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Testimony of Randall D. Eliason
Professorial Lecturer in Law
Hearing on H.R. 2102
The "Free Flow of Information Act of 2007"
Before the House Committee on the Judiciary
Thursday, June 14, 2007

Executive Summary

- The primary rationale for a reporter's privilege is that, in the absence of a privilege, confidential sources will be "chilled" and will not speak to the press. There is substantial reason to doubt that this alleged "chilling effect" is real, and thus to doubt whether the reporter's privilege generates any real benefits. The privilege will, however, result in substantial costs by excluding relevant evidence from consideration, which has the potential to result in error or injustice.
- In the thirty-five years since the landmark case of *Branzburg v. Hayes*, there has been no federal reporter's privilege statute. Our country's vigorous, free press has flourished during that time. History does not support the need for a privilege law.
- Confidential sources are important to journalism. But it is also important to distinguish between a reporter's promise of confidentiality and the existence of a legal evidentiary privilege. Even without a statutory privilege, a reporter can promise a great deal of confidentiality simply by agreeing never to reveal a source's name voluntarily. Cases in which a reporter is actually compelled to testify are extremely rare, and thus such a promise can satisfy most reasonable expectations of confidentiality.
- Even if there were an ironclad privilege law, a reporter could not promise sources that they would never be identified. There are many more likely ways for a source to be discovered that do not involve forcing the reporter to testify, such as internal leak investigations or probes by other third parties. Sources who have decided to assume these greater risks will not be deterred by the slight additional chance that a court might someday compel the reporter to identify them.
- Sources who are truly concerned about exposure may provide information to a journalist anonymously, thus ensuring that the reporter cannot identify them.
- A federal privilege law will not keep reporters from going to jail. Reporters are jailed not for what they write, but for refusing to honor lawful court orders to testify. If a court rules that the federal privilege does not apply in a given case, many reporters will still refuse to testify and will still be jailed for contempt.
- H.R. 2102's nearly absolute protection for the identity of sources will effectively grant immunity to those who commit many crimes, including disclosure of national security information. The sweeping definition of "journalism" is problematic in the age of the Internet, and renders the privilege unacceptably broad. It is also hard to justify providing exceptions to the privilege to protect trade secrets and private information, but not to prosecute crime.
- The BALCO case provides no support for those who favor a federal privilege law. The actions of the BALCO reporters were deplorable, not heroic.

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Mr. Chairman and Members of the Committee: Thank you very much for inviting me to be here today to testify concerning the proposed federal reporter's privilege or shield law. I am a former federal prosecutor, and worked as an Assistant United States Attorney in the District of Columbia for more than twelve years. From 1999 to 2001, I served as the Chief of the Public Corruption/Government Fraud section of that office. I now teach a course on white collar crime at the George Washington University Law School and at the American University, Washington College of Law.

As a former prosecutor of public corruption cases, I am a great fan of investigative journalism. Many significant corruption cases are first exposed through reports in the press; the Jack Abramoff and Randy "Duke" Cunningham scandals are just two of the most recent examples. I believe that a vigorous, free press is vital to our democracy, and I fully appreciate the critical role the press plays as a watchdog over both the government and the private sector.

Nevertheless, I do not support a federal reporter's shield law. I believe such a law is extremely unlikely to achieve its stated goals: to encourage and increase the free flow of information to the public and to keep reporters from going to jail to protect their sources. The law will, however, impose substantial costs, both by excluding relevant evidence from consideration in particular cases and by adding to litigation expense and delays as parties battle over the privilege's terms. In addition, I believe that technology, particularly the rise of the Internet, has so fundamentally transformed journalism that a reporter's privilege today is neither practical nor constitutionally workable.

Costs and Benefits of a Privilege

The primary rationale for a reporter's privilege is that, in the absence of a privilege, confidential sources will not speak to the press for fear of having their identities revealed. This claimed "chilling effect" on sources will supposedly hamper the ability of the press to uncover sensitive information and report it to the public. Accordingly, the argument runs, the privilege is necessary to encourage sources who wish to remain anonymous to share information with the press. Virtually all judicial, academic, and policy discussions of the privilege proceed from the assumption that this chilling effect is real; rarely is the claim held up to any critical scrutiny. I would like to challenge this assumption. I submit there is little or no evidence that this chilling effect exists, and thus little reason to believe that any real benefits would flow from the passage of a privilege law.

By contrast, there can be no doubt that privileges have costs, and this law would be no exception. All evidentiary privileges shield relevant evidence from consideration by a jury or other fact-finder; as the Supreme Court has noted, privileges are in derogation of the search for truth. The exclusion of relevant evidence may directly impact the rights of criminal defendants or civil litigants, or may prevent prosecutors from bringing criminals to justice. As a result, privileges have the potential to lead to errors or injustice in any given case. Privileges also result in litigation costs, as parties and the courts devote time and resources to resolving questions concerning the privilege's applicability. Before creating new privileges, therefore, we should be fairly confident that the resulting benefits will outweigh the costs. The reporter's privilege inspires no such confidence.

History Suggests the Privilege is Not Necessary

In 1972, in the landmark case of *Branzburg v. Hayes*, the United States Supreme Court held that the First Amendment does not provide a privilege for reporters to refuse to testify, at least in grand jury proceedings. The majority in *Branzburg* was quite skeptical of the underlying factual premise of the proposed privilege; namely, that in the absence of a privilege sources would be deterred from speaking to the press. The Court observed that the nation's history of a vigorous free press seemed to undercut that claim. The Court also noted that claims about the effect of a privilege on newsgathering were largely speculative and consisted primarily of the opinions of journalists themselves, and thus had to be viewed in light of the professional self-interest of those making the claims.

In the thirty-five years since *Branzburg*, there has been no federal reporter's privilege statute. Yet the country has been blessed with a robust free press, with great ability to ferret out and publish information from confidential informants and other sources. The examples are legion: from the Watergate scandal which exploded in the media around the time *Branzburg* was decided, to recent press revelations concerning Abu Ghraib prison, potentially unlawful domestic surveillance by the government, and secret overseas CIA prisons. Indeed, the latter stories were published by journalists who apparently received confidential leaks even while the highly-publicized CIA leak/Valerie Plame case was going on and journalists were being jailed and compelled to reveal their sources. The Plame case was a very visible demonstration that reporters often cannot protect their sources, and yet other sources were not deterred. It would appear that sources are quite impervious to the chills.

Proponents of a privilege often cite the importance of confidential sources to the reporting of such historic events as Watergate, the Pentagon papers, or the Iran-Contra scandal. What they usually fail to note is that those stories all were reported *despite* the lack of any federal reporter's privilege law. Leaking to the press is widespread, occurs for many reasons, and is a pervasive part of our culture. As a historical matter, it's hard to make the case that the free press in this country has suffered as a result of the lack of a federal privilege.

The Meaning and Limits of Confidentiality

There is little doubt that confidential sources are important to journalism. Clearly many sources request confidentiality, and presumably most do so for a reason. Journalists seem to be virtually unanimous in their belief that the use of confidential sources is essential to their work. This may be true as well, although there is currently a healthy debate taking place within the journalism community itself over whether reliance on confidential sources has become excessive.

But granting that reporters need to be able to promise "confidentiality" leaves unanswered the question of exactly what that means. Privilege proponents argue that, in the absence of a privilege, reporters will be

unable to promise confidentiality and thus their craft – and the public's right to know – will suffer. The necessary corollary to this argument is that *with* a privilege, reporters will be able to assure confidentiality and the problem will be solved. But these claims are misleading for two different reasons: first, a reporter can promise a great deal of confidentiality even in the absence of a privilege law; and second, even with an ironclad privilege law, a reporter cannot really guarantee confidentiality.

It is important to distinguish between a reporter's promise of confidentiality and the existence of a legal evidentiary privilege. The former may indeed be quite important in encouraging sources to come forward; the latter seems unlikely to play much of a role in a source's decision. Therefore, even granting that reporters sometimes need to promise confidentiality and that confidential sources are essential to journalism, it does not follow that a reporter's privilege is necessary or even particularly important. We may assume for argument's sake that confidential sources are, as former *New York Times* reporter Judith Miller testified before the Senate, the "life's blood of journalism." The question still remains whether the presence or absence of a reporter's privilege has any effect on the blood flow.

There are many different degrees and types of confidentiality. Presumably the most pressing concern for any confidential source is that he not be named in an article the reporter writes tomorrow, not that a judge might order the reporter to testify in some hypothetical case months or even years in the future. Typically a journalist is speaking with a source in connection with a story that will appear fairly soon. The first and foremost meaning of a guarantee of confidentiality is that, in any story the journalist prepares, the source will not be identified. In the overwhelming majority of cases, in fact, that is the end of the matter: the information is relayed, the story is reported, no one seeks to identify the source, and confidentiality is maintained.

By simply promising never voluntarily to reveal a source's name, therefore, a reporter can assure a high degree of confidentiality. Even if there is no privilege statute, a reporter may tell a source: "I will do all I can to protect your identity. I will not publish it, will not reveal it to anyone else voluntarily, and if I am ever subpoenaed I will fight as far and as hard as I can to avoid having to divulge it. Only if I'm compelled to do so by a valid court order after exhausting all of my appeals would I reveal your name." A source given these assurances knows that he will be identified by the reporter only if: 1) the reporter actually writes a story that includes the source's information; *and* 2) the story results in a lawsuit or investigation; *and* 3) a party to that case actually subpoenas the reporter; *and* 4) the reporter and the party are unable to reach some compromise that would still shield the source's identity; *and* 5) the party chooses to pursue the matter to the bitter end and not simply give it up in light of the reporter's refusal; *and* 6) all relevant trial and appellate courts eventually agree there is no basis for the reporter to withhold the information. The odds of all this happening are extremely remote. Relative to the total number of press reports involving confidential sources, the number of cases in which a reporter is actually compelled to testify is vanishingly small. Even if the reporter is ultimately forced to testify, it will likely be a year or more after the story appears. Thus for the vast majority of sources, the reporter's simple promise not to reveal the source's name voluntarily can satisfy any reasonable concern for confidentiality, quite independent of the existence of a privilege law.

Equally important, it is false to suggest that if we have a privilege law a reporter will be able to guarantee a source that her identity will remain a secret. Even if there were an ironclad, absolute reporter's privilege, a source could hardly breathe easily. A potential leaker faces many risks of exposure if she decides to pass information along to a reporter, even under the reporter's promise of confidentiality. Court-ordered compulsion of the reporter is only one way that the source's identity may be revealed, and is actually one of the least likely avenues.

First, the source's identity may be discovered through investigative methods that do not involve testimony from the reporter. Perhaps the most significant risk is that the source's company or agency will conduct an internal investigation of the leak. Such an investigation may include taking employee statements under oath, examining e-mail or telephone records, and other methods. For example, in one recent case, a career intelligence officer was fired by the Central Intelligence Agency for leaking classified information to reporters about secret overseas CIA prisons. Her identity was discovered through an internal CIA investigation that included the administration of polygraph examinations to employees. As a result of that investigation the leaker was exposed, with no need to seek to compel the reporter to reveal her sources.

In addition to internal investigations, there may be investigations of the leak launched by outside parties. If a reporter's article results in civil litigation or a criminal investigation, those may lead to discovery of the source's identity through many means other than subpoenaing the reporter. Civil discovery or a grand jury investigation may uncover e-mails, computer files, or other documents or witnesses that identify the source. The source may be deposed or subpoenaed to testify in the grand jury, and will then be forced to admit her role in the leak (unless she is willing to commit perjury).

In any serious case, a thorough investigation of the leak is almost guaranteed. Companies and agencies concerned with safeguarding their secrets have a great incentive to track down the source of any leaks. In addition, courts that do recognize the privilege, as well as the Department of Justice guidelines for media subpoenas, require a party to exhaust all reasonable efforts to obtain the information from other sources before seeking to compel testimony from a reporter. A source can therefore be almost certain that before any issue of subpoenaing the reporter will even arise, the party seeking the information will exhaust every other reasonable means to discover the leaker's identity.

A potential source faces other significant risks as well. The reporter may in fact reveal the source's identity, either deliberately or inadvertently, or may waive the privilege by disclosing the source's identity to a third party. For example, in a recent, highly-publicized case in Rhode Island, reporter Jim Taricani was

sentenced to six months home confinement after being convicted of criminal contempt for refusing to identify a confidential source who illegally provided him with an FBI videotape from a corruption probe. Shortly before he was convicted, however, Taricani made an inadvertent comment to an FBI agent about a document he had seen, which allowed the agent to deduce the identity of Taricani's source. The source then came forward and admitted leaking the videotape, after learning he was about to be subpoenaed by prosecutors.

There are still other risks. Details in the reporter's article may make it possible for others to guess the source's identity. Others may overhear the source's conversations with the reporter, or may stumble across an e-mail or document revealing the conversations. The source's colleagues may be contacted by a reporter who is trying to investigate further, and may deduce from those contacts the identity of the reporter's source. Others who knew about or participated in the source's conversations with the reporter may later decide to turn on the source and expose him, as recently happened in the BALCO case in San Francisco.

All of these risks exist whether or not there is a privilege or a subpoena to the reporter. A reporter therefore could not guarantee a source that her identity would remain a secret, even if there were an absolute, airtight privilege law. There are far too many ways for a source's identity to be discovered that are simply out of the reporter's hands. Leaking will never be free from risk, regardless of the state of the law on reporter's privilege.

An individual who has decided to leak confidential information to the press has necessarily decided to assume a significant risk that she will be exposed, and presumably has determined the public good (or personal gain) that will result from bringing the information to light outweighs those risks. Proponents of a reporter's privilege are therefore necessarily arguing that some substantial number of confidential sources, having otherwise decided to assume all of these more immediate and concrete risks of exposure, would be dissuaded from coming forward *solely* by the very slight, incremental additional risk that the reporter might be compelled to testify in some hypothetical litigation sometime well off in the future. This seems very unlikely.

It is also reasonable to assume that those potential sources most likely to be deterred by the small additional risk resulting from the absence of a privilege would be those sources with the most to fear personally from having their identities revealed. That presumably would be those who fear not merely embarrassment, opprobrium in the eyes of their colleagues, or loss of a job, but criminal prosecution. The sources who are apt to be most concerned about being exposed will be those who either have engaged in prior criminal conduct or are committing a criminal act by disclosing the information to the reporter. But society has little interest in providing a shield for communications from those engaged in criminal activity. As the Supreme Court said in *Branzburg*, upholding a privilege in such cases would be to argue that it is more important to write about crime than to do something about it. A reporter's privilege may well have the perverse effect of being most likely to promote the types of communications that society has the least interest in encouraging or shielding from disclosure.

Uncertainty Undercuts the Ability of a Privilege to Encourage Sources

The existence of a privilege will only encourage confidential sources to come forward if they can be relatively certain the privilege will apply. At the time they are considering reaching out to a reporter, sources have to be confident that the privilege will protect them. An absolute privilege, or one that is virtually absolute, would be the most likely to accomplish this goal. As outlined above, I believe it is extremely unlikely that the presence or absence of a legal privilege (as opposed to a reporter's promise of confidentiality) plays a significant role in a source's calculations. However, if we assume for argument's sake that the privilege can encourage otherwise reluctant sources to come forward, then I agree with privilege advocates that the only type of privilege likely to do this is one that is virtually absolute. As the Supreme Court has noted, an uncertain privilege, or one that is applied inconsistently by different courts, is little better than no privilege at all.

The Free Flow of Information Act does not provide for an absolute privilege. There are a number of exceptions to the privilege that apply in certain types of cases. A source considering whether to talk to a reporter would therefore be forced to look into the future to guess whether a judge, some months or years down the road, might decide that one of those exceptions applies. It's very unlikely that a source can do this in a meaningful way. The more uncertainty and exceptions there are in a privilege, the less likely it is to give a source any confidence that his identity will be protected. Adding to the uncertainty is the fact that a source can't know in advance whether any suit seeking the source's identity will be filed in federal or state court – and if the latter, which state. State privilege statutes and court rulings vary widely in terms of what is protected. Accordingly, even if the Free Flow of Information Act were to become law, the overall state of the law on reporter's privilege would still be so uncertain that sources could not have any confidence that a legal privilege would ultimately shield them from exposure. In the face of such uncertainty, otherwise reluctant sources will not be moved to reveal what they know.

Concerned Sources Have the Option of Remaining Anonymous

A final factor that undercuts the assumption about sources needing a privilege before they will come forward is the availability of anonymous tips. It is impossible to have an anonymous communication with your spouse, doctor, or attorney, or in other relationships traditionally protected by an evidentiary privilege. By contrast, a source who wants to leak information to a reporter but is worried about being identified always has the option of making an anonymous phone call.

Reporters presumably would argue that an anonymous tip is not as useful or reliable as a known source, and that is probably true. But the issue should be whether the press gets the information at all, not whether it gets the information in what the press considers to be an ideal form. Once information from an anonymous source is in their hands, diligent journalists may start digging to verify the tip. Reporters may contact other potential sources, some of whom may not have the same hesitation about speaking out. They may conduct additional research to attempt to verify the anonymous information through documents, public records, and the like. Even when a confidential source's identity is known, responsible journalists will rarely run a story without doing some additional investigation to attempt to corroborate the source. The same investigation may be done even when the initial source has chosen to remain anonymous.

Any potential confidential sources who are truly "chilled" by the absence of a privilege statute, therefore, can always slip their documents over the proverbial transom. Given a choice between not revealing the information at all and doing so anonymously, most sources who are eager to see the information made public presumably will choose the latter. The public interest in giving the press access to the information is served, and the source need not worry about having her identity revealed—at least by the reporter—because the reporter does not know it. This alternative, which is unavailable for any of the more traditional privileged relationships, further undercuts the argument that a reporter's privilege is essential to encourage these particular communications.

A Federal Shield Law Will Not Keep Reporters Out of Jail

Many recent calls for a federal reporter's privilege statute have been fueled by the jailing of former *New York Times* reporter Judith Miller. Supporters maintain a federal law is necessary in order to avoid the specter of journalists being jailed to protect their sources. Passage of the Free Flow of Information Act will not, however, accomplish this goal.

When reporters are jailed in privilege disputes, they are not being punished for newsgathering or for the content of anything that they wrote. They are being held in contempt for refusing a valid court order to testify. In that regard, they are being treated no differently from any other witness who asserts an unsuccessful privilege claim. For example, if I am subpoenaed to a grand jury and believe that my testimony would incriminate me, I have a right to assert my Fifth Amendment privilege to remain silent. If a court disagrees with my claim and orders me to testify, I may appeal that order. If I am unsuccessful, however, I must comply with the court order and testify, no matter how firmly convinced I am that the court is wrong. If I refuse, I will be held in contempt and likely jailed until I agree to testify. The courts are the final arbiters of the privilege question, and the rule of law requires that their orders be obeyed.

Journalists who assert a privilege, however, frequently do not abide by this legal process. They appear to believe that their professional obligations require them to refuse to reveal their sources regardless of what a court says. Even where there is a privilege, therefore, if a court rules it does not apply in a given case, the reporter will often refuse to obey the court's order. Doctors, lawyers, and others in privileged relationships routinely honor judicial decisions about whether the privilege applies; many members of the media, however, believe they are acting nobly when they decide for themselves what the law should require.

The Free Flow of Information Act provides for a qualified privilege. That means there will be cases where a court rules that, under the terms of the statute, the privilege may be overridden and a reporter may be ordered by a court to testify. History demonstrates that, when that happens, many reporters will refuse to comply and will be jailed for contempt. Indeed, the Reporter's Committee for Freedom of the Press has advised on their website that if Congress passes a qualified privilege law, reporters who want to protect a source must still be prepared to go to jail if a court rules that the privilege does not apply.

Journalists rely on our legal system to protect them from unjustified libel suits, or from those who would impose prior restraints on the press to keep certain material from being published. When it comes to decisions about reporter's privilege, however, many journalists refuse to accept the judgments of that same legal system. Reporters expect their adversaries to honor court rulings upholding the privilege, but many will not themselves honor court rulings that go against them. In seeking passage of the Free Flow of Information Act, therefore, journalists are asking Congress for a new legal protection, while at the same time preparing to defy that law themselves when they don't agree with a judge's decision.

Supporters of the privilege have argued that the jailing of journalists in this country is a disgrace and places us in the company of regimes that oppress the media, such as China, Burma, or Cuba. I believe these arguments miss the mark. In totalitarian societies, journalists are jailed because of the content of what they write. When journalists are jailed in the United States, it is because they are refusing to abide by a lawful court order, entered after a full and fair hearing and due process of law. Rather than demonstrating that the United States is akin to a totalitarian regime, these jailings demonstrate just the opposite: that we are a society governed by the rule of law, and that no one gets to pick and choose for herself which laws she will obey.

Journalists don't go to jail simply because of the lack of a federal reporter's privilege. They go to jail in part due to a professional culture that insists on an absolute privilege, chastises reporters who comply with court orders to testify, and lionizes those who defy the law as martyrs for the First Amendment. Passage of a federal privilege law will not alleviate that problem.

Particular Concerns about H.R. 2102

Scope of Protection for Sources of Information

The proposed legislation provides extremely broad protection for sources. Under Section 2(a)(3), a reporter may be compelled to identify a source only: 1) when necessary to prevent imminent and actual harm to national security; 2) when necessary to prevent imminent death or significant bodily harm; or 3) when necessary to identify a person who has illegally disclosed: a) a trade secret, b) individually identifiable health information, or c) nonpublic personal information. Unless a case falls into one of these categories, the protection for the identity of sources is absolute. There is no requirement that confidentiality was requested by the source or promised by the journalist; presumably a reporter could refuse to identify a source even if the source had expressed no desire to remain anonymous.

This protection for sources is much broader than that provided for in the Department of Justice guidelines for subpoenaing members of the media. Under those guidelines, the ability to obtain a subpoena for information from a reporter, including confidential source information, is not limited to particular categories of cases. A subpoena may be sought in any type of case, provided the need for the information is sufficiently compelling, other avenues for obtaining the information have been exhausted, and other requirements of the guidelines have been satisfied.

In my view, the proposed legislation's sweeping protection for source identities is unwise. For example, assume a heinous crime has been committed, such as a mass murder, the bombing of a public building, or a child abduction and rape. The Department of Justice learns that a reporter has spoken with a confidential source who either participated in the crime or has critical information about it. All other attempts to obtain that information have been unsuccessful. Under this legislation, assuming that the death or significant bodily harm has already happened and no new injury is imminent, the reporter could not be compelled to reveal that source – even if that means the criminals are never brought to justice. This would be true no matter how serious the crime or how severe the harm that resulted.

There is a special concern when the leak to a reporter is itself a crime. For example, suppose a source illegally provides classified information to a reporter. Suppose further that as a result of the reporter's story based on that information, significant harm results; perhaps troops are killed or a covert investigation of terrorist activity is compromised. Assuming that the harm to national security has already taken place and no further harm is imminent, under this legislation the reporter could not be compelled to identify the lawbreaker.

In a case where the leak to a reporter is itself a crime, there often will be only two witnesses: the reporter and the source. Even if the source's identity is suspected, he or she will have a Fifth Amendment privilege not to testify. That leaves the reporter as the only witness to the crime – and under this legislation, the reporter usually could not be compelled to testify. This would effectively grant immunity from prosecution to many who leak classified information, no matter how grave the resulting harm, provided they are careful to leak it only to a journalist (which, as discussed below, under this statute could be virtually anyone with an Internet connection). As a result, this legislation may well have the undesired effect of increasing illegal leaks of classified information or other illegal communications with reporters, by assuring potential leakers that the reporter will not be forced to identify them. A privilege should not shield and encourage conduct that has already been determined to be unlawful.

The response to this argument is often, "What about the next Pentagon Papers case?" It is true that the most difficult cases are those where it seems that an illegal leak of classified information ended up serving the larger public good. At the same time, presumably all agree that, in the interest of national security, the government must be able to keep at least some secrets. As a matter of policy, it makes no sense to criminalize the disclosure of classified information and then, in a different statute, effectively to immunize those who disclose such information to the media. Part of the solution may lie in a re-examination of what materials actually deserve to be classified. It may be, though, that those who wish to leak such material in the name of the public interest must be willing to run the risk of exposure and prosecution, trusting that public opinion will support them and history will judge them kindly. Alternatively, those wishing to leak such material may do so anonymously, avoiding the risk that they will be identified by the reporter (although not, as detailed above, avoiding the more substantial risk that they will be exposed in some other way).

The list of exceptions to the privilege provided in the proposed legislation is also open to question. Why, for example, would we allow the privilege to be overcome and a confidential source to be discovered in a civil suit concerning trade secrets or private health information, but not in a criminal investigation of a large-scale terrorist attack? Surely the public interest in obtaining the information is far greater in the latter case than in the former. Crime victims and the general public will be hard-pressed to understand why the privilege is allegedly so important that we must allow criminals to walk free to preserve it if necessary, and yet that same privilege can be breached in order to protect a corporation's trade secrets.

If a federal shield law is to be enacted, it would be more appropriate to track the Department of Justice guidelines so that, in any type of case in which a court finds that the need is sufficiently compelling, the privilege may be overridden, even where the identity of a confidential source is involved. A judge should have the power to determine in any given case whether the overall public interest weighs in favor of the privilege or in favor of disclosure.

Who May Invoke the Privilege

One of the most difficult challenges in crafting a federal reporter's privilege in the age of the Internet is deciding to whom the privilege should apply. Even more than thirty years ago in *Branzburg*, the Supreme Court observed that trying to define who was a "newsman" deserving of the privilege would be extremely

problematic. In the simpler *Branzburg* era of daily newspapers and three television networks, determining the proper scope of a privilege was challenging enough; in the age of the Internet, satellite communications, and cable television, that question is exponentially more complicated.

With other evidentiary privileges, it is generally not difficult to determine whether the person involved in the communication is a member of the class the privilege is designed to protect. Lawyers, doctors, and social workers all have certain educational and licensing requirements, and are monitored by professional associations to ensure their credentials; whether or not someone is a witness's spouse likewise is usually easy to determine. Anyone, however, can call himself a journalist. There are no particular educational requirements, and no licensing regulations. I may set up a blog on my home computer, or use desktop publishing to create my own local newspaper, and claim the First Amendment's protection as legitimately as the *Washington Post*.

The traditional approach to limiting the scope of the reporter's privilege has been to focus on the format of the journalism in question. Many state statutes specify the types of media that qualify for the privilege; for example, limiting its application to those who work for newspapers, magazines, television, or other periodical publications. This approach may have made sense when most of the statutes were drafted, before the rise of the Internet and modern communications. Today, though, any statute that sought to limit its application only to certain forms of the media would be constitutionally suspect. The legislative creation of a favored class of journalists entitled to a legal benefit would be incompatible with First Amendment values. What's more, a statute that included, for example, newspapers and television but excluded Internet bloggers, would be difficult to justify. If the purpose of the privilege is to increase the flow of information to the public, on what rational basis could the law grant the privilege to a reporter for a small local newspaper with a few hundred readers but deny the privilege to the proprietor of a political blog read by hundreds of thousands of people each day?

H.R. 2102 avoids this dilemma by adopting a functional approach to defining who qualifies as a journalist. The bill provides that the privilege may be invoked by anyone "engaged in journalism," which is defined to mean "the gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing of news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public." Sec. 4(5). There is no requirement that a person be earning their livelihood as a journalist or be employed by or contracted to a media company. There is also no requirement that the information be disseminated through a particular format, such as a newspaper or television station. This definition effectively avoids discriminating among different types of media and journalists, and would appear to apply equally to an individual pajama-clad blogger and a reporter for the *New York Times*.

But although this broad definition of a journalist avoids one dilemma, it creates another: the scope of such a privilege in the Internet age is breathtaking. The essence of journalism is, as the bill recognizes, the gathering and transmission of information to the public. When *Branzburg* was decided, this usually required at least some capital investment or material not readily accessible to the general public: a printing press, a book contract, or a job with a newspaper or television station. Now, however, all it requires is a computer and an Internet connection, which may be obtained for free at the public library. In the Internet age, anyone can be a journalist. A citizen can gather information, post it on the Internet, and thereby disseminate it to hundreds of millions around the world. If, for example, someone takes a video of a public event with his cell phone and posts it on his MySpace page, there is no apparent reason he could not claim the protections of this statute. Millions of people who share information on-line could potentially invoke this privilege if for any reason they did not want to testify or turn over evidence in their possession. This will result in an enormous amount of information potentially being excluded from the justice system, and an enormous amount of additional litigation over the privilege.

The statute will also invite litigation over what constitutes "news" or "matters of public interest," as parties challenging the privilege try to narrow its terms. This will necessarily place courts in the position of making judgments about the importance to the public of particular reporting, based on its content. This also is incompatible with First Amendment values, under which the worth of particular information is to be evaluated by the public in the free marketplace of ideas, not by judicial referees.

The reality is that technology may have outstripped the law to such a degree that the entire notion of a journalist's privilege today is no longer workable. A narrow privilege that applied only to certain media formats would likely be unconstitutional, but a broader privilege such as that proposed in H.R. 2102 is far too sweeping to be acceptable. Technology has transformed journalism and has eroded the traditional lines between the institutional press and the overall public marketplace of ideas. As those lines break down, so does the rationale for special legal protections for the press not enjoyed by the millions of other contributors to the information age.

The BALCO Case

I would like to conclude by discussing one of the most significant recent disputes concerning the reporter's privilege, the Bay Area Laboratory Co-Operative (BALCO) steroids case. In that case, two *San Francisco Chronicle* reporters were held in contempt by a federal judge and were facing jail for refusing to identify a confidential source for some of their BALCO reporting. As their case was about to be argued in the U.S. Court of Appeals for the 9th Circuit, their source, defense lawyer Troy Ellerman, was identified by other means. On Feb. 15, 2007, Ellerman pleaded guilty to obstruction of justice and related charges. As a result, prosecutors withdrew their subpoenas of the reporters.

The BALCO case is frequently cited as evidence that the federal reporter's privilege is needed. The BALCO

reporters themselves have been advocates for the federal privilege law. Far from demonstrating the need for the privilege, however, BALCO highlights the damage to the justice system that can occur when a sweeping claim of reporter's privilege is abused by journalists. I submit that the BALCO saga does not demonstrate that enacting a federal reporter's privilege would be good public policy; in fact, it suggests just the opposite.

In 2002, a federal grand jury in San Francisco began investigating allegations that BALCO employees had illegally supplied anabolic steroids and other performance-enhancing drugs to a number of professional athletes. On Feb. 12, 2004, the grand jury indicted the head of BALCO, Victor Conte, and three other defendants for illegal distribution of steroids and other offenses. Troy Ellerman represented one of the defendants.

The *Chronicle* reporters, Mark Fainaru-Wada and Lance Williams, had been reporting on the BALCO investigation for some time and had written dozens of articles about it. In June and December of 2004, however, they wrote articles that included verbatim excerpts from the confidential grand jury testimony of several star athletes, including sprinter Tim Montgomery and Major League Baseball sluggers Barry Bonds and Jason Giambi. It was clear from the articles that the reporters had been given unlawful access to grand jury material that was subject to a federal judge's protective order.

After the first articles appeared, all parties and lawyers involved in the case—including Ellerman—filed sworn declarations with the court denying responsibility for the leaks. In October 2004, the defense lawyers—again including Ellerman—filed a motion accusing the government of leaking grand jury material to the press. They claimed that the resulting publicity had made it impossible for their clients to obtain a fair trial, and they argued that the court should dismiss the indictment based on this "outrageous government misconduct." The court ultimately denied their motion, and the BALCO defendants later pleaded guilty to various charges.

The BALCO judge asked the Justice Department to investigate the illegal leaks. During that investigation, the reporters refused to testify before the grand jury, citing their obligation to protect the identity of their confidential source. The judge ruled that there was no privilege and ordered the reporters to testify. When they refused, the judge held them in contempt. They were prepared to go to jail rather than comply with the court's order, until Ellerman's guilty plea made that unnecessary.

It's now clear exactly what the *Chronicle* reporters were protecting. Ellerman admitted during his guilty plea that he had illegally allowed Fainaru-Wada to review copies of the grand jury testimony on two occasions. Ellerman thus leaked the grand jury information to the media himself, denied doing so in a sworn statement to the judge, and then tried to get his client's criminal case dismissed by pointing to the resulting newspaper articles and blaming the *government* for the leaks. This is the scheme that ultimately resulted in Ellerman's guilty plea to obstruction of justice and related charges.

The *Chronicle* reporters knew that Ellerman had committed a fraud on the court, and that he had used their own reporting as a means to execute that fraud. They did not come forward to expose this criminal use of their work; in fact, they continued to deal with Ellerman as he committed additional crimes. After Ellerman had lied to the judge and filed his motion falsely accusing the government of the leaks, Fainaru-Wada met with him again, reviewed more grand jury transcripts, and published more articles with Williams disclosing additional grand jury information.

Fainaru-Wada and Williams also wrote a successful book about the BALCO scandal. They accepted prestigious journalism awards for their reporting, and were generally seen as heroes by many in the journalism community for their refusal to testify.

Now that the facts have come to light, the reporters no longer look so noble. Their source was not some selfless whistle-blower intent on informing the public about the evils of steroids, but a defense lawyer who manipulated the media and committed perjury in an unlawful attempt to thwart his client's criminal prosecution. For their part, the reporters went to great lengths to prevent Ellerman from being brought to justice, while profiting from his crimes and portraying themselves as victims.

Supporters argue that the *Chronicle* reporters were only protecting the public's right to know. They claim that because the steroids scandal was such an important story, it was appropriate for the reporters to encourage Ellerman to break the law and then help to conceal his crimes. This "ends justify the means" argument is more than a little self-serving. If a reporter hired a burglar to break into a private residence, or set up an illegal wiretap, we would not excuse that conduct on the grounds that it resulted in an important story. Why, then, would we laud reporters who encouraged and then shielded a criminal who used their work to defraud the criminal justice system?

The public generally does not have a "right to know" what happens inside a grand jury. That is the whole point of grand jury secrecy, which exists for a number of good reasons, including protecting the rights of criminal suspects. Grand jury witnesses are assured that their testimony will be confidential, which allows them to feel comfortable being completely forthcoming. If grand jury witnesses see that their testimony may in fact be splashed on the front pages of the newspaper, they may be much more likely not to reveal what they know about a criminal matter. The irony of a case like BALCO is that in the next investigation involving high-profile witnesses, those witnesses may be much more likely to lie in the grand jury or conceal information relevant to the criminal investigation, out of fear that their testimony may be leaked to the media. We can't consider the public good that may have resulted from exposure of the steroids scandal without also considering the harm that may have been done to future cases and investigations by this very public breach of grand jury secrecy.

Publishing grand jury information was not in fact necessary in order to inform the public about steroid use and BALCO. Williams and Fainaru-Wada wrote more than 100 articles about BALCO that did not contain illegally leaked grand jury material. The public was already receiving a wealth of information from these articles, the ongoing criminal case, and other sources. Even the particular details about big-name athletes using steroids almost certainly would have come to light eventually. Information that explosive does not stay buried forever. There were (and are) multiple investigations, hearings, civil suits, and criminal proceedings exploring the facts related to BALCO. The lead defendant, Victor Conte, even began giving television interviews about his conduct.

Working with Ellerman and concealing his criminal scheme was not essential to the public's ultimate right to know. It did, however, allow the *Chronicle* reporters to get the "scoop" by reporting certain information first, and to obtain exclusive material and greater publicity for their book. All of this advanced their careers considerably. It appears that the reporters' desire to be out front on this story and their zeal to protect their source at any cost led them to close their eyes to Ellerman's crimes and to the significant harm caused by their own actions.

Some sources don't deserve to be protected. At some point, reporters have an obligation to refuse to shield those who manipulate the media for their own improper or illegal ends. In my view, the actions of the reporters in the BALCO case were deplorable, not heroic. Under H.R. 2102, the reporters would have been free to remain silent even if Ellerman's scheme to obstruct justice had succeeded and the criminal case against the BALCO defendants had been dismissed. Federal law should not provide a cover for such behavior.