Fall 2008

BALCO, the Steroids Scandal, and What the Already Fragile Secrecy of Federal Grand Juries Means to the Debate over a Potential Federal Media Shield Law

Peter Meyer
Indiana University School of Law-Bloomington

Follow this and additional works at: https://www.repository.law.indiana.edu/ilj

Part of the Constitutional Law Commons, Entertainment, Arts, and Sports Law Commons, Health Law and Policy Commons, and the Medical Jurisprudence Commons

Recommended Citation
Available at: https://www.repository.law.indiana.edu/ilj/vol83/iss4/18

This Note is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.
BALCO, the Steroids Scandal, and What the Already Fragile Secrecy of Federal Grand Juries Means to the Debate over a Potential Federal Media Shield Law

PETER MEYER*

INTRODUCTION

In recent years, the jailing of investigative reporters who refuse to betray the confidence of their informants has reawakened legislators, academics, and the media to a perceived need for a federal reporter's privilege, one that would protect the press from compelled disclosure of secret sources. A recent, prominent case involved the 168-day imprisonment of Vanessa Leggett in 2001. A federal court held the self-proclaimed, freelance, investigative reporter in contempt for refusing to provide a federal grand jury with research she gathered for a true-crime novel. Leggett's jailing was the longest of its kind in our nation's history.

While the press has used anonymous sources to procure crucial information since as early as 1812, its reliance on them has significantly increased during the latter part of the twentieth century. Now, it seems the media rarely publishes an investigative report whose main source has not demanded confidentiality in exchange for inside information. Many have argued that if courts retain the power to compel the revelation of such confidential sources, journalists' most reliable supply of crucial information will evaporate as sources are "chilled" by their potential exposure in future government proceedings. Others have argued that such a chilling effect might be desirable, citing journalistic over-reliance on confidential sources as a major culprit.

* J.D. Candidate, 2008, Indiana University School of Law–Bloomington.
3. The imprisonment of Vanessa Leggett, for instance, inspired several national news organizations to contribute to the writing of an amicus curiae brief in her defense. See Elrod, supra note 2, at 115 n.3 (citing Brief of The Reporters Committee for Freedom of the Press, et al. as Amici Curiae Supporting Appellant, Leggett v. United States, No. 01-20745, 2001 WL 34113130 (5th Cir. 2001)).
5. See Elrod, supra note 2, at 115–17.
6. Id. at 115.
8. Id.
9. See id.
10. See Elrod, supra note 2, at 123.
behind inaccuracies in contemporary news reporting and arguing that reporters can adequately deliver news without the benefit of such sources.11

While, as a policy matter, a federal media shield law might seem imperative to an informed representative democracy, law enforcement officials have reasonably bristled at its potential consequences. Many contend that a strong reporter's privilege would hinder a grand jury's responsibility to "'inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred.'"12 Obviously, the identity of a confidential source has bearing on the credibility of the information he or she has provided. This conflict between First Amendment freedom of the press and the Fifth Amendment right to "'every man's evidence" in the pursuit of justice begs the question central to the prudence of a federal media shield law: which should our democratic society value more, the assurance that no accused person will undergo the criminal process without a guarantee that all evidence for or against him has been received by the peers who hold the keys to his continued liberty, or the assurance that the flow of information to the general public suffer as little impediment from the government as possible?

This Note will focus on the proper anatomy of a possible federal media shield law in the very narrow context of a federal grand jury. More specifically, it will analyze the effect that recent breaches of the secrecy of federal grand juries provided by Rule 6 of the Federal Rules of Criminal Procedure have on arguments for or against the passing of a media shield law. On one hand, the current failures of courts to maintain the privacy of federal grand juries eviscerate the common argument asserting the superfluity of a federal reporter's privilege, that which contends that the secrecy of a federal grand jury entails that the names of confidential sources will never be revealed to the general public anyway. On the other hand, though, when private federal grand jury testimony does illicitly leak to the press, an absolute federal reporter's privilege would protect journalists from revealing the names of the sources responsible for that leak, sources who unethically and illegally undermined the proper administration of justice by frustrating the tenets of grand jury secrecy. Thus, a federal media shield law might actually impinge on the Fifth Amendment in two ways: first by preventing the revelation of key information useful in prosecuting criminal cases (i.e., confidential information regarding illegal behavior), and second by disrupting the secrecy of grand juries, an institution vehemently supported by the Supreme Court, and one crucial in obtaining the complete and forthright testimony of key witnesses. As this Note will argue, the former consequence of a federal media shield law is justified, while the latter, because it more directly and illicitly undermines the process of law enforcement, is not.

The recent federal investigation into the Burlingame Bay Area Laboratory Co-Operative (BALCO) steroids controversy clearly illustrates the effects of federal grand jury secrecy breaches on the federal media shield law debate. In 2003, federal authorities organized a federal grand jury charged with investigating the possibility that BALCO was providing elite, world-class athletes with illegal steroids.13 Grand

12. Id. at 349 (quoting United States v. R. Enters., Inc., 498 U.S. 292, 297 (1991)).
13. Mark Fainaru-Wada & Lance Williams, How the Doping Scandal Unfolded, S.F.
jury testimony by several of these athletes was leaked to San Francisco Chronicle staff reporters Mark Fainaru-Wada and Lance Williams, who revealed its contents in their scandal-exposing book Game of Shadows: Barry Bonds, BALCO, and the Steroids Scandal That Rocked Professional Sports, and who, until recently, faced jail time for refusing to reveal the confidential source who leaked the testimony.

Part I of this Note will focus on the need for a federal media shield law and analyze the most high-profile legislative proposal currently stewing in Congress, the Free Flow of Information Act. Part II will provide background information about the BALCO investigation and its aftermath. Using the BALCO investigation as an illustrative example, Part III will argue that breaches in the secrecy of federal grand juries and the necessity of strong First Amendment rights for the press to a stable, self-governed democracy justify the passing of a strong federal media shield law. However, it will then argue that any such law should contain among its exceptions a provision that would allow prosecutors to compel the disclosure of sources who leak key private evidence acquired in federal grand juries, for these sources unethically undermine the fair administration of justice and endanger the livelihood of witnesses who testified under a reasonable expectation of privacy.

I. THE DISPARATE PROGENY OF BRANZBURG AND THE NEED FOR LEGISLATIVE CLARIFICATION

A. Confusion in the Aftermath of Branzburg v. Hayes

The fiercest opponents of a federal media shield law have been those engaged in the administration of justice. They have argued that affording the press such potent First Amendment protection would consequently dilute the Fifth Amendment right to “every man’s evidence” in federal grand jury proceedings. The Supreme Court last directly addressed this narrow collision of the First and Fifth Amendments in the seminal case Branzburg v. Hayes, a 5-4 decision in which the majority appeared to allow the press to challenge attempts at forced disclosure only in cases where witnesses could demonstrate that prosecutors were operating in bad faith. In that case, Branzburg, a newspaper reporter, published several articles describing unlawful drug activities in Frankfort, Kentucky, but refused to disclose to a state grand jury the identities of the drug offenders he anonymously described. In rejecting Branzburg’s argument that the First Amendment guaranteed him a reporter’s privilege, Justice White, writing for a total of four justices, argued that the secrecy of grand jury proceedings provides assurance that the general public will not learn of the source’s identities (seemingly ignoring, of course, the fact that the grand jury proceedings could, and probably would,
lead to the indictment of the sources and a subsequent public criminal trial). Justice White further wrote that the Court

perceive[d] no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential . . . burden on news gathering that is said to result from insisting that reporters . . . respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.

However, the language of Justice Powell’s concurring opinion tempered the definitiveness of Branzburg’s precedent. It seemingly advocates determining whether to compel the revelation of confidential sources by using an ad hoc analysis, one concerned with “the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.”

In his dissenting opinion, Justice Stewart stated that the majority’s “crabbed view of the First Amendment reflects a disturbing insensitivity to the critical role of an independent press in our society.” He proposed a test to determine, on a case-by-case basis, whether to excuse reporters from their obligations to testify before a grand jury about confidential information. He would have held that the government must (1) show that probable cause exists to believe that the reporter has information clearly relevant to a specific probable violation of law, (2) demonstrate that the information cannot be obtained by alternative means, and (3) demonstrate a compelling and overriding interest in the information.

Justice Powell’s concurrence, whether he intended it to or not, provided just enough wiggle room for dissatisfied federal courts to use the amorphous guidance in Branzburg to establish their own standards governing the reporter’s privilege. That said, every circuit court except the Sixth Circuit eventually adhered to the theory that Branzburg applies almost solely to subpoenas of reporters in the context of a federal grand jury. Furthermore, all federal circuit courts, with the exception of the Sixth Circuit, have found that, outside the context of a grand jury, journalists were protected by a qualified First Amendment or common law privilege, one that uses at least some form of the three-part test fashioned in Justice Stewart’s Branzburg dissent. However, sufficient disparity in the application of this privilege by the various appellate courts has left journalists uncertain as to the security they can derive from the privileges. Even within the narrow context of a federal grand jury, uncertainty

19. Id. at 695.
20. Id. at 690–91.
21. Id. at 710 (Powell, J., concurring).
22. Id. at 725 (Stewart, J., dissenting).
23. Id. at 743.
24. See Capocasale, supra note 11, at 353 n.71.
26. Id.
abounds. Several courts, including the Fourth Circuit and the Ninth Circuit, have argued that Justice Powell’s concurrence created a non-binding plurality decision. Others have criticized such an interpretation, disregarding the possibility that Justice Powell’s concurrence mandated the use of ad hoc balancing in cases where bad faith or harassment could not be demonstrated.

Thus, a journalist considering whether to grant a source confidentiality is “faced not only with the question of whether she may keep information out of court, but also the issue of being subject[ed] to different rules depending on where litigation seeking [the] information . . . happens to take place.” The uncertainty arising from the nebulous Branzburg decision has fueled the perception that Congress must provide clarity through the passage of a federal media shield law.

B. Past Attempts at a Federal Media Shield Law and Congress’s Current Proposals

The first attempt to pass a federal media shield law came in the early 1970s. In fact, ninety-nine bills for a federal shield law were unsuccessfully introduced in the six years following the Branzburg decision. They failed for two reasons. First, supporters could not determine how to define “journalist” (a quandary that still exists now, thanks to the Internet and Weblogs, but one on which this Note will not meaningfully comment). Second, in lobbying for a possible federal media shield law, journalists have refused to settle for anything less than an absolute privilege. Attempts in the 1980s, fueled by subpoenas issued to major television networks with footage of the hijacking of a TWA jet, succumbed to similar pitfalls.

However, in response to the Vanessa Leggett controversy and a wave of similar cases involving the criminal sentencing of reporters, Congress has renewed its efforts to pass a media shield law. In November 2004, Sen. Christopher Dodd, a Democrat
from Connecticut, introduced the Free Speech Protection Act of 2004.\textsuperscript{37} The law includes an absolute privilege against the disclosure of confidential sources and a qualified privilege for non-confidential sources.\textsuperscript{38} Parties seeking disclosure of non-confidential materials would only overcome the privilege in instances where the news or information was “critical and necessary to the resolution of a significant legal issue,” a standard stronger than that of even the strongest state shield laws.\textsuperscript{39}

However, the greatest amount of congressional focus has been directed toward the Free Flow of Information Act (FFIA), introduced in February 2005 by Sen. Richard Lugar in the Senate and Rep. Mike Pence in the House of Representatives, respectively.\textsuperscript{40} The FFIA contains similarities to many state shield laws.\textsuperscript{41} Like the bill introduced by Sen. Dodd, the FFIA would initially grant an absolute privilege to confidential sources and a qualified privilege for information other than the identity of a confidential source.\textsuperscript{42} In determining whether reporters can withhold information other than the identity of a confidential source, the FFIA draws primarily from the guidelines used by the Department of Justice to regulate the issuance of subpoenas.\textsuperscript{43} The FFIA requires subpoenaing parties to demonstrate by “clear and convincing evidence” that they have attempted to obtain the information “from all persons from which such testimony or document could reasonably be obtained other than a covered person.”\textsuperscript{44} Furthermore, in criminal cases, it must be demonstrated that: “(i) there are reasonable grounds to believe that a crime has occurred; and (ii) the testimony or document sought is essential to the investigation, prosecution, or defense.”\textsuperscript{45} In other cases, it must be demonstrated that “the testimony or document sought is essential to a dispositive issue of substantial importance to that matter.”\textsuperscript{46}

The first version of the Free Flow of Information Act offered an absolute privilege to reporters protecting the identity of confidential sources.\textsuperscript{47} However, at the urging of the Department of Justice, the drafters removed the absolute privilege.\textsuperscript{48} The FFIA was amended to allow for the compelled disclosure of the identity of a confidential source when all of the requirements for compelling non-identity information have been satisfied and knowledge of the source’s identity is necessary to prevent imminent and actual harm to national security.\textsuperscript{49} The amended version also includes a balancing test requiring that the potential harm resulting from non-disclosure of a confidential source outweigh the public interest in protecting the free flow of information.\textsuperscript{50}

\textsuperscript{37} Lystad, supra note 31, at 4.
\textsuperscript{38} Id.
\textsuperscript{39} Id.
\textsuperscript{40} Fargo, supra note 25, at 1115.
\textsuperscript{41} Porter, supra note 2, at 568 (citing Mike Pence & Richard G. Lugar, Protecting the Press—And the Public, WASH. POST, Apr. 15, 2006, at A25).
\textsuperscript{42} Id. at 568 n.133.
\textsuperscript{43} Id. at 568.
\textsuperscript{45} Id. § 2(a)(2)(A)(i)–(ii).
\textsuperscript{46} Id. § 2(a)(2)(B).
\textsuperscript{47} Lystad, supra note 31, at 5.
\textsuperscript{48} Id. at 6.
\textsuperscript{49} Id.
\textsuperscript{50} Id.
While progress in passing the FFIA has been relatively slow, the recent threat of jail time for the two San Francisco Chronicle ("Chronicle") reporters responsible for breaking the BALCO steroids scandal has inspired Sen. Arlen Specter and others to call for its timely ratification. However, as this Note will subsequently argue, the events and circumstances surrounding the interference of the Chronicle reporters with the scandal’s grand jury investigations support not only the argument that Congress should pass the Free Flow of Information Act, but also provide reasons why the FFIA’s drafters should consider adding a further exception to the privilege when a federal grand jury seeks the identities of confidential sources of leaked grand jury testimony.

II. THE BALCO STEROIDS SCANDAL

A. The Transformation of Barry Bonds and the Exposure of BALCO

In 2001, Barry Bonds shattered the Major League Baseball single-season home-run record, blasting seventy-three baseballs out of the field of play and into the bleachers of ballparks across the nation. The slugger’s super-human statistics overshadowed the alchemic physical transformation that Bonds had undergone to achieve his power surge; indeed, the general public and the media raised few concerns about the legality of his muscle gains. They should have, though. As Fainaru-Wada and Williams alleged in their scandal-exposing book, Game of Shadows, Bonds began using steroids prior to the 1999 season. The authors suggest that Bonds, long regarded as the game’s top player, became enraged with envy as the nation heaped adulation upon Mark McGwire and Sammy Sosa during the 1998 season, one that saw each player eclipse Roger Maris’s record for home runs in a season, sixty-one. During that season, McGwire hit seventy home runs. Suspecting that McGwire’s success occurred because he was “juiced,” Bonds decided to even the playing field.

Bonds’s boyhood friend and trainer, Greg Anderson, took him to visit Victor Conte, a self-taught scientist, whose diverse clientele included not only Major League baseball players, but also Olympic track and field stars Marion Jones and Tim Montgomery, NFL linebacker Bill Romanowski, and several members of the Denver Broncos and Miami Dolphins football teams. Conte headed a nutrition and training

55. See FAINARU-WADA & WILLIAMS, supra note 14, at 39, 112.
56. See id. at XV.
57. See id. at 38.
58. Fainaru-Wada & Williams, supra note 13.
center known as the Burlingame Bay Area Laboratory Co-Operative, more commonly and now infamously known as BALCO. 59

Bonds's statistics from 1999 to 2004 certainly support the notion that he has used steroids. In 2001, the year he broke McGwire's record of seventy home runs in a season, he weighed 230 pounds, about forty-five pounds heavier than his playing weight as a rookie. 60 Despite the fact that most athletes' careers spiral downward after the age of thirty, four of Bonds's five finest offensive seasons occurred after the age of thirty-five. 61 Prior to hitting seventy-three home runs in 2001, Bonds had never even eclipsed fifty in a season. 62

BALCO continued to receive world renown for its ability to push athletes to the brink of their physical talent. Soon, though, the preternatural accomplishments of the BALCO athletes began attracting the scrutiny of athletic regulatory agencies, and, eventually, federal prosecutors. In June 2003, a self-described "high-profile" track coach mailed the U.S. Anti-Doping Agency a syringe for testing and implicated Conte and BALCO as the sources of its contents. 63 The agency notified federal authorities, who opened an official investigation. In August, scientists at the UCLA Olympic Analytical Laboratory identified the substance in the syringe as Tetrahydrogestrinone (THG), a previously unknown and likely illegal anabolic steroid. 64 On September 3, 2003, agents of the IRS, the FDA, and the San Mateo County Narcotics Task force raided BALCO facilities and seized containers labeled as steroids, human growth hormone, and testosterone. 65 Days later, law enforcement agents raided the home of Bonds's trainer Greg Anderson, seizing substances believed to be steroids and $60,000 cash. 66

A year later, a federal grand jury investigating BALCO began issuing subpoenas to elite athletes with connections to Conte. 67 The athletes subpoenaed included Bonds, Jones, Montgomery, New York Yankees first baseman Jason Giambi, Oakland Raiders running back Tyrone Wheatley, and many others. 68 In exchange for their truthful testimony, the athletes were granted immunity. 69 Thus, their testimony could only be used against them in the event that they testified untruthfully, rendering them vulnerable to perjury charges. As I shall discuss later in the Note, the secrecy of federal grand jury proceedings likely served as a comforting impetus for these athletes to accept immunity and testify openly about their relationships with BALCO. On October

59. Id.
61. See id. at 278.
62. See id.
63. See Fainaru-Wada & Williams, supra note 13.
64. Id.
65. Id.
66. Id.
67. Id.
68. Id.
69. Id.
30, 2003, the grand jury began taking testimony from the various athletes. On
December 4, 2003, Barry Bonds testified for five hours before the grand jury.

B. The Leaks of Grand Jury Testimony from the BALCO Investigation and the
Threatened Jailing of Mark Fainaru-Wada and Lance Williams

On February 12, 2004, Victor Conte, Greg Anderson, and two others were indicted
for, among other charges, conspiracy to distribute steroids. Redacted from the
indictments were the names of the top athletes whose testimony served as the evidence
implicating the men, thus providing the athletes the privacy they had relied upon in
agreeing to testify. Eventually, Conte and Anderson agreed to a plea agreement, and
prosecutors agreed to drop forty of the forty-two charges against them. In exchange,
both men agreed to plead guilty to one count each of conspiracy to distribute anabolic
steroids and money laundering. Because no trial would ever occur, thus eliminating
the possibility that Bonds and the other athletes would be called to corroborate their
grand jury testimony in a public trial, it definitively appeared that the masses would
never learn which famous athletes had actually used illegal performance enhancing
drugs.

However, prior to the signing of the plea agreements, U.S. District Judge Susan
Ilston disclosed the athletes' grand jury testimony to all of the attorneys involved in the
case for the purpose of preparing for a possible trial. Judge Ilston did so under a strict
court order that the contents of the testimony remain completely confidential. Yet, in
December 2004, Mark Fainaru-Wada and Lance Williams began publishing stories in the
Chronicle that directly quoted the contents of the grand jury testimony, including
that of Barry Bonds and Jason Giambi. In the leaked testimony, Giambi admitted to
using steroids provided by BALCO, while Bonds confessed to using a mysterious clear
liquid substance and a rubbing cream, but maintained that he had no idea the
supplements contained steroids. The grand jury testimony also became a primary
source of information for Game of Shadows, the book co-authored by Fainaru-Wada
and Williams that violently rocked the sports world with its detailed information about
the steroid use of prominent athletes.

Because the leaking of the grand jury testimony violated key secrecy requirements,
Judge Ilston charged the Department of Justice with investigating the source of the

70. Id.
71. Id.
72. Jack Curry, Four Indicted in a Steroid Scheme That Involved Top Athletes, N.Y. TIMES,
73. Joe Mozingo, Expose a Scandal, Face a Prison Term, L.A. TIMES, Nov. 14, 2006, at
A1.
74. Mark Fainaru-Wada, Judge to See Plea Deals Tuesday in BALCO Case, S.F. CHRON.,
75. Id.
76. Mozingo, supra note 73.
77. Id.
78. Id.
79. Id.
leak, thus instigating the primary controversy behind this Note. Prosecutors inevitably subpoenaed Fainaru-Wada and Williams, the two reporters responsible for publishing stories based on the leaked content, and demanded the identity of their confidential source or sources. The two reporters, citing the maintenance of their integrity and a reporter’s privilege derived from the public’s right to such information for the purpose of self-governance, refused to provide any information regarding their source.

Invoking Branzburg, prosecutors argued that no such privilege exists. They demanded that the reporters be held in contempt of court for refusing to comply with the subpoenas, and requested that a U.S. District court sentence each to eighteen months of prison time. U.S. District Judge Jeffrey Wright agreed with the prosecutors and sentenced Fainaru-Wada and Williams to eighteen months in jail. The sentences were suspended pending an appellate ruling from the Ninth Circuit on the matter. Despite the stoic silence of the two reporters, credible reports surfaced regarding their source. In December 2006, news outlets began reporting that Troy Ellerman, a defense lawyer for Victor Conte, had leaked the confidential information. In February 2007, Ellerman pled guilty to leaking the secret grand jury documents, allowing Fainaru-Wada and Williams to avoid jail time. As Part III of this Note shall demonstrate, a leak from a member of the bar, of all people, supports not only the belief that a federal media shield law should be passed, but also that it must not be absolute. Rather, it should include an exception allowing courts to force disclosure of confidential sources who betray the secrecy of grand juries.

III. PROTECTING THE SECRECY OF THE GRAND JURY

Protective measures must be taken to prevent the leaking of grand jury testimony to the general public. As the threatened imprisonment of Fainaru-Wada and Williams indicates, such measures are currently in place; had Troy Ellerman not pled guilty to leaking the grand jury testimony, the media would have received a clear message that it cannot provide guarantees of confidentiality to sources who illegally frustrate the grand jury process and its guarantees of secrecy. However, if a federal media shield law akin to the Free Flow of Information Act presently being considered in the House and Senate becomes active law, reporters could freely grant such unethical sources confidentiality, thus removing disincentives to breaches in grand jury secrecy, a

82. Id.
83. Id.
85. Id.
86. Id.
87. Id.
consequence that, as this Note asserts, will have unjustifiable detrimental effects upon the federal government's ability to administer justice.

A. The Mechanics and Secrecy of a Federal Grand Jury

Before analyzing the controversy involving Fainaru-Wada and Williams in the context of the federal media shield law debate, it is helpful to consider the proceedings and characteristics of the federal grand jury system. As Justice White noted in Branzburg v. Hayes, "the grand jury's authority to subpoena witnesses is not only historic, but essential to its task." Federal grand juries are governed by Rule 6 of the Federal Rules of Criminal Procedure, which provides substantial statutory support for maintaining the secrecy of their proceedings. During grand jury proceedings, only the following people may be present: attorneys for the government (prosecutors), the witnesses being questioned, interpreters when needed, and a court reporter or operator of a recording device. Notably absent from this list are both persons under investigation for the potential crime at issue (unless they are the witness being questioned, of course) and defense attorneys.

Rule 6 expressly states that the following people may not at any time disclose the events and testimony occurring before a grand jury: a grand juror, an interpreter, a court reporter, an operator of a recording device, a person who transcribes testimony, an attorney for the government, or a person to whom disclosure is made. Essentially, the only person who may publicly disclose a witness' testimony is the witness herself, thus assuring, in theory, that if a witness prefers that the general public not learn of the substance of her testimony, it will not be heard unless the court subpoenas her to deliver similar testimony in a public criminal trial following the issuance of an indictment.

In 1977, Congress amended Rule 6 to expressly provide a penalty for derogating from one's duty to maintain the secrecy of a grand jury. The Rule's scant language failed to elaborate on the scope of that penalty by neglecting to indicate whether the newly created contempt remedy was criminal or civil and whether it contemplated a private right of action. Federal courts have reached different interpretations of the Rule. On the whole, though, courts have typically recognized that Rule 6 contemplates a criminal contempt penalty to punish past violations and civil contempt remedies (e.g., injunctive orders) to prevent future breaches of security. The criminal contempt penalty provides a particularly solid deterrent against breaching the secrecy of a grand jury. Federal courts can issue both fines and prison sentences to those held in criminal contempt, and there is no maximum limit to the amount of the fine or the length of

91. FED. R. CRIM. P. 6(d)(1).
92. FED. R. CRIM. P. 6(e)(2).
94. Id.
95. Id. at 245–46; see Finn v. Schiller, 72 F.3d 1182 (1996); Barry v. United States, 865 F.2d 1317 (1989).
the sentence. Thus, if the consequences of a breach of secrecy are severe, violators could face very substantial penalties.

For prosecutors, who, as this Note will demonstrate later, actually might have the greatest incentives to leak information, there exist further substantial consequences. If a judge deems that the jury pool has been contaminated by the prosecutor’s leaks, he or she can transfer the venue elsewhere, or in some cases, dismiss altogether any indictment procured through the grand jury. Clearly, the threat of losing an indictment altogether will, in most cases, deter prosecutors from leaking, so long as the possibility exists that they might be discovered as the sources of the leaks (e.g., if the courts remain permitted to compel disclosure from, say, the reporters who published them).

That said, the testimony that occurs before a grand jury can be disclosed to certain parties, but only in specific situations and for very specific purposes. Rule 6 allows the disclosure of grand jury matters to other U.S. attorneys in the course of their government duties to enforce criminal law, or to any other federal grand jury. Furthermore, a defendant can request that testimony from the grand jury investigation leading to his indictment be released to him if he can demonstrate “that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury.” Obviously, given the fact that the indicted defendant and his attorney have not yet had access to the grand jury minutes, they have little evidentiary ammunition with which to load such a motion, making disclosure unlikely under this provision.

Also, under Rule 6(e)(3)(E)(i), courts may allow disclosure to a defendant or other party “preliminarily to or in connection with a judicial proceeding.” In the 1966 Supreme Court case Dennis v. United States, the Court stated: “[i]n our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact. Exceptions to this are justifiable only by the clearest and most compelling considerations.” Thus, the defense will often receive access to transcripts of grand jury testimony for the purposes of impeaching witnesses and other forms of trial preparation. In the BALCO case, Judge Ilston likely used this line of reasoning in releasing the grand jury testimony to the defense. While such disclosure for the purpose of trial preparation is necessary to the fair administration of justice, its detrimental effects on the secrecy of federal grand juries warrant the passage of a federal media shield law to protect reporters and non-culpable confidential sources of legitimate news.

97. See Goldfine v. United States, 268 F.2d 941, 947 (1st Cir. 1959).
98. See infra notes 136–41 and accompanying text.
100. FED. R. CRIM. P. 6(e)(3)(A).
103. FED. R. CRIM. P. 6(e)(3)(E)(i).
105. Typically, though, the defense is only entitled to grand jury testimony of witnesses after that witness has actually testified at trial, as authorized by the Jencks Act. 18 U.S.C. § 3500 (2000).
B. How the BALCO Leaks Provide Justification for a Federal Media Shield Law

Perhaps the primary argument from reporters who assert that they should not be compelled to disclose their confidential sources in a grand jury context is that, despite the safeguards provided by Rule 6 of the Federal Rules of Criminal Procedure, the sources' names will still potentially become public knowledge. As discussed earlier, Justice White's citation of the secret nature of federal grand juries as a justification for not finding a reporter's privilege in 

Branzburg

constitutes a rather romantic, over-idealistic view of the effectiveness of protecting the contents of testimony. First, the purpose of grand jury testimony is to secure evidence to support an indictment; it follows then, that should an indictment be issued, that same evidence may be necessary to support a conviction. As such, if a reporter discloses the name of a confidential source to a grand jury, and that source himself is called, or the credibility of the source is put into issue at the criminal trial, the identity of the source will become public knowledge. Furthermore, as the BALCO defense leaks indicate, even if a grand jury does not lead to a trial, the necessity of disclosing the testimony of the grand jury for preparations in plea negotiations can also lead to the leaking of the information.

Greg Anderson, who has since been subpoenaed to testify before a new grand jury organized to determine whether Barry Bonds committed perjury during his prior grand jury testimony, has cited the futility of maintaining grand jury secrecy in refusing to testify. While Mr. Anderson may not elicit sympathy from many, his characterization of the federal government's guarantee of grand jury secrecy as a weak promise possesses some merit. As such, arguments by journalists claiming a similar lack of confidence in the ability of the government to protect the identity of their sources should be heeded by Congress, and a federal media shield law should indeed be passed.

C. The Importance of Maintaining the Secrecy of Federal Grand Juries to the Fullest Extent Possible

As the previous section explained, considerable fallibility plagues the current system of federal grand jury secrecy. Judge Richard Posner has stated that “[s]o little is kept secret nowadays that many participants in grand jury proceedings, whether as witnesses, jurors, or prosecutors, probably have no expectations of long-term secrecy.” Often, confidential information will find its way into the public realm. Such an assertion should alarm no one. The keepers of federal grand jury secrets—prosecutors, defense lawyers, grand jurors, witnesses, etc.—are human beings, creatures of imperfect willpower who are susceptible to outside influence, and because this shall always be the case, courts can never fully guarantee secrecy. This fallibility,

107. Illinois v. F.E. Moran, Inc., 740 F.2d 533, 539 (7th Cir. 1984), overruled by FED. R. CRIM. P. 6(e).
108. Posner’s qualification that people have little expectation of long-term secrecy is crucial. It implies that in many cases of grand jury leaks, the information is released long after the grand jury proceedings have ended, at a time when the reasons for keeping it under wraps are no longer applicable.
however, does not support the notion that attempts to maintain federal grand jury secrecy should be abandoned entirely, for despite the occasional failure to keep classified information completely undisclosed, the institution of secrecy still provides considerable meaningful protection to witnesses and potential defendants in many, if not most, cases. As the Supreme Court and Judge Posner have asserted,\(^\text{109}\) federal grand jury secrecy, in spite of its shortcomings, still remains necessary to effective law enforcement.

Before this Note argues that any federal media shield law should contain a provision that creates an exception for cases where the confidential source has leaked grand jury testimony, the reasons why grand jury secrecy should be maintained warrant further elaboration. The grand jury system, in some form at least, predates the Norman Conquest of England in 1066.\(^\text{110}\) In 1681, provisions cementing the secrecy of grand jury proceedings became part of English common law. Initially, the rationale behind establishing secrecy stemmed from a desire to divorce the monarchy from court proceedings, thus ensuring that the suspect's peers who composed the grand jury could weigh the evidence without the domineering, "Big Brother" influence of the Crown.\(^\text{111}\) In doing so, the grand jury became an institution concerned not only with investigating possible crimes and securing indictments, but also with protecting the interests of innocent suspects.

The desire to protect the innocent accused from malevolent or unjust prosecution has remained a primary rationale for the secrecy of grand juries, but, over time, further utility has emerged from the policy.\(^\text{112}\) The Supreme Court, in *United States v. Procter & Gamble Co.*, outlined five reasons for continuing the tradition of grand jury secrecy. It summarized them as follows:

(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.\(^\text{113}\)

Judge Posner focuses more on the benefits grand jury secrecy offers to witnesses, arguing that because witnesses testify without counsel present, and because they testify about others as well as themselves, secrecy is necessary to offer them protection from retaliation and public scorn.\(^\text{114}\) Indeed, a byproduct of these benefits is that the maintenance of grand jury secrecy promotes both the willingness of witnesses with

\(^{109}\) *See infra* text accompanying notes 113–15.

\(^{110}\) *Weems*, *supra* note 99, at 432–33.

\(^{111}\) *Id.* at 433.

\(^{112}\) *Id.*

\(^{113}\) *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 n.6 (1958) (quoting *United States v. Rose*, 215 F.2d 617, 628–29 (3d Cir. 1954)).

useful information to come forward, and, because they are cognizant that steps have been taken to ensure discretion, the increased confidence to testify as openly and comprehensively as possible when they do.

In spite of Judge Posner's casual assertion to the contrary, it appears, from both real-world examples and simple common sense, that grand jury participants do still harbor expectations of secrecy, particularly in "garden-variety," non-high-profile cases. One need look no further than the BALCO investigation to find grand jury witnesses for whom the guarantee of secrecy served as an impetus for frank, open testimony, and for whom the improper revelation of such testimony proved devastatingly costly. Bonds, Giambi, and the other elite athletes offered damaging personal information under the assumption that it would not escape the courtroom unless the prosecution deemed it necessary to a public trial. If not for the unexpected leak, their reputations would have emerged from the investigation largely unscathed. Instead, the aftermath has been severe. Giambi found himself forced to make an apology in a press conference, one in which he all but openly admitted to taking steroids—and to letting down an entire nation of baseball fans. He also suffered the jeers from audiences in baseball stadiums throughout the nation—jeers that undoubtedly contributed (along with, of course, the absence of performance enhancers in his bloodstream) to the rapid decline in his productivity. Bonds has been forced to endure similar derision from fans.

The witnesses in the BALCO investigation were offered immunity in exchange for their candid testimony. Thus, skeptics of the effects of federal grand jury secrecy might ask how we can be certain that secrecy, and not solely immunity, influenced their decision to comply with the grand jury. It can easily be argued, though, that immunity provided little reason for the athletes to come forward. After all, it would have been extremely difficult for prosecutors to prove that the individual athletes had used steroids; the athletes could have easily cycled off and disposed of the drugs at the first inkling that they were the focus of an investigation. Unless the athletes were caught red-handed with performance enhancers, the chances are slim to none that their refusal to comply with a federal grand jury subpoena would result in retaliatory criminal charges for steroid use. Even if they did face potential criminal charges, were the athletes not guaranteed secrecy in the grand jury proceedings (and, granted, wary of contempt charges for ignoring subpoenas), they might have taken the rather low risk of being convicted and just refused to candidly admit anything in their testimony, thus

115. See supra text accompanying note 107.
116. Such routine cases rarely see leaks, but in high profile cases, the prevalence of leaks has been greater. See Roma W. Theus II, "Leaks" in Federal Grand Jury Proceedings, 10 ST. THOMAS L. REV. 551, 552–53 (1998).
118. Id. As the article notes, in 2005, Giambi's performance was so poor that New York Yankees manager Joe Torre left him out of the post-season lineup, an abomination for a player who had just inked a four-year, $82 million deal. Id.
120. Nearly all statutes criminalizing anabolic steroids punish merely the possession of steroids or the intent to sell them, not their prior use. See Rick Collins, Steroids and the LAW, STEROID.COM, 1999, http://www.steroid.com/steroidandlaws.php.
preserving the millions of dollars in endorsements that are incident to an elite athlete’s clean reputation. In fact, a simple cost-benefit analysis makes this the logical choice for the athlete.

Furthermore, even if the presence of federal grand jury secrecy were not the primary lure leading the athletes to testify, consider the effect that the complete absence of any promise of secrecy would have had. Were federal grand jury secrecy completely dissolved (a likely byproduct of the federal media shield laws currently proposed), the testimony of the athletes would have undoubtedly been recounted on televisions, newspapers, and Web sites around the world. This, of course, would have led image-dependent athletes to curb the extent of their testimony substantially, if not entirely. Thus, the fact that the athletes agreed to testify so candidly before the grand jury demonstrates that the guarantee of secrecy did factor into their decisions to do so.

Of course, there exist a myriad of other instances where a key witness to a prosecution might not himself be threatened with criminal sanctions and yet might still have very good reasons for refraining from testifying. As Judge Posner intimates, innocent witnesses fearing further retaliation from the suspects they would potentially implicate might refrain from testimony if their identities would become public knowledge in the indictment phase of the investigation. Furthermore, witnesses whose testimony will not implicate them criminally could still fear public scorn for admissions they will have to make about their salacious, though not illegal, behavior.

An example of the latter instance can be found in another recent high-profile case involving Deborah Palfrey, a woman accused of running a high-end prostitution service in Washington, D.C. from 1993–2006. Palfrey claims to possess the names of 15,000 clients and purports that many of them are famous and powerful. She has asserted her innocence, stating that her business served merely as a high-end escort service and never sanctioned illicit sexual activity. Her defense attorney has stated that Palfrey plans to subpoena her former clients in order for them to testify about the legal nature of their contact with Palfrey’s employees. Already, she has sought to depose Dick Morris, a prominent White House advisor during the Clinton administration.

Had the prosecution sought to subpoena a large number of her clients as witnesses, the promise of immunity would have been unnecessary in many cases. After all, much of the allegedly illegal activity occurred in the mid-nineties, and the federal criminal statute of limitations bars criminal prosecution for non-capital offenses that occurred more than five years ago. Yet, like professional athletes, famous politicians and even regular Joes (perhaps “Johns” would be more appropriate) possess an extremely keen interest in keeping from the public realm the fact that they have solicited prostitution. Hence, if called to testify, they could certainly be expected to limit the

121. Illinois v. F.E. Moran, Inc., 740 F.2d 533, 539 (7th Cir. 1984), overruled by Fed. R. Crim. P. 6(e).
123. Id.
124. Id.
125. Id.
126. Id.
expanse of their testimony, or to simply commit perjury to protect their good name from public ruin, thus considerably hindering the prosecution of Ms. Palfrey.

D. The Free Flow of Information Act of 2005: Insufficient to Protect the Continued Secrecy of Federal Grand Juries, but an Excellent Template for a Federal Media Shield Law

The Free Flow of Information Act of 2005 (FFIA) would substantially damage the ability of federal authorities to maintain the secrecy of grand juries by allowing reporters to protect their confidential sources of grand jury leaks from criminal liability. To demonstrate the insufficient protection of grand jury secrecy offered by the FFIA, consider how it would have operated had it been enacted prior to the issuing of subpoenas to Mark Fainaru-Wada and Lance Williams. Because Fainaru-Wada and Williams's source would be classified as "confidential" under section two of the FFIA, prosecutors would only be able to force disclosure of the source's identity if they could prove that "disclosure of the identity of such a source is necessary to prevent imminent and actual harm to national security" and that the disclosure would prevent the harm from occurring. Obviously, the determination of who leaked the grand jury testimony of some athletes who used performance-enhancing drugs does not constitute a matter of national security. As such, in this case, and in most common criminal cases, the national security exception to an otherwise absolute reporter's privilege does little to protect the tradition of federal grand jury secrecy so necessary to the administration of justice.

However, the national security provision does provide helpful instruction for crafting a provision that could provide such protection. Indeed, the drafters of the FFIA wisely chose to enact an absolute privilege that has a single exception, one that provides explicit notice to reporters that they should not guarantee confidentiality to a source when the insider information has national security implications unless they are willing to serve jail time.

The Free Flow of Information Act, then, serves as an excellent template for any media shield law to follow. By granting an absolute privilege and then tempering its potency by adding explicit exceptions to that privilege, it increases the ability of reporters to predict whether the information they will obtain warrants protection under the FFIA. The major reason that journalists since the 1970s have demanded that any federal media shield law contain an absolute privilege against the disclosure of confidential sources stems from their desire for predictability. Most state media shield laws provide reporters with a qualified privilege, one that requires judges to balance a number of nebulous factors. Many of these media shield laws simply employ the three-part test advocated by Justice Stewart in Branzburg v. Hayes. Thus, reporters are forced to ask themselves prior to granting confidentiality to a source whether prosecutors and investigators will in the future possess the ability to

129. Id. § 2(a)(3)(A).
131. Id. at 666.
132. Id.
obtain the information by alternative means, or whether a party seeking the information will be able to demonstrate a compelling and overriding public interest of the people in the information. The uncertainty of the reporter as to the exact nature of the information the confidential source possesses compounds the difficulty of making such determinations; neither the source nor the reporter can anticipate how the information will be used or how far-reaching its effects might be in developing future leads whose information might inflate the importance of such information. As Time reporter Matthew Cooper recently told Congress, "I can't really know what I'm getting myself into assuming what follows is important and controversial enough to rise to the level of litigation." Thus, the ad hoc balancing created by such an equivocal qualified privilege leads to the inability of lawyers to advise reporters on whether or not they can grant confidentiality to a prospective source.

The format exemplified by the Free Flow of Information Act, which grants an absolute privilege with a specific exception, avoids such confusion. Under the FFIA, should a reporter wish to grant a source confidentiality, he need only ask the source whether the information he or she can provide concerns an issue of national security. If so, the reporter can simply tell the source that, unless the information is of a rather innocuous nature, such that the interest in maintaining the free flow of information trumps its release to a federal grand jury, then he or she cannot grant confidentiality. In the alternative, the reporter can grant the confidentiality, and then later betray the source before a grand jury should the information prove to be of considerable national concern (of course, doing so would likely prohibit the reporter from securing the trust of future confidential sources). Finally, the reporter could simply decide that breaking the story is worth enduring jail time.

As such, the privilege provided by the Free Flow of Information Act offers far more predictive certainty for reporters than the qualified privileges contained in many state media shield laws and provides an excellent template for a federal media shield law. Hence, any provision included in a federal media shield law allowing courts to compel disclosure of a confidential source in cases where he or she has illicitly leaked secret grand jury testimony should take the form of an exception to an otherwise absolute reporter's privilege.

E. Assessing the Costs and Benefits of Implementing a Reporter's Privilege that Would Preclude the Compelled Disclosure of Sources of Grand Jury Leaks

A more general analysis of the potential effects of an absolute federal media shield law on grand jury secrecy also indicates that its benefits do not justify its costs. The passage of such a law would serve as the death knell of grand jury secrecy, particularly in cases with any newsworthy merit, for should a reporter want access to "confidential" grand jury information, he need only find a participant with the slightest motivation to reveal it, as the media shield law would insulate both from any consequences. Because of the reporter's privilege, a court would be powerless to punish the reporter who

133. See id.
134. See id. at 665.
refuses to reveal his source, and because the reporter will have an interest in maintaining his reputation for protecting his sources, he will continue to insulate his source from being discovered. The teeth of the threat of the criminal contempt penalty, which currently deters the leakage of grand jury testimony, would be dulled to the point of ineffectuality, and federal grand jury secrecy, while now imperfect, would in the future be rendered completely illusory.

Of course, in order to make such a claim, one must demonstrate that potentially involved parties—namely prosecutors and reporters—would possess the motivation for revealing secret information. Prosecutors especially, it would seem, have an interest in maintaining the secrecy of their proceedings. Indeed, doing so prevents potential defendants from fleeing at the first hint of impending prosecution, protects against the destruction of evidence, prevents the subornation of perjury for potential witnesses, prevents the intimidation of witnesses, and, again, helps encourage witnesses to testify openly and comprehensively.  

However, the leaking of grand jury information can occasionally help prosecutors secure an indictment. Releasing information as to whom the grand jury has targeted or the substantiality of the evidence can result in the creation of a non-custodial “prisoner’s dilemma” for potential suspects, one which encourages them to race to the prosecutor’s office to offer testimony in exchange for leniency before their partners in the criminal enterprise can.  

Also, the release of information to the public can help trigger the memories of witnesses unlikely to face criminal implication. Finally, offering reporters information on the case could help create a reciprocal relationship, one in which journalists and prosecutors share the fruits of their investigative efforts.  

Furthermore, prosecutors might be motivated not by a leak’s usefulness in securing an indictment or a conviction, but by their own self-interest. Prosecutors might seek political and public approval by demonstrating their diligence in pursuing indictments against certain types of crime. Or, they might be motivated by a desire to gain enough notoriety and clout within the legal community to help secure a lucrative job, either through a government promotion or by a transition to the private sector.  

In lauding reporters for providing the public with information that assists the public in overseeing its government and informing its political decisions, many have depicted journalism as an altruistic profession, one characterized by a selfless duty to ethics and the common good. One should not doubt, though, that journalists would be increasing more eager to use illegally released grand jury information after the passage of the currently proposed media shield laws. Journalists possess the same self-interest inherent in human nature as the rest of us, and they thus have definite motivations to zealously pursue the leaking of grand jury testimony, particularly in high-profile cases.

Reporters typically earn rather meager salaries; a survey by the National Association of Colleges and Employers estimates that the average salary for a recent

---

137. Id. at 346.
138. Id.
139. Id.
140. Id. at 347.
141. Id.
graduate with a journalism degree is less than $30,000. Yet, journalists often are able to parlay their investigations into wildly profitable book deals or employment with higher-paying national news outlets. Judith Miller, a New York Times reporter who refused to testify as to the identity of her confidential source before a grand jury, spent eighty-five days in prison—but emerged with a $1.2 million book deal from publisher Simon & Schuster to share the tale of her resilience. Meanwhile, Fainaru-Wada and Williams’s book, Game of Shadows, spent five weeks on the New York Times Best-Sellers List. Ironically, literary agents have asserted that if the two San Francisco Chronicle reporters actually go to prison, the fame resulting from the controversy is “absolutely going to bump up sales” of their book. If such considerable financial incentives exist now to pursue grand jury leaks and endure a prison sentence, imagine the augmented willingness of journalists to pursue them should the threat of incarceration be removed entirely by an absolute reporter’s privilege.

While it has been demonstrated that courts and legislators should continue to promote federal grand jury secrecy, this Note has yet to make a concerted effort to argue that this cause should trump the public’s interest in the free flow of information and, therefore, that any federal media shield law should include an exception for confidential sources who undermine the law enforcement process by leaking secret grand jury testimony. After all, the public benefit obtained through the publication of grand jury testimony can be overwhelming. Consider again, for instance, the positive effects inspired by the decision of Mark Fainaru-Wada and Lance Williams to publish, in depth, the testimony of elite athletes containing confessions of steroid use. As a direct result of the steroid scandal they exposed, Congress held nationally televised hearings in March 2005 to investigate Major League Baseball’s problem with steroid use, during which members grilled League Commissioner Bud Selig and several prominent players. In the face of congressional pressure, Major League Baseball (MLB) has taken revolutionary action aimed at eradicating steroid use in its sport. Before the scandal, MLB players received not punishment, but mere counseling if they tested positive for steroids. Now, first-time offenders receive a fifty-game suspension, and if a player tests positive for steroids three times, he receives a lifetime ban.

The scrutiny of steroid use has trickled down into the amateur ranks as well. The National Federation of State High School Associations began an anti-steroid campaign aimed at every student in the country. Even President George W. Bush has recognized the immense impact of Fainaru-Wada and Williams’s reporting. After the

144. Id.
145. Id.
146. See supra notes 98–106 and accompanying text.
148. Id.
149. Id.
150. Id.
two won a journalism award from the White House Correspondents’ Association at an April 2005 ceremony, the President approached them and told them “You’ve done a service.”  

Not everyone has been quite so eager to award credit for the steroid reform to the two writers, though. In a court brief advocating the jailing of the two reporters, Assistant U.S. Attorney Brian Hershman argued that “the government’s investigation of BALCO and subsequent indictment of Victor Conte and others on February 12, 2004 . . . raised the public’s consciousness concerning steroid use in sports . . . the ‘leaked information’ served only to titillate and hold up to public ridicule those athletes who admitted using steroids before the grand jury . . . .” 152 That said, while the investigation and indictment might have raised public suspicion about steroids, the overriding effect of putting actual confessional testimony to names and faces cannot be denied.

Most importantly, though, many have lost cognizance of the fact that more conventional journalistic means still could have been used to uncover this information; the presence of a reporter’s privilege and the revelation that Bonds and others used anabolic steroids need not be mutually exclusive realities. Yes, the grand jury transcripts provided Fainaru-Wada and Williams with a gift-wrapped, comprehensive source of the information—yet nothing precluded them from attempting to discover that elite athletes were using steroids through the hard work of traditional investigative reporting. Quite frankly, the leaked testimony offered the reporters a shortcut, a replacement for the toil and sweat incident to more legitimate means of journalism. Had they not received the grand jury transcripts and instead investigated the rumors surrounding the athlete-witnesses who were known to have testified, much of the same information may have been unveiled, the public still would have benefited from the information, and the confidence of future witnesses in the secrecy of grand juries would not have been devastated by such a high-profile leak.

The exception I have proposed will help ensure that innocent suspects who eventually receive no indictment will not have their name sullied by the public knowledge that they were the subjects of a federal criminal investigation. It will help ensure that witnesses will feel more comfortable testifying openly and thoroughly concerning the matters upon which they have special, helpful knowledge. It will not lead to the mass incarceration of journalists, who will be put on notice by the specificity of the exception that any confidential source leaking grand jury information will not be entitled to protection. Ultimately, it will reinforce the use of more traditional, and less illicit, investigative means of providing the public with crucial information. For those who argue that the exception will burden the profession of journalism by making journalists’ jobs more difficult, I contend that it will also bolster the ethical regard for the profession by curbing the use of information obtained from sources who must break the law in order to provide it.

F. The Similarities of Investigative News Reporting and Investigative Grand Juries:
Why Ensuring the Fair and Effective Administration of Justice Should Take Precedent over the Free Flow of Information in the Context of a Federal Media Shield Law and Federal Grand Juries

The public benefit derived from the leaks of grand jury testimony simply cannot justify granting a reporter's privilege to journalists who protect "leakers" who break the law in order to provide information. Ironically, the reason for including an exception to any reporter's privilege for confidential sources who leak grand jury testimony is rather analogous to the reason why reporters deserve some exemption from the disclosure of confidential sources in the first place. To understand this argument, though, one must first acknowledge the striking similarities between prosecutors conducting an investigation via grand juries and reporters performing investigations via confidential sources. In performing his or her task, each seeks to serve a purpose necessary to society. Prosecutors seek to fairly and effectively administer justice. Reporters seek to provide the public with the information it needs to self-govern. While scholars may argue as to which of these causes merits greater protection, the fact remains that neither can be said to be definitively more worthwhile than the other; each, in its contribution to the U.S. system of government, remains a societal necessity.

Furthermore, in carrying out their tasks, both prosecutors and reporters rely on sources that will only provide information in exchange for a guarantee that their identities will remain secret. As this Note has attempted to demonstrate, grand jury witnesses often only come forward and testify openly because they have been guaranteed at least temporary privacy through Rule 6 of the Federal Rules of Criminal Procedure. Likewise, confidential news sources often only come forward when a reporter promises not to disclose their identities. Finally, each side argues that the passage, or conversely, the absence, of a federal media shield law will prevent such sources from coming forward, thus chilling their investigatory efforts. Prosecutors argue that if confidential sources of grand jury leaks cannot be held criminally liable due to a reporter's privilege that protects their identity, then witnesses will temper their forthrightness as they testify for fear of the undeterred leaking of their testimony. Conversely, reporters argue that if they can be compelled to reveal the identity of confidential sources, such sources will never be willing to come forward.

I agree with Justice Stewart's dissenting opinion in Branzburg v. Hayes: prosecutors should not be able to "annex the journalistic profession as an investigative arm of government" when doing so threatens the ability of the press to perform its duties by dissuading confidential sources from exposing information of public interest. Essentially, Justice Stewart was telling prosecutors that their task of fairly and effectively administering justice is crucial to this society and merits protection from impediment; however, when removing such impediment threatens the livelihood of an equally important institution—the free press—it should not be done. This sort of reasoning informs the argument that a federal media shield law protecting against the disclosure of confidential sources should contain an exception for sources who have

153. See supra notes 102-06 and accompanying text.
unethically and illegally leaked grand jury testimony. While the free press is essential to a self-governing democracy, it should not be able to annex the Department of Justice as its investigative arm when doing so threatens the fair administration of justice, which, as the Supreme Court and others have noted, depends upon maintaining the secrecy of federal grand juries. When a specific practice carried out in the name of a legitimate societal necessity severely invades and impinges upon the carrying out of another legitimate societal necessity, the former practice loses its legitimacy.

CONCLUSION

Critics of this Note’s argument that a federal media shield law needs an exception to allow for the compelled disclosure of sources who violate federal law by leaking grand jury testimony will continue to emphasize the present fragility of federal grand juries and the reality that witnesses and potential defendants can never be absolutely assured that damaging information will not become public knowledge. However, witnesses and defendants deserve to know that the government will attempt to prevent leaks, and that in most cases, such attempts will be successful. What matters most is not the occasional fallibility of the current provisions for secrecy, but rather the potential consequence of a complete absence of secrecy—that is, the destruction of the expectation of privacy that, as this Note has demonstrated with real-life examples and common sense elaboration, leads to the open testimony of witnesses with information eminently useful to prosecutors, but potentially devastating to them personally. Congress should not strain to provide protection to those who seek profit by violating current federal law; in doing so, it may potentially destroy the livelihood of those witnesses whose cooperation helps enforce all other provisions of federal criminal law.

Because they circumvent and undermine the secrecy of grand juries, confidential sources leaking grand jury testimony do not warrant the protection that a reporter’s privilege provides; any marginal benefit derived from protecting those who act illegally in providing the information is outweighed substantially by the overwhelming benefits to the administration of justice offered by the secrecy of federal grand juries. Should a federal media shield law be passed without an exception for leakers of grand jury testimony, the grand jury, a pillar of our nation’s legal system, one vehemently championed time and again by the Supreme Court, will find itself wounded to the point of near absolute inefficacy. Thus, while the Free Flow of Information Act, by creating a largely absolute privilege with specific exceptions, presents an excellent template for a federal media shield law, it should include another exception, one that would allow courts to compel reporters to reveal the identity of a confidential source who has leaked secret grand jury testimony.