The Strange Case of Josh Wolf: What It Tells Us About Privilege Law

Anthony L Fargo, Indiana University
The Strange Case of Josh Wolf:
What It Tells Us About Privilege Law*

Anthony L. Fargo**

When the United States House of Representatives approved a journalists’ shield law by a wide margin in October 2007,\(^1\) it was a historic moment. It marked the first time that legislation protecting journalists from facing contempt citations for refusing to identify confidential sources in response to subpoenas made it to a vote in either full house of Congress.\(^2\) Whether the legislation will come to a vote in the Senate and then survive a veto threat from President Bush was an open question when this article was written.\(^3\) Given the House’s overwhelming vote in favor of the legislation, however, it seemed that momentum was on the side of the bill’s supporters.

Much of the impetus for the federal legislation comes from several cases involving journalists and their sources in the past few years that have revived a debate about the legal protection for journalists’ relationships with sources.\(^4\) One such case, involving California

---

\*This article is an expanded and revised version of a paper presented on Oct. 5, 2007, at a conference, “Confidential Sources: What Does Branzburg Mean Now?,” sponsored by the University of Oregon School of Journalism and Communication and the UO School of Law in Eugene.

\**Assistant Professor, School of Journalism, Indiana University. B.A., Morehead State University; M.A., Ph.D., University of Florida. The author wishes to thank Yunjuan Luo for her research assistance and Kyu Ho Youm and Robert S. Lasnik for their helpful comments about an earlier draft of this article.


\(^2\) See Elizabeth Williamson, House Passes Bill to Protect Confidentiality of Reporters’ Sources, WASH. POST, Oct. 17, 2007, at A3 (noting that the bill was the first “to make it to a House vote in 30 years and more than 100 attempts”).

\(^3\) Id. (noting that bill had not been scheduled for a Senate vote and that President Bush has threatened a veto because of concerns about possible harms to national security).

\(^4\) See Hatfill v. Gonzales, 505 F. Supp. 2d 33 (D.D.C. 2007) (denying reporters’ petition to quash subpoena from plaintiff in Privacy Act litigation against federal government); see also Eric
freelance journalist and blogger Josh Wolf,\(^5\) uniquely demonstrates some of the broad problems with the way journalist’s privilege law has developed in the United States since 1972. In that year, the Supreme Court decided *Branzburg v. Hayes*,\(^6\) its only attempt so far to grapple with the apparent conflict between the First Amendment press clause\(^7\) and authorities’ need for competent information in criminal investigations. Wolf’s case also raises questions about whether the proposed federal shield law, if approved, would resolve some of the more frustrating controversies arising from clashes between journalists and authorities.

Part I of this article will examine the facts of the Wolf case. Before moving on to an analysis of how the case illuminated unresolved legal issues about the journalist’s privilege, the article in Part II will examine the background of federal privilege law. Parts III and IV will examine the issues of defining “journalist” for privilege purposes and how the Wolf case

---


\(^6\) *In re* Grand Jury Subpoena, Joshua Wolf, 201 Fed. Appx. 430 (9th Cir. 2006) (unpub.).

\(^7\) 408 U.S. 665 (1972) (finding that three reporters could not use the First Amendment press clause to shield them from identifying sources to grand juries investigating possible criminal activity by the sources or their associates).

\(^7\) “Congress shall make no law … abridging the freedom of speech, or of the press, …” U.S. CONST. AMEND I.
illuminated inconsistencies in the law. The article will conclude in Part V by examining the response of proposed federal shield legislation to these problems.

I

Josh Wolf and the Tape

Josh Wolf is a blogger, a freelance video journalist, and a recent candidate for mayor of San Francisco. He also holds the record for most time served in jail by a journalist for refusing to cooperate with a criminal investigation.

Josh Wolf’s legal troubles began after an anarchist protest in San Francisco on July 8, 2005, in conjunction with the Group of Eight economic summit in Scotland. During the protest, a police officer was seriously injured, store windows were broken, and, according to press reports, a mattress was stuffed under a police car and set on fire in an apparent attempt to burn the car. Wolf shot video of the protest and posted some of it on his blog and sold portions of it to local television stations. Wolf would later contend that none of the footage he shot showed any criminal activity.

As Wolf would later tell it, a few days after the protest, a man in Bermuda shorts and a Hawaiian shirt showed up at his door and asked if he could talk to him. Wolf, thinking the man was a reporter, said yes. The man then flashed an FBI badge and was joined by another FBI

---

10 The Revolution, supra note 8.
11 Egelko & Zamora, supra note 9.
13 Id.
15 Id.
agent and two San Francisco police detectives.\textsuperscript{17} Wolf answered their questions but declined to give them a copy of his tape from the protest. After speaking with a lawyer, Wolf continued to refuse to turn over his full tape, including outtakes, from the protest and received a federal grand jury subpoena a few months later.\textsuperscript{18}

Exactly why a federal grand jury was investigating the protest was a bit of a mystery. According to press reports, federal prosecutors got involved in a case about possible attempted arson of a city police car because the San Francisco Police Department received federal money. Beyond that, however, the federal authorities declined to comment, citing grand jury secrecy.\textsuperscript{19}

Under federal law, federal authorities may intercede in otherwise state or local investigations of arson or bombing if there was damage or attempted damage to any property “owned or possessed by, or leased to, the United States, or any department or agency thereof, or any institution or organization receiving Federal financial assistance. …”\textsuperscript{20} The law does not require federal authorities to get involved in otherwise local matters involving arson and bombing of local facilities. However, federal courts have broadly interpreted the reach of the law to allow federal authorities to claim jurisdiction when federal funding is even remotely connected to an arson or bombing target.\textsuperscript{21}

\textsuperscript{17} \textit{Id.}
\textsuperscript{18} \textit{Id.}
\textsuperscript{19} Egelko, \textit{Cameraman Jailed, supra} note 12.
\textsuperscript{21} See, e.g., United States v. Hicks, 106 F.3d 187 (7th Cir. 1997) (upholding conviction of man who set fire to restaurant on theory that the restaurant was engaged in interstate commerce); United States v. Davis, 98 F.3d 141 (4th Cir. 1996) (upholding conviction of man who tried to burn down home whose tenant received rental assistance through a federal housing program); United States v. Eichman, 957 F.2d 45 (2d Cir. 1992) (upholding convictions of defendants for burning American flag belonging to military recruiting center); United States v. Brown, 557 F.2d 541 (6th Cir. 1977) (upholding conviction of man who confessed to firebombing Planned Parenthood office); United States v. Apodaca, 522 F.2d 568 (10th Cir. 1975) (upholding
A federal district court judge in San Francisco found Wolf in contempt of court in August 2006 for failing to comply with the subpoena seeking the tape and his testimony before a federal grand jury.\textsuperscript{22} A month later, a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit, in an unpublished opinion, affirmed the contempt ruling.\textsuperscript{23}

The Court of Appeals panel, citing \textit{Branzburg v. Hayes}\textsuperscript{24} and \textit{Scarce v. United States},\textsuperscript{25} said that a journalist could not refuse to comply with a grand jury subpoena unless there was a showing of grand jury bad faith, no legitimate need of law enforcement, or irrelevance.\textsuperscript{26} The panel agreed with the district court that none of those issues arose in Wolf’s case.\textsuperscript{27} The panel specifically rejected Wolf’s claim that the grand jury was acting in bad faith because the attempted burning of a police car was not a federal concern.\textsuperscript{28} The panel also cast doubt on whether Wolf would have been better off if the subpoena had come from a state grand jury.

Noting that the California shield law,\textsuperscript{29} which is also part of the California Constitution,\textsuperscript{30} protects “a publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire

\begin{itemize}
\item \textsuperscript{22} \textit{In re Grand Jury Subpoena, Joshua Wolf}, 201 Fed. Appx. 430 (9th Cir. 2006) (unpub.).
\item \textsuperscript{23} \textit{Id.} at 434.
\item \textsuperscript{24} 408 U.S. 665 (1972).
\item \textsuperscript{25} 5 F.3d 397 (9th Cir. 1993) (finding that graduate student could not claim “scholar’s privilege” under First Amendment to justify refusing to comply with grand jury subpoena for his research, which could contain evidence of alleged crime).
\item \textsuperscript{26} \textit{In re Grand Jury Subpoena}, at 432.
\item \textsuperscript{27} \textit{Id.}
\item \textsuperscript{28} \textit{Id.} at 432.
\item \textsuperscript{29} \textsc{Cal. Evid. Code} § 1070 (West 1995, Supp. 2005).
\item \textsuperscript{30} \textsc{Cal. Const. Art. I, § 2.}
\end{itemize}
service,"\(^{31}\) the panel said that Wolf had not provided evidence that “he was so connected or employed” when he taped the protest.\(^{32}\)

The appellate judges also said it was not up to them to determine whether prosecuting a specific crime was in the government’s interest.\(^{33}\) On the record before it, the panel said, it seemed clear that the grand jury was acting in good faith and that Wolf’s tape was relevant to the investigation, so the district court was correct not to balance Wolf’s First Amendment concerns against the government’s interest in fighting crime.\(^{34}\)

Even if a balancing test were appropriate, the court said, it still would have ruled against Wolf.\(^{35}\) The judges said that the events Wolf taped occurred in public and there was no promise of confidentiality or anonymity involved.\(^{36}\) The panel also summarily dismissed Wolf’s contentions that the court should recognize a common-law privilege under Federal Rule of

\(^{31}\) *In re Grand Jury Subpoena*, at 432 n.1 (quoting CAL. CONST. ART. I, § 2(b)).

\(^{32}\) *Id.*

\(^{33}\) *Id.*

\(^{34}\) *Id.* at 432-33.

\(^{35}\) *Id.* at 433 n.2.

\(^{36}\) *Id.*
Evidence 501 and that enforcement of the subpoena would have a “chilling effect” on Wolf’s future attempts to gather information. 

Wolf was sent to a federal prison after the August 2006 district court order finding him in contempt. He was released temporarily while his appeal was pending, but after the Ninth Circuit ruled against him he returned to prison and served a total of seven and a half months, or about 225 days. Wolf was released in April 2007 after he agreed to put his uncut video footage from the protest on his website, provided a copy of the tape to prosecutors, and answered two questions under oath regarding his ignorance about the police car incident and the police officer’s injury. In return, prosecutors agreed not to call him as a grand jury witness.

---


“Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.”


38 In re Grand Jury Subpoena, at 433.

39 Egelko & Zamora, supra note 9.

40 Interview by Lowell Bergman, supra note 16.

41 See Egelko & Zamora, supra note 9; Jesse McKinley, 8-Month Jail Term Ends as Maker of Video Turns Over a Copy, N.Y. Times, Apr. 4, 2007, at A9 (quoting Reporters Without Borders spokeswoman Lucie Morillon as saying Wolf served 224 days); Joe Mozingo, Imprisoned Blogger is Freed in Deal with Federal Prosecutor: Josh Wolf Served 226 Days for Refusing to Give Authorities Footage of a San Francisco Protest, L.A. Times, Apr. 4, 2007, at B3 (stating Wolf’s prison term was 226 days).

42 Egelko & Zamora, id.

43 Id.
Before examining the specific issues about journalist’s privilege law raised by the Wolf case, it is necessary to backtrack a bit and examine the development of that body of law before Wolf’s case.

II

_Branzburg and the Development of a Federal Privilege_

Unlike Josh Wolf, the three reporters whose opposition to grand jury subpoenas became a Supreme Court issue in 1972 were all employed by mainstream media organizations. In other ways, however, their situations were to varying degrees similar to Wolf’s – all of them either witnessed confidential sources engaged in criminal activity or were thought to have witnessed such activity.

Paul Branzburg wrote two stories for the Louisville (Kentucky) _Courier-Journal_ in 1969 and 1971 that led to his being subpoenaed by grand juries. The first was an interview with two drug dealers in Louisville and the second involved interviews with several drug users in Frankfort, the state capital. Branzburg appealed to the Kentucky Court of Appeals from attempts to get him to identify his sources to grand juries after both stories were published. In the Louisville drug dealers case, the Kentucky Court of Appeals ruled 5-1 against Branzburg. The court noted that Kentucky’s shield law barred courts, grand juries, and other government bodies from forcing a journalist to reveal the “source of any information” obtained in the course of his or her work as a journalist. However, the court determined that Branzburg could not claim the statutory privilege’s protection for what he saw because his personal observation was the

---

46 Branzburg v. Pound, 461 S.W.2d 345 (Ky. 1970).
47 _Id._ at 346 (citing KY. REV. STAT. § 421.100).
“information,” not the “source.” \(^{48}\) The same court later denied a rehearing in the Louisville case \(^{49}\) and also ruled against Branzburg in the Frankfort case. \(^{50}\)

Earl Caldwell, a correspondent for the New York Times, was based in Oakland, California, and covered the Black Panther Party. \(^{51}\) The radical group had attracted nationwide attention for advocating violent challenges to authority to change race relations. \(^{52}\) The Black Panthers had been involved in several clashes with police and claimed that the police shot first when the confrontations became violent. \(^{53}\) Caldwell was subpoenaed to appear before a federal grand jury in California to testify and surrender his notes from an interview with Black Panther leader David Hilliard, who allegedly had threatened President Nixon’s life. \(^{54}\) Caldwell sought an order to quash the subpoena or, at the least, a protective order allowing him to refuse to answer questions about the identities of confidential sources. \(^{55}\) A federal district court in California agreed that Caldwell could refuse to identify his sources but ruled that he had to enter the grand jury room and answer all other questions. \(^{56}\)

Caldwell then appealed to the U.S. Court of Appeals for the Ninth Circuit. In November 1970, a Ninth Circuit panel ruled that Caldwell not only did not have to identify his confidential sources but also did not have to appear before the grand jury. \(^{57}\) Noting affidavits from Caldwell and other journalists stating that his appearance before the grand jury was likely to destroy his

\(^{48}\) Id. at 347-48.
\(^{49}\) Branzburg v. Pound, 461 S.W.2d at 345 (noting that petition for rehearing was denied on Jan. 22, 1971).
\(^{50}\) Branzburg v. Meigs, 503 S.W.2d 748 (Ky. 1971).
\(^{52}\) Id.
\(^{53}\) Id.
\(^{54}\) In re Caldwell, 311 F. Supp. 358, 359 (N.D. Cal. 1970).
\(^{55}\) Id. at 360.
\(^{56}\) Id.
\(^{57}\) Caldwell v. United States, 434 F.2d 1081, 1089 (9th Cir. 1970).
fragile relationship with the Black Panthers, the court noted that Caldwell swore that he had no information for the grand jury beyond his published stories except information covered by the district court’s protective order. In the narrow circumstances of this case, the court said, “the public’s First Amendment right to be informed” had to be balanced against any “compelling interest” the government could show for a witness’s grand jury appearance.

The third reporter involved in the case, Paul Pappas, was a reporter for a television station in New Bedford, Massachusetts. He covered an outbreak of apparently racially motivated violence in that city. While covering the disturbance in New Bedford, Pappas recorded a man reading a statement outside of a store that was also a Black Panthers headquarters. The Black Panthers told Pappas he could return later with his camera as long as he agreed not to report on anything except an anticipated police raid. Pappas returned and was allowed to enter, but the raid never happened and he filed no story.

Pappas was then ordered to appear before a grand jury to answer questions about who and what he saw in the New Bedford building. Pappas appeared before the grand jury and answered some questions but none about what or whom he saw inside the headquarters building. He also moved to quash the subpoena but lost in Superior Court. The Massachusetts

58 Id. at 1087-88.
59 Id. at 1089.
60 Id.
63 Id.
64 Id.
65 Id. The record does not indicate how it became public knowledge that Pappas had been inside the Black Panthers’ headquarters. However, the Supreme Court noted that Pappas made the film he shot outside the headquarters available to the Bristol County District Attorney. Branzburg v. Hayes, 408 U.S. 665, 672 (1972).
66 Id.
67 Id.
Supreme Judicial Court also ruled against Pappas.\textsuperscript{68} Noting that Massachusetts had no statutory privilege,\textsuperscript{69} the court said that to create one by constitutional or common law “would be engaging in judicial amendment of the Constitution or judicial legislation.”\textsuperscript{70} The court also suggested that procedural safeguards already in place to protect all witnesses from unreasonable questioning were adequate to protect journalists without “newly discovered constitutional absolutes” such as those embraced by the Ninth Circuit in the Caldwell case.\textsuperscript{71}

Branzburg, Pappas and the United States (in Caldwell’s case) all appealed the decisions to the Supreme Court, which granted certiorari\textsuperscript{72} and consolidated the cases. The decision in \textit{Branzburg v. Hayes}\textsuperscript{73} was announced June 29, 1972, at the end of the Court’s 1971-72 term.\textsuperscript{74} Justice Byron White wrote the majority opinion, joined by Chief Justice Warren Burger and Associate Justices Harry Blackmun, Lewis Powell, and William Rehnquist.\textsuperscript{75} Justice Powell also wrote a separate concurring opinion,\textsuperscript{76} while Justices William Brennan, Thurgood Marshall, and Potter Stewart joined in a dissent written by Justice Stewart.\textsuperscript{77} Justice William O. Douglas wrote a separate dissenting opinion.\textsuperscript{78}

The majority opinion noted that newsgathering was a protected activity under the First Amendment, without which “freedom of the press would be eviscerated.”\textsuperscript{79} But the Court noted

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{68} \textit{Id.} at 304.
\item \textsuperscript{69} \textit{Id.} at 299.
\item \textsuperscript{70} \textit{Id.} at 302.
\item \textsuperscript{71} \textit{Id.} at 302-303.
\item \textsuperscript{72} 402 U.S. 942 (1971).
\item \textsuperscript{73} 408 U.S. 665 (1972).
\item \textsuperscript{74} \textit{Id.}
\item \textsuperscript{75} \textit{Id.}
\item \textsuperscript{76} \textit{Id.} at 709-10 (Powell, J., concurring).
\item \textsuperscript{77} \textit{Id.} at 725-52 (Stewart, J., dissenting).
\item \textsuperscript{78} \textit{Id.} at 711-25 (Douglas, J., dissenting).
\item \textsuperscript{79} \textit{Id.} at 681.
\end{itemize}
\end{footnotesize}
that it was also “clear that the First Amendment does not invalidate every incidental burdening of the press” resulting from “the enforcement of civil or criminal statutes of general applicability.”

The majority opinion noted that the weight of common law and constitutional law did not favor recognizing the type of privilege the reporters sought. Despite press concerns to the contrary, the Court said it doubted that ruling against the reporters would threaten “the vast bulk” of relationships between reporters and confidential sources. The only sources who needed to be concerned about exposure were those who committed crimes or confessed their crimes to journalists. The press had operated throughout American history without common law or constitutional protection for sources “and the press has flourished,” the Court said.

In order to work, the Court said, the privilege would have to be absolute, but “[w]e are unwilling to embark the judiciary on a long and difficult journey to such an uncertain destination.” The Court said it also was concerned that it would be difficult, if not impossible, to determine who would qualify for protection under the proposed privilege. Traditionally, the Court said, the “liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as the large metropolitan publisher who utilizes the latest photocomposition methods.” The Court said that press freedom was an individual right that did not belong just to the institutional press, and the functions performed by newspaper and

---

80 Id.
81 Id. at 685-86.
82 Id. at 691.
83 Id. at 698-99.
84 Id.
85 Id. at 703.
86 Id.
television reporters were “also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists.”

Also, the Court said that lower courts would have to determine whether the conditions requiring a reporter to testify had been met. In order to determine whether the government interest was indeed “compelling,” the court would have to determine the value of the criminal law in question. In other words, the Court said, judges would have to decide that some crimes were more important than others, thus substituting their own values for those of the legislative body that created the law.

While saying that it was not willing to recognize a constitutional privilege, the Court said that Congress was free to create a statutory journalist’s privilege, and the state legislatures were free to do the same. The Court also noted that it was “powerless” to stop state courts from recognizing a journalist’s privilege through their states’ constitutions. The Court also suggested that in other circumstances reporters would be protected. The majority said that grand jury investigations conducted in bad faith or purely for the purpose of disrupting reporter-source relationships would raise different First Amendment issues and would not be tolerated. “We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth.”

Justice Lewis Powell’s brief concurring opinion picked up on the end of the majority’s opinion, but then took it a bit further, which may explain why the concurrence has been

---

87 Id. at 704-05.
88 Id. at 705-06.
89 Id. at 706.
90 Id.
91 Id. at 708-09.
92 Id. at 709.
described as “enigmatic”\(^93\) and “opaque,”\(^94\) among other things. Justice Powell said that he was writing separately “to emphasize what seems to me to be the limited nature of the Court’s holding.”\(^95\) The Court was not saying that journalists called to testify to grand juries were without constitutional rights, Justice Powell wrote, and the majority also was not saying that the government was free to “annex” the press as “an investigative arm,” as Justice Stewart’s dissent suggested.\(^96\) Pointing to the conclusion of the majority opinion,\(^97\) Justice Powell interpreted the majority as saying “that no harassment of newsmen will be tolerated.”\(^98\) He added that journalists were “not without remedy” if they believed they were being called before a grand jury investigation conducted in bad faith.\(^99\)

Justice Powell added that if a journalist was called to provide testimony “bearing only a remote and tenuous relationship to the subject of the investigation,” or if the journalist had “some other reason to believe that his testimony” would not fulfill “a legitimate need of law enforcement,” the journalist would be able to file a motion to quash and seek a protective order.\(^100\) Justice Powell said that the journalist’s privilege claim should be weighed by balancing “freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.”\(^101\) So while specifically taking issue with the Stewart dissent, Justice Powell also seems to be agreeing with part of it.

---

\(^{93}\) Id. at 725 (Stewart, J., dissenting).


\(^{95}\) Branzburg v. Hayes, 408 U.S. at 709 (Powell, J., concurring).

\(^{96}\) Id.

\(^{97}\) Id.; see supra text accompanying notes 91-92.

\(^{98}\) Id. at 709-10.

\(^{99}\) Id. at 710.

\(^{100}\) Id.

\(^{101}\) Id.
In his dissenting opinion, Justice Stewart accused the majority of having a “crabbed view of the First Amendment.”\textsuperscript{102} He appeared to be particularly irritated that the majority seemed to be asking for empirical proof that a lack of privilege would cause demonstrable harm, noting that the Court had never required such certainty before in free expression cases.\textsuperscript{103}

Justice Stewart argued that the majority decision would allow the government to “annex the journalistic profession as an investigative arm.” He also said that the decision would interfere with the free flow of information to the public.\textsuperscript{104} In rejecting the empirical approach to proving harm to free expression, Justice Stewart offered a logical syllogism:

The right to gather news implies, in turn, a right to a confidential relationship between a reporter and his source. This right 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.\textsuperscript{105}

In cases in which the government sought testimony from journalists that would reveal their confidential sources, Justice Stewart wrote, the government should have 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 less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.\textsuperscript{106}

For his part, Justice Douglas was unhappy with both the majority and with the news organizations involved in the case. Justice Douglas expressed amazement that the New York

\begin{footnotes}
\item[102] Id. at 725 (Stewart, J., dissenting).
\item[103] Id. at 733.
\item[104] Id. at 725.
\item[105] Id. at 728.
\item[106] Id. at 743.
\end{footnotes}
Times in its brief for Caldwell favored a balancing test similar to Justice Stewart’s to decide when journalists would be required to obey grand jury subpoenas. 107 “My belief is that all of the ‘balancing’ was done by those who wrote the Bill of Rights,” Justice Douglas wrote. “By casting the First Amendment in absolute terms, they repudiated the timid, watered-down, emasculated version of the First Amendment which both the Government and the New York Times advance in this case.” 108 Not surprisingly, then, Justice Douglas argued that journalists should have “an absolute right” to refuse to appear before a grand jury. 109 The only exception to this absolute First Amendment shield would be in cases in which journalists were accused of committing crimes, he wrote. And in those cases, the Fifth Amendment would bar the journalist from self-incrimination. 110

Justice Douglas tied his opposition to the majority opinion to a concern about the flow of information to the public, much as Justice Stewart had. “The press has a preferred position in our constitutional scheme, not to enable it to make money, not to set newsmen apart as a favored class, but to bring fulfillment to the public’s right to know,” he wrote. 111

The idea that the press had a “preferred position” in the Constitution never caught on with a majority of the Supreme Court, which in subsequent cases repeatedly found that journalists had no more claim to First Amendment protection from government action than other citizens. 112 But Justice Douglas was not alone in his belief that the word “press” in the press

---

107 Id. at 713 (Douglas, J., dissenting).
108 Id.
109 Id. at 712.
110 Id.
111 Id.
112 See, e.g., Pell v. Procunier, 418 U.S. 817 (1974) (state prison authorities may bar journalists from one-on-one interviews with specific prisoners if the practice would interfere with prison security); Saxbe v. Wash. Post, 418 U.S. 843 (1974) (similar federal prison policy upheld); Houchins v. KQED, Inc., 438 U.S. 1 (upholding local jail’s policy of excluding television
clause referred to the institutional news media and not just the general public. In a 1974 law school speech published in 1975, Justice Stewart argued that the press clause would be a “redundancy” if it referred to a broad general right to publish that, he believed, was already secured by the speech clause.\(^{113}\) Justice Stewart said he believed that the Framers meant to protect the press as a “Fourth Estate” with a mandate to act as a watchdog over the three official branches of government to the benefit of the public.\(^{114}\)

However, perhaps in an attempt to reconcile his philosophy with the Court’s decisions, Justice Stewart added that the Constitution set up a contest between the press and government but did not declare a winner.\(^{115}\) The government was free to resist press demands for information and other assistance, while the press was free to find out what it could and publish what it found. But, Justice Stewart said, the First Amendment was “neither a Freedom of Information Act nor an Official Secrets Act.”\(^{116}\)

The issues raised by the \textit{Branzburg} case and the subsequent Watergate scandal that toppled President Richard Nixon and was fueled by investigative journalism\(^ {117}\) had a direct impact on Justice Stewart’s views.\(^{118}\) The adversary role of the press in reporting on the Vietnam War and Watergate also inspired scholars to consider a more robust vision of the First Amendment. This development is best exemplified by Professor Vincent Blasi’s “checking cameras, recorders, and reporters from special access to jail beyond access afforded to general public).\(^{113}\) Potter Stewart, \textit{“Or Of the Press,”} 26 HASTINGS L.J. 631, 633 (1975).\(^{114}\) \textit{Id.} at 634.\(^{115}\) \textit{Id.} at 636.\(^{116}\) \textit{Id.}\(^ {117}\) \textit{See, e.g., Carl Bernstein \\& Bob Woodward, All the President’s Men} (1974) (describing the two \textit{Washington Post} reporters’ investigation into the Watergate break-in and their discovery of a White House cover-up of political ties to the burglars).\(^ {118}\) Stewart, \textit{supra} note 113, at 631 (saying that the rise of investigative reporting and its role in Watergate demonstrated that the press was performing “precisely the function it was intended to perform by those who wrote the First Amendment of our Constitution.”).
value” article, in which he argued that the primary purpose of the First Amendment was to empower citizens and the press to check abuses of government power.\footnote{Vincent Blasi, \textit{The Checking Value in First Amendment Theory}, 1977 AM. B. FOUND. RES. J. 521.} Blasi specifically suggested that the press should be protected by an absolute privilege when its sources were government whistleblowers and a qualified privilege in other situations in order to enhance the press’s checking role.\footnote{\textit{Id.} at 608-09.}

The extent to which any of the ferment in First Amendment theory affected post-
\textit{Branzburg} privilege law is debatable, given that judges generally eschew philosophical debates in the course of deciding cases before them. What is clear is that, for whatever reason, a First Amendment privilege protecting journalists from revealing sources and other information has survived in the federal judicial system. Meanwhile, the states, which were pioneers in protecting journalists from subpoenas,\footnote{See Aaron David Gordon, \textit{2 Protection of News Sources: The History and Legal Status of the Newsman’s Privilege} 439-73 (1971) (unpublished doctoral dissertation, University of Wisconsin) (on file with Herman Wells Library, Indiana University) (discussing events leading to passage of Maryland’s shield law, the first in the nation, in 1896).} have continued to provide statutory, common law, and state constitutional protection to journalists.

But how can this be, given the holding in \textit{Branzburg}? In the same law review edition that carried the text of Justice Stewart’s 1974 speech,\footnote{See supra text accompanying notes 113-116.} James Goodale, an executive vice president of the \textit{New York Times} and that paper’s counsel in the Caldwell case, showed how the \textit{Branzburg} math equation could be turned on its head.\footnote{Goodale, \textit{supra} note 94.} Referring to the \textit{Branzburg} five-justice majority decision as a “plurality opinion,”\footnote{\textit{Id.} at 715.} Goodale argued that Justice Powell’s concurring opinion

\begin{footnotesize}
\begin{enumerate}
\item[120] \textit{Id.} at 608-09.
\item[121] See Aaron David Gordon, \textit{2 Protection of News Sources: The History and Legal Status of the Newsman’s Privilege} 439-73 (1971) (unpublished doctoral dissertation, University of Wisconsin) (on file with Herman Wells Library, Indiana University) (discussing events leading to passage of Maryland’s shield law, the first in the nation, in 1896).
\item[122] See supra text accompanying notes 113-116.
\item[123] Goodale, \textit{supra} note 94.
\item[124] \textit{Id.} at 715.
\end{enumerate}
\end{footnotesize}
actually signaled his adoption of a qualified journalist’s privilege.\textsuperscript{125} Goodale suggested that Justice Powell accepted the Stewart “relevance” test and did not expressly reject the other two prongs of the Stewart test, while perhaps shifting the burden of proof from the government to the journalist.\textsuperscript{126}

Whether one accepts Goodale’s theory of the real holding of \textit{Branzburg} or not, it is clear that even before his article appeared, federal appellate courts were coming to similar conclusions in cases not involving grand jury subpoenas. In 1972, for example, the U.S. Court of Appeals for the Second Circuit ruled in favor of a reporter attempting to quash a subpoena in a civil case in which the reporter was not a party.\textsuperscript{127} While the Second Circuit said that \textit{Branzburg} made it clear that there was no absolute or qualified journalist’s privilege in federal law,\textsuperscript{128} the three-judge panel also found \textit{Branzburg} did not control the outcome in its case.\textsuperscript{129} The court then determined that the litigants had no “compelling concern” overcoming the journalist’s interest in keeping his source confidential.\textsuperscript{130} Also in 1972, the Eighth Circuit upheld a lower court’s dismissal of a libel suit and its refusal to force the defendant reporter to reveal a source.\textsuperscript{131} In the Ninth Circuit, a three-judge panel allowed two employees for the Black Panthers’s newspaper to refuse to answer grand jury questions about news and business operations that it said were irrelevant to the grand jury’s investigation of David Hilliard’s possible threat against the President.\textsuperscript{132} The court then

\begin{footnotes}
\footnote{125} Id. at 716.
\footnote{126} Id. at 717.
\footnote{127} Baker v. F. & F. Investment, 470 F.2d 778 (2d Cir. 1972).
\footnote{128} Id. at 781.
\footnote{129} Id. at 783.
\footnote{130} Id. at 785.
\footnote{131} Cervantes v. Time, Inc., 464 F.2d 986 (8th Cir. 1972).
\footnote{132} Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972).
\end{footnotes}
rejected a rehearing and rehearing en banc in light of the *Branzburg* opinion, finding no inconsistency between its decision and the Supreme Court’s ruling.  

Over time, most of the federal appellate circuits recognized some sort of protection for journalists subpoenaed in criminal or civil cases.  

The notable exceptions were the Sixth Circuit, which rejected the existence of any constitutional or common law privilege in a case involving a grand jury subpoena, and the Seventh Circuit, which in 2003 rejected a privilege claim by three reporters who wanted to avoid giving the defense their tapes of interviews with a key witness in a Northern Ireland terrorism case. In the Seventh Circuit case, *McKevitt v. Pallasch*, the three-judge panel criticized the approaches to *Branzburg* taken by circuit courts that had recognized some form of federal journalist’s privilege. The panel said the approaches taken “surprisingly” or “audaciously” in light of *Branzburg* “can certainly be questioned.” Noting that some appellate courts had gone so far as to extend a privilege to nonconfidential information, such as notes, unpublished photos, and audio and video tapes, the Seventh Circuit said those courts were “skating on thin ice.”

---

133 *Id.* at 1090-92.
134 See, e.g., Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980) (libel case); Riley v. City of Chester, 612 F.2d 708 (3d Cir. 1979) (civil case); LaRouche v. NBC, 780 F.2d 1134 (4th Cir. 1986) (civil); Miller v. Transamerican Press, Inc., 621 F.2d 721 (5th Cir. 1980) (libel case); Farr v. Pitchess, 522 F.2d 464 (9th Cir. 1975) (grand jury); Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977) (civil case); United States v. Caporale, 806 F.2d 1487 (11th Cir. 1986) (criminal case); Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981) (civil case).
136 *McKevitt* v. Pallasch, 339 F.3d 530 (7th Cir. 2003).
137 *Id.* at 532.
138 See, e.g., Gonzales v. NBC, 194 F.3d 29 (2d Cir. 1999); Shoen v. Shoen, 5 F.3d 1289 (9th Cir. 1993); United States v. Cuthbertson, 630 F.2d 139 (3d Cir. 1980). *But see* United States v. Smith, 135 F.3d 963 (5th Cir. 1998) (rejecting extension of federal privilege to nonconfidential information in criminal case).
139 *McKevitt*, 339 F.3d at 533.
Meanwhile, there are now statutory protections for journalists in thirty-two states and the District of Columbia, while formal court rules in New Mexico and Utah accomplish the same purpose. In the seventeen states without statutory protection, most have case law that favors some sort of protection based on state constitutional law, federal constitutional law, or common law.

---


The development of federal and state privileges suggests there is widespread support for protecting journalists from subpoenas. However, there are still unanswered questions about the extent of that protection, some of which the Josh Wolf case highlights. Two of them are particularly important: how do you define who may receive protection from a statutory, constitutional, or common law privilege, and how do you resolve the problem of differential treatment under conflicting laws?

III

Is Josh Wolf a Journalist?

In *Branzburg*, the Supreme Court’s majority opinion warned that recognizing a First Amendment privilege for journalists would create several problems, including the problem of how to define who is or is not a journalist. The Court determined that the traditional view of the First Amendment was that freedom of the press was a right shared by everyone, from the “lonely pamphleteer” to the “large metropolitan publisher.” The functions performed by

---


143 *See supra* text accompanying notes 86-87.
professional journalists in informing the public were also performed by other persons, including “lecturers, political pollsters, novelists, academic researchers, and dramatists.”

Despite the Court’s concerns, the problem of defining “journalist” for the purpose of bestowing a privilege has not been daunting. The question of whether a subpoenaed person may claim a “journalist’s privilege” has been a key element of only a handful of federal appellate cases. In *von Bulow by Auersperg v. von Bulow*, for example, the Second Circuit determined that a book author could not claim the privilege for subpoenaed research because she did not intend to write a book when she gathered the information. The court said the privilege’s purpose was to protect the process of “investigative reporting.” The relevant test, the court said, was whether a person claiming to be a journalist intended, at the start of the information-gathering process, to disseminate that information to the public. Using a similar definition, the First and Ninth Circuits have determined that nonfiction book authors may claim the privilege for materials collected during their research. Even earlier, and without being specific about definitions, the 10th Circuit ruled in 1977 that a documentary filmmaker could claim First Amendment protection for materials gathered in preparation for a film. But the Third Circuit determined that the host of a talk show about professional wrestling could not claim the privilege. The court said the host was more entertainer than journalist and did not meet the test for declaring someone a journalist, which involved finding that a person was “engaged in

---

145 *Id.* at 704-05.
146 811 F.2d 136 (2d Cir. 1987).
147 *Id.* at 145.
148 *Id.* at 142-43.
149 *Id.* at 145.
150 *In re* Cusumano, 162 F.3d 708 (1st Cir. 1998); Shoen v. Shoen, 5 F.3d 1289, 1293 (9th Cir. 1993).
151 Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 436 (10th Cir. 1977) (noting that filmmaker was engaged in “investigative reporting”).
152 *In re* Madden, 151 F.3d 125 (3d Cir. 1998).
investigative reporting, gathering news, and [had] the intent at the beginning of the news-
gathering process to disseminate this information to the public.”

In the states with shield laws, the problem of defining who may claim protection of the
journalist’s privilege has been solved, imperfectly perhaps, by statutory language. There is little
uniformity in the state definitions, and some states are more specific than others. Laws in
Nebraska and Oregon, for example, provide protection to persons employed by, connected with,
or engaged in a “medium of communication,” which is a “newspaper, magazine, other
periodical, book, pamphlet, news service, wire service, news or feature syndicate, broadcast
station or network, or cable television system.” Oklahoma defines “medium of
communication” similarly but adds “record” to the list of media. In Maryland, persons
connected with newspapers, magazines, journals, press associations, news agencies, wire
services, radio, television and “any printed, photographic, mechanical, or electronic means of
disseminating news and information to the public” are protected.

Delaware and Indiana tie the privilege closely to employment status. Delaware’s shield
law refers to “reporters,” defined as “any journalist, scholar, educator, polemicist, statutory trust,
or other individual” who was earning his or her principal income by obtaining or preparing
information “for dissemination with the aid of facilities for the mass reproduction of words,
sounds, or images in a form available to the general public.” In order to be a “reporter” in
Delaware, the person must have spent in each of the past three weeks or in four of the past eight

---

153 Id. at 130.
weeks at least twenty hours per week gathering or preparing information for dissemination. In Indiana, a person claiming protection under that state’s shield law must be a “bona fide” owner or employee of a news organization and must have been paid for “legitimate” gathering, writing, editing, interpretation, announcing or broadcasting of the news.

At the other end of the spectrum, the North Dakota shield law applies to persons employed by or connected with “any organization engaged in publishing or broadcasting news.” In Tennessee, the shield law applies to “the news media or press” without further definition.

The two most recently passed state shield laws, in Connecticut and Washington, do not differ much from the more specific laws above, but Washington’s apparently is the first to use the word “internet.” The Washington law specifically protects persons employed by, agents of, or independent contractors of “any newspaper, magazine or other periodical, book publisher, news agency, wire service, radio or television station or network, cable or satellite station or network, or audio or audiovisual production company, or any entity that is in the regular business of news gathering and disseminating news or information to the public by any means, including, but not limited to, print, broadcast, photographic, mechanical, internet, or electronic distribution.” The Connecticut list of “news media” covered by the shield law is similar to Washington’s, but it does not include “internet” specifically. Instead, it applies to media that

\footnote{158}{Id.}
\footnote{159}{IND. STAT. ANN. § 34-46-4-1 (1)-(2) (Lexis Publishing 1998, Supp. 2004).}
\footnote{160}{N.D. CENT. CODE § 31-01-06.2 (Michie 1996, Supp. 2003).}
\footnote{161}{TENN. CODE ANN. § 24-1-208 (a) (Lexis Publishing 2000, Supp. 2004).}
\footnote{162}{WASH. REV. CODE ANN. § 5.68.010 (5)(a) (LexisNexis 2008).}
\footnote{163}{Id. (5)(a)-(b).}
disseminate information by “print, broadcast, photographic, mechanical, electronic or any other means or medium.”

In California, the state shield law says that persons “connected with or employed” by print or broadcast media are protected from contempt citations for refusing to disclose “any information” they have obtained. The California law also specifically protects journalists who do not wish to disclose “unpublished information,” including outtakes.

The Ninth Circuit panel in Wolf’s case did not tackle the issue of whether Wolf was a journalist, noting only that he had made no showing that he would fit the definition under California law. But earlier in 2006, the California Court of Appeals found that online news magazine publishers fit the definition of “publisher” under the California shield law. The appellate court determined that there was no “theoretical basis” for treating a website that gathered and published information differently than a newspaper.

It does not seem far-fetched to say that Wolf is a journalist for the sake of the California shield law, at least in the context of his disputed 2005 protest video. A San Francisco Chronicle article printed the day after Wolf was ordered to go to jail for contempt described him as a blogger, part-time journalist, outreach director for a community college cable television system, and Scholastic Aptitude Test preparation instructor. Wolf described himself as an “independent journalist” whose “beat” was political dissent. Given that the footage in question

164 CONN. GEN. STAT. § 52-146t (a)(2)(A) (LEXIS 2007).
166 Id. § 1070 (c).
169 Id. at 1459.
170 Egelko, Freelancer Doesn’t Want, supra note 14.
171 Id.
appeared on local television stations and was displayed on his blog, it would appear more than likely that he would have been able to claim that the California shield law applied to him, had his case been heard in state court.

But Wolf’s case, and the earlier California case involving online news magazines, point out what is likely to become an increasingly fractious issue. As the Internet continues to make publishing news and commentary easier for everyone, including bloggers and other citizen journalists, how can the law adapt without either unfairly denying protection to some nontraditional journalists or expanding protection to so many people that the search for truth in courts of law becomes difficult, if not impossible?172

The latter possibility worried one of the appellate judges in the case of New York Times reporter Judith Miller. Judge David Sentelle’s concurring opinion, in arguing against the recognition of a privilege that would protect Miller from going to jail for refusing to identify a source, questioned how the court could define who the privilege would protect.173 Judge Sentelle wondered whether the proposed privilege would protect bloggers and other new media publishers and what the consequences would be if it did.174

Scholars who have considered the issue of bloggers as journalists protected by constitutional, common law, or statutory privileges have come to a variety of conclusions. Some have suggested that bloggers who practice journalism (as opposed to spreading unverified

172 For discussions of blogging, its history, and impact, see, e.g., DAVID KLINE & DAN BURSTEIN, BLOG! HOW THE NEWEST MEDIA REVOLUTION IS CHANGING POLITICS, BUSINESS, AND CULTURE (2005); Matt Welch, Blogworld and Its Gravity, COLUM. JOURNALISM REV., Sept./Oct. 2003, at 21; Hyunwoo Kim, Blogs as the New Media on the Internet, 5 REV. OF COMM. 100, 101 (2005) (quoting statistics saying there were about 10 million blogs in existence).
174 Id.
rumors or posting opinions devoid of original reporting) should be protected. Others have suggested that the privilege may have to be limited to allow protection for legitimate journalism, in whatever form, while excluding more questionable practices and practitioners. Others see the rise of blogs as one of several issues that point to the need for journalists to abandon the pursuit of a journalist’s privilege in any form.

It may be philosophically appealing to adopt the stance of one journalist who wrote that “my short answer to the question of who is a `journalist’ is that we all are journalists,” but that would not be a legally appealing answer. Given the Supreme Court’s skepticism about defining “journalist” in a constitutionally acceptable manner, the answer may have to come from Congress and the legislatures. That possibility raises its own problems, however, as this paper will discuss after dealing with another issue raised by the Josh Wolf case: what to do about the inconsistencies in privilege law.

IV

Josh Wolf and Inconsistent Privilege Law

---

179 In regard to blogs, it also likely would not be accurate. See Welch, supra note 172 (saying that 90 percent of news-related blogs were “crap”).
The discussion above about the various legal definitions of “journalist” provides a glimpse into one of the more maddening aspects of journalist’s privilege law: the inconsistency of its foundations and enforcement among the states and among federal appellate circuits.

This inconsistency is at the heart of what is most troubling about the Josh Wolf case. Wolf’s video was being sought in an investigation of injuries to a San Francisco police officer and an attempt to damage a San Francisco police car. These offenses would seem to be within the province of local law enforcement, which would mean that state law would apply to the investigation. Yet Wolf found himself facing a subpoena from a federal grand jury, on the basis that because the San Francisco Police Department received federal money, crimes against police department personnel and equipment were under federal jurisdiction. While it should be stressed here that the law allows the federal government to prosecute persons for crimes against federally funded agencies, the law does not require federal intervention in otherwise local crimes. The authorities and the courts did nothing wrong in Wolf’s case, but whenever a choice could be made in the case, the choice seemed to go against Wolf’s interests.

Whether Wolf’s fate would have been different if he had been subpoenaed by a state grand jury is debatable. Wolf’s tape captured activities during a public protest, which likely means it would be considered nonconfidential material. California appellate courts have determined that the state shield law is not an absolute prohibition to subpoenas for reporters’ nonconfidential material in criminal cases. In 1990, the California Supreme Court ruled that reporters subpoenaed by a criminal defendant could be ordered to testify if they were the only witnesses to an event that went to the heart of the defendant’s case. But the same court also

---

180 Egelko, Cameraman Jailed, supra note 12.
181 See supra text accompanying notes 20-21 and cases cited.
ruled nine years later that prosecutors did not have the same due process rights as criminal
defendants to nonconfidential evidence in journalists’ possession.\textsuperscript{183}

What is apparent is that Wolf’s chances of success in quashing the subpoena faded considerably when the case became a federal grand jury matter. As federal appellate courts have said repeatedly lately, \textit{Branzburg’s} one clear holding is that journalists have no protection from a grand jury subpoena issued in good faith.\textsuperscript{184} The fact that Wolf was a freelance journalist who ran a blog rather than a newspaper might have been less important than the type of proceeding that he found himself involved with.

But Wolf’s freelance status might have contributed to his treatment in other ways. While Wolf was sent to jail after a district judge found him in contempt for refusing to cooperate with the federal grand jury, two \textit{San Francisco Chronicle} reporters who also lost in their attempt to quash a federal grand jury subpoena remained free pending appeal.\textsuperscript{185} The same week that Wolf was ordered to turn over his tapes or go to jail, another federal district court judge heard arguments on why the two \textit{Chronicle} reporters should not be found in contempt for defying a federal grand jury subpoena.\textsuperscript{186} While the judge who heard the case of \textit{Chronicle} reporters Lance Williams and Mark Fainaru-Wada said he was sympathetic to their plight,\textsuperscript{187} he ruled against them ten days later.\textsuperscript{188} The \textit{Chronicle} reporters had published stories based on sealed grand jury

\begin{itemize}
\item \textsuperscript{183} Miller v. Superior Court, 986 P.2d 170 (Cal. 1999).
\item \textsuperscript{184} See \textit{supra} cases cited note 4.
\item \textsuperscript{185} Zachary Coile, \textit{Key Lawmakers Urge Justice Department to Rescind Subpoenas of BALCO Reporters}, S.F. CHRON., Jan. 19, 2007, at A1 (noting that the two reporters, Lance Williams and Mark Fainaru-Wada, had remained free pending appeal after being found in contempt of court in August 2006).
\item \textsuperscript{187} \textit{Id}.
\item \textsuperscript{188} \textit{In re} Grand Jury Subpoenas to Fainaru-Wada and Williams, 438 F. Supp. 2d 1111 (N.D. Cal. 2006).
\end{itemize}
testimony about professional baseball players’ use of performance-enhancing drugs allegedly supplied by the Bay Area Laboratory Co-Operative (BALCO). After criminal cases against persons associated with BALCO concluded, another federal grand jury began investigating the leaks of grand jury transcripts to the reporters and subpoenaed them to identify their source or sources. Before the Ninth Circuit could hear the reporters’ appeal, however, the source was identified through another party as a defense attorney for one of the BALCO criminal defendants, and contempt charges against the reporters were dropped.

It is noteworthy that Wolf’s appeal before the Ninth Circuit was decided without oral argument only a month after he was ordered to jail by a federal district court judge, while the Ninth Circuit was not due to hear oral arguments in the Chronicle case until March 2007, more than six months after the district court ruled against the Chronicle reporters. It may also be noteworthy that the record that Wolf broke for jail time by a journalist previously was held by another freelancer, Vanessa Leggett, who served nearly six months in a federal prison after defying a federal grand jury subpoena for materials she collected for a book about a Texas murder case. At the same time, neither the Ninth Circuit in Wolf’s case nor the Fifth Circuit in Leggett’s directly challenged their standing as journalists. Were their sentences the result of the relative seriousness of the crimes being investigated, their status as freelance journalists, ineffective counsel, or some other reason?

\[189\] Id. at 1113-14.  
\[190\] Id. at 1114.  
\[192\] In re Grand Jury Subpoena, Joshua Wolf, 201 Fed. Appx. 430 (9th Cir. 2006) (unpub.).  
\[193\] Egelko, Judge Hears Arguments, supra note 180.  
\[194\] In re Grand Jury Subpoenas, 29 Media L. Rep. (BNA) 2301 (5th Cir. 2001) (unpub.); Ross E. Malloy, Writer Who Was Jailed in Notes Dispute Is Freed, N.Y. TIMES, Jan. 5, 2002, at A8 (noting that Leggett had served the longest prison sentence ever given to a journalist for refusing to reveal sources of information).
There is no clear answer to those questions, and again, there is nothing in the record to suggest that the courts did anything wrong or were somehow out to “get” Wolf. What the treatment of Wolf’s case clearly does, however, is shine a spotlight on a problem of consistency that goes beyond the circumstances of this case. The problem is not just that state and federal law might yield different results in the same case; it is that different federal appellate circuits might also come to different judgments under the same facts. A certain amount of disagreement among states and the federal legal system probably is inevitable. In Wolf’s case, all of the circuit courts might have found that he had to turn over his tape, given the consensus about Branzburg’s holding on grand jury subpoenas and the nonconfidential nature of his tape. But if Wolf had been subpoenaed to testify in a criminal or civil trial, his right to refuse could have depended upon which circuit he lived in.

For example, the right of a journalist to resist a subpoena in a civil case seems reasonably well-established in most circuits, although the privilege is qualified. This is true even if the journalist or her employer is a defendant in a libel case, although the calculus becomes trickier in that circumstance. In a criminal trial situation, the journalist is on more solid ground in the Second and Third Circuits than in the Fourth, but in largely uncharted territory in the others. If the journalist wants to protect nonconfidential material from disclosure, she will get a more

---

195 See, e.g., In re Petroleum Products Antitrust Litigation, 680 F.2d 5 (2d Cir. 1982); Riley v. City of Chester, 612 F.2d 708 (3d Cir. 1979); Church of Scientology Int’l v. Daniels, 992 F.2d 1329 (4th Cir. 1993); Shoen v. Shoen, 5 F.3d 1289 (9th Cir. 1993).
198 See, e.g., United States v. Burke, 700 F.2d 70 (2d Cir. 1983); United States v. Cuthbertson, 630 F.2d 139 (3d Cir. 1980).
199 See, e.g., In re Shain, 978 F.2d 850 (4th Cir. 1992).
favorable hearing in the Second, Third, and Ninth Circuits, and possibly the First, than in the Fifth or Seventh.

The problem for journalists is that they often cannot foresee whether their promise of confidentiality to a source will land them in state court or federal court, if legal action ensues at all. For reporters doing stories with national interest and importance, it may not be possible to predict which federal circuit will hear the case. That means that reporters largely have to guess whether they will end up facing a contempt citation, which cannot be a comfort for either reporters or sources.

We could look at the inconsistency problem and the confusing array of legal complications facing reporters and sources and simply throw up our hands and agree with scholars like Randall Eliason that it is time for journalists to stop pursuing a privilege and simply obey the same law that everyone else obeys. But the privilege, to the extent that it exists, exists for a reason. It is hard to deny the logic of Justice Stewart’s argument that without some protection, journalists face being annexed by the government to do its investigating, with resulting damage to the free flow of information. So how do we unravel this mess? One option is a federal shield law, but that may solve only part of the problem.

V

Is a Federal Shield Law the Answer?

---

200 See, e.g., Gonzales v. NBC, 194 F.3d 29 (2d Cir. 1999); Shoen v. Shoen, 5 F.3d 1289 (9th Cir. 1993); United States v. Cuthbertson, 630 F.2d 139 (3d Cir. 1980).
201 See United States v. LaRouche Campaign, 841 F.2d 1176 (1st Cir. 1988) (ruling against NBC on motion to quash subpoenas for outtakes but agreeing that network had raised important issues about need to protect nonconfidential material).
202 See McKevitt v. Pallasch, 339 F.3d 530 (7th Cir. 2003); United States v. Smith, 135 F.3d 963 (5th Cir. 1998).
203 Eliason, supra note 177, at 387.
As attorney Paul McAdoo and I have argued elsewhere, one solution to the problem of consistency in federal privilege law would be a Supreme Court decision endorsing a common law privilege. As we also noted, however, the Court might be uncomfortable defining the privilege owners, given its skepticism about performing that task in *Branzburg*. It is, perhaps, telling that the Court has not considered another journalist’s privilege case since *Branzburg* in 1972. The Court rarely explains why it does not take a case, so we are left to speculate whether the Court is happy to let the appellate circuits fight it out or just does not want to create another ambivalent precedent, among other possibilities.

The bill that the House approved 398-21 in October 2007 is an attempt to resolve the issues raised by *Branzburg* and subsequent cases in the lower federal courts. H.R. 2102, as approved by the House, would require a party seeking nonconfidential material to satisfy a test similar to the Stewart three-part test from *Branzburg* before the journalist could be forced to comply with a subpoena. For information that would reveal a confidential source, the party seeking disclosure would have to show that disclosure was necessary to prevent an imminent threat to national security; death or serious bodily harm; or to identify a person who had disclosed a trade secret, individual health information, or other nonpublic personal information. Also, the party seeking disclosure would have to show that the public interest

---

206 Id. at 1395-97.
207 *Branzburg v. Hayes*, 408 U.S. at 743 (Stewart, J., dissenting); see supra text accompanying note 106.
209 Id. § 2(a)(3)(A).
210 Id. § 2(a)(3)(B).
211 Id. § 2(a)(3)(C)(i)-(iii).
would be better served by disclosure than maintaining secrecy.\textsuperscript{212} The bill also states that courts may consider the degree to which national security may be harmed when balancing public interest concerns.\textsuperscript{213}

There are other limitations in the House bill. The bill would not apply to defenses to civil defamation cases brought under state law.\textsuperscript{214} Also, journalists would not be protected if they had eyewitness evidence of criminal or tortious activity.\textsuperscript{215} However, the bill would reinstate protection if the alleged criminal behavior “is the act of transmitting or communicating the information, record, document, or item sought for disclosure,” which presumably would protect leaked information and leakers barring serious national security issues.\textsuperscript{216}

H.R. 2102 defines a “covered person” as someone who “gathers, prepares, collects, photographs, records, writes, edits, reports, or publishes news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public for a substantial portion of the person’s livelihood or for substantial financial gain,”\textsuperscript{217} including supervisors or parent companies. The bill would exclude persons affiliated with foreign powers or terrorist organizations.\textsuperscript{218}

In the Senate, the amended version of S. 2035 is similar to the House bill in many respects. The privilege for confidential information is qualified in much the same way that the House bill qualifies the privilege for nonconfidential material.\textsuperscript{219} The bill specifically leaves

\begin{itemize}
\item \textsuperscript{212} Id. § 2(a)(4).
\item \textsuperscript{213} Id. § 2(b).
\item \textsuperscript{214} Id. § 2(d).
\item \textsuperscript{215} Id. § 2(e).
\item \textsuperscript{216} Id.
\item \textsuperscript{217} Id. § 4(2).
\item \textsuperscript{218} Id. § 4(2)(A)-(E).
\item \textsuperscript{219} Free Flow of Information Act, S. 2035, 110th Cong. § 2 (as reported by S. Comm. on the Judiciary, Oct. 22, 2007).
\end{itemize}
federal law as to nonconfidential material untouched.\textsuperscript{220} The qualified privilege for confidential material would not apply to information needed to prevent death, kidnapping, or “substantial bodily harm”\textsuperscript{221} or information needed to prevent terrorist activity or other harms to national security.\textsuperscript{222}

Under the Senate bill, a “covered person” would be someone “engaged in journalism” but not someone associated with foreign powers or terrorist organizations.\textsuperscript{223} “Journalism” is defined as “the regular 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.”\textsuperscript{224} Notably absent from the definition is a requirement that the covered person must earn his or her “livelihood” from engaging in journalism.

If the House or Senate bill, or some amended version of either, passes and survives an expected veto, it is not clear whether a case similar to Wolf’s would turn out differently. The House bill would only protect persons earning “substantial financial gain” or a substantial part of their livelihood from journalistic activity.\textsuperscript{225} Wolf received compensation for his protest video and other video he shot, but whether it would be considered “substantial” would be a question for the courts. The Senate bill would be more likely to protect Wolf, if the current definition of “covered person” survives. More problematic under the Senate bill than the House bill is the fact that Wolf’s video contained scenes of protesters marching on public streets, so it likely would not be considered confidential. The House bill provides limited protection to nonconfidential

\textsuperscript{220} Id. § 7.
\textsuperscript{221} Id. § 4.
\textsuperscript{222} Id. § 5.
\textsuperscript{223} Id. § 8(2).
\textsuperscript{224} Id. § 8(5).
\textsuperscript{225} See supra text accompanying notes 216-217.
material and the Senate bill would leave the law regarding nonconfidential material alone, meaning the same law under which Wolf was found in contempt would remain in place. The existence of a shield law, however, might at least require federal courts to take a case like Wolf’s more seriously.

Whether Josh Wolf would be a “covered person” under the House bill or some version of the Senate bill would still be an open question. What is clearer is that any bill that Congress may pass will not solve the problem of inconsistencies between state and federal law. That problem may in fact be intractable, absent a clear and well-considered Supreme Court opinion setting a baseline for a constitutional or common law privilege that state as well as federal courts and legislatures would have to respect. The good news is that federal legislation would bring consistency to the law among the federal appellate circuits.

**Conclusion**

The Josh Wolf case stands apart from many of the recent cases that have pitted journalists against authorities and civil litigants seeking the identities of confidential sources. Wolf’s status as a freelance journalist and his long prison sentence are two key differences. At the same time, his case highlights issues about how to define “journalist” and inconsistencies within federal privilege law and between state and federal law that are far from unique. It is unclear at this writing whether a federal shield law will pass in both houses of Congress and survive a veto threat. Statutory protection for journalists and their sources might be the only viable way to solve the problems that the Wolf case demonstrates, but even a shield law might not have protected Wolf. As Congress continues to debate shield legislation, it would be prudent to ask whether allowing a repeat of the Wolf case is likely to encourage sources to trust that reporters and the law will protect them.