

Not Just “Every Man”: Revisiting the Journalist’s Privilege Against Compelled Disclosure of Confidential Sources

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“A popular government without popular information, or the means of acquiring it, is but a prologue to a farce or tragedy; or perhaps both.”¹

INTRODUCTION

In its pursuit of truth and justice, the American judicial system has long relied on the principle that the public “has a right to every man’s evidence.”² To this end, courts rely on a strong presumption against recognizing evidentiary privileges. This presumption, however, is not absolute; rather, throughout the years, the law has recognized that disclosures made within the confines of certain relationships should be privileged. While evidentiary privileges have been recognized since as early as the second century, A.D.,³ and well-established privileges exist for attorney-client,⁴ psychotherapist-patient,⁵ clergy-penitent,⁶ and spousal communications,⁷ a modern movement is underway to provide an evidentiary privilege for yet another set of communications: those between journalists and their sources.

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1. Letter from James Madison to W.T. Barry (Aug. 4, 1822), in *THE FOUNDERS’ CONSTITUTION* 690 (Philip B. Kurland & Ralph Lerner eds., 1987).

2. *United States v. Bryan*, 339 U.S. 323, 331 (1950) (quoting 7 J. WIGMORE, *EVIDENCE* § 2192 (McNaughton rev. 1961)).

3. Marshall Williams, *The Scope of the Corporate Attorney-Client Privilege in View of Reason and Experience*, 25 *HOW. L.J.* 425, 426 (1982). “The Roman law of slavery in effect gave rise to the predecessor of the attorney-client privilege.” *Id.*

4. “The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law.” *Upjohn Co. v. U.S.*, 449 U.S. 383, 389 (1981) (citing 8 J. WIGMORE, *EVIDENCE* § 2290 (McNaughton rev. 1961)).

5. See discussion of *Jaffee v. Redmond*, 518 U.S. 1 (1996), *infra* Part III.A.

6. The clergy-penitent privilege is considered one of the three professional privileges recognized in federal courts (the other two being the psychotherapist-patient and attorney-client privileges). GEORGE FISHER, *EVIDENCE* 756 (2002). For a discussion of the clergy-penitent privilege, see, e.g., *In re Grand Jury Investigation*, 918 F.2d 374 (3d. Cir. 1990); *Morales v. Portuondo*, 154 F. Supp.2d 706 (S.D.N.Y. 2001).

7. See, e.g., *United States v. Rakes*, 136 F.3d 1, 3 (1st Cir. 1998) (stating that the marital communications privilege “permits an individual to refuse to testify, and to prevent a spouse or former spouse from testifying, as to any confidential communication made by the individual to the spouse during their marriage”).

It is undisputed that journalists must sometimes rely on confidential sources,⁸ and it is also clear that the press, as an institution, serves a vital function in our democratic system.⁹ In order to keep the public informed, the press must be unimpeded in gathering information; yet, the legal protection afforded to the press for maintaining the confidentiality of its sources remains nebulous. The Supreme Court addressed confidential sources in *Branzburg v. Hayes*, holding that compelling journalists to disclose the identities of such sources before grand juries does not abridge the freedoms of speech and press guaranteed by the First Amendment.¹⁰ Despite the Supreme Court's ruling, many federal courts have nonetheless recognized a privilege against disclosure of sources in the grand jury setting.¹¹ Many states have also counteracted the Supreme Court's *Branzburg* ruling by passing shield laws to protect journalists.

The privilege established by federal courts and state legislatures, however, is inconsistent at best. In addition, there is an emerging trend towards narrowing the privilege.¹² The journalist's privilege gained particular notoriety from the highly publicized incarceration of former *New York Times* reporter Judith Miller for her refusal to comply with a court order compelling disclosure of the source who revealed covert CIA agent Valerie Plame's identity.¹³ While this case incited national debate

8. Walter Cronkite has stated that "in doing my work, I . . . depend constantly on information, ideas, leads and opinions received in confidence. Such material is essential in digging out newsworthy facts and, equally important, in assessing the importance and analyzing the significance of public events." *Branzburg v. Hayes*, 408 U.S. 665, 730 n.8 (1972). Journalist James Taricani, who was held in contempt for not revealing sources, has also expressed the necessity of confidentiality: "I wish all my sources could be on the record, but when people are afraid, a promise of confidentiality may be the only way to get the information to the public, and in some cases, to protect the well-being of the source." Pam Belluck, *Reporter is Found Guilty for Refusal to Name Source*, N.Y. TIMES, Nov. 19, 2004, at A24.

9. Chief Justice Burger called journalists "surrogates for the public," referring to the necessity of the media for disseminating information about trials to the public. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572-73 (1980).

10. 408 U.S. 665, 667.

11. When finding that a privilege exists, many courts have relied on Justice Powell's *Branzburg* concurrence. See *infra* Part I.B.

12. The United States fell more than twenty places in the Reporters Without Borders 2005 World Press Freedom Index. The organization attributed this occurrence to "the imprisonment of *New York Times* reporter Judith Miller and judicial action that is undermining the privacy of journalistic sources," particularly the increased boldness of federal courts in subpoenaing reporters to disclose confidential sources. Reporters Without Borders, *The 2005 World Press Freedom Index*, Oct. 20, 2005, at 2, available at www.rsf.org/IMG/pdf/CM_2005_Am_Eng.pdf (last visited Feb. 26, 2007).

13. The Miller controversy began in 2003, when journalist Robert Novak published the name of covert CIA agent Valerie Plame Wilson. See, e.g., Nicholas Lemann, *Telling Secrets: How a Leak Became a Scandal*, THE NEW YORKER, Nov. 7, 2005. A special prosecutor, Patrick Fitzgerald, was appointed to investigate the potential violation of The Intelligence Identities Protection Act of 1982, 50 U.S.C. § 421 (1982), which criminalizes revealing the identity of a CIA agent. *Id.* While Miller investigated the Plame story, she never published an article about it. *Id.* Nevertheless, she was subpoenaed by Fitzgerald to testify in front of a grand jury investigating the leak. When Miller refused to cooperate, she was held in contempt of court by the D.C. District Court; the Circuit Court of Appeals upheld the decision, and the Supreme

over the legal soundness of the privilege, the subpoenaing of journalists to testify about their confidential sources is not anomalous in the realm of journalism. Media lawyers report that there has been a recent increase in the number of subpoenas being issued to journalists, and that “the legal climate for those seeking to protect confidential sources is turning chillier.”¹⁴ In addition to a spate of cases in the D.C. Circuit (the Miller and related Matthew Cooper cases,¹⁵ as well as the Wen Ho Lee case¹⁶), a number of other federal courts, including the First, Fifth, and Seventh Circuits, have recently denied

Court denied certiorari. See *In re* Special Counsel Investigation, 332 F. Supp.2d 26 (D.D.C. 2004); *In re* Grand Jury Subpoena, Judith Miller, 397 F.3d 964 (D.C. Cir. 2005), *cert. denied*, 545 U.S. 1150 (2005). In sum, Miller was denied protection against revealing her sources; she ultimately served eighty-five days in a federal prison for refusing to do so. See, e.g., Jeffrey Toobin, *Name that Source*, THE NEW YORKER, Jan. 16, 2006, at 30. The irony of the Miller story is that Fitzgerald knew the leaker’s identity (it was Richard Armitage, a former deputy secretary of state under Colin Powell) from “his very first day in the special counsel’s chair.” David Johnston, *Leak Revelation Leaves Questions*, N.Y. TIMES, Sept. 2, 2006, at A1.

14. Katherine Q. Seeyle, *Journalists Say Threat of Subpoena Intensifies*, N.Y. TIMES, July 4, 2005, at C1. Because there is no database to track how many subpoenas have been issued to reporters, it is difficult to quantify the increase, and some prosecutors dispute that there has been an increase at all. *Id.* However, according to the Newspaper Association of America, more than two dozen reporters nationwide were subpoenaed or questioned about their confidential sources in 2004–2005. *Id.* The Reporters Committee for Freedom of the Press has estimated that “subpoenas and other quests for journalists’ sources of information now approach two thousand per year.” Robert Zelnick, *Journalists and Confidential Sources*, 19 NOTRE DAME J.L. ETHICS & PUB. POL’Y 541, 549 (2005).

15. *Time* reporter Matthew Cooper also faced legal action for his initial refusal to provide grand jury testimony regarding his sources for the Plame leak. At the last moment, Cooper agreed to testify after being released from confidentiality by his source. Yet just days prior to this, Cooper’s bosses at *Time* turned over his notes and revealed the identity of his source. See, e.g., David Kidwell, Commentary, *Free Press Code Often Requires Some Sacrifice*, MIAMI HERALD, July 10, 2005, at L5.

16. *Lee v. U.S. Dep’t of Justice*, 327 F. Supp.2d 26 (D.D.C. 2004). Wen Ho Lee was a scientist at Los Alamos accused of stealing classified nuclear data. After Lee was implicated in a *Washington Post* article that relied on unidentified sources, Walter Pincus, *U.S. Cracking Down on Chinese Designs on Nuclear Data*, WASH. POST, Feb. 17, 1999 at A7, he filed a lawsuit against the federal government, arguing that his rights under the federal Privacy Act had been violated. Toobin, *supra* note 13. To prove his case, Lee had to “establish that government officials improperly disclosed information.” *Id.* at 33. However, after failing to get any information from deposed government employees, Lee and his attorneys began issuing subpoenas to journalists. *Id.* at 34. The D.C. Circuit Court ordered the journalists to testify, and its decision was upheld by the court of appeals. See *Lee v. Dept. of Justice*, 327 F. Supp.2d 26 (2004), *aff’d* 413 F.3d 53, 55 (2005). The case settled in 2006, with the government dropping the case, and the media organizations subpoenaed paying \$750,000 in order to retain the confidentiality of their sources. Paul Farhi, *U.S., Media Settle With Wen Ho Lee*, WASH. POST, June 3, 2006, at A1. Henry Hoberman, senior vice president of ABC, summed up the media’s settlement agreement:

Unfortunately, the journalists in this case . . . reluctantly concluded that the only way they could continue to protect the bond with their sources and sidestep increasing punishment, including possible jail time, was to contribute to the settlement with the government and Wen Ho Lee . . . It was not a decision that any of the journalists came to easily or happily.

Id.

journalists protection from disclosing sources.¹⁷ These developments indicate that the protections that have served journalists for the past thirty years—from the First Amendment and state statutes, to the common law, and Department of Justice guidelines¹⁸—may no longer be adequate.¹⁹ The tension between investigative journalists, whose objective is to keep the public informed, and prosecutors in search of indictments and justice, is no longer in balance, and thus it is necessary to revisit the journalist's privilege.²⁰

This Note contemplates two means for strengthening the journalist's privilege, beyond a revisiting of *Branzburg* by the Supreme Court: finding a common law evidentiary privilege through Federal Rule of Evidence 501 ("Rule 501") and passage of a federal shield law by Congress. Part I of this Note discusses the seminal holding in *Branzburg*, while Part II details post-*Branzburg* jurisprudence and the resulting need for a stronger privilege. Part III then discusses ways of strengthening the privilege and the institutional actors who would be required to do so.

Finally, Part IV looks at the values implicated in each solution and concludes that while finding the privilege via Rule 501 is most practical, particularly in light of the Supreme Court's ruling in *Jaffee v. Redmond*,²¹ doing so would not adequately protect the First Amendment values at stake. Rather, the best response to the need for a stronger privilege is action by Congress, as only Congress has the ability to ensure that three key interests are provided for: protecting the democratic values inherent in the First Amendment; appropriately balancing the journalist's privilege against the

17. *E.g.*, *In re Special Proceedings*, 373 F.3d 37, 45 (1st Cir. 2004) (upholding a contempt order against investigative reporter Jim Taricani on the basis that the special prosecutor's request for confidential information was "highly relevant" and reasonable efforts were made to obtain the information elsewhere); *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003) (upholding the district court's order compelling production of tape recordings of journalists' nonconfidential interviews on the basis that subpoena was reasonable under the circumstances and no First Amendment interest was at stake); *see also* Daniel Scardino, *Vanessa Leggett Serves Maximum Jail Time, First Amendment-Based Reporter's Privilege Under Siege*, 19 COMM. LAW 4, 11 (discussing the Fifth Circuit's determination that "the Constitution does not offer any testimonial or material privilege for reporters in the context of a grand jury or even a criminal proceeding"); *infra* note 83 (discussing the Fourth, Fifth, Sixth, Seventh, and Eighth Circuits' stances on the journalist's privilege).

18. *See* 28 C.F.R. § 50.10 (2005).

19. *But see* Benjamin Wittes, *Leaks and the Law*, THE ATLANTIC MONTHLY, Dec. 2004, at 116. Wittes argues that the threat of prosecutors subpoenaing reporters for disclosure of confidential sources is minimal. A prosecutor who calls a reporter before a grand jury "knows he's going to have to litigate. He also knows that even if he wins, the reporter will most likely go to jail rather than give up a source; and even if a judge is willing to hold a reporter in contempt, it is rare for a court to use its coercive powers in anything more than token form." *Id.* at 117. Thus, there is only a slim likelihood of a prosecutor actually obtaining the information sought.

20. For up-to-date synopses regarding "the federal shield law effort and . . . other legal controversies involving reporters' subpoenas," *see* The Reporters Committee for Freedom of the Press, Special Report: Reporters and Federal Subpoenas, http://www.rcfp.org/shields_and_subpoenas.html (last visited Feb. 26, 2007).

21. 518 U.S. 1 (1996).

administration of justice; and safeguarding the free speech of both journalists and their sources.

I. THE IMPETUS FOR A CONSTITUTIONALLY-BASED JOURNALIST'S PRIVILEGE: THE RISE IN INVESTIGATIVE JOURNALISM AND THE *BRANZBURG* DECISION

A. *The Majority Holding: No Constitutional Privilege*

While lower courts first addressed the idea of the journalist's privilege in 1958,²² the Supreme Court did not take up the issue until 1972, in *Branzburg v. Hayes*.²³ During the tumultuous years leading up to this decision, investigative reporting took on increased importance. As the revolutionary tenor of the era's social and political movements resonated throughout American society, journalists often had to grant confidentiality in order to obtain information on "highly charged topics" that would otherwise be unavailable to the public.²⁴ At the same time, federal and state prosecutors began using their subpoena power to "gain access to confidential information obtained [by journalists] in the process of gathering news about highly controversial topics."²⁵

Branzburg was a consolidation of district court cases involving three reporters who were subpoenaed by grand juries to testify about confidential sources.²⁶ The *Branzburg* case illuminated the tension between a grand jury's interest in obtaining information related to criminal conduct and a journalist's interest in protecting confidential sources,²⁷ with the reporters asserting that the First Amendment protected their right against disclosure. Specifically, the reporters argued that in order to gather news, it was necessary for them to "agree either not to identify the source of information published or to publish only part of the facts revealed, or both."²⁸ Without the ability to protect

22. *Garland v. Torre*, 259 F.2d 545 (2d Cir. 1958) (Stewart, J.). Although the *Garland* court did not grant an evidentiary privilege to the newsperson at issue, Judge Stewart (who went on to write a dissent in *Branzburg*) did allude to the possibility of a privilege in some instances, such as the forcing of a "wholesale disclosure of a newspaper's confidential sources of news" or cases in which the "identity of the news source is of doubtful relevance or materiality." *Id.* at 549–50.

23. 408 U.S. 665 (1972).

24. See Heather Stamp, Case Notes and Comments, *McKevitt v. Pallasch: How the Ghosts of the Branzburg Decision are Haunting Journalists in the Seventh Circuit*, 14 DEPAUL-LCAJ. ART & ENT. L. & POL'Y 363, 370 (2004).

25. Note, *Reporters and Their Sources: The Constitutional Right to a Confidential Relationship*, 80 YALE L.J. 317, 317 (1970). For a synopsis of subpoenas issued on "highly controversial topics" of the era, see *id.* at 317 n.1.

26. Paul Branzburg, a reporter in Kentucky, was asked to testify regarding an article he had published on the making of marijuana and drug use in Frankfort, Kentucky. *Branzburg*, 408 U.S. at 667–71. Paul Pappas, a reporter in New England, was subpoenaed regarding his reporting at the Black Panthers' headquarters (though he never published a story). *Id.* at 672–75. Earl Caldwell, a *New York Times* reporter, was also subpoenaed regarding his investigation of the Black Panthers, and he was specifically asked to hand over "notes and tape recordings of interviews given him for publication by officers and spokesmen of the Black Panther Party." *Id.* at 675–77.

27. *Id.* at 681–82.

28. *Id.* at 679–80.

confidential source identities, the reporters feared that future sources would be deterred from providing information, thus burdening newsgathering activities.²⁹ Ultimately, such a burden would impede the free flow of information to the public, particularly on controversial or sensitive issues that potential sources might be hesitant to discuss with reporters.³⁰

In holding that the First Amendment does not protect journalists from identifying confidential sources before a grand jury, the *Branzburg* majority relied on a number of rationales.³¹ While recognizing the importance of the First Amendment's protection of free speech and a free press, the majority focused instead on the government's interest in investigating and prosecuting crime.³² The government's pursuit of these goals obligates all citizens, when called upon, to provide evidence to grand juries, and the Court found no reason to exempt journalists from this requirement.³³ The majority pointed out that incidental burdens on the First Amendment are not always invalid; rather, burdens resulting from the "general applicability" of criminal or civil statutes may be acceptable.³⁴ The majority also noted that the press has never been wholly impervious to restrictions on its activity.³⁵

Balanced against the First Amendment interests of the press was the role of grand juries in the criminal justice system.³⁶ Grand juries are constitutionally required,³⁷ and, because they are required to return only well-founded indictments, their "investigative powers are necessarily broad."³⁸ In light of the important role of grand juries in pursuing justice, the maxim that the "public has a right to every man's evidence" rang especially true to the *Branzburg* majority,³⁹ which determined that the government's interest in "fair and effective law enforcement" outweighed the benefits of providing an evidentiary privilege to journalists.⁴⁰

29. *Id.* at 681–82.

30. *Id.* at 680.

31. *Id.* at 682–85.

32. *Id.*

33. *Id.* at 682, 685.

34. *Id.* at 682. The Court stated that "[o]therwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible [First Amendment] burden that may be imposed." *Id.* at 682–83.

35. *See id.* at 683–86. The majority details Supreme Court jurisprudence related to the press, noting first that the press has "[n]o special immunity from the application of general laws." *Id.* at 683 (quoting *Associated Press v. NLRB*, 301 U.S. 103, 132–33 (1937)). Among other restrictions, newspapers are "not free to publish with impunity everything and anything [they] desire[.]" *id.*; journalists and newspapers can be punished for contempt of court, *id.* at 684; and the press does not have "a constitutional right of special access to information not available to the public generally." *Id.*

36. The *Branzburg* majority described the grand jury as having two functions: (1) "determining if there is probable cause to believe that a crime has been committed"; and (2) "protecting citizens against unfounded criminal prosecutions." *Id.* at 685.

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

38. *Branzburg*, 408 U.S. at 688.

39. *Id.* at 689 (citing *United States v. Bryan*, 339 U.S. 323, 331 (1950)).

40. *Id.* at 690.

In refuting the reporters' arguments, the majority considered the extent of the burden imposed on the press by a denial of the privilege against disclosure of confidential sources.⁴¹ One of the strongest arguments against granting a privilege was the lack of empirical evidence supporting the reporters' deterrence argument.⁴² The majority also expressed concern that in the grand jury setting, those reporters most worried about compelled disclosure were likely either personally involved in the criminal conduct at issue or else protecting sources involved in such conduct.⁴³ The majority believed that in these scenarios, requests by sources to remain anonymous were "a product of [the] desire to escape criminal prosecution."⁴⁴ In the eyes of the Court, allowing such a result—even in the name of First Amendment freedoms and the importance of newsgathering—could not be justified.⁴⁵

Finally, the majority expressed concern over the role of the judiciary in enforcing a journalist's privilege, specifically with regard to the "practical and conceptual difficulties" that creating a journalist's privilege would entail.⁴⁶ Creating a privilege would require courts to define who qualifies as a journalist⁴⁷ and to make factual and legal determinations regarding whether it was appropriate for the journalist to have been called to testify.⁴⁸ The majority also felt that courts should not be "inextricably involved" in "considering whether enforcement of a particular law serve[s] a 'compelling' governmental interest."⁴⁹ Making such case-by-case determinations about the appropriateness of testimony by journalists would "require [the courts to make] a value judgment that a legislature had declined to make" and would clearly overstep the

41. *Id.* at 691.

42. *Id.* Specifically, the majority was unclear about the frequency and extent to which informants were actually deterred. *Id.* at 693. The majority also determined there was insufficient evidence to support a conclusion that compelled disclosure would ultimately constrict the flow of news to the public. *Id.*

43. *Id.* at 691.

44. *Id.* The majority further underscored this point, stating that "[t]he [First] Amendment does not reach so far as to override the interest of the public in ensuring that neither reporter nor source is invading the rights of other citizens through reprehensible conduct forbidden to all other persons." *Id.* at 691–92.

45. *Id.* at 691.

46. *Id.* at 703–04.

47. Making determinations as to which "organs of communication" could and could not invoke the privilege would effectively require the courts to discriminate on the basis of content. *Id.* at 705 n.40. Favoring one kind of speaker, content, or medium of communication would potentially violate the First Amendment's principle of neutrality. 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, 1409 (2003). The majority was prescient with regard to definitional problems, as the rise of Internet journalism and blogging have compounded the difficulties in determining who qualifies as a journalist in modern terms. *See, e.g.,* Clay Calvert, *And You Call Yourself a Journalist?: Wrestling with a Definition of "Journalist" in the Law*, 103 DICK. L. REV. 411 (1999). For example, Professor Calvert asks whether Matt Drudge, the online publisher who broke the Bill Clinton-Monica Lewinsky sex scandal, is "a journalist or merely a gossip monger?" *Id.* at 411; *infra* note 137 and accompanying text.

48. *Branzburg*, 408 U.S. at 704.

49. *Id.* at 705.

judicial role.⁵⁰ However, the majority determined that one instance existed in which journalists could not be compelled to testify: grand juries instituted or conducted “other than in good faith.”⁵¹ “Official harassment of the press . . . to disrupt a reporter’s relationship with his news sources” would not be tolerated; such activity would be restrained through judicial control (when dealing with harassment) and subpoenas to motions to quash (when resisting being compelled to testify).⁵²

Ultimately, the Court held that the reporters at issue in *Branzburg* were called before the grand jury “because it was likely that they could supply information to help the government determine whether illegal conduct had occurred and, if it had, whether there was sufficient evidence to return an indictment.”⁵³ In essence, the Court found that the public’s interest in law enforcement, plus the vital role of grand juries in prosecuting crime,⁵⁴ combined to outweigh the interests of the press in maintaining confidentiality.

B. Justice Powell’s Balancing Test

Justice Powell was the key fifth vote for *Branzburg*’s majority holding. However, he issued a strongly-worded concurrence that is nothing short of a fundamental departure from the majority’s holding that no privilege exists. The essence of his concurrence is that the privilege claim should be determined on a case-by-case basis and “judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.”⁵⁵ Under Justice Powell’s view, journalists, when subpoenaed, would be required to appear before the grand jury, at which time they could assert the privilege of confidentiality by filing a motion to quash.⁵⁶ Justice Powell’s concurrence thus represents a middle ground between the majority and dissenting opinions. While he rejected requiring the government to make a threshold showing for the subpoenaing of journalists,⁵⁷ he did recognize that a First Amendment privilege of confidentiality exists,⁵⁸ but in a qualified manner, to be determined by the courts case-by-case. The significance of this stance became increasingly apparent in the years that followed.⁵⁹

50. *Id.* at 706.

51. *Id.* at 707–08.

52. *Id.*

53. *Id.* at 701.

54. “The investigative power of the grand jury is necessarily broad if its public responsibility is to be adequately discharged.” *Id.* at 700 (citing *Costello v. United States*, 350 U.S. 359, 364 (1956)).

55. *Id.* at 710.

56. *Id.*

57. *Id.* at n.*. The dissent, however, would have required a threshold showing by the government upon a journalist’s filing of a motion to quash a subpoena. *See infra* Part I.C and text accompanying notes 67–69.

58. *Branzburg*, 408 U.S. at 710. “In short, the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection.” *Id.*

59. *See infra* Part II.A.

C. The Dissent

Justice Stewart's dissent is an important part of the *Branzburg* puzzle, as it provided a framework for later arguments regarding a journalist's privilege.⁶⁰ Joined by Justices Brennan and Marshall, Justice Stewart focused on the importance of the press to American democracy⁶¹ in arguing that the First Amendment interest of the press outweighs the countervailing interest in making the evidence of "every man" available to grand juries.⁶²

One of the major points of departure between the majority and dissent is over the deterrent effect of subpoenaing reporters. While the lack of empirical evidence supporting the deterrence theory proved fatal under the majority's reasoning, the dissent approached the issue from a more conceptual perspective, concluding that available evidence and common sense suggested a deterrent effect significant enough to cause concern.⁶³ The dissent's analysis of the deterrence argument looks first at the role of the First Amendment in protecting "indispensable liberties,"⁶⁴ and notes that First Amendment rights have never required empirical evidence to "demonstrate[] beyond any conceivable doubt that deterrent effects exist."⁶⁵

Second, the dissent considers the actual manner in which sources would be deterred, with a particular focus on the types of sources at greatest risk. While not every confidential relationship will necessarily be deterred, the dissent noted that deterrence will "certainly occur in certain types of relationships involving sensitive and controversial matters."⁶⁶ Further, these are the very sources that necessitate protection if the public is to benefit from the free flow of information that is vital to the healthy functioning of our democracy.⁶⁷ In addition to deterring sources from coming forward, the dissent noted that a lack of protection against subpoenas could also deter journalists from "gathering, analyzing, and publishing the news."⁶⁸ The majority failed to consider this point, despite the likelihood that reluctance by journalists to fully investigate sensitive issues would have a detrimental effect on the content of news.

The tangible effects of subpoenas on the newsgathering process and the importance to democracy of preserving First Amendment values combine to present a formidable argument in favor of providing a privilege for journalists. Yet before reaching this

60. *Branzburg*, 408 U.S. at 725–52 (Stewart, J., dissenting). Justice Douglas dissented separately, arguing that reporters have an absolute First Amendment right against appearing in front of a grand jury or being compelled to testify, unless the reporter himself is implicated in the crime. *Id.* at 711–25 (Douglas, J., dissenting). However, the discourse surrounding the reporter's privilege focuses predominantly on whether there should be a qualified privilege (as Justice Stewart advocated) or no privilege at all (as the majority advocated).

61. The underlying rationale for protecting a free press is the "broad societal interest in a full and free flow of information to the public." *Id.* at 725 (Stewart, J., dissenting).

62. *Id.* at 738.

63. *Id.* at 735.

64. *Id.* at 734 (quoting *NAACP v. Alabama*, 357 U.S. 449, 461 (1958)).

65. *Id.* at 733.

66. *Id.* at 735–36.

67. In fact, the importance of the free flow of information to the public has "buttressed [the] Court's historic presumption in favor of First Amendment values." *Id.* at 736 n.19.

68. *Id.* at 730.

conclusion, the dissent also considered the countervailing interest in the use of grand juries to administer justice.⁶⁹ While allowing grand juries to have broad powers and access to “every man’s relevant evidence” is important, this interest is at times limited by the interests of other Amendments and, when sufficient policy rationales exist, by common law privileges of evidence.⁷⁰ In the case of journalists, the First Amendment interest at stake is not that of private individuals (i.e., the journalist invoking the privilege); rather, at stake is the public’s interest in accessing information that will enable citizens to contribute to “democratic decisionmaking through the free flow of information.”⁷¹

The dissent recognized that “First Amendment rights require special safeguards,”⁷² and that the proper constitutional standard of review is strict scrutiny.⁷³ Thus, the dissent proposed a narrow, three-part test that the government could invoke to overcome the journalist’s privilege: (1) there must be “probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law”; (2) there must be evidence that “the information sought cannot be obtained by alternative means less destructive of First Amendment rights”; and (3) there must be a “compelling and overriding interest in the information.”⁷⁴

An important aspect of the proposed test is that it provides a qualified privilege that does not ignore the government interests at stake in grand jury proceedings. Further, Justice Stewart noted that a journalist would be unable to completely ignore a subpoena; rather, the journalist would need to move to quash the subpoena, thus triggering the government’s burden of showing that the privilege of confidentiality should be overridden.⁷⁵ At the same time, the test set a threshold high enough to ensure that journalists would not be subjected to overly vague or broad grand jury investigations that could have a chilling effect on speech.⁷⁶

69. *Id.* at 736–37.

70. *Id.* at 737.

71. *Id.* at 738.

72. *Id.* Supreme Court jurisprudence has long recognized that First Amendment rights are of vital importance and should receive special consideration when balanced against other interests. When balanced against the administration of justice, the Court has said, “[i]t is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press . . . and freedom of communication of ideas.” *Id.* at 739 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957) (plurality opinion)).

73. *See id.* at 739–40. “[W]hen an investigation impinges on First Amendment rights, the government must not only show that the inquiry is of ‘compelling and overriding importance’ but it must also ‘convincingly’ demonstrate that the investigation is ‘substantially related’ to the information sought.” *Id.*

74. *Id.* at 743.

75. *Id.*

76. Vague laws lead to uncertainty about what speech is and is not protected, and thus “needlessly discourage First Amendment activity.” *Id.* at 741. Reporters who are unsure whether the law will allow them to protect their sources and sources who are unsure whether the law will allow them to remain anonymous are both likely to modify their behavior as a result of this uncertainty. Vagueness is also a concern because of the broad powers of grand juries, which “are not limited in scope to specific criminal acts” and which invoke relaxed standards of materiality and relevance. *Id.* at 742.

The dissent also rejected the majority's assertion that the journalist's privilege is subordinate to the government's interest in prosecuting crime.⁷⁷ The majority based its reasoning on the assumption that only when a source is *actually implicated* in a crime does the reporter or source need to be worried about subpoenas.⁷⁸ In reality, because of the broad power of grand juries,⁷⁹ reporters could be subpoenaed to testify on matters that are not related to criminal conduct.⁸⁰ The denial of a journalist's privilege in the grand jury context would thus create circumstances ripe for compelling and enabling the government to "annex the press as an investigative arm,"⁸¹ clearly undermining both freedom of the press and the foundations of democracy.

II. POST-BRANZBURG JURISPRUDENCE: INITIAL EXPANSION OF THE PRIVILEGE FOLLOWED BY A NARROWING TREND

A. Interpretation and Application of *Branzburg* at the Federal Level

According to Ben Bradlee, Vice President of the *Washington Post*, "[t]here is a privilege whether the Supreme Court says so or not."⁸² This sentiment, not uncommon among the press, is representative of the confusion that arose after the *Branzburg* decision. On the one hand, the majority clearly ruled against a journalist's privilege. Yet, journalists involved in litigation continued to argue for its existence, and many federal courts agreed, reading the majority opinion and the concurrence together to find a privilege. In fact, the federal courts have, by and large, recognized a qualified constitutional privilege, supported by Justice Powell's concurrence.⁸³

77. *See id.* at 744.

78. *Id.*

79. *Id.* at 744 & n.34 (Stewart, J., dissenting).

80. *Id.* at 744.

81. *See id.* at 744 n.34. Justice Stewart's prescience with regards to the Judith Miller and Matthew Cooper cases is notable, as he expressed concern over the ability of "vindictive prosecutors" to use the guise of investigating crime to "explore the newsman's sources at will, with no serious law enforcement purpose." *Id.* Such questions have been raised about the motives behind Special Prosecutor Fitzgerald's subpoenaing of Miller, particularly since Miller never published the identity of Valerie Plame. *See supra* note 13. Fitzgerald has said of his investigation that "he'd not wanted any 'First Amendment showdown' . . . and wished Judith Miller, who'd languished for 85 days in jail, hadn't spent a second there. Such things should happen only very rarely . . . only when reporters [are] eyewitnesses to a crime." David Margolick, *Mr. Fitz Goes to Washington*, VANITY FAIR, Feb. 2006, at 179. Nonetheless, Fitzgerald arguably abused his prosecutorial discretion by continuing to hound journalists for disclosure of their confidential sources, despite his knowledge of the leaker's identity. Johnston, *supra* note 13.

82. Florence George Graves, *Protecting the Privilege*, AM. JOURNALISM R., Apr. 1998, at 22.

83. Kara Larsen, Note, *The Demise of the First Amendment-Based Reporter's Privilege: Why This Current Trend Should Not Surprise the Media*, 37 CONN. L. REV. 1235, 1244 (2005). The Sixth Circuit, however, has not explicitly recognized the journalist's privilege, *see In re Grand Jury Proceedings* (Storer Grand Jury), 810 F.2d 580, 583-86 (6th Cir. 1987) (holding that there was no First Amendment privilege for a television reporter to withhold information sought by a grand jury), nor has the Eighth Circuit, *see In re Grand Jury Subpoena Duces*

There are a number of ways in which *Branzburg* has been interpreted. It has been referred to as a plurality opinion; as a narrow opinion that applies only to grand juries and criminal investigations, thus leaving room for differing interpretations in other contexts; as wholly rejecting the journalist's privilege; and as supporting a qualified privilege, to be determined on a case-by-case basis, pursuant to Justice Powell's concurrence.⁸⁴

As the situation currently stands, lower federal courts essentially see *Branzburg* as an endorsement of the journalist's privilege in situations other than grand jury subpoenas for direct testimony about criminal activity.⁸⁵ Yet even among federal courts that recognize the journalist's privilege, "not all courts recognizing the privilege follow[] precisely the same line of interpretation, describe[] the privilege in exactly the same terms, or agree[] on its scope."⁸⁶ Specifically, courts vary on factors ranging from the status of the information (confidential versus nonconfidential) to the type of proceeding at issue (civil versus criminal), as well as on methodologies for balancing the interests at stake.⁸⁷ As a result, a journalist who is considering whether to grant a source confidentiality is "faced not only with the question of whether she may keep information out of court, but also the issue of being subject[ed] to different rules depending on where litigation seeking [the] information . . . happens to take place."⁸⁸ The *Yale Law Journal* foresaw, in 1970, the major jurisprudential problem that was to arise in the years following the *Branzburg* decision:

Under the case-by-case method of developing rules, it will be difficult for potential informants and reporters to predict whether testimony will be compelled since the decision will turn on the judge's ad hoc assessment in different fact settings of "importance" or "relevance" in relation to the free press interest. A "general" deterrent effect is likely to result . . . [l]eaving substantial discretion with judges to delineate those "situations" in which rules of "relevance" or "importance" apply

Tecum, 112 F.3d 910, 918 n.8 (8th Cir. 1997) ("[W]e believe [the] question [regarding the existence of a qualified journalist's privilege] is an open one in this Circuit."). The Fourth and Fifth Circuits, meanwhile, have recognized a privilege only when there is evidence of governmental harassment or bad faith. *See, e.g.*, *United States v. Smith*, 135 F.3d 963, 971 (5th Cir. 1998); *In re Shain*, 978 F.2d 850, 852 (4th Cir. 1992). Finally, the Seventh Circuit recently held that journalists should not be afforded any special privilege; rather, the courts should simply make sure that subpoenas directed at the media are "reasonable in the circumstances, which is the general criterion for judicial review of subpoenas." *McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003). For a discussion of recent denials of the journalist's privilege in the First and Fifth Circuits, see *supra* note 17.

84. *See* Erik W. Laursen, Comment & Casenote, *Putting Journalists on Thin Ice: McKevitt v. Pallasch*, 73 U. CIN. L. REV. 293, 301 (2004).

85. Anthony L. Fargo, *Analyzing Federal Shield Law Proposals: What Congress Can Learn From the States*, 11 COMM. L. & POL'Y 35, 39 (2006).

86. Larsen, *supra* note 83, at 1246; *see also* The Reporters Committee for Freedom of the Press, *The Free Flow of Information Act of 2006: A Brief Analysis by the Reporters Committee for Freedom of the Press*, http://www.rcfp.org/shields_and_subpoenas/specter.html (last visited Feb. 26, 2007) ("[E]ven in the circuits that recognize a reporter's privilege for protecting confidential sources, it is always qualified by a balancing test and there is generally not a weighing of the public interests at stake.").

87. *Id.* at 1247–51.

88. Laursen, *supra* note 84, at 310.

would therefore seem to undermine significantly the effectiveness of a reporter-informer privilege.⁸⁹

The recent Second Circuit case *Gonzales v. NBC*, which involved compelled disclosure of nonconfidential information, exemplifies the problematic nature of current lower court jurisprudence.⁹⁰ Initially, the Second Circuit found that no qualified privilege for nonconfidential information existed under federal law, as elucidated by the *Branzburg* majority opinion. On petition for rehearing, however, the court reached a different conclusion, granting nonconfidential press materials the protection of a qualified journalist's privilege.⁹¹ This decision was based on policy considerations such as the importance of journalists to the dissemination of information and the public interest in maintaining a "vigorous, aggressive, and independent press capable of participating in robust, unfettered debate over controversial matters."⁹²

The *Gonzales* case is a prime example of the problem that exists due to the lack of a clear, national standard. As First Amendment attorney James Goodale noted, the first *Gonzales* decision "made no sense at all" because journalists' nonconfidential information was protected under New York's state shield law, but was not protected under federal law.⁹³ This indicates a significant notice problem, as it forces journalists to make investigative and confidentiality decisions without knowing whether their information could later be subject to compelled disclosure.⁹⁴

B. State Responses

Currently, thirty-one states and the District of Columbia have shield laws that protect the press from compelled disclosure of sources, work product, and information.⁹⁵ These statutes run the gamut from broad protections that provide an absolute privilege to laws that provide qualified privileges of various types.⁹⁶

89. Note, *supra* note 25, at 341.

90. 155 F.3d 618 (2d Cir. 1998), *rev'd*, 194 F.3d 29 (2d Cir. 1999).

91. *Gonzales*, 194 F.3d at 35.

92. *Id.* (quoting *Baker v. F. & F. Inv.*, 470 F.2d 778, 782 (2d Cir. 1972)).

93. James C. Goodale, *A Sigh of Relief*, N.Y.L.J., Oct. 1, 1999, at 3.

94. The notice problem also manifested itself in the Judith Miller case. Although Miller worked in D.C. and New York, both of which have shield laws, she was subpoenaed for a federal grand jury investigation; thus, her ability to successfully invoke the journalist's privilege was subject to the D.C. District Court's interpretation of the amorphous *Branzburg* holding. Additionally, denying a federal journalist's privilege "frustrate[s] the purpose of state legislation" because without a federal privilege, "any state's promise of confidentiality and protection would have little value if the source were aware that the privilege would not be honored in federal court." Theodore J. Boutrous & Seth M.M. Stodder, *Retooling the Federal Common-Law Reporter's Privilege*, 17 SPG COMM. LAW. 1, 24 (1999).

95. CONG. RESEARCH SERV., THE LIBRARY OF CONG., JOURNALISTS' PRIVILEGE TO WITHHOLD INFORMATION IN JUDICIAL AND OTHER PROCEEDINGS: STATE SHIELD STATUTES I (2005), available at <http://www.fas.org/sgp/crs/secrecy/RL32806.pdf>. The following states do not have shield laws: Connecticut, Hawaii, Idaho, Iowa, Kansas, Maine, Massachusetts, Missouri, Mississippi, New Hampshire, South Dakota, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. *Id.* at 2.

96. *Id.*

Additionally, the application of protections for journalists varies immensely, covering everything from the identity of a source to notes, work product, outtakes, and even personal observations.⁹⁷ The rationale behind such shield laws is primarily protection of the free flow of information to the public, rather than protection of individual journalists or the press as an institution.⁹⁸

C. The Present-Day Need to Strengthen the Journalist's Privilege

Although there have been some highly publicized losses by journalists attempting to claim a privilege against disclosure, they may not be representative of the whole story. In fact, from October 2004, to October 2005, the press won over sixty percent of the shield cases decided, a percentage that has been consistent over the last thirty years.⁹⁹ Why, then, should we care about the state of the journalist's privilege? While the *Branzburg* decision was not favorable to journalists, it was not, on its face, a necessarily wrong decision, as it seemed to leave open at least the possibility of a qualified privilege. However, it has created confusion in an area of the law which necessitates clarity. Lack of clarity regarding the government's power to compel revelation of confidential sources undermines the functioning of the press, its ability to keep the public informed, and ultimately democracy. Further, anecdotal evidence indicates that the lack of consistent protection for journalists against confidential source identity is drying up the supply of sources available to journalists, thus chilling the dissemination of information to the public.¹⁰⁰ And, as the dissent in *Branzburg* predicted,¹⁰¹ this state of affairs may be affecting the content choices of journalists.¹⁰²

Although providing a qualified privilege to journalists would still require courts to be involved in case-by-case determinations of whether the privilege applied (a concern

97. *Id.*

98. See Berger, *supra* note 47 at 1392. It is worth noting that one cost of shield laws is a decrease in the amount of information available to the public when the shield is used. *Id.* at 1377.

99. James C. Goodale, *Are all Reporters Going to Jail?*, N.Y.L.J., Oct. 7, 2005, at 3.

100. See, e.g., *Reporter's Shield Legislation: Issues and Implications: Hearing Before the S. Judiciary Comm.*, 109th Cong. 3 (2005) (testimony of Norman Pearlstine, Editor-In-Chief, Time, Inc.), available at http://judiciary.senate.gov/testimony.cfm?id=1579&wit_id=4505 [hereinafter *Hearing*]. "[V]aluable sources [have] insisted that they no longer trusted the magazine and that they would no longer cooperate on stories. The chilling effect is obvious." *Id.*

101. The dissent worried that failing to provide protection against compelled disclosure of confidential sources would require journalists to "speculate about whether contact with a controversial source or publication of confidential material will lead to a subpoena." *Branzburg v. Hayes*, 408 U.S. 665, 731 (1972) (Stewart, J., dissenting).

102. For example, in 2005, the *Cleveland Plain Dealer* announced that it was withholding from publication two stories "of profound importance," because both were based on leaked documents and publication would put the paper at risk of an investigation. Doug Clifton, *Jailing Reporters, Silencing the Whistleblowers*, CLEVELAND PLAIN DEALER, June 30, 2005, at B9. The paper's editor, Doug Clifton, wrote: "The public would be well served to know [the stories] Publishing the stories would almost certainly lead to a leak investigation and the ultimate choice: talk or go to jail. Because talking isn't an option and jail is too high a price to pay, these two stories will go untold for now." *Id.* See also Robert D. McFadden, *Newspaper Withholding Two Articles After Jailing*, N.Y. TIMES, July 9, 2005, at A10.

of the *Branzburg* majority),¹⁰³ this scenario would nevertheless benefit all parties involved: journalists (both as individuals and the press as an institution), sources, and the public. Journalists, in particular, would benefit from knowing that a qualified privilege exists and that certain criteria must be met in order for the government to compel disclosure of source identities. A clearer standard would, in essence, grant journalists the tools necessary to think more carefully about confidentiality before promising it to sources. If journalists have the security of knowing a qualified privilege exists and feel confident that they meet the requirements of that privilege, then granting confidentiality in order to secure important information would make sense. On the other hand, journalists could opt not to grant confidentiality if, after weighing the factors involved, it was determined that doing so would be either unnecessary or ill-advised in light of the applicable legal standard.

Finally, the important First Amendment values at stake, both for the press and for society, require revisiting the journalist's privilege. As journalist Bill Kovach eloquently stated:

[I]t is difficult to separate the concept of news and journalism from the notion of creating community and democracy. The world in which the well of accurate, reliable, factual information is not being constantly replenished is one that becomes more polluted with gossip, rumor, speculation and propaganda. This is a mixture that is toxic to civic health. This is a mixture that will produce a public less and less able to participate in civic life. This is a mixture that makes it more and more likely that a self-appointed elite will be free to exercise its will on society. . . . Freedom and democracy depend upon individuals who refuse to give up the belief that the free flow of information has made freedom and human dignity possible.¹⁰⁴

III. RESOLVING THE CONFUSION: POTENTIAL SOLUTIONS FOR THE CURRENT UNWORKABLE STATE OF AFFAIRS

A. Applying *Jaffee* to Find a Common Law Evidentiary Privilege

By finding a common law evidentiary privilege, the Supreme Court can grant journalists protection against disclosure of confidential sources. The Court's analysis in establishing a common law psychotherapist-patient privilege in *Jaffee v. Redmond*¹⁰⁵ provides a foundation for arguing that a privilege should also be created for journalists.¹⁰⁶ In *Jaffee*, the Court expanded the evidentiary privilege provided for in

103. See *Branzburg*, 408 U.S. at 704.

104. Bill Kovach, Chairman, Committee of Concerned Journalists, Address at the Organization of News Ombudsman (April 30, 2002), available at <http://www.publicintegrity.org/report.aspx?aid=182>. Bill Kovach is a veteran newsman, former curator of the Nieman Foundation at Harvard University, and founding chairman of the Committee of Concerned Journalists. *Id.*

105. 518 U.S. 1 (1996) (7-2 decision).

106. See, e.g., Boutrous & Stodder, *supra* note 94; Jeffrey S. Nestler, *The Underprivileged Profession: The Case for Supreme Court Recognition of the Journalist's Privilege*, 154 U. PA. L. REV. 201 (2005); The Committee on Communications & Media Law, *The Federal Common Law of Journalists' Privilege: A Position Paper*, THE RECORD OF THE ASSOCIATION OF THE BAR

Federal Rule of Evidence 501¹⁰⁷ to include a psychotherapist-patient privilege of confidentiality.¹⁰⁸ At issue in *Jaffee* was whether statements made to a licensed clinical social worker should be protected from compelled disclosure in a federal civil action.¹⁰⁹

In expanding the federal evidentiary privilege, the Court began with Rule 501, which grants federal courts the power to “define new privileges by interpreting ‘common law principles . . . in the light of reason and experience.’”¹¹⁰ While the concept that the public has “a right to every man’s evidence” is long-standing, it does give way to certain exceptions. The Supreme Court has held that the rationale for an exception to general evidentiary rules disfavoring privileges may be made when there exists “a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.”¹¹¹ Thus, in *Jaffee*, the Court faced the challenge of balancing the public good resulting from a psychotherapist privilege against the need for all relevant evidence.

The Court first considered the specific relationship at issue, and the public good served by it. In the case of psychotherapists and patients, the privilege is “rooted in the imperative need for confidence and trust.”¹¹² The relationship is characterized as one of a sensitive nature; because of this, allowing disclosure of the information conveyed in psychotherapist-patient sessions would undermine the relationship as well as the underlying purpose of confidentiality (that is, successful patient treatment).¹¹³ Further, ensuring that this relationship functions effectively is in the public interest, as it facilitates mental health, which is a “public good of transcendent importance” to our citizenry.¹¹⁴

The Court also looked at the privilege counterfactually to consider what would result from denial of the privilege in favor of full evidentiary disclosure. The primary concern was the chilling effect that would arise if patients were unsure whether their confidential statements could be disclosed in court. The chill factor is even further exacerbated when “it is obvious that the circumstances that give rise to the need for

OF THE CITY OF NEW YORK, VOL. 60, NO. 1 (2005).

107. Rule 501 provides that:

[T]he privilege of a witness, person, government, state, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which state law supplies the rule of decision, the privilege of a witness, person, government, state, or political subdivision thereof shall be determined in accordance with state law.

FED. R. EVID. 501. It should be noted that with respect to state law claims, privileges are determined in accordance with state law. *Id.*

108. *Jaffee*, 518 U.S. at 1.

109. *Id.* at 3–4. The social worker in *Jaffee* provided therapy to a police officer who shot a man while she was on duty. The police officer participated in approximately fifty counseling sessions with the social worker. *Id.* at 4.

110. *Id.* at 8 (quoting FED. R. EVID. 501).

111. *Trammel v. United States*, 445 U.S. 40, 50 (1980) (quoting *Elkins v. United States*, 364 U.S. 206 (1960) (Frankfurter, J., dissenting)).

112. *Jaffee*, 518 U.S. at 10 (citation omitted).

113. *Id.*

114. *Id.* at 11.

treatment will probably result in litigation.”¹¹⁵ The Court pointed out that self-censorship would likely result from the lack of a privilege. That is, a patient would be unlikely to disclose any information that might be useful in litigation; thus, from an evidentiary standpoint, the outcome would be the same as if the information had been discussed but considered privileged.¹¹⁶

Finally, because “the policy decisions of the States bear on the question [of] whether federal courts should recognize a new privilege or amend the coverage of an existing one,”¹¹⁷ it was notable to the Court that all fifty states and the District of Columbia had already enacted a form of the psychotherapist privilege.

In applying the *Jaffee* reasoning to the journalist’s privilege, we begin with the same question: does the public good transcend all rational means for ascertaining the truth? If the answer is yes, then the privilege should be granted. In the case of journalists, the confidential source relationship is of vital importance. Just as a patient in a psychotherapist’s office may not reveal certain information if he or she knows it is not maintained in full confidentiality, so too might a journalist’s source not supply information if the source’s identity would not be protected in court. Additionally, sources of the type of information that is most likely to be of public importance—for example, whistleblowers or those with inside information regarding crime or government corruption—may not come forward if they believe their identities could be disclosed.

Though the *Branzburg* majority worried that a privilege against compelled disclosure would condone criminal activity, that concern is ill-founded. When potential sources involved in illegal activity are deterred from speaking out or telling their stories, the government and the public are unlikely to hear of the activity at all. It follows that the public interest is better served by having more, rather than less information about wrongdoing. And, as Paul McMasters notes, the First Amendment rights at issue go beyond those of journalists to “the free speech and dissent rights of government employees (or private sector employees),”¹¹⁸ who may need a confidential outlet for airing institutional wrongdoing. Further, consideration for the First Amendment rights of those who require a free press in order to “engage in informed discourse” should be paramount.¹¹⁹ These interests in free discourse, an informed citizenry, and a healthy democracy certainly represent public goods worthy of transcending the need for all relevant evidence.¹²⁰

The states’ recognition of a psychotherapist-patient privilege in *Jaffee* additionally supports an analogous recognition for journalists. Currently, forty-nine states and the

115. *Id.* at 11–12.

116. *Id.* Of course for the patient withholding information, the result would likely be less effective mental health treatment.

117. *Id.* at 12–13 (citing *Trammel v. United States*, 445 U.S. 40, 48–50 (1980)). The States’ adoption of the privilege suggests that “‘reason and experience’ support recognition of the privilege.” *Id.*

118. Paul McMasters & Geoffrey R. Stone, *Do Journalists Need a Better Shield?*, LEGAL AFFAIRS DEBATE CLUB, Dec. 6, 2004, http://www.legalaffairs.org/webexclusive/debateclub_cooper1204.msp (last visited Feb. 26, 2007). McMasters is a columnist and the First Amendment Ombudsman at the First Amendment Center. *Id.*

119. *Id.*

120. *See supra* note 104 and accompanying text.

District of Columbia recognize some form of the journalist's privilege, either by statute or common law.¹²¹ Clearly, there is a need for such protection for journalists and a critical mass of states have made this policy judgment, either legislatively or judicially. Yet, while many states offer protection, this alone is not enough. Given the increasingly national and international scope of news coverage, the creation of a federal privilege is of particular importance for journalists. A national journalist subject to varying state laws will have a difficult time assessing with any confidence whether relying on confidential sources is wise, or whether there is a risk of future compelled disclosure. This is the very situation in which Judith Miller found herself: while she worked in New York and Washington, D.C., both of which provide a journalist's privilege by statute, she was subpoenaed by a *federal* grand jury and thus lacked protection against compelled disclosure of her sources.¹²²

One stumbling block in applying *Jaffee* to *Branzburg* scenarios is a fundamental difference in the type of confidential relationship at issue: "the journalists' privilege is distinct from other recognized privileges, in that the privilege vests only with the journalist, not with the source of the information."¹²³ Thus, the privilege in the journalist-source relationship is the journalist's to give away, despite the fact that the confidential information would harm the *source* rather than the journalist. Other relationships that recognize an evidentiary privilege place the privilege with the individual who is subject to harm if the information is publicized (for example, in a lawyer-client relationship, the client retains the privilege).¹²⁴ However, when examined more closely, this difference between the journalist's privilege and other evidentiary privileges actually supports granting the privilege to journalists. Without it, journalists subpoenaed by grand juries are in a no-win situation: they have to decide whether to be held in contempt of court or reveal the source's identity, likely resulting in harm to the source. Were confidentiality granted in the first place, no harm would be done to either the individual with the privilege (that is, the journalist) or to the individual granting the information (that is, the source).

An additional argument against granting the evidentiary privilege is that the journalist's ethical obligation to protect confidential sources of information "should not be left completely in the hands of each individual journalist to define," as journalists may take advantage of the privilege and irresponsibly grant confidentiality to sources.¹²⁵ Other relationships entitled to the confidentiality privilege are ones that

121. *Hearing, supra* note 100 (testimony of Norman Pearlstein). Thirty-one states and the District of Columbia have statutory protection. *See supra* note 95 and accompanying text. Wyoming is the only state that has neither a statutory nor judicially created privilege. 152 CONG. REC. S4800 (daily ed. May 18, 2006) (statement of Sen. Lugar).

122. Miller faced the same quandary as the reporter in *Gonzales*. *See supra* notes 90–94 and accompanying text.

123. CONG. RESEARCH SERV., *supra* note 95, at Summary.

124. FISHER, *supra* note 6, at 756–57. While the "precise contours of the professional privileges [i.e., psychotherapist-patient, clergy-penitent, and lawyer-client] vary," a common element is that the privilege is the client's. *Id.* at 756. "The professional may assert the privilege, but only on the client's behalf." *Id.* at 757.

125. Gerald F. Uelman, *Leaks, Gags and Shields: Taking Responsibility*, 37 SANTA CLARA L. REV. 943, 959 (1997). Professor Uelman posits that the "[c]urrent 'shield laws' encourage the leaking of information by protecting the leaker from any consequences for his breach of

serve some publicly recognized goal, such as providing legal advice or administering spiritual counseling.¹²⁶ In these relationships, legal protection attaches to a specific promise of confidentiality only when confidentiality is related to the publicly recognized goal. Conversely, if the specific promise of confidentiality is not related to a recognized public goal, the privilege is not allowed.¹²⁷ Although the journalist's privilege is a recent jurisprudential development, it serves not just one, but a number of publicly recognized goals—the free flow of information, the ability to maintain an independent press,¹²⁸ and an informed citizenry—and the privilege is not one that seeks to exceed the public good it serves. While there may be some risk of journalists irresponsibly granting confidentiality to sources, the overwhelming public good that is served by protecting the journalist-source relationship surpasses such risk. Additionally, codes of ethics in journalism make explicit the importance of granting confidentiality responsibly,¹²⁹ and absent evidence to the contrary, it should be assumed that this obligation is met.

Federal Rule of Evidence 501 provides that evidentiary privileges should be adaptable to changing times.¹³⁰ The *Branzburg* majority argued that there was no indication that refusing to recognize a journalist's privilege would undermine the freedom of the press, because “from the beginning of our country the press has operated without constitutional protection for press informants and the press has flourished. The existing constitutional rules have not been a serious obstacle to either the development or retention of confidential news sources by the press.”¹³¹ However, there is sufficient evidence to show that in recent years the operating rules have failed to adequately protect the press,¹³² as a consequence, the rules are no longer adequately protecting our democracy. By applying the *Jaffee* reasoning to the journalist's privilege, the Court could provide some protection to journalists without going so far as finding the privilege within the scope of the First Amendment. Rather, the Court could strike a compromise by recognizing the First Amendment interests at stake, and applying them to find a journalist's privilege in Rule 501.

confidentiality, and place no responsibility on reporters for lack of restraint in promising confidentiality to their sources.” *Id.* at 945.

126. *Id.*

127. *Id.*

128. As the court in *Baker v. F & F Inv.* pointed out, “where the press remains free, so too will a people remain free.” 470 F.2d 778, 785 (2d Cir. 1972).

129. See, e.g., SOCIETY OF PROFESSIONAL JOURNALISTS, CODE OF ETHICS, <http://www.spj.org/pdf/ethicscode.pdf> (last visited Feb. 26, 2007) (“Journalists should: . . . Always question sources’ motives before promising anonymity. Clarify conditions attached to any promise made in exchange for information. Keep promises.”); RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION & FOUNDATION, CODE OF ETHICS, <http://www.rtna.org/ethics/coe.shtml> (last visited Jan. 5, 2007) (“Professional electronic journalists should: Identify sources whenever possible. Confidential sources should be used only when it is clearly in the public interest to gather or convey important information or when a person providing information might be harmed. Journalists should keep all commitments to protect a confidential source.”).

130. “The Rule . . . did not freeze the law governing the privileges of witnesses in federal trial at a particular point in our history, but rather directed federal courts to ‘continue the evolutionary development of testimonial privileges.’” *Jaffee v. Redmond*, 518 U.S. 1, 8–9 (1996) (quoting *Trammel v. United States*, 445 U.S. 40, 47 (1980)).

131. *Branzburg v. Hayes*, 408 U.S. 665, 698 (1972).

132. See *supra* notes 12–19 and accompanying text.

B. Congressional Action: The Possibility of a Federal Shield Law

In response to the highly publicized subpoenaing of reporters during 2004, the 109th Congress undertook a number of legislative efforts to provide federal protection for journalists against the compelled disclosure of confidential sources. The first such effort was made in February 2005, when Senator Richard Lugar (R-Indiana) and Representative Mike Pence (R-Indiana) introduced the Free Flow of Information Act of 2005 (“2005 legislation”).¹³³

The 2005 legislation borrowed provisions from the Department of Justice guidelines for issuing subpoenas to the media,¹³⁴ and were functionally similar to the shield laws already in place in a number of states.¹³⁵ The legislation’s proponents sought to establish “national standards that must be met before federal officials may issue a subpoena to a member of the news media,”¹³⁶ and the key provision prohibited compelled disclosure of confidential source identities.¹³⁷ Further, the 2005 legislation managed to avoid the definitional and notice problems of judicially-created privileges

133. S. Res. 340, 109th Cong. (2005); H.R. Res. 581, 109th Cong. (2005). Due to political pressure, S.340 and H.R. 581 were redrafted and reintroduced on July 18, 2005. Louis J. Capocasale, Comment, *Using the Shield as a Sword: An Analysis of How the Current Congressional Proposals for a Reporter’s Shield Law Wound the Fifth Amendment*, 20 ST. JOHN’S J. LEGAL COMMENT. 339, 362; S. Res. 1419, 109th Cong. (2005); H.R. Res. 3323 109th Cong. (2005). The revised bills provided a qualified privilege for reporters, S. Res. 1419 § 2(a)(1), (2); H.R. Res. 3323 § 2(a)(1), (2), and provided an exception to the prohibition against compelled disclosure of sources in cases where it could “reasonably be expected” that source information or identity was necessary to “prevent imminent and actual harm to national security.” S. Res. 1419 § 2(a)(3); H.R. Res. 3323 § 2(a)(3). For the national security exception to apply, the revised bill also required a showing that “compelled disclosure . . . would prevent such harm,” and that “the harm sought to be redressed by requiring disclosure clearly outweigh[ed] the public interest in protecting the free flow of information.”

The original and revised bills were cosponsored by Senators Christopher Dodd (D-Connecticut), Bill Nelson (D-Florida), Jim Jeffords (I-Vermont), and Frank Lautenberg (D-New Jersey), as well as Representative Rick Boucher (D-Virginia). Despite cosponsoring the House version, Representative Boucher has stated that he would “prefer that the courts interpret the First Amendment so as to provide to reporters a privilege to refrain from revealing confidential sources in court proceedings.” Statement of Representative Rick Boucher (D-Virginia) on H.R. 581, Free Flow of Information Act, http://www.boucher.house.gov/index.php?option=com_content&task=view&id=34 (last visited Feb. 26, 2007). However, because the courts have declined to do so, Representative Boucher felt compelled to support the federal response. *Id.*

For a more thorough exposition on the proposed bills, as well discussion of similar proposals by Senator Dodd (S. Res. 3020, 108th Cong. (2004); S. Res. 369, 109th Cong. (2005)), see Fargo, *supra* note 85, and Capocasale, *supra*.

134. 28 C.F.R. § 50.10 (2005).

135. Mike Pence & Richard G. Lugar, *Protecting the Press—And the Public*, WASH. POST, Apr. 15, 2006, at A25.

136. *Id.*

137. S. Res. 1419 § 2; H.R. Res. 3323 § 2.

by specifying who the privilege covered and under precisely what circumstances it would apply.¹³⁸

Neither the House nor Senate version of the Free Flow of Information Act of 2005 made it out of committee. In recognition of the need to clarify the “extraordinary differences of opinion in the Federal courts of appeals,”¹³⁹ Senator Lugar thus reintroduced the Free Flow of Information Act in 2006 (“2006 legislation”), with the aim of striking a balance between the free flow of information and the administration of justice: “The purpose of this Act is to guarantee the free flow of information to the public through a free and active press . . . , while protecting the right of the public to effective law enforcement and the fair administration of justice.”¹⁴⁰

The 2006 legislation expanded and improved upon the legislation introduced during the 2005 session, most notably by providing more explicit detail regarding when and how the general prohibition against compelled disclosure could be overcome. For example, the 2006 legislation specifically stated that it applied only to information or material received from a source with a promise of confidentiality attached, and that it would provide a qualified privilege to journalists¹⁴¹ when disclosure was sought by United States attorneys in criminal proceedings,¹⁴² by criminal defendants,¹⁴³ and by litigants in civil proceedings.¹⁴⁴ The legislation prohibited federal courts in each scenario from compelling a journalist to disclose confidential source identity or any records, documents, or other information obtained or received under a promise of confidentiality.¹⁴⁵ Qualifying this general prohibition, however, were provisions allowing federal courts to compel disclosure of confidential sources and information in cases where a requisite showing was made by the party seeking disclosure, to be determined by the courts under a “clear and convincing evidence” standard.¹⁴⁶

Under the 2006 legislation, disclosure of confidential information sought by United States attorneys in criminal proceedings and by civil litigants would have been allowed only upon a showing that: alternative sources of the information had been exhausted;

138. See, e.g., Jennifer Elrod, *Protecting Journalists from Compelled Disclosure: A Proposal for a Federal Statute*, 7 N.Y.U. J. LEGIS. & PUB. POL’Y. 115, 149–61 (discussing the definitional difficulties of determining to whom the journalist’s privilege applies); Laura Durity, *Shielding Journalists-“Bloggers”*: *The Need to Protect Newsgathering Despite the Distribution Medium*, 2006 DUKE L. & TECH. REV. 11, 34–35 (arguing that the Free Flow of Information Act’s definition of journalists does not “address modern informational technology” and fails for being overly vague).

139. 152 CONG. REC. S4800 (daily ed. May 18, 2006) (statement of Sen. Lugar).

140. Free Flow of Information Act of 2006, S. 2831, 109th Cong. (2006). The 2006 Act was cosponsored by Senators Arlen Specter (R-Pennsylvania), Christopher Dodd (D-Connecticut), Lindsey Graham (R-South Carolina), and Charles Schumer (D-New York). 152 CONG. REC. S4800 (2006).

141. Under section 3, journalist is defined as “a person who, for financial gain or livelihood, is engaged in the gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing news or information as a salaried employee or an independent contractor.” S. 2831 § 3(3).

142. *Id.* § 4.

143. *Id.* § 5.

144. *Id.* § 6.

145. *Id.* §§ 4(a), 5(a), 6(a).

146. *Id.* §§ 4(b), 5(b), 6(b).

the subpoena was not being used “to obtain peripheral nonessential, or speculative information”; the subpoena was limited in scope; and reasonable and timely notice of a demand for documents was provided.¹⁴⁷ In addition, in criminal proceedings, the United States attorney would have been required to show that there were “reasonable grounds . . . to believe that a crime . . . occurred, and that the information sought [was] critical to the investigation or prosecution, particularly with respect to directly establishing guilt or innocence,”¹⁴⁸ and that nondisclosure was contrary to the public interest (balancing the interest in newsgathering and the free flow of information against compelling disclosure).¹⁴⁹ In civil actions, the party seeking disclosure would have also needed to show that “the information sought [was] critical to the successful completion of the civil action,”¹⁵⁰ and that nondisclosure was contrary to the public interest (“taking into account . . . compell[ed] disclosure and the public interest in newsgathering and in maintaining the free flow of information to the widest possible degree about all matters that enter the public sphere”).¹⁵¹

In addition to ensuring a fair balance between the free flow of information and the fair administration of justice, the 2006 legislation included an important provision protecting the rights of criminal defendants to a fair trial: under section 5, criminal defendants seeking disclosure of confidential information would have been subjected to a lower threshold showing than civil litigants and United States attorneys. A criminal defendant would only be required to show: that alternative sources of the information had been exhausted; that there were “reasonable grounds . . . to believe that the information sought [was] directly relevant to the question of guilt or innocence or to a fact . . . critical to . . . mitigation of a sentence”; that the subpoena was not being used to obtain nonessential information; and that nondisclosure would be “contrary to the public interest” (balancing the defendant’s interest in a fair trial against the public’s interest in the free flow of information).¹⁵²

The 2006 legislation also provided important exceptions to the prohibition against disclosure of confidential sources or information for: eyewitness observations by journalists (or participation in criminal or tortious conduct),¹⁵³ prevention of death or substantial bodily injury,¹⁵⁴ and prevention of “significant and actual harm to the national security.”¹⁵⁵

Despite the improvements made in the 2006 legislation, it suffered the same fate as did earlier proposals, never making it out of committee. However, the legislation introduced during the 109th Congress represents an important first step in the quest to provide federal protection to journalists against compelled disclosure of confidential sources. A bill like the Free Flow of Information Act of 2006 would create a national

147. *Id.* §§ 4(b)(1)–(3), (6), 6(b)(1), (4)–(6).

148. *Id.* § 4(b)(5).

149. *Id.* § 4(b)(4).

150. *Id.* § 6(b)(2).

151. *Id.* § 6(b)(3).

152. *Id.* § 5(b)(1)–(4). As with United States attorneys and civil litigants, courts would have been required to make this determination for criminal defendants by a standard of “clear and convincing evidence.” *Id.* at § 5(b).

153. *Id.* § 7.

154. *Id.* § 8.

155. *Id.* § 9.

standard upon which journalists could rely, thus aiding in the gathering and dissemination of news to the public—an issue of particular importance in the modern era of national news coverage.

Additionally, the text of the 2006 legislation and statements by its sponsors revealed a clear Congressional intent: protection of free speech and a free press, and ensuring that the American public has the “information [it has] a right to”—a necessary component of a healthy democracy.¹⁵⁶ By providing adequate notice to journalists and clear interpretive guidance to courts, Congress has the ability to grant greater protection for confidential sources in a manner that aligns with the key interests and values at stake. At the same time, the 2006 legislation recognized the importance of the fair administration of justice, and sought to ensure that, when necessary for a fair trial, a defendant would have the opportunity to overcome the prohibition against compelled disclosure. Further, the 2006 legislation made important exceptions,¹⁵⁷ which represented compromise and an understanding that an absolute privilege would not be in the public’s best interest. As Senator Dodd said about the bill, it “is not a perfect bill,” but rather “the work product of significant negotiation [and] compromise.”¹⁵⁸

It remains to be seen how the 110th Congress will approach the issue of a federal shield law. However, with all of the sponsors and cosponsors of the 2005 and 2006 bills returning to Congress, it seems likely that the issue will be reintroduced—and hopefully in time for real legislative action to occur.

IV. CONGRESS: THE BEST ACTOR FOR STRENGTHENING THE PRIVILEGE WHILE KEEPING IMPORTANT FREE SPEECH AND DEMOCRACY VALUES INTACT

The argument for granting an evidentiary privilege following the rationale laid out in *Jaffee v. Redmond* is strong; however, it fails to adequately protect the important interests of free speech and democracy that are at stake. The intent behind the Federal Rules of Evidence is described in section 102: “[t]hese rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.”¹⁵⁹ The combination of placing the determination of privileges in the hands of the judicial system and the presumption disfavoring privileges that is inherent in the rules¹⁶⁰ leaves a journalist’s privilege created by Rule 501 on shaky ground. In addition to not invoking democracy and free speech values, a privilege created via Rule 501 would be subject to the changeability of

156. Pence & Lugar, *supra* note 135.

157. See *supra* notes 141–46 and accompanying text. Despite the exceptions provided for in the 2006 legislation, the Department of Justice went on record about the bill, stating that it “could weaken a criminal defendant’s right to a fair trial as well as undermine national security. It could also be manipulated to give terrorist organizations free rein to disseminate dangerous information.” Lisa Friedman, *Unshielded*, AM. JOURNALISM REV., Aug./Sept. 2006, available at <http://www.ajr.org/Article.asp?id=4165>.

158. Chris Dodd, *Senator Dodd Speaks about the Free Flow of Information Act*, May 18, 2006, <http://dodd.senate.gov/index.php?q=node/3486/print>.

159. FED. R. EVID. 102.

160. See *United States v. Bryan*, 339 U.S. 323, 331 (1950) (quoting 7 J. WIGMORE, EVIDENCE § 2192, at 64 (McNaughton rev. 1961)).

the common law¹⁶¹ and would also face potential clarity and notice problems for both journalists and sources.¹⁶²

Congressional action, however, would assure that the values of democracy and free speech are protected, while at the same time providing the requisite clarity for courts, journalists, and sources. Further, congressional action would institutionalize a balance between protecting the confidentiality of sources and enabling the administration of justice. While an absolute privilege may be too extreme, particularly in cases involving grand juries, requiring the government to make a substantial showing in order for the journalist's privilege to be overcome would ensure that the interests of both journalists and the government are protected. The key to congressional action, however, is that any proposed bill must be carefully tailored to provide clear definitions and a workable balance between compelled disclosure in *rare* circumstances and a more general protection for journalists. Professor Anthony Fargo also recommends that any bill before Congress includes very clear legislative intent to "clarify why it is acting in contradiction to the well-established maxim that 'the public . . . has a right to every [person's] evidence.'"¹⁶³

CONCLUSION

"From Watergate to the latest corporate whistleblowers, the benefits that flow to the public from [the] pact of confidentiality are invaluable."¹⁶⁴ This statement sums up the need for the journalist's privilege: journalists must have the freedom to obtain information necessary for keeping the public informed about the state of our society, and in order to do so, they must be able to operate without fear of being subjected to compelled disclosure of the confidential sources or information they rely on. Further, by continuing to allow courts to compel the disclosure of confidential information, Justice Stewart's warning of government efforts to annex the press as an investigative arm could become a reality.¹⁶⁵ This warning is particularly important given the type of information that confidential sources are likely to be protecting.¹⁶⁶

The journalist's privilege is often framed as one that implicates the First Amendment's promise of the freedom of the press versus the Fifth Amendment's grand jury provision. Determining whether the First or the Fifth Amendment interest ought to predominate requires a value judgment. However, there is one greater, overarching interest that is often overlooked: the right of the public to receive vital information about public affairs.¹⁶⁷

161. *See supra* note 130 and accompanying text.

162. Leaving the application of a privilege—particularly a qualified one—to ad hoc determinations made by the courts would mean that journalists and sources would not know, at the time the confidential relationship was entered into, whether a court would uphold the confidentiality. *See, e.g., supra* notes 46–50 and accompanying text.

163. Fargo, *supra* note 85, at 69 (alteration in original).

164. Geneva Overholser, *The Journalist and the Whistle-Blower*, N.Y. TIMES, Feb. 6, 2004, at A27.

165. *Branzburg v. Hayes*, 408 U.S. 665, 710 (1972) (Stewart, J., dissenting).

166. *See supra* note 8 and accompanying text.

167. Alexander Meiklejohn argues that the First Amendment guards not only the freedom to hear and to read, but also the "writing or speaking of everyone whom a citizen, at his own

This Note synthesizes the three ways in which the law could grant protection to journalists from compelled disclosure of confidential sources. While there has been prior discussion of the ways in which this could be done—whether rooting protection in First Amendment rights of the press, finding protection via Federal Rule of Evidence 501, or by Congressional action—this Note argues that by looking to the intent behind each action, we can better analyze the options and thus reach a more satisfactory conclusion.

It appears unlikely that the Supreme Court will revisit *Branzburg*, as it denied certiorari in the Miller and Cooper cases.¹⁶⁸ Additionally, while extending Federal Rule of Evidence 501 to cover journalists has strong support based on the reasoning in *Jaffee*, it fails to adequately protect free speech values and the healthy functioning of our democracy. Congress, however, can promote these interests by providing clear legislative intent and carefully tailored provisions. Although the Miller and Cooper cases began a national discourse on the issue of the journalist's privilege, it is up to Congress to act and the bill proposed by Senator Lugar and Representative Pence is a good start. Congress needs to seriously consider the importance of press freedom to our democracy and follow the counsel of Justice White, who stated that "Congress has the 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."¹⁶⁹

discretion, may choose to hear or read." ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 118–19 (1960). Similarly, the Supreme Court has expressed the belief that "the process of informing the public [is] the core purpose of the constitutional guarantee of free speech and a free press." *Branzburg*, 408 U.S. at 726 n.1 (Stewart, J., dissenting). According to Meiklejohn, the process of informing the public of the First Amendment is of vital importance to the health of our democracy. For voters to express themselves at the polls, they must first "make up their minds" through "read[ing] the printed records of the thinking and believing which other men have done in relation to those issues [that affect the general welfare]." MEIKLEJOHN at 117. Newspapers and the media are a fundamental source of information on such issues.

168. *In re Grand Jury Subpoena*, 397 F.3d 964, cert. denied, 125 S. Ct. 2977 (2005).

169. *Branzburg*, 408 U.S. at 706.