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ENACTING A REASONABLE FEDERAL  
SHIELD LAW: A REPLY TO PROFESSORS  
CLYMER AND ELIASON

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

Justice Byron White<sup>1</sup>

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#### INTRODUCTION

These days, it can be difficult to read a newspaper without seeing a story of another journalist subpoenaed to identify a confidential source. From Lance Williams and Mark Fainaru-Wada to Judith Miller and Jim Taricani, many reporters are becoming known more for the court proceedings against them than they are for the stories they write. Pulitzer Prize-winning *New York Times* reporter James Risen, who broke the story on the Bush Administration’s illegal warrantless wiretapping program, is the latest casualty.<sup>2</sup> Instead of reporting the news, journalists have become the news.

Efforts to compel the identification of reporters’ sources are certainly nothing new. As early as 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.<sup>3</sup> In 1848, the first reported federal case was brought against a reporter jailed for contempt of the Senate for refusing to identify the source of a secret draft of a Mexican-American War treaty.<sup>4</sup> In 1857, a *New York Times* reporter was jailed after declining

2. Philip Shenon, *Times Reporter Subpoenaed Over Source for Book*, N.Y. TIMES, Feb. 1, 2008, at A17.

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

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

to reveal to a House select committee the identities of members who revealed names of colleagues taking bribes.<sup>5</sup> As long as there have been reporters who have relied upon confidential sources for their stories, subpoenas have been used to try to get reporters to reveal them.

For a long time, the press relied solely upon the Constitution to resist the subpoenas. The First Amendment certainly seemed to support that reliance, prohibiting Congress—and the States by incorporation through the Fourteenth Amendment<sup>6</sup>—from “abridging the freedom of speech, or of the press.”<sup>7</sup> However, the Supreme Court’s 1972 decision in *Branzburg v. Hayes*<sup>8</sup> marked a significant setback to that strategy. In a fractured decision, a plurality found that a journalist’s shield did not exist, while at the same time five Justices concluded that the First Amendment provided the press with at least some protection.<sup>9</sup>

Afterward, federal courts tried to reconcile the conflicting opinions when they were confronted with requests to subpoena journalists.<sup>10</sup> Similarly, forty-nine states and the District of Columbia used court decisions, statutes, or both, in an effort to provide judges with guidance on how to handle requests to compel identification of a journalist’s source.<sup>11</sup> The result is a hodge-podge of inconsistent rules that vary from state to state and from federal circuit to federal circuit.<sup>12</sup>

Today, there is growing support to remedy the problem through a federal shield law. In October 2007, the House of Representatives approved H.R. 2102, the Free Flow of Information Act of 2007, by the overwhelming margin of 398 to 21.<sup>13</sup> A companion Senate bill, S. 2035, was reported out of the Senate Judiciary Committee that same month by a vote of fifteen to four.<sup>14</sup> Passage of a shield law

5. 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE § 5426 (1980).

6. See generally *Near v. Minnesota*, 283 U.S. 697, 713 (1931) (incorporating freedom of the press); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (incorporating freedom of speech).

7. U.S. CONST. amend. I.

8. 408 U.S. 665 (1972).

9. See *infra* Part II.A.

10. See *infra* Part II.C.3.

11. See *infra* notes 76–83 and accompanying text.

12. See *infra* Part II.B–C.

13. H.R. 2102, 110th Cong., 153 CONG. REC. H11, 602 (daily ed. Oct. 16, 2007).

14. Michael A. Chihak, *Sen. Secrecy, aka Jon Kyl, Blocks Free Flow of Info*, TUCSON CITIZEN, Oct. 13, 2007, available at <http://www.tucsoncitizen.com/altss/printstory/opinion/65735>. The Committee vote in favor of S. 2035 originally was fifteen to two. Keith Perrine, *Legislation Advances to Protect Confidentiality of Reporters’ Sources*, CONG. Q. WKLY., Oct. 6, 2007, available at 2007 WLNR 20161187. However,

seems inevitable. At the same time, the Bush Administration and many federal prosecutors remain opposed to the federal shield bills. Professor Steven Clymer and Professor Randall Eliason, current and former federal prosecutors who testified during congressional hearings,<sup>15</sup> ably summarized some of the reasons for that opposition in their remarks during the Symposium.

This Article responds to Professors Clymer and Eliason. Part I begins by briefly explaining the role of the press in our republic and why the First Amendment protects it. Part II examines the *Branzburg* decision and efforts to enact shield legislation in its aftermath. Part III describes the key provisions of H.R. 2102 and explores how the bill evolved to address criticism of the legislation's opponents. Part IV summarizes the arguments made by Professors Clymer and Eliason and explains why the public interest outweighs their concerns, to the extent that some have merit. The need for a shield law is real, and H.R. 2102 strikes the right balance between the free flow of information and other competing interests.

#### I. PROMOTING AN INFORMED ELECTORATE THROUGH A FREE PRESS

In 1786, Thomas Jefferson wrote to John Jay, "our liberty . . . cannot be guarded but by the freedom of the press, nor that be limited without danger of losing it."<sup>16</sup> Those oft-quoted words explain why freedom of the press is a cornerstone of our republic.<sup>17</sup> Constitutional protection of the press, through the First Amendment, is not an end in itself. Rather, it is deeply rooted in the press's

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Senator Sessions of Alabama and Senator Coburn of Oklahoma later changed their votes from "pass" to "no." See Chihak, *supra*.

15. See *Free Flow of Information Act of 2007: Hearing on H.R. 2102 Before the H. Comm. on the Judiciary*, 110th Cong. 52–63 (2007) [hereinafter *Hearing on H.R. 2102*] (testimony of Randall Eliason, Professor, George Washington University Law School); *Reporters' Privilege Legislation: Preserving Effective Federal Law Enforcement: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 16–18 (2006) [hereinafter *Senate Hearing*] (statement of Steven Clymer, Professor, Cornell Law School);

16. Thomas Jefferson, *To John Jay*, in *THE WORKS OF THOMAS JEFFERSON* 73 (Paul Leicester Ford ed., 1904), available at [http://oll.libertyfund.org/files/802/0054-05\\_Bk.pdf](http://oll.libertyfund.org/files/802/0054-05_Bk.pdf).

17. Experience has shown what could happen without a free press. 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. See generally LIVINGSTON RUTHERFURD, *JOHN PETER ZENGER: HIS PRESS, HIS TRIAL AND A BIBLIOGRAPHY OF ZENGER IMPRINTS* (Dogg, Mead & Co. 1904), for an account of Zenger's trial and its ramifications.

unique role in promoting speech and self-governance for all Americans.<sup>18</sup>

The press accomplishes its purpose in several ways. It communicates information essential to the discovery of truth in the marketplace of ideas<sup>19</sup> and to the advancement of innovation.<sup>20</sup> 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.<sup>21</sup> The press “is one of the greatest Bulwarks of Liberty”<sup>22</sup> because it keeps the government in check.<sup>23</sup> 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

18. See *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.”).

19. The “marketplace of ideas” is grounded in the belief that speech must be protected as a fundamental right for the discovery of truth. JOHN STUART MILL, *ON LIBERTY AND OTHER ESSAYS* 58–59 (Oxford Univ. Press 1991) 1859. Justice Oliver Wendell Holmes eloquently invoked the metaphor by observing:

[W]hen 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 safely can be carried out.

*Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

20. See FIRST CONT’L CONG., ADDRESS TO THE INHABITANTS OF THE PROVINCE OF QUEBEC 1774, reprinted in 1 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 honourable and just modes of conducting affairs.”).

21. U.S. CONST. art. IV, § 4.

22. VIRGINIA DECLARATION OF RIGHTS § 12 (1776), reprinted in *WE THE STATES: AN ANTHOLOGY OF HISTORIC DOCUMENTS AND COMMENTARIES THEREON, EXPOUNDING THE STATE AND FEDERAL RELATIONSHIP*, at 4 (William Byrd Press, Inc. 1964).

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

government can maintain itself . . . it will naturally be careful to keep the press open, as of importance to its own preservation.<sup>24</sup>

To ensure this role is fulfilled, the First Amendment guarantees the press the right to be free from prior restraints by the government.<sup>25</sup> Without those guarantees, the press would be subjected to censorship “as had been practiced by other governments.”<sup>26</sup>

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.”<sup>27</sup> 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 to 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.<sup>28</sup>

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.”<sup>29</sup> The press must have the ability to gather that information free of government interference.<sup>30</sup>

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24. DAVID HUME, OF THE LIBERTY OF THE PRESS (1742), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, at 117 (Philip B. Kurlan & Ralph Lerner ed., Univ. of Chi. Press 1987).

25. *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. . . . [T]his freedom from previous restraint upon publication . . . was a leading purpose in the adoption of the constitutional provision.”).

26. *Patterson v. Colorado ex rel. Attorney Gen.*, 205 U.S. 454, 462 (1907); *see* *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.”).

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

28. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491–92 (1975); *see* *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. Am. 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.”).

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

30. *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”).

Armed with a free press, Americans can make informed decisions as “the final judge of the proper conduct of public business.”<sup>31</sup> It further allows “debate on public issues” to remain “uninhibited, robust, and wide-open.”<sup>32</sup> 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.”<sup>33</sup>

## II. THE NEED FOR A FEDERAL SHIELD LAW: *BRANZBURG* AND ITS AFTERMATH

Government officials often have challenged the press in its reporting, particularly when news accounts from confidential sources reveal embarrassing or illegal activities. The absence of a common law reporters’ privilege fueled the use of subpoenas to identify those sources.

An 1897 case illustrates how the judiciary frequently responded. The court compelled an editor and a reporter to disclose their sources after they published a story that state senate members had been bribed.<sup>34</sup> In upholding the order, the California Supreme Court found that “[i]t cannot be successfully contended, and has not been seriously argued, that the witnesses were justified in refusing to give these names upon the ground that the communication was privileged.”<sup>35</sup> Other courts agreed that there was no common law privilege for journalists to refrain from judicial orders to reveal their sources.<sup>36</sup>

As the use of subpoenas increased, it became evident that some action had to be taken. In 1896, the Maryland legislature enacted a testimonial privilege for reporters under state law.<sup>37</sup> Sixteen additional states followed suit.<sup>38</sup> In 1970, the U.S. Department of

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31. *Cox*, 420 U.S. at 495.

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

33. *Time, Inc. v. Firestone*, 424 U.S. 408, 471 (1976) (Brennan, J., dissenting).

34. *Ex parte Lawrence*, 48 P. 124, 125 (Cal. 1897).

35. *Id.*

36. See *Garland v. Torre*, 259 F.2d 545, 550 (2d Cir. 1958) (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).

37. Md. ANN. CODE art. 35, § 2 (1896) (repealed 1973); *Branzburg v. Haynes*, 408 U.S. 665, 699 n.37 (1972).

38. See *Branzburg*, 408 U.S. at 690 n.27 (collecting citations of state statutes that provide some level of protection to a reporter’s confidential sources).

Justice implemented procedures for issuing subpoenas to the press. The guidelines recognized “that compulsory process in some circumstances may have a limiting effect on the exercise of First Amendment rights.”<sup>39</sup>

Against that backdrop, the Supreme Court decided *Branzburg*, addressing whether there was a journalist’s privilege under the First Amendment. Unfortunately, the plurality and concurring opinions raised more questions than they answered. Following the divided Court’s decision, a host of different approaches were adopted at the state and federal levels. What has resulted is a lack of uniformity and uncertainty that can lead to different results for the same set of facts, dependent entirely upon the court in which a subpoena is requested. This Part explores the problems posed by *Branzburg* that necessitate passage of a federal shield law.

#### A. *The Branzburg Decision*

In *Branzburg*, the Supreme Court addressed four cases in which subpoenas required journalists to appear before a grand jury to identify a confidential source.<sup>40</sup> 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.<sup>41</sup> 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.”<sup>42</sup>

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.<sup>43</sup> 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.”<sup>44</sup> The court held that to overcome the privilege, the government must

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39. *Id.* at 707 n.41 (quoting Memorandum No. 692 from Dep’t of Justice (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 . . . [was] essential to a successful investigation” and it was otherwise unavailable. *Id.*

40. *Id.* at 667.

41. *In re Pappas*, 266 N.E.2d 297, 302–03 (Mass. 1971), *aff’d*, *Branzburg*, 408 U.S. 665.

42. *Branzburg*, 408 U.S. at 669.

43. *Caldwell v. United States*, 434 F.2d 1081, 1089–90 (9th Cir. 1970), *rev’d*, *Branzburg*, 408 U.S. 665.

44. *Id.* at 1089.

demonstrate “a compelling need for the witness’s presence before judicial process properly can issue to require attendance.”<sup>45</sup>

Writing for a plurality in *Branzburg*, Justice White disagreed. He acknowledged that “some protection for seeking out the news” was necessary to prevent the press from being “eviscerated.”<sup>46</sup> However, he found that none of the four cases restricted the ability of the reporters to investigate and publish their stories.<sup>47</sup> Instead, Justice White concluded that journalists were not immune “from disclosing to a grand jury information . . . received in confidence” any more than other citizens.<sup>48</sup> According to Justice White, the only exception was grand jury investigations “instituted or conducted other than in good faith.”<sup>49</sup> 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.”<sup>50</sup>

Justice Powell wrote a separate concurring opinion aptly described by Justice Stewart as “enigmatic.”<sup>51</sup> 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.”<sup>52</sup> 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.”<sup>53</sup> 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.”<sup>54</sup>

Four Justices dissented.<sup>55</sup> 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

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45. *Id.*

46. *Branzburg*, 408 U.S. at 681.

47. *Id.* at 681–82.

48. *Id.* at 682–83.

49. *Id.* at 707.

50. *Id.* at 706.

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

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

53. *Id.* at 710.

54. *Id.*

55. Justice Stewart filed a dissenting opinion, in which Justice Brennan and Justice Marshall joined. *See id.* at 725 (Stewart, J., dissenting); *see also id.* at 711 (Douglas, J., dissenting).

immunity from appearing or testifying before a grand jury, unless the reporter himself is implicated in a crime.”<sup>56</sup> As a result, “a newsman has an absolute right not to appear before a grand jury.”<sup>57</sup> According to Justice Douglas, this privilege was not lost even if the journalist voluntarily appeared before a grand jury.<sup>58</sup>

Justice Stewart, joined by Justices Brennan and Marshall, argued that the plurality invited “authorities to undermine the historic independence of the press by attempting to annex the journalistic profession as an investigative arm of government.”<sup>59</sup> He further observed that “informants are necessary to the news-gathering process” and “the free flow of information to the public.”<sup>60</sup> 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.”<sup>61</sup> 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.”<sup>62</sup> That was particularly true for details derived from “relationships involving sensitive and controversial matters.”<sup>63</sup>

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.”<sup>64</sup> 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.”<sup>65</sup> 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.”<sup>66</sup> Justice Stewart conceded that

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56. *Id.* at 712.

57. *Id.*

58. *Id.* at 712–13.

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

60. *Id.* at 729, 738.

61. *Id.* at 731.

62. *Id.*

63. *Id.* at 735–36.

64. *Id.* at 745.

65. *Id.* at 743. Justice Stewart’s test is similar to one proposed by the reporter in *Caldwell*. Compare *id.*, with *Caldwell v. United States*, 434 F.2d 1081, 1090 n.10 (9th Cir. 1970), *rev’d*, *Branzburg v. Hayes*, 408 U.S. 665 (1972).

66. *Branzburg*, 408 U.S. at 743 (Stewart, J., dissenting).

“courts would be required to make some delicate judgments . . . . But that, after all, is the function of courts of law.”<sup>67</sup>

Taken together, the *Branzburg* opinions provide little guidance. All nine Justices agreed that journalists were protected from bad faith grand jury investigations, but a majority did not identify what constituted “bad faith.” Eight Justices rejected an absolute journalist’s privilege under the First Amendment; conversely, at least five Justices—Justice Powell and the four dissenting Justices—agreed that journalists had at least some First Amendment protections to refrain from identifying a confidential source. Led by Justice Stewart, three Justices proposed a balancing test to weigh the competing interests implicated by a subpoena to the press; however, a four Justice plurality declined to adopt a specific test, choosing instead to defer to Congress and the states. Legislative efforts to respond to *Branzburg*’s fractured opinion soon followed.

#### B. State Responses to *Branzburg* and *Nixon’s Abuse of Power*

Growing evidence of governmental abuses of power 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*.<sup>68</sup> The Pentagon Papers detailed President Lyndon Johnson’s escalation of the Vietnam War while he was promising the public not to expand it.<sup>69</sup> 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.<sup>70</sup>

In 1973, the Watergate scandal broke wide open because of a confidential source, W. Mark Felt. Felt, also known as “Deep Throat,” was the second highest official in the FBI. His 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

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67. *Id.* at 745–46.

68. *See* *N.Y. Times Co. v. United States*, 403 U.S. 713, 713–14 (1971).

69. THE PENTAGON PAPERS: ABRIDGED EDITION 157–58 (George C. Herring ed., 1993).

70. DANIEL ELLSBERG, SECRETS: A MEMOIR OF VIETNAM AND THE PENTAGON PAPERS 439–41 (2002).

Democratic National Committee headquarters.<sup>71</sup> Following news reports of Felt's disclosures, a federal investigation of Nixon was opened, despite Nixon's efforts to withhold and destroy evidence.<sup>72</sup> According to Bernstein, Felt would not have revealed that information without the promise of confidentiality,<sup>73</sup> which would have doomed the case against Nixon.<sup>74</sup> Felt's identity remained secret for over thirty years, until he voluntarily came forward in 2005.<sup>75</sup>

Nixon's abuse of power, combined with *Branzburg*, spurred the states to take action. After *Branzburg*, sixteen state legislatures accepted Justice Stewart's invitation to adopt a statutory reporters' privilege. Today, more than thirty-three states and the District of Columbia have enacted legislation to protect the confidential relationship between reporters and their sources.<sup>76</sup> All state shield laws provide journalists at least some relief from judicial subpoenas directed at obtaining the identity of confidential sources.<sup>77</sup> Approximately two-thirds of those laws also protect certain unpublished and non-confidential information.<sup>78</sup>

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. Sixteen of the seventeen states without shield laws have provided at least some relief to journalists seeking to protect confidential sources.<sup>79</sup> Courts in ten of those states have expressly found some form of reporters' privilege

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71. David Von Drehle, *FBI's No. 2 was "Deep Throat"*, WASH. POST, June 1, 2005, at A1.

72. See *United States v. Nixon*, 418 U.S. 683, 714 (1974) (ordering President Nixon to produce the subpoenaed White House tapes).

73. Affidavit of Carl Bernstein in Support of the Motion to Quash Subpoenas by Mark Fainaru-Wada and Lance Williams ¶ 5, *In re Grand Jury Subpoenas*, 438 F. Supp. 2d 1111 (N.D. Cal. 2006) (No. CR 06-90225 JSW).

74. See generally WASH. 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).

75. See Von Drehle, *supra* note 71.

76. See HENRY COHEN, CONG. RESEARCH SERV., JOURNALISTS' PRIVILEGE TO WITHHOLD INFORMATION IN JUDICIAL AND OTHER PROCEEDINGS: STATE SHIELD STATUTES 1 (2007). See generally *id.* at 3-47 (providing the text of the statutory reporters' shield laws).

77. *Id.* at 1-2.

78. *Id.*

79. No courts in Wyoming have addressed whether a reporters' privilege exists under state law. See *id.* at 1; see also Lucy Dalglish, Executive Dir., Reporters Comm. for Freedom of the Press, Remarks at the American University Law Review Symposium: Left Out in the Cold? The Chilling of Speech, Association, and the Press in Post-9/11 America (Sept. 20, 2007) [hereinafter Dalglish Remarks], *video available at* <http://www.wcl.american.edu/journal/lawrev/symposia.cfm#>.

under applicable state law.<sup>80</sup> The remaining six states have limited protection for journalists with some courts in those states recognizing the privilege<sup>81</sup> and others rejecting it.<sup>82</sup> The result is that reporters' shield protections vary considerably from state to state.<sup>83</sup>

### C. *The Hodge-Podge of Federal Responses to Branzburg*

The variance among some state reporters' shield provisions is nothing compared to the hodge-podge of federal protection. There are statutory, executive, 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.

#### 1. *Federal Rule of Evidence 501 does not recognize a common law shield*

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

80. *In re Contempt of Wright*, 700 P.2d 40, 45 (Idaho 1985); *Waterloo/Cedar Falls Courier v. Hawkeye Cmty. Coll.*, 646 N.W.2d 97, 101 (Iowa 2002); *State v. Sandstrom*, 581 P.2d 812, 814 (Kan. 1978), *cert. denied*, 440 U.S. 929 (1979); *In re John Doe Grand Jury Investigation*, 574 N.E.2d 373, 375 (Mass. 1991); *State ex rel. Classic III, Inc. v. Ely*, 954 S.W.2d 650, 653 (Mo. Ct. App. 1997); *State v. Siel*, 444 A.2d 499, 502-03 (N.H. 1982); *Hopewell v. Midcontinent Broad. Corp.*, 538 N.W.2d 780, 781-82 (S.D. 1995), *cert. denied*, 519 U.S. 817 (1996); *State v. St. Peter*, 315 A.2d 254, 256 (Vt. 1974); *Brown v. Commonwealth*, 204 S.E.2d 429, 431 (Va. 1974), *cert. denied*, 419 U.S. 966 (1974); *State ex rel. Green Bay Newspaper Co. v. Circuit Court*, 335 N.W.2d 367, 371-72 (Wisc. 1983).

81. The six states in which some courts have recognized a reporters' privilege are Hawaii, Maine, Mississippi, Texas, Utah, and West Virginia. *See Brinston v. Dunn*, 919 F. Supp. 240, 243-44 (S.D. Miss. 1996) (concluding that reporters have a qualified privilege); *Bottomly v. Leucadia Nat'l Corp.*, No. 94-C-590 B, 1996 U.S. Dist. LEXIS 14760, at \*4-5 (D. Utah July 2, 1996) (quashing a subpoena of a reporter based upon a qualified privilege); *DeRoburt v. Gannett Co.*, 507 F. Supp. 880, 886 (D. Haw. 1981) (recognizing a conditional reporters' privilege of nondisclosure but finding it was not met); *In re Denis Letellier*, 578 A.2d 722, 726-27 (Me. 1990) (adopting the balancing test used by the First Circuit); *Dallas Morning News Co. v. Garcia*, 822 S.W.2d 675, 681-85 (Tex. App. 1991) (applying a qualified privilege through a balancing test); *State ex rel. Hudok v. Henry*, 389 S.E.2d 188, 194 (W. Va. 1989) (recognizing a qualified reporters' privilege).

82. *See In re Goodfader*, 367 P.2d 472, 482 (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, 312 (Tex. App. 1999) (rejecting a reporters' privilege to non-confidential information and reserving judgment on confidential sources).

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

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.”<sup>84</sup>

Congress considered adopting a rule that would have listed and defined the specific privileges recognized in Rule 501,<sup>85</sup> but widespread disagreement resulted in language permitting the continued “evolutionary development of testimonial privileges.”<sup>86</sup> Rule 501 does not “freeze the law governing the privileges of witnesses”<sup>87</sup> and is meant to adapt “itself to varying conditions.”<sup>88</sup> 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.

## 2. *Department of Justice regulations are inadequate*

The current Department of Justice regulations are less protective than those in place when *Branzburg* was decided.<sup>89</sup> 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.”<sup>90</sup> Before the Department may subpoena a reporter, “[a]ll reasonable attempts should be made to obtain information from alternative sources.”<sup>91</sup> In addition, the Department claims to pursue negotiations with the media “in all cases” in which a subpoena to a reporter is contemplated.<sup>92</sup> Where appropriate, “the government should make clear what its needs are . . . as well as its willingness to respond to particular problems of the media.”<sup>93</sup>

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84. FED. R. EVID. 501.

85. S. REP. NO. 93-1277, at 6 (1974).

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

87. *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996).

88. *Id.* at 8 (quoting *Funk v. United States*, 290 U.S. 371, 383 (1933)).

89. Compare 28 C.F.R. § 50.10 (2007) (current Dep’t of Justice guidelines), with *Branzburg v. Hayes*, 408 U.S. 665, 707 n.41 (1972) (describing Dep’t of Justice guidelines in effect when *Branzburg* was decided).

90. 28 C.F.R. § 50.10.

91. *Id.* § 50.10(b).

92. *Id.* § 50.10(c). Certain exceptions apply for subpoenas of reporters’ telephone records. *Id.* § 50.10(d).

93. *Id.* § 50.10(c).

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.”<sup>94</sup> The Attorney General must approve all Justice Department subpoenas of reporters.<sup>95</sup> In making that 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.”<sup>96</sup>

Protection for journalists under the Justice Department regulations is illusory. The Attorney General exercises unfettered discretion in issuing subpoenas under Department rules. As the United States Circuit Court of Appeals for the District of Columbia noted in the Judith Miller case, “the guidelines provide no enforceable rights to any individuals, but merely guide the discretion of the prosecutors.”<sup>97</sup> There is no judicial oversight to determine whether the Attorney General is applying the regulations properly, or even applying them at all.

As a result of the Attorney General’s discretion, the Department can construe “avoid[ing] the loss of life or the compromise of a security interest”<sup>98</sup> as justifying sweeping subpoenas of the press. For example, the Department subpoenaed Lance Williams and Mark Fainaru-Wada, two *San Francisco Chronicle* reporters who exposed the steroid scandal surrounding the Bay Area Laboratory Co-Operative (“BALCO”). The purpose of the subpoena was to compel the reporters to disclose the identity of the confidential source who supplied secret grand jury testimony about BALCO.<sup>99</sup>

However, Mark Corallo, former press secretary for Attorney General John Ashcroft, requested that the court reject the Department’s request for a subpoena. Corallo explained:

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94. *Id.* § 50.10(f).

95. *Id.* § 50.10(e).

96. *Id.* § 50.10(a).

97. *In re* Grand Jury Subpoena, 438 F.3d 1141, 1153 (D.C. Cir. 2006).

98. 3 THE DEPARTMENT OF JUSTICE MANUAL § 9-13.400 (Supp. 2007) (titled “News Media Subpoenas—Subpoenas for News Media Telephone Toll Records—Interrogation, Indictment, or Arrest of Members of the News Media”).

99. Elizabeth Fernandez & Suzanne Herel, *U.S. Orders Chronicle Reporters to Testify*, S.F. CHRON., May 6, 2006, at A1.

I do not believe that [the subpoenas] would have been issued under former Attorney General 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.<sup>100</sup>

Corallo later called the Department's request "the most reckless abuse of power I have seen in years."<sup>101</sup>

The BALCO subpoenas illustrate the dangers to a free press that are posed by the Justice Department's regulations. The sanctions that Fainaru-Wada and Williams received, up to eighteen months in prison for civil contempt,<sup>102</sup> were more than twice as long as the sentences of BALCO ringleader Victor Conte and the four other convicted defendants.<sup>103</sup> The subpoenas also were unnecessary. Attorney General Alberto Gonzales argued, "[w]e . . . 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."<sup>104</sup> However, Gonzales's statement proved untrue. The confidential source, a criminal defense attorney whom the Department believed to be the leak long before the reporters were subpoenaed, voluntarily came forward.<sup>105</sup>

Additionally, the regulations do not even apply to all of the Department's cases. As Lucy Dalglish noted, special prosecutors are not subject to the regulations.<sup>106</sup> Many of the most widely reported cases of press subpoenas involved special prosecutors.<sup>107</sup> Although it is possible that individual special prosecutors may choose to follow the Justice Department regulations, they are under no obligation to do so. Like the Attorney General, a special prosecutor who

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100. Affidavit of Mark Corallo in Support of the Motion to Quash Subpoenas and/or for a Protective Order by Mark Fainaru-Wada and Lance Williams ¶ 10, *In re Grand Jury Subpoenas*, 438 F. Supp. 2d 1111 (N.D. Cal. 2006) (No. CR 06-90225 JSW).

101. Liz Halloran & Scott Michels, *Curbing the Press*, U.S. NEWS & WORLD REP., June 12, 2006, at 29, 30.

102. *In re Grand Jury Subpoenas*, No. CR 06-90225 (JSW), 2006 WL 2734275, at \*3 (N.D. Cal. Sept. 25, 2006).

103. 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. Mark Fainaru-Wada & Lance Williams, *BALCO's Conte, Barry Bonds' Trainer Sentenced*, S.F. CHRON., Oct. 18, 2005, at A1.

104. Zachary Coile, *Gonzales Defends Move Against BALCO Reporters*, S.F. CHRON., May 20, 2006, at A3.

105. Bob Egelko, *Lawyer Admits Leaking BALCO Testimony*, S.F. CHRON., Feb. 14, 2007, at A1.

106. Dalglish Remarks, *supra* note 79.

107. *Id.*

voluntarily applies the regulations is not subject to any oversight to monitor whether they have done so properly.

Moreover, the regulations “do not apply to civil litigants in federal court.”<sup>108</sup> The number of journalists subpoenaed in civil cases brought in federal court is burgeoning,<sup>109</sup> as Professor Clymer ably pointed out in citing the Wen Ho Lee and Steven Hatfill libel cases.<sup>110</sup> Yet, even the voluntary guidelines that can be applied at the attorney general’s discretion are unavailable. Courts end up caught in the middle between dueling civil litigants, bereft of any guidance. The resulting “lack of uniformity” undercuts state privileges, “causes needless confusion,” and undermines the administration of justice.<sup>111</sup>

Determination of whether a journalist is compelled to identify his or her source should be the product of a single set of judicially enforceable standards, and not the forum shopping that results from discretionary Justice Department regulations inapplicable to an entire class of cases.

### 3. *Federal courts are divided over the journalist shield’s scope*

The level of protection for journalists in civil cases differs considerably among the federal circuit courts of appeal. Three circuit courts have failed to adopt a reporters’ privilege in civil matters. The Sixth Circuit has expressly rejected the privilege.<sup>112</sup> The Seventh and Eighth Circuits have not addressed the issue,<sup>113</sup> although some lower courts have recognized a qualified privilege in civil cases.<sup>114</sup> 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.<sup>115</sup>

108. 153 CONG. REC. H11, 599 (daily ed. Oct. 16, 2007) (statement of Rep. Holt).

109. *Hearing on H.R. 2102, supra* note 15, at 32 (testimony of Lee Levine, Partner, Levine, Sullivan, Koch & Schulz).

110. Professor Steven Clymer, Remarks at the American University Law Review Symposium: Left Out in the Cold? The Chilling of Speech, Association, and the Press in Post-9/11 America (Sept. 20, 2007) [hereinafter Clymer Remarks], *video available at* <http://www.wcl.american.edu/journal/lawrev/symposia.cfm#>.

111. H.R. REP. NO. 110-370, at 6–8 (2007).

112. *Storer Commc’ns, Inc. v. Giovan (In re Grand Jury Proceedings)*, 810 F.2d 580, 583–84 (6th Cir. 1987).

113. 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. 1997), *cert. denied*, 521 U.S. 1105 (1997).

114. *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); *Cont’l Cablevision, Inc. v. Storer Broad. Co.*, 583 F. Supp. 427, 437–38 (E.D. Mo. 1984).

115. *E.g.*, *N.Y. Times Co. v. Gonzales*, 459 F.3d 160, 169–74 (2d Cir. 2006); *In re Special Proceedings*, 373 F.3d 37, 45 (1st Cir. 2004); *In re Madden*, 151 F.3d 125, 128–29 (3d Cir. 1998); *Church of Scientology Int’l v. Daniels*, 992 F.2d 1329, 1335

Some federal circuits have gone further, applying the qualified privilege to non-confidential information or sources in civil cases.<sup>116</sup> The Fourth Circuit has not addressed the issue conclusively,<sup>117</sup> while the Fifth Circuit has declined to protect non-confidential information.<sup>118</sup> Lower courts in the Tenth, Eleventh, and D.C. Circuits have applied the privilege to non-confidential sources or information.<sup>119</sup> 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 nonconfidential, becomes routine and casually, if not cavalierly, compelled.”<sup>120</sup> Some circuits apply the same balancing test they use for confidential information.<sup>121</sup> Other circuits apply a lower threshold for civil litigants seeking non-confidential information than what is required to obtain confidential information.<sup>122</sup>

Only a handful of federal circuits (the First, Second, Third, and Eleventh) have recognized a qualified reporter’s privilege in criminal cases.<sup>123</sup> The Fourth Circuit has followed Justice Powell’s opinion in

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(4th Cir. 1993), *cert. denied*, 510 U.S. 869 (1993); *Scarce v. United States (In re Grand Jury Proceedings)*, 5 F.3d 397, 402–03 (9th Cir. 1993), *cert. denied*, 510 U.S. 1041 (1994); *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, 712 (D.C. Cir. 1981); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 725 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 436–37 (10th Cir. 1977).

116. *E.g.*, *Gonzales v. Nat’l Broad. Co.*, 194 F.3d 29, 31–32 (2d Cir. 1999); *Shoen v. Shoen*, 5 F.3d 1289, 1294–95 (9th Cir. 1993); *United States v. LaRouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988); *United States v. Cuthbertson (Cuthbertson I)*, 630 F.2d 139, 147 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981).

117. The Fourth Circuit has protected some non-confidential information in civil cases in limited circumstances. *Church of Scientology Int’l*, 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, 582–85 (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, 1083–84 (W.D.N.C. 1995) (applying a qualified privilege for non-confidential information).

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

119. *E.g.*, *Hutira v. Islamic Rep. of Iran*, 211 F. Supp. 2d 115, 121 (D.D.C. 2002); *United States v. Foote*, 30 Media L. Rep. 2469, 2471–72 (D. Kan. 2002); *United States v. Blanton*, 534 F. Supp. 295, 297 (S.D. Fla. 1982), *aff’d*, 730 F.2d 1425 (11th Cir. 1984).

120. *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 715 (1st Cir. 1998) (quoting *LaRouche*, 841 F.2d at 1182). The federal government’s efforts to coerce disclosure of freelance videographer Josh Wolf’s outtakes highlight the need for protection. Henry K. Lee, *Appeals Panel Sends Journalist Back to Prison*, S.F. CHRON., Sept. 23, 2006, at B5.

121. *Mark v. Shoen*, 48 F.3d 412, 416–18 (9th Cir. 1995); *United States v. Cuthbertson (Cuthbertson II)*, 651 F.2d 189, 195–96 (3d Cir. 1981), *cert. denied*, 454 U.S. 1056 (1981).

122. *Smith*, 135 F.3d at 972–73.

123. *E.g.*, *In re Special Proceedings*, 373 F.3d 37, 44–45 (1st Cir. 2004); *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986), *cert. denied*, 482 U.S. 917

*Branzburg* by limiting the privilege to cases of government harassment or bad faith.<sup>124</sup> *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 from 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.<sup>125</sup>

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.<sup>126</sup> 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.<sup>127</sup>

The rift in federal courts over the reporters' privilege is present even where the issue purportedly is settled, such as in *In re Grand Jury Subpoena*. Three judges wrote concurring opinions reflecting their deep divisions. Judge Sentelle rejected the privilege in grand jury proceedings, reasoning that "reporters . . . enjoy no common law privilege beyond the protection against harassing grand juries conducting groundless investigations that is available to all other citizens."<sup>128</sup> He further concluded that Rule 501 provided no basis to

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(1987); *United States v. Burke*, 700 F.2d 70, 77 (2d Cir. 1983), *cert. denied*, 464 U.S. 816 (1983); *United States v. Cuthbertson* (*Cuthbertson I*), 630 F.2d 139, 147 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981).

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

125. 438 F.3d 1141, 1147 (D.C. Cir. 2006).

126. *Cuthbertson I*, 630 F.2d at 147; *see also Burke*, 700 F.2d at 77 ("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."). 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.

*Cont'l Cablevision, Inc. v. Storer Broad. Co.*, 583 F. Supp. 427, 433 (E.D. Mo. 1984) (citations omitted).

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

128. *In re Grand Jury Subpoena*, 438 F.3d at 1153 (Sentelle, J., concurring).

depart from *Branzburg*.<sup>129</sup> Judge Tatel reached the opposite conclusion, finding that under Rule 501, “the consensus of forty-nine states plus the District of Columbia—and even the Department of Justice—would require us to protect reporters’ sources as a matter of federal common law were the leak at issue either less harmful or more newsworthy.”<sup>130</sup> 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,”<sup>131</sup> Rule 501 did not “authorize federal courts to mint testimonial privileges for any group . . . that demands one.”<sup>132</sup>

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, “[t]he consensus among the States on the reporter’s privilege issue is as universal as the federal courts of appeals decisions on the subject are inconsistent, uncertain and irreconcilable.”<sup>133</sup> 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 “buck[s] 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.<sup>134</sup>

In other words, “[t]his increasing conflict has undercut the State shield laws just as much as the absence of a federal privilege.”<sup>135</sup>

### III. THE FEDERAL SOLUTION: H.R. 2102, THE FREE FLOW OF INFORMATION ACT OF 2007

For over three decades, Congress considered numerous federal reporters’ shield bills. In the months following *Branzburg*, six bills were introduced to adopt a shield law. The following year, sixty-five more bills were introduced.<sup>136</sup> All told, approximately one hundred

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129. *Id.* at 1155–56.

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

131. *Id.* at 1160 (Henderson, J., concurring).

132. *Id.* at 1161.

133. Brief for the States of Okla. et al. as Amici Curiae Supporting Petitioners at 7, *Miller v. United States*, 545 U.S. 1150 (2005) (Nos. 04-1507 & 04-1508), 2005 WL 1317523, at \*7.

134. *Id.* at \*2–3 (citation omitted).

135. *Id.* at \*3.

136. The Reporters Comm. for Freedom of the Press, *A Short History of Attempts to Pass a Federal Shield Law*, 28 NEWS MEDIA & THE L. 9 (2004), available at <http://www.rcfp.org/news/mag/28-4/cov-ashorthi.html> [hereinafter *A Short History*].

bills to create a shield law were introduced by 1978.<sup>137</sup> None of the bills made it to a floor vote. Despite the acknowledged need for congressional action, no federal reporters' shield law had been enacted for thirty-five years after *Branzburg*.

There were several reasons for congressional inaction. Some resisted attempts to pass legislation because they could not agree on how to define who could qualify as a "journalist."<sup>138</sup> As Lucy Dalglish observed, some journalists stood on principle against early bills by arguing that despite *Branzburg*, "the First Amendment protects us."<sup>139</sup> Journalists also effectively killed several bills through their division on the key question of whether to seek an absolute or qualified privilege.<sup>140</sup> Excluding information vital to criminal defendants also was cited by some who opposed shield bills.<sup>141</sup> More recently, some members of Congress rested their opposition to a reporters' privilege on national security grounds.<sup>142</sup>

In 2007, all of those obstacles were removed in the House of Representatives, largely thanks to strong bipartisan efforts on both sides of the Hill.<sup>143</sup> The resulting bill, H.R. 2102, the Free Flow of Information Act of 2007, is a product of compromise on the key issues that doomed earlier bills. As a result, on October 16, 2007, the House enacted it by an overwhelming and veto-proof margin.<sup>144</sup> This Part summarizes how the provisions of H.R. 2102 address concerns raised about earlier shield bills.

#### A. A Functional Definition of "Journalist"

In *Branzburg*, Justice White declined to recognize a reporters' privilege under the First Amendment, at least in part, because of the

137. 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).

138. See *infra* notes 145-151 and accompanying text.

139. Dalglish Remarks, *supra* note 79.

140. *Id.*; Berger, *supra* note 137, at 1391-92.

141. See *infra* note 287 and accompanying text.

142. See *infra* notes 169-170 and accompanying text.

143. Richard Lugar (R-Ind.), Arlen Specter (R-Pa.), and Christopher Dodd (D-Conn.) were early leaders in the Senate, proposing a number of shield bills. See, e.g., Free Flow of Information Act of 2007, S. 2035, 110th Cong. (2007) (sponsored by Sen. Specter); Free Flow of Information Act of 2006, S. 2831, 109th Cong. (2006) (sponsored by Sen. Lugar); Free Speech Protection Act of 2005, S. 369, 109th Cong. (2005) (sponsored by Sen. Dodd). Representative Mike Pence (R-Ind.) introduced companion legislation to Senator Lugar's shield bill in 2005, H.R. 3323, which he reintroduced with Representative Rick Boucher (D-Va.) as H.R. 2102 in 2007. See Free Flow of Information Act of 2007, H.R. 2102, 110th Cong. (2007) (sponsored by Reps. Boucher and Pence).

144. See *supra* note 13 and accompanying text.

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.’”<sup>145</sup> Instead, it also encompasses “the right of the lonely pamphleteer . . . just as much as . . . the large metropolitan publisher.”<sup>146</sup> Information is communicated to the public “by lecturers, political pollsters, novelists, academic researchers, and dramatists.”<sup>147</sup> 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.<sup>148</sup>

More recently, others 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”<sup>149</sup> under the First Amendment:

[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?<sup>150</sup>

Some senators and witnesses raised similar concerns during the most recent hearings on S. 2831.<sup>151</sup>

While their concerns are understandable, they are unfounded for 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.<sup>152</sup> As Judge Sentelle explained, Congress is better positioned to resolve the “fundamental policy question involved in the crafting of such a privilege.”<sup>153</sup> On the other hand,

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145. *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972) (citing *Lovell v. Griffin*, 303 U.S. 444, 450, 452 (1938)).

146. *Id.* at 704.

147. *Id.* at 705.

148. *Id.*

149. *In re Grand Jury Subpoena*, 438 F.3d 1141, 1156 (D.C. Cir. 2006) (Sentelle, J., concurring).

150. *Id.*

151. See *Hearing on H.R. 2102*, *supra* note 15, at 91–92 (testimony of Steven Clymer, Professor, Cornell Law School); *id.* at 108–11 (statement of Paul J. McNulty, Deputy Att’y Gen., United States Department of Justice).

152. See *supra* notes 118–119 and accompanying text.

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

federal courts are well positioned to apply a statutory definition of journalist, just as they already do in other contexts.<sup>154</sup>

Therefore, it was important for Congress to focus on what the person seeking coverage as a journalist was doing when he or she received the information being subpoenaed, and not on the medium of communication they used for their stories, such as blogging. Gregg Leslie, Legal Director for the Reporters Committee for Freedom of the Press explained:

The medium doesn't answer the question. It has to do more 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.<sup>155</sup>

To address these concerns, the House adopted a functional definition of journalist that included four components. First, H.R. 2102 focuses on whether the person seeking the privilege has engaged in acts of journalism: “covered person’ means a person who regularly gathers, prepares, collects, photographs, records, writes, edits, reports, or publishes news or information that concerns local, national, or international events or other matters of public interest.”<sup>156</sup> That language tracks definitions used in existing state shield laws such those of North Carolina<sup>157</sup> and Oklahoma.<sup>158</sup>

Second, H.R. 2102 requires an examination of 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,<sup>159</sup> and the bill makes that requirement

154. 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) (2000). *E.g.*, Long v. U.S. Dep’t of Justice, 450 F. Supp. 2d 42, 82–85 (D.D.C. 2006), *order amended on other grounds*, 457 F. Supp. 2d 30 (D.D.C. 2006).

155. FixYourThinking.com, Are Bloggers Journalists?, <http://jackwhispers.blogspot.com/2006/03/are-bloggers-journalists-courts-seem.html> (Mar. 28, 2006) (quoting Gregg Leslie, Legal Defense Director, The Reporters Committee for Freedom of the Press).

156. H.R. 2102, 110th Cong. § 4(2) (2007).

157. *See* N.C. GEN. STAT. § 8-53.11(a) (2007) (defining a journalist as “[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”).

158. *See* OKLA. STAT. ANN. tit. 12, § 2506(A)(7) (West 1993) (defining a journalist as “any man or woman 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”) (emphasis added).

159. *See supra* notes 24–39 and accompanying text.

explicit.<sup>160</sup> 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 is not required.<sup>161</sup> This flexible approach ensures that the purpose of the privilege is being fulfilled. It also is consistent with one already followed by federal courts.<sup>162</sup>

Third, the definition of “covered person” is limited to those engaging in acts of journalism for their “livelihood or for substantial financial gain.”<sup>163</sup> Representatives Boucher and Pence added this requirement through a manager’s amendment to “narrow[] the definition of a ‘covered person’ to include only professional journalists.”<sup>164</sup> This change ensures that casual bloggers who do not meet a conventional definition of a journalist—“a person whose *occupation* is journalism”<sup>165</sup>—cannot avail themselves of the shield’s protection.<sup>166</sup> At the same time, it would cover freelance journalists who have not yet sold their story and reporters who are not in an employment relationship with news companies, as long as they earn their livelihood from their reporting.

Fourth, several persons and entities were expressly excluded from the definition of “covered person”: (1) “a foreign power or agent of a foreign power” as defined by the Foreign Intelligence Surveillance Act of 1978<sup>167</sup> (“FISA”); (2) “any organization designated . . . as a foreign terrorist organization” under the Immigration and

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160. See H.R. 2102 § 4(2) (defining “covered person” for the purpose of the bill as “a person who regularly gathers, prepares, collects, photographs, records, writes, edits, reports, or publishes news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public”).

161. 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.

162. See generally *Von Bulow v. Von Bulow*, 811 F.2d 136, 145–46 (2d Cir. 1987) (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).

163. H.R. 2102 § 4(2).

164. See H.R. REP. NO. 110-370, at 12 (2007) (additional views of Rep. Smith); see also 153 CONG. REC. H11, 600 (daily ed. Oct. 16, 2007) (statement of Rep. Boucher) (pointing out that the manager’s amendment “narrows the definition of the individuals who may assert the privilege”).

165. WEBSTER’S NEW WORLD DICTIONARY 762 (2d ed. 1980) (emphasis added).

166. See generally 153 CONG. REC. H11, 600 (daily ed. Oct. 16, 2007) (statement of Rep. Pence) (explaining that this narrower “definition will exclude casual bloggers but not all bloggers”).

167. 50 U.S.C. § 1801(a)–(b) (2000 & Supp. V 2005).

Nationality Act;<sup>168</sup> (3) anyone specially designated as a terrorist under FISA; (4) anyone specially designated as a global terrorist by the Treasury Department; and (5) any terrorist organization under FISA.<sup>169</sup> These exceptions were added to address the concerns of the Director of National Intelligence that the national security exception “would hinder efforts to investigate and prosecute leakers of classified information” and could be exploited by foreign governments.<sup>170</sup>

In addition to journalists, the shield law applies to their communications service providers and their supervisors, employers, or affiliates.<sup>171</sup> By doing so, journalists have some measure of protection from the problem described by Lucy Dalglish: avoiding use of telephones, e-mails, notes, or conversations with their editors to communicate source information out of fear that they will become subject to being subpoenaed.<sup>172</sup> Without that protection, journalists will be chilled in an entire range of communications that they routinely use in preparing their stories.<sup>173</sup>

#### B. A Qualified Privilege that Gives the Press Breathing Room

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.”<sup>174</sup> At least thirteen states and the District of Columbia adopted absolute privileges in their shield laws for confidential sources,<sup>175</sup> five of which

168. 8 U.S.C. § 1189 (2000 & Supp. V 2005).

169. H.R. 2102, 110th Cong. § 4(2) (2007).

170. 153 CONG. REC. H11, 589 (daily ed. Oct. 16, 2007) (statement of Rep. Conyers).

171. H.R. 2102 §§ 3–4.

172. Dalglish Remarks, *supra* note 79.

173. *Id.*

174. See *Branzburg v. Hayes*, 408 U.S. 665, 712 (1972) (Douglas, J., dissenting); see also *supra* notes 56–58 and accompanying text (summarizing Justice Douglas’s reasoning).

175. ALA. CODE § 12-21-142 (LexisNexis 2005); ARIZ. REV. STAT. ANN. § 12-2237 (2003); CAL. EVID. CODE § 1070 (West 1995); D.C. CODE § 16-4703 (2001); IND. CODE ANN. § 34-46-4-2 (LexisNexis 1998); KY. REV. STAT. ANN. § 421.100 (West 2006); MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (LexisNexis 2006); MONT. CODE ANN. § 26-1-902 (2007); NEB. REV. STAT. § 20-146 (1997); NEV. REV. STAT. § 49.275 (2003); N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1999 & Supp. 2008); OHIO REV. CODE ANN. §§ 2739.04, 2739.12 (LexisNexis 2000); OR. REV. STAT. ANN. § 44.520 (West 2003); 42 PA. CONS. STAT. ANN. § 5942 (West 2002). The New York shield law provides a qualified privilege for non-confidential information or sources. 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. 42 PA. CONS. STAT. ANN. § 5942(b).

also apply to non-confidential information.<sup>176</sup> At the federal level, the Third Circuit Court of Appeal has suggested the privilege may be absolute in some circumstances:

[A] journalist does in fact possess a privilege that is deeply rooted in the [F]irst [A]mendment. 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.<sup>177</sup>

However, no federal circuit, including the Third Circuit, has adopted an absolute reporters' privilege in all cases.<sup>178</sup>

Earlier federal shield bills often proposed making the reporters' shield absolute. For example, a 1978 bill offered by Representative Philip Crane (R-Ill.) would have prohibited any federal, state, or local governmental authority from issuing search warrants and subpoenas on reporters.<sup>179</sup> Similarly, Representative Bill Green (R-N.Y.) introduced a bill in 1979 shielding journalists from disclosure of "any news, or sources of any news," even to grand juries.<sup>180</sup> The Dodd shield bill<sup>181</sup> and the earlier Lugar shield bill<sup>182</sup> included absolute privileges for the disclosure of journalists' confidential sources and information. All proved unworkable.

The reason is evident. There was a developing consensus that the reporters' privilege must yield to other competing concerns in certain circumstances. Professor Geoffrey Stone argued for an absolute privilege, but acknowledged some cases when it should not apply.<sup>183</sup> A qualified privilege can strike the right balance. The press can have breathing room under a federal shield, subject to some narrow exceptions.

H.R. 2102 provides for a qualified privilege "that prevents a reporter's source material from being revealed except under narrow circumstances."<sup>184</sup> Thus, it does not, as Professor Clymer contends,

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176. 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.

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

178. *See supra* Part II.C.3.

179. *Id.*

180. *A Short History*, *supra* note 136, at 9.

181. Free Speech Protection Act of 2005, S. 369, 109th Cong. (2005).

182. Free Flow of Information Act of 2005, S. 340, 109th Cong. (2005).

183. *See Reporters' Shield Legislation: Issues and Implications, Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2005) [hereinafter *Hearing, Issues and Implications*] (testimony of Geoffrey R. Stone, Professor, University of Chicago Law School).

184. H.R. REP. NO. 110-370, at 3 (2007).

ensure that reporters can provide “absolute, unqualified assurances of confidentiality” to their sources.<sup>185</sup>

Section two of the bill sets the basic parameters for the privilege, which generally follow Justice Stewart’s balancing test:<sup>186</sup>

In any matter arising under Federal law, a Federal entity may not compel a covered person to provide testimony or produce any document related to information obtained or created by such covered person as part of engaging in journalism, unless a court determines by a preponderance of the evidence, after providing such notice and an opportunity to be heard to such covered person—

that the party seeking to compel production of such testimony or document has exhausted all reasonable alternative sources (other than the covered person) of the testimony or document;

that . . . the testimony or document sought is critical [to the matter in which it is sought] . . . ;

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

disclosure of the identity of such a source is necessary [or essential] to prevent, or to identify any perpetrator of, an act of terrorism . . . ;

(B) . . . to prevent imminent death or significant bodily harm . . . ;

. . . to identify a person who has disclosed . . . a trade secret, . . . ; individually identifiable health information, . . . ; or nonpublic personal information . . . ; or

(D) . . . [to identify in a criminal investigation or prosecution the source of an unauthorized leak that] has caused or will cause significant and articulable harm to the national security; and

(4) that the public interest in compelling disclosure of the information or document involved outweighs the public interest in gathering or disseminating news or information.<sup>187</sup>

The balancing test merely requires that “law enforcement . . . pursue other sources of information before being able to turn to journalists for their notes.”<sup>188</sup>

During the floor vote, the House added one additional factor to be included in the balancing test: “a court may consider the extent of

185. Clymer Remarks, *supra* note 110.

186. See *supra* notes 64–67 and accompanying text.

187. H.R. 2102, 110th Cong. § 2(a) (2007).

188. H.R. REP. NO. 110-370, at 8.

any harm to national security.”<sup>189</sup> The purpose of this amendment was to allow “the judge to consider this factor in any case, not just a criminal case. It allows a judge to consider any leak that harms national security, not just a leak in violation of the laws on classified information.”<sup>190</sup>

The bill also includes certain limitations on the content of information that can be obtained from journalists. The content of any testimony or document that is compelled shall:

[N]ot be overbroad, unreasonable, or oppressive and, as appropriate, be limited to the purpose of verifying published information or describing any surrounding circumstances relevant to the accuracy of such published information; and

be narrowly tailored in subject matter and period of time covered so as to avoid compelling production of peripheral, nonessential, or speculative information.<sup>191</sup>

At the same time, the shield does not apply to journalists who are eyewitnesses to or participants in criminal or tortious conduct, except where the alleged conduct “is the act of transmitting or communicating the information, record, document, or item sought for disclosure.”<sup>192</sup> In this manner, “[t]he bill . . . strikes a balance with respect to promoting the free dissemination of information and ensuring effective law enforcement and the fair administration of justice.”<sup>193</sup>

#### IV. A BALANCED SHIELD LAW THAT ADEQUATELY ADDRESSES LEGITIMATE CONCERNS

Professors Clymer and Eliason ably presented many of the arguments against a federal shield law in an incisive manner that often was as entertaining as it was informative. As current and former prosecutors, each provided a thorough summation of some of the issues that Congress has wrestled with since *Branzburg* was decided. Their respective contributions to the debate over a federal shield law, both in the halls of Congress and in the lecture hall at the Washington College of Law, are invaluable. The experiences of such public servants are essential to ensuring that any federal shield law that is enacted adequately reflects all competing concerns.

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189. H.R. 2102 § 2(b).

190. 153 CONG. REC. H11, 601 (daily ed. Oct. 16, 2007) (statement of Rep. Smith).

191. H.R. 2102 § 2(c).

192. H.R. 2102 § 2(e).

193. H.R. REP. NO. 110-370, at 3.

Nevertheless, as is often the case in federal legislation, reasonable minds can differ on how those concerns should be resolved. In some instances, there simply is a divergence of opinion about the empirical evidence needed to justify the shield law. In others, their criticism already has been adequately addressed by the shield bill that passed the House. However, the crux of the opposition to Professors Clymer and Eliason, and indeed the Bush Administration, lies in a fundamental variance in the role that they believe the courts should play in keeping federal prosecutors in check. It is that last point that cuts most against their argument, as many conservatives—including a number of former federal prosecutors—have acknowledged.

There are several criticisms of a federal shield law offered by Professor Clymer and Professor Eliason. First, they maintain that there is no evidence that, without a shield, confidential sources will dry up and chill the free flow of information to the public.<sup>194</sup> Second, Professor Clymer contends that a shield actually impedes the purposes of the First Amendment by denying the public information that it wants to know.<sup>195</sup> Third, Professor Eliason insists that even without a shield law, other alternatives can work just as effectively to get information from confidential sources.<sup>196</sup> Fourth, both argue that a privilege is special treatment that places reporters above the law and promises more than it can deliver.<sup>197</sup> Fifth, they reason that a shield will effectively immunize those who illegally leak information to the press.<sup>198</sup> Sixth, both claim that a journalist's shield is very costly and will lead to unjust civil and criminal results.<sup>199</sup> This Part will explain why their concerns either are unfounded or are outweighed by the important public interests advanced by H.R. 2102.

#### A. *Unregulated Federal Subpoenas Have a Chilling Effect*

According to both Professors Clymer and Eliason, one of the leading reasons not to adopt a shield law is that it is unnecessary. Their argument comes in two parts. First, Professor Eliason asserts that there is no evidence of a dramatic increase in federal subpoenas being issued without a shield law.<sup>200</sup> His conclusion is certainly

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194. See *infra* Part IV.A.

195. See *infra* Part IV.B.

196. See *infra* Part IV.C.

197. See *infra* Part IV.D.

198. See *infra* Part IV.E.

199. See *infra* Part IV.F.

200. Professor Randall Eliason, Remarks at the American University Law Review Symposium: Left Out in the Cold? The Chilling of Speech, Association, and the Press in Post-9/11 America (Sept. 20, 2007) [hereinafter Eliason Remarks], *video available at* <http://www.wcl.american.edu/journal/lawrev/symposia.cfm#>.

plausible, if we only consider the number of subpoenas reported by the attorney general in the past few years. During hearings on H.R. 2102, a Justice Department representative testified that subpoenas had been sought in only nineteen cases since 1991, including just four since 2001.<sup>201</sup>

However, that statistic does not tell the complete story. The number of journalists subpoenaed is far greater than the number of cases in which the department has sought them. In 2001, the Department of Justice “disclosed that it had issued 88 subpoenas involving news reporters in the previous decade.”<sup>202</sup> 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.”<sup>203</sup> According to another news account, echoed by the Reporters Committee,<sup>204</sup> “[m]ore than 40 reporters have been questioned in recent years by federal prosecutors about their sources, notes and reports in civil and criminal cases.”<sup>205</sup>

Further, the Department’s statistics for subpoenas directed at reporters do not include those sought by special prosecutors, which comprise a large number of recent cases in which subpoenas have been issued.<sup>206</sup> Regardless of the actual number of subpoenas, and irrespective of whether that number means that “journalists are drowning in a sea of subpoenas,”<sup>207</sup> the results are still evident.

Lucy Dalglish reported that in the first few years she was with the Reporters Committee, it “had only one major showdown in the federal courts, and that was involving a Houston freelancer by the name of Vanessa Leggett.”<sup>208</sup> In contrast, today Ms. Dalglish says the Reporters Committee is “working on subpoenas all the time.”<sup>209</sup> The Reporters Committee’s experience is corroborated by the apparent lack of subpoenas issued between 1976 and 2000 to compel

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201. *Hearing on H.R. 2102*, *supra* note 15, at 18 (testimony of Rachel Brand, Assistant Att’y Gen., Office of Legal Policy, United States Department of Justice).

202. Adam Liptak, *Leaks and the Courts: There’s Law, But Little Order*, N.Y. TIMES, Oct. 5, 2003, at WK3.

203. *Id.*

204. Dalglish Remarks, *supra* note 79.

205. Editorial, *Protecting Sources: Preserving the Free Flow of Information*, WASH. POST, Sept. 21, 2007, *reprinted in* 153 CONG. REC. H11, 595 (daily ed. Oct. 16, 2007).

206. Dalglish Remarks, *supra* note 79.

207. REPORTERS COMM. FOR FREEDOM OF THE PRESS, AGENTS OF DISCOVERY: A REPORT ON THE INCIDENCE OF SUBPOENAS SERVED ON THE NEWS MEDIA IN 1997 1 (1999).

208. Dalglish Remarks, *supra* note 79.

209. *Id.*

journalists to reveal their sources: only two, both of which were quashed.<sup>210</sup>

Second, Professor Clymer takes issue with the notion that there is a chilling effect. He contends that “there is no evidence that the absence of [a journalist’s] privilege, which has been the law for years . . . prevents sources from coming forward.”<sup>211</sup> According to that argument, echoed by Representative Lamar Smith of Texas during the House floor debate, “for 200 years in this Nation, the press, in fact, has flourished. Information has flowed freely. And that is why I believe this bill is simply a solution in search of a real problem.”<sup>212</sup>

When Representative Pence spoke at the Symposium, he described an oft-cited example of a source who would have been chilled without judicial protection: “Deep Throat.”<sup>213</sup> He asserted, “[n]ot long ago, [a] reporters’ assurance of confidentiality was unquestionable. That assurance led to sources . . . like [in] Watergate, where government . . . misdeeds were brought to light . . . . However, the press cannot, this day, make the same assurance of confidentiality to sources.”<sup>214</sup> Professor Clymer took strong exception to Representative Pence’s argument, contending that he was “flat out wrong” about the law being different during Watergate.<sup>215</sup> The facts do not support Professor Clymer’s conclusion. When Bob Woodward and Carl Bernstein were subpoenaed to identify their source in 1973, the court quashed the subpoenas. The court reasoned that it “cannot blind itself to the possible ‘chilling effect’ the enforcement of these broad subpoenas would have on the flow of information to the press, and so to the public.”<sup>216</sup>

Whether there is a chilling effect on speech in the absence of a journalist’s privilege is an open question, if it is only the numbers that matter. Lucy Dalglish is correct that “it’s very difficult to prove anything about the need.”<sup>217</sup> How do you prove the negative—namely, that without a shield law, fewer confidential sources are

210. *Hearing on H.R. 2102, supra* note 15, at 32 (testimony of Lee Levine, Partner, Levine, Sullivan, Koch & Schulz).

211. Clymer Remarks, *supra* note 110.

212. 153 CONG. REC. H11, 590 (daily ed. Oct. 16, 2007) (statement of Rep. Smith).

213. Congressman Mike Pence, Remarks at the American University Law Review Symposium: Left Out in the Cold? The Chilling of Speech, Association, and the Press in Post-9/11 America (Sept. 20, 2007), *video available at* <http://www.wcl.american.edu/journal/lawrev/symposia.cfm#>.

214. *Id.*

215. Clymer Remarks, *supra* note 110.

216. *Democratic Nat’l Comm. v. McCord*, 356 F. Supp. 1394, 1397 (D.D.C. 1973).

217. Dalglish Remarks, *supra* note 79.

coming forward? You can try to measure it, but empirically it is virtually an impossible task, as the Court explained in *Branzburg*:

The available data indicate that some newsmen rely a great deal on confidential sources and that some informants are particularly sensitive to the threat of exposure and may be silenced if it is held by this Court that, ordinarily, newsmen must testify pursuant to subpoenas, but the evidence fails to demonstrate that there would be a significant constriction of the flow of news to the public if this Court reaffirms the prior common-law and constitutional rule regarding the testimonial obligations of newsmen. Estimates of the inhibiting effect of such subpoenas on the willingness of informants to make disclosures to newsmen are widely divergent and to a great extent speculative. It would be difficult to canvass the views of the informants themselves; surveys of reporters on this topic are chiefly opinions of predicted informant behavior and must be viewed in the light of the professional self-interest of the interviewees.<sup>218</sup>

That has not stopped researchers from trying to prove the chilling effect. Professor Vince Blasi's 1971 study is perhaps the best known one.<sup>219</sup> Among the 975 reporters interviewed, slightly more than half said that they relied on confidential sources for at least ten percent of their stories.<sup>220</sup> Among those using confidential sources, eight percent reported with some certainty that their ability to report had been adversely affected by the threat of a subpoena.<sup>221</sup> Professor Blasi acknowledged the methodological problems he faced in trying to resolve the question of a chilling effect.<sup>222</sup>

A separate study conducted by John Osborn in 1985 did little to clarify the issue.<sup>223</sup> According to that study, 31.25% of responding reporters relied on confidential sources in their news stories.<sup>224</sup> Slightly less than twenty percent of respondents reported that their stories were hurt by the possibility of having to identify their confidential sources.<sup>225</sup> Yet, nearly all reported that they were

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218. *Branzburg v. Hayes*, 408 U.S. 665, 693-94 (1972) (footnotes omitted).

219. See generally Vince Blasi, *The Newsmen's Privilege: An Empirical Study*, 70 MICH. L. REV. 229 (1971). Professor Blasi's study was cited by the Supreme Court in *Branzburg*, 408 U.S. at 694 n.33.

220. Blasi, *supra* note 219, at 247.

221. *Id.* at 270.

222. *Id.* at 235-39.

223. See generally John E. Osborn, *The Reporter's Confidentiality Privilege: Updating the Empirical Evidence After a Decade of Subpoenas*, 17 COLUM. HUM. RTS. L. REV. 57 (1985).

224. *Id.* at 73.

225. *Id.* at 74-75.

“threatened by the potential diminution of the present limited and uncertain protection” in the absence of a shield law.<sup>226</sup>

The utility of both studies is lessened because the research is somewhat stale. That conclusion is especially true if, in fact, there has been an upsurge in the number of subpoenas issued in recent years. It therefore is welcome news that a professor at the University of Arizona is updating the Blasi and Osborn studies with more contemporary data.<sup>227</sup> Nevertheless, assuming that study faces the same obstacles as the earlier ones, not to mention the likelihood that some detractors will take exception to it regardless of the results, where does that leave us?

Well, for one thing, we have several examples of the chilling effect. Many reporters have described cases in which the threat of disclosure shut down their confidential sources. As columnist William Safire testified, “[b]elieve me, when a journalist is threatened with jail or, indeed, is jailed for refusing to blow the whistle on a whistleblower or to betray a trusting source, he or she feels a coercive chill.”<sup>228</sup>

Lucy Dalglish also points out that it is increasingly common for federal judges to impose heavy fines—hundreds or even thousands of dollars a day—on journalists in contempt, and sometimes even prohibit their employers from paying it.<sup>229</sup> Unless a journalist is independently wealthy, and few are, lengthy jail sentences and hefty fines certainly can discourage reporters from printing stories derived from confidential sources likely to be sought by prosecutors or civil litigants. Lee Levine testified during the House hearing on H.R. 2102 about one such case:

[T]he *Cleveland Plain Dealer* . . . decided that it was obliged to withhold from publication two investigative reports because they were predicated on documents provided by confidential sources.

Doug Clifton, the newspaper’s editor, explained that the public would have been well-served to know about these stories, but that publishing them would “almost certainly lead to a leak investigation and the ultimate choice: talk or go to jail. Because talking isn’t an option and jail is too high a price to pay, these two stories will go untold for now.”<sup>230</sup>

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226. *Id.* at 77.

227. Dalglish Remarks, *supra* note 79.

228. *Hearing on H.R. 2102*, *supra* note 15, at 29 (testimony of William Safire, Chairman, The Dana Foundation).

229. Dalglish Remarks, *supra* note 79.

230. *Hearing on H.R. 2102*, *supra* note 15, at 33 (testimony of Lee Levine, Partner, Levine, Sullivan, Koch & Schulz).

Representative John Yarmuth, a former journalist,<sup>231</sup> also described the impact of not being able to assure anonymity to a source:

At my newspaper in Louisville, we were able to open doors for the community on several occasions due to confidential accounts of protected sources which would have otherwise remained closed to us forever. . . . [W]e saw what happens when we fail to protect a source's identity. There, Jeffrey Wigand, the famous tobacco whistle-blower, was victimized by threats and intimidation, ultimately losing his job, his family and his home. He is considered a hero today, but for many the lesson from that episode was, if you have incriminating information that will benefit the American public, just keep it to yourself.<sup>232</sup>

But it is not just reporters and Democrats who feel that way. Many conservative Republicans, including minority whip Roy Blunt<sup>233</sup> and Representative Pence,<sup>234</sup> the latter a former journalist, have reached the same conclusion.

In the end, it is unnecessary to resolve the question of whether the lack of a shield law causes a chilling effect. Instead, as the Court acknowledged in *Branzburg*, that is a policy decision left to the legislative branch: Congress is 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."<sup>235</sup> Having decided that a journalist's privilege is necessary, by a vote of 398 to 21, undoubtedly federal courts uninterested in legislating from the bench will not disturb that judgment.

*B. A Shield Law Will Facilitate, Not Inhibit, the Free Flow of Information*

Professor Clymer next makes what can be characterized as one of the more unusual arguments against a shield law. He maintains that a shield law undermines the free flow of information because it "will deny . . . the public, very important information [it] ought to have about the way the government operates and other newsworthy stories."<sup>236</sup> How does he reach that conclusion?

He begins by citing several high profile cases, including the leak of Valerie Plame's identity, the BALCO grand jury leak, and the leak of information that Wen Ho Lee and Steven Hatfill were suspects in

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231. Congressman John Yarmuth: John's Biography, <http://yarmuth.house.gov/?sectionid=28&sectiontree=6,28&itemid=8> (last visited Apr. 12, 2008).

232. 153 CONG. REC. H11, 592 (daily ed. Oct. 16, 2007) (statement of Rep. Yarmuth).

233. *Id.* at 591 (statement of Rep. Blunt).

234. *Id.* at 591-92 (statement of Rep. Pence).

235. *Branzburg v. Hayes*, 408 U.S. 665, 706 (1972).

236. Clymer Remarks, *supra* note 110.

criminal investigations.<sup>237</sup> In each of these cases, either the government or the civil litigant subpoenaed journalists who reported information obtained from a leak given an assurance of anonymity.<sup>238</sup> Professor Clymer chides the journalists for resisting the subpoenas, supported by a “well financed entity [that] has fought tooth and nail to keep information about those leaks from the public,”<sup>239</sup> including “the identity and the circumstances of the leaks.”<sup>240</sup>

This clever bit of rhetoric does not comport with reality in several important respects. As an initial matter, opponents of a shield law do not want to know the identity of leakers because of an altruistic desire to inform the public about them. Prosecutors like Professor Clymer subpoena journalists to learn the identity of sources so they can prosecute them. Civil litigants, such as Lee and Hatfill, are seeking the identity in an attempt to win a civil judgment that benefits themselves, not the public at large. To the extent that information about the identity of leaks might be published when those cases are tried, any benefit to the public is purely secondary to the primary self-interests that prosecutors and litigants are pursuing.

In addition, Professor Clymer’s assertion assumes that confidential sources will still come forward if they know that a journalist’s assurance of anonymity will never be honored. Common sense, as well as the experience of journalists,<sup>241</sup> tells us otherwise. A source would have to be dumb enough or reckless enough to talk to a reporter without regard for his or her safety or well-being. What is far more likely to happen is the alternative suggested by Professor Eliason in his House testimony: if confidential sources still come forward, they will not reveal their identity to journalists, choosing instead to drop anonymous notes or place untraceable calls.<sup>242</sup> In the process, many important stories will be killed because editors have no way to corroborate the underlying details.<sup>243</sup> After all, professional journalists cannot take shortcuts in reporting the news.

In a similar vein, the argument presupposes that the leak itself is news that will be reported. But if the source of the leak has nowhere to go without revealing himself or herself, many leaks simply will not happen in the first place. In that way, Professor Clymer is not just putting the cart before the horse; there is no cart and no horse. It

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237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *See supra* notes 228–232 and accompanying text.

242. *See infra* notes 253–257 and accompanying text.

243. *See infra* notes 261–264 and accompanying text.

appears that is precisely the result that many government officials would prefer.

Concomitantly, Professor Clymer acknowledges the importance of leaks in ensuring a well-informed public. He concedes “that confidential sources are essential in a free country,” without which “reporters are reduced to simply regurgitating official versions of news events, versions that may be incomplete or inadequate.”<sup>244</sup> He further admits that “we have seen some of the most important leaks in decades come very recently; leaks about secret CIA presence in Europe, leaks about warrantless wiretapping, leaks about abuses at Abu Ghraib prison.”<sup>245</sup> That leads him to conclude that the lack of a federal shield law has not stopped the presses.

That may be true. But at the same time, the fact that journalists were prepared to go to jail and face substantial fines to protect their sources made those leaks possible. Given the recent trends we have seen in terms of the increasingly aggressive stance of the courts, federal government, and civil litigants in pursuing source identity from reporters, the continued absence of a federal shield law does not bode well for the prospect that those leaks will be forthcoming in the future. That is precisely why most commentators and members of Congress have concluded that in the debate over H.R. 2102, a shield law lives up to its name: preserving, not impeding, the free flow of information to the public.

### C. *Alternatives to a Shield Law are Less Effective*

Professor Eliason maintains that a journalist’s privilege is not needed because of the limits of confidentiality and “the availability of anonymous tips.”<sup>246</sup> Curiously, in both instances, Professor Clymer and Professor Eliason make several concessions that directly undermine that argument. Instead of disproving the need for a shield law, their contentions reinforce the policy and practical concerns that led to the enactment of H.R. 2102.

Preliminarily, the alternative protection proposed by Professor Eliason rings hollow. He asserts that “[b]y simply promising never voluntarily to reveal a source’s name . . . a reporter can assure a high degree of confidentiality.”<sup>247</sup> He says that a reporter may simply tell a source:

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244. Clymer Remarks, *supra* note 110.

245. *Id.*

246. *Hearing on H.R. 2102, supra* note 15, at 57 (testimony of Randall Eliason, Professor, George Washington University Law School).

247. *Id.* at 55.

I will do all I can to protect your identity. I will not publish it, will not reveal it to anyone else voluntarily, and if I am ever subpoenaed I will fight as far and as hard as I can to avoid having to divulge it. Only if I'm compelled to do so by a valid court order after exhausting all of my appeals would I reveal your name.<sup>248</sup>

Professor Clymer made a similar argument at the Symposium.<sup>249</sup>

Let's test their argument. Place yourself in the shoes of a government employee who has learned about the Bush Administration's illegal warrantless wiretapping program.<sup>250</sup> In 2005, you call two *New York Times* reporters with the intention to reveal that following 9/11, "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."<sup>251</sup> You are well aware that President Bush stated 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."<sup>252</sup>

In response, the reporters you call, Eric Lichtblau and James Risen, recite Professor Eliason's script for assuring you an empty promise of confidentiality. What do you do? Common sense and Professor Clymer provide the answer: "Now, if that happens and the source says to the reporter, 'Without that guarantee [of confidentiality], I'm not talking to you' and hangs up," there has been a chilling effect.<sup>253</sup> Experience tells us that the government does not lose in federal court when it subpoenas a journalist in a criminal investigation before a grand jury to identify a source, regardless of how many appeals are taken.<sup>254</sup> Armed with that knowledge, you are not going to reveal the illegal program unless you want to be charged with treason and face, at a minimum, a lengthy prison sentence. In the process, the illegal government program continues, free of public scrutiny or

248. *Id.*

249. Clymer Remarks, *supra* note 110.

250. *See* Am. Civil Liberties Union v. Nat'l Security Agency, 438 F. Supp. 2d 754, 775 (E.D. Mich. 2006) (holding that the program was "obviously in violation of the Fourth Amendment").

251. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1. President Bush confirmed this accusation. President George W. Bush, President's Radio Address from the White House, (Dec. 17, 2005), <http://www.whitehouse.gov/news/releases/2005/12/20051217.html>.

252. President George W. Bush, President Discusses Job Creation with Business Leaders at the University of Chicago (Sept. 30, 2003), <http://www.whitehouse.gov/news/releases/2003/09/20030930-9.html>.

253. Clymer Remarks, *supra* note 110.

254. *See supra* notes 124–132 and accompanying text.

congressional oversight. What Professor Clymer describes as an “extremely important leak” never occurs.<sup>255</sup>

Professor Eliason’s alternative suggestion that sources simply can provide their information anonymously to reporters is equally empty. He argues that “a source who wants to leak information to a reporter but is worried about being identified always has the option of making an anonymous phone call.”<sup>256</sup> But even Professor Eliason does not seem convinced, acknowledging that it is “probably true” that “an anonymous tip is not as useful or reliable as a known source.”<sup>257</sup>

That is unsurprising. Certainly, Professor Eliason’s own experience as a federal prosecutor should tell him that a confidential source that remains anonymous even to law enforcement is worth very little. It is well established that “[w]hen confronted with hearsay information from a confidential informant, ‘a court must consider the veracity, reliability, and the basis of knowledge for that information as part of the totality of the circumstances for evaluating the impact of that information.’”<sup>258</sup> If an affidavit attesting to the veracity of a confidential source is not provided—and it cannot be if investigators do not know the identity of the source—there must be “substantial independent police corroboration.”<sup>259</sup> If corroborating evidence is unavailable, the information obtained from the anonymous source is worthless and will not support issuing a warrant.<sup>260</sup>

The same holds true for anonymous tips to journalists. As William Safire testified:

The idea that it is easy for a source to simply send in [an] anonymous document and expect any results from it is unrealistic. No good reporter will take a tip or a document from an anonymous source that he can’t get back to and ask questions of and check out. That is the whole idea of reporting, is [sic] to see if you can trust our source.<sup>261</sup>

Mr. Safire provided a compelling example to support his conclusion. For years, he relied upon confidential tips provided by William Casey, who later became the director of the CIA.<sup>262</sup> At one point during their relationship, Safire said that Casey “lied in his

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255. Clymer Remarks, *supra* note 110.

256. *Hearing on H.R. 2102*, *supra* note 15, at 57 (testimony of Randall Eliason, Professor, George Washington University Law School).

257. *Id.*

258. *United States v. Frazier*, 423 F.3d 526, 532 (6th Cir. 2005) (citation omitted).

259. *Id.*

260. *Id.*

261. *Hearing on H.R. 2102*, *supra* note 15, at 75 (testimony of William Safire, Chairman, The Dana Foundation).

262. *Id.* at 75–76.

teeth” by telling him that he had not talked to reporter Bob Woodward.<sup>263</sup> The only way he was able to determine that was by knowing the identity of his source and getting a tip from another known source to tell him the information Casey provided to him was false.<sup>264</sup> Journalists cannot rely upon anonymous sources and false assurances of confidentiality any more than federal prosecutors can.

*D. H.R. 2102 Provides Necessary, but Qualified, “Special Protection”*

Professor Clymer takes issue with a federal shield law because underlying the privilege is a desire “to treat reporters differently.”<sup>265</sup> He explains, “[w]hat we are talking about is whether we should carve out a special legal rule that applies to reporters, when it doesn’t apply to most other witnesses.”<sup>266</sup> He is absolutely correct. As Lucy Dalglish explained, “it is in our interest to . . . show a little humility when we’re asking for that particular privilege because it is something special that nobody else gets other than a select few folks.”<sup>267</sup>

There are strong policy reasons behind this special protection. As the House Judiciary Committee observed, “[p]rivileges are created to promote sharing information without the fear that either party will be forced to disclose to a third party.”<sup>268</sup> The Committee noted that there are “typically two bases in the First Amendment” that support the privilege: “(1) the need to protect the free flow of information and ideas, and (2) the need to keep the government from interfering with the press or using it as an investigative arm.”<sup>269</sup> Professor Clymer apparently recognizes the value of both reasons.<sup>270</sup>

Professor Eliason, on the other hand, questions them. He cites the BALCO case as an example for why the public policy is disserved by a shield law:

Working with [defense attorney Troy] Ellerman [in publishing information obtained from grand jury testimony about the federal steroid investigation] and concealing his criminal scheme was not essential to the public’s ultimate right to know. It did, however, allow the *Chronicle* reporters to get the “scoop” by reporting certain information first, and to obtain exclusive material and greater publicity for their book. All of this advanced their careers

263. *Id.* at 76.

264. *Id.*

265. Clymer Remarks, *supra* note 110.

266. *Id.*

267. *Id.*

268. H.R. REP. NO. 110-370, at 6 (2007).

269. *Id.* at 4.

270. Clymer Remarks, *supra* note 110.

considerably. It appears that the reporters' desire to be out front on this story and their zeal to protect their source at any cost led them to close their eyes to Ellerman's crimes and to the significant harm caused by their own actions.<sup>271</sup>

The evidence suggests the contrary. The reporting of Mark Fainaru-Wada and Lance Williams, including the source information from Ellerman, provided an important public service. Their link between professional athletes and growing steroid use in the public schools proved critical to raising the public's consciousness of the growing epidemic.<sup>272</sup> Representatives John Conyers (D-Mich.) and Tom Davis (R-Va.) lauded their work by observing, "[s]ome 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."<sup>273</sup> They "put a face" on the issue of steroids and children.<sup>274</sup> For their reporting, they received accolades from the press,<sup>275</sup> Republican and Democratic members of Congress,<sup>276</sup> the California attorney general,<sup>277</sup> and even President Bush.<sup>278</sup> The two reporters did not cause any harm because the subpoenas directed at them proved wholly unnecessary when Ellerman, their source, came forward voluntarily.<sup>279</sup>

Professor Eliason's implication that a privilege is improper because journalists may be motivated by self-serving reasons that deny the public valuable information is without merit. H.R. 2102 does not apply the shield to any journalist who obtains information from a

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271. *Hearing on H.R. 2102*, *supra* note 15, at 63 (testimony of Randall Eliason, Professor, George Washington University Law School).

272. Mark Fainaru-Wada, *Dreams, Steroids, Death—A Ballplayer's Downfall*, S.F. CHRON., Dec. 19, 2004, at A1.

273. Letter from John Conyers, Jr. & Tom Davis, Members of Cong., to Alberto Gonzales, U.S. Attorney Gen., (Jan. 18, 2007), <http://judiciary.house.gov/media/pdfs/balcosubletter.pdf>.

274. Affidavit of Denise A. Garibaldi, PH.D. in Support of Motion to Quash Subpoenas by Mark Fainaru-Wada and Lance Williams ¶ 16, *In re Grand Jury Subpoenas*, 438 F. Supp. 2d 1111 (N.D. Cal. 2006) (No. CR 06-90225 JSW).

275. Press Release, White House Correspondents Association, White House Correspondents' Association 2005 Award Winners (Apr. 8, 2005), <http://www.whca.net/2005pressrelease.pdf>.

276. See Letter from John Conyers & Tom Davis to Alberto Gonzalez, *supra* note 273; Affidavit of John E. Sweeney in Support of Motion to Quash Subpoenas and/or for a Protective Order by Mark Fainaru-Wada and Lance Williams ¶ 7, *In re Grand Jury Subpoenas*, 438 F. Supp. 2d 1111 (N.D. Cal. 2006) (No. CR 06-90225 JSW).

277. Affidavit of California Attorney General Bill Lockyer ¶ 7, *In re Grand Jury Subpoenas*, 438 F. Supp. 2d 1111 (N.D. Cal. 2006) (No. CR 06-90225 JSW).

278. Affidavit of Mark Fainaru-Wada in Support of the Motions to Quash Subpoenas ¶ 8, *In re Grand Jury Subpoenas*, 438 F. Supp. 2d 1111 (N.D. Cal. 2006) (No. CR 06-90225 JSW).

279. See *supra* note 105 and accompanying text.

confidential source for purposes other than disseminating it to the public.<sup>280</sup> Additionally, even when public dissemination is intended, the shield still can be pierced if the source's identity is essential and is unavailable from other sources.<sup>281</sup>

Moreover, merely because journalists win accolades and advance their careers for reporting their stories to the public does not mean that their self-interests have trumped the very real service they are performing, any more than would Justice Department merit recognition of the successes of a career prosecutor. The fact that Woodward and Bernstein profited in their reporting of Deep Throat's leaks does not repudiate the importance of the free flow of information about Watergate to the public. The greater harm would have occurred if they either did not report the scandal or they shut off all of their future confidential sources by revealing Felt's identity.<sup>282</sup>

Furthermore, the media's special status under a shield law is not so different than the special role the press plays as the eyes and ears of the public. The press is allowed space in courtrooms and committee rooms, at White House events, on Air Force One, at Guantanamo hearings, when other members of the public are not admitted. These are all ways in which the media is afforded special treatment, not for its own benefit but for the benefit of public information.

Professor Eliason also maintains that a shield law promises more than it can deliver because it will not keep reporters out of jail.<sup>283</sup> He reasons, "[e]ven where there is a privilege . . . , if a court rules it does not apply . . . the reporter will often refuse to obey the court's order. . . . [T]herefore, journalists are asking Congress for a new legal protection, while . . . preparing to defy that law . . . when they don't agree with a judge's decision."<sup>284</sup>

There is some truth in his argument. H.R. 2102 provides for a qualified and not an absolute privilege.<sup>285</sup> That means that sometimes a court will find that a journalist must comply with a subpoena because of an applicable exception. A qualified privilege is necessary to address many legitimate concerns raised by Professor Clymer,

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280. See *supra* notes 160–162 and accompanying text.

281. See *supra* notes 184–190 and accompanying text.

282. As Lucy Dalglish explained, "[k]eeping your promises to your sources are right up there. . . . Why? Because . . . you need to ensure that people will continue to come and talk to you." Dalglish Remarks, *supra* note 79.

283. *Hearing on H.R. 2102*, *supra* note 15, at 58 (testimony of Randall Eliason, Professor, George Washington University Law School).

284. *Id.*

285. See *supra* Part III.B.

Professor Eliason, and others.<sup>286</sup> But compromising to protect competing interests bolsters, not invalidates, the legitimacy of the federal shield. Indeed, if the privilege were absolute, presumably both Professor Clymer and Professor Eliason would be among the first to point out that it could deny a criminal defendant exculpatory evidence in violation of the Sixth Amendment,<sup>287</sup> as well as other key information available under the bill.<sup>288</sup>

Reporters recognize that a qualified privilege will not always protect them from revealing their sources. As Lucy Dalglish observed, media organizations and newsrooms already have responded by “coming up with guidelines on . . . when [reporters are] allowed to use confidential sources and when they are not.”<sup>289</sup> Those actions reflect the reality that journalists cannot promise anonymity in all cases, with or without a shield law.

News organizations also need to be given more credit for their willingness to comply with lawful court orders after they have exhausted all appeals. That is precisely what happened when Matthew Cooper, a reporter for *Time* magazine, was subpoenaed to identify the source of the Valerie Plame leak. In a statement to its readers, *Time*'s editors explained that they did so because “[t]he same Constitution that protects the freedom of the press requires obedience to final decisions of the courts and respect for their rulings and judgments.”<sup>290</sup> If individual reporters or news organizations choose a different path than *Time* by violating a lawful order, they will of course have to face the consequences.

#### *E. H.R. 2102 Does Not Immunize Anyone from Prosecution*

Professor Clymer further asserts that a federal shield law would immunize those who unlawfully leak information to journalists. He reasons:

If a Congressman . . . wants to leak classified information . . . he can now have one of those off-the-record conversations . . . with the reporter, [and] if there is a reporter privilege he can sleep soundly at night knowing that he is immune from prosecution. Why does it immunize a leaker from prosecution? Well, if the investigators go to the leaker, the leaker can assert his Fifth Amendment privilege

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286. *Id.*

287. Eliason Remarks, *supra* note 200.

288. *See supra* Part III.B.

289. Dalglish Remarks, *supra* note 79.

290. Press Release, Time Inc., Statement of Time Inc. on the Matthew Cooper Case (June 30, 2005), <http://www.time.com/time/nation/article/0,8599,1078444,00.html>.

and not have to give any information. And the reporter . . . can assert the reporter's privilege and not have to give any information. And if it's a two-party conversation where this leak occurs there is no other source[] of information to solve this crime.<sup>291</sup>

Professor Eliason provided similar testimony before the House, arguing that a shield bill "would effectively grant immunity from prosecution to many who leak classified information," possibly resulting in an increase in "illegal leaks of classified information or other illegal communications with reporters."<sup>292</sup>

Both Professor Clymer and Professor Eliason are far off the mark. As an initial matter, they should be more precise in their use of terms. "Immunity" refers to a situation in which a witness is given a binding promise that he or she cannot be prosecuted for a crime or tort.<sup>293</sup> Nothing in the shield law meets that definition. No one, regardless of whether he or she is a source of illegal information or a reporter engaging in unlawful conduct, is immunized by a shield law.

Their argument also presupposes that the shield law provides an absolute privilege, which does not comport with the reality of H.R. 2102. The bill contains a qualified privilege with a number of exceptions that avoid the catastrophic results predicted by both professors.<sup>294</sup> The best way to illustrate this is by using Professor Clymer's own example.

Let's assume the government wants to learn the identity of the congressman who leaked the classified information. Despite following every "reasonable alternative source[] (other than the covered person),"<sup>295</sup> investigators have come up empty. The government then proceeds to federal court to request a subpoena to compel the reporter to reveal the name of the congressman. Accompanying its request, the government provides an affidavit in which it states: the information reported in the newspaper was properly classified; its disclosure provides reasonable grounds to believe a crime has occurred; its disclosure is likely to harm national security; the government has exhausted efforts to obtain the leak's identity from other sources; and the identity is critical to prosecuting the crime. Under H.R. 2102, the government would be able to meet

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291. Clymer Remarks, *supra* note 110.

292. *Hearing on H.R. 2102*, *supra* note 15, at 59 (testimony of Randall Eliason, Professor, George Washington University Law School).

293. BLACK'S LAW DICTIONARY 751 (6th ed. 1990).

294. *See supra* Part III.B.

295. H.R. 2102, 110th Cong. § 2(a)(1) (2007).

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its showing under a preponderance of the evidence and the subpoena would be issued.<sup>296</sup>

The House Judiciary Committee and managers of H.R. 2102 went to great pains to address the Justice Department's concerns that a journalist's shield would impede federal investigations. Representative Boucher described some of the changes incorporated into the manager's amendment:

First, [it] expands the instances in which source disclosure can be compelled to include a leak . . . of properly classified information . . . .

Secondly, source disclosure could be compelled when the reporter personally witnesses criminal conduct or when the reporter is himself involved in criminal conduct.

Third, source disclosure could occur when necessary to identify any perpetrator of an act of terrorism . . . or other . . . harm to national security.<sup>297</sup>

A motion to recommit offered by Representative Smith was adopted providing that a "judge may consider the extent of any harm to national security" regardless of whether the information is classified and protect "national security against harmful leaks in all cases, not just criminal cases."<sup>298</sup>

These amendments, along with the preponderance of the evidence standard, dramatically expanded the exceptions to allow the government to pierce the shield in any case involving properly classified information unobtainable from other sources. As House Judiciary Committee chairman John Conyers pointed out, "If the exceptions were any broader, it would swallow up the rule itself. . . . I have no doubt that if . . . disclosure of the source is necessary to prevent . . . harm to national security" a court will compel disclosure.<sup>299</sup>

Even Representative Lamar Smith, one of the staunchest opponents of a shield law, was exasperated by the position of the government and federal prosecutors such as Professor Clymer and Professor Eliason. He observed, "despite efforts to accommodate their concerns, the Justice Department still opposes the bill. . . . But DOJ should do more than complain; they should negotiate in good

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296. *Id.* § 2.

297. 153 CONG. REC. H11, 600 (daily ed. Oct. 16, 2007) (statement of Rep. Boucher).

298. *Id.* at 601 (statement of Rep. Smith).

299. *Id.* at 589 (statement of Rep. Conyers).

faith and provide the Committee with language that addresses their concerns.<sup>300</sup>

In the end, opponents of the shield bill need to be straight about what it does and does not do. By its unambiguous terms, H.R. 2102 does not immunize anyone or any conduct from prosecution. It has very broad exceptions that will ensure that identity information will be made available to prosecutors where no other source is available, especially in cases involving leaks of classified information or other disclosures harmful to national security. The contrary assertions by Professor Clymer and Professor Eliason are refuted by the plain language of the bill and accompanying legislative record.

*F. A Federal Shield Law Imposes Acceptable Costs*

The final argument made by both professors is that a federal shield law would impose unacceptable costs on the public. We have already explained why some of the costs they cite—the “loss of reliable, probative evidence”<sup>301</sup> that will deny criminal defendants exculpatory information and will immunize illegal leaks—will not materialize.<sup>302</sup> But Professor Clymer and Professor Eliason maintain those are not the only costs of a shield law.

H.R. 2102 merely codifies existing Department of Justice regulations,<sup>303</sup> with three changes: it makes them mandatory, it applies them to all cases in federal court, and it requires a judge and not the attorney general to decide whether the shield applies.<sup>304</sup> That point was made very clear during the House floor debate.<sup>305</sup> Nevertheless, Professor Clymer and Professor Eliason oppose the shield bill because of the costs and delay it adds to litigation. According to Professor Eliason, a statutory journalist’s privilege will require “parties and the courts [to] devote time and resources to resolving questions concerning the privilege’s applicability.”<sup>306</sup>

Without question, Professor Eliason is correct. Federal proceedings will be delayed as parties litigate and the court decides

300. H.R. REP. NO. 110-370, at 13 (2007) (additional views of Rep. Smith).

301. *Senate Hearing*, *supra* note 15, at 85 (statement of Steven Clymer, Professor, Cornell Law School).

302. *See supra* Parts III.B, IV.D–E.

303. *See supra* notes 297–300 and accompanying text.

304. *See* H.R. 2102, 110th Cong. § 2 (2007).

305. *See* 153 CONG. REC. H11, 592 (daily ed. Oct. 16, 2007) (statement of Rep. Pence); *id.* at 595 (written submission of former Solicitor General Theodore B. Olson); *id.* at 599 (statement of Rep. Holt); *id.* (statement of Rep. Shays).

306. *Hearing on H.R. 2102*, *supra* note 15, at 54 (testimony of Randall Eliason, Professor, George Washington University Law School).

the applicability of a shield. However, those costs are present with or without a shield law, as Professor Eliason admits:

[Y]ou are not going to subpoena a journalist unless you've got no other alternative. Because it is going to slow your case way down and you are going to be in a royal battle for or year or two with some of the best First Amendment lawyers in the country trying to avoid your subpoena . . . .<sup>307</sup>

Even today, a prosecutor or civil litigant cannot run to the courthouse and expect to get a subpoena directing a journalist to reveal their source without substantial cost and delay. As former federal prosecutor Bruce Baird concluded, a federal shield law would not impair “the prosecution or defense of criminal and regulatory cases.”<sup>308</sup>

On the other hand, the most significant cost is the two-fold prospect that the government will have to demonstrate to a federal judge that they are entitled to pierce the shield because of an applicable exception. That is why the Bush Administration stated its opposition to the shield bill in its Statement of Administration Policy: “In order to satisfy the bill’s requirements, prosecutors essentially must prove the existence of specific criminal activity in a hearing before a judge, with notice to the subjects of the investigation, before they will be able to undertake the necessary investigative steps to determine whether a crime has occurred.”<sup>309</sup>

Federal Judge Robert Stack put a finer point on the Administration’s argument: “the only real question is whether federal courts should be given some supervisory authority to ensure that prosecutors have, in fact, met governing standards before forcing reporters to testify. The answer seems obvious: yes.”<sup>310</sup>

Let’s be honest about what is really at stake here. No prosecutor likes being second-guessed by a judge. That is especially true because with a shield law, the government will no longer automatically win under criteria for which the attorney general is the sole arbiter. While judicial oversight may be an inconvenience that imposes costs on the government, those are the costs of having a limited government subject to the constraints of the Constitution.

Prosecutors already are subject to many such constitutional inconveniences. Under the Fourth Amendment, the government

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307. Eliason Remarks, *supra* note 200.

308. *Senate Hearing*, *supra* note 15, at 82.

309. 153 CONG. REC. H11, 591 (daily ed. Oct. 16, 2007) (statement of Rep. Smith) (quoting the Statement of Administration Policy on H.R. 2102).

310. *Id.* at 598 (statement of Rep. Udall) (quoting an article by former Solicitor General Theodore B. Olson).

must obtain a judicially issued warrant “supported by Oath or affirmation” before searching or seizing “persons, houses, papers, and effects.”<sup>311</sup> That requirement “was promulgated in response to the Framers’ distrust of law enforcement’s broad discretion to search without judicial oversight.”<sup>312</sup> The sweeping authority the executive branch has under FISA also is not unlimited, but rather is subject to comprehensive oversight by the other two branches of government.<sup>313</sup> Prosecutors likewise are subject to the principle of separation of powers to ensure they do not overstep their authority.<sup>314</sup> Judicial oversight may be inopportune, but that is the price of protecting liberty.

Professor Clymer raises another point related to the question of judicial oversight, mirroring some of the Administration’s objections.<sup>315</sup> He maintains that to demonstrate that an exception to the shield applies, the government “would . . . have to reveal secret grand jury information and otherwise confidential information . . . to persuade the judge to release them.”<sup>316</sup> He is correct, but that happens all the time in federal court. It is routinely done for judicial determinations of whether to compel the release of information under the Freedom of Information Act. Following a court ruling striking down the NSA’s warrantless wiretapping program,<sup>317</sup> former Attorney General Alberto Gonzales conceded that a federal court could review applications for counter-terrorism surveillance without harming national security.<sup>318</sup> Moreover, for nearly three decades the Classified Information Procedures Act has governed review of classified information in federal courts.<sup>319</sup> Federal judges are particularly well equipped to apply a shield law.<sup>320</sup>

In the end, Professor Eliason makes a point that proves the costs of a shield law are modest, if any. He concedes that “if you look at all these big recent cases . . . the source is almost never revealed by the

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311. U.S. CONST. amend. IV.

312. Kelly A. Deters, Note, *The “Evaporation Point”: State v. Sykes and the Erosion of the Fourth Amendment Through the Search-Incident-to-Arrest Exception*, 92 IOWA L. REV. 1901, 1905 (2007).

313. *United States v. Belfield*, 692 F.2d 141, 148 (D.C. Cir. 1982).

314. Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1014 (2006).

315. See *supra* note 309 and accompanying text.

316. Clymer Remarks, *supra* note 110.

317. *Am. Civil Liberties Union v. Nat’l Security Agency*, 438 F. Supp. 2d 754, 782 (E.D. Mich. 2006).

318. Dan Eggen, *Spy Court’s Orders Stir Debate On Hill; Some Want Documents Made Public*, WASH. POST, Jan. 19, 2007, at A6.

319. 18 U.S.C. app. § 3 (2000).

320. See *supra* notes 310–314 and accompanying text.

reporter. It comes out in some other way.”<sup>321</sup> That’s true. As a result, if we agree that the evidence of a chilling effect on reporters is lacking in some respects,<sup>322</sup> the data on the other side—whether a shield law would actually prevent prosecutors from bringing their cases—is completely absent. Indeed, former Solicitor General Ted Olson noted that “[t]he 49 states and the District of Columbia . . . have experienced no diminution of law enforcement efforts as a result of these shield laws.”<sup>323</sup>

Conversely, Olson pointed out that the costs without a shield law are tremendous:

Unfortunately, the rules regarding what reporters must disclose, and under what circumstances, remain a hopelessly muddled mess. . . .

. . . .

. . . [R]eporters may be protected if they are subpoenaed in state court, but not protected at all if the same subpoena is issued by a federal court. No one benefits from that patchwork of legal standards.

[The shield bill would] regularize the rules for reporters, their sources, publishers, broadcasters, and judges.<sup>324</sup>

This “ad hoc, case-by-case” approach<sup>325</sup> is much more likely to cause delays and additional expense than an approach under the certainty of a uniform federal shield law.

#### CONCLUSION

Freedom of the press is essential to safeguard our liberty, as recent revelations of government torture,<sup>326</sup> warrantless wiretapping,<sup>327</sup> kidnapping, and illegal detention have shown us.<sup>328</sup> Confidential sources willing to step forward about these abuses are the lifeblood for that reporting, particularly with growing government secrecy. While Professor Clymer and Professor Eliason raise some valid

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321. Eliason Remarks, *supra* note 200.

322. See *supra* notes 211–212 and accompanying text.

323. 153 CONG. REC. H11, 595 (daily ed. Oct. 16, 2007) (written submission of former Solicitor General Theodore B. Olson).

324. *Id.*

325. *Id.* at 598 (statement of Rep. Jackson-Lee).

326. Jess Bravin, *Pentagon Report Set Framework For Use of Torture*, WALL ST. J., June 7, 2004, at A1; Seymour Hersh, *Torture at Abu Ghraib*, NEW YORKER, May 10, 2004, at 42.

327. Risen & Lichtblau, *supra* note 251.

328. Glenn Kessler, *Rice to Admit German’s Abduction Was an Error*, WASH. POST, Dec. 7, 2005, at A18; Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1; Dana Priest, *Wrongful Imprisonment: Anatomy of a CIA Mistake*, WASH. POST, Dec. 4, 2005, at A1.

concerns, the balance of public interests weighs firmly against them. “Compelling reporters to testify and, in particular, forcing them to reveal the identity of their confidential sources without extraordinary circumstances, hurts the public interest.”<sup>329</sup> Passage of a federal reporters’ shield law like H.R. 2102 standardizes “the rules of the game . . . 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.”<sup>330</sup> In the process, the bill will live up to its name and maintain the free flow of information to the public.

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329. *Hearing: Issues and Implications*, *supra* note 183 (testimony of Sen. Richard Lugar).

330. *Senate Hearing*, *supra* note 15, at 135 (testimony of Theodore B. Olson).