Using the Shield as a Sword: An Analysis of how the Current Congressional Proposals for a Reporter's Shield Law Wound the Fifth Amendment

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INTRODUCTION

Frequently, journalists, broadcasters, and other newsgatherers are subpoenaed by federal prosecutors to disclose the identity of their confidential sources before a grand jury.\(^1\) Federal

prosecutors insist that the fair administration of justice guaranteed by the Fifth Amendment requires that regardless of the confidential nature of the information, a newsgatherer, like any other citizen, is required to comply with federal subpoenas in accordance with federal law. Newsgatherers and other press advocates assert that the press has a responsibility to keep the public informed, and that in order to gather information for this purpose, reporters often have to promise their sources confidentiality. They further assert that if reporters are compelled to disclose the identity of their sources, the sources will “dry up,” undermining the press’ ability to effectively report the news and obstructing the public citizenry’s access to information. Therefore, the press argues that the First Amendment, as interpreted in Reporters Increasingly Pressed [hereinafter Reporters Increasingly Pressed] (noting that more reporters who refuse to reveal confidential sources may receive jail time).

2 The Fifth Amendment states, “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . .” U.S. CONST. amend. V.


4 For the purpose of this Comment, the words “newsgatherer,” “journalist,” and “reporter” will be used interchangeably, and are to be regarded as having identical meanings.

5 When reporting, journalists either receive information from a source “on-the-record,” so that the source may be named in the story, “off-the-record,” whereby information itself cannot be used in the story, or as "background" or “not-for-attribution,” which allows journalists to use information without disclosing their sources’ identities. See Monica Langley & Lee Levine, Branzburg Revisited: Confidential Sources and First Amendment Values, 57 GEO. WASH. L. REV. 13, 31 n.107 (1988). Journalists argue confidential sources “are essential to successful investigative reporting, and contribute to the free flow of information that lies at the heart of the freedom of the press provision.” Kraig L. Baker, Are Oliver Stone and Tom Clancy Journalists? Determining Who Has Standing to Claim the Journalist’s Privilege, 69 WASH. L. REV. 739, 739 (1994). Recently, journalists’ ability to protect their confidential sources pursuant to First Amendment’s Press Clause has been called into question by prosecutors’ success in indicting those newsgatherers who do not comply with subpoenas compelling them to testify about their sources. See Paul McMasters & Geoffrey R. Stone, Do Journalists Need A Better Shield?, LEGAL AFFAIRS, Dec. 6, 2004, http://www.legalaffairs.org/webexclusive/debateclub_cooper1204.msp. As a result, it has become increasingly difficult for journalists to obtain information, thus hindering their ability to disseminate news to the public. Id.

Amendment Press Clause\textsuperscript{7} impliedly grants immunity to reporters from compelled disclosure of confidential sources, and that the federal government violates this protection when newsgatherers are required to reveal a confidential source in the course of a federal grand jury investigation.\textsuperscript{8}

In the landmark case on the matter, \textit{Branzburg v. Hayes},\textsuperscript{9} the Supreme Court in a five-to-four decision rejected the notion that a reporter possesses a First Amendment right beyond that of an ordinary citizen to withhold confidential news sources from a grand jury investigation.\textsuperscript{10} Justice Powell’s controversial concurrence, though agreeing with the majority, emphasized that the Court did not intend that newsgatherers should be afforded no First Amendment protection when subpoenaed as part of a bad faith investigation or in a harassing manner.\textsuperscript{11} Contrastingly, Justice Stewart’s dissent recognized a qualified privilege to refuse revealing confidential sources based on a three-part test,\textsuperscript{12} while Justice Douglas, in a separate dissenting
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\text{news); see also McMasters & Stone, supra note 5 (explaining journalists' argument that potential sources will be disinclined to speak with them knowing journalists can no longer offer confidentiality); Reporters Increasingly Pressed, supra note 1, (noting public interest in ensuring sources are not intimidated from speaking with reporters).}
\text{7 U.S. CONST. amend. I (stating “Congress shall make no law... abridging the freedom... of the press ...”).}
\text{8 See Karl H. Schmid, Journalist's Privilege in Criminal Proceedings: An Analysis of United States Courts of Appeals' Decisions from 1973 to 1999, 39 AM. CRIM. L. REV. 1441, 1444-45 (2002) (discussing conflicting interests between prosecutors attempting to gather evidence in criminal proceedings and journalists who receive subpoenas to reveal what they know); see also McMasters & Stone, supra note 5 (arguing that just as the law prevents courts from compelling either party in an attorney-client relationship from testifying about his communications, the law should protect journalists from revealing their sources).}
\text{9 408 U.S. 665 (1972).}
\text{10 White, J. was joined by Burger, C.J., Blackmun, Powell, and Rehnquist, JJ. who agreed that requiring newsmen to appear and testify before grand juries abridges neither their freedom of speech nor their freedom of the press guaranteed by the First Amendment. Id. at 704. Powell, J. filed a concurring opinion, and Douglas, Brennan, Stewart, and Marshall, JJ. dissented. See id. at 667. Although reporters have claimed this privilege for centuries, the notion of an absolute privilege for the confidentiality of the press’s sources was flatly rejected in \textit{Branzburg}. See Baker, supra note 5, at 740-41.}
\text{11 See \textit{Branzburg}, 408 U.S. at 709 (Powell, J., concurring) (suggesting that government is not free to harass the press in effort to acquire information); see also New York Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring) (noting that only free and unrestrained press can be effective in democratic society).}
\text{12 Justice Stewart, joined by Justices Brennan and Marshall opined that to compel information, the government must show three things: probable cause to believe that the newsgatherer has information that is clearly relevant to a specific probable violation of law, that the information sought cannot be obtained by alternative means less damaging of First Amendment rights, and a “compelling and overriding interest in the information.” \textit{Branzburg}, 408 U.S. at 743 (Stewart, J., dissenting); see also Garland v. Torre, 259 F.2d}
opinion, advocated for an absolute reporter's privilege against disclosing confidential sources. Since the Court did not prohibit state legislatures from enacting their own shield laws based on their own local concerns for law enforcement and press relations, thirty-one states and the District of Columbia drafted their own shield laws providing statutory protection to a reporter who wished to withhold the identity of her sources. Only ten of those states and the District of Columbia created absolute reporters' privileges against compelled disclosure of confidential sources to a grand jury. The remaining states derived qualified reporters' privileges from the common law or their own state constitutions, with the exception of Wyoming, which has remained silent on the issue, Hawaii, which has refused to recognize the privilege, and Missouri, Mississippi, and Utah, the

545, 549 (2d Cir. 1958) (stating that freedom of press is of "paramount public interest in fair administration of justice").

13 See Branzburg, 408 U.S. at 711–25 (Douglas, J., dissenting) (arguing that press possesses preferred position under the Constitution to inform the public); see also Amy Tridgell, Newsgathering and Child Pornography Research: The Case of Lawrence Charles Matthews, 33 COLUM. J.L. & SOC. PROBS. 343, 360-61 (2000) (noting how scope of protection for reporters extends to absolute privilege in Montana).

14 See Branzburg, 408 U.S. at 706 (noting that laws had to be within limits of First Amendment); see also Jennifer Elrod, Protecting Journalists From Compelled Disclosure: A Proposal for a Federal Statute, 7 N.Y.U. J. LEGIS. & PUB. POLY 115, 124-25 (2003-04) (commenting on differences in application of state shield laws to journalists).


highest courts of which have not directly ruled on the issue. Of these states, the only high state court to explicitly recognize some form of qualified reporters' privileges in the grand jury context is the Supreme Judicial Court of Massachusetts. A patchwork of shield laws and state court decisions resulted based upon each state's interpretation of the Brassburg opinion. Yet, since it is well settled that state law privileges do not apply to a federal grand jury subpoena, and that federal law governs subpoenas issued by the federal government pursuant to a federal grand jury investigation, the debate has raged over a federal reporter's privilege in the federal courts, spawning a myriad of differing opinions on the subject. These jurisprudential discrepancies have instigated a battle between newsgatherers and federal officials that has been ongoing since Brassburg.


20 See Elrod, supra note 14, at 124–25. These various shield laws are inconsistent in the protections they offer. See id. Twenty-eight states provide for a qualified privilege by statute or case law for the possible disclosure of confidential sources. See Campagnolo, supra note 15, at 450. Eighteen states and the District of Columbia provide an absolute privilege against compelled disclosure of confidential sources. See id.

21 See In re Grand Jury Proceedings, 867 F.2d 562, 564 (9th Cir. 1989) (stating "federal privilege law, not state law, must be applied in criminal cases brought in federal court"), cert. denied, 493 U.S. 906 (1989); In re Subpoena Served Upon Jorge S. Zuniga, 714 F.2d 632, 635 (6th Cir. 1983) (noting "inasmuch as the subpoenas in issue are the product of a federal grand jury investigation into alleged violations of federal criminal law, questions of privilege, are governed by federal law"), cert. denied 464 U.S. 983 (1983).

22 See Elrod, supra note 14, at 124. Some believe that the recent increase in subpoenas coming in federal court and not in state court is because most state shield laws offer more protection than the First Amendment, while federal courts offer less protection. See David Shaw, Journalists are Working in a Dark and Dangerous Era, L.A. Times, Nov. 21, 2004, at E-18. Nonetheless, the majority of federal courts recognize some form of qualified reporter's privilege based on Brassburg, each varying in scope and application. See, e.g., United States v. Burke, 700 F.2d 70, 76–77 (2d Cir. 1983); United States v. Cuthbertson, 630 F.2d 139, 146 (3rd Cir. 1980). Other courts, however, reject a qualified reporter's privilege. See, e.g., Lee v. Dept. of Justice, 413 F.3d 53, 60 (D.C. Cir. 2005); Storer Commc'ns. Inc. v. Giovan (In re Grand Jury Proceedings), 810 F.2d 580, 583–84 (6th Cir. 1987).

23 See Alexander, supra note 1, at 111–12 (commenting on difficulties legislators faced while attempting to balance freedom of press with compelling public interest in confidential information); see also Brassburg v. Hayes, 408 U.S. 665, 699 (1972) (pinpointing mutual distrust and tension between press and government officials).
Recently, this confrontation has gained increased media attention in light of two particular federal court decisions involving grand jury proceedings. In *In re Special Proceedings*, the First Circuit affirmed a lower court civil contempt conviction of Rhode Island reporter James Taricani for refusing to reveal a confidential source before a grand jury, and found no reporter's privilege that would offer such protection. Taricani was later convicted of criminal contempt and sentenced to six months home confinement for continued failure to testify, though the source was eventually discovered. The D.C. Circuit in *In re Grand Jury Subpoena, Judith Miller* found Time magazine reporter Matthew Cooper and New York Times reporter Judith Miller in civil contempt of court, holding that there is no privilege under the First Amendment protecting journalists from compulsory disclosure of confidential sources when called to testify before a grand jury. The Supreme Court

24 See McMasters, *supra* note 6 (remarking that in recent cases federal judges have rejected journalists' First Amendment claim that it is in both the public and governmental interest to allow flexibility in reporting); see also *San Francisco Reporters, supra* note 3 (quoting Lucy Dalglish, executive director of reporters' committee, who "think[s] we're setting up a real showdown here").

25 373 F.3d 37 (1st Cir. 2004).

26 Jim Taricani was a television reporter for WJAR Channel 10, a television station in Providence owned and operated by NBC. *See id.* at 40; The Associated Press, *R.I. Reporter Convicted of Criminal Contempt*, FIRST AMEND. CTR., Nov. 18, 2004, http://www.firstamendmentcenter.org/news.aspx?id=14390. Taricani aired a videotape he received from a confidential source which showed Frank Corrente, administrative director to Providence Mayor Vincent A. Cianci, Jr., accepting a cash bribe for himself and possibly for Cianci as well. *See In re Special Proceedings*, 373 F.3d at 40. The airing violated a protective court order not to release the tapes during the grand jury proceedings against Corrente and Cianci. *See id.* at 41. Taricani stated that he had given the source of the tape a pledge of confidentiality, and after continued refusal to submit to a deposition pursuant to a subpoena, the district court found Taricani in civil contempt until he complied with the subpoena. *See id.* The circuit court affirmed the district court decision, stating "[i]n *Branzburg*, the Supreme Court flatly rejected any notion of a general-purpose reporter's privilege for confidential sources, whether by virtue of the First Amendment or of a newly hewn common law privilege." *See id.* at 44. To note, though Taricani was initially held in civil contempt, a "Federal Grand Jury Proceeding is a criminal proceeding notwithstanding that it may result in either civil or criminal content citations." In re Williams, 766 F. Supp. 358, 367 (W.D. Pa. 1991).


28 397 F.3d 964 (D.C. Cir. 2005).

29 The Department of Justice investigated whether government employees violated federal law by allegedly disclosing the identity of Valerie Plame, a CIA operative. *See id.*
of the United States denied Cooper and Miller's petitions for writs of certiorari. As a result, Cooper cooperated with the federal government, while Miller served 85 days in jail before eventually disclosing her confidential source to the federal grand jury. These high profile cases, among others, have produced an ardent reaction among the news media community, which has become increasingly concerned about incurring criminal penalties, including jail time, for refusing to disclose confidential

at 966. Grand jury subpoenas were issued to Cooper and Miller to discover the confidential source who leaked Plame's identity, and both were eventually held in civil contempt for refusal to hand over documents or provide testimony relating to their confidential sources. See id. at 966–67. A three-judge panel of the D.C. Circuit affirmed this decision. See id. at 968, 976. A petition for en banc rehearing was denied. See In re Grand Jury Subpoena (Miller), 405 F.3d 17, 20 (D.C. Cir. 2005). The controversy has become overtly political in light of the fact that Plame's identity was first revealed by columnist Robert Novak, citing unidentified senior Bush administration officials. The Associated Press, High Court Won't Hear Reporters' Appeal Over Subpoenas, FIRST AMEND. CTR., June 27, 2005, http://www.firstamendmentcenter.org/news.aspx?id=15475. Plame's identity was revealed after Plame's husband, former Ambassador Joseph Wilson, wrote a newspaper opinion piece critical of the Bush Administration's claim that Iraq was purchasing uranium from Niger. Id.

30 See Cooper v. United States, 125 S. Ct. 2977 (2005) (denying writ of petitioner Matthew Cooper); Miller v. United States, 125 S. Ct. 2977 (2005) (denying writ of petitioner Judith Miller); High Court Won't Hear Reporters' Appeal, supra note 29 (noting that 34 states and various news groups supported the Court's intervention).


32 Much of the recent controversy over reporters serving jail time began with Vanessa Leggett, a crime writer who, at the time, was jailed longer than any U.S. writer who cited the First Amendment as support for rejecting a grand jury subpoena. See The Associated Press, Supreme Court Turns Away Jailed Writer's Appeal, FIRST AMEND. CTR., Apr. 15, 2002, http://www.firstamendmentcenter.org/news.aspx?id=4018. Leggett was convicted to five months in jail for refusing to present confidential research she collected for an upcoming book to a grand jury panel in the investigation of a Houston murder. See In re Grand Jury Subpoena to Vanessa Leggett, No. 01-20745 (5th Cir. Aug. 17, 2001) (per curiam) (unpublished). More recently, the Justice Department has also been aggressively subpoenaing journalists for confidential sources related to the federal BALCO steroid investigations. See 3 San Francisco Reporters, supra note 3. In the context of civil proceedings, five reporters were held in civil contempt for refusing to reveal confidential sources needed by Dr. Wen Ho Lee to litigate his civil action against the government. See Lee v. United States Dep't of Justice, 327 F. Supp. 2d 26, 32 (D.D.C. 2004), aff'd in part, vacated in part, by Lee v. Dep't of Justice, 413 F.3d 53 (D.C. Cir. 2005).
sources to grand juries. Consequently, many newsgatherers and press advocates have appealed to Congress to enact federal legislation securing their right not to reveal confidential news sources.

Despite prior unsuccessful attempts, several legislators from the 109th Congress have decided to champion the newsgatherers' cause by introducing bills into Congress that would create a uniform statutory federal reporter's shield law. One of the primary justifications for proposing such legislation is that the inconsistency among federal circuits regarding a reporter's privilege to refuse to reveal confidential sources has left reporters with inadequate protection when subpoenaed to testify before federal grand juries. There are, however, some reporters who


35 See Elrod, supra note 14, at 124 n.58 (noting that Congress has introduced several federal shield laws, but none have been passed); see also Douglas H. Frazer, Criminal Law: The Newsperson's Privilege in Grand Jury Proceedings: An Argument for Uniform Recognition and Application, 75 J. CRIM. L. & CRIMINOLOGY 413, 416 (1984) (stating that Congress has periodically proposed, but never passed, legislation "guaranteeing a Newsperson's privilege").

36 See The Associated Press, Bill to Create Federal Shield Law Introduced in House, FIRST AMEND. CTR., Feb. 2, 2005, http://www.firstamendmentcenter.org/news.aspx?id=14782 [hereinafter Introduced in House] (suggesting proposal is, in part, a reaction to recent reporter convictions); see also Dale Harrison, Lawmakers Must Raise Shields For Reporters, SUN-SENTINEL, Aug. 21, 2005, at 5H (discussing how recent federal prosecution of reporters for failing to reveal their sources may increase chances that federal shield laws, recently introduced to Congress, will be passed).

37 See 150 CONG. REC. S11, 642, 647-68 (daily ed. Nov. 19, 2004) (statement of Sen. Dodd) (stating that there needs to be a federal shield for reporters so they may know what confidential information they may be liable to disclose, and so that the press can collect information for public disclosure without fear of prosecution); see also The Associated
prefer waiting for the federal courts to come to a consensus on this issue, and believe the passage of a national shield law will imply that the First Amendment alone is insufficient to grant reporters any privilege at all. Nevertheless, the confusion among circuits in this area of the law requires Congressional intervention for the benefit of both federal prosecutors and reporters. However, in unifying this area of law, Congress should not simply disregard the sound judicial reasoning of the Branzburg Court. Nor should Congress ignore the long line of post-Branzburg federal court decisions, including the recent D.C. Circuit decisions, which have adhered to the Court’s ruling in this regard. The current Congressional proposals, however, ignore federal precedent, along with pragmatic public policy concerns, by creating a reporter’s privilege that is absolute, and proffers no exceptions for federal grand jury investigations.

This Comment argues that the current Congressional proposals should be rejected because by creating an absolute federal reporter’s privilege against compelled disclosure of confidential sources before federal grand juries, the proposals undermine the Fifth Amendment interests protected by Branzburg and its progeny. The proposals also ignore the long


See Eirol, supra note 14, at 126 (suggesting that uniform standard for courts and journalists will promote regularity and consistency of outcomes); see also In re Grand Jury Subpoena (Miller), 397 F.3d 964, 981 (D.C. Cir. 2005) (Sentelle, J., concurring) (suggesting that the media should bring their concerns to the legislative branch for presentment to the executive branch rather than to Article III courts); GEOFFREY R. STONE, AMERICAN CONSTITUTION SOCIETY FOR LAW AND POLICY, THE MERITS OF THE PROPOSED JOURNALIST-SOURCE PRIVILEGE 5 (Sept. 2005), available at http://www.acslaw. org/pdf/stone9-23-05.pdf (noting that confusion among federal circuits supports adopting a federal privilege statute that would provide much-needed guidance).

See discussion infra Part I.

See infra notes 83-87 and accompanying text (delineating the reasons why federal courts have sided with Branzburg).

See infra notes 89-115 and accompanying text (discussing bills granting an absolute reporter’s privilege).
line of federal precedent refusing to grant absolute privileges at law, generally, and with respect to the press. Furthermore, an absolute privilege is unnecessary considering the protections afforded to reporters against compelled disclosures of confidential sources conducted in bad faith or in an abusive manner under \textit{Branzburg}, as well as other federal procedures. Additionally, this Comment argues that the creation of an absolute federal reporter-source privilege is overly broad, creating the potential for abuse in contravention of public policy. Part I will discuss the competing interests of the First and Fifth Amendments and how they were analyzed by the \textit{Branzburg} Court and its progeny. Part II will detail those sections of the current proposals that address disclosure of confidential sources, and outline the legal arguments against absolute protection of confidential sources, along with the practical problems presented by an absolute reporter-source privilege.

I. \textbf{CONSTITUTIONAL WARFARE: \textit{BRANZBURG} AND THE FIRST AND FIFTH AMENDMENTS}

Historically, the press plays an essential role in disseminating information to the public.\footnote{See Bradley S. Miller, \textit{The Big Chill: Third-Party Documents and the Reporter's Privilege}, 29 U. Mich. J.L. Ref. 613, 623 (1995–96) (discussing importance of the press in getting useful information about government to the people); \textit{see also} Citizen Pub. Co. v. United States, 394 U.S. 131, 139–40 (1969) (explaining that free press is key to free society, in that it ensures widespread and diverse dispersal of information).} In addition to providing general news about crimes against the state, the press furthers the values of the First Amendment by providing information on public officials and government corruption.\footnote{See \textit{New York Times v. Sullivan}, 376 U.S. 254, 270 (1964) (stating that "debate on public issues should be uninhibited, robust, and wide-open"); \textit{see also} Mills v. Alabama, 384 U.S. 214, 218 (1966) (asserting that "a major purpose of that Amendment was to protect the free discussion of government affairs"); Garrison v. Louisiana, 379 U.S. 64, 77 (1964) (suggesting that there is "paramount public interest in a free flow of information to the people concerning public officials"). \textit{See generally} David A. Anderson, \textit{The Origins of the Press Clause}, 30 UCLA L. Rev. 465 (1983) (detailing history of Press Clause).} As such, the press needs to be free of certain government restrictions on dissemination of information if they are to provide newsworthy information to the general public.\footnote{See Miller, supra note 43, at 623 (arguing that press must be free of governmental restrictions so it can remain the "investigative arm of the people," uncovering government corruption and other crimes detrimental to American people); \textit{see also} \textit{New York Times v. United States}, 403 U.S. 713, 728 (1971) (Stewart, J., concurring) (arguing that in certain...} The Court has recognized this, and struck down...
laws that have restricted the press's ability to broadcast information of public concern. Since confidential sources are particularly important to bringing unrestricted information of public interest to light, newsgatherers argue that the First Amendment offers protection against compulsory disclosure of these confidential sources by the federal government.

Though the First Amendment holds an important place in American jurisprudence, the Fifth Amendment grand jury is also vital to promoting the general welfare and the establishment of justice. The grand jury is unique in that its function is to investigate whether or not a crime has been committed and "[u]nlike a court, whose jurisdiction is predicated on a specific case or controversy, the grand jury can 'investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.'" The grand jury must "inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred." In Branzburg, the Court emphasized the essential role the Fifth Amendment plays in ensuring that the public's right to know "every man's evidence" is preserved. The areas of government, the only checks and balances against such government may be "enlightened citizenry," and an alert and free press is essential to bestow knowledge on the public.


47 See Olga Puerto, When Reporters Break Their Promises to Sources: Towards a Workable Standard in Confidential Source/Breach of Contract Cases, 47 U. MIAMI L. REV. 501, 512 (1992) (noting that many confidential sources are former government officials); Shaw, supra note 22 (citing important role of Deep Throat to Woodward and Bernstein's Watergate investigation).

48 See supra text accompanying notes 4–7.

49 See United States v. Morton Salt Co., 338 U.S. 632, 642–43 (1950) (noting unique role grand jury plays in criminal justice system); In re Grand Jury Empaneled February 5, 1999, 99 F. Supp. 2d 496, 498 (D.N.J. 2000) (stating that "[g]uaranteed by the Fifth Amendment, the grand jury has the dual function of determining whether probable cause exists to believe that a crime has been committed and of protecting citizens against groundless criminal prosecutions"); see also Hannah v. Larche, 363 U.S. 420, 489–90 (1960) (Frankfurter, J., concurring) (noting that grand jury proceeding is rooted in Anglo-American history); John T. White, Comment, Smoke Screen: Are State Shield Laws Really Protecting Speech or Simply Providing Cover for Criminals Like the Serial Arsonist?, 33 ARIZ. ST. L.J. 909, 911 (2001) (discussing First Amendment's role in promoting common good).


51 R. Enter., 498 U.S. at 297.

Fifth Amendment also protects the individual rights of the accused who is charged with a federal crime by ensuring that he is fairly brought to justice for "infamous crimes" and protected from hasty and malicious persecution. The accused is additionally protected from publicity of false accusations because grand jury proceedings are secret in nature. Since a grand jury's task is to seek out potential criminal conduct and "return only well-founded indictments, its investigative powers are necessarily broad." The grand jury's authority to subpoena witnesses is far-reaching and necessary to fulfilling these duties. Only those who are protected by a constitutional, common law, or statutory privilege can claim an exemption from the public's right to know all evidence presented before the accused.

In refusing to grant newsgatherers a testimonial privilege under the First Amendment or interpret one through federal common law, the Court placed the government interest in protecting the innocent against hasty and oppressive prosecution that grand jury holds high place as instrument of justice; Blair v. United States, 250 U.S. 273, 279–81 (1919) (emphasizing power of Fifth Amendment in holding accused accountable for capital crime or other infamous crime by way of grand jury indictment). "Infamous crimes" include offenses punishable by death or by imprisonment for a term exceeding one year, or at hard labor. See FED. R. CRIM. P. 7(a).

See Branzburg, 408 U.S. at 686–87, 688 n.23 (1972) (noting that role of the grand jury is "the dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against the unfounded"); see also Wood v. Georgia, 370 U.S. 375, 390 (1962) (stating that grand jury serves function of "standing between the accuser and the accused . . . to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malicious ill will").

See Branzburg, 408 U.S. at 695 (discussing grand jury proceedings); United States v. Amazon Indus. Chem. Corp., 55 F.2d 254, 261 (1931) (explaining reasons behind secrecy requirement including "to protect the innocent accused who is later exonerated from disclosure of the fact that he has been under investigation"); see also FED. R. CRIM. P. 6(e)(2) (outlining grand jury proceedings in federal system).

Branzburg, 408 U.S. at 688; see Wood, 370 U.S. at 392 (suggesting that society is best served when grand jury performs thorough and extensive investigation); Costello, 350 U.S. at 362 (noting that grand jury established by Fifth Amendment is similar to English grand juries which did not hamper grand jurors with "rigid procedural or evidential rules" and allowed grand jurors to "make their presentments and indictments on such information as they deem satisfactory").


See Branzburg, 408 U.S. at 688 (listing exceptions to public's right to hear all evidence in grand jury proceedings); see also United States v. Bryan, 339 U.S. 323, 331 (1950) (stating that only when substantial individual interest has been found, "through centuries of experience, to outweigh the public interest in the search for the truth" is there exception to duty to testify).
over the press’s right to conceal confidential sources. The Court found that “[f]air and effective law enforcement... is a fundamental function of government, and the grand jury plays an important constitutionally mandated role in this process,” and thus the “public interest in law enforcement and in ensuring effective grand jury proceedings” overrides the incidental burden on newsgatherers that may result from “insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.”

The Court therefore concluded, based on the fundamental governmental role of the grand jury in investigating crimes, calling reporters to give testimony “bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification.”

The *Branzburg* Court acknowledged the importance of confidential sources to the free flow of information, yet it found insufficient data that revealing such sources in a grand jury proceeding would deter future informants from providing important information to the press. The Court also explained that it is unlikely that confidential sources will dry up because a subpoenaed newsgatherer may never even be called to testify, or the prosecution may not insist that he testify if he refuses. Additionally, the Court suggested that informants are generally members of minority political or cultural groups that rely heavily on the media to propagate their views, and would be reluctant to cease providing information to the press simply because a reporter may be called to testify before a grand jury.

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59 See *Branzburg*, 408 U.S. at 687–90 (declining “to grant newsmen a testimonial privilege that other citizens do not enjoy”); see also *Wood*, 370 U.S. at 390 (describing grand jury system as “a primary security to the innocent against hasty, malicious and oppressive persecution”).

60 *Branzburg*, 408 U.S. at 690–91.

61 Id. at 700 (quoting *Bates v. City of Little Rock*, 361 U.S. 516, 525 (1960)).


63 See *Branzburg*, 408 U.S. at 694 (suggesting that many fears arising out of subpoenas involving the press are exaggerated); see also *Gard*, 88 F.R.D. at 130–31 (finding reasoning in *Branzburg* persuasive).

64 See *Branzburg v. Hayes*, 408 U.S. 665, 694–95 (1972) (describing symbiotic relationship between informants and press); see also *United States v. Morison*, 844 F.2d 1057, 1085 (4th Cir. 1988) (stating that citizens other than newsmen, including politicians, have motives to ensure availability of press sources).
Furthermore, the Court found that since grand jury proceedings are conducted in secret and law enforcement is experienced in dealing with informers, an informant would not be in any worse position by placing his trust in public officials whose duty it is to protect the public against crime.65

The Court also took issue with the fact that when the reporter’s source is himself in violation of the law, and the reporter protects this criminal activity by refusing to reveal the source to a prosecutor, the public’s interest in the fair administration of justice is severely weakened.66 The Court suggested that the First Amendment’s Press Clause does not override the public interest in ensuring that neither reporters nor their sources violate laws that are applicable to all citizens.67 Offering such protection indirectly facilitates the concealment of a crime which is in itself a violation of the law.68 Moreover, most sources engaged in criminal conduct prefer to remain anonymous when leaking information presumably to escape prosecution; and the First Amendment cannot be understood to protect a newsgatherer’s agreement to conceal the criminal conduct of his source or evidence thereof based on the notion that “it is better to write about crime than to do something about it.”69 There is thus no special privilege under the Press Clause that allows reporters

65 See Branzburg, 408 U.S. at 695 (stating that there is little evidence that informants would be worse off by placing their trust in experienced members of law enforcement); see also Tofani v. State, 465 A.2d 413, 421 (Md. 1983) (adopting conclusion in Branzburg that informants are no worse off with information in hands of public officials than reporters).

66 See Branzburg, 408 U.S. at 692 (stating that “[t]he crimes of news sources are no less reprehensible and threatening to the public interest when witnessed by a reporter than when they are not”); see also City of Akron v. Cripple, 2003 Ohio App. LEXIS 3497, *5-6 (Ohio Ct. App. 2003) (holding that First Amendment does not protect newsman’s agreement to conceal informant’s criminal conduct).

67 See Branzburg, at 691–92 (explaining that “[t]he Amendment does not reach so far as to override the interest of the public in ensuring that neither reporter nor source is invading the rights of other citizens through reprehensible conduct forbidden to all other persons.”); see also Toledo Newspaper Co. v. United States, 247 U.S. 402, 419–20 (1918) (asserting that “however complete is the right of the press to state public things and discuss them, that right, as every other right enjoyed in human society, is subject to the restraints which separate right from wrong-doing”).

68 See 18 U.S.C. § 4 (2005) (stating that “[w]hoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be [guilty of misprision]”); see also Branzburg, 408 U.S. at 696 (noting that common law also recognizes duty to report crimes to authorities).

69 Branzburg, 408 U.S. at 691–92.
who witness or possess evidence of criminal activity to withhold such information.\textsuperscript{70}

Although debated and misinterpreted by many lower federal courts, Justice Powell's concurring opinion formed a majority rejection of a reporter-source privilege, and merely re-emphasized the majority's view that reporters still retained some limited First Amendment protections against harassment and bad faith grand jury investigations.\textsuperscript{71} The Court agreed with the press's argument that federal authorities should not use the news media as an "investigative arm of government," and Justice Powell's concurrence merely addressed this issue in further detail by explaining that there is a safeguard in place to prevent this from occurring.\textsuperscript{72} The newsgatherer can move to quash the

\textsuperscript{70} See Branzburg v. Hayes, 408 U.S. 665, 692 (1972) (concluding that the "[Court] cannot seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it."); Anthony L. Fargo, The Journalist's Privilege for Nonconfidential Information in States with Shield Laws, 4 COMM. L. & POLY 325, 333 (1999) (discussing how Branzburg rejected idea that reporters have special privilege to keep source identities confidential in grand jury proceedings if they had evidence of or witnessed criminal activity).

\textsuperscript{71} See Branzburg, 408 U.S. at 707-08, 709-10 (Powell, J., concurring). Several courts have suggested that Justice Powell's concurrence created a non-binding plurality decision. See, e.g., In re Grand Jury 87-3 Subpoena Duces Tecum, 985 F.2d 229, 232-34 (4th Cir. 1992); Farr v. Pitchess, 522 F.2d 464, 467 (9th Cir. 1975). However, these federal courts overlooked the fact that Justice Powell joined with Justice White to create a binding majority decision that rejected a reporter's privilege. See David A. Anderson, Freedom of the Press, 80 TEX. L. REV. 429, 490 n.330 (2002). A number of federal courts have specifically addressed this issue, criticizing other courts insistence that Branzburg was a plurality decision when it was in fact a majority, and rejecting the notion that Justice Powell's concurrence required a case-by-case balancing in all cases save a showing of harassment or bad faith investigations. See, e.g., In re Grand Jury Subpoena (Miller), 397 F.3d 964, 966-72 (D.C. Cir. 2005); In re Special Proceedings, 373 F.3d 37, 44-45 (1st Cir. 2004); In re Grand Jury Subpoena, No. 01-20745 (5th Cir. Aug. 17, 2001) (per curiam) (unpublished); In re Grand Jury Proceedings, 5 F.3d 397, 401 (9th Cir. 1993), cert. denied sub. nom. Scarce v. United States, 510 U.S. 1041 (1994); Storer Commc'ns. Inc. v. Giovan (In re Grand Jury Proceedings), 810 F.2d 580, 584-86 (6th Cir. 1987); United States v. King, 194 F.R.D. 569, 576-582 n.7 (E.D. Va. 2000); In re Grand Jury Subpoena Am. Broad. Co., 947 F. Supp. 1314, 1318 (E.D. Ark. 1996); Karem v. Priest, 744 F. Supp. 136, 138 (W.D. Tex 1990). In a later Supreme Court decision, Justice Powell himself cited Branzburg as a rejection by the Court of a qualified First Amendment right to refuse revealing confidential sources to grand juries. See Saxbe v. Wash. Post Co., 417 U.S. 843, 857-58 (1974) (Powell, J., dissenting).

\textsuperscript{72} See Branzburg, 408 U.S. at 709-10 (Powell, J., concurring) (announcing that "[t]he asserted claim to 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"); see also David Joseph Onorato, Note, A Press Privilege for the Worst of Times, 75 GEO. L.J. 361, 364 (1986) (citing Branzburg, 408 U.S. at 710 (Powell, J., concurring)) (suggesting that method of balancing between freedom of the press and citizen's obligation to give relevant testimony to grand jury to determine reporter's privilege agrees with traditional ways of adjudicating such issues).
federal subpoena, and show that the grand jury investigation is being conducted in bad faith or in a way that harasses the newsgatherer, i.e. the information the newsgatherer must provide bears only a remote and tenuous relationship to the subject of the investigation or the newsgatherer’s testimony implicates confidential source relationships absent a legitimate law enforcement need. The case-by-case balancing between freedom of the press and a citizen’s obligation to give relevant testimony to a grand jury described by Justice Powell has been interpreted by many federal courts as an approval of a qualified reporter’s privilege based on Justice Stewart’s three-part test. However, this reading of Justice Powell’s concurrence is misguided for several reasons, and, at least in the federal grand jury context, should not be followed. First, it is important to note that the majority of cases which interpret the concurrence in this manner were decided in the civil context, and have no bearing in the context of federal grand jury proceedings. Second, although many of these courts justify their interpretation based on the language Justice Powell used in his concurrence, specifically the words “privilege” and “proper balance,” this language has been recognized by other federal courts as a mere description of Justice Powell’s proffered guidance to courts in determining whether to grant the reporter’s motion to quash. Justice Powell

73 See Branzburg, 408 U.S. at 709–10 (Powell, J., concurring) (clarifying that these circumstances are to be judged on facts, on case-by-case analysis, and by balancing “freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct”); see also Campagnolo, supra note 15, at 462 n.101 (proposing that burden to show bad faith of grand jury is on reporter).

74 See, e.g., La Rouche v. National Broadcasting Co., 780 F.2d 1134, 1139 (4th Cir. 1986) (recognizing reporter's privilege and utilizing Justice Stewart’s three-part test in civil case); United States v. Burke, 700 F.2d 70, 76–77 (2d Cir. 1983) (refusing to distinguish between civil and criminal cases when considering a reporter's interest in confidentiality).

75 See In re Grand Jury Subpoena Am. Broad. Co., 947 F. Supp at 1319 (suggesting that “the majority of these cases were decided in the civil context and, in the opinion of this Court, have no bearing on cases involving federal grand jury proceedings.”); see also United States v. R. Enter., Inc., 498 U.S. 292, 298 (1991) (determining that Justice Powell’s three-part test would “invite procedural delays and detours” from which the Supreme Court “has expressly stated that grand jury proceedings should be free . . . ”).

76 See Giovann., 810 F.2d at 585–86 (warning against misinterpreting Justice Powell’s concurring opinion to “rewrite” majority opinion); Campagnolo, supra note 15, at 465 (expressing Justice Powell’s unwavering support of Branzburg opinion); see also Branzburg v. Hayes, 408 U.S. 665, 710 (1972) (Powell, J., concurring) (noting that when Court is called upon to protect news-gatherer from “improper or prejudicial questioning [it] would be free to balance the competing interests on their merits in the particular case”).
was explaining that the courts, on an ad hoc basis, are permitted to screen out bad faith "improper and prejudicial" interrogations of reporters. In other words, Justice Powell agreed that there exists no reporter's privilege to protect confidential sources, but where a reporter can show the above mentioned "abuse of the grand jury function," the court may then engage in a balancing, and find that the government and public interest in the Fifth Amendment may be outweighed by First Amendment interest. Absent evidence of government harassment or bad faith, however, the reporter has no more a right to refuse providing knowledge relevant to a criminal investigation than the average citizen. Thus, Justice Powell's "balancing" only arises in the limited circumstances he mentioned, leaving his concurrence consistent with Justice White's majority opinion. In addition, Justice Powell explicitly rejected Justice Stewart's three-prong test, and believed that it would undermine the ability of the courts to adequately balance the First and Fifth Amendment interests when necessary.

Since *Branzburg*, the Court has reiterated its holding that the First Amendment is not abridged by requiring reporters to reveal

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77 See *Branzburg*, 408 U.S. at 710 (Powell, J., concurring) (assuring court protection in case of real First Amendment violation); *Reporters Comm. for Freedom of Press v. Am. Tel. & Tel. Co.*, 593 F.2d 1030, 1060–61 (D.C. 1978) (rejecting notion that every reporter must receive case by case balancing in "good faith felony investigation[s]").


79 See *Branzburg*, 408 U.S. at 709–10 (Powell, J., concurring) (noting that majority opinion states clearly that "no harassment of newsmen will be tolerated . . . "); *In re Shain*, 978 F.2d 850, 854 (4th Cir. 1992) (Wilkinson, C.J., concurring) (refusing to quash issued subpoenas and holding reporters in contempt for ignoring call to testify).

80 See *In re Grand Jury Proceedings*, 5 F.3d at 401 (recognizing the agreement between *Branzburg’s* majority and concurring opinions); see also *Storer Commc’ns. Inc. v. Giovan* (In re Grand Jury Proceedings), 810 F.2d 580, 585 (6th Cir. 1987) (arguing that Justice Powell’s concurrence must be read to agree with majority opinion, allowing balancing analysis only in case of reporter "harassment").

the identity of confidential sources to a grand jury as part of a good faith criminal investigation. Additionally, many other federal courts have followed the *Branzburg* majority and its rationale that the public interest in law enforcement and ensuring effective grand jury proceedings outweighs the resultant burden on newsgathering. The most recent federal court decisions addressing this issue have likewise followed *Branzburg*’s rejection of a reporter-source privilege. In ruling against Taricani, the First Circuit explained that *Branzburg* flatly rejected a reporter’s privilege with respect to confidential sources under the First Amendment or at common law, and that Justice Powell’s concurrence joined the majority as the fifth vote by also rejecting the privilege, but offering protection for reporters who show “a bad faith purpose to harass.” Judge Torres who wrote the First Circuit opinion also rejected the notion that Taricani’s conviction would chill the willingness of whistleblowers to converse with reporters.

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82 See Cohen v. Cowles Media Co., 501 U.S. 663, 669 (1991) (stating that according to *Branzburg*, the First Amendment does not “relieve a newspaper reporter of the obligation shared by all citizens to respond to a grand jury subpoena and answer questions relevant to a criminal investigation, even though the reporter might be required to reveal a confidential source”); Pell v. Procunier, 417 U.S. 817, 833 (1974) (citing *Branzburg* to stand for principle that absent bad faith the First Amendment is not offended when reporters are compelled to reveal source before Grand Jury); see also Univ. of Pa. v. EEOC, 493 U.S. 182, 201 (1990) (citing *Branzburg* as rejecting notion that “under the First Amendment a reporter could not be required to appear or testify as to information obtained in confidence without a special showing that the reporter’s testimony was necessary”).

83 See In re Grand Jury Proceedings, 5 F.3d 397, 401 (9th Cir. 1993) (declaring to recognize a journalist’s privilege in the grand jury setting); *Giovan*, 810 F.2d 580, 583–84 (6th Cir. 1987) (relying on *Branzburg* to deny television reporter’s motion to quash subpoena even though prosecution had not extinguished every other possible method of gathering needed evidence); Lewis v. United States, 517 F.2d 236, 237–38 (9th Cir. 1975) (noting that *Branzburg* held “that the [F]irst [A]mendment does not afford a reporter a privilege to refuse to testify before a federal grand jury as to information received in confidence”); see also In re Grand Jury Subpoenas, No. 01-20745 (5th Cir. Aug. 17, 2001) (per curiam); In re Possible Violations of 18 U.S.C. §§ 371, 641, 1503, 564 F.2d 567, 570 (D.C. Cir. 1977) (rejecting appellant’s claim that *Branzburg* required showing of probable cause, demonstration that information could otherwise be obtained, and proven substantial need for information, even though “adherents” to such erroneous reading of *Branzburg* existed); In re Grand Jury Subpoena Am. Broad. Co., 947 F. Supp. 1314, 1319–20 (E.D. Ark. 1996) (agreeing that the *Branzburg* majority and Justice Powell’s concurrence are consistent with each other).

84 In re Special Proceedings, 373 F.3d 37, 45 (1st Cir. 2004).

Circuit concurred that there is no First Amendment reporter's privilege protecting confidential sources under *Branzburg*, and denounced other federal courts' interpretation of Justice Powell. Even prior to the *Miller* decision and not long after *Branzburg*, the D.C. Circuit stated that

[i]t is thus clear from *Branzburg* and related cases that the freedom to gather information guaranteed by the First Amendment is the freedom to gather information Subject to the general and incidental burdens that arise from good faith enforcement of otherwise valid criminal and civil laws that are not themselves solely directed at curtailing the free flow of information. The broad scope of acceptable government investigation, so necessary to the secure enjoyment of All liberties, unavoidably places a burden on All citizens. It is difficult, though not impossible, to establish absolutely secret contacts with other people. The freedom that 'journalists' enjoy with respect to their news gathering is subject to this burden. The First Amendment does not guarantee plaintiff 'journalists,' or other citizens, a special right to immunize themselves from good faith investigation simply because they may be engaged in gathering information.

Although the *Branzburg* Court did not preclude Congress from enacting a federal statutory reporter's privilege as broad or as narrow as it saw fit, and although such legislation may be necessary to clarify this area of law, the current proposals should consider *Branzburg* and its progeny in articulating the statutory privilege. Instead, the current proposals, by creating an absolute reporter's privilege against compelled disclosure of confidential sources to federal grand juries, and consequently tipping the *Branzburg* scales, undermine the public's interest in the effective

that Judge Torres wanted Taricani's sentence to send strong message to journalists that they do not have authority to decide when sources may be kept secret).  
86 See *In re Grand Jury Subpoena (Miller)*, 397 F.3d 964, 968-72 (D.C. Cir. 2005) (rejecting reporter's privilege); *see also* *Lee* v. Dept. of Justice, 413 F.3d 53, 60 (D.C. Cir. 2005) (affirming *Miller* and stating that there is no absolute common law reporter's privilege).  
88 See *Branzburg* v. *Hayes*, 408 U.S. 665, 706 (1972) (suggesting compilicities that would be involved in drafting such law); *see also* *Elrod*, supra note 14, at 170-71 (positing that federal shield law could be enacted pursuant to Congress's Commerce Clause power).
prosecution of criminals, as well as the individual rights of the accused.

II. PIERCING THROUGH THE LEGISLATIVE AEGIS

A. Here Comes the Cavalry: The Congressional Response

In reaction to the recent federal decisions upholding *Branzburg*, a small group of legislators have decided to follow the *Branzburg* Court's guidance, and have drafted proposed federal shield laws to be brought before Congress. The first of these bills is the Free Speech Protection Act of 2005. This proposal was introduced last November before the close of the Congressional session, and was reintroduced in the Senate by Senator Christopher Dodd (D-Conn). In introducing the bill, Sen. Dodd intended to establish a strong law that would combat the recent pressures on journalists to reveal confidential sources. Sen. Dodd's proposal is based on the notion that the Founders believed "our democratic institutions [are] premised in large part upon an informed citizenry," and that they understood that the "best guarantee of a knowledgeable citizenry is a free


93 See 150 CONG. REC. S11 642, 647–8 (daily ed. Nov. 19, 2004) (statement of Sen. Dodd) (explaining that federal shield law would provide uniformity and consistency to the varying State statutes and state court decisions interpreting *Branzburg*); see also Press Release, Office of Sen. Christopher S. Dodd, *supra* note 92 (suggesting that the bill was introduced in response to pressure on members of press to reveal their confidential sources).
press and a public free to speak to the press." The Senator’s bill is meant to protect the public by fostering the free flow of information and deliberation, as well as ensuring an open government that is accountable to its citizens.

Sen. Dodd’s proposal provides for an absolute privilege to reporters against compelled disclosure of sources in all proceedings. All branches of the Federal Government and entities therein with the power to issue a subpoena or provide compulsory process are prohibited from compelling any “covered person” who is providing or has provided services for the news media to disclose “the source of any news or information procured by the person, or any information that would tend to identify the source, while providing services for the news media, whether or not the source has been promised confidentiality.” The protection from compelled disclosure extends to supervisors, employers, or any other person assisting a “covered person” who is protected. Although there is an exception provided for compelled disclosure of news or information based on a heightened version of the three-prong test articulated by Justice

94 150 CONG. REC. S11, 647 (referring especially to James Madison and Thomas Jefferson).
95 See id. (suggesting that Americans must have access to information to “make educated decisions and fully participate in our democracy”); see also Press Release, Office of Sen. Christopher S. Dodd, supra note 92 (stating that “[w]hen the public’s right to know is threatened, and when the rights of free speech and free press are at risk, all of the other liberties we hold dear are endangered”); Journalist Shield Bill, supra note 89 (noting that bill is meant to mirror state shield laws throughout country).
96 See 150 CONG. REC. S11, 648 (noting, however, that protection against compelled disclosure of news and information will be qualified); see also Press Release, Office of Sen. Christopher S. Dodd, supra note 92 (distinguishing between absolute protection granted to journalists protecting sources and qualified privilege offered to protect unpublished material).
97 The proposed legislation broadly defines a “covered person” who is granted absolute protection as including a person who “engages in the gathering of news or information; and has the intent, at the beginning of the process of gathering news or information, to disseminate the news or information to the public.” Free Speech Protection Act of 2005, S. 369, 109th Cong. § 2(1) (2005). “News or information” encompasses any “written, oral, pictorial, photographic, or electronically recorded information or communication concerning local, national, or worldwide events, or other matters.” Id. at § 2(2). The bill defines “news media” as newspapers, magazines, journals, radio, television, news agencies, press associations, wire services and “any printed, photographic, mechanical, or electronic means of disseminating news or information to the public.” Id. at § 2(3).
98 S. 369 at § 3(a)(1).
99 See id. at § 3(b) (extending protection to supervisors and employers); Free Speech Protection Act of 2004, S. 3020, 108th Cong. (2004) (proposing original version of bill with protection extending to any supervisor, employer, or any other person assisting a "covered person").
Stewart in his *Branzburg* dissent, it does not apply to the identity of sources or information that reveals the identity of the source. Furthermore, publication or dissemination of the source by the news media does not constitute a waiver of the protection provided by the bill. Some media outfits have applauded the Senator for his efforts in providing absolute protection to confidential news sources.

In addition to Sen. Dodd’s proposal, two companion bills have been introduced in the Senate and the House of Representatives, entitled the Free Flow of Information Act of 2005. Congressman Mike Pence (R-Ind.) and Congressman Rick Boucher (D-Va.) introduced the House bill, and Sen. Richard Lugar (R-Ind.) introduced a Senate version of the bill. Sen. Lugar’s statements regarding the bill reiterate the opinion held by Sen. Dodd that the freedom of the press is essential to democracy by providing a conduit for “the open market of information.” Congressman Boucher has directly attacked the rationale of *Branzburg* by stating that “the public’s right to know should outweigh the more narrow interest in the administration of justice in a particular federal case.”

100 See S. 369 at § 4(a) (allowing court to compel disclosure of news or information if party seeking information can meet three prong test by clear and convincing evidence); *USA: Watchdog Denounces Court Decision, Journalists Facing Imprisonment*, BBC MONITORING INT’L REPORTS, June 28, 2005 (noting that the Free Flow of Information Act provides qualified privilege to notes, emails, negatives and any other professional documents only if evidence is determined to be essential to criminal case).

101 See S. 369 at § 4(b) (limiting application of exception); *Journalist Shield Bill*, supra note 89 (explaining that, as last resort, federal judges can seek information from reporters, but they can never seek name of source).

102 See S. 369 at § 5 (listing activities that do not constitute waiver); S. 3020 at § 3 (containing provision that publication by news media of source is not waiver of protection against compelled disclosure).


106 151 CONG. REC. S1199, 1215 (statement of Sen. Lugar) (additionally stating that absent the right to refuse to reveal confidential sources, “whistleblowers will refuse to step forward and reporters will be disinclined to provide our constituents with the information that they have a right to know”).

The companion bills also grant an absolute statutory privilege by prohibiting Federal entities in any proceeding under Federal law, from compelling a "covered person" to disclose "the identity of a source of information from whom the covered person obtained information; and who the covered person believes to be a confidential source; or any information that could reasonably be expected to lead to the discovery of the identity of such a source." The companion bills create a qualified privilege for confidential information and documents, except confidential sources, based on the Department of Justice guidelines. This protection extends to compelled disclosure of testimony or documents from third parties, such as telephone records and e-mail that are related to business transactions with "covered persons." As in Sen. Dodd's proposal, publication or

108 The "Free Flow" proposals define a "covered person" as including traditional media entities such as newspapers, magazines, books, television broadcast networks and stations, cable and satellite networks, channel and programming services, news agencies and wire services, and information disseminated by such entities by any means. See H.R. 581 § 7(1)(A); S. 340 § 7(1)(A). Parents, subsidiaries, or affiliates of those covered, or employees, contractors, or any person "who gathers, edits, photographs, records, prepares, or disseminates news or information for such an entity" are also covered by the bills. H.R. 581 § 7(1)(B)(C); S. 340 § 7(1)(B)(C). These proposals depart from Sen. Dodd's proposal, however, by restricting their definition of "covered persons" to traditional news sources, thereby excluding personal website users or Internet opinion column Weblogs ("blogs") from falling within the scope of protection. Defining "covered persons" for purposes of a federal shield law raises additional problems that the Court in Branzburg observed, such as potentially licensing the press. See Branzburg v. Hayes, 408 U.S. 665, 703–04 (1972). Some reporters are against a federal shield law for this reason. See Don Wycliff, Shield Laws Offer Illusory Protection, CHICAGO TRIBUNE, Feb. 24, 2005, at 19. This discussion, however, is beyond the scope of this Comment and can be pursued by referring to other sources such as Linda L. Berger, Shielding the Unmedia: Using the Process of Journalism To Protect the Journalist’s Privilege in an Infinite Universe of Publication, 39 HOUS. L. REV. 1371 (2003) and Clay Calvert, And You Call Yourself a Journalist?: Wrestling With a Definition of “Journalist” in the Law, 103 DICK. L. REV. 411 (1999).

109 H.R. 581 § 4(1)(2); S. 340 § 4(1)(2). To note, the bills will not preempt current State shield laws or common law applied in state court proceedings since this prohibition on compelled disclosure is imposed solely upon “federal entities." H.R. 581 § 4(1)(2); S. 340 § 4(1)(2).


dissemination of a confidential source’s identity does not waive any prohibitions.\textsuperscript{112} Sen. Lugar himself has stated that the fact that the bills provide no exceptions to source protection, and therefore go further than the Department of Justice guidelines, “may be the most controversial part.”\textsuperscript{113} Sen. Lugar was correct. In response to political pressures, the two companion bills have since been redrafted to include a single exception to the reporter’s privilege against compelled disclosure of confidential sources, not for federal grand jury proceedings, but where source identification is necessary to protect national security.\textsuperscript{114} To note, Sen. Dodd is a cosponsor of both the original and revised Senate bills introduced by Sen. Lugar.\textsuperscript{115}

\textbf{B. Avoiding a Pyrrhic Victory: Legal Arguments Against Absolute Protection for Confidential Sources}

\textit{1. Branzburg Lives}

As discussed, the \textit{Branzburg} Court directly addressed the issue of the reporter’s privilege and confidential sources in the context

\begin{itemize}
\item \textsuperscript{112} See H.R. 581 § 6 (establishing activities not constituting a waiver as proposed to House of Representatives); S. 340 § 6 (describing activities not constituting a waiver as proposed to Senate).
\item \textsuperscript{113} \textit{Journalist Shield Bill, supra} note 89.
\item \textsuperscript{114} See \textit{Free Flow of Information Act of 2005, H.R. 3323, 109th Cong. § 2(a)(3) (2005)} (revising H.R. 581 to provide for compelled disclosure of confidential sources pursuant to criminal investigations or prosecutions if disclosure of the identity of such a source is necessary to prevent imminent and actual harm to national security; compelled disclosure of the identity of such source would prevent such harm; and the harm sought to be redressed by requiring disclosure clearly outweighs the public interest in protecting the free flow of information’); \textit{Free Flow of Information Act of 2005, S. 1419, 109th Cong. § 2(a)(3) (2005)} (mirroring House version of revised bill); The Associated Press, \textit{Bush Administration Opposes Shield Law, FIRST AMEND. CTR., July 20, 2005, http://www.firstamendmentcenter.org/news.aspx?id=15562} (noting Bush Administration and Justice Department’s belief that bill is bad public policy); \textit{see also} The Associated Press, \textit{Intel Panel Complains Press Leaks Help U.S. Foes, FIRST AMEND. CTR., April 1, 2005, http://www.firstamendmentcenter.org/news.aspx?id=15063} [hereinafter \textit{Intel Panel}] (suggesting that the presidential commission investigating intelligence failures has complained that the Justice Department is inadequately prosecuting those who leak classified information to journalists, and that such leaks are aiding United States’ adversaries).
\item \textsuperscript{115} See THOMAS (Library of Congress), \textit{Bill Summary & Status of S. 340}, http://thomas.loc.gov/cgi-bin/bdquery/z?d109:SN00340:@@L&summ2=m&/bss/109search.html (noting that the bill has been referred to Senate Judiciary Committee); THOMAS (Library of Congress), \textit{Bill Summary & Status of S. 1419}, http://thomas.loc.gov/cgi-bin/bdquery/z?d109:SN01419:@@L&summ2=m&/bss/109search.html (showing all eleven cosponsors of the bill); \textit{Bush Administration Opposes Shield Law, supra} note 114 (mentioning Sen. Dodd’s response to Deputy Attorney General James Comey’s remarks that the bill is bad public policy).
\end{itemize}
of federal grand jury investigations, and its reasoning remains equally relevant today. By creating an absolute federal reporter's privilege, the current legislative proposals provide newsgatherers with an absolute privilege to withhold evidence that may be valuable or even essential to either the prosecution or vindication of a citizen subject to a federal indictment. Such a sweeping privilege undermines the Fifth Amendment interests the Branzburg Court sought to protect, namely the individual rights of the accused, and the power of the government to effectively investigate criminal conduct for the public welfare.  

An absolute federal reporter's privilege undermines the Court's well-established view that "many of the rules and restrictions that apply at a trial do not apply in grand jury proceedings." As the Court explained post-Branzburg,

[the same rules that, in an adversary hearing on the merits, may increase the likelihood of accurate determinations of guilt or innocence do not necessarily advance the mission of a grand jury, whose task is to conduct an ex parte investigation to determine whether or not there is probable cause to prosecute a particular defendant."

A grand jury subpoena is thus different than subpoenas issued in the context of a criminal trial "where the specific offense has been identified and a particular defendant charged," because in the context of grand jury proceedings, the specific offense to be charged and the identity of the accused is the focus of the proceeding, and generally "developed at the conclusion of the grand jury's labors, not at the beginning." The grand jury must be able to compel the production of evidence or testimony of witnesses as it deems appropriate, unrestrained by procedural


118 Id.

119 Id. at 297 (quotations and citation omitted).
and evidentiary rules that may govern the criminal trial itself.\textsuperscript{120} A grand jury lacks knowledge from the commencement of the proceedings, and thus requires that some "fishing" necessarily occurs to develop the record.\textsuperscript{121} Based on this reasoning, the Court has declined to apply other exclusionary evidentiary rules to grand jury proceedings, so as to avoid delaying and disrupting the grand jury proceedings.\textsuperscript{122}

Furthermore, the concern expressed by the \textit{Branzburg} Court over the ability to effectively conduct grand jury investigations when confidential news sources violate federal law has been revisited in the recent \textit{Miller} and \textit{In re Special Proceedings} cases, where the sources violated a federal law and a court order, respectively.\textsuperscript{123} Even post-\textit{Branzburg}, there remains no public interest in promoting confidential sources to speak freely about matters which violate federal law,\textsuperscript{124} just as there is no public interest in granting a privilege to clients who employ attorneys to facilitate criminal activity.\textsuperscript{125}

\textsuperscript{120} See, e.g., Hale v. Henkel, 201 U.S. 43, 65 (1906) (explaining that grand juries may summon witnesses to testify against a party without informing witnesses of nature of charge against that party); see also Blair v. United States, 250 U.S. 273, 282 (1919) (noting "the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning").


\textsuperscript{124} See Langley, \textit{supra} note 5, at 48 n.197 (noting that even Bob Woodward is of opinion that if source was involved in criminal activity, promise of confidentiality would be off); McMasters, \textit{supra} note 6 (concluding that where there is no public interest in promoting this sort of communication, there is likewise no reason to provide protection to those engaged in such communication); see also Eugene Volokh, \textit{You Can Blog, But You Can't Hide}, N.Y. TIMES, Dec. 2, 2004, at A39 (proposing that legislation could be passed protecting sources who lawfully leak information, but not those who use journalists to conduct illegal activity).

\textsuperscript{125} See McMasters, \textit{supra} note 6. Confidential communications between attorney and client are protected if the client confesses crimes to his attorney, but this protection is limited so as to enable the attorney, or even obligate him, to testify against his client if he
In light of the Court's long-standing view of the grand jury and its functions in the criminal justice system, Congress will be hard-pressed to justify creating an absolute federal reporter's privilege that applies to grand jury proceedings. The Court, pre-
Branzburg and post-Branzburg, has emphasized that society's interest is best served by a thorough and extensive grand jury investigation where every piece of evidence has been made available to determine if a crime has been committed.126

2. The Fall of Jurisprudential Absolutism

For Congress to create an absolute statutory reporter-source privilege that extends to federal grand jury proceedings would not only overlook Branzburg and its progeny, but would discount the fact that federal courts have refused generally to recognize absolute privileges in this context. The Court has refused to grant absolute privileges to withhold evidence in federal criminal proceedings to other traditionally recognized confidential relationships, such as physician-patient127 and attorney-client.128 The Court has also refused to grant the President an absolute executive privilege based on reasoning similar to that in Branzburg, that withholding relevant evidence from a criminal investigation undermines due process of law and the fair

is hired to assist in the commission of a crime. See Volokh, supra note 124. A journalist should be ordered to testify when a source attempts to use the journalist in the commission of an illegal act just like an attorney whom a client has hired in order to facilitate a crime would be compelled to testify against the client. See id.

126 See United States v. Dionisio, 410 U.S. 1, 17 (1973) (stating "[a]ny holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws"); Wood v. Georgia, 370 U.S. 375, 392 (1962) (noting "[w]hen the grand jury is performing its investigatory function . . . society's interest is best served by a thorough and extensive investigation"); see also United States v. R. Enter., Inc., 498 U.S. 292, 298-99 (1991) (supporting the view held by the Court in Dionisio); United States v. Stone, 429 F.2d 138, 140 (2d Cir. 1970) (stating that "[a] grand jury's investigation is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed").


administration of justice.129 Ironically enough, the Court has refused to grant an absolute privilege to conceal the identity of confidential sources in the context of Congressional investigations and proceedings, and Congress has been unwilling to create a statutory privilege overriding the Court's decision.130

Even when First Amendment interests are implicated, the Court has specifically rejected the notion that freedom of the press implies absolute privileges in civil and criminal contexts.131 In fact, though federal courts "have shown a special solicitude for freedom of speech and of the press, we have eschewed absolutes in favor of a more delicate calculus that carefully weighs the conflicting interests to determine which demands the greater protection under the particular circumstances presented."132 For instance, the First Amendment's Press Clause does not grant newsgatherers special access to information not available to the public,133 nor the unrestrained right to gather information.134 The press does not possess the absolute right to destroy the lives and careers of others by defaming them with actual malice.135


130 See McGrain v. Daugherty, 273 U.S. 135, 174 (1927) (stating that "[w]e are of opinion that the power of inquiry... with process to enforce it... is an essential and appropriate auxiliary to the legislative function"); see also James J. Mangan, Note, Contempt for the Fourth Estate: No Reporter's Privilege Before a Congressional Investigation, 83 Geo. L.J. 129, 130 (1994) (arguing that "the weight of the governmental interests will always preclude the assertion of a reporter's privilege to keep sources confidential before a valid legislative investigation").

131 See Near v. Minnesota, 283 U.S. 697, 708 (1931) (noting that the state may punish abuse of liberty of press); Gitlow v. New York, 268 U.S. 652, 666 (1925) (stating that freedom of speech does not confer an absolute right to speak or publish).


134 See Zemel v. Rusk, 381 U.S. 1, 16–17 (1965) (allowing Secretary of State's refusal to validate citizen's passport for travel to Cuba, where diplomatic relations had been severed, balancing foreign policy against the unfettered right to gather information); Cent. S.C. Chapter, Soc'y. of Prof'l Journalists v. Martin, 431 F. Supp. 1182, 1187 (D.S.C. 1977) (reaffirming notions from Zemel that First Amendment rights do not include unrestrained right to information).

135 See Herbert v. Lando, 441 U.S. 153, 156 (1979) (maintaining lines of cases aimed at restricting journalists from defaming without incurring liability); Curtis Publ'g Co. v.
Nor does a media defendant in a libel case have an absolute privilege to prevent a plaintiff from inquiring into the media defendant's editorial process.\textsuperscript{136} The press is not exempt from searches and seizures conducted pursuant to a valid warrant,\textsuperscript{137} nor is it exempt from generally applicable laws on the grounds that the laws burden its newsgathering resources and abilities.\textsuperscript{138} Thus, not every government action that affects or even inhibits First Amendment press activity constitutes "abridgment" prohibited by the First Amendment.\textsuperscript{139}

3. Guarding the Media Flank

Heightened protection for newsgatherers in the form of an absolute federal reporter's shield is unjustifiable given the fact that newsgatherers already enjoy a reasonable level of protection from government abuse. Under \textit{Branzburg}, as stressed by Justice Powell in his concurrence, newsgatherers may move to quash federal grand jury subpoenas when the subpoenas are issued as part of a bad faith investigation or harassment.\textsuperscript{140}

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\textsuperscript{136} See \textit{Herbert}, 441 U.S. at 169 (noting that allowing an absolute privilege would raise the actual malice burden); \textit{see also} \textit{In re Grand Jury Matter}, Gronowicz, 764 F.2d 983, 986 (3d Cir. 1985) (following \textit{Herbert} in grand jury context).


\textsuperscript{138} See, \textit{e.g.}, \textit{Cohen v. Cowles Media Co.}, 501 U.S. 663, 670, 671 (1991) (establishing that newspaper publisher had no special immunity from application of general laws and was therefore liable for breach of contract based upon promissory estoppel); Oklahoma Press Publ'g Co. v. Walling, 327 U.S. 186, 192–94 (1946) (applying Fair Labor Standards Act to the press); \textit{Associated Press v. United States}, 326 U.S. 1, 19–20 (1945) (holding that application of antitrust laws to the press did not violate First Amendment); \textit{Associated Press v. NLRB}, 301 U.S. 103, 132–33 (1937) (finding that the press must comply with National Labor Relations Act); \textit{Grosjean v. Am. Press Co.}, 297 U.S. 233, 250 (1936) (declaring that the press is not exempt from nondiscriminatory taxation). \textit{See generally} Alexander, \textit{supra} note 1, at 104 (noting that at common law special privileges exempting persons from testifying in court were disfavored).

\textsuperscript{139} See \textit{Reporters Comm.}, 593 F.2d at 1052 (denying journalists relief from defendant for releasing information to the government during investigation without prior notice to journalists because no Constitutional clause creates such right); \textit{see also} Saxbe v. Wash. Post Co., 417 U.S. 843, 847 (1974) (Powell, J., dissenting) (upholding Federal Bureau of Prisons' policy regarding inability of press, like all ordinary citizens, to meet with inmates with whom they have no personal relationship).

Furthermore, when evaluating whether to grant a reporter's motion to quash, federal courts must follow Federal Rule of Criminal Procedure 17(c), requiring that subpoenas issued pursuant to federal criminal investigations, including grand jury investigations, be reasonable and unoppressive. What is "reasonable" depends on the context of the investigation and proceedings. Though grand jury subpoenas issued through normal channels are presumed reasonable, and therefore, the burden of showing unreasonableness rests on the recipient who seeks to avoid compliance, both the Court and 17(c) prohibit grand juries from engaging in arbitrary "fishing" expeditions of a newsgatherer's confidential sources. Moreover, federal courts favor the application of 17(c) with "special sensitivity" when First Amendment interests are involved.

In addition to the protection offered by the Court and 17(c), newsgatherers are protected by the Department of Justice guidelines, which provide strict procedures for federal prosecutors issuing subpoenas to the news media. These investigation of a reporter has not been conducted in good faith, the reporter has access to the federal courts on a motion to quash that may result in a protective order being granted. See Reporters Comm. for Freedom of Press v. Am. Tel. & Tel. Co., 593 F.2d 1030, 1062 (D.C.C. 1978). In the case of subpoenas issued in bad faith, there will be no government interest to balance against the journalist's privacy interests, resulting in bad faith subpoenas being quashed. See Reporters Comm. for Freedom of Press v. Am. Tel. & Tel. Co., 593 F.2d 1030, 1062 (D.C.C. 1978).

141 See Fed. R. Crim. P. 17(c) (2005) (mandating that a "court may quash or modify a subpoena if compliance would be unreasonable or oppressive"); McKevitt v. Pallasch, 339 F.3d 530, 533 (7th Cir. 2003) (recognizing that 17(c) is the general standard for judicial review of subpoenas); see also United States v. Calandra, 414 U.S. 338, 346 (1974) (noting that grand jury is subject to 17(c)).

142 See New Jersey v. T.L.O., 469 U.S. 325, 337 (1985) (outlining test balancing party's expectation of privacy against government need for effective methods); Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967) (arguing "there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails").


144 See In re Grand Jury 95-1 (Anderson), 59 F. Supp. 2d 1, 10 (D.C. Cir. 1998) (noting that grand juries are not permitted to engage in arbitrary fishing expeditions); see also R. Enter., 498 U.S. at 299 (stating that powers of grand jury are limited and do not extend to fishing expeditions).

145 See In re Grand Jury 87-3 Subpoena Duces Tecum 955 F.2d 229, 234 (4th Cir. 1992) (rejecting argument that government must show subpoena served compelling government interest and must substantially relate to investigation); In re Grand Jury 95-1 (Anderson), 59 F. Supp. 2d 1, 9-10 (D.C.C. 1996) (following Fourth Circuit's reasoning).

146 See 28 C.F.R. § 50.10 (2005) (describing necessary procedure for issuing subpoenas to news media); see also R. Enter., Inc., 498 U.S. at 300 (incorporating reasonableness standard into Federal Rule requirements).
guidelines aim to balance the “public’s interest in the free dissemination of ideas and information and the public’s interest in effective law enforcement and the fair administration of justice.” The relevant sections of the guidelines mandate that all “reasonable attempts should be made to obtain information from alternative sources before considering issuing a subpoena to a member of the news media.” Furthermore, in criminal cases, which equally apply to grand jury proceedings, there “should be reasonable grounds to believe, based on information obtained from non-media sources, that a crime has occurred, and that the information sought is essential to a successful investigation—particularly with reference to directly establishing guilt or innocence.” The information sought therefore cannot be “peripheral, nonessential, or speculative.” The prosecutor must also acquire authorization from the Attorney General before subpoenaing the news media. Although the guidelines are enforced internally by the government, and they do not create a legally enforceable right to quash a subpoena, requiring authorization from the Attorney General and completion of an exhaustive investigatory process before issuing a subpoena to the news media eliminates most legitimate claims that a federal grand jury subpoena was issued in bad faith.

C. Absolute Power Corrupts Absolutely: Policy Arguments Against Absolute Protection for Confidential Sources

If Congress decides to create a federal reporter’s privilege which protects confidential news sources, there are several practical reasons, in addition to the above mentioned legal arguments, for not granting an absolute privilege. The press

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147 28 C.F.R. § 50.10 (a) (2005).
148 Id. at § 50.10 (f)(3).
149 Id. at § 50.10 (f)(1).
150 Id.
151 See id. § 50.10(e) (mandating consent of Attorney General). See generally Campagnolo, supra note 15 (discussing necessary steps for obtaining subpoenas of new media).
152 See 28 C.F.R. § 50.10(n) (stating that no legally enforceable right is created); In re Shain, 978 F.2d 850, 853–54 (4th Cir. 1992) (discussing administrative mechanisms in quashing subpoenas).
153 See Campagnolo, supra note 15, at 474 (detailing steps required to obtain subpoena). But see In Re Shain, 978 F.2d at 853 (conceding that subpoena was not sought in bad faith notwithstanding allegations of improper acquisition of subpoena).
insists that as the “Fourth Estate,” it is the watchdog guardian of democracy which holds the government accountable on behalf of the public citizenry. There is some truth to the argument that confidential sources better inform the citizenry of internal government actions of which they may be unaware, and thus promote democracy. However, a major practical problem with granting an absolute privilege is the inability of the citizenry to determine if the information that is intended to make it “better” informed is inaccurate due to an unverified source or a renegade journalist. If the press can invoke an absolute privilege even under these circumstances, it would free the press from personal accountability for the information they disseminate. Such free reign may be of no help in furthering the values of democracy.

154 Historically, the institution of the press has been described as a “Fourth Estate” outside of the government which acts as an additional check on the other three branches of government. See Anderson, supra note 71, at 449; see also Onorato, supra note 72, at 366. Justice Stewart argued that the Constitution recognizes the press as a “Fourth Estate,” whose primary purpose is to “question and criticize the three official branches of government, not to inform the public.” See id. at 366–67.

155 See Campagnolo, supra note 15, at 452 (explaining that their obligation to protect source’s identity is duty to source and journalist in general); see also Elrod, supra note 14, at 123 (noting that the press’s “primary roles in our democracy is serving the public as a watchdog over the government and as a critic of the government’s actions”); Miller, supra note 43, at 623 n.71 (suggesting that reporter’s task is commonly analogous to that of watchdog).

156 See Puerto, supra note 47, at 501 n.1 (explaining that reporter-source relationship enables confidential sources to reveal facts they would not otherwise disclose for fear of retaliation); see also New York Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring) (stating “[t]he press was protected so that it could bare the secrets of government and inform the people’); Volokh, supra note 124, at A39 (noting that tips from confidential sources often help journalists uncover crime and misconduct).

157 See generally Editorial, Shielding the Messenger, FLORIDA TODAY, Jan. 18, 2005. Citizens like Robert Knazik aptly summarize this concern with creating an absolute privilege by stating:

[e]vents over the past few years have shown that reporters are more than capable of making up stories or fabricating sources. A shield law would protect these reporters, as well as the honest ones, from judicial scrutiny. If that happens, and there is no risk of being forced to testify, embellished stories could very well become the norm. After all, there would be no risk of being caught in a lie, and plenty of incentive to write a story that surpasses one’s peers.

Id. In a separate anecdote by editor Jon Ham, he described a co-worker who fabricated the truth in an article regarding a house fire. That reporter was subsequently promoted by the managing editor. See Jon Ham, Editorial, Competition Didn’t Cause CNN/Time to Err, THE HERALD-SUN, July 10, 1998, at 13.

158 See Bill Dunlap & Nathan Kingsley, Editorial, The Balance in Protecting Sources, THE WASHINGTON POST, Feb. 19, 2005, at A30 (noting that unearthing government corruption “requires whistle-blowers to tip off the responsible media and alert the electorate. However a blank check is dangerous”); see also Shielding the Messenger, supra note 157 (discussing potential for press to embellish stories to increase appeal to public).
The real question then that must be asked is who will watch the watchdogs while the watchdogs keep watch?

To illustrate this point, envision a journalist who writes a news story about a public official, figure, or private individual that accuses the official, figure, or private individual of committing a federal crime based on information provided to the journalist by a confidential source. A federal prosecutor or special prosecutor then investigates the potential federal crime, and subpoenas all relevant parties, including the journalist who wrote the story, to testify before a grand jury. Under the current proposals, when the journalist is ordered to reveal the confidential sources, she can claim an absolute privilege to withhold the pertinent information from the federal government.159 If the accused is guilty of the crime, the public policy behind the Fifth Amendment is undermined because the inability of the public to have access to all potential evidence obstructs the fair administration of justice. If the accused is innocent, however, the reputational protections of the Fifth Amendment afforded by holding secret proceedings is diluted since the account of the confidential source has already been disseminated by the national media.160 Similar arguments have been made with respect to an individual’s Sixth Amendment right to a fair trial.161 In our post-modern technological age where media is so readily accessible by way of the Internet and where almost anyone can call himself a journalist or “blogger,” these concerns become even more pressing.162


160 For example, anonymous sources falsely accused Richard Jewell in the Atlanta Olympic bombing, and Dr. Wen Ho Lee for espionage. See Hilary E. MacGregor, Anthrax Case Poses Troubling Questions, L.A. TIMES, Aug. 15, 2002, § 5, at 1. These examples of falsely accused individuals illustrate how quick the public is to rush to judgment once a story is reported. See Judith Miller, Scientist Files Suit Over Anthrax Inquiry, N.Y. TIMES, Aug. 27, 2003, at A13.

161 See Schmid, supra note 8, at 1458 (noting that “opponents argue that protecting confidential sources may jeopardize a defendant’s Sixth Amendment right to compulsory process by depriving the defendant of information that might help to prove his innocence”); see also Branzburg v. Hayes, 408 U.S. 665, 690–91 (1972) (explaining that public interest in law enforcement trumps burden on newsgathering in “valid grand jury investigation or criminal trial”); In re Shain, 978 F.2d 850 (4th Cir. 1992) (holding that “reporters have no privilege different from that of any other citizen not to testify about knowledge relevant to a criminal prosecution”).

162 Though beyond the scope of this Comment, the Internet allows almost anyone to qualify as a journalist, simply by setting up his own personal website or opinion column
There are too many personal or institutional conflicts of interest to grant the press an absolute First Amendment privilege that may have the affect of damaging the Fifth Amendment rights of others. First, the news media is a vast commercial industry in which journalists compete for newsworthy stories and account for profits.\textsuperscript{163} To provide the news media with an absolute privilege to withhold confidential sources may increase the temptation for the news media to print false "scandalous," or "controversial" stories about individuals in an effort to sell newspapers, since when confronted about the factual substance of the story if a federal investigation ensues, the newsgatherer could raise his or her shield.\textsuperscript{164} Even Justice Douglas who advocated for an absolute privilege in \textit{Branzburg} explained that the privilege should not enable reporters to make more money.\textsuperscript{165} Yet providing an absolute privilege to reporters frees the news media to focus on the financial potential of a newsworthy story rather than the accuracy of the story itself.\textsuperscript{166}

called a Weblog ("blog"). \textit{See} Volokh, \textit{supra} note 124, at A10. When anyone can be a journalist, a broad journalist privilege is even more problematic because a government agent who wants to leak information no longer needs to approach mainstream journalists who may turn him in. \textit{See id.} Instead, the journalist can leak the information to a friend with a blog and a political agenda, who can then post the information and claim a journalist's privilege to avoid revealing the agent's identity. \textit{See id.} If the privilege is upheld by the court, the "blogger" and the agent are safe at the expense of the privacy of the individual affected by the leak. \textit{See id; see also} Dan Fost, \textit{Bay Judge Weighs Rights of Bloggers; Journalist's Shield Claimed in Response to Apple's Lawsuit}, \textsc{The San Francisco Chronicle}, March 8, 2005, at A1.  
\textsuperscript{163} \textit{See} J. Craig Williams, \textit{Spin Doctoring the News Into Freedom of Speech}, \textsc{May It Please the Court}, Nov. 20, 2004, http://www.mayitpleasethecourt.net/journal.asp?blog id=514 (proposing checks on reporter's privilege to protect truthfulness of stories and information); \textit{see also} Anderson, \textit{supra} note 71, at 484 (noting that American news media generates approximately $145 billion in revenue per year which is more than twice as much as oil and gas). \textit{See generally} McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 360 (1995) (Thomas, J., concurring) (stating that the Founders "did not envision the large, corporate newspaper and television establishments of our modern world. Instead... [they] refer[ed] to the many independent printers who circulated small newspapers or published a writer's pamphlets for a fee.").

\textsuperscript{164} \textit{See} Williams, \textit{supra} note 163 (noting problems of unaccountable reporters); \textit{Testimony Prepared for the Senate Committee on Finance, Theodore R. Marmor, Professor of Public Policy and Management, Yale University Health Care: The International Perspective}, \textsc{Federal News Service}, October 14, 1993 (noting that the media is hungry for conflict and that controversies sell newspapers); \textit{see also} Donald E. Zimmerman, \textit{Letter to the Editor, Press Never Freed from Responsibility}, \textsc{Florida Today}, Jan. 18, 2005, at 10 (expressing need for responsible reporters).

\textsuperscript{165} \textit{See Branzburg}, 408 U.S. at 721 (Douglas, J., dissenting) (explaining benefits of privilege). \textit{But see} Ham, \textit{supra} note 157, at 13 (illustrating how reporters benefit economically from fabricating information).

\textsuperscript{166} \textit{See} Williams, \textit{supra} note 163 (stating "[t]he editors who have to balance these weighty issues against the almighty dollar, may not be in the best position to evaluate the veracity of the source and the wisdom of publishing that information."). \textit{See generally}
Second, it is a frequent talking point today that the media itself attempts to advance particular political agendas when reporting the news, and presents the problem of deciphering whether the information the public receives is truly unveiling true government corruption based on verifiable sources, and not fictitious accounts by overzealous reporters looking to engage in character assassination. By providing the press with absolute protection, the opportunity to create manipulated or falsified information increases, which not only violates professional ethics, but may in fact injure the individual rights of the public which the press claims to support, and instigate more governmental secrecy which the press attempts to seek out. Third, even if reporters themselves are not spinning news stories, reporters may be used or manipulated by their sources in an effort to disseminate false information into the public forum. As a
result, the public, who is supposed to be made better informed by
the press, has no way of knowing whether the journalist is being
used and fed information to advance a particular agenda, or
reporting accurate newsworthy information.\textsuperscript{170} In this sense, it
may not be in the public's best interest to provide heightened
protection for confidential sources when the information they
provide may be either false or damaging to the public.\textsuperscript{171} As
suggested by Justice Powell, only the valued interest in the
public's right to receive \textit{accurate} information enhances
democracy.\textsuperscript{172} The public has acknowledged these potential
problems in the accuracy of news stories, and has reacted by
becoming more skeptical of the press and its role in politics and
society, especially with respect to its use of confidential
sources.\textsuperscript{173} The vast data on increasing skepticism of the press by

\textsuperscript{170} \textit{See} Williams, \textit{supra} note 163. Many times, confidential sources wish to leak
information so as to harm their political adversaries. \textit{See} Puerto, \textit{supra} note 47, at 513-
14. For example, when Matthew Cooper wrote about the Novak column, he suggested that
leaking the identity of CIA operative Valerie Plame was in retaliation for her husband's
criticism of the Bush Administration with respect to the war in Iraq. \textit{See} Editorial, \textit{Pass
Shield Law}]. Furthermore, confidential sources may be minority cultural or political
dissident organizations that are suspicious of the government, and seeking to advance a
particular cause. \textit{Branzburg}, 408 U.S. at 694–95.

\textsuperscript{171} \textit{See} McMasters, \textit{supra} note 6 (questioning whether in the context of the Miller and
Cooper case, public interest supports encouraging White House officials to disclose
identity of CIA operatives for political gain); \textit{see also} \textit{Pass Shield Law}, \textit{supra} note 170, at
A8 (noting that Plame leak endangered Plame, compromised national security, and
violated federal law).

(discussing media's role in enhancing democracy); \textit{see also} Kingsley, \textit{supra} note 169
(discussing adverse effects of inaccurate information on public policy).

\textsuperscript{173} The public has become increasingly skeptical of the media in light of recent
scandals such as Jack Kelly at \textit{USA Today} and Jayson Blair at \textit{The New York Times}. \textit{See}
Elizabeth A. Hurley, 'Perfect Storm' Threatening Press Freedom, Panelist Says, \textit{First
From 1985 to 1999, those who believed that the news media accurately reports the news
decreased from 55% to 37%, the number who saw the press as "immoral" rose from 13% to
40%, and the number who saw the press as lacking professionalism tripled. Anderson,
\textit{supra} note 71, at 480. The plurality who believed that the news media improved democracy
more than they damaged it fell from two-thirds to slightly over one-half, and those who
believed that press criticism obstructed political leaders from doing their jobs nearly
doubled. \textit{Id} In an annual survey done by the First Amendment Center and the \textit{American
Journalism Review} in the Spring of 2004, the percentage of those who agreed to some
extent that journalists should be allowed to keep a news source confidential decreased
those who disagree has increased from 12% in 1997 to 25% in 2004. \textit{Id}. While almost half
of those polled strongly agreed that it is important for democracy for the news media to
act as a watchdog of democracy, a majority disagreed that the news media tries to report
the news without bias. \textit{See id}. 52% answered "yes" to having heard or read recent
reporters concerning fact falsification in news stories. \textit{Id}. For those who answered "yes,"
the public suggests that although many citizens favor a press that uncovers government corruption and corporate fraud, the same favor is not felt when it comes to public support for investigative reporting methods such as the use of anonymous sources. This information is extremely relevant to Congress if it plans on moving forward with a federal shield because the people must play an integral role in the national definition of freedom of the press and the privileges it possesses.

Despite the fact that journalists tend to rely on confidential sources, many journalists themselves believe that such reliance is excessive, and one of the causes of the decline in news media credibility. Some even argue that investigative

30% said these reports decreased their trust in their local newspaper, while 66% said their level of trust remained the same. Id. 37% of citizens strongly agree and 24% mildly agree that the "falsifying or making up of stories in the American news media is a widespread problem." Id. Another national survey was conducted in the first week of October 2004, to determine if results would vary after the CBS News Dan Rather scandal regarding the flawed report on President Bush's military service, which was based on a confidential source, had aired. See First Amend. Ctr., 2004 Confidential-Sources Survey, http://www.firstamendmentcenter.org/about.aspx?id=2004_confidential_sources (last visited Feb. 13, 2006). 86% agreed that "when a news story relies on an unnamed source, one should question the accuracy of the news story." Id. 52% agreed that "news stories that rely on unnamed sources should not be published in the first place." Id. Additionally, the survey found four in 10 Americans believe the press has too much freedom, and only 15% mentioned the press when asked to list the five freedoms protected by the First Amendment. See Paul McMasters, Low Marks, AM. JOURNALISM REV., Aug./Sept. 2004, available at http://www.ajr.org/article_printable.asp?id=3731.

See Alexander, supra note 1, at 102-03 (explaining that public does not always approve of use of anonymous sources even though people do support watchdog press); The Pew Research Center, Public More Critical of Press, But Goodwill Persists (June 26, 2005), http://people-press.org/reports/tables/248.pdf (citing recent survey that 52% of Americans believe it is too risky to use confidential sources).

In considering whether to recognize any privilege against disclosure of communication, one of the fundamental considerations should be the opinion of the community as to whether such a reporter-source relationship ought to be fostered. See Storer Commc'ns. Inc. v. Giovan (In re Grand Jury Proceedings), 810 F.2d 580, 584 (6th Cir. 1987) (citing 8 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE § 2286 (J. McNaughton rev. ed.,1940)). Alexander Hamilton insisted on a similar evaluation of public opinion when defining the scope of liberty of the press, stating "whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government." THE FEDERALIST No. 84, at 476 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961). Some members of the public believe that though the Founders desired to secure liberty of the press, they did not say that the American people should trust every word the press publishes, especially when reporters refuse to reveal the sources of their information. See Shielding the Messenger, supra note 157.

See Puerto, supra note 47, at 501 n.1 (providing varied statistics on number of journalists who rely on confidential sources); see also Alexander, supra note 1, at 112 (noting increases in use of confidential sources over years).

See James Rainey, Journalists See More to Story Than Secret Source, L.A. TIMES, June 1, 2005, at A14 (finding that some reporters believe that reducing dependence on anonymous sources could improve confidence in media); David Shaw, Promises of
reporting can be pursued without heavy reliance on confidential sources.\textsuperscript{178} Interestingly enough, reporters are supposed to follow similar guidelines to those of the Department of Justice guidelines when investigating a news story.\textsuperscript{179} Before using a confidential source, a reporter must be convinced that there is no other way to acquire the information on the record, and such use must be of "overwhelming public concern."\textsuperscript{180} Furthermore, The Professional Journalists Code of Ethics mandates that journalists test the accuracy of information from all sources, question a source's motives before promising anonymity, and identify sources whenever possible because the public is entitled to as much information as possible on the source's reliability.\textsuperscript{181} The Code even suggests that reporters "balance a criminal suspect's fair trial rights with the public's right to be informed."\textsuperscript{182} Although these rules provide a screening process before a journalist uses confidential sources, the interests of justice require that these rules alone are insufficient to justify granting an absolute privilege to protect them.\textsuperscript{183}

Additionally, empirical studies conducted after \textit{Branzburg}, which found little support for the argument that compelled disclosure chills speech, have lead some commentators to suggest that confidential sources are concerned not with their statements being protected by a First Amendment reporter's privilege, but with the relationship of trust between the source and the

\textit{Confidentiality Aren't Made to be Broken,} L.A. TIMES, Oct. 26, 2003, at E16 (suggesting that reporters grant anonymity too easily and too frequently, often due to laziness, and that doing so undermines reporter's duty to inform public).

\textsuperscript{178} See Alexander, \textit{supra} note 1, at 103 (positing that more statutory protections for whistleblowers would create atmosphere in which there would be no need for anonymous sources); \textit{cf.} Editorial, \textit{Newsweek's Apology, Retraction Falls Short, Lancaster New Era,} May 24, 2005, at A-8 (stating that use of anonymous sources could be made more reliable if more than one source were required).


\textsuperscript{180} \textit{Using Confidential Sources, supra} note 180.

\textsuperscript{181} See \textit{id.} (suggesting that reporters be willing to tell the public as much information as possible); \textit{Code of Ethics, supra} note 169 (offering guidelines for reporting).

\textsuperscript{182} \textit{Code of Ethics, supra} note 168.

\textsuperscript{183} See People ex rel. Mooney v. Sheriff of New York County, 269 N.Y. 291, 295 (1936) (stating that "policy of law is to require the disclosure of all information by witnesses in order that justice may prevail" and refusing to grant absolute privilege to reporter on basis that information is confidential). \textit{See generally} Klein v. State, 52 So. 2d 117, 120 (Fla. 1950) (discussing importance of full and complete disclosure before grand jury).
reporter. Still other empirical evidence indicates that journalists actually receive more subpoenas for non-confidential information than confidential information. Since many reporters are willing to subject themselves to jail time before revealing a source, e.g. James Taricani and Judith Miller, this trust is worth more than an absolute shield law. Still other empirical evidence indicates that journalists actually receive more subpoenas for non-confidential information than confidential information.

Since reporters assume the role of watchdogs for the people, sniffing out individual and government crime on the trail of truth, it is illogical to afford them the right to sit idly by while another citizen or public official faces possible reputational harm, impeachment, or imprisonment by being accused of a crime. Providing for an absolute privilege thus opens the door for leakers and reporters to weaken the judicial process by bringing information on potential criminal conduct to the surface, but then hiding behind an impenetrable First Amendment shield

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184 See Marcus A. Asner, Starting From Scratch: The First Amendment Reporter-Source Privilege and the Doctrine of Incidental Restrictions, 26 U. Mich. J.L. Reform 593, 610–11 (1993). Two studies were conducted, one in 1971 and one in 1985, during which reporters were surveyed regarding their use of confidential sources. Not only does the lack of support for the argument that compelled disclosure chills speech not surprise Asner, but it leads him to observe that a confidential source may be more concerned with trusting a reporter on a personal level. See id.; Lili Levi, Dangerous Liaisons: Seduction and Betrayal in Confidential Press-Source Relations, 43 Rutgers L. Rev. 609, 702 (1991). All relationships between reporters and confidential sources are based on some kind of trust. The reasons and depth of this trust differs from relationship to relationship and even within relationships from the source to the reporter. See Asner, supra note 184, at 611.

185 See Asner, supra note 184, at 596. Many reporters have violated court orders to reveal their sources despite the threat of jail time. See Susan Allison Weifert, Cohen v. Cowles Media Co.: Bad News for Newsgatherers; Worse News for the Public, 25 U.C. Davis L. Rev. 1099, 1124 (1992). Reporters have accepted jail sentences in addition to subjecting their publications to default judgments in libel cases to avoid revealing sources. See Asner, supra note 184, at 612.

186 See Fargo, supra note 70, at 327. Three national surveys conducted by the Reporter's Committee for Freedom of the Press in 1989, 1991, and 1993 showed percentages of subpoenas received asking journalists for confidential information or sources of 5.1%, 3.4%, and 3.8% respectively. See Anthony L. Fargo, Reconsidering the Federal Journalist's Privilege for Non-Confidential Information: Gonzales v. NBC, 19 Cardozo Arts & Ent. L.J. 355, 356 (2001). An additional survey taken in 1997 revealed similar results. All four surveys taken by the Reporter's Committee for Freedom of the Press indicated between 95% and 97% of subpoenas received by the surveyed news sources were for non-confidential information. Id. at 356.

187 See Branzburg v. Hayes, 408 U.S. 665, 697 (1972) (explaining that "concealment of crime and agreements to do so are not looked upon with favor" and declining to "afford it First Amendment protection by denigrating the duty of a citizen, whether reporter or informer, to respond to grand jury subpoena and answer relevant questions put to him"); see also Campagnolo, supra note 15, at 460 (noting Branzburg Court's concern that relieving confidential sources from public accountability would threaten privacy expectations of citizens and protect those who betray others).
when asked to aid in the investigation they initiated. As one commentator suggests, the problem with claims to such a privilege is that “[j]ournalists aren’t claiming the right to tell us things we want to know[] [t]hey’re claiming the right to not tell things they’d rather we didn’t know.”

Some have even gone as far as to suggest that a judge should be allowed to use his contempt power to imprison journalists and compel them to disclose confidential sources possessing information relevant to a federal criminal investigation. The justification for such extreme action may be based in a modern interpretation of the traditionalist common law view of freedom of the press articulated by Sir William Blackstone, likely held by the drafters of the First Amendment, but eventually modified by the modern Court, that

[t]he liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity. To subject the press to the restrictive power of a licensor, as was formerly done, both before and since the Revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion and government. But to punish as the law does at present any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty. Thus, the will of individuals is still left free: the

188 See McMasters, supra note 6 (asking “[h]ow do they expect the government to solve such a crime without asking the reporters who committed the leak?”); see also Jon Paul Dilts, The Press Clause and Press Behavior: Revisiting the Implications of Citizenship, 7 COMM. L. & POLY 25, 33 (stating that courts actually expect press “to give up a source to a grand jury to solve a crime”).


190 See Schmid, supra note 8, at 1460 (discussing argument made by Zachariah Chaffee); see also Shielding the Messenger, supra note 157 (noting that some citizens believe that threat of legal action helps keep press honest).
abuse only of that free will is the object of legal punishment. Neither is any restraint hereby laid upon freedom of thought or inquiry; liberty of private sentiment is still left; the disseminating, or making public, of bad sentiments, destructive to the ends of society, is the crime which society corrects. 191

At bottom, however, the public sentiment appears to be essentially that if the government must be held accountable to the people in order to foster individual rights, so must the press. 192 Such belief is not ill-founded. Though the press tends to bemoan the limits placed upon them as undermining the guarantee of free press, limiting the ability of reporters to maintain confidential sources from federal prosecutors indicates “a commonsense attitude that a free press is not free from all normal restraints on society.” 193

Finally, an absolute privilege from source accountability undermines the truth-seeking principles the First Amendment is meant to foster which in turn, violates a journalist’s professional ethics. 194 Contrastingly, providing access to all relevant evidence in a grand jury proceeding promotes the search for truth by advancing the fair administration of justice based on all relevant evidence. 195 By allowing journalists to use an absolute privilege as a license to conceal crimes or “aggrandize criminals,” this

191 WILLIAM BLACKSTONE, 4 COMMENTARIES 151, 152 (1769).
192 See generally Intel Panel, supra note 114 (discussing accountability for confidential information leaks); Shielding the Messenger, supra note 157 (noting that maintaining confidential sources is not more important then proving something as true to the public).
194 See Branzburg v. Hayes, 408 U.S. 665, 691 n.29 (1972) (stating that “[t]he creation of new testimonial privileges has been met with disfavor by commentators since such privileges obstruct the search for truth”); Code of Ethics, supra note 168 (asserting that one of the duties of a journalist is to further public enlightenment by seeking the truth); see also Shielding the Messenger, supra note 157.
195 See Garland v. Torre, 259 F.2d 545, 548 (2d Cir. 1958) (positing that although freedom of press is basic to society, so “are courts of justice, armed with the power to discover truth”); see also Adams v. Associated Press, 46 F.R.D. 439, 440 (S.D. Tex. 1969) (asserting that private concerns of reporters are subordinate to public interests in having grand juries seek the truth); Baker, supra note 5, at 742 (commenting that while journalists believe a lack of privilege from disclosure will impede the free flow of information, many courts have held that the need for fair adjudication of litigation is more compelling).
search for truth would diminish, and could result in further public distrust for press, as well as the criminal justice system.\textsuperscript{196}

\textbf{CONCLUSION}

The Supreme Court's refusal to consolidate this area by articulating the existence and extent of a reporter's privilege in all types of judicial proceedings demands legislative attention. However, if the 109th Congress is serious about granting any special constitutional protection to newsgatherers,\textsuperscript{197} the sections in the current Congressional proposals addressing confidential sources require un-radical reconstruction. By creating an absolute reporter's privilege against compelled disclosure of confidential news sources before a grand jury, the proposed legislation appears to be a knee-jerk reaction to recent federal contempt charges, rather than a well-thought statutory scheme. Similar oversights have been the Achilles' heel of close to one hundred proposed federal shield laws introduced in Congress since \textit{Branzburg}; all of which failed, in part, because of the press's insistence on an absolute privilege.\textsuperscript{198} Therefore, if Congress is realistic about departing from \textit{Branzburg}, and enacting a federal shield law to protect a reporter's confidential sources from compelled disclosure before a grand jury, the drafters should consider adopting a qualified privilege.

The creation of a statutory qualified reporter's privilege to conceal confidential sources from federal grand juries similar to those set forth by many federal courts may still face resistance

\textsuperscript{196} \textit{See} Schmid, \textit{supra} note 8, at 1458 (illustrating that opponents of absolute privilege believe that privilege promotes recklessness within journalism by insulating journalists from both the need to prove the validity of their stories and obligation to assist in the investigation of criminal activity which they expose); \textit{see also} Ayala, \textit{supra} note 167, at 181 (noting that a reporter's privilege may encourage the press to falsify or "invent" the news).

\textsuperscript{197} \textit{See} Anderson, \textit{supra} note 44, at 455 (suggesting that if the press is to receive preferential legal treatment, it should be by statute or other non-constitutional means). \textit{See generally} Elrod, \textit{supra} note 14 (arguing that federally enacted statute will provide standardized rule and establish certainty in area of forced disclosure).

when applied in the grand jury context. Although the majority of federal courts have interpreted *Branzburg* as creating some form of qualified reporter's privilege based on Justice Powell balancing or Justice Stewart's three-prong test,\(^{199}\) or have created a qualified federal common law reporter's shield law based on Federal Rule of Evidence 501,\(^ {200}\) most have done so outside of the grand jury context.\(^ {201}\) In *Miller*, the D.C. Circuit declared that these qualified reporter's privileges do not "change the law applicable to grand juries as set forth in *Branzburg*."\(^ {202}\) It has also been suggested that a qualified privilege requiring the government to establish probable cause for issuing a grand jury subpoena is counterproductive, and undermines the Court's efforts to free federal grand juries from procedural delays.\(^ {203}\) The

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\(^{199}\) See *e.g.*, *Ashcroft v. Conoco, Inc.*, 218 F.3d 282, 287 (4th Cir. 2000) (noting that reporter's privilege is not absolute and, as in *Branzburg*, may be overcome when society's need for confidential information outweighs the First Amendment right); *Riley v. City of Chester*, 612 F.2d 708, 715 (3rd Cir. 1979) (recognizing a federal reporter's privilege requiring case-by-case balancing based on Justice Powell's concurrence). *But see Karem v. Priest*, 744 F. Supp. 136, 139 (W.D. Tex. 1990) (rejecting expansive reading of *Branzburg* that allows qualified privilege and suggesting that many courts have "chipped away at the holding of *Branzburg*" by granting constitutional protections for reporters in factual scenarios distinguishable from those in *Branzburg*).

\(^{200}\) Rule 501 authorizes federal courts to create evidentiary privileges in federal question cases according to "the principles of the common law as they may be interpreted . . . in the light of reason and experience." FED. R. EVID. 501 (2005). Some federal courts assert that Rule 501 applies to grand jury proceedings, when combined with Federal Rule of Evidence 1101 which provides that all rules are inapplicable in grand jury proceedings except with respect to privileges. See *In re Williams*, 766 F. Supp. 358, 367-68 (W.D. Pa. 1991).


\(^{202}\) *In re Grand Jury Subpoena (Miller)*, 397 F.3d 964, 972 (D.C.C. 2005).

\(^{203}\) See *In re Grand Jury Subpoena Am. Broad. Co.*, 947 F. Supp. 1314, 1319 (E.D. Ark. 1996) (noting that Supreme Court has stated that grand jury proceedings should not be plagued by "procedural delays and detours"); *see also* United States v. R. Enter., Inc., 498 U.S. 292, 297-98 (1991) (stating that the federal "government cannot be required to justify the issuance of a grand jury subpoena by presenting evidence sufficient to
Seventh Circuit has stated “rather than speaking of privilege, courts should simply make sure that a subpoena duces tecum directed to the media, like any other subpoena duces tecum, is reasonable in the circumstances, which is the general criterion for judicial review of subpoenas.” Consequently, a qualified privilege articulated in a manner similar to that in The Free Flow of Information Act of 2005’s section on disclosure of testimony and documents unrelated to confidential source identity, which simply codifies the Department of Justice guidelines modeled after Justice Stewart’s three-part test, may be a more reasonable approach for the drafters, considering the fact that federal prosecutors and courts are already familiar with the Department’s procedures. Yet, that debate is another battle for another day.

One notion is clear, however, the Press Clause cannot be used as an impenetrable shield against every type of governmental interference with the press’s ability to inform the public citizenry. An absolute shield against disclosure of confidential sources to federal grand juries would create an “institutional” privilege unique to the press, in contravention of Supreme Court and federal case law, the Fifth Amendment, sensible public policy establish probable cause because the very purpose of requesting the information is to ascertain whether probable cause exists”).

204 McKevitt v. Pallasch, 339 F.3d 530, 533 (7th Cir. 2003).
207 See Alexander, supra note 1, at 105 (describing Timothy W. Gleason’s argument that even watchdog function of the press never afforded it greater rights than ordinary citizens); Anderson, supra note 71, at 525 (2002) (suggesting that Press Clause should not be free-exercise clause for journalism).
concerns, and the Press Clause itself.\textsuperscript{208} Even those federal courts that recognize a qualified reporter's privilege in some form have asserted

when constitutional precepts collide, the absolute gives way to the qualified and a balancing process comes into play to determine its limits \ldots. The journalists' privilege therefore must be considered in the context of Supreme Court teachings that there is no absolute right for a newsman to refuse to answer relevant and material questions asked during a criminal proceeding.\textsuperscript{209}

In an age where the media has an inescapable influence on society and the judicial system, the fact that the press has been historically recognized as an institution that holds the government accountable on behalf of the body politic, does not mean that the press should be absolutely free from accountability itself when performing this function. Congress has failed to strictly construe the current shield law proposals, or offer convincing arguments that "permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth."\textsuperscript{210} As such, before Congress decides to drive the statutory spike through the heart of \textit{Branzburg} and its progeny, it should reconsider whether the ends truly justify the means.

\textsuperscript{208} See supra Parts I, II; see also First Nat'l Bank v. Bellotti, 435 U.S. 765, 796-802 (1978) (White, J., dissenting) (disagreeing with nuances that framers, developing Press Clause, supported separate "institutional" press existing exclusive of people or corporations); In re Grand Jury Subpoena (Miller), 397 F.3d 964, 972 (D.C. Cir. 2005) (assimilating with \textit{Branzburg} and accordingly rejecting that exclusive privilege exists for reporters); Glenn Harlan Reynolds, Editorial, \textit{No 'Journalistic Privilege,'} USA TODAY, June 28, 2005, \textit{available at} http://www.usatoday.com/news/opinion/editorials/2005-06-28-oppose_x.htm (asserting that journalists cannot be treated as a "privileged class" distinct from ordinary witnesses of crimes or participants in crimes because "the First Amendment doesn't create that sort of privilege").

\textsuperscript{209} United States v. Criden, 633 F.2d 346, 356-57 (3d Cir. 1980).

\textsuperscript{210} Trammel v. United States, 445 U.S. 40, 50 (1980) (internal quotations and citation omitted).