

A FEDERAL SHIELD LAW THAT WORKS: PROTECTING SOURCES, FIGHTING FAKE NEWS, AND CONFRONTING MODERN CHALLENGES TO EFFECTIVE JOURNALISM

Anthony L. Fargo*

I. INTRODUCTION

Covering government and politics is rarely easy for journalists even in the best of times. Officials want to hide information that would make them look bad. Candidates and party leaders try to “spin” coverage to favor their side. Sources with potentially important news to share often have hidden or not-so-hidden agendas that could cast doubt on their veracity.

Recent months certainly have not been the best of times for journalists. The President of the United States has labeled mainstream news outlets as “enemies of the people.”¹ President Trump and his most ardent supporters frequently call any news that portrays the administration unfavorably “fake news.”² Public trust in the news media is low, especially among those aligned with the President’s party.³ President Trump and his attorney general have announced that they are going to get tough on people who leak classified or sensitive information to the press, which could chill potential news sources and, if leakers are prosecuted, possibly lead to journalists being subpoenaed to identify their sources or face contempt citations.⁴

* Anthony Fargo is an Associate Professor and Director for the Center for International Media Law and Policy Studies, The Media School, Indiana University. The author thanks Patrick Ober for his valuable research assistance. Funding for this study was provided by the Barbara Restle Press Law Project.

1. Michael M. Grynbaum, *Trump Calls Media the “Enemy of the American People,”* N.Y. TIMES, Feb. 18, 2017, at A15.

2. Steve Coll, *Donald Trump’s “Fake News” Tactics,* NEW YORKER, Dec. 11, 2017, <https://www.newyorker.com/2017/12/11/donald-trumps-fake-news-tactics>.

3. Michael Barthel, *Americans’ Attitudes About the News Media Deeply Divided Along Partisan Lines,* PEW RESEARCH CENTER, May 10, 2017, <http://www.journalism.org/2017/05/10/americans-attitudes-about-the-news-media-deeply-divided-along-partisan-lines/>. *But see* Mathew Ingram, *People Distrust the Media in General but Trust the Media They Like,* FORTUNE, May 24, 2017, <http://fortune.com/2017/05/24/trust-media/>.

4. Joe Pompeo, *In the Trenches of Trump’s Leak War,* VANITY FAIR, Aug. 29, 2017, <https://www.vanityfair.com/news/2017/08/donald-trump-leak-war-reporter-fear>.

With the press unpopular and the White House and Senate all under the control of one party, it is somewhat quixotic to suggest that now would be a good time for Congress to pass a shield law protecting journalists in federal proceedings. But political winds tend to change, and when they do, it would be useful for journalists and their supporters to have a plan.

In December 2018, a bill was pending in the House of Representatives to create such a law, but it died as the year ended.⁵ Previous attempts to pass a federal shield law have failed, most recently in 2013.⁶ From journalists' perspectives, that could be a blessing in disguise. The bills introduced to create a shield law between 2005 and 2013 were similar and also exception-filled. Some of the exceptions, such as for national security purposes, were probably unavoidable in a post-9/11 world but were rather broad.

Additionally, Congress struggled with the problem of defining who would be protected by the shield law, particularly after WikiLeaks began exposing secret documents purloined from private companies and the U.S. government.⁷ Faced with the specter of possibly shielding WikiLeaks as well as the *Washington Post*, members of Congress tried to write an airtight definition of "journalist" before giving up on the shield.

Any new attempt to pass a federal shield law will have to confront the problems of the old proposals and some new ones as well. How could Congress protect "real" journalists from facing jail time or fines for refusing to identify sources without also potentially protecting purveyors of "fake news?" Also, a recent report by UNESCO, based on a global study of how news sources are protected, found that most laws around the world are outdated in how they identify "journalists" and what they protect those journalists and their sources from, often ignoring threats such as mass surveillance and data breaches that could expose sources without journalists knowing.⁸

Using the recent House proposal and the most recent Senate proposal as jumping-off points, this Article will examine the need for a federal shield law and recommend what should be included in such a law. Part II will examine the history of the journalist's privilege in federal and state law, focusing primarily on how the current haphazard system of limited protection for journalists in the federal legal system has developed. Part III will examine the 2017 bill and previous attempts to pass a shield law in Congress. Part IV will explore the more recent issues that were not adequately addressed in previous shield bills and the issues raised by the UNESCO report. This

5. Free Flow of Information Act, H.R. 4382, 115th Cong. (2017) (hereinafter, "H.R. 4382").

6. See *infra* Part III.

7. See *infra* notes 97-98 and accompanying text.

8. Julie Posetti, *Protecting Journalism Sources in the Digital Age* (2017), UNESCO SERIES ON INTERNET FREEDOM, <http://unesdoc.unesco.org/images/0024/002480/248054E.pdf>.

Article will close with an analysis of how a shield law could be drafted that would be most favorable to journalists and sources. Although the analysis will favor journalists as a starting position for negotiation, it also will suggest that they may need to make concessions to fears about fake news (and fake sources), including the possibility that they may have to swear that their sources exist before they can be shielded.

II. THE DEVELOPMENT OF AMERICAN PRIVILEGE LAW

It would be hard to find one case that embodies all of the frustrating elements of U.S. journalist's privilege law as well as the case of James Risen.⁹ Risen, a *New York Times* reporter and author covering matters of national security before and after the 2001 terrorist attacks in New York and Washington, D.C., wrote a book based on his reporting that included classified information, attributed to unnamed sources, about a failed American attempt to disrupt Iran's nuclear program.¹⁰ Federal investigators concluded that Jeffrey Sterling, a disgruntled former CIA employee, was a likely source of the Iran story and persuaded a federal grand jury to indict him on charges related to disclosing government secrets.¹¹

Although the government had enough evidence from phone and e-mail records to get an indictment, its evidence against Sterling was circumstantial.¹² Risen received a subpoena demanding his presence at Sterling's trial to answer questions about whether Sterling was a source for the Iran information.¹³ Shortly after, a familiar pattern began to play itself out in the media and in the courts. Risen, of course, had no intention of identifying Sterling as his source.¹⁴ Journalists, particularly those covering sensitive beats like national security, believe that revealing a confidential source is likely to deter future sources from revealing important information to the media, and by extension, the public.¹⁵ The Society of Professional Journalists' Code of Ethics, which is a model for many news organization ethics codes, confronts this belief by discouraging journalists from granting anonymity to sources, while recognizing that sometimes it is necessary; the

9. *United States v. Sterling*, 724 F.3d 482 (4th Cir. 2013) (hereinafter "*Sterling*").

10. JAMES RISEN, *STATE OF WAR: THE SECRET HISTORY OF THE CIA AND THE BUSH ADMINISTRATION* (2006).

11. *Sterling* at 490.

12. *Id.* at 489.

13. *Id.* at 490.

14. *See, e.g.*, Matt Apuzzo, *Reporter Wins a 7-Year Fight Not to Testify*, N.Y. TIMES, Jan. 13, 2015, at A1.

15. *See, e.g.*, Christine Haughney, *Press Sees Chilling Effect in Justice Dept. Inquiries*, N.Y. TIMES, May 25, 2013, at A13.

Code says journalists must “keep [their] promises.”¹⁶ Risen sought a court order to quash the subpoena and a protective order to prevent the government from bothering him further.¹⁷

Judge Louise Brinkema of the U.S. District Court for the Eastern District of Virginia found in Risen’s favor.¹⁸ Judge Brinkema concluded that journalists are protected by a qualified privilege based on the First Amendment’s press clause.¹⁹ The court determined that the government had not shown that Risen’s evidence was necessary in the presence of strong circumstantial evidence that Sterling was Risen’s source.²⁰

The government appealed, and a three-judge panel of the U.S. Court of Appeals for the Fourth Circuit ruled 2-1 to reverse Judge Brinkema’s decision.²¹ The majority determined that no constitutional journalist’s privilege existed in a federal criminal trial court in the wake of *Branzburg v. Hayes*, a 1972 Supreme Court ruling on the existence of a constitutional journalist’s privilege, and the Circuit’s own precedent.²² The majority also rejected a bid by Risen to recognize a common-law privilege based on the widespread adoption of privilege statutes in the states, recognition of a constitutional privilege by most federal circuit courts, and the existence of Rule 501 of the Federal Rules of Evidence, which instructed courts to use their best judgment based on common law in recognizing privileges.²³ More problematic for Risen, perhaps, was the majority’s determination that no qualified privilege, if it existed, would have saved him from testifying because circumstantial evidence, however strong, was not an adequate substitute for the kind of direct evidence of guilt he could provide.²⁴

However, the third judge on the three-judge appellate panel dissented, arguing that a privilege of the sort Risen asserted did exist and would have been enough to save him from testifying because the circumstantial evidence against Sterling made Risen’s testimony duplicative.²⁵

Four federal judges, examining the same facts and precedent, split more or less evenly on what it all meant. This, in a nutshell, is the history of the journalist’s privilege issue in federal courts since *Branzburg*.

Because it remains the only opinion from the Supreme Court about the existence of a journalist’s privilege, *Branzburg* often gets the most attention

16. SPJ Code of Ethics, <https://www.spj.org/ethicscode.asp> (last visited Dec. 4, 2018).

17. *United States v. Sterling*, 818 F. Supp. 2d 945, 947 (E.D. Va. 2011).

18. *Id.*

19. *Id.*

20. *Id.* at 960.

21. *Sterling* at 482.

22. *Branzburg v. Hayes*, 408 U.S. 665 (1972) (hereinafter “*Branzburg*”).

23. *See infra* notes 76-77, 63-66 and accompanying text; FED. R. EVID. 501.

24. *Sterling* at 505.

25. *Id.* at 526-30 (Gregory, J., dissenting).

from judges and scholars pondering the existence or scope of the privilege. But disputes between journalists and officials prying into their sources far predate 1972.

There is some debate about who was the first journalist in the United States to refuse to reveal the identity of a confidential source to authorities. Some legal scholars and historians say that John Peter Zenger, whose famous prosecution and subsequent acquittal for criminal libel in 1735 is credited with inspiring post-Revolution protections for free speech, deserves the title for refusing to name the benefactors who bankrolled his colonial New York paper and provided the content that got him in trouble.²⁶ Others attribute the beginning of the practice of American journalists refusing to disclose sources to James Franklin, who defied colonial authorities' efforts to force him to name the authors of articles in his Pennsylvania newspaper in the 1760s.²⁷

The first person in post-Revolution America who was jailed for refusing to reveal a source and who resembled what modern Americans would recognize as a reporter was John Nugent of the *New York Herald*, who was detained in the Capitol jail for ten days in 1848 for refusing to reveal who provided him with a copy of a treaty being considered by the U.S. Senate.²⁸ At that time, treaties were secret until voted upon, and Nugent was found in contempt of Congress after publishing the details of the treaty and refusing to name his source.²⁹

The Nugent episode was the start of a long period in which authorities and news organizations periodically clashed over whether journalists could be compelled to name sources of controversial stories. For about 100 years, journalists largely avoided using the First Amendment as a shield against official demands, instead arguing that the standards of their profession required them to keep promises they made to sources.³⁰ The position of the authorities can perhaps best be summed up by an oft-quoted phrase from *United States v. Bryan* in 1950: in a legal proceeding whose goal is to find the truth, "the public has a right to every man's evidence."³¹

26. See, e.g., Sandra Davidson & David Herrera, *Needed: More Than a Paper Shield*, 20 WM. & MARY BILL RTS. J. 1277 (2012); Scott J. Street, *Poor Richard's Forgotten Press Clause: How Journalists Can Use Original Intent to Protect Their Confidential Sources*, 27 LOY. L.A. ENT. L. REV. 463 (2006).

27. See, e.g., Kara A. Larsen, Note: *The Demise of the First Amendment-Based Reporter's Privilege: Why the Current Trend Should Not Surprise the Media*, 37 CONN. L. REV. 1235 (2005); Mary-Rose Papandrea, *Citizen Journalism and the Reporter's Privilege*, 91 MINN. L. REV. 515 (2007).

28. Aaron David Gordon, *1 Protection of News Sources: The History and Legal Status of the Newsman's Privilege 185-88* (1971) (unpublished dissertation, University of Wisconsin) (on file at Indiana University's Wells Library).

29. *Id.*

30. TIMOTHY GLEASON, *THE WATCHDOG CONCEPT* (1990).

31. *United States v. Bryan*, 339 U.S. 323, 331 (1950).

As Aaron David Gordon documented in his exhaustive dissertation on the journalist's privilege in 1971, these occasional clashes between journalists and authorities often resulted in findings of contempt against journalists and/or their employers but few disclosures of sources.³² The disputes also often led to lobbying by news organizations and press associations for shield laws to protect journalists from future threats of jail time or fines for contempt, such as the long effort by Maryland journalists in the 1890s that led to the passage of the nation's first state shield law.³³ There were also calls for passage of a federal shield law as early as the 1920s, but the disputes were too few and far between to create any sort of groundswell of support for federal legislation.³⁴ Another obstacle was that influential legal scholars were hostile to the idea of expanding the number of professionals eligible to claim privileges beyond lawyers, doctors and clergy members. John Henry Wigmore, perhaps the leading early twentieth century authority on evidentiary rules, stated in a 1909 treatise that privileges should only be judicially recognized if they met four conditions:

1. The communications must originate in a confidence that they will not be disclosed.
2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
3. The relation must be one which in the opinion of the community ought to be sedulously fostered.
4. The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.³⁵

Wigmore found most privileges advocated by professionals, including journalists, lacked at least one of those elements.³⁶

In 1958, an entertainment columnist for a New York newspaper became the first journalist to argue that the press clause of the First Amendment protected her right to refuse to name a confidential source. Marie Torre had written an article about a dispute between singer and actress Judy Garland and the CBS television network over a planned show starring Garland.³⁷ The article quoted an unnamed CBS executive suggesting that Garland was to

32. Gordon, *supra* note 28, at 184-287.

33. See Dean C. Smith, *The Real Story Behind the Nation's First Shield Law: Maryland, 1894-1897*, 19 COMM. L. & POL'Y 3 (2014).

34. See Dean C. Smith, *Journalist Privilege in 1929: The Quest for a Federal Shield Law Begins*, 3 U. BALT. J. MEDIA L. & ETHICS 126 (2012).

35. JOHN WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2285 (McNaughton rev. ed. 1961).

36. *Id.*

37. *Garland v. Torre*, 259 F.2d 545 (2d Cir. 1958).

blame for problems with getting the show on the air.³⁸ When Garland sued CBS for breach of contract and defamation, she subpoenaed Torre to learn the identity of her source, and Torre refused to provide the identity, citing the First Amendment.³⁹

The U.S. Court of Appeals for the Second Circuit eventually ruled against Torre, finding that because her information “went to the heart” of Garland’s lawsuit, she had to reveal the source.⁴⁰ The opinion was notable for reasons that did not become obvious until later; it was written by Judge Potter Stewart, who would later be named to the Supreme Court in 1958, and it did not dismiss the idea that the First Amendment might protect journalists from revealing sources in some situations.⁴¹

No one could have predicted in 1958 that the relationship between the press and the government soon would undergo a shift that would make Torre’s pioneering legal argument more significant. The changes that have swept through the news industry in the last half-century are mostly beyond the scope of this Article, but the shift in how many journalists saw their role in informing the public (from being glorified stenographers for government pronouncements to skeptical and critical “watchdogs” of officialdom) is relevant in understanding why subpoenas to the press increased, along with resistance, and led to an inevitable clash in the U.S. Supreme Court.⁴²

By the early 1970s, the number of subpoenas issued to the media nationwide had increased from about one or two a year to seventy-five or more, according to some estimates.⁴³ Observers have stated that the increase stemmed from official alarm over widespread racial, economic, and social unrest, and journalists’ increasing reliance on non-official sources in “radical” movements that officials were unsuccessful in infiltrating.⁴⁴ Simply put, authorities wanted to know what various groups were planning, and journalists sometimes appeared to know more than the authorities did.

The situations that led the three reporters, whose cases were consolidated in *Branzburg v. Hayes*, to the Court are symbolic of the increasing tensions between journalists and government officials.⁴⁵ Paul Branzburg, a reporter for the *Courier-Journal* in Louisville, Kentucky, was subpoenaed by two state grand juries after publishing stories based on interviews with drug

38. *Id.* at 547.

39. *Id.* at 547-48.

40. *Id.* at 550.

41. Anthony Lewis, *Ohioan Is Chosen for Burton’s Post on Supreme Court*, N.Y. TIMES, Oct. 8, 1958, at A1; *Garland*, 259 F.2d at 549-50.

42. *See, e.g.*, Michael Schudson, *The Sociology of News* 80-82 (2d ed. 2011).

43. Achal Mehra, *Newsman’s Privilege: An Empirical Study*, 59 JOURNALISM Q. 560 (1982).

44. *See, e.g.*, Margaret Sherwood, Comment, *The Newsman’s Privilege: Government Investigations, Criminal Prosecutions and Private Litigation*, 58 CAL. L. REV. 1198 (1970).

45. *Branzburg*, at 665.

dealers and users.⁴⁶ Earl Caldwell, a correspondent for the *New York Times*, was covering the Black Panthers, a controversial civil rights group, when he was subpoenaed by a federal grand jury in California looking into alleged Black Panther threats against authorities.⁴⁷ Paul Pappas, a Massachusetts television journalist, was subpoenaed by a Massachusetts grand jury after he spent several hours in the headquarters of a Black Panthers offshoot in New Bedford after a night of racial disturbances.⁴⁸

The three privilege cases had one thing in common: all of the journalists had allegedly either witnessed or been told directly about criminal activity by their sources.⁴⁹ The cases also came from three different types of jurisdictions: Kentucky had a shield law, Massachusetts did not, and Caldwell was subpoenaed by a federal grand jury.⁵⁰

In *Branzburg's* case, the Kentucky Court of Appeals twice refused to quash the subpoenas he faced, despite the existence of a relatively absolute state shield law, by finding that he was not so much a reporter protecting sources as an eyewitness to criminal behavior.⁵¹ Pappas also lost his appeals all the way up to the Massachusetts Supreme Judicial Court, which noted the lack of a statutory shield and declined to create a common-law privilege.⁵² Caldwell, however, won his appeal in the U.S. Court of Appeals for the Ninth Circuit, which found that the government had not made an adequate showing that his testimony was needed that would obviate the harm to his source relationships.⁵³

The Supreme Court took it as a given that newsgathering deserved “some” First Amendment protection, lest the freedom of expression be “eviscerated,” but the protection did not extend to giving journalists a right that other citizens did not have to defy valid grand jury subpoenas.⁵⁴ The majority also expressed concerns about how to define a class of “journalists” who had extraordinary First Amendment protection as opposed to other communicators who did not.⁵⁵ Another concern was that recognizing a qualified privilege would mire courts in determining who deserved the

46. *Id.* at 667-71. See also Paul M. Branzburg, *The Hash They Make Isn't to Eat*, CURIER-JOURNAL, Nov. 15, 1969, at A1; Paul M. Branzburg, *Rope Turns to Pot: Once an Industry, Kentucky Hemp Has Become a Drug Problem*, CURIER-JOURNAL & TIMES, Jan. 10, 1971, at A1.

47. *Branzburg*, at 675-77; see also Earl Caldwell, *Declining Black Panthers Gather New Support from Repeated Clashes with Police*, N.Y. TIMES, Dec. 14, 1969, at 69.

48. *Branzburg*, at 672-75.

49. *Id.* at 691.

50. *Id.* at 667-79.

51. *Id.* at 668-71; see also *Branzburg v. Pound*, 461 S.W.2d 345 (Ky. 1970); *Branzburg v. Meigs*, 503 S.W. 2d 748 (Ky. 1971); KY. REV. STAT. § 421.100 (LexisNexis 2005; Supp. 2016).

52. *Branzburg*, at 673-75; see also *In re Pappas*, 266 N.E. 2d 297 (Mass. 1971).

53. *Branzburg*, at 679; see also *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970).

54. *Branzburg*, at 681, 690.

55. *Id.* at 704-05.

protection and whether the government had made its case for requiring the journalist to testify.⁵⁶

Justice Lewis Powell's heavily scrutinized concurring opinion noted the "limited nature" of the majority opinion he had joined while also suggesting journalists should have recourse if they believed they were being harassed by subpoenas of dubious purpose or dubious relevance to an active investigation.⁵⁷ The concurrence was brief both in words and reasoning, leaving later courts to try to trick out its meaning.

Justice William Douglas' dissent chastised both the majority and the journalists, the former for failing to adequately protect journalists and the latter for seeking only a qualified privilege.⁵⁸ Justice Douglas argued that journalists should have an absolute privilege against government subpoenas to protect their constitutionally guaranteed role in informing the public.⁵⁹

Justice Potter Stewart, who as an appellate judge had written the Second Circuit opinion in 1958 that denied Marie Torre protection from disclosing her source, wrote a dissent in *Branzburg* joined by Justices William Brennan and Thurgood Marshall that, arguably, was the most important opinion in the case. Justice Stewart criticized the majority's "crabbed view" of the First Amendment and expressed concern about the damage the decision would do to the free flow of information.⁶⁰ He wrote that it was logical for reporters to need to maintain confidential relationships with sources in order to do their jobs effectively.⁶¹ However, unlike Justice Douglas, he did not see the need for an absolute privilege. Instead he advocated for a qualified privilege that would allow journalists to protect their sources' identities unless the government could clearly and convincingly show that the information it sought was critically important to its investigation, that the information was relevant to the investigation, and that the information could not be obtained elsewhere.⁶²

This so-called "Stewart three-part test" became the standard many federal courts used in deciding subsequent cases because, as odd as it may seem, most federal circuit courts of appeal determined that *Branzburg* either endorsed or allowed a First Amendment privilege in situations other than valid grand jury subpoenas.⁶³ A few circuits even extended the privilege to

56. *Id.* at 705-06.

57. *Id.* at 709-10 (Powell, J., concurring).

58. *Id.* at 713 (Douglas, J., dissenting).

59. *Id.* at 721.

60. *Id.* at 725 (Stewart, J., dissenting).

61. *Id.* at 728.

62. *Id.* at 743.

63. *See, e.g.*, *United States v. Caporale*, 806 F.2d 1487 (11th Cir. 1986); *LaRouche v. National Broadcast. Co.*, 780 F.2d 1134 (4th Cir. 1986); *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981); *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980); *Miller v.*

non-confidential information such as interview notes, unpublished photographs, and outtakes from broadcast news stories.⁶⁴ Only the Sixth Circuit has refused to recognize any privilege for journalists, while the Seventh Circuit has leaned hard in that direction without explicitly rejecting a privilege in all circumstances.⁶⁵

The 2003 Seventh Circuit decision in *McKevitt v. Pallasch* marked a turning point of sorts in journalists' success against efforts to force them to disclose sources.⁶⁶ Justice Richard Posner's opinion for a unanimous three-judge panel rejected the bid of several reporters to avoid turning over interview tapes with a key prosecution witness to the defense in a Northern Ireland terrorist trial.⁶⁷ The opinion also questioned in dicta how other federal courts could have found support for a privilege from *Branzburg*, particularly for protection of non-confidential material.⁶⁸

The extent to which Judge Posner's decision raised doubts about the privilege among other federal judges is unclear – *McKevitt* has rarely been cited by other circuits – but journalists soon began to have trouble concealing sources and keeping themselves out of jail.⁶⁹ A more likely factor in the number of high-profile losses is that many of the cases involved grand jury or special prosecutor investigations that led to easy analogies with the core finding of *Branzburg*. A few examples:

1. Jim Taricani, a Rhode Island television reporter, was sentenced to six months in detention for refusing to disclose his source for a sealed videotape of an alleged corrupt act by a Providence city official. Taricani was found guilty of criminal contempt of court even after his source, an attorney for a defendant in the corruption case, came forward.⁷⁰
2. Judith Miller, a reporter for the *New York Times*, served eighty-five days in jail for refusing to tell a special prosecutor who leaked the name of a Central Intelligence Agency operative to her in an apparent political retaliation against the operative's husband, a Bush administration critic. She

Transamerican Press, Inc., 621 F.2d 721 (5th Cir. 1980); *Riley v. Chester*, 612 F.2d 708 (3d Cir. 1979); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977); *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975); *Baker v. F & F Inv.*, 470 F.2d 778 (2d Cir. 1972).

64. *Gonzales v. National Broadcast. Co.*, 194 F.3d 29 (2d Cir. 1998); *v. Shoen*, 48 F.3d 412 (9th Cir. 1995); *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980).

65. *In re Grand Jury Proceedings Storer Communications, Inc.*, 810 F.2d 580 (6th Cir. 1987); *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003).

66. *McKevitt*, 339 F.3d 530.

67. *Id.* at 531.

68. *Id.* at 532-33.

69. *But see In re Special Proceedings*, 373 F.3d 37, 45 (1st Cir. 2004).

70. *Id.*; *see also In re Special Proceedings*, C.A. No. 01-47 (D.R.I. Dec. 9, 2004).

was released after her source, Vice President Dick Cheney's chief of staff, allowed her to use his name.⁷¹

3. Two reporters for the *San Francisco Chronicle* were ordered to reveal their source for a secret grand jury report about steroid use in professional baseball. They were spared jail when their source came forward.⁷²

4. Josh Wolf, a freelance videographer in San Francisco, set the record for most time incarcerated for contempt by a journalist after he refused to give federal investigators the unedited tape of footage he shot during a protest in which a police officer was injured and a police car was damaged. His nearly eight months in jail ended when he and prosecutors reached an agreement that kept him from having to testify before a grand jury.⁷³

5. Four journalists were ordered to reveal to former government nuclear scientist, Wen Ho Lee, the sources within federal agencies who leaked information to them about Lee's alleged involvement in espionage. The reporters escaped contempt penalties when, in an unprecedented move, their employers joined with the government to pay a settlement to end Lee's Privacy Act lawsuit against the government.⁷⁴

6. Toni Locy, a former *USA Today* reporter, faced bankruptcy when a federal district court judge ordered her to pay, from her own funds, up to \$45,500 in fines if she did not reveal her sources for stories about Steven Hatfill. Mr. Hatfill was eventually cleared years after being named a "person of interest" in the mailing of deadly anthrax to journalists and politicians. While her appeal was pending, Hatfill and the government reached a substantial settlement and her testimony was no longer needed.⁷⁵

The series of cases that journalists were losing had two potentially positive effects for the media; they spurred Congress members to introduce bills to create a federal shield law, and they inspired several state legislatures to pass shield laws as well. As of this writing, forty states have statutes that,

71. See *In re Grand Jury Subpoena* (Miller), 397 F.3d 964 (D.C. Cir. 2005); David Johnston & Douglas Jehl, *Times Reporter Free From Jail; She Will Testify*, N.Y. TIMES, Sept. 30, 2005, at A1.

72. See *In re Grand Jury Subpoenas* (Fainaru-Wada), 438 F. Supp. 2d 1111 (N.D. Cal. 2006); Bob Egelko & John Koopman, *Lawyer Enters Guilty Plea as BALCO Leaker*, S. F. CHRON., Feb. 16, 2007, at A1.

73. See *Wolf v. United States (In re Grand Jury Subpoena)*, 201 Fed. Appx. 430 (9th Cir. 2006); Jesse McKinley, *8-Month Jail Term Ends as Maker of Video Turns Over a Copy*, N.Y. TIMES, Apr. 4, 2007, at A9.

74. See *Lee v. Department of Justice*, 413 F.3d 53 (D.C. Cir. 2005); Adam Liptak, *News Media Pay in Scientist Suit*, N.Y. TIMES, June 3, 2006, at A1.

75. See *Hatfill v. Mukasey*, 539 F. Supp. 2d 96 (D.D.C. 2008); Scott Shane & Eric Lichtblau, *Scientist Is Paid Millions by U.S. in Anthrax Suit*, N.Y. TIMES, June 28, 2008, at A1.

to various extents, protect journalists from revealing sources and other newsgathering-related information⁷⁶ or state court rules that do the same.⁷⁷

For a variety of reasons, the effort to pass a federal shield law did not succeed. The next section will examine the efforts made between 2005 and the present day to pass a bill.

III. PAST AND PRESENT EFFORTS TO PASS A FEDERAL SHIELD LAW

The cases discussed above that resulted in journalists being jailed, fined, or threatened with jail or fines spurred senators and representatives from both major political parties to introduce legislation to protect journalists' ability to promise sources' anonymity. While the legislative activity from 2005-2013 was notable for how close it came to success, as well as why it did not, this was not the first time that Congress attempted to pass a shield law.

First Amendment scholar Dean Smith has traced the first serious effort to pass a federal shield law to 1929, at a time when only one state – Maryland – had a shield statute on the books.⁷⁸ Legislative activity heated up considerably after the *Branzburg* decision in 1972, with dozens of bills introduced over the course of several sessions of Congress but, ultimately, none of the bills were passed.⁷⁹

76. ALA. CODE § 12-21-142 (LexisNexis Pub. 2012; Supp. 2016); ALASKA STAT. §§ 09.25.300-09.25.390 (2016); ARIZ. REV. STAT. ANN. § 12-2237 (2016); ARK. CODE ANN. § 16-85-510 (2005; Supp. 2015); CAL. EVID. CODE § 1070 (West 2009; Supp. 2017); COLO. REV. STAT. § 13-90-119 (2014; Supp. 2016); CONN. GEN. STAT. § 52-146t (2013; Supp. 2017); DEL. CODE ANN. tit. 10, §§ 4320-4326 (2013; Supp. 2016); D.C. CODE §§ 16-4701-16-4704 (2001; Supp. 2017); FLA. STAT. § 90.5015 (2011; Supp. 2017); GA. CODE ANN. § 24-5-508 (2013; Supp. 2016); 735 ILL. COMP. STAT. §§ 5/8-901 to 5/8-909 (West 2003; Supp. 2017); IND. CODE §§ 34-46-4-1 to 34-46-4-2 (2008; Supp. 2016); KAN. STAT. ANN. §§ 60-480 to 60-485 (2005; Supp. 2016); KY. REV. STAT. ANN. § 421.100 (LexisNexis 2005; Supp. 2016); LA. REV. STAT. ANN. §§ 45:1451 to 45:1459 (Thomson Reuters 2015; Supp. 2017); ME. REV. STAT. tit. 16, § 61 (2006; Supp. 2016); MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (LexisNexis 2013; Supp. 2016); MICH. COMP. LAWS ANN. § 767.5a (2000; Supp. 2017); MINN. STAT. §§ 595.021 to 595.025 (West 2010; Supp. 2017); MONT. CODE ANN. §§ 26-1-901 - 26-1-903 (2016); NEB. REV. STAT. §§ 20-144 to 20-147 (LexisNexis Pub. 2015; Supp. 2016); NEV. REV. STAT. § 49.275 (LexisNexis Pub. 2012; Supp. 2016); N.J. STAT. ANN. §§ 2A:84A-21 to 2A:84A-21.13 (West 2011; Supp. 2017); N.Y. CIV. RIGHTS LAW § 79-h (West 2009; Supp. 2017); N.C. GEN. STAT. § 8-53.11 (Thomson Reuters 2016); N.D. CENT. CODE § 31-01-06.2 (2010; Supp. 2015); OHIO REV. CODE ANN. §§ 2739.04, 2739.12 (LexisNexis 2014); OKLA. STAT. ANN. tit. 12, § 2506 (West 2009; Supp. 2017); OR. REV. STAT. §§ 44.510 - 44.540 (2015); 42 PA. CONS. STAT. ANN. § 5942 (West 2013; Supp. 2017); R.I. GEN. LAWS §§ 9-19.1-1 to 9-19.1-3 (2012; Supp. 2016); S.C. CODE ANN. § 19-11-100 (1985; Supp. 2012); TENN. CODE ANN. § 24-1-208 (West 2010).

77. N.M. CODE R. § 11-514 (Thomson Reuters 2017); UTAH R. EVID. 509 (LexisNexis Pub. 2017).

78. Smith, *supra* notes 33 and 34.

79. Jason M. Shepard, *After the First Amendment Fails: The Newsmen's Privilege Hearings of the 1970s*, 14 COMM. L. & POL'Y 373 (2009).

Starting in 2005, when the Judith Miller case was in the news, no fewer than fifteen bills have been introduced in the two houses of Congress, including the most recent in 2017, House Bill 4382 (H.R. 4382).⁸⁰ Introduced in November 2017 by Reps. Jamie Raskin (D-Maryland) and Jim Jordan (R-Ohio), the bill was identical to earlier versions of the bill introduced in the House that passed in two sessions of Congress.⁸¹

H.R. 4382 would prevent a covered person from being forced to testify or reveal “any document related to information obtained or created” while engaging in journalism unless a court determined that there were no other reasonable alternative sources and, in criminal investigations or prosecutions, it was reasonable to believe a crime had been committed and the information sought was “critical to the investigation or prosecution or to the defense against the prosecution.”⁸² In a matter other than a criminal investigation or prosecution, the person seeking the information would have to prove that it was “critical to the successful completion of the matter.”⁸³

If a confidential source would be revealed by disclosure, a court could order disclosure if it determined that it was necessary to prevent a terrorist act or identify a terrorist, to prevent death or serious injury, to identify someone who had disclosed a trade secret, “individually identifiable health information,” or nonpublic personal information, or to identify someone who had leaked classified information whose disclosure caused or would cause “significant and articulable harm to the national security,” and that the public interest would be better served by disclosing the source.⁸⁴ The bill would limit disclosure by requiring that it not be “overbroad, unreasonable, or oppressive” and, when possible, limited to verifying published information and its accuracy. It also would be narrowly tailored as to subject matter and time period and required to avoid the production of irrelevant information.⁸⁵

80. H.R. 4382. *See also* Free Flow of Information Act, S. 340, 109th Cong. (2005); Free Flow of Information Act, H.R. 581, 109th Cong. (2005); Free Speech Protection Act, S. 369, 109th Cong. (2005); Free Flow of Information Act, H.R. 3323, 109th Cong. (2005); Free Flow of Information Act, S. 1419, 109th Cong. (2005); Free Flow of Information Act, S. 2831, 109th Cong. (2006); Free Flow of Information Act, H.R. 2102, 110th Cong. (2007); Free Flow of Information Act, S. 1267, 110th Cong. (2007); Free Flow of Information Act, S. 2035, 110th Cong. (2007); Free Flow of Information Act, S. 448, 111th Cong. (2009); Free Flow of Information Act, H.R. 985, 111th Cong. (2009); Free Flow of Information Act, H.R. 2932, 112th Cong. (2011); Free Flow of Information Act, H.R. 1962, 113th Cong. (2013); Free Flow of Information Act, S. 987, 113th Cong. (2013) (hereinafter “S.987”).

81. Free Flow of Information Act, H.R. 1962, 113th Cong. (2013); H.R. 2932, 112th Cong. (2011); H.R. 985, 111th Cong. (2009) (enacted); 155 CONG. REC. H4209 (2009); H.R. 2102, 110th Cong. (2007) (enacted); 153 CONG. REC. H11537 (2007).

82. H.R. 4382 § 2(a)(1) & (2)(A).

83. *Id.* at § 2(a)(2)(B).

84. *Id.* at § 2(a)(3) & (4).

85. *Id.* at § 2(c).

The House bill contained an exception for eyewitness observations and criminal or tortious conduct by the covered person.⁸⁶ Another exception would prevent journalists from seeking protection under the federal shield law in state or federal cases involving civil defamation, slander, or libel.⁸⁷

The bill would apply the same conditions for overcoming the privilege to subpoenas issued to communication service providers doing business with covered persons. It would require that a covered person be given notice of the subpoena at the time it was served on the provider and that the covered person have a chance to respond. However, notice of the subpoena could be delayed if a court determined “by clear and convincing evidence” that notice would “pose a substantial threat to the integrity of a criminal investigation.”⁸⁸

The definition of “covered person” would include someone “who regularly gathers, prepares, collects, photographs, records, writes, edits, reports, or publishes” news about events of public interest “for a substantial portion of the person’s livelihood or for substantial financial gain.” The definition would also include “a supervisor, employer, parent, subsidiary, or affiliate” of a covered person.⁸⁹ The term would not include a foreign power or an agent of that power, a foreign terrorist organization, a specially designated terrorist, or any other terrorist organization.⁹⁰

“Journalism” would be defined as the gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing of news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public.⁹¹

H.R. 4382 would protect journalists from being forced to reveal information they have gathered or the identities of sources unless there was a compelling need for that information in relation to a criminal case, or the information would prevent death or physical harm, identify a terrorist, reveal the leaker of a trade secret, reveal the leaker of personal information about health or other matters, or came from a leak of classified information posing a clear threat to national security. The bill would also require that journalists be given a chance to fight subpoenas sent to their communication service providers, such as telephone companies or e-mail providers, but notice to journalists that their information was being sought could be delayed if the notice was shown to jeopardize a criminal investigation. Covered persons could include anyone in any medium, but only if they were making a living

86. *Id.* at § 2(e).

87. *Id.* at § 2(d).

88. *Id.* at § 3.

89. *Id.* at § 4(2).

90. *Id.* at § 4(2)(A)-(E).

91. *Id.* at § 4(5).

from journalistic activity, which could exclude some bloggers and citizen journalists who otherwise would fit the definition.

While the bill would have brought consistency to federal law on the journalist's privilege, its many exceptions and qualifications raise questions about whether journalists pursuing highly sensitive stories would be much better off than they are now.

No companion Senate bill was introduced. Although the early Senate bills tended to be identical to House versions, that began to change in later sessions of Congress. The primary reason appears to be the revelations of classified documents about the wars in Afghanistan and Iraq and diplomatic messages by WikiLeaks.⁹² By the time the last Senate version was approved by the Senate Judiciary Committee in 2013, becoming the third Senate bill to win committee approval but not full Senate approval, there were key differences with the House bills.⁹³ The final Senate bill introduced and approved by the Judiciary Committee in 2013 illustrates the differences in approaches between the two houses of Congress, most notably in defining a "covered person."

Senate Bill 987 as amended and approved in committee referred to "covered journalist" instead of "covered person" and said such a person should be associated with an entity that disseminated news

by means of newspaper, nonfiction book, wire service news agency, news website, mobile application, other news or information service (whether distributed digitally or otherwise), news program, magazine or other periodical (whether in print, electronic, or other format), through television or radio broadcast, multichannel video programming distributor ... or motion picture for public showing.⁹⁴

Alternatively, the covered journalist could be a person who gathered news with the intent to distribute it to the public and would have been subject to the earlier definition for "any continuous one-year period within the 20 years prior to the relevant date" or any three-month period over the previous five years. A person could also qualify for protection if she had "substantially contributed" to a medium defined above within five years of the relevant date or if she was a student journalist at a college or university.⁹⁵ There was no mention of an income requirement. "Relevant date" was defined as the date

92. See Free Flow of Information Act, S. 340 & H.R. 581, 109th Cong. (2005); Free Flow of Information Act, S. 1267 & H.R. 2102, 110th Cong. (2007); Charlie Savage, *After Afghan War Leaks, Revisions in a Shield Bill*, N.Y. TIMES, Aug. 4, 2010, at A12.

93. See 153 CONG. REC. S13192 (2007) (reporting S. 2035 out of committee); 155 CONG. REC. S13032 (2009) (reporting S. 448 out of committee).

94. S. 987, § 11(1)(A)(i)(I)(aa).

95. *Id.* at § 11(1)(A)(i)(II)(cc)(AA)-(CC).

on which the covered journalist obtained or created the protected information at issue in a case.⁹⁶

The bill included the same disqualifications for foreign powers and terrorists as in H.R. 4382 but added one: a person or entity whose principal function, as demonstrated by the totality of such person or entity's work, is to publish primary source documents that have been disclosed to such person or entity without authorization.⁹⁷

Presumably, this would have eliminated from shield law protection WikiLeaks or similar sites that primarily made documents available without editing. However, the bill also specifically empowered judges to use their discretion to find that a person who did not fit the definition of covered journalist should still be protected under the law if doing so would serve the interest of justice and "protect lawful and legitimate news-gathering activities."⁹⁸

The Senate bill used language similar to H.R. 4382 in defining the limits of protection for journalists and their sources in regard to criminal activity. Exceptions to the presumption of confidentiality would have also included eyewitness observations or participation in criminal activity.⁹⁹ Other exceptions included situations in which the subpoenaed information would "stop, prevent, or mitigate death, kidnapping, serious bodily harm, crimes against minors, or '[i]ncapacitation of critical infrastructure.'"¹⁰⁰ However, there was no mention of exceptions for health-related information or trade secrets.

The 2013 Senate bill also carved out an exception for leaks of classified information, if such information would prevent or mitigate an act of terrorism or other acts that would pose a "significant and articulable harm to national security."¹⁰¹ However, a journalist could still protect a source of classified information if the information did not pose such a harm. The bill would have required a court to give deference to the government in determining the severity of the threat from leaked classified material.¹⁰²

Despite the obvious attempts to appease critics who feared that WikiLeaks would be protected from disclosing sources, the bill never reached a vote on the Senate floor. No bills to create a federal shield law were introduced in the 114th Congress.

During the years that Congress debated the various shield bills, several hearings were held in which House and Senate members heard testimony for

96. *Id.* at § 11(8).

97. *Id.* at § 11(1)(A)(iii)(I).

98. *Id.* at § 11(1)(B).

99. *Id.* at § 3(a).

100. *Id.* at § 4.

101. *Id.* at § 5(a).

102. *Id.* at § 5(c).

and against passing a bill.¹⁰³ The Senate Report on S. 987, the last of the shield bills to date to get much attention from Congress, does an adequate job of synthesizing congressional views and hearing testimony about that bill and previous bills and will be summarized here to avoid repetition.

The Senate Judiciary Committee's report on S. 987, released on November 6, 2013, after the committee voted to approve the bill and send it to the full Senate, contained a majority view and two minority views by bill opponents. The majority noted that decisions of lower federal courts post-*Branzburg* had created a "confusing collage" that had, the committee argued, discouraged sources from going to the media with information about corporate or government wrongdoing. The report said that the shield law was needed to "clarify the law in this area."¹⁰⁴

The report said that the need for the shield law "has never been more pressing than now" because of an increase in the number of government-issued subpoenas in recent years, including a rise in the number of subpoenas related to leak investigations.¹⁰⁵ Discussing recent cases, such as the one involving James Risen, the committee said that the outcome might have been the same if the shield law had been in place, but at least judges would have had a "predictable balancing test" to apply.¹⁰⁶ The law was needed, the senators said, to avoid "a return to the late 1960s, when subpoenas to reporters had become not only frequent but virtually *de rigeur*."¹⁰⁷ The committee also noted that journalists had testified that highly publicized cases of reporters being held in contempt of court or turning over confidential information had risked "creating a broad chilling effect."¹⁰⁸ The committee also expressed concern that the federal government's use of subpoenas had "ebbed and flowed" over the years, lending their use "the taint of politicization."¹⁰⁹

Much of the rest of the majority report was devoted to recounting the history of the shield legislation in the Senate over the years and defending provisions of the 2013 bill. Notably, the report stated that the bill would require judges to give appropriate deference to the government in national security matters, but would also require a specific showing of likely damage so that a prosecutor would not "be able to hide behind an overbroad and

103. Transcripts of Congressional hearings are available from the Government Printing Office at <https://www.gpo.gov/fdsys/browse/collection.action?collectionCode=CHRG> (last visited Dec. 4, 2018).

104. S. REP. NO. 113-118, at 3 (2013).

105. *Id.* at 5.

106. *Id.* at 6.

107. *Id.* at 6-7.

108. *Id.* at 8-9.

109. *Id.* at 9.

unreasonable claim of harm.”¹¹⁰ The majority view also defended the definition of “covered journalist” as drawing a “clear and administrable line” between “actual journalists” and “those who would try to hide behind the cloak of journalism in order to harm our country – a scenario which has never occurred.”¹¹¹

Opponents of the bill filed two minority views, the first by Senator (later Attorney General) Jeff Sessions (R-Alabama) and Senator John Cornyn (R-Texas). Sessions and Cornyn warned that the bill would “seriously impede important criminal investigations and prosecutions” into terrorist activity and threats to national security. They cited what they called the “proliferation of the most damaging leaks of classified information in our country’s history” in recent years, including published reports on terrorist “kill lists,” the existence of secret prisons in Europe for alleged Al-Qaeda operatives, and administration concerns about Iraq’s prime minister.¹¹²

Sessions and Cornyn also argued, citing comments from intelligence officials and others, that the bill was a solution in search of a problem. They said that the Attorney General’s subpoena guidelines were “powerfully protective” (perhaps too much so) and, if “faithfully adhered to,” more than adequate to ensure that the government did not “unlawfully or unfairly intrude on the press’s right to legitimately report on issues of public controversy.”¹¹³

The two senators also criticized the process required by the bill for overcoming the privilege as “burdensome and time-consuming,” so much so that the bill’s language could “derail a critical, fast-moving investigation.”¹¹⁴ They also found it troublesome that in a leak investigation, the government would have to “contextualize” the leak for a court in order to show harm to national security, thus introducing more sensitive information into the record and exacerbating the harm associated with the leak.¹¹⁵ The committee, they wrote, had placed “protecting a leaker’s identity ahead of the safety and security of the country,” a move they said would likely encourage more leaks of sensitive information.¹¹⁶

Noting that the committee had attempted to write a definition of “covered journalist” that would exclude persons merely posing as journalists to harm American interests, Cornyn and Sessions said the definition still seemed to cover “almost anyone.” While the definition excluded persons or organizations linked to terrorism, the senators argued that it would still

110. *Id.* at 19.

111. *Id.* at 22 n. 33.

112. *Id.* at 25.

113. *Id.* at 27.

114. *Id.* at 34.

115. *Id.* at 34-35.

116. *Id.* at 35.

protect “terrorist media” such as *Russia Today*, *Al Jazeera*, and China’s *People’s Daily*. “It is not difficult to anticipate the scenarios under which the robust protections of S. 987 would be easily abused by those who wish to harm our safety and national security.”¹¹⁷

A second, much shorter, minority view was added by Senators Cornyn, Sessions, Ted Cruz (R-Texas) and Mike Lee (R-Utah).¹¹⁸ Oddly enough, given the concerns expressed by Cornyn and Sessions about the definition of “covered journalist,” the second minority view argued that the definition was too narrow. The four senators argued that the bill amounted to a form of government licensing by favoring some “forms of media” over others, which they said was “inimical to the First Amendment.”¹¹⁹

IV. INTERNATIONAL PERSPECTIVES ON THE JOURNALIST’S PRIVILEGE

The debate over whether, and to what extent, to protect journalists from being forced to reveal their confidential news sources is not just an American problem. Many countries recognize a right to protect sources through statutes or common law. Cataloging the various national laws is beyond the scope of this Article. Instead, this Article will focus on international tribunals and organizations with jurisdiction or authority to recommend or enforce legal actions across borders.

Treaties and covenants of global and regional organizations that monitor and, to various extents, enforce human rights guarantees generally recognize freedom of expression as a human right that governments should protect.¹²⁰ Arguably, the most influential of the free-expression protections is Article 19 of the U.N. Human Rights Commission’s International Covenant on Civil and Political Rights (ICCPR), which states:

Everyone shall have the right to hold opinions without interference.
Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all

117. *Id.* at 37.

118. *Id.* at 54.

119. *Id.*

120. G.A. Res. 217 (III) A, *Universal Declaration of Human Rights*, at Art. 19 (Dec. 10, 1948); U.N. HUMAN RIGHTS COMMISSION, *International Covenant on Civil and Political*, U.N. Doc. A/RES/2200/XXI, at Art. 19 (Dec. 16, 1966); COUNCIL OF EUROPE, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, at Art. 10 (Nov. 4, 1950); ORGANIZATION OF AMERICAN STATES, *American Convention on Human Rights*, at Art. 13 (Nov. 22, 1969); AFRICAN UNION, *African (Banjul) Charter on Human and Peoples’ Rights*, OAU Doc. CAB/LEG/67/3 rev. 5, at Art. 9 (June 27, 1981); ASSOCIATION OF SOUTHEAST ASIAN NATIONS, *ASEAN Human Rights Declaration*, at Art. 23 (Nov. 18, 2012).

kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.¹²¹

However, Article 19 also states that the rights to freedom of opinion and expression carry “special duties and responsibilities” and may be restricted by law “[f]or respect of the rights or reputations of others” and “[f]or the protection of national security or of public order (ordre public), or of public health or morals.”¹²²

None of the global or regional covenants and treaties specifically mention a journalist’s right to protect sources. However, clarifying statements by the organizations and decisions by courts that adjudicate disputes about the proper limitations on rights have recognized a journalistic right to protect sources.

For example, in 2011 the U.N. Human Rights Committee published a General Comment on Article 19 based on observations the Committee had made about individual nations’ records on human rights and its decisions on disputes between citizens and their countries over possible violations of Article 19. In a paragraph stating that it was generally impermissible for States to restrict journalists’ freedom to travel to attend meetings or investigate possible human-rights abuses, conflicts, or natural disasters, the Committee also said that States “should recognize and respect that element of the rights of freedom of expression that embraces the limited journalistic privilege not to disclose information sources.”¹²³

Media law scholar Edward Carter has stated that *General Comment 34* is significant for three reasons. Because the ICCPR is binding on the 168 countries that have signed it, including the United States, a nation would have to show that an exception to the privilege was necessary and proportional.¹²⁴ Also, the comment created a single global standard rather than allowing countries to mold it to their own standards.¹²⁵ Finally, the comment would require nations to “respect, protect and fulfill the right” to a privilege.¹²⁶

The Committee’s linkage of journalists’ right to protect sources with the right to move freely in conflict zones was probably not accidental. Although the Committee did not cite it, there is an obvious link between the brief statement of support for protecting sources and an earlier decision by the International Criminal Tribunal for the former Yugoslavia (ICTY) that

121. U.N. HUMAN RIGHTS COMMISSION, *International Covenant on Civil and Political Rights*, U.N. Doc. A/RES/2200/XXI, at Art. 19(1)-(2) (Dec. 16, 1966).

122. *Id.* at Art. 19 (3).

123. UNITED NATIONS HUMAN RIGHTS COMMISSION, *General Comment 34*, CCPR/C/GC/34, at paragraph 45 (Sept. 12, 2011).

124. Edward L. Carter, “*Not to Disclose Information Sources*”: *Journalistic Privilege Under Article 19 of ICCPR*, 22 COMM. L. & POL’Y 399, 400 (2017).

125. *Id.* at 419.

126. *Id.*

recognized a qualified privilege for war correspondents.¹²⁷ The ICTY determined that a *Washington Post* correspondent who covered the war in Bosnia would not have to testify about a story he wrote about a Bosnian official suspected of war crimes.¹²⁸ The Appeals Chamber of the ICTY agreed with the reporter, Jonathan Randal, that forcing him to testify could endanger other journalists covering conflicts by making them potential witnesses against combatants.¹²⁹ The decision was a watershed moment for recognition of a journalist's privilege on the international stage.¹³⁰

In addition to *General Comment 34*, numerous other reports, statements of principle, and recommendations have been adopted by global and regional organizations in recent years. For example, David Kaye, the United Nations' special rapporteur for freedom of opinion and expression, presented a report to the General Assembly in 2015 calling for strong protections for confidential sources and whistleblowers.¹³¹ Principle 3 of the Chapultepec Declaration, adopted in 1994 at the Organization of American States' Hemisphere Conference on Free Speech, states that "[n]o journalist may be forced to reveal his or her sources of information."¹³² The Organization for Security and Co-operation in Europe (OSCE) adopted recommendations in 2011 to protect the safety of journalists that included an encouragement to legislators to create laws to protect confidential sources, among other things.¹³³ That same year, the Parliamentary Assembly of the Council of Europe adopted a recommendation urging member countries to adopt or improve legislation protecting sources and develop guidelines for intercepting computer data that would also protect journalists' sources.¹³⁴

127. Prosecutor v. Brdjanin & Talic, Case No. IT-99-36-AR73.9, Appeals Chamber Decision (Int'l Crim. Trib. for the Former Yugoslavia Dec. 11, 2002).

128. *Id.*

129. *Id.* at ¶¶ 42-44.

130. For a thorough examination of the Randal case and its implications, see Kyu Ho Youm, *International and Comparative Law on the Journalist's Privilege: The Randal Case as a Lesson for the American Press*, 1 J. OF INT'L MEDIA & ENT. L. 1 (2006). See also Anastasia Heeger, *Securing a Journalist's Testimonial Privilege in the International Criminal Court*, 6 SAN DIEGO INT'L L.J. 209 (2005); Nia Y. McDonald, Comment, *Under Fire: The Fight for the War Correspondent's Privilege*, 47 HOW. L.J. 133 (2003).

131. *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, U.N. Doc. A/70/361 (Sept. 8, 2015).

132. ORGANIZATION OF AMERICAN STATES, *Chapultepec Declaration*, March 11, 1994, <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=60> (last visited Dec. 4, 2018).

133. ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE, *Vilnius Recommendations on Safety of Journalists*, June 8, 2011, <http://www.osce.org/cio/78522> (last visited Dec. 4, 2018).

134. COUNCIL OF EUROPE, *Recommendation 1950: The Protection of Journalists' Sources*, Parliamentary Assembly, Jan. 25, 2011, <http://assembly.coe.int/nw/xml/XRef-XML2HTML-EN.asp?field=17943&lang=en> (last visited Dec. 4, 2018).

Additionally, there have been numerous opinions by the European Court of Human Rights, which adjudicates disputes between citizens and their governments over the proper interpretation of the European Convention, that have found that restrictions on journalists' right to protect sources are not "necessary in a democratic society."¹³⁵

While an international recognition of a right to protect sources is, if not consistent across all borders, at least widely held, a recent report from UNESCO suggests that the laws have failed to keep up with new threats to the journalist's privilege universally, including in the United States.

The 2017 report, *Protecting Journalism Sources in the Digital Age*, which was written by Julie Posetti, an Australian journalist and academic, was based on various information collection methods, including surveys, analysis of legal and news websites, qualitative interviews, and panel discussions.¹³⁶

The UNESCO report stated that there were both benefits and drawbacks to the digital environment but focused primarily on the drawbacks. It determined that "the legal frameworks that protect the confidential sources of journalism are under significant strain" from mass and targeted surveillance, data retention policies, and anti-terror and national security laws that are prone to over-reach.¹³⁷ The report also noted that the privilege recognized in 121 nations that were part of the study was being "[c]hallenged by questions about entitlement to claim protection" – in other words, "Who is a journalist?" and "What is journalism?"¹³⁸

The report warned of dire consequences if the protection of sources was weakened, including the premature exposure of press investigations, "legal or extra-legal repercussions" for exposed sources, the drying-up of sources, and self-censorship.¹³⁹

UNESCO's report stated that the value of protecting confidential sources "is widely recognized as greatly offsetting instances of journalists abusing the confidentiality privilege to, for example, invent sources."¹⁴⁰ Journalists generally expose and condemn such incidents, the report said.¹⁴¹ Recognition of the value of protecting sources had led most nations to adopt the standard

135. See, e.g., Halldórsson v. Iceland, (2017) ECHR 44322/13; Telegraaf Media Nederland Landelijke Media B.V. v. The Netherlands, (2012) ECHR 39315/06; Sanoma Uitgevers B.V. v. The Netherlands, (2010) ECHR 38224/03; Financial Times Ltd. and Others v. United Kingdom, (2009) ECHR 821/03; Tillack v. Belgium, (2008) ECHR 20477/05.

136. Posetti, *supra* note 8 at 14-17.

137. *Id.* at 5.

138. *Id.* at 7.

139. *Id.* at 8.

140. *Id.* at 11.

141. *Id.*

that confidentiality should be the norm and exposure should be the exception.¹⁴²

Turning to specific issues affecting source confidentiality, the report said that anti-terror and national security laws adopted after the Sept. 11, 2001 terrorist attacks in the United States tended to have a “trumping effect” through which the laws took priority over source protection.¹⁴³ In some countries, the broad reach of such laws had led to journalists being held criminally liable for publishing leaked information or being targeted for surveillance and harassment.¹⁴⁴ Some states had adopted anti-anonymity or anti-encryption laws in the name of national security that made it difficult to assure sources their identities would be protected.¹⁴⁵

A second issue of concern in the report was the use of mass surveillance, such as the type exposed by Edward Snowden in the United States, as well as unregulated targeted surveillance.¹⁴⁶ Digital technology has made such surveillance, and the storage of materials obtained through the surveillance, relatively cheap and easy.¹⁴⁷ This trend has been accompanied by laws that expand the number of crimes for which interception of communications is allowed; remove or relax legal limits on surveillance, including allowing warrantless interception; permit the use of invasive technologies such as keystroke monitoring; and increase the demand that users of telecommunications services be identified.¹⁴⁸ All of this means that journalists are fearful that they can no longer protect sources or that sources will reveal themselves through using electronic communication devices and services.¹⁴⁹

A related issue is data retention by third parties, such as telecommunications companies, internet service providers, search engines, and social media platforms. Many nations now require telecommunications companies to retain records about their clients’ use of the services and to turn it over when requested, which in effect may give both governments and private actors access to information about journalists’ sources without their knowledge.¹⁵⁰ Also, laws in many nations require that telecommunications companies retain and surrender metadata, defined as “data that defines and

142. *Id.*

143. *Id.* at 19.

144. *Id.*

145. *Id.* at 21.

146. *See, e.g.*, GLENN GREENWALD, NO PLACE TO HIDE: EDWARD SNOWDEN, THE NSA, AND THE U.S. SURVEILLANCE STATE (Metropolitan Books, 1st ed. 2014).

147. Posetti, *supra* note 8 at 21.

148. *Id.* at 21-23.

149. *Id.*

150. *Id.* at 25.

describes other data.”¹⁵¹ Metadata includes information about what a person sends and receives, to and from whom, for how long, and on what device, and can also include geolocation information.¹⁵² People who encrypt their communications often forget to also encrypt the metadata, which can leave sources vulnerable to identification.¹⁵³

A fourth issue addressed in the report is the problem of how to define *journalist* or *journalism* at a time when digital tools allow more players and more platforms to enter the market for news and opinion. The report notes that some have called for improvements to whistleblower laws to protect the source more directly, but laws in some nations would still target journalists for publishing leaks even if sources were protected, so the need to define who is entitled to press freedom remains.¹⁵⁴ The report noted that many laws around the world protecting journalists were too narrow in the digital age, often limiting their reach to people working for legacy media organizations or who had considerable publishing credits or proof of substantial income from journalistic endeavors.¹⁵⁵ While not unanimous, many contributors to the report favored laws tied to “acts of journalism” instead of employment or income status, but the report also noted that defining an “act of journalism” is problematic at a time when so much material is produced by so many.¹⁵⁶

After reviewing materials gathered for the study about the state of confidential-source protection in various regions of the world and individual countries, the report offered eleven principles that could be used to assess legal protections for journalists’ sources and identify areas that needed improvement. The report recommended, among other things, that source protection be recognized as a necessary component of free expression and be made part of each country’s constitution or national law; that it should apply to all “acts of journalism” across all platforms; that it should entail protecting information collected through surveillance and stored; that any exception should be very narrow, necessary, and proportional; that willful violations of source protection should be criminalized; and that source protection should be accompanied by robust whistleblower protection.¹⁵⁷

While the UNESCO report raises several important issues about the efficacy of existing privileges, it makes fleeting mention of an issue that threatens to cast a shadow on attempts to strengthen privilege law or create a new statutory privilege in the United States: fake news.¹⁵⁸

151. *Id.* at 26.

152. *Id.*

153. *Id.* at 24-26.

154. *Id.*

155. *Id.* at 27.

156. *Id.* at 26-28.

157. *Id.* at 132-33.

158. *Id.* at 21.

As Jacob Soll of *Politico* has noted, fake news has a bloody, centuries-long history around the world, from anti-Semitic tales in the twelfth century to Nazi propaganda in Germany before and during World War II.¹⁵⁹ The difference now is that the Internet and social media distribute fake news, which is often hard to tell from real news, farther and faster than was possible only a few decades ago. Famous examples during and after the 2016 U.S. election included reports that an Ohio postal worker had destroyed absentee ballots to hurt President Trump's election chances and reports that an aide to Hillary Clinton had set up a child sex ring in a pizza restaurant, which led an armed man to fire a shot in the restaurant during a confrontation with employees.¹⁶⁰

For some purveyors of fake news in the United States and elsewhere, distributing phony news stories that are then eagerly shared by readers through social media is a big business. Shortly after the November 2016 election, the *New York Times* reported on several sites run by young people in the nation of Georgia and elsewhere that distributed partially true or completely fake pro-Trump stories to drive traffic and ad revenue from Facebook and other social media to their sites.¹⁶¹ The easy distribution of fake news on social media is particularly worrisome at a time when up to two-thirds of Americans report getting at least some of their news through social media, with 20 percent reporting they "often" get their news from Facebook, Twitter, and similar sites.¹⁶²

As troublesome as "real" fake news is, there is also the issue of President Trump's frequent criticism of the mainstream news media as purveyors of fake news. While some optimists have suggested that the President's attacks on the media have actually strengthened the media, others have noted that his rhetoric has been picked up by authoritarian leaders in other countries who use the phrase "fake news" to dismiss stories about human-rights violations and other questionable conduct.¹⁶³

Some of President Trump's favorite targets include anonymous sources in news stories critical of his administration, although his aversion to unnamed sources appears to be uneven. Several news organizations noted

159. Jacob Soll, *The Long and Brutal History of Fake News*, POLITICO, Dec. 18, 2016, <http://www.politico.com/magazine/story/2016/12/fake-news-history-long-violent-214535>.

160. *Id.*

161. Andrew Higgins, Mike McIntire, & Gabriel J.X. Dance, *Websites Hit a "Gold Mine" in Fake News*, N.Y. TIMES, Nov. 26, 2016, at A1.

162. Elisa Shearer & Jeffrey Gottfried, *News Use Across Social Media Platforms 2017*, PEW RESEARCH CENTER, Sept. 7, 2017, <http://www.journalism.org/2017/09/07/news-use-across-social-media-platforms-2017/>.

163. *See, e.g.*, Steve Coll, *Donald Trump's "Fake News" Tactics*, NEW YORKER, Dec. 11, 2017, <https://www.newyorker.com/magazine/2017/12/11/donald-trumps-fake-news-tactics>; Steven Erlanger, *Globe's Autocrats Echo Trump's "Fake News" Cry*, N.Y. TIMES, Dec. 13, 2017, at A1.

that despite his occasional tweets telling his followers to assume that unnamed sources do not exist, he cited a Fox News story based on an unnamed source in a May 2017 tweet defending his adviser and son-in-law Jared Kushner against allegations that he helped set up contacts between President Trump's campaign and Russian operatives.¹⁶⁴

It is tempting to dismiss the President's "fake news" tweets as politically motivated and so transparent that they cannot be taken seriously. But the confusion created by the existence of documented fake news and the President's media targeting, particularly in regard to unnamed sources, creates at least a perception problem that is likely to make the passage of a federal shield law difficult. Addressing the issue will potentially require a creative and, for the media, unattractive solution, as will be discussed below.

V. BUILDING A BETTER U.S. SHIELD LAW

The need for a federal shield law is not self-evident, certainly not to those who agree with President Trump that the news media regularly traffic in "fake news" and are the "enemies of the people." But a strong case exists for such a law when one considers the confusion left in *Branzburg's* wake that was evident in the *Risen* case, as well as the inconsistency that has developed in federal appellate circuits about the privilege.

The 2017 House bill, previous proposed legislation, and the UNESCO report all offer guidance on how to write an effective shield law. Also, state shield laws provide ideas on statutory construction, although their authority is diminished by inconsistency and the absence of a need to address issues that Congress cannot ignore, such as national security.

The following observations about what an ideal shield law should contain draw on all of those sources. The purpose of this section is to sketch out a bill that would be most favorable to journalists and aid them in the important work that they do in a democratic society. Such a bill is probably not feasible because of concerns about damaging other interests. The discussion below will acknowledge some of those concerns that appear unavoidable while leaving others to the imaginations of media critics.

A. *How Strong Should Protection Be?*

In *Branzburg*, both the majority and one of the dissenters suggested that only an absolute privilege would suffice to reassure sources that they would not be unmasked in a grand jury probe. The majority noted that the reporters

164. Ryan Bort, *Trump Defends Kushner with Story Citing Unnamed Sources*, NEWSWEEK, May 30, 2017, <http://www.newsweek.com/trump-defends-kushner-retweet-fox-news-unnamed-sources-617577>.

involved in the consolidated cases were seeking only a qualified privilege but said such a privilege would create uncertainty about when the privilege would apply. “If newsmen’s confidential sources are as sensitive as they are claimed to be,” the Court said, “the prospect of being unmasked whenever a judge determines the situation justifies it is hardly a satisfactory solution to the problem.”¹⁶⁵ Justice Douglas, in his dissent, agreed, but for different reasons. While the majority raised the issue of the absolute privilege to highlight what it saw as the unworkability of any privilege, Justice Douglas suggested that an absolute privilege was what the First Amendment required. Attacking both the government and the *New York Times* for asserting that journalists’ rights should be balanced against other interests, he wrote that he believed “that all of the ‘balancing’ was done by those who wrote the Bill of Rights.”¹⁶⁶ Because the First Amendment was written in absolute terms, he added, the writers “repudiated the timid, watered-down, emasculated versions of the First Amendment which both the Government and the New York Times advance in the case.”¹⁶⁷

While an absolute shield is probably politically impossible, the majority and dissent in *Branzburg* raise a logical point. If the purpose of a shield law is to encourage sources to communicate with journalists on matters of public importance, a qualified privilege would likely discourage sources from disclosing information. Even if an absolute privilege is not possible, the circumstances that would compel a journalist to name a source should be as narrow as possible.

There is precedent for providing more robust protection to confidential sources in earlier versions of the shield law that Congress considered in 2005-06. For example, H.R. 581 and S. 340, which were identical, provided qualified protection for non-confidential material but absolute protection for the identities of confidential sources. The bills stated that no federal government body could compel the disclosure of “any document” from a “covered person” unless a court had, “by clear and convincing evidence,” determined that the government had failed to obtain the information sought “from all persons from which such testimony or document could reasonably be obtained other than a covered person.”¹⁶⁸ In a criminal investigation or prosecution, the court would also have to find that “there [were] reasonable grounds to believe a crime [had] occurred” and the information sought was “essential to the investigation, prosecution, or defense.”¹⁶⁹ In a matter other

165. *Branzburg*, at 702 (1972).

166. *Id.* at 713 (Douglas, J., dissenting).

167. *Id.*

168. Free Flow of Information Act, S. 340, 109th Cong. § 2 (a)(1) (2005); Free Flow of Information Act, H.R. 581, 109th Cong. § 2 (a)(1) (2005).

169. S. 340 at § 2(a)(2)(A).

than a criminal case, the court would have to find the information sought was “essential to a dispositive issue of substantial importance to that matter.”¹⁷⁰ If a covered person was required to provide information, the bills stated that disclosure should be limited to verification of the information’s accuracy and be “narrowly tailored” both in subject matter and time period.¹⁷¹

H.R. 581 and S. 340 would also have provided absolute protection against the forced disclosure of the identity of someone “who the covered person [believed] to be a confidential source” and any information that could lead to the source’s unmasking.¹⁷²

Another bill introduced in the 109th Congress, S. 369, also would have provided absolute protection to confidential sources. The bill provided that no federal entity of any branch of government could compel a covered person to disclose the source of any information “whether or not the source [had] been promised confidentiality” or any information gathered but not published, including “notes; outtakes; photographs or photographic negatives; video or sound tapes; film; or other data, irrespective of its nature.”¹⁷³ The provision against forced disclosure would have also applied to “a supervisor, employer, or any person assisting a person covered” by the previous language, and any information obtained in violation of the bill’s provisions would be inadmissible in any proceeding of any branch of government.¹⁷⁴

Compelled disclosure of news or information, but not the source, would be permitted, however, if a court found, after allowing the covered person notice and an opportunity to be heard, that clear and convincing evidence showed that the news or information was “critical and necessary to the resolution of a significant legal issue,” there were no alternative means of obtaining the information, and there was “an overriding public interest in the disclosure.”¹⁷⁵

The approach taken in the 2005 bills would, from a journalist’s perspective, be preferable to the exception-filled approaches taken in H.R. 4382 and the Senate’s last version of the shield law bill, S. 987 in 2013.¹⁷⁶ H.R. 4382 would allow the shield to be pierced in criminal cases if there were no reasonable alternative sources and the information was critical to the defense or prosecution¹⁷⁷ and in civil cases if the information sought was

170. *Id.* at § 2(a)(2)(B).

171. *Id.* at § 2(b).

172. H.R. 581 at § 4.

173. Free Speech Protection Act, S. 369, 109th Cong. § 3 (a) (2005).

174. *Id.* at § 3(b)-(c).

175. *Id.* at § 4(a).

176. H.R. 4382; S. 987.

177. H.R. 4382 at § 2(a)(1) & (2)(A).

critical to the completion of the litigation.¹⁷⁸ A judge could also order disclosure to prevent or punish terrorism, prevent death or bodily harm, or unmask someone who leaked a trade secret, personally identifiable health information, other personal information, or classified information that would pose a clear threat to national security.¹⁷⁹ There are also exceptions for eyewitness observations, criminal or tortious conduct by a journalist, and libel and slander suits.¹⁸⁰

S. 987 in 2013 did not include the exceptions for health information, other personal information, or trade secrets, but did provide exceptions for the prevention or mitigation of death, kidnapping, bodily harm, crimes against minors, and threats to critical infrastructure.¹⁸¹

The interests protected by the exceptions in H.R. 4382 and S. 987 are important, but the piling on of exceptions would do little to reassure nervous potential sources that their names would remain secret. A better approach would be to use the language from the 2005 bills and, if necessary, a catch-all phrase allowing compelled disclosure of sources if a judge determined that the public interest in disclosure outweighed the public interest in protecting sources. It is not a perfect solution because it still falls short of absolute protection and injects uncertainty into the journalist-source relationship, but it may be necessary in a post-9/11 society.

B. *What About Third Parties?*

At least two federal appellate courts have determined that journalists generally do not have standing to intervene when subpoenas are issued to third parties, such as phone companies or Internet service providers, or to require notice that their records are being sought.¹⁸² More recently, a public controversy arose when the Associated Press learned that the government had subpoenaed its phone records in an attempt to identify a source for a sensitive story about a foiled terrorist attack.¹⁸³ The controversy led Attorney General Eric Holder to amend the Justice Department's guidelines on press subpoenas to require that notice be given to affected news organizations when subpoenas or warrants were authorized to seek communication or business records from a third party, unless the Attorney General determined that the

178. *Id.* at § 2(a)(2)(B).

179. *Id.* at § 2(a)(3) & (4).

180. *Id.* at § 2(d).

181. S.987 at § 4.

182. *See* *New York Times Co. v. Gonzales*, 459 F. 3d 160 (2d Cir. 2006); *Reporters Comm. for Freedom of the Press v. AT&T*, 593 F. 2d 1030 (D.C. Cir. 1978).

183. Charlie Savage & Leslie Kaufman, *Phone Records of Journalists Seized by U.S.*, N.Y. TIMES, May 24, 2013, at A1.

notice would clearly and substantially harm an investigation or risk a threat to national security, death, or bodily harm.¹⁸⁴

Provisions in H.R. 4382 and S. 987, and earlier versions of the shield bills, closely mirror the Attorney General's guidelines. H.R. 4382 would require that the same requirements applied to subpoenas to covered persons apply to subpoenas for communication records related to those persons and that covered persons receive notice of the subpoena. Notice could be delayed, however, if it would harm the integrity of the investigation.¹⁸⁵ S. 987 contained similar language but a more detailed description of exceptions, including setting a specific forty-five-day limit on delayed notice to covered journalists, with extensions possible if a judge determined that they were necessary to protect the integrity of an investigation or to prevent harm to national security or persons.¹⁸⁶

Such provisions to protect sources from being identified through the perusal of electronic communication records are a step in the right direction but may not be sufficient. The *Risen* case made clear that phone and e-mail records could be enough to tie a source to a journalist without subpoenas being issued to the journalist, so preventing such intrusions would be useful.¹⁸⁷ However, it is not clear how such restrictions on subpoenas to communication service providers would work if the journalist was not connected to a recognized news organization. Also, it is not clear if the provisions in H.R. 4382 or S. 987 would apply to records obtained through the kind of warrantless mass surveillance exposed by Edward Snowden, or whether such mass surveillance is continuing.¹⁸⁸

It is also worth noting that the government has other ways to obtain communication service provider information other than subpoenas issued through courts of law. The Stored Communications Act, part of the broader Electronic Communication Privacy Act, allows the government to obtain records related to e-mails, cloud storage of data, and other electronic communication through court-issued warrants, administrative subpoenas, or other court orders.¹⁸⁹ Further, a federal agency obtaining such records may require service providers not to disclose for at least ninety days to anyone, including the subscriber whose records are being sought, that the court order exists, if certain "adverse results" could occur, with the delay renewable by court order.¹⁹⁰ Under certain conditions, a preclusion of notice order may be

184. 28 C.F.R. § 50.10(a)(4) (2017).

185. H.R. 4382, at § 3.

186. S. 987, at § 6.

187. *Sterling*, at 482.

188. Greenwald, *supra* note 146.

189. 18 U.S.C. § 2703(a)-(d) (2012) (LEXIS through Pub. L. No. 115-29).

190. 18 U.S.C. § 2705(a) (2012) (LEXIS through Pub. L. No. 115-29).

granted for an indefinite period determined by a court.¹⁹¹ Further, the Federal Bureau of Investigation (FBI) may seek toll and transactional records from electronic communication service providers through what are commonly called national security letters, or administrative subpoenas, and require service providers not to disclose to customers the existence of the letters for an indefinite period of time.¹⁹²

Challenges to the non-disclosure provisions of the law have generally come from service providers who argue that the orders violate their free-speech rights because the orders constitute content-based restrictions on speech. The U.S. Court of Appeals for the Ninth Circuit recently upheld the national security letters and non-disclosure provisions.¹⁹³ Some challenges to notice-of-preclusion orders regarding warrants and other court orders have been more successful, but not consistently.¹⁹⁴

The various methods described above for allowing government access to electronic communication records suggest that more robust language is necessary in the shield law to require notice of warrants, national security letters, and other court orders in addition to subpoenas. The 2017 House bill made reference to subpoenas “or other compulsory process” but could be more specific about what types of instruments it affects to make protection stronger and clearer.¹⁹⁵ A model can be found in Canada’s recently enacted Journalistic Sources Protection Act.¹⁹⁶ The act amends the criminal code to require that law enforcement officers who know they are seeking an “object, document or data” related to or possessed by a journalist must apply to a judge for a search warrant.¹⁹⁷ If law enforcement officers obtain a search warrant and later discover that the information sought relates to a journalist, they must then make an application to a judge and also seal the material without examining it until the judge determines whether it can be used.¹⁹⁸

The Canadian approach would require law enforcers to seek judicial permission to examine third-party records related to journalists (and, by

191. *Id.* § 2705(b).

192. 18 U.S.C. § 2709(a)-(c) (2012) (LEXIS through Pub. L. No. 115-29).

193. *In re* National Security Letter, 863 F. 3d 1110 (9th Cir. 2017).

194. *See, e.g., In re* Search Warrant Issued to Google, Inc., No. 5:17-mj-532-HNJ, 2017 WL 204448 (N.D. Ala. Sept. 11, 2017) (finding indefinite nondisclosure order unconstitutional and limiting it to 180 days); *United States v. Warrant*, No. 19-mj-041116, 2017 WL 3669564 (D.N.J. Aug. 15, 2017) (denying Google motion to amend indefinite nondisclosure order); *In re* Search Warrant for [Redacted].com, 248 F. Supp. 3d 970 (C.D. Cal. 2017) (finding indefinite nondisclosure order unconstitutional and setting 180-day limit); *Microsoft Corp. v. U.S. Dep’t of Justice*, 233 F. Supp. 3d 887 (W.D. Wash. 2017) (granting in part and denying in part government motion to dismiss service provider’s challenge to law authorizing notice-of-preclusion orders).

195. H.R. 4382, at § 3(b)(1).

196. Journalistic Sources Protection Act, S.C. 2017, c. 22 (Can.).

197. *Id.* at sec. 3, § 488.01(2), R.S.C., 1985, c. C-46.

198. *Id.* at sec. 3, §488.01(9), R.S.C., 1985, c. C-46

extension, their sources) and keep any information obtained before officials knew a journalist was involved under seal until a judge could determine whether the information should be disclosed. The Canadian law's presumption that journalistic source material should be off-limits unless overridingly important sends a stronger protective message to sources than the most recent U.S. proposals.

C. Who Should Be Protected?

One of the more contentious issues in shield law construction involves defining who is protected under the law. H.R. 4382 and S. 987 took different approaches to the question. H.R. 4382 would include anyone who engaged in journalistic activity for any medium for a "substantial" portion of the covered person's livelihood,¹⁹⁹ while specifically excluding foreign powers or their agents or anyone believed to be involved in terrorism.²⁰⁰ S. 987, as amended in committee, did not have the income requirement but was limited primarily to members of mainstream media organizations, such as newspapers, books, wire services, magazines, television and radio programs, and motion pictures, although the definition of "covered journalist" also included persons working for newer media such as websites and mobile applications.²⁰¹ Persons associated with foreign powers or terrorism were also excluded in the Senate bill, as were persons who worked for organizations such as Wikileaks that primarily published raw documents obtained without authorization.²⁰²

Considering the concerns raised by the UNESCO report about outdated definitions of covered persons in privilege laws around the globe, the House definition of covered persons was probably preferable because it did not limit protection to a specific list of legacy media entities.²⁰³ The income requirement, however, is problematic at a time when people not employed by media organizations often create content intentionally, as citizen journalists, or by accidentally being at the right place at the right time with a cell phone or handheld camera. Also, unlike the Senate bill, the House bill failed to make a provision for student journalists and could have excluded them with the income requirement.

State shield laws take a wide variety of approaches to defining who is protected by the laws. Some protect persons working for a specific list of media entities, while others leave the definition of covered person open to

199. H.R. 4382 at § 4(2).

200. H.R. 4382 at § 4 (2)(A)-(E).

201. S. 987, § 11(1)(A)(i)(I)(aa).

202. *Id.* at § 11 (1)(A)(iii)(I).

203. Posetti, *supra* note 8, at 26-28.

court interpretation. For example, the Texas shield law is similar to S. 987 in providing a long list of types of media organizations covered, including newspapers, wire services, magazines, radio and television broadcasters, cable and satellite providers, and Internet providers.²⁰⁴ By contrast, the Minnesota shield law refers to a person who is or has been directly engaged in the gathering, procuring, compiling, editing, or publishing of information for the purpose of transmission, dissemination or publication to the public.²⁰⁵

In addition to Texas, statutes in Arkansas, Kansas, and Washington state refer to media distributed through the Internet or online.²⁰⁶

Both specific and vague language on who is protected by a shield law have advantages and disadvantages. Open-ended definitions do not have to be amended every time a new type of news medium is invented, but they lack predictability for sources dealing with journalists working for non-traditional media. Specific definitions, if broad enough, are more predictable but may not cover new media or even older media that are not mentioned. In regard to the latter point, there have been cases in which people who would be widely recognized as journalists were ruled not to be covered by state shield laws that did not mention the types of media organizations they worked for. In one case, a Michigan court found that a television reporter could not claim protection under the state shield law because it did not mention television.²⁰⁷ In a diversity jurisdiction case, the U.S. Court of Appeals for the Eleventh Circuit ruled that a magazine reporter was not protected by the Alabama shield law because it did not mention magazines.²⁰⁸

Another factor to be considered in judging the “covered person” part of a shield law is the fake news dilemma. Because of that phenomenon, it could be useful to limit protection under the shield law to “fact-based” reporting. An ideal “covered person” section, therefore, would protect a person engaged in fact-based gathering, collecting, photographing, recording, writing, editing, or publishing of information of public interest in any medium of communication disseminated to the public. Exclusions for persons associated with terrorism are probably inevitable, but a provision designed to exclude Wikileaks and similar entities might be problematic and could, arguably, be left out if the shield law was limited to those engaged in fact-based reporting.

204. TEX. CODE CRIM. PROC. ANN., at Art. 38.11, § 3(1) (West 2009); TEX. CIV. PRAC. & REM. CODE ANN. § 22.021(3) (West 2009).

205. MINN. STAT. ANN § 595.023 (West 2010).

206. ARK. CODE ANN. § 16-85-510 (West 2011); KAN. STAT. ANN. § 60-480(a)(2) (West 2010); WASH. REV. CODE § 5.68.010(5)(a) (West 2007).

207. *In re Contempt of Stone*, 397 N.W. 2d 244, 245 (Mich. Ct. App. 1986). The law was later amended to include television reporters. *See* MICH. COMP. LAWS ANN. § 767.5a (West 1986).

208. *Price v. Time, Inc.*, 416 F.3d 1327 (11th Cir. 2005).

D. *What About Fake News?*

Limiting the definition of “covered person” to those engaged in fact-based journalistic activity could be enough to allay fears that a federal shield law would apply to fake news purveyors. An additional safeguard could make passage of a bill more palatable in the current climate, but not without controversy.

This article has attempted to set out a best-case scenario from journalists’ perspective for a federal shield law, while acknowledging that a law most favorable to the press might not be possible. Assuming that legislators could be persuaded to back a law with stronger protections for journalists than recent legislative history would suggest, a concession might be needed. One concession would be a provision in the law permitting judges to require persons seeking protection under the shield law to swear, under penalty of perjury, that their sources exist.

An obvious objection to such a provision would be that it would put journalists in the posture of being presumed to be lying absent a sworn statement. However, the advantage would be that it would reassure courts that persons not associated with traditional media outlets and their codes of ethics are playing by the rules nonetheless.

It should be noted that such a provision is only slightly removed from the default position of many journalists who fight subpoenas to name their sources but agree to testify under oath that their reporting is accurate. For example, James Risen escaped having to identify his sources in court or go to jail for contempt by agreeing to testify that he had multiple sources for his book whom he would not identify.²⁰⁹ Also, this same approach was already suggested by the 2017 House bill, which would have required that, when possible, testimony or materials that journalists are required to surrender should be limited to only material that would verify the accuracy of published information or “describing any surrounding circumstances relevant to the accuracy of such published information.”²¹⁰ Requiring an affidavit swearing that unnamed sources did in fact exist would not seem to be much of a leap by comparison.

Whether journalists would be willing to accept such a provision, or whether it would be adequate to persuade members of Congress to strengthen protections for journalists, is anyone’s guess.

209. Apuzzo, *supra* note 14.

210. H.R. 4382, at § 2(c).

VI. CONCLUSION

Efforts to pass a federal shield law in the United States have foundered in recent years, and the issues involved have become more complicated. Concerns about terrorism and shielding leakers of classified information have led to convoluted language and watered-down protection in recent bills considered in Congress. As UNESCO has pointed out, privileges to protect journalists from revealing sources increasingly are outdated in terms of who is protected and often fail to address concerns about new types of surveillance that allow governments to uncover sources without bothering with subpoenas. The specter of fake news, an old problem with new life, raises questions about how to protect legitimate news activities without also protecting those who make up their stories.

Congress has an opportunity to shore up protection for journalists engaged in important public-service reporting and also offer a template to other countries with outdated laws. In order to persuade Congress to pass a bill that would be effective, journalists may have to agree to swear under oath that their sources exist in order to silence those who cry "Fake news!" when they dislike what is being reported. There may be other solutions, but it is hard to see how a bill that would strongly protect journalists from revealing their sources, or having them revealed through covert operations, could pass without some concession from journalists that the difference between fact and fiction is blurrier than ever.

