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**“MY LIPS ARE SEALED, UNLESS . . .”  
EXAMINING THE REPORTER’S PRIVILEGE IN NEW YORK  
AND WHY IT SHOULD BE APPLIED FEDERALLY**

*Luann Dallojacono*\*

**INTRODUCTION**

He would agree only to meet me in certain places, and when he came to my office at the newspaper to drop off documents one day, he wore gloves so his fingerprints wouldn’t embed on the pages. He was my confidential source – my off-the-record, don’t-use-my-name, seemingly paranoid, whistle-blowing informant – and his story was a rookie reporter’s dream. They say a journalist is only as good as her sources, and boy, did I have a fantastic source.

But would I go to jail to protect this man? What would I do if my article prompted an investigation, and I was asked to reveal his name? I would say no, and that would be that, right? Isn’t that the rule – journalists don’t have to give up their sources? Luckily, I was never asked, but some reporters face these questions every day, motivated by the thrill of breaking news and praying that they never see the day when they have to choose between protecting their sources and protecting themselves.

Laws preventing journalists from being compelled to give up their sources – called reporter’s shield laws – have been codified in thirty-nine states<sup>1</sup> and the District of Columbia.<sup>2</sup> Legal analysts have

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<sup>1</sup> Hawaii had a shield law until 2013 but it was allowed to lapse. See Marina Riker, *Media Shield Law 2015: Who’s Really a Journalist?*, CIVIL BEAT HONOLULU (Feb. 20, 2015), <http://www.civilbeat.org/2015/02/media-shield-law-2015-whos-really-a-journalist/>.

<sup>2</sup> Eric Robinson, *No Confidence: Confidentiality, Ethics and the Law of Academic Privilege*, 21 COMM. L. & POL’Y 323, 325 n.12 (2016).

identified four types of privileges for newsgatherers on the state level: an absolute privilege, a qualified privilege, a hybrid privilege (combining the absolute and qualified privileges), and immunity for not complying with an order from the court or a subpoena.<sup>3</sup> New York employs a hybrid privilege, giving newsgatherers an absolute privilege for some types of information and a qualified privilege for others.<sup>4</sup>

Despite the protection afforded to journalists by the states, there is no federal legislation protecting journalists, meaning there is no uniform standard for protecting a reporter who receives a subpoena from a federal agency.<sup>5</sup> This note will argue that a federal reporter's shield mirroring New York's law should be adopted because the New York law offers the most appropriate protection for journalists since it balances the need for disclosure in exigent circumstances with a newsgatherer's interest in protecting confidential sources.

Section I of this note will explain the reporter's shield and its origins. Section II will discuss the reporter's shield in New York and in other states. Section III will discuss why the lack of a federal reporter's shield is problematic and why the New York law should be adopted on a national level.

## I. THE REPORTER'S SHIELD: HISTORY AND ITS ORIGINS

Reporters often serve as watchdogs for the communities they cover.<sup>6</sup> The ones who break big-time news may find themselves investigating governmental corruption, corporate greed, funneling of funds, misuse of power or taxpayer dollars, or a host of other controversies.<sup>7</sup> In a way, reporting on these issues amounts to a public service.<sup>8</sup> Journalists serve as a check on the powerful, the untouchable, and the people who have figured out how to skirt the official oversight put into place to protect the public.<sup>9</sup>

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<sup>3</sup> Joshua A. Faucette, Note, *Your Secret's Safe with Me . . . or So You Think: How the States Have Cashed in on Branzburg's "Blank Check,"* 44 VAL. U. L. REV. 183, 187 (2009).

<sup>4</sup> N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1990) (granting professional journalists and newscasters absolute protection for the identity of a source of confidential news and qualified protection for nonconfidential news or sources under certain circumstances).

<sup>5</sup> Erin C. Carroll, *Protecting the Watchdog: Using the Freedom of Information Act to Preference the Press*, UTAH L. REV. 193, 219 (2016).

<sup>6</sup> See generally *Anonymous Sources*, SOCIETY OF PROFESSIONAL JOURNALISTS, <https://www.spj.org/ethics-papers-anonymity.asp> (last visited Mar. 17, 2017).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

Hard-hitting or controversial stories, however, don't usually fall from the sky. Rather, they often involve sources who want to do the right thing by exposing corruption or greed, but who also do so at great personal risk.<sup>10</sup> These sources often wish to remain anonymous to protect their life, family, or livelihood.<sup>11</sup> Most newsrooms discourage the use of anonymous sources but will justify their use if the story is important enough (and of course, if the source's information is corroborated in some way).<sup>12</sup>

For this process to work, sources must trust reporters.<sup>13</sup> This trust vanishes if a reporter can be compelled to reveal her source or produce information given to her confidentially in court. Who would ever again want to speak to a reporter knowing they could be compromised in court?

### A. What is the Reporter's Privilege?

The reporter's privilege, also known as the reporter's shield law, prevents reporters and journalists from being forced to disclose confidential information and name sources.<sup>14</sup> The privilege originates in the right to freedom of the press in the First Amendment, which provides that "Congress shall make no law . . . abridging the freedom . . . of the press."<sup>15</sup> In essence, the goal of the privilege is to preserve the "free flow of information."<sup>16</sup> Some states give journalists an

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<sup>10</sup> Paul Farhi, *Anonymous Sources are Increasing in News Stories, Along with Rather Curious Explanations*, WASH. POST (Dec. 15, 2013), <https://www.washingtonpost.com/lifestyle/style/anonymous-sources-are-increasing-in-news-stories-along-with-rather-curious-explanations/2013/12/15/5049a11e-61ec-11e3-94ad-004fefa61ee6>. See also *Anonymous Sources*, *supra* note 6 (providing a description of perhaps the most famous anonymous source, Watergate's "Deep Throat").

<sup>11</sup> Farhi, *supra*, note 10.

<sup>12</sup> *Anonymous Sources*, *supra* note 6.

<sup>13</sup> Anthony Fargo, *How Should You Read Unnamed Sources and Leaks?*, THE CONVERSATION (Jan. 23, 2017), <http://theconversation.com/how-should-you-read-unnamed-sources-and-leaks-71214>.

<sup>14</sup> Dina Hovsepian, Comment, *Quid Pro Quo: Piercing the Reporter's Privilege for Media Who Ride Along*, 32 LOY. L.A. ENT. L. REV. 335, 335 (2012).

<sup>15</sup> U.S. CONST. amend. I.

<sup>16</sup> U.S. Commodity Futures Trading Comm'n v. McGraw-Hill Companies, Inc., 390 F. Supp. 2d 27, 31 (D. D.C. 2005) (stating the rationale of the reporter's privilege is that "forcing journalists to disclose confidential sources will discourage sources from communicating with reporters, thereby disrupting the 'free flow of information protected by the First Amendment.'") (quoting *Branzburg v. Hayes*, 408 U.S. 665, 679, (1972)).

absolute privilege,<sup>17</sup> which cannot be overcome by competing interests seeking disclosure,<sup>18</sup> while other states grant only a qualified privilege,<sup>19</sup> which can be overcome if the party seeking the information has a sufficiently compelling reason.<sup>20</sup>

### B. Why Does the Reporter's Privilege Exist?

The reporter's privilege exists to prevent journalists from being forced to disclose confidential sources because doing so could disrupt the "free flow of information protected by the First Amendment" by discouraging sources from speaking with reporters.<sup>21</sup> As one New York Court of Appeals case described it, the "thrust of the Shield Law was aimed at encouraging a free press by shielding those communications given to the news media in confidence."<sup>22</sup>

The privilege does more than just protect journalists and their sources.<sup>23</sup> It also protects the integrity of the newsgathering and reporting process and promotes trust in the reporter-source relationship, which results in the release of more information and ultimately, a better story for the reporter's readers.<sup>24</sup> If reporters could be forced to reveal the names of sources who had given them confidential information, which usually comes in the form of sensitive

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<sup>17</sup> See, e.g., ALA. CODE § 12-21-142 (1940); KY. REV. STAT. ANN. § 421.100 (West 1952); 42 PA. CONS. STAT. § 5942 (1978).

<sup>18</sup> See *Absolute Privilege*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/category/glossary-terms/absolute-privilege> (last visited Mar. 17, 2017).

<sup>19</sup> See, e.g., ARK. CODE ANN. § 16-85-510 (2011); CONN. GEN. STAT. § 52-146t (2006); Fla. Stat. § 90.5015 (1998).

<sup>20</sup> See *Qualified Privilege*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/category/glossary-terms/qualified-privilege> (last visited Mar. 17, 2017).

<sup>21</sup> *U.S. Commodity Futures Trading Comm'n*, 390 F. Supp. 2d at 31.

<sup>22</sup> *Knight-Ridder Broadcasting, Inc., v. Greenberg*, 511 N.E.2d 1116, 1118 (N.Y. 1987), *superseded by statute*, N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1990).

<sup>23</sup> See *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993) (stating that the privilege recognizes that society's interest in "protecting the integrity of the newsgathering process, and in ensuring the free flow of information to the public, is an interest 'of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice.'").

<sup>24</sup> *Id.* at 1292. See also Fahri, *supra* note 10; Laurence B. Alexander, *Looking Out for the Watchdogs: A Legislative Proposal Limiting the Newsgathering Privilege to Journalists in the Greatest Need of Protection for Sources and Information*, 20 Yale L. & Pol'y Rev. 97, 102 (2002) (stating that confidential sources have given journalists access to information that would be otherwise unavailable and have helped them build trust and give confidence to fearful sources; and that laws protecting journalists lead to more investigative reporting).

or damning material, it naturally follows that people would be hesitant to give up such information if it could be traced back to them.<sup>25</sup>

In fact, just a few years ago, this exact result followed after the government subpoenaed reporters' phone records and tracked the movements of a Fox News reporter when he visited the State Department.<sup>26</sup> One news article reported that, after the leak about the surveillance, formerly forthcoming sources grew scared, silent, and suspicious.<sup>27</sup> Reporters and watchdogs said the sources were "reluctant to return phone calls, even on unclassified matters, and, when they do talk, prefer in-person conversations that leave no phone logs, no emails, and no records of entering and leaving buildings."<sup>28</sup> The lack of such critical and confidential information from high-level sources is one example of the "chilling effect" burdens on the press could have on a reporter's work, which is perhaps why courts have minimized such encumbrances.<sup>29</sup>

However, access to such high-level and sensitive information also makes journalists easy targets for subpoenas and attorneys hoping to get their hands on reporters' eyewitness testimony, interview notes, and documents.<sup>30</sup> This is why reporter's shield laws are so important.

### C. Origins of the Reporter's Shield

The landmark case in reporter shield law is *Branzburg v. Hayes*,<sup>31</sup> in which the Supreme Court held that a journalist has no constitutional privilege for an agreement he makes to withhold facts relevant to a grand jury's investigation of a crime.<sup>32</sup> The court ruled

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<sup>25</sup> See *Branzburg v. Hayes*, 408 U.S. 665, 731 (1972) (Stewart, J., dissenting) ("[W]hen governmental officials possess an unchecked power to compel newsmen to disclose information received in confidence, sources will clearly be deterred from giving information . . ."); *Anonymous Sources*, *supra* note 6. This is especially true in Washington, D.C., where government insiders often become confidential sources. See William E. Lee, *Deep Background: Journalists, Sources, and the Perils of Leaking*, 57 Am. U. L. Rev. 1453, 1462-63 (2008).

<sup>26</sup> Dylan Byers, *Reporters Say There's a Chill in the Air*, POLITICO (Jun. 8, 2013), <http://www.politico.com/story/2013/06/reporters-doj-obama-chilling-effect-92432.html>.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *In re Slack*, 768 F. Supp. 2d 189, 193 (D. D.C. 2011).

<sup>30</sup> Alexander, *supra* note 24, at 102.

<sup>31</sup> 408 U.S. 665 (1972).

<sup>32</sup> *Id.*

that a journalist may not refuse to respond to a grand jury subpoena and answer questions related to a criminal investigation.<sup>33</sup>

The Court in *Branzburg* was faced with a group of consolidated cases: Kentucky newspaper reporter Paul Branzburg, who was ordered to testify before two grand juries over articles he wrote that withheld the identities of drug dealers and drug users; Paul Pappas, a Rhode Island television reporter who encountered Black Panther<sup>34</sup> members after an incident in Massachusetts; and New York Times reporter Earl Caldwell in San Francisco, whose assigned coverage area included the Black Panthers.<sup>35</sup> Branzburg had lost his case in the Kentucky Court of Appeals even though Kentucky had a shield law.<sup>36</sup> Pappas lost in the Massachusetts Supreme Judicial Court.<sup>37</sup> Caldwell was the only winner, and his victory came in federal court.<sup>38</sup> The U.S. Court of Appeals for the Ninth Circuit found that he did not have to appear before a grand jury investigating the Black Panthers because doing so was likely to cause his sources to vanish, crippling news reporters in their ability to cover the views and activities of the militant group.<sup>39</sup>

In a majority opinion authored by Justice Byron White, the Supreme Court in *Branzburg* held that reporters did not have a First Amendment right to refuse to testify before grand juries and respond to relevant questions asked of them in the context of a grand jury investigation or criminal trials.<sup>40</sup> The majority in this five-to-four decision said that while newsgatherers deserved some First Amendment protection (because “without some protection for seeking out the news, freedom of the press could be eviscerated”), that

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<sup>33</sup> *Id.*

<sup>34</sup> The Black Panther Party is described by the FBI as “a black extremist organization founded in Oakland, California in 1966. It advocated the use of violence and guerilla tactics to overthrow the U.S. government.” See *FBI Records: The Vault*, FEDERAL BUREAU OF INVESTIGATION, <https://vault.fbi.gov/Black%20Panther%20Party%20>, (last visited Mar. 17, 2017).

<sup>35</sup> *Branzburg*, 408 U.S. at 667-73.

<sup>36</sup> *Branzburg v. Meigs*, 503 S.W.2d 748 (K.Y. 1971). The privilege granted by the statute at the time protected the source of a reporter’s information but not the information itself. *Id.* at 749.

<sup>37</sup> *In re Pappas*, 266 N.E.2d 297 (Mass. 1971). Note that Massachusetts did not have a reporter’s privilege at the time and the court did not recognize one at common law. *Id.* at 299.

<sup>38</sup> *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970), *rev’d sub nom. Branzburg v. Hayes*, 408 U.S. 665 (1972).

<sup>39</sup> *Id.* at 1084, 1089.

<sup>40</sup> *Branzburg*, 408 U.S. at 690-91.

protection did not include a privilege for declining to disclose to a grand jury in a criminal case information received in confidence.<sup>41</sup> In declining to find an appropriate constitutional defense as launched by the petitioners, the Court found that the public interest in law enforcement and effective grand jury proceedings outweighed the burden on newsgathering if reporters were required to testify.<sup>42</sup>

The case is almost equally as memorable for its concurring opinion by Justice Powell.<sup>43</sup> Justice Powell emphasized that the majority's holding does not mean that news reporters who are subpoenaed to testify before a grand jury are without constitutional rights when it comes to the gathering of news or in safeguarding their sources.<sup>44</sup> Instead, Justice Powell said claims of a reporter's privilege must be judged on a case-by-case basis by balancing the freedom of the press and all citizens' obligation as it pertains to grand jury investigations into criminal conduct.<sup>45</sup> Powell wrote:

The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources . . . . The asserted claim to privilege should be 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. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.<sup>46</sup>

It is also important to understand the dissents, as they have gained similar notoriety when combined with Powell's concurrence.<sup>47</sup> Justice William Douglas argued in his dissent that the First Amendment gives a newsgatherer an absolute right not to appear in

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<sup>41</sup> *Id.* at 681-82.

<sup>42</sup> *Id.* at 690-91 (“[W]e perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.”).

<sup>43</sup> *Id.* at 709 (Powell, J., concurring).

<sup>44</sup> *Id.*

<sup>45</sup> *Branzburg*, 408 U.S. at 710.

<sup>46</sup> *Id.* at 709-10.

<sup>47</sup> Robinson, *supra* note 2, at 324-25.

front of a grand jury for questioning.<sup>48</sup> He believed in the principle that for effective self-government to succeed, its citizens must be immersed in a “steady, robust, unimpeded, and uncensored flow of opinion and reporting which are continuously subjected to critique, rebuttal, and re-examination.”<sup>49</sup> In that sense, a reporter’s status as a newsgatherer, integral to that process, is critical.<sup>50</sup> On the other hand, Justices Potter Stewart, William Brennan, and Thurgood Marshall, in a dissent authored by Justice Stewart, argued for a qualified privilege,<sup>51</sup> stressing the importance of confidential sources to the newsgathering process:

The right to gather news implies, in turn, a right to a confidential relationship between a reporter and his source. This proposition follows as a matter of simple logic once three factual predicates are recognized: (1) newsmen require informants to gather news; (2) confidentiality—the promise or understanding that names or certain aspects of communications will be kept off the record—is essential to the creation and maintenance of a news-gathering relationship with informants; and (3) an unbridled subpoena power—the absence of a constitutional right protecting, in any way, a confidential relationship from compulsory process—will either deter sources from divulging information or deter reporters from gathering and publishing information.<sup>52</sup>

According to Justice Stewart, to protect the “free flow of information”<sup>53</sup> to the public, when a reporter is asked to surrender his source, the government should be required to: (1) show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means

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<sup>48</sup> *United States v. Caldwell*, 408 U.S. 665, 712 (1972).

<sup>49</sup> *Id.* at 715.

<sup>50</sup> *Id.*

<sup>51</sup> *Branzburg*, 408 U.S. at 743 (1972) (Stewart, J., dissenting).

<sup>52</sup> *Id.* at 728.

<sup>53</sup> *Id.* at 738.

less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.<sup>54</sup>

The Supreme Court left to Congress and state legislatures the decision of determining whether a statutory newsgatherer's privilege is "necessary and desirable."<sup>55</sup>

#### D. Post-Branzburg Reporter's Shield

Although the Supreme Court's ruling in *Branzburg* at first glance seems to preclude journalists from refusing to reveal sources at all times, journalists have gained some rights since *Branzburg*.<sup>56</sup> On the state level, a reporter's privilege is recognized in some capacity by all states except Hawaii and Wyoming, either by statute or common law, albeit with much variation.<sup>57</sup>

On the federal level, the reporter's privilege varies since the circuit courts are split whether there is a privilege and if so, the scope of such a privilege.<sup>58</sup> The Third Circuit, for example, has recognized a reporter's privilege in civil, criminal, and grand jury matters,<sup>59</sup> while the Sixth Circuit has refused to recognize a reporter's privilege based on its interpretation of Justice Powell's concurring opinion, which it argues is consistent with the majority.<sup>60</sup>

However, some journalists have argued that the combination in *Branzburg* of Justice Powell's concurring opinion and the dissents of four other justices actually created a majority in favor of case-by-case balancing of rights when a journalist refuses to comply with a grand jury subpoena.<sup>61</sup> This argument has found favor with many federal appeals courts, which have recognized a reporter's privilege in some

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<sup>54</sup> *Id.* at 743.

<sup>55</sup> *Id.* at 706.

<sup>56</sup> Robinson, *supra* note 2, at 324.

<sup>57</sup> Robinson, *supra* note 2, at 325.

<sup>58</sup> Robinson, *supra* note 2, at 324-25.

<sup>59</sup> See *In re Williams*, 766 F. Supp. 358 (W.D. Pa. 1991), *aff'd en banc*, 963 F.2d 567 (3d Cir. 1992); *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980).

<sup>60</sup> *In re Grand Jury Proceedings, Storer Commc'ns, Inc. v. Giovan*, 810 F.2d 580, 585 (6th Cir. 1987) (arguing Powell's concurrence "certainly does not warrant the rewriting of the majority opinion to grant a first amendment testimonial privilege to news reporters.").

<sup>61</sup> Robinson, *supra* note 2, at 324.

capacity.<sup>62</sup> However, among the circuit courts, the scope of the privilege is widely varied.<sup>63</sup>

## II. THE REPORTER'S PRIVILEGE IN NEW YORK

### A. What is the Privilege in New York?

The Supreme Court in *Branzburg* held that reporters qualify for some First Amendment protection, but that protection is not absolute.<sup>64</sup> For its shield law, New York, a state that has a “consistent tradition . . . of providing the broadest possible protection to ‘the sensitive role of gathering and disseminating news of public events,’”<sup>65</sup> uses a privilege that perhaps all of the *Branzburg* justices could support, as it draws a little piece of each one’s argument to craft a comprehensive privilege with broad protection but some exceptions.

New York is one of only a few jurisdictions that uses a hybrid privilege.<sup>66</sup> The Empire State grants newsgatherers an absolute privilege to refuse to disclose confidential sources and information obtained in confidence and a qualified privilege from forced disclosure of non-confidential information and sources that can be overcome under certain circumstances.<sup>67</sup>

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<sup>62</sup> Robinson, *supra* note 2, at 324-25.

<sup>63</sup> Robinson, *supra* note 2, at 324-25. Compare *United States v. Smith*, 135 F.3d 963, 972 (5th Cir. 1998) (holding that news reporters enjoy no qualified privilege not to disclose nonconfidential information in criminal cases) and *Shoen v. Shoen*, 5 F.3d 1289, 1295 (9th Cir. 1993) (broadening protection to include non-confidential information in a civil case).

<sup>64</sup> *Branzburg*, 408 U.S. 665.

<sup>65</sup> *O’Neill v. Oakgrove Const., Inc.*, 523 N.E.2d 277, 281 (N.Y. 1988) (quoting *Matter of Beach v. Shanley*, 465 N.E.2d 304 (1984)).

<sup>66</sup> The District of Columbia and Maryland also have hybrid laws that are basically the same. Both have an absolute privilege against forced disclosure of sources and a qualified privilege against forced disclosure of news or information that may be compelled if the person seeking the news or information can show, by clear and convincing evidence, that the news or information is relevant to a significant legal issue before a body that has the power to issue a subpoena; that the news or information could not be obtained by any alternative means; and that an overriding public interest in disclosure exists. See D.C. CODE § 16-4702 (1995); D.C. CODE § 16-4703 (1992); MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (West 2014).

<sup>67</sup> N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1990). *E.g.*, *People v. Juarez*, 39 N.Y.S.3d 155 (App. Div. 1st Dep’t 2016) (holding the People did not make a proper showing that a reporter’s testimony and notes of an interview with a murder defendant were critical to the People’s proof of a material issue so as to overcome the qualified protection for the reporter’s non-confidential material).

New York's statute on absolute protection for confidential news is highly detailed and specific, covering both civil and criminal proceedings as well as grand juries.<sup>68</sup> The statute reads as follows:

[N]o professional journalist or newscaster presently or having previously been employed or otherwise associated with any newspaper, magazine, news agency, press association, wire service, radio or television transmission station or network or other professional medium of communicating news or information to the public shall be adjudged in contempt by any court in connection with any civil or criminal proceeding, or by the legislature or other body having contempt powers, nor shall a grand jury seek to have a journalist or newscaster held in contempt by any court, legislature or other body having contempt powers for refusing or failing to disclose any news obtained or received in confidence or the identity of the source of any such news coming into such person's possession in the course of gathering or obtaining news for publication or to be published in a newspaper, magazine, or for broadcast by a radio or television transmission station or network or for public dissemination by any other professional medium or agency which has as one of its main functions the dissemination of news to the public, by which such person is professionally employed or otherwise associated in a news gathering capacity notwithstanding that the material or identity of a source of such material or related material gathered by a person described above performing a function described above is or is not highly relevant to a particular inquiry of government and notwithstanding that the information was not solicited by the journalist or newscaster prior to disclosure to such person.<sup>69</sup>

Under the section detailing qualified protection for non-confidential news, the law requires the party seeking the information to prove that

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<sup>68</sup> N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1990).

<sup>69</sup> *Id.*

the need for the reporter's information: (1) is highly material and relevant; (2) is critical or necessary for a party's claim or defense, or proof of a material issue; and (3) cannot be obtained from any other source.<sup>70</sup> The law has been said to "reflect a paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters, an interest which has always been a principal concern of the First Amendment."<sup>71</sup>

New York's law was first codified in 1970 and has been amended several times since, but its genesis occurred centuries earlier.<sup>72</sup> The privilege was recognized in the colonial era in a 1735 case in which reporter John Peter Zenger was prosecuted for publishing articles that criticized the New York colonial governor.<sup>73</sup> Zenger refused to identify his source, and his attorney, Andrew Hamilton, hailed his client's decision to protect those brave enough to criticize the government.<sup>74</sup> Zenger's case ended with an acquittal.<sup>75</sup> In the years that have followed, the reporter's privilege in New York has expanded greatly to the point that it now gives the press the "broadest possible protection."<sup>76</sup>

The New York law applies only to confidential sources and to "professional journalists," defined as anyone involved in the "gathering, preparing, collecting, writing, editing, filming, taping or photographing of news intended for a newspaper, magazine, news agency, press association or wire service or other professional medium or agency which has as one of its regular functions the processing and researching of news intended for dissemination to the public."<sup>77</sup> Student journalists are not considered professional journalists and, therefore, receive no protection under the state shield law, although

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<sup>70</sup> N.Y. CIV. RIGHTS LAW § 79-h(c) (McKinney 1990).

<sup>71</sup> *Baker v. F & F Inv.*, 470 F.2d 778, 782 (2d Cir. 1972).

<sup>72</sup> *New York – Privilege Compendium, Introduction: History & Background*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/new-york-privilege-compendium/i-introduction-history-background> (last visited Mar. 17, 2017).

<sup>73</sup> *In re Beach v. Shanley*, 465 N.E.2d 304, 312 (N.Y. 1984) (Wachtler, J., concurring).

<sup>74</sup> Kelli L. Sager & Rochelle L. Wilcox, *Protecting Confidential Sources*, 33 LITIGATION 36, 36 (Winter 2007).

<sup>75</sup> *Beach*, 465 N.E.2d at 312.

<sup>76</sup> *New York Privilege Compendium: Introduction: History & Background*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/new-york-privilege-compendium/i-introduction-history-background> (last visited Mar. 17, 2017).

<sup>77</sup> N.Y. CIV. RIGHTS LAW § 79-h(a)(6) (McKinney 1990).

New York federal courts have recognized a First Amendment privilege for students.<sup>78</sup>

### B. New York Compared to Other States

New York differs from other states in that most states grant reporters a qualified privilege while at least ten states give reporters an absolute privilege.<sup>79</sup> One state that has a shield law that grants an absolute reporter's privilege is Indiana.<sup>80</sup> Indiana's law, much simpler in wording and shorter in length than New York's hybrid statute, gives total protection to journalists by providing that those covered by the scope of the statute:

shall not be compelled to disclose in any legal proceedings or elsewhere the source of any information procured or obtained in the course of the person's employment or representation . . . whether: (1) published or not published: (A) in the newspaper or periodical; or (b) by the press association or wire service; or (2) broadcast or not broadcast by the radio station or television station.<sup>81</sup>

Indiana also has a broad standard covering to whom the law applies, using sweeping language like "connected with" and "has received income from."<sup>82</sup> Covered under the statute are:

(1) any person connected with, or any person who has been connected with or employed by: (A) a newspaper or other periodical issued at regular intervals and having a general circulation; or (B) a recognized press

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<sup>78</sup> See *Persky v. Yeshiva University*, 2002 WL 31769704 (S.D.N.Y. Dec. 10, 2002) (holding that a student journalist writing for an undergraduate newspaper did not have to answer questions about his sources and the information they provided, but noting that the case would be different if it were governed by New York state law, which gives protection only to professional journalists or newscasters); *Blum v. Schlegel*, 150 F.R.D. 42 (W.D.N.Y. 1993) (holding that a law student reporting for a law school newspaper could assert a federal reporter's privilege despite not being a professional journalist and thus did not have to turn over a recording of an interview, but noting that the same privilege might not apply under New York law). See also *Reporter's Privilege Guide: New York*, STUDENT PRESS LAW CENTER (Dec. 5, 2014), [http://www.splc.org/article/2014/12/reporters-privilege-3?\\_h=2cfec365-c60c-4452-aa6d-f3ecdd527e44](http://www.splc.org/article/2014/12/reporters-privilege-3?_h=2cfec365-c60c-4452-aa6d-f3ecdd527e44).

<sup>79</sup> *Faucette*, *supra* note 3, at 197-98.

<sup>80</sup> IND. CODE § 34-46-4-2 (1998).

<sup>81</sup> *Id.*

<sup>82</sup> IND. CODE § 34-46-4-1 (1998).

association or wire service; as a bona fide owner, editorial or reportorial employee, who receives or has received income from legitimate gathering, writing, editing and interpretation of news; and (2) any person connected with a licensed radio or television station as owner, official, or as an editorial or reportorial employee who receives or has received income from legitimate gathering, writing, editing, interpreting, announcing or broadcasting of news.<sup>83</sup>

This varies from New York's statute, which is more detailed about who qualifies as a professional journalist.<sup>84</sup>

Other states grant a qualified privilege rather than an absolute privilege. The qualified privilege is narrower than the absolute privilege because it compels a reporter to disclose information under certain circumstances.<sup>85</sup> For example, Florida's shield law grants reporters a qualified privilege not to be forced to disclose information or the identity of a source the reporter obtained "while actively gathering news."<sup>86</sup> The privilege applies to both confidential and non-confidential sources.<sup>87</sup> If a reporter has shown that the qualified privilege applies, the Florida Supreme Court has held that a court must then apply the three-prong balancing test used by an "overwhelming majority of other states" (and proposed by the dissent in *Branzburg*) to determine whether the privilege will halt disclosure of the information.<sup>88</sup> The party that wants access to the information must establish that: "(1) the reporter possesses relevant information; (2) the same information is not available from alternative sources; and (3) the movant has a compelling need for any information the reporter may have."<sup>89</sup> The Florida legislature has codified the same requirements in its shield law.<sup>90</sup> Florida's law has exceptions where the shield law does not apply, including physical evidence and eyewitness accounts of crimes.<sup>91</sup>

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<sup>83</sup> *Id.*

<sup>84</sup> N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1990).

<sup>85</sup> *See, e.g.*, FLA. STAT. § 90.5015 (1990).

<sup>86</sup> *Id.*

<sup>87</sup> *News-Journal Corp. v. Carson*, 741 So. 2d 572, 576 (Fla. Dist. Ct. App. 1999).

<sup>88</sup> *State v. Davis*, 720 So. 2d 220, 227 (Fla. 1998).

<sup>89</sup> *Id.*

<sup>90</sup> FLA. STAT. § 90.5015 (1990).

<sup>91</sup> *Id.*

Meanwhile, California employs no privilege at all and instead gives reporters immunity from being held in contempt for refusing a subpoena or court order to name a confidential source or disclose confidential information.<sup>92</sup>

### III. FEDERAL REPORTER'S PRIVILEGE

#### A. What is the Scope of the Reporter's Privilege Federally?

There is no federal reporter's shield law.<sup>93</sup> In federal cases, where a reporter's rights "may depend solely on an interpretation of the First Amendment,"<sup>94</sup> circuit courts are split on recognizing any constitutional protections, and those that do recognize it do not agree on its scope.<sup>95</sup>

The District of Columbia recognizes a qualified reporter's privilege but only in civil matters.<sup>96</sup> The First Circuit has held that in cases where a plaintiff seeks discovery of sources, and the plaintiff is not a public figure, the plaintiff must show why the desired information is relevant.<sup>97</sup> Then, the defendant must establish a need for preserving confidentiality.<sup>98</sup> The Second Circuit has held that the qualified privilege for journalists applies to non-confidential as well as to confidential information.<sup>99</sup> The Third Circuit has recognized a reporter's privilege in civil, criminal, and grand jury matters.<sup>100</sup> The Fourth Circuit has found the privilege in civil but not criminal

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<sup>92</sup> CAL. CONST. ART. I. § 2.

<sup>93</sup> However, it is important to note that federal law does protect journalists from having their work product and documents seized without a warrant. *See Sources and Subpoenas (Reporter's Privilege)*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, <http://www.rcfp.org/digital-journalists-legal-guide/sources-and-subpoenas-reporters-privilege> (last visited Mar. 17, 2017).

<sup>94</sup> Sager & Wilcox, *supra* note 74, at 36.

<sup>95</sup> *McKevitt v. Pallasch*, 339 F.3d 530, 532 (7th Cir. 2003) (stating "a large number of [federal circuit court] cases conclude, rather surprisingly in light of *Branzburg*, that there is a reporter's privilege, though they do not agree on its scope.").

<sup>96</sup> *Zerilli v. Smith*, 656 F.2d 705, 711-12 (D.C. Cir. 1981).

<sup>97</sup> *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 597 (1st Cir. 1980).

<sup>98</sup> *Id.*

<sup>99</sup> *Baker v. Goldman Sachs & Co.*, 669 F.3d 105 (2d Cir. 2012); *Gonzales v. Nat'l Broad. Co.*, 194 F.3d 29, 35 (2d Cir. 1999).

<sup>100</sup> *See Cuthbertson*, 630 F.2d at 146-47; *In re Williams*, 766 F. Supp. 358, 371 (W.D. Pa. 1991), *aff'd en banc*, 963 F.2d 567 (3d Cir. 1992).

matters.<sup>101</sup> This is significant because the Fourth Circuit includes Virginia and Maryland, home to the C.I.A., the Pentagon, and the National Security Agency – all agencies that draw much press attention, as well as leaks to the media involving classified information.<sup>102</sup> The Fifth Circuit has recognized the privilege<sup>103</sup> but declined to extend it to non-confidential information in a criminal case,<sup>104</sup> while the Ninth Circuit has broadened protection to include non-confidential material.<sup>105</sup> The Tenth<sup>106</sup> and Eleventh<sup>107</sup> Circuits have also found a privilege.

While most circuit courts have recognized some form of the reporter's privilege, still others have not. The Sixth Circuit, in refusing to recognize a reporter's privilege and based on its interpretation of Justice Powell's concurring opinion in *Branzburg*, declined to join other circuit courts in adopting the "qualified privilege balancing process urged by the three *Branzburg* dissenters and rejected by the majority."<sup>108</sup> The Sixth Circuit court viewed Justice Powell's concurring opinion as consistent with the majority and said that the concurrence "certainly does not warrant the rewriting of the majority opinion to grant a first amendment testimonial privilege to news reporters."<sup>109</sup> The court continued:

Instead, courts should, as did the Michigan state courts, follow the admonition of the majority in *Branzburg* to make certain that the proper balance is struck between freedom of the press and the obligation of all citizens to

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<sup>101</sup> Compare *United States v. Sterling*, 724 F.3d 482, 492 (4th Cir. 2013) ("There is no First Amendment testimonial privilege, absolute or qualified, that protects a reporter from being compelled to testify by the prosecution or the defense in criminal proceedings about criminal conduct that the reporter personally witnessed or participated in, absent a showing of bad faith, harassment, or other such non-legitimate motive, even though the reporter promised confidentiality to his source."), and *Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 287 (4th Cir. 2000) ("[T]he reporter's privilege recognized by the Supreme Court. . . is not absolute and will be overcome whenever society's need for the confidential information in question outweighs the intrusion on the reporter's First Amendment interests.").

<sup>102</sup> See Tricia Bishop, *Conservative Federal Appeals Court Shifts Left*, THE BALTIMORE SUN (Nov. 19, 2011), <http://www.baltimoresun.com/news/maryland/bs-md-fourth-circuit-20111119-story.html>.

<sup>103</sup> *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 725 (5th Cir. 1980).

<sup>104</sup> *Smith*, 135 F.3d at 972.

<sup>105</sup> *Shoen*, 5 F.3d at 1295.

<sup>106</sup> *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 437 (10th Cir. 1977).

<sup>107</sup> *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986).

<sup>108</sup> *Storer*, 810 F.2d at 584.

<sup>109</sup> *Id.* at 585.

give relevant testimony, by determining whether the reporter is being harassed in order to disrupt his relationship with confidential news sources, whether the grand jury's investigation is being conducted in good faith, whether the information sought bears more than a remote and tenuous relationship to the subject of the investigation, and whether a legitimate law enforcement need will be served by forced disclosure of the confidential source relationship.<sup>110</sup>

Similarly, the Seventh Circuit rejected a federal common law reporter's privilege. Judge Posner wrote:

It seems to us that rather than speaking of privilege, courts should simply make sure that a subpoena duces tecum directed to the media, like any other subpoena duces tecum, is reasonable in the circumstances, which is the general criterion for judicial review of subpoenas. We do not see why there need to be special criteria merely because the possessor of the documents or other evidence sought is a journalist.<sup>111</sup>

The issue is still open in the Eighth Circuit.<sup>112</sup>

### **B. Should There be a Federal Reporter's Shield Law?**

Most journalists would answer that question with a resounding, "Yes!"<sup>113</sup> It is more likely now than ever before that a reporter will be targeted with a subpoena or asked to give up a source.<sup>114</sup> Additionally, given the circuit split and varying scope of the reporter's privilege in the federal courts, a national law would create much-needed uniformity around a hot-button issue in today's divisive political climate.

Recent efforts in Congress to pass a reporter's shield statute applicable in federal courts nationwide have failed, despite support

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<sup>110</sup> *Id.* at 586.

<sup>111</sup> *McKevitt*, 339 F.3d at 533.

<sup>112</sup> *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 918 n.8 (8th Cir. 1997).

<sup>113</sup> *See generally Raise the Shield!*, SOCIETY OF PROFESSIONAL JOURNALISTS, <http://www.spj.org/shieldlaw.asp> (last visited Mar. 17, 2017).

<sup>114</sup> *See James Risen, If Donald Trump Targets Journalists, Thank Obama*, N.Y. TIMES (Dec. 30, 2016), [http://www.nytimes.com/2016/12/30/opinion/sunday/if-donald-trump-targets-journalists-thank-obama.html?smid=fb-nytimes&smtyp=cur&\\_r=0](http://www.nytimes.com/2016/12/30/opinion/sunday/if-donald-trump-targets-journalists-thank-obama.html?smid=fb-nytimes&smtyp=cur&_r=0).

from news agencies and even the Obama administration.<sup>115</sup> Congress's most recent attempts included the Free Flow of Information Acts of 2009, 2011, and 2013, which would have established a federal qualified reporter's privilege.<sup>116</sup>

Nevertheless, a federal reporter's shield law should be enacted. In fact, the *Branzburg* decision specifically mentioned that Congress has the power to decide whether a statute codifying a reporter's privilege is needed and to create standards and rules "as narrow or broad as deemed necessary to deal with the evil discerned."<sup>117</sup> Furthermore, the federal government itself has formally acknowledged that members of the news media should be protected.<sup>118</sup> The Justice Department states that its guidelines for obtaining information from reporters are "intended to provide protection to members of the news media from certain law enforcement tools, whether criminal or civil, that might unreasonably impair newsgathering activities" and recognize the importance of "safeguarding the essential role of the free press in fostering government accountability and an open society."<sup>119</sup>

One argument in favor of enacting a federal reporter's shield is uniformity, especially in terms of having the same rules apply nationally to civil, criminal, and grand jury proceedings. As previously discussed, the federal circuits vary in the scope of protection they have offered reporters.<sup>120</sup> However, most recognize at least some form of a reporter's privilege.<sup>121</sup> Thus, the federal circuits' "almost uniform recognition" of a reporter's privilege "strongly

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<sup>115</sup> See Callum Borchers, *Mike Pence Might be the Media's New Best Friend*, WASH. POST (Jul. 29, 2016), [https://www.washingtonpost.com/news/the-fix/wp/2016/07/29/mike-pence-might-be-the-medias-new-best-friend/?utm\\_term=.216df81cc9ff](https://www.washingtonpost.com/news/the-fix/wp/2016/07/29/mike-pence-might-be-the-medias-new-best-friend/?utm_term=.216df81cc9ff); Cora Currier, *Pressure, Potential for a Federal Shield Law*, COLUMBIA JOURNALISM REVIEW (Jun. 13, 2014), [http://archives.cjr.org/behind\\_the\\_news/shield\\_law\\_risen\\_etc.php](http://archives.cjr.org/behind_the_news/shield_law_risen_etc.php); David Jackson, *Obama Backs 'Shield Law' for Reporters*, USA TODAY (May 15, 2013), <http://www.usatoday.com/story/news/politics/2013/05/15/obama-schumer-associated-press-shield-law/2161913/>.

<sup>116</sup> Rachel Harris, *Conceptualizing and Reconceptualizing the Reporter's Privilege in the Age of Wikileaks*, 82 FORDHAM L. REV. 1811, 1822 (2014).

<sup>117</sup> *Branzburg*, 408 U.S. at 706.

<sup>118</sup> See 28 C.F.R. § 50.10 (2015) for information on the Justice Department's policy regarding obtaining information from, or records of, members of the news media as well as questioning, arresting, or charging members of the media.

<sup>119</sup> *Id.*

<sup>120</sup> See *supra* Section III(A) and accompanying footnotes.

<sup>121</sup> See *supra* Section III(A) and accompanying footnotes.

indicates that enacting a national reporter’s shield law would be in accord with the sentiment of the federal judiciary.”<sup>122</sup>

A second argument in favor of enacting a federal reporter’s shield is that this protection will become more important due to uptick in government leaks to media organizations and statements from the Trump administration.<sup>123</sup> There is a reason why articles breaking headline news often contain mysterious descriptions of sources like “a former Congressional staffer” or “according to a source familiar with the situation.”<sup>124</sup> News reporters depend on these insider, confidential sources for information and news tips, often in exchange for anonymity in an article.<sup>125</sup>

In recent years, a great deal of news coverage – particularly when it comes to government actions – has stemmed from large-scale leaks, like those involving Chelsea Manning,<sup>126</sup> Edward Snowden,<sup>127</sup> and James Risen.<sup>128</sup> The Obama Administration made combating leaks a priority,<sup>129</sup> prompting the Committee to Protect Journalists, a New York-based journalist advocacy organization, to release a report called “The Obama Administration and the Press: Leak investigations and surveillance in post-9/11 America.”<sup>130</sup> The report came in the wake of revelations that the Justice Department had secretly seized

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<sup>122</sup> Joel G. Weinberg, *Supporting the First Amendment: A National Reporter’s Shield Law*, 31 SETON HALL LEGIS. J. 149, 173 (2006).

<sup>123</sup> See Niall Stange, *Trump White House besieged by leaks*, THE HILL (Feb. 9, 2017), <http://thehill.com/homenews/administration/318621-trump-white-house-besieged-by-leaks>; Justina Crabtree, *The Tools Helping Facilitate Leaks from Trump’s White House*, CNBC (Feb. 9, 2017), <http://www.cnbc.com/2017/02/09/the-tools-helping-facilitate-leaks-from-trumps-white-house.html>.

<sup>124</sup> Farhi, *supra* note 10.

<sup>125</sup> *Anonymous Sources*, *supra* note 6.

<sup>126</sup> Chelsea Manning is a U.S. Army intelligence analyst who gave hundreds of thousands of classified documents to WikiLeaks. See *Chelsea Manning*, BIOGRAPHY, <http://www.biography.com/people/chelsea-manning-21299995#leak-and-arrest> (last visited Mar. 17, 2017).

<sup>127</sup> Edward Snowden is a former National Security Agency subcontractor who leaked secret information about National Security Agency surveillance. See *Edward Snowden*, BIOGRAPHY, <http://www.biography.com/people/edward-snowden-21262897> (last visited Mar. 17, 2017).

<sup>128</sup> James Risen is a *New York Times* reporter who received a grand jury subpoena after he relied on confidential sources in a book discussing unsuccessful CIA efforts to destabilize the Iranian nuclear program. See Matt Apuzzo, *Times Reporter Will Not Be Called to Testify in Leak Case*, N.Y. TIMES (Jan. 12, 2015), <https://www.nytimes.com/2015/01/13/us/times-reporter-james-risen-will-not-be-called-to-testify-in-leak-case-lawyers-say.html>.

<sup>129</sup> Risen, *supra* note 114. See also, *e.g.*, 28 C.F.R. § 50 (2014).

<sup>130</sup> Michael Calderone, *Obama Administration Has Gone to Unprecedented Lengths To Thwart Journalists, Report Finds*, THE HUFFINGTON POST (Oct. 10, 2013), [http://www.huffingtonpost.com/2013/10/10/obama-press-freedom-cpj\\_n\\_4073037.html](http://www.huffingtonpost.com/2013/10/10/obama-press-freedom-cpj_n_4073037.html).

phone records at The Associated Press and obtained a Fox News reporter's email account, drawing criticism from media organizations.<sup>131</sup> According to a recent New York Times article, under President Obama, the Justice Department and the F.B.I. "have spied on reporters by monitoring their phone records, labeled one journalist an unindicted co-conspirator in a criminal case for simply doing reporting and issued subpoenas to other reporters to try to force them to reveal their sources and testify in criminal cases."<sup>132</sup>

The Justice Department recently changed the guidelines setting restrictions on when the government may subpoena reporters to try to force them to reveal their sources.<sup>133</sup> The new guidelines also restrict the government from labeling a journalist as a criminal co-conspirator in order to obtain a search warrant to access reporting materials.<sup>134</sup> However, a loophole in those guidelines allows the Justice Department to continue to "aggressively pursue investigations into news reports on national security, which covers most leak investigations."<sup>135</sup> Additionally, the guidelines are not codified; thus, the next Attorney General can change them.<sup>136</sup>

That fact is particularly relevant and troublesome to journalist advocate organizations, especially given a recent comment made by newly appointed Attorney General Jeff Sessions.<sup>137</sup> At a confirmation hearing on January 10, 2017, the then-Senator from Alabama said he has not studied the current regulations for investigations involving journalists, and he "wouldn't commit to not jailing them in the course of probing leaks."<sup>138</sup> In 2013, Mr. Sessions opposed a federal shield law that he said could "create a legal mechanism to protect anyone who is going to call himself a newsperson," and he has also opposed reforms to the Freedom of Information Act.<sup>139</sup>

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<sup>131</sup> *Id.*; Michael Calderone & Ryan J. Reilly, *Justice Department Revises Media Guidelines In Leak Investigations*, HUFFINGTON POST (July 12, 2013), [http://www.huffingtonpost.com/2013/07/12/justice-department-media-guidelines\\_n\\_3587819.html](http://www.huffingtonpost.com/2013/07/12/justice-department-media-guidelines_n_3587819.html).

<sup>132</sup> Risen, *supra* note 114.

<sup>133</sup> Risen, *supra* note 114.

<sup>134</sup> Calderone & Reilly, *supra* note 131.

<sup>135</sup> 28 C.F.R. § 50 (2014); Risen, *supra* note 114.

<sup>136</sup> Risen, *supra* note 114.

<sup>137</sup> Michael Calderone, *Jeff Sessions Doesn't Commit To Not Jailing Journalists For Doing Their Jobs*, HUFFINGTON POST (Jan. 10, 2017), [http://www.huffingtonpost.com/entry/jeff-sessions-comments-jailing-journalists\\_us\\_58753d8ee4b02b5f858ba2a2?ninnrnez87eklnmi](http://www.huffingtonpost.com/entry/jeff-sessions-comments-jailing-journalists_us_58753d8ee4b02b5f858ba2a2?ninnrnez87eklnmi).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

### C. What Should a Federal Reporter's Shield Law Look Like?

The federal reporter shield should mirror the hybrid privilege law of New York. For one, New York's law balances all approaches advocated for in *Branzburg*, giving the reporter and the public the best of both worlds.<sup>140</sup> For another, it allows flexibility for case-by-case analysis.

By giving complete protection for confidential sources and information, a hybrid privilege gives an absolute privilege where it is needed most: to protect confidential sources, thereby facilitating a positive relationship and ultimately, a better, more informed story for the public.<sup>141</sup> Confidential sources are undoubtedly responsible for some of the most important stories of the last 40 years, and sources like that need to be protected.<sup>142</sup>

Yet at the same time, a hybrid privilege also employs a qualified privilege where less is at stake and only as a "last resort," such as with non-confidential information.<sup>143</sup> This gives litigants, the government, and the judicial system access to critical information and evidence while also implementing a balancing test to determine when a reporter should have to give up the right to keep confidential information confidential.<sup>144</sup> In effect, the law strikes a balance between the urgency of civil and criminal litigation and the "countervailing need to prevent the undue diversion of journalistic effort and disruption of press functions . . . to maintain the tradition . . . of providing the broadest possible protection to [secure] the sensitive role of gathering and disseminating news of public events," and to protect newsgatherers from "undue interference."<sup>145</sup>

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<sup>140</sup> *Branzburg*, 408 U.S. at 731.

<sup>141</sup> *Id.* at 729 (Stewart, J., dissenting) ("It is obvious that informants are necessary to the news-gathering process as we know it today . . . It is equally obvious that the promise of confidentiality may be a necessary prerequisite to a productive relationship between a newsman and his informants.").

<sup>142</sup> See *Why reporters need confidential sources*, FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/newswar/tags/confidentialsources.html> (last visited Mar. 17, 2017) (quoting Carl Bernstein as saying, "I know of very little important reporting of the last 30 to 40 years that has been done without use of confidential sources, particularly in the national security area.").

<sup>143</sup> *In re Grand Jury Subpoenas Served on Nat'l Broadcasting Co.*, 683 N.Y.S.2d 708, 711 (N.Y. Sup. Ct. 1998).

<sup>144</sup> Faucette, *supra* note 3, at 225.

<sup>145</sup> *Nat'l Broadcasting*, 683 N.Y.S.2d at 711 (quoting *O'Neill v Oakgrove Construction Inc.*, 71 N.Y.2d 521, 528-29 (N.Y. App. Div. 1988) (internal quotations omitted)).

The hybrid privilege comes with a disadvantage in that it restricts freedom of the press by nature of offering a qualified privilege at all.<sup>146</sup> In other words, the disadvantage of a hybrid privilege is that it is not an absolute privilege because a journalist in a jurisdiction using a hybrid privilege could be forced to disclose non-confidential information if the party seeking the information satisfies the required burden of proof.<sup>147</sup> However, an absolute privilege does not account for the possibility that an overriding interest may require disclosure of information, and for that reason, an absolute privilege may not be appropriate at the federal level and may not gain legislative support, especially in today's divisive political climate.

Thus, the hybrid privilege properly balances the interests of all parties and carries with it few downsides. This privilege protects absolutely the sources who require confidentiality while giving qualified protection to sources who did not put the condition of anonymity on their information.

#### IV. CONCLUSION

If there were ever a time to codify protections for reporters and their sources on a federal level, that time seems to be now. As the *Caldwell* court wrote, in words that resonate today, “the need for an untrammelled press takes on special urgency in times of widespread protest and dissent. In such times the First Amendment protections exist to maintain communication with dissenting groups and to provide the public with a wide range of information about the nature of protest and heterodoxy.”<sup>148</sup>

It is truly a challenging and important time to be a member of the press.<sup>149</sup> Yet, at the end of the day, the press is how the public gets its information, and confidential sources often play a role in explaining what goes on behind closed doors, whether at the White House, in the

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<sup>146</sup> Faucette, *supra* note 3, at 225.

<sup>147</sup> Faucette, *supra* note 3, at 225.

<sup>148</sup> *Caldwell v. United States*, 434 F.2d 1081, 1084-85 (9th Cir. 1970), *rev'd sub nom. Branzburg v. Hayes*, 408 U.S. 665 (1972).

<sup>149</sup> See Shelley Hepworth, *Covering Trump Conference on Journalism, Politics and Fake News*, COLUMBIA JOURNALISM REVIEW (Mar. 2, 2017) (in advertising an upcoming conference, saying, “The president has labeled the press ‘the enemy of the American people’ and excluded some news outlets from briefings; the First Amendment feels like it’s under threat; and fake news and ‘alternative facts’ abound. The unorthodox nature of this environment has raised questions.”).

board room, or during caucus.<sup>150</sup> These confidential sources are key to investigative journalists, and it is critical that the law catch up to the level of trust required to keep journalism healthy and thriving.

The time is now to afford the press as much protection as is reasonably possible, and a federal law mirroring that of New York would be the most appropriate way to accomplish this. The hybrid privilege provides the greatest protection when most needed but allows for information to be disclosed when absolutely necessary, thereby balancing First Amendment concerns against compelling governmental interests. This approach properly takes into consideration the interests of all parties and promotes newsgathering by providing sources with the peace of mind needed to ensure continued conversation with journalists.

After all, a journalist is only as good as her source.

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<sup>150</sup> Sager & Wilcox, *supra* note 74, at 36 (“[C]ountless journalistic investigative reports about government corruption, corporate misconduct, and other wrongdoings would never have been written without information from people who came forward partly because of assurances that their identities would be protected. These compelling interests are what inspire journalists and media companies to fight these battles on virtually a daily basis.”).