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Fit to Print - Consequences of Implementing a Federal Reporter's Privilege

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FIT TO PRINT? CONSEQUENCES OF IMPLEMENTING A FEDERAL REPORTER’S PRIVILEGE

In July 2003, a then-unknown source revealed the name of a covert CIA operative to as many as six Washington, D.C., journalists. Later, syndicated columnist Robert Novak published the identity of the operative, Valerie Plame.1 The White House and the Department of Justice appointed United States Attorney for the Northern District of Illinois Patrick Fitzgerald as special prosecutor to oversee a criminal investigation to ferret out and hold accountable the source who revealed Plame’s identity.2 Hoping to secure an indictment after an extensive investigation,3 Fitzgerald convened a federal grand jury. Fitzgerald subpoenaed New York Times reporter Judith Miller and Time magazine correspondent Matthew Cooper, two of the reporters to whom Plame’s identity was revealed, and asked them to disclose the name of their source.4 Both refused and were subsequently held in civil contempt.5 Although Cooper ultimately testified before the grand jury, Miller continued her silence. On July 7, 2005, she was jailed.6 The Times called her imprisonment “a proud but awful moment” for the publication, declaring that it would stand by her as she “surrender[ed] her liberty in defense of a greater liberty.”7 Miller spent eighty-five days in jail before her confidential source released her from her journalistic obligation of confidentiality.8 Later, the

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3 The intentional or knowing disclosure of the identity of undercover intelligence agents is a federal crime, punishable by imprisonment of ten years. 50 U.S.C. § 421 (2006).
6 Id.
8 David Johnston & Douglas Jehl, Times Reporter Free From Jail; She Will Testify, N.Y. TIMES.
sources were discovered to be Vice-President Dick Cheney's former Chief of Staff I. Lewis "Scooter" Libby, ex-presidential advisor Karl Rove, and then-Deputy Secretary of State Richard Armitage.\(^9\)

Miller's imprisonment is neither novel nor unique. Since the Supreme Court first declined to extend a federal privilege to reporters in 1972,\(^10\) more than twenty journalists have been imprisoned in the United States.\(^11\) For example, Florida newspaper reporter Timothy Roche was jailed for eighteen days in 1990 after refusing to identify who leaked a sealed court order.\(^12\) New York Times reporter Myron Farber served forty days in jail in 1978 when he refused to reveal sources in a criminal trial.\(^13\) Internet blogger Joshua Wolf was imprisoned after refusing to turn over videotapes of a protest to police for use in an investigation.\(^14\) He was briefly freed pending appeal, but returned to jail when the Ninth Circuit refused to reconsider his appeal *en banc.*\(^15\) Until recently, freelance investigative author Vanessa Leggett held the record, serving 168 days in prison after refusing to disclose confidential source information to a Texas grand jury.\(^16\) Leggett was freed after the grand jury's term expired, never breaching her promise of confidentiality.\(^17\) Leggett's record was bested only by internet blogger Joshua Wolf, who served 226 days in a federal prison for contempt after he refused to comply with a federal grand jury subpoena and turn over videotapes of activists clashing with San Francisco police.\(^18\) Government-mandated disclosure of confidential journalistic information continues to make news headlines—evidence that the issue of a reporter's privilege is far from being resolved.\(^19\)


\(^10\) *Branzburg v. Hayes,* 408 U.S. 665 (1972) (refusing to find a reporter's privilege on First Amendment or federal common law grounds).


\(^12\) *In re Roche,* 448 U.S. 1312 (1980).


\(^14\) *Paying the Price,* supra note 11.

\(^15\) *Wolf v. United States*, 201 F. App'x. 430 (9th Cir. 2006), *reh'g en banc* denied.

\(^16\) *Paying the Price,* supra note 11.


\(^19\) *See Dan Eggen, Grand Jury Subpoenas Times Reporter Over Book Sources,* WASH.
Those imprisoned each asserted a testimonial privilege against disclosing the identity of confidential sources or other journalistic information. They attempted to employ a reporter’s privilege to shield themselves from criminal or civil liability, while maintaining their ethical and journalistic obligations of source confidentiality. This Note examines the evolution of this reporter’s privilege at the federal level. It traces both the traditional approach in the federal courts as well as the more recent judicial developments. It also draws comparisons to both legislatively-enacted statutory shield laws and judicially-crafted common law privileges. This background serves primarily as a foundation for analyzing two primary questions: to whom should such a privilege apply, and what are the consequences of implementing a reporter’s privilege.20

This Note is divided into three primary sections. Part I traces the evolution of a reporter’s privilege at both the federal and state levels. Part II discusses the federal privilege, to the extent it exists, with respect to various holders of the privilege. Part II addresses the various scenarios in which the mainstream media commonly invokes the privilege—i.e., grand jury proceedings, criminal matters, civil actions, and legislative inquiries. Drawing heavily on state statutory models, Part II also discusses how nontraditional media entities fit into the schematic of a federal privilege, before moving even further beyond this boundary, in questioning whether non-media parties could ever invoke the federal privilege. Finally, Part III addresses the potential consequences of implementing a federal reporter’s privilege, most notably the licensure of journalists.

I. EVOLUTION OF A REPORTER’S PRIVILEGE21

At its most fundamental level, a reporter’s privilege is a testimonial privilege, which journalists hold, conferring the right to refuse to disclose the confidential source of information used


20 This Note does not revisit the existing debate as to whether a privilege should exist. It also omits other substantive elements of developing a reporter’s privilege at the federal level (i.e., balancing interests, exceptions, waiver, and other elements). Although the analysis touches on specific aspects of a reporter’s privilege, it is not meant to create a model federal privilege. That is a task too broad in scope and too great in depth for the purposes of this Note.

21 This analysis and discussion is grounded in constitutional theory as it applies to both federal and state judicial decision-making and legislation. For practical guidance in litigating cases involving a reporter’s privilege, see Kelli L. Sager & Rochelle L. Wilcox, Protecting Confidential Sources, 33 LITIG. 36 (2007).
throughout the newsgathering process. However, this is a generic description; the true breadth and depth of the privilege are as varied as the privileges are numerous.\(^{22}\) The development of a reporter's privilege in the United States has a somewhat disjointed history. The notion that a journalist is not required to disclose the source of information is not found among the testimonial privileges historically recognized at common law. Instead, the genesis of a reporter's privilege is two-fold, developing both at the state and federal levels, depending on who seeks to compel disclosure of the journalist's confidential information. This section first examines the primary constitutional basis for a reporter's privilege—the First and Fourteenth Amendments to the federal Constitution—and the United States Supreme Court's decision in \textit{Branzburg v. Hayes}.\(^{23}\) Next, this section analyzes significant post-\textit{Branzburg} federal appellate-court decisions. Finally, it contrasts the common law source of the federal privilege with the statutory source of various state privileges.

\textit{A. The Constitutional Basis and Branzburg}

The constitutional basis for a reporter's privilege is rooted primarily in the First Amendment of the federal Constitution. The Amendment expressly provides for freedom of the press: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or \textit{abridging the freedom of speech, or of the press}."\(^{24}\) Proponents of the privilege contend that the Due Process Clause of the Fourteenth Amendment further solidifies the constitutional basis for a reporter's privilege by making the First Amendment applicable to the states. The Supreme Court agrees, having held that First Amendment rights are incorporated to the states by virtue of the Fourteenth Amendment.\(^{25}\) The “freedom of the press” provided for in the First Amendment encompasses a group of rights. For instance, in certain circumstances, the First Amendment protects journalists from prior restraints.\(^{26}\) The First Amendment also provides

\(^{22}\) Statutory shield laws and common law privileges vary significantly in scope, especially with regard to whom the privilege protects, what type of information is and is not subject to compelled disclosure, and in what legal contexts the privilege applies. See discussion, infra.

\(^{23}\) 408 U.S. 665 (1972).

\(^{24}\) U.S. CONST. amend. I (emphasis added).

\(^{25}\) Gitlow v. New York, 268 U.S. 652, 666 (1925) (holding that “freedom of speech and of the press . . . are among the fundamental personal rights and 'liberties' protected . . . from impairment by the States”).

\(^{26}\) A prior restraint is the suppression of speech prior to its publication or dissemination. The Supreme Court states with particular clarity that such restraints on speech bear a heavy presumption against constitutional validity. See, e.g., New York Times Co. v. United States, 403 U.S. 713 (1971); Near v. Minnesota, 283 U.S. 697 (1931).
special protection for journalists publishing statements about public officials.27 Thus, although the freedoms are not absolute, the First Amendment provides significant constitutional protections to journalists.

The United States Supreme Court first addressed the question of a reporter's privilege in *Branzburg v. Hayes* in 1972.28 The case was a series of consolidated actions involving reporters who had promised confidentiality to news sources. Branzburg published articles in the *Louisville Courier-Journal* regarding marijuana production, distribution, and use. Branzburg was summoned before a grand jury and was asked to disclose the sources for his stories. Pappas was a television photographer who gained access to and filmed activity inside Black Panther headquarters in Massachusetts. The footage was never used or published, but Pappas was nevertheless summoned before a grand jury to reveal what, if any, criminal activity he had witnessed. Both reporters refused to disclose the requested information. The central constitutional question in *Branzburg* was "whether requiring [journalists] to appear and testify before state or federal grand juries abridges the freedom of speech and press guaranteed by the First Amendment."29 Writing for the Court, Justice White opined that journalists had the same obligations as ordinary citizens and that "neither the First Amendment nor any other constitutional provision protects the average citizen from disclosing to a grand jury information that he has received in confidence."30

In reaching this conclusion, Justice White also employed traditional constitutional balancing. He wrote that the significant truth-finding function of the grand jury constitutes a government interest sufficient to overcome the First Amendment interests of reporters.31 The journalists and their *amici* urged the Court that refusing to acknowledge a reporter's privilege would "undermine the freedom of the press to collect and disseminate news."32 In response, Justice White noted that existing constitutional protections have sufficiently provided for the free operation of journalism. Yet Justice

28 408 U.S. 665.
29 Id. at 667. Justice White's plurality opinion also addressed the question of whether the First Amendment conferred on journalists an absolute right to gather news. Justice White answered this question in the negative, noting that "the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." Id. at 684. Although related, this aspect of *Branzburg* is collateral to an analysis of the reporter's privilege. It is not discussed here.
30 Id. at 682.
31 Id. at 687–90.
32 Id. at 698.
White did not foreclose a reporter's privilege entirely; journalists were not required to answer to "oppressive, unnecessary, irrelevant, and other improper" grand jury inquiries. This, however, did not amount to a reporter's privilege, insofar as ordinary citizens also enjoyed constitutional protection from such inappropriate proceedings. Chief Justice Burger, along with Justices Blackmun and Rehnquist, joined Justice White's plurality opinion.

Four justices dissented. Justice Stewart, with whom Justices Brennan and Marshall joined, argued that the First Amendment's freedom of the press necessarily includes a right to gather news. Justice Stewart noted that "[t]he right to gather news implies, in turn, a right to a confidential relationship between a reporter and his source," The Stewart dissent created a three-part test to determine whether a journalist would be required to disclose the identity of confidential sources. The government would have to demonstrate that: (1) a journalist possesses relevant information; (2) the information is unobtainable by alternative means; and (3) the need for the information is compelling. Justice Douglas dissented separately to advocate an absolute reporter's privilege.

Justice Powell represented the critical swing vote in Branzburg. Justice Powell's brief, albeit powerful, concurring opinion is arguably the logical springboard for any discussion of a federal reporter's privilege. Justice Powell did not believe "that [journalists], subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources." Justice Powell's concurrence is often read as providing a qualified reporter's privilege, allowing journalists to refuse to disclose the confidential source of information under particular circumstances. He partially echoed Justice White's plurality opinion but added one significant qualification:

If a [journalist] believes that the grand jury investigation is not being conducted in good faith he is not without remedy. Indeed, if the [journalist] is called upon to give information bearing only a remote and tenuous relationship to the subject

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33 Id. at 675.
34 Id. at 728 (Stewart, J., dissenting).
35 Id. at 743 (Stewart, J., dissenting).
36 Id. at 711 (Douglas, J., dissenting).
37 Had Justice Powell dissented, the Branzburg holding would undoubtedly be read oppositely. A reporter's privilege would surely exist; the debate would instead center on whether the privilege is Justice Powell's qualified privilege or Justice Douglas's absolute privilege.
38 Branzburg, 408 U.S. at 709 (Powell, J., concurring).
of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court . . . .

Justice Powell also utilized traditional constitutional balancing. He required any privilege to "strike a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony" as well as the constitutional and societal interests of maintaining established and necessary judicial proceedings. "[W]here legitimate First Amendment interests require protection," Justice Powell assured the media that courts would provide appropriate remedies.

B. The Branzburg Progeny

Justice Powell's qualification that journalists may assert a testimonial privilege provided the foundation for an extensive series of later cases exploring, adopting, and applying a federal reporter's privilege. Indeed, while Justice Powell's concurrence had the legal effect of providing the fifth vote for the judgment against the reporters, it continues to have the practical effect of leaving the door open to a qualified reporter's privilege. The Supreme Court has scarcely revisited Branzburg. In the nearly thirty-five years since Branzburg, only fifty-five Supreme Court decisions cite that case. Many of these decisions relate to the corollary issue in Branzburg—the absolute right to newsgathering under the First Amendment, subject to laws of general applicability—albeit in other contexts. Because Branzburg is seemingly limited to the invoking of a

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39 Id. at 710 (Powell, J., concurring) (emphasis added).
40 Id.
41 Id.
42 Justice Stewart's dissent characterized Justice Powell's concurrence as an "enigmatic [view, giving] some hope of a more flexible view in the future." Id. at 725 (Stewart, J., dissenting).
43 Compare the Supreme Court's reluctance to revisit Branzburg with its insistence on revisiting the right to abortion announced in Roe v. Wade, 410 U.S. 113 (1973). The same nine justices decided Roe only seven months after their decision in Branzburg. Since that time, the Supreme Court cites Roe in 122 subsequent opinions, more than double the subsequent citations to Branzburg. Similarly, federal appellate courts cite Roe 729 times, compared to only 339 federal appellate decisions citing Branzburg.
reporter's privilege in grand jury proceedings, a handful of decisions examine the issue in other contexts.45

While in every Branzburg-related case that has reached the U.S. Supreme Court, the Court has declined to adopt any version of a reporter's privilege,46 the situation is significantly different in federal appellate courts. Given that the Branzburg Court did not define a clear majority with respect to the privilege, judges in circuit courts are free to formulate their own approach. This makes many circuits seem more open to recognizing a qualified reporter's privilege. For example, the Third Circuit has an exceptionally strong reporter's privilege in all proceedings.47 Other circuits have recognized a qualified privilege but have fashioned unique balancing tests, which must be satisfied before a journalist invokes the privilege.48 A few circuits extremely limit their recognition of a federal reporter's privilege or refuse to recognize the privilege altogether. The Seventh Circuit rejects the privilege completely,49 whereas recent cases in the Sixth Circuit, which had also routinely rejected the privilege, now suggest recognition of a qualified privilege in limited circumstances.50

C. State Shield Laws: A Statutory Privilege

It is important to note that Branzburg and its progeny are controlling only with respect to a federal reporter's privilege. Because of the U.S. Supreme Court's unwillingness to recognize a federal reporter's privilege,51 and Congress's reluctance to codify the

46 See New York Times Co. v. Jascalevich, 439 U.S. 1301 (1978) (reaffirming that the First Amendment does not provide a constitutional privilege to journalists). But see In re Roche, 448 U.S. 1312 (1980) (recognizing that, because of the divergence of views in Branzburg, the question of a reporter's privilege has not been foreclosed).
47 See, e.g., United States v. Cuthbertson, 651 F.2d 189 (3d Cir. 1981) (holding that the privilege applies in criminal cases); Riley v. City of Chester, 612 F.2d 708 (3d Cir. 1979) (holding that the privilege applies in civil actions).
48 See, e.g., LaRouche v. NBC, 780 F.2d 1134, 1139 (4th Cir. 1986) (adopting Justice Powell's Branzburg concurrence); United States v. Burke, 700 F.2d 70, 76-78 (2d Cir. 1983) (reaffirming three-part balancing test for disclosure of confidential journalist sources); Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977) (adopting a similar four-part balancing test).
49 See, e.g., McKevitt v. Pallasch, 339 F.3d 530 (7th Cir. 2003) (explaining that the Seventh Circuit does not recognize the reporter's privilege).
51 See Branzburg v. Hayes, 408 U.S. 665 (1972); see also supra note 43.
privilege,\textsuperscript{52} many states have independently recognized a reporter’s privilege. Thirty-one states and the District of Columbia have codified the reporter’s privilege through legislative action.\textsuperscript{53} Some states without a legislatively enacted shield law have recognized a reporter’s privilege through the courts.\textsuperscript{54} Many state courts adopt the limited reasoning of \textit{Branzburg} and its progeny or the approach that the federal appellate circuits in which the state is located has employed.\textsuperscript{55} Only six states—Hawaii, Maine, Massachusetts, Mississippi, Missouri, and Vermont—have declined to recognize either a statutory or judicial privilege.\textsuperscript{56} Wyoming also has no

\textsuperscript{52} Congress has made numerous failed attempts at codifying a federal statutory privilege. The most recent attempt, the federal Free Flow of Information Act of 2007, creates a qualified reporters’ privilege. The bill is designed “[t]o maintain the free flow of information to the public by providing conditions for the federally compelled disclosure of information by certain persons connected with the news media.” Free Flow of Information Act of 2007, H.R. 2102, 110th Cong (2007); Free Flow of Information Act of 2007, S. 2035, 110th Cong. (2007). The House of Representatives overwhelmingly passed its version of the bill, by a recorded vote of 398 to 21. \textit{See} 153 CONG. REC. H11,587, 11,602-03 (daily ed. Oct. 16, 2007). The Senate has yet to act on either the House bill or its own version, which contains terrorism, national security and additional exceptions, having stalled on the Senate floor despite the favorable reports of the Senate Judiciary Committee. \textit{See} 153 CONG. REC. D1,326 (2007); 154 CONG. REC. S7,710-21, 7,759 (daily ed. July 30, 2008) (showing the last failed attempt by the Senate to close debate on S. 2035).


\textsuperscript{54} \textit{See}, \textit{e.g.}, \textit{Opinion of the Justices}, 373 A.2d 644 (N.H. 1977) (recognizing a limited privilege from disclosure under state constitution); \textit{Dallas Oil & Gas, Inc. v. Mouer}, 533 S.W.2d 70, 75–78 (Tex. Civ. App. 1976) (recognizing a balancing test for the privilege); \textit{Brown v. Commonwealth}, 204 S.E.2d 429 (Va. 1974) (recognizing a privilege that must be balanced against fair trial concerns).

\textsuperscript{55} \textit{See}, \textit{e.g.}, \textit{In re Contempt of Wright}, 700 P.2d 40 (Idaho 1985) (recognizing a qualified privilege under \textit{Branzburg} and the federal appellate courts); \textit{Opinion of the Justices}, 373 A.2d at 646–47 (utilizing \textit{Branzburg} to find a qualified privilege under the state constitution).

\textsuperscript{56} \textit{See}, \textit{e.g.}, \textit{Jenkins v. Liberty Newspapers Ltd. Partnership}, 971 P.2d 1089 (Haw. 1999); \textit{In re Letellier}, 578 A.2d 722 (Maine 1990); \textit{In re Roche}, 411 N.E.2d 466 (Mass. 1980); CBS, Inc. v. Cambpell, 645 S.W.2d 30 (Mo. Ct. App. 1982) (citing \textit{Ex parte} Holliway, 199 S.W. 412
statutory privilege, and the state courts have never addressed the
question.\textsuperscript{57}

The states with a statutory privilege, commonly referred to as a
reporter’s shield law, have enacted protections diverse in both scope
and applicability. Some states have detailed shield laws, while others
adopt a general version of the reporter’s privilege.\textsuperscript{58} Many state shield
laws protect only traditional media entities—newspapers, radio
broadcasters, and television stations.\textsuperscript{59} Other states allow others to
exercise the privilege as well.\textsuperscript{60} Most states apply their privilege in all
legal contexts, while a few limit exercise of the privilege to certain
proceedings.\textsuperscript{61} A few states incorporate the balancing tests similar to
those adopted in the federal courts.\textsuperscript{62}

Although this Note is primarily concerned with the application of a
federal reporter’s privilege, the state shield laws cannot be ignored.
First, many recent federal appellate decisions incorporate the
parameters of state shield laws in fashioning the federal privilege.\textsuperscript{63}
Second, the shield laws are part of substantive state law. As such,
they may govern a question of privilege in a federal diversity action.\textsuperscript{64}
Finally, near unanimity among the states may possibly be the only
thing that persuades the United States Supreme Court to revisit the
reasoning in \textit{Branzburg} and genuinely establish a federal reporter’s
privilege.\textsuperscript{65} This Note evaluates the application of a federal privilege
to nontraditional entities based on state statutory privileges in Part
II.B.

\textsuperscript{57} See, \textit{e.g.}, Sheridan Newspapers, Inc. \textit{v.} City of Sheridan, 660 P.2d 785 (Wyo. 1983)
(examining \textit{Branzburg} only in the context of public records requests).
\textsuperscript{58} See, \textit{e.g.}, FLA. STAT. ANN. \textsection 90.5015 (West 1999) (specifically defining who qualifies
as a “professional journalist” and what constitutes “news” and “waiver”).
\textsuperscript{59} See, \textit{e.g.}, ALA. CODE 1975 \textsection 12-21-142 (LexisNexis 2005) (protecting only those three
entities).
\textsuperscript{60} See, \textit{e.g.}, DEL. CODE ANN. tit. 10, \textsection 4320(4) (1999) (covering “journalist[s], scholar[s],
educator[s], polemicist[s], or other[s]”).
\textsuperscript{61} See, \textit{e.g.}, 42 PA. CONS. STAT. ANN. \textsection 5942(a) (West 2000) (applying the privilege in all
proceedings). But see NEV. REV. STAT. ANN. \textsection 49.275 (LexisNexis 2006) (specifically
enumerating proceedings).
\textsuperscript{62} See, \textit{e.g.}, GA. CODE ANN. \textsection 24-9-30 (1995) (requiring materiality, exhaustion of
alternatives, and necessity).
\textsuperscript{63} See, \textit{e.g.}, Frey \textit{v.} Multimedia, Inc., 42 F.3d 1388 (6th Cir. 1994); Riley \textit{v.} City of
Chester, 612 F.2d 708 (3d Cir. 1979).
\textsuperscript{64} FED. R. EVID. 501 (deeming that privileges shall be construed under common law or
state law).
\textsuperscript{65} See, \textit{e.g.}, Jaffee \textit{v.} Redmond, 518 U.S. 1 (1996) (recognizing a psychotherapist-patient
privilege because of near unanimity in state law).
II. HOLDERS OF A REPORTER’S PRIVILEGE

Having provided the necessary legal context for a discussion of the reporter’s privilege, this Note’s focus now turns to the applicability of the privilege. The Supreme Court’s refusal in *Branzburg* to recognize a reporter’s privilege, and its refusal to revisit the question in the nearly thirty-five years since that decision, has left lower federal courts split over the scope and applicability of the reporter’s privilege. The primary question of this section is to whom a reporter’s privilege applies. This requires defining both “journalist” and “journalism.” One definition involves a functional approach, defining journalism as “a fact-based search for truth, collaborative in nature and subject to review, and whose ultimate beneficiary is the audience for, not the sponsor of the information.” Yet, beginning even from this premise makes defining a journalist for purposes of a reporter’s privilege a difficult task for both courts and legislatures.

A. Mainstream Media

Assuming that a federal reporter’s privilege exists, Justice Powell’s concurrence in *Branzburg* and its subsequent interpretations in lower federal courts leave little doubt that the privilege would apply to traditional media entities. Newspaper reporters, magazine writers, radio broadcasters, and television correspondents could all invoke the privilege without question. All state shield laws reinforce this position, expressly covering print reporters and broadcasters. The central issue confronting traditional media entities concerns the context in which mainstream journalists may exercise the privilege.

While *Branzburg* and subsequent decisions provide a semblance of guidance from the Supreme Court on the applicability of a reporter’s privilege as it applies to traditional journalists confronted with grand jury subpoenas, the issue becomes less clear when mainstream media face compelled disclosure of sources in the trial phase of civil and criminal actions. Liberal civil discovery rules allow litigants to “obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense.” Civil litigants may compel disclosure of information through a variety of means. They may

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66 Clearly the question of whether a federal reporter’s privilege exists is unresolved. The remainder of this Note assumes, arguendo, that the privilege does exist insofar as it has developed in the lower federal courts.


68 See supra Part I.B.

employ any of the recognized discovery tools, such as depositions, interrogatories, and requests for production of documents. However, these discovery tools are generally reserved for requesting disclosure from other parties to the suit. Litigants obtain discovery or trial attendance from nonparties (such as journalist-witnesses) using a civil subpoena.

Courts, however, have been generally skeptical of allowing civil litigants to subpoena mainstream journalists to ask them to disclose confidential newsgathering information at trial. While the Supreme Court has never granted review to a case involving journalists invoking the reporter's privilege in the civil context, those federal appellate courts recognizing a privilege continue to look to Justice Powell's concurrence in Branzburg. In Zerilli v. Smith, for example, the plaintiffs subpoenaed a Detroit News reporter in a civil action against the government for violating the Privacy Act. In quashing the subpoena, the court noted that a different set of interests controlled in civil actions, as opposed to grand jury proceedings, because the public interest in investigating and prosecuting crimes evaporates in the context of civil trials. The Zerilli court held First Amendment protections to be paramount to the trial interests of civil litigants: "When striking the balance between the civil litigant's interest in compelled disclosure and the public interest in protecting a newspaper's confidential sources, we will be mindful of the preferred position of the First Amendment and the importance of a vigorous press." Under this approach, the reporter's privilege creates a presumption against requiring disclosure of a journalist's sources. However, mindful of Justice Powell, courts have allowed civil litigants to overcome that presumption by demonstrating that their interests outweigh the public interest in preserving a free press and First Amendment protections. If a party can show that the privileged information is: (1) critical to the heart of a claim or defense, (2) highly material and relevant, and (3) not obtainable from other sources, then the reporter's privilege is overcome, and courts require disclosure. Other courts have reached different results under similar circumstances.

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70 See generally id. at 26–37 (setting forth rules governing disclosures and discovery).
71 Id. at 45.
72 656 F.2d 705 (D.C. Cir. 1981).
73 Id.
74 Id. at 711–12 (relying heavily on Carey v. Hume, 492 F.2d 631 (D.C. Cir. 1974) (distinguishing the grand jury context of Branzburg)).
75 Id. at 712.
76 Id. at 713–14. Several other circuits have adopted a similar balancing analysis in the context of civil litigation. See, e.g., Riley v. City of Chester, 612 F.2d 708 (3d Cir. 1979);
Although *Branzburg* limits the applicability of the reporter’s privilege in criminal grand jury proceedings, lower courts differ on its availability in a criminal trial. In his concurrence in *Branzburg*, Justice Powell suggested that invoking the reporter’s privilege must “stri[k] a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.” Although the *Branzburg* Court refused to allow a journalist to invoke the reporter’s privilege in a *grand jury proceeding*, other lower courts, adopting Justice Powell’s approach, have protected traditional journalists from compelled disclosure of confidential sources in a *criminal trial*, albeit with different outcomes. In *In re Petroleum Products Antitrust Litigation*, the publisher of a newsletter was held in contempt after refusing to divulge the source of confidential information when subpoenaed to testify in a federal criminal antitrust trial. The Second Circuit reversed the contempt citation, noting that the reporter’s privilege was an important tool “to protect the important interests of reporters and the public in preserving the confidentiality of journalists’ sources.” However, the court went on to hold that the government or a criminal defendant could overcome the reporter’s privilege at trial by satisfying the same balancing test used in civil litigation, described above. “Disclosure may be ordered only upon a clear and specific showing that the information is: highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources.” Other cases have applied this test in rejecting claims of privilege. These decisions evidence the vitality of Justice Powell’s concurrence in *Branzburg* and the erosion of the *Branzburg* majority’s steadfast rejection of the reporter’s privilege as it applies to traditional journalists.

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77 *See* Pete Yost, *Anthrax Reporter Held in Contempt*, *Dayton Daily News*, Mar. 8, 2008 (describing how a federal judge held reporter Toni Locy in contempt for his refusal to disclose confidential news information in a civil lawsuit related to the publication of news stories about the anthrax attacks in 2001).

78 408 U.S. 665, 710 (Powell, J., concurring).

79 680 F.2d 5 (2d Cir. 1982).

80 *Id.* at 7.

81 *Id.*

82 *See*, e.g., United States v. Burke, 700 F.2d 70, 77 (2d Cir. 1983).
An interesting question involving traditional media is also raised in the context of legislative inquiries. Congress, in holding legislative hearings on pertinent issues, often compels witnesses to appear and give testimony. The congressional power to issue subpoenas is statutory but has also been recognized by the Supreme Court as an extension of the Necessary and Proper Clause of the federal Constitution. Federal law provides Congress with the power to hold witnesses in contempt, making it a crime to "refuse[] to answer any question pertinent to the question under [congressional] inquiry." Moreover, a federal statute limits the applicability of evidentiary privileges in the legislative setting, declaring that "[n]o witness is privileged to refuse to testify . . . upon the ground that his testimony . . . may tend to disgrace him or otherwise render him infamous."  

However, witnesses appearing before Congress often assert privileges to shield their testimony. In Watkins v. United States, a witness appearing before the House Un-American Activities Committee refused to testify. In overturning the congressional contempt citation, the Supreme Court noted that "the constitutional rights of witnesses will be respected by the Congress as they are in a court of justice. The Bill of Rights is applicable to investigations as to all forms of governmental action . . . [T]he First Amendment freedoms of speech, press, religion, or political belief and association [cannot] be abridged." Although Watkins specifically references the First Amendment, it does not involve an assertion of a reporter's privilege in the legislative context. Indeed, there is no judicial precedent involving an assertion of the reporter's privilege during legislative inquiries. However, in 1992, National Public Radio

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84 2 U.S.C. § 190(m) (2006) (allowing Congress to issue subpoenas); McGrain v. Daugherty, 273 U.S. 135 (1927). The Supreme Court has historically given great deference to the power of congressional inquiry. See Watkins v. United States, 354 U.S. 178, 187 (1957) (noting that "[t]he power of the Congress to conduct investigations is inherent in the legislative process [and such] power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes").


87 354 U.S. 178.

88 Id. at 188. Recently, President George W. Bush vowed to fight congressional subpoenas on the grounds of executive privilege. Laurie Kellman, House Panel OKs Subpoenas for Bush Aides, ASSOCIATED PRESS, Mar. 21, 2007.
correspondent Nina Totenberg, after being subpoenaed, refused to disclose confidential newsgathering information concerning the nomination of Justice Clarence Thomas to the Supreme Court. Although the independent special counsel conducting the inquiry sought to have Totenberg held in contempt, the Senate Rules Committee chairman refused, noting that a contempt citation "could have a chilling effect on the media [and] could close a door where more doors need opening." Although some commentators believe a reporter's privilege would not survive judicial scrutiny in the context of legislative inquiries, the question has not yet reached the federal judiciary. By rethinking Branzburg and applying Justice Powell's qualified privilege, as many federal appellate courts have, it may be possible to ensure the confidentiality of a journalist's sources, even before a congressional committee.

B. Nontraditional Media

The question of applicability becomes significantly more clouded when considering nontraditional media sources. The advent and expansion of the Internet complicates the analysis of who qualifies as a journalist for purposes of invoking a reporter's privilege. For instance, many traditional media entities have corresponding or subsidiary Internet publications. Much of the "new media" circulation occurs exclusively via the Internet. The analysis becomes even more difficult in the context of independent persons. Whether independent print publishers or Internet bloggers could invoke a reporter's privilege is a novel question for many courts. This section addresses the question of extending the reporter's privilege to such nontraditional media.

The question of whether a reporter's privilege extends to independent print publications is resolved in a relatively straightforward manner that closely mirrors the analysis applicable to traditional media. Independent print and Internet publications are analogous to traditional print media in both form and circulation. In most instances, a court interprets a state's shield law in determining whether the privilege applies to nontraditional entities. For example, in Forensic Advisors, Inc. v. Matrixx Initiatives, Inc., a Maryland
appellate court held that the statutory reporter’s privilege reaches independent publications. Forensic Advisors, Inc. publishes The EyeShade Report, which provides subscribers with periodic information about publicly traded companies. It is circulated primarily via the Internet. In a civil defamation action, Matrixx Initiatives, Inc. sought to depose Forensic president Timothy Mulligan regarding the source of allegedly defamatory statements published in The EyeShade Report. Forensic moved to quash the subpoena of Mulligan, asserting a reporter’s privilege. The trial court ordered Forensic to comply with the subpoena, noting that whether The EyeShade Report fell within the scope of the Maryland shield law “can be dealt with on a question-by-question basis. If [the disclosed information is] not admissible or if it ought to be protected, certainly the [court and applicable discovery rules] can . . . provide [Forensic with] protection.” The Maryland appellate court adopted the trial court’s ruling and conditionally affirmed continued discovery proceedings with respect to the subpoena.

Other courts have declined to recognize the protections of a reporter’s privilege for similar publications. A federal court in a diversity case refused to apply the privilege to a similar financial newsletter, published and distributed via the internet bimonthly. The court noted that the narrow language of the Ohio shield law “indirectly indicates a specific intent of the legislature” to restrict application of the privilege only to traditional newsgathering entities. Conversely, the federal district court in Washington, D.C. recognized the privilege as applying to the publisher of an energy newsletter, who was subpoenaed in connection with an investigation of price manipulation, but held the privilege inapplicable under the circumstances of the case because the publisher did not satisfy the court’s balancing test requirements.

Courts have also declined to extend the privilege to independent authors. The most telling instance involving a freelance writer remains the contempt proceedings of Texas author Vanessa Leggett. Leggett was jailed after she refused to turn over to a federal grand jury the volumes of interview materials she had compiled while

93 Id. at 860.
94 Id. at 863.
96 Id. at 789 (citing OHIO REV. CODE ANN. § 2739.12 (West 2006)).
98 Discussion of the scholar’s privilege, while closely related to the reporter’s privilege, is omitted. The scholar’s privilege has its own body of law and its own unique history, which fall outside the scope of this discussion.
working on a true-crime book about the murder of Houston socialite Doris Angleton. The book allegedly contained an interview with Angleton’s brother-in-law Roger Angleton, who was charged with her murder but committed suicide while in jail awaiting trial. Although Leggett’s imprisonment was widely publicized and criticized, the Fifth Circuit upheld Leggett’s contempt charges in an unpublished opinion. The U.S. Supreme Court refused to grant review of Leggett’s privilege claim. Leggett spent 168 days in jail and was freed only after the grand jury’s term expired. Leggett’s case is not unique, as the government continues to subpoena independent authors reporting on government affairs.

The newer the medium in question, however, the less guidance courts provide. In recent years, the popularity of bloggers has skyrocketed. Blogging allows individuals to post material virtually in real time to the Internet, for the consumption and discussion of others. Although much published material poses a fundamental journalistic question—namely, whether it is news—blog material intensifies that inquiry. Blogs often combine news or current events and commentary; their diversity also affects this issue. Blogs may range from personal diaries to extensive commentary on political, economic and social happenings. These “professional” blogs often receive coverage in the traditional press, particularly because of their ability to cover stories more quickly and disseminate information at a higher rate than the mainstream media. However, whether bloggers should be classified as journalists for the purpose of invoking a reporter’s privilege is a novel question.

100 See, e.g., Daniel Scardino, Vanessa Leggett Serves Maximum Jail Time, First Amendment-Based Reporter’s Privilege Under Siege, 19 COMM. L. 1 (2002) (criticizing both the Department of Justice and the United States Fifth Circuit Court of Appeals for their handling of the Leggett case).
101 In re Grand Jury Subpoena of Vanessa Leggett, No 01-20745 (5th Cir. Aug. 17, 2001).
103 See supra note 17.
104 See Eggen, supra note 19.
105 According to Pew Research Institute surveys in 2005 and 2006, more than twelve million American adults kept blogs, which more than fifty-seven million American adults read. AMANDA LENHART & SUSANNAH FOX, BLOGGERS: A PORTRAIT OF THE INTERNET’S NEW STORYTELLERS 22 (Pew Internet & American Life Project 2006).
106 Interestingly, only thirty-four percent of bloggers surveyed self-identified as journalists. Id. at 11. Whether this would ever persuade a court to limit a reporter’s privilege so as to exclude bloggers is unclear. If so, it does raise the question of how many of the bloggers not considering themselves journalists would change positions and attempt to invoke the protections of a reporter’s privilege when faced with a subpoena.
Courts have been reluctant to recognize bloggers as journalists. For example, in *Apple Computer, Inc. v. Doe*, a California court expressly refused to decide the question of whether a blogger is a journalist. The plaintiffs filed suit for misappropriation and disclosure of trade secrets against unidentified parties after the trade secrets appeared in an Internet blog that three individuals maintained. Apple filed a motion to compel the bloggers to disclose the source of the misappropriated information. The court applied California's five-part balancing test and analyzed the state's shield law. Based on [the language of the shield law] and the facts presented, it is far from clear that [the bloggers] qualif[y] for relief from the subpoena. In reaching its holding, the court primarily noted that the balance of interests favored disclosure regardless of the bloggers' status.

In *Wolf v. United States*, the Ninth Circuit ordered blogger Joshua Wolf to be returned to prison for civil contempt. Wolf filmed a violent protest and intended to publish the footage via his blog. A federal grand jury impaneled to hand down criminal charges in connection with the violence ordered Wolf to produce his videotape. When Wolf refused, citing a reporter's privilege, he was held in contempt and imprisoned. In upholding the contempt order, the Ninth Circuit relied heavily on *Branzburg* and squarely rejected a federal reporter's privilege. Although the appellate panel did not expressly consider Wolf's status as a reporter, the court's application of a privilege exclusively to traditional media implies that bloggers would not receive similar protection. The court held that, because Wolf's videotape records criminal activity, the government, whose interest in prosecuting federal crimes is compelling, is entitled to the evidence. The Ninth Circuit could have arguably reached an opposite result in a similar case involving the subpoena of traditional journalists, given the more public forum in which traditional reporters operate. Certainly, in a state prosecution, the mainstream media would have received protections to which Wolf is not entitled, given California's statutory privilege. Such disparities are based only on the label

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108 Id. at *6 (citing CAL. EVID. CODE §§ 1070(a), (b) (West 1995)).
109 Id. at *7.
110 Id.
111 201 F. App'x 430 (9th Cir. 2006).
112 Id. at 432–33.
113 California's evidence rules provide, in pertinent part, that "[n]o radio or television news reporter [can] be adjudged in contempt for refusing to disclose . . . any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public." CAL. EVID. CODE, § 1070(b) (West 1995). Thus, the California shield law creates an absolute reporter's privilege for radio or television news reporters. Had a radio or television station employed Wolf, the state could never compel him to disclose his work-product or hold
given news-gatherers; such inapposite results only bolster the necessity to treat independent journalists equally. Wolf was freed after serving a record 226 days in federal prison.114

C. Expanding the Privilege to Non-Media Entities

Nearly all courts and commentators agree that any reporter’s privilege cannot be absolute.115 Instead, courts and legislatures routinely balance the First Amendment interests of the privilege-holder with the general judicial and societal interests of those seeking disclosure of privileged information. Yet if a reporter’s privilege may arguably expand to encompass nontraditional media entities, how do courts and legislatures strike the proper balance? Put simply, can a non-media entity invoke a reporter’s privilege? A few courts have addressed the question of non-media entities and their ability to invoke the privilege. This section examines these unique situations.

Already reluctant to apply a reporter’s privilege to nontraditional media, courts are even more skeptical about extending the privilege to non-media entities. The Minnesota Supreme Court recently evaluated the reporter’s privilege in the context of political campaigns, holding that a judicial candidate could not invoke the privilege.116 A judicial challenger had made public statements disparaging the record of the incumbent judge he was opposing. Minnesota ethics rules prohibit knowingly or recklessly making false statements about the qualifications or integrity of a judge or candidate for judicial office.117 Investigators subpoenaed the challenger, asking him to disclose the source of his information so that they could determine whether the statements were actually false. The challenger refused, citing a reporter’s privilege to withhold the identity of confidential sources. As in many other novel cases, the majority opinion declined to decide whether a reporter’s privilege was applicable. Instead, it assumed that, even if a privilege applied, the public interest overcame any

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114 See Mozingo, supra note 18.
116 In re Charges of Unprofessional Conduct, 720 N.W.2d 807 (Minn. 2006).
117 MINN. RULE OF PROF’L COND. 8.2(a) (West 2006).
individual First Amendment interests. \textsuperscript{118} Separate concurrences and dissents both found that a reporter's privilege would apply, but, subject to appropriate balancing tests, the privilege would (or would not) be overcome. \textsuperscript{119}

Courts have also addressed whether various associations could invoke a reporter's privilege. In \textit{T.S. v. Boy Scouts of America}, \textsuperscript{120} a former boy scout filed suit against the organization, alleging sexual molestation by scoutmasters. The plaintiff, seeking records of complaints against the scoutmasters, sought disclosure of BSA files. \textsuperscript{121} Although the BSA did not directly assert a reporter's privilege, it drew heavily on that recognized state privilege to create an analogous privilege for confidential information possessed by organizations. \textsuperscript{122} The court reaffirmed the ability of civil litigants to assert the state's qualified reporter's privilege and agreed with the BSA that an analogous privilege was applicable to associations. \textsuperscript{123} The court, however, imposed a balancing test, noting the privilege could be overcome if "the claim was meritorious, . . . [if] the information being sought went to the heart of [the claim, and if] . . . a reasonable effort [had been] made to acquire the desired information by other means." \textsuperscript{124} The appellate court found that the trial court had implicitly made these findings in resolving discovery disputes and affirmed disclosure. \textsuperscript{125}

Conversely, other courts have flatly refused to extend a reporter's privilege to voluntary associations. In \textit{United States Department of Education v. National Collegiate Athletic Association}, \textsuperscript{126} the court compelled disclosure of confidential NCAA records for which the Department of Education had issued an administrative subpoena in order to investigate various violations of university administrative policies. The court expressed reluctance to recognize new or expanded privileges, noting that "[t]he Supreme Court's admonition against new privileges has prevailed [even] where the argument for confidentiality was compelling." \textsuperscript{127} Similarly, an attorney was not

\textsuperscript{118} Id. at 817.
\textsuperscript{119} Id. at 818–19 (P. Anderson, J., concurring) (applying the privilege but balancing compelled disclosure); id. at 819–20 (G. Anderson, J., dissenting) (applying the privilege and stating that it was not overcome).
\textsuperscript{120} 138 P.3d 1053 (Wash. 2006) (en banc).
\textsuperscript{121} Id. at 1054–56.
\textsuperscript{122} Id.
\textsuperscript{123} Id. at 1058–59.
\textsuperscript{124} Id. at 1058 (internal quotation marks and citations omitted) (third brackets in original).
\textsuperscript{125} Id. at 1060–61.
\textsuperscript{126} 2006 WL 3198822 (S.D. Ind. Sept. 8, 2006), aff'd, 483 F.3d 936 (7th Cir 2007).
\textsuperscript{127} Id. at *5 (citing Branzburg v. Hayes, 408 U.S. 665 (1972)).
entitled to assert a reporter's privilege in refusing to identify his client.\textsuperscript{128}

### III. Consequences of the Privilege

Whether a reporter's privilege does or should exist in the federal courts is a matter of continuing discussion. That, however, is not the focus here. Should the U.S. Supreme Court overrule \textit{Branzburg} or adopt Justice Powell's concurrence, or should Congress enact a federal shield law, the consequences of that policy decision would mark a momentous shift in First Amendment law. Its impact would not only raise new questions of the privilege's applicability, but would also reach issues such as licensing and the impact on state laws and national security. This section discusses some of these consequences, namely the concerns about the scope of a federal reporter's privilege and the dangers of government licensure of journalists.\textsuperscript{129}

#### A. Applicability of the Privilege

Most of the judicial guidance on applying a reporter's privilege to nontraditional media strikes against the privilege. The few courts to provide such protection have done so while interpreting the most liberal of state shield laws. Indeed, the more expansive the language of the shield law, the more likely a court will apply the privilege to nontraditional media entities. However, even in cases where a reporter's privilege does apply, the courts often compel disclosure, using the balancing of interests as judicial cover. These courts' emphasis on this type of reasoning is misplaced. The underlying social and constitutional policies of a reporter's privilege are to protect a fundamental social institution from government abuse. The general applicability of a reporter's privilege must be a question of process rather than form. No one would question the applicability of a

\textsuperscript{128} See Thompson v. Jiffy Lube Int'l, Inc., No. 05-1203-WEB, 2006 WL 2037395, *2-3 (D. Kan. July 18, 2006). The attorney in this case had originally asserted the attorney-client privilege. When the court rejected his claim, he turned to the reporter's privilege. \textit{Id.}

reporter's privilege to a newspaper reporter or television correspondent. However, the reportorial status of an independent internet blogger is questioned. These independent entities, albeit nontraditional, often serve the same newsgathering functions as traditional media. They have become such a force in American journalism that mainstream media often incorporate the independent analysis in their own reporting. Yet, an independent claim to the privilege continues to be routinely questioned or rejected outright. Courts understandably express reluctance to expand a reporter's privilege and further limit the truth-finding functions of the judicial process. However, where prudence and logic, here by virtue of the newsgathering functions of nontraditional media, dictate expansion, courts should not shy away from applying already applicable law, irrespective of novelty.\(^1\)

The divergent analyses of courts in applying a reporter's privilege to non-media entities illustrate the complexity inherent in novel questions of law. First, scarcity of applicable precedent provides little guidance for courts. However, sound legal reasoning should be sufficient to guide courts in properly applying the privilege. Actions from sister jurisdictions should provide enough preliminary guidance for a court's reasoning. More importantly, the court should not shy away from a serious evaluation of the underlying policy considerations of the privilege. The reporter's privilege, at its heart, provides an instrumental justification of sorts—essentially, a means to the end of adequately maintaining recognized First Amendment freedoms. Courts must consider one fundamental question to adequately perform this analysis: are the parties invoking the privilege involved in the gathering and public dissemination of information? If the factual situation with which a court is confronted falls within this policy, the court should cast aside its reluctance to expand a privilege and apply established law to the instant facts. However, because a reporter's privilege cannot be absolute, courts should employ traditional balancing tests to ensure a fair and just result is reached. This is particularly true when confronting the unique

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\(^1\) It is well established that federal courts are under no obligation to discuss or decide matters unnecessary to the final determination of the case or controversy. See, e.g., McLanahan v. Universal Ins. Co., 26 U.S. 170 (1828). It is equally clear that federal courts violate the case or controversy requirement of their limited Article III jurisdiction by issuing advisory opinions or deciding hypothetical questions. See, e.g., Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792); Clinton v. Jones, 520 U.S. 681 (1997). Consequently, the reader should not infer that federal courts are urged to unnecessarily contort the reporters' privilege, hypothesize about future application, or otherwise employ it when circumstances do not warrant its application. Instead, federal courts must simply remain open-minded and be willing to applying the privilege in new, yet appropriate circumstances, as they arise.
situation of applying a limited reporter's privilege to non-media entities.

B. Licensing of Journalists

Creating a federal reporter's privilege, especially by enacting a federal shield law, however, would create the danger of undue regulation of the media. Assuming the existence of a federal reporter's privilege, whether statutory or judicially created, as the above discussion illustrates, deciding who is a journalist (and, as such, could invoke the privilege) is a question that ultimately remains largely unanswered. It is likely, given the historic practice in the states and general public acceptance, that traditional media would be entitled to the protections of a reporter's privilege. A cogent argument may be advanced in favor of extending such protections to independent journalists and nontraditional media as well. It is at this margin where the question becomes most difficult, particularly where non-media entities are involved. At some point, however, a policy decision is required in order to define the limits of the reporter's privilege. Justice White deferred engaging in such analysis whose time had not yet come:

We are unwilling to embark the judiciary on a long and difficult journey to such an uncertain destination. The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order. Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege. . . .

Yet the question remains squarely at the forefront of First Amendment jurisprudence. It is the inability or unwillingness of courts to fashion a satisfactory answer to this question in which one of the great dangers of a reporter's privilege arises. When the legislature enacts a privilege, the legislature inherently also regulates the privilege's holders. Should Congress pass a federal shield law,

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131 Branzburg v. Hayes, 408 U.S. 665, 703–04 (1972). Justice White went on to note that "every sort of publication which affords a vehicle of information" could potentially qualify for the privilege. Id. at 704 (quoting Lovell v. Griffin, 303 U.S. 444, 452 (1938)). This he was unwilling to do, leaving it to Congress to assess the necessity of enacting a statutory shield law to protect journalists. Id. at 706; see also Randall D. Eliason, Leakers, Bloggers, and Fourth Estate Inmates: The Misguided Pursuit of a Reporter's Privilege, 24 CARDOZO ARTS & ENT. L.J. 385, 428–37 (2006) (arguing that creating a privilege presents too many difficult policy choices for courts and, as such, should be left to the legislature); Geoffrey R. Stone, Half a Shield Is Better than None, N.Y. TIMES, Feb. 21, 2007, at A21 (calling on Congress to develop a federal shield law, even if it means compromising expanded protection).
whether because of judicial refusal or as a legislative response, enacting a federal reporter's privilege opens a Pandora's box to increased federal media regulation, including licensure of journalists.

Upon careful examination, federal regulation of journalists through licensing provisions is not as remote a possibility as Orwellian fiction might suggest. Despite the admonition of the First Amendment, the media business is a heavily regulated industry, and courts have often grappled with the limitations on press freedoms.\textsuperscript{132} Despite the judiciary's perpetual concerns for the First Amendment, media regulation is commonplace. In 1934, Congress created the Federal Communications Commission "[f]or the purpose of regulating interstate and foreign commerce in communication" and charged the FCC with administering and enforcing broadcast media regulations.\textsuperscript{133} These requirements concern not only the format of communications, but also the substance of communications, with an increasingly close eye to content.\textsuperscript{134} Moreover, the expansive authority of the FCC evidences the very real existence of federal licensing requirements. Federal regulations already require licenses for the operation of amateur and commercial radio stations, television studios, cable outfits, and satellite broadcasters.\textsuperscript{135} As a result, radio and television broadcast journalists fall within the reach of FCC licensure. FCC regulations governing radio and television content cover myriad issues, including the truthfulness, objectivity, equality, and decency of broadcasts, including news.\textsuperscript{136} The agency also regulates the character of license applicants.\textsuperscript{137}

Given the prolixity of federal broadcast rules, it is clear that continued congressional intervention in the media industry would breed further regulation. It is very likely that enacting a federal

\textsuperscript{132}See, e.g., City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750 (1988) (striking down licensing requirements for newspaper stands but leaving room for content- or media-neutral regulations).


\textsuperscript{134}For example, the Communications Decency Act provides for criminal sanctions against "who[m]ever [broadcasts] any obscene, indecent, or profane language." 18 U.S.C. § 1464 (2000). The FCC also provides for decency regulations, prohibiting "licensee[s] of a radio or television broadcast station [from broadcasting] any material which is obscene." 47 C.F.R. § 73.3999 (2007).


\textsuperscript{136}See 47 C.F.R. § 73.1217 (2007) (prohibiting the broadcast of hoaxes); 47 C.F.R. § 73.1910 (requiring broadcasters "to afford reasonable opportunity for the discussion of conflicting views"); 47 C.F.R. § 73.4050 (requiring a weekly quota of children's programming); 47 C.F.R. § 73.4185 (regulating political broadcasts).

\textsuperscript{137}47 C.F.R. § 73.4280 (requiring broadcast licensees to maintain certain standards of character).
statutory reporter's privilege would lead to the licensing of individual journalists. However, states with similar shield laws have not experienced this phenomenon. While no state shield law includes specific licensing provisions, many do narrowly circumscribe the limits of the privilege, extending protection only to traditional journalists or in particular circumstances. Given the potential preemptive force of federal regulations and the interstate nature of the media business, state legislatures are without authority to impose the type of sweeping regulations that the federal government is able to promulgate. Finally, because the federal district and appellate courts have had little occasion to construe state shield laws, the federal judiciary would be left to develop its own body of precedent concerning the specifics of a federal shield law.

Finally, licensing as it relates to other federal evidentiary privileges is not a foreign concept. The Federal Rules of Evidence do not expressly recognize any privileges; however, the federal courts have enumerated several vocational privileges over time. Each of these professional privileges, irrespective of whether recognized by the federal courts or created by state statute, requires the trustee of the privilege to be a licensed practitioner in his or her respective field. Given this licensing requirement for other recognized vocational privileges, it would not be extraordinary for a reporter's privilege to require licensure of journalists. And so Justice White's remark in Branzburg that eventually journalists would be categorized becomes a prophetic insight. Regulation of journalists by virtue of a federal shield law no longer raises the specter of licensing—that possibility becomes a distinct reality.

138 See supra Part I.C.

139 While federal courts sitting in diversity apply substantive state law, they nevertheless apply federal procedural and evidentiary law, instead of the evidentiary rules of states. See Fed. R. Evid. 501 (stating that federal privilege rules always control in federal criminal actions); Pearson v. Miller, 211 F.3d 57, 66 (3d Cir. 2000) (stating that federal privilege rules control in federal civil actions, except where the privilege is an essential element of a supplemental state claim).


141 For example, Jaffee requires that the psychotherapist be licensed, Fisher requires that the attorney be licensed, and In re Grand Jury Investigation requires that the clergyman be ordained. See Jaffee, 518 U.S. 1; Fisher, 425 U.S. 391; In re Grand Jury Investigation, 918 F.2d 374 (1990).

142 408 U.S. 665, 704-05 (1972).
Some commentators believe that licensure of journalists is an appropriate means of ensuring effective administration of a federal reporter's privilege. However, numerous inherent dangers accompany the government licensure of journalists. The most prominent of these pitfalls is the risk of limited protection for journalists. As the above discussion demonstrates, the difficulties in defining who exactly qualifies as a journalist makes the question not a simple one to answer. As a result, statutory privileges often trade licensing requirements for limited protection. This is illustrated in numerous states whose legislatures have enacted statutory privileges. Many state shield laws grant the protections of the reporter's privilege only to traditional media outlets, the alternative being a privilege the limits of which are defined by a functional journalistic approach. The functional approach extends protection to anyone engaged in the gathering and public dissemination of news. However, the possibility of government licensure attaches to this broader protection. Thus, in hopes of avoiding unwanted—and, possibly, unconstitutional, under the First Amendment—licensing requirements, a federal shield law could unduly limit the very protections a reporter's privilege means to provide.

Licensing requirements could also impose hefty financial burdens on journalists seeking to invoke the privilege. Government-issued licenses necessarily carry licensing fees, including issuance, renewal, taxes, and other special assessments. The FCC already imposes

143 See, e.g., Barry P. MacDonald, The First Amendment and the Free Flow of Information: Towards a Realistic Right to Gather Information Age, 65 OHIO ST. L.J. 249 (2004) (supporting a requirement that any claimant to a reporter's privilege demonstrate membership in journalistic associations, formal training, or other credentials). Although advocates of licensing rightly point out that such requirements would lead to higher journalistic standards, it is also worthy to note that journalism, while not a licensed profession per se, is already a self-regulating industry. Professional associations and generally accepted ethical codes govern the conduct of journalists. See Society of Professional Journalists, Code of Ethics, http://www.spj.org/ethicscode.asp (last visited May 13, 2008). Moreover, in an industry in which credibility is the primary currency, licensing requirements would do little to prevent unethical or otherwise inappropriate journalistic practices. Instead, the marketplace would self-correct journalistic misconduct, ferreting out the degenerate news-gatherers as confidential sources refuse to do business with them.

144 See, e.g., ALA. CODE § 12-21-142 (LexisNexis 2005) (limiting the privilege to newspaper, radio, and television reporters); GA. CODE ANN. § 24-9-30 (1995) (limiting the privilege to newspaper, radio, and television reporters, as well as book and magazine writers).

A few states, however, have enjoyed success with shield laws providing broad coverage without requiring licensing of journalists. See, e.g., FLA. STAT. § 90-5015 (2006) (extending the privilege to those regularly engaged in publishing "information of public concern relating to local, statewide, national, or worldwide issues"); LA. REV. STAT. ANN. §§ 45:1451-1454 (1999) (same); N.Y. CIV. RIGHTS LAW § 79-h (2007) (same).

145 One can hardly obtain a state driver's license without paying for the issuance or renewal of the license. See, e.g., OHIO REV. CODE ANN. § 4507.23 (West Supp. 2007) (listing licensing fees).
substantial licensing requirements for obtaining broadcast licenses.  
For new commercial radio or television stations, such fees can range upwards of five thousand dollars.  
While established, commercial (or mainstream) broadcasters can afford to bear the costs of these licenses, independent journalists are unlikely to be in a similar financial position. And while independent journalists are utilizing new (and relatively affordable) technology, such as the Internet, to expand their media presence, should the government institute licensing requirements, these media could eventually suffer the same fate as conventional broadcasters. Imposing high financial burdens on journalists also creates an implicit, often overlooked, danger—the homogenization of media. Levying substantial licensing fees inherently stratifies journalists into two classes: those who can afford to pay, and those who cannot. Eventually, market forces allow only the former class to continue practicing journalism, while the latter class must fold under the financial pressures. Media homogenization is already evident in all traditional media.  
As individual media voices submit to financial constraints, the surviving media elite swallow the market share that this vacuum creates.

Licensing journalists may also bring with it a host of ancillary requirements. For example, FCC regulations already require broadcast licensees to meet certain standards and criteria in order for licensees to retain their broadcast privileges. Licensing journalists creates the possibility of similar requirements. Journalists could be required to keep formal records of conversations with sources. Although most journalists already keep detailed notes, licensing regulations could allow the government access to confidential work-product (essentially circumventing the reporter’s privilege). Similarly, as is the case with other licensed professions, journalists could be required to undergo formal continued training. While continuing education is a worthy obligation for some professions, it

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148 47 C.F.R. § 1.1104 (2007) (providing fees for television stations of: $4,000 for a television construction license, $895 for a main studio license, and $270 for a broadcast license; and fees for commercial AM radio of: $3,565 for a radio construction license, $895 for a main studio license, $585 for a broadcast license, and $675 for each antenna license).
149 For instance, the Tribune Company alone (whose monthly revenues for February 2007 were more than $385 million—in the media industry, a welterweight conglomerate) owns twenty-three television stations, eleven newspapers, one national broadcasting studio, and one radio station. Tribune Company, http://www.tribune.com (last visited Apr. 6, 2008).
150 See Dean Colby, Toward a New Media Autonomy, 10 COMM. L. & POL’Y 433 (2005), for a discussion of the effects of media homogenization.
151 See, e.g., 47 C.F.R. § 73.1800 (2007) (requiring broadcast carriers to retain operational logs); 47 C.F.R. § 73.4099 (mandating financial qualifications for licensees); 47 C.F.R. § 73.4280 (requiring licensees to meet and maintain certain character qualifications).
would be superfluous in most of media practice. The work of attorneys and healthcare professionals, for example, requires practitioners to keep up with substantive and procedural developments in their respective fields. By contrast, most core journalistic practices are unchanging, firmly rooted in the traditions of the profession. While journalists are wise to keep up with developing trends, formal training is not required to accomplish this end. Finally, journalists would not bear the burdens of licensing requirements alone. Instituting federal regulations of journalists would create the need for a new bureaucratic infrastructure. Federal agencies would be responsible for administering regulations and enforcing compliance.

Each of these dangers inherent in licensing leads to an unwelcome chilling effect on free press. Throughout the history of First Amendment jurisprudence, courts have condemned such impositions on firmly established rights. The Supreme Court has described this chilling effect as “antithetical to the First Amendment’s protection[s.]” The Court’s frequent encomia on the necessity of adequately protecting First Amendment freedoms is more than mere puffing, however; the Court is genuinely concerned with the preservation of fundamental individual American liberties. In one of the most eloquent expositions on the primacy of First Amendment freedoms, the Supreme Court noted that “these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy. The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed.” The paramount danger of government licensure of journalists is that it will lead to censorship based on content. The Supreme Court, in striking down regulations targeting specific media, recognized this threat, noting that “law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship.” The government, as the gatekeeper of journalists’ licenses, would also become the gatekeeper of editorial content. Should the licensor dislike or disagree with the views that the licensee expresses, irrespective of the truth or necessity of such views, the government could easily refuse to grant, refuse to renew,

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152 Reporters who stay current will likely meet continued success, while those who do not will fall by the wayside as others pass them by.
or revoke outright a dissenting journalist's license to report. This would, in turn, essentially create a state-run media and destroy important institutional autonomy. The press serves as essential a function today as the Fourth Estate served in Nineteenth Century England and pre-revolutionary France, insofar as it provides for crucial checks and balances on otherwise coordinate branches of government. The chilling effect of licensing requirements would also carry with it more concrete, practical impacts for journalists. Concerns about compliance with licensing regulations could impede an increasingly rapid news cycle. In a world where immediate access to twenty-four-hour news is the norm, journalists who constantly find themselves constrained by asking whether certain actions will cost them their license will limit their ability to function properly. Moreover, noncompliance with licensing requirements could lead to criminal and civil penalties. These penalties would functionally limit the free conduct of journalists, effectively eliminating the free flow of information.

The crux of the issue of a reporter's privilege at the federal level thus rests with the most appropriate means of balancing the mandates of the First Amendment, its guarantees of free, vigorous and unbridled press and the public interest in facilitating the free flow of information through vibrant and diverse journalistic practices, while ensuring the effective administration of justice. While some commentators are freely willing to trade off First Amendment protections, and others are ready to accept a certain level of regulation in the name of facilitating a workable compromise, the most efficacious solution still lies within the province of the judiciary. Some may decry this approach as an inefficient use of scarce judicial resources or as impracticable and improper, given the role of the federal courts, but such objections cannot be well-taken. A

156 See N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279 (1964) (noting that "would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true"); see also Note, Reporters and Their Sources: The Constitutional Right to a Confidential Relationship, 80 Yale L.J. 317, 336 (arguing that the chilling effect would also reach a journalist's confidential sources, "[u]nless reporters and informers can predict with some certainty the likelihood that newsmen will be required to disclose names or information obtained in confidential relationships").

157 See THOMAS CARLYLE, ON HEROES AND HERO WORSHIP IN HISTORY (1841) (quoting Edmund Burke as saying "there were Three Estates in Parliament [referring to the houses of the British legislature]; but, in the Reporters' Gallery yonder, there sat a Fourth Estate more important far than they all" and referring back to his own work, THOMAS CARLYLE, THE FRENCH REVOLUTION (1837)) (emphasis added).

158 See, e.g., MacDonald, supra note 143.

159 See, e.g., Stone, supra note 131.

160 The role of the courts, after all, is to resolve the cases and controversies presented to them. Federal courts already resolve complicated matters of evidentiary privilege without great
carefully crafted, judicially created reporter's privilege, complete with simple, yet elucidated guidelines is best able to address the myriad concerns presented by the question of instituting a federal reporter's privilege.

CONCLUSION

Nearly thirty-five years after the Supreme Court's landmark decision in *Branzburg v. Hayes*, the fate of a federal reporter's privilege remains in a state of flux. The Supreme Court has refused to revisit the question, while lower courts recognize varying degrees of the privilege. One of the central questions of any inquiry regarding a federal reporter's privilege remains to whom such a privilege would apply. Some guidance comes from lower federal courts and the statutory privileges enacted in many states. However, this guidance has done little to facilitate the adoption of a privilege sufficient to protect the First Amendment freedoms lying at its heart. Moreover, as new proposals surface in an attempt to provide adequate protection, new concerns become apparent. A federal shield law, for instance, although widely supported, brings with it the specter of government licensure of journalists, the chilling effects of which would have far-reaching implications in First Amendment jurisprudence. Some may question the harm, especially in light of recent occurrences. Judith Miller and Vanessa Leggett were freed from prison. But what to do with James Risen or the next imprisoned newsgatherer? Until the courts and Congress squarely confront one of today's most pressing First Amendment issues, that question will remain unanswered.

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burden or difficulty. See, e.g., *supra* notes 140–41 and accompanying text.

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


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