COMMENT

CRIME THAT PLAYS: SHAPING A REPORTER'S SHIELD TO COVER NATIONAL SECURITY IN AN INSECURE WORLD

INTRODUCTION

Standing in the ornate Speaker's Lobby just off the floor of the U.S. House of Representatives between votes on October 2, 2003, Representative Porter Goss, Chairman of the House Select Committee on Intelligence, told reporters that the recent leak and publication of CIA agent Valerie Plame's identity was not worth an investigation.[1] The Plame scandal was beginning to snowball; Republicans in the White House and Congress were resisting calls for an independent counsel and congressional investigations. "You know how much time we would spend doing leaks if we did nothing but leaks?" said Goss, a Republican from Florida. "That's all we'd do."[2]

Goss summed up two facts about leaks in Washington: they are common and not all worth plugging.[3] Nevertheless, the Plame scandal spiraled into the greatest direct challenge in thirty years to the privilege of journalists to protect their sources from forced disclosure. Though no one was convicted of an offense related to leaking classified information or the identity of a covert agent, the ensuing criminal investigation resulted in the conviction of Vice President Dick Cheney's Chief of Staff, I. Lewis "Scooter" Libby, for lying to a grand jury, and a contempt citation for *New York Times* reporter Judith Miller, who refused to identify Libby as her source

1. Cory Reiss, *Florida Lawmaker Says Leak Isn't Worth an Investigation*, LEDGER (Lakeland, Fla.), Oct. 3, 2003, at A11.

2. *Id.* Goss also told reporters: "Somebody sends me a blue dress and some DNA, I'll have an investigation." *Id.* Goss became director of the Central Intelligence Agency in September 2004 during the leak investigation by the Department of Justice that led to the conviction of a White House aide and the jailing of a *New York Times* reporter.

3. William E. Lee, *Deep Background: Journalists, Sources, and the Perils of Leaking*, 57 AM. U. L. REV. 1453, 1467 (2008) ("Despite the security indoctrination of government employees, leaking classified information occurs so regularly in Washington that it is often described as a routine method of communication about government."); *id.* at 1469 ("Although information can be declassified and publicly released, the selective release of classified information to favored reporters is a deeply established Washington practice.").

until he told her to do so after she spent eighty-five days in jail.[4]

Miller's contempt citation and jailing coincided with a rash of high-profile cases in which the government or civil litigants pressed reporters to identify their confidential sources.[5] In response, Congress breathed life into legislation that had wandered Capitol Hill like the undead for three decades. Lawmakers got serious about a shield law for reporters that would provide a federal statutory privilege to protect confidential sources.[6] In 1972, the U.S. Supreme Court in *Branzburg v. Hayes* declined to recognize such a privilege in the First Amendment of the Constitution but gave Congress and state legislatures wide latitude to create one.[7] Most states have acted, but not Congress.[8]

In October 2007, largely because of attention to the Plame scandal, the House overwhelmingly passed the Free Flow of Information Act, which offered a broad federal privilege for journalists.[9] Faced with a veto threat from President Bush and strong opposition from intelligence agencies, however, the Senate killed a similar bill on a procedural vote in July 2008.[10] That was

4. *See id.* at 1458–59; William E. Lee, *The Priestly Class: Reflections on a Journalist's Privilege*, 23 CARDOZO ARTS & ENT. L.J. 635, 638–39 (2006).

5. *See, e.g.*, N.Y. Times Co. v. Gonzales, 459 F.3d 160 (2d Cir. 2006) (holding that reporters did not have a privilege to protect confidential sources of information that led the reporters to contact for comment the target of a pending federal asset freeze and premises search); Lee v. Dep't of Justice, 413 F.3d 53 (D.C. Cir. 2005) (upholding contempt citations for journalists who refused to identify their sources in a civil lawsuit brought against the government under the Privacy Act for leaks that identified the plaintiff as suspected of passing nuclear secrets to China); Hatfill v. Mukasey, 539 F. Supp. 2d 96 (D.D.C. 2008) (upholding a reporter's contempt citation for refusing to name her sources in a Privacy Act lawsuit against the government for leaks that named the plaintiff as a person of interest in a federal bioterrorism investigation).

6. Lee, *supra* note 3, at 1459. "In fact, many stories would not have been published without a promise of confidentiality of sources, such as Watergate, the Pentagon Papers, and Iran-Contra. More recent news stories brought to light based on confidential sources include the conditions at the Walter Reed Army Medical Center, the Abu Ghraib prison scandal, and the abuse of steroids by baseball players." H.R. REP. NO. 110-370, at 7 (2007).

7. Branzburg v. Hayes, 408 U.S. 665, 690–91, 706 (1972).

8. *See* HENRY COHEN & KATHLEEN ANN RUANE, CONG. RESEARCH SERV., JOURNALISTS' PRIVILEGE: OVERVIEW OF THE LAW AND LEGISLATION IN THE 109TH AND 110TH CONGRESSES 3 (2008), *available at* http://fas.org/sgp/crs/secrecy/RL34193.pdf.

9. Lee, *supra* note 3, at 1459 & n.27, 1460; *see* 153 CONG. REC. H11,602–03 (2007).

10. *See* 154 CONG. REC. S7721 (2008); OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: H.R. 2102, at 1 (2007), *available at* http://www.whitehouse.gov/omb/legislative/sap/110-1/hr2102sap-h.pdf ("[I]f H.R. 2102 were presented to the President in its current form, his senior advisors would recommend that he veto the bill."); Mike McConnell, Op-Ed., *Bill Wrongly Shields Press*, USA TODAY, July 28, 2008, at 10A ("I have joined . . . every senior intelligence community leader in

the closest that a federal shield law has ever come to passage. The issue is now left to the new Congress and President Obama's administration.

The defeat was a setback for reporters across the country. Though relatively few reporters at a small number of news organizations routinely deal in classified information, much of the bill's opposition focused on the ramifications for leak investigations.[11] Classified leaks are far from the only reasons that reporters are subpoenaed, and subpoenas seeking confidential sources are not always tied to criminal cases.[12] Many reporters, therefore, would benefit from a shield law, not just those reporters whose work on classified matters was cited as the dominant reason for scuttling the bill.

The House and Senate legislation differed in key respects, including their definitions of covered "journalists" and the scope of their privileges. The question of who might claim the privilege has always bedeviled lawmakers and professional journalists. That question is especially critical when the government is using its classification powers liberally, professional journalists and resources for investigative reporting are shrinking like the polar ice caps, and "citizen journalists" and bloggers increasingly dot the media landscape. Those trends boost the odds that bloggers will obtain classified information for global publication on the Internet. Although that prospect is not inherently riskier than leaving national security reporting to professionals, it does raise valid concerns. Moreover, subpoenas of journalists have proliferated and, since September 11, 2001, prosecution for receiving classified information has become a real threat to all who seek such material. Reporters may need a privilege more than ever, but the twenty-first century has complicated their argument for it.

This Comment examines proposals for a federal shield law challenged by valid concerns about who could claim the privilege when classified information is at stake. Part I examines current privileges under state shield laws and federal common law and the

expressing the belief . . . that this bill will gravely damage our ability to protect national security information.").

11. *See, e.g.*, OFFICE OF MGMT. & BUDGET, *supra* note 10, at 1 (threatening a veto because H.R. 2102 "would create a dramatic shift in the law that would produce immediate harm to national security and law enforcement"); McConnell, *supra* note 10 (arguing that "this bill would upset the balance established by current law, crippling the government's ability to investigate and prosecute those who harm national security").

12. News organizations report facing federal subpoenas that involve immigration matters, employment-discrimination suits, federal drug crimes, civil-rights actions, and ordinary accidents in the District of Columbia. RonNell Andersen Jones, *Avalanche or Undue Alarm? An Empirical Study of Subpoenas Received by the News Media*, 93 MINN. L. REV. 585, 639–40 (2008); *see also* Lee v. Dep't of Justice, 413 F.3d 53 (D.C. Cir. 2005); Hatfill v. Mukasey, 539 F. Supp. 2d 96 (D.D.C. 2008).

current environment in which more reporters are being subpoenaed and threatened with jail. Part II examines the House and Senate proposals, focusing on their different approaches to who may claim a federal privilege and under what circumstances. Part III examines the differences between classified leaks and leaks of unclassified information in the context of recent cases. Part IV suggests a new approach to the federal privilege that accounts for the competing interests of public disclosure in a democratic society and the government's duty to protect its most sensitive secrets.

I. "AN ENLIGHTENED PEOPLE"

The U.S. Supreme Court has treated the press in turns as indispensable to lifting the shroud of government secrecy and as a class worthy of little, if any, constitutional distinction. In *New York Times Co. v. United States*, Justice Black wrote that a free press required constitutional protection to "fulfill its essential role in our democracy. . . . The press was protected so that it could bare the secrets of government and inform the people."[13] The Court sided six to three with newspapers in barring prior restraint of publishing a classified history of the Vietnam War, known as the Pentagon Papers.[14] Concluding that "without an informed and free press there cannot be an enlightened people," Justice Stewart placed the responsibility for protecting national defense secrets on the government, "where the power is," not on journalists.[15]

The following year, however, the Court took a dimmer view of the place journalists hold in the Constitution when it decided, in *Branzburg v. Hayes*, that journalists do not have a privilege under the First Amendment to protect their confidential sources before grand juries.[16] Justice White wrote for the Court that journalists have no more right to protect information from grand-jury scrutiny than any other citizens.[17] The opinion made an exception for grand-jury investigations conducted in bad faith—instigated, for example, as a means merely to discover a reporter's sources.[18] Although the Court declined to find a First Amendment privilege, Justice White explained that "Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to

13. N.Y. Times Co. v. United States (*Pentagon Papers*), 403 U.S. 713, 717 (1971) (per curiam) (Black, J., concurring).

14. *Id.* at 714 (majority opinion).

15. *Id.* at 728–29 (Stewart, J., concurring).

16. *See* James Thomas Tucker & Stephen Wermiel, *Enacting a Reasonable Federal Shield Law: A Reply to Professors Clymer and Eliason*, 57 AM. U. L. REV. 1291, 1298–99 (2008).

17. Branzburg v. Hayes, 408 U.S. 665, 682–83 (1972).

18. *Id.* at 707–08.

refashion those rules as experience from time to time may dictate."[19]

Justice Powell, however, acknowledged that some constitutional privilege exists for journalists brought before a grand jury to identify confidential sources.[20] He suggested a case-by-case balancing of freedom of the press against the obligation of all citizens to provide testimony in a criminal proceeding.[21]

Including Justice Powell and four dissenting Justices, at least five Justices agreed that journalists have some privilege to protect confidential sources.[22] Justice Stewart, in a dissent joined by Justices Brennan and Marshall, proposed a three-part balancing test that many states and circuits would later adopt.[23] The tally of opinions in *Branzburg* left state and federal lawmakers with little guidance. Eight Justices rejected an absolute privilege, but at least five agreed that journalists have some privilege to protect a source's identity.[24] Three Justices supported a balancing test, and four left any test to Congress and the states.[25] Most states have since responded with their own shield laws, encouraged by the excesses demonstrated in the *Pentagon Papers* case and the Watergate scandal, both of which hinged on confidential sources.[26] To date, thirty-three states and the District of Columbia have enacted shield laws in various forms and courts in sixteen others have established a reporter's privilege by decision.[27]

A. State of Privilege

State laws vary by whom they cover and under what circumstances. Some states specifically include newspapers, radio, television, and magazines, while others exclude television or magazine reporters.[28] Statutes in some states, by various terms, limit the shield to employees of established media organizations.[29]

19. *Id.* at 706.
20. *Id.* at 709–10 (Powell, J., concurring).
21. *Id.* at 710.
22. Tucker & Wermiel, *supra* note 16, at 1301.
23. According to Justice Stewart's proposal, to overcome a reporter's privilege

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

Branzburg, 408 U.S. at 743 (Stewart, J., dissenting).
24. Tucker & Wermiel, *supra* note 16, at 1301.
25. *Id.*
26. *Id.* at 1301–02.
27. COHEN & RUANE, *supra* note 8, at 3.
28. Mary-Rose Papandrea, *Citizen Journalism and the Reporter's Privilege*, 91 MINN. L. REV. 515, 564–65 (2007).
29. *Id.* at 566.

Other states require regular engagement in journalistic activities or define journalists as those who earn their "livelihood," to a greater or lesser extent, from the gathering and disseminating of information to the public—sometimes more nebulously called "news."[30] A few states provide a nearly absolute privilege, but most employ a balancing test to determine if a qualified privilege has been overcome.[31] Under state laws, confidential and nonconfidential information may receive less protection than the identities of confidential sources.[32]

Federal circuit courts have either devised their own tests or denied that any privilege exists. Nine circuit courts have recognized some qualified privilege for reporters to protect their confidential information or sources in civil cases.[33] Only four circuit courts (the First, Second, Third, and Eleventh) have recognized a qualified privilege in criminal cases.[34] The Seventh and Eighth Circuits have not directly ruled on whether a privilege exists, but the Sixth Circuit has expressly denied it.[35] Most circuits have applied versions of Justice Stewart's three-part balancing test.[36] The Second Circuit, however, held in *von Bulow v. von Bulow* that a reporter's privilege only applies to a person who intended to disseminate information to the public at the time the information gathering began.[37] The First and Ninth Circuits adopted this intent test and extended it to cover authors and academic researchers.[38]

Some circuit courts also have examined Federal Rule of Evidence 501 to determine if a common-law reporter's privilege exists.[39] Rule 501 allows courts to determine if a privilege exists based on the federal common law, such as the privilege between a patient and a psychotherapist.[40] The Third Circuit has recognized a reporter's privilege under Rule 501 for criminal and civil cases,[41] but

30. *Id.* at 566–67.

31. Laurence B. Alexander & Ellen M. Bush, *Shield Laws on Trial: State Court Interpretation of the Journalist's Statutory Privilege*, 23 J. LEGIS. 215, 218 (1997).

32. *Id.* at 221–23.

33. *See* Tucker & Wermiel, *supra* note 16, at 1307 & n.115.

34. *Id.* at 1308.

35. *Id.* at 1307.

36. *Id.*

37. von Bulow v. von Bulow, 811 F.2d 136, 144 (2d Cir. 1987).

38. Papandrea, *supra* note 28, at 570–71.

39. *See* N.Y. Times Co. v. Gonzales, 459 F.3d 160, 169 (2d Cir. 2006); *In re* Grand Jury Subpoena, Judith Miller, 438 F.3d 1141, 1149–50 (D.C. Cir. 2006) (splitting three ways as to whether a common-law privilege exists or should be considered in the case); *id.* at 1155–56 (Sentelle, J., concurring); *id.* at 1160–61 (Henderson, J., concurring); *id.* at 1166, 1176–77 (Tatel, J., concurring in the judgment).

40. FED. R. EVID. 501.

41. United States v. Cuthbertson, 630 F.2d 139, 146 (3d Cir. 1980); Riley v. City of Chester, 612 F.2d 708, 713–15 (3d Cir. 1979).

other circuits have not followed suit. In the absence of a new decision by the U.S. Supreme Court revisiting *Branzburg* or recognizing a privilege under Rule 501, Congress and the states are left to their own devices. Splintered opinions leave considerable uncertainty among rank-and-file journalists covering myriad subjects, including courts, crime, schools, the environment, politics, and national security.

B. Secrets, Subpoenas, and Scoops

These are perilous times for reporters. A recent survey of daily newspapers and network-affiliated television news operations suggests that federal subpoenas were both more frequent in 2006, compared to five years earlier, and "more common than opponents of a federal shield law have suggested."[42] The subpoenas from the survey involved legal actions in a broad range of criminal and civil cases.[43]

The survey of subpoenas in 2006 found that 761 responding news organizations, representing 38% of those surveyed, were served with 3062 state and federal subpoenas.[44] Weighted to estimate actual instances for the entire survey population, daily newspapers and television newsrooms received 7244 subpoenas,[45] an average of 3.6 per organization.[46] The weighted average in a similar 2001 survey was 2.6 subpoenas per organization.[47] As expected, because of the much larger number of state courts, most of the 2006 subpoenas were in state-court proceedings; however, the weighted data suggest that 774 subpoenas were issued in federal-court proceedings.[48] Nearly twice as many federal subpoenas per respondent were reported in the 2006 survey than in the 2001 survey conducted by the Reporters Committee for Freedom of the Press.[49]

The percentage of federal and state subpoenas seeking confidential material more than quadrupled between the 2001 and 2006 surveys.[50] The weighted data suggest that, in 2006, 213 federal and state subpoenas sought confidential material, including 92 that sought the names of confidential sources.[51] Slightly fewer than half

42. Jones, *supra* note 12, at 637.
43. *Id.* at 639–40.
44. *Id.* at 623, 626.
45. *Id.* at 626.
46. *Id.* at 628.
47. *Id.*
48. *Id.* at 637–38.
49. *Id.* at 638; *see also* REPORTERS COMM. FOR FREEDOM OF THE PRESS, AGENTS OF DISCOVERY: A REPORT ON THE INCIDENCE OF SUBPOENAS SERVED ON THE NEWS MEDIA IN 2001, at 5, 7 (Lucy A. Dalglish ed., 2003), *available at* http://www.rcfp.org/agents/agents.pdf.
50. Jones, *supra* note 12, at 643.
51. *Id.*

the reported subpoenas for source identities were in conjunction with federal proceedings.[52] The survey results likely underestimate the actual number of subpoenas issued to news organizations in both federal and state courts because they exclude subpoenas to radio news organizations, cable-television news organizations, magazines, journals, and online publications.[53] Furthermore, the federal share was probably higher because 529 reported subpoenas were not specified as issued in either federal or state proceedings.[54]

At the same time, the federal government has ramped up its classification of documents, setting the stage for more battles over leaks and growing cynicism about the level of secrecy. Justice Stewart warned against "secrecy for its own sake" because "when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion."[55] Classification activity has increased sufficiently in recent years to newly highlight those concerns.[56]

The federal government's classification of documents jumped beginning in 2001, when national security became the nation's predominant concern. The government classified an average of 159,900 original documents each year from 1995 through 2000, according to federal data analyzed by OpenTheGovernment.org, a coalition of watchdog groups.[57] In comparison, the government classified an average of around 255,300 original documents each year from 2001 through 2007, a 60% increase, with a peak of 351,150 documents in 2004.[58] Moreover, derivative classifications from the original documents—in other words, the creation of new classified documents from original classified documents in forms such as classified e-mails—grew from just under 5.7 million in 1996 to more than 22.8 million in 2007.[59]

That explosion of classified materials, be they original or

52. *Id.*
53. *See id.* at 586.
54. *Id.* at 637.
55. N.Y. Times Co. v. United States (*Pentagon Papers*), 403 U.S. 713, 729 (1971) (per curiam) (Stewart, J., concurring).
56. Jack Goldsmith, a former attorney with the Department of Justice in the Bush administration, argues that, although the *New York Times* was not justified in printing stories that revealed classified programs since September 11, 2001, a "root cause of the perception of illegitimacy inside the government that led to leaking . . . is, ironically, excessive government secrecy." Jack Goldsmith, *Secrecy and Safety*, NEW REPUBLIC, Aug. 13, 2008, at 31, 35. By "extravagantly" employing secrecy, the effort was self-defeating. *Id.* at 36.
57. *See* OPENTHEGOVERNMENT.ORG, SECRECY REPORT CARD 2008: INDICATORS OF SECRECY IN THE FEDERAL GOVERNMENT 6 (2008), *available at* http://www.openthegovernment.org/otg/SecrecyReportCard08.pdf.
58. *See id.*
59. *Id.* at 7.

derivative in form, could result in more classified information reaching the hands of professional and nonprofessional reporters. There is just more of it to leak. Although traditional news organizations are cutting budgets and staff,[60] far more people are assuming the mantle of public watchdog and are just as able to publish what they find on a global scale.[61] Bloggers have enjoyed some high-profile scoops of the mainstream press in recent years.[62] Among his many unsubstantiated rumors, Matt Drudge has broken significant news stories, most notably the story about President Clinton's affair with Monica Lewinsky.[63] Other bloggers broke the story about Senator Trent Lott's comments regarding Senator Strom Thurmond's race-based bid for the presidency, among other news.[64] Sources intent on publicizing classified information to which they have access could easily turn to the increasingly popular new media.

C. Crime News

Bloggers are sharing the risks as well as the rewards of journalistic pursuits. The incarceration of Joshua Wolf for 226 days on a contempt citation in federal district court in California shows that nonprofessional reporters are at risk from authorities seeking the information they collect.[65] In that case, Wolf refused to provide a federal grand jury with a videotape he made of a protest that turned violent, claiming a First Amendment privilege as a journalist.[66] The court held that, under *Branzburg*, Wolf had no privilege to decline to testify before a grand jury.[67] The court also noted that Wolf, a freelance blogger, would not even be protected under California's 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

60. David Carr, *Mourning Old Media's Decline*, N.Y. TIMES, Oct. 29, 2008, at B1.

61. *See* Papandrea, *supra* note 28, at 523–28.

62. *Id.* at 524–25; *see, e.g.*, Scott Shane, *Waterboarding Used 266 Times on 2 Suspects*, N.Y. TIMES, Apr. 20, 2009, at A1 (crediting bloggers with the discovery of new information about the extent to which waterboarding was used by CIA interrogators); *see also* Tim Dickinson, *The New Web Slingers: Political Bloggers Scoop the Mainstream Media on Plamegate*, ROLLING STONE, Nov. 3, 2005, http://www.rollingstone.com/politics/story/8719209/the_new_web_slingers (explaining scoops in his coverage of the Libby prosecution, a blogger said that sources "talk to us because we're not the mainstream . . . . Sources who haven't been treated well by, say, *The Washington Post*—they come to us").

63. Papandrea, *supra* note 28, at 524 & n.44.

64. *Id.* at 524.

65. Reporters Comm. for Freedom of the Press, Shields and Subpoenas: The Reporter's Privilege in Federal Courts, http://www.rcfp.org/shields_and_subpoenas.html (last visited Apr. 21, 2009). The Reporters Committee for Freedom of the Press considers Wolf the longest-jailed American journalist. *Id.*

66. Wolf v. United States (*In re* Grand Jury Subpoena), 201 F. App'x 430, 431–32 (9th Cir. 2006).

67. *Id.* at 432–33.

association or wire service," as required under that law.[68] The question of Wolf's status as a journalist was never truly settled, but his case highlighted the perils that bloggers or "citizen journalists" face under existing state and federal privilege regimes.[69]

The ongoing prosecution of two lobbyists for the well-connected American Israel Public Affairs Committee ("AIPAC"), Steven J. Rosen and Keith Weissman, further illustrates that traditional journalists are not the only ones gathering information for public dissemination, and that, when classified information is involved, the government may choose to prosecute the recipients of leaks.[70] The Department of Justice portrays the two lobbyists as prolific middlemen in an information black market, cultivating sources and then handing their information to Israeli diplomats and using it to entice members of the press to write stories.[71] The government alleges that the lobbyists violated the Espionage Act by seeking and receiving classified information from Lawrence Franklin, a security specialist on Iran with a Top Secret clearance, and distributing it to Israeli diplomats as well as journalists for CBS, the *Washington Post*, and Reuters.[72] Franklin, who pleaded guilty in 2005 to conspiracy to communicate national defense information and conspiracy to communicate classified information to a foreign agent,

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

69. After his release from jail, Wolf took a job as a newspaper reporter. Justin Berton, *Video Blogger Gets Job as 'Real Journalist*,*'* S.F. CHRON., Aug. 20, 2008, at A1.

70. As this Comment went to press, the Department of Justice was considering dropping the charges against Rosen and Weissman based on evidentiary concerns. R. Jeffrey Smith, Walter Pincus & Jerry Markon, *U.S. Might Not Try Pro-Israel Lobbyists*, WASH. POST, Apr. 22, 2009, at A1. Declining to proceed with prosecution would leave unsettled many questions about the potential for similar prosecutions of recipients of classified material, including journalists. The government appears to be concerned about an appellate ruling that upheld a trial court decision allowing the defendants to introduce classified information more fully than the government argued should be permitted under the Classified Information Procedures Act, which gives the trial court discretion to redact such information or replace it with summarized versions. United States v. Rosen, 557 F.3d 192, 196, 200 (4th Cir. 2009). The government also appears to be concerned about a trial court determination that to prove conspiracy to violate the Espionage Act, the government must prove that a recipient of classified information who disclosed it to other persons knew "the information he disclosed was closely held by the government and damaging to national security if revealed, and actually knew that the recipient was not entitled to receive the information under the applicable classification regulations." United States v. Rosen, 520 F. Supp. 2d 786, 792–93 (E.D. Va. 2007) (mem.).

71. *See* Statement of Facts, United States v. Franklin, Crim. Nos. 1:05CR225, 1:05CR421 (E.D. Va. Oct. 5, 2005); Superseding Indictment, United States v. Franklin, Crim. No. 1:05CR225 (E.D. Va. Aug. 4, 2005).

72. *See* Superseding Indictment, *supra* note 71; Howard Kurtz, *Media Tangled in Lobbyist Case: Press Freedoms Debated After Wiretapping of Call to Reporter*, WASH. POST, Nov. 12, 2005, at A10.

said he acted out of frustration with U.S. policy toward Iran.[73] Rosen and Weissman contend they were merely engaged in the ordinary business of Washington.[74]

The Rosen and Weissman prosecutions raise two points that are relevant to the debate about a shield law for journalists. First, they demonstrate that the government is willing, and perhaps able, to prosecute recipients of classified leaks, potentially including reporters. "If this is a conspiracy, then reporters are in widespread violation of the Espionage Act."[75] Like the AIPAC lobbyists, journalists cultivate sources in positions to have access to information they want and sometimes promise confidentiality to get it.[76] In his concurring opinion in the *Pentagon Papers* case, Justice White warned that journalists were exposed to prosecution under his interpretation that 18 U.S.C. §§ 793, 797, and 798 (all provisions of the Espionage Act) enable the government to prosecute journalists for "criminal publication."[77]

In the Rosen and Weissman prosecutions, U.S. District Judge T.S. Ellis similarly concluded that under § 793, "the government can punish those outside of the government for the unauthorized receipt and deliberate retransmission of information relating to the national defense" without violating the First Amendment.[78] From the perspective of reporters, therefore, the Rosen and Weissman prosecutions underscore the urgent need for a federal shield law.

Second, from the government's perspective, the Rosen and Weissman prosecutions illustrate that classified information does not always flow from high-level officials to traditional journalists, as was the case in the Libby prosecution and the contempt citation of Miller. Leaks of national security information may come from mid- or low-level government employees to middlemen or nontraditional publishers.[79] For example, Franklin gave Rosen and Weissman

73. Lee, *supra* note 3, at 1482–83, 1485.

74. *Id.* at 1512. To make this point, Rosen and Weissman have been allowed to subpoena fifteen high-ranking current and former government officials to testify at trial, including former Secretary of State Condoleezza Rice, former National Security Advisor Stephen Hadley, and former Deputy Assistant to the President and Deputy National Security Advisor Elliott Abrams. *See* United States v. Rosen, 520 F. Supp. 2d 802, 804, 808, 814–15 (E.D. Va. 2007) (mem.).

75. Lee, *supra* note 3, at 1518.

76. *Id.*

77. N.Y. Times Co. v. United States (*Pentagon Papers*), 403 U.S. 713, 733–37 (1971) (per curiam) (White, J., concurring); *see also* Goldsmith, *supra* note 56, at 32–34 (arguing that reporters who revealed a classified program tapping phone lines domestically without warrants could be prosecuted under § 798, which criminalizes publication of "communication intelligence").

78. United States v. Rosen, 445 F. Supp. 2d 602, 636–37 (E.D. Va. 2006) (mem.).

79. *See* Lee, *supra* note 3, at 1482–83.

classified information about a draft presidential directive outlining a new U.S. posture toward Iran, an avowed enemy of Israel.[80] Rosen, in turn, allegedly distributed the information to Israeli diplomats and American reporters, some of whom mentioned the material in stories.[81] How damaging those leaks were to national security, as in most cases, is debatable. But the government's concern about classified leaks gains added credence from evidence that individuals with agendas not necessarily in line with the American public's are able to coax government sources into providing classified information that may be used to achieve those ends.

Rather than attempting to entice mainstream journalists to use their information, lobbyists today might give it to bloggers for publication or post the material themselves. The political, financial, or diplomatic agendas at work in future cases could be more hostile to American interests. The U.S. government's opposition to a federal shield law, therefore, appears more justifiable where the concern involves classified leaks to "less reputable entities or individuals who nevertheless would still qualify as 'covered persons'" under the House bill,[82] or to individuals who adopt some "trappings of journalism" under the Senate bill but are not yet known to be tied to terrorist or criminal organizations.[83] The stakes, therefore, are especially high for the mainstream press, nontraditional journalists, and the government when the debate about a shield law intersects with justifiable national security considerations.

II. BLOCKING THE SHIELD

The House and Senate took significantly different approaches to their shield proposals. The House bill, which that chamber passed on October 16, 2007, by a vote of 398–21, provides a very broad privilege but defines those who may claim it by whether they earn substantial money from their journalistic activities.[84] The Senate bill, which failed to pass a procedural hurdle on July 30, 2008, would provide a narrower privilege but does not limit its application to

80. *Rosen*, 445 F. Supp. 2d at 609; Kurtz, *supra* note 72.

81. *Rosen*, 445 F. Supp. 2d at 609; Kurtz, *supra* note 72.

82. Letter from Brian A. Benczkowski, Principal Deputy Assistant Att'y Gen., U.S. Dep't of Justice, to Lamar S. Smith, Ranking Member, Comm. on the Judiciary, U.S. House of Representatives 8 (July 31, 2007), *available at* http://www.docstoc.com/docs/720041/Department-of-Justice-s-Views-Letter-on-the-Proposed-Manager-s-Amendment-to-HR-the-Free-Flow-of-Information-Act-July---Media-Shield [hereinafter Benczkowski Letter].

83. Letter from Michael B. Mukasey, Att'y Gen., U.S. Dep't of Justice, & J.M. McConnell, Dir. of Nat'l Intelligence, to Harry Reid, Majority Leader, U.S. Senate, & Mitch McConnell, Minority Leader, U.S. Senate 2 (Apr. 2, 2008), *available at* http://www.usdoj.gov/archive/opa/mediashield/ag-dni-ltr-s2035-040208.pdf.

84. Free Flow of Information Act, H.R. 2102, 110th Cong. §§ 2, 4(2) (as passed by House, Oct. 16, 2007); *see* 153 CONG. REC. H11,602–03 (2007).

professional journalists.[85]

Specifically, House Bill 2102 would cover "a person who regularly gathers, prepares, collects, photographs, records, writes, edits, reports, or publishes news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public for a substantial portion of the person's livelihood or for substantial financial gain."[86] The bill also defines journalism in terms of those activities.[87] The bill excludes foreign agents, members of terrorist organizations, and people with whom transactions are prohibited by executive order because of their financial support for terrorists.[88] Senate Bill 2035 would allow anyone regularly engaging in journalism (defined in the same terms as House Bill 2102) to claim the privilege.[89] While the House bill limits the privilege to professionals, the Senate bill does not.[90] In that respect, the Senate bill likely would cover many bloggers and "citizen journalists" who could not claim the privilege offered by the House.

As a general rule, House Bill 2102 would prevent federal courts and other federal entities with subpoena power from compelling testimony or production of documents from a "covered person" that are "related to information obtained or created . . . as part of engaging in journalism."[91] To overcome that privilege, the government or civil litigants must show that they have "exhausted all reasonable alternative sources."[92] In civil cases, parties must also show from another source that the testimony or documents sought are critical to resolution of the matter.[93] In criminal cases, parties must show that the testimony or documents are critical to the investigation, prosecution, or defense.[94] In a criminal case, the government also must show that there are reasonable grounds to believe that a crime occurred.[95]

The burden under House Bill 2102 would increase when testimony might reveal confidential sources or information. In that case, testimony also must be necessary to prevent an act of terrorism, to identify the perpetrator of terrorism, or to prevent

85. Free Flow of Information Act, S. 2035, 110th Cong. §§ 2–5, 8(2) (as reported by S. Comm. on the Judiciary, Oct. 22, 2007); *see* 154 CONG. REC. S7721 (2008).

86. H.R. 2102 § 4(2).

87. *Id.* § 4(5).

88. *Id.* § 4(2).

89. S. 2035 § 8(2), (5).

90. *Compare* H.R. 2102 § 4(2), *with* S. 2035 § 8(2). For a detailed analysis of the proposed shield laws, see COHEN & RUANE, *supra* note 8, at 7–12.

91. H.R. 2102 § 2(a).

92. *Id.* § 2(a)(1).

93. *Id.* § 2(a)(2)(B).

94. *Id.* § 2(a)(2)(A)(ii).

95. *Id.* § 2(a)(2)(A)(i).

imminent death or significant bodily harm.[96] Disclosure also could be required to identify someone who has divulged a trade secret, individually identifiable health information, or private consumer information.[97] Finally, the government may overcome the privilege when the information is necessary to identify "in a criminal investigation or prosecution a person who without authorization disclosed properly classified information and who at the time of such disclosure had authorized access to such information," if the unauthorized disclosure "has caused or will cause significant and articulable harm to the national security."[98] If the conditions for any exception are met, the court then must determine whether "the public interest in compelling disclosure . . . outweighs the public interest in gathering or disseminating news or information."[99]

While House Bill 2102 would allow journalists to avoid testifying about nonconfidential information unless the government or a civil litigant could satisfy the conditions of an exception,[100] Senate Bill 2035 would only extend a privilege to confidential information and sources.[101] The Senate bill, therefore, has a much narrower scope. Otherwise, Senate Bill 2035 is substantially similar to House Bill 2102 in its tests for overcoming the privilege and forcing disclosure.[102] Senate Bill 2035, however, exempts from the privilege "any protected information that is reasonably necessary to stop, prevent, or mitigate a specific case of . . . death, . . . kidnapping, . . . substantial bodily harm,"[103] or terrorist activity.[104] (The original Senate bill also raised the standard for compelled disclosure when the criminal offense is the leak itself, but this language was changed in committee.)[105] Both measures exclude foreign agents and terrorists from claiming the privilege.[106] Both bills also would cover the editors and associates of covered

96. *Id.* § 2(a)(3)(A)–(B).
97. *Id.* § 2(a)(3)(C).
98. *Id.* § 2(a)(3)(D).
99. *Id.* § 2(a)(4).
100. *See id.* § 2(a).
101. Free Flow of Information Act, S. 2035, 110th Cong. §§ 2(a), 7, 8(6) (as reported by S. Comm. on the Judiciary, Oct. 22, 2007).
102. *Compare* S. 2035 §§ 2–5, *with* H.R. 2102 § 2.
103. S. 2035 § 4.
104. *Id.* § 5.
105. *Compare* Free Flow of Information Act, S. 2035, 110th Cong. § 2(a)(2)(A)(iii) (as introduced, Sept. 10, 2007) (requiring "significant, clear, and articulable harm to the national security"), *with* Free Flow of Information Act, S. 2035, 110th Cong. § 2(a)(2)(A)(iii) (as reported by S. Comm. on the Judiciary, Oct. 22, 2007) (requiring only "significant and articulable harm to the national security").
106. H.R. 2102 § 4(2); Free Flow of Information Act, S. 2035, 110th Cong. § 8(2)(C) (as reported by S. Comm. on the Judiciary, Oct. 22, 2007); *see also* AM. SOC'Y OF NEWSPAPER EDITORS, ISSUE-BY-ISSUE COMPARISON OF H.R. 2102 WITH S. 2035, at 1 (2007), http://www.asne.org/files/S2035_HR2102.pdf.

persons,[107] and both measures would allow third-party communications providers, such as telephone companies and Internet-service providers, to assert the privilege when asked to divulge a covered person's electronic records.[108]

Despite the other differences mentioned above, the fundamental distinctions between the two bills are whether nonprofessionals who may not satisfy the financial requirements of House Bill 2102 are covered and whether the privilege can be asserted to avoid testifying about nonconfidential information.[109] Judging from the two surveys of subpoenas to reporters in 2001 and 2006, the majority of subpoenas are not related to confidential information or sources.[110] The House bill, therefore, likely would deprive civil litigants, prosecutors, and defense attorneys of a great deal of nonconfidential information unless they can show that it is critical to their case, that it cannot be obtained any other way, and that disclosure outweighs the effect on newsgathering. The Senate bill would have a similar effect only when confidential information is involved. Federal agencies, including the Department of Justice, have argued that both measures would damage criminal defendants' Sixth Amendment rights, for example.[111] The merits and pitfalls that these bills pose in most federal civil and criminal proceedings are beyond the scope of this Comment, but privileges recognized by some federal courts already treat subpoenas to traditional journalists with special care when deciding whether to quash them.[112]

A. Agency Alarms

Agencies in the executive branch, including the Department of Justice, the Department of the Treasury, the Department of Energy, and the Office of the Director of National Intelligence, complained publicly and often about both the House and Senate bills.[113] Although some agencies expressed concerns about matters such as a criminal defendant's Sixth Amendment right to subpoena witnesses

107. H.R. 2102 § 4(2); S. 2035 § 8(2)(B).

108. H.R. 2102 §§ 3, 4(1); S. 2035 §§ 6, 8(1); *see also* AM. SOC'Y OF NEWSPAPER EDITORS, *supra* note 106, at 4–5.

109. *See supra* notes 86–90, 100–01 and accompanying text; *see also* AM. SOC'Y OF NEWSPAPER EDITORS, *supra* note 106, at 1–2.

110. *See* REPORTERS COMM. FOR FREEDOM OF THE PRESS, *supra* note 49, at 9; Jones, *supra* note 12, at 643.

111. *See, e.g.*, Letter from Michael B. Mukasey, Att'y Gen., U.S. Dep't of Justice, & J.M. McConnell, Dir. of Nat'l Intelligence, to Harry Reid, Majority Leader, U.S. Senate, & Mitch McConnell, Minority Leader, U.S. Senate 6 (Aug. 22, 2008), *available at* http://www.usdoj.gov/archive/opa/mediashield/ag-odni-letter082208.pdf [hereinafter Mukasey & McConnell Letter].

112. *See supra* notes 33–41 and accompanying text.

113. *See* U.S. Dep't of Justice, Latest on Media Shield, http://www.usdoj.gov/archive/opa/media-shield.htm (last visited Apr. 21, 2009) (providing access to letters from various federal agencies).

on his behalf,[114] it is safe to say that the Bush administration's overarching focus was on the legislation's effect on investigations of classified leaks and terrorism.[115]

Among the government's numerous concerns about both bills were restrictions on the limited circumstances under which the government could compel disclosure, requirements that the material be properly classified, the "significant and articulable harm" standard for compelling disclosure of sources of classified material, the application of a balancing test providing judicial discretion to block forced disclosure, and potential effects on other security-related laws.[116] The agencies objected to the application of the privilege in the Senate bill to "essentially anyone who disseminates information of any public interest on a regular basis."[117] The agencies denounced the House bill's definition of "covered persons" on the basis of financial income as inadequate to prevent part-time bloggers and social-networking sites, where classified or criminal information may be posted, from claiming the privilege.[118] On the other hand, government lawyers also contend that excluding people or Internet sites that do not earn a sufficient income would result in constitutional challenges when they are served with subpoenas.[119] Therefore, the government argues, adequately defining who may invoke a reporter's privilege may be impossible.[120]

114. *See, e.g.*, Benczkowski Letter, *supra* note 82, at 2.

115. "[I]t is likely that the legislation will encourage more leaks of classified information by giving leakers . . . a formidable shield behind which they can hide. . . . Efforts to safeguard national security and bring to justice those who have breached it must not be subjected to such unreasonable burdens and standards." OFFICE OF MGMT. & BUDGET, *supra* note 10, at 1. Attorney General Michael B. Mukasey and National Intelligence Director J.M. McConnell warned that they would recommend a presidential veto of the Senate legislation because "by undermining the investigation and deterrence of unauthorized leaks of national security information to the media, this legislation will gravely damage our ability to protect the Nation's security." Mukasey & McConnell Letter, *supra* note 111, at 1.

116. For representative discussions of government complaints about House Bill 2102 and Senate Bill 2035, see Benczkowski Letter, *supra* note 82; Mukasey & McConnell Letter, *supra* note 111.

117. Mukasey & McConnell Letter, *supra* note 111, at 5.

118. *See, e.g.*, Benczkowski Letter, *supra* note 82, at 12. Critics also assail broad shield proposals from the perspective of mainstream journalists on the grounds that

> so many divergent groups of persons could be called journalists that the protection of the privilege would be dissolved. To the most neutral observer, it should be clear that allowing classes of persons other than journalists to use the privilege may sap the strength out of these provisions, which help keep journalists out of court.

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, 101 (2002).

119. *See, e.g.*, Benczkowski Letter, *supra* note 82, at 13–14.

120. *See, e.g.*, *id.* at 14.

Although these objections came in direct response to legislative proposals for some type of shield law, concerns about protecting journalists from forced disclosure are not new. According to former Attorney General Janet Reno, classified leaks have caused the losses of intelligence sources and methods, damaged diplomatic efforts, and "hampered some of our most sensitive espionage and terrorism investigations and . . . jeopardized our prosecutions."[121] Nevertheless, successive Republican and Democratic administrations have "sought to avoid the constitutional and public policy questions that would be posed by subjecting the media to compulsory process or using sensitive techniques against members of the media."[122]

The federal government has tolerated leaks to journalists for decades and has only recently targeted them in leak investigations.[123] Since 1969, for example, the Department of Justice has required intelligence agencies to answer eleven specific questions, which serve a "screening function," about the leaked material and employees with lawful access to it before the Department would authorize a criminal investigation of classified leaks.[124] Justice Department policy since the 1970s also has barred the Department from issuing subpoenas to members of the media without specific approval from the Attorney General.[125] Some critics have argued that a federal shield law would merely codify the Department of Justice's own guidelines.[126]

Because the government has been so reluctant to subpoena journalists, despite their lack of First Amendment protection under *Branzburg*, many of the government's objections to the proposed shield legislation would be relevant only in the rare cases that the

121. *Unauthorized Disclosure of Classified Information: Hearing Before the S. Select Comm. on Intelligence*, 106th Cong. 2 (2000) (statement of Janet Reno, Att'y Gen. of the United States), *available at* http://www.fas.org/sgp/othergov/renoleaks.pdf [hereinafter *Hearing*].

122. *Id.* at 7–8.

123. Adam Liptak, *After Libby Trial, New Era for Government and Press*, N.Y. TIMES, Mar. 8, 2007, at A18.

124. *Hearing*, *supra* note 121, at 4–5.

125. *Id.* at 7; 28 C.F.R. § 50.10(e) (2008); *see also Reporters' Privilege Legislation: Preserving Effective Federal Law Enforcement: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 106 (2006) (statement of Paul J. McNulty, Deputy Att'y Gen. of the United States) ("The Department has not changed its policy or approach to investigating leaks.").

126. Tucker & Wermiel, *supra* note 16, at 1335 ("H.R. 2102 merely codifies existing Department of Justice regulations, with three changes: it makes them mandatory, it applies them to all cases in federal court, and it requires a judge and not the attorney general to decide whether the shield applies."). The Department contends that the proposals would have a significant effect in shifting the process from one in which the Department has discretion to one in which discretion lies with the judiciary. Benczowski Letter, *supra* note 82, at 14.

government would seek to compel testimony in the first place.[127] The strongest possible shield law would therefore affect the government's efforts to determine the sources of only a small fraction of the leaks to mainstream journalists that occur routinely.

B. Everyday Risks

From the perspective of journalists, the subpoenas issued to reporters in the Libby case demonstrate that Department of Justice policies discouraging pursuit of information from journalists can be illusory because they are discretionary and do not apply to special prosecutors;[128] it was a special prosecutor who subpoenaed testimony and documents from Miller, other reporters, and news organizations.[129] Furthermore, the prosecutions of Rosen and Weissman are premised on the government's ability to charge recipients of classified information with crimes under the Espionage Act, which has caused press advocates to fear that journalists will be next.[130] Journalists also face the more common threat of forced disclosure in civil cases, in which the consequence of noncompliance can be jail.[131] Even when journalists are determined to keep their pledges of confidentiality in the face of jail threats, they increasingly operate in a corporate and technological environment where it is more difficult to protect sources if information about them exists in a reporter's computer instead of a notebook, as was once the case.[132] The employer may now opt to divulge the information from its computer systems over the reporter's objections.[133]

The government's numerous arguments against specific provisions of both the House and Senate bills, while deserving attention, amount to protecting a status quo in which the

127. The actual incidence of federal subpoenas is a matter of debate. The Department said in 2007 that the Attorney General had approved nineteen subpoenas to reporters seeking confidential source information since 1992. Benczowski Letter, *supra* note 82, at 3. The Department, however, issued far more subpoenas seeking notes and other materials; tallies also do not include subpoenas issued by special prosecutors. Tucker & Wermiel, *supra* note 16, at 1320. The Department of Justice does not keep records concerning subpoenas issued by special prosecutors. Benczkowski Letter, *supra* note 82, at 3 n.2.

128. Tucker & Wermiel, *supra* note 16, at 1305–07.

129. Lee, *supra* note 3, at 1457–59.

130. Kurtz, *supra* note 72.

131. *See, e.g.*, Lee v. Dep't of Justice, 413 F.3d 53 (D.C. Cir. 2005); Hatfill v. Mukasey, 539 F. Supp. 2d 96 (D.D.C. 2008); LUCY A. DALGLISH ET AL., REPORTERS COMM. FOR FREEDOM OF THE PRESS, CONFIDENTIALITY COMPLICATIONS: HOW NEW RULES, TECHNOLOGIES AND CORPORATE PRACTICES AFFECT THE REPORTER'S PRIVILEGE AND FURTHER DEMONSTRATE THE NEED FOR A FEDERAL SHIELD LAW 8 (2007).

132. *See* DALGLISH ET AL., *supra* note 131, at 7–8.

133. *Id.* This type of divulgence occurred in the Libby case when *Time*, after exhausting appeals in its effort to quash a subpoena to the company for relevant materials, turned over a reporter's electronic notes despite his objections. *Id.* at 8–9.

government avoids compelling disclosure from the media but does not want matters complicated in the rare instances that the Attorney General decides compulsion is warranted. The government's wish for such stasis pales when compared to the risks that journalists face for nondisclosure under more common circumstances, such as in civil cases or investigations conducted by special prosecutors who need not seek the Attorney General's approval,[134] and the damage to the newsgathering process that results from chilled relations between reporters and sources.[135]

The government's concerns about a shield law have the most traction, however, with respect to whom such a law would cover. That issue deserves heightened scrutiny where classified information is concerned because the potential ramifications are far-reaching and could threaten many lives. The prospect of extending the privilege to anyone who might publish classified information without regard to background, motives, or deliberative processes raises questions beyond the scope of existing policies that restrict the use of subpoenas when the mainstream press is involved.

In a concurring opinion upholding Miller's contempt citation, Judge Sentelle referred to Supreme Court precedent holding that freedom of the press is a "fundamental personal right" that encompasses a newspaper and pamphleteer alike.[136] Judge Sentelle asked if the egalitarian vision of press freedom meant that, to find a common-law reporter's privilege, as the court was asked to do in that case, it must cover media giants as well as "the stereotypical 'blogger' sitting in his pajamas at his personal computer posting on the World Wide Web his best product to inform whoever happens to browse his way."[137] Judge Sentelle further asked if drawing a distinction would be consistent with the notion of the free press as a personal right.[138] Answering that question with another question,

134. Civil litigants are not constrained by Justice Department policies and have been "increasingly willing to take on the press." Lee, *supra* note 3, at 1472. "Unless a journalist is independently wealthy, and few are, lengthy jail sentences and hefty fines certainly can discourage reporters from printing stories derived from confidential sources likely to be sought by prosecutors or civil litigants." Tucker & Wermiel, *supra* note 16, at 1323.

135. Alexander, *supra* note 118, at 103 ("[C]ompelled disclosure would cause news sources to avoid future contact with news employees, breaking the trust between journalists and society, and jeopardizing the free flow of information from source to reporter.").

136. *In re* Grand Jury Subpoena, Judith Miller, 438 F.3d 1141, 1156 (2006) (Sentelle, J., concurring) (quoting Branzburg v. Hayes, 408 U.S. 665, 704 (1972)).

137. *Id.* The debate about who is a journalist for the purposes of the First Amendment and ordinary relations between government and "the press" is taking place in more mundane settings as well. *See, e.g.*, Sewell Chan, *N.Y.P.D. Is Sued over Denial of Press Credentials,* N.Y. TIMES ONLINE, Nov. 12, 2008, http://cityroom.blogs.nytimes.com/2008/11/12/nypd-is-sued-over-denial-of-press-credentials (describing a lawsuit by nontraditional "journalists").

138. *Judith Miller*, 438 F.3d at 1157 (Santelle, J., concurring).

the judge took the next logical step:

> If so, then would it not be possible for a government official wishing to engage in the sort of unlawful leaking under investigation in the present controversy to call a trusted friend or political ally, advise him to set up a web log (which I understand takes about three minutes) and then leak to him under a promise of confidentiality the information which the law forbids the official to disclose?[139]

Put another way, could a person with government contacts and an agenda to push stories about U.S. policies toward another country, such as Iran, turn to like-minded bloggers to publish classified information they obtain? Would that be easier than enticing reporters at established media organizations with verification standards and other checks against manipulation? If so, is that worth considering in the context of a reporter's shield?

It is clear that the Bush administration would not have embraced a legislative proposal to provide a meaningful statutory reporter's privilege, but the issue now falls to a new administration and Congress. The concern that most directly blocked the shield law from passage was its treatment of classified leaks. That issue is worth added consideration, especially in the context of whom the shield would cover. Terrorism is a reality. Global threats have increased in recent years rather than declined with the end of the Cold War. More people are hunting for information that can be published faster, easier, and with greater reach than ever before. The government is manufacturing more secret documents for them to find. And not all sources act with altruistic and selfless motives when leaking information. For those reasons, and others discussed in Part III, raising the standard for who may claim the reporter's privilege when classified information is involved would be justified.

III. "BAGGING THEIR PREY"

Reporters, the public, and intelligence agencies would benefit from a shield law that treats confidential sources of damaging classified information differently than sources of other materials before a determination is made about whether the person claiming the privilege is covered by it. Such a system, however, must minimize concerns about impermissible press "licensing" if it is to pass constitutional muster.

A. The Nature of Classified Information

Some observers criticized the Free Flow of Information Act as originally introduced because it defined "covered persons" in terms

139. *Id.*

of their employment with an entity that distributes information.[140] Others have warned that requiring membership in a media organization, formal training, or credentials to determine who is truly a "journalist" would be much too close to licensing.[141] Should legislation like House Bill 2102 become law, that argument seems likely to arise and challenge the measure's requirement of earning substantial income from the practice of "journalism" to claim the privilege; a pay stub is literally the ticket to joining the press club.

Nevertheless, *Branzburg* offers significant support for the proposition that Congress has wide latitude to design a privilege to protect confidential sources from forced disclosure even in a grand-jury setting—but not as a method of providing government approval for publishing or newsgathering. State legislatures and Congress may "fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned."[142] If the evil to be addressed is the release of classified information that demonstrably damages national security, for example, then Congress should be able to design a privilege that distinguishes that concern from others associated with a shield law.[143] The nature of classified information warrants such a distinction.

Journalists often grant confidentiality because their sources would face "serious personal, professional, and possibly legal consequences if their identities were discovered."[144] Unlike most information passed to reporters under confidentiality agreements, however, the act of leaking classified information is a crime for

140. *See, e.g.*, Paul Brewer, Note, *The Fourth Estate and the Quest for a Double Edged Shield: Why a Federal Reporters' Shield Law Would Violate the First Amendment*, 36 U. MEM. L. REV. 1073, 1100–06 (2006) (arguing that Congress cannot pass a shield law without violating the First Amendment because the legislature would assume "the role of press guardian" and thus threaten the independence of the press and its ability to perform watchdog duties); *see also* 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, 1398 (2003) (noting that "there is virtually no support for basing shield law protection on a specific institutional form or news media entity," because excluding some media and including others would be "'reminiscent of the abhorred licensing system of Tudor and Stuart England'" (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 801 (1978) (Berger, C.J., concurring))).

141. Papandrea, *supra* note 28, at 574–75.

142. Branzburg v. Hayes, 408 U.S. 665, 706 (1972).

143. The Third Circuit has limited the privilege to people involved in "investigative reporting"; this limit has not been declared to be unconstitutional press licensing. *In re* Madden, 151 F.3d 125, 130 (3d Cir. 1998) (holding that "individuals are journalists when engaged in investigative reporting, gathering news, and have the intent at the beginning of the news-gathering process to disseminate this information to the public"); *see also* Papandrea, *supra* note 28, at 571. All journalists, however, benefit from the privilege to protect confidential sources. Alexander, *supra* note 118, at 123.

144. Papandrea, *supra* note 28, at 536.

which both the leaker and, as the Rosen and Weissman case shows, the receiver can be prosecuted. Forced disclosure of sources of such classified information would result in journalists bearing responsibility for the sources' prosecution because the act of leaking is itself illegal. Moreover, forced disclosure could raise Fifth Amendment questions since it is possible that the disclosure could provide evidence for the reporter's own prosecution as a recipient of classified material. Judge Tatel, in his concurrence affirming the contempt finding against Miller, pointed out that leak cases also require the government to investigate itself and, "if leaks reveal mistakes that high-level officials would have preferred to keep secret, the administration may pursue the source with excessive zeal, regardless of the leaked information's public value."[145] That may be true even when special prosecutors are appointed because they feel obliged to justify their appointment by "bagging their prey."[146]

B. Leaks Are Not Created Equal

All of these issues are complicated by the methods used to classify information and the fact that "no general criminal statute penalizes the unauthorized disclosure of classified information."[147] Every decision to classify a document makes disclosure of additional information illegal—and there were 4182 government employees in 2007 authorized to classify original documents.[148] Whether a leak recipient had reason to know the information was classified, whether it was properly classified, and ultimately whether the leak may actually damage national security are questions not patently answered by the information's classified status.[149] The government contends that a classification of "Top Secret," "Secret," or "Confidential" means that a leak of such information "by definition constitutes harm to the national security."[150] Courts, however, have recognized the subjective nature of such designations.[151]

145. *In re* Grand Jury Subpoena, Judith Miller, 438 F.3d 1141, 1176 (D.C. Cir. 2006) (Tatel, J., concurring in the judgment).

146. *Id.*

147. Lee, *supra* note 3, at 1466.

148. OPENTHEGOVERNMENT.ORG, *supra* note 57, at 6–7. That is the largest number of employees authorized to make original classification decisions since 1996. *Id.* at 7.

149. Executive Order 13,292 establishes procedures for classifying information, including duration of classification, classification levels, and prohibitions against classification. For example, § 1.7 bars classification to conceal violations of law; prevent embarrassment to a person, organization, or agency; restrain competition; or prevent or delay the release of information that does not require protection in the interest of national security. Exec. Order No. 13,292 § 1.7(a), 68 Fed. Reg. 15,315, 15,318 (Mar. 25, 2003).

150. Mukasey & McConnell Letter, *supra* note 111, at 3 (emphasis omitted).

151. *See, e.g.*, N.Y. Times Co. v. United States (*Pentagon Papers*), 403 U.S. 713, 719 (1971) (per curiam) (Black, J., concurring) ("The word 'security' is a

Representative Goss of the House Intelligence Committee certainly did not think all leaks were created equal when he resisted calls for an investigation of the Plame affair.[152]

Moreover, the standard for a violation of 18 U.S.C. § 793 for leakers and the recipients of leaks is not that the information is classified but rather that it is "information relating to the national defense."[153] The U.S. Supreme Court has never ruled on a § 793(d) or § 793(e) case, but the phrase "information relating to the national defense" in a related espionage statute has withstood Supreme Court scrutiny, as have other aspects of § 793 in a handful of circuit decisions.[154] The Espionage Act has been used to prosecute leakers just three times, not including the ongoing prosecutions of Rosen and Weissman.[155] Other statutes also may be applied to leak cases, such as the Intelligence Identities Protection Act of 1982, but they have never been invoked.[156] And while Judge Ellis in the Rosen and Weissman prosecutions made no distinctions between the lobbyists and other recipients of classified leaks with respect to § 793,[157] Justices Black and Douglas argued in the *Pentagon Papers* case that § 793 "does not apply to the press."[158] Who may be prosecuted under the Espionage Act for leaked classified material is therefore unsettled territory.

The very nature of classified information, however, may indeed justify heightened concern about its release compared to the considerations involved in other criminal or civil matters where parties seek the identity of a reporter's source. Leaks may result in the deaths of covert CIA agents, as occurred in the 1970s and 1980s when Philip Agee went on an anti-CIA spree.[159] Leaks of plans for

broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment."); *Judith Miller*, 438 F.3d at 1174 (Tatel, J., concurring in the judgment) ("[I]n some cases a leak's value may far exceed its harm, thus calling into question the law enforcement rationale for disrupting reporter-source relationships.").

152. *See supra* notes 1–2 and accompanying text.

153. 18 U.S.C. § 793(d)–(e) (2006).

154. United States v. Rosen, 445 F. Supp. 2d 602, 613 (E.D. Va. 2006) (mem.).

155. Lee, *supra* note 3, at 1477. The Rosen and Weissman prosecutions under § 793 are especially notable in this context because while the previous three prosecutions were of "insiders" in a position of trust when they leaked classified information, these proceedings represent a move by the government to begin prosecuting "outsiders" who were not in such positions of trust. *See id.* at 1512–15.

156. *Id.* at 1467.

157. *See id.* at 1513–14.

158. N.Y. Times Co. v. United States (*Pentagon Papers*), 403 U.S. 713, 720–22 (1971) (per curiam) (Douglas, J., concurring).

159. Robert W. Bivins, *Silencing the Name Droppers: The Intelligence Identities Protection Act of 1982*, 36 FLA. L. REV. 841, 843–44 (1984).

weapons of mass destruction or military action could cause immeasurable harm in terms of national security and lives.

On the other hand, classified leaks have raised questions of extraordinary public interest about the government's legal and moral authority to conduct domestic warrantless wiretapping, maintain secret CIA prisons for interrogation of suspected terrorists held outside the American judicial system, monitor financial transactions through international banking systems, and streamline the military's authorization for covert strikes against terrorists in many foreign countries.[160]

Eliminating all classified leaks by zealously prosecuting all leakers and their recipients is no more in the public's interest than keeping no secrets at all. The objective should be to establish a shield under which leaks that do occur are at least handled with the deliberativeness due such potentially damaging information. For example, the *New York Times* delayed publication of its story revealing the National Security Agency wiretapping program for more than a year to conduct additional reporting after the Bush administration raised objections, which ultimately led to the removal of information that officials said could be useful to terrorists.[161] Similarly, the *Washington Post* agreed to remove information from its story about secret CIA prisons that the Bush administration argued could jeopardize national security.[162] The proposed shield legislation raises questions about how to encourage such balancing while still accommodating the growing corps of bloggers and citizen journalists operating on many journalistic fronts who might also obtain classified information of public interest but who may be less inclined to weigh the consequences.

IV. HANDLE WITH CARE

Executive-branch concerns about the shield law's treatment of classified information can be addressed to a reasonable extent by handling leaks of national security information differently than information related to other criminal or civil matters. That can be accomplished without "licensing" journalists and while reassuring the public that the law is not designed to protect wanton and reckless release of potentially damaging state secrets. Moreover, distinctions can be made that allow any "journalist," however

160. *But see generally* Goldsmith, *supra* note 56. Goldsmith argues that exposure of such programs by the press "made it easier for terrorists to plan and to execute attacks, and in that sense endangered the physical safety of Americans." *Id.* at 35.

161. Paul Farhi, *At the Times, a Scoop Deferred*, WASH. POST, Dec. 17, 2005, at A7. *See generally* ERIC LICHTBLAU, BUSH'S LAW: THE REMAKING OF AMERICAN JUSTICE (2008) (describing decisions by the *New York Times* about when and whether to reveal classified programs).

162. Farhi, *supra* note 161.

defined, to protect sources in all other cases while elevating the shield standard for only the small number of instances involving classified material. The result would be to mitigate some of the valid concerns that intelligence agencies have raised against a meaningful shield law. This Part suggests how that could be accomplished.

A. A New Approach to the Federal Privilege

Assume that classified information has been leaked to a person who publishes or broadcasts it. The exact nature of the information, where it was published, by whom, and in what medium is not important for this analysis. The government, however, launches an investigation, which fails to identify the leaker. Under a shield system that distinguishes classified information from all other information for the purposes of determining whether a "journalist" may invoke the statutory privilege to keep a source confidential, the government logically must show a court that it is dealing, first, with classified information. Given the previously discussed recognition that the classification process is highly subjective, may be abused, and is routinely ignored by leakers operating on behalf of the executive and legislative branches,[163] the threshold for forced disclosure cannot rationally be as low as a mere showing that the information was indeed a protected government secret. The system should include a check for classified information that is in some way damaging to national security to avoid forcing journalists to disclose sources of information that is classified but that lacks sufficient national security value to outweigh the damage of forced disclosure to freedom of the press.

After the government makes the requisite showing that the information is properly classified and sufficiently damaging to national security, the burden should shift to the person claiming the privilege. This test should be designed to alleviate concerns about overly broad coverage of the shield but without resorting to impermissible categorizations that distinguish state-recognized "journalists" who have credentials or affiliations with approved organizations. Even with the showing required to claim the privilege, the protection cannot be absolute. The government must have a means of obtaining the source information in the direst of circumstances, as determined by a court. The threshold for forcing disclosure in such instances, however, should be high.

Many aspects of this proposed shield system—such as verification of proper classification, a showing that the material is demonstrably damaging to national security, and a balancing of the harm of confidentiality against the harm of forced disclosure—are present in House Bill 2102 and Senate Bill 2035. The government

163. *See supra* text accompanying notes 55–59, 70–74, 123, 147–52.

argues that such requirements are unreasonable given the inherent nature of classified information to be damaging to national security if released and that the shift of discretion from the executive branch to the judiciary in making such determinations would imperil national security and prosecutions for unlawful behavior.[164] The government, however, is not unaccustomed to demonstrating that information is properly classified; such a showing is required under the Freedom of Information Act when a party seeks the public release of classified information.[165] The Classified Information Procedures Act also establishes procedures for handling classified information in federal courts.[166] The shift of discretion from the executive branch to the judiciary may be objectionable to the executive branch, but it by no means suggests that courts are incapable of properly analyzing the information for its potential harm.

The primary difference between the House and Senate bills and the approach suggested by this Comment is that here the inquiries about classification and harm would be conducted before a decision about whether a journalistic privilege applies. That sequence would have several advantages. First, it would allow a broad privilege to apply presumptively to all "journalists" unless the government alleges that classified information is involved.[167] Bifurcating the privilege would also justify lowering slightly the very stringent standards under the House and Senate bills for compelled disclosure of information and sources that are not related to national security concerns while allowing the strict standard for forced disclosure to remain in place for national security sources. Such differences are justified by the potential for criminal prosecution of leakers and recipients that may result from the act of leaking classified information. Professional and amateur journalists, "citizen journalists," and bloggers then could operate in most civil and criminal contexts under a system in which the threshold for claiming the privilege may be lower than the threshold when national security secrets are involved.

Such a system would allow the government to pursue leak investigations more easily when it makes the requisite showing of proper classification and potential damage to national security and

164. *See supra* text accompanying notes 115–16, 150.

165. 5 U.S.C. § 552(b)(1)(A)–(B) (2006) (exempting from access matters that are to be kept secret in the interest of national security and "are in fact properly classified").

166. Tucker & Wermiel, *supra* note 16, at 1337.

167. The merits of the more broadly applicable privilege embodied by Senate Bill 2035 versus the privilege in House Bill 2102 defined by a person's income from the practice of journalism are beyond the scope of this Comment. It is the author's hope, however, that alleviating concerns on the national security front would justify a shield of the broadest possible applicability with respect to other criminal and civil matters.

when the leak recipient fails to meet the criteria for invoking the privilege. Journalists who meet the threshold requirements in national security scenarios could invoke the privilege unless the damage to national security would outweigh adherence to the Press Clause. Moreover, because such a system would make clear that a reporter's shield would not shelter some leak recipients, who thus would be forced to divulge their sources, leakers of sensitive information would be more judicious in their decisions about whom to give such material, if at all. This regime would have a stronger deterrent effect than currently existing Justice Department regulations, which are rarely and unpredictably used to force disclosure, and House Bill 2102 and Senate Bill 2035, which would likely result in more leaks to a broader array of recipients than have traditionally published or broadcast classified information.

B. Serving Democracy

The fundamental question, of course, is how to define "covered persons" when the government shows that damaging national security information has been released. The first requirement of this test must be to avoid inflexible classes based on training, education, or even financial income related to the practice of journalism.[168] Aside from potential constitutional challenges such criteria might draw, they would not help determine if a person to whom classified material is leaked is likely to handle it in a manner that is in line with the principles underpinning the Press Clause. An individual who is well-trained in information gathering, who profits from information dissemination, or who works as part of an organization is capable of acting with motives that are corrupt or not in the public interest. Conversely, an amateur working alone could exhibit the restraint that has often characterized news decisions in an organized, professional setting. Rapid changes taking place in the news business warrant caution in setting strict standards based on organizational charts. One approach to the dilemma is to allow journalistic values to guide the analysis.

Professor Berger identifies three elements of "journalism" that may be assessed objectively, offering a roadmap through this thicket of competing objectives.[169] Journalistic independence can be maintained in a system that examines (1) a person's "track record of past publication," (2) "the presence of internal verification" and deliberation, and (3) "the availability of information that allows readers to assess the claimant's independence."[170] Berger focuses on

168. Berger, *supra* note 140, at 1409 ("Restricting the protected class to those who are 'professional' journalists or who are associated with 'established' news media would make a distinction not required by the purpose of the privilege or by the Press Clause of the First Amendment.").

169. *Id.* at 1405–06.

170. *Id.* at 1406.

qualities that show the person claiming the privilege intends to seek and disseminate truth, evaluates information before publication, and opens himself to inspection for possible manipulation.[171] Broadly applied, however, that analysis would impose higher standards than Congress has contemplated and could prove unwieldy in the many disputes about confidential sources in cases that do not involve classified material. On the other hand, Berger's three elements would be especially useful in identifying people who may claim the privilege when national security information is at stake and a higher standard is warranted. Moreover, any person in any medium, working alone or in an organization, could satisfy these criteria. The determination would be based on evidence of the individual's reporting practices, publishing deliberations, and transparency.

To claim the privilege in a national security situation, a person should have to show he engages in "some information-gathering, information-verification, or decisionmaking process about the content to be disseminated."[172] The evidence should show "intent to publish truthful, nonfiction information," which a verification effort and a history of "more truthful than not" publications tend to show.[173] Requiring intent to disseminate the information to the public, as opposed to a small group or private audience, promotes the role of journalism as a catalyst for self-governance.[174] Courts also must "look for whether the publisher has mechanisms in place to systematically exercise judgment over the content of the publication."[175] The independence element requires persons claiming the privilege to provide readers, viewers, or listeners enough information to assess credibility.[176]

The focus of these three elements—a track record, a process of deliberation and verification, and transparency—is certainly welcome with respect to any publication that purports to be nonfiction and for which the publisher uses confidential sources or information. These elements, however, are especially critical if the government is to tolerate leaks of classified information in all but the cases in which the damage to national security is overriding. Even when the national security damage does not outweigh First Amendment considerations in a given case, the release of national

171. *Id.* at 1412–16.

172. *Id.* at 1412. Berger excludes writers and publishers of fiction, as well as those who intend to publish only once. The purpose of protecting the free flow of information is not diminished by forced disclosure of sources for a single story, nor is the goal of protecting continuing relationships with sources of truthful information served by a privilege that covers writers and publishers of fiction. *Id.* at 1413.

173. *Id.*

174. *Id.* at 1413–14.

175. *Id.* at 1414.

176. *Id.* at 1415.

security information should still only be tolerated when the objectives of the First Amendment as a tool of democracy are served.

Other criteria supporting those objectives also should be considered. For example, a laudable journalistic practice when dealing with confidential sources is to negotiate the degree of confidentiality to be conferred (often characterized generally as "off the record," "deep background," and "background") and the conditions for that treatment before the information is shared. Evidence of such negotiation in the case at hand or by past practice is relevant to the journalist's intent at the outset to disseminate information to be gathered, the deliberative process at work, and transparency. Negotiating those matters with sources helps prevent unwitting manipulation by actively controlling the search for information to publicly reveal and explain government operations.

Evidence of past negotiations about the terms for releasing information of any type, classified or not, would show the extent to which the person claiming the privilege seeks at the outset of reporting to disseminate relevant material, which includes source identities or descriptions of their position to know in the narrowest possible terms. Leakers of classified material are likely to demand relatively strict confidence, but even general attributions are often negotiated. Sources may be identified as a high-ranking administration aide, an intelligence official, an American diplomat, a Democratic or Republican congressional aide, or another identifier that is more revealing than simply a "source," often under an explicit agreement. The narrowness of an attribution that protects a source's identity is relevant to credibility, deliberativeness, and transparency.

This analysis of journalistic qualities would not guarantee that national security information will always be used judiciously by those who meet the criteria, but it would provide some basis for courts, the public, potential sources, and government agencies to determine in whose hands such information is least desirable. Such detailed inquiries to determine who may avail themselves of a press shield are sufficiently burdensome for the government and the persons claiming the privilege that they would be prohibitive if applied in all cases where published material comes from confidential sources. The burdens, however, are warranted where publication involves classified material and potentially the most serious threats.

CONCLUSION

The prospects for final passage of a shield law improved with the election of 2008. President Obama supported the Senate bill.[177]

177. THOMAS (Library of Congress), S. 2035 Cosponsors, http://thomas.loc.gov/cgi-bin/bdquery/z?d110:SN02035:@@@P (last visited Apr.

The Democratic congressional majority and administration could advance an important journalistic cause by passing a version of the Free Flow of Information Act.[178] Reporters across the country operate daily under the threat that they will be forced to choose between jail and keeping promises of confidentiality for information about matters of great concern to their communities yet of no concern to national security. It is important, however, to recognize that the government has legitimate reasons, and duties, to maintain some secrets. It is also critical to recognize that the role of the press, however defined, in a democracy is to explain what the government is doing. The government's first defense should be to keep fewer secrets. But leaks are a fact of life in Washington, and the diffusion of journalism raises questions about how those leaks will be handled in the twenty-first century. The threat of terrorist attacks, especially with weapons of mass destruction, deserves care that a privilege for all comers in all circumstances may not inspire.

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21, 2009).

178. As this Comment went to press, new versions of the Free Flow of Information Act were winding their way through Congress. House Bill 985 was introduced on February 11, 2009, and passed by the House on March 31, 2009; Senate Bill 448 was introduced on February 13, 2009. Free Flow of Information Act, H.R. 985, 111th Cong. (2009); Free Flow of Information Act, S. 448, 111th Cong. (2009).

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