SHIELDING JOURNALIST-"BLOGGERS": THE NEED TO PROTECT NEWSGATHERING DESPITE THE DISTRIBUTION MEDIUM

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ABSTRACT

The failure to agree on a sufficiently narrow definition of "journalist" has stalled efforts to enact a federal shield law to legally protect reporter-source communications from compelled disclosure in federal court. The increasing use of the Internet in news coverage and the greater reliance by the public on the Internet as a news source creates further problems as to who should qualify for federal shield law protection. This iBrief argues that a functional definition of "journalist" can be created to shield journalists from compelled source disclosure so as to protect the free flow of information to the public, but limits must be set to prevent abuse of such protection.

INTRODUCTION

¶1 This past year, Pulitzer Prize-winning *New York Times* reporter Judith Miller was jailed for refusing to divulge a confidential source. She was called before a grand jury investigation to reveal how she discovered the name of covert CIA operative Valerie Plame.[2] In a separate case, U.S. District Court Judge Thomas Penfield Jackson ordered five journalists to pay $500 a day in civil contempt fines for failing to divulge the source linking former Los Alamos scientist Wen Ho Lee to espionage on behalf of China.[3] And in California, Apple Computers subpoenaed the email records from three websites that published confidential product information in order to uncover the names of alleged Apple employees who leaked trade secret information to the site.[4] Even if the Apple case ultimately fails to examine

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[2] *See* Jeffrey S. Nestler, Comment, *The Underprivileged Profession: The Case for Supreme Court Recognition of the Journalist's Privilege*, 154 U. PA. L. REV. 201, 201-02 (2005); Robert Zelnick, *Journalists and Confidential Sources*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 541, 541 (2005).

[3] *See* Zelnick, *supra* note 2, at 543.

[4] Kimberly Wimlot Voss, *Will Lawmakers Raise Shields to Protect Bloggers?* ONLINE JOURNALISM REV., Oct. 13, 2005, http://www.ojr.org/ojr/stories/051013voss/.

the application of the reporter's privilege to "bloggers," the issue will inevitably arise in another case.[5] Bloggers are a permanent fixture in the twenty-four hour news cycle,[6] and the use of "blogs" as a method of disseminating information can no longer be ignored.[7]

¶2 These three situations illustrate the need for a federal shield law to resolve the jurisdictional "patchwork"[8] of protection offered to a reporter's confidential sources. In some cases, compelled disclosure may be the proper approach. Yet a consistent federal approach, upon which journalists can rely when making promises of confidentiality to sources, is needed both to effect justice and guarantee the public's right to a free flow of information.

¶3 The Supreme Court recently declined an opportunity to establish a unified approach to reporter-source communications. In July 2005, the Supreme Court refused to grant certiorari in the widely-publicized reporter privilege case involving former *New York Times* reporter Judith Miller.[9] Had it granted certiorari, the Court could have clarified its opinion in *Branzburg v. Hayes*,[10] which has been the seminal, although wholly misunderstood, case addressing the constitutionality of the reporter's privilege. The Court's refusal to hear the case and possibly clarify *Branzburg* underscores the urgent need for a federal shield law. Such a law would resolve policy tensions and ensure that journalists' use of confidential sources is protected in federal court.

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[5] Indeed, the Electronic Frontier Foundation has recognized and attempted to quell the legal fears of journalist-"bloggers" by providing a free online legal guide for bloggers at http://www.eff.org/bloggers/lg (last updated Nov. 18, 2005).

[6] *See, e.g.*, David L. Hudson Jr., Blogging, First Amendment Center, http://www.firstamendmentcenter.org/press/topic.aspx?topic=blogging (last visited Mar. 8, 2006) ("[T]hree amateur journalists at the Powerline.com blog were primarily responsible for discrediting the documents used in CBS's rush-to-air story on President George Bush's National Guard service.").

[7] "Blog" is a shortened form of "web log" and is defined as a "website in which items are posted on a regular basis and displayed in reverse chronological order." WIKIPEDIA, THE FREE ENCYCLOPEDIA, http://en.wikipedia.org/wiki/Blog (last visited Mar. 9, 2006). A person who posts these entries is called a "blogger." *Id.*

[8] Jennifer Elrod, *Protecting Journalists from Compelled Disclosure: A Proposal for a Federal Statute*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 115, 125-26 (2003-2004).

[9] *In re* Grand Jury Subpoena, Miller, 397 F.3d 964 (D.C. Cir. 2005), *cert. denied*, 125 S. Ct. 2977 (2005).

[10] 408 U.S. 665 (1972).

¶4 In response to the Court's denial of certiorari in *Miller*, two federal shield laws were introduced in Congress and are currently in committee.[11] These laws suffer from a similar problem as their rejected predecessors: an over-inclusive definition of the term "journalist." In order to have any success in passing a federal shield law, a narrow definition of a "journalist" is needed to calm fears that extending a reporter's privilege could compromise national security. The problem becomes how to define the term "journalist" given the increasing use of the Internet as a modern information source.[12] United States D.C. Circuit Court of Appeals Judge Sentelle framed the concerns about an over-inclusive federal shield law when he asked whether, if a privilege is granted to bloggers,

> would it not be possible for a government official wishing to engage in the sort of unlawful leaking under investigation in the present controversy to call a trusted friend or a political ally, advise him to set up a web log (which I understand takes about three minutes) and then leak to him under a promise of confidentiality the information which the law forbids the official disclose?[13]

¶5 Any definition in a federal shield law should act to protect those journalists who use blogs as a medium for news distribution. But that definition should also exclude those whose online postings do not serve the informational needs intended to be protected by the reporter's privilege. An effective federal shield law will address the current phenomenon of bloggers by providing a functional definition of "journalist," applicable regardless of the medium.

¶6 A restrictive definition would require Congress to make somewhat arbitrary choices concerning who should qualify for the reporter's privilege. But overbroad, diluted protection would be similarly harmful.[14] Curbing the scope of the definition of "journalist" under the statute will ensure valuable, but qualified, protection for those who are serving to inform the public.[15] This iBrief proposes that in order to qualify for protection a journalist must satisfy specific criteria unrelated to his or her choice of distribution method. The need to protect the use of confidential sources and

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[11] Free Flow of Information Act of 2005, S. 1419, 109th Cong. (2005); Free Flow of Information Act of 2005, H.R. 3323, 109th Cong. (2005).
[12] Linda L. Berger, *Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist's Privilege in an Infinite Universe of Publication*, 39 HOUS. L. REV. 1371, 1390 (2003) (quoting Mike Godwin, *Who's a Journalist?—II. Welcome the New Journalists on the Internet*, 13 MEDIA STUD. J. 38, 39 (1999) ("With a $1,000 desktop computer and a connection to the Internet, anybody can reach an audience of thousands or millions . . . .")).
[13] *In re Grand Jury Subpoena*, 397 F.3d at 979-80.
[14] Hudson, *supra* note 6.
[15] *Id.*

create stability in the law merits the exclusion of some journalists. One possibility is to exclude those bloggers or Internet journalists who are not associated with an established news organization and do not significantly further the dissemination of information.

¶7 Part I of this iBrief will set forth the current state of the law concerning the reporter's privilege. Part II addresses the current federal shield law proposals pending in Congress and proposes that a more restrictive definition of the term "journalist" is needed in order for a federal law to be both enacted and effective.

I. CURRENT STATE OF THE LAW

A. Framing the Debate

¶8 The struggle over if and when journalists should be compelled to reveal confidential sources or their notes is a struggle in which each side purports to act in the public interest.[16] Journalists argue that subpoenas undermine journalists' ability to perform their constitutional function of informing the citizenry,[17] while the Department of Justice ("DOJ") asserts that subpoenas allow for effective prosecution in criminal trials.[18]

¶9 This is the first time since the 1970s that journalists have been subpoenaed in such significant numbers.[19] Particularly worrisome is the increase in the subpoenaing of journalists in lengthy civil cases in which a news organization can be charged daily fines for years for contempt.[20] This trend threatens the public's right to know[21] by undermining journalists'

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[16] *See* Stephen Bates, *The Reporter's Privilege, Then and Now*, Research Paper No. R-23, The Joan Shorenstein Center on the Press, Politics, and Public Policy, Harvard University, John F. Kennedy School of Government (2000), *available at* http://www.ksg.harvard.edu/presspol/Research_Publications/Papers/Research_Papers/R23.pdf (discussing generally how prosecutors and journalists view press subpoenas and recognizing obstacles to a reporter's privilege).

[17] *Id.* at 1.

[18] *Id.* at 17 (describing the prosecutor and the journalist as "locked in a struggle for democratic legitimacy").

[19] Jeffrey Toobin, *Name That Source: Why Are the Courts Leaning on Journalists*, NEW YORKER, Jan. 16, 2006, at 30.

[20] *See, e.g*, *id.* (relating that lawyers for Steven Hatfill at one point subpoenaed thirteen news organizations in a lawsuit filed against the government for leaks in his anthrax investigation case).

[21] Former *New York Times* general counsel James Goodale and Joseph diGenova, a federal prosecutor during the Reagan administration and an independent counsel in the early 1990s, have rejected the notion that there is an anti-media trend in the courts. Rachel Smolkin, *Under Fire*, AM. JOURNALISM REV., Feb./Mar. 2005, at 18. Goodale estimated that 500 cases litigated in the

ability to promise confidentiality to their sources. Without confidentiality, the public will suffer. For instance, without promises of confidentiality, it is unlikely that *Washington Post* reporters would have uncovered the Watergate scandal.[22]

¶10 Journalists also protect confidential sources in order to preserve future sources. In one survey, just over 86 percent of the 711 journalists questioned either mildly or strongly agreed that "the use of confidential sources [was] essential to [their] ability to report some news stories to the public."[23] In addition, professional ethics codes require that journalists protect their sources even when doing so means going to jail or paying hefty fines.[24] Every major American news organization demands that journalists uphold the promise of confidentiality they make to a source.[25]

B. Common-Law Privileges

¶11 Testimonial privileges, including attorney-client privilege, doctor-patient privilege, spousal privilege, and most recently, therapist privilege, have been recognized by the judicial system.[26] The reporter's privilege is much less established, and reporters are often compelled to reveal confidential sources and information, whether published or unpublished.[27] This may be because most other judicially-sanctioned testimonial privileges

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past 30 years have touched on the reporter's privilege and that recent high profile cases have focused increased attention on the issue. *Id.*

[22] Berger, *supra* note 12, at 1375.

[23] Petition for Writ of Certiorari at 8 n.4, Miller v. United States, 125 S. Ct. 2977 (2005) (No. 04-1507) (citing First Amendment Center, *Reporters and Confidential News Sources Survey—2004*, Mar. 7, 2005, http://www.firstamendmentcenter.org/news.aspx?item=reporters_confidential_survey_04).

[24] Brief for the States of Oklahoma et al. as Amici Curiae Supporting Petitioner at 7-8, Miller v. United States, 125 S. Ct. 2977 (2005) (No. 04-1507).

[25] *See*, *e.g.*, Petition for Writ of Certiorari, *supra* note 23, at 8 (citing American Society of Newspaper Editors Statement of Principles, Art. VI ("Pledges of confidentiality to news sources must be honored at all costs, and therefore should not be given lightly."), http://www.asne.org/index.cfm?id=888 (last updated Aug. 28, 2002) and Radio-Television News Directors Association Code of Ethics and Professional Conduct ("Journalists should keep all commitments to protect a confidential source."), http://www.rtnda.org/ethics/coe.shtml (last visited Mar. 8, 2006)).

[26] Nestler, *supra* note 2, at 212-13. In *Jaffe v. Redmond*, 518 U.S. 1 (1996), the Supreme Court recognized a privilege for psychotherapist-patient communications.

[27] *See generally* Reporters Committee for Freedom of the Press, The Reporter's Privilege Compendium, http://www.rcfp.org/privilege/index.html (last visited Mar. 8, 2006).

involve the protection of private information given to members of an accredited profession, whereas journalism is less a profession than an activity in which all citizens can participate. [28]

¶12 The Federal Rules of Evidence state that testimonial privileges in federal civil and criminal cases "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."[29] Congress rejected a rule that would list and define the nine testimonial privileges recognized at the time of the promulgation of the Federal Rules of Evidence[30] and instead adopted Rule 501, which allows for the continued "evolutionary development of testimonial privileges."[31] The legislative history makes clear that by adopting a flexible approach to testimonial privileges, Congress anticipated that federal courts would act to determine whether a reporter's privilege existed under federal common law.[32] Indeed, federal courts' increasing recognition of additional testimonial privileges reinforces the notion that Congress did not intend for Rule 501 to freeze the law of privileges.[33]

¶13 Despite the legislative history of Rule 501 and the recognition by more than thirty state legislatures of the need to protect a reporter's sources, the Supreme Court has not recognized a reporter privilege. Further, the Supreme Court's refusal to grant certiorari in *Miller* suggests that the Court is unlikely to recognize a reporter's privilege in the immediate future. Without federal recognition of a reporter's right to protect the promise of source confidentiality, any confidential information sought can be attained simply by bringing the suit in federal court. Although some federal circuits have found a common-law reporter privilege, such a circuit-by-circuit approach only creates uncertainty in the law and has the same chilling effect on investigative stories as the recognition of no privilege at all.

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[28] *See* Douglas McCollam, *Attack at the Source*: *Why the Plame Case is So Scary*, COLUMBIA JOURNALISM REV., Mar./Apr. 2005, at 29, 33, *available at* http://www.cjr.org/issues/2005/2/mccollam-plame.asp.

[29] FED. R. EVID. 501; *see Jaffee*, 518 U.S. at 8-9.

[30] *See* Petition for Writ of Certiorari, *supra* note 23, at 21 (citing 56 F.R.D. 183, 230-61 (1972) (proposed Rules 501-513)).

[31] *Jaffee*, 518 U.S. at 8-9 (quoting Trammel v. United States, 445 U.S. 40, 47 (1980)).

[32] Petition for Writ of Certiorari, *supra* note 23, at 22 (citing a statement by Congressman Hungate, Chairman of the House Judiciary Subcommittee on Criminal Justice, upon presentation of the Conference Report to the House, that Rule 501 "permits the courts to develop a privilege for newspaperpeople on a case-by-case basis," 120 Cong. Rec. H12253-54 (daily ed. Dec. 18, 1974)).

[33] *See Jaffee*, 518 U.S. at 8-9 ("Rule [501] thus did not freeze the law governing the privileges of witnesses in federal trials at a particular point in our history . . . .").

C. Confusion Created by the Supreme Court in Branzburg v. Hayes

¶14 *Branzburg*, the only Supreme Court case to address the reporter's privilege, denied recognition of a constitutional or common law reporter's privilege, and the ambiguous outcome has led to three decades of assorted judicial and legislative approaches to the reporter's privilege[34] and significant lower court confusion in how to apply the law.[35] Some federal circuits and most state courts have come to recognize either a common law or constitutionally derived reporter's privilege despite the fact that the majority opinion in *Branzburg* found to the contrary.[36] Significant variations in the scope of the reporter's privilege granted, however, have created uncertainty in the law and, consequently, have weakened any protection a privilege provides for the free flow of information.

¶15 In *Branzburg*, the Supreme Court held that the First Amendment does not protect a reporter from questioning by a grand jury concerning confidential sources, provided the investigation was in good faith and not merely to harass the journalist.[37] In a 5-4 decision, the Court expressly rejected the argument that "the public interest in possible future news about crime from undisclosed, unverified sources [overrides] the public interest in pursuing and prosecuting those crimes reported . . . and in thus deterring" future crimes.[38] The Court was unwilling to articulate a reporter's privilege when the First Amendment's guarantee of a free press applies equally to almost anyone: "the lonely pamphleteer . . . just as much as the large metropolitan publisher."[39] Rather, the Court left Congress the difficult task of deciding who, if anyone, should have the protection of a reporter's privilege.[40]

¶16 Justice Powell's concurrence to Justice White's majority opinion, however, left courts an opening to recognize a qualified reporter's privilege subject to case-by-case judicial discretion,[41] stating that any "asserted claim

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[34] *See* Berger, *supra* note 12, at 1390.
[35] *See* 408 U.S. 665; *see also* Adam Liptak, *The Hidden Federal Shield Law: On the Justice Department's Regulations Governing Subpoenas to the Press*, 199 ANN. SURV. AM. L. 227, 231 (1999) ("*Branzburg* is a confusing 4-1-4 decision.").
[36] Nestler, *supra* note 2, at 224-26.
[37] *Branzburg*, 408 U.S. at 707.
[38] *Id*. at 695.
[39] *Id.* at 704.
[40] *Id.* at 706 ("Congress has the freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned.").
[41] Berger, *supra* note 12, at 1390 ("In recognizing a qualified privilege, as Justice Powell appeared to suggest, many lower courts also adopted the balancing test specifically advocated by Justice Stewart in his dissent.").

to privilege should be judged on its facts by the striking of a proper balance between the freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct."[42] Allowing courts to recognize this privilege on a case-by-case basis[43] has created confusion, which Justice Stewart accurately summarized when he commented that in *Branzburg*, "the Court rejected the [reporters'] claims by a vote of five to four, or, considering Mr. Justice Powell's concurring opinion, perhaps by a vote of four and a half to four and a half."[44]

¶17 This circuit split has resulted in a range of protections for journalists at the federal appellate level and a proliferation of state shield laws.[45] Some circuits have expressed inconsistent views about how Justice Powell's concurrence affects the majority's holding.[46] For example, in *In re Grand Jury Subpoena, Judith Miller*, the D.C. Circuit gave no weight to Justice Powell's concurrence[47] while, in *Carey v. Hume*, it had found that *Branzburg*'s precedential value was "controlled" by Powell's concurrence.[48]

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[42] *Branzburg*, 408 U.S. at 710.
[43] *Id.*
[44] Potter Stewart, *Or of the Press,* 26 HASTINGS L.J. 631, 635 (1975), *reprinted in* 50 HASTINGS L. J. 705, 709 (1999), *cited in* Brief for the Center for Individual Freedom as Amicus Curiae Supporting Petitioner at 11, Miller v. United States, 125 S. Ct. 2977 (2005) (No. 04-1507).
[45] *See generally* Reporters Committee for Freedom of the Press, *supra* note 27 (providing a database outlining the specifics of the law of journalist's privilege in each state and federal circuit); *see also* Karl H. Schmid, *Journalist's Privilege in Criminal Proceedings: An Analysis of United State Court of Appeals' Decisions from 1973 to 1999*, 39 Am. Crim. L. Rev. 1441, 1498 (2002) (concluding that courts of appeals have applied varying standards for overcoming privilege but have in general been more lenient in approving prosecutors' subpoenas than those served by the defendants in criminal cases).
[46] *Compare In re* Selcraig, 705 F.2d 789, 792 (5th Cir. 1983) (finding a qualified privilege based on the "plurality opinions" in *Branzburg*), *with* United States v. Smith, 135 F.3d 963, 969 (5th Cir. 1998) (acknowledging the plurality of the *Branzburg* opinion but rejecting the notion that Powell's concurrence is "a mandate to construct a broad, qualified newsreporter's privilege in criminal cases"); *compare* LaRouche v. Nat'l Broad. Co., 780 F.2d 1134, 1139 (4th Cir. 1986) (finding a broadly applicable reporter's privilege based upon Justice Powell's concurrence) *with In Re* Shain, 978 F.2d 850, 852 (4th Cir. 1992) (arguing that Justice Powell's concurrence only "emphasize[d] the Court's admonishment against official harassment of the press").
[47] 397 F.3d 964, 972 (D.C. Cir. 2005) (concluding that "whatever Justice Powell specifically intended, he joined the majority" in rejecting a First Amendment reporter's privilege not to testify before a grand jury).
[48] 492 F.2d 631, 636 (D.C. Cir. 1974); *see also* Petition for Writ of Certiorari, *supra* note 23, at 17-18 (describing this contradiction).

¶18 Currently, only the Sixth Circuit has explicitly rejected the existence of a qualified reporter's privilege.[49] The Seventh Circuit has not ruled conclusively in either direction, but a recent opinion indicates that the reporter's privilege will not be recognized.[50] Other circuits have recognized a qualified reporter's privilege but with variable levels of protection and depending upon the type of proceedings.[51]

¶19 Only four circuits—the First, Second, Third and Eleventh—have found that the government's interest in prosecuting a criminal trial does not outweigh a journalist's right to protect a confidential source under the First Amendment and therefore, a case-by-case balancing test must be invoked.[52] These circuits have reasoned that Justice Powell's concurrence created

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[49] *See In re* Grand Jury Proceeedings (Storer Commc'ns, Inc. v. Giovan), 810 F.2d 580, 584 ("[W]e decline to join some other circuit courts . . . [that have] adopted the qualified privilege balancing process urged by the three *Branzburg* dissenters and rejected by the majority."). *But see* Southwell v. S. Poverty Law Ctr., 949 F. Supp. 1303, 1312 (W.D. Mich. 1996) (finding a qualified reporter's privilege).

[50] *See* McKevitt v. Pallasch, 339 F.3d 530, 533 (7th Cir. 2003) (warning that courts recognizing a privilege over published or non-confidential information "may be skating on thin ice").

[51] *See, e.g.*, Zerilli v. Smith, 656 F.2d 705, 711 (D.C. Cir. 1981) (recognizing a First Amendment privilege against compelled disclosure in civil but not criminal cases); Cervantes v. Times, Inc., 464 F.2d 986, 992 n.9 (8th Cir. 1972) (also recognizing a privilege in civil cases but not directly addressing criminal cases); Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 437 (10th Cir. 1977) (recognizing a privilege in civil cases but not directly addressing whether protection is available in criminal cases);.*In re* Shain, 978 F.2d 850, 852 (4th Cir. 1992) ("[A]bsent evidence of government harassment or bad faith, reporters have no privilege different from that of any other citizen not to testify about knowledge relevant to a criminal prosecution."); *compare* Shoen v. Shoen, 5 F.3d 1289 (9th Cir. 1993) (recognizing privilege in civil case) *with* Farr v. Pitchess, 522 F.2d 464 (9th Cir. 1975) (upholding privilege in criminal trial), *cert. denied*, 427 U.S. 912 (1976), *and*, *In re* Grand Jury Proceedings (Scarce v. United States), 5 F.3d 397 (9th Cir. 1993) (rejecting privilege in grand jury investigations but failing to articulate a legally principled distinction between criminal trials and grand jury investigations upon which their reading of *Branzburg* is founded).

[52] *In re* Special Proceedings, 373 F.3d 37, 45 (1st Cir. 2004); Gonzales v. Nat'l Broad. Co., 700 F.2d 70, 77 (2d Cir. 1999); United States v. Cuthbertson, 630 F.2d 139, 147 (3d Cir. 1980) (holding that "journalists possess a qualified privilege not to divulge confidential sources and not to disclose unpublished information in their possession in criminal cases"). The Third Circuit found that "the interests of the press that form the foundation of the privilege are not diminished because the nature of the underlying proceeding out of which the request for the information arises is a criminal trial." *Id.*; *accord* United States v. Caporale, 806 F.2d 1487, 1504 (11th Cir. 1987).

the majority opinion and, therefore, it must be given significant weight.[53] Significantly, however, they define eligibility for protection based on the writer's purpose in gathering the news. Notably, the First Circuit has held that

> [t]he medium an individual uses to provide his investigative reporting to the public does not make a dispositive difference in the degree of protection accorded to his work.. . . [T]he courts will make a measure of protection available to him as long as he intended "at the inception of the newsgathering process to use the fruits of his research to disseminate information to the public."[54]

¶20 Similarly, a federal district court determined who was entitled to invoke a reporter's privilege based on the purpose for which the person or entity gathered news and not subject to formal employment with a news organization.[55] These holdings support the theory that bloggers acting as journalists should not be excluded from protection under the reporter's privilege merely because they have selected to use an online-posting format or are not members of a traditional media outlet.

D. Current State Legal Landscape

¶21 Seventeen states at the time of *Branzburg* already had some type of statutory protection over a journalist's confidential sources.[56] Fifteen additional states and the District of Columbia, accepted the Court's invitation in *Branzburg* [57] to fashion a "shield law."[58] Of the nineteen

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[53] *See* United States v. LaRouche Campaign, 841 F.2d 1176, 1182 (1st Cir. 1988) (finding Justice Powell's concurring opinion to be essential); *In re* Petroleum Prods. Antitrust Litig., 680 F.2d 5, 8 & n.9 (2nd Cir. 1982) (concluding Justice Powell's concurrence "cast the deciding vote" in *Branzburg* and thus, "his reservations are particularly important in understanding the decision"); Riley v. City of Chester, 612 F.2d 708, 715-716 (3d Cir. 1979) (employing Justice Powell's balancing test and noting that he "cast the deciding vote in *Branzburg*"); *Caporale*, 806 F.2d at 1504 (citing *In re* Selcraig, 705 F.2d 789, 792 (5th Cir. 1983) (upholding a First Amendment reporter's privilege based on a "careful reading of the plurality and concurring opinions in *Branzburg*")).

[54] Cusumano v. Microsoft Corp., 162 F.3d 708, 714 (1st Cir. 1998).

[55] United States v. Vastola, 685 F. Supp. 917, 925 (D.N.J. 1998) (extending privilege to author of book about the mafia and President Reagan).

[56] *See Branzburg*, 408 U.S. at 689 n.27 (listing all the states with statutory protection at the time of the decision).

[57] *See id.* at 706 ("[T]here is also merit in leaving state legislatures free within First Amendment limits, to fashion their own standards [based on] the relations between law enforcement officials and press in their own areas.").

[58] As of 2005, thirty-one states plus the District of Columbia have state shield laws. Ala. Code § 12-21-142 (1995); Alaska Stat. §§ 09.25.300-09.25.390

states without statutory shield laws, courts in all but one state have recognized a reporter's privilege in one context or another.[59] Wyoming is the only state that has remained silent on the issue.[60]

¶22 State shield laws vary in the scope of the qualified protection offered to reporter-source communications and information.[61] In contrast to federal courts, state statutes focus more on a journalist's affiliation with a news organization and less on the journalist's motivation for newsgathering.[62] For example, California's shield law protects a "person connected with or employed [by] a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed."[63] Delaware's statute is

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(2004); Ariz. Rev. Stat. Ann. §§ 12-2214, 12-2237 (2003); Ark. Code Ann. § 16-85-510 (1987); Cal. Evid. Code § 1070 (West 1995); Cal. Civ. Proc. Code § 1986.1 (West 1998); Colo. Rev. Stat. § 13-90-119 (2004); Del. Code Ann. tit. 10, §§ 4320-4326 (1999); D.C. Code Ann. §§ 16-4701 to -4704 (LexisNexis 2005); Fla. Stat. Ann. § 90.5015 (West 1999); Ga. Code Ann. § 24-9-30 (1995 & Supp. 2005); 735 Ill. Comp. Stat. Ann. 5/8-901 to -909 (West 2002); Ind. Code Ann. § 34-46-4-1 (West 1999); Ky. Rev. Stat. Ann. § 421.100 (LexisNexis 1992); La. Rev. Stat. Ann. §§ 45:1451-1459 (1999); Md. Code Ann., Cts. & Jud. Proc. § 9-112 (LexisNexis 2002); Mich. Comp. Laws Ann. § 767.5a (West 2000); Minn. Stat. Ann. §§ 595.021 to 595.025 (West 2000); Mont. Code Ann. §§ 21-1-901 to -903 (2003); Neb. Rev. Stat. §§ 20-144 to -147 (1997); Nev. Rev. Stat. Ann. §§ 49.275, 49.385 (LexisNexis 2002); N.J. Stat. Ann. § 2A:84A-21 (West 1994); N.M. Stat. Ann. §38-6-7 (LexisNexis 1998); N.Y. Civ. Rights Law § 79-h (McKinney 1992); N.C. Gen. Stat § 8-53.11 (2003); N.D. Cent. Code § 31-01-06.2 (1996); Ohio Rev. Code Ann. §§ 2739.04, 2739.12 (LexisNexis 2000); Okla. Stat. tit. 12, § 2506 (2001); Or. Rev. Stat. §§ 44.510-.540 (2003); 42 Pa. Cons. Stat. § 5942 (2002); R.I. Gen. Laws §§ 9-19.1-1 to -3 (1995); S.C. Code Ann. § 19-11-100 (2004); Tenn. Code. Ann. § 24-1-208 (2000).

[59] Nestler, *supra* note 2, at 226 & n.123 (extensive list of state appellate court decisions recognizing the reporter's privilege).

[60] *Id.* at 226.

[61] *See* Laurence B. Alexander, *Words That Shield: A Textual Analysis of the Journalist's Privilege*, 18 NEWSPAPER RES. J. 51, 60-64 (1997) (describing the wide variations in protection afforded under state shield laws).

[62] *See id.*

[63] CAL. CONST. art. 1, § 2(b); CAL. EVID CODE § 1070(a) (West 1995). *See also* DEL. CODE. ANN. tit. 10, § 4320(4)(a) (1999) (extending protection only to those who have earned "their principal livelihood by, or in each of the preceding three weeks or four of the preceding eight weeks [have] spent at least twenty hours engaged in the practice of, obtaining or preparing information for dissemination . . . to the general public."); N.Y. CIV. RIGHTS LAW § 79-h(a)(6) (McKinney 1992) (extending shield only to "professional" journalists who are "professionally affiliated for gain or livelihood" with a traditional news media organization).

even more specific in its requirements, extending protection only to those journalists who have earned "their principal livelihood by, or in each of the preceding three weeks or four of the preceding eight weeks [to have] spent at least twenty hours engaged in the practice of, obtaining or preparing information for dissemination . . . to the general public."[64] Generally, state statutes define the protected class of journalists as those who "(1) . . . have a substantial connection with or relationship to a recognized or traditional news media entity, and (2) [are] engaged in recognized or traditional news media activities."[65]

¶23 Although Alaska, Oklahoma, and Louisiana's definition of a protected journalist as someone "regularly engaged" in the business or activities of journalism could be interpreted to include journalist-bloggers who regularly post online,[66] no state court has yet addressed whether or not a journalist-blogger would be covered by that state's shield law.[67]

E. DOJ Guidelines

¶24 The Department of Justice's special guidelines with regards to the subpoenaing of the news media reveal that journalists are not like other witnesses subpoenaed in a trial.[68] Rather, the Department of Justice acknowledges that it must "strike the proper balance between the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice."[69] Under the Guidelines, a federal prosecutor is required to (1) weigh the effect of the subpoena against the fair administration of justice; (2) make reasonable attempts to obtain the particular materials from alternative sources other than the press; and (3) to obtain the Attorney General's authorization on all requests for subpoenas of the press.[70]

¶25 Many journalists reject these guidelines as giving the Attorney General too much discretion to decide when a journalist is privileged from

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[64] DEL. CODE. ANN. tit. 10, § 4320(4)(a) (1999).
[65] *See* Berger, *supra* note 12, at 1393 (analyzing the variation in the focus of the reporter's privilege protection offered under federal and state law).
[66] ALASKA STAT. § 09.25.390(4) (2000); LA. REV. STAT. ANN § 45:1451 (1999); OKLA. STAT. tit. 12, § 2506(7) (1993).
[67] In California, the issue could be resolved on appeal in Apple Computer, Inc. v. Doe 1, No. 1-04-CV-032178, 2005 WL 578641 (Cal. Super. Ct. Mar. 11, 2005). Apple has charged three bloggers with publishing confidential product information in violation of state law and seeks to compel the bloggers to divulge which of Apple's employees turned over the information to the bloggers. *Id.*
[68] 28 C.F.R. § 50.10 (2003).
[69] *Id.* at § 50.10 (a).
[70] Elrod, *supra* note 8, at 154-55.

disclosure.[71] Fighting a subpoena takes significant time and money and can be disruptive to even the biggest news media organizations.[72] Consequently, subpoenas especially threaten to chill independent or non-traditional journalists.[73] Without a precise definition of the term "journalist," prosecutors can more easily subpoena confidential communications from writers whose status as a journalist is unclear, such as those who freelance or post gathered news in an online blog.[74] The increasing use of the Internet by journalists to distribute information and by the public to receive information makes this ambiguity all the more worrisome.

¶26 More important still, the District of Columbia Circuit Court has concluded that the Guidelines, "merely guide the discretion of the prosecutors,"[75] so if the DOJ fails to follow its own internal guidelines a journalist has no legal recourse to seek their enforcement.[76] In order to enforce the promise made to their sources, journalists should not be dependent on the discretion of the DOJ to weigh their interests.

II. CALL FOR FEDERAL SHIELD LAW

¶27 As recently as July 2005, the Court refused to grant certiorari to resolve the irreconcilable conflicts between the circuits that have developed over the recognition of the reporter's privilege.[77] The Supreme Court's refusal to address this diverse and uncertain legal landscape that has developed in the wake of *Branzburg*'s unclear majority opinion makes it all the more necessary for Congress to step in to protect the informational interests of American citizens. Indeed, by refusing to re-address the issue, the Supreme Court has implicitly deferred to Congress to enact a law that will resolve current tensions in federal reporter privilege law by articulating a functional definition for the category of journalists to be protected.

¶28 Legislation is needed to resolve uncertainties in the law, articulate a consistent scope for the privilege, and strengthen reporters' confidence in any promise of confidentiality offered to a source.[78] Most importantly, a consistent national definition of the "journalist" to be covered by the privilege is needed. Without legislation the approach to whether journalist-bloggers qualify for the reporter's privilege will be inconsistent and unpredictable. The current hodge-podge of approaches requires journalists

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[71] *See id*.
[72] *Id.*
[73] *Id.*
[74] *See id.*
[75] *In re* Grand Jury Subpoena, Miller, 397 F.3d 964, 976 (D.C. Cir. 2005).
[76] *Id.* at 975.
[77] *See Miller*, 125 S. Ct. 2977.
[78] *See* Nestler, *supra* note 2, at 234.

to know the scope of any shield law or common law privilege in a certain state or circuit at a particular time.[79] For journalists whose medium is the Internet, it is even less clear whether a circuit's or a state's definition of the reporter's privilege will apply. A consistent federal approach in particular is needed in order to guarantee that journalists continue to report on federal government misconduct—information that journalists can often only obtain through confidential insider sources.

A. Why a Federal Shield Law Is Essential

¶29 There are four primary reasons why a federal shield law is needed to protect reporter-source communication. The first reason is to recognize the states' interest in protecting confidential sources.[80] A party should not be able to compel disclosure of a journalist's source or notes by suing in federal court.[81] This federal loophole undermines the interest of forty-nine states in upholding the reporter's privilege made plain either by judicial determination or through the enactment of state shield laws.[82] The source loses confidence that his or her identity will be protected when a journalist may be called into federal court where state shield law protection will not apply, and the journalist left will have a choice between violating a court order and going to jail or divulging the source and breaking a professional promise.[83]

¶30 Second, uncertainty among the federal circuits concerning the scope of the reporter's privilege chills journalists' use of anonymous sources and results in a reduction in the flow of information to the public.[84] Subpoenas burden future news reporting[85] and should be quashed except when the

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[79] *See id.*

[80] *See Free Flow of Information Act of 2005*, *Hearing on S. 1419 Before the S. Comm. on the Judiciary,* 109th Cong. (Oct. 19, 2005) (statement of Anne Gordon, Managing Editor of the *Philadelphia Inquirer*) ("Without a federal shield law, a source cannot be confident that his or her identity will be protected as Pennsylvania law contemplates. If a journalist is subpoenaed in federal court, even though the reporting was done in Pennsylvania, the journalist can be ordered to disclose a confidential source something that the Pennsylvania legislature has otherwise prohibited in our Commonwealth.").

[81] *Id.*

[82] *See* Nestler, *supra* note 2, at 239-40 (explaining that developing a working knowledge of all the relevant reporter's privilege laws is burdensome for journalists).

[83] *Id.*

[84] *Id.* at 239.

[85] Bates, *supra* note 16, at 10 ("Subpoenas are inherently, invariable, inescapably burdensome. They devour time and resources that recipients would rather devote to other matters.").

prosecutor can demonstrate by clear and convincing evidence that the information is essential and cannot be obtained in any other manner.[86]

¶31 Third, a recent increase in the subpoenaing of journalists has contributed to an increased fear that the independent press has been "press[ed] into an investigative arm of the government."[87] Unless unattainable through any other source, litigants, prosecutors and criminal defendants should conduct their own investigations and should not rely on journalists at the expense of the public's informational interests.[88]

¶32 Lastly, a federal shield law is needed to address a problem faced by all federal and state courts: In today's modern information age, who qualifies as a journalist? Unambiguous criteria applied equally by all federal courts would provide notice of protection to journalists and enable other writers to gain protection if needed by altering their behavior. Furthermore, such a definition would provide guidance to state courts struggling to interpret the vague language in their own shield laws.[89]

B. Current Federal Shield Law Proposals

¶33 Since *Branzburg*, there have been frequent calls for a federal shield law. Indeed, in the six years following *Branzburg*, approximately one hundred federal statutes were introduced.[90] The failure of any of the proposals to pass can be attributed both to the press's insistence on an absolute, not qualified, privilege and the inability to reach a consensus on the definition of a "journalist."[91]

¶34 Two similar bipartisan bills currently pending in both the Senate[92] and the House,[93] labeled the "Free Flow of Information Act of 2005," were introduced largely in response to the jailing of *New York Times* reporter Judith Miller.[94] The legislation would prevent government officials from compelling a reporter to reveal a source unless it was determined by clear and convincing evidence that "disclosure of the identity of the person is necessary to prevent imminent and actual harm to national security."[95] The language of the proposals covers "any entity that disseminates information by print, broadcast, cable, mechanical, photographic, electronic or other

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[86] S.1419, 109th Cong. §§ 1-5 (2005).
[87] Bates, *supra* note 16, at 1.
[88] *See* Elrod, *supra* note 8, at 164-66.
[89] *Id.* at 150.
[90] Berger, *supra* note 12, at 1391-92.
[91] *Id.* at 1392.
[92] S.1419, 109th Cong. §§ 1-5 (2005).
[93] H. R. 3323, 109th Cong. §§ 1-5 (2005).
[94] Voss, *supra* note 4.
[95] S.1419 at § 2(a)(3)(A).

means" and "any employee, contractor, or other person who gathers, edits, photographs, records, prepares, or disseminates news or information for such an entity."[96] The addition of "or" before the word "disseminates" acts to extend the reporter's privilege to almost anyone. It is hard to imagine who would be excluded from the broad definition proposed.

¶35 The Free Flow of Information Act is likely to follow in the footsteps of its predecessors because, like other failed federal shield law proposals, it fails to provide a definition of "journalist" that addresses modern information technology. It is unclear if bloggers would be protected under the Act. Senator Richard Lugar, sponsor of the bill, told a journalism conference that bloggers should "probably not" be considered real journalists and subject to the bill's protection.[97] Given the ease with which anyone can become a "blogger," such a vague definition of the term "journalist" could be interpreted broadly to include nearly every print, broadcast, or online writer, or it could be interpreted narrowly to exclude online newspostings altogether. A definition setting forth a set of criteria that must be satisfied in order to qualify for a federal shield law's protection is needed so as to limit the discretion of the court in applying the statute, increase certainty and predictability in the law, provide notice to all writers promising confidentiality to a source, and bolster the legitimacy of the reporter's testimonial privilege.[98]

C. Proposed Definition of the Term "Journalist"

¶36 In order to avoid the dangerously broad definition proposed in the Free Flow of Information Act, the author of this iBrief recommends that any proposed federal shield law should cover only those journalists who function as journalists. A two-part functional test, adapted from the current federal and state court approaches to reporter's privilege, should be used to determine who is acting as a journalist and thus qualifies for protection under the federal statute.[99]

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[96] *Id.* at § 5(2)(C).

[97] Anne Broache, *Senators: Bloggers May Not Be True Journalists*, NEWS.COM, Oct. 19, 2005, http://news.com.com/Senators+Bloggers+may+not+be+true+journalists/2100-1047_3-5902539.html.

[98] Cornell University Law Professor Steven Clymer spoke on a panel expressing reservations about the Free Flow of Information Act. He argued that the current wording of the bill would apply to "bloggers." *Id.* The inclusion of "bloggers" would be a "'dangerously broad' move that would undermine the idea of granting privileges at all." *Id.* (quoting Professor Clymer).

[99] *See* Berger, *supra* note 12, at 1387-94 (comparing the application of the reporter's privilege in state and federal courts).

¶37 First, to qualify for a journalists' privilege, the writer must intend to disseminate information to the public at the time the information was gathered.[100] The gathering of information for private purposes should not be covered.[101] Second, a writer fails to qualify as a "journalist" unless he or she has a substantial connection with or a relationship to an established news media organization such that there is sufficient editorial oversight.[102] A hierarchy of editors who must review the accuracy of the work before it is published or posted online creates accountability. Such a criterion in the definition avoids any concerns that "the relative anonymity afforded bloggers, coupled with a lack of accountability" will create "a certain irresponsibility when it comes to accurately reporting information."[103]

¶38 Requiring an intent to disseminate and editorial oversight sufficiently narrows the category of journalists to be covered by a federal shield law to those writers who are professional journalists. Because journalists are not licensed and the practice of journalism does not require an advanced degree, it is difficult to distinguish the serious truth-telling journalist engaged in furthering the public's right to know from a fabricator who seeks a privilege with the purpose of exploiting First Amendment protection and compromising the justice system.[104] Furthermore, this author's proposed definition covers those journalists who use blogs as a mere distribution device for their work.[105] Specifically, those journalists

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[100] *Id.* at 1391.

[101] The Second Circuit did not allow the author of a manuscript on the accused murderer, Clause Von Bulow, to benefit from the privilege because the author "gathered information initially for purposes other than to disseminate information to the public." Von Bulow v. Von Bulow, 811 F.2d 136, 146 (2d Cir. 1987). The court found that the author commissioned reports on the life styles of Von Bulow's wife's children with no intention of disclosing them to the public. *Id.* at 145.

[102] *See also*, Shoen v. Shoen, 5 F.3d 1289, 1293 (9th Cir. 1993) (explaining that it makes no difference whether "[t]he intended manner of dissemination [was] by newspaper, magazine, book, public or private broadcast medium, [or] handbill because '[t]he press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.'" (quoting Lovell v. Griffin*,* 303 U.S. 444, 452 (1938))).

[103] *See* Broache, *supra* note 97 (quoting the statement Senator John Cornyn of Texas prepared for a Senate Judiciary Committee Hearing on the current reporter privilege legislation).

[104] *See* Berger, *supra* note 12, at 1391 ("There is no need for shield law protection for writers and publishers of fiction. Such writers are unlikely to require the kinds of continuing relationships with sources that lead to obtaining and publishing truthful information.").

[105] *See* Voss, *supra* note 4 ("Washington attorney Laura Handman, who handles subpoena issues for journalists, says there is no reason bloggers should be

who are bloggers will satisfy the criteria for protection. But the self-absorbed blogger whose postings do not serve the informational public good and who lacks sufficient institutional oversight will not qualify as a "journalist" and, therefore, will not be extended protection.

III. CONCLUSION

¶39 A federal shield law is needed to protect both traditional and non-traditional journalists, such as bloggers, in order to ensure the subpoenaing of journalists in criminal and civil proceedings does not unnecessarily burden the public's constitutional right to information. A federal law that only vaguely defines who qualifies for protection would give far too much discretion to courts and will fail to standardize the current disarray of legal approaches to the reporter's privilege. Consistency is needed to reassure journalists that promises of confidentiality to sources can be upheld and thereby, guarantee sources for future important news stories.

¶40 Moreover, a federal shield law's definition of "journalist" should not be predicated on the form of the journalist's expression.[106] Rather, the law should seek to protect the journalist's newsgathering tactics in order to ensure an informed citizenry and safeguard democracy. The current bill proposals are inadequate because, for a federal shield law to offer meaningful reporter-source protection, it must apply only to a restrictive category of journalists. Limitations on the shield law protection will ensure the exclusion of writers seeking information only for personal gain and who take advantage of the ability provided by the Internet to post instantaneously before verifying the accuracy of the information. If a blogger gathers information with intent to disseminate and is subject to editorial oversight, he or she is a journalist, and therefore, should be extended protection. Moreover, the definition of "journalist" proposed here can also adapt as sources of information continue to grow and evolve in the digital era.

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denied the same rights as traditional journalists—if their intention is to operate as journalists.").

[106] *See* Berger, *supra* note 12, at 1410.