminent national security threats. This Comment will examine different sections of the bill and discuss the relative merits of each section and suggest changes to the bill that would make it more precise and sensitive to the unique issues that the federal government faces.

---

131 Senate Hearing, supra note 14, at 10 (testimony of Norman Pearlstine, Editor-In-Chief, Time, Inc.).
133 For instance, David Westin, President of ABC News, comments, “[The chilling effect] certainly, I’m sorry to say, is a factor that we talk about and take into active consideration as part of the editorial process.” Reporter’s Privilege Legislation: Hearing Before the S. Judiciary Comm., 109th Cong. 23 (2005) [hereinafter Second Senate Hearing] (testimony of David Westin, President, ABC News).
134 See N.Y. Times Editorial, supra note 80 (discussing the Cleveland Plain Dealer’s stance that “[j]ail is too high a price to pay” for a reporter doing a story).
136 Id. § 2(a)(3)(A).
i. Who Should Be Protected Under the Statute?

The most important definition in the bill is the term “covered person.” The “covered person” is essentially the journalist; however, this definition is not as straightforward as it appears. The current version of the bill begins with covering “an entity,” which can include both businesses, teams of journalists, or an individual publisher. To be covered under the definition, the entity must “disseminate information by print, broadcast, cable, satellite, mechanical, photographic, electronic or other means.” This definition is very broad, encompassing almost all forms of publishing.

In addition to the condition listed above, the entity must be one that “publishes a newspaper, book, magazine, or other periodical in print or electronic form.” This is a very important change from the original version of the bill, in which the language does not include the italicized portion above. This potentially opens the door for many interpretations of who could be covered under the legislation. This is a shortcoming of the proposed law because it could lead to different definitions of who is covered in different circuits throughout the country instead of creating a uniform approach nationwide.

Senator Cornyn raised this point at the Senate Judiciary Committee Hearing on the proposed bill by asking the panel of experts about whether the bill should protect “bloggers,” who under the definition of “covered person” would be protected as they disseminate news in an electronic format. William Safire pointed out that there are between nine to ten million bloggers and that a line must be drawn somewhere. Would excluding bloggers mean eliminating sources such as the Drudge Report? Safire mentioned potential criteria for defining a covered person could include regularity and those in the business of disseminating the news. However, he points out his belief that,
“the lonely pamphleteer has the same rights as the New York Times.”

The U.S. Department of Justice (“DOJ”), which opposed the bill at both Senate hearings, also notes the weakness in the bill’s definition of “covered person,” stating that it is concerned that the term could be applied to corporations outside of the United States that pose a threat to national security. The DOJ further speculates that the term, as written, could be even more inclusive, contending that the bill “could also be read broadly to include any supermarket, department store, or other business that periodically publishes a products catalog, sales pamphlet, or even a listing of registered customers.”

The DOJ’s position that a foreign media company, such as Al Jazeera, could fall under this definition of “covered person” thus posing a threat to national security has merit. Extending the same coverage to catalog and sales pamphlets, however, is an overstatement. Yet, the DOJ is correct in that the language defining “covered person” is not entirely clear or narrowly tailored. For this bill to be effective as a tool to protect those who are most in need, and to eliminate abuse, the terms of the “covered person” must be more precise. The issue of drafting proper boundaries for a “covered person” is not new—each of the states that passed a shield law necessarily defined the terms of who it intends to cover.

New York’s state shield law provides a good example of pinpointing those covered by the law. The law provides protection for “professional journalists,” which is a better working standard than simply anyone who disseminates information. The statute defines “professional journalist” as follows:

\[\text{New York Times).}\]

147 Id.

148 See id. (statement of James B. Comey, Deputy Attorney General, U.S. Department of Justice); Second Senate Hearing, supra note 133, at 3–4 (statement of Chuck Rosenberg, U.S. Attorney, Southern District of Texas). Comey did not actually appear at the original Senate hearing, but instead submitted a written statement summarizing the position of the DOJ on the original version of the bill, which was not current when the hearing took place. Rosenberg did appear at the second Senate hearing on the topic and also submitted a written statement further outlining the DOJ’s views in response to the current version of the bill.


150 Id. at 8.

151 See generally Randall P. Bezanson, The Developing Law of Editorial Judgment, 78 Neb. L. Rev. 754 (1999). Bezanson suggests that editorial judgment is a hallmark of what defines “the press.” Using this standard, catalogs and other such works that are largely comprised of lists would not be considered covered under the proposed bill because they do not reflect “editorial judgment.” It is difficult to imagine a judge hearing this issue deciding that a catalog constitutes a covered person under the bill given the legislative history attached to it.


153 See Jeffrey Rosen, Overcharged, New Republic, Nov. 14, 2005, at 14 (commenting that the term “professional journalist” is useful in a shield law because, without it, any per-
“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 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.

This definition is particularly effective because of the phrase “or other professional medium.” Under this definition, bloggers who were engaged in legitimate professional journalism but use the web as their method of publication would be protected, however the protection would not extend to the masses of bloggers, saving the effectiveness from the shield law from being diluted.

It is important to note that the statute does not stand in a vacuum, but rather is subject to judicial interpretation. By providing language that is precise, yet inclusive, such as that encompassed in the New York statute, the language enables a court to make reasonable fact-specific determinations about whom exactly should be covered should the situation arise. This would aid both journalists, who would know when and why they were covered, as well as law enforcement officials, who would know when a journalist would be immune to avoid testifying before a grand jury could just start their own blog).

---

154 N.Y. CIV. RIGHTS LAW § 79-h(a)(6).
155 Id.
156 See Lystad, supra note 74, at 18 (“Numerous members of Congress clearly indicated that a shield law that explicitly protected all bloggers would never pass. Whether a particular blog qualifies as a magazine or an electronic periodical would determine whether the person receives the act’s protection. That decision would be left to the courts.”).
157 For a thoughtful analysis on why the definition of a journalist should be limited, particularly to exclude bloggers, see Laurence B. Alexander, Looking Out for Watchdogs: A Legislative Proposal Limiting the Newsgathering Privilege to Journalists in the Greatest Need of Protection for Sources and Information, 20 YALE L. & POL’Y REV. 97 (2002). But see Linda L. Berger, Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist’ Privilege in an Infinite Universe of Publication, 39 Hous. L. REV. 1371 (2003). Berger rebuts Alexander’s claims, specifically disputing the point that bloggers should not be covered along with other “traditional” journalists and arguing that journalism should be based on factors such as distribution and the gathering and processing of information. Id.
158 See Lystad, supra note 74, at 18 (“[T]he language would grant discretion to the court to determine whether freelance journalists who were not yet working ‘for’ a covered entity, either by contract or an informal agreement, would be covered.”).
159 Case law demonstrates that the definition included in the New York statute has been helpful in allowing judges to separate those covered by the shield law from those who are not. See, e.g., Am. Sav. Bank, FSB v. UBS Paine Webber (In re Fitch), 330 F.3d 104 (2d Cir. 2003). In this case, a bank sought to discover communications between a broker and a rating firm. The rating firm claimed protection under the New York shield law because it had conducted research, fact gathering, and analysis of data and posted it on its website for the general public. The court applied the statutory definition of “professional journalist” to determine that the employee did not meet the standard of professional journalist and therefore could not claim privilege.
from being subpoenaed.\textsuperscript{160}

\textit{ii. Conditions for Compelled Disclosure—Is “Imminence” Really Necessary?}

Under the proposed law, the government cannot compel a covered person to testify or produce documentation in any issue arising under federal law unless very specific conditions are met. One of the first requirements is that the “covered person” is “provided notice and an opportunity to be heard” in court.\textsuperscript{161} This important step grants journalists due process by enabling them to present to the judge reasons why they should not be required to divulge confidential information before disclosing his or her source.\textsuperscript{162}

Second, the government must prove that they have no other way to obtain the information than from the covered person.\textsuperscript{163} Additionally, (1) in the case of a criminal investigation, the government must prove that there is reasonable ground to show a crime has been committed and that the reporter’s testimony is essential to the investigation; or (2) in the case of a matter other than a criminal investigation, that the information the covered person provides “is essential to a dispositive issue of substantial importance to that matter.”\textsuperscript{164}

These alone would impose a roadblock to interrogating journalists, but the strength of the bill (from a journalist’s standpoint) comes in the third provision. This states that where the identity of a source of information would reasonably be revealed through such testimony, the disclosure must be necessary to “prevent imminent and actual harm to national security . . . and the harm sought to be redressed by requiring disclosure clearly outweighs the public interest in protecting the free flow of information.”\textsuperscript{165} This is a substantial burden for the government to overcome. The statute presumes (and therefore the court must also presume) that the “free flow of information” is in the public interest.\textsuperscript{166}

\begin{itemize}
\item \textsuperscript{160} See discussion \textit{infra} Part IV.C for the Author’s complete proposed version of the federal shield law, which incorporates the New York “professional journalist” standard.
\item \textsuperscript{161} S. 1419, 109th Cong. § 2(a) (2005).
\item \textsuperscript{162} \textit{See Senate Hearing, supra} note 14, at 17 (testimony of William Safire, Columnist, New York Times) (“What do judges do? They strike a balance. They say, how important is this testimony, and can we get it from someplace else? They recognize the importance of the first amendment and the protection of the First Amendment, the right of the free press help the flow of news. At the same time, you’re not going to put somebody in jail, because there’s no other way of getting the information except from a reporter. So this is something that judges do every day.”).
\item \textsuperscript{163} S. 1419 § 2(a)(1).
\item \textsuperscript{164} \textit{Id.} § 2(a)(2)(B).
\item \textsuperscript{165} \textit{Id.} § 2(a)(3)(A)--(C) (emphasis added).
\item \textsuperscript{166} This language is reflective of the bill’s sponsors beliefs. \textit{See Senate Hearing, supra} note 14, at 3 (testimony of Sen. Richard Lugar, Chairman, S. Foreign Relations Comm.) (“I believe that the free flow of information is an essential element of democracy. In order for the United States to foster the spread of freedom and democracy globally, it is incumbent...
This phrase in and of itself essentially voids the *Branzburg v. Hayes* decision, which held that the public interest in compelling reporters to testify before a grand jury outweighed the public interest of a free flow of information. The further requirement that the issue must be one of "imminent and actual harm to national security" in order to compel testimony places the journalist almost beyond reproach. This language is not found in the original draft of the bill, which gave even more expansive protection to journalists.

The original bill contained a section entitled "Compelled Disclosure Prohibited," which provides that though a testimony or document could be compelled by (1) a proper showing that a crime had been committed; (2) that the information was vital to a matter of substantial importance; or (3) that the information was unavailable elsewhere; the identity of a source of information could not be compelled. This section was likely deleted so as to remove the situation where the journalist could not be compelled to reveal their source even in extreme cases. The drafters compromised by making an "imminent and actual harm to national security" requirement. However, the "imminent and actual" language prevents the bill, as currently written, from being viable because it creates too great a burden on the government before any journalist could be compelled to reveal information.

Senator Lugar, during his testimony before the Senate Judiciary Committee stated, "The national security exception and continued strict standards relating to classified information will ensure that reporters are protected while maintaining an avenue for prosecution and disclosure when considering the defense of our country." Senator Dodd, in his testimony, answers the objection that the national security exception is too broad by saying;

If that is so, then wouldn't we expect to see great threats to public safety in those states that have shield laws, which are at least as protective as the shield law that we propose? Indiana, which my colleague, Senator Lugar, has already mentioned, has an absolute protection for reporters from having to reveal any information in court.

Senator Lugar and Congressman Pence will correct me if I'm wrong, I'm sure, but I am unaware that Indiana is beset with any unusual lack of public safety relative to other states. Moreover if this legislation is harmful to law enforcement, as the Justice Department suggests, then why did 34 state attorneys general submit an amicus brief to the Supreme Court that we first support an open and free press nationally here at home.

169 Id. §§ 2, 4.
170 See Lystad, supra note 74, at 17 ("Ultimately the sponsors made several revisions [to the original bill], the most critical being Section 4, which would have provided an absolute privilege against disclosure of confidential sources.").
171 Compare H.R. 581 § 4 (providing an absolute privilege for journalists), with S. 1419, 109th Cong. § 2(a) (2005) (spelling out the conditions necessary for compelled testimony).
172 Senate Hearing, supra note 14, at 4 (testimony of Sen. Richard Lugar, Chairman, S. Foreign Relations Comm.).
in the Miller and Cooper case, essentially arguing for a federal shield law along the lines of what we have drafted.\textsuperscript{173}

This argument, while tenable, is not persuasive. The DOJ states that because it is charged with "unique responsibilities to protect the national security and to safeguard our nation's secrets, the fact that there may be a state privilege doesn't quite answer the question of whether there should be a federal privilege."\textsuperscript{174} The DOJ correctly argues that security concerns on the state and federal level are not comparable. The federal government, in dealing with issues of national security, grapples with issues more complicated, sinister, and threatening than any state deals with itself.\textsuperscript{175} It is not a valid comparison to hold the public safety concerns of Indiana up to the national security concerns of the entire United States in a post September 11th-era.

Safire, in defending the cause of the bill, stated during questioning that reporters are not looking for an absolute privilege.\textsuperscript{176} Safire asserts that the "imminent danger" requirement is an exception to the privilege. He believes the requirement would respect the press' right to confidentiality and would not require the press to become the government's own investigative source.\textsuperscript{177} Senator Feinstein disagreed with the use of this language, stating, "this would mean basically there's no ability to compel anything—I couldn't conceive of a case where under this statute information could be received."\textsuperscript{178}

The bill would become more acceptable to everyone, including the DOJ, if the word "imminent" were removed.\textsuperscript{179} It is not difficult to imagine a situation where a reporter gains information about a potential terrorist plot with no specific timeframe and cannot be forced to identify a source due to the lack of imminence. With this new formulation, the government would still have the burden of proving the disclosure was necessary "to prevent actual harm to national security." Such a burden would still require a substantial showing by the government, but it would be less stringent than the burden necessary to prove

\begin{thebibliography}{179}

\bibitem{173} \textit{Id.} at 6 (testimony of Sen. Christopher Dodd).

\bibitem{174} \textit{Second Senate Hearing}, supra note 133, at 9 (statement of Chuck Rosenberg, U.S. Attorney, Southern District of Texas).

\bibitem{175} \textit{See, e.g.,} Editorial, \textit{Federal Shield Law Needed}, RENO GAZETTE-J., July 24, 2005, at 8A ("[T]he Justice Department, Homeland Security and intelligence agencies have legitimate concerns about national security and fighting terrorism.").

\bibitem{176} \textit{Senate Hearing}, supra note 14, at 17 (testimony of William Safire, Columnist, New York Times).

\bibitem{177} \textit{Id.}

\bibitem{178} \textit{Id.} at 20 (testimony of Sen. Dianne Feinstein, Member, S. Judiciary Comm.).

\bibitem{179} The DOJ is particularly concerned with the use of the word "imminent." The DOJ's position is that "the test for a national security case would be imminent actual harm. If we could not show that that leak was imminent actual harm, we may not be able to reach it through this bill. In other words, it may be off-limits even though a crime." \textit{Second Senate Hearing}, supra note 133, at 12 (statement of Chuck Rosenberg, U.S. Attorney, Southern District of Texas). Thus if the word were removed then one of the DOJ's main issues with the bill would be eliminated.


that the threat is "imminent."  

Section 2 of the bill requires that the context of any forced disclosure must be narrowly tailored to the subject matter and time period and is limited to, "verifying published information or describing any surrounding circumstances relevant to the accuracy of such published information." This language is too narrow; it leaves the government helpless to compel disclosure of an unpublished tip, even if the imminent and actual harm standards are met. If "published" were expanded simply to "published or planned to be published," it would give the government the right to seek information from journalists that is in the best interest of the nation but had yet to be published. This would not deprive journalists of their limited privilege because the government would still have to meet its national security burden before a judge, affording the journalist procedural due process. 

With this expansion comes the potential issue of prior restraint. Prior restraint is defined as "[a] governmental restriction on speech or publication before its actual expression" which in most cases is unconstitutional under the First Amendment. The meaning of "planned to be published," therefore must be clearly defined to mean that the story is in its final edited form in place to be published in the news organization's next publication. This would avoid prior restraint in two ways. First, there is no mandate anywhere that the information cannot be published. The news organization is still free to disseminate the story, thus the organization really has not been "restrained" from anything. Second, the other qualifications for the compelled disclosure ensure that this would happen only in extreme circumstances of national security. Finally, the Judith Miller case shows that journalists can be compelled to reveal a source without having written anything at all—prior restraint was not an issue.

All of the remaining procedures prescribed in the proposed bill would still apply except for the "imminent" requirement. This allows a judge to use a balancing test to determine the level of need. S. 1419, 109th Cong. § 2(a) (2005).

Id. § 2(b)(1)-(2) (emphasis added).

Id. § 2(a).

BLACK'S LAW DICTIONARY, supra note 20, at 1232.

It is worth noting that “[f]reedom of speech and press, historically considered and taken up by the Federal Constitution, means principally, although not exclusively, immunity from previous restraints or censorship.” 16A Am. Jur. 2d Constitutional Law § 454 (2002). The point of the federal shield law is to augment First Amendment protections, not to decrease them. Therefore it is important that the prior restraint does not become an issue which eliminates the effectiveness of the federal shield law.

See discussion infra Part VI. The expanded definition of “planned to be published” is noted in the Author’s proposed version of the federal shield law.
iii. Compelled Disclosure from Third Parties

Another section of the bill deals with the government's ability to obtain a reporter's confidential information by subpoenaing "communications service provider[s]." The bill's definition of "communications service provider" encompasses those persons who transmit information electronically and those companies whose job it is to convey information from one person to another. Entities that would fall under this discussion include network servers and electronic databases where e-mails and other documents would be stored. Additionally, the definition encompasses telecommunications carriers, or wireless and wireline phone companies.

The section makes clear that the same procedures that apply to extracting information from the covered person also apply to accessing their communications records. The section further provides that the only way the government can access this information is by providing the covered person with due process—notice and a right to be heard. There is an exception to the notice requirement, however, where a court finds "by clear and convincing evidence" that notice would "pose a substantial threat to the integrity of a criminal investigation."

The DOJ objects to this section because it "ends the ability of law enforcement authorities to conduct any investigation involving third parties."

---

186 S. 1419 § 4.
187 Id.; see also Lystad, supra note 74, at 17–18 ("[T]he Act makes it clear that these procedures, much like the guidelines, would apply only to communications or records of covered persons rather than the records of all companies doing business with covered persons.").
188 In defining "Communication Service Provider," the proposed bill references definitions contained in the Communications Act of 1934 for the terms, "telecommunications carrier, an information service provider and an information content provider." S. 1419 § 5(1). The Communications Act of 1934 defines these terms as follows:

The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.


"The term 'telecommunications carrier' means any provider of telecommunications services . . . ." Id. § 153(44). The Act defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." Id. § 153(43). "The term 'information content provider' means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." Id. § 230(f)(3).
189 S. 1419 § 4(a).
190 Id. § 4(b).
191 Id. § 4(c).
192 Senate Hearing, supra note 14, at 5 (statement of James B. Comey, Deputy Attorney
The DOJ then offers the hypothetical that "a ransom demand made to a kidnap victim's family's home telephone could be investigated by compulsory process; a ransom demand made by an anonymous person to a media outlet could not be investigated by such compulsory process."\(^{193}\)

This hypothetical is unrealistic. Subsections 4(b) and 4(c) spell out situations where a communications source can be subpoenaed and effectively used.\(^{194}\) Section 4 merely provides covered parties with notice and the opportunity to be heard. If Congress is going so far as to recognize that the free flow of information is in the public interest, as they recognized in § 2 of the bill, then Congress clearly feels that the procedural due process right of the covered party is worth protecting.\(^{195}\) Section 4 does not end all possibility of investigation, it simply lets the affected party know that he or she is under investigation.

The DOJ's hypothetical overstates the potential problem. As it admits, "[M]edia outlets are often happy to provide certain types of non-sensitive information to the Federal government, but are more comfortable doing so in response to a subpoena."\(^ {196}\) While the DOJ's objective in making that statement was to show that it would be more difficult to obtain a subpoena,\(^{197}\) it nevertheless assuages its own fears that with the process in place, media stations would almost certainly aid in an investigation involving non-sensitive sources. It is truly hard to imagine a media outlet not wishing to aid the government in capturing a kidnapper. This hypothetical is overblown and the section, as is, provides the proper procedures and mechanisms to allow both the covered person and the DOJ to do their jobs.

C. Author's Proposed Shield Law

The text below constitutes the Author's proposed shield law with changes incorporated. This proposal addresses the weaknesses of the bill entitled the Free Flow of Information Act and proposes changes to make the law more palatable for the federal government while maintaining strong protection for journalists.

\(^{193}\) Id. This hypothetical was offered again by U.S. Attorney Rosenberg in his written statement as well. Id. (statement of Chuck Rosenberg, U.S. Attorney, Southern District of Texas).

\(^{194}\) S. 1419 § 4(b)–(c) (stating that in some situations the covered party need not receive notice); id. § 4(c).

\(^{195}\) Id. § 2(a)(3)(C).

\(^{196}\) See Senate Hearing, supra note 14, at 3 (statement of James B. Comey, Deputy Attorney General, U.S. Department of Justice).

\(^{197}\) Id.
To maintain the free flow of information to the public by providing conditions for the federally compelled disclosure of information by certain persons connected with the news media.

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

SECTION 1. SHORT TITLE.
This Act may be cited as the ‘Free Flow of Information Act of 2005’.

SECTION 2. CONDITIONS FOR COMPELLED DISCLOSURE.
(a) Conditions for Compelled Disclosure—A Federal entity may not compel a covered person to testify or produce any document in any proceeding or in connection with any issue arising under Federal law unless a court determines by clear and convincing evidence, after providing notice and an opportunity to be heard to the covered person—

(1) that the party seeking to compel production of such testimony or document has unsuccessfully attempted to obtain such testimony or document from all persons from which such testimony or document could reasonably be obtained other than a covered person;

(2) that—

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

(i) there are reasonable grounds to believe that a crime has occurred; and

(ii) the testimony or document sought is essential to the investigation, prosecution, or defense; or

(B) in a matter other than a criminal investigation or prosecution, based on information obtained from a person other than a covered person, the testimony or document sought is essential to a dispositive issue of substantial importance to that matter; and

(3) in any matter in which the testimony or document sought could reveal the identity of a source of information or include any information that could reasonably be expected to lead to the discovery of the identity of such a source, that—

(A) disclosure of the identity of such a source is necessary to prevent actual harm to national security;

(B) compelled disclosure of the identity of such a source would prevent such harm; and

(C) the harm sought to be redressed by requiring disclosure clearly

198 The term “imminent” has been removed.
outweighs the public interest in protecting the free flow of information.

(b) Limitations on Content of Information—The content of any testimony or document that is compelled under subsection (a) shall, to the extent possible—

(1) be limited to the purpose of verifying information published (or planned to be published) or describing any surrounding circumstances relevant to the accuracy of such information published (or planned to be published); and

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

SECTION 3. COMPELLED DISCLOSURE PERMITTED.
Notwithstanding any provision of section 2, in any proceeding or in connection with any issue arising under Federal law, a Federal entity may compel a covered person to produce any testimony or document that consists only of commercial or financial information that is not related to news gathering or the dissemination of news and information by the covered person.

SECTION 4. COMPELLED DISCLOSURE FROM THIRD PARTIES.
(a) Conditions for Compelled Disclosure—Section 2 shall apply to any testimony or document that a third party or a Federal entity seeks from a communications service provider if such testimony or document consists of any record, information, or other communication that relates to a business transaction between a communications service provider and a covered person.

(b) Notice and Opportunity Provided to Covered persons—A court may compel the testimony or disclosure of a document under this section only after the party seeking such a document provides the covered person who is a party to the business transaction described in subsection (a)—

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

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

(c) Exception to Notice Requirement—Notice under subsection (b)(1) may be delayed only if the court determines by clear and convincing evidence that such notice would pose a substantial threat to the integrity of a criminal investigation.
SECTION 5. DEFINITIONS.

In this Act:

(1) COMMUNICATIONS SERVICE PROVIDER—The term ‘communications service provider’—

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

(B) includes a telecommunications carrier, an information service provider, an interactive computer service provider, and an information content provider (as such terms are defined in the §§ 3 and 230 of the Communications Act of 1934 (47 U.S.C. §§ 153, 230)).

(2) COVERED PERSON—The term ‘covered person’ means—

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 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. ¹⁹⁹

(3) PLANNED TO BE PUBLISHED—The term ‘planned to be published’ means a news story in its final, edited form that is scheduled to be published in the news organization’s next publication.

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

(5) FEDERAL ENTITY—The term ‘Federal entity’ means an entity or employee of the judicial or executive branch or an administrative agency of the Federal Government with the power to issue a subpoena or provide other compulsory process.

(6) THIRD PARTY—The term ‘third party’ means a person other than a covered person.

V. JUDITH MILLER: APPLYING THE PROPOSED FEDERAL SHIELD LAW

Judith Miller was a reporter for the New York Times who was held in contempt of court and jailed for refusing to testify about her confidential source before a grand jury; she has become the central figure in the movement for the federal shield law. Miller received information from a source within the federal

¹⁹⁹ This text completely replaces the current definition of “covered person.”
government revealing that Valerie Plame, wife of former Ambassador Joseph Wilson, was an undercover Central Intelligence Agency agent. Apparently, I. Lewis “Scooter” Libby, Vice President Cheney’s former Chief of Staff and assistant for National Security Affairs spread this information around to several sources but it was not written about until an article by Robert Novak made the information about Plame public in a Chicago Sun-Times article. It is unclear how the government knew that Miller had this information, as Miller never wrote about Plame, but Miller was called to testify before the grand jury. Miller steadfastly refused to reveal her source and was sent to jail. Because a federal grand jury indicted Miller, shield law protection was unavailable.

If the author’s proposed federal shield law had been in place Miller’s situation would have been drastically different. First, in order to bring Miller before the grand jury, the government would have had to prove to the court by “clear and convincing evidence” that: (1) it had exhausted all other avenues for discovering who leaked Plame’s identity; (2) that there are reasonable grounds to believe that the leak of Plame’s identity constituted a crime.

Assuming arguendo that a court could make such a finding, it would then evaluate the more difficult elements: that finding the leak of the information was of imminent and actual harm to national security, that her testimony about her source would prevent such harm, and the public interest in finding this information outweighs the public interest in protecting the free flow of information. It is extremely difficult to classify the leak as causing “imminent and actual harm to national security.” This would, in effect, be stating that if the source of the leak is not discovered then the safety of the nation is in extreme peril.

Additionally, it would be a difficult decision for the judge to decide which public interest prevails now that Congress has determined there is a significant public interest in the free flow of information. This could be sorted out using case law, but it is still a difficult decision to render. Furthermore, Section 2(b) says that the inquiry must be limited to “verifying published information.” Miller never published a story, so she would be automatically exempt under this provision. If the federal shield law were in place, Miller could not have been forced to testify in front of the grand jury, and thus never sent to jail for contempt.

---

200 The source was later determined to be I. Lewis “Scooter” Libby, the former Chief-of-Staff for Vice-President Cheney. See, e.g., Greg Pierce, Miller Freed, WASH. TIMES, Sept. 30, 2005, at A11.


202 For more about Judith Miller and the Valerie Plame affair, see Van Natta Jr. et al., supra note 5.

203 S. 1419, 109th Cong. § 2(b) (2005).
If the author's proposed changes were implemented, however, there would be a different result. Instead of having to prove “imminent” danger to national security and actual harm, the government would only have to prove that there is danger to national security and actual harm, a much more reasonable standard. Additionally, the author's proposed change from “published” to “published or planned to be published” would give the government more leeway towards questioning her (though there is, in this case, no evidence that Miller ever planned to publish on this topic).

If the government can indeed prove to the court that this matter does invoke our national security by “clear and convincing evidence” after Miller herself has had the opportunity to testify about why she should not be forced to divulge her source, then Miller would have had procedural due process and must accept the result. The goal of my proposed shield law is neither to force disclosure of sources nor to keep all sources confidential no matter the circumstances, it is a balance of competing public interests, which is what Congress should achieve with this bill.

VI. CONCLUSION

When the Supreme Court decided *Branzburg v. Hayes* thirty-three years ago, a sharply-divided majority decided that journalists had no privilege to resist revealing their confidential sources at common law. Over time, however, the courts gradually adopted the balancing test from the Powell concurrence instead of sticking with the hard-line majority decision. When recent decisions came down that moved back towards showing no consideration for the value of the press’ right to protect their confidential sources, the current rendition of the federal shield law proposal was born.

The proposed legislation, however, moves too far in the opposite direction so that no reporter can be compelled to reveal a source except in the most dire of circumstances. Given the national security concerns that exist in the world today, there is tremendous value in having whistle-blowers and other sources confident that they can come forward with their information. This information is essential to any democracy, but the importance of this element of freedom of the press cannot quash all efforts involved in protecting our national security. My proposed changes, which include narrowing the definition of a “covered person” and removing the “imminence” requirement in order to compel a witness, would bring a balance to the proposed federal shield law and allow both contingencies to do their part to keep America safe.