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Article

Avalanche or Undue Alarm? An Empirical Study of Subpoenas Received by the News Media

RonNell Andersen Jones†

In 2006, Mark Fainaru-Wada, a reporter for the *San Francisco Chronicle*, sat down with his two young children to break some bad news: he likely would be spending the holidays in jail.[1] He had refused to reveal the name of a confidential source when subpoenaed to do so, and a federal district court judge had found him in contempt and sentenced him to eighteen months in federal prison.[2] Journalists across the country were outraged, but not wholly surprised.[3] This, they said, was part of an alarming trend—an "avalanche" of recent cases in which members of the media had faced subpoenas seeking material they did not believe they should be compelled to provide.

Across the country, a deputy attorney general was testifying in a congressional hearing.[4] The avalanche, he said, was

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1. Nick Cafardo, *Only Integrity Is Revealed: Judge Plays Hardball but Reporter Won't Give*, BOSTON GLOBE, Sept. 24, 2006, at C13.

2. *See* Bob Egelko, *Silence Means Prison, Judge Tells Reporters*, S.F. CHRON., Sept. 22, 2006, at A1.

3. *See* Joe Garofoli, *2 Chronicle Reporters at Center of Media, Government Standoff*, S.F. CHRON., Sept 20, 2006, at A1.

4. *Reporters' Privilege Legislation: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 2–8 (2006) [hereinafter *2006 Senate Judiciary Hear-*

imaginary—built of rhetoric and fear generated from a handful of exceptionally high-profile cases in which reporters from large national news media asserted a reporter's privilege in response to subpoenas and lost.[5] In reality, reporters were being subpoenaed only rarely, in numbers and scope not warranting any major federal legislation.[6]

For more than thirty years, a legislative battle has raged over the need for a federal shield law for journalists. But this battle, which has turned largely on assertions about the frequency of media subpoenas, has been fought in the absence of any useful data on the question. As hearings on Capitol Hill continue to reverberate with proponents' allegations of high numbers of subpoenas and opponents' allegations of low numbers of subpoenas, a neutral, empirical assessment of the number of subpoenas actually received by members of the mainstream press is completely missing from the dialogue. This Article is designed to close that gap. It offers both an overview of the modern debate on reporter's privilege and a report on the 2007 Media Subpoena Survey, a nationwide survey of newspaper editors and television news directors conducted by this Article's author. The survey aimed to assess the frequency and impact[7] of media subpoenas by tallying the self-reported numbers of subpoenas received during 2006 at daily newspapers and network television news affiliates, and by comparing those numbers to similar data collected before the recent spate of high-profile cases.

The survey data reveal that, while the numbers of media subpoenas may not constitute an avalanche in scale, they do appear to justify federal legislation. Overall increases in subpoenas in the last five years are not as drastic as some media organizations have contended, but the number, scope, and nature of subpoenas—particularly those in federal proceedings and those related to confidential information—appear to be significantly broader than opponents have claimed, suggesting that the alarm is not entirely undue.

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ings] (statement of Paul J. McNulty, Deputy Att'y Gen. of the United States).

5. *Id.*

6. *Id.*

7. The data on subpoena impact are presented in a separate article. *See* RonNell Andersen Jones, Media Subpoenas: Impact and Perception in American Newsrooms (2008) (unpublished working paper, on file with the *Minnesota Law Review*) [hereinafter Impact and Perception].

Part I of the Article provides a historical context for the issue of reporter's privilege and describes the dire need for an empirical study on media subpoenas. Part II describes the study that was designed to test the conventional wisdom about the recent wave of high-profile cases and to contribute empirical data to the ongoing federal legislative debate. Part III sets forth the results of the survey, divided into five major categories: (1) Subpoena-Frequency Data, describing the number and distribution of subpoenas reported; (2) Federal-Subpoena Data, focusing on the numbers that are most significant to the current congressional debate; (3) Confidential-Material Data, describing trends in data seeking source names or other information obtained under a promise of confidentiality; (4) Shield-Law Data, comparing the experiences of those organizations protected by state shield laws and those that are not; and (5) Additional Data, including information about who is issuing subpoenas, what the subpoenas are seeking, and how the media responds to them. Part IV summarizes the author's conclusions.

I. THE NEED FOR THE STUDY: THE MODERN HISTORY OF REPORTER'S PRIVILEGE AND FEDERAL SHIELD LAW PROPOSALS

A. THE TREATMENT OF REPORTER'S PRIVILEGE BY COURTS

1. *Branzburg v. Hayes*

The modern story of reporter's privilege begins with the case of *Branzburg v. Hayes*,[8] a 1972 Supreme Court decision in which a deeply divided Court held that there was no privilege under the First Amendment for journalists to refuse to testify before a grand jury.[9] The case launched one of the most remarkable legal developments in the history of media law, with the creative attorneys of a then-popular press turning a losing decision into a winning line of precedent that lasted for three decades.

The named petitioner in the case was Paul Branzburg, a reporter for the *Louisville Courier-Journal*, who wrote two stories about drug use and drug dealers in Kentucky and then received a subpoena to testify before a grand jury about his ob-

8. 408 U.S. 665 (1972).

9. *Id.* at 667.

servations.[10] Branzburg's case was consolidated with the cases of two other reporters who in separate incidents had been subpoenaed to testify before grand juries about the activities of the Black Panthers.[11] The Supreme Court split 5-4, or, more accurately, 4-1-4,[12] with Justice Lewis Powell providing the critical fifth vote for the majority's denial of the constitutional privilege.[13] Powell did not join the plurality opinion authored by Justice Byron White, which flatly rejected the argument that the subpoenas implicated First Amendment concerns.[14]

The *Branzburg* dissenters would have recognized a qualified privilege rooted in the First Amendment.[15] Justice Potter Stewart, joined by Justices William Brennan and Thurgood Marshall,[16] argued that a journalist should be privileged from revealing the identity of a confidential source unless the government is able to

> (1) show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of the law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.[17]

Justice Powell's brief, tie-breaking, and legendarily nebulous[18] concurrence agreed that the petitioners were

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10. *Id.* at 667–70.

11. *Id.* at 672–79 (describing *In re* Pappas, 402 U.S. 942 (1971), and United States v. Caldwell, 402 U.S. 942 (1971)).

12. *Id.* at 665.

13. *Id.* at 709 (Powell, J., concurring).

14. Justice White noted that the case did not explicitly involve a prior restraint, a limitation on what the press might publish, an order compelling the press to publish something, or punishment for the publication of particular content. *See id.* at 681 (majority opinion). Justice White also emphasized that the press was not expressly "forbidden or restricted" from using confidential sources and that, given the critical importance of grand jury subpoenas, the demands of justice required that journalists be no more privileged than ordinary citizens. *Id.* at 681–82 ("The sole issue before us is the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime. Citizens generally are not constitutionally immune from grand jury subpoenas; and neither the First Amendment nor any other constitutional provisions protect the average citizen from disclosing to a grand jury information that he has received in confidence.").

15. *See id.* at 743 (Stewart, J., dissenting).

16. Justice Douglas dissented separately, calling for an absolute, unqualified privilege. *Id.* at 711–12 (Douglas, J., dissenting).

17. *Id.* at 743 (Stewart, J., dissenting).

18. Scholars and commentators have puzzled for years over the riddle of Justice Powell's seemingly confused effort to stake out a middle ground. *See,*

unprotected by a constitutional privilege,[19] but emphasized the narrowness of the holding.[20] He stressed that reporters subpoenaed for purposes of harassment are differently situated, and called for a balancing of the obligation of all citizens to give relevant testimony with the constitutional freedom of the press.[21] "The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources," he wrote.[22] "In short, the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection."[23]

Seizing upon that language, media attorneys crafted an argument that legitimate First Amendment interests required a privilege for journalists in a wide variety of cases, and that *Branzburg* was limited only to its very facts: assertions of reporter's privilege in the grand jury setting.[24] For three decades

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e.g., John D. Castiglione, *A Structuralist Critique of the Journalist's Privilege*, 23 J.L. & POL. 115, 121 (2007) (calling Justice Powell's opinion a "contrarian concurrence"); James C. Goodale, Branzburg v. Hayes *and the Developing Qualified Privilege for Newsmen*, 26 HASTINGS L.J. 709, 709 (2004) ("opaque"); Monica Langley & Lee Levine, Branzburg *Revisited: Confidential Sources and First Amendment Values*, 57 GEO. WASH. L. REV. 13, 36 (1988) ("enigmatic"); Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards a Realistic Right to Gather Information in the Information Age*, 65 OHIO ST. L.J. 249, 278 n.90 (2004) ("ambiguous"); Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 95 n.191 (2005) (calling *Branzburg* a "notorious example" of the "bad practice" of "casting the essential fifth vote for the 'majority' opinion while also writing a separate opinion qualifying the Court's opinion"). The *Branzburg* dissenters called the opinion "enigmatic," but noted that it "g[ave] some hope of a more flexible view in the future." *Branzburg*, 408 U.S. at 725 (Stewart, J., dissenting). Recently discovered notes on the case from Justice Powell's papers indicate that the Justice did not, in fact, believe that there should be a constitutionally protected reporter's privilege based on the First Amendment, and that he envisioned something more "analogous to an evidentiary [privilege]." Adam Liptak, *A Justice's Scribbles on Journalists' Rights*, N.Y. TIMES, Oct. 7, 2007, § 4 (Week in Review), at 4.

19. *See Branzburg*, 408 U.S. at 709 (Powell, J., concurring).

20. *Id.*; *see also* Saxbe v. Wash. Post Co., 417 U.S. 843, 859–60 (1974) (Powell, J., concurring) ("[A] fair reading of the majority's analysis in *Branzburg* makes plain that the result hinged on an assessment of the competing societal interests involved in that case rather than on any determination that First Amendment freedoms were not implicated.").

21. *Branzburg*, 408 U.S. at 710 (Powell, J., concurring).

22. *Id.* at 709.

23. *Id.* at 710.

24. *See* 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, 19 (2006) ("[F]or thirty-two years, many subpoenaed reporters and their lawyers convinced courts all over the country that

after *Branzburg*, a strong majority of state and federal courts found some form of qualified First Amendment or common-law privilege embodied in Justice Powell's concurrence. Indeed, within a decade,[25] nearly every federal circuit had interpreted that case to give rise to some form of qualified reporter's privilege,[26] and federal courts across the country had consistently recognized the existence of a First Amendment-based privilege in both civil and criminal cases.[27] State courts followed suit in finding a qualified privilege,[28] either as a matter of common law, or as a constitutional matter relying either on Powell's concurrence, or on the reporter-friendly standards of the applicable federal circuit. Some also recognized such a privilege rooted in state constitutional law.[29] The precise scope of the

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Justice Powell's concurrence represented the true majority view.").

25. *See* John E. Osborn, *The Reporter's Confidentiality Privilege: Updating the Empirical Evidence After a Decade of Subpoenas*, 17 COLUM. HUM. RTS. L. REV. 57, 67 (1985) ("Many decisions in the wake of *Branzburg* have proven more favorable toward the press, as lower courts strive to reconcile that decision's holding with their own inclination to afford a measure of first amendment protection for the media. The result has been the development of a flexible 'qualified' privilege, where courts apply varying degrees of protection depending on the factual context in which a dispute arises.").

26. *See, e.g.*, United States v. Caporale, 806 F.2d 1487, 1504 (11th Cir. 1986); LaRouche v. Nat'l Broad. Co., Inc., 780 F.2d 1134, 1139 (4th Cir. 1986); Zerilli v. Smith, 656 F.2d 705, 710–11 (D.C. Cir. 1981); Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 595–99 (1st Cir. 1980); Miller v. Transamerican Press, Inc., 621 F.2d 721, 725 (5th Cir. 1980); Riley v. City of Chester, 612 F.2d 708, 715 (3d Cir. 1979); Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 438 (10th Cir. 1977); Farr v. Pitchess, 522 F.2d 464, 467–68 (9th Cir. 1975); Baker v. F & F Inv., 470 F.2d 778, 779–80 (2d Cir. 1972); Cervantes v. Time, Inc., 464 F.2d 986, 992–93 (8th Cir. 1972). For an in-depth discussion of circuit cases and their readings of *Branzburg*, see Kristina Spinneweber, Branzburg, *Who? The Existence of a Reporter's Privilege in Federal Courts*, 44 DUQ. L. REV. 317, 323–30 (2006) ("*Branzburg* has been effectively limited to the grand jury setting.").

27. Only the Sixth Circuit gave a bare reading to Justice White's plurality opinion. *See* Storer Commc'ns v. Giovan (*In re* Grand Jury Proceedings), 810 F.2d 580, 584 (6th Cir. 1987) (emphasizing that Justice White's opinion in *Branzburg* "declin[ed] to recognize the existence of a first amendment reporter's 'testimonial privilege that other citizens do not enjoy,'" and refusing to "resurrect" the privilege as a qualified one (quoting *Branzburg*, 408 U.S. at 690)).

28. *See, e.g.*, State v. Sandstrom, 581 P.2d 812, 814–15 (Kan. 1978) (applying *Branzburg* and opinions from various other state courts); State *ex rel.* Classic III Inc. v. Ely, 954 S.W.2d 650, 653–60 (Mo. Ct. App. 1997) (relying on various state and federal cases, including *Branzburg*); State v. St. Peter, 315 A.2d 254, 256 (Vt. 1974) (citing *Branzburg*); Brown v. Commonwealth, 204 S.E.2d 429, 431 (Va. 1974) (same).

29. *See, e.g.*, *In re* Contempt of Wright, 700 P.2d 40, 45 (Idaho 1985); Winegard v. Oxberger, 258 N.W.2d 847, 852 (Iowa 1977); Opinion of the Justices, 373 A.2d 644, 647 (N.H. 1977); Zelenka v. State, 266 N.W.2d 279, 286–87

privilege varies, but ordinarily calls for a balancing of interests, taking into consideration such factors as the type of controversy at issue; whether the information sought is critical for the prosecution or defense of the case; whether the information goes to the heart of the matter; whether the information is relevant and material; and whether the party seeking the information from a member of the media has exhausted nonmedia alternative sources.[30]

2. *McKevitt v. Pallasch*

Notwithstanding the significant success that media attorneys had in invoking a qualified privilege after *Branzburg*, recent developments have reminded these attorneys that what the courts give, the courts may take away. In 2003, one particularly prominent federal appellate judge authored an opinion that was seen by many as marking the beginning of the end for the court-created privilege.[31]

In *McKevitt v. Pallasch*,[32] three Chicago newspaper reporters writing the biography of an informant who had infiltrated a Northern Ireland terrorist organization challenged a court order to produce tape recordings of their interviews with the informant.[33] The reporters, citing *Branzburg*, argued that they were protected from compelled disclosure by a federal reporter's privilege rooted in the First Amendment.[34]

A three-judge panel of the United States Court of Appeals for the Seventh Circuit refused to stay the district court's order that the tapes be produced.[35] Writing for the panel, Judge Richard Posner held that a subpoena for material not obtained under a promise of confidentiality could not raise First Amendment issues.[36] Posner roundly criticized the journalist-

(Wis. 1978).

30. *See, e.g.*, *In re* John Doe Grand Jury Investigation, 574 N.E.2d 373, 375 (Mass. 1991); *Ely*, 954 S.W.2d at 655; Hopewell v. Midcontinent Broad. Corp., 538 N.W.2d 780, 782 (S.D. 1995); State *ex rel.* Green Bay Newspaper Co. v. Circuit Court, 335 N.W.2d 367, 372–74 (Wis. 1983).

31. *See, e.g.*, Michael Miner, *Reporter's Privilege in Peril*, CHI. READER, Dec. 10, 2004, http://www.chicagoreader.com/hottype/2004/041210_1.html.

32. 339 F.3d 530 (7th Cir. 2003).

33. *Id.* at 531.

34. *Id.*

35. *Id.* at 535.

36. *Id.* at 533 ("When the information in the reporter's possession does not come from a confidential source, it is difficult to see what possible bearing the First Amendment could have on the question of compelled disclosure.").

friendly readings of *Branzburg* adopted by courts across the country: "Some of the cases that recognize the privilege . . . essentially ignore *Branzburg*"; some "treat the 'majority' opinion in *Branzburg* as actually just a plurality opinion"; and "some audaciously declare that *Branzburg* actually created a reporter's privilege."[37] Thus, Judge Posner blew a bold gust of wind at the neatly constructed house of cards that media attorneys had built out of *Branzburg*.[38]

Posner questioned why there needed to be "special criteria [for a judge's review of a subpoena] merely because the possessor of the documents or other evidence sought is a journalist."[39] Instead, he said, "rather than speaking of privilege, courts should simply make sure that a subpoena duces tecum directed to the media, like any other subpoena duces tecum, is reasonable in the circumstances, which is the general criterion for judicial review of subpoenas."[40] *Branzburg* itself had said so: reporters are just like everyone else.

McKevitt has yet to bring about a full-scale retreat by courts from their recognition of a *Branzburg*-based qualified privilege.[41] However, as the first major opinion in three decades

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37. *Id.* at 532.

38. *Id.* ("The approaches that these decisions take to the issue of privilege can certainly be questioned."). Judge Posner declared that cases citing *Branzburg* in recognizing a reporter's privilege for confidential sources were surprising and that those recognizing a privilege for information not obtained under a promise of confidentiality were "skating on thin ice." *Id.* at 532–33.

39. *Id.* at 533.

40. *Id.*

41. As of September 2008, only two circuit courts and two district courts outside of the Seventh Circuit have cited *McKevitt*. *See In re* Grand Jury Subpoena, Judith Miller, 438 F.3d 1141, 1177 (D.C. Cir. 2006) (Tatel, J., concurring) (distinguishing *Branzburg* by saying that *McKevitt* "involved a criminal defendant's effort to obtain nonconfidential records from the biographers of a government witness, not waiver of confidentiality by a previously unidentified source"); *In re* Special Proceedings, 373 F.3d 37, 45, 47 (1st Cir. 2004) (noting that First Circuit cases "are in principle somewhat more protective" than Judge Posner's relevance and reasonableness requirements in *McKevitt* but upholding a contempt order under the First Circuit precedent); Sioux Biochem., Inc. v. Cargill, Inc., 410 F. Supp. 2d 785, 805 (N.D. Iowa 2005) (citing *McKevitt* for a different point); N.Y. Times Co. v. Gonzales, 382 F. Supp. 2d 457, 485, 487 (S.D.N.Y. 2004) (recognizing the existence of *McKevitt*, but noting that a privilege may still be found through "'a case by case evaluation and balancing of the legitimate competing interests of the newsman's [privilege]'" (quoting United States v. Burke, 700 F.2d 70, 77 (2d Cir. 1983))), *vacated and remanded by* N.Y. Times Co. v. Gonzales, 459 F.3d 160, 163, 169 (2d Cir. 2006) (refusing to recognize whether there actually is a common law privilege without citing *McKevitt* because even if there is, it would be qualified, and the government's need in this case is sufficient to overcome any such privilege). Even

to seriously question the qualified-privilege progeny of *Branzburg*, it was not without impact. In part because Judge Posner is seen as an "unusually influential judge,"[42] and in part because his opinion in *McKevitt* came at a time in which journalists were losing previously widespread public support[43] and in the midst of several other high-profile privilege cases,[44] commentators suggested that the opinion "changed the landscape"[45] and that it served as a warning that the qualified, court-created privilege the media had built for itself might be short-lived.[46]

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within the Seventh Circuit, *McKevitt*'s impact has not completely eliminated protection for reporters. *See, e.g.*, Hobley v. Burge, 223 F.R.D. 499, 504 (N.D. Ill. 2004). In *Hobley*, the court noted that "*McKevitt* is the law in this Circuit, which this court is bound to follow," *id.* at 502, but went on to find some protection for reporters under the Federal Rules of Civil Procedure and Judge Posner's reasonableness requirement in *McKevitt*. *Id.* at 504; *see also* United States v. Hale, 32 Media L. Rep. 1606, 1608 (N.D. Ind. 2004) (citing *McKevitt* and noting that "the mere fact that [the subpoenaed individual] is a reporter does not automatically render the subpoena unreasonable"). Only one state case, *People v. Combest*, 828 N.E.2d 583, 587 n.3 (N.Y. 2005), has cited *McKevitt*. *Combest* involved a criminal defendant's attempt to obtain nonconfidential sources, and the court held that he had met his burden for disclosure. *Id.* at 587. It cited *McKevitt* in a footnote string cite, noting that the Seventh Circuit does not "recognize the existence of *any* journalist's privilege in the context of a criminal case." *Id.* at 587 n.3.

42. Dalglish & Murray, *supra* note 24, at 37.

43. *See* Impact and Perception, *supra* note 7, 1–2.

44. *See infra* text accompanying notes 172–88; *see also* Dalglish & Murray, *supra* note 24, at 36 (suggesting that, with *McKevitt*, "the perfect storm that devastated the federal reporter's privilege started gathering").

45. Wendy N. Davis, *The Squeeze on the Press: More Courts Are Forcing Reporters to Testify as Judges Reconsider Media Privilege*, A.B.A. J., Mar. 2005, at 23.

46. *See, e.g.*, Paul Brewer, *The Fourth Estate and the Quest for a Double Edged Shield: Why a Federal Reporters' Shield Law Would Violate the First Amendment*, 36 U. MEM. L. REV. 1073, 1090 (2006); Dalglish & Murray, *supra* note 24, at 37, 39 (arguing that *McKevitt* "drastically changed the formulations," that "the media has lost much of the ground it gained since *Branzburg*," and that "[a]ny suggestion that a First Amendment argument has been developing over the past thirty years in the federal courts has been collapsing"); Jane Kirtley, *Will the Demise of the Reporter's Privilege Mean the End of Investigative Reporting, and Should Judges Care if it Does?*, 32 OHIO N.U. L. REV. 519, 520–21 (2006) (citing *McKevitt* as part of a trend of judges "question[ing] whether any kind of constitutional or federal common law privilege exists" and "rejecting the suggestion that the public interest would actually be enhanced by granting rights to the press not enjoyed by the public"); Mary-Rose Papandrea, *Citizen Journalism and the Reporter's Privilege*, 91 MINN. L. REV. 515, 555 (2007) (citing *McKevitt* and noting that "[i]n the last few years, the minority view that Powell's concurring opinion is largely irrelevant has been gaining ground"); Michael D. Saperstein, Jr., *Federal Shield Law: Protecting Free Speech or Endangering the Nation?*, 14 COMMLAW CONSPECTUS

B. FEDERAL SHIELD LAW PROPOSALS

1. Legislative Efforts in the Wake of *Branzburg*

The *Branzburg* majority explicitly noted that, while it was declining to recognize a reporter's privilege as a matter of constitutional doctrine, Congress remained free to craft such a privilege through federal legislation.[47] And in the immediate wake of *Branzburg*, members of Congress attempted to take the Court up on its suggestion.[48] Just one day after the Court handed down its opinion in *Branzburg*, a bill was introduced in the U.S. Senate calling for an absolute reporter's privilege against compulsory testimony in federal and state judicial proceedings.[49] At least three other measures, all proposing a qualified privilege, followed on the heels of this one in the Ninety-Second Congress.[50] In just the first month of the Ninety-Third Congress, fifty-six bills were introduced in the House, while eight bills and one joint resolution were introduced in the Se-

543, 559 (2006) (noting that *McKevitt* "opened a floodgate of litigation in federal courts with a rising tide of holding journalists in contempt"); Leslie Siegel, Note, *Trampling on the Fourth Estate: The Need for a Federal Reporter Shield Law Providing Absolute Protection Against Compelled Disclosure of News Sources and Information*, 67 OHIO ST. L.J. 469, 473 (2006) (citing *McKevitt* for the proposition that "the recent trend has been toward utilizing [*Branzburg*] to refuse to recognize a reporter privilege").

47. Branzburg v. Hayes, 408 U.S. 665, 706 (1972) ("At the federal level, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate.").

48. The post-*Branzburg* efforts were not the first attempts to shepherd a federal shield law through Congress. As early as 1929, Kansas Senator Arthur Capper introduced a bill that would have created a newsman's privilege. *See* 71 CONG. REC. 5832 (1929); Sam J. Ervin, Jr., *In Pursuit of a Press Privilege*, 11 HARV. J. ON LEGIS. 233, 241 n.23 (1974). Numerous other efforts arose between that time and the *Branzburg* case in 1972. *See, e.g.*, S. 1311, 92d Cong. (1971); S. 3552, 91st Cong. (1970); H.R. 16704, 91st Cong. (1970); H.R. 16328, 91st Cong. (1970); S. 1851, 88th Cong. (1963); H.R. 8519, 88th Cong. (1963); H.R. 7787, 88th Cong. (1963); S. 965, 86th Cong. (1959); H.R. 355, 86th Cong. (1959); STAFF OF S. COMM. ON THE JUDICIARY, 89TH CONG., THE NEWSMAN'S PRIVILEGE 62 (Comm. Print 1966); *see also Branzburg*, 408 U.S. at 689 n.28 (recognizing these proposed bills).

49. S. 3786, 92d Cong. (1972).

50. S. 3932, 92d Cong. (1972); S. 3925 Cong. (1972); H.R. 16527, 92d Cong. (1972); *see also* Ervin, *supra* note 48, at 260–63 (describing the legislative flurry in the aftermath of *Branzburg* from the perspective of a senator who sponsored reporter's privilege legislation).

nate.[51] All told, seventy-one bills were introduced in the year immediately following *Branzburg*.[52]

In the extensive House and Senate hearings held between 1972 and 1975,[53] the Department of Justice and representatives of media organizations were at odds over the appropriateness and necessity of a legislative reporter's privilege.[54] Supporters of a shield law contended that subpoenas against the press had increased suddenly and dramatically,[55] "assum[ing] epidemic proportions"[56] in a "calamitous change in the status

51. Ervin, *supra* note 48, at 261.

52. *A Short History of Attempts to Pass a Federal Shield Law*, NEWS MEDIA & L., Fall 2004, at 9 ("At least six bills [were] introduced quickly [after *Branzburg*], and 65 would be introduced in the next year.") [hereinafter *A Short History*]; *see also* MAURICE VAN GERPEN, PRIVILEGED COMMUNICATION AND THE PRESS 148 (1979) (listing congressional sessions before 1975 in which federal shield-law bills were introduced); Davis, *supra* note 45, at 22–23 (quoting the executive director of the Reporters Committee for Freedom of the Press as saying that ninety-nine bills were introduced between 1973 and 1978).

53. *See generally Newsmen's Privilege: Hearings on H.R. 215 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the H. Comm. on the Judiciary*, 94th Cong. (1975) [hereinafter *1975 House Hearings*]; *Newsmen's Privilege: Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 93d Cong (1973) [hereinafter *1973 Senate Hearings*]; *Newsmen's Privilege: Hearings on H.R. 717 Before Subcomm. No. 3 of the H. Comm. on the Judiciary*, 93d Cong. (1973) [hereinafter *1973 House Hearings*]; *Freedom of the Press: Hearing Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 92d Cong. (1972) [hereinafter *1972 Senate Hearings*].

54. *See, e.g.*, *1975 House Hearings*, *supra* note 53, at 6 (statement of Rep. Kastenmeier, Chairman, S. Comm. on Courts, Civil Liberties, and the Administration of Justice) (noting that there is a "considerable difference of opinion between the administration and the media . . . as to the need for a privilege"); *1973 Senate Hearings*, *supra* note 53, at 5 (statement of Sen. Ervin, Chairman, S. Comm. on the Judiciary) ("The Justice Department has argued that while it does not oppose a qualified statutory privilege in principle, it is unnecessary in view of . . . Justice Department guidelines.").

55. *See, e.g.*, *1973 Senate Hearings*, *supra* note 53, at 282 (statement of William F. Thomas, Editor, Los Angeles Times) ("We are in trouble right now, deep trouble . . . . We have become a lawyer's grab bag. . . . We are subpenaed [sic] in every conceivable kind of case, and we never know where the assault is going to come from."); *id.* at 293 (statement of Richard C. Wald, President, NBC News) ("[N]ever in my experience have the difficulties of following my trade been as great as today."); *1973 House Hearings*, *supra* note 53, at 241 (testimony of A. M. Rosenthal, Managing Editor, New York Times) ("We fear that wells of information are drying up, that we are not hearing all we should, and that, therefore, the public is not hearing either."); Ervin, *supra* note 48, at 243 (noting a "rather abrupt shift in . . . attitude"); *id.* at 246 (referencing "the rash of subpoenas"); *id.* at 251 (quoting Senator Thomas H. McIntyre as reacting to "'the recent wave of broad and sweeping subpoenas which have issued from the Justice Department'").

56. *1972 Senate Hearings*, *supra* note 53, at 652 (statement of William M.

quo."[57] Editors testified of a perceived seachange in attitude among prosecutors and others issuing subpoenas, who long had appreciated the special status of the press and declined to use the media as an agent of discovery, but who now had few qualms in seeking compelled evidence or testimony from reporters.[58] Several shield law supporters suggested that initial, highly publicized incidents of federal subpoenas "spread like wildfire to courts throughout the land," buoying other courts and governmental agencies to use compulsory process against the press.[59]

Supporters of federal legislation testified in droves of their individual struggles with newsroom subpoenas, of perceived leaps in overall numbers of subpoenas, and of large news organizations that had received more than one hundred subpoenas in a few years' time.[60] Law professor Vincent Blasi also testified, telling of a pre-*Branzburg* empirical study[61] designed to determine, among other things, how many respondents had been served with subpoenas in conjunction with their reporting.[62] But aside from Blasi's testimony, the evidence presented in legislative hearings was largely anecdotal, and the claims were largely sweeping—that a "rash of subpoenas"[63] was eroding respect for the press as an institution requiring unique protection from subpoenas.[64]

Ware, Chairman, Freedom of Information Comm. of the Associated Press Managing Editors Association).

57. Ervin, *supra* note 48, at 243.

58. For example, *Los Angeles Times* Editor William Thomas stated:

> [W]hat we are simply asking for is a return to where we were before .... We always had an understanding, I think, with prosecutors, there were certain things they couldn't ask of us. They couldn't bring us into court, they couldn't make us serve as an agent of the court, [and] they couldn't get hold of our material. When they made feeble efforts to do so, that is all they were in those days, we told them they were not going to do it and that was the end of it ....

1973 Senate Hearings, *supra* note 53, at 291–92.

59. *1972 Senate Hearings*, *supra* note 53, at 652 (statement of William M. Ware, Chairman, Freedom of Information Comm. of the Associated Press Managing Editors Association).

60. *See* Ervin, *supra* note 48, at 245.

61. *1973 Senate Hearings*, *supra* note 53, at 136–44; *1973 House Hearings*, *supra* note 53, at 127–41.

62. Vince Blasi, *The Newsman's Privilege: An Empirical Study*, 70 MICH. L. REV. 229, 260 (1971).

63. *See, e.g.*, Ervin, *supra* note 48, at 246.

64. *See 1972 Senate Hearings*, *supra* note 53, at 653 (statement of William M. Ware, Chairman, Freedom of Information Comm. of the Associated Press Managing Editors Association).

While the overwhelming weight of congressional hearing testimony in the early- to mid-1970s supported some form of legislative privilege,[65] the lone dissenting views came from the Justice Department, which adamantly opposed an absolute privilege[66] and further argued against even a qualified legislative privilege on a variety of grounds.[67] Notably, the Justice Department consistently argued themes with empirical undercurrents: that the legislation was unnecessary because the number of media subpoenas was in fact minimal, and that a free press was adequately ensured through the Department's Guidelines on Media Subpoenas (the Guidelines).[68]

Promulgated by the Attorney General in 1970, just as the cases that became *Branzburg* worked their way to the United States Supreme Court,[69] these Guidelines remain in force today. They have the stated aim of "provid[ing] protection for the news media from forms of compulsory process, whether civil or criminal, which might impair the news gathering function."[70]

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65. *1973 House Hearings*, *supra* note 53, at 1 (statement of Rep. Kastenmeier, Member, H. Comm. on the Judiciary) ("With the sole exception of the Department of Justice, witnesses at the hearings [before the House Judiciary Committee in 1972], comprising Members of Congress and representatives of organizations, and so forth, favored some form of privilege.").

66. *See 1973 Senate Hearings*, *supra* note 53, at 331 (statement of Robert G. Dixon, Assistant Att'y Gen. of the United States) (arguing that an absolute privilege would "unduly subordinate the vital national interest in the fair and effective administration of justice"); *1973 House Hearings*, *supra* note 53, at 88 (testimony of Roger C. Cramton, Assistant Att'y Gen. of the United States) (expressing opposition to an absolute privilege).

67. *See 1975 House Hearings*, *supra* note 53, at 7–8 (testimony of Antonin Scalia, Assistant Att'y Gen. of the United States).

68. *See, e.g.*, *id.* at 8 (testimony of Antonin Scalia, Assistant Att'y Gen. of the United States) ("I question the benefits that are to be purchased at such cost."); *1973 Senate Hearings*, *supra* note 53, at 334 (testimony of Roger C. Cramton, Assistant Att'y Gen. of the United States) ("[I]t is doubtful whether a statute providing a qualified privilege would have any additional effect, not already accomplished by the guidelines, in insuring [sic] the free flow of confidential information to the press.").

69. Justice White's majority opinion in *Branzburg* referenced the recent institution of the Guidelines, noting that the Attorney General first announced the "Guidelines for Subpoenas to the News Media" in a speech given on August 10, 1970. Branzburg v. Hayes, 408 U.S. 665, 707 n.41 (1972). After that, the Guidelines were laid out in Department of Justice Memorandum No. 692, which was dated September 2, 1970. *Id.* This memo was sent to all United States Attorneys by the Assistant Attorney General in charge of the Criminal Division. *Id.*

70. 28 C.F.R. § 50.10 (2007).

The Guidelines policy, applicable to "all members of the Department in all cases,"[71] dictates that the Attorney General must expressly authorize any subpoena issued to the news media.[72] It calls for a weighing of "the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice,"[73] and requires that "[a]ll reasonable attempts should be made to obtain information from alternative sources before considering issuing a subpoena to a member of the news media."[74]

Critics have argued that the Guidelines are wholly insufficient as a sole source of protection for journalists[75] because they create no right on the part of press members,[76] are not enforced by courts,[77] do not carry any mandatory sanctions for the fail-

71. *Id.*

72. *Id.* § 50.10(e). The relevant provision states that if a member of the news media expressly agrees to provide already published or broadcast material after negotiations with Department officials, the U.S. Attorney may authorize issuance of a subpoena. *Id.*

73. *Id.* § 50.10(a).

74. *Id.* § 50.10(b). Specifically, in criminal cases, the Guidelines indicate that authorization will be granted if there are "reasonable grounds to believe, based on information obtained from nonmedia sources, that a crime has occurred, and that the information sought is essential to a successful investigation—particularly with reference to directly establishing guilt or innocence." *Id.* § 50.10(f)(1). In civil cases, the policy calls for "reasonable grounds, based on nonmedia sources, to believe that the information sought is essential to the successful completion of the litigation in a case of substantial importance." *Id.* § 50.10(f)(2). Except under "exigent circumstances," the Guidelines provide that the use of media subpoenas should be "limited to the verification of published information and to such surrounding circumstances as relate to the accuracy of the published information." *Id.* § 50.10(f)(4). The Guidelines indicate that media subpoenas "should not be used to obtain peripheral, nonessential, or speculative information," *id.* § 50.10(f)(1), and that "[e]ven subpoena authorization requests for publicly disclosed information should be treated with care to avoid claims of harassment." *Id.* § 50.10(f)(5). The policy calls for negotiations with the media in all cases in which a media subpoena is contemplated. *Id.* § 50.10(c).

75. *See* Dalglish & Murray, *supra* note 24, at 35 ("Away from the public eye in Washington, the guidelines remained guidelines, and would have little to no effect if the attorneys issuing the subpoenas did not want to follow them. . . . [W]hile the higher office of the Attorney General maintains that the guidelines are vitally important, the United States Attorneys have the ability to ignore the guidelines as they deem necessary.").

76. *See* 28 C.F.R. § 50.10(n) (stating that the regulations "are not intended to create or recognize any legally enforceable right in any person").

77. *See, e.g.*, *In re* Grand Jury Subpoena, Judith Miller, 397 F.3d 964, 975–76 (D.C. Cir. 2005) ("The guidelines . . . exist to guide the Department's exercise of its discretion in determining whether and when to seek the is-

ure to apply them,[78] and are subject to potentially radical differences in enforcement with changing personnel or changing philosophies of administrations.[79] Nevertheless, at least at the time of their initial promulgation, the policies were welcomed as a potential mechanism for staving off the tide of press subpoenas.[80]

In their testimony in opposition to federal shield law proposals immediately post-*Branzburg*, Justice Department representatives insisted that the Guidelines should serve as the primary mechanism of press protection, arguing against any codification of the Guideline principles and questioning the need for federal legislation.[81] Assistant attorneys general told members of Congress "that at present the guidelines are working satisfactorily and nothing more is needed on the Federal

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suance of subpoenas to reporters, not to confer substantive or procedural benefits upon individual media personnel."); *In re* Shain, 978 F.2d 850, 854 (4th Cir. 1992) (holding that the Guidelines were "of the kind to be enforced internally by a governmental department, and not by courts").

78. *See* 28 C.F.R. § 50.10(n) ("Failure to obtain the prior approval of the Attorney General [before subpoenaing a reporter] may constitute grounds for an administrative reprimand or other appropriate disciplinary action."). The policy does not set forth penalties for violations other than the entire failure to obtain approval. For example, it does not call for disciplinary action for the failure to negotiate with the media prior to issuing the subpoena or for a failure to make reasonable attempts to obtain the information elsewhere; nor does it call for any check on the attorney general's grant of approval. *See id.*

79. *See, e.g.*, *1973 House Hearings*, *supra* note 53, at 99 (statement of Rep. Cohen, Member, H. Comm. on the Judiciary) ("There has been some discussion and concern about the Attorney General's regulations, about the changing personnel and possible changing philosophy of those assuming the position.").

80. *See, e.g.*, Ervin, *supra* note 48, at 252–53 (reporting a perceived "sudden reduction in the number of federal government subpoenas which followed the issuance of the guidelines"). The plurality opinion in *Branzburg* called the Guidelines "a major step in the direction [that members of the media] . . . desire to move" and suggested that they "may prove wholly sufficient to resolve the bulk of disagreements and controversies between press and federal officials." Branzburg v. Hayes, 408 U.S. 665, 707 (1972).

81. *See 1975 House Hearings*, *supra* note 53, at 13 (testimony of Antonin Scalia, Assistant Att'y Gen. of the United States) (arguing that "experience under these guidelines demonstrates that there is no need for statutory proscription at the Federal level"); *1973 Senate Hearings*, *supra* note 53, at 332 (statement of Robert G. Dixon, Assistant Att'y Gen. of the United States) ("[T]he successful experience under the Attorney General's 'Guidelines for Subpoenas to the News Media' . . . demonstrates that legislation governing Federal proceedings is unnecessary at this time."); *1973 House Hearings*, *supra* note 53, at 88 (testimony of Roger C. Cramton, Assistant Att'y Gen. of the United States) (arguing that federal legislation establishing a testimonial privilege for newsmen is unnecessary).

level,"[82] and that the President would "reconsider his position on the need for Federal legislation should it ever become apparent that the Federal guidelines fail to maintain a proper balance between the newsman's privileges and his responsibilities of citizenship."[83] Arguing that the evidence demonstrated there were "no abuses on the part of Federal prosecutors at the present time,"[84] the testimony suggested that members of the media were overreacting,[85] and that the threat of subpoenas was having no real impact on the operations of the press.[86] The Justice Department's position was that the executive could be trusted to abide by the Guidelines and to "pledg[e] [itself] to an atmosphere of negotiation and restraint."[87] Echoing testimony that had been given by other Justice Department representatives at hearings on similar legislation proposed in the previous three years, then-Assistant Attorney General Antonin Scalia told the House Judiciary Committee in 1975 that he could "think of no field in which it is safer to provide a degree of administrative discretion than this field dealing with the special treatment to be accorded to the press."[88] Scalia emphasized that he did not think the free flow of information could "best be achieved by any form of rigid legislative proscription."[89] In-

82. *1973 House Hearings*, *supra* note 53, at 98 (testimony of Roger C. Cramton, Assistant Att'y Gen. of the United States).

83. *Id.* at 88 (citations omitted); *see also 1973 Senate Hearings*, *supra* note 53, at 334 (statement of Robert G. Dixon, Assistant Att'y Gen. of the United States) (setting forth the administration's position that "[s]uch legislation should be adopted . . . only after the necessity for it becomes apparent").

84. *1973 House Hearings*, *supra* note 53, at 98 (testimony of Roger C. Cramton, Assistant Att'y Gen. of the United States); *see also 1973 Senate Hearings*, *supra* note 53, at 332 (statement of Robert G. Dixon, Assistant Att'y Gen. of the United States) ("To the best of our knowledge, no abuses have occurred regarding subpenas [sic] authorized under the guidelines.").

85. *See 1973 House Hearings*, *supra* note 53, at 94 (testimony of Roger C. Cramton, Assistant Att'y Gen. of the United States) ("I think there is a tendency of any institution to be predominantly interested in its own problems. I would point out that the press, of all interest groups in our society, is in the best position to protect itself.").

86. *See id.* at 97 ("It seems to me that lots of confidential and private material is turning up in the newspapers every day. I don't see that the existing tension and uncertainty about what the law is is harming a vigorous and robust press.").

87. *See 1973 Senate Hearings*, *supra* note 53, at 336 (statement of Robert G. Dixon, Assistant Att'y Gen. of the United States).

88. *1975 House Hearings*, *supra* note 53, at 22 (testimony of Antonin Scalia, Assistant Att'y Gen. of the United States).

89. *Id.* at 12; *see also id.* at 14 (calling for reliance on the "wise exercise of administrative discretion" with legislative inquiries, as necessary).

stead, he said, "the only satisfactory protection is a constant advertence to the particular sensitivity of this area by law enforcement agencies themselves. At the Federal level, this has been assured by the Justice Department guidelines."[90]

The Justice Department presented numerical data to support its arguments. In sharp contrast to testimony by media representatives referencing great increases in subpoenas, the Department argued that as an empirical matter, the problem of media subpoenas was not arising with any frequency.[91] In both legislative hearing testimony and submitted reports, the Justice Department took the position "that requests for subpoenas to newsmen occur only infrequently under the Guidelines,"[92] and stressed what it called the "very small portion of the total news in the newspapers that can ever give rise to the question of compulsory process to a newsman"[93] and the "small number of situations in which newsmen have been compelled to testify."[94] The Justice Department also produced a report describing the Department's activity under its Guidelines between August 1970 and March 1973, indicating that subpoenas had been requested "in only thirteen situations and eleven of these situations involved newsmen who, though willing to testify or produce documents, preferred to follow the formal procedure for the issuance of a subpoena."[95]

The Department recited these same numbers and presented the same memorandum two years later as evidence of the lack of need for the legislation, downplaying an admittedly stark increase in numbers in the two years since the memorandum had been produced.[96] Scalia insisted, as those before him

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90. *Id.* at 12.

91. *See 1973 House Hearings*, *supra* note 53, at 578–83 (Memorandum from Roger C. Cramton, Assistant Att'y Gen. of the United States, the Dep't of Justice (Oct. 4, 1972)).

92. *Id.* at 578 (Letter from Roger C. Cramton, Assistant Att'y Gen. of the United States, to Rep. Robert W. Kastenmeier, Member, H. Comm. on the Judiciary (Oct. 5, 1972)).

93. *Id.* at 95.

94. *Id.*

95. *Id.* at 579; *see also 1973 Senate Hearings*, *supra* note 53, at 332 (statement of Robert G. Dixon, Assistant Att'y Gen. of the United States) (citing the same statistics).

96. *See 1975 House Hearings supra*, note 53, at 13, 15. When asked by a legislator for updated numbers, Assistant Attorney General Scalia indicated that there had been forty-six subpoenas issued under the guidelines in the two-year period since March 1973. *Id.* at 13. Pressed for details on this apparent tripling of the subpoena numbers, he said the matters were "still being

had, "that experience under these guidelines demonstrates that there is no need for statutory proscription at the Federal level."[97]

2. Subsequent Legislative Efforts

Ultimately, none of the bills in the surge just after *Branzburg* ever went to a floor vote in either house of Congress. It appears that only one bill was voted out of committee.[98] The legislative fervor of the *Branzburg* aftershocks diminished, in no small part because of the reading given to *Branzburg* by lower courts—many of whom, within a few years of the Supreme Court's decision, had held that the opinion supported a qualified privilege for journalists in some circumstances.[99] In spite of the decreased sense of urgency on the issue, the remainder of the 1970s and the 1980s saw several federal legislative privilege proposals that, like their predecessors, never made it to the floor.[100]

For a time, legislative efforts had their detractors within the media itself.[101] Many believed that anything less than an absolute privilege—especially in the case of confidential

checked upon" and that he "d[id] not know all [he] would like to know about them." *Id.*

97. *Id.*

98. H.R. 215, 94th Cong. (1975); *see* VAN GERPEN, *supra* note 52, at 169–70.

99. *See supra* Part I.A.1; *see also 1975 House Hearings*, *supra* note 53, at 95 (testimony of Jack Nelson, Member, Executive Comm. for Reporters Committee for Freedom of Press) ("[T]he *Branzburg* case has not proved to be the disaster that some feared."); Ervin, *supra* note 48, at 274 (noting a "declining sense of urgency" and suggesting that "the willingness of the courts to limit the Supreme Court decision under certain circumstances, plus the apparent change of heart by prosecutors, served to muffle the hue and cry in Congress").

100. *See, e.g.*, H.R. 368, 96th Cong. (1979); H.R. 14309, 95th Cong. (1978); H.R. 562, 94th Cong. (1975); H.R. 172, 94th Cong. (1975); H.R. 15242, 93d Cong. (1974); H.R. 14981, 93d Cong. (1974); *see also A Short History*, *supra* note 52, at 9 (describing a failed federal shield law proposed by the American Bar Association in 1974, an unsuccessful lobbying effort by the International Executive Board of the Newspaper Guild in 1977, three pieces of legislation introduced in the House of Representatives in 1978 and 1979, a bill introduced by Representative Crane in January 1981, and a 1987 movement in which Senator Reid "circulate[d] [a] draft of [a] federal shield law to media groups for comments").

101. *See 1973 House Hearings*, *supra* note 53, at 358 (statement of Clark R. Mollenhoff, Washington Bureau Chief, Des Moines Register) ("Any government role . . . has the major drawback of permitting government to have 'a little control' over the press."); Vermont Royster, Op-Ed., *Dubious Shield*, WALL ST. J., Feb. 28, 1973, at 10, *reprinted in 1973 Senate Hearings*, *supra* note 53, at 642–44 (expressing doubts as to the remedy proposed).

sources—would put the press at too great a risk,[102] and they fought earnestly against others within the industry who welcomed at least a qualified privilege.[103] Some worried that inviting governmental regulation would be a tacit recognition of the government's right to regulate the press in other ways, or that permitting the government to define "the press" for purposes of the privilege[104] could lead to further governmental control or licensing of the press.[105] Reporter Lewis H. Lapham colorfully compared media efforts to lobby Congress for a shield law to "convicts building gallows from which they will hang."[106] These conflicting fears made lobbying efforts "a disorganized mess."[107]

But by 2004, in response to the beginnings of a string of high-profile cases in which a reporter's privilege was unsuccessfully asserted[108] and to signals that courts might retreat from interpretations of *Branzburg* that were favorable to the press,[109] the issue of a federal reporter's privilege was moved to the front burner again, and even some who had spoken against federal legislation warmed to the idea.[110]

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102. *See 1973 House Hearings*, *supra* note 53, at 536 (statement of Elmer W. Lower, President, ABC News) (arguing for an absolute privilege); *id.* at 538 (statement of Robert G. Fichenberg, Chairman, Freedom of Information Committee, American Society of Newspaper Editors) ("[A] qualified shield law will not provide the protection that is needed.").

103. *See* Dalglish & Murray, *supra* note 24, at 18–19.

104. Stephen Bates, *The Reporter's Privilege, Then and Now*, 38 SOC'Y 41, 50 (2001) ("Defining a journalist is dicier.").

105. *See* Bree Nordenson, *The Shield Bearer*, COLUM. JOURNALISM REV., May/June 2007, at 48, 50 (quoting Floyd Abrams, First Amendment Att'y, stating that asking legislatures for help is "'dangerous ideologically and practically . . . . Ideologically because we shouldn't be asking them for favors and practically because God knows what they'll do.'"); *see also* Jane Kirtley, *Investigation or Illusion? The Secretive Probe into the Leak of Valerie Plame's Name Has Done Little More Than Threaten the Rights of the Press*, AM. JOURNALISM REV., Dec. 2004/Jan. 2005, at 66.

106. VAN GERPEN, *supra* note 52, at 167 (quoting Lewis H. Lapham, *The Temptation of a Sacred Cow*, HARPER'S, Aug. 1973, at 43).

107. Dalglish & Murray, *supra* note 24, at 19; *see also id.* at 18 ("None [of the early proposals] passed—largely because 'the media' could not decide what it wanted.").

108. *See infra* Part I.C.

109. *See supra* Part I.A.2; *see also infra* Part I.C.

110. *See, e.g.*, Douglas McCollam, *Attack at the Source: Why the Plame Case Is So Scary*, COLUM. JOURNALISM REV., Mar./Apr. 2005, at 29, 36 ("[Those in the media industry] say the media are united as never before in seeking to get a shield law through Congress."); Nordenson, *supra* note 105, at 48, 50 ("[T]he media's consensus on the need for legislative action is new."); Tony Pederson, *Warming Up to the Idea of a Federal Shield Law*, NEWS MEDIA & L., Winter 2005, at 8.

In November 2004, Senator Christopher Dodd introduced the Free Speech Protection Act of 2004,[111] a bill that would have provided reporters with an absolute privilege against disclosing sources, whether or not the sources had been promised confidentiality.[112] The bill also would have conferred a qualified privilege upon reporters when they were subpoenaed for notes, documents, photographs, and other information obtained in the course of newsgathering.[113] The quest for legislation had begun again in earnest, and what followed was a flurry of legislative proposals not seen since *Branzburg*'s immediate aftermath. In the 109th Congress alone, five bills were proposed in the House[114] and the Senate.[115]

For the first time in three decades, Washington buzzed with talk of a possible legislative privilege for journalists. None of the proposals between 2004 and 2006 made it out of committee, but they generated an intense amount of heated dialogue in hearings on Capitol Hill.[116] In 2007, the momentum for the law built, and in October 2007, proponents of a federal shield claimed their greatest victory to date when the House of Representatives passed the Free Flow of Information Act of 2007,

111. S. 3020, 108th Cong. (2004).

112. *Id.* § 4(b).

113. *Id.* § 4(a). Senator Dodd introduced the legislation in the closing hours of the 108th Congress and reintroduced the bill in the 109th Congress. S. 369, 109th Cong. (2005) (referred to the Committee on the Judiciary).

114. Representative Pence proposed the Free Flow of Information Act, H.R. 581, 109th Cong. (2005), in the House in February 2005. It was reintroduced in July as H.R. 3323, 109th Cong. (2005). The bill called for a near-absolute privilege for confidential information and a qualified privilege for nonconfidential information. For a comparison of the coverage of the different bills, see Anthony L. Fargo, *Analyzing Federal Shield Law Proposals: What Congress Can Learn from the States*, 11 COMM. L. & POL'Y 35, 50–55 (2006).

115. In the Senate, in addition to Senator Dodd's reintroduced measure, Senator Lugar introduced the Free Flow of Information Act, S. 340, 109th Cong. (2005), in February 2005, which was substantively identical to H.R. 581, 109th Cong. (2005). That bill was reintroduced in July 2005 as S. 1419, 109th Cong. (2005), which was identical to H.R. 3323, 109th Cong. (2005). The following year, Lugar introduced yet another Free Flow of Information Act. S. 2831, 109th Cong. (2006). For an in-depth review of the Free Flow of Information Act of 2006, see generally Mark Gomsak, Note, *The Free Flow of Information Act 2006: Settling the Journalists' Privilege Debate*, 45 BRANDEIS L.J. 597, 606–22 (2007).

116. *See, e.g.*, *2006 Senate Judiciary Hearings*, *supra* note 4; *Hearing on Reporters' Privilege Legislation Before S. Comm. on the Judiciary*, 109th Cong. (Oct. 19, 2005) (on file with the *Minnesota Law Review*) [hereinafter *October 2005 Hearing*]; *Hearing on Reporters' Shield Legislation Before S. Comm. on the Judiciary*, 109th Cong. (July 20, 2005) (on file with the *Minnesota Law Review*) [hereinafter *July 2005 Hearing*].

H.R. 2102, by a vote of 398-21.[117] Sponsored by Representative Mike Pence and Representative Frederick Boucher, the Act applied to those who engaged in journalism "for a substantial portion of the person's livelihood or for substantial financial gain."[118] The bill's overall approach was two-tiered, giving broader protection to confidential sources than to general information.[119]

Twelve days before H.R. 2102 passed the House, a narrower bill, covering only material obtained by a reporter under a promise of confidentiality,[120] cleared the Senate Judiciary Committee by a vote of 15-2.[121] In July 2008, Senate sponsors offered a modified version of that bill on the Senate floor as a substitute amendment.[122] In response to harsh criticism from the Attorney General, the new bill was even narrower than the original Senate version, making it easier for the government to force disclosures in cases of leaked classified information and beefing up the instances in which reporters would be required to make disclosures to prevent criminal activities.[123] But a vote on the modified bill was blocked and the Senate had not yet be-

117. H.R. 2102, 110th Cong. (2007). H.R. 2102 was identical to S. 1267, 110th Cong. (2007), as introduced on May 2, 2007 by Senator Lugar.

118. H.R. 2102, 110th Cong. § 4(2) (2007).

119. *Compare id.* § 2(a)(2) (setting up a qualified privilege with a balancing test for criminal and civil investigations), *with id.* § 2(a)(3) (establishing more limited exceptions to an otherwise absolute privilege against disclosure of a confidential source only when revealing the source is: (A) "necessary to prevent, or to identify any perpetrator of, an act of terrorism . . . or other significant and specified harm to national security"; (B) "necessary to prevent imminent death or significant bodily harm with the objective to prevent such death or harm, respectively"; (C) "necessary to identify a person who has disclosed (i) a trade secret . . . (ii) individually identifiable health information . . . or (iii) nonpublic personal information").

120. S. 2035, 110th Cong. § 7 (2007). Sponsored by Senators Specter and Schumer, S. 2035 also had a series of enumerated exceptions that made its application narrower than the House version. *Id.* A different bill, S. 1267, 110th Cong. (2007), which was identical to H.R. 2102, 110th Cong. (2007), as proposed by Representatives Pence and Boucher, was introduced by Senators Lugar and Dodd at the same time that Pence and Boucher introduced H.R. 2102, but it did not receive Judiciary Committee consideration. Senators Lugar and Dodd opted to co-sponsor S. 2035.

121. *See* 154 CONG. REC. S7595 (daily ed. July 29, 2008) (statement of Sen. Leahy); Letter from Sen. Leahy to Sens. Reid and McConnell (Mar. 6, 2008), *available at* http://leahy.senate.gov/press/200803/030608e.html.

122. *See* 154 CONG. REC. S7595 (daily ed. July 29, 2008) (statement of Sen. Leahy).

123. Walter Pincus, *Vote on Journalist Shield Stalled*, WASH. POST, July 31, 2008, at A17.

gun debate on it when this Article went to press.[124] Moreover, in the wake of the shield law's passage in the House, the Bush administration issued a press release indicating that the president's advisors would counsel him to veto the bill if presented to him.[125] Thus, shield-law proponents' most promising year in history appeared likely to end with no federal law on the books.

Throughout these modern debates, supporters and opponents sparred over the appropriate scope of shield coverage,[126] over the need to address national security concerns[127] and limit the courts' application of the shield to address such issues,[128] and over the best definition of "reporter" in an age when bloggers generate Internet news.[129] Yet woven

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124. *Id.*

125. Statement of Admin. Policy, Executive Office of the President (Oct. 16, 2007), http://www.whitehouse.gov/omb/legislative/sap/110-1/hr2102sap-h.pdf. The statement argued that the shield law "would create a dramatic shift in the law that would produce immediate harm to national security and law enforcement[,] . . . mak[ing] it extremely difficult to prosecute cases involving leaks of classified information and would hamper efforts to investigate and prosecute other serious crimes." *Id.*

126. *See, e.g.*, *July 2005 Hearing*, *supra* note 116 (statement of Rep. Pence, Member, H. Comm. on the Judiciary) (noting the evolution of his proposed bill from an absolute privilege for confidential sources to a qualified privilege); *id.* (testimony of Geoffrey Stone, Professor, University of Chicago School of Law) (arguing that a "qualified privilege undermines the very purpose of the journalist-source privilege"); *see also 2006 Senate Judiciary Hearings*, *supra* note 4, at 19 (statement of Victor Schwartz, Partner, Shook, Hardy & Bacon, LLP) (noting that evidence scholars agree that "privileges in the private context" should not be absolute).

127. *2006 Senate Judiciary Hearings*, *supra* note 4, at 1–2 (statement of Sen. Specter, Chairman, S. Comm. on the Judiciary) (noting the hearing was designed to address concerns that a shield law would "hamper" the activities of the Department of Justice in "national security cases or in criminal prosecutions"); *see also id.* at 3 (statement of Paul J. McNulty, Deputy Att'y Gen. of the United States) ("Security and freedom are not mutually exclusive or, as Justice Goldberg famously observed, the Constitution 'is not a suicide pact.'").

128. *Compare id.* at 6 (statement of Sen. Specter, Chairman, S. Comm. on the Judiciary) (suggesting that courts possess "the capacity to weigh national security matters"), *with id.* (statement of Sen. Kyl, Member, S. Comm. on the Judiciary) (noting that the national security exception provides no clear guidance for the courts to apply).

129. *See, e.g.*, *July 2005 Hearing*, *supra* note 116 (statement of Sen. Leahy, Member, S. Comm. on the Judiciary) (noting that prior efforts to enact a shield law "failed, in part because supporters of the concept found it difficult to agree on how to define the scope of what it meant to be a 'journalist'" and that "with bloggers participating fully in the 24-hour news cycle," a similar problem exists today); *see also 2006 Senate Judiciary Hearings*, *supra* note 4, at 111 (statement of Paul J. McNulty, Deputy Att'y Gen. of the United States) (noting the possible constitutional dilemma of defining "journalist" only in terms of people who work for financial gain because it "discriminates against individu-

throughout the discussions was the same core question that had anchored the Executive's opposition to a federal shield law three decades earlier: was the law necessary at all? Journalists testifying at legislative hearings about the changing legal tide and the high-profile losses they were experiencing in federal courts were countered by Justice Department representatives echoing reservations made a generation earlier about the usefulness of a federal shield.[130] With each taking a page from their 1970s playbooks, representatives of the media cited "[a]n unusually large number of subpoenas seeking the names of anonymous sources [that had been] issued in a remarkably short period of time to a variety of media organizations and the journalists they employ."[131] Meanwhile, the administration dubbed the legislation "a solution in search of a problem."[132] The result was another massive disconnect between the numerical story told by the media and the empirical narrative put forth by the government.

On the one hand, in pounding home their recurring theme, Department of Justice representatives testified in positive terms about the use of the Guidelines and in dismissive terms about the numbers of federal subpoenas being issued to members of the media, insisting that Department regulations "ha[d] served to limit the number of subpoenas authorized for source information to little more than a handful over its 33-year history,"[133] and that the problem was rare.[134] At an October 2005 Senate Judiciary Committee hearing, U.S. Attorney Chuck Rosenberg asked, "What is broken about the way we are handling matters involving subpoenas to the media? We rarely issue subpoenas to the media seeking information about confidential

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als who, for no money, contribute a story to a local newspaper").

130. *Compare July 2005 Hearing*, *supra* note 116 (testimony of Norman Pearlstine, Editor-in-Chief, Time, Inc.) (citing a "disturbing trend"), *with 2006 Senate Judiciary Hearings*, *supra* note 4, at 113 (statement of Paul J. McNulty, Deputy Att'y Gen. of the United States) ("[O]nly rarely has the Department determined that the interests of justice warranted seeking to compel a journalist to reveal information obtained from a confidential source.").

131. *July 2005 Hearing*, *supra* note 116 (testimony of Lee Levine, Partner, Levine Sullivan Koch & Schulz, LLP).

132. *2006 Senate Judiciary Hearings*, *supra* note 4, at 107 (statement of Paul J. McNulty, Deputy Att'y Gen. of the United States).

133. *October 2005 Hearing*, *supra* note 116 (testimony of Chuck Rosenberg, United States Att'y).

134. *See id.* ("For the last 33 years, the Department of Justice has authorized subpoenas to the news media only in a small number of cases involving serious allegations of criminal conduct.").

sources. And when we do, it is only after painstakingly careful review and meticulous adherence to our internal guidelines."[135]

On the other hand, in tones reminiscent of their immediately post-*Branzburg* legislative battles, federal shield law supporters in the 2005 hearings noted a "recent surge in the number of subpoenas" and an "increase in the severity of contempt penalties."[136] Media advocates commented on the stark contrast between the good judicial treatment given to the press in the years following *Branzburg* and the high-profile contempt citations in very recent cases.[137] They also referenced a "profound departure from the [prior] practice of federal prosecutors."[138] As a numerical matter, some journalists who testified spoke in generic terms of "several" problematic cases,[139] or of getting "a number of subpoenas . . . all the time,"[140] or of being subpoenaed "several times a month."[141] Veteran media attorney Floyd Abrams testified that "[i]n the last year and a half, more than 70 journalists and news organizations have been embroiled in disputes with federal prosecutors and other litigants seeking to discover unpublished information; dozens have been asked to reveal their confidential sources; some are or were virtually at the entrance to jail."[142] Several testifying journalists referred to "more than two dozen reporters" who had been subpoenaed or questioned about their confidential sources in fed-

135. *Id.*

136. *July 2005 Hearing*, *supra* note 116 (testimony of Lee Levine, Partner, Levine Sullivan Koch & Schulz, LLP); *see also id.* (testimony of Matthew Cooper, White House Correspondent, Time Magazine) (referencing "a run of federal subpoenas of journalists").

137. *See id.* (testimony of Lee Levine, Partner, Levine Sullivan Koch & Schulz, LLP) ("There appear to have been only two decisions from 1976–2000 arising from subpoenas issued by federal grand juries or prosecutors to journalists seeking confidential sources. Both involved alleged leaks to the media and in both, the subpoenas were quashed. Yet in the last four years, three federal courts of appeals have affirmed contempt citations issued to reporters who declined to reveal confidential sources, each imposing prison sentences more severe than any previously known to have been experienced by journalists in American history.").

138. *Id.* (testimony of Norman Pearlstine, Editor-in-Chief, Time, Inc.).

139. *October 2005 Hearing*, *supra* note 116 (testimony of David Westin, President, ABC News) (citing "several, high-profile cases over the last two years").

140. *Id.*

141. *Id.* (testimony of Anne Gordon, Managing Editor, Philadelphia Inquirer).

142. *July 2005 Hearing*, *supra* note 116 (testimony of Floyd Abrams, Partner, Cahill Gordon & Reindel LLP).

eral court cases, either in the "last year"[143] or "in the past two years."[144] Legislative sponsors echoed these numerical assertions.[145] The government, meanwhile, asserted that the Justice Department issued only a dozen subpoenas in such cases in the *fourteen* years since 1991.[146]

The disparity in the numerical assessments partially stems from a difference in the universe of subpoenas being described by each side of the debate. The Justice Department focused narrowly on confidential-source materials in the prosecutorial setting. For example, when Rosenberg testified that the Department's Criminal Division had issued only twelve subpoenas for confidential source materials since 1991,[147] his statement may have been responding to journalists' claims about apples with an assertion about oranges. The number of subpoenas Rosenberg cited did not include, for example, subpoenas from spe-

143. *October 2005 Hearing*, *supra* note 116 (testimony of Anne Gordon, Managing Editor, Philadelphia Inquirer); *see also July 2005 Hearing*, *supra* note 116 (testimony of Lee Levine, Partner, Levine Sullivan Koch & Schulz, LLP) ("Indeed, three federal proceedings in Washington, D.C. alone have generated subpoenas seeking confidential sources to roughly two dozen reporters and news organizations, seven of whom have been held in contempt in less than a year."); *id.* (testimony of William Safire, Political Columnist, New York Times) ("More than ever, journalists across the nation are now in danger of being held in contempt, nearly two dozen in Federal courts alone.").

144. *October 2005 Hearing*, *supra* note 116 (testimony of Judith Miller, Reporter, New York Times) ("More than two dozen reporters have now been subpoenaed in the past two years and are in danger of going to jail."); *see also July 2005 Hearing*, *supra* note 116 (testimony of Norman Pearlstine, Editor-in-Chief, Time, Inc.) ("In the last two years, dozens of reporters have been subpoenaed to reveal their confidential sources, many of whom face the prospect of imminent imprisonment.").

145. *See, e.g.*, 152 CONG. REC. S4803 (daily ed. May 18, 2006) (statement of Sen. Dodd) ("In the past year alone, some two dozen reporters have been subpoenaed or questioned about their confidential sources."); *see also July 2005 Hearing*, *supra* note 116 (statement of Sen. Lugar, Member, S. Comm. on the Judiciary) ("Over two dozen reporters were served or threatened with jail sentences last year in at least four different Federal jurisdictions for refusing to reveal confidential sources."); *id.* (testimony of Rep. Pence, Member, H. Comm. on the Judiciary) ("In the past year, nine journalists have been given or threatened with jail sentences for refusing to reveal confidential sources and at least a dozen more have been questioned or on the receiving end of subpoenas."); *id.* (statement of Sen. Dodd, Member, S. Comm. on the Judiciary) ("Some two dozen other journalists stand subpoenaed or prosecuted in our country at this hour.").

146. *October 2005 Hearing*, *supra* note 116 (testimony of Chuck Rosenberg, United States Att'y) ("Over the last 14 years, . . . we have issued subpoenas to the media seeking confidential sources 12 times.").

147. *See id.* ("And that's why if you look at the past 14 years, we've only issued 12 confidential source subpoenas.").

cial prosecutors, who had been the sources of the highest-profile media subpoenas in recent history, arising out of the Valerie Plame investigation and other cases.[148] Indeed, in the wake of the October Senate Judiciary Committee hearing, journalist organizations decried the Justice Department testimony as misleading and dishonest, noting that it conflicted with the Department's own 2001 report, which indicated that it had authorized eighty-eight subpoenas of news media since 1991, seventeen of which sought information that could identify a source or source material.[149] But without any clear, current empirical data of its own, the media could only speak in general terms and cite high-profile examples.

In the two legislative sessions that followed, the mathematical back-and-forth continued.[150] Journalists testifying in

148. *See infra* text accompanying notes 174–88.

149. Casey Murray, *Sparring over a Shield*, NEWS MEDIA & L., Fall 2005, at 14. In early September 2001, Senator Grassley, ranking member of the Subcommittee on Crime and Drugs, wrote two letters to the Department of Justice, asking if Department of Justice procedures had been followed in the case of Associated Press reporter John Solomon, whose home telephone records had been subpoenaed, and requesting specific details about those procedures. *See* Letter from Sen. Grassley, to Larry Thompson, Deputy Att'y Gen., Department of Justice (Dec. 6, 2001), http://www.rcfp.org/news/documents/grassley.pdf (referencing letters written on September 4 and 6, 2001). Senator Grassley also requested specific information regarding how many times in the past ten years media organizations or journalists had been subpoenaed by the Department of Justice and how many of those subpoenas were issued in an attempt to get information on a journalist's source. *Id.* The response letter from Assistant Attorney General Daniel J. Bryant, indicated that between 1991 and September of 2001 there were at least eighty-eight instances in which subpoenas were authorized in connection with members of the news media. *See* Letter from Daniel J. Bryant, Assistant Att'y Gen., Department of Justice, to Sen. Grassley (Nov. 28, 2001), http://www.rcfp.org/news/documents/grassley.pdf. Of those eighty-eight subpoenas, seventeen had been issued seeking the name of a reporter's source or information that could lead to the identification of a source. *Id.* The letter indicated that these numbers had been compiled from information obtained from the Department's Criminal Division and did not include information from other divisions. *Id.* This total also did not include authorizations for grand jury subpoenas to members of the news media. *Id.* Senator Grassley responded to this information in a December 6, 2001 letter expressing his doubts over "how much caution the Department of Justice exercises when seeking information from, or about, members of the media." Letter from Sen. Grassley, to Larry Thompson, Deputy Att'y Gen., Department of Justice, *supra.*

150. In proposing his 2006 bill, Senator Lugar contended that "[o]ver 30 reporters were recently served or threatened with jail sentences in at least four different Federal jurisdictions for refusing to reveal confidential sources." 152 CONG. REC. S4800 (daily ed. May 18, 2006) (statement of Sen. Lugar). In a September 2006 Senate Judiciary Committee hearing, Senator Leahy asserted that "[i]n the last year, half a dozen journalists have been jailed or fined for

support of the most recent legislation spoke anecdotally about their own contempt penalties[151] and the chilling effect that high-profile cases had on other reporters and their sources.[152] While arguing that "[i]ncreasingly, subpoenas to journalists have become a weapon of first resort for those seeking information concerning confidential sources,"[153] that "this deluge of subpoenas in the Federal courts has now reached epidemic proportions,"[154] and that "the process of gathering of the news has been under unprecedented attack,"[155] supporters nevertheless

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protecting their sources." *2006 Senate Judiciary Hearings*, *supra* note 4, at 95 (statement of Sen. Leahy, Member, S. Comm. on the Judiciary). The Deputy Attorney General testifying on behalf of the Justice Department countered with a different set of numbers, saying that "[i]n the past 15 years, the [Attorney General] has approved only approximately 13 requests for media subpoenas that implicated source information." *Id.* at 105 (statement of Paul J. McNulty, Deputy Att'y Gen. of the United States). In proposing the 2007 legislation, Senator Lugar noted that over thirty reporters "have recently been served subpoenas or questioned . . . about their confidential sources." 153 CONG. REC. S5504 (daily ed. May 2, 2007) (statement of Sen. Lugar). Another supporter gave the ballpark figure of "more than seventy" federal subpoenas seeking unpublished information in the "last several years." *Free Flow of Information Act of 2007: Hearing on H.R. 2102 Before the H. Comm. on the Judiciary*, 110th Cong. 105–06 (2007) (Letter from Denise A. Cardman, Acting Director, American Bar Association, to Rep. Conyers, Chairman, H. Comm. on Judiciary (June 13, 2007)) [hereinafter *2007 House Judiciary Hearings*].

151. *See, e.g.*, *2007 House Judiciary Hearings*, *supra* note 150, at 64 (testimony of Jim Taricani, Investigative Reporter, WJAR/NBC10 News) ("I am just one of several reporters in recent years that have been sent to prison or threatened with subpoenas for refusing to disclose a confidential source.").

152. *Id.* at 74 ("I have talked to people who are very aware of all the ongoing highly publicized cases of reporters being found in contempt or being sent to jail and some of these people who could provide information are not. They are very leery about what might happen, what they might get tangled up with."); *see also id.* at 69 (testimony of William Safire, Chairman, Dana Foundation) ("The Justice Department can say, 'Gee, there are very few cases.' We have just seen an example of somebody incarcerated at home and although these are individual cases, we live with individual cases and these cases, I think, militate toward dealing with this terrible trend . . . .").

153. *Id.* at 101 (statement of the National Association of Broadcasters).

154. *Id.* at 32 (testimony of Lee Levine, Partner, Levine Sullivan Koch & Schulz, LLP).

155. *Id.* at 29 (testimony of William Safire, Chairman, Dana Foundation); *see also id.* at 32 (testimony of Lee Levine, Partner, Levine Sullivan Koch & Schulz, LLP) ("For almost three decades following [*Branzburg*], subpoenas issued by Federal courts seeking disclosure [of] journalists' confidential sources were very, very rare. . . . That situation has now changed. An unprecedented number of subpoenas seeking the names of confidential sources have been issued by Federal courts in a remarkably short period of time.").

acknowledged that there was no clear empirical data to tell the entire story.[156]

The Justice Department countered that "the case has [not] been made that any legislation is necessary on this subject,"[157] and flatly denied that "subpoenas to the media are on the rise."[158] Reemphasizing the role of the Department Guidelines, Assistant Attorney General Rachel Brand testified that the Department had a "record of restraint" when it came to subpoenaing the press.[159] She suggested that a few isolated high-profile cases involving major media organizations were causing unnecessary panic among journalists outside the Beltway.[160] "When one gets past the overheated rhetoric," she said, "there is simply no evidence that the Department is now pursuing subpoenas of the press more aggressively or in greater numbers than it has in the past."[161] She reported that "[e]vidence gathered by the Department's Criminal Division reflect [sic] that the Attorney General has approved subpoenas to the media seeking source-related information in only 19 cases since 1991. Only four of those cases have occurred since 2001."[162] When questioned about trends outside the confines of federal criminal prosecutions, Brand testified that she did not have that information, but that she was confident there had been no surge as to the Department.[163] Representative Pence noted that Brand was describing only a very limited universe of subpoenas.[164]

156. *Id.* at 75 (testimony of Lee Levine, Partner, Levine Sullivan Koch & Schulz, LLP) ("I hesitate to quote an exact number [of subpoenas compelling reporters to reveal their confidential sources], because it is very hard to get data on this.").

157. *Id.* at 18 (testimony of Rachel Brand, Assistant Att'y Gen. of the United States).

158. *Id.*

159. *Id.*

160. *See id.* at 24.

161. *Id.*

162. *Id.* at 18; *see also id.* at 21 ("The fact is that the Department issues subpoenas to the media very rarely.").

163. *Id.* at 84 ("So whether courts are appointing special prosecutors who are issuing more subpoenas or whether private litigants are issuing more subpoenas, that I can't answer because I don't have that information in hand. But I can tell you that with respect to source-related subpoenas, in particular, there have only been those subpoenas in four matters since 2001. And since 1991, when the Department started keeping that information, it has happened in 19 cases. So I don't view that as a surge, at least with respect to [the] Department of Justice.").

164. *Cf. id.* at 88 (statement of Rep. Pence, Member, H. Comm. on Judiciary).

Brand acknowledged that the nineteen cases mentioned were only those involving subpoenas for source-related information, and that dozens more subpoenas may have been issued in other contexts.[165] This, Pence said, highlighted the "numbers game" played throughout the debates:[166] "[T]here clearly is a dispute over whether this is a solution in search of a problem or whether this is an avalanche."[167]

Certainly, when a core question in a legislative debate is the frequency with which the relevant factual scenario arises, proponents of the legislation might be expected to amplify evidence of that frequency and opponents might be expected to downplay it. But the radical empirical disparities in the shield law debate are only partially explained by definitional differences and bias. Indeed, in the thirty years since *Branzburg v. Hayes*, there has not been a single neutral academic study empirically assessing the frequency and impact of subpoenas against the press.[168] While dozens of commentators and scholars have written in support of a federal shield law,[169] and have

165. *See id.* (testimony of Rachel Brand, Assistant Att'y Gen. of the United States).

166. *Id.* (statement of Rep. Pence, Member, H. Comm. on the Judiciary).

167. *Id.*; *see also id.* at 92 (voicing concern about the discrepancy between the numbers asserted by the Department of Justice and those asserted by supporters of the legislation).

168. Blasi's study immediately before *Branzburg* was the last known major academic effort of this kind. *See supra* notes 61–62 and accompanying text. John Osborn conducted a similar empirical study in 1985 while he was interning at the Reporter's Committee for Freedom of the Press. *See* Osborn, *supra* note 25, at 57.

169. *See, e.g.*, Leslye deRoos Rood & Ann K. Grossman, *The Case for a Federal Journalist's Testimonial Shield Statute*, 18 HASTINGS CONST. L.Q. 779, 802 (1991) (proposing a model reporter's shield statute that would give absolute privilege to members of the institutional media); Jennifer Elrod, *Protecting Journalists from Compelled Disclosure: A Proposal for a Federal Statute*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 115, 126 (2003) (offering a model statute "as a remedy for the multiple problems that exist in the current patchwork of state and federal rules and rulings regarding forced disclosure"); Fargo, *supra* note 114 (examining proposed bills in comparison to state shield laws and offering drafting suggestions to avoid legal challenges); Michael A. Giudicessi, *A Federal Shield Law for Journalists: A Matter of Good Housekeeping*, 23 COMM. LAW., Summer 2005, at 15 (arguing that a federal shield law is necessary as a matter of fairness because employees of executive branch agencies are sheltered under the federal housekeeping statute); Richard B. Kielbowicz, *The Role of News Leaks in Governance and the Law of Journalists' Confidentiality, 1795–2005*, 43 SAN DIEGO L. REV. 425, 487–94 (2006) (proposing that Congress adopt shield legislation that considers the role of leaks and that protects anonymity where political communication is advanced); William E. Lee, *The Priestly Class: Reflections on a Journalist's Privilege*, 23 CARDOZO ARTS &

insightfully debated the appropriate contours of potential federal legislation,[170] the significant empirical question has not been answered.[171] Thus, with no shortage of ideas on what

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ENT. L.J. 635, 643, 683–84 (2006) (explaining that legislatures are free to exempt journalists from generally applicable laws and arguing for a congressionally created privilege); Geoffrey R. Stone, *Why We Need a Federal Reporter's Privilege*, 34 HOFSTRA L. REV. 39, 39–41 (2005) (claiming that the journalist-source privilege is just as important as currently recognized privileges); Leila Wombacher Knox, Note, *The Reporter's Privilege: The Necessity of a Federal Shield Law Thirty Years After* Branzburg, 28 HASTINGS COMM. & ENT. L.J. 125, 144 (2005) (arguing that leaving the issue to conservative courts is unwise and urging passage of a pending bill); Jaime M. Porter, Note, *Not Just "Every Man": Revisiting the Journalist's Privilege Against Compelled Disclosure of Confidential Sources*, 82 IND. L.J. 549, 562–63, 568–71 (2007) (arguing that a privilege is increasingly necessary and that a federal shield law is the superior means for strengthening it); Siegel, *supra* note 46, at 469 (proposing a model statute granting an absolute privilege and arguing the need for such legislation in light of recent court decisions and variances in protection among the states); Leita Walker, Comment, *Saving the Shield with* Silkwood*: A Compromise to Protect Journalists, Their Sources, and the Public*, 53 U. KAN. L. REV. 1215, 1237–47 (2005) (proposing a statute that adopts a balancing test from caselaw).

170. *See, e.g.*, Laurence B. Alexander, *Looking Out for the Watchdogs: A Legislative Proposal Limiting Newsgathering Privilege to Journalists in the Greatest Need of Protection for Sources and Information*, 20 YALE L. & POL'Y REV. 97, 101 (2002) (arguing that the definition of journalist could become too broad, which would undermine an attempt to protect true journalists); Elrod, *supra* note 169, at 147–49; Fargo, *supra* note 114, at 49–73; Papandrea, *supra* note 46, at 565.

171. Some scholars, while not gathering the numerical data to demonstrate the frequency of subpoenas, have noted the difficult task of quantifying the impact of subpoenas on investigative reporting and the use of confidential sources. *See, e.g.*, Randall D. Eliason, *Leakers, Bloggers, and Fourth Estate Inmates: The Misguided Pursuit of a Reporter's Privilege*, 24 CARDOZO ARTS & ENT. L.J. 385, 417–18 (2006) (explaining the common assumption that if reporters are compelled to reveal their sources, the confidential flow of information will dry up and arguing that this assumption is "impossible to prove empirically"). Others presuppose empirical information or adopt one side or the other's data. *See, e.g.*, Dalglish & Murray, *supra* note 24, at 42 ("a dramatic spike in federal subpoenas"); Eliason, *supra* at 417 ("The truth remains that, despite a few recent high-profile cases and the protestations of large and well-funded media organizations, cases in which a reporter is compelled to testify and reveal confidential sources are still extremely rare."); Steven D. Zansberg, *The Empirical Case: Proving the Need for the Privilege*, MEDIA L. RESOURCE CENTER BULL., Aug. 2004, at 145, 148, *available at* http://www.medialaw.org/Content/NavigationMenu/Publications1/MLRC_Bulletin/Bulletin_Archive/2004-2WhitePaper.pdf (arguing that since *Branzburg*, there has been a "growing body of evidence—testimonial, empirical, and anecdotal—that persuasively demonstrates the vital role that confidential sources . . . plays [sic] in the daily generation of important news reports on topics of public interest and concern" and that "this evidence points to the conclusion that without constitutional protection afforded to reporters and other newsgatherers against compelled disclosure of their sources . . . the American people would inevitably

should be done about the allegedly increasing numbers of subpoenas against the media, the numbers themselves remain missing.

C. RECENT HIGH-PROFILE CASES AND THE CONVENTIONAL WISDOM ABOUT THEIR EFFECT

The need for an impartial survey of media subpoena numbers has become all the more pressing in recent years. Without question, the very recent history of reporter's privilege has been turbulent, at best. In the five-year period between 2002 and 2007, journalists in the United States faced an unprecedented wave of exceptionally high-profile cases in which subpoenaed reporters asserted a privilege, lost their arguments, and then either relented and testified or were jailed for contempt.

Although, prior to the present study, the jury was still out on whether this wave represented or triggered an increase in the *number* of subpoenas, it is indisputable that during that time period there was a substantial increase in *publicity* about the issue of reporter's privilege. Beginning in approximately 2002, a firestorm of headlines emerged as reporters' battles—and ultimate losses—were placed in the public spotlight in a way that had not been seen for at least three decades.

First, a federal district court judge took the then-extraordinary step[172] of holding journalist James Taricani, a broadcast reporter for WJAR Channel 10 in Providence, Rhode Island, in criminal contempt and sentencing him to six months of home confinement, after a $1000-per-day civil fine failed to persuade Taricani to comply with a subpoena requiring him to

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be deprived of the information necessary to be self-governing citizens"); Sean W. Kelly, Note, *Black and White and Read All Over: Press Protection After* Branzburg, 57 DUKE L.J. 199, 224–25 (2007) (noting the "growing trend" of federal prosecutors issuing subpoenas for journalists to reveal sources); Jeffrey S. Nestler, Comment, *The Underprivileged Profession: The Case for Supreme Court Recognition of the Journalist's Privilege*, 154 U. PA. L. REV. 201, 243 (2005) (discussing the "increasing number of journalists being held in contempt"); Walker, *supra* note 169, at 1219 (referring to "the recent onslaught of subpoenas"); *see also* Papandrea, *supra* note 46, at 539 n.143 (citing Blasi's study as one attempt to generate empirical evidence).

172. *See, e.g.*, Pam Belluck, *Reporter Is Found Guilty for Refusal to Name Source*, N.Y. TIMES, Nov. 19, 2004, at A24 (noting that the Taricani's case was "unusual because he faced the jail time not to force him to reveal his source, but as punishment for refusing to do so"); Jane Kirtley, *Not So Privileged*, AM. JOURNALISM REV., Feb./Mar. 2005, at 62 (describing as "rare" the punishment of reporters who defy court orders by refusing to reveal confidential sources).

reveal the name of the source from whom he had received a videotape showing a government official accepting a bribe.[173]

Then, in a Federal Privacy Act[174] suit brought against the federal government by Taiwanese-born nuclear physicist Dr. Wen Ho Lee,[175] a district court held six reporters from national news outlets in contempt for failing to reveal confidential sources who had leaked personal details about Dr. Lee and his alleged involvement in espionage for China.[176] After the D.C. Circuit refused to overturn the contempt citations—and despite the fact that they were not named defendants in the suit—the *New York Times*, the *Associated Press*, ABC News, the *Los Angeles Times*, and the *Washington Post* agreed to a controversial collective settlement of $750,000 with Dr. Lee in an effort to protect the confidentiality of the sources and to save their reporters from possible jail time.[177]

A third case arose out of the Bay Area Laboratory Co-Operative's (BALCO) alleged distribution of illegal steroids to well-known, high-profile athletes. Fainaru-Wada and his fellow *San Francisco Chronicle* reporter Lance Williams—who won major journalism awards for exposing the steroids scandal[178]—were subpoenaed to reveal the source of grand jury transcripts discussed in their articles.[179] When they refused, a federal court held them in civil contempt and ordered them confined "until such time as [they were] willing to give such testimony or pro-

173. *See In re* Special Proceedings, No. 01-47 (D.R.I. Dec. 9, 2004), *available at* http://www.rid.uscourts.gov/opinions/torres/12092004_1-01MSC0047T_Sentencing.pdf (sentencing Taricani to six months home confinement); *In re* Special Proceedings, 291 F. Supp. 2d 44 (D.R.I. 2003), *aff'd*, 373 F.3d 37 (1st Cir. 2004) (ordering Taricani to reveal his source). Ultimately, the source revealed himself. *See* Katie Zezima, *Lawyer Says He Gave Convicted Reporter Videotape in Corruption Inquiry*, N.Y. TIMES, Dec. 2, 2004, at A26.

174. Federal Privacy Act of 1974, 5 U.S.C. § 552a (2000).

175. Lee v. Dep't of Justice, 287 F. Supp. 2d 15 (D.D.C. 2003), *aff'd in part and vacated in part*, 413 F.3d 53 (D.C. Cir. 2005).

176. Neely Tucker, *Wen Ho Lee Reporters Held in Contempt*, WASH. POST, Aug. 19, 2004, at A2.

177. Paul Farhi, *U.S., Media Settle with Wen Ho Lee: News Organizations Pay to Keep Sources Secret*, WASH. POST, June 3, 2006, at A1. The settlement also involved an $895,000 payment by the government. *Id.* It was entered into after the reporters petitioned the United States Supreme Court for certiorari, which ultimately was denied. *See* Thomas v. Lee, 547 U.S. 1187 (2006).

178. *See BALCO Reporters Win National Recognition: 2 Will Receive Prize at Washington Dinner*, S.F. CHRON., Apr. 10, 2005, at A2; *Prize for Chronicle's BALCO Investigation: Steroids Probe Wins National Award from Sports Editors*, S.F. CHRON., Mar. 20, 2005, at A2.

179. *In re* Grand Jury Subpoenas, Fainaru-Wada and Williams, 438 F. Supp. 2d 1111, 1113–14 (N.D. Cal. 2006).

vide such information."[180] The reporters were spared imprisonment only by their source's decision to reveal himself.[181]

In another Privacy Act case, Dr. Steven Hatfill, a proclaimed germ weapons expert identified by the FBI as a "person of interest" in the anthrax-laced mailings that shook the country just weeks after the September 11 attacks,[182] subpoenaed six reporters to identify a government source who he said had leaked personal information about him to the press.[183] Toni Locy, formerly of *USA Today*, was issued a contempt sanction—and, in an "unprecedented step,"[184] the court ordered her to pay fines of up to $45,500 herself, with no assistance from *USA Today*.[185] At publication, the case is still pending.

Perhaps most notoriously, *New York Times* reporter Judith Miller spent eighty-five days in jail in 2005 for refusing to reveal the "senior [Bush] administration officials" who had outed covert CIA agent Valerie Plame to her and to other reporters from national news organizations.[186] Miller was sentenced to confinement until she agreed to testify.[187] She ultimately agreed to do so, saying it was because she had obtained a release from her confidentiality promise with her source, and because the special prosecutor agreed to limit his questioning "'so that it would not implicate other sources of hers.'"[188]

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180. *In re* Grand Jury Subpoenas, Fainaru-Wada and Williams, No. CR 06–90225 JSW, 2006 WL 2734275, at *2–3 (N.D. Cal. Sept. 25, 2006).

181. *See* Bob Egelko, *Lawyer Admits Leaking BALCO Testimony: He Agrees to Plead Guilty; Prosecutors Say They'll Drop Bid to Jail Chronicle Reporters*, S.F. CHRON., Feb. 15, 2007, at A1.

182. *See* Hatfill v. Ashcroft, 404 F. Supp. 2d 104, 106–08 (D.D.C. 2005). The Justice Department ultimately settled the suit with Hatfill for $4.6 million. Scott Shane & Eric Lichtblau, *Scientist Is Paid Millions by U.S. in Anthrax Suit*, N. Y. TIMES, June 28, 2008, at A13.

183. *See* Hatfill v. Gonzales, No. M8–85, 2007 WL 2710116, at *2 (S.D.N.Y. Sept. 11, 2007) (referencing Brian Ross of ABC); Hatfill v. Gonzales, 505 F. Supp. 2d 33, 35–36 (D.D.C. 2007) (referencing Michael Isikoff and Daniel Klaidman of *Newsweek*, Allan Lengel of the *Washington Post*, Toni Locy, formerly of *USA Today*, and James Stewart, formerly of CBS News).

184. Ken Paulson, Op-Ed., *The Real Cost of Fining a Reporter*, USA TODAY, Mar. 12, 2008, at 11A.

185. *See id.*

186. *In re* Grand Jury Subpoena, Judith Miller, 397 F.3d 964, 966 (2005) (quoting Robert Novak, *The Mission to Niger*, CHI. SUN-TIMES, July 14, 2003, at 31); *see In re* Special Counsel Investigation, 338 F. Supp. 2d 16, 17 (D.D.C. 2004).

187. Adam Liptak, *Reporter Jailed After Refusing to Name Source*, N.Y. TIMES, July 7, 2005, at A1.

188. David Johnston & Douglas Jehl, *Times Reporter Free from Jail; She Will Testify*, N.Y. TIMES, Sept. 30, 2005, at A1 (quoting Bill Keller, Executive

Statements of media advocates that are peppered throughout the coverage of these cases,[189] coupled with the strong assertions of reporters' advocacy groups in the aforementioned legislative debates,[190] strongly suggest that journalists now believe that this string of cases adversely affected their legal climate.[191] Journalists believe that prosecutors and civil litigants now feel much more comfortable subpoenaing the press,[192] and the conventional wisdom holds that attorneys who would not have subpoenaed the press five years ago now view a media subpoena as both more socially acceptable and more likely to be legally permissible.[193]

Editor, *New York Times*). Her source was I. Lewis "Scooter" Libby, Vice President Cheney's former chief of staff, who ultimately was found guilty of four felony counts. Neil A. Lewis, *Libby, Ex-Cheney Aide, Guilty of Lying in C.I.A. Leak Case*, N.Y. TIMES, Mar. 7, 2007, at A1.

189. *See, e.g.*, Zachary Coile, *Key Lawmakers Urge Justice Department to Rescind Subpoenas of BALCO Reporters*, S.F. CHRON., Jan. 19, 2007, at A1 ("The Chronicle case has become Exhibit A for lawmakers pushing for a federal shield law . . . ."); Charles Lane, *Deal with Wen Ho Lee May Make Press-Freedom Case Moot*, WASH. POST, May 23, 2006, at A3 (calling the Lee case "one of the most significant press-freedom battles of recent years"); Liptak, *supra* note 187 (calling the Judith Miller case "the most serious confrontation between the government and the press since the Pentagon Papers").

190. *See supra* Part I.B.2.

191. *See* David Carr, *Subpoenas and the Press*, N.Y. TIMES, Nov. 27, 2006, at C1 ("Within the news business, there is a consensus that the roof is caving in on the legal protections for working journalists."); Peter Huck, *Media: Will Congress Shield the Media?*, GUARDIAN (London & Manchester), Aug. 13, 2007, at 6 (quoting Linda Foley, head of the Newspaper Guild, as commenting "'There's a record number of subpoenas out there . . . . It seems like open season'"); Adam Liptak, *News Media Pay in Scientist Suit*, N.Y. TIMES, June 3, 2006, at A1 ("Federal courts have been increasingly hostile in recent years to assertions by journalists that they are legally entitled to protect their confidential sources."); McCollam, *supra* note 110, at 30 ("When those cases are viewed together, many see them as constituting a moment of peril for journalism."); Jeffrey Toobin, *Name That Source*, NEW YORKER, Jan. 16, 2006, at 30; *see also* Impact and Perception, *supra* note 7, at 17–22.

192. *See* Theodore B. Olson, *A Much-Needed Shield for Reporters*, WASH. POST, June 29, 2006, at A27 ("[I]t is now de rigueur to round up the reporters, haul them before a court, and threaten them with heavy fines and jail sentences if they don't cough up names and details concerning their sources."); David Westphal, *Secrets & Subpoenas*, AM. EDITOR, Mar. 2007, at 4 (reporting on the American Society of Newspaper Editors' summit in January 2007 and noting that "[a]t the heart of this summit was evidence of the federal government's growing threat to reporting—specifically in prosecutors' willingness to use subpoena power and jailhouse threats to force reporters to testify and identify sources"); *see also* Impact and Perception, *supra* note 7, at 17.

193. *See 2007 House Judiciary Hearings*, *supra* note 150, at 32 (testimony of Lee Levine, Partner, Levine Sullivan Koch & Schulz, LLP) (testifying that litigants are "emboldened" by recent legal developments); Carr, *supra* note 191

The inevitable consequence of this emboldening, journalists suggest, is an increase in media subpoenas.[194] The consequence of this up-tick, they continue, is a change for the worse in the practices of American journalism. Not only are subpoenas believed to divert time and energy from newsgathering,[195] they also are said to deter good reporting. The theory is that reporters who feel threatened by subpoenas and the real possibility of jail time or substantial individual fines for noncompliance will shy away from stories that might give rise to subpoenas—especially those involving confidential sources, who will expect them to go to jail or pay the fines rather than revealing their identities.[196] Meanwhile, sources who see that journalists increasingly lose subpoena battles will be increa-

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(quoting Eve Burton, general counsel at the Hearst Corporation, as being concerned about a possibility that "'[i]f the government wins in [the BALCO case], every reporter's notebook will be available to the government for the asking'"); McCollam, *supra* note 110, at 31 (quoting Nathan Siegel, a Washington lawyer who represents several media companies as stating, "'[t]his is by far the most activity I've ever seen attacking journalists' sources'").

194. *See* Joan Biskupic, *Settlement Could Leave Issue of Reporter 'Privilege' Unsettled*, USA TODAY, May 22, 2006, at A5 (reporting that in the Wen Ho Lee case "[t]hirty-four news organizations . . . joined to file a brief in the case, as did 14 states. They note a recent tide of subpoenas seeking reporters' sources in various cases . . . ."); Katharine Q. Seelye, *Journalists Say Threat of Subpoena Intensifies*, N.Y. TIMES, July 4, 2005, at C1 (quoting Paul J. Boyle, vice president of Newspaper Association of America, as believing that "'the filing of subpoenas, as well as the letters and phone calls that media companies receive from prosecutors and civil litigants, is on the rise'"); *id.* (reporting that Kurt Wimmer, media lawyer at Covington & Burling, said he had "'as many subpoenas against reporters in the first three months of [2005] as he had in all of last year'"); Toobin, *supra* note 191, at 30 (quoting Lucy Dalglish, Executive Director of the Reporter's Committee for Freedom of the Press, as noting that "'[t]hirty-five years or so ago, reporters started getting a lot of subpoenas, and then there was a long lull . . . . [S]tarting about two years ago we got this sudden pop.'").

195. For greater description of newsroom leaders' perceptions of these impacts, see Impact and Perception, *supra* note 7, at 17–22.

196. *See* Casey Murray, *Under Oath: Journalists Are Under Increasing Pressure to Testify in Court, Threatening Their Independence and Leading Many to Consider a Federal Shield Law*, NEWS MEDIA & L., Winter 2006, at 10, 11 (quoting *Washington Post* reporter Howard Kurtz as asserting that "'[e]very journalist is going through a bit of soul searching about whether to grant anonymity to sources,'" because "'the prospect of going to jail is no longer a hypothetical possibility'"); Murray, *supra* note 149, at 16 (quoting ABC News President David Westin as insisting that "'[t]here are some stories . . . that we could not report without the ability to give some protection to sources'"); Bruce W. Sanford & Bruce D. Brown, *The Futility of Chasing Leaks*, WASH. POST, July 20, 2006, at A23 (describing the "bruising battles in the federal courts that have left the relationships between journalists and their sources more vulnerable").

singly unwilling to speak on condition of confidentiality. In either instance, the result is a chilling of the free press and a hampering of the ability to uncover important stories in the public interest.[197] Supporters of a shield law point to the avalanche of subpoenas and to the string of consequences arising from that avalanche as evidence that legislation is needed to protect the free flow of information.

But has the avalanche really happened? Or has the intense publicity surrounding cases that involved mostly very large national news organizations—reporting mostly on very sensitive national security-related topics—brought about undue alarm over an issue that is isolated to those kinds of organizations and those sorts of topics? This study seeks to determine whether the onslaught that is being so widely reported actually exists and to answer the fundamental empirical questions of how many subpoenas are faced by members of the media and who among the media are facing them. The ongoing debate over the propriety of a federal shield law provides the framework for the study's central inquiry: do the number, scope, and nature of media subpoenas warrant federal legislation?

II. THE STUDY

Although no neutral academic study has been conducted on the empirical question of subpoena frequency, there are some data extant. Before the most recent string of high-profile cases, the Reporters Committee for Freedom of the Press, a nonprofit group formed to support newspaper and television reporters,[198] conducted six biennial surveys attempting to document the in-

197. *See* Anna Badkhen, *TV Reporter Gets Confined to Home*, S.F. CHRON., Dec. 10, 2004, at A6 (quoting Frank Smyth of the New York-based Committee to Protect Journalists as asserting that the Taricani case is "'going to have a chilling effect for sources to come forward with sensitive information, and it's going to result in less information to the public domain'"); Paul Moore, *The Squeeze Is on for Reporters Asked to Reveal Sources*, BALT. SUN, May 21, 2006, at 2F ("[I]t is hard to deny that the independence that keeps journalists from becoming part of the prosecutorial process is under more pressure than ever."); Jacques Steinberg, *Setbacks on Press Protections Are Seen*, N.Y. TIMES, Aug. 18, 2004, at A16 ("[W]hat legal experts characterize as an ominous trend for journalists: the weakening of fundamental protections for the gathering and publishing of news that had been generally viewed as settled since the Watergate era.").

198. *See* About the Reporters Committee, http://www.rcfp.org/about.html (last visited Oct. 30, 2008) (describing the Committee as a leader in "building coalitions with other media-related organizations to protect reporters' rights to keep sources confidential," "keep[ing] an eye on legislative efforts," and submitting *amicus curiae* briefs on behalf of journalists).

cidence of subpoenas served on the media.[199] The surveys were sent to television news directors and newspaper editors, who were asked to report the total number of subpoenas received by the newspaper or television station in a given calendar year, and whether the subpoenas were in conjunction with federal or state proceedings.[200] Respondents also were asked to tell whether the proceedings were criminal or civil in nature[201] and to give various details about the nature of the proceeding, the entity issuing the subpoena, and the items sought in the subpoena.[202] Respondents then specified how they dealt with the subpoenas received and how courts responded to any challenges.[203] The Reporters Committee studies concluded with data for 2001—the year often regarded as the beginning of the recent change in legal climate.[204] The data collection for the 2001 study did not purport to be scientific[205] or neutral,[206] and the response rates were low, with 14% of the total distributed surveys returned.[207] Nevertheless, the survey results represent a baseline of data that is ideal as to topic and timing, if imperfect as to structure or statistical significance.

The survey in the present study was sent to the same population targeted by the Reporters Committee:[208] every editor of

199. LUCY A. DALGLISH, ET AL., THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, A REPORT ON THE INCIDENCE OF SUBPOENAS SERVED ON THE NEWS MEDIA IN 2001, at 1 (2003), http://www.rcfp.org/agents/agents.pdf [hereinafter 2001 REPORTERS COMMITTEE STUDY]. The report compiling data about subpoenas received in 2001 was published in 2003. The five earlier reports were published in 1991, 1993, 1995, 1999, and 2001. *Id.*

200. *See id.* at 5, 7; *id.* app. A, http://www.rcfp.org/agents/app_a.html (last visited Oct. 30, 2008) (replicating the survey instrument used to collect the data).

201. *Id.* at 7.

202. *Id.* at 8.

203. *Id.* at 10–11.

204. *See supra* text accompanying notes 172–97.

205. *See* 2001 REPORTERS COMMITTEE STUDY, *supra* note 199, at 5 ("The figures and percentages contained in this report have not been statistically analyzed, and no statistical generalizations have been made outside the group of respondents.").

206. *Id.* at 1 (noting that the study's goal was "to demonstrate that journalists are, indeed, 'differently situated' from other targets of discovery, and that the negative impact of subpoenas on newsgathering and dissemination was substantial").

207. *Id.* at 6 (reporting that the response rate was 16% for newspapers and 10% for broadcasters).

208. *See id.* at 5 (describing the 2001 Reporters Committee study surveys being mailed to print and broadcast outlets in every state and the District of Columbia). The data and respondent commentary analyzed in this article are

a U.S. daily newspaper, regardless of circulation or geographic location,[209] and every news director of a U.S. television news station affiliated with ABC, NBC, CBS, or FOX.[210] A total of 1997 invitations to participate in the survey were sent, by both U.S. mail and e-mail, in late March and early April 2007.[211] Respondents were given the option of completing the survey by U.S. mail, by e-mail, by telephone, or by logging onto the project's website. Respondents were asked to report numerical data for calendar year 2006.[212]

With a few nonsubstantive alterations in format, the present study adopted verbatim from the Reporters Committee survey a set of numerical questions and a yes/no question about whether the threat or use of subpoenas against the organization affected its policy on confidential sources.[213] Some alterations were made to the earlier survey instrument and methodology to meet the current needs. First, respondents in the present study were promised confidentiality in the reporting of data, with general demographic and organizational-size data gathered only for analytical purposes.[214] Second, respondents in

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the results of a survey independently conducted by the author. Datasets, programs, survey commentary, and additional results are on file with the author and publicly available at http://www.law.umn.edu/lawreview/issues.html and http://www.law.byu.edu/Law_School/Faculty_Profile?241.

209. Author sent surveys to newspaper editors as listed in EDITOR & PUBLISHER, INT'L YEARBOOK (86th ed. 2006).

210. Author sent surveys to news directors as listed in R.R. BOWKER, BROADCASTING & CABLE YEARBOOK 2006.

211. The initial invitations to participate in the survey were timed to correspond with the annual conventions of the American Society of Newspaper Editors and the Radio Television News Directors Association, at which the study was announced by the author.

212. Follow-up e-mails were sent to those who had not participated as of May 15 and June 15, 2007. One e-mail contained a link to the survey website; the other had a Microsoft Word survey fill-in form attached. All nonrespondents were sent a follow-up letter and final e-mail notice in August 2007.

213. *Compare* 2001 REPORTERS COMMITTEE STUDY, *supra* note 199, app. A, http://www.rcfp.org/agents/app_a.html (last visited Oct. 30, 2008), *with* survey instrument distributed in present study, Questions 10–12, 17 (on file with author and available for public review at http://www.law.umn.edu/lawreview/issues.html and http://www.law.byu.edu/Law_School/Faculty_Profile?241).

214. This was done both because federal law requires as much when studies are conducted at universities receiving federal funding, and because it was anticipated that confidentiality might remove inhibitions that some organizations might have in discussing their subpoena situations. In contrast, the Reporters Committee survey gave the responding organization the option of asking that its identity be kept confidential. *See* 2001 REPORTERS COMMITTEE STUDY, *supra* note 199, at 5. Thirty-seven percent of respondents requested this anonymity; the rest of the participating organizations were listed

the current study were asked to categorize their reported subpoenas by forum—federal or state—and to provide details within forum categories.[215] Eighteen percent of respondents opted to give only "top tier" numerical answers—that is, the total number of federal subpoenas received by the organization and the total number of state subpoenas received by the organization—without providing details about the source of those subpoenas, what they sought, or how they were handled. When discussed below, the details as to these subpoenas are listed as "unspecified." Third, the current survey added nine new multiple-choice questions designed to assess editor and news director perceptions of the impact of the recent high-profile cases[216] and changes in legal climate "compared to five years ago."[217]

Data collection concluded in September 2007. Seven hundred sixty-one surveys were completed, making the final response rate 38%, with a greater than 50% response rate among the one hundred largest newspapers by circulation[218] and among the twenty-five largest television stations by market area. Three hundred forty-six responses were received through the website, 196 by U.S. mail, 121 by e-mail, and 98 by telephone. Of the 1411 newspapers that were provided with surveys, 511 responded, for a newspaper response rate of 36.2%. Of the 586 television stations that were provided with surveys, 250 responded, for a television response rate of 42.7%. Television responses represented 32.9% of the total surveys received; newspaper responses represented 67.1%.[219] Respondents in-

by name in the final report. *See id.* at 5; *id.* app. B, http://www.rcfp.org/agents/app_b.html (last visited Oct. 30, 2008) (listing participating organizations).

215. *Compare id.* app. A, http://www.rcfp.org/agents/app_a.html (last visited Oct. 30, 2008) (Question 3), *with* survey instrument distributed in present study (Questions 10–12) (on file with author and available for public review at http://www.law.umn.edu/lawreview/issues.html and http://www.law.byu.edu/Law_School/Faculty_Profile?241). The Reporters Committee survey had asked a single forum question, asking only for the total number of subpoenas received that arose out of federal proceedings and out of state proceedings. Aiming to better inform the debate over a federal shield law, the survey in the current study asked that the federal and state subpoenas be reported separately and that details about the subpoenas' sources, topics, and handling be given by forum category.

216. The data gathered in these "perception questions" are discussed more fully in Impact and Perception, *supra* note 7, at 17.

217. The questions were asked in 2007; thus "five years ago," when referenced in this article, refers to the period since 2002.

218. Responses were received from six of the largest ten newspapers by circulation and fifty-nine of the top one hundred.

219. By comparison, the 2001 study received 319 responses, for a response

cluded stations from all Nielsen television market-size categories and newspapers from all *Editor & Publisher* newspaper-circulation categories, and, as demonstrated in Figure 1, the proportion of the respondents found in each market-size and circulation category was roughly representative of the proportion of organizations from those categories found in the total population. Responses were received from the District of Columbia and from every state except Delaware.[220]

Figure 1. Summary of Survey Participants and General Population

Media by Category	Proportion of Respondent Group	Proportion of General Population
Broadcast Market Size (Households)		
Under 100,000	7.2%	9.0%
100,000–250,000	28.8%	24.9%
250,000–500,000	29.6%	27.5%
500,000–1,000,000	18.4%	20.1%
> 1,000,000	16.0%	18.4%
Newspaper Circulation		
Under 10,000	34.2%	43.2%
10,000–25,000	27.8%	28.4%
25,000–50,000	15.7%	13.6%
50,000–100,000	10.2%	7.5%
100,000–250,000	8.0%	4.7%
250,000–500,000	2.7%	1.7%
> 500,000	1.4%	0.8%

Survey-response data were analyzed using STATA/IC 10.0 statistical software, in which numerical totals were tabulated and percentages of actual responses were calculated. In an effort to directly parallel the 2001 methodology, surveys were sent to the whole population of editors and news directors, and participation was voluntary. The methodology is imperfect as a tool for making comparisons with the 2001 Reporters Committee survey or for noting trends based on the responses to that

rate of 14%. Eighty-two of the responses were from television broadcasters and 237 were from newspapers. 2001 REPORTERS COMMITTEE STUDY, *supra* note 199, at 5.

220. The 2001 study did not receive responses from Delaware, Hawaii, Rhode Island, or Wyoming. *Id.* at 7.

earlier study because, although the total starting population was identical, the respondents in the two studies may have been from different segments of that population.

Two efforts were made to overcome this imperfection. First, in an effort to predict responses for the total population using actual responses, results were analyzed in STATA using a standard mechanism for countering nonresponse bias. A logistic regression was performed using a set of factors known about all media organizations in the population: (1) form of media (newspaper or television broadcaster); (2) state in which the organization is located; (3) circulation or market size; (4) the existence of a state shield statute; and (5) whether or not the organization responded to the survey. Based on these factors, responses were weighted by the inverse of the probability of response, so as to minimize nonresponse bias and make results more generalizable to the total population. Except where specified otherwise, all results reported in this article are responses that have been weighted in this way, giving a truer picture of the current experiences and beliefs of *all* newsroom leaders in the country.

Second, data analysis was performed on a group of respondents who participated in both the 2001 study and the current study. The Reporters Committee study made public the names of survey participants except in cases in which respondents requested anonymity.[221] One hundred seventeen of the 319 participating news organizations in 2001 requested anonymity; 202 had their identities made public.[222] One hundred forty-four of these 202 organizations identified as participants in the 2001 study also participated in the current study. This subgroup—45% of the total 2001 respondents—are referred to in this article as the Comparison Group.[223] Comparison Group analysis provides an additional mechanism for tracking numerical

221. *See id.* at 5; *id.* app. B, http://www.rcfp.org/agents/app_b.html (last visited Oct. 30, 2008) (listing participating organizations).

222. *See id.* at 5.

223. The Comparison Group contained a mix of television news directors and newspaper editors roughly proportionate to the mix contained in the entire group of 2001 respondents. Of the 319 total 2001 respondents, 237 (74%) were newspaper editors. Of the 144 Comparison Group members, 104 (72%) are newspaper editors. Of the 2001 respondents, eighty-two (26%) were television news directors. Of the Comparison Group members, forty (28%) are television news directors.

trends over the five-year period and for confirming apparent changes in frequency and impact suggested by other data.[224]

III. STUDY RESULTS

This survey aimed to answer the central unanswered questions in the legislative debates: How many subpoenas are being issued to the press in the United States and who among the media is receiving them? With its snapshot of the national experience for a single year, the survey provides a look at both the depth and the breadth of the media-subpoena situation. This snapshot suggests that, while the news media is not experiencing the "avalanche"[225] of subpoenas that some have described, there does appear to have been some increase in both the frequency and the impact of subpoenas over the five-year period of the study. Further, some apparent trends among federal subpoenas and, especially, confidential-material subpoenas, suggest that federal legislation would be a plausible response to an actual need and not merely a "solution in search of a problem."[226]

A. SUBPOENA-FREQUENCY DATA

The 761 responding news organizations participating in the study reported that their "reporters, editors or other news employees" received a total of 3062 "subpoenas seeking information or material relating to newsgathering" in calendar year 2006. Weighting responses to estimate actual values for the entire population suggests that a total of 7244 subpoenas were received by all daily newspapers and network-affiliated television news operations in the United States that year.

Subpoenas were reported by media organizations in Washington, D.C. and all forty-nine reporting states,[227] and by news-

224. Although it is impossible to deduce the specific characteristics of the anonymous participants in the 2001 study, it can be noted that the identified organizations (and the Comparison Group formed from these organizations) are organizations with comparatively small circulations and market sizes, and it might be speculated that larger organizations with greater numbers of subpoenas were more likely to request anonymity. Thus, trends seen in the Comparison Group arguably are understated, and would be even more pronounced if the full population of 2001 respondents was available for analysis.

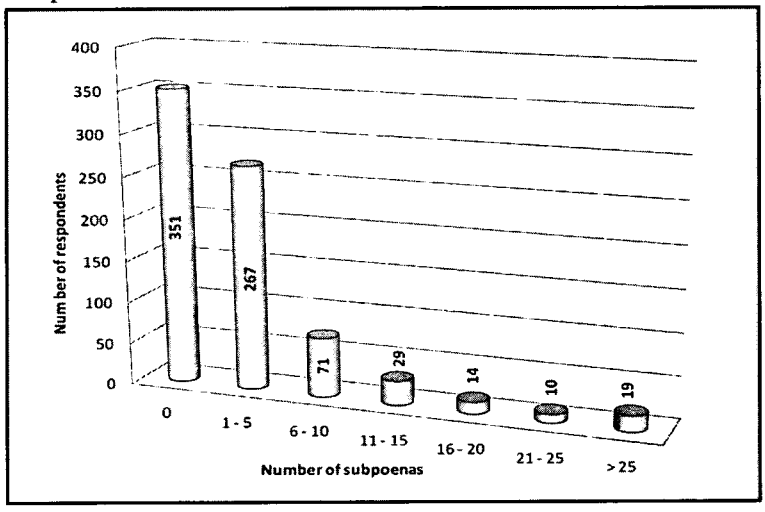
225. *2007 House Judiciary Hearings*, *supra* note 150, at 88 (statement of Rep. Pence, Member, H. Comm. on the Judiciary).

226. *2006 Senate Judiciary Hearings*, *supra* note 4, at 107 (statement of Paul J. McNulty, Deputy Att'y Gen. of the United States).

227. Media subpoena experiences varied widely from state to state. Massa-

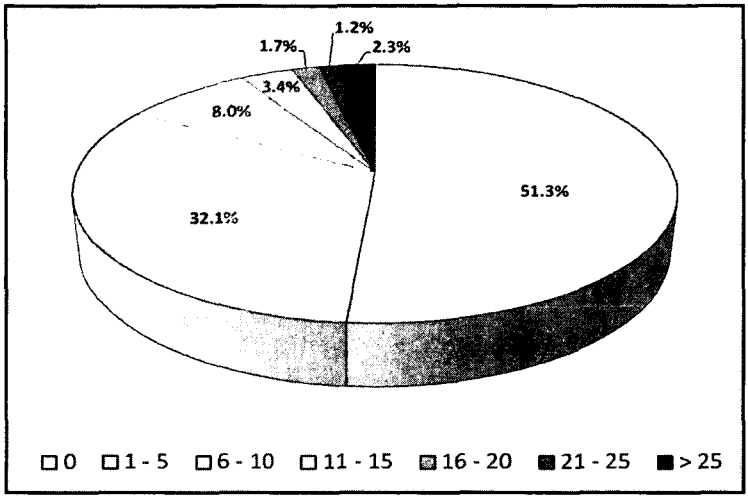
papers of every circulation category and broadcasters in every market size. An analysis of the distribution of subpoenas among media organizations shows that greater than half of the 761 responding organizations reported receiving one or more subpoenas. The vast majority of those received subpoenas in single-digit amounts, although almost 10% received greater than ten, and two survey respondents—both broadcasters—reported receiving more than one hundred subpoenas. The largest total number reported was 160. When responses are weighted and generalized to the entire population, the data suggest that 51.3% of media organizations received no subpoenas in 2006, 32.1% received between one and five, 8.0% received between six and ten, 6.3% received between ten and twenty-five, and 2.3% received greater than twenty-five.

Figure 2. Distribution of Respondents by Number of Subpoenas Received



chusetts organizations reported the largest average number of subpoenas per news organization (18.4), followed by Louisiana (18.0), and Washington, D.C. (11.3). The states with the smallest subpoena averages per organization were Vermont (0.4), Wyoming (0.4), New Hampshire (0.3), and Alaska (0.1). Complete state-by-state data is on file with author and available for public review at http://www.law.umn.edu/lawreview/issues.html and http://www.law.byu.edu/Law_School/Faculty_Profile?241.

Figure 3. Proportion of News Organizations by Number of Subpoenas Received



Newsroom leaders' responses lean heavily toward a belief that both raw numbers and subpoena risk have increased. Sixty-four percent of all newsroom leaders believe the frequency of media subpoenas to be greater than it was five years ago. Nearly half believe the risk of their own organization receiving a subpoena is greater than it was five years ago, while only 6% believe the risk to be less. Some rudimentary trend data appear to support this belief. The average number of subpoenas reported per respondent in this study was 4.02. Weighted to account for nonresponses, the data suggest that the average number of subpoenas received per news organization in the United States in 2006 was 3.6. The 144 members of the Comparison Group reported a total of 464 subpoenas, for an average of 3.22 subpoenas per respondent. In answers to identical numerical questions asked in the Reporters Committee survey five years earlier, the average number of subpoenas per respondent was 2.6.[228]

1. Newspapers vs. Television Broadcasters

Survey responses were grouped by medium for an additional analytical assessment. Using the 2001 data as a rough baseline, it appears that both newspapers and broadcasters have experienced increases in the number of subpoenas re-

228. *See* 2001 REPORTERS COMMITTEE STUDY, *supra* note 199, at 6.

ceived.[229] While newspapers receive more of the potentially complicated subpoenas dealing with confidential material than do their television counterparts,[230] television stations bear a significantly greater burden in terms of numbers of subpoenas received—most likely because subpoenaing attorneys seek material with a strong visual impact on juries.[231] Weighted to account for nonresponses, the data suggest that the average total number of subpoenas per television news operation is ten times the average per newspaper. In 2006, newspapers received an average of 0.9 subpoenas each, while the average number of subpoenas per television news operation was 10.2.[232] The largest number of subpoenas reported by any newspaper respondent was sixteen; the largest received by any broadcaster was ten times greater: 160. In raw numbers, even though there are more than twice as many daily newspapers as there are network-affiliated television news operations, more than four times as many subpoenas are issued to the latter than to the former. An extrapolation of the reported data to the entire population indicates that newspapers received a total of 1313 subpoenas in 2006, while broadcasters received a total of 5931.[233]

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229. *See id.* at 11. The 2001 study found an average of 7.7 subpoenas per broadcast respondent; weighted for nonresponse, the present study found 10.2 subpoenas per broadcast outlet. The 2001 study found an average of 0.7 subpoenas per newspaper respondent; weighted for nonresponse, the present study found 0.9 subpoenas per newspaper. In 2001, 79% of the responding broadcasters received at least one subpoena. The present study found that 86.4% of all broadcasters received at least one. In 2001, 32% of responding newspapers received at least one subpoena. The present study found that 38.0% of all newspapers received at least one.

230. *See infra* Part III.C.

231. Many broadcaster respondents made this point in the comments sections of the survey. Many resent what they see as being unfairly taken advantage of for these purposes. One typical comment:

> Civil attorneys are using tv stations to conduct discovery and relying on our video of car wrecks and accidents for a dramatic effect in court. They can get all the relevant information they need from police reports and such, but in short, want video of a mangled car to show to the jury. Prosecutors are lazy and would rather subpoena a tv station's video of a chase, for example, instead of having numerous officers subpoenaed and patrol car video dubbed. TV stations are being overburdened with these types of subpoenas.

232. Subpoenas to broadcasters account for 82.9% of all federal subpoenas issued to the media and account for 80% of all state subpoenas issued to the media in 2006.

233. This dichotomy very closely mirrors the situation described by the Reporters Committee in its 2001 study. The eighty-two television stations participating in that study reported a total of 638 subpoenas (79% received one or more during the year). 2001 REPORTERS COMMITTEE STUDY, *supra* note 199,

Perhaps even more notable is the breadth of subpoena distribution among television broadcasters in comparison to the distribution among newspapers. Two-thirds of all newspapers in the country did not receive any subpoenas at all in 2006. Conversely, 85.9% of all television news operations received at least one subpoena in 2006. Anecdotally, in survey comment sections, broadcasters speak of subpoenas as "routine," "an unfortunate, but regular, part of what we do," and something that "happens all the time." One large television station's news director noted, "We receive a subpoena almost weekly and it has been like this at all the other stations in the country for which I have worked."

Although they receive far fewer subpoenas than broadcasters, newspaper editors' anecdotal descriptions of the process of subpoena compliance almost uniformly characterize it as a significantly greater imposition than television news editors do.[234] Nearly all newspaper editors who described their subpoena experiences indicated that the disruption was major and that the personnel involved were numerous, ranging from the reporter or photographer to lower-level editors and, in many instances, to top editors and publishers. Conversely, a very large number of television news director respondents described a policy of automatically complying with all requests for material that actually aired—and treating such a subpoena as a dubbing request like any other that might come from the public, for which a standard fee is charged. Some noted that the subpoena situation is not entirely parallel to the dubbing-service situation because the former requires a letter from the newsroom certifying the authenticity of the footage or, more disruptively, actual testimony from the videographer, reporter, or news director. Broadcasters did express much greater concern about subpoenas seeking material other than that which was already was aired.[235] But the mere issuance of a subpoena appears to be less alarming to those in broadcast newsrooms than to those at newspapers.

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at 6. The 237 participating newspapers received a total of 185 subpoenas (32% received one or more during the year). *Id.*

234. For a more detailed discussion of the reported impact of subpoenas on the newsgathering process, see Impact and Perception, *supra* note 7, at 23.

235. *See infra* note 305.

2. Subpoenas and Organizational Size

Although promised confidentiality, survey respondents were asked to provide demographic data, including circulation size for newspapers and market size for television news operations. The numerical data were grouped by organizational size for further analysis.

As shown in Figure 4, when weighted to account for nonresponses, the data demonstrate that the likelihood of receiving a subpoena increases with newspaper circulation size. Small papers report starkly different experiences than do larger papers. More than 80% of newspapers with a circulation under 10,000 and more than 70% of newspapers with a circulation between 10,000 and 25,000 received no subpoenas in 2006.[236] Conversely, every newspaper with a circulation over 500,000 received at least one subpoena in that year, as did 85.7% and 82.9%, respectively, of newspapers with circulations between 250,000 and 500,000 and circulations between 100,000 and 250,000. However, as demonstrated in Figure 5, because small-circulation newspapers make up a very large percentage of the total newspaper population, the proportion of all newspaper subpoenas that is received by smaller newspapers is equal to or greater than the proportion received by those in larger circulation categories. As shown in Figures 6 and 7, respectively, these same correlations between newspaper size and number of subpoenas received exist within the subgroup of state subpoenas received, but not within the subgroup of federal subpoenas received, for which organizations from the top three newspaper-circulation categories received a greater proportion of the subpoenas.

Similar size trends also exist among television stations. Although the smallest broadcast organizations are overwhelmingly more likely to receive a subpoena than the smallest newspapers—66.2% of those in markets with fewer than 100,000 households received one or more subpoenas in 2006—they are less likely to receive a subpoena than larger television news operations. Nearly 90% of stations with market sizes of more than

236. In survey comments, respondents from these small and very small newspapers confirmed that subpoenas are exceptionally rare:

"We have not had a subpoena in all my years at the paper."

"My family has owned this newspaper for three generations, and do not believe we have gotten a single subpoena."

"We are a small community newspaper and do not ever receive subpoenas."

one million households and 91% of stations with market sizes between 500,000 and one million households received at least one subpoena in 2006. Larger stations also are experiencing greater total numbers of subpoenas than their smaller counterparts. Just over sixty percent of all subpoenas received by television news operations were received by broadcasters in market areas of 500,000 households or more. These broadcasters were the recipients of six of every ten state subpoenas to television newsrooms and seven of every ten federal subpoenas to television newsrooms.

Figure 4. Newspaper Reception of Subpoenas by Circulation

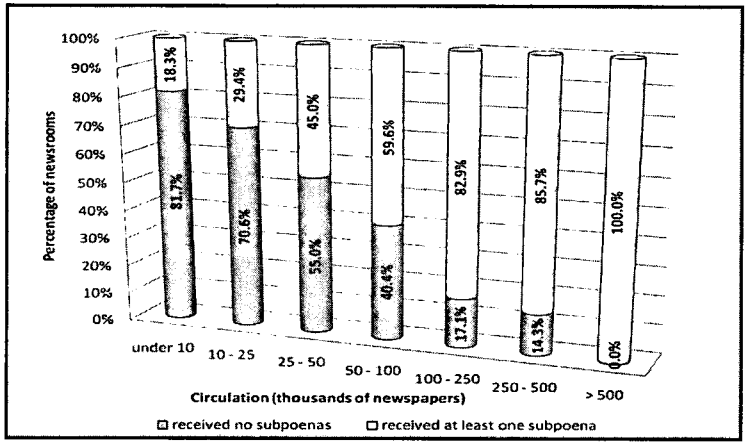


Figure 5. Proportion of Subpoenas Received by Newspaper Circulation

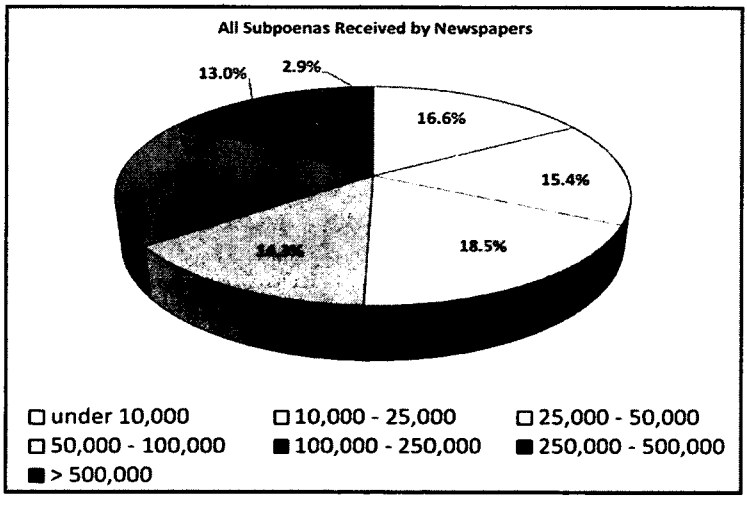


Figure 6. Proportion of State Subpoenas Received by Newspaper Circulation

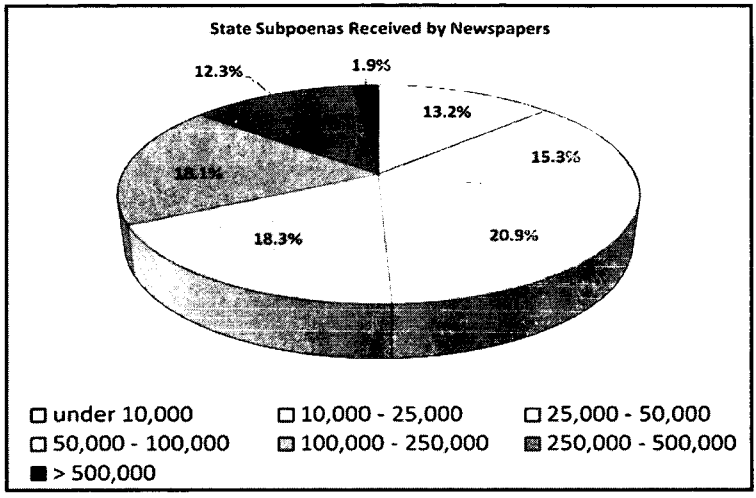


Figure 7. Proportion of Federal Subpoenas Received by Newspaper Circulation

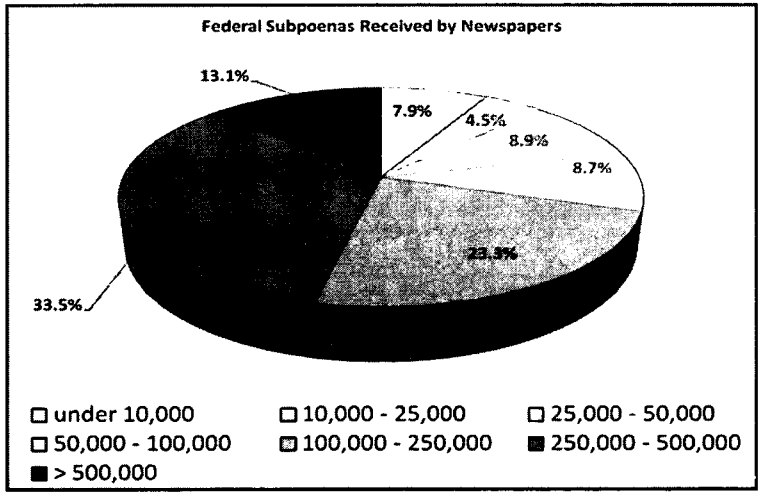


Figure 8. Broadcaster Reception of Subpoenas by Market Size

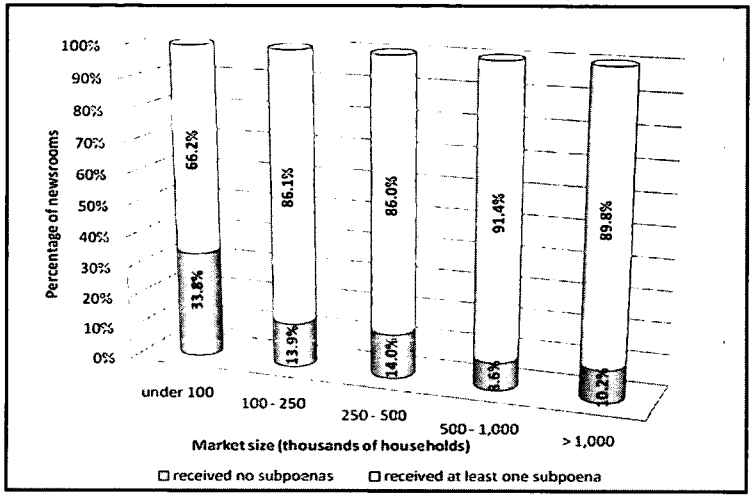


Figure 9. Proportion of Subpoenas Received by Broadcast Market Size

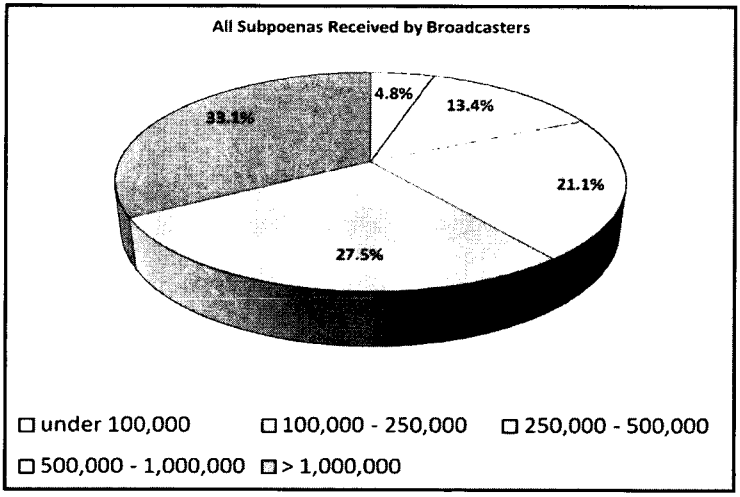


Figure 10. Proportion of State Subpoenas Received by Broadcast Market Size

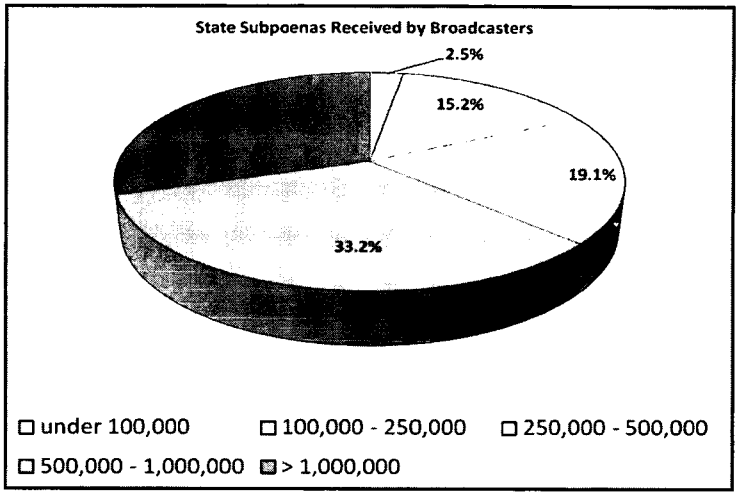
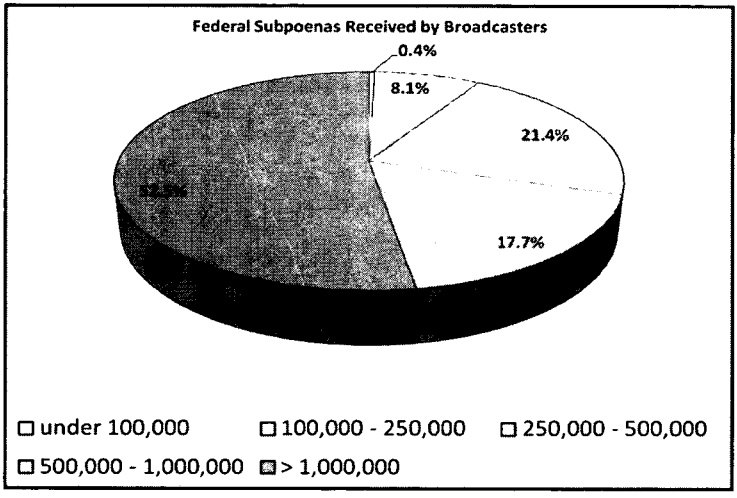


Figure 11. Proportion of Federal Subpoenas Received by Broadcast Market Size



A linear analysis of organizational size and number of subpoenas received shows a positive relationship between the total number of subpoenas received by a newspaper organization and the size of the organization and a very strong positive relationship between the number of subpoenas received by a broadcaster and the size of the organization. The average number of subpoenas per newspaper with a circulation under 10,000

(0.36) is seventeen times lower than the average per newspaper with a circulation between 250,000 and 500,000 (6.36). While television news operations in markets with fewer than 100,000 households received an average of 4.99 subpoenas per organization, those in markets with greater than one million households received an average of 18.94 per organization.

Figure 12. Average Number of Subpoenas Received by Newspaper Circulation

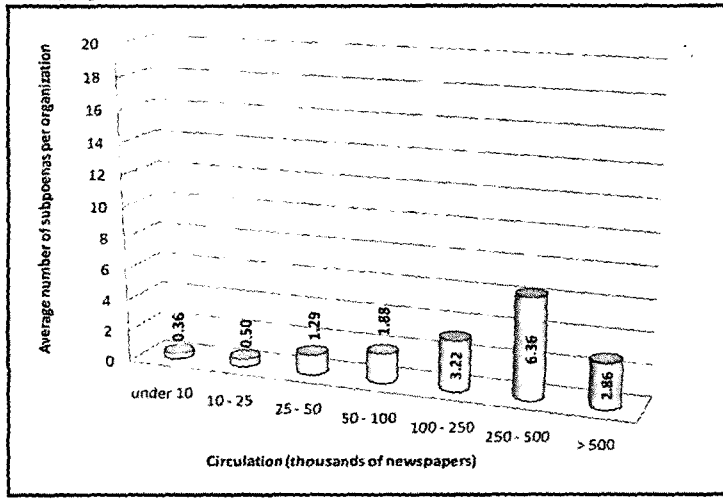
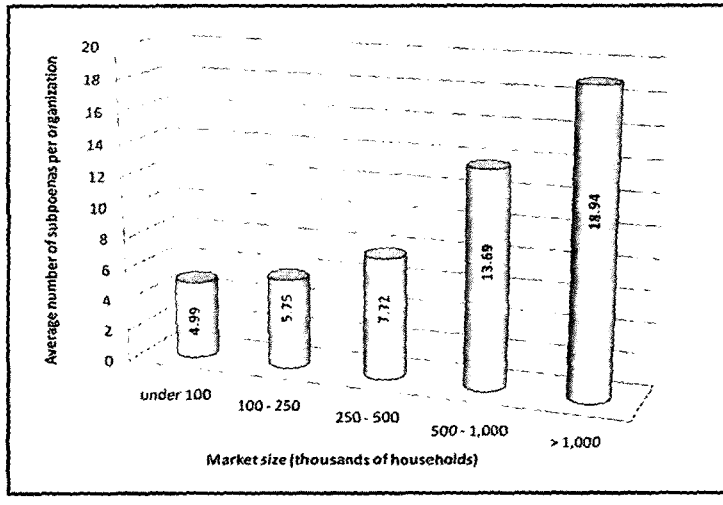


Figure 13. Average Number of Subpoenas Received by Broadcaster Market Size



Thus, it appears that for newspapers, the brunt of the subpoena burden is borne by the one hundred or so largest organizations, perhaps because these newspapers produce a greater volume of news material each day, or perhaps because they are more likely to have full-time investigative reporting teams, budgets that can support in-depth work, and reporters with connections to officials in cases of significant legal import. Among broadcasters, subpoenas are a reality for almost all mid- and large-sized stations and for a large percentage of small stations, because attorneys in a wide variety of cases seek visually compelling evidence to put before juries.[237]

B. FEDERAL-SUBPOENA DATA

Because recent high-profile cases and current legislative debates have been federal in their focus, the numerical portion of the survey asked respondents to categorize the received subpoenas as arising out of federal proceedings or state proceedings and to describe the nature, handling, and resolution of these subpoenas separately by forum category. Consistent with past trends,[238] and as would be expected given the significantly larger number of state courts than federal courts, subpoenas issued in connection with state proceedings greatly outnumbered those issued in connection with federal proceedings. However, analysis of the survey data suggests that federal subpoenas may be both more frequent than they were five years ago and more common than opponents of a federal shield law have suggested.

Ninety-one responding media organizations reported receiving one or more federal subpoenas in calendar year 2006. Sixteen organizations reported receiving five or more. All told, in actual numbers from the 38% of the nation's media outlets that responded to the survey, there were a reported 335 federal subpoenas issued in 2006. Because an additional 529 reported subpoenas were not specified as either federal or state, the true number of federal subpoenas could be even greater. Sixty-four

237. *See supra* note 231 and accompanying text.

238. *See* 2001 REPORTERS COMMITTEE STUDY, *supra* note 199, at 7 (indicating that 706 of the 823 subpoenas reported in 2001 (86%) arose in state court proceedings, while 74 (9%) were issued in proceedings in a federal court (5% were unspecified)). In the current study, 2198 of the 3062 reported subpoenas (71.8%) arose out of state court proceedings and 335 (10.9%) arose out of federal proceedings (17.3% were unspecified). When the data are weighted to account for nonresponses, federal subpoenas represent 13.1% of all subpoenas received.

federal subpoenas were reported by newspapers; 271 were reported by television broadcasters. Extrapolating to the larger population, the statistically weighted data suggest that at least 774 federal subpoenas were issued to the press in 2006—132 (17.1%) to newspapers and 642 (82.9%) to television news operations.[239]

Nearly twice as many federal subpoenas per respondent were reported in the current study than in the 2001 study.[240] Moreover, the survey results and respondent commentary indicate that federal subpoenas in the United States are having an increasing impact on newsroom practices across the country and are casting a wider net than the high-profile media organizations involved in the recently publicized cases. Weighted responses suggest that 10.3% of all media organizations in the country received at least one federal subpoena in 2006. To be sure, larger media organizations face federal subpoenas with much greater frequency. Close to 70% of the federal subpoenas reported by newspapers were reported by the one hundred largest of the more than 1400 daily newspapers in the country, and more than half of the federal subpoenas issued to broadcasters were issued to those in markets of one million households or more.[241] But federal subpoenas were not limited to those major news outlets. Mid-sized organizations are receiving them with some regularity. Nearly 10% of newspapers with circulations between 50,000 and 100,000 received a federal subpoena in 2006; so did more than 20% of television newsrooms in markets of between 250,000 and 500,000 households. In all, federal subpoenas were issued to media organizations in thirty-two states and the District of Columbia and to newspapers and television news outlets in every circulation and market size.

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239. By comparison, analysis of the data weighted for nonresponses suggests that a total of at least 5151 state subpoenas were issued to the media in 2006. Eighty percent (4125) were issued to broadcasters; 20% (1026) were issued to newspapers.

240. In the 2001 study, the Reporters Committee found 0.23 federal subpoenas per respondent. 2001 REPORTERS COMMITTEE STUDY, *supra* note 199, at 5, 7 (dividing the number of federal subpoenas (74) by the number of respondents (319)). This study found 0.44 federal subpoenas per respondent. The Comparison Group reported a slight increase from five years ago, with an average of 0.28 per respondent. Weighted to account for nonresponses, the data suggest an average of 0.39 federal subpoenas per media organization.

241. *See supra* fig.11.

Figure 14. Newspaper Reception of Federal Subpoenas by Circulation

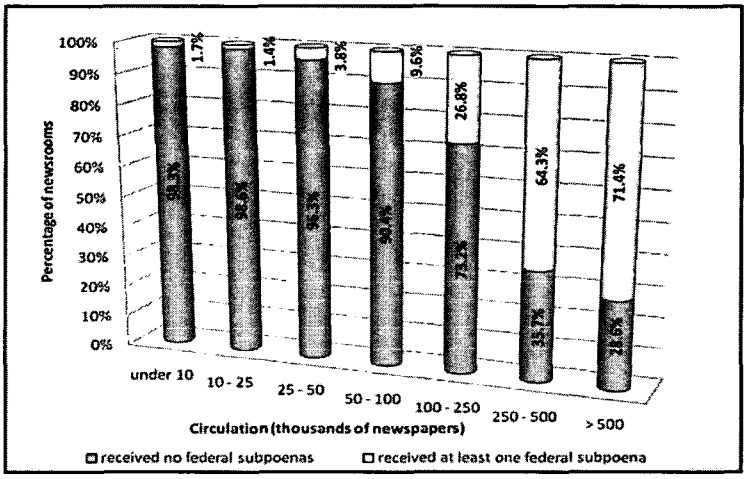
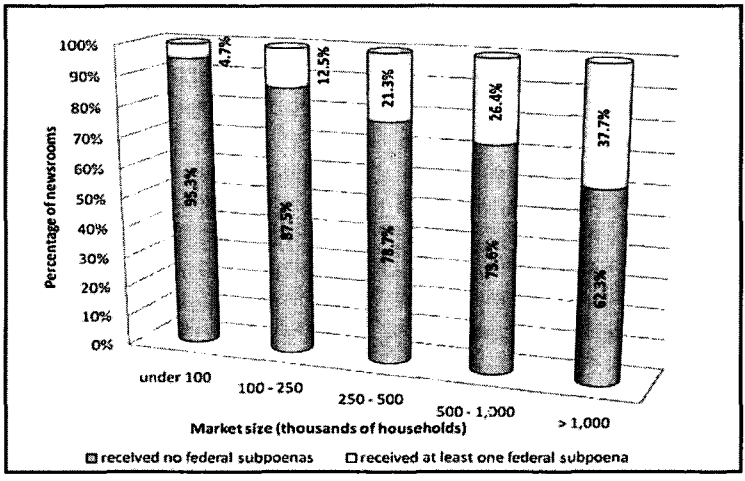


Figure 15. Broadcaster Reception of Federal Subpoenas by Market Size



The substance of federal subpoenas is greatly varied, too. Beyond the high-profile national-security stories and governmental leaks that result in Privacy Act cases—the stuff of which the recent headlines were made[242]—media organizations in the United States report facing federal subpoenas related to immigration matters, employment discrimination suits, the

242. *See supra* Part I.C.

prosecution of federal drug crimes, securities cases, civil rights actions, and even civil suits arising out of automobile accidents that took place in Washington, D.C. If 2006 is a representative year, it would appear that reporters and their organizations are spending time, energy, and money dealing with subpoenas in a wide variety of federal cases, and that a federal shield law—even one with a strong national-security exception—could be expected to have a meaningful impact upon journalism.

When asked to describe generally "how much time and resources were expended on subpoenas" with which they complied, some respondents differentiated between federal and state subpoenas—and uniformly commented that federal subpoenas required more time and had a significantly greater impact on newsroom operations.[243] When asked to compare time and resources spent dealing with subpoenas today compared with five years ago, 62.2% of news organizations that received federal subpoenas report that the time spent is either somewhat or significantly greater. This figure is more than two-and-a-half times greater than the percentage of those receiving no federal subpoenas who report an increase, as demonstrated in Figure 16.

Survey respondents were given the option of specifying the kind of proceeding in which the subpoena arose and the entity that issued the subpoena. A total of 160 federal subpoenas were specified as having arisen in connection with federal criminal matters.[244] Of those, seventy-eight were reported to have been issued by federal prosecutors, three by special prosecutors, sixty by defense attorneys, and one by federal law enforcement.[245] These raw-number totals, if weighted to account for nonresponses, suggest that *at least*[246] 175 subpoenas were issued by the Department of Justice's Criminal Division in calendar year

243. One newsroom leader who reported handling state subpoenas with limited disruption to the news process also reported that "[t]he federal subpoena consumed at least five hours a week of my time for several months." Another who said that state subpoenas took, on average, an hour for compliance reported: "We complied with [a] federal subpoena. About 20 hours of staff time." Others commented:

"We feel protected in [this state's] state courts in regards to subpoenas. We feel very vulnerable in federal court."

"Courts are somewhat more protective locally, but not nationally. On a national level, it is much less protective."

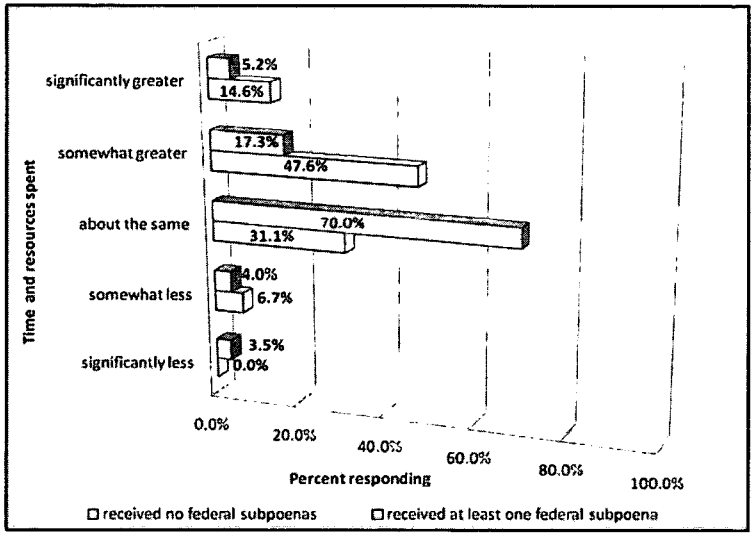
244. For overall data on who issued subpoenas, see *infra* Part III.E.

245. Eleven respondents answered "Don't Know."

246. Because the type of proceeding was unspecified for 26.3% of the reported federal subpoenas, the true number may well be greater.

2006 alone—a number that sheds greater light on the activity of the Department than does the Justice Department's narrow testimony that the division has "approved subpoenas to the media seeking source-related information in only 19 cases since 1991," only four of which "have occurred since 2001."[247]

Figure 16. Time and Resources Expended on Federal Subpoenas Compared to Five Years Ago



The data gathered on the question of federal subpoenas seeking confidential material likewise offer a clearer empirical picture than has been available thus far. Actual respondents representing 38% of the nation's news organizations reported a total of twenty-one federal subpoenas seeking names of confidential sources in 2006. They reported thirteen federal subpoenas that sought other information received on condition of confidentiality,[248] for a total of thirty-four actually reported federal subpoenas demanding confidential material. Weighted to account for nonresponses and extrapolated to the entire population, the data suggest confidential material was sought in a federal subpoena at least sixty-seven times in 2006, and that in forty-one of these instances, the name of a confidential source was sought.

247. *2007 House Judiciary Hearings*, *supra* note 150, at 18 (testimony of Rachel Brand, Assistant Att'y Gen. of the United States).

248. For details on confidential-material data, see *infra* Part III.C.

It is worth noting that while federal subpoenas represent only about 10% of the total reported subpoenas, federal subpoenas seeking the names of confidential sources represent nearly 50% of the total subpoenas seeking the names of confidential sources,[249] meaning reporters are facing this situation in federal courts as often as they are facing it in the state courts of all fifty states, where even the barest of reporter's privilege regimes provide a privilege for material obtained under a promise of confidentiality.[250]

Further, demographic data gathered in connection with the numerical responses show that federal subpoenas seeking confidential material were received by news organizations outside the major national media, including at mid-sized television news operations, 50,000-circulation newspapers, and media organizations in Georgia, Colorado, Kentucky, and Arizona—all of which, again, suggest that a federal shield law's protection would serve journalists nationally, and not merely the handful of top-tier news organizations that have been involved in the highest profile cases in recent years.

More to the point, these numbers, representing a single calendar year, stand in stark contrast to the nineteen incidents in the past fifteen years in which the Department of Justice's Criminal Division reports it has sought source-related information—particularly because such a large percentage of federal subpoenas appear to have arisen in the criminal setting. At a minimum, the numbers indicate that the incidence of federal subpoenas in general and federal subpoenas seeking source-related material in particular may not be as rare as opponents of a shield law suggest.

C. CONFIDENTIAL-MATERIAL DATA

One of the clearest trends appearing in the data relates to subpoenas seeking confidential material. The results suggest a dramatic increase since 2001 in reported subpoenas seeking material that a reporter obtained under a promise of confidentiality.

The Reporters Committee 2001 study indicated that just two of the 823 reported subpoenas in that survey had de-

249. Twenty-one federal subpoenas seeking the names of confidential sources were reported; twenty-two state subpoenas sought them. *See infra* Part III.C.

250. *See supra* text accompanying notes 28–29; *infra* text accompanying notes 280–82.

manded the identity of a confidential source and that four had requested other information obtained under a promise of confidentiality, for a total of six instances of subpoenas seeking confidential material.[251] These subpoenas represented well under 1% of the total subpoenas reported.[252]

Respondents in the present survey reported ninety-seven instances in which subpoenas sought information obtained under a promise of confidentiality.[253] Although the percentage of total subpoenas seeking this information remains small, this number represents a more than four-fold increase from 2001 in the percentage of requests for confidential material.[254] Extrapolating with weighted values to account for nonresponses, the current data suggest there were a total of 213 instances in which confidential information was sought in media subpoenas in calendar year 2006 alone, ninety-two of which sought the name of a confidential source. The conclusion that confidential-material subpoena requests have increased is further supported by an analysis of the Comparison Group. These 144 respondents, who represent just 45% of the participants of the 2001 study, report a total of nineteen instances in which subpoenas sought confidential material in 2006—more than three times as many as were reported by the full 319 respondents in the earlier study.

A total of forty-three actually reported subpoenas from 2006 sought the names of confidential sources. Twenty-one of these were in conjunction with federal proceedings; twenty-two were in conjunction with state proceedings. A total of fifty-four reported subpoenas sought other information obtained under a promise of confidentiality. Thirteen of these were in conjunction with federal proceedings; forty-one in conjunction with state proceedings. While, as a general matter, broadcasters are receiving significantly greater numbers of subpoenas than newspapers, newspapers are facing a disproportionately large percentage of the subpoenas that seek material obtained under a promise of confidentiality. Newspapers received 54.9% of the

251. *See* 2001 REPORTERS COMMITTEE STUDY, *supra* note 199, at 5, 9.

252. *Id.*

253. *See infra* fig.17.

254. The 2001 study reported 6 instances of confidential material being requested in a total of 823 subpoenas (0.73%). 2001 REPORTERS COMMITTEE STUDY, *supra* note 199, at 5, 9. The current study reports 97 instances of confidential material being requested in a total of 3062 subpoenas (3.17%). *See infra* fig.17; *supra* Part III.A.

reported confidential-material subpoenas; 45.1% were received by television newsrooms.

Anecdotally, respondents told of a noticeable up-tick in subpoenas seeking confidential material—and of a concomitant increase in time, resources, and money spent dealing with them.[255] If confidential sources can be integral to the acquisition of the news—as courts,[256] commentators,[257] and legislators[258] routinely have recognized—these trends may be cause for concern. If the press needs to utilize confidential sources and information in order to act as a watchdog of government,[259] or if, as many within the industry have suggested,[260] it is only

255. One respondent sharing this sentiment wrote: "We have expended a great deal of time and resources on subpoenas for confidential sources in the last several years—more so than at any time before." Another wrote that an increase in confidential-material subpoenas within the study period has meant that "the publisher, the executive editor, the managing editor, and approximately 10–15 reporters and editors have had to spend significant amounts of time consulting with counsel and preparing to give or giving testimony."

256. *See, e.g.*, Zerilli v. Smith, 656 F.2d 705, 711 (D.C. Cir. 1981) ("Compelling a reporter to disclose the identity of a source may significantly interfere with this news gathering ability; journalists frequently depend on informants to gather news, and confidentiality is often essential to establishing a relationship with an informant."); *cf., e.g.*, Gonzales v. Nat'l Broadcasting Co., 194 F.3d 29, 35–36 (2d Cir. 1999) (noting that confidential sources should have greater protection than nonconfidential sources while also recognizing a qualified privilege for nonconfidential sources).

257. *See, e.g.*, Alexander, *supra* note 170, at 102 ("Journalists use confidential sources to gather important news and information that they would not be able to obtain through other means."); Lee, *supra* note 169, at 685 ("Coverage of national security is an area where confidential sources are especially vital.").

258. *See, e.g.*, *2006 Senate Judiciary Hearings*, *supra* note 4, at 96 (statement of Sen. Leahy, Member, S. Comm. on the Judiciary) ("[I]nvestigative journalism is the essence of the First Amendment. Investigative journalism is how whistleblowers, skeptics and dissenters get out the facts that they know to the public."); *July 2005 Hearing*, *supra* note 116 (statement of Sen. Feingold, Member, S. Comm. on the Judiciary) (noting that "anonymous sources have been too important to exposing government and corporate wrongdoing" to not protect them).

259. *See* Kirtley, *supra* note 46, at 523–25; Potter Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631, 631–33 (1975). *See generally* TIMOTHY W. GLEASON, THE WATCHDOG CONCEPT: THE PRESS AND THE COURTS IN NINETEENTH-CENTURY AMERICA (1990); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 538–44, 591–611 (1978).

260. *See, e.g.*, Alicia C. Shepard, *Anonymous Sources*, AM. JOURNALISM REV., Dec. 1994, at 20 (quoting Bob Woodward of the Washington Post as saying "'The job of a journalist, particularly someone who's spent time dealing in sensitive areas, is to find out what really happened. . . . When you are reporting on inside the White House, the Supreme Court, the CIA or the Pentagon, you tell me how you're going to get stuff on the record. Look at the good report-

by making meaningful connections with the most significant confidential sources that investigative reporters are able to uncover governmental wrongdoing and produce stories that serve the public interest,[261] then an increase in confidential-material subpoenas might signal a trend warranting legislative remedy.[262] Citing major historical examples like Watergate,[263] and

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ing out of any of those institutions—it's not on the record.'"); *see also* Peter Johnson, *Should Reporters Give Up a Confidential Source?*, USA TODAY, Aug. 25, 2004, at B14 (noting that a freelance writer stated that promises of confidentiality are just as necessary to a reporter as grants of immunity to confidential informants are to law enforcement officials, so that they can perform their jobs).

261. *See, e.g.*, Affidavit of Carl Bernstein in Support of the Motion to Quash Subpoenas by Mark Fainaru-Wada and Lance Williams, ¶ 8, *In re* Grand Jury Subpoenas, Mark Fainaru and Lance Williams, 438 F. Supp. 2d 1111 (N.D. Cal. 2006) (No. CR 06-90225 JSW) (noting that "the uninformed public will suffer as a result" of not protecting confidential sources); Affidavit of Jack Nelson in Support of the Motion to Quash and/or for a Protective Order by Fainaru-Wada and Lance Williams, ¶ 4, *In re* Grand Jury Subpoenas, Mark Fainaru-Wada and Lance Williams, No. CR 06-90225 JSW (N.D. Cal. 2006) ("In order to fully report on stories on many subjects, especially in order to learn of activities that otherwise would have been shielded from the public, I often found it necessary to rely on confidential sources.") (on file with author); Affidavit of Michael Parks in Support of the Motion to Quash Subpoenas by Mark Fainaru-Wada and Lance Williams, ¶¶ 5–6, *In re* Grand Jury Subpoenas, Mark Fainaru-Wada and Lance Williams, No. CR 06-90225 JSW (N.D. Cal. 2006) ("Journalists have an honor-bound commitment to protect people who are acting in good faith from reprisals.") (on file with author); *cf.* Project for Excellence in Journalism, *Content Analysis*, *in* THE STATE OF THE NEWS MEDIA 2005: AN ANNUAL REPORT ON AMERICAN JOURNALISM, JOURNALISM.ORG, http://stateofthenewsmedia.org/2005/narrative_overview_contentanalysis.asp?cat=2&media (stating that 13% of front-page newspaper articles included confidential sources). This study analyzed approximately 16,800 stories, including 6589 newspaper stories. *See* Project for Excellence in Journalism, *PEJ Media Report Card, Content Analysis, General Methodology*, *in* THE STATE OF THE NEWS MEDIA 2005: AN ANNUAL REPORT ON AMERICAN JOURNALISM, JOURNALISM.ORG, http://stateofthemedia.org/2005/methodology.asp.

262. *See* Editorial, *Contradictory Stance: While Officials Call for Journalistic Freedom, Subpoenas for BALCO Reporters Send an Opposite Message*, HOUS. CHRON., May 20, 2006, at B8 (discussing issuance of subpoenas to journalists and noting that it is "creating a national atmosphere that makes investigative reporting more difficult and whistleblowers more fearful about talking to journalists"); Op-Ed, *Jailing Reporters*, WASH. POST, Nov. 27, 2004, at A30 ("[The *Taricani* case] is part of a rash of recent cases in which judges are seeking to force journalists to renege on promises of confidentiality . . . .").

263. KATHARINE GRAHAM, PERSONAL HISTORY 471 (1998) (describing how the Washington Post relied heavily on confidential sources during reporting on Watergate); *see also* Blasi, *supra* note 62, at 251–53 (noting that at the time of publication in 1971, stories about operations of government most heavily relied on promises of confidentiality, in comparison to other categories of reporting, and that nearly one-third of these stories depended on "regular" confidential sources).

more recent examples like the stories exposing Abu Ghraib misdeeds and revealing mismanagement at Walter Reed Hospital,[264] journalists have argued that major stories only come to the public attention when confidential sources talk to reporters. Even while agreeing that credibility dictates that confidential information be used with caution, many argue that it is critically important to preserve the freedom to use it.[265] Although some have contended that the ongoing ability of the media to produce these major investigative pieces—all in the absence of a federal shield law—suggests that the legal climate is not unduly oppressive and that the federal legislation is unnecessary,[266] the data pointing to an increase in confidential-material subpoenas remain notable, in that even the most limited of state reporter's privilege regimes protect this kind of material.[267] Indeed, some state shield laws protect reporters only from having to reveal confidential information.[268]

Study results also indicate that confidential-material subpoenas are not limited to the largest media organizations or those with strong national news coverage. As demonstrated by Figure 17, subpoenas seeking confidential material were re-

264. *July 2005 Hearing*, *supra* note 116 (testimony of Lee Levine, Partner, Levine Sullivan Koch & Schulz, LLP) (noting that the sources of an early Abu Ghraib story only would speak on condition of anonymity); 153 CONG. REC. H11591 (daily ed. Oct. 16, 2007) (statement of Rep. Berkley) ("Without this protection [to sources of journalists and broadcasters], stories involving conditions at the Walter Reed Army Medical Center, prisoner abuse at Abu Ghraib, and the unmasking of the culprits behind the Enron scandal might never have been written.").

265. *See October 2005 Hearing*, *supra* note 116 (testimony of Judith Miller, Reporter, New York Times) ("If journalists cannot be trusted by sources to guarantee confidentiality, then journalists cannot function and there cannot be a free press. . . . All are entitled to anonymity if they are telling the truth and have something of importance to say to the American people. Reporters rarely know when they extend a pledge of confidentiality to a good-faith source what the impact of the information being provided will be.").

266. *See 2007 House Judiciary Hearings*, *supra* note 150, at 52 (testimony of Randall Eliason, Professor, George Washington University Law School) ("Major stories from Watergate and Iran Contra up through Abu Ghraib, secret CIA prisons, and unlawful surveillance by the Government, all have been reported without a Federal privilege law."); *see also* Branzburg v. Hayes, 408 U.S. 665, 693–95 (1972) (refusing to recognize a connection between a lack of privilege and the obstruction of flow of news to the public).

267. *See infra* text accompanying note 280.

268. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-2237 (2003); R.I. GEN. LAWS § 9-19.1-2 (1997). The Arizona statute has been limited to confidential sources by subsequent case law. Matera v. Superior Court, 825 P.2d 971 (Ariz. Ct. App. 1992). In New Mexico, the Rules of Evidence limit the reporter's privilege to confidential information or sources. N.M.R. ANN. 11-514 (2008).

ceived by television broadcasters in every market size and by newspapers in all but the very smallest circulation category (under 10,000). They were reported by organizations in twenty-two states and the District of Columbia.

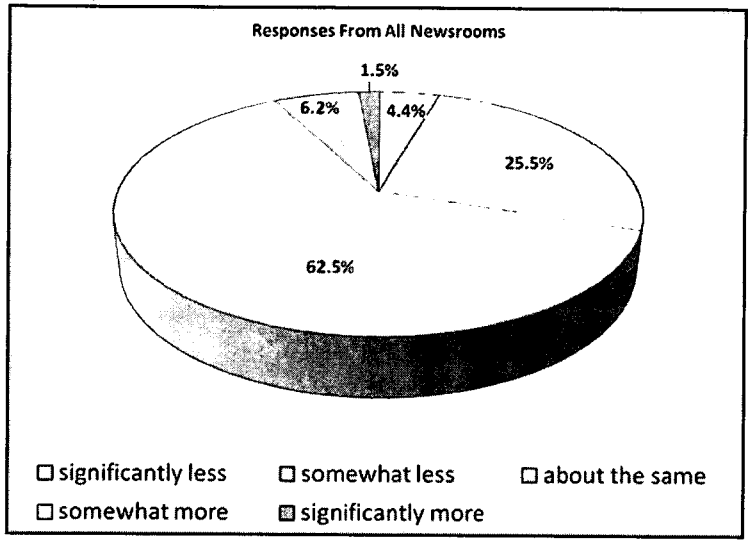
Figure 17. Summary of Recipients of Subpoenas Seeking Confidential Material

Who Received Subpoenas for Confidential Material? (Number of requests made to survey respondents)		
States	**Broadcasters by market size**	**Newspapers by circulation**
Arkansas (1) Arizona (2) California (10) Colorado (1) District of Columbia (10) Florida (12) Georgia (1) Indiana (2) Kentucky (5) Massachusetts (2) Maryland (2) Michigan (1) North Carolina (1) New Hampshire (2) New Jersey (1) New Mexico (2) New York (15) Oregon (4) Pennsylvania (1) Tennessee (3) Texas (16) Virginia (2) Wisconsin (1)	< 100,000 (4) 100,000– 250,000 (8) 250,000– 500,000 (5) 500,000– 1,000,000 (16) > 1,000,000 (5)	< 10,000 (0) 10,000– 25,000 (4) 25,000– 50,000 (1) 50,000– 100,000 (12) 100,000– 250,000 (7) 250,000– 500,000 (8) > 500,000 (27)

As subpoenas seeking confidential material increase, some newsroom leaders are reporting that news sources are not as willing to speak on condition of confidentiality. Nearly one-third of newsroom leaders in 2007 believed that sources were either somewhat or significantly less willing to speak on condition of confidentiality with reporters at their organization than they were five years earlier. By contrast, only 7.7% believe that

sources are somewhat or significantly more willing to speak on condition of confidentiality.[269]

Figure 18. Perceived Change in Willingness of Sources to Speak on Condition of Confidentiality, Compared to Five Years Ago



In comments to open-ended questions about the impact of subpoenas on newsgathering, survey respondents indicated that sources recently have verbalized their concerns about the perceived decrease in protection for reporters. Respondents suggested that "unless it is with a reporter who has been on a beat for a long while and cultivated the source," sources may no longer speak on the basis of confidentiality. One respondent from Rhode Island reported that sources have referred to that state's *Taricani* case[270] when declining to provide confidential information: "[Taricani] went to jail, and sources see that. More and more, people are not willing to put themselves in that boat. Sources say, 'Even if you promise me, I will be found out. Even if you promise us confidentiality, you'll be forced to tell. Maybe I shouldn't talk.'" Newsroom leaders suggested this concern also impacts their assignment decisions: "We certainly recognize the elevated risk," noted one, "and it affects one's willingness to put reporters at risk."

269. Sixty-two point five percent of newsroom leaders believe the willingness of sources is "about the same."

270. *See supra* text accompanying notes 172–73.

The survey asked two other questions designed to gauge change related to confidential sources. First, it asked newsroom leaders to assess the frequency of "use of confidential sources" by their organizations, compared to five years ago. As demonstrated in Figure 19, the data indicate that in 35.4% of American newsrooms, the use of confidential sources has decreased in the last five years. In 15.1% of newsrooms, the use is "significantly less." Second, respondents were asked to specify changes to newsroom "polic[ies] or practice[s] on the use of confidential sources." As demonstrated in Figure 20, almost one-third of organizations have altered their internal policies in the last five years to permit fewer uses of such sources,[271] while only 2.0% of organizations permit more uses of such sources than five years ago, and no organizations at all have a policy or practice that permits "many more" uses of confidential sources than five years ago.[272]

271. Newspapers report somewhat more changes in policy than broadcasters: 32.4% of newspapers permit either fewer or far fewer confidential sources than five years ago; 26.5% of television stations permit either fewer or far fewer.

272. Both the reduction in the use of confidential sources and the changes in policy on such sources are greater the larger the newspaper gets. As illustrated in Appendix, Figure A, smaller newspapers much more frequently report that their policies on confidential sources are "unchanged" in comparison to five years ago (this is true of greater than half of the papers in the smallest five circulation categories), while greater than half of the newspapers in the largest two circulation categories have altered their policies to permit fewer or far fewer confidential sources. Likewise, greater than 70% of editors of newspapers with circulations between 250,000 and 500,000 and circulations 500,000 or more report that their use of confidential sources is somewhat less or significantly less compared with five years ago. But no similar patterns are seen among television newsrooms. Indeed, as demonstrated by Appendix, Figure B, the smallest television newsrooms appear to be altering their policies to permit fewer confidential sources in greater percentages than larger stations are.

Figure 19. Use of Confidential Sources Compared to Five Years Ago

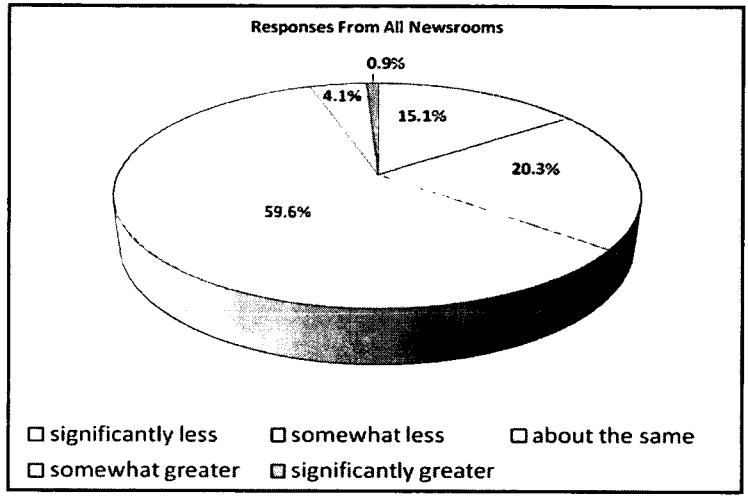
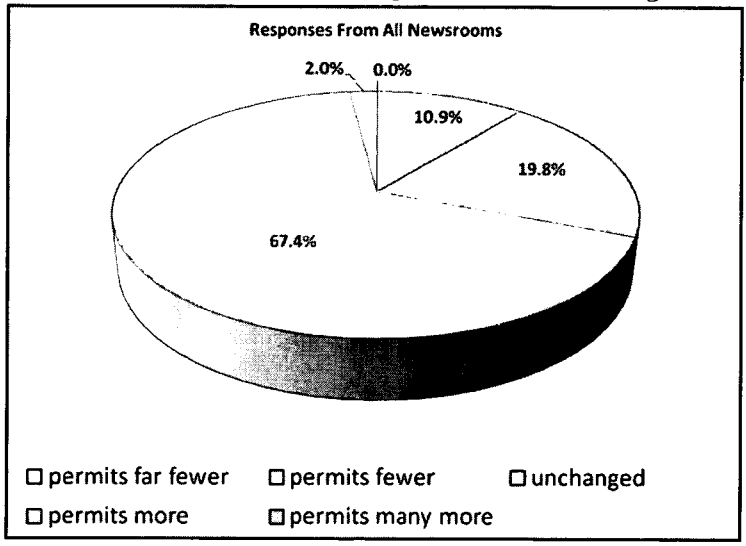


Figure 20. Changes to Newsroom Policies or Practices on the Use of Confidential Sources, Compared to Five Years Ago



Some of the changes in policy were spurred, at least in part, by changes in legal climate and the high-profile cases of recent years.[273] Notably, however, when a separate question

273. "News coverage of reporter's privilege cases that were lost by reporters at other organizations" was among the reasons for the change of policy at

asked whether the "threat or use of subpoenas against your news organization affected your policy on the use of confidential sources," only twenty-nine newspapers and twenty broadcasters answered in the affirmative. Generalized to the wider population, the data suggest that the threat or use of subpoenas affects the confidential-source policy at only an estimated 6.1% of news organizations in the country.

Indeed, when newsroom leaders at those organizations that did change their policies in the last five years to permit fewer uses of confidential sources were asked to provide the reason or reasons for those changes, a majority cited reasons that are tied more closely to journalism-industry norms than to legal environment.[274] Thirty-eight percent of organizations describe the change of policy or practice as being, to some extent, motivated by a reason other than those listed in the survey; this "other" option was selected more than any other answer choice.[275] Textual commentary suggests these reasons are overwhelmingly rooted in changing industry norms about journalistic integrity and reputation with the media-consuming public.[276] More than 90% of the participants who volunteered their own reasons for changing the policy referenced a desire for greater transparency in reporting in order to increase credibility in the eyes of readers and viewers, with nearly all of these going on to call it the "most important" of their listed reasons. Respondents reported that a change in policy on the use of confidential sources "has much more to do with trust of the media and its sources"[277] than with any fear of or reaction to subpoenas. Citing a new reader skepticism—both as to the accuracy of reports involving confidential sources and as to the motives of those who decline to go on the record—respondents referenced changes in newsroom leadership and corporate policy or the adoption of company-wide ethical codes designed to

30.2% of newsrooms making a change; 14.7% of organizations making a change consider it the most significant reason for the change. *See* app. fig.C. Advice of legal counsel was a factor motivating a change in policy for 27.8% of newsrooms, and the receipt of at least one subpoena by the organization itself was among the reasons for a change of policy for 13.9%. *See id.*

274. *See id.*

275. *Id.*

276. *See* Summary of Respondents' Comments (on file with author and available for public review at http://www.law.umn.edu/lawreview/issues.html and http://www.law.byu.edu/Law_School/Faculty_Profile?241).

277. *See id.*

meet these concerns:[278] "It is a journalistic reason, not a legal one."[279]

D. SHIELD-LAW DATA

While Congress never has enacted a federal shield law, a solid majority of state legislatures have passed shield laws that create some form of a reporter's privilege for subpoenas issued in connection with proceedings in the given state.[280] These statutes differ greatly with respect to coverage and degree of protection,[281] but all provide at least a qualified privilege against

278. Managerial decisions were among the reasons for change for 36.5% of newsrooms changing their policy or practice, and were the most significant reason for 20.1%. *See* app. fig.C.

279. *See* Summary of Respondents' Comments (on file with author and available for public review at http://www.law.umn.edu/lawreview/issues.html and http://www.law.byu.edu/Law_School/Faculty_Profile?241).

280. Maryland enacted the first state reporter shield-law statute in 1896. MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (2006); *see* CITIZEN MEDIA LAW PROJECT, STATE SHIELD LAWS, http://www.citmedialaw.org/state-shield-laws (last visited Oct. 30, 2008). By the time of the survey, thirty-two states and the District of Columbia had provided a reporter's privilege legislatively. *See* ALA. CODE § 12-21-142 (2006); ALASKA STAT. §§ 09.25.300 to .390 (2006); ARIZ. REV. STAT. ANN. § 12-2237 (2003); ARK. CODE ANN. § 16-85-510 (2005); CAL. EVID. CODE § 1070 (West 1995); COLO. REV. STAT. § 13-90-119 (2007); CONN. GEN. STAT. § 52-146t (2007); DEL. CODE ANN. tit. 10, §§ 4320–4326 (1999); D.C. CODE §§ 16-4701–04 (2001); FLA. STAT. § 90.5015 (2007); GA. CODE ANN. § 24-9-30 (1995); 735 ILL. COMP. STAT. 5/8-901 (West 2003); IND. CODE ANN. §§ 34-46-4-1 to -2 (LexisNexis 1998); KY. REV. STAT. ANN. § 421.100 (LexisNexis 2005); LA. REV. STAT. ANN. §§ 45:1451–1459 (1999); MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (2006); MICH. COMP. LAWS ANN. §§ 767.5a, 767A.6 (West 2000); MINN. STAT. §§ 595.021–.025 (2006); MONT. CODE ANN. § 26-1-902 (2007); NEB. REV. STAT. §§ 20-144–147 (1997); NEV. REV. STAT. § 49.275 (2007); N.J. STAT. ANN. § 2A:84A-21 (West 1994); N.M. STAT. ANN. § 38-6-7 (West 2003); N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1992); N.C. GEN. STAT. § 8-53.11 (2007); N.D. CENT. CODE § 31-01-06.2 (1996); OHIO REV. CODE ANN. §§ 2739.04, 2739.12 (LexisNexis 2000); OKLA. STAT. tit. 12, § 2506 (Supp. 2007); OR. REV. STAT. §§ 44.510–40 (2007); 42 PA. CONS. STAT. ANN. § 5942 (West 2000); R.I. GEN. LAWS § 9-19.1-1 to -3 (1997); S.C. CODE ANN. § 19-11-100 (Supp. 2007); TENN. CODE ANN. § 24-1-208 (LexisNexis 2000). Washington State enacted the nation's thirty-fourth shield law during the time of the study. WASH. REV. CODE ANN. § 5.68.010 (West Supp. 2008). It was signed into law on April 27, 2007, but it did not become effective until July 22, 2007. Because the law was not in effect at the time the Washington State respondents participated in the study, Washington was counted as a non-shield-law state for purposes of analysis.

281. For example, only ten states—Alabama, Arizona, Indiana, Kentucky, Montana, Nebraska, Nevada, Ohio, Oregon, and Pennsylvania—and the District of Columbia, provide an absolute privilege for confidential sources, while the others are qualified in some way. *See* Privilege Compendium Front Page, The Reporters Committee for Freedom of the Press, http://rcfp.org/privilege/

responding to some subpoenas and offer this privilege to at least journalists from traditional news organizations like those surveyed in the present study.[282] In light of the intense debate over the usefulness of a federal shield law, survey data were analyzed to determine the effect, if any, of a state shield law on subpoena frequency and handling.

It is clear that operating in a state with a shield law does not immunize a newsroom from subpoenas. Shield-law states and non-shield-law states had a nearly identical percentage of organizations experiencing at least one subpoena in 2006.[283] The percentage of organizations receiving at least one federal subpoena in 2006 is nearly the same in states with and without shield laws[284] and so is the percentage of organizations receiving at least one state subpoena.[285] Newsrooms in shield-law states also report increases of time and resources spent responding to subpoenas compared to five years ago in nearly the same amounts as non-shield-law states.[286]

Analysis does indicate that shield-law states have a smaller overall average number of subpoenas per media organization[287] and smaller average numbers of both federal and state subpoenas per media organization,[288] but, as demonstrated in Figure 21, the differences in subpoenas received—particularly as to state subpoenas—are not as great as might be expected.[289]

(last visited Oct. 30, 2008).

282. *Id.*

283. The percentages are 48.8% and 48.6%, respectively.

284. Ten point five percent of organizations in shield-law states received one or more federal subpoenas in 2006, while 9.9% of organizations in non-shield-law states did.

285. Fifty-nine point three percent of organizations in shield-law states received one or more state subpoenas in 2006, while 60.1% of organizations in non-shield-law states did.

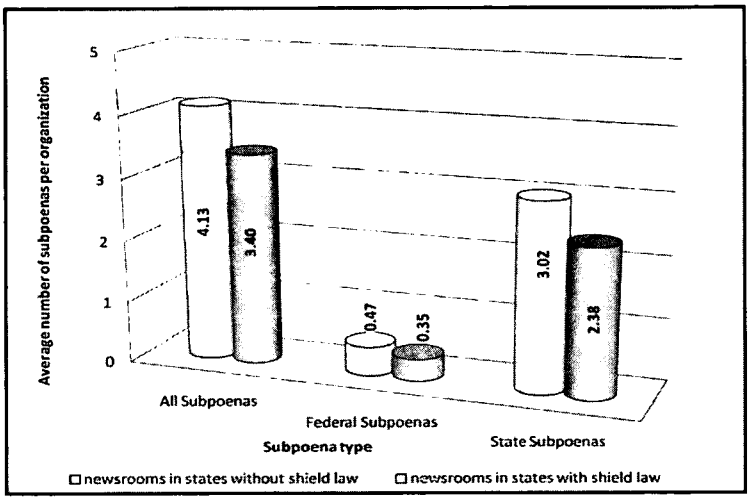
286. As demonstrated in Figure D, states without shield laws had only slightly greater percentages of organizations reporting increases in time and resources spent. *See infra* app. fig.D.

287. Among shield-law states, news organizations received an average of 3.40 subpoenas per organization in 2006. In non-shield-law states, they received an average of 4.13. This 21% difference would suggest that newsrooms are subpoenaed more aggressively in states without shield laws.

288. Organizations in shield-law states received 0.35 federal subpoenas per organization; organizations in non-shield-law states received 0.47. This may suggest that state shield laws limit the number of *federal* subpoenas received. Organizations in shield-law states received 2.38 state subpoenas per organization; organizations in non-shield-law states received 3.02.

289. *But see* 2001 REPORTERS COMMITTEE STUDY, *supra* note 199, at 11 (noting unexpected results in three different studies showing shield-law states receiving a larger number of subpoenas per news outlet than non-shield-law

Figure 21. Average Number of Subpoenas Received, by Existence of Shield Law



Several potential explanations exist for the lack of a stronger difference in shield-law and non-shield-law subpoena data. One is that shield laws are ineffective or do not make a meaningful difference in the ordinary operations of the media. This explanation runs counter to the anecdotal reports of numerous respondents, who overwhelmingly described in survey comments the quick withdrawal or limitation of subpoenas when requesting attorneys were informed of the shield legislation. Another explanation may be that because many states that do not have statutory shield laws nonetheless recognize a state-based reporter's privilege as a matter of common law or constitutional doctrine,[290] the ultimate legal protection may not be significantly different between those states that have legislation and those that do not. An additional explanation, also

states, and in two of the three studies, the disparity was significant).

290. *See, e.g.*, *In re* Contempt of Wright, 700 P.2d 40, 41 (Idaho 1985); Winegard v. Oxberger, 258 N.W.2d 847, 850 (Iowa 1977); State v. Sandstrom, 581 P.2d 812, 814 (Kan. 1978); *In re* Letellier, 578 A.2d 722, 726–27 (Me. 1990); *In re* John Doe Grand Jury Investigation, 574 N.E.2d 373, 375 (Mass. 1991); State *ex rel.* Classic III Inc. v. Ely, 954 S.W.2d 650, 655 (Mo. Ct. App. 1997); Opinion of the Justices, 373 A.2d 644, 647 (N.H. 1977) (applying the constitutional provision); Hopewell v. Midcontinent Broadcast. Corp., 538 N.W.2d 780, 782 (S.D. 1995); State v. St. Peter, 315 A.2d 254, 256 (Vt. 1974); Brown v. Commonwealth, 204 S.E.2d 429, 431 (Va. 1974); State *ex rel.* Hudok v. Henry, 389 S.E.2d 188, 193 (W. Va. 1989); Zelenka v. State, 266 N.W.2d 279, 287 (Wis. 1978). After data collection concluded, the State of Utah enacted a rule of evidence protecting news reporters. UT. R. EVID. 509.

supported anecdotally by comments from newsroom leaders participating in the survey, is that reporter's privilege legislation does not greatly limit the *number* of subpoenas received, but does impact the *outcome* of negotiations over those subpoenas. Some empirical data on subpoena handling appear to support this conclusion: Newsroom leaders in states with shield laws reported that they complied with state subpoenas much less often than those without shield laws and that they persuaded the issuing attorneys to withdraw state subpoenas more often than did those without shield laws.[291]

Apart from the numerical analysis, survey data strongly suggest that recent changes in legal climate are not perceived any differently in states with shield laws than in states without. Perceptions of changes in courts' attitudes, of the increase in subpoena frequency, and of the willingness of prosecutors and civil litigants to subpoena the press are virtually identical among respondents with state shield laws and respondents without. When asked to compare the organization's risk of receiving a subpoena to the risk five years ago, organizations with state shield laws and those without perceive no meaningful difference.[292] The one notable difference in opinions about legal climate between these two groups is that greater percentages of newsroom leaders in shield-law states believe that the recent high-profile cases are a cause of the perceived increase in subpoena frequency.[293]

Both of these findings—that legal climate change is perceived equally by those with and without state shield laws and that those with state shield laws are more highly attuned to the recent high-publicity cases—are perhaps unsurprising, given the heavily federal nature of those recent cases. Because the bulk of the dialogue on the question of media subpoenas has been occurring at a federal level, it might be expected that shield-law states, in which members of the press once felt relative ease, now have newsroom leaders who feel greater insecurity about the scope of their protection.

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291. *See infra* fig.28.

292. *See* Impact and Perception, *supra* note 7, at 22.

293. *Id.* at 19. Weighted to account for nonresponses, 80.2% of responses from shield-law states believe the increased frequency was a result of a "change in climate brought about by the high-publicity cases in which reporters were forced to testify or jailed." Sixty-four point four percent of responses from non-shield-law states believe that this is a reason for the increased frequency. *Id.* at 19 n.159.

These findings underscore one of the primary arguments made in favor of a federal shield law—namely, the particularly great need for uniformity in the area of legislative privileges.[294] When a reporter engages in newsgathering and is faced with the question of whether to promise confidentiality, she lacks many pieces of knowledge about the down-the-road moment at which a subpoena related to that newsgathering might arise. Before speaking to the source, she does not know what information the source will provide; does not know whether—or to whom—the gathered information will be useful; does not know whether litigation will arise that is related to the information's usefulness; and, perhaps most critically, certainly does not know whether that litigation would occur in a state or a federal forum.[295] Thus, at the critical moment in which the privilege affects newsgathering, a reporter cannot know what legal standard might ultimately operate upon that moment. In the absence of a federal privilege, even a reporter operating under a state shield law with an absolute privilege can make no guarantees to sources at the times in which those guarantees are sought. This may explain, at least in part, why organizations with state shield laws are reacting to the high-profile cases in equal or greater numbers than organizations without them.

E. ADDITIONAL DATA: WHO IS ISSUING SUBPOENAS, WHAT ARE THEY SEEKING, AND HOW DOES THE MEDIA RESPOND TO THEM?

The primary goal of the study was to provide useful data on the frequency of media subpoenas, so as to inform the longstanding numerical debate on the question. Mirroring the 2001 study, the current survey also gave respondents the option of providing greater details about the type of subpoenas received, what they sought, and how the organization responded to them.

For almost 65% of the reported subpoenas, respondents opted to report the type of proceeding in which the subpoena arose. Among actual responses, reported in Figure 22, criminal cases outnumbered civil by a wide margin, and the greatest

294. *July 2005 Hearing*, *supra* note 116 (testimony of Geoffrey Stone, Professor, University of Chicago School of Law) ("This generates uncertainty, and uncertainty breeds silence."); *see also October 2005 Hearing*, *supra* note 116 (testimony of Anne Gordon, Managing Editor, Philadelphia Inquirer).

295. *July 2005 Hearing*, *supra* note 116 (testimony of Matt Cooper, Reporter, Newsweek) (testifying that reporters lack the ability to foresee these factors).

percentage of subpoenas was issued in conjunction with criminal trials. When weighted to account for nonresponses, as reported in Figure 23, these data indicate that in 2006, media organizations across the country received at least[296] 1980 subpoenas arising out of criminal trials, 560 arising out of criminal investigations, 312 arising out of grand juries, 1307 arising out of civil trials, 236 arising out of civil depositions, and 33 arising out of administrative proceedings. There are no notable differences in the kinds of proceedings in which subpoenas are arising in the federal and state settings.

Figure 22. Specified Proceedings Giving Rise to Subpoenas (Actual Responses)

Proceeding		Forum				Total	
		Federal		State			
Criminal	Trial	160 47.8%	124 77.5%	1066 48.5%	728 68.3%	1226 48.4%	852 69.5%
	Investigation		27 16.9%		212 19.9%		239 19.5%
	Grand Jury		9 5.6%		126 11.8%		135 11.0%
Civil	Deposition	77 23.0%	19 24.7%	585 26.6%	83 14.2%	662 26.1%	102 15.4%
	Trial		58 75.3%		502 85.8%		560 84.6%
Administrative Proceeding		2 0.6%		12 0.5%		14 0.6%	
Don't Know		0 0.0%		4 0.2%		4 0.2%	
Other		8 2.4%		58 2.6%		66 2.6%	
Unspecified		88 26.3%		473 21.5%		561 22.1%	
Total		335 100.0%		2198 100.0%		2533 100.0%	

296. Because the type of proceeding was not specified for almost one-quarter of the reported subpoenas, and another 2.5% of responses specified "Other" or "Don't Know," this extrapolation indicates that another 1498 subpoenas were issued in 2006 for which the type of proceeding cannot be determined.

Figure 23. Overall Proceedings Giving Rise to Subpoenas (Weighted Responses)

Proceeding		Forum				Total	
		Federal		State			
Criminal	Trial	364 47.0%	284 78.0%	2488 48.3%	1696 68.2%	2852 48.1%	1980 69.4%
	Investigation		62 17.0%		498 20.0%		560 19.6%
	Grand Jury		18 4.9%		294 11.8%		312 10.9%
Civil	Deposition	172 22.2%	42 24.4%	1371 26.6%	194 14.2%	1543 26.0%	236 15.3%
	Trial		130 75.6%		1177 85.8%		1307 84.7%
Administrative Proceeding		5 0.6%		28 0.5%		33 0.6%	
Don't Know		0 0.0%		11 0.2%		11 0.2%	
Other		17 2.2%		118 2.3%		135 2.3%	
Unspecified		216 27.9%		1136 22.0%		1352 22.8%	
Total		774 100.0%		5152 100.0%		5926 100.0%	

Respondents also were asked to specify the source of their subpoenas in the criminal and civil settings. Responses are summarized in Figure 24. By a small margin, more of the criminal-proceeding subpoenas were specified as having been issued by prosecutors than by defense attorneys. In the civil setting, where the strong majority of subpoenas appear to have been issued in cases in which the news organization was not itself a party to the suit,[297] respondents reported a larger number of subpoenas issued by plaintiffs' attorneys than by defense attorneys.[298] Given the relatively large number of unspecified responses, it is difficult to identify accurately any trends over time

297. Only fifty-eight subpoenas were specified as arising in cases in which the news organization "was a party to the suit (such as a libel suit)." However, respondents reported 768 subpoenas arising out of civil suits in which the news organization "was not a party to the suit (brought in as a 'third party')." This latter number is more than the total 662 civil subpoenas reported, making it somewhat difficult to draw further conclusions from the data.

298. Respondents reported 340 subpoenas issued by plaintiffs in third-party civil proceedings and 194 issued by defendants in such proceedings. One hundred forty-one answered the question "Don't Know." The total number of subpoenas reported in these answers was 675—again, slightly exceeding the 662 civil subpoenas that were reported in the question asking respondents to identify the kind of proceedings involved. Assuming the accuracy of these reported numbers, the weighted numbers for the entire population indicate that, in 2006, media organizations received 761 subpoenas from plaintiffs' attorneys in third-party civil actions and 447 from defense attorneys in such suits.

in the entities issuing subpoenas, but it may be notable that, in the 2001 survey, subpoenas from defense attorneys in criminal cases outnumbered those from prosecutors, while in the present survey, the reverse was true.

Figure 24. Entities Issuing Media Subpoenas

Criminal Setting				
Source of Subpoenas	**Federal Subpoenas**	**State Subpoenas**	**Total**	**2001 Subpoenas**
Prosecution	78	497	575	206
Defense	60	413	473	223
Police	1	39	40	22
Special Prosecutor	3	0	3	N/A
Don't Know	11	100	111	33
Total	153	1049	1202	484
Civil Suits in Which Media Was Not a Party				
Source of Subpoenas	**Federal Subpoenas**	**State Subpoenas**	**Total**	**2001 Subpoenas**
Plaintiff	36	304	340	91
Defendant	29	165	194	79
Don't Know	22	119	141	125
Total	87	588	675	295

Figure 25 specifies the items sought in federal and state subpoenas to newspapers in 2006. Column A lists the actual responses from survey participants. Column B lists the weighted numbers that suggest the overall number of instances in which each type of item was sought from a newspaper in 2006. Column C lists the 2001 responses. Published stories are the most frequently subpoenaed items reported in 2006, followed by notes and testimony at trial. Testimony at a deposition, unpublished photographs, and published photographs are the next most sought-after items. Figure 26 specifies the items sought in federal and state subpoenas to television broadcasters in 2006. Column A lists the actual responses from survey participants. Column B lists the weighted numbers that suggest the overall number of instances in which each type of item was sought from a broadcaster in 2006. Column C lists the 2001 responses. By an overwhelming margin, material actually broadcast was the most-requested item in subpoenas to broadcasters in 2006. Unedited audio/videotape is the next most sought after, with outtakes, notes, and testimony at trial ranking next. The data demonstrating that already-published and

already-broadcast material are the most-sought items are in keeping with the strong weight of anecdotal evidence and also serve as an explanation for the relatively high rate of compliance with media subpoenas.

Figure 25. Items Sought from Newspapers

Item Sought	Column A			Column B			Column C
	Survey Responses			Weighted Responses			2001 Responses
	Federal	State	Total	Federal	State	Total	
Audiotapes	6	40	46	12	86	98	30
Internal Memos	6	25	31	12	52	64	16
Notes	32	180	212	63	394	457	70
Photo Negatives	1	29	30	2	67	69	37
Published Photographs	4	72	76	8	167	176	47
Published Stories	26	210	236	51	462	513	74
Testimony at a Deposition	18	80	98	35	174	208	47
Testimony at Trial	23	125	148	48	287	334	67
Unpublished Photographs	3	80	83	6	187	193	47
Written Drafts	5	29	34	10	61	71	14
Total	124	870	994	245	1938	2183	449

Figure 26. Items Sought from Broadcasters

Item Sought	Column A			Column B			Column C
	Survey Responses			Weighted Responses			2001 Responses
	Federal	State	Total	Federal	State	Total	
Internal Memos	0	45	45	0	117	117	17
Materially Actually Broadcast (Audio/Video)	108	980	1088	248	2294	2543	541
Notes	21	146	167	44	340	384	59
Outtakes	20	176	196	45	427	473	121
Testimony at a Deposition	23	38	61	61	95	156	5
Testimony at Trial	24	111	135	63	282	344	43
Unedited Audio/Videotape	93	595	688	210	1419	1629	172
Written Drafts	1	80	81	3	196	198	41
Total	290	2171	2461	674	5171	5845	999

Respondents were given the option of reporting how they handled the subpoenas they received. Of the subpoenas for which the media organization's method of addressing the subpoena was specified, 60.1% were complied with fully, without any opposition by the news organization. This represents a slight decrease from the 68% of subpoenas for which the Reporters Committee reported full compliance in 2001.[299] In 22.2% of reported instances, respondents persuaded the individual issuing the subpoena to withdraw it. The Reporters Committee indicated that this occurred in 19% of the reported subpoenas in 2001.[300] In 17.7% of reported instances, respondents in the current study reported filing a motion to quash a subpoena. A court granted a motion to quash in 81.9% of the total filings; in 18.1%, the court denied it.[301] In the 2001 study, news organizations challenged 8% of the subpoenas with a motion to quash, and were successful in 75% of those motions.[302] Overall, it appears that the string of recent high-profile cases has not meaningfully altered the way in which media organizations respond to subpoenas that they receive—apart from the fact that perhaps compliance is slightly down and the number of motions to quash is slightly up. If indeed the legal climate is changing, it seems it thus far has changed only the frequency with which certain subpoenas are issued, and not the handling of subpoenas once they are received.

Figure 27. Handling of Subpoenas

Handling of Subpoenas	Survey Total	
Complied Fully	60.1%	
Persuaded Withdrawal	22.2%	
Filed Motion to Quash	17.7%	
	Granted	81.9%
	Denied	18.1%

299. 2001 REPORTERS COMMITTEE STUDY, *supra* note 199, at 10.

300. *Id.*

301. One of the respondents whose motion to quash was denied reported that it was appealed to a higher court with an ultimate favorable ruling. One other respondent reported an appeal with an ultimate unfavorable ruling.

302. 2001 REPORTERS COMMITTEE STUDY, *supra* note 199, at 10.

Subpoena-response data were cross-analyzed with shield-law data in an effort to determine the impact of legislative protection on subpoena handling. Results are summarized in Figure 28. Overall compliance rates for subpoenas issued in states without shield laws are considerably greater than for those issued in states with shield laws. In 2006, responding news organizations in states without shield laws "complied fully, without opposing" with 72.1% of all subpoenas issued. News organizations in states with shield laws complied with 53.9% of subpoenas. Notably, when only federal subpoenas are considered, the disparity disappears: both organizations in states with shield laws and organizations in states without them comply with about half of their *federal* subpoenas. Conversely, organizations unprotected by a state shield law comply with *state* subpoenas 73.9% of the time, while their counterparts in shield-law states comply 54.4% of the time. News organizations in states with shield laws also were more likely than those without them to have persuaded the issuing attorney to withdraw the subpoena. Overall, organizations in states with shield laws file motions to quash more often than do their peers in states without shield laws; but shield-law state organizations file fewer motions to quash federal subpoenas than non-shield-law state organizations file. Somewhat surprisingly, among those reporting their subpoena handling, motions to quash were more successful in states without shield laws than in states with them.[303] Even more surprisingly, this disparity in success rates holds true even with respect to state proceedings. Although the question warrants further examination, this could provide evidence that court-created privileges are more protective of reporters than are legislative ones.

Finally, the data about how organizations responded to subpoenas also were cross-analyzed by medium. Results are summarized in Figure 29. Overall, broadcasters are significantly more likely to comply fully with a subpoena than are newspapers. The data suggest that in 2006 they did so 70.7% of the time—three times as frequently as did newspapers, which complied fully with only 23.3% of subpoenas they received. Although both kinds of media organizations are less likely to comply fully with federal subpoenas than with state subpoenas, the compliance rate for broadcasters was drastically greater in

303. Organizations in states with shield laws reported success in 80% of all motions to quash. Organizations in states without shield laws reported a 87.2% success rate.

both federal and state forums. Newspapers also persuade the issuing attorney to withdraw the subpoena almost three times as often as broadcasters do. Newspapers seek motions to quash more than twice as often as broadcasters do, but their motions are less successful than broadcasters' motions.

Figure 28. Handling of Subpoenas by States With and Without Shield Laws

Handling of Subpoena	**All Subpoenas**			
	No Shield Law		**Shield Law**	
Complied Fully	72.1%		53.9%	
Persuaded Withdrawal	14.8%		25.7%	
Filed Motion to Quash	13.0%		20.3%	
	Granted	87.2%	Granted	80.0%
	Denied	12.8%	Denied	20.0%

Handling of Subpoena	**Federal Subpoenas**			
	No Shield Law		**Shield Law**	
Complied Fully	50.0%		51.0%	
Persuaded Withdrawal	14.0%		19.1%	
Filed Motion to Quash	36.0%		29.9%	
	Granted	88.9%	Granted	78.7%
	Denied	11.1%	Denied	21.3%

Handling of Subpoena	**State Subpoenas**			
	No Shield Law		**Shield Law**	
Complied Fully	73.9%		54.4%	
Persuaded Withdrawal	14.9%		26.8%	
Filed Motion to Quash	11.1%		18.8%	
	Granted	86.8%	Granted	80.3%
	Denied	13.2%	Denied	19.7%

Figure 29. Handling of Subpoenas by Medium

Handling of Subpoena	**All Subpoenas**			
	Newspapers		**Broadcasters**	
Complied Fully	23.3%		70.7%	
Persuaded Withdrawal	44.7%		15.7%	
Filed Motion to Quash	31.9%		13.6%	
	Granted	71.5%	Granted	89.0%
	Denied	28.5%	Denied	11.0%

Handling of Subpoena	**Federal Subpoenas**			
	Newspapers		**Broadcasters**	
Complied Fully	14.3%		57.0%	
Persuaded Withdrawal	34.7%		17.7%	
Filed Motion to Quash	51.0%		25.3%	
	Granted	68.0%	Granted	90.0%
	Denied	32.0%	Denied	10.0%

Handling of Subpoena	**State Subpoenas**			
	Newspapers		**Broadcasters**	
Complied Fully	24.6%		72.5%	
Persuaded Withdrawal	46.1%		15.4%	
Filed Motion to Quash	29.3%		12.1%	
	Granted	72.4%	Granted	88.7%
	Denied	27.6%	Denied	11.3%

Anecdotal survey comments suggest that these data may not tell the full story of compliance and negotiation by television news outlets. In the interest of facilitating comparison with the 2001 study, the language of the Reporters Committee answer choices was adopted verbatim in the present study. Accordingly, respondents who did not file a motion to quash had the option of specifying either that they "complied fully, without opposing" or that they "persuaded [the] individual issuing [the] subpoena to withdraw it after discussion with attorney/editor/other." Almost three dozen broadcaster participants

noted in the "other comments" section of the survey that they had chosen the "complied fully" option because it most closely resembled their handling of a given subpoena, but that it was not a perfect match. All of these respondents described a newsroom policy of fully complying with requests for already-broadcasted tape and, even when the subpoena seeks more than already-broadcasted material, notifying the subpoenaing attorney that the station will willingly provide material that had appeared on air (often for a dubbing fee, which sometimes itself acts as a deterrent).[304] These organizations uniformly indicated that subpoena requests often do seek much more than the already-broadcasted material, and that their policies are to not comply with that aspect of the request.[305] One news director described what seems to be the common occurrence at television news outlets: "We often get subpoenas seeking every bit of footage we shot on a particular incident, like a car accident.

304. "I alert the attorney that there will be a $350 dub fee to produce a copy of the video and they usually tell me the video will not be needed," one news director reported. Broadcast respondents described fees as low as $30 and as high as $250 per hour for research and $350 per hour for dubbing. Some newspapers likewise report instituting research fees as a way of recouping the cost of lost time and discouraging sweeping subpoenas. "We sell accident photos to lawyers with the promise that we won't be called to testify," one commented. "We now charge $100 per hour for research when we aren't a party in the case," another editor reported. "The minimum charge is $100 and $100 for each hour or part of an hour thereafter. Four of [our reported] subpoenas were withdrawn after we explained our charges to the lawyers who issued the subpoenas." "One way to discourage this is to charge for material," another commented.

305. The participants' comments reflect the organizations' unwillingness to comply with these kinds of requests:

"We do have a policy of not giving out dubs of routine news video beyond that which actually aired. This is to avoid setting a precedent that could be used in the event our raw tape was subpoenaed."

"We have had overall luck 'training' our local police, prosecutors, and defense attorneys to include the following phrase in their subpoenas: 'video that aired on (specific date and/or newscast)'. It allows us to expedite their request because we are not turning over unpublished material or raw tape."

"We only provide what has aired."

"We never give outtakes."

"We 'comply fully' in the sense that we give already broadcasted material. But we never turn over more than that."

"Many come in asking for much more, hoping to get some nugget that wasn't aired, but we don't provide that."

"We have educated many of the lawyers around here to ask for what was broadcast and not for 'all material.' If they draft a broad subpoena, they know we'll fight it."

"Attorneys now know not to ask for unedited footage, because we'll give them what has aired without any challenge."

But then I will call the attorney and try to figure out what they really want so that we can just focus on that and not have to spend our time digging up everything. They usually will just take as much as they can get without a fuss, and when we offer the aired footage, they ordinarily don't push for more."

CONCLUSION

In the ongoing debate over a federal shield law, both opponents and proponents of the legislation are offering what may well be truthful assessments of media-subpoena numbers in the United States. However, these estimates do not advance the debate because they are either too narrow or too anecdotal to be helpful. The present study's data on the frequency and nature of subpoenas received by the press flesh out the empirical side of the debate and provide a more useful starting point for the policy dialogue: Subpoenas to the media are issued with some regularity; they are not limited to the media organizations or the substantive issues involved in the highest-profile recent cases; and, at least in some categories, they appear to be on the increase.

The current study only begins to expose the depth and the breadth of media subpoenas. The studied population—daily newspapers and major-network-affiliated television news operations—comprises only one portion of the vast set of organizations in the country with employees who would be covered by even a narrow legislative definition of journalist. The studied population excludes, among others, all radio journalists; the wide array of cable television news operations; reporters at newspapers with anything less than a daily circulation; journalists at all magazines, journals, and newsletters; and the ever-increasing number of journalists who make a living publishing exclusively online. If, as the statistically extrapolated data suggest, the limited population of news organizations studied here received more than 7000 state and federal subpoenas in a single calendar year—and if, as common sense and reporter experience suggest, the determination of whether a future subpoena will arise in a federal or a state forum is nearly impossible to make in the course of ordinary reporting—a federal law addressing subpoenas would be relevant to a large amount of newsgathering by a large number of reporters each year.

More specifically, survey data on federal subpoenas and on subpoenas seeking material obtained under a promise of confidentiality clearly indicate that a federal statute—even one ap-

plying only to confidential material, like the bill that most recently cleared the Senate Judiciary Committee—would have more than isolated applicability. Likewise, because the data indicate that the nature, source, and substance of federal subpoenas are diverse, even a shield law with a strong national-security exception would be germane and useful to journalists in newsrooms that are widely varied in geography and organizational size.

Overall, the data do not reveal an "avalanche" of subpoenas, and it may well be that journalists are alarmed about subpoenas to a greater degree than is warranted by the actual numerical increases.[306] But this apprehension might be expected, given the simultaneous signals that court-based privileges may be on the decline. Even an incrementally larger number of subpoenas results in a larger number of opportunities for courts to continue to unravel a judicially created privilege. And with each high-profile case that rejects the privilege, the tone of the legislative debate turns ever more desperate for media organizations fearing that courts will retreat entirely from recognizing a privilege for journalists.

Ultimately, of course, there are many more arguments to be made for and against the creation of a federal legislative privilege for members of the press. Certainly, policy preferences should be aired, societal implications should be weighed, and the merits and drawbacks of enacting a federal shield for reporters should be debated in full. However, with this Article's new empirical evidence now available, lawmakers and interested parties should be able to turn their attention more fully to the substantive contours of legislative proposals, ending the "numbers game"[307] that has occupied too much of the debate to date.

306. *See* Impact and Perception, *supra* note 7, at 18.

307. *2007 House Judiciary Hearings*, *supra* note 150, at 88 (statement of Rep. Pence, Member, H. Comm. on the Judiciary).

APPENDIX

Figure A. Change in Policy on Use of Confidential Sources Compared to Five Years Ago, by Newspaper Circulation

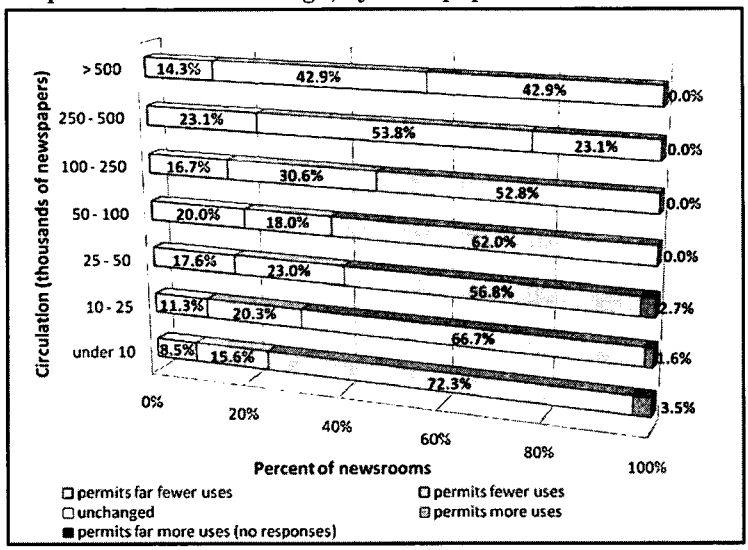


Figure B. Change in Policy on Use of Confidential Sources Compared to Five Years Ago, by Broadcast Market Size

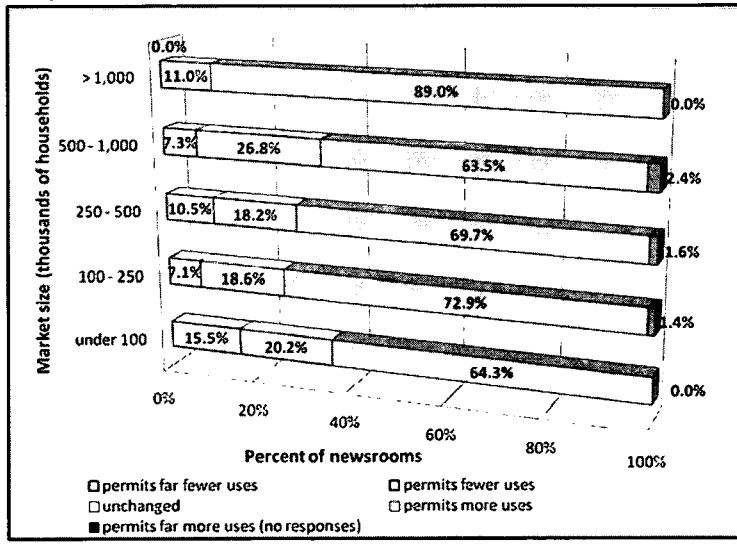


Figure C. Reasons for Changing Newsroom Policy on Confidential Sources

Reasons for Change of Policy	Percent of Newsrooms Listing as Among the Reasons for Change in Policy	Percent of Newsrooms Listing as Most Significant Reason for Change of Policy
A Request from Management	36.5%	20.1%
A Request from Reporters	9.9%	4.8%
The Receipt of One or More Subpoenas by the Organization	13.9%	5.3%
News Coverage of Reporters' Privilege Cases that Were Lost by Reporters at Other Organizations	30.2%	14.7%
Changes in the Attitudes of Major Sources	18.5%	6.2%
Advice of Legal Counsel	27.8%	17.1%
Other	38.0%	31.8%

Figure D. Time and Resources Expended on Subpoenas Compared to Five Years Ago, by Existence of Shield Law

