Protecting the Cloak and Dagger with an Illusory Shield: How the Proposed Free Flow of Information Act Falls Short

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Freedom of the press, hard-won over the centuries by men of courage, is basic to a free society. But basic too are courts of justice, armed with the power to discover truth. The concept that it is the duty of a witness to testify in a court of law has roots fully as deep in our history as does the guarantee of a free press.[1]

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1. Garland v. Torre, 259 F.2d 545, 548 (2d Cir. 1958).

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I. INTRODUCTION

Cautiously communicating through flower pots and red flags, Bob Woodward would signal that he desired a meeting with Deep Throat.[2] A *Washington Post* journalist, Woodward would meet Deep Throat on the bottom level of an underground garage at 2 o'clock in the morning.[3] There, Deep Throat provided information to Woodward under a promise of confidentiality—that Woodward could use Deep Throat's information under the condition that his identity remain a secret and he was never quoted.[4] The vital information that Deep Throat confidentially provided helped unravel President Nixon's administration's role in the Watergate scandal.[5] For more than thirty years, until he revealed himself in 2005,[6] Deep Throat's identity remained one of the greatest mysteries in U.S. politics.

In retrospect, Woodward got off fairly easily. He did not have to respond to a federal subpoena seeking the identity of his confidential source. Nor did he have to spend time in jail to protect Deep Throat's identity. Alongside his partner, Carl Bernstein, Woodward told the public a revolutionary story about corruption and deceit among the highest ranks of American government, a story made possible by Deep Throat—the most famous secret source in American history.

Of course, not all journalists have Woodward's luck. Journalists are subpoenaed in both state and federal courts to reveal a variety of documents, including their confidential sources, outtakes, notes, and

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2. BOB WOODWARD & CARL BERNSTEIN, ALL THE PRESIDENT'S MEN 72 (1987).

3. *Id.*

4. *Id*. at 71.

5. David Von Drehle, *FBI's No. 2 Was 'Deep Throat'; Mark Felt Ends 30-Year Mystery of the Post's Watergate Source*, WASH. POST, June 1, 2005, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/05/31/AR2005053100655.html.

6. *Id.* (naming Deep Throat to be W. Mark Felt, who was the second- and third-ranking official of the FBI during the Watergate scandal).

eyewitness testimony.[7] In a 2006 Freedom of Information request, the Criminal Division of the U.S. Department of Justice said that "approximately 65 requests for [federal] media subpoenas have been approved by the Attorney General since 2001."[8]

When subpoenaed, oftentimes, the journalists who write the headlines will make the headlines. In 2003, five prominent reporters[9] were subpoenaed by Wen Ho Lee, a former government scientist, to discover the names of government employees who, in violation of the Privacy Act,[10] leaked his personal information to the reporters.[11] While the government investigated Lee for providing nuclear secrets to the Chinese,[12] the reporters wrote articles about him, which he claimed, caused him financial loss, injury to his reputation, and physical and emotional distress.[13] The federal district judge ordered the reporters to comply with the subpoena.[14] Similarly, in 2008, a district judge affirmed the contempt of *USA Today* reporter, Toni Locy, for refusing to reveal the names of her sources in the Department of Justice and the FBI.[15] The sources leaked information to her, also in violation of the Privacy Act, about former Army scientist Steven Hatfill, who the federal government criminally investigated for mailing anthrax in the fall of 2001.[16] Until Locy revealed her sources, she faced fines starting at $500 a day for the first week, $1,000 a day for the next week, and $5,000 a day for the next.[17] Journalists have been subpoenaed

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7. *See, e.g.*, *In re* Grand Jury Subpoena, Judith Miller, 438 F.3d 1141 (D.C. Cir. 2006) (constituting an example of an instance in which a journalist was subpoenaed to reveal confidential sources); Wolf v. United States, 201 F. App'x 430, 432 (9th Cir. 2006) (constituting an example of an instance in which a journalist was subpoenaed to reveal eyewitness testimony and video outtakes).

8. The Reporters Committee for Freedom of the Press, Shields and Subpoenas, http://www.rcfp.org/shields_and_subpoenas.html (last visited Feb. 23, 2010) (internal quotations omitted). The Department of Justice provided the number of subpoenas as follows: The Attorney General approved thirteen subpoena requests in 2001, seven in 2002, sixteen in 2003, nineteen in 2004, seven in 2005, and three in 2006. *Id*. The Reporter's Committee makes no guarantee that these numbers are accurate. The numbers provided by the Department of Justice do not include any subpoenas not issued pursuant to the Department's guidelines or subpoenas issued in nonfederal proceedings. The Civil Division of the Department of Justice said that, in recent years, they had not submitted any media subpoenas to the Attorney General for approval. *Id.*

9. Lee v. U.S. Dep't of Justice, 287 F. Supp. 2d 15, 17 n.1 (D.D.C. 2003) (identifying the reporters as James Risen and Jeff Gerth of the *New York Times*, Robert Drogin of the *Los Angeles Times*, Josef Hebert of the Associated Press, and Pierre Thomas of CNN).

10. Privacy Act of 1974, 5 U.S.C. § 552(a) (2006).

11. *See Lee*, 287 F. Supp. 2d at 16.

12. Wen Ho Lee was ultimately exonerated.

13. *Lee*, 287 F. Supp. 2d at 17.

14. *Id.* at 24-25.

15. Hatfill v. Mukasey, 539 F. Supp. 2d 96, 98-99 (D.D.C. 2008).

16. *See id.* at 106 n.10.

17. *Id.* at 99 n.5.

and asked to break their obligations of confidentiality to sources in other recent federal cases as well.[18]

When a nonparty journalist refuses to comply with a court order to disclose a source, he or she will likely be held in contempt of court. Contempt of court may require a journalist to pay fines.[19] Most commonly, however, contempt of court means that a journalist is committed to jail until he or she chooses to comply with the court's order. In a survey of journalists that was conducted by the First Amendment Center, eighty-four percent said they were willing to go to jail rather than comply with a court order to identify a confidential source.[20] Since 1984, at least twenty-two U.S. journalists have spent time in jail for contempt of court.[21] This Note will focus on the cases of the three journalists who spent more time in jail for refusing to disclose their sources than any other U.S. journalists: aspiring true-crime novelist, Vanessa Leggett, who, in 2001, spent 168 days in jail;[22] *New York Times* reporter, Judith Miller, who, in 2005, spent 85 days in jail;[23] and freelance video blogger, Josh Wolf, who, in 2006, spent more time in jail than any other U.S. journalist—226 days.[24] Journalists and media advocates frequently cite journalists like Leggett, Miller, and Wolf as evidence of a need for Congress to pass a federal shield law that would delineate conditions for the federally compelled disclosure of information from journalists.[25] The Free Flow of Information Act of

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18. *See, e.g.*, N.Y. Times Co. v. Gonzales, 459 F.3d 160 (2d Cir. 2006) (holding that the First Amendment did not protect Judith Miller and Philip Shenon's telephone records from disclosure); *In re* Grand Jury Subpoenas, 438 F. Supp. 2d 1111 (N.D. Cal. 2006) (finding that the grand jury's interest in the source of information outweighed reporters' confidentiality agreement when the grand jury investigated alleged illegal steroid distribution).

19. *See, e.g.*, *Hatfill*, 539 F. Supp. 2d at 99 n.5.

20. Press Release, First Amendment Center, Survey Suggests Journalists Use Confidential Sources Sparingly (Mar. 17, 2005) *available at* http://www.firstamendmentcenter.org/News.aspx?id=14988.

21. *See* The RCFP: Jailed Reporters, http://www.rcfp.org/jail.html (last visited Feb. 23, 2010).

22. *See* Guillermo X. Garcia, *The Vanessa Leggett Saga*, AM. JOURNALISM REV., Mar. 2002, at 20.

23. David Johnston & Douglas Jehl, *Times Reporter Free from Jail; She Will Testify*, N.Y. TIMES, Sept. 30, 2005, at A1.

24. *U.S. Reporter Ends Record Jail Term*, BBC NEWS, Apr. 3, 2007, http://news.bbc.co.uk/2/hi/americas/6524359.stm (last visited Feb. 23, 2010).

25. *See, e.g.*, Scott Neinas, Comment, *A Skinny Shield Is Better: Why Congress Should Propose a Federal Reporters' Shield Statute that Narrowly Defines Journalists*, 40 U. TOL. L. REV. 225, 236 (2008); Bob Egelko & Jim Herron Zamora, *Imprisoned Freelance Journalist Released*, S. F. CHRON., Apr. 3, 2007, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/04/03/BAGLRP0PAP4.DTL ("[Josh Wolf] also said his case showed the need for a federal 'shield law' that would protect journalists, including bloggers, from having to disclose confidential sources or unpublished materials."); Garcia, *supra* note 22, at 27 ("Dalglish [executive director of the Reporters Committee for Freedom of the

2007[26] proposed to be such a law. The House version of the Bill, H.R. 2102, passed the House of Representatives in October 2007; however, the Senate's version of the Bill, S. 2035, after clearing the Senate Judiciary Committee the same month, never received a vote from the full Senate.[27] Most recently, the House passed H.R. 985—the 111th Congress's fledgling federal shield law.[28] While headlines of jailed journalists, like Leggett, Miller, and Wolf, revitalized the federal-shield-law revolution, one cannot help but ask whether these journalists would even be protected by the Bill their stories inspired.

This Note will demonstrate that none of the three journalists—who were jailed longer than any other U.S. journalists in history—would likely find their sources shielded if either S. 2035 or H.R. 2102 had been the law when they were jailed. Part II of this Note will discuss the background and legal history of the shield-law revolution as well as the individual cases of Leggett, Miller, and Wolf. Part III will apply the Bill to the individual journalists' cases, show that none of them would have been protected by the proposed federal shield laws, and discuss the implications of such a finding. Finally, this Note will offer two recommended provisions that any adopted media-friendly, federal shield law should include: (1) a provision protecting nonconfidential sources and (2) congressional guidance on how to balance competing interests in the grand jury context.

Press] and others, including U.S. Rep. Sheila Jackson Lee, a Houston Democrat, are exploring ways of using the Leggett case to promote a federal shield law."); Ken Ritter, *Miller Presses for Shield Law, Gets Warm Ovation in Vegas*, EDITOR & PUBLISHER, Oct. 18, 2005, *available at* http://www.editorandpublisher.com/eandp/news/article_display.jsp?vnu_content_id=1001307821 (Judith Miller appeared as a guest speaker at the annual meeting of the Society of Professional Journalists in Las Vegas, Nevada, to discuss her support for a federal shield law).

26. *See* Free Flow of Information Act of 2007, H.R. 2102, 110th Cong. (2007); S. 2035, 110th Cong. (2007) (A bill "[t]o maintain the free flow of information to the public by providing conditions for the federally compelled disclosure of information by certain persons connected with the news media.").

27. *House Passes Bill Shielding Reporters*, N.Y. TIMES, Oct. 17, 2007, at A22.

28. *See* Nat'l Press Photographers Assoc., *House Passes Shield Law for Journalists*, Mar. 31, 2009, *available at* http://www.nppa.org/news_and_events/news/2009/04/shield01.html. Please note that H.R. 985, as passed by the House, is completely identical to H.R. 2102, word for word. *Compare* H.R. 2102, 110th Cong. (2007) *with* H.R. 985, 111th Cong. (2009). As a result, all of this Note's substantive (as opposed to historical) references to H.R. 2102 apply equally to H.R. 985. The 2009 House Bill passed and was reported to the Senate as S. 448. The Senate modified the Bill in committee and, on December 11, 2009, the Bill was placed on the Senate calendar. No significant congressional action has taken place. *See* THOMAS (Library of Congress), http://thomas.loc.gov/cgi-bin/bdquery/z?d111:SN00448:@@@X (last visited Feb. 23, 2010).

II. ABRACADABRA: THE JOURNALISTS' PRIVILEGE FROM *BRANZBURG* TO PRESENT

A. Branzburg *and Its Aftermath*

The first time that the U.S. Supreme Court addressed whether a privilege exists in the First Amendment for journalists would also be the last time. In *Branzburg v. Hayes*,[29] a five-to-four decision, the Court found that journalists could not use the First Amendment as an excuse not to testify when summoned to do so before a grand jury.[30] *Branzburg* was consolidated with two other cases: *In re Pappas* and *United States v. Caldwell*.[31] Paul Branzburg, Paul Pappas, and Earl Caldwell were reporters working for different media[32] on unrelated stories—each of whom refused to reveal the sources of their stories and claimed a First Amendment journalists' privilege of confidentiality.[33]

Branzburg's newspaper had printed a story about two individuals who synthesized hashish from marijuana.[34] The story included a photograph that only captured a pair of hands working above a laboratory table with a substance that was identified in the caption as hashish.[35] In the story, Branzburg kept the sources' identities anonymous.[36] He was subpoenaed and refused to reveal their identities to the grand jury.[37] In *In re Pappas*, the journalist had covered a Black Panthers meeting and, as a condition of entry, agreed not to disclose anything that occurred inside.[38] Pappas was subpoenaed to testify about what he had seen and heard outside of the Panthers headquarters but refused to testify, claiming a First Amendment privilege to protect confidential informants.[39] In *Caldwell*, the journalist maintained that even to appear before a grand jury investigating violations of the law would destroy his relationship with the Panthers and violate his First Amendment rights.[40]

The Court found that requiring reporters to disclose confidential information to grand juries served a "compelling" and "paramount" state

29. 408 U.S. 665 (1972).
30. *See id*. at 667.
31. *See id.* at 665.
32. Branzburg wrote for Louisville's *Courier-Journal*. *Id.* at 667. Pappas was a Massachusetts television reporter. *Id.* at 672. Caldwell wrote for the *New York Times*. *Id.* at 675.
33. *Id*. at 668, 673, 676.
34. Branzburg v. Hayes, 408 U.S. 665, 667 (1972).
35. *Id.*
36. *Id.* at 667-68.
37. *Id.* at 668.
38. *Id.* at 672.
39. Branzburg v. Hayes, 408 U.S. 665, 672-73 (1972).
40. *Id.* at 676.

interest and did not violate the First Amendment.[41] Justice White, writing for the Court, said that, since the record of each case revealed no prior restraint, no command to publish sources or to disclose them indiscriminately, and no tax or penalty on the press, there was no constitutional violation.[42] The fact that the journalists received information from sources in confidence did not privilege them to withhold that information during a federal government investigation; the average citizen is often forced to disclose information received in confidence when summoned to testify in court: "We are asked to . . . interpret[] the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do."[43] The Court foreshadowed that a definitional problem would arise if a privilege is recognized because freedom of the press belongs to both the "lonely pamphleteer who uses carbon paper or a mimeograph just as much as the large metropolitan publisher who utilizes the latest photocomposition methods."[44]

Justice Powell wrote a concurring opinion in which he stressed that it is not the case that the First Amendment provides no protection to reporters; quite the contrary, the courts are available to journalists when legitimate First Amendment interests require protection.[45] He proposed the use of a balancing test, which would require courts to engage in a case-by-case balancing of interests in order to determine whether a reporter should be required to testify.[46]

In his dissent, Justice Stewart wrote that the Court's opinion invited state and federal authorities to undermine freedom of the press "by attempting to annex the journalistic profession as an investigative arm of government."[47] Justice Stewart noted that, implicit within the right to gather news, was a right to a confidential relationship between reporter and source.[48] He discussed what the privilege being sought would likely be. Reporters would not be absolutely immune but, when a grand jury calls upon a journalist to reveal confidences, the government would be required to do the following:

> (1) [S]how that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by

41. *Id.* at 700.
42. *Id.* at 681-82.
43. *Id.* at 690.
44. Branzburg v. Hayes, 408 U.S. 665, 704 (1972).
45. *Id.* at 710 (Powell, J., concurring).
46. *Id.*
47. *Id*. at 725 (Stewart, J., dissenting).
48. *Id.* at 728.

> alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.[49]

Branzburg has had an ironic effect on the journalist's privilege in the lower courts. The states' and circuits' responses to *Branzburg* would lead one to believe that the case was never decided or that it was antithetically decided. As the Seventh Circuit's Judge Posner has remarked, "[s]ome of the cases that recognize the privilege . . . essentially ignore *Branzburg*" and "some treat the 'majority' opinion in *Branzburg* as actually just a plurality opinion" and "some audaciously declare that *Branzburg* actually created a reporter's privilege."[50] The three-part test in Justice Stewart's dissent seemingly laid the foundation for the privileges now recognized one way or another by every state and the District of Columbia except Wyoming. Thirty-six states and the District of Columbia currently have enacted shield laws.[51] Eleven states without shield laws recognize a privilege to at least a minimal extent.[52] While some states may not be willing to recognize either

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49. Branzburg v. Hayes, 408 U.S. 665, 743 (1972) (footnotes omitted).

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

51. The following states have such laws: Alabama (see ALA. CODE § 12-21-142 (1975)); Alaska (see ALASKA STAT. § 09.25.300 (1962)); Arizona (see ARIZ. REV. STAT. ANN. §§ 12-2237, 12-2214 (1956)); Arkansas (see ARK. CODE ANN. § 16-85-510 (1987)); California (see CAL. EVID. CODE § 1070 (1965)); Colorado (see COLO. REV. STAT. § 13-90-119 (1990)); Connecticut (see CONN. GEN. STAT. § 52-146t (2006)); Delaware (see DEL. CODE ANN. tit. 10, § 4320-26 (1974)); District of Columbia (see D.C. CODE § 16-4702 (1973)); Florida (see FLA. STAT. § 90.5015 (1941)); Georgia (see GA. CODE ANN. § 24-9-30 (1995)); Hawaii (see HAW. REV. STAT. § 621 (1972)); Illinois (see 735 ILL. COMP. STAT. 5/8-901 (1993)); Indiana (see IND. CODE § 34-46-4-2 (1999)); Kentucky (see KY. REV. STAT. ANN. § 421.100 (2005)); Louisiana (see LA. REV. STAT. ANN. § 45:1452 (1951)); Maryland (see MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (1982)); Michigan (see MICH. COMP. LAWS §§ 767.5a, 767A.6 (1979)); Minnesota (see MINN. STAT. §§ 595.021-.025 (1999)); Montana (see MONT. CODE ANN. § 26-1-902 (1979)); Nebraska (see NEB. REV. STAT. § 20-144 (1943)); Nevada (see NEV. REV. STAT. § 49.275 (2006)); New Jersey (see N.J. STAT. ANN. § 2A:84A-21 (1993)); New Mexico (see N.M. STAT. § 38-6-7 (1978)); New York (see N.Y. CIV. RIGHTS LAW § 79-h (1978)); North Carolina (see N.C. GEN. STAT. § 8-53.11(b) (1943)); North Dakota (see N.D. CENT. CODE § 31-01-06.2 (1996)); Ohio (see OHIO REV. CODE ANN. §§ 2739.04, 2739.12 (1953)); Oklahoma (see OKLA. STAT. tit. 12, § 2506 (1953)); Oregon (see OR. REV. STAT. § 44.520 (1953)); Pennsylvania (see 42 PA. CONS. STAT. § 5942(a) (1970)); Rhode Island (see R.I. GEN. LAWS § 9-19.1-2 (1956)); South Carolina (see S.C. CODE ANN. § 19-11-100 (1976)); Tennessee (see TENN. CODE ANN. § 24-1-208 (2000)); Utah (see UTAH R. EVID. § 509 (1953)); and Washington (see WASH. REV. CODE § 5.68.010 (1951)).

52. The following states recognize some protection to various degrees: Idaho (see, e.g., In re Wright, 700 P.2d 40 (Idaho 1985)); Iowa (see, e.g., Winegard v. Oxberger, 258 N.W.2d 847 (Iowa 1977)); Kansas (see State v. Sandstrom, 581 P.2d 812 (Kan. 1978)); Massachusetts (see, e.g., *infra*, note 53); Mississippi (see Student Press Law Center, *State-by-State Guide to the Reporter's Privilege for Student Media*, http://www.splc.org/legalresearch.asp?id=57 (last visited Feb. 23, 2010) (listing trial court cases that have recognized a qualified privilege); Missouri (see, e.g., State ex rel. Classic III, Inc. v. Ely, 954 S.W.2d 650 (Mo. Ct. App. 1997)); New Hampshire (see, e.g., State v. Siel, 444 A.2d 499 (N.H. 1982)); South Dakota (see, e.g. *infra*, note 54); Vermont (see, e.g., State v. St. Peter, 315 A.2d 254 (Vt. 1974); Virginia (see, e.g., *infra*, note 55); West Virginia (see, e.g.,

a state or federal constitutional privilege, common-law balancing tests based on broad First Amendment values have provided protection.[53] Some may have been unable to define the extent of the privilege due to a lack of litigation.[54] Others have recognized a privilege based in the First Amendment of the U.S. Constitution.[55] Most circuits, including the D.C. Circuit, have recognized a qualified privilege, while the Eighth Circuit's privilege status is unclear.[56]

B. First Amendment Martyrs or Reporters "Mak[ing] Good News out of Bad Practice"?[57]

When a journalist refuses to disclose his or her sources pursuant to a court order and, instead, chooses confinement in jail, the public response is split. Media advocates tend to celebrate a journalist's choice to serve jail

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State ex rel. Hudok v. Henry, 389 S.E.2d 188 (W.Va. 1989)); and Wisconsin (see, e.g., Kurzynski v. Spaeth, 538 N.W.2d 554 (Wis. 1995)).

53. Consider, for example, Massachusetts. *See* Petition for the Promulgation of Rules Regarding the Prot. of Confidential News Sources and Other Unpub'd Info., 479 N.E.2d 154 (Mass. 1985) (finding that a balancing of interests on a case-by-case basis is more appropriate when a journalist resists a subpoena than rulemaking); *see also* Ayash v. Dana Farber Cancer Inst., 822 N.E.2d 667, 696 n.33 (Mass. 2005); *In re* John Doe Grand Jury Investigation, 574 N.E.2d 373, 375 (Mass. 1991); *In re* Roche, 411 N.E.2d 466 (Mass. 1980).

54. Consider, for example, South Dakota, which appears to have seen only one appellate decision in which compelled disclosure was an issue, *Hopewell v. Midcontinent Broadcasting Corp.*, 538 N.W.2d 780 (S.D. 1995).

55. Consider, for example, Virginia. *See* Brown v. Commonwealth, 204 S.E.2d 429 (Va. 1974).

56. *See, e.g.*, Lee v. Dep't of Justice, 413 F.3d 53, 57 (D.C. Cir. 2005) (finding the privilege overcome after applying a two-part test: (1) the information sought "went to the heart of the case" and (2) all other alternative sources of information had been exhausted); McKevitt v. Pallasch, 339 F.3d 530 (7th Cir. 2003) (limiting privilege to confidential sources only); Ashcraft v. Conoco, Inc., 218 F.3d 282 (4th Cir. 2000); Gonzales v. Nat'l Broad. Co., 194 F.3d 29 (2d Cir. 1999); Cusumano v. Microsoft Corp., 162 F.3d 708 (1st Cir. 1998); United States v. Blanton, 534 F. Supp. 295 (11th Cir. 1982); Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980); Miller v. Transamerican Press Co., 621 F.2d 721 (5th Cir. 1980); Riley v. City of Chester, 612 F.2d 708 (3d Cir. 1979); Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977); *In re* Stratosphere Corp. Sec. Litig., 183 F.R.D. 684 (D. Nev. 1999); Southwell v. S. Poverty Law Ctr., 949 F. Supp. 1303 (W.D. Mich. 1996). Courts within the Eighth Circuit are split on the reporter's privilege. Some district courts have found a qualified privilege, while others have found no privilege. *See* Cervantes v. Time, Inc., 464 F.2d 986, 991-93 (8th Cir. 1972) (holding that libel defendant was not required to disclose anonymous sources, and articulating that *Branzburg v. Hayes* was specifically applied in the grand jury context); *but see* United States v. Hivley, 202 F. Supp. 2d 886, 892 (E.D. Ark. 2002) (declining to recognize a journalistic privilege).

57. *See* John K. Jessup, *Johnson's Farewell to a Gallant Reporter*, LIFE, May 7, 1965, at 42 (quoting Edward R. Murrow).

time to protect a source.[58] To their supporters, jailed journalists are martyrs for the First Amendment who value promises and journalistic independence more than their own personal freedom. To others, however, journalists who fail to reveal their sources thwart justice by restricting the court's ability to function as a truth-seeking institution and, thus, make good news out of bad practice. Indeed, as courts have recognized,[59] a great irony exists in the debate between the media's ability to provide the public with self-governance information and the court's pursuit of justice: both institutions, in their ideal capacities, seek the truth.

The cases of three journalists will be discussed herein: Vanessa Leggett, Judith Miller, and Josh Wolf. Combined, the three journalists spent more than a year[60] in jail for refusing to disclose their sources pursuant to federal subpoenas.

1. Vanessa Leggett

When Vanessa Leggett, a legal-writing and English instructor at the University of Houston, was subpoenaed to testify before a grand jury, she had only previously been published twice in technical manuals.[61] However, Leggett was a "wannabe true-crime author," who immersed herself in a Houston murder case that would serve as a foundation for both a true-crime novel and a federal subpoena.[62]

On April 16, 1997, Doris Angleton was murdered.[63] The former model's body laid in a pool of blood in her Houston home after being shot twelve times in the head and chest.[64] At first, the murder baffled the police. The police theorized that either Doris was killed by bookies who were rivals of her millionaire bookie husband, Robert, or that he was the actual target of the murder and Doris was mistakenly killed.[65] Then, her husband's brother-in-law, Roger, was arrested on an unrelated charge in

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58. *See, e.g.*, Howard Kurtz, *Jailed Man Is a Videographer and a Blogger but Is He a Journalist?*, WASH. POST, Mar. 8, 2007, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/03/07/AR2007030702454.html (Josh Wolf "is being cast by some journalists as a *young champion of the First Amendment*") (emphasis added).

59. *See, e.g.*, *In re* Grand Jury Subpoena, Judith Miller, 438 F.3d 1141, 1163 (D.C. Cir. 2006) (noting that "[t]his case involves a clash between two truth-seeking institutions: the grand jury and the press"); *see also* Garland v. Torre, 259 F.2d 545, 548 (2d Cir. 1958).

60. The journalists spent 479 days in jail. *See supra* text accompanying notes 22-24.

61. Garcia, *supra* note 22, at 21.

62. *Id*.

63. *Id.* at 21, 23.

64. *Id*. at 21.

65. *Id.* at 23.

Las Vegas.[66] The Las Vegas police found items in his possession that connected him to the murder of Doris.[67]

When Roger returned to Houston to be charged with murder alongside his brother, Leggett was introduced to him through his attorney.[68] Leggett was drawn to the case because she was fascinated by homicide and, what she referred to as "the dark side of human behavior."[69] Roger's attorney granted Leggett access to his client, of which she took full advantage.[70] Leggett visited Roger frequently in jail, sometimes daily, and accumulated fifty hours of taped interviews with him while he awaited trial.[71] In those tapes, Roger admitted that he killed Doris and that Robert had hired him for the job.[72] Leggett collected a "gold mine of information," including intimate recollections from Roger of his and his brother's lives.[73]

For Robert's trial, a county grand jury subpoenaed Leggett in order to gain access to the materials that she had gathered.[74] Her attorney negotiated a deal with county prosecutors that would grant the prosecutors access to Leggett's materials so long as the materials were for their eyes only and returned if not used at trial.[75] However, the trial judge in Robert's case ruled that the recordings constituted inadmissible hearsay, and consequently, were not admitted into evidence.[76] Somehow, though, while the Houston police possessed Leggett's materials, the FBI and, in turn, the U.S. Attorney's office, gained access to them.[77]

A county prosecutor visited Roger in jail and told him that, if he testified against Robert at his trial, Roger might not be prosecuted.[78] Roger, having "no interest or desire to be a snitch" on his brother, told the prosecutor he would have to consult with his attorney first.[79] That same day, Leggett visited Roger and scheduled to return the next day.[80] Later that

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66. Garcia, *supra* note 22, at 23.

67. The following items were found in Roger's possession: $64,000 wrapped in paper with Robert's fingerprints, typed instructions describing how to deactivate the Angleton's burglar alarm, and a taped recording of two men preparing to kill Doris. Robert's involvement was implicated when a voice on the recording demonstrated knowledge of Doris's quotidian routine. *Id.*

68. *Id.*

69. *Id.*

70. *See* Garcia, *supra* note 22, at 23.

71. *Id.*

72. *Id.*

73. *Id.*

74. Garcia, *supra* note 22, at 23.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. Garcia, *supra* note 22, at 23.

80. *Id.*

night, Roger unsuccessfully attempted to contact Leggett multiple times.[81] The next day, Roger was found dead in his cell, cut fifty times with a razor before bleeding to death.[82]

Robert was acquitted in 1998, and shortly thereafter, the federal government began investigating him.[83] Leggett, who had previously had a quid pro quo relationship with the FBI, declined an offer from the Bureau to grant it access to her materials and become a paid government informant in exchange for funding for her novel.[84] On June 18, 2001, Leggett received a federal subpoena that ordered her to appear before the grand jury and give the government

> [a]ny and all tape recorded conversations, originals and copies, of conversations [she] had with any of the following individuals [identifying 34 people by name], or any other recorded conversations with individuals associated with the prosecution of ROBERT ANGLETON, either with or without their consent, and all transcripts prepared from those tape recordings.[85]

Leggett moved to quash the subpoena, invoking the journalist's privilege under the First Amendment of the U.S. Constitution.[86] In a written order, the district court denied her motion, and while her pro se motion to reconsider pended, she was issued another, virtually identical subpoena.[87] While Leggett appeared before the grand jury, she refused to relinquish her taped recordings or notes and, consequently, was held in contempt of court.[88] Leggett appealed the district court's order holding her a recalcitrant witness in contempt to the U.S. Court of Appeals for the Fifth Circuit.[89]

The court affirmed the district court's order, finding that a journalist's privilege is "both limited and qualified, and is especially hedged about in grand jury proceedings."[90] The obligation to testify before a grand jury is a generally applicable law that members of the media cannot evade.[91] Evidentiary privileges, including that of the journalist, are generally

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81. *Id.*

82. *Id.* Leggett remains skeptical about the county medical examiner's ruling of suicide as the manner of death. Leggett said that Roger was pleasant only hours before his suicide and that an inmate recalled that he heard another inmate's cell door open that night, despite the wing being in lockdown. *Id.*

83. *Id.* at 24.

84. *See* Garcia, *supra* note 22, at 24.

85. *In re* Grand Jury Subpoenas, No. 01-20745, at 3 (5th Cir. filed Aug. 17, 2001), *available at* http://www.cfif.org/htdocs/freedomline/current/america/appendix.pdf.

86. *Id.*

87. *Id.*

88. *Id*. at 3-4.

89. *Id.* at 4.

90. *In re* Grand Jury Subpoenas, No. 01-20745, at 1-2 (5th Cir. filed Aug. 17, 2001), *available at* http://www.cfif.org/htdocs/freedomline/current/america/appendix.pdf.

91. *Id.* at 4.

disfavored, especially by the Supreme Court.[92] However, the court found that a qualified privilege *does* exist that protects journalists, but such a privilege is easily overcome in grand jury proceedings: "The strength of this journalist's privilege is at its apex in the context of civil cases where the disclosure of confidential sources is at issue. However, the privilege is far weaker in criminal cases, reaching its nadir in grand jury proceedings."[93] While the court found that a qualified privilege exists, whether Leggett would be protected by such a privilege was unclear because she may not qualify as a journalist.[94] The court did not reach the definitional issue of whether a freelance writer operating without an employer or contract for publication constitutes a journalist, despite the fact that the issue was a matter of first impression.[95] Even assuming, arguendo, that Leggett was a journalist, evidence of government harassment must be proven in a grand jury proceeding, and she had not done so.[96] The court did not accept Leggett's argument that she was subjected to an overly broad, "kitchen sink" subpoena.[97]

The district court's order holding Leggett in contempt of court was affirmed,[98] and she spent 168 days in federal detention.[99] She was released after the grand jury's term had ended and her subpoena expired.[100]

2. Judith Miller

On January 28, 2003, President George W. Bush said the following infamous words in his State of the Union Address: "The British government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa."[101] However, former Ambassador Joseph Wilson conducted an investigation in Niger, requested by the CIA,

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92. *Id.*

93. *Id.* at 5 (internal citations omitted).

94. *See id*. at 5 n.4.

95. *In re* Grand Jury Subpoenas, No. 01-20745, at 5 n.4 (5th Cir. filed Aug. 17, 2001), *available at* http://www.cfif.org/htdocs/freedomline/current/america/appendix.pdf. The court did advise that a three-part test utilized by other circuits would be used to resolve this question. To claim the journalist's privilege, it must be asked whether the person claiming the privilege "(1) is engaged in investigative reporting; (2) is gathering news; and (3) possesses the intent at the inception of the news gathering process to disseminate the news to the public." *Id.*

96. *See id.* at 5-7.

97. *See id.* at 6; *see also* Garcia, *supra* note 22, at 26.

98. *In re* Grand Jury Subpoenas, No. 01-20745, at 2 (5th Cir. filed Aug. 17, 2001), *available at* http://www.cfif.org/htdocs/freedomline/current/america/appendix.pdf.

99. Garcia, *supra* note 22, at 21.

100. *Id.* at 27.

101. George W. Bush, Former U.S. President, State of the Union Address to Congress at the U.S. Capitol (Jan. 28, 2003), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2003/01/20030128-19.html.

which, he said in an op-ed column that he wrote for the *New York Times* on July 6, 2003, revealed no credible evidence that Hussein had sought uranium.[102]

In response to Ambassador Wilson's op-ed, the *Chicago Sun-Times* published columnist Robert Novak's op-ed, "Mission to Niger."[103] Novak said that the decision to send the ambassador to Niger was made "without Director George Tenet's knowledge," and at the suggestion of his wife: "Wilson never worked for the CIA, but his wife, Valerie Plame, is an agency operative on weapons of mass destruction. *Two senior administration officials told me* that Wilson's wife suggested sending him to Niger to investigate."[104] After the publication of Novak's column, other members of the media began reporting the same—that high-ranking officials in the Bush administration had revealed that the ambassador's wife worked for the CIA, monitored weapons of mass destruction, and that she suggested that her husband conduct the investigation in Niger.[105]

The Department of Justice began to conduct an investigation into whether government officials had in fact leaked the name of Valerie Plame, a covert CIA operative, in violation of 50 U.S.C. § 421, which criminalizes the disclosure of the identity of a covert agent by anyone with access to such classified information.[106] Special Counsel was appointed and delegated full authority in the investigation.[107] Grand jury subpoenas were issued to *New York Times* reporter Judith Miller in August 2004.[108] The subpoena sought all documents between her and a named government official "occurring from on or about July 6, 2003, to on or about July 13, 2003, . . . concerning Valerie Plame Wilson (whether referred to by name or by description as the wife of Ambassador Wilson) or concerning Iraqi efforts to obtain uranium."[109] Miller filed a motion to quash the subpoenas, which was denied by the district court.[110] Miller was found in contempt of court and appealed to the U.S. Court of Appeals for the D.C. Circuit.[111]

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102. *See* Joseph C. Wilson, Op-Ed., *What I Didn't Find in Africa*, N.Y. TIMES, July 6, 2003, at WK9, *available at* http://www.nytimes.com/2003/07/06/opinion/06WILS.html.

103. *See* Robert D. Novak, *Mission to Niger*, CHI. SUN-TIMES, July 14, 2003, at 31.

104. *Id.* (emphasis added).

105. *See, e.g.*, Matthew Cooper et al., *A War on Wilson?*, TIME, July 17, 2003, *available at* http://www.time.com/time/nation/article/0,8599,465270,00.html.

106. *See In re* Grand Jury Subpoena, Judith Miller, 438 F.3d 1141, 1143 (D.C. Cir. 2006).

107. *Id.*

108. *Id.* at 1144.

109. *Id.* (quoting the subpoena).

110. *Id.*

111. *See In re* Grand Jury Subpoena, Judith Miller, 438 F.3d 1141, 1144 (D.C. Cir. 2006).

Miller delineated four theories for reversal to the court.[112] For the purposes of this Note, only two theories are relevant. First, she argued that journalists have a right under the First Amendment not to disclose their confidential sources in the face of a grand jury subpoena.[113] Second, an evidentiary privilege can be found in the common law that affords journalists the ability to conceal confidential sources.[114] The court rejected both of these arguments and affirmed the district court's finding of contempt.[115]

The court relied on the Supreme Court's decision in *Branzburg*, recalled the facts of each consolidated case, and noted that the facts on the record before it were indistinguishable—Miller, like the journalists in *Branzburg*, received communications from a source in confidence.[116] Because the Supreme Court already resolved that there was no First Amendment privilege in such a case, the disposition of Miller's case would be predictable: "The Highest Court has spoken and never revisited the question. Without doubt, that is the end of the matter."[117] The court rejected Miller's argument that, because Justice Powell's concurring opinion was the least encompassing, it controlled in *Branzburg*.[118] While each of the three separate judges had differing opinions concerning whether a common-law privilege had evolved since *Branzburg* was decided, all agreed that, even if such a privilege existed, it was overcome in the case before the court for the reasons outlined by Judge Tatel.[119]

Judge Tatel, who believed that a common-law privilege existed, found that any existing privilege would not survive in this case.[120] The leak of a covert operative's name was more harmful than it was newsworthy.[121] Leaks are especially unique because they are extremely difficult to prove without the journalist's cooperation.[122] Tatel noted that leaks have historically imposed severe national security concerns insofar as, in one instance, the exposure of a covert agent caused the deaths of several CIA operatives in the 1970s and 1980s.[123] If a leak provides little value to public

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112. *Id*. at 1144-45.
113. *Id.*
114. *Id.* at 1145.
115. *Id*. at 1141.
116. *See In re* Grand Jury Subpoena, Judith Miller, 438 F.3d 1141, 1145-47 (D.C. Cir. 2006).
117. *Id*. at 1147.
118. *Id.* at 1148.
119. *Id.* at 1150.
120. *Id.* at 1164 (Tatel, J., concurring).
121. *See In re* Grand Jury Subpoena, Judith Miller, 438 F.3d 1141, 1164 (D.C. Cir. 2006).
122. *Id.* at 1166.
123. *Id*. at 1173.

debate and a risk to national security, the source of such a leak should not be protected through the journalist's privilege.[124] A balancing test was advocated that would take into consideration both the degree of harm and the news value.[125] Tatel noted that it would be difficult to imagine a situation involving a criminal leak where the requesting party's need for the information and the exhaustion of alternative resources would not be satisfied:

> Insofar as the confidential exchange of information leaves neither paper trail nor smoking gun, the great majority of leaks will likely be unprovable without evidence from either leaker or leakee. Of course, in some cases, circumstantial evidence such as telephone records may point towards the source, but for the party with the burden of proof, particularly the government in a criminal case, such evidence will often be inadequate.[126]

The exposure of Plame may have jeopardized her covert activities as well as her friends and associates who have provided her with information in the past.[127] Congress has identified that exposures of covert agents come at a cost: loss of human intelligence, spent taxpayers' money, and harm to intelligence officers and their sources.[128] Plame's employment had little news value "compared to the damage of undermining covert intelligence-gathering."[129] Special Counsel could not obtain the needed information from any other source but Miller.[130] The leak in this case harmed national security since specific efforts were made to keep Plame's identity a secret, and she had been on covert missions overseas within the past five years.[131] Again, Tatel's concurring opinion is stressed here because the opinion of the court indicates that all judges were in agreement that, for the reasons addressed by Tatel, any privilege that may exist was overcome.[132]

The district court's order finding Miller in contempt was affirmed and she spent eighty-five days in federal detention.[133] She was released because she decided to testify before the grand jury.[134] Her confidential source, I. Lewis "Scooter" Libby, Vice President Cheney's Chief of Staff, had

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124. *Id.* at 1174.
125. *Id.*
126. *See In re* Grand Jury Subpoena, Judith Miller, 438 F.3d 1141, 1175 (D.C. Cir. 2006).
127. *Id.* at 1179.
128. *Id.*
129. *Id.*
130. *See id*. at 1180-81.
131. *See In re* Grand Jury Subpoena, Judith Miller, 438 F.3d 1141, 1181-82 (D.C. Cir. 2006).
132. *Id.* at 1150.
133. *See* Johnston & Jehl, *supra* note 23.
134. *Id.*

released Miller from her confidentiality agreement.[135] President Bush later commuted Libby's sentence.[136]

3. Josh Wolf

On July 8, 2005, freelance video-blogger Josh Wolf videotaped an antiglobalization[137] anarchist protest in San Francisco.[138] As a result of the violent protest, federal prosecutors pursued a possible attempted arson that was allegedly started with a firecracker[139] on a San Francisco police vehicle by a hooded assailant with a pipe or baseball bat who physically assaulted and fractured the skull of a police officer.[140]

The federal government investigated the attempted arson of the city police vehicle pursuant to 18 U.S.C. § 844(f)(1),[141] which makes it a federal crime to damage or destroy by means of fire or explosives anything owned in whole or part by the federal government. The federal government claimed jurisdiction over the case because the city police received funding from the federal government,[142] which indicated a possible Section 844(f)(1) violation. The assault remained an issue of state concern.[143]

In January and February 2006, the FBI served Wolf with subpoenas for testimony and demanded "all documents, writings, and recordings related to protest activities conducted in San Francisco, California, on July 8, 2005, between the hours of 6:30 p.m. and 11:59 p.m."[144] The government requested all of the equipment (cameras, video recorders, etc.) used in connection with the protest's recording as well.[145] While not possessing all the footage that Wolf filmed, the government already had a video clip of what was broadcasted to the public on Indymedia, NBC, KTVU, and KRON.[146] Wolf filed a motion to quash the subpoenas, which a magistrate denied. Wolf appeared before a grand jury and refused to

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135. *Id.*

136. Andy Sullivan, *White House Says May Veto Reporters' Shield Law*, REUTERS, Oct. 16, 2007, http://www.reuters.com/article/politicsNews/idUSN1618715420071016?sp=true (last visited Jan. 31, 2010).

137. Tony Burman, Letter from the Editor in Chief, *Jailed Journalist a Symbol of Internet Age*, CBC/RADIO-CANADA, Mar. 2, 2007, *available at* http://www.cbc.ca/news/about/burman/letters/2007/03/jailed_journalist_a_symbol_of_1.html.

138. Brief of Witness-Appellant at 5, Wolf v. United States, No. 06-16403 (9th Cir. Aug. 11, 2006).

139. *Id.* at 5.

140. Kurtz, *supra* note 58.

141. Brief of Witness-Appellant, *supra* note 138, at 5.

142. *See* Kurtz, *supra* note 58.

143. *See* Brief of Witness-Appellant, *supra* note 138, at 5-6.

144. *Id*. at 7.

145. *Id.*

146. *Id.* at 5-7.

answer questions related to his materials and would not relinquish them.[147] Contempt proceedings were initiated against Wolf, who was held in contempt by the district court and taken into custody without bail.[148] He appealed to the U.S. Court of Appeals for the Ninth Circuit.[149]

Wolf contended that his video did not capture an image of an individual who may have allegedly attempted the arson[150] and refused to comply with the grand jury subpoenas, citing a First Amendment journalist's privilege.[151] Wolf further questioned the federal government's interest in the attempted arson, argued that the grand jury was conducted in bad faith, and hoped to transfer the case to state court so that he could be protected by California's shield law.[152] He claimed that the subpoenas had a chilling effect and interfered with his relationships with anarchist and antiwar groups,[153] which grew to perceive Wolf as an investigative arm of law enforcement.[154]

Because the record indicated a possible violation of Section 844(f)(1), the court rejected Wolf's argument that the grand jury was conducted in bad faith.[155] Since the investigation was conducted in good faith, a balancing test did not need to be applied.[156] However, even if a balancing test would have been applied, Wolf would still not be eligible for a journalist's privilege because he had taped a nonconfidential activity conducted in public.[157] Furthermore, the court doubted that Wolf would even be protected by the California shield law because he had not shown that he was a "publisher, editor, reporter, or other person *connected with or employed* upon a newspaper, magazine, or other periodical publication, or by a press association or wire service."[158] Citing *Branzburg*, the court also rejected Wolf's claim that the subpoenas made him the government's "de-facto investigator."[159] Media independence has flourished and confidential

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147. *Id.* at 10.

148. Brief of Witness-Appellant, *supra* note 138, at 10,

149. *Id.* at 11.

150. *Id.* at 6.

151. Wolf v. United States, 201 F. App'x 430, 432 (9th Cir. 2006) (unpublished opinion). Wolf also invoked his Fifth Amendment right against self-incrimination. *Id.* at 433.

152. *Id.* at 432 n.1.

153. Brief of Witness-Appellant, *supra* note 138, at 7.

154. *Wolf*, 201 F. App'x at 433.

155. *Id.* at 432-33.

156. *Id.*

157. *See id.* at 433 n.2.

158. *Id.* at 432 n.1 (quoting CAL. CONST. art. I, § 2(b)) (emphasis added).

159. Brief of Witness-Appellant, *supra* note 138, at 9.

sources have thrived despite the absence of a constitutional protection for their use.[160]

The district court's order finding Wolf in contempt was affirmed[161] and he spent 226 days in federal detention.[162] He was released after finally relinquishing the video footage sought by prosecutors.[163]

C. A Reawakened Push for a Federal Shield Law: the Evolution of the Free Flow of Information Act

While the publicity that Leggett, Miller, and Wolf received helped jumpstart a voice for the shield-law revolution, the push for a federal shield law is hardly a modern invention. The first two pushes for a federal law came after *Branzburg* was decided in 1972 and, then, later in the 1970s, after the jailing of *New York Times* reporter Myron Farber who refused to disclose confidential research files to a defendant accused of murder.[164] As a matter of fact, in the six years after *Branzburg*, ninety-nine bills for a federal shield law were introduced in Congress.[165] They all failed in part because legislators could not agree on how to define a "journalist," and the media insisted on an absolute, unqualified privilege.[166] A third push for the federal law came in the 1980s when the Department of Justice subpoenaed television networks in an attempt to gain access to footage of a TWA hijacking.[167]

1. Modern Shield Legislation: Attempts of the 108th and 109th Congresses

In the twenty-first century, the first push for a federal shield law was made by Senator Christopher Dodd, D-Conn., in November 2004.[168] Dodd proposed the Free Speech Protection Act of 2004 (S. 3020)—an absolute privilege against disclosure of confidential information but a qualified privilege against the disclosure of nonconfidential information that was "critical and necessary to the resolution of a significant legal issue."[169] Senator Dodd stressed that the Bill was not only about the media, but about the U.S. public: The Free Speech Protection Act is "about ensuring that our

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160. *See Wolf*, 201 F. App'x at 433 (citing Branzburg, 408 U.S. at 698-99).

161. *Id.* at 434.

162. *See U.S. Reporter Ends Record Jail Term*, *supra* note 24.

163. Egelko & Zamora, *supra* note 25.

164. Robert D. Lystad, *Anatomy of a Federal Shield Law: The Legislative and Lobbying Process*, COMM. LAW., Fall 2005, at 3, 3.

165. *Id.*

166. *See id.*

167. *Id.* at 3-4.

168. *See id*. at 4.

169. S. 3020, 108th Cong. § 4(a)(1) (2004).

constituents, the American citizenry, have access to the knowledge and information they need to make educated decisions and fully participate in our democracy."[170]

During the winter recess, a House bill materialized. Representative Mike Pence, R-Ind., and Representative Rick Boucher, D-Va., formed a bipartisan duo to draft a bill that would take a different approach to federal shield legislation than Senator Dodd's Bill.[171] For guidance on the issuance of subpoenas to the news media, Pence and Boucher looked to the Department of Justice's guidelines.[172] The Pence-Boucher bill, also known as the Free Flow of Information Act of 2005 (H.R. 581), resulted.[173] Senator Richard Lugar, R-Ind., took an interest in that Bill and introduced companion legislation in the Senate (S. 340).[174] Senator Lugar stressed the importance of the Bill by arguing that journalists need to be free to gather information "without fear of intimidation or imprisonment."[175] The Bill was necessary to protect whistleblowers and confidentiality agreements, which are "essential to the flow of information the public needs about its government."[176] Senator Lugar's support was considered to be critical because, as the Chairman of the Senate Foreign Relations Committee, he could assuage concerns that a federal shield law would pose risks to national security.[177]

Under H.R. 581 and S. 340, confidential sources would be protected by an absolute privilege—meaning, that the identity of a source that provided information under a condition of confidentiality could not be compelled by the federal government under any circumstances.[178] Any other information (i.e., nonconfidential information) would be protected by a qualified privilege.[179] A federal entity could overcome the qualified privilege if shown by "clear and convincing evidence" after providing the journalist with "notice and an opportunity to be heard" that all other resources have been exhausted.[180] In criminal cases, the government would further have to demonstrate that "there are reasonable grounds to believe that a crime has occurred" and that the information sought is "essential to

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170. Lystad, *supra* note 164, at 4 (quoting 150 CONG. REC. S11647 (daily ed. Nov. 19, 2004) (statement of Sen. Dodd)).

171. *Id.*

172. *Id*. at 4-5.

173. H.R. 581, 109th Cong. (2005).

174. S. 340, 109th Cong. (2005).

175. Lystad, *supra* note 164, at 5 (quoting Press Release, U.S. Sen. Richard Lugar (Feb. 9, 2005)).

176. *Id.*

177. *Id.* at 5.

178. *See* H.R. 581 § 4; *see also* S. 340 § 4.

179. *See* H.R. 581 § 2(a); *see also* S. 340 § 2(a).

180. *See* H.R. 581 § 2(a); *see also* S. 340 § 2(a).

the investigation, prosecution, or defense."[181] In a civil case, the information sought would need to be "essential to a dispositive issue of substantial importance" to the case.[182]

The Bill gained support, but not without obstacles. By mid-April 2005, H.R. 581 was cosponsored by eighteen House members (nine Republicans and nine Democrats).[183] S. 340 was cosponsored by four senators (three Republicans and one Democrat).[184] Democrats were generally reluctant to show their support for the Bill because, in the aftermath of the Valerie Plame scandal, they did not want to appear as though they were giving a "bail out" to the top White House officials responsible.[185] Indeed, many in Congress were skeptical about the Bill because, after September 11, 2001, it was, of course, necessary to effectively investigate crimes, especially those that may be linked to national security.[186] A shield law was perceived by many, like the Department of Justice, as a hindrance to such a goal and, after consulting with opponents of the Bill, it was revised to reflect and correct their concerns.[187] Because the Bill was redrafted, its sponsors in the House and Senate decided to submit the revised legislation under new bill numbers, H.R. 3233 and S. 1419.[188]

During the summer of 2005, several developments fomented optimism among shield-law supporters. In July 2005, Senator Arlen Specter, former-R-Penn.,[189] as Chairman, called a hearing of the Senate Judiciary Committee to discuss the Bill, which featured the testimony of congressional representatives, journalists, and lawyers.[190] As Judith Miller sat in jail, the American Bar Association's House of Delegates, which, in 1974, voted against a shield law,[191] changed its mind and adopted a

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181. *See* H.R. 581 § 2(a)(2)(A); *see also* S. 340 § 2(a)(2)(A).

182. *See* H.R. 581 § 2(a)(2)(B); *see also* S. 340 § 2(a)(2)(B).

183. Lystad, *supra* note 164, at 5.

184. *Id*. at 5-6.

185. *Id.* at 6.

186. *Id.*

187. *Id.* For example, the absolute privilege originally found in the Bill was eliminated by creating an exception for instances in which national security is at stake. *See* H.R. 3233, 109th Cong. § 2(a)(3) (2005); *see also* S. 1419, 109th Cong. § 2(a)(3) (2005).

188. Lystad, *supra* note 164, at 7.

189. *See* Paul Kane, Chris Cillizza, & Shailagh Murray, *Specter Leaves GOP, Shifting Senate Balance*, WASH. POST, April 29, 2010, *available at* http://www.washingtonpost.com/wpdyn/content/article/2009/04/28/AR2009042801523.html.

190. *Reporters' Shield Legislation: Issues and Implications Before the Senate Judiciary Committee*, 109th Cong. (July 20, 2005), *available at* http://judiciary.senate.gov/hearings/hearing.cfm?id=1579.

191. *See* Lystad*, supra* note 164, at 3.

resolution supporting a federal shield law.[192] Former Senate majority leader, Bob Dole, wrote an op-ed column in the *New York Times* expressing his support for a federal shield law.[193] Also, Senator Specter announced to local Pennsylvania media that he supported a federal shield law.[194] By October 11, 2005, H.R. 3233 was cosponsored by sixty-three representatives, and S. 1419 was cosponsored by eleven senators.[195] Despite its apparent momentum, the 2005 bill died in a House Committee.[196]

2. Developments Since the 109th Congress

Similar versions of a federal shield law were introduced by the 110th Congress. On May 2, 2007, Senator Lugar and Representative Boucher introduced companion bills into the Senate and House, respectively, S. 1267 and H.R. 2102.[197] On August 1, 2007, the House Judiciary Committee approved the House Bill even though the Committee remained concerned that the definition of who constitutes a "journalist" was vague.[198] The entire House passed H.R. 2102, by a vote of 398-21, on October 16, 2007.[199]

H.R. 2102, as passed by the House, would apply when a federal entity, excluding the legislative branch, seeks the disclosure of documents as they are defined by Rule 1001 of the Federal Rules of Evidence.[200] The protections of the Bill could be claimed by someone who *regularly* engages in journalism[201] "for a substantial portion of the person's livelihood or for substantial financial gain."[202] The journalistic privilege that would be created is qualified. Conditions for overcoming the qualified privilege are

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192. *Id.* at 7-8 (citing http://www.abanet.org/leadership/2005/annual/dailyjournal/104b.doc).

193. *See* Bob Dole, Op-Ed., *The Underprivileged Press*, N.Y. TIMES, Aug. 16, 2005, at A15.

194. *See* Lystad, *supra* note 164, at 8.

195. *Id.*

196. Neinas, *supra* note 25, at 238.

197. Henry Cohen & Kathleen Ann Ruane, CRS Report for Congress, *Journalists' Privilege: Overview of the Law and Legislation in the 109th and 110th Congresses*, at 7 (July 29, 2008); *see also* S. 1267, 110th Cong. (2007); H.R. 2102, 110th Cong. (2007).

198. Cohen & Ruane, *supra* note 197, at 7.

199. *See House Passes Bill Shielding Reporters*, *supra* note 27.

200. Cohen & Ruane, *supra* note 197, at 8. *See* Fed. R. Evid. 1001(1)-(2) ("'Writings' and 'recordings' consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation. . . . 'Photographs' include still photographs, X-ray films, video tapes, and motion pictures.").

201. H.R. 2102 § 4(5) ("[T]he gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing of news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public.").

202. *Id.* § 4(2).

virtually identical to those discussed herein regarding H.R. 581 and S. 340.[203] The privilege would apply to both confidentially obtained information as well as any information obtained while engaging in journalism;[204] although, a more stringent test is imposed to compel confidential as opposed to nonconfidential information. In order for the government to compel the disclosure of information that could reveal a confidential source, the information must be necessary (1) to prevent a terrorist threat (or other national-security threat); or (2) to thwart imminent death or significant bodily harm; or (3) to ascertain the identity of an individual who disclosed a trade secret, personal health, or financial information; or (4) to identify the source of a leak of classified information that could cause significant and articulable harm to national security.[205] Finally, a balancing test must be applied to determine whether compelling the disclosure serves more of a public interest than newsgathering.[206] The privilege does not apply to eyewitness testimony of a criminal or tortious action.[207]

Two proposed shield laws were introduced in the Senate. S. 1267, introduced by Senator Lugar, is identical to H.R. 2102 as introduced in the House.[208] It remained in Committee, and a new version of the Free Flow of Information Act, S. 2035, was introduced in the Senate on September 10, 2007, by Senator Specter.[209] Senator Lugar signed onto S. 2035 as a cosponsor. On October 22, 2007, the Senate Judiciary Committee reported it out of Committee with amendments and, on July 30, 2008, a motion to proceed to consideration of the Bill was withdrawn on the Senate floor.[210]

There are several notable differences between S. 2035 and the version of the Bill passed by the House. First, information that was not obtained through a promise of confidentiality is unprotected.[211] Second, to qualify as a "journalist," the journalistic activity need only be regular; the activity need not constitute a substantial portion of the person's livelihood or be for substantial financial gain.[212] Third, alternative sources need not be exhausted when the information sought is eyewitness testimony of a

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203. *See supra* text accompanying notes 178-82.

204. H.R. 2102 § 2.

205. *See id*. § 2(a)(3).

206. *See id.* § 2(a)(4).

207. *See id.* § 2(e).

208. *See* S. 1267, 110th Cong. (2007); *see also* Cohen & Ruane, *supra* note 197, at 10 n.23.

209. Cohen & Ruane, *supra* note 197, at 7-8.

210. *See* THOMAS (Library of Congress), http://thomas.loc.gov/cgi-bin/bdquery/z?d110:SN02035:@@@X (last visited Feb. 23, 2010).

211. *See* S. 2035, 110th Cong. § 7 (2007).

212. *See id.* § 8(2), (5).

criminal or tortious act;[213] part of the death, kidnapping, or bodily harm exception;[214] or related to terrorist activity or risk to national security.[215] Fourth, when the information sought is the source of a leak of classified information, the government must *exhaust all reasonable alternative sources*, the leak must have caused or will cause a significant and articulable harm to national security, and nondisclosure of the information must be contrary to the public interest.[216] H.R. 2102 does not have an exhaustion requirement for leaks of classified information. Fifth, if the "death[,] kidnapping[,] or substantial bodily harm" exception applies, no balancing test is needed to compel disclosure.[217] Sixth, exhaustion of alternative resources is not required to compel disclosure of eyewitness testimony of criminal or tortious conduct.[218] Like the House Bill, if the journalist is the eyewitness to a leak as the leakee, then the privilege remains intact.[219] Seventh, unlike the House Bill, no specific provision exists for trade secrets, personal medical information, or personal financial information.[220]

The Bush administration adamantly opposed the Free Flow of Information Act. President Bush threatened to veto the federal shield law since it supposedly would interfere with the government's ability to prosecute leaks of classified information.[221] Many members of the administration wrote letters to the Senate to show their strong opposition to S. 2035.[222] However, when President Obama served as a senator, he cosponsored S. 2035, and many hope that a bill will finally be passed

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213. *See id.* § 3.
214. *See id.* § 4.
215. *See id.* § 5.
216. *See* S. 2035, 110th Cong. § 2(a)(2)(A)(iii) (2007).
217. *See id.* § 4.
218. *See id.* § 3(a).
219. *See id.* § 3(b); *see also* H.R. 2102 § 2(e).
220. *See* H.R. 2102 § 2(a)(3)(C); *but see* S. 2035 (no specific or identical provision reflecting H.R. 2102 § 2(a)(3)(C)).
221. Sullivan, *supra* note 136.
222. *See, e.g.*, Letter from Samuel W. Bodman, Secretary of Energy, to Chairman Bingaman, Chairman, Senate Committee on Energy and Natural Resources (Sept. 15, 2008), *available at* http://www.justice.gov/archive/opa/media-shield.htm; Letter from Robert Gates, Secretary of Defense, to Senator Harry Reid, Senate Majority Leader (Sept. 9, 2008), *available at* http://www.justice.gov/archive/opa/media-shield.htm; Letter from Michael B. Mukasey, Attorney General, and J. M. McConnell, Director of National Intelligence, to Senator Harry Reid, Senate Majority Leader, and Senator Mitch McConnell, Senate Minority Leader (Aug. 22, 2008), *available at* http://www.justice.gov/archive/opa/media-shield.htm; Letter from Henry M. Paulson, Jr., Secretary of the Treasury, to Chairman Max Baucus, Chairman of the Senate Committee on Finance (Apr. 15, 2008), *available at* http://www.justice.gov/archive/opa/media-shield.htm.

without the fear of a presidential veto.[223] As expected, a House bill has already been reintroduced early in the 111th Congress.[224] The House Judiciary Committee passed H.R. 985 on March 25, 2009—a bill that is identical to H.R. 2102.[225] As discussed above, H.R. 985 then passed the House and was reported to the Senate as S. 448. The Senate modified the Bill in committee and, on December 11, 2009, the Bill was placed on the Senate calendar. No significant congressional action has since taken place.[226]

III. NOT A SHIELD TO TAKE INTO BATTLE

In this Part, each of the three journalists' cases discussed in Part II will be evaluated under the proposed Free Flow of Information Act of 2007. This Part will demonstrate that Leggett, Miller, and Wolf would have found no protection for their sources under the Bill had it been law at the time they were held in contempt of court.

A. Vanessa Leggett

Even though the court did not define whether Leggett would qualify as a journalist, it discussed the definitional issue more than it discussed whether the materials that she gathered would be protected.[227] As a matter of fact, the court did not discuss at all how the nature of Leggett's materials would preclude her protection under a journalistic privilege. Ironically, Leggett would qualify as a journalist under the Free Flow of Information Act; however, her materials would not be eligible for protection.

Leggett *would* likely be found to qualify as a journalist under both House and Senate versions of the Bill. The House Bill requires that the journalistic activity be "regular" and "for a substantial portion of the person's livelihood or for substantial financial gain."[228] The record in Leggett's case demonstrates that she was regularly gathering and collecting information from Roger, since she visited him frequently, oftentimes daily, in jail.[229] While Leggett remained employed at the University of Houston throughout, the writing and eventual publication of a novel on the Angleton

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223. *See, e.g.*, Editorial, *Time to Pass a Shield Law*, BUFFALO NEWS, Jan. 5, 2009 (on file with the author).

224. John Eggerton, *SPJ Holding Obama to His Pledge to Support Shield Law*, BROAD. & CABLE, Nov. 20, 2008, *available at* http://www.broadcastingcable.com/article/CA6616466.html?rssid=193.

225. *See supra* text accompanying note 28.

226. *See id.*

227. *In re* Grand Jury Subpoenas, No. 01-20745, at 5 (5th Cir. filed Aug. 17, 2001), *available at* http://www.cfif.org/htdocs/freedomline/current/america/appendix.pdf.

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

229. *See supra* text accompanying notes 72-73.

murder, a matter of public interest, could have produced substantial financial gain. Since the Senate's version of the Bill is more inclusive than that of the House—requiring only that the journalistic activity be "regular"[230]—she would qualify as a journalist under that Bill as well.

However, Leggett's materials—the taped recordings of interviews with Roger—would not be eligible for protection. The Senate Bill would only provide protection for information that was confidentially obtained.[231] While Leggett may have developed a rapport with Roger that led him to trust her, the interviews were not confidential. The fact that the interviews were conducted in jail, where records are kept of visitations, indicates that the interviews were nonconfidential for the purposes of S. 2035: Protected information means "information identifying a source who provided information under a promise or agreement of confidentiality made by a covered person as part of engaging in journalism" or any "information that a covered person obtained or created as part of engaging in journalism; and upon a promise or agreement that such . . . information would be confidential."[232] Nothing in the record indicates that Roger spoke with Leggett under the condition that his identity not be revealed. Also, the information was obviously not intended to be kept confidential because Leggett obtained it for the purpose of publication in a true-crime novel.

While nonconfidential information would be protected under the House Bill, such information is not privileged if (1) the government has exhausted all reasonable alternatives to find the information from a source other than the journalist,[233] (2) there are reasonable grounds to believe that a crime has occurred,[234] (3) the testimony sought is critical to the investigation,[235] and (4) the public interest in compelled disclosure of the information outweighs the public interest in the news.[236] While the sources that the FBI consulted in the investigation of Angleton are not readily available to this Author, one may likely assume that the government could show that all other reasonable alternative sources had been exhausted. The FBI began to investigate Angleton after he had been acquitted at a 1998 trial.[237] The FBI did not serve a subpoena on Leggett until three years later,[238] which may indicate that it was forming a case against Angleton in the interim. Furthermore, Leggett testified once before the federal grand

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230. S. 2035, 110th Cong. §§ 8(5) (2007).
231. *See id.* § 8(6).
232. *Id.* (emphasis omitted).
233. H.R. 2102, 110th Cong. § 2(a)(1) (2007).
234. *Id.* § 2(a)(2)(A)(i).
235. *Id.* § 2(a)(2)(A)(ii).
236. *See id.* § 2(a)(4).
237. *See supra* text accompanying notes 83.
238. *See supra* text accompanying note 85.

jury and, at the time, did not object to turning over all materials that would help the investigation.[239] Six months later, she was issued another subpoena to testify.[240] The government could likely show that, within those six months, it had exhausted all reasonable alternative sources and more information was needed from Leggett.

The other requirements for the disclosure of nonconfidential information could easily be satisfied: the murdered body of Doris Angleton is compelling evidence that a crime had occurred; Leggett's testimony, as possessor of a "gold mine of information" from the defendant's brother, would likely be critical to the investigation; and the public interest in keeping murderers out of communities would outweigh Leggett's interest in her materials. Indeed, the court discussed at length how easily grand jury investigations dilute the potency of the journalistic privilege.[241]

B. *Judith Miller*

Miller would not be protected under either the House or Senate versions of the Free Flow of Information Act. Her journalistic privilege would have been overcome pursuant to the sections on leaks of classified information.[242] The two bills will be discussed together because the commonalities the two bills share, without the added requirements of S. 2035, would eviscerate Miller's privilege.

Both H.R. 2102 and S. 2035 specify that the journalist's privilege is overcome when an unauthorized disclosure of properly classified information has caused or will cause significant and articulable harm to national security and it is contrary to the public interest not to compel the disclosure of the journalist's confidential source who leaked the information.[243] S. 2035 further requires compelled disclosure when there is reason to believe that a crime has occurred,[244] the testimony sought is essential to the prosecution or defense,[245] and all other reasonable alternative sources have been exhausted.[246]

Novak's op-ed column was clear evidence that information of a covert agent's identity had been leaked in violation of 50 U.S.C. § 421. This was

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239. *See supra* text accompanying notes 74-75.

240. *See supra* text accompanying note 85.

241. *See In re* Grand Jury Subpoenas, No. 01-20745, at 5-6 (5th Cir. filed Aug. 17, 2001), *available at* http://www.cfif.org/htdocs/freedomline/current/america/appendix.pdf.

242. H.R. 2102, 110th Cong. § 2(a)(3)(D) (2007); S. 2035, 110th Cong. § 2(a)(2)(A)(iii) (2007).

243. H.R. 2102, 110th Cong. § 2(a)(3)(D) (2007); S. 2035, 110th Cong. § 2(a)(2)(A)(iii) (2007).

244. *See* S. 2035 § 2(a)(2)(A)(i).

245. *See id.* § 2(a)(2)(A)(ii).

246. *See id.* § 2(a)(1).

an unauthorized disclosure of properly classified information as well as an indication that a crime had occurred. Judge Tatel, in his concurring opinion, outlined a variety of reasons why the leak was more harmful to national security than it was newsworthy.[247] The severity of such a leak is not inconsequential. Shortly after Valerie Plame was exposed, a Senate Committee hearing discussed the implications of disclosing the identity of a covert intelligence officer.[248] Witnesses testified that the exposure of Plame "almost certainly damaged intelligence assets that were connected with providing the United States information about rogue states and terrorist organizations trying to acquire chemical, biological and nuclear material."[249] One witness testified that "an entire intelligence network was destroyed."[250] Since covert agents build and maintain relationships with informants overseas on the safety that the agents' cover provides, "[w]hat has suffered irreversible damage is the credibility of our case officers when they try to convince an overseas contact that their safety is of primary importance to us."[251] Clearly, the disclosure of Plame's identity has caused significant and articulable harm to national security. Considering the national security interests at stake and Tatel's own balancing of interests, the public's interest in compelling the disclosure of Miller's source would be found to outweigh the public's interest in the journalist's newsgathering. Tatel also discussed at length how Miller's information was essential to the prosecution of the leaker and unavailable from any other source.[252]

C. Josh Wolf

Wolf would not be protected for two reasons: first, his videotape of the anarchist protest was not confidential and, second, the videotape was eyewitness testimony. Even though nonconfidential information would enjoy a limited privilege in H.R. 2102, such a privilege would be overcome and, even if it is not, would still be unprivileged as a result of the Bill's provision for eyewitness testimony.[253]

Media advocates will breathe a sigh of relief to know, however, that Wolf would likely fit the definition of a journalist found in both the House

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247. *See supra* text accompanying notes 120-32.

248. *National Security Implications of Disclosing the Identity of a Covert Intelligence Officer: Hearing Before the Senate Democratic Policy Committee and Democrat Members of the House Government Reform Committee*, 109th Cong. (2005).

249. *Id*. at 32 (testimony of Larry Johnson, former CIA analyst).

250. *Id.* at 10 (statement of Rep. Louise Mcintosh Slaughter (D-NY)).

251. *Id.* at 25 (testimony of Jim Marcinkowski, former CIA officer).

252. *See In re* Grand Jury Subpoena, Judith Miller, 438 F.3d 1141, 1179-82 (D.C. Cir. 2006).

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

and Senate Bills. Currently, Wolf's blog[254] has not received much activity; however, in July 2005, the month of the anarchist protest that he covered, Wolf posted fourteen times,[255] which certainly seems to qualify as "regular" activity considering how less frequently an employed reporter may see his or her bylined article published.[256] To fit the definition in the House Bill, the "livelihood or substantial financial gain" requirement must be satisfied.[257] As one author noted, a blogger could easily fit this definition by selling a single advertisement on his or her Web site and claim to blog for "financial gain."[258]

However, Wolf's protection stops there. S. 2035 does not protect nonconfidential information at all.[259] While Wolf may have felt that a tacit confidentiality agreement existed between him and the anarchist groups he videotaped entirely in public, the courts would certainly disagree with such an argument. Wolf's nonconfidential information would not be protected in H.R. 2102 for the similar reasons that Leggett's materials were not protected—the government could likely show that all reasonable alternatives had been exhausted; reasonable grounds exist to believe that an attempted arson occurred;[260] video footage of the attempted arson is critical to the investigation; and, considering how the courts have historically been deferential to grand juries, a balancing test would likely find that the law-enforcement interests of the grand jury investigation trump the public's interest in Wolf's newsgathering activities.

A court would probably not even address the fact that Wolf's videotape is a nonconfidential source simply because it constitutes an eyewitness account of an alleged crime. Whether or not Wolf's videotape actually captured the attempted arson is unclear; Wolf claimed that it did not. Nevertheless, the government insisted that the video did, and, therefore, it was a necessary element for their investigation. Neither the House nor Senate bill protects video recordings of a journalist's eyewitness account of a crime.[261]

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254. Freedomedia, http://www.joshwolf.net (last visited Feb. 4, 2010).

255. *See* Freedomedia, July 2005, http://www.joshwolf.net/blog/?m=200507 (last visited Feb. 23, 2010).

256. Here, the Author reminisces on her experience and knowledge with print publications.

257. *See* H.R. 2102 § 4(2).

258. Neinas, *supra* note 25, at 239 (internal quotations omitted).

259. *See* S. 2035, 110th Cong. § 7 (2007).

260. Wolf v. United States, 201 F. App'x 430, 432 (9th Cir. 2006) (noting that "evidence in the record appears to support the investigation").

261. *See* H.R. 2102 § 2(e); S. 2035 § 3(a).

D. Back to the Drawing Board . . . Again?

One question that remains is whether the Free Flow of Information Act, in either of its forms, is adequate. A historic obstacle to the realization of a federal shield law, the definition of a "covered person"—who constitutes a "journalist"[262]—should finally be resolved by H.R. 2102 and S. 2035. Not all bloggers will qualify for protection, and not all bloggers should. Only those bloggers engaging in journalistic activity—regularly gathering information that concerns the public interest of a community for dissemination to the public—should be protected. The 110th Congress's version of the Act finally accomplishes this. For example, a teenager who regularly posts to a blog items, such as photographs of his or her friends at social gatherings and the latest high-school gossip, would not qualify for protection. Whereas, an individual who regularly posts newsworthy information in the public's interest and investigates and disseminates a story illuminating, for example, flaws in the mainstream media's assessment of President Bush's military record would be protected.[263] Indeed, the emergence of the new media demonstrates that bloggers deserve protection, especially considering how, recently, bloggers have exposed sloppy journalism in the traditional media.[264] Without being overly broad, H.R. 2102 and S. 2035 adequately define a journalist.

Instead of focusing on the definitional issue, media advocates should now focus on the final balancing test. Leggett, Miller, and Wolf each failed, among other privilege requirements, a public-interest balancing test—that is, that the "nondisclosure of the information would be contrary to the public interest, taking into account both the public interest in compelling disclosure and the public interest in gathering news and maintaining the free flow of information."[265] The public interest in newsgathering was overcome by the nature of the grand jury investigations in their cases because precedent has indicated deference to grand juries.[266] Absent any legislative guidance regarding what factors should be taken into consideration for the purposes of the balancing test, disclosure in the grand jury context will probably be compelled so long as other requirements for compelled disclosure are satisfied (e.g., the person claiming the privilege does not qualify as a journalist, the information is not essential to the resolution of a matter, etc.). If we accept disclosure in such a context, then

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262. *See* Lystad, *supra* note 164, at 3.

263. *See* H.R. 2102 § 4(2); S. 2035 § 8(2).

264. *See, e.g.*, CBS Killian Document Index, http://www.littlegreenfootballs.com/article/12582_CBS_Killian_Document_Index (Sept. 13, 2004, 9:35 PDT) (raising doubts about the authenticity of the Killian documents).

265. S. 2035, 110th Cong. § 2(a)(3) (2007).

266. *See, e.g.*, *In re* Grand Jury Subpoenas, No. 01-20745, at 1-2 (5th Cir. filed Aug. 17, 2001), *available at* http://www.cfif.org/htdocs/freedomline/current/america/appendix.pdf.

an implicit value judgment emerges: fact finding pursuant to justice in a criminal investigation outweighs the public's interest in access to information necessary for self-governance. The philosophical debate concerning the appropriate balance of these two competing ideals is not within this Note's scope. However, by accepting the Free Flow of Information Act in its current form, without any guidance on when the privilege is *not* overcome in the grand jury context, we tacitly accept that access to information is not a preeminent goal. As the shield-law debate continues to evolve, journalists should also push for protection for nonconfidential information, which can be found in the House but not the Senate Bill.

Perhaps the real concern of many is, not that the government compels compliance with its subpoenas, but that we do not like to witness journalists going to jail simply for performing their jobs. While the law provides few alternatives to serving jail time for contempt other than incurring a fine or complying with the subpoena, the internal practices of journalists may provide a solution. One commentator[267] has noted that journalists, like Miller, should inform their confidential sources that their identity will remain a secret unless the government issues a subpoena requesting the name of the source. Considering the relative infrequency of the issuance of such subpoenas and the fact that, oftentimes, sources will relieve a journalist of a promise of confidentiality once subpoenaed,[268] such a basic solution seems practical.

IV. CONCLUSION

Ever since the Supreme Court decided *Branzburg*, many journalists have been fighting for a federal shield law. Since 1972, Congress has attempted to pass a federal shield law more than 100 times. With so many failed attempts, it is promising to witness that, more than thirty years after *Branzburg*, a shield law passed the House in the 110th and 111th Congresses, and a cosponsor of S. 2035 sits in the White House. Indeed, the Obama administration has even publicly endorsed a federal shield law.[269] In light of the fact that the Supreme Court has refused to address the journalists' privilege since *Branzburg* and the privilege is now recognized in almost every jurisdiction, it seems only appropriate that Congress enact a federal shield law.

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267. Gabriel Schoenfeld, *Why Journalists Are Not Above the Law*, COMMENTARY, Feb. 2007, at 40, 44, *available at* http://www.commentarymagazine.com/viewarticle.cfm/why-journalists-are-not-above-the-law-10827.

268. For example, I. Lewis "Scooter" Libby.

269. Nat'l Press Photographers Assoc., *White House Endorses Federal Shield Law for Journalists*, Nov. 6, 2009, http://nppa.org/news_and_events/news/2009/11/shield.html (last visited Feb. 23, 2010).

The jailing of Leggett, Miller, and Wolf alone demonstrates a compelling need for a federal shield law, and, indeed, their stories have motivated many in law, journalism, and Congress to strive for federal protection for journalists' sources. However, the Free Flow of Information Act would not have changed the fate of these three journalists. The Act would not have applied to Leggett—who, contrary to the doubts expressed by the Fifth Circuit, would qualify as a journalist—because her nonconfidential materials would not have been eligible for protection. The Act would not have protected Miller, either, because the disclosure of a covert CIA operative caused a significant and articulable risk to national security. Finally, Wolf—who would also qualify as a journalist under the Act—would not find his videotape shielded because it was a nonconfidential, eyewitness recording of an alleged arson.

Knowing that the jailing of Leggett, Miller, and Wolf could happen again under H.R. 2102 and S. 2035, should media advocates insist on more? The media have abandoned their politically idealistic request for absolute coverage, and the passage of H.R. 2102 in the House indicates that a consensus has finally been reached on how to define a journalist. As a matter of fact, Leggett, Miller, and Wolf would all qualify as a "covered person" under the Bill. However, the media's support for the Bill seems nearsighted—a support for the passage of any shield law regardless of its extent of protection. Indeed, if the media values a shield law that would have protected the federally compelled disclosure of the materials and sources harbored by Leggett, Miller, or Wolf, their support for the current Bill must be reevaluated.

Most notably, media advocates should strive for two solutions. First, the provision for nonconfidential information passed in H.R. 2102 must be found in a finalized federal shield law. Second, and perhaps more importantly, Congress must provide guidance on how to balance competing interests—the public interest in compelling disclosure and the public interest in access to information. Such guidance would be especially helpful in the grand jury setting. Without a federal law that adequately shields the cloak-and-dagger reporting that has historically proven essential to exposing dirty politics and dishonesty, future sources, with stories to tell like Deep Throat's, may remain hidden in the shadows.