

ANALYZING FEDERAL SHIELD LAW PROPOSALS: WHAT CONGRESS CAN LEARN FROM THE STATES

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After several high-profile cases in which journalists faced jail or fines for failing to reveal confidential sources to investigators, two senators and a representative filed bills in Congress in 2005 that would create a federal shield law for journalists. The proposals were similar but differed in how they would define protected persons, protect confidential sources, and whether they would protect journalists from subpoenas to third parties, such as phone and Internet service companies. A comparison of the proposed laws to state shield laws finds that the bills avoid many of the pitfalls that have led to interpretations of state laws that were adverse to journalists. The best situation for journalists might be a federal shield law that combines elements of all the proposed bills, plus some additions to clarify who is protected.

After a rash of cases in which journalists who refused to reveal confidential sources were jailed or threatened with jail or fines for contempt of court,¹ bills were introduced in both houses of Congress in 2005 to create a federal shield law for journalists.² The bills were still awaiting committee votes when this article was published.

This is not the first time members of Congress have proposed protecting journalists from being forced to disclose information to grand

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¹See text *infra* accompanying notes 34-69.

²Free Flow of Information Act, S. 1419, 109th Cong. (2005); Free Flow of Information Act, H.R. 3323, 109th Cong. (2005); Free Speech Protection Act, S. 369, 109th Cong. (2005). S. 1419 and H.R. 3323, introduced in July 2005, were identical to each other and were amended versions of S. 340 and H.R. 581, introduced in February 2005.

juries, courts and other official bodies. For example, in the wake of the ruling by the Supreme Court of the United States in *Branzburg v. Hayes* in 1972,³ several dozen bills aimed at shielding journalists to various degrees were introduced in Congress, but none of them came to a vote of the full House or Senate.⁴ Instead of statutory protection, journalists came to rely on the widespread but fragile protection offered by federal appellate and district courts that interpreted *Branzburg* as allowing, if not endorsing, the development of a common-law or constitutional qualified privilege.⁵

The journalist's privilege has always been in conflict with the long-standing tradition of compelling persons with relevant evidence to present it to grand juries or in courts of law. Lately the balance between journalists' need to keep source identities confidential and the needs of the legal system has tilted more toward the authorities. To what extent would the new shield bills tilt the balance back toward journalists? What is the likelihood that courts will interpret a shield law, if passed, as tilting that balance too far in favor of the journalists?

To answer these questions, this article examines the shield bills introduced in Congress in 2005 and analyzes what they would protect, what they would not protect, and how courts are likely to interpret them. The article first briefly outlines how the federal privilege has evolved since *Branzburg* and explores recent challenges to the federal journalist's privilege. Next, it details the provisions of each of the shield-law bills introduced in 2005. To assess the likely effectiveness of each proposal, the article will analyze the bills by comparing them to state shield laws and state court interpretations of those laws. The article concludes with suggestions for how the legislation could be amended to avoid successful challenges and better balance the competing interests at play in subpoena battles.

FEDERAL PRIVILEGE BACKGROUND

The Supreme Court's 1972 decision in *Branzburg v. Hayes* is a logical beginning to any discussion of a federal privilege for journalists. The case marked the first time—indeed, the only time—the Court has considered Press Clause⁶ implications of subjecting journalists to

³408 U.S. 665 (1972).

⁴See AMERICAN ENTERPRISE INSTITUTE, LEGISLATIVE ANALYSIS: NEWSMEN'S PRIVILEGE LEGISLATION (1973).

⁵See, e.g., text *infra* accompanying notes 18–19 and cases cited.

⁶"Congress shall make no law ... abridging the freedom of speech, or of the press. ..." U.S. CONST. amend. I.

grand-jury subpoenas seeking the names of confidential sources. In the four consolidated cases that the Court considered, three journalists were subpoenaed after either seeing their sources break laws or hearing them admit to potentially criminal acts.⁷

In an opinion in which the justices split 5–4—or perhaps, as Justice Potter Stewart would say later, four-and-a-half to four-and-a-half⁸—the Court rejected the reporters’ argument that they should have a qualified privilege to refuse to testify before grand juries if doing so would identify confidential sources. The majority’s reasoning can be summarized this way:

- Every citizen has a duty to provide relevant evidence to an investigation when called to do so, and journalists are no exception.⁹
- The Press Clause applies to all citizens, not just those engaged by the institutional news media. Identifying a protected class of persons called “journalists” would in itself be constitutionally suspect because it would leave out other persons who might perform the same societal functions that journalists do. Defining the protected class too broadly would be too great a burden on the courts because it would deprive them of competent witnesses.¹⁰
- Proceedings to determine whether a journalist’s privilege claim should be honored in a particular situation would bog down the courts and interfere with the administration of justice.¹¹

⁷Paul Branzburg of the Louisville *Courier-Journal* was subpoenaed by two Kentucky grand juries after writing stories about drug dealers in Louisville and drug users in the state capital of Frankfort. He lost twice in his attempts to get the subpoenas quashed. *Branzburg v. Meigs*, 503 S.W.2d 748 (Ky. 1971); *Branzburg v. Pound*, 461 S.W.2d 354 (Ky. 1970). The two cases were consolidated on appeal as *Branzburg v. Hayes* after Judge J. Miles Pound of Louisville died and was replaced by Judge J.P. Hayes. One of the other two cases involved a television reporter who visited a headquarters of the Black Panthers in Massachusetts but did not report on what he heard or saw there. He was subpoenaed to appear before a grand jury and lost his appeal in Massachusetts courts. *In re Pappas*, 266 N.E.2d 297 (Mass. 1971). The fourth case involved *New York Times* reporter Earl Caldwell, who regularly wrote about the Black Panthers. He was ordered to testify about what he heard and saw at the Black Panthers’ national headquarters in Oakland, California, but he refused and won a ruling in his favor from the United States Court of Appeals for the Ninth Circuit. *Caldwell v. United States*, 434 F.2d 1018 (9th Cir. 1970).

⁸Potter Stewart, *Or Of the Press*, 26 HASTINGS L.J. 631 (1975) (characterizing the *Branzburg* decision as a virtual tie because of Justice Lewis Powell’s concurring opinion). See text *infra* accompanying note .

⁹*Branzburg*, 408 U.S. 665, 686–88 (1972).

¹⁰*Id.* at 704–05.

¹¹*Id.* at 702–03.

Justice Lewis Powell joined in the majority opinion but concurred separately as well. In his brief concurrence, Justice Powell emphasized the narrowness of the majority opinion, which he said only referred to cases in which journalists had witnessed criminal activity and been called in good faith to appear before grand juries. If journalists believed that they were being called in bad faith or as a form of government harassment, they could still seek protection from the courts, Justice Powell wrote.¹²

In one of the two dissenting opinions, Justice Stewart, joined by Justices William Brennan and Thurgood Marshall, argued that journalists should be able to claim a qualified privilege in order to protect the free flow of information to the public and to avoid government interference with journalistic autonomy.¹³ Justice Stewart wrote that journalists should not be turned into ersatz investigators for the government. He proposed that subpoenas to journalists from the government must be quashed unless the government could show that the information it sought was highly relevant to an investigation, highly important to resolving the issues at hand, and unavailable from any other source.¹⁴

In a separate dissent, Justice William O. Douglas argued for an absolute privilege that would bar the government from ever asking a journalist to identify a confidential source. Justice Douglas argued that such a privilege was needed to enable journalists to root out corruption and incompetence in government. He lamented that the majority opinion contributed to “the disease of this society”—the constant grasping for power of those in office and the use of that power to smother both people and causes.¹⁵

While the Supreme Court’s holding in *Branzburg* and the concurring and dissenting opinions are well known among those who study First Amendment law, two more obscure passages in *Branzburg* bear noting in light of recent controversies and the introduction of shield legislation in Congress. First, the majority in *Branzburg* noted that the privilege being sought by the journalists differed from other widely recognized privileges in at least one key aspect. While the attorney-client, doctor-patient and clergy-penitent privileges, among others, were designed to protect the client, patient or penitent, the proposed journalist’s privilege, the Court said, was designed to protect the journalist.¹⁶ In other words, the proposed privilege would

¹²*Id.* at 709–10 (Powell, J., concurring).

¹³*Id.* at 725 (Stewart, J., dissenting).

¹⁴*Id.* at 743 (Stewart, J., dissenting).

¹⁵*Id.* at 711–25 (Douglas, J., dissenting).

¹⁶*Id.* at 695.

have belonged to the receiver rather than the provider of information. Second, the Court noted that nothing in its *Branzburg* holding should discourage Congress or state legislatures from creating statutory protection for journalists or prevent the state courts from interpreting state law as providing a constitutional or common-law privilege.¹⁷

Interpreting Branzburg

The Court's opinion in *Branzburg* did not end the debate over whether journalists could claim a privilege not to testify in federal proceedings. Indeed, one could argue that *Branzburg* merely started the debate. Because of Justice Powell's concurring opinion, many lower federal courts interpreted *Branzburg* as applying only to grand jury subpoenas and endorsing journalists' use of privilege in other types of proceedings, such as criminal or civil trials. Over the next thirty-plus years, most of the federal appellate courts at least tacitly supported journalists' rights to refuse to testify or provide other evidence if the information subpoenaed was not highly relevant, critical or unavailable elsewhere.¹⁸ Some federal appellate courts have even extended protection for journalists to include nonconfidential material—such as outtakes unpublished photographs, and notes—that was not obtained through a promise of confidentiality.¹⁹

The support for the qualified journalist's privilege among federal courts has been more wide than deep. Only a few federal appellate courts have dealt with more than one privilege case in the years since *Branzburg*, and some of the appellate decisions have given weak support to the privilege. For example, the United States Court of Appeals

¹⁷*Id.* at 706.

¹⁸See *Price v. Time*, No. 04-13027, 2005 U.S. App. LEXIS 14331 (11th Cir. July 15, 2005); *Donohue v. Hoey*, No. 02-1405, 2004 U.S. App. LEXIS 19594 (10th Cir. Sept. 21, 2004); *Ashcraft v. Conoco*, 218 F.3d 282 (4th Cir. 2000); *Gonzales v. NBC*, 194 F.3d 29 (2d Cir. 1999); *United States v. Lloyd*, 71 F.3d 1256 (7th Cir. 1995); *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981); *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980); *Burse v. United States*, 466 F.2d 1059 (9th Cir. 1972); *Cervantes v. Times, Inc.*, 464 F.2d 986 (8th Cir. 1972). *But see* *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003) (questioning decisions of other circuits to recognize privilege in light of *Branzburg*); *In re Grand Jury Proceedings*, 810 F.2d 580 (6th Cir. 1987) (rejecting existence of any journalist's privilege in federal law in wake of *Branzburg*).

¹⁹See *Shoen v. Shoen*, 48 F.3d 412 (9th Cir. 1995); *United States v. Burke*, 700 F.2d 70 (2d Cir. 1983); *United States v. Cuthbertson*, 651 F.2d 189 (3d Cir. 1981). *But see* *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003) (rejecting existence of privilege for nonconfidential information); *United States v. Smith*, 135 F.3d 963 (5th Cir. 1998) (same).

for the Seventh Circuit upheld a lower court's decision to quash a subpoena for a reporter called by the defense in a criminal case.²⁰ But while the district court relied on its interpretation of the journalist's privilege in quashing the subpoena, the appellate court merely noted that the reporter's testimony would have been irrelevant. Anyone in any profession can challenge a subpoena on irrelevance grounds,²¹ so the appellate decision gave the news media no special protection other than an indirect approval of the lower court's decision.

The wobbly foundation of the federal privilege began to crack in several ways in the late 1990s, although the signs of structural failure were easy to miss because they were scattered and subtle. In *United States v. Smith*²² in 1998, the United States Court of Appeals for the Fifth Circuit ruled against a television station fighting a subpoena for outtakes of its interview with an arson suspect. Both the prosecution and defense wanted the unedited tape, and the appellate court was not convinced that forcing the station to release it harmed any First Amendment values. The court reported that it failed to see why it should even consider the First Amendment ramifications of the subpoenas. The television station, it held, was not "differently situated" than any other business that might have relevant evidence in a criminal case.²³ One reading of that statement is that the Fifth Circuit was agreeing with the *Branzburg* majority that the First Amendment conferred no more rights on the press than on anyone else. But the Fifth Circuit was among the federal appellate courts that had endorsed a qualified journalist's privilege.²⁴ Was it rethinking its position?

In the same year as the *Smith* decision, the U.S. Court of Appeals for the Second Circuit, despite years of precedent in that circuit, stated that there was no privilege protecting journalists' nonconfidential information from compelled disclosure. In *Gonzales v. NBC*,²⁵ plaintiffs in a federal civil rights lawsuit subpoenaed the network to provide outtakes from an aired story that touched on the same issues and people involved in the Gonzaleses' lawsuit. The court found no grounds for considering NBC's objections to the subpoena but later agreed to rehear the case and reversed itself in part.²⁶

²⁰*United States v. Lloyd*, 71 F.3d 1256 (7th Cir. 1995).

²¹See FED. R. CIV. PROC. 26(C); FED. R. CRIM. PROC. 17(C) (allowing any witness to challenge a subpoena that the witness considers irrelevant or unreasonable).

²²135 F.3d 963 (5th Cir. 1998).

²³*Id.* at 970.

²⁴See *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980).

²⁵155 F.3d 618 (2d Cir. 1998), *rev'd in part on recon.*, 194 F.3d 29 (2d Cir. 1999).

²⁶*Gonzales v. NBC*, 194 F.3d 29 (2d Cir. 1999).

While still finding that the network would have to turn over the outtakes to the Gonzaleses, the court noted its own precedent and said there was a privilege in the Second Circuit regarding both confidential and nonconfidential information. However, without explanation, the panel in *Gonzales* determined for the first time that the test for overcoming the privilege was less stringent when the information was not confidential. Instead of requiring a showing of clear relevance, critical need and unavailability from any other source, the panel said someone seeking to compel the disclosure of nonconfidential information from the press need only show *likely* relevance and unavailability from any *reasonable* source.²⁷

More recently, the Seventh Circuit Court in *McKevitt v. Pallasch*²⁸ rejected the appeal of three Chicago newspaper reporters who were fighting an order to turn over tape recordings of interviews with an informant who had infiltrated a Northern Ireland terrorist group. The attorney for the alleged terrorist group's leader, who was on trial in Northern Ireland, sought the tapes to see if anything on them might impugn the informant's upcoming testimony.²⁹ In dismissing the reporters' claims, a three-judge panel said it could not understand how a subpoena for nonconfidential material could raise First Amendment issues.³⁰ But the panel went further, finding the decisions of other federal courts supporting the journalist's privilege for confidential sources to be "surprising" or "audacious" in light of *Branzburg*.³¹ The courts that had extended the privilege to nonconfidential information were, in the Seventh Circuit's words, "skating on thin ice."³²

The Seventh Circuit also noted that David Rupert, the reporters' source, did not object to the tapes being turned over to the defense in Michael McKevitt's trial. The panel expressed confusion about why the reporters were objecting to the tapes' release.³³ The issue of whether journalists have a legitimate claim of privilege when the source is willing to allow his or her identity to be revealed or his or her words to be entered into evidence has also played a part in some of the controversies that erupted in 2004 and 2005.

²⁷*Id.* at 36 (emphasis added).

²⁸339 F.3d 530 (7th Cir. 2003).

²⁹See Mike Robinson, *Judge Studies Suspect's Bid for Reporters' Transcripts*, CHICAGO SUN-TIMES, June 26, 2003, at 10.

³⁰339 F.3d at 533.

³¹*Id.* at 532.

³²*Id.* at 532-33.

³³*Id.* at 532.

Recent Controversies

When this article was written, one reporter involved in the 2004–05 subpoena cases had served a sentence for contempt and a second was in jail.

Jim Taricani, a Providence, R.I., television reporter, refused to reveal his source for a copy of an FBI surveillance tape purportedly showing a city official accepting a bribe. The tape aired on Taricani's station in 2001, but it was 2004 before a special prosecutor ran out of options and subpoenaed Taricani in an investigation of whether his source violated a gag order. Taricani was found in civil contempt and the U.S. Court of Appeals for the First Circuit rejected his appeal.³⁴ Taricani continued to resist cooperating with the investigation and began paying a \$1,000-a-day fine in August 2004.³⁵ The judge eventually ordered Taricani to appear before him on a charge of criminal contempt. Taricani was convicted in a brief non-jury trial and was sentenced in December 2004 to six months of home confinement instead of prison, a concession to his fragile health after a 1996 heart transplant.³⁶

During the hearings leading up to the sentencing, the name of Taricani's source for the tape was revealed. It also was revealed that the source, an attorney for one of the defendants in the city corruption probe, had signed a confidentiality waiver after the tape was shown releasing any reporter he might have spoken to from a promise of confidentiality. Taricani, however, told the court his source said the waiver signing was coerced, so Taricani did not believe he should take it seriously.³⁷ Taricani was given early release from his sentence in April 2005 for good behavior.³⁸

The second reporter to lose her freedom was Judith Miller of the *New York Times*. Miller was involved in the highest profile case to emerge in 2004–05, which involved the public identification of a CIA operative. The operative, Valerie Plame Wilson, was married to former U.S. ambassador Joseph Wilson IV. Wilson wrote an op-ed column for the *New York Times* in 2003 about his CIA-sponsored trip to Africa to investigate claims that Iraqi leader Saddam Hussein was

³⁴In re Special Proceedings, 373 F.3d 37 (1st Cir. 2004).

³⁵*Taricani Pays Fine for Not Naming Source*, PROVIDENCE J., Aug. 20, 2004, at B3.

³⁶In re Special Proceeding, 33 Med. L. Rep. (BNA) 1033 (D.R.I. Dec. 9, 2004).

³⁷See Tracy Breton, *Taricani Sentenced to Home Confinement*, PROVIDENCE J., Dec. 10, 2004, at A1.

³⁸See Pam Belluck, *Reporter Granted Early Release from Sentence*, N.Y. TIMES, Apr. 7, 2005, at A21.

trying to buy an ingredient used to make nuclear weapons. Wilson said that he found no evidence of Iraqi purchases of uranium, but the Bush administration continued to claim that Hussein was preparing to build nuclear weapons as the United States sought support for war against Iraq.³⁹ After the column ran, syndicated columnist Robert Novak wrote that Wilson's mission was approved at a low level in the CIA and that Valerie Plame Wilson recommended her husband for the job.⁴⁰ Novak, apparently unaware that Mrs. Wilson was still considered an undercover operative, used her name in his column and said he got it from two unnamed administration officials.⁴¹

It is a federal crime to divulge the identity of an undercover intelligence agent to unauthorized persons in some circumstances.⁴² A special prosecutor, Patrick Fitzgerald, began trying to determine who had given Novak and other reporters Plame's name. Eventually, a federal judge found *New York Times* reporter Judith Miller in contempt for refusing to tell Fitzgerald the name or names of her sources.⁴³ Miller, who did not write about the Wilsons, was told that she could be jailed until the investigation ended, she revealed her sources, or for eighteen months, whichever came first.⁴⁴ Matthew Cooper, a *Time* magazine reporter who also refused to testify, also was found in contempt, along with his magazine.⁴⁵ Cooper and Miller both appealed their contempt citations to the U.S. Court of Appeals for the District of Columbia, which, in February 2005, ruled against them.⁴⁶ The three appellate judges disagreed on whether a federal privilege existed, but all agreed that even if it did, the prosecutor had overcome his burden in the case.⁴⁷ The full circuit court later declined to hear the case *en banc*⁴⁸ and the Supreme Court denied *certiorari*.⁴⁹ *Time* magazine agreed to cooperate with investigators after the Supreme Court ruling and turned over documents, including

³⁹Joseph C. Wilson IV, *What I Didn't Find in Africa*, N.Y. TIMES, July 6, 2003, at Sect. 4, p. 9.

⁴⁰Robert Novak, *Mission to Niger*, July 14, 2003, available at <http://www.townhall.com/columnists/robertnovak> (last visited June 3, 2005).

⁴¹In re Special Counsel Investigation, 332 F. Supp. 2d 26, 27 (D.D.C. 2004).

⁴²Intelligence Identities Protection Act of 1982, 50 U.S.C. § 421 (2002).

⁴³See Adam Liptak, *Reporter for Times, Silent Over Sources, Is Facing Jail Time*, N.Y. TIMES, Oct. 8, 2004, at A1.

⁴⁴*Id.*

⁴⁵In re Special Counsel Investigation, 346 F. Supp. 2d 54 (D.D.C. 2004).

⁴⁶In re Grand Jury Subpoena (Miller), 397 F.3d 964 (D.C. Cir. 2005).

⁴⁷*Id.*

⁴⁸In re Grand Jury Subpoena (Miller), 405 F.3d 17 (D.C. Cir. 2005).

⁴⁹Cooper v. United States, 125 S. Ct. 2977 (2005); Miller v. United States, 125 S. Ct. 2977 (2005).

Cooper's notes and e-mail messages.⁵⁰ On the day that he and Miller were to be sentenced to jail for contempt, Cooper also agreed to cooperate with the investigation after saying that his source had released him from his promise of confidentiality.⁵¹ Miller was sent to a Virginia jail until she agreed to testify or until the grand jury's term expired in October 2005.⁵² Novak has not said publicly whether he was subpoenaed or testified.⁵³

In addition to the case arising from the Wilson identification, federal prosecutor Fitzgerald and *New York Times* reporter Miller were locked in a second dispute over sources that, so far, has gone better for the press. Fitzgerald has pursued subpoenas of the phone records of Miller and fellow *Times* reporter Philip Shenon to learn who may have told them about a planned raid of an Islamic charity in Chicago. The reporters allegedly called the charity for comment after learning it was suspected of being a terrorist front, and prosecutors believe the charity then destroyed records that might have tied it to terrorist activities.⁵⁴ In response to Fitzgerald's move, the *Times* sued the prosecutor in federal court to block the subpoenas.⁵⁵ In February 2005, less than two weeks after Miller lost her contempt appeal in the CIA case, a federal district judge in New York ruled in favor of the *Times* in the phone-records case.⁵⁶ Fitzgerald has filed notice that he plans to appeal that ruling.⁵⁷

Meanwhile, four reporters were facing fines or jail time after refusing to testify in a civil suit. A federal district judge in Washington, Thomas Penfield Jackson, ordered five reporters to comply with subpoenas seeking testimony and records. Wen Ho Lee, a former government scientist, sued the United States Departments of Justice and Energy, among others, for allegedly violating the federal Privacy Act.⁵⁸ Lee alleged that he had exhausted all other avenues for deter-

⁵⁰See Adam Liptak, *Time Inc. to Yield Files on Sources, Relenting to U.S.*, N.Y. TIMES, July 1, 2005, at A6.

⁵¹See Adam Liptak, *Reporter Jailed After Refusing to Name Source*, N.Y. TIMES, July 7, 2005, at A1.

⁵²*Id.*

⁵³See David Margolick, *What About Novak?*, VANITY FAIR, Apr. 2005, at 160.

⁵⁴See Susan Schmidt, *Reporters' Files Subpoenaed*, WASH. POST, Sept. 10, 2004, at A16.

⁵⁵See Adam Liptak, *Times Sues Prosecutor on Phone Records*, N.Y. TIMES, Sept. 29, 2004, at A19.

⁵⁶*New York Times v. Gonzales*, No. 04 CIV 7677, 2005 U.S. Dist. LEXIS 2642 (S.D.N.Y. Feb. 24, 2005).

⁵⁷See Reporters Committee for Freedom of the Press, *Shields and Subpoenas: Global Relief Foundation Grand Jury Investigation*, available at http://www.rcfp.org/shields_and_subpoenas.html#globalrelief (last visited Aug. 1, 2005).

⁵⁸5 U.S.C.S. § 552a (2005).

mining who in the government leaked information to the reporters about an investigation of alleged security lapses at Los Alamos National Laboratory, which led to stories suggesting Lee had participated in espionage.⁵⁹ When the reporters continued to refuse to testify about confidential sources, Judge Jackson found them in contempt and then stayed imposition of \$500-a-day fines pending appeal.⁶⁰ In June 2005, the U.S. Court of Appeals for the District of Columbia upheld Judge Jackson's ruling against four of the five reporters, finding that there was not enough evidence that the fifth had actually violated Judge Jackson's order.⁶¹ The reporters were considering further appeal options when this article went to press.⁶²

The CIA case raised the issue of whether reporters whose sources sign confidentiality waivers releasing the reporters from promises lose the protection of the federal privilege. Other reporters agreed to testify to the grand jury after their sources released them from confidentiality promises.⁶³ The government argued in its brief to the U.S. Court of Appeals for the District of Columbia that if Miller's and Cooper's sources had signed the waivers, the reporters' conversations with them were now "on the record" and not protected.⁶⁴ Only one of the judges in the panel that decided the Miller/Cooper appeal addressed the government's argument and rejected it, finding that the journalist's privilege belongs to the reporter and therefore cannot be waived by the source.⁶⁵ But the issue is likely to arise again.

In a case that had not generated any judicial opinions by late summer 2005, the Department of Justice in October 2004 agreed to send dozens of its investigators confidentiality waivers regarding any possible conversations they had had with reporters. The Justice Department sent the forms to investigators at the request of Steven J. Hatfill, who was suing the government for leaking information to the media linking him to anthrax poisonings in the months after the terrorist attacks of Sept. 11, 2001. Hatfill's attorney said he wanted the

⁵⁹Lee v. U.S. Dept. of Justice, 287 F. Supp. 2d 15 (D.D.C. 2003).

⁶⁰Lee v. U.S. Dept. of Justice, 327 F. Supp. 2d 26 (D.D.C. 2004).

⁶¹Lee v. U.S. Dept. of Justice, 413 F.3d 53 (D.C. Cir. 2005).

⁶²See Reporters Committee for Freedom of the Press, *Shields and Subpoenas: Lee v. Department of Justice*, available at http://www.rcfp.org/shields_and_subpoenas.html#lee (last visited Aug. 1, 2005).

⁶³See Susan Schmidt, *Post Source Reveals Identity to Leak Probers*, WASH. POST, Sept. 16, 2004, at A2; Jacques Steinberg, *Threat of Jailing is Lifted with Reporter's Testimony*, N.Y. TIMES, Aug. 25, 2004, at A16.

⁶⁴Brief for United States at 46, In re Grand Jury Subpoena (Miller), 397 F.3d 964 (D.C. Cir. 2005) (No. 04-3138).

⁶⁵In re Grand Jury Subpoena (Miller), 397 F.3d 964, 999-1000 (D.C. Cir. 2005) (Tatel, J., concurring).

promises of confidentiality waived so that he could depose reporters to find out who leaked them information rather than deposing government investigators.⁶⁶ The subpoenas began to arrive in press offices in December 2004.⁶⁷ As this article was going to press, no judge had ruled on whether journalists from ABC, CBS, NBC, the Associated Press, *The Washington Post*, *Newsweek*, Gannett Co. and the *Los Angeles Times*, among others, would have to comply with the subpoenas, according to the Reporters Committee for Freedom of the Press.⁶⁸ The press subpoenas were later withdrawn when the Justice Department agreed to allow Hatfill to depose Justice employees, but they could be re-served if no one at Justice admits to talking to reporters about Hatfill.⁶⁹

State Experiences With Protecting Journalists

While journalists subpoenaed to appear in federal proceedings have had to rely upon a privilege based upon judicial interpretations of the First Amendment, common law, and *Branzburg*, journalists subpoenaed in some state courts have had statutory protection for many years. Maryland became the first state to pass a journalist's shield law in 1896, and thirty other states and the District of Columbia have followed suit.⁷⁰ All of the shield laws provide some protec-

⁶⁶See Scott Shane, *Anthrax Figure Wins a Round on News Sources*, N.Y. TIMES, Oct. 22, 2004, at A12.

⁶⁷See Richard B. Schmitt, *Scientist Subpoenas News Outlets in Anthrax Leaks*, L.A. TIMES, Dec. 18, 2004, at A30.

⁶⁸Reporters Committee for Freedom of the Press, *Shields and Subpoenas: Hatfill v. Ashcroft*, http://www.rcfp.org/shields_and_subpoenas.html#hatfill (last visited Aug. 1, 2005).

⁶⁹*Id.*

⁷⁰ALA. CODE § 12-21-142 (Michie 1995, Supp. 2004); ALASKA STAT. §§ 09.25.300 - 09.25.390 (2004); ARIZ. REV. STAT. ANN. § 12-2237 (West 2003, Supp. 2004); ARK. CODE ANN. § 16-85-510 (Michie 1987, Supp. 2003); CAL. EVID. CODE § 1070 (West 1995, Supp. 2005); COLO. REV. STAT. ANN. § 13-90-119 (West 2005); DEL. CODE ANN. tit. 10, §§ 4320 TO 4326 (Michie 1999, as amended, Supp. 2004); D.C. CODE ANN. §§ 16-4701-16-4704 (West 2001, Supp. 2004); FLA. STAT. ANN. § 90.5015 (West 1999, Supp. 2005); GA. CODE ANN. § 24-9-30 (Michie 1995, Supp. 2004); 735 ILL. COMP. STAT. ANN. §§ 5/8-901 - 5/8-909 (West 2003, Supp. 2004); IND. CODE ANN. §§ 34-46-4-1 to 34-46-4-2 (Lexis Law Pub. 1998, Supp. 2004); KY. REV. STAT. § 421.100 (Michie 1992, Supp. 2004); LA. CODE EVID. ANN. arts. 1451-1459 (West 1999, Supp. 2005); MD. ANN. CODE, CTS. & JUD. PRO., § 9-112 (Michie 2002, Supp. 2003); MICH. COMP. LAWS ANN. § 767.5a (West 2000, Supp. 2005); MINN. STAT. ANN. §§ 595.021 - 595.025 (West 2000, Supp. 2005); MONT. CODE ANN. §§ 26-1-901 to 26-1-903 (2003); N.M. RULES ANN. § 11-514 (2005); NEB. REV. STAT. ANN. §§ 20-144- 20-147 (Lexis Law Pub. 1999, Supp. 2004); NEV. REV. STAT. ANN. § 49.275 (Michie 2002, Supp. 2003); N.J. STAT. ANN. §§ 2A:84A-21 - 2A:84A-21.13 (West 1994, Supp. 2005); N.Y. CIV. RIGHTS LAW § 79-h (West 1992, Supp. 2005); N.C. GEN. STAT. ANN.

tion from subpoenas, or the consequences of disobeying subpoenas, for journalists seeking to keep the identities of confidential sources secret. About twenty of the laws are written broadly enough that they appear to also protect journalists from having to disclose notes, unpublished photographs, video outtakes, or other nonconfidential information as well.⁷¹

In the nineteen states without shield laws as of June 2005, state appellate courts in three—Mississippi, Utah⁷² and Wyoming—have not yet considered directly whether journalists have a privilege not to testify. Also, Hawaii appellate courts have not considered the issue since 1961, before the Supreme Court decided *Branzburg*.⁷³ Appellate courts in eleven of the other states have said that there is a journalist's privilege protecting confidential information based on their interpretations of state constitutions or common-law development.⁷⁴ Also, the Connecticut Supreme Court quashed a subpoena for a reporter because it found that a city council did not have subpoena power.⁷⁵ The Maine Supreme Judicial Court has twice said there is

§ 8–53.11 (West 2000, Supp. 2004); N.D. CENT. CODE § 31–01–06.2 (Michie 1996, Supp. 2003); OHIO REV. CODE ANN. §§ 2739.04 & 2739.12 (Anderson 2000, Supp. 2003); OKLA. STAT. ANN. tit. 12, § 2506 (West 1993, as amended, Supp. 2005); OR. REV. STAT. ANN. §§ 44.510 – 44.540 (2003, Supp. 2004); 42 PA. CON. STAT. ANN. § 5942 (West 2000, Supp. 2004); R.I. GEN. LAWS §§ 9–19.1–1 – 9–19.1–3 (Michie 1997, Supp. 2005); S.C. CODE § 19–11–100 (Lawyers Co-Op 1985, as amended, Supp. 2004); TENN. CODE ANN. § 24–1–208 (Lexis Law Pub. 2000, Supp. 2004).

⁷¹Those states are California, Colorado, Delaware, Florida, Georgia, Louisiana, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, New Jersey, New York, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina and Tennessee. *See id.*

⁷²*But see* Edward L. Carter, Note and Comment: *Reporter's Privilege in Utah*, 18 *BYU J. PUB. L.* 163 (2003) (discussing recent lower-court cases in Utah involving journalists' privilege claims).

⁷³*See In re Goodfader's Appeal*, 367 P.2d 472 (Haw. 1961).

⁷⁴*See In re Contempt of Wright*, 700 P.2d 40 (Idaho 1985); *Sierra Life Insurance Co. v. Magic Valley Newspapers*, 623 P.2d 103 (Idaho 1981); *Waterloo/Cedar Falls Courier v. Hawkeye Community College*, 646 N.W.2d 97 (Iowa 2002); *Winegard v. Oxberger*, 258 N.W.2d 847 (Iowa 1977); *State v. Sandstrom*, 581 P.2d 812 (Kan. 1978); *In re John Doe Grand Jury Invest.*, 574 N.E.2d 373 (Mass. 1991); *Sinnott v. Boston Retirement Bd.*, 524 N.E.2d 100 (Mass. 1988); *State ex rel. Classic III Inc. v. Ely*, 954 S.W.2d 650 (Mo. Ct. App. 1997); *State v. Siel*, 444 A.2d 499 (N.H. 1982); *Opinion of the Justices*, 373 A.2d 644 (N.H. 1977); *Hopewell v. Midcontinent Broad. Corp.*, 538 N.W.2d 780 (S.D. 1995); *State v. St. Peter*, 315 A.2d 254 (Vt. 1974); *Brown v. Commonwealth*, 204 S.E.2d 429 (Va. 1974); *Senear v. Daily Journal-American*, 641 P.2d 1180 (Wash. 1982) (en banc); *Clampitt v. Thurston County*, 658 P.2d 641 (Wash. 1983) (en banc); *State v. Rinaldo*, 689 P.2d 392 (Wash. 1984) (en banc); *State v. Knops*, 183 N.W.2d 93 (Wisc. 1971); *Zelenka v. State*, 266 N.W.2d 279 (Wis. 1978); *State ex rel. Green Bay Newspaper Co. v. Circuit Court*, 335 N.W.2d 367 (Wis. 1983).

⁷⁵*City Council of West Haven v. Hall*, 429 A.2d 481 (Conn. 1980).

no privilege for nonconfidential information but has not directly confronted the issue of confidential source protection since *Branzburg*.⁷⁶ The highest court in West Virginia also has not confronted since 1972 the issue of whether journalists have a privilege to protect the identities of confidential sources, but the court has twice upheld the quashing of subpoenas for nonconfidential information.⁷⁷ Also, Texas appellate courts have rejected the existence of any privilege when journalists are called to testify or give evidence in criminal cases.⁷⁸ The most recent decision from a Texas appellate court cast doubt on whether there is any privilege if journalists are subpoenaed relative to a civil case.⁷⁹ Appellate courts in Iowa⁸⁰ and Wisconsin⁸¹ have extended the journalist's privilege to nonconfidential information, but appellate courts in Idaho,⁸² Massachusetts⁸³ and Missouri,⁸⁴ in addition to Maine, have specifically ruled out the existence of a privilege protecting nonconfidential information from disclosure.

The states' approaches to protecting journalists from subpoenas vary widely. Commentators have noted that shield laws and court interpretations of those laws in the states do not follow a consistent pattern nationwide.⁸⁵ But while a shield law may not be a panacea for problems between the press and the legal system, it can provide relatively consistent treatment within a jurisdiction.

⁷⁶In re Letellier, 578 A.2d 722 (Me. 1990); State v. Hohler, 543 A.2d 364 (Me. 1988).

⁷⁷State ex rel. Charleston Mail v. Ranson, 488 S.E.2d 5 (W.Va. 1997); State ex rel. Hudok v. Henry, 389 S.E.2d 188 (W.Va. 1989).

⁷⁸Burnette v. State, No. 01-00-00403-CR, 2001 Tex. App. LEXIS 3944 (Tex. App. June 14, 2001); Coleman v. State, 966 S.W.2d 525 (Tex. Crim. App. 1998) (en banc); State ex. rel. Healey v. McMeans, 884 S.W.2d 772 (Tex. Crim. App. 1994).

⁷⁹In re Union Pacific R.R. Co., 6 S.W.3d 310 (Tex. App. 1999) (finding television station had no privilege to protect nonconfidential outtakes and reserving judgment on whether a privilege would extend to confidential material).

⁸⁰Bell v. Des Moines, 412 N.W.2d 585 (Iowa 1987); Lamberto v. Bown, 326 N.W.2d 305 (Iowa 1982).

⁸¹Kurzynski v. Spaeth, 538 N.W.2d 554 (Wis. Ct. App. 1995).

⁸²State v. Salsbury, 924 P.2d 208 (Idaho 1996).

⁸³Commonwealth v. Corsetti, 438 N.E.2d 805 (Mass. 1982).

⁸⁴CBS Inc. (KMOX-TV) v. Campbell, 645 S.W.2d 30 (Mo. Ct. App. 1982).

⁸⁵See, e.g., Laurence B. Alexander & Ellen M. Bush, *Shield Laws on Trial: State Court Interpretation of the Journalist's Statutory Privilege*, 23 J. OF LEGIS 215 (1997); Laurence B. Alexander & Leah G. Cooper, *Words That Shield: A Textual Analysis of the Journalist's Privilege*, 18 NEWSPAPER RESEARCH J. 51 (1997); Anthony L. Fargo, *The Journalist's Privilege for Nonconfidential Information in States Without Shield Laws*, 7 COMM. L. & POL'Y 241 (2002); Anthony L. Fargo, *The Journalist's Privilege for Nonconfidential Information in States with Shield Laws*, 4 COMM. L. & POL'Y 325 (1999).

In short, journalists find themselves in a precarious situation if they promise confidentiality to a source or resist providing other information to avoid being turned into investigators for the government, criminal defendants, or civil litigants. A journalist working on a story often has no idea whether she will be subpoenaed because of what she learns, let alone in what type of proceeding. While the journalist may be able to rely on a state shield law if the subpoena comes from a state court, grand jury, or official, he must rely on a shaky and inconsistent body of law if the subpoena comes from a federal entity. Would a federal shield law level the playing field for journalists?

THE SHIELD BILLS IN CONGRESS

Senator Christopher Dodd, a Democrat from Connecticut, introduced the Free Speech Protection Act (Senate Bill 369) in February 2005. Senator Dodd had proposed the same bill toward the end of the 108th Congress in December 2004, but it was never acted upon. Senator Richard Lugar, a Republican from Indiana, also introduced the Free Flow of Information Act (Senate Bill 340) in February 2005, which was identical to House Bill 581, introduced by Representative Mike Pence, an Indiana Republican. In July 2005, in response to concerns raised about the bills, Lugar and Pence introduced amended bills, Senate Bill 1419 and House Bill 3323, which are still identical to each other.

As of August 2005, the Dodd bill, S. 369, had attracted only three co-sponsors in the Senate, while the amended Lugar bill, S. 1419, had attracted nine.⁸⁶ The House companion bill to S. 1419, Pence's H.R. 3323, had attracted forty-eight co-sponsors.⁸⁷ This suggests that, if either version of a shield law is approved before the 109th Congress adjourns at the end of 2006, it is more likely to resemble the Lugar/Pence version. However, it is difficult to predict how any shield legislation might be amended in either house of Congress before it comes to a vote, if it ever does. Comparing the Dodd and Lugar/Pence bills is one way to consider the options that Congress may choose from in drafting a shield bill. The bills are compared here by content areas.⁸⁸ A summary of the comparison appears in the Table.

⁸⁶S. 369 & S. 1419 Summary and Status, *available at* <http://thomas.loc.gov> (last visited Aug. 19, 2005).

⁸⁷H.R. 3323 Summary and Status, *available at* <http://thomas.loc.gov> (last visited Aug. 19, 2005).

⁸⁸To simplify the discussion below, the text will refer only to the Dodd and Lugar bills, S. 369 and S. 1419, respectively.

Table 1: Proposed Federal Shield Bills Compared

| | S. 369 | S. 1419/H.R. 3323 |
|----------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Confidential source protection | Absolute. | Absolute, except in cases of national security. |
| Protection for other information | Qualified. Privilege can be overcome by showing that information is critical and necessary; not available elsewhere; and that there is overriding public interest in disclosure. | Qualified. Privilege can be overcome by showing that information could not be obtained elsewhere; in a criminal case, showing that a crime likely was committed and information sought is essential to investigation; in other cases, information must be essential to a dispositive and important issue. |
| Protected persons | Persons who engage in gathering of news or information and have intent, at start of process of gathering news or information, to disseminate that information. | An entity that disseminates information by print, broadcast, satellite, cable, mechanical, photographic electronic, or other means; the parent, subsidiary, or affiliate of that entity; or an employee, contractor, or other person who works for such an entity. |
| Waivers | The publication by the news media of a source of information or a portion of the information itself shall not constitute a waiver of protection from compelled disclosure. | No provision. |
| Subpoenas to third parties | No provision. | Information about business transactions between covered persons and communications service providers protected in similar way as information held by covered persons. |

Source: <http://thomas.loc.gov>

Covered Persons

S. 369 would cover anyone who “engages in the gathering of news or information”⁸⁹ and “has the intent, at the beginning of the process of gathering news or information, to disseminate the news or information to the public.”⁹⁰ The bill defines “news or information” as “written, oral, pictorial, photographic, or electronically recorded information or communication concerning local, national, or worldwide events, or other matters.”⁹¹ The bill defines “news media” as a newspaper, magazine, journal or other periodical, radio, or television,⁹² as well as “any means of disseminating news or information

⁸⁹Free Speech Protection Act, S. 369, 109th Cong. § 2 (1)(A) (2005).

⁹⁰*Id.* at § 2 (1)(B).

⁹¹*Id.* at § 2 (2).

⁹²*Id.* at § 2 (3)(A)–(E).

gathered by press associations, news agencies, or wire services,” including dissemination to the news media,⁹³ and “any printed, photographic, mechanical, or electronic means of disseminating news or information to the public.”⁹⁴

S. 1419 would define a “covered person” as any entity that “disseminates information by print, broadcast, cable, satellite, mechanical, photographic, electronic, or other means” through publishing a newspaper, book, magazine or other periodical; through operating a radio or television broadcast station or network or cable system, satellite carrier, or providing programming *via* radio, television, cable or satellite; the parent company of such an organization to the extent that the parent is engaged in news gathering or dissemination; or “an employee, contractor, or other person who gathers, edits, photographs, records, prepares, or disseminates news or information for such an entity.”⁹⁵ The bill would apply to any document created by the covered “persons” in writings, recordings and photographs, as the terms are defined in Federal Rule of Evidence 1001.⁹⁶

Extent of Protection

With some exceptions, S. 369 would bar all entities of the executive, legislative or judicial branches with subpoena power or other powers of compulsory process from requiring any person covered by the act “who is providing or has provided services for the news media” to disclose two types of information. First, the bill would bar the federal entities from forcing disclosure of a news source or any information that might identify the source, “whether or not the source has been promised confidentiality.”⁹⁷ Second, the bill would bar federal entities from compelling disclosure of “any news or information” gathered by a covered person but not communicated in the news media, including notes, outtakes, photographs or negatives, video or sound tapes, film or “other data, irrespective of its nature, that is not itself communicated in the news media.”⁹⁸ The bill would also protect supervisors, employers and other persons assisting a covered person from being forced to disclose the information.⁹⁹ The bill would also make any news or information obtained in violation of

⁹³*Id.* at § 2 (3)(F).

⁹⁴*Id.* at § 2 (3)(G).

⁹⁵Free Flow of Information Act, S. 1419, 109th Cong. § 5 (2)(A)–(C) (2005).

⁹⁶*Id.* at § 5 (3).

⁹⁷Free Speech Protection Act, S. 369, 109th Cong. § 3 (a)(1) (2005).

⁹⁸*Id.* at § 3 (a)(2)(A)–(F).

⁹⁹*Id.* at § 3 (b).

the bill's provisions inadmissible in any proceeding in any branch of the federal government.¹⁰⁰

S. 1419 would allow federal entities to require disclosure of information such as notes, outtakes and photographs if a court finds that the party seeking the information has shown, by clear and convincing evidence, that the news or information is "critical and necessary to the resolution of a significant legal issue" before a federal entity;¹⁰¹ that the news or information could not be obtained by "any alternative means;"¹⁰² and that "there is an overriding public interest in the disclosure."¹⁰³ However, the conditions allowing compelled disclosure would not apply to the identity of sources for news or information, only unpublished information that might not be confidential in nature.

In its original form, S. 340 provided absolute protection for the identities of journalists' confidential sources, as did S. 369. But S. 1419 would qualify the protection for confidential sources. In its original version, S. 340 stated that no federal entity in any branch of government could require a covered person to identify a source "from whom the covered person obtained information" and "who the covered person believes to be a confidential source," as well as any information that might identify the source.¹⁰⁴ As amended, the bill would protect journalists from revealing confidential sources unless the party seeking the identification could show that it had exhausted all other sources, that the information was essential to an underlying case or investigation, and the disclosure was necessary to prevent "imminent and actual" harm to national security.¹⁰⁵ The amended bill also specifically excludes Congress from its reach, so it would only affect proceedings in judicial and executive branches.¹⁰⁶

With regard to other types of information that journalists may be compelled to disclose, S. 1419, like S. 369, would create a qualified privilege. The Lugar bill, however, would make a distinction between information subpoenaed for a criminal investigation and information sought by a civil litigant. The bill states that no federal entity could compel a covered person to "testify or produce any document" unless a court determined, by clear and convincing evidence, that the entity had made reasonable attempts to obtain the information from

¹⁰⁰*Id.* at § 3 (c).

¹⁰¹Free Flow of Information Act, S. 1419, 109th Cong. at § 4 (a)(1) (2005).

¹⁰²*Id.* at § 4 (a)(2).

¹⁰³*Id.* at § 4 (a)(3).

¹⁰⁴Free Flow of Information Act, S. 340, 109th Cong. § 4 (1)–(2) (2005).

¹⁰⁵Free Flow of Information Act, S. 1419, 109th Cong. § 2 (a)(3)(A)–(C) (2005).

¹⁰⁶*Id.* at § 5 (4).

all persons who might have the same information.¹⁰⁷ In a criminal investigation or prosecution, the party seeking the information would also have to show that there were reasonable grounds to believe that a crime had been committed and show that the information sought was essential to the investigation, prosecution, or defense.¹⁰⁸ In other types of proceedings, the party seeking the information would have to show that the testimony or information sought from a journalist was “essential to a dispositive issue of substantial importance” to the case.¹⁰⁹

S. 1419 also would place limitations on subpoenaing parties in regard to what information could be compelled if the conditions for requiring disclosure were met. If a journalist did have to testify or provide other evidence, the bill would require that the information be limited to verifying published information or describing “circumstances relevant to the accuracy” of published information and that the inquiry be “narrowly tailored” in regard to subject matter and time period covered.¹¹⁰ Also, the Lugar bill would exclude from protection information about financial or business transactions that are unrelated to newsgathering or information dissemination.¹¹¹ This presumably would allow Congress or the courts to examine the books of media corporations and allow the Securities and Exchange Commission to seek financial data on publicly traded media corporations.

Third-Party Subpoenas

S. 1419 includes a section devoted to subpoenas to third parties not affiliated with the media. The Lugar bill would bar federal entities from issuing subpoenas to telephone companies, Internet service providers, or operators of interactive computer services for records of business transactions between those companies or providers and covered persons.¹¹² Subpoenas for such records would have to meet the same requirements related to covered persons. A subpoena for such information could be enforced only if the covered person (journalist or company) was notified of the subpoena’s issuance and was allowed to be heard in court before the information was disclosed.¹¹³ However, the bill would provide an exception allowing a federal en-

¹⁰⁷*Id.* at § 2 (a)(1).

¹⁰⁸*Id.* at § 2 (a)(2)(A)(i)–(ii).

¹⁰⁹*Id.* at § 2 (a)(2)(B).

¹¹⁰*Id.* at § 2 (b)(1)–(2).

¹¹¹*Id.* at § 3.

¹¹²*Id.* at § 4 (a), § 5 (1).

¹¹³*Id.* at § 4 (b)(1)–(2).

tity to skip the notice to the covered person if there was clear and convincing evidence that the notice would threaten a criminal investigation.¹¹⁴ The Dodd bill, S. 369, has no similar provision.

Waivers

S. 369 provides that the publication of a source of news or information or a portion of the news or information itself should not be construed as a waiver of the protection provided by the bill.¹¹⁵ In its original form, S. 340 stated that the publication or dissemination of any information sought by a federal entity would not constitute a waiver.¹¹⁶ However, the waiver provision was removed from the amended bill, S. 1419. Representative Pence, in testimony to the Senate Judiciary Committee regarding the shield law proposals, said that questions had been raised (he did not say by whom) about the “general phrasing” of the provision. He suggested it was highly unlikely that a court would construe a waiver from continued reporting about issues related to a subpoena, so he and Senator Lugar decided to delete the section as unnecessary.¹¹⁷

Summary

The Dodd and Lugar bills would provide qualified protection for journalists who do not want to disclose unpublished information. The Dodd bill is more specific about what types of unpublished information are covered. The Lugar bill does not define what kinds of testimony or other unpublished information is shielded but makes a distinction between what a subpoenaing party must show to overcome the qualified privilege in criminal proceedings compared to other types of proceedings, presumably including civil suits. The Dodd bill, S. 369, would provide absolute protection for journalists against disclosure of their confidential sources, while the Lugar bill provides absolute protection except in cases involving national security.

Both bills would cover a wide range of people employed by the mainstream media. The S. 369 definition of covered persons is broader, defining those covered not by employer but by the intent of

¹¹⁴*Id.* at § 4 (c).

¹¹⁵Free Speech Protection Act, S. 369, 109th Cong. § 5 (2005).

¹¹⁶Free Flow of Information Act, S. 340, 109th Cong. § 6 (2005).

¹¹⁷*Reporters' Shield Legislation: Issues and Implications, Hearing Before the Senate Comm. on the Judiciary*, 109th Cong. (2005) (testimony of Representative Mike Pence, R-IN, 6th Dist.), accessed at <http://www.judiciary.senate.gov> (July 20, 2005).

the news gatherer at the start of the newsgathering process. In that respect, the S. 369 definition is closer to the one federal courts have used to determine whether the qualified journalist's privilege should extend to filmmakers,¹¹⁸ book authors,¹¹⁹ and the host of an entertainment program about professional wrestling.¹²⁰ Senator Dodd's bill would define a journalist as someone who has an intent, at the start of the information-gathering process, of sharing that information with the public through print, broadcast or electronic means. However, S. 369 would not specifically protect book authors or publishers, while S. 1419 would.

S. 369 contains a waiver provision that specifies that publication of some part of the information sought in an investigation does not constitute a waiver of the protection provided by the bill. While it would seem logical to assume that a journalist would not waive protection by publishing the information gathered from a source, spelling out the waiver provision could prevent a court from making a leap in that direction. As will be discussed below, the highest court in at least one state has made that leap.¹²¹ S. 1419 does not have a similar provision.

One key difference between S. 369 and S. 1419 is a provision in S. 1419, the Lugar bill, that would protect journalists from subpoenas to third parties, such as phone companies and Internet service providers. Such a provision would provide extra protection to Judith Miller and Philip Shenon of the *New York Times* and others who fight subpoenas for their phone records.¹²² Such records can be used to allow prosecutors to obtain source identities through the back door, as it were, and could intimidate sources unrelated to the investigation at hand who might be concerned about being identified.

COMPARING THE FEDERAL BILLS TO STATE LAWS

Because there is no federal shield law for journalists, a logical point of comparison for the Dodd and Lugar bills is state shield laws. Many states have already dealt with issues likely to arise in debates

¹¹⁸ See *Silkwood v. Kerr-McGee*, 563 F.2d 433 (10th Cir. 1977) (finding that documentary filmmakers could claim protection under journalist's privilege).

¹¹⁹ See *Cusumano v. Microsoft Corp.*, 162 F.3d 708 (1st Cir. 1998); *Shoen v. Shoen*, 48 F.3d 412 (9th Cir. 1995) (finding that nonfiction book authors could claim protection under journalist's privilege).

¹²⁰ See *In re Madden*, 151 F.3d 125 (3d Cir. 1998) (finding that host of show about wrestling could not claim protection under journalist's privilege because his show was entertainment and he did not gather information sought to disseminate it to the public).

¹²¹ See text *infra* accompanying notes 206–208.

¹²² See text *supra* accompanying notes 54–57.

over the federal bills, including how to define “journalist,” what information is protected from compelled disclosure, whether “absolute” prohibitions to disclosure are valid, and waiver provisions.

Covered Persons

One concern of the *Branzburg v. Hayes* majority was that it would be ill-advised to define who is or is not a journalist. The majority in *Branzburg* held that the Press Clause of the First Amendment applied to all persons, not just those working for the institutional media.¹²³ Defining a class of persons who would receive special protection from providing evidence to grand juries would be tricky at best and possibly unconstitutional at worst because it would force judges to decide who qualified and who did not, the Court said.¹²⁴

Despite that admonition, the states that have approved shield laws have all defined, through statutory language, who may claim protection behind the shield. The states’ approaches to this task have varied widely, but most state provisions are similar to Senator Lugar’s in defining covered persons as members of the traditional institutional media.¹²⁵

States that are specific in their definitions of covered persons include Nebraska and Oregon, which say that the privilege may be claimed by a person employed by, connected with, or engaged in a “medium of communication.” The two states define “medium of communication” as “any newspaper, magazine, other periodical, book, pamphlet, news service, wire service, news or feature syndicate, broadcast station or network, or cable television system.”¹²⁶ Oklahoma defines “medium of communication” in almost the exact same way, except that it adds “record” to the list.¹²⁷ However, Oklahoma’s shield statute, as amended in 2002, separately defines a journalist as “any person who is a reporter, photographer, editor, commentator, journalist (sic), correspondent, announcer, or other individual” who is “regularly engaged” in working with news in various media.¹²⁸ Maryland specifically includes persons connected with newspapers, magazines, journals, press associations, news agencies,

¹²³408 U.S. 665, 704–05 (1972).

¹²⁴*Id.* at 686–88.

¹²⁵Free Flow of Information Act, S. 1419, 109th Cong. § 5 (2) (2005). *See also* text *supra* accompanying notes 95–96.

¹²⁶Neb. Rev. Stat. Ann. § 20–145 (2) (Lexis Publishing 1999, Supp. 2004); OR. REV. STAT. ANN. § 44.510 (2) (2003, Supp. 2004).

¹²⁷OKLA. STAT. ANN. tit. 12, § 2506 (A)(2) (West 1993, as amended, Supp. 2005).

¹²⁸*Id.* at § 2506 (A)(7).

wire services, radio, television and “any printed, photographic, mechanical, or electronic means of disseminating news and information to the public.”¹²⁹ Other states—Colorado is one—do not go into as much detail, although the effect may be the same. Colorado limits the privilege to persons employed by a “mass medium” and defines “mass medium” as “any publisher of a newspaper or periodical; wire service; radio or television station or network; news or feature syndicate; or cable television system.”¹³⁰

Delaware has an unusual definition of persons who may claim protection under its shield law from forced disclosure, and its provision is closer to the one in S. 369, the Dodd bill. Its statute defines a protected person as a “reporter.” A reporter is “any journalist, scholar, educator, polemicist, statutory trust, or other individual” who, when he or she received the information sought, was earning his or her principal income by obtaining or preparing information “for dissemination with the aid of facilities for the mass reproduction of words, sounds, or images in a form available to the general public.”¹³¹ Also,

¹²⁹MD. CODE ANN., CTS. & JUD. PROC., § 9-112 (a)(1)–(9) (Michie 2002, Supp. 2003). *See also* D.C. CODE ANN. § 16-4701 (1)–(9) (West 2001, Supp. 2004) (“[n]ewspapers, magazines, journals, press associations, news agencies, wire services, radio, television, or any printed, photographic, mechanical, or electronic means of disseminating news and information to the public”); N.J. STAT. ANN. § 2A:84A-21a (a) (West 1994, Supp. 2005) (“newspapers, magazines, press associations, news agencies, wire services, radio, television or other similar printed, photographic, mechanical or electronic means of disseminating news to the general public”); S.C. CODE ANN. § 19-11-100 (A) (Lawyers Coop. 1985, as amended, Supp. 2004) (“newspaper, book, magazine, television, news or wire service, or other medium”).

¹³⁰COLO. REV. STAT. ANN. § 13-90-119 (1)(a) (West 2005). *See also* N.Y. CIV. RIGHTS LAW § 79-h (a)(1)–(5) (West 1992, Supp. 2005), which defines the persons protected as those connected with newspapers, magazines, news agencies, press associations, and wire services and defines each term. The statute also applies to “newscasters” employed by radio and television stations. *See also* GA. CODE ANN. § 24-9-30 (Michie 1995, Supp. 2004) (“[a]ny person, company, or other entity engaged in the gathering and dissemination of news for the public through a newspaper, book, magazine, or radio or television broadcast”); LA. CODE EVID. ANN. art. 1451 (a)–(f) (West 1999, Supp. 2005) (“[a]ny newspaper or other periodical issued at regular intervals and having a paid general circulation; press associations; wire service; radio; television; and persons or corporations engaged in the making of news reels or other motion picture news for public showing”); CAL. CONST. art. I, § 2 and CAL. EVID. CODE § 1070 (a), (b) (West 1995, Supp. 2005) (newspapers, magazines, press associations and radio and television stations); FLA. STAT. ANN. § 90.5015 (1)(a) (West 1999, Supp. 2005) (“newspaper, news journal, news agency, press association, wire service, radio or television station, network, or news magazine”); MONT. CODE ANN. § 26-1-902 (1) (2003) (“any newspaper, magazine, press association, news agency, news service, radio station, television station or community antenna television service”); NEV. REV. STAT. ANN. § 49.275 (Michie 2002, Supp. 2003) (“any newspaper, periodical or press association or ... any radio or television station”).

¹³¹DEL. CODE ANN. tit. 10, § 4320 (3)(a) (Michie 1999, Supp. 2004).

a reporter for the sake of the definition could be someone who in each of the past three weeks or in four of the past eight weeks spent at least twenty hours a week gathering or preparing information for dissemination.¹³² The shield law also protects a person who was serving as an agent, assistant, employee or supervisor of a “reporter.”¹³³ Indiana also sets employment standards for persons claiming to be protected by the shield law. A person seeking protection from the shield law must be a “bona fide” owner or employee of a news organization and must have received or be receiving income for “legitimate” gathering, writing, editing, interpretation, announcing or broadcasting of the news.¹³⁴

Those states that define the media in more vague or general terms refer simply to protections for “[a] reporter or other person who is involved in the gathering or preparation of news for broadcast or publication;”¹³⁵ a person “who is or has been directly engaged in the gathering, procuring, compiling, editing, or publishing” of information to be disseminated to the public;¹³⁶ persons employed by or connected with “any organization engaged in publishing or broadcasting news;”¹³⁷ or “the news media or press.”¹³⁸ North Carolina defines a journalist as a person, entity or company or its agents “engaged in the business of writing, editing, photographing, or processing information for dissemination *via* any news medium.”¹³⁹ The statute defines “news medium” as any entity engaged in publishing or distributing news “*via* print, broadcast, or other electronic means accessible to the general public.”¹⁴⁰

Perhaps because many of the definitions of journalist are so specific, there has been little litigation over the question of defining a journalist in the state courts. There are only a handful of cases from state appellate courts in which the question has arisen, and the cases seem to favor an expansive reading of the definition of journalist.¹⁴¹

¹³²*Id.*

¹³³*Id.* at (3)(b).

¹³⁴IND. STAT. ANN. § 34-46-4-1 (1)-(2) (Lexis Publishing 1998, Supp. 2004).

¹³⁵MICH. COMP. LAWS ANN. § 767.5a (1) (West 2000, Supp. 2005).

¹³⁶MINN. STAT. ANN. § 595.023 (West 2000, Supp. 2005).

¹³⁷N.D. CENT. CODE § 31-01-06.2 (Michie 1996, Supp. 2003).

¹³⁸TENN. CODE ANN. § 24-1-208 (a) (Lexis Publishing 2000, Supp. 2004).

¹³⁹N.C. GEN. STAT. ANN. § 8-53.11 (a)(1) (West 2000, Supp. 2004).

¹⁴⁰*Id.* at (a)(3).

¹⁴¹*See* *People v. von Villas*, 13 Cal. Rptr.2d 62 (Cal. Ct. App. 1992) (freelance writer may claim protection under state shield law even for information gathered before he got a publication contract); *State v. Fontanille*, No. 93-KH-935 1994 La. App. LEXIS 191 (La. Ct. App. 1994) (book author may claim privilege despite lack of mention of books in state shield law); *Becnel v. Lucia*, 420 So.2d 1173 (La. Ct. App. 1982) (owner-editor of newspaper may claim protection under privilege for name of

The exceptions to that general trend, however, show why it is better to be specific and inclusive than not. In a 1986 case, the Michigan Court of Appeals ruled that a television reporter could not claim protection under the state shield law because the law only mentioned “newspapers and other publications.”¹⁴² The law was amended that same year to include journalists working for other media.¹⁴³ More recently, the U.S. Court of Appeals for the Eleventh Circuit interpreted the Alabama shield law as providing no protection to *Sports Illustrated* magazine because the statute specifically mentions newspapers, radio stations and television stations but not magazines.¹⁴⁴

Extent of Protection

The Dodd and Lugar bills each would create a nearly absolute privilege for journalists’ confidential information, except in cases of national security in Senator Lugar’s S. 1419, and a more qualified privilege for other, unpublished material, such as notes, outtakes and photographs. All of the state shield laws define to some degree what is protected from compelled disclosure and all protect confidential information. It is not always clear, however, whether the states intend to protect nonconfidential and/or unpublished information. Only three states—New York, North Carolina and Louisiana¹⁴⁵—specifically use the word “nonconfidential” in defining what information is protected from disclosure.

Shield laws in eleven states—Alabama, Alaska, Arizona, Arkansas, Illinois, Indiana, Kentucky, New Mexico, Ohio, Pennsylvania and Rhode Island—appear to protect only confidential sources and

anonymous letter writer). *But see* *In re Fitch*, 330 F.3d 104 (2d Cir. 2003) (New York shield law’s definition of journalist does not include appellant, a financial rating agency); *People v. LeGrand*, 415 N.Y.S.2d 252 (N.Y. App. Div. 1979) (book author may not claim protection under New York shield law); *Svoboda v. Clear Channel Comm. Inc.*, 805 N.E.2d 559 (Ohio Ct. App. 2004) (radio station news director was not acting as journalist when she talked to caller on phone about gossip regarding plaintiff).

¹⁴²*In re Contempt of Stone*, 397 N.W.2d 244 (Mich. Ct. App. 1986) (citing MICH. COMP. LAWS § 767.5a (West 1982)).

¹⁴³*See* MICH. COMP. LAWS ANN. § 767.5a (West 2000, Supp. 2005).

¹⁴⁴*Price v. Time*, No. 04-13027, 2005 U.S. App. LEXIS 14331 (11th Cir. July 15, 2005) (finding that fired football coach suing magazine for libel had not overcome requirements of federal First Amendment privilege in seeking names of magazine’s confidential source or sources).

¹⁴⁵LA. CODE EVID. ANN. arts. 1451-1459 (West 1999, Supp. 2005); N.Y. CIV. RIGHTS LAW § 79-h (West 1992, Supp. 2005); N.C. GEN. STAT. ANN. § 8-53.11 (West 2000, Supp. 2004).

material, judging by the plain language used.¹⁴⁶ In addition to Louisiana, New York and North Carolina, seventeen states and the District of Columbia appear to protect nonconfidential information. The language in their statutes does not limit the privilege to confidential sources or confidential information.¹⁴⁷ This latter category of state laws is more applicable to the Dodd and Lugar bills, which do not use the word “nonconfidential” but imply it.

Of the three states that explicitly use the word “nonconfidential” in their shield statutes, Louisiana provides a qualified privilege for unpublished or unaired news or the source of such news, “even if such news was not obtained or received in confidence.”¹⁴⁸ The statute defines “news” as “any written, oral, pictorial, photographic, electronic, or other information or communication ... concerning local, national, or worldwide events or other matters of public concern or public interest or affecting the public welfare.”¹⁴⁹ New York’s qualified privilege also requires that the nonconfidential news be unpublished.¹⁵⁰ New York defines news in almost identical language to Louisiana.¹⁵¹ North Carolina’s statute, passed in 1999, simply states that a journalist has a qualified privilege against disclosure of “any confidential or nonconfidential information, document, or item” obtained during newsgathering activities.¹⁵²

Among the states that do not specifically use the word “nonconfidential” in their statutes, Colorado has one of the broadest

¹⁴⁶ALA. CODE § 12-21-142 (Michie 1995, Supp. 2004) (sources of information); ALASKA STAT. § 09.25.300 (2004) (source of information); ARIZ. REV. STAT. ANN. § 12-2237 (West 2003, Supp. 2004) (source of information); ARK. CODE ANN. § 16-85-510 (Michie 1987, Supp. 2003) (source of information); ILL. COMP. STAT. ANN. § 5/8-901 (West 2003, Supp. 2004) (source of any information); IND. STAT. ANN. § 34-46-4-2 (Lexis Publishing 1998, Supp. 2004) (source of any information); KY. REV. STAT. ANN. § 421.100 (Michie 1992, Supp. 2004) (source of any information); N.M. RULES ANN. § 11-514 (B)(1) & (B)(2) (2005) (confidential source and any confidential information); OHIO REV. CODE ANN. §§ 2739.04 & 2739.12 (Anderson 2000, Supp. 2003) (source of any information); 42 PA. CON. STAT. ANN. § 5942 (West 2000, Supp. 2003) (source of any information); R.I. GEN. LAWS § 9-19.1-2 (Michie 1997 Supp. 2005) (confidential association, any confidential information, or source of any confidential information).

¹⁴⁷The seventeen states are California, Colorado, Delaware, Florida, Georgia, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, New Jersey, North Dakota, Oklahoma, Oregon, South Carolina and Tennessee.

¹⁴⁸LA. CODE EVID. ANN. art. 1459 (B)(1) (West 1999, Supp. 2005).

¹⁴⁹*Id.* at (A).

¹⁵⁰N.Y. CIV. RIGHTS LAW § 79-h (c) (West 1992, Supp. 2005).

¹⁵¹*Id.* at (a)(8) (“News” shall mean written, oral, pictorial, photographic, or electronically recorded information or communication concerning local, national or worldwide events or other matters of public concern or public interest or affecting the public welfare.”).

¹⁵²N.C. GEN. STAT. ANN. § 8-53.11(b) (West 2000, Supp. 2004).

definitions of what is covered. It defines protected “news information” as “any knowledge, observation, notes, documents, photographs, films, recordings, videotapes, audiotapes, and reports, and the contents and sources thereof.” The definition applies to information “regardless of whether such items have been provided or obtained ... in confidence.”¹⁵³ However, in Colorado the privilege does not apply to any information gathered at a news conference; published or broadcast; based on a journalist’s personal observation of the commission of a crime if the information cannot reasonably be obtained elsewhere; or based on a newsperson’s personal observation of the commission of certain felonies, regardless of whether the information is obtainable elsewhere.¹⁵⁴

Some of the states that provide indirect privileges for nonconfidential information also define in fairly explicit terms what material is covered under the privilege. California is the only state to provide a journalist’s privilege in its state constitution.¹⁵⁵ Almost identical language is contained in the California Evidence Code.¹⁵⁶ Both the constitution and the evidence code provide that no journalist for a print or broadcast medium can be held in contempt by any legislative, judicial or administrative body for refusing to disclose the source of any information or any unpublished information. The Constitution and Evidence Code define unpublished information as notes, outtakes, photographs, tapes or other data not disseminated to the public, even if information based on such material was published.¹⁵⁷ Similar language is contained in statutes in Delaware,¹⁵⁸ the District of Columbia,¹⁵⁹ Maryland¹⁶⁰ and Minnesota.¹⁶¹

Other states—for example, New Jersey—define “news” as “any written, oral or pictorial information”¹⁶² or use similar terms.¹⁶³

¹⁵³COLO. REV. STAT. ANN. § 13-90-119 (1)(b) (West 2005).

¹⁵⁴*Id.* at (2)(a)–(d).

¹⁵⁵CAL. CONST. art. I, § 2(b).

¹⁵⁶CAL. EVID. CODE § 1070 (West 1995, Supp. 2005).

¹⁵⁷CAL. CONST. art. I, § 2; CAL. EVID. CODE § 1070(c) (West 1995, Supp. 2005).

¹⁵⁸DEL. CODE ANN. tit. 10, § 4320 (2) (Michie 1999, Supp. 2004).

¹⁵⁹D.C. CODE ANN. § 16-4702 (A)–(F) (West 2001, Supp. 2004).

¹⁶⁰MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (2)(i)–(vi) (Michie 2002, Supp. 2003).

¹⁶¹MINN. STAT. ANN. § 595.023 (West 2000, Supp. 2005) (“any unpublished information ... or ... any ... notes, memoranda, recording tapes, film or other reportorial data whether or not it would tend to identify the person or means through which the information was obtained”).

¹⁶²N.J. STAT. ANN. § 2A:84A-21a (b) (West 1994, Supp. 2005).

¹⁶³NEB. REV. STAT. ANN. § 20-145 (3) (Lexis Publishing 1999, Supp. 2004); OKLA. STAT. ANN. tit. 12, § 2506 (A)(3) (West 1993, as amended, Supp. 2005); OR. REV. STAT. ANN. § 44.510 (1) (2003, Supp. 2004).

Montana,¹⁶⁴ North Dakota¹⁶⁵ and Tennessee¹⁶⁶ refer only to “any information,” while Georgia¹⁶⁷ and South Carolina¹⁶⁸ refer to “any information, document or item.” Nevada refers to “any published or unpublished information.”¹⁶⁹ Michigan refers to “any unpublished information obtained from an informant, or any unpublished matter or documentation.”¹⁷⁰ Florida does not define “information” but defines protected “news” as information “of public concern, relating to local, statewide, national, or worldwide issues or events.”¹⁷¹

Litigation over what type of information is protected from compelled disclosure has been rather extensive, at least compared to litigation over the definition of journalist. The litigation is too extensive to allow a detailed discussion here of all the issues raised, but generally, appellate courts in states whose statutes appear to protect only confidential information have ruled, as expected, that their shield laws do not protect nonconfidential information.¹⁷² In the other states, one major bone of contention has been whether a journalist can claim the privilege for eyewitness observations of potentially criminal or tortious events.¹⁷³ Much of the other case law on what is or is not protected from disclosure has focused on case-specific determinations about whether a party seeking to subpoena the information has met the requirements of the qualified privilege.¹⁷⁴

¹⁶⁴MONT. CODE ANN. § 26-1-902 (1) (2003).

¹⁶⁵N.D. CENT. CODE § 31-01-06.2 (Michie 1996, Supp. 2003).

¹⁶⁶TENN. CODE ANN. § 24-1-208 (a) (Lexis Publishing 2000, Supp. 2004).

¹⁶⁷GA. CODE ANN. § 24-9-30 (Michie 1995, Supp. 2004).

¹⁶⁸S.C. CODE ANN. § 19-11-100 (A) (Lawyers Coop. 1985, as amended, Supp. 2004).

¹⁶⁹NEV. REV. STAT. ANN. § 49.275 (Michie 2002, Supp. 2003).

¹⁷⁰MICH. COMP. LAWS ANN. § 767.5a (1) (West 2000, Supp. 2005).

¹⁷¹FLA. STAT. ANN. § 90.5015 (1)(b) (West 1999, Supp. 2005).

¹⁷²See, e.g., *Matera v. Superior Court*, 825 P.2d 971 (Ariz. Ct. App. 1992); *In re WTHR-TV*, 693 N.E.2d 1 (Ind. 1998); *In re Grand Jury Witness Subpoena of Abraham*, 634 N.E.2d 667 (Ohio Ct. App. 1993); *Hatchard v. Westinghouse Broad. Co.*, 532 A.2d 346 (Pa. 1987); *Outlet Communications, Inc. v. State*, 588 A.2d 1050 (R.I. 1991).

¹⁷³See *Henderson v. People*, 879 P.2d 383 (Colo. 1994) (television station helicopter pilot who flew police officers over a suspected marijuana field could not be subpoenaed by defense to describe what he observed); *In re Woodhaven Lumber and Mill Work*, 589 A.2d 135 (N.J. 1991) (photographers taking aerial photographs of a fire were not eyewitnesses to the crime of arson because they did not see the fire being set); *People v. Combest*, 828 N.E.2d 583 (N.Y. 2005) (television production company must turn over tapes of police interview with defendant because it was only unbiased eyewitness to interview); *State v. Pelham*, 901 P.2d 972 (Or. Ct. App. 1995) (television camera operator could refuse to answer questions about what he videotaped at arrest site but not questions about what he saw with the naked eye).

¹⁷⁴For a more extensive discussion of how state shield laws have been interpreted, see Anthony L. Fargo, *The Journalist's Privilege for Nonconfidential Information in States With Shield Laws*, 4 COMM. L. & POL'Y 325 (1999).

Limits on Absolute Privileges

Among the states that appear to provide protection only for confidential source identities or confidential information, Alabama, Arizona, Indiana, Kentucky, Ohio, and Pennsylvania do not qualify the protection by statute.¹⁷⁵ California, Montana, Nebraska, Nevada and Oregon have provided what appears to be absolute protection to both confidential and nonconfidential information by not mentioning any qualifications in their statutes.¹⁷⁶ Most states that protect confidential and/or nonconfidential information by statute provide a qualified privilege, and most define in fairly specific terms how someone seeking information can overcome the presumption of a privilege.¹⁷⁷ Many of the qualifications appear to be modeled after Justice Potter Stewart's dissenting opinion in *Branzburg*, in which he provided a three-part balancing test requiring a showing of compelling need, relevance and the lack of alternative sources.¹⁷⁸

The Dodd bill in particular seems to mirror closely the approach taken by New York, which provides absolute protection to confidential sources but qualified protection to nonconfidential information.¹⁷⁹ The New York statute defines the type of information cov-

¹⁷⁵ALA. CODE § 12-21-142 (Michie 1995, Supp. 2004); ARIZ. R. STAT. ANN. § 12-2237 (West 2003, Supp. 2004); IND. STAT. ANN. §§ 34-46-4-1 to 34-46-4-2 (Lexis Publishing 1998, Supp. 2004); KY. REV. STAT. § 421.100 (Michie 1992, Supp. 2004); OHIO REV. CODE ANN. §§ 2739.04 & 2739.12 (Anderson 2000, Supp. 2003); 42 PA. CON. STAT. ANN. § 5942 (West 2000, Supp. 2004).

¹⁷⁶CAL. CONST. art. I, § 2 and CAL. EVID. CODE § 1070 (West 1995, Supp. 2005); MONT. CODE ANN. § 26-1-902 (2003); NEB. REV. STAT. ANN. § 20-145 (Lexis Publishing 1999, Supp. 2004); NEV. REV. STAT. ANN. § 49.275 (Michie 2002, Supp. 2003); OR. REV. STAT. § 44.510 (2003, Supp. 2004).

¹⁷⁷See ALASKA STAT. §§ 09.25.310 (2004); ARK. CODE ANN. § 16-85-510 (Michie 1987, Supp. 2003); COLO. REV. STAT. ANN. § 13-90-119 (3) (a)-(c) (West 2005); DEL. CODE ANN. tit. 10, § 4323 (Michie 1999, as amended, Supp. 2004); D.C. CODE ANN. §§ 16-4703 (West 2001, Supp. 2004); FLA. STAT. ANN. § 90.5015 (2) (a)-(c) (West 1999, Supp. 2005); GA. CODE ANN. § 24-9-30 (1)-(3) (Michie 1995, Supp. 2004); 735 ILL. COMP. STAT. ANN. §§ 5/8-907 (West 2003, Supp. 2004); LA. CODE EVID. ANN. arts. 1453, 1459 (B) (1) (a)-(c) (West 1999, Supp. 2005); MD. ANN. CODE, CTS. & JUD. PRO., § 9-112 (d) (1) (i)-(iii) (Michie 2002, Supp. 2003); MICH. COMP. LAWS ANN. § 767.5a (West 2000, Supp. 2005); MINN. STAT. ANN. § 595.024 (West 2000, Supp. 2005); N.J. STAT. ANN. § 2A:84A-21.3 (West 1994, Supp. 2005); N.M. RULES ANN. § 11-514 (C) (1)-(4) (2005); N.Y. CIV. RIGHTS LAW § 79-h (c) (i)-(iii) (West 1992, Supp. 2005); N.C. GEN. STAT. ANN. § 8-53.11 (c) (1)-(3) (West 2000, Supp. 2004); N.D. CENT. CODE § 31-01-06.2 (Michie 1996, Supp. 2003); OKLA. STAT. ANN. tit. 12, § 2506 (B) (2) (West 1993, as amended, Supp. 2005); R.I. GEN. LAWS §§ 9-19.1-3 (Michie 1997, Supp. 2005); S.C. CODE § 19-11-100 (B) (1)-(3) (Lawyers Co-Op 1985, as amended, Supp. 2004); TENN. CODE ANN. § 24-1-208 (c) (2) (A)-(C) (Lexis Law Pub. 2000, Supp. 2004).

¹⁷⁸408 U.S. 665, 743 (1972) (Stewart, J., dissenting).

¹⁷⁹N.Y. CIV. RIGHTS LAW § 79-h (b)-(c) (West 1992, Supp. 2005).

ered as including “written, oral, pictorial, photographic, or electronically recorded information or communication” about “local, national or worldwide events or other matters of public concern or public interest or affecting the public welfare.”¹⁸⁰ When the information is not confidential, a party seeking to subpoena the press can overcome the privilege by a showing that the information sought is “critical or necessary” to the underlying case; “highly material and relevant” to the case; and “not obtainable from any alternative source.”¹⁸¹

Like New York, the District of Columbia and two states have absolute privileges for confidential sources or information. The District of Columbia, Maryland and Oklahoma require that a balancing test only be used when unpublished information is sought.¹⁸²

Delaware also has a combination of absolute and qualified privileges, but the difference is not tied to the type of information sought. Delaware’s law provides an absolute privilege in nonadjudicative proceedings, which it does not define, but qualifies the privilege for adjudicative proceedings. An adjudicative proceeding is defined as “any judicial or quasi-judicial proceeding in which the rights of parties are determined,” excluding grand juries.¹⁸³ In an adjudicative proceeding, the privilege can be overcome with respect to nonconfidential information if a judge determines that the public interest would be better served by having the journalist testify. In making the determination, the judge must apply the Stewart three-part test and consider the circumstances under which the journalist

¹⁸⁰*Id.* at (a)(8).

¹⁸¹*Id.* at (c).

¹⁸²D.C. CODE § 16–4703 (a)(1)–(3) & (b) (West 2001, Supp. 2004) (Person seeking information must show it is relevant, could not with due diligence be obtained elsewhere, and there is overriding public interest in information, but court may not compel disclosure of source of any information protected under statute.); MD. CODE ANN., CTS. & JUD. PROC., § 9–112 (d)(1)(i)–(iii) (d)(2) (Michie 2002, Supp. 2003) (Production can be compelled if person seeking information shows relevance, no other source available, and overriding public interest, but a court may not compel disclosure of source of any news or information as defined.); OKLA. STAT. ANN. tit. 12, § 2506 (B)(1)–(2) (West 1993, as amended, Supp. 2005) (No journalist may be required to reveal the source of any published or unpublished information; no journalist may be compelled to disclose any unpublished information unless party seeking information shows that it is relevant and not obtainable elsewhere.).

¹⁸³DEL. CODE ANN., tit. 10 § 4320 (1) (Michie 1999, Supp. 2004). Although Delaware does not define “nonadjudicative proceedings,” its definition for adjudicative proceedings indicates that the term “nonadjudicative” refers to a proceeding of any executive or legislative body that has the power to subpoena witnesses or hold uncooperative witnesses in contempt.

obtained the information and what effect disclosure could have on the future “flow of information to the public.”¹⁸⁴

Louisiana has different standards for how to overcome its statutory privilege; neither is absolute. A party seeking to compel disclosure of a source’s identity must show that the disclosure is “essential to the protection of the public interest.”¹⁸⁵ If the information is nonconfidential, the person seeking it must show that disclosure is critical or necessary to the maintenance of a claim and that the material is highly material and relevant and not obtainable elsewhere.¹⁸⁶

In the other states with shield laws that protect nonconfidential as well as confidential information, the protection is qualified for both types of information. Michigan says that the privilege can be overcome in criminal cases involving crimes punishable by life imprisonment if it can be shown that the information is essential and not available elsewhere.¹⁸⁷ North Dakota requires a court to find only that withholding the information would cause “a miscarriage of justice.”¹⁸⁸ Likewise, Alaska law states that the privilege can be overcome by a showing that withholding testimony would result in a miscarriage of justice, the denial of a fair trial, or would be contrary to the public interest.¹⁸⁹ Arkansas law says that the privilege does not apply if the news story in question was produced “in bad faith, with malice, and not in the interest of the public welfare.”¹⁹⁰

¹⁸⁴*Id.* See also COLO. REV. STAT. ANN. § 13–30–119 (3)(a)–(c) (West 2005) (relevant, no other reasonable source, strong interest); FLA. STAT. ANN. § 90.5015 (2)(a)–(c) (West 1999, Supp. 2005) (relevant and material, no other source, compelling interest); GA. CODE ANN. § 24–9–30 (Michie 1995, Supp. 2004) (material and relevant, no other reasonable source, necessary); 735 ILL. COMP. STAT. ANN. § 5/8–907 (West 2003, Supp. 2004) (exhaustion of all other sources, essential to public interest); MINN. STAT. ANN. § 595.024 (West 2000, Supp. 2005) (clearly relevant, no other source, compelling and overriding interest); N.J. STAT. ANN. § 2A:84A–21.3 (b) (West 1994, Supp. 2005) (relevant, material and necessary, no other source); N.M. RULES ANN. § 11–514 (C) (1)–(4) (2005) (material and relevant, reasonable exhaustion of other sources, crucial to case, in public interest); N.C. GEN. STAT. ANN. § 8–53.11 (c)(1)–(3) (West 2000, Supp. 2004) (relevant and material, no other source, essential); R.I. GEN. LAWS § 9–19.1–3 (Michie 1997, Supp. 2005) (necessary to permit prosecution or prevent threat to human life, not available from another source); S.C. CODE § 19–11–100 (B)(1)–(3) (Lawyers Coop. 1985, as amended, Supp. 2004) (material and relevant, no other reasonable source, necessary); TENN. CODE ANN. § 24–1–208 (c)(2)(A)–(C) (Lexis Publishing 2000, Supp. 2004) (clearly relevant, no other reasonable source, compelling and overriding public interest).

¹⁸⁵LA. CODE EVID. ANN. art. 1453 (West 1999, Supp. 2005).

¹⁸⁶LA. CODE EVID. ANN. art. 1459 (B)(1)(a)–(c) (West 1999, Supp. 2005).

¹⁸⁷MICH. COMP. LAWS ANN. § 767.5a (West 2000, Supp. 2005).

¹⁸⁸N.D. CENT. CODE § 31–01–06.2 (Michie 1996, Supp. 2003).

¹⁸⁹ALASKA STAT. § 09.25.310 (b) (1)–(2) (2004).

¹⁹⁰ARK. CODE ANN. § 16–85–510 (Michie 1987, Supp. 2003).

Even when shield statutes do not qualify journalists' protection from subpoenas, state appellate courts sometimes have interpreted seemingly absolute privileges to be qualified. The California Supreme Court ruled in 1990 that the state's seemingly absolute privilege against disclosure must take a back seat to a defendant's Sixth Amendment right to a fair trial.¹⁹¹ In *Delaney v. Superior Court*,¹⁹² the California high court ruled that a reporter and photographer for the *Los Angeles Times* could be compelled to testify about whether a search of the defendant was legal because they were the only impartial witnesses to the search. Likewise, the Oregon Court of Appeals indicated in a 1987 case that a journalist could be called to testify or provide evidence if the evidence was proven to help a criminal defendant's case. But in that case, *State ex rel. Meyers v. Howell*,¹⁹³ the Oregon court ruled that the defendant had not made such a showing and overturned a lower court's decision to hold a newspaper in contempt for failing to turn over unpublished photographs of a political demonstration at which the defendant was arrested.

Waivers

Many of the state statutes that shield journalists have provisions for what constitutes a waiver of the privilege.

For example, Colorado specifically excludes information actually published or broadcast from the privilege.¹⁹⁴ However, the statute also states that only a voluntary disclosure of information constitutes a waiver. The statute also states that if information related to, but not directly addressing, the information sought is disseminated, the privilege still applies to the specific information sought.¹⁹⁵ In other words, if a subpoena seeks all of a television station's aired and unaired tapes related to a specific story, the subpoenaing party only has a right to those specific pieces of information that were broadcast. Similarly, New Jersey's statute says that dissemination of information only waives the privilege as to the information disseminated.¹⁹⁶ New York's law specifically privileges only unpublished nonconfidential information. Its waiver provision states that

¹⁹¹The Sixth Amendment guarantees a criminal defendant the right to a fair trial by a jury of his or her peers and the right to call witnesses in his or her defense. U.S. CONST. amend VI.

¹⁹²789 P.2d 934 (Cal. 1990).

¹⁹³740 P.2d 792 (Or. Ct. App. 1987).

¹⁹⁴COLO. REV. STAT. ANN. § 13-90-119 (2)(b) (West 2005).

¹⁹⁵*Id.* at (4).

¹⁹⁶N.J. STAT. ANN. § 2A:84A-21.3 (b) (West 1994, Supp. 2005).

the privilege no longer exists if the person subpoenaed discloses specific information to any person who is not entitled to claim the privilege.¹⁹⁷ However, the statute also specifically privileges journalists' employers,¹⁹⁸ so presumably a journalist who confided in his or her editor would not waive the privilege.

Delaware provides that a reporter may be examined and cross-examined on any information for which he or she waived the privilege, but not on other facts for which he or she still claims the privilege.¹⁹⁹ The statute also states that a journalist does not waive the privilege by disclosing information protected by the privilege to another party.²⁰⁰ Similarly, Montana states that the privilege is not waived unless the journalist voluntarily waives the privilege, even if he or she agreed to testify.²⁰¹ Presumably, this means that a journalist can disclose certain information while still claiming the privilege for related information.

Some statutes simply state that dissemination of information obtained by the journalist in the course of his or her newsgathering activities does not waive the privilege. The District of Columbia states that dissemination of a source or a portion of the news or information does not constitute a waiver.²⁰² Maryland uses almost the same terminology.²⁰³ Florida simply states that a professional journalist "does not waive the privilege by publishing or broadcasting information."²⁰⁴ South Carolina, likewise, states that publication of "any information, document, or item" obtained in the gathering or dissemination of news does not constitute a waiver.²⁰⁵

Experiences of journalists in Nevada demonstrate the wisdom of including a waiver provision in a shield law. Although the Nevada statute is written in absolute terms, the Nevada Supreme Court twice ruled against journalists, at least in part, who sought protection for confidential material.²⁰⁶ In both cases, the court noted that a law passed after the shield law was enacted had made all privileges subject to waiver if the holder of the privilege voluntarily disclosed

¹⁹⁷N.Y. CIV. RIGHTS LAW § 79-h (g) (West 1992, Supp. 2005).

¹⁹⁸*Id.* at (f).

¹⁹⁹DEL. CODE ANN. tit. 10, § 4325 (Michie 1999, Supp. 2005).

²⁰⁰*Id.*

²⁰¹MONT. CODE ANN. § 26-1-903 (2) (2003).

²⁰²D.C. CODE ANN. § 16-4704 (West 2001, Supp. 2004).

²⁰³MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (e) (Michie 2002, Supp. 2003).

²⁰⁴FLA. STAT. ANN. § 90.5015 (4) (West 1999, Supp. 2005).

²⁰⁵S.C. CODE § 19-11-100 (C) (Lawyers Co-op 1985, as amended, Supp. 2004).

²⁰⁶*Las Vegas Sun v. Eighth Judicial Dist. Court*, 761 P.2d 849 (Nev. 1988); *Newburn v. Howard Hughes Med. Inst.*, 594 P.2d 1146 (Nev. 1979).

some significant part of the privileged material.²⁰⁷ This put journalists in the rather awkward position of waiving the privilege if they used material gathered from a confidential source in stories or editorials. The court recognized this problem in 2000, however, and ruled in favor of a journalist attempting to avoid testifying in a civil case while also disavowing its previous decisions regarding waivers.²⁰⁸

BUILDING A BETTER SHIELD LAW

The experiences of the states with shield laws indicate that there are nearly as many ways to write such legislation as there are jurisdictions. One could certainly argue that a shield law is unnecessary or unwise. One commentator has suggested that the problem of uneven treatment of journalists in federal and state courts could be solved by amending Federal Rule of Evidence 501 to make it clear that federal courts should follow state law on journalist's privilege issues.²⁰⁹ But it is not clear that such a move would solve the problem of inconsistent treatment and might only exacerbate it, given the wide variation among state approaches to the journalist's privilege.

By the time this article is published, Congress already may have acted on the shield-law proposals in the House and Senate, though that seemed unlikely at the time of publication. Senate and House versions of the law must be heard in the Judiciary Committees of each chamber, and the Senate Judiciary Committee was likely to be busy with hearings on President George W. Bush's nominee to replace Sandra Day O'Connor on the Supreme Court.²¹⁰ Also, the Bush administration has expressed opposition to a shield law,²¹¹ which should at least delay its passage because the president's party controls both houses of Congress. Even if a shield law passed before publication of this article, it could still be amended. Therefore, the discussion here is not merely academic, no matter what happened in Congress between the writing and publication of this article.

Neither S. 369 nor S.1419/H.R. 3323 is perfect from a journalist's point of view, and probably not from the point of view of those who might want to compel journalists to disclose information. There may

²⁰⁷NEV. REV. STAT. ANN. § 49.385 (LEXIS 2004).

²⁰⁸Diaz v. Eighth Judicial Dist., 993 P.2d 50 (Nev. 2000).

²⁰⁹Theodore Campagnolo, *The Conflict Between State Press Shield Laws and Federal Criminal Proceedings: The Rule 501 Blues*, 38 GONZ. L. REV. 445 (2002).

²¹⁰See Richard W. Stevenson, *O'Connor to Retire, Touching Off Battle Over Court*, N.Y. TIMES, July 2, 2005, at A1.

²¹¹See Lorne Manly, *Bill to Shield Journalists Gets Senate Panel Hearing*, N.Y. TIMES, July 21, 2005, at A13.

be no such thing as the “perfect” shield law, but given what the states have experienced with their laws, there may be ways to avoid shielding too much or too little while also preventing misinterpretations in the courts. The major benefit of a shield law, given the current state of federal privilege case law, would be to bring consistency to an area of law that is in desperate need of consistency. A badly drafted law would defeat that purpose. How could the bills proposed so far be improved to satisfy the needs of both journalists and those who might subpoena them?

Legislative Intent

As drafted, neither S. 369 nor S. 1419/H.R. 3323 contains a congressional findings nor a “statement of purpose” section. Such a section is usually unnecessary because courts can determine legislative intent by the plain language of the statute. But if Congress is to create a privilege by statute, it would not be superfluous to add a statement to clarify why it is acting in contradiction to the well-established maxim that “the public ... has a right to every [person’s] evidence.”²¹²

State shield laws rarely contain sections on legislative findings or statements of public policy, but two do. Minnesota’s Free Flow of Information Act contains a “public policy” section that states that the shield law protects “the confidential relationship between the news media and its [sic] sources.”²¹³ Copying this language might prove problematic for the federal law, which also protects unpublished information that may or may not be confidential. If Congress wanted to adopt public policy or legislative findings language, a better model might be the Nebraska Free Flow of Information Act, which states that it is “contrary to the public interest” to force a member of the news media to disclose a source or unpublished information.²¹⁴

²¹²*Branzburg v. Hayes*, 408 U.S. 665, 688 (1972) (citing *United States v. Bryan*, 339 U.S. 323, 331 (1950)).

²¹³Minnesota Free Flow of Information Act, MINN. STAT. ANN. § 595.022 (West 2000, Supp. 2005). The section as a whole reads:

In order to protect the public interest and the free flow of information, the news media should have the benefit of a substantial privilege not to reveal sources of information or to disclose unpublished information. To this end, the freedom of press requires protection of the confidential relationship between the news gatherer and the source of information. The purpose of sections 595.021 to 595.025 is to insure and perpetuate, consistent with the public interest, the confidential relationship between the news media and its sources.

Id.

²¹⁴Free Flow of Information Act, NEB. REV. STAT. ANN. § 20-144 (Lexis Law Pub. 1999, Supp. 2004). The section reads in full:

Whether such a clear and strong indication of legislative intent might help a court interpret the law in cases where the law itself is not entirely clear is speculative. However, a Lexis search turned up no cases in which Nebraska appellate courts have had to interpret that state's shield law, so perhaps a clear statement of legislative intent works to discourage subpoenas to the media.

Given some of the controversies in 2004 and 2005 over whether confidentiality waivers signed by sources wiped out journalists' ability to claim a privilege,²¹⁵ a findings or public policy section might also provide a way for Congress to clarify that the journalist's privilege belongs to the journalist, not the source. The confusion was evident during Senate Judiciary Committee hearings on S. 369 and S. 1419 in July 2005. University of Chicago law professor Geoffrey Stone, testifying in favor of a shield law, likened the proposed journalist's privilege to privileges for attorneys, physicians, clergy and others. He suggested that the journalist's privilege, like the others, would belong to the source, with the reporter acting merely as an agent of that source.²¹⁶ Professor Stone was apparently trying to suggest that the proposed journalist's privilege would not be a legal anomaly because similar privileges existed. But identifying the possessor of the privilege as the source would not help journalists whose sources were presumed to be among a group of people who signed a privilege waiver. It also would not serve the interests of the press in

The Legislature finds:

- (1) That the policy of the State of Nebraska is to insure the free flow of news and other information to the public, and that those who gather, write, or edit information for the public or disseminate information to the public may perform these vital functions only in a free and unfettered atmosphere;
- (2) That such persons shall not be inhibited, directly or indirectly, by governmental restraint or sanction imposed by governmental process, but rather that they shall be encouraged to gather, write, edit, or disseminate news or other information vigorously so that the public may be fully informed;
- (3) That compelling such persons to disclose a source of information or disclose unpublished information is contrary to the public interest and inhibits the free flow of information to the public;
- (4) That there is an urgent need to provide effective measures to halt and prevent this inhibition;
- (5) That the obstruction of the free flow of information through any medium of communication to the public affects interstate commerce; and
- (6) That sections 20-144 to 20-147 are necessary to insure the free flow of information and to implement the first and fourteenth amendments and Article I, Section 5, of the United State Constitution, and the Nebraska Constitution.

Id.

²¹⁵See text *supra* accompanying notes 37, 51, 63-65. See also *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003) and text *supra* accompanying note 33.

²¹⁶*Reporters' Shield Legislation: Issues and Implications: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong. (2005) (testimony of Professor Geoffrey Stone, Harry Kalven Jr. Distinguished Professor of Law, University of Chicago Law School), accessed at <http://www.judiciary.senate.gov> (July 20, 2005).

maintaining autonomy from the government, one of the interests implicated by subpoenas that Justice Stewart identified in his *Branzburg* dissent.²¹⁷

Definition of Journalist

Senator Dodd's bill, S. 369, includes a more expansive definition of persons covered by its provisions than Senator Lugar's S. 1419 and Representative Pence's H.R. 3323. This might be wise in an age when technology is driving rapid changes in the way journalists deliver information. Tying the definition too closely to the traditional media risks under-covering the people who may need the protection. At the same time, if the definition includes too many people, the law would risk incurring the wrath of a court system in need of competent witnesses.

This may prove to be the toughest part of the bill to draft. Already, the Internet has revolutionized the ways both the media and individuals communicate with the public and each other. The law has not yet caught up with the changes.²¹⁸ A key question will be whether bloggers should be covered by a privilege. Web logs, or blogs, first began to appear in 1997 and now include a wide variety of content, from multi-user online magazines to personal diaries of individuals.²¹⁹ Blogs are devoted to a wide range of topics, including politics, law and journalism. In fact, bloggers are credited with pointing out flaws in a CBS News story about President Bush's military service that led the network to retract the story in 2004.²²⁰ Already, bloggers who published proprietary information from Apple Computer about products Apple was about to introduce have sought a protective order to avoid being subpoenaed by Apple as it seeks to learn who gave away its trade secrets.²²¹ A trial-court judge in California sidestepped the question of whether the bloggers could seek protection under the journalist's shield law in that state by finding that the shield law

²¹⁷*Branzburg v. Hayes*, 408 U.S. 665, 725 (1972) (Stewart, J., dissenting). See text *supra* accompanying note 13.

²¹⁸See, e.g., Victoria Smith Ekstrand, *Unmasking Jane and John Doe: Online Anonymity and the First Amendment*, 8 COMM. L. & POL'Y 405 (2003) (noting that few, if any, appellate courts had dealt with whether Internet service providers could be compelled to disclose users' names despite hundreds of trial-court cases).

²¹⁹For a discussion of the definition, history, and development of Web logs, see <http://en.wikipedia.org/wiki/Blog> (last visited July 11, 2005).

²²⁰See Howard Kurtz, *After Blogs Got Hits, CBS Got a Black Eye*, WASH. POST, Sept. 20, 2004, at C1.

²²¹See *Apple Computer, Inc. v. Doe*, 33 Med. L. Rep. (BNA) 1449 (Calif. Super. Ct., Mar. 11, 2005).

would not protect anyone who broke the trade-secrets law, including journalists.²²² But the question of whether bloggers are journalists will not go away.

The language in S. 369 defines a “journalist” by the person’s intent at the start of the news-gathering process, and that may be a good way to ensure that journalists for traditional mainstream media and the new Internet journalists are both covered. But blogs cover a wide range of topics and come in many different forms. Should the law protect them all? Probably not, but how does one choose? Some who favor a federal shield law argue that it must include non-traditional journalists to be fair to all who do the work the public typically defines as journalism.²²³ One way to be fair while not extending the privilege to everyone with a computer would be to limit the privilege only to those reporting on issues of public concern.²²⁴ While this solution also raises a problem—how does one define “public concern?”—it might preserve the privilege for those trying to blow the whistle on public and private corruption while denying it to those who trade in gossip or celebrity “news.” Several states limit their shield laws to protecting only information gathered in the public interest or public concern, so such a limitation would not be revolutionary. For example, the New York shield law defines the type of information covered as being about local, national or worldwide events or other matters of public concern or public interest or affecting the public welfare.²²⁵ Florida’s definition of news that is protected under its shield law says that news is information “of public concern, relating to local, statewide, national, or worldwide issues or events.”²²⁶ Such definitions are broad enough to take in a wide variety of news and opinion but also allow courts to find that some information is not protected.

Extent of the Privilege

Both S. 369 and S. 1419/H.R. 3323 would protect confidential information almost absolutely and unpublished information

²²²*Id.*

²²³See 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).

²²⁴See Laurence B. Alexander, *Looking Out for the Watchdogs: A Legislative Proposal Limiting the Newsgathering Privilege to Journalists in the Greatest Need of Protection for Sources and Information*, 20 YALE L. & POL’Y REV. 97 (2002).

²²⁵N.Y. CIV. RIGHTS LAW § 79-h (a)(8) (West 1992, Supp. 2005).

²²⁶FLA. STAT. ANN. § 90.5015 (1)(b) (West 1999, Supp. 2005).

qualifiedly, although S. 1419 and H.R. 3323 would provide an exception to the absolute protection in cases of national security.²²⁷ The approach of giving some information qualified protection and some absolute protection is not unheard of among state shield laws and makes sense given the relative risks to journalists' relationships with sources from disclosures of source names versus disclosures of unpublished material. However, a qualified privilege is less predictable than an absolute one. In his testimony to the Senate Judiciary Committee in July 2005, Professor Stone from the University of Chicago argued for an absolute privilege to avoid ad hoc decisions about whether there was a "substantial need" for the subpoenaed information. He suggested that there could be an exception for cases in which the source's disclosure was unlawful, tempered by a requirement that reporters only be required to testify about unlawful source disclosures when the disclosure served no public purpose. As he noted, other privileges are limited by an exception for unlawful activity, including the attorney-client and doctor-patient privileges.²²⁸

An absolute privilege would bring greater consistency to the law but is likely to be politically unpopular. In fact, the Bush administration has already expressed opposition to a shield law, although it is not clear whether that opposition came before or after Senator Lugar and Representative Pence amended their bills.²²⁹ Courts in states with shield laws have not been shy about finding "absolute" privileges to be less than absolute when they conflict with constitutional rights such as those protected by the Sixth Amendment,²³⁰ so the utility of an absolute privilege is questionable. Even without the Lugar/Pence amendment to allow a reporter to be questioned when a national security issue is at stake, it seems unlikely that any court would allow a reporter to continue resisting a subpoena in the face of a legitimate national security threat.

Senator Lugar and Representative Pence make an additional distinction in regard to nonconfidential information, lowering the finding needed to overcome the privilege in criminal as opposed to civil matters. While journalists may not like this provision as much as Senator Dodd's "one-size-fits-all" approach, Senator Lugar has anticipated how the courts are likely to react to the privilege in criminal cases, where the constitutional stakes are higher than in a civil suit. It would be better to define an exception rather than allow the courts

²²⁷See text *supra* accompanying note .

²²⁸Stone testimony, *supra* note 216.

²²⁹See Manly, *supra* note 211.

²³⁰See text *supra* accompanying notes 191–193.

to do so. At the same time, it is easy to overstate the stakes in a criminal case, particularly when the government and not the defendant is seeking the information. It is interesting to note that one of the briefs filed with the Supreme Court on behalf of Judith Miller and Matthew Cooper came from a coalition of thirty-four state attorneys general.²³¹ The state officials argued that the privilege did more good than harm to criminal investigations by allowing the press to ferret out information that could lead to investigations by the authorities.²³² In August 2005, former Republican presidential candidate and Senator Bob Dole made much the same point in an op-ed column for the *New York Times*.²³³

Waivers

S. 369, the Dodd bill, contains a provision stating that the media do not waive the privilege when they publish a source of news or information itself that otherwise would be protected.²³⁴ This is wise because, as courts in Nevada have shown, odd things can happen when waiver conditions are not spelled out.²³⁵ The lack of such a provision in the amended Lugar bill, S. 1419, is a weakness of that bill. Congress would be wise to retain or restore the waiver provision in the final version of the bill to avoid confusion in the courts about whether publication of information from a confidential source creates a waiver of the privilege for the source's identity.

Summary

As of late 2005, S. 369 and S. 1419 offered two alternatives to protecting journalists from subpoenas in federal proceedings. They were by no means the only alternatives, as the existence of thirty-two shield laws in thirty-one states and the District of Columbia attest. Neither bill was perfect from a journalist's perspective or, perhaps, from the perspective of those who would require that the press provide testimony or documentary evidence more often. How could a better balance be struck between the needs of journalists to protect

²³¹See Adam Liptak, *State Attorneys General Ask Supreme Court to Hear 2 Reporters' Case*, N.Y. TIMES, May 28, 2005, at A8.

²³²*Id.*

²³³See Bob Dole, *The Underprivileged Press*, N.Y. TIMES, Aug. 16, 2005, at A15.

²³⁴Free Speech Protection Act, S. 369, 109th Cong. § 5 (2005). See text *supra* accompanying notes 115–16.

²³⁵See text *supra* accompanying notes 206–208.

sources and maintain independence and the legitimate needs of parties in criminal and civil matters to obtain evidence?

The Dodd approach to “covered persons” in S. 369 is preferable in that it would include all of those who perform the functions of journalism, including bloggers and other non-professionals. However, the breadth of the definition is also a curse, in that it might extend protection to so many people that Congress or the courts might find the privilege unworkable. One way to avoid that would be to retain the Dodd language but add a provision stating that the privilege only applies to those who are publishing news and opinions of public concern. Journalists may complain that “public concern” is a vague term, but Congress could remedy that by defining the term to mean news and opinion about public officials, political and social issues, and public and private actions that affect the public welfare. About all that would be eliminated would be protection for gossip, which would not be a great loss.

Both S. 369 and S. 1419 would provide nearly absolute protection for confidential sources and qualified protection for other unpublished material. While an absolute privilege covering all material that journalists gathered might be attractive to journalists, it likely would be politically unpopular. Senator Lugar’s amendment to provide only qualified protection to confidential sources in the event of a serious national security threat probably is a necessary evil in the wake of the Sept. 11, 2001, terrorist attacks in the United States. The Lugar exception is unlikely to arise in the vast majority of subpoena cases, so its inclusion is not a major weakness. There is also something to be said for the Lugar bill’s delineation between criminal and civil matters in regard to the qualified privilege. If the shield law does not make such a distinction, it is likely that courts will craft their own distinctions.

The completed shield law, if one is passed, should retain the Dodd language on waivers or some similar language to make it clear that publication of a source’s information does not waive the journalist’s right to assert the privilege. While such language may seem superfluous, clarity is never a vice in writing legislation. The final bill should also contain a section regarding subpoenas to third parties, similar to that in the Lugar bill, to protect journalists from having their sources uncovered through the back door when the front door was closed.

The final shield law should contain language that neither bill contained in 2005 to clarify that the privilege belongs to the journalist, not the source. This would prevent situations in which the source’s signing of a confidentiality waiver, with or without coercion, would

lead courts to believe that the journalist's protection also had been waived. Such language could appear in a "legislative findings" or similar section or be included in the definitions section (defining "privilege," for example).

One question that remains is whether either S. 369 or S. 1419 would have protected Jim Taricani, Judith Miller, the reporters subpoenaed by Wen Ho Lee, or the reporters who may be subpoenaed again in the Hatfill case.

Under either bill, the answer is probably "yes" with regard to Taricani, the Lee reporters and the Hatfill reporters. They all were or are protecting confidential sources in situations unlikely to raise national security issues. Both S. 369 and S. 1419 would provide absolute protection to confidential sources outside of national security concerns. Miller's case, however, is less clear. While one could argue that any threat to national security posed by the outing of CIA operative Valerie Plame Wilson had long passed by the time Miller and Matthew Cooper were subpoenaed, a clever prosecutor could argue that finding the person(s) responsible for the leak could plug a hole in our nation's defenses. It would be a stretch, but given that the information that Miller's source or sources provided was hardly the stuff of Deep Throat,²³⁶ a judge certainly could be tempted to strain the definition of "national security" to include the Plame leak.

CONCLUSION

Any shield law that emerges from Congress—if one ever does—should give clear guidance to the courts that will be called upon to interpret its meaning. The clearer the guidance, the less likely are courts to create their own exceptions and caveats, returning journalists to the uncertain fate they face now when they challenge subpoenas in federal proceedings. The experiences of the states with regard to the shield laws can provide guidance to Congress as it tries to protect journalists with a higher degree of certainty. The sample shield law above in the appendix to this article is one attempt to harmonize the various possible approaches to producing a strong shield law. It is by no means the only possibility.

²³⁶"Deep Throat" was the nickname that *Washington Post* reporters Carl Bernstein and Bob Woodward gave to a source who helped guide their coverage of the Watergate scandal in 1972-74, leading to the resignation of President Richard Nixon. In June 2005, Mark Felt, a former FBI official, revealed that he was "Deep Throat." See Evan Thomas, *A Long Shadow*, NEWSWEEK, June 13, 2005, at 22. See also BOB WOODWARD, *THE SECRET MAN* (2005).

Given the Supreme Court's reluctance to revisit *Branzburg v. Hayes*, as evidenced by its denial of *certiorari* in the Miller and Cooper cases in 2005,²³⁷ a legislative solution may be the best way to balance the competing interests of journalists and authorities. In the end, the public would benefit from having a press that does not have to worry about jail or heavy fines every time a reporter says, "Your secret is safe with me."

²³⁷United States v. Cooper, 125 S.Ct. 2977 (2005); United States v. Miller, 125 S.Ct. 2977 (2005).

APPENDIX: SAMPLE SHIELD LAW**A Bill**

To protect persons who gather and disseminate news and information to the public from being compelled to disclose sources and unpublished information.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Section 1: Short Title.

This act may be cited as the “Free Flow of Information Act of 2005.”¹

Section 2: Findings of Fact

Congress finds:

(a) That the policy of the United States of America is to insure the free flow of news and other information to the public, and that those who gather, write, or edit information for the public or disseminate information to the public may perform these vital functions only in a free and unfettered atmosphere;

(b) That such persons shall not be inhibited, directly or indirectly, by governmental restraint or sanction imposed by governmental process, but rather that they shall be encouraged to gather, write, edit, or disseminate news or other information vigorously so that the public may be full informed;

(c) That compelling such persons to disclose a source of information or disclose unpublished information is contrary to the public interest and inhibits the free flow of information to the public.²

Section 3: Compelled Disclosure Prohibited

(a) A Federal entity may not compel a covered person to testify or produce any document in any proceeding or in connection with any issue arising under Federal law if the testimony or production of the document would identify or lead to the identification of a confidential

¹Free Flow of Information Act, S. 1419, 109th Cong. § 1 (2005).

²Free Flow of Information Act, Neb. Rev. Stat. Ann. § 20-144 (1)-(3) (Lexis Law Pub. 1999, Supp. 2004).

source of information, regardless of whether a specific promise of confidentiality was made to that source.³

(b) A Federal entity may not compel a covered person to testify or produce any document that has not been published, broadcast, or otherwise disseminated to the public, regardless of whether the information contained in the testimony or document was obtained by the covered person through a promise of confidentiality.⁴

Section 4: Conditions for Compelled Disclosure

(a) Notwithstanding any provision of Section 3, a Federal entity may compel a covered person to reveal the identify of a confidential source of information if

(1) the disclosure of the identity of such a source is necessary to prevent imminent and actual harm to national security;

(2) compelled disclosure of the identity of such a source would prevent such harm; and

(3) The harm that would be avoided by requiring disclosure clearly outweighs the public interest in protecting the free flow of information.⁵

(b) Notwithstanding any provision of Section 3, a Federal entity may compel a covered person to testify or produce a document that is unpublished and that was not obtained through a promise of confidentiality if

(1) the information contained in the testimony or document can not be obtained by any other means; and

(2) there are reasonable grounds to believe that a crime has been committed and the information is essential to the investigation, prosecution, or defense; or

(3) in a noncriminal matter, the testimony or document sought is essential to a dispositive issue of substantial importance.⁶

(c) The content of any testimony or document that is compelled under subsection (a) or (b) shall, to the extent possible

³Free Flow of Information Act, S. 1419, 109th Cong. § 2 (a) & 2 (a) (3) (2005) (modified to tighten).

⁴*Id.* at § 2 (a) (1) (modified to tighten and conform with earlier section).

⁵*Id.* at § 2 (a) (3) (A)–(C) (modified to conform with earlier section).

⁶*Id.* at § 2 (a) (1)–(3) (modified to conform with earlier section).

- (1) be limited to the purpose of verifying published information or describing any surrounding circumstances relevant to the accuracy of such published information; and
- (2) be narrowly tailored in subject matter and period of time covered.⁷

Section 5: Compelled Disclosure from Third Parties

(a) Section 3 shall apply to any testimony or document that a third party or a Federal entity seeks from a communications service provider if such testimony or documents consists of any record, information, or other communication that relates to a business transaction between a communications service provider and a covered person.

(b) A court may compel the testimony or disclosure of a document under this section only after the party seeking such a document provides the covered person who is a party to the business transaction described in subsection (a)

- (1) notice of the subpoena or other compulsory request for such testimony or disclosure from the communications service provider not later than the time at which such subpoena or request is issued to the communications service provider; and
- (2) an opportunity to be heard before the court before the time at which the testimony or disclosure is compelled.

(c) Notice under subsection (b)(1) may be delayed only if the court determines by clear and convincing evidence that such notice would pose a substantial threat to the integrity of a criminal investigation.⁸

Section 6: Activities Not Constituting a Waiver

The publication by the covered person, or the dissemination by a person while providing services for the covered person, of a source of news or information, or a portion of the news or information, obtained in the course of pursuing newsgathering activities shall not constitute a waiver of the protection from compelled disclosure that is described in section 3.⁹

⁷*Id.* at § (2) (b) (1)–(2).

⁸*Id.* at § 4 (modified to conform with earlier section).

⁹Free Speech Protection Act of 2005, S. 369, 109th Cong., § 5 (2005) (modified to change “news media” to “covered person” to conform to earlier sections).

Section 7: Definitions

(a) **COVERED PERSON**—The term “covered person” means

- (1) a person who engages in the gathering of news or information; and
- (2) has the intent, at the beginning of the process of gathering news or information, to disseminate the news or information to the public; or
- (3) an entity that publishes a newspaper, book, magazine, or other periodical in print or electronic form; operates a radio or television broadcast station (or network of such stations), cable system, satellite carrier, or a channel or programming service for any such station, network, system, or carrier; or
- (4) the parent, subsidiary, or affiliate of such an entity to the extent that the parent, subsidiary, or affiliate is engaged in newsgathering or the dissemination of news and information.¹¹

(b) **FEDERAL ENTITY**—The term “federal entity” means an entity or employee of the judicial, legislative, or executive branch or an administrative agency of the Federal Government with the power to issue a subpoena or provide other compulsory process.¹²

(c) **NEWS OR INFORMATION**—The term news or information means written, oral, pictorial, photographic, or electronically recorded information or communication concerning local, national, or worldwide events of public concern, public interest, or important to the public welfare.¹³

(d) **DOCUMENT**—The term “document” means writings, recordings, and photographs, as those terms are defined by Federal Rule of Evidence 1001 (28 U.S.C. App.).¹⁴

(e) **COMMUNICATIONS SERVICE PROVIDER**—The term “communications service provider” means

- (1) any person that transmits information of the customer’s choosing by electronic means; and
- (2) a telecommunications carrier, an information service provider, an interactive computer service provider, and an information content pro-

¹⁰*Id.* at § 2 (1) (A)–(B).

¹¹Free Flow of Information Act of 2005, S. 1419, 109th Cong., § 5 (2) (A)–(C) (2005) (modified to tighten and conform with earlier sections).

¹²*Id.* at § 5 (4) (“legislative” added).

¹³Free Speech Protection Act of 2005, S. 369, 109th Cong., § 2 (2) (2005); N.Y. Civ. Rights Law § 79–h (a)(8) (West 1992, Supp. 2005).

¹⁴Free Flow of Information Act of 2005, S. 1419, 109th Cong., § 5 (3) (2005).

vider (as such terms are defined in the sections 3 and 230 of the Communications Act fo 1934 (47 U.S.C. §§ 153 & 230)).¹⁵

(f) THIRD PARTY—The term “third party” means a person other than a covered person.¹⁶

¹⁵*Id.* at § 5 (1).

¹⁶*Id.* at § 5 (5).