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# The Reporter's Privilege in the 21st Century: The Need for a Qualified Federal Media Shield Law That Balances Freedom of Speech With National Security Concerns

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**THE REPORTER’S PRIVILEGE IN THE 21<sup>ST</sup>  
CENTURY: THE NEED FOR A QUALIFIED  
FEDERAL MEDIA SHIELD LAW THAT  
BALANCES FREEDOM OF SPEECH WITH  
NATIONAL SECURITY CONCERNS**

**Joseph W. Tursi\***

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### INTRODUCTION

In 1848, the *New York Herald's* John Nugent<sup>1</sup> became the first person imprisoned by the federal government for refusing to disclose a confidential source.<sup>2</sup> Since Nugent's confinement, the federal government has, with varied success, subpoenaed countless reporters to try and compel them to disclose confidential sources and information gathered in the preparation of news stories.<sup>3</sup> In the time since Nugent's confinement, the question remains unanswered whether, under the Constitution or common law, a reporter's privilege<sup>4</sup> protecting reporters from compelled disclosure of sources and information by the government exists.

Recent judicial decisions as well as the publication of top-secret U.S. government documents beginning in 2010 by

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1. *Ex Parte* Nugent, 18 F. Cas. 471 (C.C.D.C. 1848). Nugent received a draft copy of a secret treaty with Mexico and was brought in front of the United States Senate for questioning. When he refused to answer he was held in contempt and, due to the lack of available jail cells, was held for a month in an empty committee meeting room during the day and went home with the Senate's sergeant-at-arms each night. The Senate eventually released Nugent after a few months. See Stephen Bates, *Getting to the Source: The Curious Evolution of the Reporter's Privilege*, SLATE (Dec. 26, 2003, 11:51 AM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2003/12/getting\\_to\\_the\\_source.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2003/12/getting_to_the_source.html); see also Kristina Spinneweber, *Branzburg, Who? The Existence of a Reporter's Privilege in Federal Courts*, 44 DUQ. L. REV. 317, 318 (2006).

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

3. See, e.g., Joel G. Weinberg, *Supporting the First Amendment: A National Reporter's Shield Law*, 31 SETON HALL LEGIS. J. 149, 162–66 (2006).

4. The reporter's privilege is also referred to as a newsman's privilege, newsmen's privilege, and journalist's privilege. In this comment it will be referred to only as the reporter's privilege except in quoted authority.

WikiLeaks, a self-described “not-for-profit organization” with the stated goal of “bring[ing] important news and information to the public,”<sup>5</sup> has once again rekindled the debate over the reporter’s privilege.<sup>6</sup> In its simplest form the reporter’s privilege is simply, “a reporter’s protection, under constitutional or statutory law, from being compelled to testify about confidential information or sources.”<sup>7</sup> The reporter’s privilege now finds itself entrenched in the continuing WikiLeaks saga, in which serious questions surrounding the balance between the freedom of speech and national security are being debated. Justice Sotomayor believes that Congress will likely pass legislation in the future that will include some form of a reporter’s privilege and invariably that that legislation will find its way before the Supreme Court.<sup>8</sup> This comment will argue that it is indeed up to Congress to pass a federal shield law providing for a qualified reporter’s privilege<sup>9</sup> as the actions of the judiciary have demonstrated an unwillingness to find a reporter’s privilege under either constitutional<sup>10</sup> or common law analysis.<sup>11</sup>

This comment will begin by briefly noting the pre-Revolutionary understandings of free speech and a free press that influenced the language of the Press Clause found in the First Amendment,<sup>12</sup> before going on to review the first, and only, time the Supreme Court of the United States has taken

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5. *About, WIKILEAKS*, <http://wikileaks.org/About.html> (last visited Nov. 27, 2013).

6. See Jonathan Peters, *WikiLeaks Would Not Qualify to Claim Federal Reporter’s Privilege In Any Form*, 63 FED. COMM. L.J. 667 (2011) (arguing that WikiLeaks would not qualify to claim a federal reporter’s privilege because it does not conform to any definition of news gathering and disseminating); see also Kellie C. Clark & David Barnette, *The Application of the Reporter’s Privilege and the Espionage Act to WikiLeaks*, 37 U. DAYTON L. REV. 165 (2012) (arguing that while WikiLeaks is a compelling issue that blurs the line between journalism and espionage, it is unlikely to be able to claim a reporter’s privilege).

7. BLACK’S LAW DICTIONARY 1035 (9th ed. 2009).

8. David Batty, *WikiLeaks War Logs Posting Will Lead to Free Speech Ruling*, THE GUARDIAN, (Aug. 26, 2010), <http://www.guardian.com/media/2010/aug/27/wikileaks-war-logs-free-speech-supreme-court>.

9. See *infra* Part III.A–III.B.

10. See *infra* Part I.B–I.E.

11. See *infra* Part I.D.

12. The First Amendment, in relevant part, states that “Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .” U.S. CONST. amend. I.

up the issue of a reporter's privilege.<sup>13</sup> Next, the comment will offer an in-depth examination of how the federal circuits have applied the High Court's decision,<sup>14</sup> and review attempts by Congress to pass a federal statute recognizing a reporter's privilege. The comment will review the Supreme Court's analysis that weighs the public's interest in the publication of top-secret information with national security concerns,<sup>15</sup> before a survey of recent developments and the problem this has created.<sup>16</sup> Further, this Comment will propose a qualified federal shield law that not only encompasses a reporter's privilege, but also provides for the weighing of national security concerns.<sup>17</sup> Lastly, the comment will conclude with a review of the proposed legislation before giving a realistic forecast of what the future may hold for the reporter's privilege at the hands of the judicial and legislative branches.<sup>18</sup>

## I. BACKGROUND

### *A. Pre-Revolutionary and Revolutionary Origins of the Freedom of Speech and of the Press*<sup>19</sup>

The notion of a free press is not itself a novel United States ideal, as the concept was recognized before both the signing of the Declaration of Independence in 1776 as well as the Constitutional Convention in 1787.<sup>20</sup> Prior to the first shots of the American Revolution ringing out across the Lexington village green on the morning of April 19, 1775, colonial leaders zealously defended the right of the press to

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13. See *infra* Part I.B–I.B.3.

14. See *infra* Part I.C.

15. See *infra* Part I.E.

16. See *infra* Part I.G.

17. See *infra* Part IV.

18. See *infra* Part III.A.

19. This comment will not give an exhaustive treatment of the history of the Press Clause as it evolved during the pre- and post-Revolutionary eras in American History. Instead, this section merely aims to give a general understanding of what the Founders understood the importance of the Clause to mean. For in-depth treatment, see, e.g., JASON M. SHEPARD, *PRIVILEGING THE PRESS: CONFIDENTIAL SOURCES, JOURNALISM ETHICS AND THE FIRST AMENDMENT* 105–44 (Melvin I. Urofsky ed., 2011).

20. See David A. Anderson, *The Origins of the Press Clause*, 30 *UCLA L. REV.* 455, 463 (1983).

print stories that criticized the government.<sup>21</sup>

One example of this zealous defense was seen in a 1768 episode in which the *Boston Gazette* published an article about the royal governor who, in turn, requested that the Massachusetts House turn the matter over to a grand jury for prosecution.<sup>22</sup> Instead, under the leadership of Samuel Adams, the House adopted a resolution stating that “[t]he Liberty of the Press is a great Bulwark of the Liberty of the People: It is, therefore, the incumbent Duty of those who are constituted the Guardians of the People’s Rights to defend and maintain it.”<sup>23</sup>

One of the earliest national manifestations of the importance of the press to a free society was embodied by the Continental Congress in a 1774 declaration to the settlers in Quebec in an attempt to create an alliance prior to the start of the Revolutionary War:

The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, in 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.<sup>24</sup>

These two examples illustrate the First Amendment guarantee, that “Congress shall make no law . . . abridging the freedom . . . of the press” is rooted in the Framers’ desire to maintain a free flow of information, as well as concerns about the dangers of a government left unchecked.<sup>25</sup>

#### B. *Branzburg v. Hayes*

The Supreme Court of the United States has handed down countless opinions related to First Amendment interpretation.<sup>26</sup> However, *Branzburg v. Hayes*<sup>27</sup> is the first

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21. See Leslie Siegel, *Trampling on the Fourth Estate: The Need for a Federal Reporter Shield Law Providing Absolute Protection Against Compelled Disclosure of News Sources and Information*, 67 OHIO ST. L.J. 469, 475 (2006).

22. See Anderson, *supra* note 20, at 463.

23. See *id.* at 463.

24. See *id.* at 463–64.

25. See Siegel, *supra* note 21, at 474–75.

26. See *generally* Schenck v. United States, 249 U.S. 47 (1919) (“clear and

and only time the Court has ruled on a reporter's privilege grounded in the Press Clause of the First Amendment.<sup>28</sup> The issue of whether such a constitutional privilege existed was initially raised before the United States Court of Appeals for the Second Circuit twelve years before *Branzburg* in 1958 in *Garland v. Torre*,<sup>29</sup> but was generally rejected by the lower courts.<sup>30</sup>

*Branzburg* was a consolidated decision of four petitions for *certiorari*, two of which involved Paul Branzburg.<sup>31</sup> Branzburg was a reporter for the *Courier-Journal* in Louisville, Kentucky and had published two stories on the ongoing drug culture in the area in which he observed the use and sale of illegal drugs.<sup>32</sup> Branzburg promised confidentiality to the subjects of his first article,<sup>33</sup> but did not make the same promise to those he covered in his second article.<sup>34</sup> On two separate occasions, a grand jury subpoenaed Branzburg to testify about what he had witnessed in preparation for his articles.<sup>35</sup> Branzburg subsequently moved to quash both subpoenas.<sup>36</sup> In both instances the Kentucky Court of Appeals denied Branzburg's motions while affirming "the generally recognized rule that the sources of information

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present danger" in certain speech not protected by the First Amendment); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (established the "fighting words doctrine"); *Roth v. United States*, 354 U.S. 476 (1957) (obscene material not protected by the First Amendment); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (advocacy of the use of force or the violation of law without more, is protected by the First Amendment); *Cohen v. California*, 403 U.S. 15 (1971) (wearing a jacket that read "Fuck the Draft" is protected under the First Amendment as the word "fuck" although perhaps a fighting word was not directing at any individual); *Miller v. California*, 413 U.S. 15 (1973) (enunciated test to judge whether material is obscene); *Citizens United v. Fed. Election Com'n*, 558 U.S. 310 (2010) (First Amendment is violated by limits on corporate and union political expenditures during an election cycle); *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011) (video games qualify for First Amendment protection).

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

28. See Weinberg, *supra* note 3, at 172.

29. *Garland v. Torre*, 259 F.2d 545, 547-48 (2d Cir. 1958).

30. See 5 RONALD D. ROTUNDA & JOHN E. NOWAK, CONSTITUTIONAL LAW § 20.24(a) (West 2013).

31. *Branzburg v. Meigs*, 503 S.W.2d 748 (Ky. Ct. App. 1971); *Branzburg v. Pound*, 461 S.W.2d 345 (Ky. Ct. App. 1970).

32. *Branzburg*, 408 U.S. at 667-71.

33. *Id.* at 667-68.

34. *Id.* at 669-71.

35. *Id.* at 668-70.

36. See *id.*

of a newspaper reporter are not privileged under the First Amendment.”<sup>37</sup>

The third petition<sup>38</sup> surrounded a television newsman-photographer from New Bedford, Massachusetts, named Paul Pappas, who refused to respond to a grand jury inquiry into his observations at a Black Panther Party’s headquarters.<sup>39</sup> As a condition to his admittance into the headquarters, Pappas promised not to reveal anything he saw or heard while inside except for an anticipated police raid.<sup>40</sup> After it became apparent that the police raid was not going to happen, Pappas left the headquarters and did not report any story related to either the raid or the activities of the Black Panthers.<sup>41</sup> Like *Branzburg*, a grand jury subpoenaed Pappas to testify about what he observed while with the Black Panthers.<sup>42</sup> Pappas moved to quash the motion claiming a First Amendment privilege against disclosure.<sup>43</sup> The Supreme Judicial Court of Massachusetts affirmed the denial of Pappas’ motion to quash holding that “there exists no constitutional newsman’s privilege, either qualified or absolute, to refuse to appear and testify before a court or grand jury”<sup>44</sup> before concluding that “[t]he obligation of newsmen . . . is that of every citizen . . . to appear when summoned, with relevant written or other material when required, and to answer relevant and reasonable inquiries.”<sup>45</sup>

The fourth and final petition consolidated in *Branzburg* was *United States v. Caldwell*.<sup>46</sup> In that case, a federal grand jury in the Northern District of California subpoenaed *New York Times* reporter Earl Caldwell to produce notes and recordings he had made while covering the Black Panther Party and other black militant groups.<sup>47</sup> After removing the requirement that Caldwell bring his documentary items, he was again subpoenaed to appear before the grand jury to

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37. *Id.*

38. *In re Pappas*, 266 N.E.2d 297 (Mass. 1971).

39. *Branzburg*, 408 U.S. at 672–75.

40. *Id.* at 672.

41. *Id.*

42. *Id.* at 672–73.

43. *Id.* at 673.

44. *Id.* at 674 (quoting *In re Pappas*, 266 N.E.2d 297, 302–03 (Mass. 1971)).

45. *Branzburg*, 408 U.S. at 674 (quoting *In re Pappas*, 266 N.E.2d at 303).

46. *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970) *rev'd*, 408 U.S. 665 (1972).

47. *Branzburg*, 408 U.S. at 675.

answer questions.<sup>48</sup> Caldwell moved to quash the motion on the grounds that if he was required to appear it would not only severely damage his relationship with the Black Panther Party but would also violate his First Amendment freedoms by “driving a wedge of distrust and silence between the news media and the militants.”<sup>49</sup> The United States Court of Appeals for the Ninth Circuit quashed the subpoena and determined that “the First Amendment provided a qualified testimonial privilege to newsmen . . . [and] absent some special showing of necessity by the Government, attendance by Caldwell [at the grand jury] was something he was privileged to refuse.”<sup>50</sup>

### 1. *The Court’s Holding*

The Supreme Court, in a narrow five to four opinion by Justice White, rejected Branzburg’s claim that the First Amendment embraced a privilege to constitutionally refuse to disclose information to a federal grand jury in order to keep the flow of information available to the reporter.<sup>51</sup> The Court further rejected the notion that “requiring newsmen to appear and testify before state or federal grand juries abridges the freedom of speech and press guaranteed by the First Amendment.”<sup>52</sup>

The Court, while acknowledging that news gathering qualifies for a certain extent of First Amendment protection because “without some protection for seeking out the news, freedom of the press could be eviscerated,”<sup>53</sup> was unwilling to find a constitutional exception for members of the press over other citizens.<sup>54</sup> In the majority’s view, the chance that sources may refuse to “furnish newsworthy information in the future” if reporters are “forced to respond to subpoenas and identify their sources or disclose other confidences” was only an “incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general

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48. *Id.* at 677–78.

49. *Id.* at 676.

50. *Id.* at 679.

51. *Id.* at 665–67.

52. *Id.*

53. *Id.* at 681.

54. *Id.* at 682 (finding that “[c]itizens generally are not constitutionally immune from grand jury subpoenas”).

applicability.”<sup>55</sup> Justice White then went on to review prior precedent limiting access by the press or instances where the press was burdened.<sup>56</sup> The ancient role of the grand jury was of further importance to the Court in reaching its holding.<sup>57</sup>

The Court then explicitly declined to create a testimonial privilege for reporters because the only such privilege for unofficial witnesses was rooted in the Fifth Amendment and that creating new testimonial privileges was generally disfavored.<sup>58</sup> Furthermore, the Court concluded that while it was possible that the stream of news may be diminished “by compelling reporters to aid the grand jury in a criminal investigation,” it remained “unclear how often and to what extent informers are actually deterred from furnishing information.”<sup>59</sup>

Due to perceived “practical and conceptual difficulties,” the *Branzburg* Court bolstered its holding by declining to recognize a reporter’s privilege.<sup>60</sup> In the Court’s summation, recognizing such a privilege would “sooner or later . . . be necessary to define those categories of newsmen who qualified for the privilege,” which was “a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer . . . just as much as of the large metropolitan publisher.”<sup>61</sup> The majority reasoned that “[a]lmost any author may quite accurately assert that he is contributing to the stream of information to the public, that he relies on confidential sources of information, and that these sources will be silenced if he is forced to make disclosures before a grand jury.”<sup>62</sup> This was particularly problematic to the Court. It worried that “[s]uch a privilege might be claimed by groups that set up newspapers in order to engage in criminal activity and to therefore be insulated from grand jury inquiry, regardless of Fifth Amendment

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55. *Id.* at 682.

56. *Id.* at 683–86.

57. *Id.* at 687 (noting “[g]rand jury proceedings are constitutionally mandated for the institution of federal criminal prosecutions for capital or other serious crimes, and ‘its constitutional prerogatives are rooted in long centuries of Anglo-American history.’”) *Id.* at 687 (quoting *Hannah v. Larche*, 363 U.S. 420, 489–90 (1960) (Frankfurter, J., concurring in the result)).

58. *Id.* at 690 n.29.

59. *Id.* at 693.

60. *Id.* at 703–04. See also Weinberg, *supra* note 3, at 168.

61. *Branzburg*, 408 U.S. at 704.

62. *Id.* at 705.

grants of immunity.”<sup>63</sup>

Of additional concern was the possibility that the “courts would also be embroiled in preliminary factual and legal determinations with respect to whether the proper predicate had been laid for the reporter’s appearance.”<sup>64</sup> This would lead to courts being put into the position of “making a value judgment that a legislature had declined to make, since in each case the criminal law involved would represent a considered legislative judgment, not constitutionally suspect, of what conduct is liable to criminal prosecutions.”<sup>65</sup> In essence, the Court was concerned that judges would be taking on the legislative duty of making law as opposed to upholding it.<sup>66</sup> Moreover, observing the duties of each branch, the Court noted that Congress was free to “determine whether a statutory newsman’s privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate.”<sup>67</sup> The majority concluded its holding by noting that “news gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution.”<sup>68</sup> In the Court’s view, reporters were well protected because “[g]rand juries are subject to judicial control . . . [and] grand juries must operate within the limits of the First Amendment as well as the Fifth.”<sup>69</sup>

## 2. *Justice Powell’s Concurrence*

Justice Powell cast the crucial fifth vote and filed a concurring opinion to emphasize what he believed to be the “limited nature of the Court’s holding.”<sup>70</sup> Justice Powell made it clear that, as he read the case, the majority had not held, as

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63. *Id.* at 705 n.40 (arguing that it would be difficult to distinguish “sham” newspapers as the courts are barred from inquiring into the content of expression).

64. *Id.* at 705.

65. *Id.* at 706.

66. *Id.*

67. *Id.*

68. *Id.* at 707.

69. *Id.* at 708.

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

argued by Justice Stewart in dissent, “that state and federal authorities are free to ‘annex’ the news media as ‘an investigative arm of government.’”<sup>71</sup> Instead, Justice Powell opined that “no harassment of newsmen will be tolerated. If a newsmen believes that the grand jury investigation is not being conducted in good faith . . . he will have access to the court on a motion to quash and an appropriate protective order may be entered.”<sup>72</sup> In his summation:

The asserted claim of privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicated such questions.<sup>73</sup>

### 3. Justice Stewart's Dissent

In a lengthy dissent, Justice Stewart, joined by Justices Brennan and Marshall,<sup>74</sup> predicted that “[n]ot only will [the Court's] decision impair performance of the press' constitutionally protected functions, but it will . . . harm rather than help the administration of justice.”<sup>75</sup> After reviewing the ways a free press leads to “an informed citizenry,” Justice Stewart observed that “the right to publish must be the right to gather news” and without the “freedom to acquire information the right to publish would be impermissibly compromised.”<sup>76</sup> This “right to gather news” implied, according to the dissent, “a right to a confidential relationship between a reporter and his source.”<sup>77</sup>

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71. *Id.*

72. *Id.* at 710.

73. *Id.*

74. Justice Douglas also filed a dissenting opinion in which he argued for an absolute reporter's privilege based on his belief that the First Amendment is absolute and not subject to balancing “against other needs or conveniences of government.” *Branzburg*, 408 U.S. at 713 (Douglas, J. dissenting).

75. *Branzburg*, 408 U.S. at 725 (Stewart, J., dissenting).

76. *Id.* at 726–28

77. *Id.* at 728 (finding that “[t]his proposition follows as a matter of simple logic once three factual predicates are recognized: (1) newsmen require informants to gather news; (2) confidentiality- the promise or understanding that names or certain aspects of communications will be kept off the record is essential to the creation and maintenance of a news-gathering relationship with informants; and (3) an unbridled subpoena power—the absence of a constitutional right protecting, in any way, a confidential relationship from

The dissent responded to the majority's arguments against finding a testimonial privilege by opining that "the long standing rule making every person's evidence available to the grand jury is not absolute. The rule has been limited by the Fifth Amendment, the Fourth Amendment, and the evidentiary privileges of the common law."<sup>78</sup> Justice Stewart further scolded his colleagues for demanding that in order to find a reporter's privilege "the impairment of the flow of news . . . be proved with scientific precision" as the Court "[had] never before demanded that First Amendment rights rest on elaborate empirical studies."<sup>79</sup>

Justice Stewart felt a better approach to take when reporters were asked to appear before a grand jury and reveal confidential sources would be to utilize a three-pronged test. In order to satisfy the test the government would be required to:

- (1) show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.<sup>80</sup>

While recognizing a potential need for courts to use this approach to make "some delicate judgments," Justice Stewart reasoned that this was better than the majority's approach which was "simplistic and stultifying absolutism [and denied] any force to the First Amendment in these cases."<sup>81</sup> The Supreme Court has affirmed the basic principles of the *Branzburg* decision in three subsequent cases.<sup>82</sup>

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compulsory process—will either deter sources from divulging information or deter reports from gathering and publishing information.”).

78. *Id.* at 737 (citations omitted).

79. *Id.* at 733.

80. *Id.* at 743 (Justice Stewart went on to say that “before the government’s burden to make such a showing were triggered, the reporter would have to move to quash the subpoena, asserting the basis on which he considered the particular relationship a confidential one.”).

81. *Id.* at 745–46.

82. *See* *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1981) (First Amendment does not prohibit a plaintiff from recovering damages, under state promissory estoppel law, if the defendant newspaper breaches its promise of confidentiality); *Univ. of Pa. v. EEOC*, 493 U.S. 182 (1990) (First Amendment does not give a university any privilege to avoid disclosure of its confidential

*C. Application of the Reporter's Privilege by the Federal Circuits*

The federal circuit Courts of Appeal have applied the *Branzburg* decision inconsistently.<sup>83</sup> The First<sup>84</sup>, Second<sup>85</sup>, Third<sup>86</sup>, Fourth<sup>87</sup>, Fifth<sup>88</sup>, Ninth<sup>89</sup>, Tenth<sup>90</sup>, Eleventh<sup>91</sup>, and District of Columbia<sup>92</sup> Circuits have all found a reporter's privilege. However, the extent of the privilege's protection recognized within each circuit is varied.<sup>93</sup> Most of the circuits recognize a reporter's privilege in civil cases while others also recognize one in criminal cases, thereby leading *Branzburg* to be "effectively limited to the grand jury setting."<sup>94</sup>

In contrast, the Sixth Circuit has said that there is not a reporter's privilege.<sup>95</sup> Although not as explicitly, the Seventh

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peer review materials pursuant to an EEOC subpoena in a discrimination case); *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978) (First Amendment does not provide any special protections for newspapers whose offices might be searched pursuant to a search warrant based on probable cause to look for evidence of a crime).

83. See Weinberg, *supra* note 3, at 172; Cf. Spinneweber, *supra* note 1, at 323–30.

84. See *Bruno & Sullivan, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 594–99 (1st Cir. 1980); see also *United States v. LaRouche Campaign*, 841 F.2d 1176, 1181–82 (1st Cir. 1988) (recognizing the possibility of a reporter's privilege under constitutional or common law dimensions).

85. See *United States v. Burke*, 700 F.2d 70, 76–77 (2d Cir. 1983); See also RODNEY A. SMOLLA, 3 SMOLLA & NIMMER ON FREEDOM OF SPEECH § 22:13 (2d ed. 1996) ("In the Second Circuit, a journalist's privilege is recognized, though the Second Circuit has carefully refrained from deciding whether the privilege is grounded in the First Amendment or federal common law.").

86. See *United States v. Cuthbertson*, 630 F.2d 139, 146–47 (3d Cir. 1980).

87. See *United States v. Sterling*, 724 F.3d 482 (4th Cir. 2013); *Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 287 (4th Cir. 2000).

88. See *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 725–26 (5th Cir. 1980).

89. See *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993).

90. See *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 437 (10th Cir. 1977).

91. See *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986).

92. See *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981).

93. Compare *Bruno & Sullivan, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 594–99 (1st Cir. 1980), and *United States v. Burke*, 700 F.2d 70, 76–77 (2d Cir. 1983), and *United States v. Cuthbertson*, 630 F.2d 139, 146–47 (3d Cir. 1980), and *Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 287 (4th Cir. 2000), with *Miller*, 621 F.2d at 725–26, and *Shoen*, 5 F.3d at 1292, and *Silkwood*, 563 F.2d at 437, and *Caporale*, 806 F.2d 1504, and *Zerilli*, 656 F.2d at 711; see also Siegel, *supra* note 21, at 485 n.91 (finding "[m]any circuits have recognized a qualified reporter privilege based on the First Amendment cite the Powell concurrence as the basis for such a privilege").

94. Spinneweber, *supra* note 1, at 330.

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

Circuit has seriously questioned whether there can ever be a reporter's privilege under constitutional or common law dimensions,<sup>96</sup> and the Eighth Circuit "has not made an explicit ruling on the issue, . . . [although] District Courts within that circuit have recognized a reporter's privilege."<sup>97</sup> Writing for the Seventh Circuit in *McKevitt v. Pallasch*,<sup>98</sup> Judge Posner opined that while the majority of circuits have recognized a reporter's privilege, those circuits may be "skating on thin ice."<sup>99</sup>

In 2005, the United States Court of Appeals for the District of Columbia held that, *In re Grand Jury Subpoena, Judith Miller*,<sup>100</sup> pursuant to *Branzburg*, there was not a First Amendment reporter's privilege.<sup>101</sup> In *Judith Miller*, Circuit Judge Tatel, noted:

[U]nquestionably, 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>102</sup>

Circuit Judge Tatel also rejected the argument that *Branzburg* may be understood as a plurality opinion finding it was a majority opinion by highlighting the fact that Justice Powell joined the majority opinion of the Court, in addition to filing a separate concurring opinion.<sup>103</sup> Circuit Judge Tatel went on to say that, at most, Justice Powell's concurrence only stood for the proposition that there would be First Amendment protection in cases of bad faith investigations.<sup>104</sup> The *Judith Miller* court reasoned, "[t]he Constitution protects all citizens, and there is no reason to believe that Justice

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96. See *McKevitt v. Pallasch*, 339 F.3d 530, 532 (7th Cir. 2003).

97. See Weinberg, *supra* note 3, at 172–73 (citing *Richardson v. Sugg*, 220 F.R.D. 343, 346 (E.D. Ark. 2004); *Cont'l Cablevision, Inc., v. Storer Broad. Co.*, 583 F. Supp. 427, 435 (E.D. Mo. 1984)).

98. *McKevitt*, 339 F.3d at 530.

99. *Id.* at 533.

100. *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1145–49 (D.C. Cir. 2006).

101. *Id.* at 1146–49.

102. *Id.* at 1147.

103. *Id.* at 1148.

104. *Id.* at 1149.

Powell intended to elevate the journalistic class above the rest.”<sup>105</sup>

After concluding its analysis of *Branzburg* to the case at bar, the *Judith Miller* court split on whether a reporter's privilege should be adopted as a matter of federal common law.<sup>106</sup> The significance of the court's decision declining to find a reporter's privilege in accordance with the *Branzburg* decision was further magnified when the Supreme Court declined to accept review.<sup>107</sup> It quickly looked as though Circuit Judge Tatel was correct and that this was the end of the matter.

#### *D. Federal Common Law Understanding*

The courts that have found a reporter's privilege have done so by analyzing the First Amendment's freedom of the press, however, as seen in the *Judith Miller* court's opinion, courts may also consider whether there is a federal common law privilege.<sup>108</sup> One area legal scholars have touched on in support of finding a common law privilege is grounded in Federal Rule of Evidence 501.<sup>109</sup> Since being enacted by Congress in 1974, federal courts have utilized Rule 501 to “create, affirm, or deny other privileges.”<sup>110</sup> Rule 501 explicitly states that federal privileges are to be governed by “the principles of common law as they may be interpreted by the courts of the United States in light of reason and experience.”<sup>111</sup> In its notes to the rule the Advisory Committee wrote that privileges would be recognized “based on a confidential relationship and other privileges should be determined on a case-by-case basis.”<sup>112</sup>

Even with Rule 501 available to the courts, few have applied it to find a reporter's privilege grounded in common

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105. *Id.*

106. *Id.*

107. See SMOLLA, *supra* note 85, §25:26.

108. *In re Judith Miller*, 438 F.3d at 1149–50.

109. See Spinneweber, *supra* note 1, at 331–33. See also Weinberg, *supra* note 3, at 177–83; Paul Marcus, *The Reporter's Privilege: An Analysis of the Common Law, Branzburg v. Hayes, and Recent Statutory Developments*, 25 ARIZ. L. REV. 815, 817–21 (1984).

110. See Spinneweber, *supra* note 1, at 331.

111. FED. R. EVID. 510.

112. FED. R. EVID. 510 advisory committee's note.

law.<sup>113</sup>

*E. Judicial Response to the Attempted Publication of National Security Information*

The seminal case involving the publication of national security information by the press is *New York Times Co. v. United States*, more commonly referred to as “The Pentagon Papers case.”<sup>114</sup> The Court, in a 6-3 decision, affirmed the right of the press to publish materials relating to a classified Pentagon study during the Vietnam War detailing how the United States “had come to be embroiled in that conflict.”<sup>115</sup>

In that case the government sought injunctive relief against the *New York Times* from publishing parts of the study illegally acquired by Daniel Ellsberg.<sup>116</sup> The Court held that “any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity”<sup>117</sup> before going on to say, “[t]he Government thus carries a heavy burden of showing justification for the imposition of such a restraint” and found that the government had failed to meet that burden.<sup>118</sup>

In concurrence, Justice Stewart opined that the government could restrict publication of classified information if it would “surely result in direct, immediate, and irreparable damage to our Nation or its people.” However, he found that criteria was not met in this case.<sup>119</sup>

Federal courts have challenged the *New York Times Co.* ruling and likewise they have struggled to balance the public interest in receiving information against national security interests.<sup>120</sup>

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113. See Spinneweber, *supra* note 1, at 331–32.

114. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

115. *Id.* at 714. See also Floyd Abrams, *The Pentagon Papers Case at Forty: Commemorating a First Amendment Legacy in the Context of WikiLeaks and an Evolving Press*, 1 WAKE FOREST J. L. & POL'Y 7, 8 (2011).

116. *New York Times Co.*, 403 U.S. at 714.

117. *Id.*

118. *Id.*

119. *Id.* at 730 (Stewart, J., concurring).

120. Robert Bejesky, *National Security Information Flow: From Source to Reporter's Privilege*, 24 ST. THOMAS L. REV. 399, 449–55 (2012).

*F. Congressional Attempts at Creating a Federal Media Shield Law*

Since the Great Depression, members of Congress have introduced legislation that would lead to a federal shield law that includes some form of a reporter's privilege.<sup>121</sup> However, starting with Senator Arthur Capper of Kansas on November 20, 1929, each piece of proposed legislation has failed.<sup>122</sup> Generally, Congressional attempts to pass a media shield law have failed over national security concerns.<sup>123</sup>

While there were various attempts at introducing legislation throughout the twentieth century, it was not until the 1960s and 1970s that the frequency with which such legislation was proposed hit its peak.<sup>124</sup> Another attempt to pass such legislation came during the first session of the 112th Congress in the "Free Flow of Information Act of 2011,"<sup>125</sup> introduced by Representative Michael Pence<sup>126</sup> on September 14, 2011.<sup>127</sup> The bill was referred to the Subcommittee on the Constitution on September 23, 2011,<sup>128</sup> where it remained until the 112th Congress ended on January 3, 2013.<sup>129</sup> With the swearing in of the 113th Congress, another attempt came at passing a reporter's privilege.<sup>130</sup> Sen. Chuck Schumer introduced a bill<sup>131</sup> on May

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121. See Sam J. Ervin, *In Pursuit of a Press Privilege*, 11 HARV. J. ON LEGIS. 233, 241 n.23 (1974).

122. See Siegel, *supra* note 21, at 507.

123. Ian Simpson, *U.S. Senate Judiciary Committee Passes Media Shield Law*, REUTERS (September 12, 2013, 6:31 PM) <http://www.reuters.com/article/2013/09/12/us-usa-senate-media-idUSBRE98B1AI20130912>.

124. See Siegel, *supra* note 21, at 508.

125. H.R. 2932, 112th Cong. (2011).

126. Michael Pence is now the Governor of Indiana and so, while his legislation may serve as a model, it will not be reintroduced in the 113th Congress. See Kari Huus, *Pence in as Governor of Indiana; Hassan wins N.H.*, NBC NEWS (Nov. 6, 2012, 6:54 PM), [http://nbcpolitics.nbcnews.com/\\_news/2012/11/06/14973266-pence-in-as-governor-of-indiana-hassan-wins-nh?lite](http://nbcpolitics.nbcnews.com/_news/2012/11/06/14973266-pence-in-as-governor-of-indiana-hassan-wins-nh?lite).

127. *Bill Summary & Status 113th Congress (2013–2014) H.R. 2932*, THE LIBRARY OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d113:hr2932> (last visited Nov. 27, 2013).

128. *Id.*

129. *Id.*

130. Press Release, Sen. Charles E. Schumer, *Schumer, Graham, Bipartisan Group Push New Media Shield Law – Legislation Would Codify & Augment New DOJ Media Guidelines and Provide Additional Protections, Ensuring They Can't Be Undone* (Jul 17, 2013), <http://www.schumer.senate.gov/record.cfm?id=345352&>.

131. For the full text of the bill, see S. 987, 113th Cong. (2013), *available at*

16, 2013 entitled “The Free Flow of Information Act.”<sup>132</sup> The Senate Judiciary Committee passed the bill by a vote of 13-5 and sent it to the full Senate for consideration on August 12, 2013.<sup>133</sup> However, the bill sent to the full Senate includes an amendment which has drawn criticism in that it attempts to define who are “real” journalists and reporters.<sup>134</sup> This puts digital reporters and bloggers in a perilous position as they would not be protected under The Free Flow of Information Act.

### *G. Recent Issues and Developments*

#### *1. Wikileaks and the NSA Scandal*

The advent of the Internet has connected the world and, of particular relevance here, allowed anyone with access to create his or her own blog to share anything of interest. Independent news reporting is one of the many diverse topics covered by blogs.<sup>135</sup> Some are maintained by corporate entities while others are privately run.<sup>136</sup> On occasion the private sites will be the first to report breaking news ahead of their more established counterparts.<sup>137</sup>

On February 15, 2008, Judge Jeffery S. White of the Federal District Court in San Francisco granted a permanent injunction ordering an Internet domain register to block access to a website called WikiLeaks.<sup>138</sup> This order was

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<https://www.govtrack.us/congress/bills/113/s987/text>.

132. Simpson, *supra* note 123; S. 987, *supra* note 131.

133. Simpson, *supra* note 123; Press Release Sen. Charles E. Schumer, *supra* note 130.

134. Jason Stverak, *A Media Law that Stifles the Press*, POLITICO (September 26, 2012, 6:28 PM), <http://www.politico.com/story/2013/09/a-media-law-that-stifles-the-press-97431.html>.

135. See, e.g., DRUDGE REPORT, <http://www.drudgereport.com> (last visited Nov. 27, 2013).

136. Compare NEW YORK TIMES, <http://www.nytimes.com> (last visited Nov. 27, 2013), with SAN FRANCISCO PUBLIC PRESS, <http://sfpublicpress.org/news> (last visited Nov. 27, 2013).

137. See *Scandalous Scoop Breaks Online*, BBC NEWS (Jan. 25, 1998), [http://news.bbc.co.uk/2/hi/special\\_report/1998/clinton\\_scandal/50031.stm](http://news.bbc.co.uk/2/hi/special_report/1998/clinton_scandal/50031.stm) (reporting the Drudge Report was first in breaking the Monica Lewinsky Scandal).

138. See Adam Liptak & Brad Stone, *Judge Shuts Down Website Specializing in Leaks*, NY TIMES (Feb. 20, 2008), [http://www.nytimes.com/2008/02/20/us/20wiki.html?ref=wikileaks&\\_r=0](http://www.nytimes.com/2008/02/20/us/20wiki.html?ref=wikileaks&_r=0).

widely criticized as a stifling of free speech.<sup>139</sup> Judge White, in withdrawing his order on March 1, 2008, reasoned that “[w]e live in an age when people can do some good things and people can do some terrible things without accountability necessarily in a court of law.”<sup>140</sup> In Judge White’s summation, technology may have outran the law and, as a result, the courts were not be able to rein in information once it had been disclosed online.<sup>141</sup>

Two years later WikiLeaks would release a leaked video showing the killing of a Reuters photographer and driver in July 2007 by a U.S. helicopter.<sup>142</sup>

Since the first major leak of documents, WikiLeaks has continued to release classified U.S. documents including diplomatic cables.<sup>143</sup> In the days following major leaks, those in the mainstream media were quick to criticize WikiLeaks and argue that the website was not engaging in journalism.<sup>144</sup> Of further concern at the time was a proposed “media shield” bill working its way through the Senate which was amended to “remove even a scintilla of doubt” to ensure WikiLeaks would not enjoy any of the legislation’s envisioned protections.<sup>145</sup>

Currently WikiLeaks is still in operation with its founder and editor-in-chief, Julian Assange, living out of the Ecuadorian embassy in London after being granted political asylum.<sup>146</sup> In a speech from the balcony of the embassy on

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139. See Editorial, *Stifling Online Speech*, NY TIMES (Feb. 21, 2008), <http://www.nytimes.com/2008/02/21/opinion/21thu3.html?ref=wikileaks>.

140. See Jonathan D. Glater, *Judge Reverses His Order Disabling Web Site*, NY TIMES (Mar. 1, 2008), <http://www.nytimes.com/2008/03/01/us/01wiki.html?ref=wikileaks>.

141. *Id.*

142. See Elisabeth Bumiller, *Video Shows U.S. Killing of Reuters Employees*, NY TIMES (Apr. 5, 2010), <http://www.nytimes.com/2010/04/06/world/middleeast/06baghdad.html>.

143. See Scott Shane & Andrew W. Lehren, *Leaked Cables Offer Raw Look at U.S. Diplomacy*, NY TIMES (Nov. 29, 2010), <http://www.nytimes.com/2010/11/29/world/29cables.html?pagewanted=all>.

144. See Charlie Savage, *After Afghan War Leaks, Revisions in Shield Bill*, NY Times (Aug. 4, 2010), <http://www.nytimes.com/2010/08/04/us/04shield.html>; Paul Farhi, *WikiLeaks Controversy Highlights Debate Over Shield Law*, WASH. POST (Aug. 21, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/20/AR2010082005402.html>.

145. Farhi, *supra* note 144.

146. See Julian Assange: *WikiLeaks to Release 1 Million New Documents*, CNN (Dec. 21, 2012, 1:06 PM), <http://www.cnn.com/2012/12/20/world/europe/assange-wikileaks-release/index.html>.

December 20, 2012, Assange told those gathered that WikiLeaks was preparing to release more than a million documents whose contents would “affect every country in the world.”<sup>147</sup> On August 21, 2013, Private Bradley Manning was sentenced to thirty-five years in prison for his role in the initial Wikileaks controversy.<sup>148</sup>

In early June of 2013, the United States witnessed an unprecedented leak when ex-CIA contractor Edward Snowden revealed classified surveillance programs conducted by the NSA.<sup>149</sup> In the aftermath Snowden has been viewed as a hero and a villain, while others put blame solely on the United States.<sup>150</sup> These leaks also put the United States in the difficult position of explaining to its citizens and the world the extent of its surveillance programs and their end goals.<sup>151</sup> These leaks revealed that the United States as well as Great Britain tracked diplomats.<sup>152</sup> The effects of the leaks also saw themselves intertwined with politics overseas in Germany.<sup>153</sup> The NSA was quick to argue that its programs helped to stop possible terror attacks.<sup>154</sup> British intelligence has labeled the leaks “a gift” for terrorists.<sup>155</sup> Furthermore, the leaks have

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147. *Id.*

148. Paul Courson & Matt Smith, *WikiLeaks Source Manning Gets 35 Years, Will Seek Pardon*, CNN (Aug. 22, 2013, 6:38 AM), <http://www.cnn.com/2013/08/21/us/bradley-manning-sentencing/index.html>.

149. Mark Mazzetti & Michael S. Schmidt, *Ex-Work at C.I.A. Says He Leaked Data On Surveillance*, NY TIMES (Jun. 9, 2013), [http://www.nytimes.com/2013/06/10/us/former-cia-worker-says-he-leaked-surveillance-data.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/06/10/us/former-cia-worker-says-he-leaked-surveillance-data.html?pagewanted=all&_r=0).

150. *Trying to Balance Privacy and Security*, NY TIMES (Jun. 10, 2013), [http://www.nytimes.com/2013/06/11/opinion/trying-to-balance-privacy-and-security.html?\\_r=0](http://www.nytimes.com/2013/06/11/opinion/trying-to-balance-privacy-and-security.html?_r=0).

151. James Kanter, *E.U. Official Pushes U.S. to Explain Its Surveillance*, NY TIMES (Jun. 11, 2013), <http://www.nytimes.com/2013/06/12/world/europe/eu-official-pushes-us-to-explain-its-surveillance.html?pagewanted=all>.

152. Scott Shane & Ravi Somaiya, *New Leak Indicates Britain and U.S. Tracked Diplomats*, NY TIMES (Jun. 16, 2013), [http://www.nytimes.com/2013/06/17/world/europe/new-leak-indicates-us-and-britain-eavesdropped-at-09-world-conferences.html?\\_r=0](http://www.nytimes.com/2013/06/17/world/europe/new-leak-indicates-us-and-britain-eavesdropped-at-09-world-conferences.html?_r=0).

153. Melissa Eddy, *Merkel Appears to Weather Anger Among German Voters Over N.S.A. Spying*, NY TIMES (Jul. 11, 2013), [http://www.nytimes.com/2013/07/12/world/europe/merkel-seems-to-weather-german-anger-over-nsa-spying.html?\\_r=0](http://www.nytimes.com/2013/07/12/world/europe/merkel-seems-to-weather-german-anger-over-nsa-spying.html?_r=0).

154. Charlie Savage, *N.S.A. Chief Says Surveillance Has Stopped Dozens of Plots*, NY TIMES (Jun. 18, 2013), <http://www.nytimes.com/2013/06/19/us/politics/nsa-chief-says-surveillance-has-stopped-dozens-of-plots.html?pagewanted=all>.

155. Guy Faulconbridge, *British spy chief warns Snowden data is a ‘gift’ for*

shed light on how the United States has justified such spying programs in the past as a few opinions from the United States Foreign Surveillance Intelligence Court being published.<sup>156</sup> Since fleeing Hong Kong, Snowden has remained in Russia and is living out in the open.<sup>157</sup>

## 2. Obama Administration's Stance

Even before winning reelection, President Obama has faced numerous controversies.<sup>158</sup> Now in his second term, with controversies mounting, President Obama and his administration are rethinking its stance on a media-shield law.<sup>159</sup> Presently, the United States has failed to crack down on leaks.<sup>160</sup> This was, in part, motivated by the revelation that the Justice Department had seized the Associated Press phone records in investigating a leak related to national security.<sup>161</sup> In attempting to move towards a media-shield law with a national security exception, the Obama Administration contacted Senator Charles E. Schumer (D-NY), "to reintroduce a version of a bill he had pushed in 2009, called the Free Flow of Information Act."<sup>162</sup> Amid criticism of

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terrorists, REUTERS (Oct. 8, 2013, 5:02 PM), <http://www.reuters.com/article/2013/10/08/us-usa-security-britain-idUSBRE99711A20131008>.

156. Gerry Shih, *Court Orders Declassification of Decision on Surveillance*, NY TIMES (Jul. 16, 2013), <http://www.nytimes.com/2013/07/17/us/court-orders-declassification-of-decision-on-surveillance.html>.

157. Denver Nicks, *Edward Snowden Goes Grocery Shopping in Moscow, Just Like Regular People*, TIME (Oct. 7, 2013), <http://newsfeed.time.com/2013/10/07/edward-snowden-goes-grocery-shopping-in-moscow-just-like-regular-people/>.

158. See generally David D. Kirkpatrick, *Election-Year Stakes Overshadow Nuances of Libya Investigation*, NY TIMES (Oct. 15, 2012), <http://www.nytimes.com/2012/10/16/world/africa/election-year-stakes-overshadow-nuances-of-benghazi-investigation.html>; Tom Cohen, *Controversies Knock Obama Off Balance*, CNN (Jun. 11, 2013, 11:50am), <http://politicalticker.blogs.cnn.com/2013/06/11/second-term-blues-knock-obama-off-balance/?iref=allsearch>.

159. See Jennifer Epstein, *Obama Pushes Back on IRS, AP, Benghazi*, POLITICO (May 16, 2013, 8:36 PM), <http://www.politico.com/story/2013/05/obama-embassy-security-funding-91491.html>.

160. James E. Cartwright, *Math Behind Leak Crackdown: 153 Cases, 4 Years, 0 Indictments*, NY TIMES (Jul. 20, 2013), <http://www.nytimes.com/2013/07/21/us/politics/math-behind-leak-crackdown-153-cases-4-years-0-indictments.html?pagewanted=all>.

161. See Dylan Bryers, *Obama: 'Need to find balance' on Leaks*, POLITICO (May 16, 2013, 1:30 PM), <http://www.politico.com/blogs/media/2013/05/obama-need-to-find-balance-on-leaks-164169.html>.

162. Charlie Savage, *Criticized on Seizure of Records, White House Pushes*

the AP probe, Attorney General Eric Holder has stated that he supported Senator Schumer's bill.<sup>163</sup> With new controversies coming to light every day,<sup>164</sup> it is clear that the Obama Administration must take up the issue of a media shield law.

## II. IDENTIFICATION OF THE LEGAL PROBLEM

The inconsistent application and interpretation of *Branzburg* by the federal circuits<sup>165</sup> highlights the legal maxim first espoused in *Winterbottom v. Wright*<sup>166</sup> and subsequently embodied by Justice Oliver Wendell Holmes when he stated “[g]reat cases, like hard cases, make bad law.”<sup>167</sup> *Branzburg* was a hard case in that the Court was

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*New Media Shield Law*, NY TIMES (May 15, 2013), <http://www.nytimes.com/2013/05/16/us/politics/under-fire-white-house-pushes-to-revive-media-shield-bill.html> (the article also notes that even if a media-shield law were in place, with a national security exception it is likely the Justice Department would have been able to subpoena the AP records in this case); *see also* Dylan Bryers, *The Limits of a Media Shield Law*, POLITICO (May 29, 2013), <http://www.politico.com/blogs/media/2013/05/the-limits-of-a-media-shield-law-164964.html> (arguing that the Associated Press and Fox News probes would have likely been legal even if a media shield law was in place); *see supra* Section I.F for a discussion of Sen. Schumer's bill and its status in the Senate.

163. *See* Savage, *supra* note 144 (Mr. Holder went on to say that, “[t]here should be a shield law with regard to the press's ability to gather information and to disseminate it. The focus should be on those people who break their oath and put the American people at risk, not reporters who gather this information.”).

164. *See generally* Scott Shane & Jonathan Weisman, *N.S.A. Disclosures Put Awkward Light on Past Denials*, NY TIMES (Jun. 12, 2013), <http://www.nytimes.com/2013/06/12/us/nsa-disclosures-put-awkward-light-on-official-statements.html?pagewanted=all>; Charlie Savage, *A.C.L.U. Files Lawsuit Seeking to Stop the Collection of Domestic Phone Logs*, NY TIMES (Jun. 11, 2013), [http://www.nytimes.com/2013/06/12/us/aclu-files-suit-over-phone-surveillance-program.html?\\_r=0](http://www.nytimes.com/2013/06/12/us/aclu-files-suit-over-phone-surveillance-program.html?_r=0).

165. *See supra* Part. I.G.

166. *Winterbottom v. Wright*, (1842), 152 Eng. Rep. 402 (L.R. Exch.); 10 Meeson & Welsby 109, 152 (Eng.), *available at* <http://drsager.webhost.utexas.edu/judicialpro/Winterbottom%20v.pdf>.

167. *N. Sec. Co. v. United States*, 193 U.S. 197, 364 (1904) (Holmes, J., dissenting).

For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend. What we have to do in this case is to find the meaning of some not very difficult words. We must try,—I have tried,—to do it with the same

divided on the issue as evidenced by the close 5-4 majority, including one concurrence and two separate dissents.<sup>168</sup> In turn, the inconsistency with which the circuit courts have applied the *Branzburg* decision leading to the recognition of a reporter's privilege in some circuits but not others, in addition to the Supreme Court's decision not to revisit the issue, has led to the hindrance of the free flow of information. This has given rise to the possibility of an unchecked government – a chief concern of the Framers – in addition to the inconsistent administration of justice.

In addition, with advances in the technology leading to quicker dissemination of news there are added national security concerns impossible for the *Branzburg* Court to have foreseen. While The Pentagon Papers case remains the judicial standard for weighing the public's interest in the dissemination of news balanced against national security, it has never been applied directly with the reporter's privilege. As a result, the way in which a reporter or potential source may conduct themselves is contingent on what federal circuit's jurisdiction they are subject to or whether there is a state shield law in their state.<sup>169</sup> Therefore, it is up to Congress to finally respond to the invitation in *Branzburg* to pass legislation leading to the creation of a federal qualified reporter's privilege.

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freedom of natural and spontaneous interpretation that one would be sure of if the same question arose upon an indictment for a similar act which excited no public attention, and was of importance only to a prisoner before the court. Furthermore, while at times judges need for their work the training of economists or statesmen, and must act in view of their foresight of consequences, yet, when their task is to interpret and apply the words of a statute, their function is merely academic to begin with,—to read English intelligently,—and a consideration of consequences comes into play, if at all, only when the meaning of the words used is open to reasonable doubt.

*Id.* at 364–401.

168. See *supra* Part I.B.-B.3.

169. An exhaustive review of state shield laws currently in force around the United States is outside the scope of this comment. For a broad overview, see Weinberg, *supra* note 3, at 172.

## III. ANALYSIS

*A. Why Leaving The Reporter's Privilege to the Courts Is Not Advisable**1. Analysis of Branzburg and its Application by the Federal Circuits*

One reason the *Branzburg* decision is so difficult to understand and apply due to Justice Powell's enigmatic concurring opinion.<sup>170</sup> Not only did Justice Powell's concurrence open the door to interpretation as to whether the Court's decision was a plurality opinion, but it also provided the prism through which many circuits came to view the case.<sup>171</sup>

In the beginning of his concurring opinion, Justice Powell narrowed the Court's decision by reasoning that "[t]he Court does not hold that newsmen . . . are without constitutional rights with respect to the gathering of news or in safeguarding their sources."<sup>172</sup> Justice Powell went on to embrace the notion rejected by the majority that there is a balancing test available to reporters who believe that they are being subpoenaed in bad faith.<sup>173</sup> In applying this test that strikes a balance "between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct," Justice Powell was led to believe that the First Amendment would be protected on a case-by-case basis.<sup>174</sup>

Moreover, the argument is advanced that as Justice Powell was the crucial vote in the case, the majority opinion "is not a majority except to the extent that it agrees with [the views of the concurring justice]. What he writes is not a 'gloss' but the least common denominator."<sup>175</sup> Essentially, the concurring opinion "cannot add to what the majority opinion holds, binding the other four justices to say what they have not said; but it can assuredly narrow what the majority

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170. *Branzburg v. Hayes*, 408 U.S. 665, 725 (1972) (Stewart, J., dissenting).

171. See Weinberg, *supra* note 3, at 169–70.

172. *Branzburg*, 408 U.S. at 709 (Powell, J., concurring).

173. *Id.*

174. *Id.*

175. *McKoy v. North Carolina*, 494 U.S. 433, 448 n.3 (1990) (Blackmun, J., concurring).

opinion holds, by explaining the more limited interpretation adopted by a necessary member of that majority . . . .”<sup>176</sup> Although this analysis is not uniformly embraced among the circuits, it has led to finding of a qualified reporter’s privilege grounded in the First Amendment.<sup>177</sup>

In the forty-one years since *Branzburg* the federal circuits have tried to apply the decision to cases before them with divergent results leading to a circuit split over the issue of whether there can be a reporter’s privilege under either a constitutional or common law analysis.<sup>178</sup> This has resulted in an inconsistent administration of justice leaving reporters and their confidential sources unsure of their constitutional rights.

2. *Analysis of the Supreme Court’s Response to In re Grand Jury Subpoena, Judith Miller*

Perhaps the greatest opportunity missed by the Supreme Court to clear up the confusion among the circuits would have been to grant review to *Judith Miller*.<sup>179</sup> In its failure to do so, the Court seemed to signal that it was in agreement with the holding of the District of Columbia Court of Appeals’ decision rejecting the notion that a First Amendment reporter’s privilege existed.<sup>180</sup> This assumption was further amplified by the fact that the *Judith Miller* case was highly visible and that prominent members in the legal community filed amici briefs urging the Court to accept review.<sup>181</sup> Not only did this signal the Supreme Court’s agreement with the lower court’s ruling but it also suggested the possible demise

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176. *McKoy*, 494 U.S. at 462 n.3 (Scalia, J. joined by Rehnquist, C.J., and O’Connor, J., dissenting) (The D.C. Circuit did not weigh the merits of this argument but found it did not apply to *Branzburg* because “Justice White’s opinion is not a plurality opinion of four justices joined by a separate Justice Powell to create a majority it is the opinion of the majority of the Court.” *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1148 (D.C. Cir. 2006).)

177. *See supra*, notes 86–93.

178. *In re* Request from U.K. Pursuant to Treaty Between Gov’t of U.S. & Gov’t of U.K. on Mut. Assistance in Criminal Matters in the Matter of Dolours Price, 685 F.3d 1, 17 n.23 (1st Cir. 2012) (referring to the identification of the circuit split in *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003)).

179. *See SMOLLA, supra* note 85, §25:26.

180. *Id.* (arguing “[i]n the aftermath of *Branzburg*, journalists who continued to successfully assert the existence of a First Amendment reporter’s privilege may have been living on borrowed time”).

181. *See id.* §25:26.50.

of the long run of lower court precedent that had found a qualified reporter's privilege grounded in the First Amendment.<sup>182</sup>

The *Judith Miller* court clearly believed that *Branzburg* was controlling as it cited the opinion as concluding that there is not a First Amendment privilege.<sup>183</sup> As the Supreme Court had not revisited the issue since *Branzburg* this led the Court of Appeals to conclude that "[w]ithout a doubt, that is the end of the matter."<sup>184</sup> However, in failing to grant review, the assumption that the Supreme Court agreed with the ruling of the Court of Appeals decision is simply that – an assumption. Without explicitly ruling on the issue the Supreme Court laid yet another brick in the unstable foundation of the reporter's privilege.

### 3. *Why Common Law Approach Will Not Work*

Leaving the reporter's privilege anchored in the uncertain waters of the common law is also a shortsighted approach towards resolution of the issue. While there are strong arguments in support of finding a common law privilege recognizing a reporter's privilege under federal common law,<sup>185</sup> they assume a uniform analysis by the judiciary. If the application of *Branzburg* is any indication of what may happen when each circuit takes up the issue, then it is clear that this will not bring about a consistently applied analysis of the reporter's privilege under common law.

The analysis for finding a common law privilege was enunciated in *Jaffee v. Redmond*.<sup>186</sup> There the Supreme Court articulated a four-part examination into whether the proposed privilege: (1) serves important private interests,<sup>187</sup> (2) serves public ends,<sup>188</sup> (3) the likely evidentiary benefit that would result from the denial of the privilege;<sup>189</sup> and (4) whether the proposed privilege is widely recognized by

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182. *Id.*

183. *See In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1145–49 (D.C. Cir. 2006).

184. *Id.* at 1147.

185. *See Weinberg, supra* note 3, at 32 n.202.

186. 518 U.S. 1 (1996).

187. *Id.* at 11.

188. *Id.*

189. *Id.*

the States.<sup>190</sup> While strong arguments can be made that the four factors are present in the case of the reporter's privilege<sup>191</sup> that will not automatically create a common law reporter's privilege because for a such a privilege to be found in the federal common law and applied consistently throughout the federal courts it would take such a finding on the part of the Supreme Court. While it is possible that the Court would recognize such a privilege, it is not probable given that reluctance on the Court's part of even revisiting the issue under constitutional analysis.<sup>192</sup>

Among the reasons that lead to a conclusion that the Supreme Court would not find a reporter's privilege in the common law, besides its reluctance to reexamine the issue under constitutional analysis, are: the fact that the Supreme Court would be giving a special privilege to the press not available to the public, the Court generally neither announces new privileges<sup>193</sup> or expands old ones,<sup>194</sup> and it would be difficult for a court to define which categories of reporters qualify for a common law reporter's privilege.<sup>195</sup>

In light of the ongoing confusion and lack of explicit guidance on the issue from the Supreme Court, even with several circuits recognizing the internal split on the issue,<sup>196</sup> it is unlikely that the judicial branch will be able to resolve this issue uniformly in the near future. The greatest obstacle that must be overcome in order for the reporter's privilege to be found in the common law is the same obstacle facing the

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190. *Id.* at 12–13.

191. *See* Weinberg, *supra* note 3, at 179–80 (arguing that “a reporter's privilege can comfortably fit within the *Jaffee* framework. A reporter's privilege serves important private interests because, like the spousal, attorney-client, and psychotherapist-patient privileges, the reporter's privilege is ‘rooted in the imperative need for confidence and trust.’ The inability of a reporter to protect a confidential source threatens a ‘reporter's ability to obtain confidential information in the future or to publish investigative stories at all.’ Reporters possess significant privacy interests in maintain the confidentiality of their sources. Recognizing a reporter's privilege serves public ends because it promotes journalism's vital role in our democracy and because it fosters development of important stories that reporters have brought to light only because of confidential sources.”).

192. *See In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1147 (D.C. Cir. 2006).

193. *See* Weinberg, *supra* note 3, at 181.

194. *Id.*

195. *Id.*

196. *See supra* note 157 and accompanying text.

reporter's privilege under a constitutional analysis – the Supreme Court's reluctance to revisit *Branzburg*.<sup>197</sup>

### *B. Need For A Federal Shield Law*

The passing of a reporter's shield law not only protects the First Amendment but is also in accordance with *Branzburg*.<sup>198</sup> Congress was invited to pass legislation in *Branzburg*<sup>199</sup> and “refashion [such legislation] . . . as experience from time to time may dictate.”<sup>200</sup> In balancing the freedom of speech with national security interests it is important that Congress pass a qualified shield law. While a qualified shield law would not offer the same degree of protection as an absolute shield law it must be remembered that an absolute shield law would bar any balancing of national security interests. Moreover, an absolute shield law would offer a blander protection in all cases.<sup>201</sup> This would be counterintuitive to the spirit of *Branzburg*.<sup>202</sup> Although the opinion itself may be difficult to apply, the logical underpinnings of the case should guide any attempt at federal legislation. In finally creating a federal shield law providing for a reporter's privilege, issues of judicial application and interpretation of a dated opinion would be resolved.

Beyond the direct invitation from the Supreme Court to pass such legislation,<sup>203</sup> Congress can find authorization for

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197. It is important to note, however, that *Branzburg* did not reach the issue of whether a reporter's privilege would be found in the common law because the issue in *Branzburg* was “whether requiring newsmen to appear to testify . . . abridges the freedom of speech and press guaranteed by the First Amendment.” *Branzburg v. Hayes*, 408 U.S. 665, 667 (1972).

198. See Weinberg, *supra* note 3, at 183.

199. *Branzburg*, 408 U.S. at 706.

200. The Court further opined that “[t]here is also merit to leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas.” *Branzburg*, 408 U.S. at 706.

201. An absolute privilege is one that “immunizes an actor from suit, no matter how wrongful the action might be, and even though it is done with an improper motive” as opposed to a qualified privilege which “immunizes an actor from suit only when the privilege is properly exercised in the performance of a legal or moral duty.” BLACK'S LAW DICTIONARY 1033–34 (9th ed. 2009).

202. *Branzburg*, 408 U.S. at 682.

203. *Id.* at 706.

passing such legislation within the Commerce Clause.<sup>204</sup> The end result of a qualified federal shield law would be the creation of a uniformly applied protection for all reporters as opposed to state by state protections leading to possible inconsistencies based on the geographic location of the reporter, their source, or the publication of the information.

#### IV. PROPOSAL

Below is a proposed federal shield law creating a qualified reporter's privilege drafted after reviewing other proposed state and federal shield laws and law reviews:

##### Reporter's Shield Act of 2013

##### Section 1. Qualified Privilege Against Disclosure For Members of the News Media

- (a) A member of the news media engaged in or that has been engaged in the gathering and dissemination of news for the public through a newspaper, book, magazine, radio, television, news or wire service, or other medium has a qualified privilege against disclosure of any information, documents, or items obtained or prepared in the gathering or dissemination of news in any judicial, legislative, or administrative proceeding in which the compelled disclosure is sought and where the one asserting the privilege is not a party in interest to the proceeding unless a court determines by a preponderance of the evidence, after providing notice and an opportunity to be heard to such member of the news media—
- (1) that the party seeking to compel production of such information, documents, or items has exhausted all reasonable alternative sources of the testimony or document;
  - (2) that –
    - (A) in a criminal investigation or prosecution, based on information obtained from a person

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204. The Commerce Clause states that Congress shall have the power to “To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes.” U.S. CONST. art. I, § 8, cl. 3. *See also* Siegel, *supra* note 21, at 521.

- other than the members of the news media—
- (i) there are reasonable grounds to believe that a crime has occurred; and
  - (ii) the information, documents, or items sought are critical to the investigation or prosecution or to the defense against the prosecution; or
- (B) in a matter other than a criminal investigation or prosecution, based on information obtained from a person other than the covered person, the information, documents, or items sought are critical to the successful completion of the matter;
- (3) that the public interest in compelling disclosure of the information, documents, or items involved outweighs the public interest in gathering or disseminating news or information.
- (b) Authority To Consider National Security Interests- For purposes of making a determination under subsection (a)(3), a court may consider the extent of any harm to national security involved in the compelled disclosure.
- (c) Limitations on Content of Information- The content of any information, documents, or items that are compelled under subsection (a) shall—
- (1) not be overbroad, unreasonable, or oppressive; and
  - (2) be narrowly tailored in subject matter and period of time covered to avoid compelling production of peripheral, nonessential, or speculative information.

## Section 2.

- (a) Publication of any information, document, or item obtained in the gathering and dissemination of news does not constitute a waiver of the qualified privilege against compelled disclosure provided for in this section.

## Section 3. Definitions

“News media” means newspapers, magazines, journals, television, radio, news websites, press associations, wire

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services or other professional journalist or news organizations.

“Newspaper” means a paper that is printed in hard copy and is distributed regularly and not less frequently than once weekly, and that contains news, and may contain editorials, features, advertising, or other material considered of current public interest.

“Magazine” means a publication that is published and distributed on a regular basis, and that contains news, and may contain editorials, features, advertising, or other material considered of current public interest that is wholly unique to the publication itself.

“News or Wire service” means a news agency that distributes syndicated news copy by wire or other means to subscribing newspapers, magazines, periodicals or other news medium.

“Other medium” includes, but is not limited to, an Internet site maintained by a professional journalist or professional news organization created for the sole purpose of disseminating news on a regular basis with the sole intent of providing that news to the public.

“Professional journalist” means one who, for gain or livelihood, is regularly engaged in the gathering, compiling, writing, editing photographing, recording or processing news and other information with the intent of disseminating that news or information to the public, or was so engaged at the time a source or information was procured.

“News” means written, oral, pictorial, photographic, or electronically recorded information or communication concerning local, national, or worldwide events or other matters of public concern or interest.

“Information” means any written, oral or pictorial news or other material.

*A. Analysis of Proposed Legislation**1. Origins of Statutory Language*

The Reporter's Shield Act of 2013 ("RSA") borrows language from various state shield laws and previously proposed Congressional legislation. The qualified shield laws of Tennessee,<sup>205</sup> South Carolina,<sup>206</sup> New Mexico,<sup>207</sup> and the Free Flow of Information Act of 2011<sup>208</sup> are used to draft sections one and two of the RSA. The RSA's definitions are based in part on those in the state shield laws of Maryland,<sup>209</sup> North Carolina,<sup>210</sup> New Mexico,<sup>211</sup> Florida,<sup>212</sup> New York,<sup>213</sup> and other previously proposed legislation.<sup>214</sup> In bringing together both state and proposed federal sources, the aim is to create an all-encompassing shield law that protects reporters and their sources for the foreseeable future.<sup>215</sup>

*2. Preference of a Qualified Privilege Over an Absolute Privilege*

The RSA is a qualified reporter's privilege and was drafted specifically with that intent in mind. Many in the legal community have disagreed as to whether an absolute or a qualified federal reporter's privilege would be the best course of action for Congress to take. Those advancing arguments in support of an absolute reporter's privilege

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205. TENN. CODE ANN. § 24-1-208 (West 2008).

206. S.C. CODE ANN. § 19-11-100 (2009).

207. N.M. GEN. STAT. ANN. § 38-6-7 (West 2012).

208. H.R. 2932, 112th Cong. (2011).

209. Maryland's definition of "news media" shaped the definition of the RSA. See MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (West 2012).

210. North Carolina's statutory definition of "professional journalist" influenced the definition found in the RSA. See N.C. GEN. STAT. ANN. § 8-53.11 (West 2009).

211. The New Mexico statutory definition of "information" as well as "professional journalist" shaped the definition of both in the RSA. See N.M. STAT. ANN. § 38-6-7.

212. The definition of "news" found in Florida's shield law led to the definition found in the RSA. See FLA. STAT. ANN. § 90.5015 (West 2008).

213. Many of the definitions found under New York's shield law inspired the definitions found in the RSA as well as other draft pieces of legislation. See N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1992).

214. See Siegel, *supra* note 21, at 512-13.

215. As technological advances since *Branzburg* have furthered the difficulties in applying it to the world of today, the aim is for the RSA to be applicable to those similarly unforeseen advances the 2050s.

frequently cite Justice Douglas' *Branzburg* dissent.<sup>216</sup> Conversely, those calling for a qualified reporter's privilege ground their arguments in Justice Powell's concurrence that calls for a case-by-case balancing of vital constitutional and societal interests.<sup>217</sup>

The RSA is a hybrid of the entire *Branzburg* opinion and reasoning. As a qualified privilege, following Justice Powell's balancing by not only leaving open the possibility of compelled disclosure in a number of circumstances but can also be "re-fashioned" as necessary over time as was noted by Justice White. As the RSA requires judicial inquiry into whether the government has met the "probable cause and alternative means requirements" called for by Justice Stewart in *Branzburg*, after recounting that they are hallmarks of government investigation prerequisites that "serve established policies reflected in numerous First Amendment decisions,"<sup>218</sup> the legislation concretely guards against the possibility that the government could "annex" the news media as "an investigative arm of the government."<sup>219</sup>

### 3. *Explicit Authorization for Judicial Balancing of National Security Interests*

Perhaps the greatest advantage of the RSA over an absolute shield law is the fact that it allows for a balancing of national security concerns against Freedom of Speech. This is crucial in the post-WikiLeaks world. Moreover, at present, The Pentagon Papers case would guide the courts in determining whether the government has met its burden of showing that publication of classified information would "result in direct, immediate, and irreparable damage to [the country] or its people" while also meeting the "heavy burden of showing justification for the imposition of" the prior restraint of expression.<sup>220</sup> Thus the hybrid nature of *Branzburg* seen in the RSA coupled with the Pentagon Papers case brings forth a new form of the reporter's privilege.

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216. See, e.g., *Branzburg v. Hayes*, 408 U.S. 665, 715 (1972) (Douglas, J., dissenting); Siegel, *supra* note 21; Weinberg, *supra* note 3.

217. *Branzburg*, 408 U.S. at 709 (Powell, J., concurring).

218. *Id.* at 740-41 (Stewart, J., dissenting).

219. *Id.* at 725-26.

220. *New York Times Co. v. U.S.*, 403 U.S. 713, 730 (1971) (Stewart, J., concurring).

#### 4. *Those Covered Under the RSA*

The RSA protects not only the reporter under the traditional definition but also accounts for the emergence of Internet journalists as well as those who may disseminate news in presently unforeseen mediums.<sup>221</sup> This area of the legislation acknowledges the *Branzburg* majority's argument that "the liberty of the press is the right of the lonely pamphleteer . . . just as much as of the large metropolitan publisher" by defining "professional journalist" broadly enough to incorporate both traditional and Internet journalists but narrowly enough thereby requiring a judicial inquiry into the intent of the journalist's actions was in fact the dissemination of news in cases that are disputed. Thus, the RSA would likely not include every person who signs up for a website that allows them to post content on any imaginable but would not exclude all bloggers.

#### 5. *Issues With Any Federal Attempt At Passing A Federal Reporter's Shield*

While a federal reporter's privilege shield law, whether absolute or qualified, would bring about a uniform framework for those in the news media as opposed to the current landscape of inconsistent judicial application, the probability of such legislation becoming law in the near future is unlikely. The 112th Congress was one of the most widely criticized in history as well as the most unproductive since the 1940s.<sup>222</sup> It has been argued that the 112th Congress "achieved nothing of note on housing, energy, stimulus, immigration, guns, tax reform, infrastructure, climate change or, really, anything . . . [and that] it's hard to identify a single significant problem that existed prior to the 112th Congress that was in any way improved by its two years of rule."<sup>223</sup> Perhaps the most damaging criticism of Congress as of late leading to a conclusion about the probability about the passing of a federal reporter's shield law is the declining

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221. See *supra* note 194.

222. Harold Maass, *10 Insulting Labels for the Outgoing 112th Congress*, THE WEEK (Jan. 3, 2013), <http://theweek.com/article/index/238354/10-insulting-labels-for-the-outgoing-112th-congress>.

223. Ezra Klein, *Good Riddance to Rottenest Congress in History*, BLOOMBERG VIEW (Jan. 2, 2013, 3:17 PM), <http://www.bloomberg.com/news/2013-01-02/good-riddance-to-rottenest-congress-in-history.html>.

number of laws passed by the last three Congresses.<sup>224</sup>

#### CONCLUSION

“Our liberty,” observed Thomas Jefferson, “depends on the freedom of the press, and that cannot be limited without being lost.”<sup>225</sup> Unfortunately, under present application of a dated Supreme Court decision that liberty tied to the freedom of speech is limited in the United States.

By action, or inaction rather, the Supreme Court has shown an unwillingness to revisit the issue of a reporter's privilege under either constitutional or common law analysis even while the federal circuits are split over the issue and thus applying the law inconsistently. Therefore, the responsibility of putting forth a qualified reporter's shield law, such as the Reporter's Shield Act put forth herein, falls to Congress. Not only would such legislation create a nationwide protection for reporters but it would also guard against future burdening of the freedom of speech while also accounting for national security concerns. In the meantime, reporters are left in the perilous position of relying on the jurisdiction of the federal circuits that have found some extent of a reporter's privilege. It would therefore appear that Circuit Judge Tatel was incorrect, there are still doubts and the matter is far from over.<sup>226</sup>

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224. See Amanda Terkel, *112th Congress Set to Become Most Unproductive Since 1940s*, HUFFINGTON POST (Dec. 28, 2012, 8:00 AM), [http://www.huffingtonpost.com/2012/12/28/congress-unproductive\\_n\\_2371387.html](http://www.huffingtonpost.com/2012/12/28/congress-unproductive_n_2371387.html) (finding that the 112th Congress only passed 219 bills, compared to 383 bills passed by the 111th Congress and 460 bills passed by the 110th Congress).

225. Letter from Thomas Jefferson, United States Minister to France, to James Currie, physician (Jan. 28, 1786) (on file with the Library of Congress), available at <http://memory.loc.gov/cgi-bin/ampage?collId=mtj1&fileName=mtj1page005.db&recNum=0215>.

226. See *supra* note 163 and accompanying text.