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**TOTAL IMMUNITY WITHOUT
ACCOUNTABILITY:
WHY THE PROPOSED FEDERAL
MEDIA SHIELD BILL IS OUT OF
BALANCE WITH AMERICA'S
LAWS AND VALUES**

VICTOR E. SCHWARTZ
PHIL GOLDBERG

PREFACE

In response to several high-profile investigations involving reporters as witnesses, Congress is considering a media shield law that would provide reporters with immunity from future subpoenas in federal courts. While the bill includes a balancing test for some information a reporter may be asked to provide, it provides total immunity for any information that could lead to the identity of an anonymous source, with practically no exceptions. As America advances in the Information Age, this bill could establish broad rights for nearly anyone who disseminates information to the public—through print, broadcast, over the Internet, or otherwise.

This monograph puts the current media shield bill into context among the traditional privileges recognized by federal and state courts, as well as decisions on reporter privilege by the United States Supreme Court and the federal circuits. It discusses thought-provoking issues that Congress and courts should consider when blocking truthful information from civil and criminal proceedings. Should Congress break from precedent and legislate rules of evidence? Should reporters have a broader immunity than doctors, lawyers, priests, and spouses? Does the bill define who can be covered under the bill so broadly as to allow almost anyone to claim a reporter's privilege, including those with personal or political agendas? Should there be some threshold test for credibility or accountability that a person must meet in order to be given the privilege? Should Internet bloggers be covered the same way as mainstream reporters?

The authors, by using practical examples, answer these questions and reveal potential problems and unforeseen consequences that could result from the current bill, such as empowering the paparazzi, inviting invasions of privacy, and making it difficult for reporters to be held accountable when they or their "anonymous sources" defame people in the stories. Finally, the authors provide guidelines should Congress decide to enact a federal media shield law.

Like all other publications of the National Legal Center, this monograph is presented to encourage a greater understanding of the law and its processes. The views expressed in this monograph are those of the authors and do not necessarily reflect the opinions of the advisers, officers, or directors of the Center. The *Briefly* . . . booklets are designed to be short, accessible, and portable treatments of leading legal issues of interest to the private sector.

Richard A. Hauser
President
National Legal Center

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I. INTRODUCTION

The United States justice system is one of America's most hallowed institutions. It is a place where the truth is doggedly pursued and people are held accountable for their actions. In pursuing truth in criminal and civil cases, the United States Supreme Court guarantees the parties the "right to every man's evidence."¹ Anyone receiving a judicial subpoena must provide the court with whatever information he or she has that is responsive to the subpoena or be held in civil or criminal contempt of court.² Congress is considering legislation that would create a permanent and impenetrable exception for reporters in many circumstances.³ In situations where the bill categorically blocks truth from federal courtrooms without discretion, it is unprecedented, unwise, and contrary to American laws and values.

The current media shield proposal in Congress broadly states that "a Federal entity may not compel a covered person [e.g., reporter or other disseminator of information] to testify or produce any document in any proceeding or in connection with any issue arising under Federal law."⁴ This bill would cover all testimony and documents,

¹ *Trammel v. United States*, 445 U.S. 40, 50 (1980).

² *See, e.g.*, Richard A. Sauber, *When Reporters Need Lawyers*, *LEGAL TIMES*, Feb. 20, 2006, at 38 (explaining the consequences of civil and criminal contempt for failing to respond to a judicial subpoena).

³ S. 1419, 109th Cong. (2006); H.R. 3323, 109th Cong. (2006).

⁴ S. 1419, 109th Cong. § 2(a) (2006).

such as notes, outtakes, and even eyewitness testimony of events covered.⁵ For all but source information, the bill provides an exception that allows the subpoena to be enforced when the information is essential or dispositive to an important issue in a case and there are no reasonable alternative means of getting that information.⁶

This legislation is troubling for two reasons. First, it discards this balancing approach for information relating to anonymous sources, and instead provides total immunity when the information could “reveal the identity of a source of information or include any information that could reasonably be expected to lead to the discovery of the identity of such a source.”⁷ The only exception is limited to preventing “imminent and actual harm to national security.”⁸ In all other criminal and civil cases and investigations, a judge would have no discretion to require disclosure of a source, even when the information is critical to the case, such as in a defamation suit, and the story is of little or no importance to the public.

Second, although this bill is often touted as a reporter’s privilege bill, it is not, as it does not tailor the immunity protections to true journalists. It includes under the definition of “covered person” anyone who disseminates information periodically. The bill does not distinguish among the established media, Internet bloggers, or those advancing personal or political agendas. As a result, it applies without consideration to whether the source is credible or the writer is accountable to any sense of journalism ethics.

This monograph discusses why total immunity without accountability is unprecedented in light of the historic approach to personal evidentiary privileges. It also exposes the current proposal’s adverse consequences, including upending people’s rights to privacy, offering a safe harbor for those who traffic in stolen information, and making it practically impossible for anyone to succeed in a defamation suit

⁵ The bill requires an exception to be satisfied by “clear and convincing evidence,” which is much higher than the “preponderance of the evidence” standard. *Id.*

⁶ S. 1419, 109th Cong. § 2 (2006).

⁷ S. 1419, 109th Cong. § 2(a)(3) (2006).

⁸ *Id.*

against a person covered by this bill. It concludes with guide-lines for a solution. If Congress wants to give reporters additional protections, the standards for triggering those protections should be high, their scope should be as narrow as needed to achieve a legitimate interest, and any exemption should be clear and achievable.⁹

II. THE FEDERAL MEDIA SHIELD LAW VIOLATES THE HISTORY OF SEPARATION OF POWERS

A. Privileges Are Rare, Narrow Exceptions To Seeking Truth in the Courtroom

Personal evidentiary privileges deny both plaintiffs and defendants the ability to use truthful information that may be crucial to their legal claims and defenses. Consequently, Congress and the courts have long recognized that privileges should be rare and narrow. As the Supreme Court has held, “exceptions to the demand for every man’s evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.”¹⁰ Rather, the Court found that “there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional.”¹¹

Historically, personal privileges have developed under common law, not by statutes. When courts have recognized an evidentiary privilege, it has been to protect information shared in the context of a special relationship, such as husband-wife, client-lawyer, and priest-penitent. These privileges encourage information sharing without fear

⁹ Christopher Clark, *The Recognition of a Qualified Privilege for Non-Confidential Journalistic Materials: Good Intentions, Bad Law*, 65 BROOK. L. REV. 369, 384-85 (1999) (“The law of privilege is **not** designed to work as a buffer against burdensome discovery obligation for favored parties. Rather, the law of privilege is a strictly limited exception to the general rule of open availability of evidence—an exception that is to be broadened only when compelling circumstances require it.”) (emphasis added)

¹⁰ *United States v. Nixon*, 418 U.S. 683, 710 (1974) (rejecting absolute presidential privilege).

¹¹ *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996).

that either party will be forced to disclose to others the confidences shared to others. *Wigmore on Evidence*, America's leading treatise and authority on the rules of evidence, explains that there is a very high bar for recognizing and enforcing privileges:

[T]he mere fact that a communication was made in express confidence . . . does not create a privilege. . . . [A] confidential communication to a clerk, to a trustee, to a commercial agency, to a banker, to a *journalist*, or to any other person, not holding one of the specific relations hereafter considered, is not privileged from disclosure.¹² (emphasis added)

In 1996, the Supreme Court of the United States in *Jaffee v. Redmond* issued a test for when a new privilege may be established: (1) whether the proposed privilege serves significant public and private interests; (2) whether the recognition of those interests outweighs any burden on truth-seeking that might be imposed by the privilege; and (3) whether such a privilege is widely recognized by the states.¹³ The purpose of the Court's test is to make sure that privileges only promote interests so important that they outweigh the need for the probative evidence.

B. Congress Has Continually Rejected Codifying Evidentiary Privileges

Congress has refused to intervene in this process by codifying personal evidentiary privileges. In 1975, when the Federal Rules of Evidence were adopted, the Judicial Federal Rules Advisory Committee (FRAC) proposed that Congress codify traditional, generally accepted privileges.

¹² *Mooney v. Sheriff of N.Y. County*, 199 N.E. 415 (N.Y. 1936) (quoting 5 JOHN H. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2286) (emphasis added).

¹³ *Jaffee*, 518 U.S. at 8 (“The making of rules of evidence to govern trials . . . is a function at the core of [the] judicial department.”); *State v. Ryan*, 691 P.2d 197, 206 (Wash. 1964) (en banc) (“court[s] [are] the final arbiter[s] of evidentiary rules”).

The FRAC draft included nine personal evidentiary privileges, including attorney-client, therapist-patient, husband-wife, clergy-penitent, and trade secrets, among a few others. It is relevant to note that the FRAC draft did not include a reporter's privilege; FRAC had very thoroughly reviewed the subject and perhaps believed that the merits of the privilege were outweighed by the jury's need to know the truth.

In a most unusual action, Congress rejected FRAC's proposal of codifying the traditional privileges.¹⁴ Instead, Congress stated a general principle that privileges "shall be governed by the principles of common law" and developed under the judicial system "in light of reason and experience."¹⁵ The public policy behind this approach may well have been premised on the belief that the federal judiciary is less subject to politics and current events than Congress, and is in a better position to objectively balance the need for truth against the need for immunity.

The proposed federal bill granting total immunity for source information is a complete U-turn from Congress's decision to leave the creation of new privileges to an independent judiciary, which could delicately balance competing interests.

C. The Proposed Federal Bill Is Out-of-Step with Other Privileges

Even if Congress were to codify a so-called reporter's privilege for information about anonymous sources, the current proposal for total immunity would put it far beyond the scope of any other personal evidentiary privilege. The Supreme Court of the United States has held

¹⁴ Congress has almost always deferred to the Federal Rules Enabling Act, 28 U.S.C. § 2071, which was enacted in 1938: "The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States District Courts . . . and courts of appeal." Under a law enacted in 1988, Congress must vote within seven months of the judicial introduction of a new privilege to change the rule. 28 U.S.C. § 2074 (1988).

¹⁵ FED. R. EVID. 501 (1975).

that even with respect to privileges “rooted in the Constitution,” privileges “must give way in proper circumstances.”¹⁶

Former United States Assistant Attorney General Joseph diGenova has testified before the Senate Judiciary Committee that “[t]here is no absolute privilege in common law.”¹⁷ Not even lawyers, doctors, and priests have blanket protection. The attorney-client privilege, perhaps the most important of traditional privileges, can be negated if a court determines that an attorney-client communication has been used to further a crime. Doctors and priests may reveal if a patient or penitent is planning imminent physical harm to others. Also, the spousal privilege can be overridden under certain circumstances, such as when the marriage is not salvageable.

Further, there are fundamental differences between the traditional evidentiary privileges and a so-called reporter’s privilege.

- Other privileges exist to keep information *confidential* after the privileged communication. A reporter’s privilege, even if limited to true journalists, exists to *expose* information to the world.¹⁸
- Traditional privileges rest with the person who conveys the information—the client, patient, or penitent—not the professional. A reporter’s privilege rests with the reporter, not the anonymous source.¹⁹ It is irrelevant, under the current federal proposal, whether the source even asked for confidentiality.²⁰

¹⁶ *Herbert v. Lando*, 441 U.S. 153, 175 (1979).

¹⁷ *Reporter’s Shield Legislation: S. Comm. on the Judiciary* (Oct. 19, 2005), available at 2005 WL 2660621 (testimony of Joseph diGenova, former United States Assistant Attorney General).

¹⁸ *Branzburg v. Hayes*, 408 U.S. 665, 726 n.2 (1972) (Stewart, J., dissenting).

¹⁹ *See, e.g., Tofani v. State*, 465 A.2d 413 (Md. 1983).

²⁰ There are several levels of confidentiality that most journalists adhere to, including “on background,” “off the record,” and “deep background.” However, there is no general agreement among reporters or sources of any specific confidentiality promise that attaches to any of these phrases. *See Sauber, supra* note 2, at 38.

- There is no license or test to be a “covered person” under the current federal proposal, reporter or otherwise. “Clergymen, doctors, and lawyers—all holders of common law privilege—are especially trained and certified.”²¹

These differences should dissuade Congress from making the so-called reporter’s privilege broader than the traditional personal evidentiary privileges.

III. BLANKET IMMUNITY FOR SOURCE IDENTIFICATION VIOLATES PRECEDENT

A. The United States Supreme Court Has Rejected First Amendment-Based Immunity for Reporters

Proponents of reporter immunity argue that they are protecting “the public’s right to know,” which they say is conceptually grounded in the First Amendment’s right to a free press.²² The First Amendment, however, does not provide for reporter immunity; in fact, the Supreme Court of the United States has specifically rejected it.

In 1972, the Supreme Court in *Branzburg v. Hayes*,²³ considered a case involving a subpoena served on a reporter to reveal source information before a grand jury in a criminal investigation. The Court, in a plurality opinion, said that there was no constitutional or common law privilege for reporters to shield the identity of their sources from the grand jury.²⁴ The only privilege the opinion recognized occurred

²¹ Robert Zelnick, *Journalists and Confidential Sources*, 19 NOTRE DAME J.L. ETHICS & PUB. POL’Y 541, 551 (2005).

²² The First Amendment right to a free press was an outgrowth of the “need [colonialists] perceived to check the abuse of governmental power.” Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 533 (1977). The United States Supreme Court has repeatedly recognized this principle: “The press was protected so that it could bare the secrets of government and inform the people.” *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981).

²³ 408 U.S. 665 (1972).

²⁴ *Branzburg*, *supra* note 18.

where the grand jury had been formed in bad faith to harass a specific reporter.

The plurality opinion specifically countered arguments that reporter immunity can be read into the First Amendment: “[R]eporters, like other citizens, [must] respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.”²⁵ The opinion stated that “we cannot accept the argument that the public interest in possible future news about crime from undisclosed, unverifiable sources must take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future.”²⁶

The opinion raised two additional public policy concerns that are applicable to the current federal proposal. First, it said that privileges should not protect those who traffic in stolen information: “Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news.”²⁷ Second, it said that media informants should not be put on a higher plane than police informers, who “enjoy no constitutional protection.”²⁸

Despite the opinion’s clarity, those who favor media shield laws have tried to narrow its application, suggesting that it only applies to criminal proceedings and that Justice Powell, who wrote a concurring opinion, gave credence to the idea that there is a qualified reporter’s privilege. Even Justice Powell, however, appreciated that any reporter’s privilege should not supersede the right to truth in the courtroom at all costs. He wrote that in each case, the privilege “should be judged on its facts by the striking of a proper balance between freedom of press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.”²⁹

²⁵ *Id.* at 691.

²⁶ *Id.* at 695.

²⁷ *Id.* at 691-92.

²⁸ *Id.* at 698.

²⁹ *Id.* at 710.

B. Federal Circuits Eschew Total Immunity for Balancing Tests

Since *Branzburg*, each federal circuit has considered the issue of whether and when a reporter can be given immunity from revealing source information. None have created blanket immunity for criminal or civil trials. Rather, each court has adopted a balancing test, which generally falls into one of three categories.

The Seventh Circuit recently stated in a civil case, *McKevitt v. Pallasch*, that subpoenas directed at the media should be evaluated by the same criteria used to determine the appropriateness of subpoenas directed at other parties: whether it is reasonable under the circumstances.³⁰ Judge Richard Posner, a well-respected federal judge, stated that any court finding either a constitutional or common law reporter's privilege is "surprising in light of *Branzburg*."³¹ "We do not see why there needs to be special criteria merely because the possessor of the documents or other evidence sought is a journalist."³²

Other circuits have accepted that a reporter may have qualified common law immunity from answering subpoenas about source information, but hold that a judge must balance that privilege against the rights of the parties to seek justice in the courts.

Several circuits have eschewed any specific formula. As the First Circuit held, "[n]ot all information as to sources is equally deserving of confidentiality," and a "fact-sensitive approach" is appropriate to assess "the shifting weights of the competing interests."³³ The Sixth Circuit clarified that "this balancing of interests should not then be elevated on the basis of semantical confusion, to the status of a first

³⁰ *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003).

³¹ *Id.* at 532.

³² *Id.* at 533.

³³ *Bruno & Stillman v. Globe Newspaper Co.*, 633 F.2d 583, 595, 597 (1st Cir. 1980).

amendment constitutional privilege.”³⁴ The Second, Third, and Eighth Circuits follow this same nonformulaic approach.³⁵

Other circuits, including the Fourth, Fifth, Eleventh, and D.C. Circuits, employ a defined balancing test: (1) whether the information is relevant; (2) whether the information can be obtained by alternative means; and (3) whether there is a compelling interest in the information.³⁶ The Ninth and Tenth Circuits have adopted variations of this formula.³⁷ In addition, since 1980, the United States Department of Justice has adopted guidelines based on these principles for

³⁴ *In re Grand Jury Proceedings Storer Communications, Inc.*, 810 F.2d 580, 586 (6th Cir. 1987).

³⁵ *Baker v. F&F Inv.*, 470 F.2d 778, 783-85 (2d Cir. 1972) (upholding a qualified privilege for confidential journalist materials in civil litigation by distinguishing *Branzburg* as applying only to criminal matters) (*cert. denied*, 411 U.S. 966); *Riley v. City of Chester*, 612 F.2d 708, 715 (3d Cir. 1979) (holding that “journalists possess a qualified privilege not to divulge confidential sources” in both civil and criminal matters); *United States v. Cuthbertson*, 630 F.2d 139, 147-48 (3d Cir. 1980) (“Because the privilege is qualified, there may be countervailing interests that will require it to yield in a particular case, and the district court must balance the defendant’s need for the material against the interests underlying the privilege to make this determination.”) (*cert. denied*, 449 U.S. 1126 (1981)); *Cervantes v. Time, Inc.*, 464 F.2d 986, 993 (8th Cir. 1972) (establishing a balancing test, but stating that courts should not “routinely grant motions seeking compulsory disclosure of anonymous news sources”) (*cert. denied*, 409 U.S. 1125 (1973)).

³⁶ *See LaRouche v. Nat’l Broad. Co.*, 780 F.2d 1134, 1139 (4th Cir. 1986); *In re Bruce Selcraig*, 705 F.2d 789, 792 (5th Cir. 1983); *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986); *Carey v. Hume*, 492 F.2d 631, 633 (D.C. Cir. 1974); *Zerilli*, 656 F.2d at 705, 712-14 (D.C. Cir. 1981).

³⁷ *Shoen v. Shoen*, 5 F.3d 1289, 1296 (9th Cir. 1993) (The burden on the party is to demonstrate “a sufficiently compelling need for the journalists’ materials to overcome the privilege. At minimum, this requires a showing that the information sought is not obtainable from another source.”); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 437 (10th Cir. 1977) (adding a fourth factor for the type of controversy).

when its lawyers may ask the Attorney General to sign a subpoena for source information from a reporter.³⁸

All three balancing tests have been used over the years to provide the reporter with immunity in some cases and enforce subpoenas in others. For example, in *Lee v. Dep't of Justice*,³⁹ the court applied the three-part balancing test in a case involving nuclear scientist Wen Ho Lee. Mr. Lee was the subject of high-profile news articles containing information allegedly leaked from the Federal Bureau of Investigation suggesting that he was a spy, but he was never so charged. The court held that identifying the source for these stories was relevant and of “central importance” to his Privacy Act suit and that he diligently pursued and exhausted reasonable alternative sources.

It does not detract from the First Amendment principle at stake to conclude that . . . the reasons for concealing from the plaintiff possible government complicity (if such there were) in the revelation to the news media of private, personal, and acutely hurtful information about Dr. Lee do not outweigh Dr. Lee’s interest in having the evidence available for his use at trial.⁴⁰

Regardless of which balancing test is used, a congressional mandate for total reporter immunity for source information before federal courts would overturn the practices of every federal circuit.

³⁸ 28 C.F.R. § 50.10 (2005). According to the guidelines, the Attorney General must sign all subpoenas for reporter source information. The following criteria are used: (1) all reasonable attempts should be made to obtain information from alternative sources before considering issuing a subpoena to a member of the news media; (2) Department of Justice attorneys must negotiate with the media first; (3) in criminal cases, there should be reasonable grounds to believe that the information sought is essential to a successful investigation—goes to guilt or innocence; and (4) in civil cases, the information must be essential to the successful completion of the litigation in a case of substantial importance. *See id.*

³⁹ 401 F. Supp. 2d 123 (D.D.C. 2005).

⁴⁰ *Lee v. Dep't of Justice*, 287 F. Supp. 2d 15, 24 (D.D.C. 2003).

C. The Proposed Federal Bill Would Not Bring National Uniformity

Proponents of the current federal proposal have argued that the bill would clarify the law by resolving conflicts among the states as to how a reporter's privilege, if one exists, is applied. That is not true. Federal legislation would apply only in federal courts.

States have historically controlled their own court rules, including the rules of evidence. Even if this bill were to pass, there still would be vast distinctions among state media shield laws. For example, the states differ on whether reporter immunity applies differently to civil and criminal cases; whether it applies differently if the reporter is a witness or party to the case; and whether it applies to confidential and nonconfidential material in the same way. Many states specifically exempt libel and defamation suits from the reporter's privilege.⁴¹ In addition, while a minority of states offer the type of broad immunity at issue in the federal bill, most states adhere to some form of balancing test, either under statutory or common law.

Currently, thirty-one states and the District of Columbia have reporter immunity statutes that address the issue of when reporters must comply with a subpoena for source identity. Among those states, Colorado, Florida, Illinois, New Mexico, North Carolina, South Carolina, and Tennessee apply a three-part test similar to the one followed by some of the federal circuits.⁴² Statutes in Alaska,

⁴¹ *See, e.g.*, *News Journal Corp. v. Carson*, 741 So. 2d 572, 575-76 (Fla. Dist. Ct. App. 1999); LA. REV. STAT. ANN. § 45:1454 (West 2004) (shifting burden to reporter in cases of defamation); MINN. STAT. §§ 595.021-025 (2005) (privilege does not apply in defamation action where the person seeking disclosure can demonstrate that the identity of the source will lead to relevant evidence on the issue of actual malice).

⁴² The test is generally whether the information (1) is material and relevant to the controversy for which the testimony or production is sought; (2) cannot be reasonably obtained by alternative means; and (3) is necessary to the proper preparation or presentation of the case of a party seeking the information, document, or item. *See, e.g.*, FLA. STAT. ANN. § 90.5015 (West 2006); COLO. REV. STAT. ANN. § 13-90-119 (West 2006); *see also* 735 ILL. COMP. STAT. ANN. 5/8-901 to -909 (West 2006); N.M. STAT. ANN. § 38-6-7

Louisiana, and North Dakota use a more general miscarriage of justice standard.⁴³

Other states follow completely different approaches. In California, for example, there is no privilege, but an immunity from contempt of court.⁴⁴ Thus, other sanctions are not precluded, and a reporter may not use the shield to avoid taking the stand. In Ohio, a reporter can only be required to identify a source that gave factual information (not rumor or innuendo) for which the source had firsthand knowledge.⁴⁵ Further, some states allow a reporter to assert the privilege regardless of whether there was any understanding of confidentiality with the source.⁴⁶ Other states require that disclosure would violate a confidentiality agreement in order for immunity to apply.⁴⁷

Of the remaining states, eighteen have a common law reporter's privilege. Twelve of them allow some form of common law protection for sources, including Connecticut, Hawaii, Idaho, Kansas, Massachusetts, Maine, Missouri, South Dakota, Vermont, Washington, West Virginia, and Wisconsin.⁴⁸ Iowa protects information, but not sources. Wyoming is

(Michie 2006) (disclosure must be necessary to "prevent justice"); N.C. GEN. STAT. ANN. § 8-53.11 (2006); S.C. CODE ANN. § 19-11-100 (Law. Co-Op. Supp. 2004); TENN. CODE ANN. § 24-1-208 (West 2006).

⁴³ See, e.g., LA. REV. STAT. ANN. § 45:1453 (West 2004) (requiring judge to weigh the public interest of source disclosure against upholding the privilege); N.D. CENT. CODE § 31-01-06.2 (Matthew Bender 2004) (miscarriage of justice); ALASKA STAT. §§ 09.25.300-390 (Matthew Bender 2004) (miscarriage of justice).

⁴⁴ *In re Willon*, 55 Cal. Rptr. 2d 245, 253 (Cal. Ct. App. 1996).

⁴⁵ *Svoboda v. Clear Channel Communications, Inc.*, 805 N.E.2d 559, 566 (Ohio Ct. App. 2004) (*appeal dismissed*, 817 N.E.2d 104 (Ohio 2004)).

⁴⁶ See, e.g., *Ulrich v. Coast Dental Serv., Inc.*, 739 So. 2d 142, 143 (Fla. Dist. Ct. App. 1999); *Hestand v. State*, 273 N.E.2d 282, 283-84 (Ind. 1971) (defendant couldn't stop reporter from testifying about confession of crime made to reporter); *Tofani*, 465 A.2d at 413, 417-18.

⁴⁷ DEL. CODE ANN. tit. 10 § 4322 (2004).

⁴⁸ *Goldfield v. Post Publ'g Co.*, 4 Med. L. Rptr. 1167 (Conn. Super. Ct. 1978); *In re Goodfader*, 367 P.2d 472 (Haw. 1961); *Marks v. Vehlow*, 671 P.2d 473 (Idaho 1983) (state includes in privilege both confidential sources and information); *State v. Sandstrom*, 581 P.2d 218 (Kan. 1978) (state

the only state without a statutory or common law reporter's privilege of any kind.

IV. THE FEDERAL MEDIA SHIELD BILL DOES NOT REQUIRE CREDIBILITY OR ACCOUNTABILITY TO GET IMMUNITY

The second major concern with the current federal proposal for a media shield law is that it does not tailor the immunity protections to only those engaged in ethical journalism practices. Under the definition of "covered person," the bill applies to any entity that "disseminates information by print, broadcast, cable, mechanical, photographic, electronic, or other means," including those who publish in a "newspaper, book, magazine, or other periodical in print or electronic form."⁴⁹ By applying the privilege to anyone who disseminates *information* on a *periodic* basis, the bill would give immunity regardless of whether the reporter was following the ethics, credibility, and true motivations associated with traditional journalism.

A. The Proposed Federal Bill Would Allow Anyone To Become a "Covered Person"

The first problem, as Professor Robert Zelnick, chair of Boston University's Department of Journalism, points out is "defining the very term 'journalist.'"⁵⁰ A definition including anyone who disseminates information periodically would apply equally to members of the

includes in privilege both confidential sources and information); *In re John Doe Grand Jury Investigation*, 574 N.E.2d 373 (Mass. 1991); *State v. Ely*, 954 S.W.2d 650 (Mo. Ct. App. 1997); *Hopewell v. Midcontinent Broad. Corp.*, 538 N.W.2d 780 (S.D. 1995); *State v. St. Peter*, 315 A.2d 254 (Vt. 1974) (state includes in privilege both confidential sources and information); *Seneer v. Daily J. Am.*, 618 P.2d 536 (Wash. Ct. App. 1980); *State v. Ranson*, 488 S.E.2d 5 (W. Va. 1997) (state includes in privilege both confidential sources and information); *Kurzynski v. Spaeth*, 538 N.W.2d 554 (Wis. Ct. App. 1995) (state includes in privilege both confidential sources and information).

⁴⁹ S. 1419, 109th Cong. § 5(2) (2006).

⁵⁰ Zelnick, *supra* note 21, at 551.

mainstream media and to anyone who keeps a regular blog, including those who solely advance personal, political or even sinister agendas. The Department of Justice has warned that the “expansive definition of ‘covered person’ could unintentionally offer a safe haven for criminals” because it includes all publications, even those with “ties to terrorist organizations and crime rings.”⁵¹ With the forms of disseminating information rapidly changing, it is impossible to tell who may qualify for reporter immunity in the future

Federal circuits and district courts already have begun extending reporter immunity to those involved in activities far beyond the current or traditional notions of journalism. The First Circuit, for example, gave immunity to academic researchers, holding that “[a]fter all, scholars too are information gatherers and disseminators.”⁵² Other federal courts have given immunity to financial rating agencies, even though the agencies are paid for their services. The courts held that a rating agency “analyzes information on matters of public interest and concern, thereby fitting the statutory definition of a news-gatherer.”⁵³

This ever-expanding definition of “reporter” has raised concern even among supporters of a media shield law. Laurence Alexander, an associate professor of journalism at the University of Florida, for example, has said that giving “widespread acceptance to non-traditional journalists” risks doing “great harm to the free flow of information undergirding the concept of a journalist’s privilege.”⁵⁴

⁵¹ See *Reporter’s Shield Legislation: Hearing on S. 1419 Before the S. Comm. on the Judiciary*, 109th Cong. (Oct. 19, 2005), available at 2005 WL 2660625 (testimony of Chuck Rosenberg, United States Attorney, Southern District of Texas).

⁵² *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 714 (1st Cir. 1998).

⁵³ *Compuware v. Moody’s Investors Servs., Inc.*, 324 F. Supp. 2d 860, 862 (E.D. Mich. 2004) (stating that the only restriction is that the agency must not participate directly in the structuring of deals or provide advice to rated companies); see also *In re Scott Paper Co. Securities Litig.*, 145 F.R.D. 366, 368 (E.D. Pa. 1992).

⁵⁴ Laurence B. Alexander, *Looking Out for the Watchdogs: A Legislative Proposal Limiting the Newsgathering Privilege to Journalists Is the Greatest Need of Protection for Sources and Information*, 20 YALE L. & POL’Y REV. 97, 131 (2002).

Most courts and legislatures support Prof. Alexander's view; they define "journalism" narrowly in this context, although their definitions vary greatly.

At the federal level, many circuits state that the person seeking immunity must, at the inception of the newsgathering process, be gathering news for the purpose of disseminating it to the public.⁵⁵ Some circuits add that those claiming immunity must demonstrate that they "are engaged in investigative reporting [and] are gathering news."⁵⁶

Some states take this same general approach, while others have more restrictive criteria to ensure that immunity can only be given to traditional, stable media organizations. In Alabama, for example, immunity is not available for magazine reporters; it only covers those "connected with or employed on any newspaper, radio broadcasting station or television station." Similarly, in Arizona, the source must be obtained "for publication in a newspaper or for broadcasting over a radio or television station."⁵⁷ In Delaware, a reporter must make his or her principal livelihood as a reporter or be an agent to a reporter,⁵⁸ and in New York, a publication must be in business for one year with paid circulation.⁵⁹

The current federal proposal does not include any of these requirements. It would apply equally to anyone meeting the broad definition in the bill. As a result, a judge would have no discretion but to protect sources even when the "covered person" is not a true journalist or the decision to publish was solely for the purpose of attaching the privilege to one's identity.

⁵⁵ *von Bulow v. von Bulow*, 811 F.2d 136, 142-43 (2d Cir. 1987); *Shoen v. Shoen*, 5 F.3d 1289, 1293 (9th Cir. 1992).

⁵⁶ *In re Madden*, 151 F.3d 125, 131 (3d Cir. 1998).

⁵⁷ ARIZ. REV. STAT. ANN. § 12-2237 (West 2004).

⁵⁸ DEL. CODE ANN. tit. 10, §§ 4320-4326 (2004).

⁵⁹ N.Y. CIV. RIGHTS LAW § 79-h (McKinney 2004).

B. The Proposed Federal Bill Would Give Immunity without Standards

The proposed federal bill does not allow a court to distinguish when a report is credible and important to society and when it is not. The problem, as illustrated by former United States Assistant Attorney General Joseph diGenova in testimony before the Judiciary Committee of the United States Senate, is that “neither the reporter nor the source has to carefully vet . . .” the information or decide whether it is appropriate to publish.⁶⁰

In an effort to provide broad guidelines, some established media companies and associations have ethical, moral, and quality standards. These codes of conduct, however, are not explicit about how reporters should handle confidential sources and verify that information from these sources is accurate and newsworthy. They are “imprecise, contradictory, and far less elaborate than the ethical regulations” of other professions.⁶¹

These guidelines are seldom used. Studies show that reporters and editors, even in the mainstream media, “rarely invoke ethical codes to resolve problematic situations” and that business interests tend to dominate newsgathering and disseminating decisions.⁶² A Pew Center survey shows that 66% of national journalists and 57% of local journalists believe that economic interests negatively affect the quality of their work product. The survey’s respondents also said that corporate owners and advertisers often usurp the editorial judgment of media personnel.⁶³ In fact, when polling the general public, the

⁶⁰ *Reporter’s Shield Legislation: Hearing on S. 1419 Before the S. Comm. on the Judiciary*, 109th Cong. (Oct. 19, 2005), available at 2005 WL 2660621 (testimony of Joseph diGenova, former United States Assistant Attorney General).

⁶¹ Mike France, *Commentary: The Press Should Try Taking a Little of Its Own Medicine: The Media’s Zeal for Higher Standards Doesn’t Always Extend to the Fourth Estate*, BUS. WK. ONLINE, Apr. 19, 2004.

⁶² *Id.* at 614.

⁶³ Bill Kovach et al., *A Crisis of Confidence: A Commentary on the Findings*, in PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS & PROJECT

American Society of Newspaper Editors found that more than two-thirds of the American people “have become more skeptical [lately] about the accuracy of anything [they] hear or read in the news.”⁶⁴

Part of the problem is that in recent years, it has become harder to distinguish between legitimate news organizations and those that publish for solely entertainment purposes.⁶⁵ In the last twenty years, there has been a “panoply of shows and stories that seem to titillate rather than inform and educate. Sex scandals and bizarre lifestyle stories, which in the past were handled by the once profitable but not necessarily respectable supermarket tabloids, are increasingly covered by more mainstream media.”⁶⁶ Any media shield law, at the federal or state level, should carefully determine what types of newsgathering activities should be required in order to be considered “reporting” for the purposes of attaching immunity from judicial subpoenas.

Congress also should consider that while media outlets disseminate news, they also are corporations and are not above the law. The United States Supreme Court has consistently recognized that “[t]he publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. He must answer for libel. He may be punished for contempt of court.”⁶⁷ The same concept holds true for applying any reporter-based immunity. When the media makes business, not news-based decisions, it does not deserve any reporter-based immunity under the principles of a free press.

FOR EXCELLENCE IN JOURNALISM, HOW JOURNALISTS SEE JOURNALISTS IN 2004, at 28, 33 (2004).

⁶⁴ AM. SOC. OF NEWSPAPER EDITORS, BUILDING READER TRUST: TRACKING PUBLIC ATTITUDES (Aug. 5, 2002).

⁶⁵ Rick S. Lear & Jefferson D. Reynolds, *Your Social Security Number of Your Life: Disclosure of Personal Identification Information by Military Personnel and the Compromise of Privacy and National Security*, 21 B.U. PUB. INT. L.J. 1, 23 (2003) (observing that the media is by-and-large a profit-motivated industry and has no effective self-regulation).

⁶⁶ Blake D. Morant, *The Endemic Reality of Media Ethics and Self-Restraint*, 19 NOTRE DAME J.L. ETHICS & PUB. POL’Y 595, 629 (2005).

⁶⁷ *Assoc. Press v. Nat’l Labor Relations Bd.*, 301 U.S. 103, 132 (1937).

V. ADVERSE PUBLIC POLICY CONSEQUENCES OF TOTAL IMMUNITY WITHOUT ACCOUNTABILITY

Total reporter immunity without any checks and balances could have significant adverse consequences. It would impose “inflexible, mandatory standards” that could not “be adapted to changing circumstances.”⁶⁸

A. The Proposed Federal Bill Would Protect People Who Traffic in Illegal Information

Most notably, the current federal proposal would create an environment where people’s reasonable expectation of privacy could be violated without repercussion—even when federal law requires that the information published be kept confidential, such as with medical records, tax returns, and intellectual property. When such information is stolen and leaked to a reporter, the law does not support the argument that reporter immunity is protecting the public’s “right to know.” There should be no reporter immunity when the source knew or should have known that disclosure was illegal.

Geoffrey Stone, a professor at the University of Chicago Law School who favors a qualified reporter privilege, explained to the Members of the Senate Judiciary Committee that “when the act of disclosure is itself unlawful, the law has already determined that the public interest cuts against disclosure.”⁶⁹ Professor Stone drew parallels to the attorney-client privilege, which does not allow a person to consult a lawyer in order to commit the perfect murder, and the doctor-patient privilege, which does not allow someone to plot insurance fraud. “A rule that excluded all unlawful disclosures from the scope of the journalist-source privilege,” he testified, “would be consistent with other privileges.”⁷⁰

⁶⁸ See *Reporter’s Shield Legislation*, *supra* note 51.

⁶⁹ *Reporter’s Shield Legislation: Hearing on S. 1419 Before the S. Comm. on the Judiciary* (Oct. 19, 2005), available at 2005 WL 1686970 (testimony of Geoffrey Stone, Professor, University of Chicago Law School).

⁷⁰ *Id.*

An episode involving Rep. (and now House Majority Leader) John Boehner offers a good illustration. A cell phone conversation Mr. Boehner had with then-Speaker of the House Newt Gingrich was illegally recorded by private citizens and ultimately given to a Florida newspaper. If the reporter had intercepted the conversation, the reporter would have been criminally liable for stealing the information; the media “may not with impunity break and enter an office or dwelling to gather news.”⁷¹ When it comes to the source who did break the law, “logic suggests,” as the trial judge in the Boehner case wrote, “that a criminal cannot launder the stains off illegally obtained property simply by giving it to someone else, when that other person is aware of its origins.”⁷²

Other examples of privacy laws that could be violated with impunity if the proposed federal media shield bill were enacted include the following:

- ✓ *Judicial protective orders and other evidentiary privileges.* The judicial system often requires information important to the litigation to remain concealed from the outside world.⁷³ Someone should not be able to leak documents under court seal to a reporter, or break into a law office or church to steal documents relating to a person’s confidences, and keep his or her identity protected by giving the secrets to a reporter.
- ✓ *Personal health care information in violation of the Health Insurance Portability and Accountability Act (HIPAA) and accompanying privacy rules.*⁷⁴ If the media shield bill were enacted, someone working at a health facility, for example, could

⁷¹ Cohen v. Cowles Media Co., 501 U.S. 663, 669 (1991).

⁷² Boehner v. McDermott, 1998 WL 436897, at *4 (D.D.C. July 23, 1998), *rev’d and remanded*, 191 F.3d 463 (D.C. Cir. 1999), *vacated and remanded*, 532 U.S. 1050 (2001), *remanded*, 22 Fed. Appx. 16 (D.C. Cir. 2001).

⁷³ See, e.g., Rosato v. Super. Ct., 124 Cal. Rptr. 427, 443 (Cal. Ct. App. 1975).

⁷⁴ See generally OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF HEALTH & HUMAN SERVS., SUMMARY OF THE HIPAA PRIVACY RULE (2003).

leak, with impunity, private files about personal medical procedures. Should a political activist who takes a job at a medical facility be protected when leaking information about the mental health history, plastic surgery, or abortions of a Member of Congress or someone in a Member's family?

- ✓ *Trade secrets and intellectual property.* Congress enacted the Uniform Trade Secrets Act because trade secrets derive value from not being known and must be subject to efforts “reasonable under the circumstances to maintain [their] secrecy.”⁷⁵ Those who leak such trade secrets should not be protected by a media shield bill. Consider the situation of Apple Computer, which often files lawsuits before product launches to identify those leaking the new product's information to Internet bloggers.⁷⁶ Some bloggers already have asserted a reporter's privilege to protect the leakers. In one case, a court said that no public interest “was served by publishing private, proprietary product information that was ostensibly stolen and turned over to those with no reason for getting it.”⁷⁷
- ✓ Other examples of information that Congress and federal courts have determined should be kept confidential include personal tax

⁷⁵ Uniform Trade Secrets Act § 1 (adopted in more than 43 states); *see, e.g.,* Newsouth Communications Corp. v. Universal Tel. Co., 2002 WL 31246558, at *20 (E.D. La. Oct. 4, 2002).

⁷⁶ *See* Victoria A. Cundiff, *Trade Secrets and the Internet, Preventing the Internet from Being an Instrument of Destruction*, 842 PLI/Pat. 347, 355 (2000).

⁷⁷ *Apple Computer, Inc. v. Doe*, Case No. 1-04-CV-032178 (Sup. Ct., Santa Clara Cty. Mar. 11, 2005). It is well settled that the First Amendment may not encroach upon one's intellectual property rights. *In re Capital Cities/ABC, Inc.*, 918 F.2d 140, 143 (11th Cir. 1990).

returns, grand jury proceedings,⁷⁸ and membership lists protected under freedom of association, among others.

The bottom line is that sources who violate the law in obtaining information would be protected by the proposed federal media shield bill, so long as they give the information to a reporter. Even more serious is the fact that the bill, if enacted into law, could be intentionally abused to get around these and other privacy laws. For example, an individual engaged in corporate espionage could give the information to a competitor by “publishing” the information on an obscure, but “periodic,” Web site—secure in the knowledge that the Webmaster would have immunity from a subpoena for source information.

Professor Zelnick of Boston University’s School of Journalism believes that if a journalist “finds that she cannot, in conscience, breach a confidential source, she should be prepared to spend some time in jail for that act of civil disobedience.”⁷⁹ Reporters should stop and consider the consequences of publishing illegally stolen information. This can only be achieved if the reporter knows that a judge can ask her or him to tell the truth.

B. The Proposed Federal Bill Would Provide the Media with a “Get Out of Jail Free” Card from Defamation Suits

Total immunity without accountability also would give reporters a “get out of jail free” card when sued for defamation and violations of privacy rights. If the bill is not amended, some reporters could gather

⁷⁸ R.I. GEN. LAWS §§ 9-19.1-1 to 1-3 (2004) (Rhode Island does not extend the privilege where source and source information is concerning a government proceeding where information was required to be kept secret, such as a grand jury); John M. Broder, *From Grand Jury Leaks Comes a Clash of Rights*, N.Y. TIMES, Jan. 15, 2005, at A8, available at 2005 WLNR 566953 (S.F. Chronicle Editor Phil Bronstein stated: “The press has certain responsibilities in our society, but one of them is not to enforce the provisions of the federal grand jury system.”).

⁷⁹ Zelnick, *supra* note 21, at 551.

information from sources, regardless of the illegality of their sources' methods, and print damaging information, with near disregard for its truth.

Of most concern are defamation claims by public figures, such as elected officials, athletes, and Hollywood personalities. In such suits, a plaintiff must prove that the reporter acted with actual malice, which requires clear and convincing evidence that the reporter had specific knowledge of falsity or recklessly disregarded the truth.⁸⁰ Proof is generally offered by showing that no reliable source existed, that the source was fabricated, that the reporter misrepresented the actual source, or that the reporter's reliance upon the source was reckless.

As the D.C. Circuit held, the court must know and assess the credibility of the reporter's source and whether the reporter checked with more credible, reasonable sources to verify the information. Knowing the source's identity, the court stated, is the "logical, initial element of proof"; when a reporter is a party to the suit, "successful assertion of the privilege will effectively shield him from liability."⁸¹ The Fifth Circuit concurred, stating that "[t]he only way that the [plaintiff] can establish malice and prove his case is to show that [the defendant] knew the story was false or that it was reckless to rely on the informant. In order to do that, he must know the informant's identity."⁸²

Private individuals could sue under the tort of violation of the right to privacy, but they are unlikely to succeed because of the high standards that courts have applied in these suits. First, the disclosure must be "highly offensive to a reasonable person"⁸³ and not of

⁸⁰ See RESTATEMENT (SECOND) OF TORTS § 580 (1977). When plaintiff is a private person, the tort offers a remedy for injuries that result from the dissemination of false information. While there is no defined duty of care specific to the journalism, the *Restatement* states that the plaintiff must show that the reporter did not act in accordance with the skill normally possessed by members of the profession. See *id.* at cmt. g.

⁸¹ *Care v. Hume*, 492 F.2d 631, 634, 637-38 (D.C. Cir. 1974).

⁸² *Miller v. Transam. Press, Inc.*, 621 F.2d 721, 726-27 (5th Cir. 1980).

⁸³ RESTATEMENT (SECOND) OF TORTS § 652D cmt. d (1965).

legitimate concern to the public.⁸⁴ Second, the Supreme Court has said that courts should not second-guess the media's own definition of news unless there is a countervailing interest to the *highest order*.⁸⁵ In the opinion, Justice White acknowledged that these hurdles essentially obliterate any chance a plaintiff has of succeeding under this tort under existing law.⁸⁶ A blanket reporter privilege would make a person's ability to secure damages for invasion of his privacy even harder.

The proper public policy is to give judges the discretion to question a source's credibility when the harm from the leak is personal and significant. As former CBS news anchor Dan Rather might attest, given his coverage of President Bush's service in the Texas Air National Guard, not all sources are credible. In addition, as nuclear scientist Wen Ho Lee, Atlanta security officer Richard Jewell, and others have undoubtedly realized, reporters using anonymous sources are not accurate arbiters of justice. When one is mistakenly accused of wrongdoing, it is hard to reestablish one's reputation. By contrast, whistle-blower laws protect sources and support law enforcement as the appropriate entity to which to disclose information related to potential wrongdoing.

C. The Proposed Federal Bill Would Empower the Paparazzi

Hollywood stars and professional athletes have long voiced concern about overaggressive reporting by paparazzi. After Princess Diana's death, outrage over paparazzi tactics was pervasive. The late Rep. Sonny Bono, Rep. John Conyers, Rep. Marcy Kaptur, and former Rep. Bill McCollum sponsored bipartisan legislation to provide protection from such personal intrusion for commercial purposes. The bill recognized that people have a reasonable expectation of privacy; when they take steps to protect their privacy, the media should not invade that space.

⁸⁴ *Sipple v. Chronicle Publ'g Co.*, 154 Cal. App. 3d 1040, 1046 (Cal. Ct. App. 1984).

⁸⁵ *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 117 (5th ed. 1984); *Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989).

⁸⁶ *Florida Star* (White, J., dissenting).

A blanket privilege for source information, which includes photographs, is directly contrary to the public policy underlying these efforts. “Newsgathering does not create license to trespass or intrude by electronic means into the precincts of another’s home or office.”⁸⁷ As the Ninth Circuit observed, granting immunity to reporters would allow tactics that would “grossly offend[] ordinary men.”⁸⁸

VI. SOLUTION: BALANCING TEST WITH ACCOUNTABILITY

Over the years, Congress has consistently acknowledged that personal evidentiary privileges are best left in the hands of the judiciary, where they can be developed and applied in light of reason and experience. If this Congress is intent on codifying a reporter’s privilege in federal law, it should follow the lead of federal circuits and most state courts by adopting one of the proven, reasonable balancing tests for when the privilege should apply:

- (1) The traditional approach for enforcing subpoenas as applied by the Seventh Circuit: whether the subpoena is reasonable under the circumstances;
- (2) A general balancing approach, which is followed by some federal circuits and a few states: a journalist has a qualified privilege not to divulge confidential sources, and a defendant’s need for the material must be balanced against the interests underlying the privilege; or
- (3) The three-factor test for a qualified reporter’s privilege, as used by several federal circuits and states: (1) whether the information is relevant; (2) whether the information can be obtained by alternative means; and (3) whether there is a compelling interest in the information.

⁸⁷ Copeland v. Hubbard Broad., 526 N.W.2d 402, 405 (Minn. Ct. App. 1995).

⁸⁸ Dietemann v. Time, Inc., 449 F.2d 245, 250 (9th Cir. 1971).

In order to make these balancing tests practical and achievable, a judge should apply the more traditional “preponderance of the evidence” standard for evidence he or she considers in applying such a balancing test and not the “clear and convincing” standard that is currently in the federal proposal.

Congress also should ensure that the privilege is available only for credible journalists by tying immunity to prescribed codes of conduct. Under this approach, the bill would include professional criteria for the recruitment and handling of a source and a source’s information.

The benefits of this approach are twofold. First, it would ensure that immunity is only given to legitimate reporters acting within the American notion of a free press. Second, it would minimize the opportunity for individuals to abuse the shield. In an age when numerous companies would gladly accept a government standards defense to litigation, asking media corporations to abide by some standards for their immunity makes sense.

VII. CONCLUSION

As Prof. Zelnick has acknowledged, “*Branzburg* and its progeny have done little to inhibit enterprising reporting.”⁸⁹ Government and corporate scandals first reported in the press have been exposed under the current system.

Congress should reject the current federal proposal for reporter immunity because it is too broad and its exceptions are too few, narrow, and rigid. The only privilege Congress should consider is one that comports with other personal evidentiary privileges by adopting a reasonable balancing test and by limiting those who may avail themselves of the privilege. In some instances, a reporter’s immunity from testifying as to the identity of a source will prevail; in other cases, the court’s quest for truth will take priority. Categorically allowing anyone who disseminates information periodically to keep the secrets of their own work at the expense of other people’s legal rights and obligations does not serve justice.

⁸⁹ Zelnick, *supra* note 21, at 551.

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