

PUBLISH AND PERISH:

THE NEED FOR A FEDERAL REPORTERS' SHIELD LAW



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Publish and Perish: The Need for a Federal Reporters' Shield Law

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Front cover: *San Francisco Chronicle* reporters Lance Williams (left) and Mark Fainaru-Wada. Photo courtesy of Darryl Bush/*San Francisco Chronicle*.

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EXECUTIVE SUMMARY

Freedom of the press promotes speech and self-governance for all Americans. Journalists provide information needed for voters to evaluate candidates. They uncover unlawful acts by elected representatives and expose government abuses of power. Investigative reporting helps ensure a government open to public scrutiny. Liberty is lost without a free and independent press.

Journalists cannot maintain their independence without access to information from confidential sources. The Watergate scandal and the Pentagon Papers became public only after informants were assured anonymity. More recently, confidential sources broke stories about illegal government programs including torture, warrantless wiretapping, kidnapping, and illegal detention. In retaliation, the government has used subpoenas to intimidate journalists into revealing sources and jailed them if they declined to name names.

The government's efforts to silence dissent are facilitated by the lack of a federal journalist's privilege from identifying confidential sources. Forty-nine states and D.C. recognize some form of reporters' privilege. Yet, 35 years after the Supreme Court declined to recognize a reporters' privilege under the First Amendment in *Branzburg v. Hayes*, Congress has not followed the states' lead. The result is a hodge-podge of federal protection that undermines even the strongest state reporters' shield laws. Increasingly, the Justice Department is exploiting the press's vulnerability by securing subpoenas of reporters and their notes that at least one former senior Bush administration official has denounced as a "reckless abuse of power."

The government's war on the press arguably threatens the First Amendment as much as the Sedition Act of 1798, which was enacted to silence dissent. Since *Branzburg* was decided in 1972, government coercion of reporters has meant:

- **More jailed journalists.** At least 31 journalists have been jailed for failing to identify their confidential sources compared to only five under the Sedition Act of 1798.
- **Journalists getting longer jail sentences.** Journalists are facing more jail time than under the Sedition Act, often receiving sentences far longer than those convicted of the crimes that the journalists reported.
- **Journalists accused of "crimes" and "treason" for their reporting.** Journalists uncovering government misconduct are accused of covering up the "crimes" of their sources for revealing information to them and "treason" for reporting it, just like in 1798.

The assault on the press occurs even for reporting that eliminates a substantial public danger. *San Francisco Chronicle* reporters Lance Williams and Mark Fainaru-Wada broke the BALCO story by relying on a confidential source. They brought the steroids epidemic into the national consciousness, resulting in federal and state laws that have saved countless lives. In return, Williams and Fainaru-Wada were rewarded with an 18-month jail sentence they avoided only after their source came forward. In contrast, the maximum sentence of any of the BALCO defendants was less than half that.

A vibrant and meaningful federal reporters' shield will ensure that journalists continue to have the tools they need to hold the government accountable to the people. It also will allow the press to continue to inform the public about substantial risks to our health and safety, such as the steroids epidemic, without fear of government persecution. This report describes the compelling need for swift passage of a federal shield law with the following recommendations:

- **Adopt a qualified privilege** that generally protects against forced disclosure of sources, with narrow exceptions for protecting other competing rights and interests.
- **Balance a reporters' privilege with the right of criminal defendants** to have access to sources and information that may be exculpatory or might mitigate their sentences.
- **Limit the national security exception to cases of imminent and actual harm** to ensure journalists continue to have independence to report government abuses of power, consistent with public safety.
- **Use a functional definition of "journalist"** focusing on acts of journalism and whether information from confidential sources is secured for dissemination to the public.

The experience of the states, most federal courts, and our closest allies around the world demonstrates that we can have freedom of the press without harming our collective security. A federal shield law that safeguards the First Amendment and other important interests strikes the right balance.

PUBLISH AND PERISH: THE NEED FOR A FEDERAL REPORTERS' SHIELD LAW

To me, the choice in this case is all the government's, and their demands are impossible. They demand that I give up my career and my livelihood. They demand that I throw over my most deeply held ethical and moral beliefs, both as a journalist and as a man.

Lance Williams, *San Francisco Chronicle* Reporter¹

Sixth among countries jailing journalists in 2005, tied with Burma.² A 2006 index of press freedoms ranked it fifty-third in the world.³ Secret wiretaps placed on journalists' phones in an effort to identify confidential sources.⁴ Reporters threatened by government officials to back off stories or face charges of "treason."⁵ Correspondents whisked away to secret detention cells where they are denied access to counsel and basic civil liberties.⁶ Courts act as accomplices in jailing journalists that do not bend to the government's will.⁷ A government not even deterred by a journalist's death in its efforts to suppress the truth.⁸

Is this a description of China? Cuba? Surely, it has to be one of the members of the so-called "axis of evil," Iran, North Korea, or Syria. No, this is the land of the free and the home of the brave, the United States. A nation with a supposedly free press, but without a journalist's privilege to preserve the free flow of information to the public. Liberty is lost through government control and coercion.

The state of the press in the United States today stands in stark contrast to where it was on September 20, 2001, when President Bush addressed a joint session of Congress. In a unifying moment he declared, "On September the 11th, enemies of freedom committed an act of war against our country."⁹ President Bush promised in his war against terror "to uphold the values of America, and remember why so many have come here. We are in a fight for our principles, and our first responsibility is to live by them."¹⁰ But soon after, journalists began to uncover startling evidence that the government was trampling on those principles, engaging in wholly un-American deeds including torture,¹¹ warrantless wiretapping,¹² kidnapping and illegal detention.¹³

Reporters' relationships with confidential sources have been key to unraveling those unlawful acts. In December 2005, the *New York Times* uncovered the government's sweeping warrantless wiretapping program.¹⁴ Citing unnamed government sources, the *Times* reported, "Months after the September 11th attacks, President Bush secretly authorized the National Security Agency to eavesdrop on Americans and others inside the United States to search for evidence of terrorist activity without the court-approved warrants ordinarily required for domestic spying."¹⁵ A federal court subsequently ruled that the program was "obviously in violation of the Fourth Amendment."¹⁶ Confidential sources leaked information that our government kidnapped an innocent German citizen, detained and tortured him for five months, released him without charge, and subsequently attempted to cover it up.¹⁷ In another case, the American public learned through an unnamed informant that torture was official U.S. policy.¹⁸

According to government officials, a free press, and not their own unlawful actions, pose a grave danger to the United States. As President Bush explained in 2003, “if there is a leak out of my administration, I want to know who it is. And if the person has violated law, the person will be taken care of.”¹⁹ To ferret out those leaks, the federal government has engaged in an unprecedented crusade against reporters. In 2001, the Department of Justice “disclosed that it had issued 88 subpoenas involving news reporters in the previous decade.”²⁰ Seventeen of those “sought information about confidential sources, while others sought notes and other unpublished materials or testimony to verify what reporters had published or broadcast.”²¹

The government’s campaign to stifle the press has accelerated in recent years. Today, “journalists are drowning in a sea of subpoenas.”²² From Pulitzer-Prize winning *New York Times* reporter Judith Miller to Rhode Island television reporter Jim Taricani, journalists increasingly find themselves behind bars. Just as President Nixon used the Federal Communications Commission to retaliate against the *Washington Post* for breaking the Watergate story, the government “has been practicing preemptive media intimidation to match its policy of preemptive war.”²³ A reporters’ privilege is necessary to stop this government abuse of power and restore freedom of the press.

PROMOTING AN INFORMED ELECTORATE THROUGH A FREE PRESS

Our liberty cannot be guarded but by the freedom of the press, nor that be limited without danger of losing it.

Thomas Jefferson to John Jay, 1786²⁴

Freedom of the press is a cornerstone of our republic. The First Amendment provides that “Congress shall make no law ... abridging the freedom of speech, or of the press.”²⁵ However, constitutional protection of the press is not an end in itself. Rather, it is deeply rooted in the press’s unique role in promoting speech and self-governance for all Americans.²⁶

The press accomplishes its purpose in several ways. It communicates information essential to the discovery of truth in the marketplace of ideas²⁷ and the advancement of innovation.²⁸ Reporters facilitate sweeping social changes by bringing matters into the public consciousness, as the civil rights movement proved. The press can unite us in the defense of shared principles. Conversely, it can provoke incisive debates on issues that divide us, such as the Iraq War.

A free press provides us with the means to maintain our republican form of government.²⁹ The press “is one of the great bulwarks of liberty”³⁰ because it keeps the government in check.³¹ As David Hume explained,

[A]rbitrary power would steal in upon us were we not careful to prevent its progress and were there not an easy method of conveying the alarm from one end of the [country] to the other ... Nothing so effectual to this

purpose as the liberty of the press, by which all that learning, wit, and genius of the nation may be employed on the side of freedom and everyone be animated to its defense. As long, therefore, as the republican part of our government can maintain itself ... it will naturally be careful to keep the press open, as of importance to its own preservation.³²

To ensure this role is fulfilled, the First Amendment guarantees the press the right to be free from prior restraints by the government.³³ Without these guarantees, the press would be subjected to censorship “as had been practiced by other governments.”³⁴

The press likewise provides the tools necessary for self-governance. “Under a representative system of government, an informed electorate is a precondition of responsive decision-making.”³⁵ That cannot be achieved without aggressive news reporting:

[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring him in convenient form the facts of those operations ... Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally...³⁶

In other words, “the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.”³⁷ The press must have the ability to gather that information free of government interference.³⁸

Armed with a free press, Americans can make informed decisions “as the final judge of the proper conduct of public business.”³⁹ It further allows “debate on public issues” to remain “uninhibited, robust, and wide-open.”⁴⁰ In the process, freedom of the press facilitates “the instrumental means required in order that the citizenry exercise that ultimate sovereignty reposed in its collective judgment by the Constitution.”⁴¹

SILENCING DISSENT BY THE PRESS

Without the ability to speak off the record to sources in the government who are not officially authorized to do so, there is substantial evidence that reporters would often be relegated to spoon-feeding the public the “official” statements of public relations officers.

Lee Levine, Media Attorney⁴²

The government often has tried to stop unfavorable reporting. Less than seven years after the First Amendment was ratified, Congress enacted the Sedition Act of 1798.⁴³ Its purpose was to bring the press “under control” by silencing dissent when war with France allegedly was imminent.⁴⁴ The Federalist government targeted critics, particularly journalists. Several newspapers were shut down or forced to refrain from

their opposition to elected officials.⁴⁵ Five of the ten men convicted of seditious libel under the act were journalists.⁴⁶ The Supreme Court later noted, “Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history.”⁴⁷

Subsequent crises were used as a pretext for a broad government assault on the press. Journalists were jailed during the Civil War for allegedly using “treasonable language” and “aiding and abetting the enemy.”⁴⁸ During World War I, the Espionage Act of 1917 and the Sedition Act of 1918 made it a crime to interfere in the war effort, insult the government, or “by word or act oppose the cause of the United States.”⁴⁹ The courts were complicit in punishing dissenting pamphleteers under these acts.⁵⁰ Curtailment of the press also was a hallmark of the Cold War.

Direct censorship has not been the government’s only method to control journalists. Stopping the flow of unfavorable news by compelling journalists to reveal their sources is also used, with powerful implications, as it allows the government to identify and punish these sources. Potential sources dry up because their anonymity cannot be assured. Journalists are jailed if they do not act as government agents and betray the confidences entrusted to them. Editors face a powerful disincentive to publish news critical of the government. Speech is effectively chilled. Dissent is silenced.

Subpoenas have been a favored weapon of the government to compel disclosure of sources, dating from the colonial period. In 1722, Benjamin Franklin’s brother was ordered by the state assembly to divulge the source of a tabloid he published about the government. When he refused, he was jailed for one month.⁵¹ In 1734, the Royal Governor of New York indicted and jailed John Peter Zenger, the publisher of the *New York Weekly Journal*, for seditious libel. Zenger was charged with printing unsigned columns endorsing a legislative candidate critical of the governor. His acquittal in 1735 laid the foundation for the sweeping protections of the press in the First Amendment.⁵²

The government’s use of coercive subpoenas continued even after ratification of the First Amendment. In 1848, the first reported federal case was brought against a reporter jailed for contempt of Senate for refusing to identify the source of a secret draft of a Mexican-American War treaty.⁵³ In 1857, a *New York Times* reporter was jailed after declining to reveal to a House select committee the identities of members who revealed names of colleagues taking bribes.⁵⁴ Journalists who publicized unfavorable information about the government or elected officials faced swift retaliation.

The absence of a common law reporters’ privilege fueled the use of subpoenas. In 1897, a court compelled an editor and reporter to disclose their sources after they published a story that state senate members had been bribed.⁵⁵ In upholding the order, the California Supreme Court found, “It cannot be successfully contended, and has not been seriously argued, that the witnesses were justified in refusing to give the names on the ground that the communications were privileged.”⁵⁶ Other courts agreed that there was no common law privilege for journalists to refrain from judicial orders to reveal their sources.⁵⁷

**SEDITION VS. SUBPOENA:
TOP JAIL SENTENCES OF JOURNALISTS⁵⁸**

Rank	Journalists indicted or convicted under the Sedition Act of 1798	Journalists jailed or sentenced to jail since <i>Branzburg</i> for failing to identify sources in response to a subpoena ⁵⁹
1	James Callender Writer, <i>Richmond Examiner</i> 9 months	Lance Williams & Mark Fainaru-Wada (2006) Reporters, <i>San Francisco Chronicle</i> Up to 18 months (dismissed after government dropped subpoena)
2	Charles Holt Editor, <i>New Haven Bee</i> 6 months	Joshua Wolf (2006-07) Freelance videographer, San Francisco 6 months and counting
3	Thomas Cooper Editor, <i>Northumberland (Pennsylvania) Gazette</i> 4 months	Jim Taricani (2001) Reporter, WJAR-TV, Rhode Island 6 months (served 4 months in home detention) ⁶⁰
4	Anthony Haswell Editor, <i>Vermont Gazette</i> 2 months	Vanessa Leggett (2001) Author, Texas 168 days
5	Abijah Adams Bookkeeper, <i>Boston Independent Chronicle</i> 1 month	Judith Miller (2005) Reporter, <i>New York Times</i> 85 days
6	Thomas Adams Editor, <i>Boston Independent Chronicle</i> Not jailed (died before trial)	David Kidwell (1996) Reporter, <i>The Miami Herald</i> 70 days (served 14 days)
7	William Duane Editor, <i>Philadelphia Aurora</i> Not jailed (indictment dismissed by President Jefferson)	William Farr (1972-73) Reporter, <i>Los Angeles Times</i> 46 days
8	John Daley Burk Editor, <i>New York Time Piece</i> Not jailed (went into hiding)	Myron Farber (1978) Reporter, <i>New York Times</i> 40 days
9		Tim Roche (1990) Reporter, <i>The News (South Florida)</i> 30 days (served 13 days)
10		Chris Van Ness (1985) Freelance writer 30 days and 10 days (released early)
11		Felix Sanchez and James Campbell (1991) Reporters, <i>Houston Post</i> and <i>Houston Chronicle</i> , respectively 30 days (freed after a few hours)

Conservative writer William Safire has called the Sedition Act of 1798 “the worst law” ever passed by Congress.⁶¹ However, subpoenas directed at the press since 1972 have resulted in the punishment of far more journalists. At least thirty-one journalists have been jailed or sentenced for criminal contempt of subpoenas since the Supreme Court rejected a reporters’ privilege, compared with only five journalists under the Sedition Act. The five longest jail sentences of journalists for violating subpoenas have been imposed since 2001 and have averaged 7.5 months, compared to 4.5 months for the five journalists jailed from 1798 to 1800.⁶² History can judge which is worse, sedition or subpoena.

Freedom of the press is a hollow guarantee if journalists are unable to gather information government officials want to suppress. Only a meaningful reporters’ privilege can protect the continued free flow of information to the public.

BRANZBURG V. HAYES

[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated.

Justice Byron White⁶³

Prior to 1972, there was some movement to adopt a reporters' privilege. As early as 1896, the Maryland legislature enacted a testimonial privilege for reporters under state law.⁶⁴ Sixteen additional states followed suit.⁶⁵ In 1970, the U.S. Department of Justice implemented procedures for issuing subpoenas to the press. The guidelines recognized "compulsory process in some circumstances may have a limiting effect on the exercise of First Amendment rights."⁶⁶ However, those limited protections proved inadequate.

In *Branzburg*, the Supreme Court addressed four cases in which subpoenas required journalists to appear before a grand jury to identify a confidential source.⁶⁷ The lower courts split on whether the reporters could be compelled to testify before a grand jury. In one case, the court rejected a reporters' privilege under Massachusetts law.⁶⁸ In two cases brought against Paul Branzburg, the courts held that a Kentucky privilege did not apply because it "did not permit a reporter to refuse to testify about events he had observed personally, including the identities of those persons he had observed."⁶⁹

On the other hand, in the fourth case the Ninth Circuit found the reporter had a qualified privilege to withhold testimony about his confidential source.⁷⁰ The court reasoned that "the public's First Amendment right to be informed would be jeopardized by requiring a journalist to submit to secret Grand Jury interrogation."⁷¹ The court held that to overcome the privilege, the government must demonstrate "a compelling need for the witness's presence before judicial process properly can issue to require attendance."⁷²

Writing for a bare five-justice majority in *Branzburg*, Justice White disagreed. He acknowledged that "some protection for seeking out the news" was necessary to prevent the press from being "eviscerated."⁷³ However, he found that none of the four cases restricted the ability of the reporters to investigate and publish their stories.⁷⁴ Instead, Justice White concluded that journalists were not immune "from disclosing to a grand jury information ... received in confidence" any more than other citizens.⁷⁵ According to Justice White, the only exception was grand jury investigations "instituted or conducted other than in good faith."⁷⁶ In addition, Congress and the state legislatures remained free "to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as ... necessary."⁷⁷

Justice Powell wrote a separate concurring opinion described by Justice Stewart as "enigmatic."⁷⁸ In it, he noted that reporters who were subpoenaed are not "without constitutional rights with respect to the gathering of news or in safeguarding their sources."⁷⁹ According to Justice Powell, a remedy existed for a journalist who was the target of a bad faith grand jury investigation. The journalist could assert a privilege that was to "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.”⁸⁰ Rather than providing specific guidance, Justice Powell concluded the balance could be achieved “on a case-by-case basis” consistent “with the tried and traditional way of adjudicating such questions.”⁸¹

Four justices dissented.⁸² Justice Douglas concluded that journalists had an absolute privilege under the First Amendment to keep their sources confidential. He reasoned that “there is no ‘compelling need’ that can be shown which qualifies the reporter’s immunity from appearing or testifying before a grand jury, unless the reporter himself is implicated in a crime.”⁸³ As a result, “a newsman has an absolute right not to appear before a grand jury.”⁸⁴ According to Justice Douglas, this privilege was not lost even if the journalist voluntarily appeared before a grand jury.⁸⁵

Justice Stewart, joined by Justices Brennan and Marshall, argued that the majority invited “authorities to undermine the historic independence of the press by attempting to annex the journalistic profession as an investigative arm of the government.”⁸⁶ He further observed that “informants are necessary to the news-gathering process” and “the free flow of information to the public.”⁸⁷ Confidentiality played a key role in securing those informants. Without that protection, a potential source would have to “choose between risking exposure by giving information or avoiding the risk by remaining silent.”⁸⁸ Justice Stewart reasoned that “unchecked power” by the government to compel disclosure of confidences would deter sources “from giving information, and reporters will clearly be deterred from publishing it.”⁸⁹ That was particularly true for information derived from “relationships involving sensitive and controversial matters.”⁹⁰

As a result, Justice Stewart found that reporters had a qualified privilege under the First Amendment. He proposed a three-part test to balance “the public interest in the administration of justice and the constitutional protection of the full flow of information.”⁹¹ To overcome the reporters’ privilege, the government would have to show: (1) probable cause that the information sought is relevant to a criminal matter; (2) the information “cannot be obtained by alternate means less destructive of First Amendment rights;” and (3) a “compelling and overriding interest in the information.”⁹² The test would not be triggered until a reporter moved to quash a subpoena, “asserting the basis on which he considered the particular relationship a confidential one.”⁹³ Justice Stewart conceded that “courts would be required to make some delicate judgments ... But that, after all, is the function of courts of law.”⁹⁴

STATE RESPONSES TO *BRANZBURG* AND PRESIDENTIAL ABUSES OF POWER

Almost all the articles I co-authored with Mr. Woodward on Watergate could not have been reported or published without the assistance of our confidential sources and without the ability to grant them anonymity, including the individual known as Deep Throat.

Carl Bernstein, *Washington Post* Reporter⁹⁵

Growing evidence of governmental abuses of power and deception coincided with the *Branzburg* decision. In 1971, the Supreme Court rejected the Nixon administration's efforts to enjoin publication of the Pentagon Papers, which confidential source Daniel Ellsberg, a State Department official, leaked to the *New York Times* and *Washington Post*.⁹⁶ The Pentagon Papers detailed President Lyndon Johnson's escalation of the Vietnam War while he was promising the public not to expand it.⁹⁷ Following publication of the Pentagon Papers, Ellsberg went into hiding. After the FBI identified Ellsberg as the source, President Nixon campaigned to discredit him. With Nixon's knowledge, the "White House plumbers" broke into Ellsberg's psychiatrist's office in an unsuccessful effort to locate Ellsberg's medical records.⁹⁸

In 1973, the Watergate scandal broke wide open because of a confidential source, W. Mark Felt, the second highest official in the FBI and also known as "Deep Throat." Felt's revelations to *Washington Post* journalists Bob Woodward and Carl Bernstein linked President Nixon directly to two crimes: the plumbers' 1971 break-in of Ellsberg's psychiatrist's office and the June 1972 burglary of the Democratic National Committee headquarters.⁹⁹ Following news reports of Felt's disclosures, a federal investigation of Nixon was opened, despite Nixon's efforts to withhold and destroy evidence.¹⁰⁰ Without the promise of confidentiality to Felt, it is unlikely Nixon's unlawful actions would have been brought to light.¹⁰¹

The Pentagon Papers and Watergate highlight the need to maintain a free flow of information. Journalists must be protected from identifying their confidential sources. Citizens cannot hold their government accountable without investigative reporting derived from those sources. The abuses of power during the Nixon years prove Jefferson's contention that "[t]he only security of all is in a free press."¹⁰² A reporters' privilege is essential to American freedom.

That point has not been lost on the states. Following *Branzburg*, fourteen additional state legislatures accepted Justice Stewart's invitation to adopt a statutory reporters' privilege. Today, thirty-one states and the District of Columbia have enacted legislation to protect the confidential relationship between reporters and their sources.¹⁰³ All state shield laws provide journalists at least some relief from judicial subpoenas directed at obtaining the identity of confidential sources.¹⁰⁴ Approximately two-thirds of those laws also protect certain unpublished and non-confidential information.¹⁰⁵



A growing number of state courts have recognized a reporters' privilege under state law or through their interpretations of the First Amendment or the state constitutional counterpart. Eighteen of the nineteen states without shield laws have provided at least some relief to journalists seeking to protect confidential sources.¹⁰⁶ Courts in eleven of those states have expressly found some form of reporters' privilege under applicable state law.¹⁰⁷ The remaining seven states have limited protection for journalists with some courts in those states recognizing the privilege¹⁰⁸ and others rejecting it.¹⁰⁹ The result is that reporters' shield protections vary considerably from state to state.¹¹⁰ In many cases, state law fails to prevent journalists from being jailed for declining to reveal their confidential sources.

FEDERAL RESPONSES TO *BRANZBURG*

The consensus among the States on the reporters' privilege is as universal as the federal courts of appeals decisions on the subject are inconsistent, uncertain and irreconcilable.

Attorneys General of 34 states and D.C.¹¹¹

The variance among some state reporters' shield provisions is nothing compared to the hodge-podge of federal protection. There are several executive, statutory, and judicial sources for a federal shield. However, all fall far short of the meaningful journalists' privilege needed to maintain the free flow of information to the public.

In 1974, Congress enacted Federal Rule of Evidence 501 to define the scope of testimonial privileges in federal civil and criminal cases. Rule 501 provides that except as otherwise required by the Constitution, Congress, or Supreme Court, "the privilege of a witness ... 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 ..."¹¹² Congress considered adopting a rule that would have listed and defined the specific privileges recognized in Rule 501,¹¹³ but widespread disagreement resulted in language permitting the continued "evolutionary development of testimonial privileges."¹¹⁴ Rule 501 does not "freeze the law governing the privileges of witnesses" and is meant to adapt "itself to varying conditions."¹¹⁵ In practice, Federal Rule of Evidence 501 has proven ineffective to provide meaningful protection for journalists in much of the nation.

Despite nearly universal recognition of a reporters' privilege by the states, federal acceptance of common law protection has lagged far behind. No federal circuit has adopted the absolute privilege advanced by Justice Douglas in *Branzburg*. Where the privilege does exist, there is general agreement that in some cases other important public interests override the privilege. Use of a balancing test is commonplace to resolve the issue.

The level of protection for journalists in civil cases differs considerably among the federal circuits. Three circuit courts have failed to adopt a reporters' privilege in civil matters. The Sixth Circuit has expressly rejected the privilege.¹¹⁶ The Seventh and Eighth Circuits have not addressed the issue,¹¹⁷ although some lower courts have recognized a qualified privilege in civil cases.¹¹⁸ In contrast, most circuits recognize a qualified privilege to withhold confidential information in civil cases by applying a balancing test similar to Justice Stewart's.¹¹⁹

Some federal circuits have gone further, applying the qualified privilege to non-confidential information or sources in civil cases.¹²⁰ The Fourth Circuit has not addressed the issue,¹²¹ while the Fifth Circuit has declined to protect non-confidential information.¹²² Lower courts in the Tenth, Eleventh, and D.C. Circuits have applied the privilege to non-confidential sources or information.¹²³ Protection is extended to non-confidential information because there is "a lurking and subtle threat to journalists and their employers if disclosure of outtakes, notes, and other unused information, even if

non-confidential, becomes routine and casually, if not cavalierly compelled.”¹²⁴ Some circuits apply the same balancing test they use for confidential information.¹²⁵ Other circuits apply a lower threshold for civil litigants seeking non-confidential information than what is required to obtain confidential information.¹²⁶

Only a handful of federal circuits (the First, Second, Third, and Eleventh), have recognized a qualified reporters’ privilege in criminal cases.¹²⁷ The Fourth Circuit has followed Justice Powell’s opinion in *Branzburg* by limiting the privilege to cases of government harassment or bad faith.¹²⁸ *New York Times* reporter Judith Miller unsuccessfully attempted to assert the privilege in the grand jury investigation into leaks of CIA official Valerie Plame’s identity. The D.C. Circuit summarized the majority rule in rejecting her claim in the *In re Grand Jury Subpoena* decision:

Unquestionably, the Supreme Court decided in *Branzburg* that there is no First Amendment privilege protecting journalists from appearing before a grand jury or testifying before a grand jury or otherwise providing evidence to a grand jury regardless of any confidence promised by the reporter to any source. The Highest Court has spoken and never revisited the question. Without doubt, that is the end of the matter.¹²⁹

Where the privilege is recognized in criminal matters, it tends to be more narrowly applied than in civil cases because of competing Sixth Amendment concerns.¹³⁰ In grand jury proceedings with facts similar to those in *Branzburg*, a reporter typically will not be shielded from being required to comply with a subpoena.¹³¹

The rift in federal courts over the reporters’ privilege is present even where the issue purportedly is settled, such as *In re Grand Jury Subpoena*. The three judges wrote concurring opinions reflecting their deep divisions. Judge Sentelle rejected the privilege in grand jury proceedings, reasoning “reporters ... enjoy no common law privilege beyond the protection against harassing grand juries conducting groundless investigations that is available to all other citizens.”¹³² He further concluded that Rule 501 provided no basis to depart from *Branzburg*.¹³³ Judge Tatel reached the opposite conclusion, finding that under Rule 501, “the consensus of 49 states plus the District of Columbia – and even the Department of Justice – would require us to protect reporters’ sources as a matter of common law where the leak at issue is either less harmful or more newsworthy.”¹³⁴ Judge Henderson disagreed with both of her colleagues, finding that while the court was not “bound by *Branzburg*’s commentary on the state of the common law in 1972,” Rule 501 did not “authorize federal courts to mint testimonial privileges for any group ... that demands one.”¹³⁵

The majority of states have criticized the widely divergent federal protections for journalists. The attorneys general of thirty-four states and the District of Columbia observed, “The consensus among the States on the reporters’ privilege is as universal as the federal courts’ of appeals decisions on the subject are inconsistent, uncertain and irreconcilable.”¹³⁶ Division among the federal courts has a pernicious effect on the states:

A federal policy that allows journalists to be imprisoned for engaging in the same conduct that these State privileges encourage and protect “bucks the clear policy of virtually all states,” and undermines both the purpose of the shield laws, and the policy determinations of the State courts and legislatures that adopted them.¹³⁷

In other words, “This increasing conflict has undercut the State shield laws just as much as the absence of a federal privilege.”¹³⁸

Justice Department regulations have made matters even worse.¹³⁹ The department’s expressed policy is to ensure “the prosecutorial power of the government” is “not used in such a way that it impairs a reporter’s responsibility to cover as broadly as possible controversial public issues.”¹⁴⁰ Before the department may subpoena a reporter, “all reasonable attempts” are supposed to be made to obtain the information from an alternative source.¹⁴¹ In addition, the department claims to pursue negotiations with the media “in all cases” in which a subpoena to a reporter is contemplated.¹⁴² Where appropriate, “the government should make clear what its needs are ... as well as its willingness to respond to particular problems of the media.”¹⁴³

If the Justice Department decides to subpoena a reporter, the regulations describe the process that should be followed. The requesting attorney is asked to show, among other things: the information is “essential” to a criminal or civil case; it is unavailable from other non-media sources; it is limited to published information and associated information except in “exigent circumstances;” and the request is carefully treated “to avoid claims of harassment.”¹⁴⁴ The attorney general must approve all Justice Department subpoenas of reporters.¹⁴⁵ In making this determination, the attorney general is supposed to “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.”¹⁴⁶ Far too often, the attorney general ignores his own guidelines.

Protection for journalists under the Justice Department regulations is illusory. The attorney general exercises unfettered discretion in issuing subpoenas under department rules. As the D.C. Circuit noted in the Judith Miller case, “the guidelines provide no enforceable rights to any individuals, but merely guide the discretion of the prosecutors.”¹⁴⁷ Moreover, the government broadly construes “avoiding the loss of life or the compromise of a security interest”¹⁴⁸ to justify sweeping subpoenas of the press that are nothing more than punitive fishing expeditions. Increasingly, the Justice Department ignores its regulations in a calculated effort to gag the press.

**PUNISHING THE PRESS IN BALCO:
“THE JUSTICE DEPARTMENT ON STEROIDS”¹⁴⁹**

The BALCO subpoenas are “the most reckless abuse of power I have seen in years.”

Mark Carallo, DOJ Press Secretary for John Ashcroft¹⁵⁰

The press remains vulnerable to capricious action by the attorney general without a federal shield law. No case highlights that more than the inquisition of *San Francisco Chronicle* reporters Lance Williams and Mark Fainaru-Wada. The two reporters co-authored over 125 articles and a book, *Game of Shadows*, exposing the steroid scandal surrounding the Bay Area Laboratory Co-Operative (BALCO). For their reporting, they received accolades from the press,¹⁵¹ Republican and Democratic Members of Congress,¹⁵² the California attorney general,¹⁵³ and even President Bush.¹⁵⁴

Williams and Fainaru-Wada reported that BALCO distributed steroids to numerous professional athletes, allegedly including baseball players Barry Bonds, Benito Santiago, and Jason Giambi, and sprinters Marion Jones and Tim Montgomery.¹⁵⁵ Their investigation also showed growing steroid use in the schools. They found that young athletes often used steroids to prepare to compete as professional athletes.¹⁵⁶ Thanks to Williams and Fainaru-Wada’s reports, the public learned of the deadly crisis facing America’s youth because of steroids and took action to save lives. Representatives John Conyers (D – MI) and Tom Davis (R – VA) lauded their work by observing, “Some of the most moving testimony before Congress was from parents of teenage athletes who had taken their own lives as a result of steroid abuse, demonstrating the public health crisis exposed by the two San Francisco Chronicle reporters.”¹⁵⁷ As a noted psychologist explained, the two reporters “put a face” on the issue of steroids and children.¹⁵⁸

Beginning on May 5, 2006, Williams and Fainaru-Wada’s names were in the national press often, but no longer in the byline. Instead, the U.S. Department of Justice subpoenaed them to disclose the identity of the confidential source that supplied secret grand jury testimony about BALCO.¹⁵⁹ Attorney General Alberto Gonzales vigorously defended the subpoena. He argued, “We know the importance and appreciate and respect the importance of the press to do its job ... but we also can’t have a situation where someone who does a terrible crime can’t be prosecuted because of information that’s in the hands of the reporter.”¹⁶⁰

Williams and Fainaru-Wada honored their confidentiality agreement and refused to testify. On May 31, 2006 the *San Francisco Chronicle* filed a motion to quash the subpoena, citing the Press Clause of the First Amendment.¹⁶¹ The federal district court upheld the subpoena and later sentenced Williams and Fainaru-Wada to a maximum of eighteen months in prison for criminal contempt.¹⁶² Their sentences were more than twice as long as the sentences received by BALCO ringleader Victor Conte and four other convicted defendants.¹⁶³ Williams and Fainaru-Wada’s sentences were stayed while they appealed their convictions to the Ninth Circuit. Just weeks before oral arguments,

the federal government dropped its subpoenas after the reporters' confidential source voluntarily came forward.¹⁶⁴ However, the damage already had been done. The federal government sent a clear message that journalists who failed to reveal their sources would be jailed.

The attorney general's persecution of the BALCO reporters set a dangerous precedent for the public health and welfare. Mark Corallo, the former press secretary for the Justice Department under Attorney General John Ashcroft, observed, "I do not believe [the subpoenas] would have been issued under former Attorney General John Ashcroft's administration. In this case, there is no danger to life or issue of grave national security. There are, however, issues of immense national importance that were brought to light by the reporting of Mr. Fainaru-Wada and Mr. Williams."¹⁶⁵ The attorney general's blatant disregard for his own non-binding regulations demonstrates why a federal shield is necessary. Only a meaningful reporters' privilege law with review in the federal courts can ensure the continued free flow of information to the public.

FIXING THE PROBLEM THROUGH FEDERAL LEGISLATION

Contrary to what its opponents may claim, the Free Flow of Information Act does not compromise national security ... or law enforcement interests ... [It] promotes them – standardizing the rules of the game, and allowing reporters to subject government programs and actions to proper scrutiny while ensuring that important information cannot be withheld solely on the grounds of privilege.

Theodore B. Olson, Former Solicitor General¹⁶⁶

Congress has made efforts to fix the problem. In the months following *Branzburg*, six bills were introduced to adopt a federal reporters' shield. The following year, 65 more bills were introduced.¹⁶⁷ All told, approximately 100 bills to create a shield law were introduced by 1978.¹⁶⁸ Despite the acknowledged need for congressional action, no federal reporters' shield law has been enacted 35 years after *Branzburg*.

Several reasons have been offered for the lack of federal protection. Some contend that problems defining "journalist" are responsible for the delay.¹⁶⁹ At least one commentator argues that the insistence of some journalists for an absolute privilege killed earlier bills.¹⁷⁰ Excluding information vital to criminal defendants also is cited.¹⁷¹ Additionally, a few Members of Congress rest their opposition to a reporters' privilege on national security grounds.¹⁷²

Nevertheless, there is growing momentum to pass federal legislation. Four bills in the 109th Congress took substantial steps to resolve issues raised about earlier legislation. In July 2005, Senator Richard Lugar (R – IN) and Representative Mike Pence (R – IN) introduced identical shield bills, S. 1419 and H.R. 3323,¹⁷³ that each garnered bipartisan support.¹⁷⁴ Senator Christopher Dodd (D – CT) introduced a separate shield bill, the Free Speech Protection Act of 2005, S. 369, but withdrew his legislation and instead cosponsored Senator Lugar's.¹⁷⁵ In May 2006, Senator Lugar introduced a new bill aptly

titled the “Free Flow of Information Act of 2006,” S. 2831, that refined the language in his earlier shield bill.¹⁷⁶

This recently proposed legislation, the collective wisdom of the states, and the practice of our closest allies overseas demonstrate that obstacles to a federal shield law can be overcome.

A FUNCTIONAL DEFINITION OF “JOURNALIST”

*A journalist is “[a]ny person ... engaged in the business of gathering, compiling, writing, editing, photographing, recording, or processing information for dissemination via any news medium,” including “print, broadcast, or other electronic means accessible to the general public.”*¹⁷⁷

In *Branzburg*, Justice White declined to recognize a reporters’ privilege under the First Amendment, at least in part, because of the breadth of the Press Clause. He reasoned that freedom of the press “is a ‘fundamental personal right’ which ‘is not confined to newspapers and periodicals.’”¹⁷⁸ Instead, it also encompasses “the right of the lonely pamphleteer ... just as much as ... the large metropolitan publisher.”¹⁷⁹ Information is communicated to the public “by lecturers, political pollsters, novelists, academic researchers, and dramatists.”¹⁸⁰ Therefore, Justice White concluded the Supreme Court could not draw lines consistent with the First Amendment where “[a]lmost any author” could make a claim to the need for the free flow of information by protecting their confidential sources.¹⁸¹

More recently, others have expressed reservations about defining “journalist” in light of new technologies such as the Internet. Following Justice White’s reasoning in *Branzburg*, Judge Sentelle questioned whether federal courts could resolve “the difficult and vexing nature of this question” under the First Amendment:¹⁸²

[D]o we extend that protection ... to the owner of a desktop printer producing a weekly newsletter ... [D]oes the privilege also protect the proprietor of a web log: the stereotypical “blogger” sitting in his pajamas at his personal computer posting on the World Wide Web his best product to inform whoever happens to browse his way?¹⁸³

Some senators and witnesses raised similar concerns during the most recent hearings on S. 2831.¹⁸⁴ While their concerns are understandable, they are unfounded in the context of a federal shield law. Separation of powers has made some courts reluctant to engage in what they perceive as a legislative function of defining a reporters’ shield.¹⁸⁵ As Judge Sentelle explained, Congress is better positioned to resolve the “fundamental policy question involved in the crafting of such a privilege.”¹⁸⁶ On the other hand, federal courts are well positioned to apply a statutory definition of journalist, just as they already do in other contexts.¹⁸⁷

In resolving this policy question, Congress should use a functional definition of “journalist.” Under this approach, the focus should not be on whether bloggers are journalists. Blogging is merely a medium of communication, like using the telephone, facsimile, or e-mail. Gregg Leslie, Legal Director for the Reporters’ Committee for Freedom of the Press has explained, “The medium doesn’t answer the question. It has more to do with the function that the person is performing. If the bloggers’ involvement is to report information to the public and to gather information for that purpose openly then they should be treated like a journalist.”¹⁸⁸

A few examples illustrate this point. Bloggers have broken some of the biggest news stories of the past ten years. Three amateur journalists discredited Dan Rather’s CBS story on President Bush’s National Guard service.¹⁸⁹ Others wrote extensively about Trent Lott’s comments on Strom Thurmond, leading mainstream media to eventually pick up the story.¹⁹⁰ Blogger reporting also led to the resignation of a CNN news executive over comments he made at the World Economic Forum.¹⁹¹ Matt Drudge, author of the online *Drudge Report*, reported about the Monica Lewinsky scandal four days before the mainstream press. Some bloggers are traditional journalists.

The federal government and political parties have admitted as much. Both the Democratic and Republican national conventions issued press credentials to bloggers in 2004.¹⁹² In March 2005, the White House issued press credentials to a blogger.¹⁹³ In November 2005, the Federal Election Commission granted a political weblog a press exemption from the law on reporting campaign finance activity.¹⁹⁴ In March 2006, the FEC expanded its press exception to encompass most bloggers.¹⁹⁵ In January 2007, the federal court reserved two of the 100 seats for bloggers in the trial of I. Lewis “Scooter” Libby, Vice President Cheney’s former chief of staff.¹⁹⁶ The question of whether some bloggers can be “journalists” already has been resolved.

A functional test should be used to determine whether bloggers and others are “journalists.” That question cannot be answered solely by employment status or receipt of money from a media organization. For example, S. 2831 narrowly defines “journalist” to include only those who engage in reporting “for financial gain or livelihood” as “a salaried employee of or independent contractor” for a news business.¹⁹⁷ That definition left out not only bloggers who function as journalists, but also freelance journalists who have not yet sold their story, video, or photos.

Rather than focusing on the communication medium, employment status or monetary payments, a functional test should include two components. First, the definition of “journalist” should focus on whether the person seeking the privilege has engaged in acts of journalism. For instance, unlike S. 2831, Oklahoma’s shield law encompasses both individuals employed by a news service, and those who regularly function as journalists:

“Journalist” means any person who is a reporter, photographer, editor, commentator, journalist, correspondent, announcer, *or other individual regularly engaged in obtaining, writing, reviewing, editing, or otherwise*

*preparing news for any newspaper, periodical, press association, newspaper syndicate, wire service, radio or television station, or other news service ...*¹⁹⁸

Similarly, Delaware's shield law does not limit its definition of "reporter" to individuals who derive their principal income from reporting. The law also includes those who spend at least 24 hours per week gathering or preparing information for dissemination in three of the past four weeks or four of the past eight weeks.¹⁹⁹ Examining reporting activities would protect freelance journalists who have not yet sold their story and reporters who are not in an employment relationship with a news company.

Second, a functional definition should examine the purpose for gathering the information that is the subject of a subpoena. A reporters' privilege is premised upon the dissemination of information to the public.²⁰⁰ If the individual did not intend to provide that information to the public, then he or she would not be protected under the privilege. Actual dissemination of the information would not be required.²⁰¹ This flexible approach ensures that the purpose of the privilege is being fulfilled. It also is consistent with one already followed by federal courts.²⁰²

The collective wisdom of the 49 states and the District of Columbia with a reporters' privilege should be considered in defining "journalist."²⁰³ Likewise, the practice of federal courts cannot be ignored. Experience has shown that it is possible to create a functional test for journalist that protects the public's need for the free flow of information. Congress should be equal to the task.

A QUALIFIED PRIVILEGE THAT GIVES THE PRESS BREATHING ROOM

I simply could not do my job reporting stories big and small without being able to speak with officials under varying degrees on anonymity.

Matthew Cooper, *Newsweek* Reporter²⁰⁴

In *Branzburg*, Justice Douglas advocated an absolute privilege for journalists to be free "from appearing or testifying before a grand jury, unless the reporter himself is implicated in a crime."²⁰⁵ At least thirteen states and the District of Columbia have absolute privileges in their shield laws for confidential sources,²⁰⁶ five of which also apply to non-confidential information.²⁰⁷ At the federal level, the Third Circuit has suggested the privilege may be absolute in some circumstances:

A journalist does in fact possess a privilege that is deeply rooted in the First Amendment. When no countervailing constitutional concerns are at stake, it can be said that the privilege is absolute; when constitutional precepts collide, the absolute gives way to the qualified and a balancing process comes into play to determine its limits.²⁰⁸

However, no federal circuit, including the Third Circuit, has adopted an absolute reporters' privilege in all cases.²⁰⁹

Some federal shield bills have proposed making the reporters' shield absolute. For example, a 1978 bill offered by Rep. Philip Crane (R – IL) would have prohibited any federal, state, or local governmental authority from issuing search warrants and subpoenas on reporters.²¹⁰ Similarly, Rep. Bill Green (R – NY) introduced a bill in 1979 shielding journalists from disclosure of “any news, or sources of any news,” even to grand juries.²¹¹ The Dodd shield bill (S. 369) and the earlier Lugar shield bill (S. 340) included absolute privileges for the disclosure of journalists' confidential sources and information.²¹² All proved unworkable.

The reason is evident. There is a developing consensus that the reporters' privilege must yield to other competing concerns in certain circumstances. For example, S. 2831 provided a qualified privilege for disclosure of confidential sources and information, with exceptions in civil and criminal matters, to prevent death or substantial bodily injury, or to protect national security.²¹³ Similarly, Geoffrey Stone, Professor at the University of Chicago Law School, argued for an absolute privilege, but acknowledged some cases when it should not apply.²¹⁴ A qualified privilege can strike the right balance. The press can have breathing room under a federal shield, subject to some narrow exceptions.

BALANCING THE PRIVILEGE WITH THE RIGHTS OF CRIMINAL DEFENDANTS

From the perspective I bring to bear, that of a long-time former prosecutor and a present member of the defense bar, the legislation being considered should not adversely affect either the prosecution or defense of criminal and regulatory cases.

Bruce A. Baird, Former Asst. U.S. Attorney²¹⁵

A broad reporters' privilege protecting the free flow of information to the public sometimes must give way to other constitutional guarantees. Under the Sixth Amendment, an accused has a right “to have compulsory process for obtaining witnesses in his favor.”²¹⁶ Journalists with evidence that is exculpatory or might mitigate a sentence should be subject to compulsory process like other witnesses. As a result, many state shield laws recognize an exception for certain felonies²¹⁷ or other cases in which the nondisclosure of information would result in a miscarriage of justice or denial of a fair trial.²¹⁸

However, the ability of an accused to subpoena journalists is not absolute. Instead, a criminal defendant must establish that the information is needed to assist in his or her defense. In addition, that need must be weighed against the type of information sought. A journalist's confidential sources and information are entitled to greater protection under the First Amendment than non-confidential information. The reason is simple. The public interest in news derived from confidential sources or information is greater than it is for reports based upon non-confidential information.

Some federal circuits already use different tests depending upon the type of information sought. For example, the Second Circuit requires a party seeking confidential information from a journalist in all civil and some criminal cases to make “a clear and specific showing” that it is “(1) highly material and relevant, (2) necessary or critical to the maintenance of the claim, and (3) not obtainable from other available sources.”²¹⁹ In contrast, litigants seeking non-confidential information from a journalist must demonstrate that it “(1) is of likely relevance, (2) to a significant issue in the case, and (3) is not reasonably obtainable from other available sources.”²²⁰ The First Circuit has adopted a similar approach to non-confidential information because of what it views to be lesser First Amendment interests.²²¹

S. 2831 likewise recognized greater protection for confidential information. A criminal defendant seeking to subpoena a journalist to reveal a confidential source or information would have to show by clear and convincing evidence that: (1) he or she “exhausted alternative sources of the information”; (2) “there are reasonable grounds ... to believe that the information sought is directly relevant to the question of guilt or innocence or to a fact that is critical to enhancement or mitigation of a sentence”; (3) the information is needed; and (4) “nondisclosure of the information would be contrary to the public interest” by weighing “the public interest in newsgathering and maintaining the free flow of information” against the defendants’ Sixth Amendment interests.²²² The first three elements duplicate the Second Circuit’s test. However, the fourth element should be removed. Once the accused has shown an actual need for the confidential information, his or her right to a fair trial always outweighs the public interest in newsgathering.²²³

Conversely, S. 2831 would not protect a journalist’s non-confidential information from being subpoenaed, leaving in place existing “law or court decision.”²²⁴ For criminal cases, that is a prudent approach. A criminal defendant should be able to subpoena testimony and evidence from a journalist for non-confidential information in the same manner as from any other person. Sufficient safeguards are present under existing rules to ensure an accused does not subpoena non-confidential information from journalists that is irrelevant, duplicative, or otherwise an abuse of process.

LESSONS FROM HOME AND ABROAD: A WORKABLE NATIONAL SECURITY EXCEPTION

Compelling reporters to testify and, in particular, forcing them to reveal the identity of their confidential sources without extraordinary circumstances, hurts the public interest.

Senator Richard Lugar²²⁵

In addition to conflicting Sixth Amendment rights, other public interests might prevail over a reporters’ privilege because “liberty of speech and of the press is ... not an absolute right.”²²⁶ For instance, the Supreme Court has hypothesized that during wartime, it is proper to preclude “the publication of the sailing dates of transports or the number and location of troops.”²²⁷ As a result, there are narrow circumstances under which the

press's right to publish information or to withhold identification of a confidential source must yield to public safety or national security.

Senator Lugar proposed that "revelation of a confidential source" be limited to the government's proof of clear and convincing evidence that disclosure is "necessary to prevent imminent and actual harm to national security."²²⁸ As he explained, this approach strikes a "reasonable balance" between the public's right to information and our collective security.²²⁹ Leading constitutional scholars and litigators agree.²³⁰

In contrast, opponents of a federal shield law argue the threat to national security is too great to restrict application of the exception. They often cite a June 7, 1942, *Chicago Tribune* article about the Battle of Midway titled, "Navy Had Word of Jap Plan to Strike at Sea" as evidence of how a journalist's confidential source harmed the U.S.²³¹ The source described the navy's detailed knowledge of the attacking Japanese naval force and its movements, but "said nothing about U.S. code-breaking activities."²³² President Roosevelt threatened to charge Colonel Robert McCormick, the *Tribune's* publisher, with treason, even after it became apparent that the Japanese were still using their broken code.²³³ Byron Price, Director of the Office of Censorship during World War II, acknowledged that even if the *Tribune* had submitted the story to his office, "it would not have been killed because the Code of Wartime Practices for journalists at the time did not cover reports of enemy ships in enemy waters, a fact the *Tribune* was aware of before it published the piece."²³⁴ The Roosevelt administration had a more nefarious purpose for going after the press. "[M]any in the government viewed the case principally as a way to punish Robert McCormick for his vitriolic opposition to Roosevelt and the New Deal, rather than as an issue of national security."²³⁵ The Midway example shows why it is necessary for the government to establish imminent and actual harm to national security.

In practice, a press report or leak of classified information rarely, if ever, will meet that standard. With the exception of an isolated case such as the Pentagon Papers, confidential sources and leaks almost never provide all of the information in a news story. As news editor Dale Davenport explained,

Because of professional and public concern about the use of anonymous sources in news stories, we insist on reporting on the record whenever possible. More often than not, what these confidential sources provide us is context, the kind of background that helps us tie facts together or to put them in order to accurately represent what happened, or to pick out the most significant aspects of the story.²³⁶

Editors and journalists do not make their publication decisions in a vacuum. They often discuss their stories with government officials before they are released to the public to ensure the story will not harm U.S. interests.²³⁷ If a story genuinely poses a threat to national security, journalists remove information or even delay or kill the story.²³⁸

Washington Post Executive Editor Leonard Downie, Jr. described a approach commonly used by the press: he "tries to evaluate whether the information would really

endanger lives, or whether officials are seeking to withhold publication for reasons of policy, partisanship or embarrassment.”²³⁹ A broader national security exemption compelling disclosure merely upon showing “potential harm”²⁴⁰ or a preponderance of evidence of “significant and actual harm”²⁴¹ would destroy that checking power. Instead, the government would control all information made public, preventing the press from being a watchdog for abuses of power and unlawful acts officials frequently conceal.²⁴²

Classification of documents or information cannot be the determining factor in evaluating alleged threats to national security. Government over-classification or misclassification is rampant. The National Security Archive recently reported that the Bush administration “had begun to classify long-available numbers of U.S. nuclear missiles during the Cold War, blacking out information on previously public documents.”²⁴³ As Judith Miller explained, post-9/11 efforts by the government to conceal information through classification makes “confidential sources, particularly in the national security and intelligence areas ... indispensable to government accountability.”²⁴⁴ The government’s efforts to conceal unlawful programs under the guise of national security prove that point.²⁴⁵

President Bush has emphasized the importance of promoting democracy abroad in fighting the war on terror. But as Senator Lugar has observed, “If the United States is to foster the spread of freedom and democracy around the world, it is incumbent that we support an open and free press to help build democracies and protect human rights.”²⁴⁶ Passage of a federal reporters’ shield law is an important step in that direction. The fledgling democracy in Afghanistan has recognized as much in protecting the confidentiality of journalists’ sources.²⁴⁷ If the United States is to remain the beacon of democracy around the world, should we require anything less of ourselves?

Our European allies, who have faced the threat of international terrorism far longer than we have, provide similar guidance.²⁴⁸ Austria and France have absolute privileges for journalists.²⁴⁹ At least fifteen additional nations have a qualified reporters’ privilege.²⁵⁰ Sweden makes it a crime to disclose a source without the source’s permission. Under its Freedom of the Press Act, unauthorized disclosure can be punished by a fine and up to one year in jail.²⁵¹ “[E]ven those countries that do not legally recognize the right to source confidentiality do appreciate the importance of the practice as a valuable news-gathering tool in a democracy.”²⁵²

Article 10 of the European Convention on Human Rights, which applies to all member states of the European Union and most other European nations,²⁵³ likewise affords broad protections for journalists’ sources. It requires journalists to prevent “the disclosure of information received in confidence,” except “in the interests of national security” and other limited circumstances.²⁵⁴ The Committee of Ministers has construed Article 10 as requiring that member states

Pay particular regard to the importance of the right of non-disclosure and the preeminence given to it in the case law of the European Court of Human Rights, and *may only order a disclosure if ... there exists an*

*overriding requirement in the public interest and if circumstances are of a sufficiently vital and serious nature.*²⁵⁵

To satisfy this exception, the government would have to meet a standard similar to the clear and convincing evidence of imminent and actual harm proposed by Senator Lugar. The committee's standard provides:

The disclosure of information identifying a source should not be deemed necessary unless it can be convincingly established that:

- i. Reasonable alternative measures to the disclosure do not exist or have been exhausted by the persons or public authorities that seek the disclosure; and
- ii. The legitimate interest in the disclosure clearly outweighs the public interest in the non-disclosure, bearing in mind that:
 - a. An overriding requirement of the need for disclosure is proved;
 - b. The circumstances are of a sufficiently vital and serious nature;
 - c. The necessity of the disclosure is identified as responding to a pressing social need.²⁵⁶

The test proposed by the committee is derived from European Court of Human Rights decisions, including *Goodwin v. United Kingdom*.²⁵⁷ In *Goodwin*, the court emphasized that without protection, journalists' "sources may be deterred from assisting the press in informing the public in matters of public interest."²⁵⁸ *Goodwin* found the "chilling effect" that source disclosure has on "press freedom in a democratic society" requires that "such a measure cannot be compatible with Article 10 of the Convention unless it is justified by *an overriding requirement in the public interest*."²⁵⁹ In a separate decision, the European Court of Human Rights applied a balancing test to determine whether the disclosure was "necessary in a democratic society."²⁶⁰ European practice shows that national security can be adequately safeguarded in our country with a meaningful reporters' privilege.

Federal courts are well equipped to determine application of the national security exception. Justice Department officials have argued otherwise, asserting that federal judges cannot "make decisions that ... require extensive and nuanced knowledge about our broader national security strategy, the details of classified programs, and the ground-level impact of certain information being disseminated to the public."²⁶¹ The evidence belies their contention. Following a court ruling that the NSA's warrantless wiretapping program was unconstitutional,²⁶² Attorney General Gonzales conceded that a federal court could review applications for counter-terrorism surveillance without harming national security.²⁶³ Moreover, for nearly three decades the Classified Information Procedures Act has governed review of classified information in federal courts.²⁶⁴ Case law also demonstrates that federal judges ably balance competing interests where common law reporters' privileges are available.²⁶⁵

Experience has shown us that the government cannot be the sole arbiter for determining what is in the national security without destroying the checking power of the press.²⁶⁶ Judicial application of a federal shield law with an exception for imminent and actual harm to the national security strikes the right balance.

CONCLUSION

The need for a federal reporters' shield law today is urgent. Freedom of the press is at risk of being lost for good as more journalists are jailed than ever before. Efforts by the press to fulfill its role of exposing government abuses of power and unlawful acts are met with subpoenas, criminal charges, and lengthy prison terms. Meaningful protection of journalists from having to reveal their confidential sources and information is necessary to keep the press from being "eviscerated."²⁶⁷ That protection can be balanced with narrow exceptions that protect competing rights and interests. Otherwise, it will be publish and perish for journalists.

ENDNOTES

¹ Teri Thompson & T.J. Quinn, *San Francisco Reporters Sentenced to Jail in Bonds Steroid Case*, N.Y. DAILY NEWS, Sept. 22, 2006.

² Katharine Q. Seelye, *U.S. Ranks Sixth Among Countries Jailing Journalists, Report Says*, N.Y. TIMES, Dec. 14, 2005, at A5.

³ See Reporters Without Borders, *Annual Worldwide Press Freedom Index (2006)*, available at <http://www.rsf.org> (last visited Feb. 1, 2007).

⁴ See generally Adam Liptak, *Leaks and the Courts: There's Law, But Little Order*, N.Y. TIMES, Oct. 5, 2003, at 43 (describing a secret subpoena of Associated Press reporter John Solomon's home phone in an effort to learn the source of his published report of an FBI wiretap; Solomon did not learn about the subpoena until three months later).

⁵ See generally Byron Calame, *Secrecy, Security, the President and the Press*, N.Y. TIMES, July 2, 2006, at 410 (describing accusations that the *New York Times* committed "treason" by exposing the government's secret banking-data surveillance program). The accusations mirror those raised over three decades earlier, when the *Times* printed the Pentagon Papers. See Anthony Lewis, *Abroad at Home; When Truth is Treason*, N.Y. TIMES, June 9, 2001, at A15.

⁶ Sami al-Haj, a Sudanese *Al-Jazeera* cameraman, "has been imprisoned without charge at the U.S. naval base at Guantanamo (Cuba) since 13 June 2002 and interrogated about 150 times to get him to confess supposed links between the Qatar-based *Al-Jazeera* and Al-Qaeda." REPORTERS WITHOUT BORDERS, 2007 ANNUAL REPORT: AMERICAS 63 (2007), available at <http://www.rsf.org> (last visited Feb. 1, 2007).

⁷ See *infra* notes 51-62, 150-65 and accompanying text.

⁸ See generally *National Briefing Washington: Effort to Recover Leaked Documents Ends*, N.Y. TIMES, Jan. 5, 2007, at A14 (reporting that the FBI was abandoning its efforts to recover leaked documents possessed by reporter Jack Anderson, who died in December 2005).

⁹ The White House, *Address to a Joint Session of Congress and the American People*, United States Capitol, Washington, D.C., available at <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html> (visited on Feb. 11, 2007).

¹⁰ *Id.*

¹¹ See Jess Bravin, *Pentagon Report Set Framework For Use of Torture*, WALL ST. J., June 7, 2004, at 1; Seymour Hersh, *Torture at Abu Ghraib*, THE NEW YORKER, May 10, 2004.

¹² See James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

¹³ See Glenn Kessler, *Rice to Admit German's Abduction Was an Error On Europe Trip, Rice Faces Scrutiny on Prisoner Policy*, WASH. POST, Dec. 7, 2005, at A18; Dana Priest, *Wrongful Imprisonment: Anatomy of a CIA Mistake: German Citizen Released After Months in 'Rendition'*, WASH. POST, Dec. 4, 2005, at A1; Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1.

¹⁴ See Risen & Lichtblau, *supra* note 12. President Bush confirmed this accusation. See President's Radio Address, White House Press Secretary (Dec. 17, 2005), available at <http://www.whitehouse.gov/news/releases/2005/12/20051217.html> (last visited Feb. 11, 2007).

¹⁵ See Risen & Lichtblau, *supra* note 12.

¹⁶ *American Civil Liberties Union v. National Security Agency*, 438 F. Supp.2d 754 (E.D. Mich. 2006).

¹⁷ See Kessler, *supra* note 13, at A18; *Wrongful Imprisonment*, *supra* note 13, at A1.

¹⁸ Bravin, *supra* note 11, at 1.

¹⁹ The White House, *President Discusses Job Creation with Business Leaders* (Sept. 30, 2003), available at <http://www.whitehouse.gov/news/releases/2003/09/20030930-9.html> (visited on Feb. 11, 2007).

²⁰ Liptak, *supra* note 4, at 43.

²¹ *Id.*

²² REPORTERS' COMMITTEE FOR FREEDOM OF THE PRESS, *AGENTS OF DISCOVERY: A REPORT ON THE INCIDENCE OF SUBPOENAS SERVED ON THE NEWS MEDIA IN 1997*, at 1 (1999).

²³ Frank Rich, *Will We Need a New 'All the President's Men'?*, N.Y. TIMES, Oct. 17, 2004, at 21.

²⁴ Letter from Jefferson to Jay, available at <http://etext.virginia.edu/jefferson/quotations/jeff1600.htm>.

²⁵ U.S. CONST. amend. I.

²⁶ *See generally* *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967) (“Those [constitutional] guarantees are not for the benefit of the press so much as for the benefit of all of us.”).

²⁷ The “marketplace of ideas” is grounded in the belief that speech must be protected as a fundamental right for the discovery of truth. *See* JOHN STUART MILL, *ON LIBERTY* 76 (1859). Justice Oliver Wendall Holmes eloquently invoked the metaphor by observing, “when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the basic test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes can be carried out.” *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., joined by Brandeis, J., dissenting).

²⁸ *See generally* First Continental Congress, *Address to the Inhabitants of the Province of Quebec* (Oct. 26, 1774), *reprinted in* BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 223 (1971)

(“The importance of this [freedom of the press] consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of government its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated into more honorable and just modes of conducting affairs.”).

²⁹ *See* U.S. CONST. art. IV, § 4, cl. 1.

³⁰ VIRGINIA DECLARATION OF RIGHTS § 12 (June 12, 1776).

³¹ *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 527.

³² DAVID HUME, *OF THE LIBERTY OF THE PRESS* (1742), *reprinted in* 5 *THE FOUNDERS' CONSTITUTION* 117 (Philip B. Kurlan & Ralph Lerner eds. 1987).

³³ *See generally* *Lovell v. City of Griffin*, 303 U.S. 444, 451-52 (1938) (“The struggle for the freedom of the press was primarily directed against the power of the licensor ... this freedom from prior restraint upon publication ... was a leading purpose in the adoption of the constitutional provision”).

³⁴ *Patterson v. Colorado ex rel. Attorney General*, 205 U.S. 454, 462 (1907); *see also* *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 259 (1974) (White, J., concurring) (“We have learned, and continue to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers.”).

³⁵ *Herbert v. Lando*, 441 U.S. 153, 203 (1979) (Marshall, J., dissenting).

³⁶ *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491-92 (1975); *see also* *Pell v. Procunier*, 417 U.S. 817, 832 (1974) (“The constitutional guarantee of a free press ... secures ‘the paramount public interest in a free flow of information to the people concerning public officials.’”) (quoting *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964)); *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936) (“The predominant purpose of the grant of immunity here invoked was to preserve an untrammelled press as a vital source of public information.”).

³⁷ *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978); *see also Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972) (referring “to a First Amendment right to receive information and ideas”).

³⁸ *See generally Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) (observing that “without some protection for seeking out the news, freedom of the press could be eviscerated”).

³⁹ *Cox*, 420 U.S. at 495.

⁴⁰ *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

⁴¹ *Time, Inc. v. Firestone*, 424 U.S. 448, 471 (1976).

⁴² *Reporters' Shield Legislation: Issues and Implications, Hearing Before the Senate Comm. on the Judiciary*, 109th Cong., 1st Sess. (testimony of Lee Levine) (July 20, 2005).

⁴³ An Act for the Punishment of Certain Crimes Against the United States (Sedition Act), Act of July 14, 1798, ch. 74, 1 Stat. 596. The Sedition Act made it a crime to “write, print, utter or publish ... any false, scandalous, and malicious writing or writings against the government of the United States,” Congress, or the President. *Id.* at § 2.

⁴⁴ JOHN C. MILLER, *CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS* 59 (1951).

⁴⁵ *See id.* at 90-92.

⁴⁶ *See id.* at 98-220.

⁴⁷ *New York Times v. Sullivan*, 424 U.S. at 276. The Sedition Act lapsed before it could be challenged in the courts. *See generally* Act of July 14, 1798, ch. 74, § 4, 1 Stat. 596 (providing that the Sedition Act remained in effect until March 3, 1801).

⁴⁸ *See* MARK E. NEELY, JR., *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* 27-28 (1991); ROBERT S. HARPER, *LINCOLN AND THE PRESS* (1951).

⁴⁹ Act of June 15, 1917, as amended by the Act of May 16, 1918, ch. 75, § 1, 40 Stat. 553 (repealed in 1921). The two acts “muffled not only freedom of speech but freedom of the press.” ROBERTA STRAUSS FEUERLICHT, *AMERICA'S REIGN OF TERROR: WORLD WAR I, THE RED SCARE, AND THE PALMER RAIDS* 35 (1971).

⁵⁰ *See, e.g., Gitlow v. People of New York*, 268 U.S. 652 (1925); *Abrams v. United States*, 250 U.S. 616 (1919); *Schenck v. United States*, 249 U.S. 47 (1919).

⁵¹ *See* Sam J. Ervin, Jr., *In Pursuit of a Press Privilege*, 11 HARV. J. ON LEGIS. 233, 233-34 (1974).

⁵² *See* LIVINGSTON RUTHERFURD, *JOHN PETER ZENGER* (NEW YORK, 1904).

⁵³ *See Ex Parte Nugent*, 18 F. Cas. 471 (C.C.D.C. 1848).

⁵⁴ *See* 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE & PROCEDURE* § 5426 at 715 (1980).

⁵⁵ *See Ex Parte A.L. Lawrence and LL. Levings*, 48 P. 124 (Cal. 1897).

⁵⁶ *Id.* at 125.

⁵⁷ *See generally Garland v. Torre*, 259 F.2d 545, 550 (2d Cir.) (noting the absence of a judicially recognized reporters' privilege), *cert. denied*, 358 U.S. 910 (1958); *People ex rel. Mooney v. Sheriff of N.Y. County*, 199 N.E. 415, 416 (N.Y. 1936) (declining to “depart from the general rule in force in many of the States and in England and create a privilege in favor of an additional class” by reasoning it was a matter for the legislature).

⁵⁸ *See* MILLER, *supra* note 44; Gordon T. Belt, *Jailed & Subpoenaed Journalists: A Historical Timeline*, available at <http://www.firstamendmentcenter.org/about.aspx?id=16896> (last visited Feb. 1, 2007).

⁵⁹ At least eighteen additional journalists have been jailed or sentenced to jail since *Branzburg*: Lisa Abraham, *Warren (OH) Tribune Chronicle*, 22 days (1994); Peter Bridge, *Newark (NJ) Evening News*, 21

days (1972); Anthony Brenna, *The National Enquirer*, sentenced to 20 days but released early (1985); Bruce Anderson, *Anderson Valley (CA) Advertiser*, 13 days (1996); John Rezendes-Herrick, *Inland Valley (CA) Daily Bulletin*, five days (1998); Tim Crews, *Sacramento Valley (CA) Mirror*, five days (2000); Richard Hargraves, *The Belleville (IL) News-Democrat*, 3 days (1984); Libby Averyt, *Corpus Christi (TX) Caller-Times*, two days (1990); Barry Smith and Dave Tragethon, the *Durango (CO) Herald* and KIUP-KRSP radio respectively, two days (1982); Bradley Stone, Detroit TV reporter, one day (1986); Sid Gaulden and Schuyler Kropf of *The Post and Courier* (Charleston, SC), Cindi Scoppe of *The State*, and Andrew Shain of *The Sun News* (Myrtle Beach, SC), several hours (1991); Ellen Marks, *The Idaho Statesman*, several hours (1981); Roxanna Kopetman and Roberto Santiago Bertero, *Los Angeles Times*, Kopetman was jailed six hours and both were released early from longer jail sentences (1987). *See id.*

⁶⁰ The judge stated that Taricani deserved to go to prison, but sentenced him to home detention because of his poor health. *See Pam Belluck, Reporter Who Shielded Source Will Serve Sentence At Home*, N.Y. TIMES, Dec. 10, 2004, at A28.

⁶¹ WILLIAM SAFIRE, SCANDALMONGER (2000). Similarly, constitutional scholar Geoffrey Stone has described 1798 as one of the three worst periods for the First Amendment, along with World War I and the Cold War. *See* <http://www.firstamendmentcenter.org/analysis.aspx?id=14124> (last visited Feb. 1, 2007).

⁶² The average for journalists sentenced or jailed for violating subpoenas treats Lance Williams and Mark Fainaru-Wada as a single case. If treated separately, then the top five sentences for journalists since 1972 (excluding Judith Miller, who had the sixth longest jail time) averaged 10.7 months, more than twice as long as the journalists sentenced under the Sedition Act.

⁶³ *Branzburg*, 408 U.S. at 681.

⁶⁴ *See* MD. ANN. CODE art. 35, § 2; *Branzburg*, 408 U.S. at 699 n.37.

⁶⁵ *See id.* at 690 n.27 (collecting citations).

⁶⁶ *Id.* at 707 n.41 (quoting Dep't of Just. Memo. No. 692 (Sept. 2, 1970)). The Guidelines required that "all reasonable attempts should be made to obtain information from non-press sources" and negotiation with the press before relying on judicial process. *Id.* In most cases, the Attorney General could authorize a press subpoena only if there was "sufficient reason to believe that the information sought is essential to a successful investigation" and it was otherwise unavailable. *Id.*

⁶⁷ *Id.* at 667.

⁶⁸ *See In re Pappas*, 266 N.E.2d 297, 302-03 (Mass. 1971), *aff'd*, *Branzburg*, 408 U.S. at 665.

⁶⁹ *Branzburg*, 408 U.S. at 669.

⁷⁰ *Caldwell v. United States*, 434 F.2d 1081, 1089-90 (9th Cir. 1970), *rev'd*, *Branzburg*, 408 U.S. at 665.

⁷¹ *Caldwell*, 434 F.2d at 1089.

⁷² *Id.*

⁷³ *Branzburg*, 408 U.S. at 681.

⁷⁴ *Id.* at 681-82.

⁷⁵ *Id.* at 682-83.

⁷⁶ *Id.* at 707.

⁷⁷ *Id.* at 706.

⁷⁸ *Id.* at 725 (Stewart, J., dissenting).

⁷⁹ *Id.* at 709 (Powell, J., concurring).

⁸⁰ *Id.* at 710 (Powell, J., concurring).

⁸¹ *Id.*

- ⁸² See *id.* at 725 (Stewart, J., dissenting); *United States v. Caldwell*, 408 U.S. 711 (1972) (Douglas, J., dissenting).
- ⁸³ *Id.* at 712 (Douglas, J., dissenting).
- ⁸⁴ *Id.*
- ⁸⁵ *Id.*
- ⁸⁶ *Branzburg*, 408 U.S. at 725 (Stewart, J., dissenting) (quoting the DOJ Guidelines).
- ⁸⁷ *Id.* at 729, 738 (Stewart, J., dissenting).
- ⁸⁸ *Id.* at 731 (Stewart, J., dissenting).
- ⁸⁹ *Id.*
- ⁹⁰ *Id.* at 735-36 (Stewart, J., dissenting).
- ⁹¹ *Id.* at 745 (Stewart, J., dissenting).
- ⁹² *Id.* at 743 (Stewart, J., dissenting). Justice Stewart's test is similar to one proposed by the reporter in *Caldwell*. Compare *id.* with *Caldwell*, 434 F.2d at 1090 n.10.
- ⁹³ *Branzburg*, 408 U.S. at 743 (Stewart, J., dissenting).
- ⁹⁴ *Id.* at 745-46 (Stewart, J., dissenting).
- ⁹⁵ Carl Bernstein Aff. ¶ 5, In re Grand Jury Subpoenas of Mark Fainaru-Wada and Lance Williams, Case No. CR 06-90225 JSW (N.D. Cal. May 30, 2006).
- ⁹⁶ See *New York Times v. United States*, 403 U.S. 713 (1971).
- ⁹⁷ See THE PENTAGON PAPERS: ABRIDGED EDITION (George C. Herring, ed. 1993).
- ⁹⁸ See DANIEL ELLSBERG, SECRETS: A MEMOIR OF VIETNAM AND THE PENTAGON PAPERS (2002).
- ⁹⁹ See David Von Drehle, *FBI's No. 2 was "Deep Throat"*, WASH. POST, June 1, 2005, at A1.
- ¹⁰⁰ See generally *United States v. Nixon*, 418 U.S. 683 (1974) (ordering President Nixon to produce the subpoenaed White House tapes).
- ¹⁰¹ See generally THE WASHINGTON POST, THE FALL OF A PRESIDENT (1974) (describing the investigation and impeachment proceedings that resulted from Woodward and Bernstein's reports of Felt's disclosures).
- ¹⁰² Letter from Thomas Jefferson to Lafayette (1823), reprinted in 15 THE WRITINGS OF THOMAS JEFFERSON: MEMORIAL EDITION 491 (Lipscomb & Bergh eds. 1903-04).
- ¹⁰³ See generally CONGRESSIONAL RESEARCH SERV., JOURNALISTS' PRIVILEGE TO WITHHOLD INFORMATION IN JUDICIAL AND OTHER PROCEEDINGS: STATE SHIELD STATUTES (Mar. 8, 2005) (providing the text of the statutory reporters' shield laws).
- ¹⁰⁴ See *id.*
- ¹⁰⁵ See *id.*
- ¹⁰⁶ No courts in Wyoming have addressed whether a reporters' privilege exists under state law.
- ¹⁰⁷ See *In re Contempt of Wright*, 700 P.2d 40 (Idaho 1985); *Waterloo/Cedar Falls Courier v. Hawkeye Cmty. Coll.*, 646 N.W.2d 97 (Iowa 2002); *State v. Sandstrom*, 581 P.2d 812 (Kan. 1978), cert. denied, 440 U.S. 929 (1979); *In re John Doe Grand Jury Invest.*, 574 N.E.2d 373 (Mass. 1991); *State ex rel. Classic III, Inc. v. Ely*, 954 S.W.2d 650 (Mo. Ct. App. 1997); *State v. Siel*, 444 A.2d 499 (N.H. 1982); *Hopewell v. Midcontinent Broad. Corp.*, 538 N.W.2d 780 (S.D. 1995), cert. denied, 519 U.S. 817 (1996); *State v. St. Peter*, 315 A.2d 254 (Vt. 1974); *Brown v. Commonwealth*, 204 S.E.2d 429 (Va.), cert. denied, 419 U.S. 966 (1974); *Senear v. Daily Journal-American*, 641 P.2d 1180 (Wash. 1982) (en banc); *State ex rel Green Bay Newspaper Co. v. Circuit Ct.*, 335 N.W.2d 367 (Wisc. 1983).

¹⁰⁸ The seven states in which some courts have recognized a reporters' privilege are Connecticut, Hawaii, Maine, Mississippi, Texas, Utah, and West Virginia. *See generally Connecticut Bd. of Labor Relations v. Fagin*, 370 A.2d 1095 (Ct. Super. Ct. 1976) (finding a limited privilege of journalists "to withhold confidential sources"); *DeRoburt v. Gannett Co.*, 507 F. Supp. 880 (D. Haw. 1981) (recognizing a conditional reporters' privilege of nondisclosure but finding it was not met); *In re Denis Letellier*, 578 A.2d 722 (Me. 1990) (adopting the balancing test used by the First Circuit); *Brinston v. Dunn*, 919 F. Supp. 240 (S.D. Miss. 1996) (concluding that reporters have a qualified privilege); *Dallas Morning News Co. v. Garcia*, 822 S.W.2d 675 (Tex. App. 1991) (applying a qualified privilege through a balancing test); *Bottomly v. Leucadia Nat'l Corp.*, 1996 U.S. Dist. LEXIS 14760 (D. Utah July 2, 1996) (quashing a subpoena of a reporter based upon a qualified privilege); *State ex rel. Hudok v. Henry*, 389 S.E.2d 188 (W. Va. 1990) (recognizing a qualified reporters' privilege).

¹⁰⁹ *See generally Rubera v. Post-Newsweek Stations*, 8 Media L. Rep. 2293 (Ct. Super. Ct. 1982) (holding that there is no reporters' privilege); *In re Goodfader*, 367 P.2d 472 (Haw. 1961) (pre-*Branzburg* decision finding that reporters do not have a privilege to withhold confidential sources); *In re Union Pac. R.R. Co.*, 6 S.W.3d 310 (Tex. App. 1999) (rejecting a reporters' privilege to non-confidential information and reserving judgment on confidential sources).

¹¹⁰ For additional discussion of the inconsistent protections afforded by states to journalists seeking to withhold confidential sources, *see, e.g.*, Laurence B. Alexander & Ellen M. Bush, *Shield Laws on Trial: State Court Interpretations of the Journalist's Statutory Privilege*, 23 J. OF LEGIS. 215 (1997); Anthony L. Fargo, *The Journalist's Privilege for Nonconfidential Information in States Without Shield Laws*, 7 COMM. L. & POL'Y 241 (2002).

¹¹¹ Brief for Thirty-Four States and D.C. as Amici Curiae Supporting Petitioners Judith Miller and Matthew Cooper, *Miller v. United States*, 545 U.S. 1150 (2005) (Nos. 04-1507 & 04-1508), 2005 WL 1317523.

¹¹² FED. R. EVID. 501.

¹¹³ *See* S. REP. NO. 93-1277, 93d Cong. 2d Sess. (1974).

¹¹⁴ *Trammel v. United States*, 445 U.S. 40, 47 (1980).

¹¹⁵ *Jaffe v. Redmond*, 518 U.S. 1, 8-9 (1996).

¹¹⁶ *See Storer Commc'ns, Inc. v. Giovan*, 810 F.2d 580, 583-84 (6th Cir. 1987).

¹¹⁷ *See McKevitt v. Pallasch*, 339 F.3d 530, 531-32 (7th Cir. 2003); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 918 (8th Cir.), *cert. denied*, 521 U.S. 1105 (1997).

¹¹⁸ *See, e.g., Warnell v. Ford Motor Co.*, 183 F.R.D. 624, 625 (N.D. Ill 1998); *Warzon v. Drew*, 155 F.R.D. 183, 187 (E.D. Wis. 1994); *May v. Collins*, 122 F.R.D 535, 540 (S.D. Ind. 1988); *Continental Cablevision, Inc. v. Storer Broad. Co.*, 583 F. Supp. 427 (D. Mo. 1984).

¹¹⁹ *See, e.g., In re Special Proceedings*, 373 F.3d 37, 45 (1st Cir. 2004); *New York Times v. Gonzales*, 459 F.3d 160, 169-74 (2d Cir. 2006); *In re Madden*, 151 F.3d 125, 128-29 (3d Cir. 1998); *Church of Scientology Int'l v. Daniels*, 992 F.2d 1329, 1335 (4th Cir.), *cert. denied*, 510 U.S. 869 (1993); *Miller v. Transamerican Press*, 621 F.2d 721, 725 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *In re Grand Jury Proceedings*, 5 F.3d 397, 402-03 (9th Cir. 1993), *cert. denied*, 510 U.S. 1041 (1994); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 437 (10th Cir. 1977); *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986), *cert. denied*, 482 U.S. 917 (1987); *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981).

¹²⁰ *See, e.g., United States v. LaRouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988); *Gonzales v. National Broad. Co.*, 194 F.3d 29 (2d Cir. 1999); *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981); *Shoen v. Shoen*, 5 F.3d 1289, 1294 (9th Cir. 1993).

¹²¹ The Fourth Circuit has protected some non-confidential information in civil cases in limited circumstances. *See Church of Scientology*, 992 F.2d at 1335. Lower courts have reached different results on the issue because of the ambiguity of the Fourth Circuit rule. *Compare United States v. King*, 194 F.R.D. 569 (E.D. Va. 2000) (concluding there is no privilege absent confidentiality or harassment by the

requesting party) with *Penland v. Long*, 922 F. Supp. 1080 (W.D.N.C. 1995) (applying a qualified privilege for non-confidential information).

¹²² See *United States v. Smith*, 135 F.3d 963, 972-73 (5th Cir. 1998).

¹²³ See, e.g., *United States v. Foote*, 30 Media L. Rep. 2469 (D. Kan. 2002); *Hutira v. Islamic Rep. of Iran*, 211 F. Supp.2d 115, 118 (D.D.C. 2002); *United States v. Blanton*, 534 F. Supp. 295 (S.D. Fla. 1982), *aff'd*, 730 F.2d 1425 (11th Cir. 1984).

¹²⁴ *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 715 (1st Cir. 1998). The federal government's efforts to coerce disclosure of freelance videographer Josh Wolf's outtakes highlight the need for protection.

¹²⁵ See *United States v. Cuthbertson (Cuthbertson II)*, 651 F.2d 189, 195 (3d Cir.), *cert. denied*, 454 U.S. 1056 (1981); *Shoen*, 48 F.3d at 416.

¹²⁶ See *infra* notes 219-21 and accompanying text.

¹²⁷ See, e.g., *In re Special Proceedings*, 373 F.3d at 45; *Burke*, 700 F.2d at 77; *United States v. Cuthbertson (Cuthbertson I)*, 630 F.2d 139, 147 (3d Cir. 1980); *Caporale*, 806 F.2d at 1504.

¹²⁸ See *In re Shain*, 978 F.2d 850, 852 (4th Cir. 1992).

¹²⁹ 438 F.3d 1141, 1147 (D.C. Cir. 2006).

¹³⁰ See *Cuthbertson I*, 630 F.2d at 147; see also *United States v. Burke*, 700 F.2d 70, 77 (2d Cir.) ("To be sure, a criminal defendant has more at stake than a civil litigant and the evidentiary needs of a criminal defendant may weigh more heavily in the balance."), *cert. denied*, 464 U.S. 816 (1983). As one district court explained,

It is easier for a party seeking to overcome the privilege to do so in a criminal trial or grand jury situation, or in a civil libel case where there is a media defendant, than in a civil case where the reporter is a non-party. This is because the paramount public interest in the maintenance of a vigorous, aggressive and independent press is more likely to outweigh the duty to testify and the private interests in civil litigation where the reporter is a non-party.

Continental Cablevision, 583 F. Supp. at 433.

¹³¹ See, e.g., *United States v. Cutler*, 6 F.3d 67, 72-73 (2d Cir. 1993).

¹³² 438 F.3d at 1153 (Sentelle, J., concurring).

¹³³ See *id.* at 1155-56 (Sentelle, J., concurring).

¹³⁴ *Id.* at 1164 (Tatel, J., concurring).

¹³⁵ *Id.* at 1160-61 (Henderson, J., concurring).

¹³⁶ Brief for Thirty-Four States and D.C. as Amici Curiae Supporting Petitioners Judith Miller and Matthew Cooper, *Miller v. United States*, 545 U.S. 1150 (2005) (Nos. 04-1507 & 04-1508), 2005 WL 1317523.

¹³⁷ *Id.* at 2-3.

¹³⁸ *Id.* at 3.

¹³⁹ Compare 28 C.F.R. § 50.10 (1980) with DOJ Guidelines discussed *supra* note 66 and accompanying text (describing Department guidelines in effect when *Branzburg* was decided).

¹⁴⁰ 28 C.F.R. § 50.10 (preamble).

¹⁴¹ 28 C.F.R. § 50.10(b).

¹⁴² 28 C.F.R. § 50.10(c). Certain exceptions apply for subpoenas of reporters' telephone records. See 28 C.F.R. § 50.10(d).

- ¹⁴³ 28 C.F.R. § 50.10(c).
- ¹⁴⁴ 28 C.F.R. § 50.10(f).
- ¹⁴⁵ See 28 C.F.R. § 50.10(e).
- ¹⁴⁶ 28 C.F.R. § 50.10(a).
- ¹⁴⁷ *In re Grand Jury Subpoena*, 438 F.3d at 1153.
- ¹⁴⁸ U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL title 9, § 13.400 (1999) (titled "News Media Subpoenas – Subpoenas for News Media Telephone Toll Records – Interrogation, Indictment, or Arrest of Members of the News Media").
- ¹⁴⁹ Debra J. Saunders, *Editorial: Justice Department on Steroids*, S.F. CHRON., Aug. 20, 2006, at E7.
- ¹⁵⁰ Halloran & Michels, *Curbing the Press*, U.S. NEWS & WORLD REP., June 12, 2006, at 29.
- ¹⁵¹ White House Correspondents Association, The 2005 Edgar A. Poe Award, available at <http://www.medill.northwestern.edu/whca/2005win.htm> (last visited Feb. 14, 2007).
- ¹⁵² Letter from John Conyers, Jr. & Tom Davis, Members of Congress, to Alberto Gonzales, Attorney General, United States of America (Jan. 18, 2007), available at <http://judiciary.house.gov/media/pdfs/balcosubletter.pdf>; John Sweeny Aff. ¶ 7, *In re Grand Jury Subpoenas of Mark Fainaru-Wada and Lance Williams*, Case No. CR 06-90225 JSW (N.D. Cal. May 24, 2006); *infra* note 157 and accompanying text.
- ¹⁵³ CA Att'y Gen. Bill Lockyer Aff., *In re Grand Jury Subpoenas of Mark Fainaru-Wada and Lance Williams*, Case No. CR 06-90225 JSW (N.D. Cal. May 24, 2006).
- ¹⁵⁴ Mark Fainaru-Wada Aff. ¶ 8, *In re Grand Jury Subpoenas of Mark Fainaru-Wada and Lance Williams*, Case No. CR 06-90225 JSW (N.D. Cal. May 24, 2006).
- ¹⁵⁵ Lance Williams & Mark Fainaru-Wada, *Sports and Drugs: How the Doping Scandal Unfolded*, S.F. CHRON., Dec. 21, 2003, at B1.
- ¹⁵⁶ Mark Fainaru-Wada, *Dreams, Steroids, Death - A Ballplayer's Downfall*, S.F. CHRON., Dec. 19, 2004, at A1.
- ¹⁵⁷ Letter from John Conyers, Jr. & Tom Davis, Members of Congress, to Alberto Gonzales, Attorney General, United States of America (Jan. 18, 2007), available at <http://judiciary.house.gov/media/pdfs/balcosubletter.pdf>.
- ¹⁵⁸ Denise Garibaldi Aff. ¶ 15, *In re Grand Jury Subpoenas of Mark Fainaru-Wada and Lance Williams*, Case No. CR 06-90225 JSW (N.D. Cal. May 24, 2006).
- ¹⁵⁹ Elizabeth Fernandez & Suzanne Herel, *Chronicle, Reporters Subpoenaed on BALCO Sources*, S.F. CHRON., May 6, 2006, at A1.
- ¹⁶⁰ Zachary Coile, *Gonzales Defends Move Against BALCO Reporters*, S.F. CHRON., May 20, 2006, at A3.
- ¹⁶¹ Matthew B. Stannard, *Chronicle Files Motion to Quash Subpoenas*, S.F. CHRON., May 31, 2006, at A2.
- ¹⁶² See *In re Grand Jury Subpoenas To Mark Fainaru-Wada and Lance Williams*, Case No. CR 06-90225 JSW (N.D. Cal. Sept. 25, 2006).
- ¹⁶³ Victor Conte, the President of BALCO, received the harshest sentence of all of those found guilty in the BALCO scandal. His sentence was four months in prison and four months home detention. See Lance Williams & Mark Fainaru-Wada, *BALCO's Conte, Barry Bonds' Trainer Sentenced*, S.F. CHRON., Oct. 18, 2005, at A1.
- ¹⁶⁴ See Bob Egelko, *Lawyer Admits Leaking BALCO Testimony*, S.F. CHRON., Feb. 14, 2007, at A1.
- ¹⁶⁵ Mark Corallo Aff. ¶ 10, *In re Grand Jury Subpoenas of Mark Fainaru-Wada and Lance Williams*, Case No. CR 06-90225 JSW (N.D. Cal. May 24, 2006).

¹⁶⁶ *Reporters' Privilege Legislation: Preserving Effective Federal Law Enforcement, Hearing Before the Senate Comm. on the Judiciary*, 109th Cong., 2d Sess. (testimony of Theodore B. Olson) (Sept. 13, 2006).

¹⁶⁷ See The Reporters Committee for Freedom of the Press, A Short History of Attempts to Pass a Federal Shield Law (2004) ("Shield History"), available at <http://www.rcfp.org/news/mag/28-4/cov-ashorthi.html> (last visited Feb. 1, 2007).

¹⁶⁸ See 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, 1391-92 (2002).

¹⁶⁹ See *infra* notes 177-87 and accompanying text.

¹⁷⁰ See Berger, *supra* note 168, at 1391-92.

¹⁷¹ See *infra* notes 215-24 and accompanying text.

¹⁷² See *infra* notes 225-65 and accompanying text.

¹⁷³ S. 1419, 109th Cong. 1st Sess. (July 18, 2005); H.R. 3323, 109th Cong. 1st Sess. (July 18, 2005). The bills are revisions of two earlier bills introduced by Sen. Lugar and Rep. Pence in the 109th Congress. See S. 340, 109th Cong. 1st Sess. (Feb. 9, 2005); H.R. 581, 109th Cong. 1st Sess. (Feb. 2, 2005).

¹⁷⁴ S. 1419 had twelve cosponsors, including four Republicans. See The Library of Congress, Thomas, available at <http://thomas.loc.gov> (visited Feb. 1, 2007). H.R. 3323 had 71 cosponsors, including twenty Republicans. See *id.*

¹⁷⁵ See *id.*

¹⁷⁶ S. 2831, 109th Cong. 2d Sess. (May 18, 2006). S. 2831 received bipartisan support with nine cosponsors, including four Republicans. See The Library of Congress, Thomas, available at <http://thomas.loc.gov> (visited Feb. 1, 2007).

¹⁷⁷ N.C. GEN. STAT. ANN. § 8-53.11(a).

¹⁷⁸ *Branzburg*, 408 U.S. at 704-05 (citations omitted).

¹⁷⁹ *Id.* at 704.

¹⁸⁰ *Id.* at 705.

¹⁸¹ *Id.* at 686-88, 705.

¹⁸² *In re Grand Jury Subpoena*, 438 F.3d at 1156 (Sentelle, J., concurring).

¹⁸³ *Id.* at 1156-57 (Sentelle, J., concurring).

¹⁸⁴ See *Reporters' Privilege Legislation: Preserving Effective Federal Law Enforcement, Hearing Before the Senate Comm. on the Judiciary*, 109th Cong., 2d Sess. (testimony of Prof. Steven Clymer) (Sept. 20, 2006); *id.* (statements of Sens. Cornyn and Leahy).

¹⁸⁵ See *supra* notes 63-94, 116-17 and accompanying text.

¹⁸⁶ *In re Grand Jury Subpoena*, 438 F.3d at 1156 (Sentelle, J., concurring).

¹⁸⁷ For example, federal courts routinely determine whether a party qualifies for the media exception for payment of document fees under the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(A)(ii)(II). See, e.g., *Long v. Department of Just.*, 450 F. Supp.2d 42, 82-85, order amended on other grounds, 457 F. Supp.2d 30 (D.D.C. 2006).

¹⁸⁸ See Reporters' Committee for Freedom of the Press, *Fix Your Thinking: Are Bloggers Journalists?* (Mar. 2006), available at <http://www.feedsfarm.com>.

¹⁸⁹ David L. Hudson, Jr., *Blogs and the First Amendment*, 11 NEXUS 129, 130 (2006).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² See Joanna Weiss, *Blogs Colliding with Traditional Media: Convention Credentials Expected for Weblogs*, BOSTON GLOBE, May 10, 2004, at B1; Marsha Walton, *Bloggers get Convention Credentials: Instant, Interactive Communication Making a Mark* (July 23, 2004), available at <http://www.cnn.com>.

¹⁹³ Katharine Q. Seelye, *White House Approves Pass for Blogger*, N.Y. TIMES, Mar. 7, 2005, at C5.

¹⁹⁴ See <http://www.fec.gov/aos/2005/ao2005-16final.pdf>.

¹⁹⁵ See Zachary A. Goldfarb & Thomas B. Edsall, *Proposed FEC Rules Would Exempt Most Political Activity on Internet*, WASH. POST, Mar. 25, 2006, at A4.

¹⁹⁶ See Alan Sipress, *Too Casual to Sit on Press Row? Bloggers' Credentials Boosted with Seats at the Libby Trial*, WASH. POST, Jan. 11, 2007, at D1.

¹⁹⁷ S. 2831, § 3(3), 109th Cong. 2d Sess. (May 18, 2006).

¹⁹⁸ OKLA. STAT. ANN. Tit. 12, § 2506(A)(7) (emphasis added).

¹⁹⁹ See DEL. CODE ANN. Tit. 10, § 4320(3)(a).

²⁰⁰ See *supra* notes 24-41 and accompanying text.

²⁰¹ This approach is necessary to allow the press to make editorial judgments on whether to publish information, including some information the government might not want to be public. Furthermore, some non-confidential information and the work product of journalists, including their notes and outtakes, must be protected even if unpublished.

²⁰² See generally *Von Bulow v. Von Bulow*, 811 F.2d 136, 145-46 (2d Cir.) (holding that the author of a manuscript was not covered by a reporters' privilege because the author "gathered information initially for purposes other than to disseminate information to the public"), *cert. denied*, 481 U.S. 1015 (1987).

²⁰³ See *supra* notes 103-10 and accompanying text.

²⁰⁴ *Reporters' Shield Legislation: Issues and Implications, Hearing Before the Senate Comm. on the Judiciary*, 109th Cong., 1st Sess. (testimony of Matthew Cooper) (July 20, 2005).

²⁰⁵ *Branzburg*, 408 U.S. at 712 (Douglas, J., dissenting); see also *supra* notes 83-85 and accompanying text (summarizing Justice Douglas's reasoning).

²⁰⁶ See ALA. CODE ANN. § 12-21-142; ARIZ. REV. STAT. ANN. § 12-2237; CAL. EVID. CODE § 1070; D.C. CODE § 16-4703; IND. CODE ANN. § 34-36-4-2; KY. REV. STAT. ANN. § 421.100; MD. CODE ANN., CTS. & JUD. PROC. § 9-112; MONT. CODE ANN. § 26-1-902; NEB. REV. STAT. § 20-146; NEV. REV. STAT. § 49.275; N.Y. CIV. RIGHTS LAW § 79-h; OHIO REV. CODE ANN. §§ 2739.04, 2739.12; OR. REV. STAT. § 44.520; 42 PA. CONS. STAT. ANN. § 5942. The New York shield law provides a qualified privilege for non-confidential information or sources. See N.Y. CIV. RIGHTS LAW § 79-h(c). Pennsylvania requires that for at least one year radio and television stations maintain and keep open for inspection "an exact recording, transcription, kinescopic film or certified written transcript of the actual broadcast or telecast" as prerequisite to protection under the shield law. See 42 PA. CONS. STAT. ANN. § 5942(b).

²⁰⁷ See CAL. EVID. CODE § 1070; MONT. CODE ANN. § 26-1-902; NEB. REV. STAT. § 20-146; NEV. REV. STAT. § 49.275; OR. REV. STAT. § 44.520.

²⁰⁸ *United States v. Criden*, 633 F.2d 346, 356 (3d Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981).

²⁰⁹ See *supra* notes 117-31 and accompanying text.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² See S. 340, 109th Cong. 1st Sess. (Feb. 9, 2005); S. 369, 109th Cong. 1st Sess. (Feb 14, 2005).

²¹³ See S. 2831, 109th Cong. 2d Sess. (May 18, 2006). Specific problems posed by the exceptions in S. 2831 are discussed *infra* notes 225-66 and accompanying text.

²¹⁴ See *Reporters' Shield Legislation: Issues and Implications, Hearing Before the Senate Comm. on the Judiciary*, 109th Cong., 1st Sess. (testimony of Prof. Geoffrey Stone) (July 20, 2005).

²¹⁵ *Reporters' Privilege Legislation: Preserving Effective Federal Law Enforcement, Hearing Before the Senate Comm. on the Judiciary*, 109th Cong., 2d Sess. (testimony of Bruce A. Baird) (Sept. 13, 2006).

²¹⁶ U.S. CONST. amend. VI.

²¹⁷ See generally MICH. COMP. LAWS ANN. § 7675a (recognizing an exception to its otherwise absolute privilege for crimes punishable by life imprisonment if the information is essential and otherwise unavailable).

²¹⁸ See, e.g., ALASKA STAT. § 09.25.310(b); N.D. CENT. CODE § 31-01-06.2.

²¹⁹ *Burke*, 700 F.2d at 76-77.

²²⁰ *Gonzales v. NBC*, 194 F.3d at 35-36.

²²¹ See *Cusumano*, 162 F.3d at 716.

²²² S. 2831, § 5, 109th Cong. 2d Sess. (May 18, 2006).

²²³ Compare *Reporters' Privilege Legislation: Preserving Effective Federal Law Enforcement, Hearing Before the Senate Comm. on the Judiciary*, 109th Cong., 2d Sess. (testimony of Deputy Attorney General Paul McNulty) (Sept. 13, 2006) (“individuals facing grave criminal penalties ... should not have their ‘constitutional rights’ – indeed, their liberty – thwarted by the interest of ‘newsgathering’”).

²²⁴ S. 2831, § 10, 109th Cong. 2d Sess. (May 18, 2006).

²²⁵ *Reporters' Shield Legislation: Issues and Implications, Hearing Before the Senate Comm. on the Judiciary*, 109th Cong., 1st Sess. (testimony of Sen. Richard Lugar) (July 20, 2005).

²²⁶ *Near v. Minnesota*, 283 U.S. 697, 708 (1931).

²²⁷ *Id.* at 716. The Court separately explained that although military troop movements during wartime “may unquestionably be restrained,” the “publication of news stories with a different content would be protected.” *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 66 (1976).

²²⁸ *Reporters' Shield Legislation: Issues and Implications, Hearing Before the Senate Comm. on the Judiciary*, 109th Cong., 1st Sess. (testimony of Sen. Richard Lugar) (July 20, 2005).

²²⁹ *Id.*

²³⁰ See generally *Reporters' Shield Legislation: Issues and Implications, Hearing Before the Senate Comm. on the Judiciary*, 109th Cong., 1st Sess. (testimony of Floyd Abrams) (July 20, 2005) (asserting that disclosure of a journalist’s confidential source be limited to cases where non-media sources have been exhausted and it is “necessary to prevent imminent and actual harm to the national security”); *Reporters' Privilege Legislation: Preserving Effective Federal Law Enforcement, Hearing Before the Senate Comm. on the Judiciary*, 109th Cong., 2d Sess. (testimony of Theodore B. Olson) (Sept. 13, 2006) (observing that the proposed legislation “does not pose a threat to matters involving classified information or national security” because “it contains a specific provision for such highly sensitive situations”).

²³¹ Douglas McCollam & Leah Nelson, *The End of Ambiguity*, 45 COLUM. JOURNALISM REV. 20 (July 2006).

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Reporters' Privilege Legislation: An Additional Investigation of Issues and Implications, Hearing Before the Senate Comm. on the Judiciary*, 109th Cong., 1st Sess. (testimony of Dale Davenport) (Oct. 19, 2005).

²³⁷ Rachel Smolkin, *Judgment Calls: How Top Editors Decide Whether to Publish national Security Stories Based on Classified Information*, AM. JOURNALISM REV. (Oct./Nov. 2006).

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Reporters' Shield Legislation: Issues and Implications, Hearing Before the Senate Comm. on the Judiciary*, 109th Cong., 1st Sess. (testimony of Rep. Mike Pence) (July 20, 2005).

²⁴¹ Lisa Friedman, *Unshielded: Anti-media Sentiment Could Jeopardize a National Shield Law for Journalists*, 28 AM. JOURNALISM REV. 12 (2006).

²⁴² *See infra* notes 11-18, 96-101 and accompanying text.

²⁴³ Smolkin, *supra* note 237.

²⁴⁴ *Reporters' Privilege Legislation: An Additional Investigation of Issues and Implications, Hearing Before the Senate Comm. on the Judiciary*, 109th Cong., 1st Sess. (testimony of Judith Miller) (Oct. 19, 2005).

²⁴⁵ *See supra* notes 11-18 and accompanying text.

²⁴⁶ *Reporters' Shield Legislation: Issues and Implications, Hearing Before the Senate Comm. on the Judiciary*, 109th Cong., 1st Sess. (testimony of Sen. Richard Lugar) (July 20, 2005).

²⁴⁷ *See generally* Afghanistan's LAW ON MASS MEDIA, Art. 6 ("Journalists shall have the right to avoid disclosing their source of information, or otherwise an authoritative court issues an order thereof").

²⁴⁸ Justice Department officials have criticized reliance on state statutes as examples for a federal shield law because they contend, "None of the States has the responsibility of protection the national security ... and protecting information that could cause serious damage to the nation itself." *Reporters' Privilege Legislation: An Additional Investigation of Issues and Implications, Hearing Before the Senate Comm. on the Judiciary*, 109th Cong., 1st Sess. (testimony of U.S. Attorney Chuck Rosenberg) (Oct. 19, 2005).

²⁴⁹ *See generally* Austria's FEDERAL ACT ON THE PRESS AND OTHER PUBLICATION MEDIA (MEDIA ACT) § 31 (June 12, 1981) (recognizing an unqualified reporters' privilege and prohibiting electronic surveillance of the media unless approved by a court); France's CODE OF CRIM. PROC. ART. 109(2) ("Any journalist heard as a witness in respect of information collected in the course of his activities is free not to disclose its origin").

²⁵⁰ *See, e.g.*, Belarus's LAW ON THE PRESS AND OTHER MASS MEDIA art. 34; Bulgaria's ACCESS TO PUBLIC INFORMATION ACT, chapt. 2, § 2, art. 19; Czech Republic's 2000 statute protecting confidential sources; Denmark's ADMINISTRATION OF JUST. ACT, art. 172; Finland's 1918 statute protecting sources except when necessary for criminal defense; Germany's CODE OF CRIM. PROC. § 53(1)(5); Italy's LAW 69 OF 1963, art. 2; Norway's law protecting journalists' sources except in "very serious cases"; Poland's PRESS LAW, art. 12(1.2) and 15(2.1); Portugal's 1975 PRESS LAW, art. 5(4); Russia's LAW OF THE RUSSIAN FEDERATION ON MASS MEDIA, art. 41 and 49; Slovenia's MASS MEDIA ACT, art. 21(2); Sweden's FREEDOM OF THE PRESS ACT, chapt. 3, art. 3-5; Ukraine's LAW ON PRINTED MASS COMM. MEDIA, art. 26; United Kingdom's CONTEMPT OF COURT ACT OF 1981 § 10.

²⁵¹ Sweden's FREEDOM OF THE PRESS ACT, chapt. 3, art. 5.

²⁵² MANNY PARASCHOS, MEDIA LAW AND REGULATION IN THE EUROPEAN UNION: NATIONAL, TRANSNATIONAL, AND U.S. PERSPECTIVES 87 (1998).

²⁵³ DAVID B. WINN, EUROPEAN COMMUNITY AND INTERNATIONAL MEDIA LAW 160 (1994).

²⁵⁴ EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, art. 10, *reprinted in* WINN, *supra* note 253, at 160.

²⁵⁵ COUNCIL OF EUROPE, COMMITTEE OF MINISTERS, RECOMMENDATION NO. R (2000) 7 (Mar. 8, 2000) (emphasis added).

²⁵⁶ *Id.*

²⁵⁷ 17488/90 [1996] ECHR 16 (Mar. 27, 1996).

²⁵⁸ *Id.* at para. 39.

²⁵⁹ *Id.* (emphasis added).

²⁶⁰ *Sunday Times v. United Kingdom* (no. 2) para. 50 (Nov. 26, 1991). More recently, the United Nations war crimes tribunal at the Hague has applied a similar exacting standard for compelling war correspondents to testify. *See The Prosecutor v. Radoslav Brdjanin & Momir Talic*, Case No. IT-99-36-AR73.8 (Dec. 11, 2002).

²⁶¹ *Reporters' Privilege Legislation: Preserving Effective Federal Law Enforcement, Hearing Before the Senate Comm. on the Judiciary*, 109th Cong., 2d Sess. (testimony of Deputy Attorney General Paul McNulty) (Sept. 13, 2006).

²⁶² *See ACLU v. NSA*, 438 F. Supp.2d at 754.

²⁶³ *See* Dan Eggen, *Dispute Looms on Wiretap Changes*, WASH. POST, Jan. 19, 2007.

²⁶⁴ *See* 18 U.S.C. App. 3.

²⁶⁵ *See supra* notes 116-31, 208, 219-21 and accompanying text.

²⁶⁶ *See supra* notes 11-18, 24-42, 96-101 and accompanying text.

²⁶⁷ *Branzburg*, 408 U.S. at 681.