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Conceptualizing and Reconceptualizing the Reporter's Privilege in the Age of Wikileaks

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NOTES

CONCEPTUALIZING AND RECONCEPTUALIZING THE REPORTER'S PRIVILEGE IN THE AGE OF WIKILEAKS

*Rachel Harris**

The examination of the reporter's privilege in light of WikiLeaks gives rise to several imperative questions. Could WikiLeaks claim a federal reporter's privilege if the U.S. government were to ask it to disclose the sources of its documents? Does the current federal law on reporter's privilege adequately address new media, such as WikiLeaks? And if not, how should the law evolve to sufficiently accommodate organizations like WikiLeaks?

This Note seeks to answer these questions. First, this Note advocates that WikiLeaks would be able to claim the privilege under current federal law. Second, this Note concludes that the current law on the reporter's privilege has not sufficiently evolved to account for entities like WikiLeaks. Third, this Note discusses policy proposals to address the current shortcomings and ultimately advocates for a qualified privilege, the scope of which is determined by the source's expectations, where the reporter presents the source's expectations in court on behalf of the source.

TABLE OF CONTENTS

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INTRODUCTION

The largest leak of classified U.S. military documents in U.S. history occurred on October 22, 2010.[1] Approximately 400,000 U.S. Army reports documenting five years of the U.S. war in Iraq were released.[2] The documents showed that U.S. authorities failed to investigate hundreds of reports of rape, torture, and murder committed by Iraqi police and soldiers.[3] Despite U.S. and U.K. officials' claims that a record of civilian casualties did not exist, the documents revealed a log recording over 66,000 noncombatant deaths.[4]

The organization behind this leak was WikiLeaks.[5] WikiLeaks is a nonprofit media organization that publishes classified government and corporate documents with a mission to increase transparency within the halls of power through the dissemination of government and corporate secrets.[6]

Following the release of the Iraq War documents, U.S. government officials and political pundits condemned WikiLeaks.[7] U.S. Senator Dianne Feinstein proclaimed that the organization's founder, Julian Assange, should be criminally prosecuted.[8] Senator Joe Lieberman demanded that private companies cut off any relationship with WikiLeaks.[9] Senator Mitch McConnell called Julian Assange a "high-tech terrorist."[10] Newt Gingrich

1. *Baghdad War Diary*, WIKILEAKS, http://wikileaks.org/irq/ (last visited Feb. 24, 2014).
2. *See id.*
3. David Batty, *Iraq War Logs: Live Reaction and WikiLeaks*, GUARDIAN (Oct. 23, 2010), http://www.theguardian.com/world/2010/oct/23/iraq-war-logs-wikileaks.
4. *Id.*
5. *See id.*
6. *See About*, WIKILEAKS, http://wikileaks.org/About.html (last visited Feb. 24, 2014).
7. *See* Glenn Greenwald, *WikiLeaks Wins Major Journalism Award in Australia*, SALON (Nov. 27, 2011), http://www.salon.com/2011/11/27/wikileaks_wins_major_journalism_award_in_australia/singleton/.
8. Dianne Feinstein, Op.-Ed., *Prosecute Assange Under the Espionage Act*, WALL ST. J., Dec. 7, 2010, at A19.
9. Glenn Greenwald, *Joe Lieberman Emulates Chinese Dictators*, SALON (Dec. 2, 2010), http://www.salon.com/2010/12/02/lieberman_55/.
10. Henry Farrell & Martha Finnemore, *End of Hypocrisy: American Foreign Policy in the Age of Leaks*, 92 FOREIGN AFF. 22, 22 (2013).

and Sarah Palin proclaimed that WikiLeaks was an enemy combatant.[11] The Pentagon's spokesman deplored WikiLeaks for carelessly disseminating the leaked documents around the world.[12]

Despite the initial outrage among U.S. policymakers, WikiLeaks' effect on U.S. national security and intelligence has been minimal.[13] WikiLeaks, however, has affected the media landscape, creating a new genre of reporting and reinforcing the power of online media.[14] Moreover, WikiLeaks has challenged the status quo in an area other than U.S. national security and journalism: law.

Specifically, WikiLeaks has brought new questions to the debate surrounding the federal reporter's privilege.[15] The reporter's privilege allows a reporter to refuse to respond to a subpoena that seeks confidential information or sources obtained in the newsgathering process[16] and to avoid being in contempt of court for such a refusal.[17] The privilege can be asserted in connection with criminal, civil, and grand jury proceedings.[18]

Currently, however, the existence of a federal reporter's privilege is debatable.[19] There is no federal statute defining the privilege,[20] and the only U.S. Supreme Court case on the privilege denied its existence.[21] Despite the Supreme Court's ruling, nine federal circuit courts have found that a reporter's privilege exists.[22] However, the doctrine amongst these circuits lacks consistency.[23] Thus, the law is unclear and inconsistent even for traditional journalists seeking to obtain the privilege.[24] The changing nature of media further complicates the federal reporter's privilege because it is difficult to define who is considered a reporter under the privilege.[25] The rise of online journalists—including bloggers, tweeters, instagrammers, and operators of websites like WikiLeaks—brings new challenges to the federal reporter's privilege.[26]

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11. Greenwald, *supra* note 7.
12. Batty, *supra* note 3.
13. *See* Farrell & Finnemore, *supra* note 10, at 22 (explaining that Former Defense Secretary Robert Gates said that WikiLeaks had a minimal impact on U.S. government operations).
14. CHARLIE BECKETT & JAMES BALL, WIKILEAKS: NEWS IN THE NETWORKED ERA 13 (2012).
15. *See generally* Jonathan Peters, *Wikileaks Would Not Qualify To Claim Federal Reporter's Privilege in Any Form*, 63 FED. COMM. L.J. 667 (2011).
16. *See* Romualdo P. Eclavea, Annotation, *Privilege of Newsgatherer Against Disclosure of Confidential Sources or Information*, 99 A.L.R. 3d 37, 42 (1980).
17. *See* RonNell Andersen Jones, *Rethinking Reporter's Privilege*, 111 MICH. L. REV. 1221, 1224 (2013).
18. *See generally* Eclavea, *supra* note 16.
19. *See infra* Part I.A.
20. *See infra* Part I.A.5.
21. *See infra* Part I.A.2.
22. *See infra* Part I.A.3.
23. *See infra* Part I.A.3.
24. *See infra* Part I.A.
25. *See infra* Part II.
26. *See infra* Part II; *see also* John J. Dougherty, Obsidian Financial Group, LLC v. Cox *and Reformulating Shield Laws To Protect Digital Journalism in an Evolving Media World*, 13 N.C. J.L. & TECH. ON. 287, 290 (2012), *available at* http://www.ncjolt.org/sites/default/

Specifically, the examination of the reporter's privilege in light of WikiLeaks gives rise to several imperative questions. Could WikiLeaks claim a federal reporter's privilege if the U.S. government were to ask it to disclose the sources of its documents? Does the current federal law on reporter's privilege adequately address new media, such as WikiLeaks? And if not, how should the law evolve to sufficiently accommodate organizations like WikiLeaks?

This Note seeks to answer these questions. Part I of this Note explains the history of the federal law on the reporter's privilege and contextualizes WikiLeaks in the altered media and national security landscape. Part II outlines the federal law that addresses the scope of the reporter's privilege, discusses the two opposing arguments regarding whether WikiLeaks would be able to claim the privilege under the current legal framework, and ultimately agrees with the view that WikiLeaks would be able to claim the privilege under current federal law. Finally, based on the premise that federal law has not sufficiently evolved to account for entities like WikiLeaks, Part III discusses policy proposals to address the current shortcomings. Ultimately, this Note advocates for a qualified privilege, the scope of which is determined by the source's expectations, where the reporter presents the source's expectations in court on behalf of the source.

I. THE HISTORY OF THE FEDERAL REPORTER'S PRIVILEGE AND THE DEVELOPMENT OF WIKILEAKS

Part I of this Note outlines the history of the federal reporter's privilege and the development of WikiLeaks amidst the rise of new media and increased government classification of national security documents. Part I.A focuses on the purpose of the privilege and outlines the three potential sources of the federal reporter's privilege: court decisions interpreting the First Amendment, Federal Rule of Evidence 501, and proposed federal statutes. Part I.B contextualizes WikiLeaks within the changed media and national security landscape.

A. The History of the Federal Reporter's Privilege

One scholar has noted that the federal reporter's privilege currently is a "many-headed beast"—potentially found in case law interpreting the First Amendment, Federal Rule of Evidence 501, and proposed congressional legislation.[27] This section discusses the privilege's purpose and outlines the privilege's three possible sources at the federal level.[28]

files/6RD_Dougherty_287_322.pdf ("[O]nline journalists, bloggers, and other 'new media' users find themselves lacking clear legal guidance and are especially vulnerable in today's shield law landscape.").

27. Peters, *supra* note 15, at 672.

28. Although the privilege has been codified at the state level in statutes and common law in forty-nine states, this Note will focus solely on the privilege at the federal level. *See* Geoffrey R. Stone, *Why We Need a Federal Reporter's Privilege*, 34 HOFSTRA L. REV. 39, 42 (2005).

1. The Purpose of the Reporter's Privilege

Scholars have pointed to two main purposes of the reporter's privilege.[29] First, similar to other privileges based on occupational status (such as the doctor-patient privilege and the attorney-client privilege), the reporter's privilege encourages the free and full flow of information into public discourse.[30] Without some protection over the process by which news is gathered and disseminated, the flow of information would be inhibited because journalists would be more restrained in their writing, and individuals would communicate less openly to reporters.[31] A robust press is essential to a well-functioning democratic society[32] because it allows for a strong marketplace of ideas, which enriches public discourse and fosters democratic self-governance.[33] An informed public opinion is "the most potent of all restraints upon misgovernment."[34] Second, other judges and scholars assert that the Constitution separates the press and the government, and that without the reporter's privilege, journalists would become an arm of the government.[35] The remaining sections in this subpart discuss the three potential sources of the reporter's privilege at the federal level.

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29. Erik Ugland, *The New Abridged Reporter's Privilege: Policies, Principles, and Pathological Perspectives*, 71 OHIO ST. L.J. 1, 2–3 (2010) ("Those supporting the privilege have traditionally rooted their arguments in the principle of autonomy and have relied on a combination of instrumental and fundamental-rights rationales. The instrumental arguments focus on the free flow of information . . . . The rights-based arguments . . . suggest that the Constitution compels a strict separation between press and government . . . ."); *see also infra* notes 30–35 and accompanying text.

30. Mary-Rose Papandrea, *Citizen Journalism and the Reporter's Privilege*, 91 MINN. L. REV. 515, 535 (2007); *see also* Stone, *supra* note 28, at 39 ("The goal of most legal privileges is to promote open communication in circumstances in which society wants to encourage such communication.").

31. *See* Stephanie B. Turner, *Protecting Citizen Journalists: Why Congress Should Adopt a Broad Federal Shield Law*, 30 YALE L. & POL'Y REV. 503, 507 (2012); *see also* Stone, *supra* note 28, at 40 (explaining that communication will be inhibited in the absence of the reporter's privilege). The main argument against the reporter's privilege—as well as other privileges—is that it deprives the factfinders of relevant evidence. *See* Stone, *supra* note 28, at 48. The rules of evidence must balance the needs of the judicial process on the one hand and competing societal interests on the other hand. *Id.* at 48–49.

32. *See* Stone, *supra* note 28, at 39.

33. *See* Jones, *supra* note 17, at 1252–53; *see also* Lili Levi, *Social Media and the Press*, 90 N.C. L. REV. 1531, 1583–84 (2012) (asserting that media entities contribute to democracy and a free society).

34. Grosjean v. Am. Press Co., 297 U.S. 233, 250 (1936); *see also* Turner, *supra* note 31, at 507 (claiming that an independent press serves as a necessary check on government action).

35. *See* Branzburg v. Hayes, 408 U.S. 665, 725 (1972) (Stewart, J., dissenting) (stating that without some privilege for reporters, the press would be an investigative arm of the government); *see also* Lucy A. Dalglish & Casey Murray, *Déjà Vu All Over Again: How a Generation of Gains in Federal Reporter's Privilege Law Is Being Reversed*, 29 U. ARK. LITTLE ROCK L. REV. 13, 14 (2006) (noting that reporters have more credibility when they are perceived as having independently collected and reported information); Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 633–34 (1975) (asserting that the Press Clause protects the press's institutional autonomy); Stone, *supra* note 28, at 39 (explaining that a reporter's privilege is essential to an independent press).

2. *Branzburg v. Hayes*: Does the First Amendment Provide for a Reporter's Privilege?

The First Amendment states, "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[36] In 1972, the Supreme Court decided its only case interpreting the First Amendment in regards to the reporter's privilege[37]: *Branzburg v. Hayes*.[38] In *Branzburg*, the Court denied the existence of a reporter's privilege under the First Amendment,[39] although a puzzling short concurrence by Justice Powell—the fifth vote needed for the majority—has left many wondering whether the First Amendment offers some protection for reporters.[40]

The Supreme Court consolidated three cases to form *Branzburg*: *Branzburg v. Pound*,[41] *In re Pappas*,[42] and *Caldwell v. United States*.[43] *Branzburg v. Pound* featured a reporter, Paul Branzburg, who observed and interviewed a group of young people making and using drugs in Kentucky and then wrote two news stories about them in a Louisville newspaper.[44] Branzburg was called to testify on two occasions before state grand juries to obtain the names of his confidential sources, but he refused to testify.[45] Similarly, in both *In re Pappas* and *Caldwell v. United States*, state prosecutors subpoenaed two different reporters who were covering the Black Panther organization to testify before grand juries to reveal confidential information.[46] Like Branzburg, Pappas and Caldwell refused to testify because they promised their sources that they would not reveal their identities.[47] Branzburg, Pappas, and Caldwell argued that the First Amendment afforded them a privilege to protect their confidential informants and their informants' information.[48] The three reporters asserted that requiring reporters to disclose confidential information would

36. U.S. CONST. amend. I.

37. *See* David Corneil, *Harboring Wikileaks: Comparing Swedish and American Press Freedom in the Internet Age*, 41 CAL. W. INT'L L.J. 477, 513–14 (2011).

38. 408 U.S. 665 (1972). However, the Supreme Court will have the opportunity to hear a case on the reporter's privilege if it decides to grant certiorari. Lucy McCalmont, *Risen Lawyers File SCOTUS Petition*, POLITICO (Jan. 13, 2014), http:// http://www.politico.com/blogs/under-the-radar/2014/01/risen-lawyers-file-scotus-petition-181112.html. Lawyers for the *New York Times* reporter James Risen filed a petition for certiorari in January 2014 regarding Risen's ability to claim the privilege. *Id.*

39. *See Branzburg*, 408 U.S. at 683–86.

40. *See infra* text accompanying notes 54–62.

41. 461 S.W.2d 345 (Ky. 1970).

42. 266 N.E.2d 297 (Mass. 1971).

43. 434 F.2d 1081 (9th Cir. 1970).

44. *See Branzburg*, 408 U.S. at 667.

45. *See id.* at 667–71.

46. *See id.* at 672–79.

47. *See id.*

48. *See id.* at 679–80 ("[T]o gather news it is often necessary to agree either not to identify the source of information published or to publish only part of the facts revealed, or both; . . . if the reporter is nevertheless forced to reveal these confidences to a grand jury, the source so identified and other confidential sources of other reporters will be measurably deterred from furnishing publishable information, all to the detriment of the free flow of information protected by the First Amendment.").

place a burden on newsgathering, which would outweigh any public interest in the information to assist the criminal justice process.[49]

Therefore, the central constitutional issue in *Branzburg* was whether requiring reporters to testify before grand juries abridges the First Amendment's freedom of speech and press guarantees.[50] In a five-to-four decision written by Justice Byron White, the Supreme Court held that neither the First Amendment nor any other constitutional provision protects reporters from disclosing confidential information to a grand jury.[51] Rather, a journalist has the same duty as an ordinary citizen to testify in front of a grand jury.[52] The Court also denied a reporter's privilege because it would present practical difficulties, such as creating a definition of "reporter" under the privilege.[53]

Justice Lewis F. Powell joined the majority but wrote a separate concurring opinion.[54] One commentator has referred to Powell's concurrence as "cryptic"; and, as a result, "no one is quite sure what the [*Branzburg*] decision meant."[55] Justice Powell's concurring opinion first clarified that the Court did not hold that newsmen who are subpoenaed to testify before a grand jury are without constitutional rights in safeguarding their sources.[56] He then said that a newsman who is called to a grand jury to give information bearing only a tenuous relationship to the subject of the investigation would still be able to file a motion to quash to seek an appropriate protective order.[57] Justice Powell then claimed:

> The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.
>
> In short, the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection.[58]

The existence of a federal reporter's privilege under the First Amendment rests on these lines of Justice Powell's concurrence.[59] The federal circuit

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49. *Id.* at 681. In the reporter's privilege context, both reporters, on the one hand, and prosecutors or government officials, on the other, claim a need for information. While the reporters argue in favor of the privilege, as a means to encourage the free flow of information, the prosecutors or government officials oppose the privilege, as a roadblock to obtaining valuable information for criminal prosecutions.

50. Markus E. Apelis, *Fit To Print? Consequences of Implementing a Federal Reporter's Privilege*, 58 CASE W. RES. L. REV. 1369, 1373 (2008).

51. *See Branzburg*, 408 U.S. at 682.

52. *See id.*

53. *See id.* at 703–04.

54. Adam Liptak, *A Justice's Scribbles on Journalists' Rights*, N.Y. TIMES, Oct. 7, 2007, § 4, at 4.

55. *Id.*

56. *Branzburg*, 408 U.S. at 709–10 (Powell, J., concurring).

57. *Id.*

58. *Id.* at 710 (footnote omitted).

59. *See infra* notes 70–86 and accompanying text.

courts, however, have interpreted these lines of Justice Powell's opinion differently.[60] The courts that interpreted his opinion as supporting a reporter's privilege have found a federal reporter's privilege under *Branzburg* because they believe that Justice Powell provided a vote to the dissent, which made it so that a majority of the justices supported some form of privilege.[61] Those courts that interpreted Justice Powell's opinion as denying a reporter's privilege have not found a federal reporter's privilege under *Branzburg*.[62]

Justice Potter Stewart's dissent advocated for a reporter's privilege and outlined its scope.[63] Justice Stewart claimed that the reporter's privilege stemmed from the broad societal interest in the full and free flow of information to the public that is central to achieving the First Amendment's goals.[64] He devised a three-part test to determine whether a journalist would qualify under the privilege.[65] Under Stewart's test, the government must demonstrate the following for a reporter to be unable obtain the privilege: (1) that there is probable cause to believe that the reporter has relevant information about a specific probable violation of law; (2) that the reporter's information cannot be obtained through other means; and (3) a compelling interest in the information.[66] In addition to Justice Stewart's dissent, Justice William O. Douglas dissented separately to advocate for an absolute reporter's privilege.[67] He argued that reporters would become an arm of the government without an absolute privilege.[68]

3. *Branzburg*'s Progeny: The Circuit Split

According to one commentator, *Branzburg* is "one of the most misunderstood cases in the history of the Supreme Court."[69] The lower courts' interpretations of *Branzburg* are conflicting.[70] The Sixth[71] and

60. *See infra* Part I.A.3.
61. *See infra* notes 76–86 and accompanying text.
62. *See infra* notes 70–71 and accompanying text.
63. *See Branzburg*, 408 U.S. at 725–52 (Stewart, J., dissenting). Justice William J. Brennan, Jr. and Justice Thurgood Marshall joined Stewart's dissent. *See id.* at 725.
64. *See id.* at 725–27.
65. *See id.* at 743.
66. *See id.*
67. *See* Apelis, *supra* note 50, at 1374.
68. *See Branzburg*, 408 U.S. at 722 (Douglas, J., dissenting).
69. Scott J. Street, *Poor Richard's Forgotten Press Clause: How Journalists Can Use Original Intent To Protect Their Confidential Sources*, 27 LOY. L.A. ENT. L. REV. 463, 494 (2007).
70. *See id.*
71. *See In re* Grand Jury Proceedings, 810 F.2d 580, 584 (6th Cir. 1987) (holding that the acceptance of a qualified reporter's privilege would be equal to substituting the dissent in *Branzburg* for its holding). However, despite the Sixth Circuit's holding, the district courts within the Sixth Circuit are split on the existence of the privilege. *Compare In re* DaimlerChrysler AG Sec. Litig., 216 F.R.D. 395, 400–02 (E.D. Mich. 2003) (holding that the court is bound by the Sixth Circuit's ruling that a reporter's privilege does not exist), *with* Southwell v. S. Poverty Law Ctr., 949 F. Supp. 1303, 1312 (W.D. Mich. 1996) (holding that a qualified privilege exists under certain circumstances).

Seventh Circuits[72] have rejected the existence of a reporter's privilege. The Eighth Circuit has not made an explicit ruling on the issue,[73] although some of the district courts within the Eighth Circuit have recognized the privilege.[74] Nine circuit courts have found a qualified reporter's privilege.[75] Interpreting the majority opinion in *Branzburg* as a plurality opinion because of the belief that Justice Powell's concurrence advocated for a privilege,[76] the District of Columbia,[77] First,[78] Second,[79] Third,[80] Fourth,[81] Fifth,[82] Ninth,[83] Tenth,[84] and Eleventh[85] Circuits have all

72. *See* McKevitt v. Pallasch, 339 F.3d 530, 532 (7th Cir. 2003) ("A large number of cases conclude, rather surprisingly in light of *Branzburg*, that there is a reporter's privilege . . . ."). Until the *McKevitt* decision, most courts within the Seventh Circuit accepted a qualified privilege; however, the *McKevitt* ruling moved the courts within the Seventh Circuit away from recognizing the privilege. *See* Dalglish & Murray, *supra* note 35, at 39. Moreover, in 2007, the Seventh Circuit stated, "There isn't even a reporter's privilege in federal cases." U.S. Dep't of Educ. v. NCAA, 481 F.3d 936, 938 (7th Cir. 2007).

73. *See, e.g.*, *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 918 n.8 (8th Cir. 1997) (stating that the question of whether a reporter's privilege exists is open in the circuit).

74. *See* Richardson v. Sugg, 220 F.R.D. 343, 347 (E.D. Ark. 2004) (holding that the court should recognize a First Amendment qualified reporter's privilege); Cont'l Cablevision, Inc. v. Storer Broad. Co., 583 F. Supp. 427, 433 (E.D. Mo. 1984) (stating that the existence of a qualified reporter's privilege is not in doubt).

75. *See infra* notes 77–85 and accompanying text.

76. *See, e.g.*, United States v. Smith, 135 F.3d 963, 968–69 (5th Cir. 1998) ("Although the opinion of the *Branzburg* Court was joined by five Justices, one of those five, Justice Powell, added a brief concurrence. For this reason, we have previously construed *Branzburg* as a plurality opinion.").

77. *See, e.g.*, Zerilli v. Smith, 656 F.2d 705, 712 (D.C. Cir. 1981) (holding that *Branzburg* is not controlling in all cases regarding the privilege and that to determine whether the privilege applies, courts should look to the facts of each case, "weighing the public interest in protecting the reporter's sources against the private interest in compelling disclosure").

78. *See, e.g.*, United States v. LaRouche Campaign, 841 F.2d 1176, 1181–82 (1st Cir. 1988) (establishing a balancing test between the goals of the First Amendment and the party's need for information to establish the privilege).

79. *See, e.g.*, United States v. Burke, 700 F.2d 70, 77 (2d Cir. 1983) (holding that to protect the important interests of reporters and the public in preserving the confidentiality of journalists' sources, disclosure of confidential information may be ordered in certain circumstances).

80. *See, e.g.*, Riley v. City of Chester, 612 F.2d 708, 715 (3d Cir. 1979) ("The strong public policy which supports the unfettered communication to the public of information, comment and opinion and the Constitutional dimension of that policy, expressly recognized in *Branzburg v. Hayes*, lead us to conclude that journalists have a federal common law privilege, albeit qualified, to refuse to divulge their sources.").

81. *See, e.g.*, Ashcraft v. Conoco, Inc., 218 F.3d 282, 287 (4th Cir. 2000) (explaining that the reporter's privilege recognized by the Supreme Court in *Branzburg* "is not absolute and will be overcome whenever society's need for the confidential information in question outweighs the intrusion on the reporter's First Amendment interests").

82. *See, e.g.*, Miller v. Transamerican Press, Inc., 621 F.2d 721, 725–26 (5th Cir. 1980) (holding that a reporter has a First Amendment privilege that protects the refusal to disclose the identity of confidential informants).

83. *See, e.g.*, Shoen v. Shoen, 5 F.3d 1289, 1292 (9th Cir. 1993) (holding that the journalist's privilege recognized in *Branzburg* is a "'partial First Amendment shield' that protects journalists against compelled disclosure in all judicial proceedings" (quoting Farr v. Pitchess, 522 F.2d 464, 467 (9th Cir. 1975))).

explicitly recognized a reporter's privilege to varying degrees.[86] Therefore, *Branzburg* launched a qualified reporter's privilege based on the First Amendment in many of the lower courts.[87] Because of these inconsistencies, one scholar has noted that the First Amendment reporter's privilege doctrine post-*Branzburg* is confusing and ambiguous.[88]

4. A Reporter's Privilege Under the Federal Rule of Evidence 501

Because of the confusion that has followed *Branzburg*, some courts have attempted to establish a reporter's privilege under Federal Rule of Evidence 501.[89] Rule 501 states: "The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless any of the following provides otherwise: the United States Constitution; a federal statute; or rules prescribed by the Supreme Court."[90] Courts have reached different results regarding whether Rule 501 extends to reporters.[91] Some courts have denied the existence of a reporter's privilege based on Rule 501,[92] while one circuit court has held that Rule 501 applies to reporters.[93]

Federal Rule of Evidence 501's application to reporters was notably mapped out in Judge David S. Tatel's concurring opinion[94] in *In re Grand Jury Subpoena, Judith Miller*.[95] Judge Tatel asserted that *Branzburg* held only that the reporter's privilege could not be derived from the First

84. *See, e.g.*, Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 437 (10th Cir. 1977) (holding that a reporter must respond to a subpoena by appearing to testify in court but that he may claim his privilege in relationship to particular questions that probe his sources).

85. *See, e.g.*, United States v. Caporale, 806 F.2d 1487, 1504 (11th Cir. 1986) (holding that the standard governing the exercise of the reporter's privilege provides that information may be compelled from a reporter claiming privilege only if the party requesting the information can show "that it is highly relevant, necessary to the proper presentation of the case, and unavailable from other sources").

86. *See* Joel G. Weinberg, *Supporting the First Amendment: A National Reporter's Shield Law*, 31 SETON HALL LEGIS. J. 149, 172 (2006); *see also* Robert Bejesky, *National Security Information Flow: From Source to Reporter's Privilege*, 24 ST. THOMAS L. REV. 399, 444 (2012) (explaining that nine circuit courts have recognized a qualified privilege and have developed various tests that balance competing interests to ascertain whether source disclosure is necessary to court processes).

87. *See* Jones, *supra* note 17, at 1225.

88. *See id.*

89. *See* Dougherty, *supra* note 26, at 309.

90. FED. R. EVID. 501.

91. *See* Papandrea, *supra* note 30, at 560–61.

92. *See, e.g.*, United States v. Sterling, 724 F.3d 482, 499–500 (4th Cir. 2013) (holding that Federal Rule of Evidence 501 is not a source of the reporter's privilege); Scarce v. United States (*In re* Grand Jury Proceedings), 5 F.3d 397, 402–03 (9th Cir. 1993) (same); Lee v. Dep't of Justice, 401 F. Supp. 2d 123, 139 (D.D.C. 2005) (rejecting the existence of a federal common law reporter's privilege).

93. *See, e.g.*, United States v. Cuthbertson, 630 F.2d 139, 146–47 (3d Cir. 1980) (holding that there exists a reporter's privilege based on Federal Rule of Evidence 501 in criminal proceedings); Riley v. City of Chester, 612 F.2d 708, 715 (3d Cir. 1979) (holding that there exists a reporter's privilege based on Federal Rule of Evidence 501 in civil proceedings).

94. *See* Papandrea, *supra* note 30, at 563–64.

95. 438 F.3d 1141, 1172 (D.C. Cir. 2006) (Tatel, J., concurring).

Amendment but failed to address whether the privilege could be obtained through Rule 501.[96] Three years after *Branzburg*, Congress enacted Federal Rule of Evidence 501, authorizing federal courts to develop evidentiary privileges in federal question cases according to their interpretations of the common law in light of reason and experience.[97] Thus, Judge Tatel asserted that today's reason and experience supports the recognition of a reporter's privilege.[98] He said, "To disregard this modern consensus in favor of decades-old views . . . would not only imperil vital newsgathering, but also shirk the common law function assigned by Rule 501 . . . ."[99] Judge Tatel advocated for a qualified reporter's privilege, which could be overcome if the government proved the existence of three factors: (1) its need for the information; (2) the exhaustion of alternative sources; and (3) balancing the harm that the leak caused against the leaked information's value.[100]

5. Proposed Federal Statutes Establishing a Reporter's Privilege

In addition to a potential reporter's privilege based on the First Amendment and Federal Rule of Evidence 501, Congress has proposed statutes establishing a qualified reporter's privilege—most recently, the Free Flow of Information Acts of 2009,[101] 2011,[102] and 2013.[103]

The Free Flow of Information Act of 2009 proposed a qualified reporter's privilege.[104] The House bill stated that a federal entity may not compel a "covered person" (a person who qualifies for the privilege)[105] to provide information unless a court determines by a preponderance of the evidence that: (1) the party seeking to compel production of the information has exhausted all reasonable alternative sources; (2) there are reasonable grounds to believe that the covered person possesses relevant information; (3) disclosure is necessary to a criminal investigation or to prevent harm; and (4) the public interest in forcing disclosure of the information outweighs the public interest in receiving the news.[106] Furthermore, the House bill defined a covered person as one "who *regularly* . . . publishes news or information . . . for dissemination to the public *for a substantial portion of the person's livelihood* or *for substantial financial gain*."[107] Although the proposed House bill was generally

96. *See id.* at 1171.
97. *See id.* at 1166.
98. *See id.* at 1172.
99. *Id.*
100. *Id.* at 1175.
101. *See* H.R. 985, 111th Cong. (2009); S. 448, 111th Cong. (2009).
102. *See* H.R. 2932, 112th Cong. (2011).
103. H.R. 1962, 113th Cong. (2013); S. 987, 113th Cong. (2013). Approximately thirty-six states have statutes establishing a reporter's privilege, but no such statute currently exists at the federal level. *See* Stone, *supra* note 28, at 51. State reporter's shield statutes are outside the scope of this Note.
104. *See* H.R. 985; S. 448.
105. *See* H.R. 985 § 4(2).
106. *See id.* § 2.
107. *Id.* § 4(2) (emphasis added).

favorable to online media reporters, a reporter who did not publish information full time was likely excluded from the bill.[108]

The Senate's proposed bill had a slightly different definition of who would qualify for the privilege.[109] The Senate defined a covered person as someone who, with the primary intent to investigate events and obtain material to disseminate information to the public, regularly reports or publishes on such matters and has such intent at the inception of the newsgathering process.[110] Thus, while the Senate's bill did not require reporters to disseminate news for financial gain, the bill still required them to report regularly to qualify for the privilege.[111]

Although the Free Flow of Information Act of 2009 passed in the House of Representatives, it never reached a Senate vote.[112] The development of WikiLeaks was the main reason for the bill's failure.[113] While the bill's sponsors amended it to explicitly exempt bloggers from protections after WikiLeaks,[114] some members of the Senate feared that the statute would still be interpreted to protect WikiLeaks.[115]

In 2011, the bill was reintroduced in the House of Representatives but failed in the House and never reached the Senate.[116] Proponents of the bill cited a number of reasons for its failure, including disagreement over who should be considered a journalist and ongoing concerns that an organization like WikiLeaks might be covered.[117]

The Free Flow of Information Act of 2013, a similar version of the prior bills, was introduced in the House and Senate in May 2013 in response to the news that the U.S. Department of Justice had secretly subpoenaed

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108. *See* Dougherty, *supra* note 26, at 309–10; *see also* Daxton R. "Chip" Stewart & Anthony L. Fargo, *Challenging Civil Contempt: The Limits of Judicial Power in Cases Involving Journalists*, 16 COMM. L. & POL'Y 425, 457 (2011) (explaining that part-time journalists or bloggers might not have received the same protection as more traditional mainstream journalists under the proposed congressional statute).

109. *See* S. 448 § 11(2).

110. *Id.*

111. *See id.*

112. *See* Dougherty, *supra* note 26, at 309.

113. *See* Stewart & Fargo, *supra* note 108, at 457–58; *see also* Paul Farhi, *WikiLeaks Is Barrier to Shield Arguments*, WASH. POST, Aug. 21, 2010, at C1 ("Until just a few weeks ago, news organizations thought they were cruising toward a long-cherished goal: Congressional passage of a federal shield law to protect journalists from being forced to reveal confidential sources. Then came Wikileaks.").

114. *See* Morgan Weiland, *Congress and Justice Dept's Dangerous Attempts To Define "Journalist" Threaten To Exclude Bloggers*, ELEC. FRONTIER FOUND. (July 23, 2013), http://www.eff.org/deeplinks/2013/07/congress-and-justice-depts-dangerous-attempts-define-journalist-threaten-exclude; *see also* Farhi, *supra* note 113 (discussing that sponsors of the bill have signaled that they will draft an amendment that would specifically exempt organizations like WikiLeaks that publish sensitive materials).

115. *See* Farhi, *supra* note 113 (explaining that members of Congress are concerned in the wake of the WikiLeaks disclosures that the bill "gives . . . judges too much leeway to determine what's in the 'public interest' when it comes to protecting journalists in cases involving national security").

116. *See H.R. 2932 (112th): Free Flow of Information Act of 2011*, GOVTRACK.US, http://www.govtrack.us/congress/bills/112/hr2932 (last visited Feb. 24, 2014).

117. *See* Turner, *supra* note 31, at 505.

personal and work telephone records of some Associate Press reporters.[118] The Senate has changed the language of who would be considered a reporter under the bill from earlier versions of the Free Flow of Information Act.[119] The new bill defines a covered person under four categories: (1) anyone with an employment relationship with a news organization for at least one year in the past twenty years, or three months in the previous five years; (2) student journalists; (3) anyone who has performed substantial freelance journalism work in the previous five years; or (4) anyone whom a federal judge determines should have the privilege in the interest of justice and to protect legitimate newsgathering.[120] As this Note is being published, the Free Flow of Information Act of 2013 is in two House subcommittees: the Subcommittee on Crime, Terrorism, Homeland Security, and Investigations and the Subcommittee on Courts, Intellectual Property, and the Internet.[121] The Senate Judiciary Committee has ordered the bill to be reported to the floor.[122]

B. The Development of WikiLeaks

The changing nature of media in the internet age further complicates the federal reporter's privilege.[123] WikiLeaks and its relationship to the privilege exemplifies this complexity.[124] This section contextualizes the

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118. *See* Sean Sullivan et al., *White House Pushes Media Shield Law As Holder Faces Questions on Capitol Hill*, WASH. POST (May 15, 2013), http://www.washingtonpost.com/politics/on-capitol-hill-holder-to-face-questions-on-ap-phone-records-irs-scandal/2013/05/15/d0dfc52c-bd70-11e2-89c9-3be8095fe767_story.html; *see also* Katie Rucke, *What Counts As 'Journalism'? Senate To Decide*, MINT PRESS NEWS (Sept. 14, 2013), http://www.mintpressnews.com/what-counts-as-journalism-senate-to-decide/168957/ (explaining that the Free Flow of Information Act of 2013 was introduced three days after the news that the government had secretly subpoenaed two months' worth of phone records from Associated Press staff members and had obtained a confidential search warrant for a Fox News journalist's emails). In addition to promoting the introduction of the Free Flow of Information Act to Congress, the Department of Justice released a guideline report governing investigations and other law enforcement matters that involve journalists. *See* U.S. DEP'T OF JUSTICE, REPORT ON REVIEW OF NEWS MEDIA POLICIES 1 (2013), *available at* http://www.justice.gov/iso/opa/resources/2202013712162851796893.pdf. The report detailed the Department of Justice's policy revisions to strengthen protections for members of the news media. *See id.*

119. *Compare* S. 448, 111th Cong. (2009), *with* S. 987, 113th Cong. (2013).

120. LEONARD DOWNIE JR., COMM. TO PROTECT JOURNALISTS, THE OBAMA ADMINISTRATION AND THE PRESS: LEAK INVESTIGATIONS AND SURVEILLANCE IN POST-9/11 AMERICA 22 (2013), *available at* http://www.cpj.org/reports/us2013-english.pdf.

121. *See H.R. 1962: Free Flow of Information Act of 2013*, GOVTRACK.US, https://www.govtrack.us/congress/bills/113/hr1962 (last visited Feb. 24, 2014).

122. *See S. 987: Free Flow of Information Act of 2013*, GOVTRACK.US, http://www.govtrack.us/congress/bills/113/s987 (last visited Feb. 24, 2014).

123. *See* Papandrea, *supra* note 30, at 518–19.

124. *See* Sandra Davidson & David Herrera, *Needed: More Than a Paper Shield*, 20 WM. & MARY BILL RTS. J. 1277, 1278 (2012); *see also* Corneil, *supra* note 37, at 481 (explaining that American jurisprudence is currently struggling with how to regulate WikiLeaks because it is a novel form of journalism). While WikiLeaks is the most well-known website that provides leaked information, other similar websites have developed, such as UniLeaks, FrenchLeaks, and BalkanLeaks. *See* LEAK DIRECTORY, http://leakdirectory.org (last visited Feb. 24, 2014). Furthermore, a few other mainstream news organizations have adopted secure leaking technology similar to WikiLeaks, such as

development of WikiLeaks in the rise of new media and the overclassification of government documents.

1. The Rise of New Media

Over the past decade, traditional print media have faced tremendous challenges in the wake of the rise of the internet.[125] Since the mid-2000s, the print press has declined in both circulation and advertising revenue.[126] Many print newspapers have gone bankrupt or reduced their operations.[127] In addition, the number of local papers and television stations has drastically declined, and a small group of media companies owns the majority of newspapers and television stations.[128]

The decline in print media is largely a result of the internet, which has generated online news and nontraditional media sources that serve society's informational needs.[129] The internet has fundamentally altered the way society disseminates and receives information.[130] In addition to online versions of traditional newspapers, millions of bloggers, tweeters, podcasts, websites, and social media users have supplemented the mainstream news media.[131] In 2010, approximately 61 percent of Americans received at least part of their news from an online source, and 75 percent of online news consumers received news through email or social networking sites.[132]

In addition, the rise of bloggers and other "citizen journalists" has changed the news media landscape.[133] While traditional journalists are generally subject to formal editorial oversight, citizen journalists generally lack such supervision.[134] In addition, citizen journalists often lack professional journalism training as well as experience in the field, and they often publish news stories only periodically.[135] Citizen journalists are more

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the *New Yorker*'s Strongbox and the *Wall Street Journal*'s SafeHouse. *See* Ed Pilkington, *Strongbox: New Yorker's Salvo in the 'War Between Data Capture and Privacy,'* GUARDIAN (May 17, 2013), http://www.theguardian.com/world/2013/may/17/new-yorker-strongbox-aaron-swartz-data-privacy.

125. *See* Levi, *supra* note 33, at 1537.

126. *See id.*

127. *See id.*

128. *See* Scott Neinas, *A Skinny Shield Is Better: Why Congress Should Propose a Federal Reporters' Shield Statute That Narrowly Defines Journalists*, 40 U. TOL. L. REV. 225, 245 (2008).

129. *See* Levi, *supra* note 33, at 1537–39.

130. *See* Randall D. Eliason, *The Problems with the Reporter's Privilege*, 57 AM. U. L. REV. 1341, 1369–70 (2008).

131. Kendyl Salcito, *New Media Trends*, JOURNALISM ETHICS, http://www.journalismethics.info/online_journalism_ethics/new_media_trends.htm (last visited Feb. 24, 2014).

132. KRISTEN PURCELL ET AL., PEW RESEARCH CTR., UNDERSTANDING THE PARTICIPATORY NEWS CONSUMER 3–4 (2010), *available at* http://www.pewinternet.org/~/media//Files/Reports/2010/PIP_Understanding_the_Participatory_News_Consumer.pdf.

133. *See* Turner, *supra* note 31, at 508–11.

134. *Id.* at 510. Citizen journalists, however, obtain editorial oversight over the internet. *Id.* at 511. If an individual publishes inaccurate information over the internet, then other individuals can choose to comment and instantly correct the mistake. *Id.*

135. *Id.* at 510–11.

likely to express controversial views and criticize traditional journalists' work because they are not editorially supervised.[136] Thus, citizen journalists are able to fill gaps in mainstream media coverage, thereby increasing the full flow of information to the public.[137]

2. Increased Government Classification of Documents

The classification of information is essential for the government to protect public safety.[138] If information that merits classification is released, whether by mistake or through leaks, the cost to national security can be high.[139]

Before 1940, military regulations governed classification determinations in the United States.[140] In 1940, however, President Franklin Delano Roosevelt issued an executive order giving the president authority over the classification of military and naval documents.[141] In 1951, President Harry S. Truman expanded classification authority to all executive agencies.[142] Classification rules have shifted under each new administration.[143]

A profound shift in classification rules occurred after the terrorist attacks of September 11, 2001,[144] which led to a rapid increase of intelligence and government agencies to combat terrorism.[145] Because the government's national security role has increased after 9/11, both the number of secrets and the number of people with access to secrets has greatly expanded.[146] President George W. Bush moved away from a presumption against classification to a presumption in favor of classification post-9/11.[147] Previously, President William J. Clinton's policy was that a document should not be classified if there existed significant doubt regarding the necessity of its classification.[148] However, President Bush deleted this provision.[149] President Bush also permitted the reclassification of certain declassified documents, changing the policies of the Clinton Administration.[150] Because of these policies, the number of government

136. *Id.* at 511.
137. *Id.* at 511–12.
138. *See* ELIZABETH GOITEIN & DAVID M. SHAPIRO, BRENNAN CTR. FOR JUSTICE, REDUCING OVERCLASSIFICATION THROUGH ACCOUNTABILITY 7 (2011), *available at* http://www.brennancenter.org/sites/default/files/legacy/Justice/LNS/Brennan_Overclassification_Final.pdf.
139. *See* Mary-Rose Papandrea, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 IND. L.J. 233, 239 (2008).
140. *See id.* at 241.
141. *See* Exec. Order No. 8381, 5 Fed. Reg. 1147 (Mar. 26, 1940).
142. *See* Exec. Order No. 10,290, 16 Fed. Reg. 9795 (Sept. 27, 1951).
143. *See* Papandrea, *supra* note 139, at 242.
144. DOWNIE, *supra* note 120, at 6.
145. *Id.*
146. *See id.*
147. *Cf.* Papandrea, *supra* note 139, at 242.
148. *See* Exec. Order No. 12,958, 60 Fed. Reg. 19,825 (Apr. 17, 1995).
149. *See* Exec. Order No. 13,292, 68 Fed. Reg. 15,315 (Mar. 25, 2003).
150. *See* Papandrea, *supra* note 139, at 242.

secrets has soared.[151] In addition, the amount of money the government has spent on classification has dramatically increased in the last decade.[152] Even though the Obama Administration reinserted the language from the Clinton Administration in its Executive Order regarding classification of national security documents,[153] the culture within the Obama Administration does not favor such disclosure in practice.[154]

Yet, government officials claim that a majority of the classified documents should not be classified.[155] The director of the Information Security Oversight Office[156] testified before Congress, claiming that "it is no secret that the Government classifies too much information" and that, in his experience, "many senior officials . . . candidly acknowledge the problem of excessive classification . . . ."[157] In addition, WikiLeaks provides anecdotal evidence of the phenomenon because analyses of the leaked documents revealed hundreds of thousands of documents that should not have been classified.[158]

Commentators have suggested four main reasons for overclassification.[159] First, government culture encourages document classification.[160] Second, some government agencies wish to conceal information that would reveal government misconduct or incompetence.[161] Third, because officials risk sanctions or public condemnation for revealing sensitive information, they are pressured to classify documents.[162] Fourth,

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151. *See* Dalglish & Murray, *supra* note 35, at 37. The Edward Snowden leaks provide further anecdotal evidence of increasing government secrecy. In June 2013, Edward Snowden, a computer technician for a U.S. defense contractor, leaked classified information about an American surveillance program that collects phone and internet data. Mark Mazetti & Michael S. Schmidt, *Ex-C.I.A. Worker Says He Disclosed U.S. Surveillance*, N.Y. TIMES, June 10, 2013, at A1.

152. *See* JOHN P. FITZPATRICK, NAT'L ARCHIVES & REC. ADMIN., 2012 ANNUAL REPORT TO THE PRESIDENT 26 (2013), *available at* http://www.fas.org/sgp/isoo/2012rpt.pdf. While in 2000 the government spent $4.27 billion on security classification, the government spent $9.77 billion in 2012. *Id.*

153. *See* Exec. Order No. 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009) (stating that a document will not be classified if there exists significant doubt about the need to classify it).

154. DOWNIE, *supra* note 120, at 4.

155. *See* David McCraw & Stephen Gikow, *The End to an Unspoken Bargain? National Security and Leaks in a Post*-Pentagon Papers *World*, 48 HARV. C.R.-C.L. L. REV. 473, 485 (2013) (explaining that Secretary of Defense Donald Rumsfeld's deputy for counterintelligence and security and the 9/11 Commission co-chair estimate that between 50 and 90 percent of classified documents should not be classified).

156. The Information Security Oversight Office oversees the government's security classification system. *See Information Security Oversight Office (ISOO)*, NAT'L ARCHIVES, http://www.archives.gov/isoo/ (last visited Feb. 24, 2014).

157. *Overclassification As a Barrier to Critical Information Sharing: Hearing Before the Subcomm. on Nat'l Sec., Emerging Threats, and Int'l Relations of the H. Comm. on Gov't Reform*, 108th Cong. 28 (2004) (statement of J. William Leonard, Director, Information Security Oversight Office); *see also* DOWNIE, *supra* note 120, at 26.

158. *See* Patricia L. Bellia, *Wikileaks and the Institutional Framework for National Security Disclosures*, 121 YALE L.J. 1448, 1524 (2012); *see also* McCraw & Gikow, *supra* note 155, at 485–86.

159. *See* GOITEIN & SHAPIRO, *supra* note 138, at 2.

160. *See id.*

161. *See id.*

162. *See id.*

there is little review of classification decisions[163] and, even when there is adequate review, the classification system does not create incentives to challenge improper classification.[164]

3. The History of WikiLeaks

WikiLeaks is a global, nonprofit, internet-based media organization that publishes corporate and government documents otherwise unavailable to the public.[165] WikiLeaks was launched in 2007 with a mission to defend free speech, improve the common historical record, and support human rights around the world.[166] WikiLeaks also provides an innovative, secure, and anonymous way for sources to leak information.[167] WikiLeaks accepts leaked material in person or through its electronic drop box and publishes original documents alongside news stories.[168] Julian Assange, an Australian antiwar activist and former hacker, founded WikiLeaks.[169] Assange remains WikiLeaks' spokesman.[170] To further its mission, WikiLeaks promotes its stories to mainstream news outlets.[171] WikiLeaks claims to only publish documents that reveal abuses within the government and corporate spheres, and it verifies the accuracy of all submitted documents.[172]

Since its development, Wikileaks has published a range of documents.[173] In 2007, WikiLeaks published the U.S. Army's Guantánamo Bay detention center operating procedures.[174] In 2008, WikiLeaks published documents regarding a Swiss bank's money-laundering activities, as well as the contents of Sarah Palin's email account.[175] Since 2010, WikiLeaks has focused on releasing classified U.S. government documents.[176] In April 2010, WikiLeaks released classified U.S. military video footage of three

163. *See* DOWNIE, *supra* note 120, at 26.
164. *See* GOITEIN & SHAPIRO, *supra* note 138, at 2.
165. *See* Kyle Lewis, *Wikifreak-Out: The Legality of Prior Restraints on Wikileaks' Publication of Government Documents*, 38 WASH. U. J.L. & POL'Y 417, 420 (2012).
166. *See About*, *supra* note 6.
167. *See id.*
168. *See id.* WikiLeaks' drop box, however, is currently unavailable because the website and its founder have been fraught with legal and financial problems. Pilkington, *supra* note 124. Currently, the only way to leak information to WikiLeaks is through direct contact with one of the organization's members. *Id.*
169. *See* Corneil, *supra* note 37, at 484.
170. *See id.*
171. *See* Lewis, *supra* note 165, at 420.
172. *See id.* at 421. To verify the authenticity of the leaked documents, WikiLeaks uses traditional journalism techniques as well as digital technology methods. Peters, *supra* note 15, at 679–80. WikiLeaks attempts to determine the cost of forgery and motive of possible forgery. *Id.* If necessary, WikiLeaks will look externally to obtain the document's verification. *Id.* at 680.
173. *See* Lewis, *supra* note 165, at 421–23.
174. *Id.* at 421.
175. *Id.* at 421–22.
176. *See* Bellia, *supra* note 158, at 1473–75.

helicopter strikes in Baghdad.[177] The video had approximately 2 million views on YouTube and was played in the news hundreds of times.[178]

In July and October 2010, WikiLeaks released its most notorious documents—the "Afghan War Diary" and the "Iraq War Log"—which contained over 90,000 U.S. military documents related to the war in Afghanistan and 400,000 U.S. military documents related to the Iraq War.[179] The documents from Afghanistan detailed how the United States lacked the resources to effectively wage the war in Afghanistan and revealed information regarding the Pakistani intelligence service's connections to the Taliban.[180] The documents from Iraq were mostly low-level, confidential U.S. army field reports.[181] This release was the largest leak of classified data in U.S. history[182] and drew comparisons to the infamous Pentagon Papers that were leaked during the Vietnam War.[183]

The U.S. government responded to WikiLeaks' document release with outrage.[184] For example, the chairman of the Committee on Homeland Security in the House of Representatives asserted that Julian Assange was an enemy of the United States and should be prosecuted.[185] However, despite these outcries, Julian Assange has not been arrested in connection with WikiLeaks, and no charges have been brought against the website directly.[186] Moreover, scholars and political officers have asserted that WikiLeaks had little effect on the United States' national security and foreign policy agenda.[187]

Despite having only a small effect on international relations, one scholar has noted that WikiLeaks has advanced journalism.[188] Although politically motivated journalism and leaking are not new, WikiLeaks published an unprecedented number of documents around the world in a very short time

177. *Id.*
178. *See id.*
179. *See id.* at 1475–76; Corneil, *supra* note 37, at 478; Lewis, *supra* note 165, at 422–23.
180. *See* Lewis, *supra* note 165, at 423.
181. *See id.*
182. *See supra* note 1 and accompanying text.
183. Corneil, *supra* note 37, at 479.
184. *See* Greenwald, *supra* note 7.
185. Press Release, U.S. House of Representatives Comm. on Homeland Sec., King Re-Introduces Bill To Strengthen DOJ Authority To Prosecute Leaks of Intelligence (Feb. 15, 2011), *available at* http://homeland.house.gov/press-release/king-re-introduces-bill-strengthen-doj-authority-prosecute-leaks-intelligence.
186. *See* Kate Kovarovic, *When the Nation Springs a [Wiki]leak: The "National Security" Attack on Free Speech*, 14 TOURO INT'L L. REV. 273, 300 (2011). The only person who has been arrested in connection with the leaking is former U.S. Army soldier Bradley Manning. *Id.* In July 2013, Manning was convicted of violating six counts of the Espionage Act for providing more than 700,000 government files to WikiLeaks and was subsequently sentenced to thirty-five years in prison. *See* Charlie Savage & Emmarie Huetteman, *Manning Setenced to 35 Years for a Pivotal Leak of U.S. Files*, N.Y. TIMES, Aug. 22, 2013, at A1.
187. *See supra* note 13; *see also* Charlie Beckett, *WikiLeaks and Networked-Era News*, OPENDEMOCRACY (Aug. 15, 2012), http://www.opendemocracy.net/charlie-beckett/wikileaks-and-network-era-news ("Diplomats who previously denounced WikiLeaks as a weapon of terror that threatened western democracy now claim it has had no impact.").
188. Beckett, *supra* note 187.

period.[189] In addition, WikiLeaks' collaboration with mainstream media outlets was an innovation in journalism.[190] To exploit the mainstream media's brands and large audiences, Julian Assange decided to work with traditional journalists to have a greater political impact around the world.[191] WikiLeaks was able to use the scale and reach of the internet while also harnessing mainstream media's connections to a mass audience and networks of powerful individuals.[192]

II. APPLYING THE REPORTER'S PRIVILEGE TO WIKILEAKS

The rise of online journalism—such as WikiLeaks—brings new questions to the federal reporter's privilege debate.[193] One of these questions is whether WikiLeaks could claim a federal reporter's privilege if the U.S. government were to ask WikiLeaks to disclose the sources of its documents.[194] This Part addresses the two competing arguments regarding whether WikiLeaks could claim the reporter's privilege under the current legal framework. Part II.A discusses the federal law that outlines the scope of the privilege. Part II.B presents the first perspective—the view of scholars John Peters, Kellie Clark, and David Barnette—which argues that WikiLeaks would not be able to claim the privilege under the current federal law on the scope of the reporter's privilege. Part II.C discusses the contrary perspective of scholar Yochai Benkler, who contends that WikiLeaks would be able to claim the privilege under the current law, and the views of scholar Mary-Rose Papandrea and others who claim that WikiLeaks has some of the characteristics needed to obtain the privilege. Part II.D ultimately concludes that WikiLeaks would be able to claim the privilege.

A. The Scope of the Reporter's Privilege

In *Branzburg*, the Court decided not to extend the reporter's privilege under the First Amendment because, among other reasons, the Court acknowledged that if it granted the privilege, then it would also have to determine who qualified as a reporter under the privilege.[195] The Court believed that determining this classification would be a difficult and uncertain task.[196] Justice White said:

189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*
193. *See supra* note 26.
194. Peters, *supra* note 15, at 670; *see also* Mary-Rose Papandrea, *The Publication of National Security Information in the Digital Age*, 5 J. NAT'L SEC. L. & POL'Y 119, 119 (2011) ("One dominant theme in the discussion of how to strike the balance between an informed public and the need to protect legitimate national security secrets is whether new media entities like WikiLeaks are part of 'the press' and whether Julian Assange and his cohorts are engaging in 'journalism.'").
195. *See* Branzburg v. Hayes, 408 U.S. 665, 703–04 (1972).
196. *See id.*

> We are unwilling to embark the judiciary on a long and difficult journey to such an uncertain destination. The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order. Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege . . . .[197]

Thus, the Court presciently outlined what it viewed as a major conceptual difficulty in granting the privilege.[198]

This section discusses the federal case law that defines the scope of the privilege. Part II.A.1 outlines the Supreme Court's broad view of the definition of a reporter as detailed in *Branzburg v. Hayes*. Part II.A.2 discusses the legal framework that has emerged in the federal circuit courts.

1. The Broadest Scope of the Federal Reporter's Privilege: Dicta in *Branzburg*

The *Branzburg* Court believed that defining the privilege narrowly would be "a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods."[199] The Court asserted that the freedom of the press is a fundamental personal right that is not solely confined to those working for the institutional media.[200] Rather, the press includes every sort of publication that disseminates information to the public.[201] According to the Court in *Branzburg*, if the privilege were granted, almost any author would be able to claim the privilege because the reporter would be able to demonstrate that he contributes information to the public, relies on confidential sources to gain information, and that his sources will be silenced if he is forced to disclose their identity before a grand jury.[202]

2. The Federal Circuit Courts' Approaches to Defining the Scope of the Reporter's Privilege

Of the nine federal circuits that have established a qualified privilege, only five have determined who is considered to be a journalist for the purpose of the privilege.[203] In *Von Bulow v. Von Bulow*,[204] the Second

197. *Id.*

198. *See id.*; *see also In re* Grand Jury Subpoena, Judith Miller, 438 F.3d 1141, 1156–57 (D.C. Cir. 2006) (Sentelle, J., concurring) (noting the difficulty in defining the privilege's scope and questioning whether the privilege should apply to the "stereotypical 'blogger' sitting in his pajamas at his personal computer posting on the World Wide Web").

199. *Branzburg*, 408 U.S. at 703–04.

200. *See id.* at 704.

201. *Id.*

202. *Id.* at 705.

203. *See* Peters, *supra* note 15, at 672–78. The D.C., Fourth, Fifth, and Eleventh Circuits have not yet defined the boundaries of whom the privilege protects. *See* Sanford L. Bohrer & Scott D. Ponce, *Reporter's Privilege: 11th Cir.*, REPORTERS COMMITTEE FOR FREEDOM PRESS 5 (Gregg P. Leslie et al. eds., 2010), http://www.rcfp.org/rcfp/orders/docs/privilege/11.pdf; Thomas S. Leatherbury et al., *Reporter's Privilege: 5th Cir.*, REPORTERS

Circuit held that to obtain the privilege, an individual must have had the intent to disseminate to the public the information that he or she collected at the inception of the newsgathering process.[205] Prior experience as a professional journalist may be persuasive evidence of present intent to gather information for the purpose of dissemination, but it is not determinative.[206] An inexperienced reporter may still obtain the privilege.[207]

In *Shoen v. Shoen*,[208] the Ninth Circuit adopted the *Von Bulow* test.[209] In the Ninth Circuit, the test is whether the person who wishes to obtain the privilege had the intent to disseminate to the public the information sought and whether that intent was present at the beginning of the newsgathering process.[210] If both of these conditions are satisfied, then the privilege may be granted.[211] Moreover, similar to the *Von Bulow* court, the Ninth Circuit held that the reporter's privilege is designed to protect investigative reporting regardless of the medium used to report the news to the public.[212] The Ninth Circuit said, "What makes journalism journalism is not its format but its content."[213]

Both the Second and Ninth Circuits focus on the activity of the person who wishes to invoke the privilege, rather than the professional affiliation of that person.[214] In addition, both "circuits believed the reporter's privilege protect[s] a particular type of journalism—investigative reporting" and implicitly require the information to be news.[215] Yet, these circuits did not define investigative reporting.[216]

The Third Circuit has also addressed the privilege's scope.[217] In *In re Madden*,[218] the Third Circuit used the principles discussed in *Von Bulow* and *Shoen* to create a three-part test.[219] The *Madden* court held that to

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COMMITTEE FOR FREEDOM PRESS 8 (Gregg P. Leslie et al. eds., 2010), http://www.rcfp.org/rcfp/orders/docs/privilege/05.pdf; Bruce W. Sanford et al., *Reporter's Privilege: 4th Cir.*, REPORTERS COMMITTEE FOR FREEDOM PRESS 7 (Gregg P. Leslie et al. eds., 2010), http://www.rcfp.org/rcfp/orders/docs/privilege/04.pdf; Charles D. Tobin & Judith F. Bonilla, *Reporter's Privilege: D.C. Cir.*, REPORTERS COMMITTEE FOR FREEDOM PRESS 15–16 (Gregg P. Leslie et al. eds., 2010), http://www.rcfp.org/rcfp/orders/docs/privilege/00.pdf (explaining that the D.C. District Court has examined the scope of the privilege, but that the D.C. Circuit has not yet examined the issue).

204. 811 F.2d 136 (2d Cir. 1987).
205. *Id.* at 142.
206. *Id.* at 144.
207. *Id.*
208. 5 F.3d 1289 (9th Cir. 1993).
209. *Id.* at 1293.
210. *Id.*
211. *Id.* at 1294.
212. *See id.* at 1293.
213. *Id.*
214. Peters, *supra* note 15, at 675–76.
215. William E. Lee, *The Priestly Class: Reflections on a Journalist's Privilege*, 23 CARDOZO ARTS & ENT. L.J. 635, 673–74 (2006).
216. *Shoen*, 5 F.3d at 1289; Von Bulow v. Von Bulow, 811 F.2d 136 (2d Cir. 1987).
217. *See* Peters, *supra* note 15, at 674.
218. 151 F.3d 125 (3d Cir. 1998).
219. *See id.* at 131; *see also* Papandrea, *supra* note 30, at 571.

obtain the privilege, a person must satisfy that he or she: (1) is engaged in investigative reporting; (2) is gathering news; and (3) possesses the intent to disseminate this news to the public at the beginning of the newsgathering process.[220] While this test seemingly would require the Third Circuit to define "investigative reporting" and "news," the Third Circuit did not define these ambiguous terms.[221]

In addition, two other circuits have adopted a similar framework to the one found in *Von Bulow*, *Shoen*, and *Madden*.[222] From these cases, four principles defining the privilege's scope have emerged: (1) the medium alone does not determine whether a person qualifies as a reporter; (2) the person asserting the privilege must have the intent to disseminate information to the public at the beginning of the newsgathering process; (3) the person asserting the privilege must be engaged in investigative reporting; and (4) the content the person disseminated must be news.[223] The remainder of this Part discusses whether WikiLeaks would be able to claim the reporter's privilege in light of these four main principles.

B. Perspective One: WikiLeaks May Not Claim the Federal Reporter's Privilege

This Part outlines the argument that WikiLeaks cannot claim the reporter's privilege, as articulated by Peters, Clark, and Barnette, that WikiLeaks does not engage in investigative reporting because it only dumps documents.[224] Under the principles established in *Von Bulow*, *Shoen*, and *Madden*, WikiLeaks could clearly meet the first, second, and fourth requirements.[225] Under the first principle, WikiLeaks' operation on the internet does not affect whether it would be able to obtain the privilege.[226] Moreover, under the second and fourth principles, WikiLeaks intends to bring important news to the public and the content disseminated on its website is news.[227] However, the third principle—that the person

220. *In re Madden*, 151 F.3d at 131.

221. *See* Peters, *supra* note 15, at 674.

222. *See, e.g.*, Cusumano v. Microsoft, 162 F.3d 708, 714 (1st Cir. 1998) (stating that the present case fits into the legal framework set by *Von Bulow*, *Shoen*, and *Madden*); Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 436–37 (10th Cir. 1977) (extending the privilege to a filmmaker producing a documentary, implicitly asserting that the reporter's privilege is not solely reserved for members of the institutionalized press, and that the test is whether the individual engaged in investigative reporting to disseminate news to the public).

223. Peters, *supra* note 15, at 676.

224. *See id.* at 676–87; *see also* Kellie C. Clark & David Barnette, *The Application of the Reporter's Privilege and the Espionage Act to Wikileaks*, 37 U. DAYTON L. REV. 165, 177–79 (2012). Peters also claims that WikiLeaks does not engage in investigative journalism because it does not take steps to minimize harm to people who could be affected by its actions. *See* Peters, *supra* note 15, at 683. However, this discussion is outside the scope of this Note because, among other things, Peters's argument is grounded in philosophy regarding the role of journalism in society rather than the law on the reporter's privilege. *See id.*

225. *See* Peters, *supra* note 15, at 676.

226. *Id.*

227. *See id.* at 676–77.

asserting the privilege must be engaged in investigative reporting—is problematic when applied to WikiLeaks.[228]

Although WikiLeaks is a media organization and may have adopted some characteristics similar to traditional journalists, Peters, Clark, and Barnette contend that WikiLeaks is not engaged in investigative reporting.[229] Investigative reporting involves more than simply putting documents on a website.[230] Investigative reporting often involves in-depth, long-term research, and multiple-article reporting based on extensive interviewing or undercover surveillance.[231] Furthermore, when investigative reporters disseminate news to the public, their stories not only describe events but also provide interpretation or analysis.[232]

Peters claims that federal court decisions support this meaning of investigative reporting.[233] In *Cusumano v. Microsoft*,[234] the First Circuit granted the privilege to two business professors who conducted interviews prior to writing a book about the competition between two companies.[235] The First Circuit held that these interviews were protected under the reporter's privilege because the sole purpose of the interviews was to gather data so that the business professors could analyze and report their findings about these two corporations' management practices.[236] In *Summit Technology, Inc. v. Healthcare Capital Group, Inc.*,[237] the District of Massachusetts extended the privilege to a financial advisor's reports, which contained independent research, analysis, and conclusions.[238] Similarly, in *Blum v. Schlegel*,[239] the Western District of New York held that a law student who was a reporter for a law school newspaper was able to obtain the privilege because the article at the center of the case exposed and described, in the student's own words, a controversy at the school and quoted some of the people involved.[240]

In addition, Peters cites two decisions from the District Court for the District of Columbia that clarified the meaning of investigative reporting.[241] In *U.S. Commodity Futures Trading Commission v. McGraw-Hill Cos.*,[242] the court granted the privilege to a publisher that produced indices and price

228. *Id.* at 676.
229. *Id.* at 677; *see also* Clark & Barnette, *supra* note 224, at 178 ("While WikiLeaks itself characterizes its website as a form of media and alleges it is engaging in the journalistic process—by employing reporters who review, rewrite, and publish the material received from WikiLeaks' anonymous sources—in truth, WikiLeaks does not engage in any form of investigative reporting.").
230. Peters, *supra* note 15, at 677.
231. *Id.*
232. *See id.* at 677–78.
233. *See id.* at 678.
234. 162 F.3d 708 (1st Cir. 1998).
235. Peters, *supra* note 15, at 678.
236. *Id.*
237. 141 F.R.D. 381 (D. Mass. 1992).
238. *Id.* at 385.
239. 150 F.R.D. 42 (W.D.N.Y. 1993).
240. *See* Peters, *supra* note 15, at 678.
241. *See id.*
242. 390 F. Supp. 2d 27 (D.D.C. 2005).

ranges in the natural gas market.[243] The U.S. Commodity Future Trading Commission argued that the publisher did not qualify under the privilege because it simply provided the results of a mathematical formula rather than making editorial judgments.[244] The court, however, held that because the publisher took into account extramarket factors, it did not merely report data but engaged in journalistic analysis and judgment.[245] Peters claims that the court extended the privilege to the publisher in light of this journalistic analysis.[246] In *Tripp v. Department of Defense*,[247] the court applied the privilege to a writer for a military publication.[248] The court said that interviewing individuals is "an activity which is a 'fundamental aspect' of investigative journalism."[249] Thus, Peters asserts that the federal case law illustrates investigative reporting as something that involves more than the mere dumping of documents.[250]

Peters, Clark, and Barnette assert that WikiLeaks does not engage in the type of investigative reporting that the case law describes.[251] Rather, WikiLeaks solicits sources to supply leaked material, which it then publishes and disseminates to the public.[252] Stories and their corresponding documentation are brought to WikiLeaks solely for publication.[253] Once the document is verified for authenticity,[254] it is posted on the WikiLeaks website with a related story.[255] The related story simply announces that the website has published certain documents, rather than providing a narrative or commentary on the released documents.[256] WikiLeaks then relies on the mainstream media, such as the *New York Times* and the *Guardian*, to publish traditional news stories analyzing the documents.[257] WikiLeaks neither engages in extensive interviewing for news stories nor provides meaningful context or journalistic analysis of the leaked documents.[258]

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243. *See* Peters, *supra* note 15, at 679.
244. *McGraw-Hill*, 390 F. Supp. 2d at 32.
245. *Id.*
246. Peters, *supra* note 15, at 679.
247. 284 F. Supp. 2d 50 (D.D.C. 2003).
248. *See* Peters, *supra* note 15, at 678.
249. *Tripp*, 284 F. Supp. 2d at 58 (quoting Mgmt. Info. Tech., Inc. v. Alyeska Pipeline Serv. Co., 151 F.R.D. 471, 476 (D.D.C. 1993).
250. Peters, *supra* note 15, at 679.
251. Clark & Barnette, *supra* note 224, at 178; Peters, *supra* note 15, at 679.
252. Clark & Barnette, *supra* note 224, at 178.
253. *Id.*
254. *See supra* note 172.
255. Peters, *supra* note 15, at 680; *see also supra* Part I.B.3.
256. Peters, *supra* note 15, at 680. When WikiLeaks released the Iraq War Logs, it posted a news story that did not feature quotes, storytelling, or analysis. *Id.* Although the story is no longer available on the WikiLeaks website, it can be found on EconomicsJunkie where it was reposted. *Iraq War Crimes Surface; Probably Greatest War-Leak in Military History*, ECONOMICSJUNKIE (Oct. 22, 2010), http://www.economicsjunkie.com/iraq-war-crimes-surface-on-wikileaks-probably-greatest-leak-in-military-history/.
257. *See* Peters, *supra* note 15, at 683.
258. Floyd Abrams, Op.-Ed., *Why WikiLeaks Is Unlike the Pentagon Papers*, WALL ST. J., Dec. 29, 2010, at A13 ("WikiLeaks offers no articles of its own, no context of any of the materials it discloses, and no analysis of them other than assertions in press releases or their

Therefore, these scholars argue that WikiLeaks fails to engage in the elements of investigative reporting and cannot obtain the reporter's privilege.[259]

C. Perspective Two: WikiLeaks May Claim the Federal Reporter's Privilege

Currently, federal courts have not addressed whether bloggers and other new-media journalists may obtain the privilege.[260] However, using the four principles derived from the federal case law, Benkler and Papandrea claim that WikiLeaks has some of the characteristics needed to claim the privilege.[261] This section explores these scholars' arguments.

1. Because the Medium in Which News Is Disseminated Is Not Determinative, WikiLeaks May Claim the Privilege

The *Branzburg* Court noted in dicta that an individual does not have to be a member of the institutionalized press to invoke the privilege.[262] The federal circuit courts that have ruled on this issue have also held that the medium in which the news is circulated is irrelevant in determining whether the privilege applies.[263] Today, journalistic activity is largely performed by "the modern 'lonely pamphleteer' with a smart phone and a Twitter feed."[264] Thus, even though WikiLeaks is an online publication, Benkler maintains that it may still claim the privilege.[265]

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equivalent."); *see also* Clark & Barnette, *supra* note 224, at 179 ("Merely playing the role of a Xerox machine does not constitute [journalism]."); Peters, *supra* note 15, at 680.

259. Clark & Barnette, *supra* note 224, at 179.

260. *See* Papandrea, *supra* note 30, at 568–69. One federal district court has held that an online gossip columnist was protected from revealing his sources under the reporter's privilege. *See* Blumenthal v. Drudge, 186 F.R.D. 236, 244–45 (D.D.C. 1999). Since *Blumenthal*, only one other case has considered whether an independent internet news provider can claim protection under the First Amendment reporter's privilege. *Developments in the Law—The Law of Media*, 120 HARV. L. REV. 990, 1000 (2007). In *O'Grady v. Superior Court*, the reporter's privilege in the California shield statute was extended to cover bloggers. *See* O'Grady v. Superior Court, 44 Cal. Rptr. 3d 72, 77 (Ct. App. 2006). *O'Grady* was the first state court decision to take up the issue of shield protection for bloggers. Dougherty, *supra* note 26, at 313–14.

261. *See, e.g.*, Yochai Benkler, *A Free Irresponsible Press: Wikileaks and the Battle over the Soul of the Networked Fourth Estate*, 46 HARV. C.R.-C.L. L. REV. 311, 361–62 (2011); Papandrea, *supra* note 194, at 124.

262. *See supra* Part II.A.1.

263. *See supra* Part II.A.2.

264. Dougherty, *supra* note 26, at 318.

265. Benkler, *supra* note 261, at 362. Peters, who ultimately argues that WikiLeaks would not be able to obtain the privilege, concedes this point. *See* Peters, *supra* note 15, at 676.

2. WikiLeaks Disseminates News and WikiLeaks Has the Requisite Intent To Disseminate Information to the Public

First, WikiLeaks disseminates news.[266] Second, Benkler argues that WikiLeaks possesses the requisite intent to disseminate information to the public.[267] Although prior experience as a professional journalist may be persuasive evidence of present intent to gather information for the purpose of dissemination, it is not determinative.[268] Therefore, WikiLeaks can possess the requisite intent because one does not have to be a professional journalist to satisfy this element.[269] Furthermore, Benkler notes, "There simply cannot be the remotest doubt that the entire purpose of Wikileaks is the gathering of information for public dissemination."[270] WikiLeaks' goal is to give people access to information to increase government transparency.[271] In addition, WikiLeaks' use of traditional media outlets to help disseminate its information to a wider audience further demonstrates that its goal is to disseminate information to the public.[272] Moreover, even though WikiLeaks may possess a political agenda and have other intentions apart from public dissemination—such as weakening governments that operate in secrecy—WikiLeaks still possesses the intent necessary to qualify for the privilege.[273]

3. WikiLeaks Engages in Investigative Reporting

Scholars have argued that WikiLeaks is different from the traditional media because WikiLeaks does not engage in the traditional investigative journalistic practice of analyzing and contextualizing the information that it publishes.[274] However, Papandrea asserts that it is inaccurate to claim that WikiLeaks does not engage in traditional investigative journalistic practices.[275] For example, WikiLeaks' release of its "Collateral Murder" video, depicting a helicopter shooting at targets below during the Iraq War, occurred at the National Press Club, where Julian Assange extensively commented on the video.[276] While WikiLeaks did not initially filter the files it obtained, WikiLeaks now filters the material to determine what it

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266. *See* Joseph S. Alonzo, *Restoring the Ideal Marketplace: How Recognizing Bloggers As Journalists Can Save the Press*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 751, 753 (2006); *see also* David Carr, *Journalists Go On Attack (Against One Another)*, N.Y. TIMES, Aug. 26, 2013, at B1 (describing WikiLeaks as its own newsroom). Even a scholar who argues that WikiLeaks would not be able to obtain the privilege concedes that WikiLeaks publishes news. *See* Peters, *supra* note 15, at 676.

267. *See* Benkler, *supra* note 261, at 359–61.

268. Von Bulow v. Von Bulow, 811 F.2d 136, 144 (2d Cir. 1987).

269. *See* Benkler, *supra* note 261, at 359–60.

270. *Id.* Peters, who argues that WikiLeaks would not be able to obtain the privilege, even concedes this point. *See* Peters, *supra* note 15, at 676.

271. *See* Benkler, *supra* note 261, at 361–62.

272. *See id.* at 360.

273. *See id.* at 360–62.

274. *See supra* notes 229–31 and accompanying text.

275. Papandrea, *supra* note 194, at 124.

276. Bellia, *supra* note 158, at 1496–97.

should publish.[277] In addition, WikiLeaks has sought guidance from the government on what names and identifying information it should redact from its materials in order to avoid harming individuals.[278] Thus, WikiLeaks engages in investigative reporting.

D. Taking Sides: WikiLeaks May Claim the Federal Reporter's Privilege Under the Existing Federal Law Because WikiLeaks Engages in Investigative Journalism

The debate on whether WikiLeaks may claim the privilege ultimately turns on whether WikiLeaks engages in investigative journalism.[279] This section maintains that WikiLeaks may claim the reporter's privilege under existing federal law because WikiLeaks engages in investigative journalism.[280] First, Peters's analysis of the case law defining investigative reporting is problematic because it does not unambiguously support the idea that investigative journalism requires analysis, interpretation, interviewing witnesses, and in-depth research. Second, even if Peters's analysis of the case law interpreting the definition of investigative journalism is accurate, WikiLeaks still engages in investigative journalism under this definition. In Part III, this Note maintains that the characteristic of investigative journalism is inadequate to address the complexities of today's media landscape.

1. The Case Law Ambiguously Defines Investigative Journalism

Peters cites five cases that he asserts further clarify the definition of investigative journalism.[281] However, these cases do not support his assertion that investigative journalism requires analysis and in-depth reporting.[282] The majority of the cases that Peters cites merely describe the published information that received the privilege as containing analysis or involving in-depth reporting.[283] In these cases, however, the court does not link the content's analytic quality to its rationale for why it extended the privilege or to the definition of investigative reporting.[284]

In his discussion of *Cusumano v. Microsoft*,[285] Peters fails to provide essential context to the First Circuit's extension of the reporter's privilege to academics engaged in prepublication research. Peters asserts that the *Cusumano* court held that the professors' interview of a corporation's personnel was covered under the privilege because the interview's sole

277. Papandrea, *supra* note 194, at 124.
278. *Id.*
279. *See supra* notes 225–28 and accompanying text.
280. *See supra* notes 274–78 and accompanying text.
281. *See supra* notes 233–50 and accompanying text.
282. *See infra* notes 285–98 and accompanying text. Also, because none of the case law that defines the scope of the privilege discusses the scope of the privilege in the context of leaked classified government information, it is possible that this line of case law does not apply to the WikiLeaks case.
283. *See infra* notes 285–98 and accompanying text.
284. *See infra* notes 285–98 and accompanying text.
285. 162 F.3d 708 (1st Cir. 1998).

purpose was to gather data to be analyzed and reported.[286] Peters's argument emphasizes the analysis component of the court's statement.[287] However, the court, prior to this assertion, said that it does not matter whether the person disseminating news is a member of the media or academia so long as he intended to disseminate information to the public at the inception of the newsgathering process.[288] Therefore, the court held that the academics should be entitled to the privilege because their purpose was to report their research findings to the public.[289] The court was merely describing the professors' newsgathering process to include analysis, but the fact that the professors were engaged in analysis was not the court's rationale for why they obtained the privilege.[290] Furthermore, the court did not define investigative reporting in this case.[291]

In *Summit Technology*, the court extended the privilege to an individual who publishes reports on companies and their products.[292] The court reasoned that the research for the individual's reports came in part from his speaking to other people.[293] While the court concluded that the individual disseminated investigative information, it did not explain the rationale for its conclusion.[294] Moreover, nowhere in this case did the court attempt to define investigative journalism.[295] Similarly, in *Blum*, the Western District of New York extended the privilege to a student journalist who engaged in interviewing and interpretation when writing an article in the student newspaper.[296] However, the court simply described the nature of the student's article and did not link these attributes to its reason for extending the privilege.[297] In addition, the court did not attempt to characterize investigative journalism in this case.[298]

Although the two D.C. District Court cases that Peters cites provide the strongest support for his definition of investigative journalism, these two cases still fail to create a standard for investigative journalism that excludes journalists who neither provide analysis nor conduct in-depth research. The *McGraw-Hill* court characterized journalistic analysis as something more than "simply reporting data,"[299] but nowhere in its opinion did the court mention investigative journalism specifically.[300] In *Tripp*, the court said

286. *See supra* notes 235–36 and accompanying text.
287. *See supra* notes 235–36 and accompanying text.
288. *Cusumano*, 162 F.3d at 714.
289. *See id.* at 714–15.
290. *See id.*
291. *See id.* at 708.
292. Summit Tech., Inc. v. Healthcare Capital Grp., Inc., 141 F.R.D. 381, 384 (D. Mass. 1992).
293. *Id.*
294. *See id.*
295. *See Summit Tech.*, 141 F.R.D. 381.
296. *See supra* notes 239–40 and accompanying text.
297. *See* Blum v. Schlegel, 150 F.R.D. 42, 42 (W.D.N.Y. 1993).
298. *See id.*
299. U.S. Commodity Futures Trading Comm'n v. McGraw-Hill Cos., 390 F. Supp. 2d 27, 32 (D.D.C. 2005).
300. *Id.* at 27.

that interviewing individuals is a fundamental aspect of investigative journalism; however, the court never said that interviewing individuals was a determinative aspect of investigative journalism.[301] Thus, the case law on the definition of investigative journalism is ambiguous, and Peters fails to establish that analysis, interpretation, and in-depth research are necessary components of investigative journalism.

2. Even If Investigative Journalism Requires More than the Mere Dumping of Documents, WikiLeaks Still Engages in Investigative Journalism

Furthermore, even if the case law supports Peters's definition of investigative journalism, WikiLeaks still engages in investigative journalism under Peters's definition and therefore qualifies as a reporter under the current scope of the privilege.[302] WikiLeaks engages in the type of investigative journalism that Peters describes is necessary to obtain the privilege.[303] When WikiLeaks receives a document, it undertakes investigations to determine whether the document is authentic.[304] Although the exact process for determining a document's authenticity is unknown, WikiLeaks says that it researches—through both traditional and electronic methods—possible motives and opportunities for forgery.[305] Also, WikiLeaks engages in editorial judgments when it filters the documents that it receives to determine which documents to publish.[306] Moreover, at times, WikiLeaks consults with the government to redact the names of individuals who could be harmed through the documents' publication.[307] In addition, although not highly analytical, WikiLeaks publishes a short statement along with its published document.[308] While the statement is similar to a press release, it still entails some editorial judgment and interpretation.[309] Furthermore, WikiLeaks spokesmen have engaged in more extensive commentary on their documents to the general public offline.[310] Therefore, Wikileaks would qualify as a reporter under the current law.

III. RECONCEPTUALIZING THE REPORTER'S PRIVILEGE

The current law on the scope of the federal reporter's privilege is inadequate to address the complexities of today's media landscape.[311] The discussion in Part II exemplifies these inadequacies. Part II illustrates that courts have failed to clearly define "investigative journalism," which is

301. *See supra* note 246 and accompanying text.
302. *See supra* Part II.C.3.
303. *See supra* Part II.C.3.
304. *See supra* note 172.
305. *See supra* note 172.
306. *See supra* note 277 and accompanying text.
307. *See supra* note 278 and accompanying text.
308. *See supra* notes 253–56 and accompanying text.
309. *See supra* notes 253–56 and accompanying text.
310. *See supra* notes 275–76 and accompanying text.
311. *See generally, e.g.*, Dougherty, *supra* note 26; Jones, *supra* note 17; Neinas, *supra* note 128; Papandrea, *supra* note 30; Stone, *supra* note 28.

particularly problematic in the current media landscape.[312] In addition, the question of whether WikiLeaks qualifies for the privilege is based merely on whether courts believe that WikiLeaks is engaged in investigative journalism.[313] This distinction is futile because it does not fully relate to the purposes of the privilege.[314] The required characteristic of investigative journalism does not fully ensure the free and robust flow of information to the public or the press's independence.[315] WikiLeaks serves an important function in disseminating news regardless of whether it engages in "investigative journalism."[316] Because of these shortcomings, scholars have proposed new policies to address the reporter's privilege in light of new media, such as WikiLeaks.[317] This Part outlines three different policy proposals and ultimately advocates for a statute that provides for a qualified privilege, the scope of which is determined by the source's expectations, where the reporter presents the source's expectations in court on behalf of the source.

A. Policy Proposals To Address the Privilege's Shortcomings

To more adequately address the reporter's privilege in the contemporary media landscape, scholars have proposed new legal policies.[318] First, this section discusses scholars' arguments on whether Congress or the Supreme Court should determine the privilege's scope. Second, this section presents three different policy proposals: Jones's anonymous speech rights approach, Stone's source-based approach, and Papandrea's presumption of the privilege for all individuals who disseminate information with a few narrow exceptions.

1. Institutional Considerations: Should Congress or the Courts Determine the Scope of the Reporter's Privilege?

The majority of scholars and commentators believe that Congress, rather than the judiciary, should determine the scope of the reporter's privilege for four main reasons.[319] First, courts have had over four decades to clearly delineate the scope of the privilege; however, the boundaries of the privilege remain inconsistent and unclear.[320] Despite having ample opportunity to hear a reporter's privilege case, the Supreme Court has refused to grant certiorari to a reporter's privilege case since *Branzburg* in

312. *See supra* notes 216, 221 and accompanying text; Part II.D.1.
313. *See supra* notes 225–28 and accompanying text.
314. *See supra* Part I.A.1.
315. *See supra* Part I.A.1.
316. *See* Papandrea, *supra* note 194, at 121 (explaining that leaks serve a vital function in exposing reprehensible government practices).
317. *See generally, e.g.*, Dougherty, *supra* note 26; Jones, *supra* note 17; Neinas, *supra* note 128; Papandrea, *supra* note 30; Stone, *supra* note 28.
318. *See supra* note 317 and accompanying text.
319. *See, e.g.*, Lee, *supra* note 215, at 675–77; Neinas, *supra* note 128, at 225; Stone, *supra* note 28, at 48. *But see* McCraw & Gikow, *supra* note 155, at 508 (explaining that the judiciary, rather than Congress, should define the scope of the privilege).
320. Neinas, *supra* note 128, at 225.

1972.[321] Second, determining who qualifies for the privilege is a difficult policy question that requires the factfinding ability of legislatures.[322] Third, the Supreme Court cannot determine who is a reporter under the privilege as a matter of First Amendment interpretation because the idea of the Court defining or licensing the press is against constitutional traditions.[323] Fourth, because judicial decisionmaking is often tied to the facts of the particular case in question, it is difficult for courts to formulate a uniform social policy.[324]

On the contrary, other scholars argue that courts should define the privilege for two main reasons.[325] First, political compromise is required in legislative channels, which often inhibits the best policy from being passed.[326] Second, because Congress has demonstrated its unwillingness to confront the executive on national security matters, the executive branch will direct the policy.[327] Thus, the President might largely control the content of the statute and it might not undergo adequate congressional investigation before it is passed.[328]

2. Policy Proposals

This section discusses three scholars' policy proposals to reconceptualize the reporter's privilege in light of its current weaknesses.[329] All of the proposals address the problem that occurs when defining the scope of the privilege through the definition of a reporter. The proposals in Part III.A.2.a and III.A.2.b address this shortcoming by focusing on the qualities of the source rather than the qualities of the reporter. The proposal in Part III.A.2.c addresses this shortcoming by broadly defining who qualifies as a reporter under the privilege.

a. Jones's Approach: Anonymous Speech Rights in the Confidential Source Context

RonNell Anderson Jones asserts that courts should replace the reporter's privilege with an anonymous speech rights approach in the confidential source–reporter scenario.[330] Jones claims that the most fundamental

321. *Id.* at 236–37.
322. Lee, *supra* note 215, at 677.
323. Stone, *supra* note 28, at 47.
324. Lee, *supra* note 215, at 677.
325. *See* McCraw & Gikow, *supra* note 155, at 508.
326. *See id.*
327. *See id.*
328. *See id.*
329. These policy proposals apply to the reporter's privilege generally and not solely to the privilege in the context of WikiLeaks.
330. Jones, *supra* note 17, at 1226. The confidential source–reporter scenario refers to the situation where a reporter publishes information obtained from a source who wishes to remain anonymous (the scenario that typically would implicate the reporter's privilege). The anonymous speech rights approach is also discussed in Jocelyn Hanamirian's Note. *See* Jocelyn V. Hanamirian, Note, *The Right To Remain Anonymous: Anonymous Speakers, Confidential Sources and the Public Good*, 35 COLUM. J.L. & ARTS 119, 134–39 (2011).

shortcoming of the reporter's privilege is that the reporter has been at the center of the constitutional inquiry, which has complicated the doctrine and created an impractical test.[331] In the newsgathering context, the source itself should be entitled to protection under the anonymous speech doctrine for confidential statements made to reporters.[332]

Jones argues that analyzing confidential source cases using sources' anonymous speech rights rather than reporters' privilege rights will improve the doctrine for three main reasons.[333] First, focusing on sources' anonymous speech rights eliminates the need to define a reporter under the privilege.[334] The task of defining a reporter has now become extremely complicated because of technological changes in newsgathering and dissemination.[335] Second, a doctrine based on anonymous speech rights enables courts to abandon a speculative investigation into the contribution the press makes to public dialogue in order to determine what degree of privilege is necessary to ensure such continued contribution.[336] Instead, this approach draws upon the clearly defined legal doctrine of anonymous speech.[337] Third, the anonymous speech rights approach acknowledges other First Amendment values that can be reinforced through the confidential source dynamic, such as the source's individual liberty.[338]

The anonymous speech doctrine originally rests on the Supreme Court's decision in *Talley v. California*.[339] In *Talley*, the petitioner distributed unsigned pamphlets promoting a boycott of merchants who he believed sold goods manufactured by companies that had discriminatory hiring practices.[340] When the petitioner was charged with violating a local ordinance that prohibited the distribution of anonymous pamphlets, he challenged that ordinance's constitutionality under the First Amendment.[341]

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331. Jones, *supra* note 17, at 1225–26.
332. *Id.* at 1260.
333. *Id.* at 1226.
334. *Id.*
335. *Id.* at 1239.
336. *Id.* at 1226. The *Branzburg* Court noted that it remains "unclear how often and to what extent informers are actually deterred from furnishing information when newsmen are forced to testify before a grand jury. . . . [E]vidence fails to demonstrate that there would be a significant constriction of the flow of news to the public" in the absence of the reporter's privilege. Branzburg v. Hayes, 408 U.S. 665, 693 (1972).
337. Jones, *supra* note 17, at 1226.
338. *Id.* One goal of the First Amendment is to provide for individual autonomy and self-fulfillment. *See* Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 879–81 (1963) (describing the "individual self-fulfillment" theory that man "finds his meaning and his place in the world" through the development of the powers of thought and expression, and that suppression of expression is therefore "an affront to the dignity of man, a negation of man's essential nature"). Anonymous speech rights advance the First Amendment's individual liberty goals because they protect individuals from retaliation and their ideas from suppression in the face of opposition. *See* Jones, *supra* note 17, at 1252–53. This protection allows a speaker to ensure that readers will not prejudge his message simply because they like or dislike its source, which directly benefits the individual liberty of the source itself. *See id.* at 1253–54.
339. 362 U.S. 60 (1960); Jones, *supra* note 17, at 1249.
340. *Talley*, 362 U.S. at 60–62; Jones, *supra* note 17, at 1251.
341. *Talley*, 362 U.S. at 60–62.

The Supreme Court held that the ordinance was unconstitutional because individuals are free to withhold their identity when they speak.[342] The First Amendment must protect anonymous distribution of information to ensure that certain information will be disseminated.[343]

The Supreme Court reaffirmed its protection of anonymous speech rights in *McIntyre v. Ohio Elections Commission*.[344] In *McIntyre*, the Court held that a citizen had a constitutional right to distribute pamphlets at a public meeting that were signed "Concerned Parents and Tax Payers" rather than with the citizen's own name.[345] The Court held that speaking anonymously is "an honorable tradition of advocacy and of dissent."[346] Thus, the goals of anonymous speech rights overlap with the major objectives of the reporter's privilege: ensuring the free flow of information and reinforcing democratic self-governance.[347]

Jones asserts that a confidential source in the reporting context is not different from speakers in other contexts who wish to convey information anonymously.[348] The dynamic between a confidential source and a reporter is similar to other dynamics that occur between anonymous speakers and other modes of communication.[349] Thus, the reporter's source should be entitled to protection under the anonymous speech doctrine for statements he makes to a reporter in confidence.[350]

Anonymous speech rights in the reporting context could be enforced in two ways.[351] First, as a protected speaker, the source could assert his own right in court.[352] Second, reporters and the news organizations that employ them may use third-party standing to assert their sources' anonymous speech rights.[353] In recent years, courts have exercised their discretion to allow third-party standing "'whenever a practical impediment makes it difficult for a right-holder to assert her own rights and some relation exists between the right-holder and the party asserting third party standing.'"[354]

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342. *Id.* at 65.

343. Jones, *supra* note 17, at 1251.

344. 514 U.S. 334, 357 (1995). *Talley* and *McIntyre* are regarded as the core cases on anonymous rights. Jones, *supra* note 17, at 1254.

345. Jones, *supra* note 17, at 1252.

346. *McIntyre*, 514 U.S. at 357.

347. Jones, *supra* note 17, at 1250–53; *see also supra* Part I.A.1.

348. *See* Jones, *supra* note 17, at 1259–60.

349. *See id.* at 1260–61; *see also supra* notes 339–47 and accompanying text.

350. *See* Jones, *supra* note 17, at 1259–60.

351. *See id.* at 1266–67.

352. *Id.* at 1266.

353. *Id.*

354. *Id.* (quoting Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1359–60 (2000)). Third-party standing, the civil procedure that describes when one party can file a lawsuit on behalf of another party, is generally prohibited. *See* 1 CAROLE L. SCOTTI ET AL., CYCLOPEDIA OF FEDERAL PROCEDURE § 2.14h (3d ed. Cum. Supp. 1984). Although the rule against third-party standing is not mandated in Article III of the Constitution, it is justified by prudential concerns. *See id.* Yet, courts have granted exceptions to this principle against third-party standing in certain circumstances, one of which is where it would be difficult for persons to present their rights before the court. *Id.*

In the reporting context, those conditions are clearly satisfied because an anonymous source would not want to reveal his identity by asserting his own rights in court, and the reporter, as a vehicle for the source to disseminate information, has a relationship with the confidential source.[355] The use of third-party standing in this context differs from its usual use.[356] Third-party standing is most often used when a plaintiff asserts that a single application of a law injures him and impinges on the rights of identifiable third persons.[357] However, one case, decided by the Middle District of Pennsylvania, allowed third-party standing in a similar context to the confidential source–reporter scenario.[358] The court held that a newspaper had third-party standing to assert the anonymous speech rights of anonymous commenters who had posted to the newspaper's online forum.[359]

b. Stone's Approach: Privilege Based on the Source's Expectations

Rather than adopt the anonymous speech rights doctrine to the confidential source–reporter scenario, constitutional law scholar Geoffrey Stone maintains the privilege mechanism but suggests that the scope of the privilege should be based on the qualities of the source.[360] The privilege belongs to the person whose communication society wants to encourage,[361] and therefore the privilege belongs to the source rather than the reporter.[362] A reporter is merely acting as the source's agent when he invokes the

355. *See* Jones, *supra* note 17, at 1266. However, Jones also acknowledges a grant of third-party standing in this context could be difficult to implement because it might be invoked in other contexts and therefore create the potential for a larger number of subpoenaed individuals to refuse to provide information because the information was conveyed to them by a speaker who requested to remain anonymous. *Id.* at 1267 n.297.

356. *See supra* notes 353–55 and accompanying text.

357. Fallon, *supra* note 354, at 1359.

358. *See* Enterline v. Pocono Med. Ctr., 751 F. Supp. 2d 782, 789 (M.D. Pa. 2008).

359. *See id.* In *Enterline*, the commenters in question had responded to a local newspaper's coverage of a sexual harassment suit filed by a nurse against her former employer. *Id.* at 783. The nurse subpoenaed the newspaper for the identification of the commenters to possibly use them as witnesses in her case. *Id.* The newspaper moved to quash the subpoena for requesting information protected by the First Amendment and the state's reporter's shield statute. *Id.* at 783–84. Instead of using the reporter's privilege to withhold the speakers' identities, the court focused on the commenters' right to speak anonymously. *Id.* at 784. The court found that the newspaper met the three requirements to warrant third-party standing: (1) a practical obstacle for a rightholder to assert his own rights; (2) a sufficient injury-in-fact to satisfy the Article III case-or-controversy requirement; and (3) the expectation that the third party can zealously present the interests of the third party. *See id.* at 786. First, the court noted the practical difficulties for the anonymous commenters to assert their own anonymous speech rights. *Id.* at 785–86. Second, the court found an injury to the newspaper because preventing such assertion of anonymous speech would hurt the newspaper's online forums, thereby reducing reader interest and advertising revenue. *Id.* at 786. Third, the court held that the newspaper would be a zealous advocate of the anonymous commenters' rights. *Id.*

360. Stone, *supra* note 28, at 50–51.

361. *Id.* at 42.

362. *Id.* at 50.

privilege.[363] Thus, Stone asserts that the focus of the privilege's scope should not be whether the reporter meets certain characteristics.[364] Instead, the privilege's scope should be based on the source's characteristics.[365]

The privilege should be most concerned with the source's expectations rather than the recipient of the information's credentials or qualities.[366] The source should be protected whenever: (1) he makes a confidential disclosure to an individual believing that the individual regularly disseminates information to the general public; and (2) his purpose is to disseminate the information to the general public through that individual.[367] Thus, Stone's approach is based on a desire to expand the privilege's scope beyond traditional journalists, while also keeping courts away from the difficult question of who qualifies as a reporter.[368] However, Papandrea critiques this element of Stone's proposal because Stone fails to explain how a court would determine the source's intent when that source's identity is supposed to be unknown and protected.[369]

Moreover, Stone asserts that the privilege should be absolute.[370] Because the privilege's purpose is to encourage sources to disclose information to the public, a qualified privilege creates uncertainty in the privilege's application that works against this goal.[371] The only narrow exception to the absolute privilege would be when the source's disclosure is itself an unlawful act.[372] In this circumstance, courts should apply a balancing test based on the leak's contribution to public debate.[373] If the unlawful leak discloses information of substantial public value, then the privilege will be upheld.[374]

363. *Id.*
364. *Id.* at 51.
365. *See id.*
366. *Id.*
367. *Id.*
368. Papandrea, *supra* note 30, at 582.
369. *Id.*
370. *See* Stone, *supra* note 28, at 52–53.
371. *Id.* at 53.
372. *Id.* at 54. Stone, however, is unclear regarding whether he believes that information obtained from a confidential source about an imminent national security threat can be an exception to an absolute privilege. *See id.* at 53–54. In this context, he claims, the source might not be willing to disclose such information without an absolute privilege. *Id.* at 53. Therefore, Stone asserts that while an imminent national security threat scenario is seemingly a compelling one in which to break the privilege, this breach of the privilege may actually be counterproductive. *Id.*
373. *See id.* at 56.
374. *Id.*

c. Papandrea's Approach: Presumptive Right to the Privilege for Those Who Disseminate Information to the Public with an Exception for Imminent National Security Threats

Papandrea asserts that the history of the privilege demonstrates that the medium of communication should not determine whether the privilege should apply.[375] Throughout the history of the privilege, state legislatures have constantly had to decide whether to expand the scope of the privilege beyond traditional newspaper reporters to journalists working in magazines, radio, and television.[376] Thus, rather than basing the scope on the definition of a reporter, the scope should be based on the privilege's underlying purpose: increasing the amount of information available to the public while also making sure that those who disseminate information do not become an arm of the government or private parties.[377] Because the privilege has a broad goal, it should cover a broad range of individuals.[378] Anyone who contributes information to the public domain and intends the general public to read the information should be presumptively entitled to the privilege.[379]

Papandrea proposes one exception to this broad privilege for imminent threats to national security.[380] The basis for the national security exception is that in these circumstances the public's interest in the information to protect against national security threats greatly outweighs the public's interest in encouraging anonymous sources from coming forward.[381]

Scholars have criticized the imminent national security exception as too expansive and deferential to the government.[382] The government might exploit the imminent national security exception when the press leaks important government information, even though such disclosures are not imminent threats to warrant the exception.[383] Judges further enforce this government tactic, as they are often wary of acting against the government when it proclaims that the country's national security is threatened.[384]

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375. Papandrea, *supra* note 30, at 519.
376. *Id.*
377. *Id.*
378. *See id.* at 519–20.
379. *Id.* at 585.
380. *Id.* at 520. Also, Papandrea asserts two more exceptions to the privilege: (1) when the subpoena is directed at someone who witnesses a criminal or tortious activity; or (2) when the subpoena is directed at someone engaged in publication solely to avoid a subpoena. *Id.* These two exceptions are outside the scope of this Note.
381. *Id.* at 589–90.
382. *See* Davidson & Herrera, *supra* note 124, at 1312.
383. *Id.* For example, this was seen in the Pentagon Papers and the George W. Bush Administration's warrantless wiretapping program. *Id.*
384. *See id.*

B. Advocating for a Qualified Privilege Based on the Source's Expectations

This section advocates for a new reporter's privilege policy: a qualified privilege based on the source's characteristics.[385] The first subpart of this section asserts that the reporter's privilege should be addressed through congressional statute. The second subpart advocates for defining the privilege's scope using the source's expectations rather than the qualities of the reporter. The third subpart claims that the privilege should be qualified to accommodate two circumstances in which the public's interest in the confidential source's identity is greater than the public's interest in promoting the free flow of information and an independent press. The fourth subpart discusses whether WikiLeaks would be able to claim the privilege under this new policy.

1. Federal Statute

The reporter's privilege should be reformed through a federal statute rather than through the courts. For over four decades, the courts have consistently failed to create a uniform and clear standard.[386] Currently, there is a circuit split regarding the very existence of the privilege.[387] The five circuits that have addressed the scope of the privilege have failed to sufficiently and clearly define key terms in that standard, such as investigative journalism.[388] Moreover, the Supreme Court—which has the ability to address these inconsistencies and inadequacies in the lower courts' holdings—has not taken a reporter's privilege case since 1972.[389] The Supreme Court's single decision on the privilege gave rise to the myriad problems discussed in this Note.[390] Furthermore, Congress's ability to extensively research this issue is essential to adequately defining the scope of the reporter's privilege.[391] Unlike the courts, Congress can consult a wide range of policy groups and members of the media industry.[392]

Scholars who believe that courts are best equipped to define the scope of the privilege present two reasons to support their view.[393] However, both of the reasons are flawed. First, scholars assert that political compromise, which thwarts the formulation of the best policy, is necessary to pass a bill in Congress.[394] However, it is unclear whether political compromise in fact inhibits the formulation of the most effective policy. Such compromise might in fact create the most effective policy. Also, judges have their own

385. This policy proposal applies to the reporter's privilege generally and not only to the privilege in the context of WikiLeaks.
386. *See supra* note 320 and accompanying text.
387. *See supra* Part I.A.3.
388. *See supra* notes 221, 281–301 and accompanying text.
389. *See supra* note 321 and accompanying text.
390. *See supra* note 21 and accompanying text.
391. *See supra* note 322 and accompanying text.
392. *See supra* note 322 and accompanying text.
393. *See supra* notes 326–28 and accompanying text.
394. *See supra* note 326 and accompanying text.

biases and agendas that can inhibit an adequate policy from being reached. Second, scholars assert that the president will control the policy regarding the privilege.[395] Because Congress usually will not confront the executive branch on such matters, these scholars assert that the statute will not undergo adequate congressional investigation before it is passed.[396] While this might have been true generally throughout history, the president's current ability to control policy in Congress is questionable. Furthermore, because the Department of Justice—which ultimately is under the president's control—would be involved with the bill's enforcement,[397] the president's involvement could strengthen its implementation and enforcement. Thus, Congress should pass a statute creating a reporter's privilege and defining its scope.

2. Privilege Based on the Qualities of the Source

This Note advocates for an approach that defines the scope of the privilege through the source's expectations. The reporter will then assert these expectations to the court on behalf of the source through third-party standing. Thus, this Note promotes Stone's approach and also takes into account the major shortcoming of Stone's approach: the failure to explain how courts could determine the source's intent when the source's identity is supposed to be protected.[398] Under the First Amendment, properly interpreted, sources should not be deterred from giving information to the public to increase the free flow of information.[399] Thus, the privilege should be based on qualities of the source rather than the qualities of the reporter.[400] For a reporter to obtain the privilege (and for the source's identity to be protected) under this proposal: (1) the source must make a confidential disclosure to the reporter believing that the reporter disseminates information to the general public; and (2) the source's purpose must be to disseminate the information to the general public through the reporter.[401]

Because the source cannot directly assert his interests in court as his identity would be revealed,[402] the court should determine the source's purpose in revealing the information to the reporter through the reporter.[403] To obtain the privilege, the reporter will assert the source's expectations on behalf of the source through the procedural mechanism of third-party standing.[404] Although third-party standing has been met with some

395. *See supra* notes 327–28 and accompanying text.
396. *See supra* notes 327–28 and accompanying text.
397. *See* CONG. BUDGET OFFICE, ESTIMATE OF THE FREE FLOW OF INFORMATION ACT OF 2013, at 2 (2013).
398. *See supra* notes 368–69 and accompanying text.
399. *See supra* notes 30–35 and accompanying text.
400. *See supra* notes 361–65 and accompanying text.
401. *See supra* note 367 and accompanying text.
402. *See supra* note 377.
403. *See supra* notes 353–55 and accompanying text.
404. *See supra* notes 353–55 and accompanying text.

resistance in federal courts[405] and has not been commonly applied in this scenario,[406] the ability for a reporter to meet the requirements for third-party standing in the abstract,[407] as well as a court's grant of third-party standing in a similar context,[408] supports the potential for third-party standing to be used here.

This policy improves the current standard on the scope of the privilege in three main ways. First, this policy eliminates the need to define "reporter" under the privilege, which has become extremely difficult given the rise of citizen journalism.[409] Second, because this policy eliminates the need to define "reporter," it creates a more timeless standard that will not need to be updated when the nature of the media changes in the future.[410] Third, this approach creates a more inclusive standard that moves away from a focus on traditional journalism towards a more adequate reflection of the current media landscape.[411] Reporters need not engage in traditional notions of "investigative journalism" to assert the privilege under this policy.[412] The medium in which the reporter publishes his or her information is not relevant.[413]

Although the policy that this Note proposes achieves the goals of Jones's and Papandrea's proposals, it does not endorse either of these proposals. Jones replaces the reporter's privilege with an anonymous speech rights approach to protect anonymous sources.[414] Jones's anonymous speech proposal brings unnecessary complexity and change to the reporter's privilege standard because it introduces the anonymous speech rights doctrine to the scenario that traditionally implicates the reporter's privilege. The law on anonymous speech rights is separate from the law on the reporter's privilege and has its own standards and case law history.[415] The goals that Jones wishes to achieve can be reached through Stone's source-based proposal without bringing a new legal doctrine to the issue and replacing the privilege mechanism.[416]

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405. *See supra* note 354.

406. *See supra* note 355–358 and accompanying text.

407. First, a reporter could establish that a practical impediment exists for the source to assert his own expectations in court because the source wishes to remain anonymous. *See supra* note 359. Second, a reporter could establish an injury-in-fact to satisfy the case-or-controversy requirement because preventing reporters from asserting their sources' interests in this context would harm the reporter's ability to perform his job and therefore result in an injury to the reporter. *See supra* note 359. Third, a reporter seemingly would be an advocate for his source because the reporter's interests would be aligned with the source's interests. *See supra* note 359.

408. *See supra* notes 358–59 and accompanying text.

409. *See supra* notes 334–35 and accompanying text.

410. *See supra* notes 334–35 and accompanying text.

411. *See supra* note 368 and accompanying text.

412. *See supra* note 368 and accompanying text.

413. *See supra* note 368 and accompanying text.

414. *See supra* Part III.A.2.a.

415. *See supra* notes 339–50 and accompanying text.

416. *See supra* notes 333–38, 409–13 and accompanying text.

Likewise, the policy advocated in this Note achieves Papandrea's goals but more adequately reconceptualizes the privilege.[417] This Note does not support Papandrea's proposal because her proposal uses the same framework as the courts and proposed congressional statutes that have addressed the scope of the privilege by attempting to define "reporter." Although Papandrea asserts that her policy is not based on the definition of a reporter but rather on the purpose of the privilege,[418] she still uses the qualities of the person who is disseminating the information or the "reporter" to determine the privilege.[419] Because Papandrea still focuses on the qualities of the reporter, her proposal has the potential to create the same problems that currently exist.

3. Qualified Privilege

This Note advocates for a qualified privilege. Because the privilege should encourage individuals to disclose information to the public, there should be only two narrow exceptions to the privilege: (1) when the source's disclosure is itself an unlawful act; and (2) in the case of an imminent threat to national security.[420] Both of these exceptions are based on the belief that there are some circumstances in which the public's interest in confidential information and its source are far greater than encouraging leakers to disclose information.[421]

When the source's disclosure is itself unlawful, the court should apply a balancing test based on the leak's contribution to public debate versus the harm caused by the leak's disclosure.[422] In these circumstances, the privilege will be upheld only if the unlawful leak discloses information that is of substantial public value.[423] The court should determine whether an unlawful leak is of substantial public value on a case-by-case basis looking at the totality of the circumstances surrounding the disclosure's effects.[424] The court, for example, should look to the following factors: potential physical harm to individuals, potential direct harm to U.S. national security, and exposure of unlawful government action.[425] On one side of the spectrum would be information of little value to public debate, such as the publication of identities of covert CIA agents operating in foreign countries.[426] On the other side of the spectrum would be information of substantial value to public debate, such as the government's use of unlawful interrogation tactics, human rights violations, or the number of

417. *See supra* notes 377, 411–13 and accompanying text.
418. *See supra* note 377 and accompanying text.
419. *See supra* notes 377–79 and accompanying text.
420. *See supra* notes 372–74, 380–81 and accompanying text.
421. *See supra* note 381 and accompany text.
422. *See supra* notes 373–74 and accompanying text.
423. *See supra* note 374 and accompanying text.
424. A discussion of the myriad scenarios that could arise under this exception is outside the scope of this Note.
425. *See* Geoffrey R. Stone, *WikiLeaks, the Proposed SHIELD Act, and the First Amendment*, 5 J. NAT'L SECURITY L. & POL'Y 105, 108 (2011).
426. *See* Stone, *supra* note 28, at 56.

noncombatant deaths during a war.[427] On this side of the spectrum, the disclosure would not directly jeopardize U.S. national security, the lives of U.S. soldiers or other government officials, or innocent lives generally.[428]

In addition, the reporter's privilege should not be granted when the source's identity is relevant to an imminent national security threat.[429] Although some scholars have criticized the imminent national security exception as having the potential to become too expansive,[430] this reason alone is not enough to eliminate the exception—especially when innocent lives could be at stake.

While this proposal will have some costs, such as depriving the factfinder of relevant evidence[431] and revealing classified information,[432] this policy seeks to balance these costs with the benefits of such disclosures. The increased classification of government documents post-9/11 has decreased government transparency.[433] In recent years, leaks of classified government documents have been central to exposing government abuses and unlawful actions during a time of government secrecy.[434] For example, such leaks exposed the treatment of prisoners in Abu Ghraib and the National Security Agency's warrantless wiretapping program.[435] Thus, leaks serve as a check on government power.[436] The policy proposed in this Note seeks to encourage the leaking of information that will expose government abuses. However, the policy advocated in this Note also recognizes that leaks of classified documents should not be encouraged in all circumstances. Certain information needs to remain classified—such as information that, if disclosed, could directly harm U.S. national security and the lives of U.S. government officials or innocent civilians—and the people have the right to obtain the identity of leakers who make such unlawful disclosures.

4. Applying the Policy Presented in This Note to WikiLeaks

WikiLeaks would most likely be able to claim the privilege under this new policy. The sources who leak documents to WikiLeaks most likely: (1) make confidential disclosures to WikiLeaks believing that WikiLeaks disseminates information to the public; and (2) leak documents so that the information will be disseminated to the public through WikiLeaks. The exceptions to the privilege under this new policy seem more problematic for WikiLeaks. WikiLeaks might not be able to claim the privilege if the disclosure of leaked information was itself unlawful or if the information

427. *See id.*
428. *See id.*
429. *See supra* notes 380–81 and accompanying text.
430. *See supra* notes 382–84 and accompanying text.
431. *See supra* note 31.
432. *See supra* notes 138–39 and accompanying text.
433. *See supra* notes 144–64 and accompanying text.
434. *See* Papandrea, *supra* note 194, at 121.
435. *Id.*
436. *See id.*

concerned an imminent national security threat. However, if the disclosure of leaked documents is itself unlawful, WikiLeaks would still likely be able to obtain the privilege if the information that WikiLeaks discloses is of substantial public value. For example, WikiLeaks would have to disclose the identification of a source who disclosed the names of Afghan informants to the United States, as occurred during the Afghan War Diaries release, because this disclosure was unlawful and had the potential to be a direct threat to the informants' lives.[437] However, WikiLeaks would be able to obtain the privilege if the unlawful leak solely revealed information about human rights abuses and the number of noncombatant deaths in the Iraq War, as was revealed during the Iraq War Logs.[438] Moreover, although it seems plausible that WikiLeaks could receive information regarding an imminent national security threat because WikiLeaks has received classified government national security documents, WikiLeaks has yet to make such a disclosure. Thus, WikiLeaks likely will be able to obtain the privilege in most circumstances under this Note's proposed policy.

CONCLUSION

The current federal reporter's privilege is rife with conflicts.[439] Even for traditional journalists, the reporter's privilege is unclear and inconsistent.[440] The rise of citizen journalism brings even more challenges to the privilege because it is more difficult to define who is a reporter in today's media landscape.[441] The debate regarding whether WikiLeaks may claim the privilege under the current law exemplifies the challenges that new media brings to the reporter's privilege.[442] Given changes in the media landscape and the increased classification of government documents, organizations like WikiLeaks do not seem to be going away.[443] Thus, these inconsistencies and shortcomings should not remain unaddressed.

Congress should pass a statute to bring much needed consistency and clarity to the reporter's privilege. Specifically, Congress should create a qualified privilege that is determined by examining the source's expectations. The reporter would assert the source's intent in court on behalf of the source through third-party standing. This approach would adequately address the problem of defining who is a reporter under the privilege, create a standard that accommodates citizen journalists, and achieve the privilege's overarching goals. With this new reporter's privilege, WikiLeaks and its successors would have a clear standard to protect them from revealing their sources. This clear standard would encourage WikiLeaks and organizations like WikiLeaks to continue to

437. *See* Peters, *supra* note 15, at 684.
438. *See supra* notes 3–4, 426–28 and accompanying text.
439. *See supra* Part I.A.
440. *See supra* Part I.A.
441. *See supra* Part II.
442. *See supra* Part II.
443. *See supra* Part I.B.1–2.

disseminate leaked information to the public to expose government abuses—contributing to public discourse, enhancing democratic self-governance, and ultimately achieving the societal values that the reporter's privilege was meant to protect.