

Comments

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Shielding the Media: In an Age of Bloggers, Tweeters, and Leakers, Will Congress Succeed in Defining the Term “Journalist” and in Passing a Long-Sought Federal Shield Act?

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"Hell I wouldn't prosecute the Times. My view is to prosecute the Goddamn pricks that gave it to 'em."¹

President Richard Nixon

June 14, 1971

INTRODUCTION

In the aftermath of the 2012 Aurora, Colorado, movie theater shooting that killed twelve people and injured dozens more,² many wondered what had motivated alleged³ shooter James Holmes to commit this appalling act of violence.⁴ In the days following

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¹ President Nixon to John Ehrlichman, discussing the leak of the Pentagon Papers in a phone call made from the White House. *The Pentagon Papers: Secrets, Lies, and Audiotapes*, NAT'L SEC. ARCHIVE, <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB48/ehrichman.pdf> (last visited July 27, 2014).

² Michael Pearson, *Gunman Turns 'Batman' Screening into Real-life 'Horror Film,'* CNN (July 20, 2012, 9:59 PM), <http://www.cnn.com/2012/07/20/us/colorado-theater-shooting/index.html>.

³ As of the writing of this Comment, Holmes had yet to undergo trial.

⁴ See Dan Frosch & Kirk Johnson, *Gunman Kills 12 in Colorado, Reviving Gun Debate*, N.Y. TIMES (July 20, 2012), http://www.nytimes.com/2012/07/21/us/shooting-at-colorado-theater-showing-batman-movie.html?pagewanted=all&_r=0; *James Holmes Described as a Brilliant Student; Motive for Shooting Rampage is Unclear*,

Holmes’s arrest, reporters like Fox News’s Jana Winter were busy digging into the young man’s past, trying to answer that question.⁵ Winter was the first to report that Holmes sent a notebook containing violent drawings to a psychiatrist prior to the shooting—a tip leaked to Winter by confidential sources believed to be in law enforcement.⁶ Holmes’s defense attorneys later subpoenaed Winter to compel her to reveal the identities of her sources.⁷ She refused, and the issue of whether she could—and should—be compelled to disclose the names made its way up through the New York Court of Appeals,⁸ which overturned the subpoena in December 2013.⁹ But the legal battle caused lasting professional damage for Winter.¹⁰ Winter said the subpoena threat caused numerous sources to dry up in the Holmes case and other investigative projects, including what she described as a “high-profile national security investigation.”¹¹ In an affidavit she filed in July 2013, Winter described the “severe hardship” the subpoena caused in her professional life: “After news of my subpoena broke, several sources around the world who had indicated they would provide me with additional information about this [national security] case were chilled and refused to speak to me, citing the news of my subpoena.”¹² Winter said that “[a]s a result, this important news has not come to light either by my reporting or anyone else’s.”¹³

Winter’s case is but one of numerous well-publicized efforts by journalists in the past decade to protect the identities of their

SYRACUSE.COM (July 20, 2012, 9:14 PM), http://www.syracuse.com/news/index.ssf/2012/07/james_holmes_described_as_a_br.html.

⁵ See Ari Rabin-Havt, *In Defense of Fox News’ Jana Winter*, MEDIA MATTERS FOR AM. (Sept. 4, 2013, 11:27 AM), <http://mediamatters.org/blog/2013/09/04/in-defense-of-fox-news-jana-winter/195714>.

⁶ *Id.*

⁷ John Ingold, *Fox News Reporter Jana Winter Relieved at New York Court’s Ruling*, DENVER POST (Dec. 12, 2013, 12:01 AM), http://www.denverpost.com/news/ci_24706752/fox-news-reporter-jana-winter-relieved-at-new#axzz2wXSS1QGd.

⁸ Though there was some debate over venue in this matter—as Holmes’s court proceedings are in Colorado—Winter’s subpoena challenge was decided in New York because she lives and works there. *See id.*

⁹ *Id.*

¹⁰ *Id.*; see also Lauren Kirchner, *Jana Winter’s Victory and What She Lost Along the Way*, COLUM. JOURNALISM REV. (Dec. 11, 2013, 6:55 AM), http://www.cjr.org/behind_the_news/jana_winter.php?page=all.

¹¹ Kirchner, *supra* note 10.

¹² *Id.*

¹³ *Id.*

confidential sources by fighting subpoenas. Judith Miller, formerly of *The New York Times*, is perhaps the most well-known journalist to refuse to reveal a source in the Valerie Plame leak case (the federal government subpoenaed Miller as part of its investigation into who had leaked CIA operative Plame's identity to reporters; Miller refused to testify or reveal her source and spent eighty-five days in jail before relenting).¹⁴ As of the writing of this Comment, James Risen, also of *The New York Times*, is garnering much attention while he resists the federal government's efforts to compel him to testify against a CIA source who leaked information to Risen about a secret government program intended to thwart Iran's efforts to attain nuclear weapons.¹⁵ Though exact numbers are nearly impossible to tally due to the self-reporting nature of subpoenas, several studies indicate that the number of media subpoenas issued by state and federal governments has risen sharply since September 11, 2001.¹⁶

The tension between the press and the government is not a new phenomenon; it dates back to the very inception of the press in the United States.¹⁷ Most states and federal circuits recognize under the

¹⁴ Don Van Natta Jr. et al., *The Miller Case: A Notebook, a Cause, a Jail Cell and a Deal*, N.Y. TIMES (Oct. 16, 2005), <http://www.nytimes.com/2005/10/16/national/16leak.html?pagewanted=all>.

¹⁵ Charlie Savage, *Subpoena Issued to Writer in C.I.A.-Iran Leak Case*, N.Y. TIMES (May 24, 2011), <http://www.nytimes.com/2011/05/25/us/25subpoena.html>. After the U.S. Court of Appeals for the Fourth Circuit declined to hear his case challenging the subpoena, Risen petitioned the U.S. Supreme Court. Andrew Beaujon, *James Risen Asks Supreme Court to Hear His Case*, POYNTER (Jan. 14, 2014, 9:10 AM), <http://www.poynter.org/latest-news/mediawire/235829/james-risen-asks-supreme-court-to-hear-his-case/>. That petition is still pending. *Id.* Risen said publicly that he is willing to go to jail rather than reveal his confidential source. Margaret Sullivan, *Protecting a Source, James Risen Takes His Case to the Supreme Court*, N.Y. TIMES (Jan. 13, 2014, 6:38 PM), http://publiceditor.blogs.nytimes.com/2014/01/13/protecting-a-source-james-risen-takes-his-case-to-the-supreme-court/?_r=0.

¹⁶ See, e.g., Sharon LaFraniere, *Math Behind Leak Crackdown: 153 Cases, 4 Years, 0 Indictments*, N.Y. TIMES (July 20, 2013), <http://www.nytimes.com/2013/07/21/us/politics/math-behind-leak-crackdown-153-cases-4-years-0-indictments.html>; Kevin Rector, *A Flurry of Subpoenas*, AM. JOURNALISM REV. (Apr./May 2008), <http://ajrarchive.org/article.asp?id=4511>; Marlana Telvick & Amy Rubin, *The Press and Subpoenas: An Overview*, PBS (Feb. 27, 2007), <http://www.pbs.org/wgbh/pages/frontline/newswar/part1/subpoenas.html>.

¹⁷ In 1848, John Nugent became the first American reporter to be arrested for refusing to identify a confidential source. Stephen Bates, *Getting to the Source: The Curious Evolution of Reporters' Privilege*, SLATE (Dec. 26, 2003, 11:51 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2003/12/getting_to_the_source.html. The Senate held Nugent in contempt and incarcerated him in a Capitol committee room after Nugent refused to disclose his sources following the publication of a secret treaty between the United States and Mexico by the *New York Herald*. *Id.* "I consider myself bound in

Constitution or statutory law some type of reporter’s privilege: the right to refuse to testify or allowing journalists to keep their sources confidential.¹⁸ Most states have crafted shield laws¹⁹ that create varying degrees of legal protection for reporters to wield against public (the government) or private (as by Holmes’s defense attorneys) efforts to compel their testimony. However, the federal government has no shield law, though lawmakers have intermittently introduced legislation to create one, most recently in 2013.²⁰ Congress’s latest attempt to protect journalists was a set of bills collectively called the Free Flow of Information Act.²¹ At the time of this writing, the legislation is stalled in Congress²² and will likely fail to pass out of committee.²³ Members of the media have both praised and panned the

honor not to answer,” Nugent declared when senators questioned him about how he got the treaty. *Id.*

¹⁸ *The Reporter’s Privilege Compendium: An Introduction*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, <http://www.rcfp.org/browse-media-law-resources/guides/reporters-privilege/introduction> (last visited Mar. 20, 2014) [hereinafter *Reporter’s Privilege Compendium*]; see “journalist’s privilege,” BLACK’S LAW DICTIONARY 1392 (10th ed. 2014).

¹⁹ A shield law is “a statute that affords journalists the privilege not to reveal confidential sources.” *Id.* at 1588. Every state but Wyoming has some form of shield law in place. See *The Reporter’s Privilege*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, <http://www.rcfp.org/privilege/> (last visited Nov. 20, 2013), for an overview of information about the reporter’s privilege in each state and federal circuit.

²⁰ *Federal Shield Law Efforts*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, <http://www.rcfp.org/federal-shield-law> (last updated Sept. 12, 2013) [hereinafter *Federal Shield Law Efforts*].

²¹ Free Flow of Information Act of 2013, S. 987, 113th Cong. (2013); H.R. 1962, 113th Cong. (2013).

²² *Bill Summary & Status, 113th Congress (2013-2014), S.987*, LIBR. OF CONG., <http://thomas.loc.gov/cgi-bin/bdquery/z?d113:s.987>: (last visited Mar. 20, 2014) [hereinafter *Bill Summary & Status, S.987*]; H.R.1962—Free Flow of Information Act of 2013, CONGRESS.GOV, <http://beta.congress.gov/bill/113th-congress/house-bill/1962> (last visited Mar. 20, 2014) [hereinafter *Bill Summary & Status, H.R.1962*].

²³ This is somewhat speculative, but several factors support this prediction. The 113th Congress, in its second half of the session at the time of this writing, has passed fewer substantive measures than any Congress in two decades. Drew DeSilver, *Congress Ends Least-Productive Year in Recent History*, PEW RES. CTR. (Dec. 23, 2013), <http://www.pewresearch.org/fact-tank/2013/12/23/congress-ends-least-productive-year-in-recent-history/>. The last action taken by the Senate on S. 987 was an amendment passed by the Senate Judiciary Committee on November 6, 2013. See *Bill Summary & Status, S. 987*, *supra* note 22. The House version, H.R. 1962, was referred to the House Judiciary Committee on May 14, 2013, and has received no further action. See *Bill Summary & Status, H.R.1962*, *supra* note 22. The website GovTrack.us estimates the odds of S. 987’s enactment are fourteen percent, and the odds of H.R. 1962 becoming law are thirty-two percent. *S. 987: Free Flow of Information Act of 2013*, GOVTRACK.US, <https://www>

Act, especially for its most controversial provision: the proposed definition of “journalist.”²⁴

A federal shield law would codify the reporter’s privilege currently recognized in numerous forms at both the state and federal circuit court levels, and it would provide uniform guidance to the government and journalists on the protections for various types of confidential source material.²⁵ The Free Flow of Information Act is a generally positive step toward achieving a consistent standard. But the bill’s current definition of “journalist” is too narrow; it excludes from protection increasingly influential nontraditional journalists like bloggers, freelancers, and some website publishers who perform journalistic services without any express agreement or expectation of compensation.²⁶ A more inclusive definition of journalist that turns on the nature of the journalistic work—rather than a definition that emphasizes an individual’s employment status or job title—would provide greater protection to those individuals and organizations seeking to shine a light in society’s darkest corners in an ever-evolving media landscape.

Parts I and II of this Comment provide background information regarding the reporter’s privilege and both judicial and congressional attempts to define it at the federal level. Part III introduces and briefly examines the current federal shield law proposals and their qualifications. Part IV presents a critique of the proposed definition of journalist and asserts that a broader, more inclusive definition would best serve the interests of the media and public by protecting confidential sources. The Comment concludes by proposing statutory

.govtrack.us/congress/bills/113/s987 (last visited Mar. 20, 2014); *H.R. 1962: Free Flow of Information Act of 2013*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/113/hr/1962> (last visited Mar. 20, 2014).

²⁴ See Emily Bazelon, *Better than No Shield at All*, SLATE (Sept. 24, 2013, 1:23 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/09/media_shield_law_matt_drudge_is_wrong_the_senate_bill_is_pretty_good.html; Charles J. Glasser, Jr., *Congress Should Pass the Federal Shield Law for Journalists, Bloggers*, WASH. EXAMINER (Aug. 5, 2013, 12:00 AM), <http://washingtonexaminer.com/congress-should-pass-the-federal-shield-law-for-journalists-bloggers/article/2533831#>; David Greene, *Senate Revises Media Shield Law for the Better, But It’s Still Imperfect*, ELEC. FRONTIER FOUND. (Sept. 20, 2013), <https://www.eff.org/deeplinks/2013/09/senate-revises-media-shield-law-better-its-still-imperfect>; Peter Sterne, *Shield Law More Like a Cheap Umbrella*, N.Y. OBSERVER (May 28, 2013, 7:30 PM), <http://observer.com/2013/05/spj-wishes-proposed-shield-law-were-stronger/>.

²⁵ See, e.g., Leslie Siegel, *Trampling on the Fourth Estate: The Need for a Federal Reporter Shield Law Providing Absolute Protection Against Compelled Disclosure of News Sources and Information*, 67 OHIO ST. L.J. 469, 474, 478 (2006).

²⁶ See *infra* notes 158-74 and accompanying text.

language that frames the privilege in the context of journalism—extending the privilege to those who “commit acts of journalism,” rather than by focusing on an individual’s employment status.²⁷

I

THE REPORTER’S PRIVILEGE

A. What Is the “Reporter’s Privilege”?

The “reporter’s privilege” is generally defined as a testimonial privilege held by journalists that protects them from compelled disclosure of information they have obtained through the newsgathering process.²⁸ The privilege stems from recognition of the “preferred position of the First Amendment” in American society and “the importance of a vigorous press.”²⁹ Reporters and news organizations are not ordinarily exempt from the legal rules that apply to the rest of the general public.³⁰ In other words, the press is not “above the law,”³¹ but the press *may* have a “special standing to assert a qualified privilege in legal proceedings to refuse to divulge the identity of sources and to reveal unpublished information.”³² This is similar to other evidentiary privileges, such as the doctor-patient or attorney-client relationship privileges.³³ The privilege is intended to

²⁷ The scope of this Comment is limited to analysis of the proposed definition of “journalist” and is not a comprehensive critique of the bill as a whole.

²⁸ See *In re Slack*, 768 F. Supp. 2d 189, 193 (D.D.C. 2011).

²⁹ *Zerilli v. Smith*, 656 F.2d 705, 712 (D.C. Cir. 1981).

³⁰ In fact, the press has lost numerous Supreme Court cases in which it claimed some right not available to everyone under the freedom of the press clause. See *Herbert v. Lando*, 441 U.S. 153, 160 (1979) (exemption from discovery of journalists’ thought processes); *Houchins v. KQED, Inc.*, 438 U.S. 1, 8–9 (1978) (access to jail); *Zurcher v. Stanford Daily*, 436 U.S. 547, 563–67 (1978) (exemption from police search); *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 608–10 (1978) (access to Watergate tapes); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (1974) (access to prisons); *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 381–83 (1973) (exemption from antidiscrimination regulations); *Branzburg v. Hayes*, 408 U.S. 665, 684–86 (1972) (refusal to disclose confidential sources); *Associated Press v. United States*, 326 U.S. 1, 19–20 (1945) (exemption from antitrust laws).

³¹ See Gabriel Schoenfeld, *Why Journalists Are Not Above the Law*, COMMENTARY MAG. (Feb. 1, 2017, 12:00 AM), <http://www.commentarymagazine.com/article/why-journalists-are-not-above-the-law/>, for a critical view of the reporter’s privilege.

³² Clay Calvert, *And You Call Yourself a Journalist?: Wrestling with a Definition of “Journalist” in the Law*, 103 DICK. L. REV. 411, 413 (1999).

³³ See Geoffrey R. Stone, *Why We Need a Federal Reporter’s Privilege*, 34 HOFSTRA L. REV. 39, 39–40 (2005).

protect journalists from facing such penalties as arrest and incarceration for refusing to reveal confidential sources.³⁴

B. Evolution of the Reporter's Privilege

What we recognize today as a reporter's privilege has evolved through decades of First Amendment jurisprudence, state statutes and constitutions, and case law.³⁵ The U.S. Constitution makes no mention of a reporter's privilege, but the privilege evolved from the First Amendment's Freedom of the Press Clause,³⁶ which encompasses a group of rights.³⁷ For example, the First Amendment protects journalists from prior restraints.³⁸ "[A]lthough the freedoms are not absolute, the First Amendment provides significant constitutional protections to journalists."³⁹ Those rights are incorporated to the states through the Fourteenth Amendment.⁴⁰

The reporter's privilege also developed out of a larger constitutional theory about the role of the press known as the "fourth estate."⁴¹ Accordingly, the press is a special institution designed to act as a fourth check on the three branches of government, with a constitutionally recognized role to "inform[] and educat[e] the public, offer[] criticism, and provid[e] a forum for discussion and debate."⁴² Support for the fourth estate theory gained traction in the 1960s and 1970s as the press developed a more adversarial relationship with the government, particularly in its reporting on the Vietnam War and the

³⁴ See *Reporter's Privilege Compendium*, *supra* note 18.

³⁵ Calvert, *supra* note 32, at 413.

³⁶ See U.S. CONST. amend. I. "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." *Id.*

³⁷ The clause extends the rights of freedom, autonomy, and protection to the press, including "daily newspapers and other established news media." See Potter Stewart, "*Or of the Press*," 26 HASTINGS L.J. 631, 631 (1975).

³⁸ A prior restraint is the suppression of speech prior to its publication or dissemination. The Supreme Court maintains that such restraints on speech bear a heavy presumption against constitutional validity. See, e.g., *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Near v. Minnesota*, 283 U.S. 697 (1931).

³⁹ Markus E. Apelis, *Fit to Print? Consequences of Implementing a Federal Reporter's Privilege*, 58 CASE W. RES. L. REV. 1369, 1373 (2008).

⁴⁰ *Id.* at 1372. See also *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (holding that "freedom of speech and of the press . . . are among the fundamental personal rights and 'liberties' protected . . . from impairment by the States").

⁴¹ Patrick M. Garry, *Anonymous Sources, Libel Law, and the First Amendment*, 78 TEMP. L. REV. 579, 585–87 (2005).

⁴² *Id.* at 586 (citing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 781 (1978)).

Watergate scandal.⁴³ But with the evolving role of journalists as government watchdogs came legal complications.⁴⁴ Subpoenas against reporters were increasingly ordered, “in such numbers and circumstances as to generate consternation in virtually all quarters of the journalism profession.”⁴⁵ Legislatures and courts were called on to analyze proposed changes in the law—at both the state and federal levels—and the possible need for a reporter’s privilege.⁴⁶

C. The Supreme Court Addresses the Reporter’s Privilege

1. Branzburg v. Hayes—Majority Opinion

The seminal case addressing reporter’s privilege was *Branzburg v. Hayes*, a 1972 Supreme Court decision in which a deeply divided Court held that the First Amendment does not provide journalists with the right to refuse to testify before a grand jury.⁴⁷ *Branzburg* marked the first and only time the Supreme Court has considered Freedom of the Press Clause implications of subjecting journalists to grand jury subpoenas seeking the names of confidential sources.⁴⁸ The fractured⁴⁹ and “peculiar configuration”⁵⁰ of the *Branzburg* majority

⁴³ *Id.* at 585–86. See generally *The Watergate Story, Part 1*, WASH. POST, <http://www.washingtonpost.com/wp-srv/politics/special/watergate/part1.html> (last visited Mar. 20, 2014); A.M. Rosenthal, *On My Mind: The Pentagon Papers*, N.Y. TIMES, June 11, 1991, <http://www.nytimes.com/1991/06/11/opinion/on-my-mind-the-pentagon-papers.html?ref=pentagonpapers>.

⁴⁴ The state and federal government’s use of subpoenas against journalists became more widespread in the 1970s as a result of growing social unrest during the first years of the Nixon Administration. Telvick & Rubin, *supra* note 16. Reporters began to gain access to information that police did not have but needed. *Id.*; see also *First Amendment Research Information: Freedom of the Press History*, ILL. FIRST AMENDMENT CTR., http://www.illinoisfirstamendmentcenter.com/freedom_press_history.php (last visited Mar. 20, 2014); Gordon T. Belt, *Jailed & Subpoenaed Journalists—A Historical Timeline*, FIRST AMENDMENT CTR., <http://www.firstamendmentcenter.org/madison/wp-content/uploads/2011/05/Jailed-subpoenaed-timeline1.pdf> (last updated Feb. 2010).

⁴⁵ RonNell Andersen Jones, *Media Subpoenas: Impact, Perception, and Legal Protection in the Changing World of American Journalism*, 84 WASH. L. REV. 317, 319 (2009) (quoting Vince Blasi, *The Newsman’s Privilege: An Empirical Study*, 70 MICH. L. REV. 229, 230 (1971)).

⁴⁶ *Id.* at 319.

⁴⁷ *Branzburg v. Hayes*, 408 U.S. 665, 689–90 (1972).

⁴⁸ Anthony L. Fargo, *Analyzing Federal Shield Law Proposals: What Congress Can Learn from the States*, 11 COMM. L. & POL’Y 35, 37 (2006).

⁴⁹ Jonathan Peters, *WikiLeaks Would Not Qualify to Claim Federal Reporter’s Privilege in Any Form*, 63 FED. COMM. L.J. 667, 674 (2011).

⁵⁰ *Id.*

and concurring opinions gave the federal courts murky guidance on how to proceed in determining whether a qualified privilege exists—and, if so, to whom it applies.⁵¹

In *Branzburg*, reporter Paul Branzburg wrote an article about young people making and using synthetic drugs.⁵² Following publication of the article, state prosecutors wanted to learn the names of his sources.⁵³ Branzburg was subpoenaed by grand juries on two occasions and refused to reveal his sources both times.⁵⁴ He lost both attempts to quash the subpoenas.⁵⁵ Two other cases involving instances in which reporters refused to testify about the identity of their confidential sources were consolidated into *Branzburg*.⁵⁶ All three reporters involved in the cases argued that the First Amendment protected them from compelled disclosure of their sources' identities.⁵⁷ Their legal theory was that if reporters were forced to reveal their sources, then people would be reluctant to speak to reporters and the "free flow of information"⁵⁸ would suffer.⁵⁹

In a five-to-four decision, the Supreme Court expressly rejected the reporters' argument for a qualified privilege to refuse to testify before grand juries when doing so would compromise the identity of their

⁵¹ *See id.*

⁵² *Id.* at 672; 408 U.S. at 667.

⁵³ 408 U.S. at 668.

⁵⁴ *Id.* at 668–70.

⁵⁵ *Branzburg v. Meigs*, 503 S.W.2d 748 (Ky. 1971); *Branzburg v. Pound*, 461 S.W.2d 345 (Ky. 1970).

⁵⁶ These cases were *In re Pappas* and *United States v. Caldwell*. The Pappas case involved a television reporter who visited a Black Panthers headquarters in Massachusetts but did not report on what he heard or saw there. He was subpoenaed to appear before a grand jury and lost his appeal. *In re Pappas*, 266 N.E.2d 297 (Mass. 1971). In *Caldwell v. United States*, *New York Times* reporter Earl Caldwell, who regularly wrote about the Black Panthers, was ordered to testify about what he heard and saw at the Black Panthers' national headquarters in Oakland, California. 434 F.2d 1018 (9th Cir. 1970). He refused and won a ruling in the Ninth Circuit Court of Appeals. *Id.*

⁵⁷ Peters, *supra* note 49, at 673.

⁵⁸ James Madison, who authored the First Amendment, wrote that a functioning government depended on a free flow of information between the government and its people. "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." James Madison to W.T. Barry (Aug. 4, 1822), in *THE FOUNDERS' CONSTITUTION* 690 (1987), available at http://press-pubs.uchicago.edu/founders/print_documents/v1ch18s35.html.

⁵⁹ Peters, *supra* note 49, at 673 (citing KENT R. MIDDLETON ET AL., *THE LAW OF PUBLIC COMMUNICATION* 442 (2000)).

confidential sources.⁶⁰ The Court said a journalist has the same duty as any other citizen to testify when called upon to do so.⁶¹

However, the Court noted that nothing in its holding would prevent Congress or state legislatures from creating statutory protection for journalists—or prevent state courts from interpreting state law as providing a constitutional or common-law privilege.⁶² Foreshadowing the current debate regarding who qualifies as a journalist under the shield law, the Court acknowledged the inherent difficulties in defining who might claim the reporter’s privilege:

The administration of a constitutional newsman’s privilege would present practical and conceptual difficulties of a high order. Sooner or later it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods. . . . ‘The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.’⁶³

Further, the majority noted, “almost any author” could claim to be contributing to the free flow of information. If an author were forced to testify before a grand jury, anonymous sources would be silenced to the detriment of the free flow of information.⁶⁴

2. Justice Powell’s Concurrence

In a concurring opinion, Justice Powell left open the possibility that the First Amendment might protect a reporter under other circumstances.⁶⁵ For example, journalists could still seek protection from the courts if they believed they were being called to testify in

⁶⁰ *Branzburg v. Hayes*, 408 U.S. 665, 690 (1972).

⁶¹ *Id.*

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

Id. at 690–91.

⁶² *Id.* at 706.

⁶³ *Id.* at 703–04 (quoting *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938)).

⁶⁴ *Branzburg*, 408 U.S. at 705.

⁶⁵ *Id.* at 709–10 (Powell, J., concurring).

bad faith or as a form of government harassment.⁶⁶ If the government seeks information that bears only a “remote and tenuous relationship to the subject of the investigation,” or if the journalist believes his testimony would implicate a “confidential source relationship without a legitimate need of law enforcement,” he can move the court to quash the subpoena and enter a protective order.⁶⁷ Where legitimate First Amendment interests are implicated, Justice Powell wrote, the courts would be available to journalists.⁶⁸

Based on Justice Powell’s concurrence, some lower federal courts have interpreted the *Branzburg* majority holding as applying only to grand jury cases, endorsing a qualified privilege in other proceedings, like civil or criminal trials.⁶⁹ Since *Branzburg*, most of the federal appellate courts have—at least tacitly—supported journalists’ right to refuse to testify or provide evidence when the information is not “highly relevant, critical or unavailable elsewhere.”⁷⁰ Many state courts followed suit in finding a qualified privilege,⁷¹ either as a matter of common law, federal constitutional law (relying on Justice Powell’s concurrence), state constitutional law,⁷² or standards of applicable federal circuits.⁷³ The scope of the privilege varies by state, but generally calls for a balancing of the interests, accounting for factors such as: “the type of controversy at issue; whether the information sought is critical for the prosecution or defense of the

⁶⁶ *Id.*

⁶⁷ *Id.* at 710.

⁶⁸ *Id.*

⁶⁹ Fargo, *supra* note 48, at 39.

⁷⁰ *Id.* See also *Ashcraft v. Conoco, Inc.*, 218 F.3d 282 (4th Cir. 2000); *Gonzales v. NBC, Inc.*, 194 F.3d 29 (2d Cir. 1999); *United States v. Lloyd*, 71 F.3d 1256 (7th Cir. 1995); *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980); *Bursey v. United States*, 466 F.2d 1059 (9th Cir. 1972); *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972). But see *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003) (questioning decisions of other circuits that recognize privilege in light of *Branzburg*); *In re Grand Jury Proceedings*, 810 F.2d 580 (6th Cir. 1987) (rejecting the existence of any journalist’s privilege in federal law in the wake of *Branzburg*).

⁷¹ See, e.g., *State v. Sandstrom*, 581 P.2d 812, 814–15 (Kan. 1978) (applying *Branzburg* and opinions from various other state courts); *State ex rel. Classic III Inc. v. Ely*, 954 S.W.2d 650, 653–60 (Mo. Ct. App. 1997) (relying on various state and federal cases, including *Branzburg*); *State v. St. Peter*, 315 A.2d 254, 256 (Vt. 1974) (citing *Branzburg*); *Brown v. Commonwealth*, 204 S.E.2d 429, 431 (Va. 1974) (same).

⁷² See, e.g., *In re Contempt of Wright*, 700 P.2d 40, 45 (Idaho 1985); *Winegard v. Oxberger*, 258 N.W.2d 847, 852 (Iowa 1977); *Opinion of the Justices*, 373 A.2d 644, 647 (N.H. 1977); *Zelenka v. State*, 266 N.W.2d 279, 286–87 (Wis. 1978).

⁷³ Ronnell Andersen Jones, *Avalanche or Undue Alarm? An Empirical Study of Subpoenas Received by the News Media*, 93 MINN. L. REV. 585, 590 (2008).

case; whether the information goes to the heart of the matter; whether the information is relevant and material; and whether the party seeking the information from a member of the media has exhausted nonmedia alternative sources.”⁷⁴

3. *The Branzburg Dissents*

Two justices wrote dissenting opinions that favored some type of special privilege for journalists.⁷⁵ Justice Stewart wrote in support a qualified privilege for journalists in order to protect the flow of information to the public and journalistic autonomy.⁷⁶ A reporter’s right to a confidential relationship with a source “stems from the broad societal interest in a full and free flow of information to the public.”⁷⁷ Moreover, “the right to publish is central to the First Amendment and basic to the existence of constitutional democracy.”⁷⁸ Without the privilege, journalists would be reduced to “an investigative arm of the government,”⁷⁹ Justice Stewart wrote. However, allowing journalists to operate independently creates “a fourth institution outside the Government as an additional check on the three official branches.”⁸⁰ Stewart argued that before a journalist could be forced to comply with a subpoena, the government should be required to meet a three-part balancing test by proving: (1) probable cause that the newsman has information that is clearly relevant to a specific violation of law; (2) that the information sought cannot be obtained by alternative means; and (3) that there is a compelling and overriding interest in revealing the information.⁸¹ This “qualified

⁷⁴ *Id.* at 590-91; see also *In re John Doe Grand Jury Investigation*, 574 N.E.2d 373, 375 (Mass. 1991); *Ely*, 954 S.W.2d at 655; *Hopewell v. Midcontinent Broad. Corp.*, 538 N.W.2d 780, 782 (S.D. 1995); *State ex rel. Green Bay Newspaper Co. v. Circuit Court*, 335 N.W.2d 367, 372-74 (Wis. 1983).

⁷⁵ *Branzburg v. Hayes*, 408 U.S. 665, 725 (1972) (Stewart, J., dissenting); *United States v. Caldwell*, 408 U.S. 665, 711 (1972) (Douglas, J., dissenting) (Douglas’s dissent appears in *Caldwell*, a case consolidated with *Branzburg*).

⁷⁶ *Branzburg*, 408 U.S. at 725 (Stewart, J., dissenting).

⁷⁷ *Id.*

⁷⁸ *Id.* at 727.

⁷⁹ *Id.* at 725 (stating that, without the privilege, journalists would effectively become policemen because their reporting would aid the government in criminal investigations, and therefore they would be unable to serve as an independent check on the government).

⁸⁰ Stephanie B. Turner, *Protecting Citizen Journalists: Why Congress Should Adopt a Broad Federal Shield Law*, 30 YALE L. & POL’Y REV. 503, 507 (2012) (quoting Stewart, *supra* note 37, at 634).

⁸¹ *Branzburg*, 408 U.S. at 743.

privilege” has been instituted by the majority of the circuits and the states.⁸²

In a separate dissent, Justice Douglas argued for an “absolute privilege” that would prohibit the government from *ever* asking a journalist to identify a confidential source.⁸³ He argued that it was necessary for journalists to perform an essential societal function: exposing government incompetence and corruption.⁸⁴ Without protection, Justice Douglas wrote, journalists would “write with more restrained pens,” and “fear of exposure [would] cause dissidents to communicate less openly to trusted reporters.”⁸⁵ In calling for an absolute privilege, Douglas opined, “any test which provides less than blanket protection to beliefs and associations will be twisted and relaxed so as to provide virtually no protection at all.”⁸⁶ Currently, about a dozen states, including New York, Nebraska, and Montana, have shield laws containing an absolute privilege for journalists in civil cases when they have promised confidentiality.⁸⁷

II

PAST ATTEMPTS TO PASS A FEDERAL SHIELD LAW

Proposals to create a federal shield law predate *Branzburg*.⁸⁸ However, the Court’s decision, and its explicit notation that Congress remained free to craft such a privilege, spurred action. Exactly one day after the issuance of the decision, a bill was introduced in the U.S. Senate seeking to create an absolute reporter’s privilege against compulsory testimony in federal and state judicial proceedings.⁸⁹ In the year after *Branzburg*, a total of seventy-one bills were introduced

⁸² John D. Castiglione, *A Structuralist Critique of the Journalist’s Privilege*, 23 J.L. & POL. 115, 145 (2007). The First, Second, Fourth, Fifth, Ninth, Tenth, and Eleventh Circuits all recognize, at least implicitly, a qualified reporter’s privilege. *Id.* at 122. States with a qualified privilege include Arkansas, California, Colorado, Connecticut, Florida, Illinois, Maine, and North Carolina. Bill Kenworthy, *State Shield Statutes & Leading Cases*, FIRST AMENDMENT CTR. (Mar. 8, 2011), <http://www.firstamendmentcenter.org/state-shield-statutes-leading-cases>.

⁸³ *Branzburg*, 408 U.S. at 711–25 (Douglas, J., dissenting).

⁸⁴ *See id.* at 721–22.

⁸⁵ *Id.* at 721.

⁸⁶ *Id.* at 720.

⁸⁷ *See* Kenworthy, *supra* note 82.

⁸⁸ As early as 1929, Kansas Senator Arthur Capper introduced a bill that would have created a “newsman’s privilege.” *See* 71 CONG. REC. 5832 (1929); Sam J. Ervin, Jr., *In Pursuit of a Press Privilege*, 11 HARV. J. ON LEGIS. 233, 241 n.23 (1974).

⁸⁹ Jones, *supra* note 73, at 594.

on the subject.⁹⁰ However, none of these efforts received a floor vote.⁹¹ Moreover, ninety-nine bills proposing a federal shield law were introduced to Congress in the six years after *Branzburg*.⁹² The bills’ failure is partly attributable to legislators’ inability to agree on the definition of “journalist,” and to the media’s insistence on an absolute, rather than a qualified, privilege.⁹³ Though shield bills were introduced periodically during the 1970s and 1980s, the initial post-*Branzburg* urgency diminished as federal circuits began recognizing a qualified privilege stemming from the case.⁹⁴ Additionally, as mentioned above, states began passing their own shield laws.⁹⁵

However, a slate of high-profile journalist arrests and jailings in the early- and mid-2000s renewed the call among supporters for a comprehensive federal shield law.⁹⁶ The most ubiquitous case is that

⁹⁰ *Id.* at 595.

⁹¹ *Id.* at 602.

⁹² Jill Laptosky, *Protecting the Cloak and Dagger with an Illusory Shield: How the Proposed Free Flow of Information Act Falls Short*, 62 FED. COMM. L.J. 403, 421 (2010).

⁹³ *Id.* at 421.

⁹⁴ See *Gonzales v. NBC, Inc.*, 194 F.3d 29 (2d Cir. 1999); *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980); *Ashcraft v. Conoco, Inc.*, 218 F.3d 282 (4th Cir. 2000); *Miller v. Transamerican Press, Inc.* 621 F.2d 721 (5th Cir. 1980); *United States v. Lloyd*, 71 F.3d 1256 (7th Cir. 1995); *Cervantes v. Times, Inc.*, 464 F.2d 986 (8th Cir. 1972); *Burse v. United States*, 466 F.2d 1059 (9th Cir. 1972) (these circuits began recognizing some form of reporter’s privilege after these decisions).

⁹⁵ See, e.g., *State v. Sandstrom*, 581 P.2d 812, 814–15 (Kan. 1978) (applying *Branzburg* and opinions from other state courts to recognize a reporter’s privilege); *State ex rel. Classic III Inc. v. Ely*, 954 S.W.2d 650, 653–60 (Mo. Ct. App. 1997) (relying on various state and federal cases, including *Branzburg*, in recognizing the privilege); *State v. St. Peter*, 315 A.2d 254, 256 (Vt. 1974) (citing *Branzburg*); *Brown v. Commonwealth*, 204 S.E.2d 429, 431 (Va. 1974) (same).

⁹⁶ The Reporters Committee for Freedom of the Press, a nonprofit association that provides legal assistance to journalists, tracks reporter jailings and fines. Since 1984, at least eighteen reporters have been jailed for contempt for failing to turn over sources or other material. See *Paying the Price: A Recent Census of Reporters Jailed or Fined for Refusing to Testify*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, <http://www.rcfp.org/jailed-journalists> (last visited Oct. 28, 2013). Jim Taricani and Josh Wolf offer two other notable cases relevant to this time period. *Id.* In February 2001, Jim Taricani, a television reporter from Providence, RI, obtained and aired video footage showing a Providence city official accepting a bribe from an undercover FBI informant. *Id.* The tape was sealed evidence in an FBI investigation into corruption by Providence officials. *Id.* The government subpoenaed Taricani, who refused to reveal his source, and the court held him in contempt. *Id.* In November of 2004, Taricani was found in criminal contempt of court and a month later, was sentenced to six months’ home confinement. *Id.* In 2006, blogger Josh Wolf spent nearly eight months in jail for refusing to testify about an anarchists’ demonstration that he had videotaped. Howard Kurtz, *Blogger Makes Deal, Is Released from Jail*, WASH. POST (Apr. 4, 2007), <http://www.washingtonpost.com/wp-dyn>

of Judith Miller, a *New York Times* reporter, and the public release of CIA operative Valerie Plame's identity.⁹⁷ Miller was subpoenaed to testify regarding the names of her sources in front of a grand jury as part of the Justice Department's investigation into the leak of Plame's identity.⁹⁸ Miller and *The New York Times* moved to quash the subpoenas, but the district court declined to grant Miller's motions; when she refused to comply with the subpoenas, she was held in civil contempt of court.⁹⁹ On appeal, the D.C. Circuit judges disagreed about whether a federal common law privilege existed, but concluded, "if there is any such privilege, it is not absolute and may be overcome by an appropriate showing."¹⁰⁰ The court found that the Justice Department had made such a showing.¹⁰¹ Miller was jailed from July 6, 2005, to September 29, 2005, at which time she agreed to testify before the grand jury, only after securing a waiver of confidentiality from her source.¹⁰² One reporter wrote that the prosecutor's efforts in this case "produced the most serious confrontation between the government and the press since the Pentagon Papers case in 1971."¹⁰³

/content/article/2007/04/03/AR2007040301898.html. Wolf was released when he turned over a copy of the protest and posted the video on his website. *Id.* This was the longest contempt of court term ever served by a member of the U.S. media. *Id.*

⁹⁷ A brief history of the events leading to Miller's incarceration: Valerie Plame Wilson was married to former U.S. ambassador Joseph Wilson IV. Wilson wrote an op-ed column in *The New York Times* in 2003 about his CIA-sponsored trip to Africa to investigate claims that Saddam Hussein was preparing to build nuclear weapons. Joseph C. Wilson 4th, *What I Didn't Find in Africa*, N.Y. TIMES (July 6, 2003), <http://www.nytimes.com/2003/07/06/opinion/06WILS.html>. Wilson wrote that he found no evidence of Iraqi purchases of uranium; the Bush Administration, however, continued to claim that Hussein was building chemical weapons to gain support in the U.S. for war against Iraq. *Id.* Plame Wilson's identity was exposed when columnist Robert Novak wrote that she recommended her husband for the CIA mission; apparently unaware that she was still considered an undercover operative, Novak used her name in the column and said he got it from two unnamed administration officials. Fargo, *supra* note 48, at 43. Judith Miller, who did not write about the Wilsons or the CIA but conducted interviews about the matter, was subpoenaed by a special prosecutor in an attempt to determine who gave Novak the name. Adam Liptak, *Reporter Jailed After Refusing to Name Source*, N.Y. TIMES (July 7, 2005), http://www.nytimes.com/2005/07/07/politics/07leak.html?pagewanted=all&_r=0.

⁹⁸ Will E. Messer, *Open Season on the Journalist's Privilege: Do Recent Rulings Represent a Trend Against Assertions of the Privilege or Proper Applications of Existing Law*, 94 KY. L.J. 421, 446 (2005-2006).

⁹⁹ *Id.* at 446-47.

¹⁰⁰ *Id.* at 447 (quoting *In re Grand Jury Subpoena*, Judith Miller, 397 F.3d 964 (D.C. Cir. 2005)).

¹⁰¹ *Id.*

¹⁰² David Johnston & Douglas Jehl, *Times Reporter Free From Jail; She Will Testify*, N.Y. TIMES, Sept. 30, 2005, at A1, A18.

¹⁰³ Liptak, *supra* note 97.

In the aftermath of this and other similar events, Congress attempted to pass the Free Flow of Information Act in 2005, 2007, 2009, and 2013. None of those efforts succeeded, and the 2013 bills are currently stalled in committee.¹⁰⁴ The scope of the Act’s protections turns on the definition of “journalist.” To understand the debate over that key term, below is an overview of the three major efforts to pass a federal shield law in the last decade. It focuses on the evolution of the bills’ definitions of “covered persons”—that is, who could claim protections as a journalist.

A. The Free Flow of Information Act of 2005

In the midst of the Miller ordeal, legislators once again attempted to craft a national shield law. Senator Chris Dodd introduced the Free Speech Protection Act of 2005,¹⁰⁵ which called for an absolute privilege to protect “covered persons” against compelled disclosure of sources in all federal proceedings.¹⁰⁶ The bill defined “covered person” as one who “engages in the gathering of news or information; and has the intent, at the beginning of the process of gathering news or information, to disseminate the news or information to the public.”¹⁰⁷ The bill defined “news or information” as “written, oral, pictorial, photographic, or electronically recorded information or communication concerning local, national, or worldwide events, or other matters.”¹⁰⁸

In addition to Senator Dodd’s proposal, Representatives Mike Pence and Rick Boucher and Senator Richard Lugar introduced two companion bills known as the Free Flow of Information Act of 2005 in the House and Senate, respectively.¹⁰⁹ The companion bills also called for an absolute statutory privilege by prohibiting federal

¹⁰⁴ See sources cited *supra* note 22.

¹⁰⁵ Free Speech Protection Act of 2005, S. 369, 109th Cong. (2005).

¹⁰⁶ Louis J. Capocasale, *Using the Shield as a Sword: An Analysis of How the Current Congressional Proposals for a Reporter’s Shield Law Wound the Fifth Amendment*, 20 ST. JOHN’S J. LEGAL COMMENT. 339, 359 (2006).

¹⁰⁷ S. 369 § 2(1)(A)–(B). The “intent to disseminate” language was taken from a 1987 opinion of the U.S. Court of Appeals for the Second Circuit in *Von Bulow v. Von Bulow*, in which the court defined a journalist as a person who had the intent to disseminate information to the public. See *Von Bulow v. Von Bulow*, 811 F.2d 136, 143 (2d Cir. 1987).

¹⁰⁸ S. 369 § 2(2).

¹⁰⁹ See Free Flow of Information Act of 2005, H.R. 3323; 109th Cong. (2005); Free Flow of Information Act of 2005, S. 1419, 109th Cong. (2005).

entities in any federal proceeding from compelling a “covered person” to disclose the identity of a source from whom they obtained information, or any information that could reasonably be expected to lead to the discovery of the source’s identity.¹¹⁰ Covered persons included publishers, broadcasters and wire services and those reporters who work for them, as well as freelance journalists working for publishers or broadcasters.¹¹¹ Freelancers without contracts or individuals who publish solely online were not included.¹¹²

By not providing exceptions to source protection, the bills proved highly controversial because they went further than the Department of Justice’s existing guidelines regarding subpoenaing the media for confidential information.¹¹³ In response to political pressure,¹¹⁴ the two bills were redrafted to include a single exception to the reporter’s privilege: where source identification was necessary to “protect national security.”¹¹⁵ Ultimately, the bills failed to advance out of committee.¹¹⁶

B. The Free Flow of Information Act of 2007

The Free Flow of Information Act of 2007¹¹⁷ was introduced as a set of companion bills by Representative Boucher and Senator Lugar.¹¹⁸ Notably, the definition of “covered person” was changed in the House version to include an element of financial gain.¹¹⁹ Accordingly, a person who is engaged in journalism “for a substantial portion of the person’s livelihood or for substantial financial gain and includes a supervisor, employer, parent, subsidiary, or affiliate of

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *See id.*

¹¹³ Capocasale, *supra* note 106, at 362.

¹¹⁴ Both the Bush Administration and the Justice Department opposed the bill. *Id.* at 362 n.114.

¹¹⁵ *Id.* at 362.

¹¹⁶ S. 1419 (109th): *Free Flow of Information Act of 2005*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/109/s1419> (last visited Mar. 20, 2014); H.R. 3323 (109th): *Free Flow of Information Act of 2005*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/109/hr3323> (last visited Mar. 20, 2014).

¹¹⁷ Free Flow of Information Act of 2007, H.R. 2102, 110th Cong. (2007); S. 2035, 110th Cong. (2007).

¹¹⁸ Laptosky, *supra* note 92, at 424.

¹¹⁹ Caroline Lynch Pieroni, *Staying Out of Jail. . . Sometimes: Maintaining a Free Press Through Journalist Shield Laws Requires Changes Not Only at the Federal Level, but Also Among the States*, 47 U. LOUISVILLE L. REV. 803, 820 (2008-2009).

such covered person” could benefit from protection.¹²⁰ Despite concerns that the definition of journalist was still vague, the House Judiciary Committee approved the bill, which then passed the entire House by a vote of 398-21.¹²¹ This version would have created a qualified privilege that applied to both confidentially obtained information and *any information* gained while practicing journalism.¹²² To compel the disclosure of information that could reveal the identity of a confidential source, the government would have had to prove that the information was necessary either: (1) to prevent a terrorist or other national security threat; (2) to thwart imminent death or significant bodily harm; (3) to ascertain the identity of an individual who disclosed a trade secret, personal health, or financial information; or (4) identify the source of a leak of classified information that could cause harm to national security.¹²³ Finally, the court would use a balancing test to determine “whether compelling the disclosure serves more of a public interest than newsgathering.”¹²⁴

The Senate version contained significant variations from the House bill, including the definition of journalist.¹²⁵ The Senate version only required that the journalistic activity be “regular”; the activity need not constitute a substantial portion of the person’s livelihood or be for substantial financial gain.¹²⁶ The bill never made it to the Senate floor, and the Bush Administration was reported to be “adamantly” opposed to the federal shield act, and even threatened to veto it.¹²⁷

C. The Free Flow of Information Act of 2009

In 2009, the House again passed a version of the Free Flow of Information Act,¹²⁸ this time by a voice vote.¹²⁹ The Senate shield

¹²⁰ Free Flow of Information Act of 2007, H.R. 2102, 110th Cong. § 4(2) (2007).

¹²¹ Laptosky, *supra* note 92, at 424.

¹²² *Id.* at 425.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Further analysis of the differences between the bills is not included in this Comment.

¹²⁶ S. 2035, 110th Cong. (2007); Laptosky, *supra* note 92, at 425.

¹²⁷ Laptosky, *supra* note 92, at 426.

¹²⁸ Free Flow of Information Act of 2009, S. 448, 111th Cong. (2009) and H.R. 985, 111th Cong. (2009).

¹²⁹ *Federal Shield Law Efforts*, *supra* note 20.

bill,¹³⁰ which the Obama administration publicly endorsed¹³¹ and the Judiciary Committee passed, was never brought to the Senate floor due to “debates over health care and other issues.”¹³²

To address disagreements among committee members over who would be covered under the bill, an amendment was added that would have excluded many bloggers and online-only journalists.¹³³ The amendment altered the focus of the definition from the covered person’s engagement in the practice of journalism to the person’s employment status.¹³⁴ The following language was inserted to the description: a person who “obtains the information sought while working as a salaried employee of, or independent contractor for, an entity” that disseminates the information through print, broadcast, cable, or other means.¹³⁵ This addition would have prevented WikiLeaks and other sites that engage in massive online dumping of classified documents from claiming a privilege against identifying the sources of the illegally obtained information.¹³⁶ However, the Act did not pass.¹³⁷

III

THE FREE FLOW OF INFORMATION ACT OF 2013

A. Background

The latest iteration of the federal shield bill arose against a backdrop of growing criticism of the Obama Administration’s aggressive prosecution of government leakers, despite the president’s

¹³⁰ S. 448.

¹³¹ As a Senator, President Obama co-sponsored the 2007 federal shield law proposal. See Laptosky, *supra* note 92, at 426.

¹³² *Federal Shield Law Efforts*, *supra* note 20.

¹³³ Cristina Abello, *Definition of ‘Journalist’ Scaled Back in Federal Shield Bill*, REPORTERS COMM. FOR FREEDOM OF THE PRESS (Sept. 18, 2009), <http://www.rcfp.org/browse-media-law-resources/news/definition-journalist-scaled-back-federal-shield-bill#sthash.vYT8pZ4z.dpuf>.

¹³⁴ *Id.*

¹³⁵ Amend. to Free Flow of Information Act of 2009, S. 448, 111th Cong. (2009), available at http://www.rcfp.org/newsitems/docs/20090918_122243_91709_amendment.pdf.

¹³⁶ See Peters, *supra* note 49, at 693–94.

¹³⁷ S. 448 (111th): *Free Flow of Information Act of 2009*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/111/s448> (last visited Mar. 20, 2014); H.R. 985 (111th) *Free Flow of Information Act of 2009*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/111/hr985> (last visited Mar. 20, 2014).

stated commitment to government transparency.¹³⁸ As in 2009, another national security leak case dominated headlines—Edward Snowden, the former CIA employee and government contractor leaked news of National Security Agency surveillance programs to *The Washington Post* and *The Guardian* newspapers.¹³⁹ But it was the scathing criticism following the Department of Justice’s large-scale secret seizure of thousands of phone and e-mail records of the Associated Press¹⁴⁰ that led to the 2013 federal shield bill.¹⁴¹ On May 10, 2013, the U.S. Department of Justice notified the Associated Press (AP), a news cooperative, that it had seized records of thousands of calls made on twenty separate phone lines used by the organization’s reporters and editors.¹⁴² AP had not been give prior notice of the subpoenas.¹⁴³ AP denounced the effort as a “massive and unprecedented intrusion by the Department of Justice into the [organization’s] news-gathering activities.”¹⁴⁴

About ten days after the May 10, 2013, announcement regarding the AP seizure, it was also revealed that the Justice Department had seized the phone logs and personal e-mails of James Rosen, Fox News’ chief Washington correspondent.¹⁴⁵ The seizure was prompted

¹³⁸ In fact, the Obama Administration prosecuted more leak-related cases in his first term (six total) than the three governments prosecuted under all previous administrations combined. Scott Shane & Charlie Savage, *Administration Took Accidental Path to Setting Record for Leak Cases*, N.Y. TIMES (June 19, 2012), <http://www.nytimes.com/2012/06/20/us/politics/accidental-path-to-record-leak-cases-under-obama.html?pagewanted=all>.

¹³⁹ Mark Mazzetti & Michael S. Schmidt, *Ex-Worker at C.I.A. Says He Leaked Data on Surveillance*, N.Y. TIMES (June 9, 2013), <http://www.nytimes.com/2013/06/10/us/former-cia-worker-says-he-leaked-surveillance-data.html?pagewanted=all>.

¹⁴⁰ Devlin Barrett, *U.S. Seized Phone Records of AP Staff*, WALL ST. J. (May 13, 2013), <http://online.wsj.com/news/articles/SB10001424127887324715704578481461374133612>.

¹⁴¹ Jeff Zalesin, *Holder Expresses Support for Federal Shield Bill Amendments Adding Judicial Role to Notice Process*, REPORTERS COMM. FOR FREEDOM OF THE PRESS (July 30, 2013), <http://www.rcfp.org/browse-media-law-resources/news/holder-expresses-support-federal-shield-bill-amendments-adding-judic>.

¹⁴² Barrett, *supra* note 140.

¹⁴³ *Id.* The move was an attempt to gather information for a leak investigation involving an AP story about a counterterrorism operation in Yemen. *Id.* “The subpoenas covered a two-month period around the time AP wrote the story about an alleged conspiracy to detonate an underwear bomb aboard a U.S.-bound airliner.” *Id.*

¹⁴⁴ *Id.*; see also Charlie Savage & Leslie Kaufman, *Phone Records of Journalists Seized by U.S.*, N.Y. TIMES (May 13, 2013), <http://www.nytimes.com/2013/05/14/us/phone-records-of-journalists-of-the-associated-press-seized-by-us.html>.

¹⁴⁵ David Sherfinski, *Fox Anchor: Justice Department Seized Phone Records for Reporter James Rosen’s Parents*, WASH. TIMES (May 22, 2013), <http://www.washington>

by an investigation into a 2009 story by Rosen about UN sanctions and North Korea; the DOJ suspected a former State Department official had leaked confidential information to Rosen.¹⁴⁶ The Justice Department suggested that it was investigating Rosen as a potential “co-conspirator” for soliciting classified information.¹⁴⁷

There was swift backlash from media organizations after these seizures came to light.¹⁴⁸ Under intense criticism, the Obama Administration renewed the call for a federal media shield law¹⁴⁹—an ongoing effort that last stalled in 2010.¹⁵⁰ The 2013 version of the Free Flow of Information Act was simultaneously introduced in the Senate and the House by Senator Charles Schumer¹⁵¹ and Representative Ted Poe, respectively.¹⁵² Their efforts were an attempt to placate the media after the AP scandal.¹⁵³ As of the writing of this Comment, both versions were stalled in committee.¹⁵⁴ Once again,

times.com/news/2013/may/22/fox-anchor-justice-department-seized-phone-records/#ixzz2sDMo07xD.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* As of this writing, Rosen has not been charged with any crime relating to the investigation. Cf. Ryan J. Reilly, *James Rosen Warrant Doesn’t Suggest Charges Against Fox News Reporter, DOJ Says*, HUFFINGTON POST (May 20, 2013, 10:05 PM), http://www.huffingtonpost.com/2013/05/20/james-rosen-subpoena_n_3309678.html.

¹⁴⁸ See, e.g., Jack Mirkinson, *Fox News Erupts Over James Rosen Scandal, Says His Parents’ Records Were Seized*, HUFFINGTON POST (May 22, 2013, 8:01 AM), http://www.huffingtonpost.com/2013/05/22/fox-news-james-rosen-parents-white-house-doj_n_3318733.html; Nicole Lozare, *Justice Department Defends Decisions in Secret Seizure of AP Phone Records as Criticism Mounts*, REPORTERS COMM. FOR FREEDOM OF THE PRESS (May 14, 2013), <http://rcfp.org/browse-media-law-resources/news/justice-department-defends-decisions-secret-seizure-ap-phone-records>.

¹⁴⁹ Charlie Savage, *Criticized on Seizure of Records, White House Pushes News Media Shield Law*, N.Y. TIMES (May 15, 2013), <http://www.nytimes.com/2013/05/16/us/politics/under-fire-white-house-pushes-to-revive-media-shield-bill.html>.

¹⁵⁰ See sources cited *supra* note 138.

¹⁵¹ Free Flow of Information Act of 2013, S. 987, 113th Cong. (2013).

¹⁵² Free Flow of Information Act of 2013, H.R. 1962, 113th Cong. (2013). On June 14, 2013, it was referred to the Subcommittee on Crime, Terrorism, Homeland Security, and Investigations. *H.R. 1962: Free Flow of Information Act of 2013*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/113/hr1962> (last visited May 25, 2014).

¹⁵³ See Chris Palmer, *The Journalism Shield Law: How We Got Here*, FREEPRESS (Aug. 6, 2013), <http://www.freepress.net/blog/2013/08/06/journalism-shield-law-how-we-got-here>.

¹⁵⁴ S. 987: *Free Flow of Information Act of 2013*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/113/s987> (last visited May 25, 2014); H.R. 1962: *Free Flow of Information Act of 2013*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/113/hr1962> (last visited May 25, 2014).

the bill’s primary sticking point is its definition of “journalist” for purposes of the law’s coverage.¹⁵⁵

B. Who the Act Covers

1. Senate Bill 987

The current Senate version of the Free Flow of Information Act defines a “covered journalist” as:

(aa) [A] person who, is, or on the relevant date, was, an *employee, independent contractor, or agent* of an entity or service that disseminates news or information by means of newspaper; nonfiction book; wire service; news agency; news website, mobile application or other news or information service. . . . (bb) with the primary intent to investigate events and procure material in order to disseminate to the public news or information concerning local, national, or international events or other matters of public interest, engages, or as of the relevant date engaged, in the regular gathering, preparation, collection, photographing, recording, writing, editing, reporting or publishing on such matters (cc) had such intent at the inception of the process of gathering the news or information sought; and (dd) obtained the news or information sought in order to disseminate the news or information to the public¹⁵⁶

To be an “employee,” that person must have been employed with the organization for at least one year within the last twenty years or three months within the last five years.¹⁵⁷ The definition of a covered journalist also includes: supervisors, editors, employers, parent companies, subsidiaries, and affiliates of covered journalists.¹⁵⁸ Student journalists also meet the definition.¹⁵⁹ The definition does not include: any person or entity “whose principle 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,” like WikiLeaks, as well as

¹⁵⁵ Kate Irby, *Senators Spar over Definition of ‘Journalist’ in Seeking to Protect Them*, MCCLATCHY DC (Aug. 1, 2013), http://www.mcclatchydc.com/2013/08/01/198338/senators-spar-over-definition.html#_Uf_QWWRARvY.

¹⁵⁶ S. 987 § 11 (emphasis added).

¹⁵⁷ *Senate Panel Approves Measure to Narrow Definition of a Journalist*, N.Y. DAILY NEWS (Sept. 13, 2013, 9:11 AM), <http://www.nydailynews.com/news/politics/senate-panel-approves-measure-narrow-definition-journalist-article-1.1454765> [hereinafter *Senate Panel Approves Measure*].

¹⁵⁸ S. 987 § 11(2).

¹⁵⁹ *Id.* § 11(1)(A)(II)(cc)(CC).

foreign powers or their agents, members of terrorist organizations or anyone involved in terrorist activity.¹⁶⁰ The bill also provides a federal judge with discretion to declare someone a “covered journalist” under the Act, even if she does not meet the above definition, if the judge determines that “such protections would be in the interest of justice and necessary to protect lawful and legitimate newsgathering activities under the specific circumstances of the case.”¹⁶¹

The above language is the result of a compromise reached after debate on the bill ground to a halt in the Senate Judiciary Committee when lawmakers could not agree on an appropriate definition.¹⁶² The original bill would have applied to a “covered person” who investigates events and obtains material to disseminate news and information to the public.¹⁶³ But some senators, like Dianne Feinstein and Dick Durbin, stated that definition left too much wiggle room for organizations like WikiLeaks to claim protections.¹⁶⁴ As a result, lawmakers wrote a narrower definition.¹⁶⁵ While the narrower definition includes journalists who practice traditional and online media, it draws the line at bloggers, social media posters (like on Twitter or Facebook), and other “non journalists.”¹⁶⁶ Though the senators on the committee did not decide definitively how expansive the definition should be, they did agree on one thing: the bill would not cover leakers of classified information (*i.e.*, WikiLeaks and Edward Snowden).¹⁶⁷ “The world has changed,” Senator Schumer said in an interview following the debate.¹⁶⁸ “We’re very careful in this bill to distinguish journalists from those who shouldn’t be protected, WikiLeaks and all those, and we’ve ensured that.”¹⁶⁹ As in previous versions, the bill contains a broad national security exception, which renders the Act’s protections moot if the government can show by a preponderance of the evidence that the

¹⁶⁰ See *id.* § 11(1)(A)(iii)(I).

¹⁶¹ *Id.* § 11(1)(B).

¹⁶² *Senate Panel Approves Measure*, *supra* note 157.

¹⁶³ *Id.*

¹⁶⁴ *Id.*; Irby, *supra* note 155.

¹⁶⁵ *Senate Panel Approves Measure*, *supra* note 157.

¹⁶⁶ *Id.*; Irby, *supra* note 155.

¹⁶⁷ *Id.*

¹⁶⁸ Irby, *supra* note 155.

¹⁶⁹ *Id.*

journalist’s information is necessary to assist the government in preventing a terrorist act or other threats to national security.¹⁷⁰

2. House Bill 1962

The House version also contains language that restricts the definition of a journalist to someone who is compensated for her work. It defines a “covered person” as one who “for financial gain or livelihood, is engaged in journalism.”¹⁷¹ It includes “a supervisor, employer, parent, subsidiary, or affiliate of such covered person.”¹⁷² Like the Senate version, it does not apply to foreign powers, their agents, or terrorist organizations.¹⁷³ The House bill defines “journalism” 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.”¹⁷⁴

C. The Media’s Reaction to the Bill

Media reactions to the proposed law were predictably mixed.¹⁷⁵ Professional industry groups tepidly praised the effort as imperfect but better than having no shield law at all.¹⁷⁶ *The Washington Post* declared on its editorial pages that it was “long past time for Congress” to pass a law protecting journalists from being forced to disclose information about their confidential sources and methods of reporting to the government.¹⁷⁷ While acknowledging criticism that the bill defined who qualifies as a journalist too narrowly, the *Post* lauded the provision that would empower judges to extend its protections on an individual basis upon finding it “in the interest of justice and necessary to protect lawful and legitimate news-gathering

¹⁷⁰ Free Flow of Information Act of 2013, S. 987 § 5(a), 113th Cong. (2013).

¹⁷¹ Free Flow of Information Act of 2013, H.R. 1962 § 4(2), 113th Cong. (2013).

¹⁷² *Id.*

¹⁷³ *Id.* § 4(2)(B).

¹⁷⁴ *Id.* § 4(5).

¹⁷⁵ See *infra* notes 177–78.

¹⁷⁶ See *Shield Law 101: Frequently Asked Questions*, SOC’Y OF PROF’L JOURNALISTS, <https://www.spj.org/shieldlaw-faq.asp> (last visited Mar. 20, 2014).

¹⁷⁷ Editorial Board, *A Shield Law Is Necessary to Protect U.S. Journalists*, WASH. POST (Sept. 22, 2013), http://www.washingtonpost.com/opinions/a-shield-law-is-necessary-to-protect-us-journalists/2013/09/22/a3449104-20af-11e3-966c-9c4293c47ebe_story.html.

activities.”¹⁷⁸ Bill Keller, opinion columnist and former editor-in-chief of *The New York Times*, wrote that though the Senate version of the shield law is full of “intolerably large loophole[s]” like the national security exception, he would settle for an imperfect law that would “at least require[] government secrecy to be weighed against our need to know what the government is up to.”¹⁷⁹ Others were more circumspect, expressing skepticism that lawmakers’ wrangling over who would be covered still did not go far enough in contemplating the ever-evolving media landscape.¹⁸⁰

IV

CRITIQUE OF THE PROPOSED SHIELD LAW’S DEFINITION OF JOURNALIST

A. The Requirement that a Journalist Be Employed Is Overly Restrictive and Excludes Nontraditional Media

It is a safe assumption that James Madison, the First Amendment’s author, could not possibly have envisioned the ways in which the media industry would evolve since the writing of the Freedom of the Press Clause—nor, for that matter, the speed in which these changes have occurred. The traditional bastions of media—daily newspapers, television, and radio news stations—are rapidly being replaced by media sources that reflect the tastes and preferences of the new media consumer: a young, tech-savvy professional who seeks out news catered to her interests.¹⁸¹ Although the mode of delivery has changed, the value in conveying information still reflects Madison’s ideal: the free flow of information between the government and its citizens is the bedrock of a democratic society.

¹⁷⁸ *Id.*

¹⁷⁹ Bill Keller, *Secrets and Leaks*, N.Y. TIMES (June 2, 2013), <http://www.nytimes.com/2013/06/03/opinion/keller-secrets-and-leaks.html>.

¹⁸⁰ See, e.g., Eric Newton, *Paying Attention to the Shield Law’s Critics*, COLUM. JOURNALISM REV. (Sept. 24, 2013, 6:50 AM), http://cjr.org/behind_the_news/paying_more_attention_to_the_s.php (“The very idea of Congress and judges defining the word ‘journalist’ is controversial.”); Times Editorial Board, *Journalists Need This Federal ‘Shield,’* L.A. TIMES (Sept. 23, 2013), <http://www.latimes.com/opinion/editorials/la-ed-shield-law-journalists-confidential-sources-20130923,0,122534.story#axzz2sfvSeiFI> (“Some critics claim that the Senate bill protects only the mainstream media.”); Sterne, *supra* note 24.

¹⁸¹ See, e.g., Andrew Beaujon, *Pew: Half of Americans Get News Digitally, Topping Newspapers, Radio*, POYNTER (Sept. 27, 2012, 3:39 PM), <http://www.poynter.org/latest-news/mediawire/189819/pew-tv-viewing-habit-grays-as-digital-news-consumption-tops-print-radio/>.

In fact, the rise of social media has substantially *enhanced* the flow of information. The dramatic street protests in the aftermath of the June 2009 Iranian elections illustrate how powerful media platforms like YouTube, Facebook, and Twitter are changing the way news is produced, distributed, and consumed.¹⁸² Some of the earliest news to emerge from the popular uprisings in Tunisia, Egypt, and Syria during the last several years has come from demonstrators themselves, in the form of photos and videos uploaded to Facebook, or tweets providing details of uprisings to the rest of the world.¹⁸³ In the United States, reports of the death of terrorist Osama bin Laden and entertainer Whitney Houston first surfaced on Twitter, hours before confirmation from traditional media outlets.¹⁸⁴

By inserting an employment component to the definition of journalist, the shield bill’s authors have excluded a growing segment of the new media—bloggers, micro-bloggers like tweeters, freelancers, and other types of citizen journalists¹⁸⁵—who may contribute to the community service function of journalism without having established economic ties to any official organization. Citizen journalists played prominent roles in the Occupy Wall Street protests, using cell phones to record and stream video and social media to cover the protests in addition to, and sometimes in place of,

¹⁸² Nic Newman, *The Rise of Social Media and Its Impact on Mainstream Journalism* (Reuters Inst. for the Study of Journalism, Working Paper, Sept. 2009) (on file with author).

¹⁸³ See generally Carol Huang, *Facebook and Twitter Key to Arab Spring Uprisings: Report*, NATIONAL (June 6, 2011), <http://www.thenational.ae/news/uae-news/facebook-and-twitter-key-to-arab-spring-uprisings-report>; Catherine O’Donnell, *New Study Quantifies Use of Social Media in Arab Spring*, UNIV. OF WASH. (Sept. 12, 2011), <http://www.washington.edu/news/2011/09/12/new-study-quantifies-use-of-social-media-in-arab-spring/>; Kate Taylor, *Arab Spring Really Was Social Media Revolution*, TG DAILY (Sept. 13, 2011), <http://www.tgdaily.com/software-features/58426-arab-spring-really-was-social-media-revolution>.

¹⁸⁴ Mathew Ingram, *If You Think Twitter Doesn’t Break News, You’re Living in a Dream World*, GIGAOM (Feb. 29, 2012, 9:16 AM), <https://gigaom.com/2012/02/29/if-you-think-twitter-doesnt-break-news-youre-living-in-a-dream-world/>.

¹⁸⁵ Citizen journalism is journalism produced by citizens who are not professional journalists by trade. The concept is based upon public citizens “playing an active role in the process of collecting, reporting, analyzing and disseminating news and information.” SHAYNE BOWMAN & CHRIS WILLIS, MEDIA CTR. AT THE AM. PRESS INST. WE MEDIA: HOW AUDIENCES ARE SHAPING THE FUTURE OF NEWS AND INFORMATION 9 (2003), available at http://www.hypergene.net/wemedia/download/we_media.pdf.

professional media outlets.¹⁸⁶ This is what some call “news as a process”—the idea that news is no longer reported, packaged, and distributed like something from a factory assembly line (as in the traditional media model), but rather that it is shaped and formed by different “key actors,” including activists, mainstream media outlets, individual journalists, bloggers, etc.¹⁸⁷ However, by focusing on employment, the bill’s definition “delivers a fatal blow to the people engaging in many new forms of journalism.”¹⁸⁸ Indeed, “[t]o the extent the definition is used to decide who may claim the legal privileges of journalists, [the bill] puts a large number of actors in the journalism ecosystem in the position of fulfilling community needs for news, however well the actors do so, without the assurances that keep traditional journalists safe when their work provokes a backlash.”¹⁸⁹

Members of the Senate Judiciary Committee were explicit in their effort to limit protections to journalists with professional qualifications and affiliations with recognized media organizations. “I think journalism has a certain tradecraft,” Senator Feinstein said in a hearing on the bill.¹⁹⁰ “It’s a profession. I recognize that everyone can think they’re a journalist.”¹⁹¹ But they aren’t, at least as far as Feinstein is concerned. The compromise amendment does not include citizen journalists, Twitter users, or other social media postings from non-journalists.¹⁹²

Arguably, non-traditional media participants need protection the most. Of the journalists who went to jail rather than testify about their sources, it was a blogger who spent the longest time behind bars.¹⁹³

¹⁸⁶ See, e.g., Colin Moynihan, *Occupying, and Now Publishing, Too*, N.Y. TIMES (Oct. 1, 2011), http://cityroom.blogs.nytimes.com/2011/10/01/occupying-and-now-publishing-too/?_php=true&_type=blogs&ref=media&_r=0.

¹⁸⁷ Mathew Ingram, *News As a Process: How Journalism Works in the Age of Twitter*, GIGAOM (Dec. 21, 2011, 9:37 AM), <https://gigaom.com/2011/12/21/news-as-a-process-how-journalism-works-in-the-age-of-twitter/>.

¹⁸⁸ Andrew Beaujon, *Study Attempts to Define Journalists—Should We Define Acts of Journalism Instead?*, POYNTER (Oct. 29, 2013, 10:13 AM), <http://www.poynter.org/latest-news/mediawire/227485/study-attempts-to-define-journalists-should-we-define-acts-of-journalism-instead/> (quoting language from a study by media lawyer and University of Dayton Assistant Professor Jonathan Peters and Edson C. Tandoc Jr., of the Missouri School of Journalism).

¹⁸⁹ *Id.*

¹⁹⁰ *Senate Panel Approves Measure*, *supra* note 157.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ Kurtz, *supra* note 96.

In 2006, blogger Josh Wolf spent nearly eight months in jail for refusing to testify about a protest he shot on video.¹⁹⁴ This was the longest contempt of court term ever served by a member of the American media.¹⁹⁵ Houston freelance writer Vanessa Leggett spent 168 days in jail for refusing to answer questions in a criminal investigation regarding her reporting for a true-crime book.¹⁹⁶

Freelance journalists may also be out of luck for coverage. Freelancers are not employed by any one media organization; they work independently and sell individual pieces for publication.¹⁹⁷ Bill sponsors said in hearings that the law would apply to freelance journalists who produced a “considerable amount” of freelance work in the last five years.¹⁹⁸ But the bill does not define, nor provide examples of, “considerable amount.”¹⁹⁹

And what about those individuals who have always worked without a formalized work arrangement with a media organization? With massive industry-wide layoffs and the shuttering of numerous daily newspapers,²⁰⁰ full-time work in traditional journalism has become difficult to find. As a result, many journalists strike out on their own immediately after graduating from journalism school.²⁰¹

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Reporter’s Privilege Compendium*, *supra* note 18. In contrast, professional journalists have rarely been jailed for long, with the exception of Judith Miller. According to the Reporters Committee for Freedom of the Press, of the seventeen journalists jailed between 1984 and 1998, none were jailed for more than a month. *Id.* Nine were jailed for less than a day. *Id.*

¹⁹⁷ See *Freelancer*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Freelancer> (last visited Mar. 20, 2014).

¹⁹⁸ *Senate Panel Approves Measure*, *supra* note 157.

¹⁹⁹ Free Flow of Information Act of 2013, S. 987, 113th Cong. (2013); see also *Senate Panel Approves Measure*, *supra* note 157.

²⁰⁰ The following newspapers have folded since 2007: *The Tucson Citizen*, *The Rocky Mountain News*, *The Baltimore Examiner*, *The Kentucky Post*, *The Cincinnati Post*, *The King County Journal*, *The Union City Register-Tribune*, *The Halifax Daily News*, *The Albuquerque Tribune*, *The South Idaho Press*, *The San Juan Star*, and *The Honolulu Advertiser*. NEWSPAPER DEATH WATCH, <http://newspaperdeathwatch.com> (last visited Aug. 21, 2014). Newsroom employment has declined steadily since 2008. See 2013 Census, AM. SOC’Y OF NEWS EDITORS (June 25, 2013, 8:42 PM), <http://asne.org/content.asp?pl=121&sl=284&contentid=284>.

²⁰¹ I received a B.A. in journalism and have personal knowledge of fellow classmates who started their careers as self-employed freelance journalists. I also worked as a freelance magazine reporter and editor after working full-time as a daily newspaper reporter.

The bill does include “independent contractor”²⁰² in its definition, which could enfold some of these freelancers. However, the key language is that the covered person is “on the relevant date”²⁰³ engaged in an employment relationship as an employee, independent contractor, or agent, indicating that protection requires that a contractual relationship exist at the time the freelancer obtains the confidential information. This does not adequately reflect the reality of the freelance sector. While some projects are contracted in advance, many are first reported and then pitched to publishers.²⁰⁴ If a freelancer were to receive a tip from an anonymous source, investigate and report the story, then contract with an entity media outlet to publish it, it is unclear whether the protection would apply.

Congress is right to draw a line somewhere. After all, the shield law would lose all meaning if it allowed every tweeter and blogger to claim protection as a journalist. Some of these actors are adding no new or original information; they perform no newsgathering or synthesis function, they are only disseminating information gathered and synthesized by others. As Senator Feinstein noted, journalism is a professional trade. But it is so difficult to produce a clear definition of a journalist in part because professional journalism itself is somewhat nebulous. The profession is informed by ideals and standards, rather than formal rules and guidelines. For example, after years spent talking to journalists around the country about what defines their work, the Pew Research Center’s Journalism Project came up with the following nine core principles of journalism:

1. Journalism’s first obligation is to the truth.
2. Its first loyalty is to citizens.
3. Its essence is a discipline of verification.
4. Its practitioners must maintain an independence from those they cover.
5. It must serve as an independent monitor of power.
6. It must provide a forum for public criticism and compromise.
7. It must strive to make the significant interesting and relevant.
8. It must keep the news comprehensive and proportional.

²⁰² S. 987 § 11(1)(a)(i)(I)(aa).

²⁰³ *Id.*

²⁰⁴ See generally, Lewis Theobald, *Pitching and Working Upfront in a Freelance Marketplace—Help or Hindrance?*, ALJT MEDIA (Feb. 20, 2014), <http://www.aljtmedia.com/blog/pitching-and-working-upfront-in-freelance-marketplaces-help-or-hindrance/>.

9. Its practitioners must be allowed to exercise their personal conscience.²⁰⁵

Like in the practice of law, there is a professional membership organization (the Society of Professional Journalists) and a code of ethics for journalists.²⁰⁶ The code has four main tenets: (1) Seek truth and report it, (2) minimize harm, (3) act independently, and (4) be accountable.²⁰⁷ Unlike the law, membership in the organization and adherence to its code of ethics is not mandatory for someone to engage in the practice of journalism. There is no accrediting organization, nor an exam to pass before entering the profession. Senator Feinstein and others seem to be searching for a line in the sand between “real” journalists and those who flirt with the profession, and they have settled upon the distinction of formal employment as that line. However, a better way to distinguish is by extending protections only to those who practice acts of journalism. This would emphasize the nature of the work being protected, which can be measured against the tenets of journalistic product, rather than the individual’s employment status or job title.

The definition of journalist should be broad enough to encompass all those who commit acts of journalism. Protecting the free flow of information is not achieved by protecting the mainstream media actors, as the 2013 bill’s definition does; rather, it is achieved by protecting the process of information gathering and dissemination.

B. The Definition of Journalist Should Be Defined so as to Apply to Acts of Journalism

Congress’s narrow definition of journalist is ultimately shortsighted in its failure to recognize that *acts* of journalism should be covered by the shield law, not just the people employed to commit them. In the summer of 2013, the Society for Professional Journalists debated a proposal to change its name to the Society for Professional

²⁰⁵ *Principles of Journalism*, PEW RES. CTR. JOURNALISM PROJECT, <http://www.journalism.org/resources/principles-of-journalism/> (last visited May 25, 2014).

²⁰⁶ *SPJ Code of Ethics*, SOC’Y OF PROF’L JOURNALISTS, <http://www.spj.org/ethicscode.asp> (last visited Aug. 1, 2014).

²⁰⁷ *Id.*

Journalism.²⁰⁸ While that resolution did not pass, a separate resolution to “reject[] any attempts to define a journalist in any way other than someone who commits acts of journalism” did pass.²⁰⁹ That move is part of a growing consensus among media industry members to move beyond the near-impossible task of defining who is a journalist and instead working to protect all acts of journalism.²¹⁰ Josh Stearns, of PBS’s MediaShift, maintains that we cannot simply look to the past to define journalism, as it is largely no longer relevant to the way Americans receive their news.²¹¹ “[E]veryday Americans are central to the future of journalism as news consumers, distributors and increasingly as creators,” according to Stearns.²¹² “As such, we need a framework for press freedom that protects longstanding journalism institutions alongside these new participants.”²¹³

Some state statutes define the reporter’s privilege as applying to acts of journalism without requiring any employment relationship to exist. In Nebraska, “[n]o person engaged in procuring, gathering, writing, editing, or disseminating news or other information to the public” shall be required to disclose a confidential source or information provided by that source in any federal or state proceeding.²¹⁴ In Arizona, “a person engaged in newspaper, radio, television or reportorial work, or connected with or employed by a newspaper, radio or television station” may claim the privilege to avoid testifying about confidential sources.²¹⁵

²⁰⁸ Josh Stearns, *Let’s Stop Defining Who Is a Journalist and Protect All Acts of Journalism*, PBS (Oct. 28, 2013), <http://www.pbs.org/mediashift/2013/10/lets-stop-defining-who-i-a-journalist-and-protect-all-acts-of-journalism/>.

²⁰⁹ *Id.*

²¹⁰ See, e.g., Tricia Todd & Eric Matthies, *Committing Acts of Journalism*, HUFFINGTON POST (Aug. 2, 2013, 8:03 PM), http://www.huffingtonpost.com/tricia-todd/shield-laws_b_3698374.html; *Journalists Need a Federal Shield Law*, L.A. TIMES (Apr. 16, 2009), <http://articles.latimes.com/2009/apr/16/opinion/ed-shield16>. In describing the 2009 proposed bill, *The L.A. Times* wrote,

[t]he House bill limits protection to those for whom journalism represents ‘a substantial portion of the person’s livelihood’ or produces ‘substantial financial gain.’ In the age of the Internet, this is too cramped a definition of the news media and would exclude bloggers, freelancers and many student journalists. The final version of this legislation should make clear that it’s protecting an activity—public-spirited journalism—not just a profession.

Id.

²¹¹ Stearns, *supra* note 208.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ NEB. REV. STAT. § 20-146 (2002).

²¹⁵ ARIZ. REV. STAT. ANN. § 12-2237 (2006) (West).

Identifying new media as worthy of shield protection embodies the principle articulated by Justice Stewart in *Branzburg* that the “right to publish is central to the First Amendment and basic to the existence of constitutional democracy.”²¹⁶ Shield laws should be designed to protect the process through which information is gathered and provided to the public, not the status of the individual or institution collecting it.²¹⁷

C. Proposed Statutory Language

This Comment proposes a broad, five-part definition of journalist for the purposes of the federal shield law to include nontraditional media participants that the law’s current definition would otherwise exclude. The Comment assumes a working definition of journalism as “the gathering, processing, and disseminating of news and information on matters of public concern.”²¹⁸ This proposed “journalist” definition emphasizes the commission of acts of journalism as critical to the definition of a journalist, as opposed to the current bill’s focus on employment status.

Under this proposal, a “covered journalist” would be one who: (1) regularly engages in (2) gathering, (3) processing, and (4) disseminating news and information (5) to serve the public interest.

1. Regularly Engages

Without requiring a financial or employment element, the definition is limited to someone who makes it a general practice to engage in journalistic activities. This could include bloggers, tweeters, citizen journalists, and freelance writers. This inquiry would be individualized and on a case-by-case basis. It would not include one-time or occasional social media posters.

²¹⁶ *Branzburg v. Hayes*, 408 U.S. 665, 727 (1972) (emphasis added).

²¹⁷ Linda L. Berger, *Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist’s Privilege in an Infinite Universe of Publication*, 39 HOUS. L. REV. 1371, 1375 (2003).

²¹⁸ See Free Flow of Information Act of 2013, H.R. 1962, 113th Cong. (2013); Beaujon, *supra* note 189; Stearns, *supra* note 208.

2. *Gathering*

This is the news gathering element; the current bill provides a good list of the types of activities that can count as newsgathering (including writing, photographing, recording, etc.).²¹⁹

3. *Processing*

Synthesis of the gathered material is necessary to distinguish it as journalistic work, as opposed to publishing a document wholesale without adding any independent analysis (as WikiLeaks currently does), or retweeting a Twitter post.

4. *Disseminating*

The information must be published in some accessible form to qualify for protection. Online publication would be a valid forum for publication, including blogs, Twitter, and other types of websites. The author must be identified to maintain accountability in accordance with the journalism code of ethics and principles. Anonymous commenters or bloggers would not qualify for protection.

5. *To Serve the Public Interest*

As discussed throughout this Comment, the First Amendment is founded upon the principle of promoting the free flow of information to the public. This distinguishes, for example, journalism from advertising, the main purpose of which is to sell a product or service. Disseminated material must adhere to the tenets and principles of journalism to receive protection; this too would likely be an individualized inquiry undertaken by a court.

This more inclusive definition retains the spirit of the current shield law while also embracing the evolving media landscape. To claim shield law protection, a journalist would be someone who regularly engages in gathering, processing, and disseminating news and information to serve the public interest.

CONCLUSION

Despite the imperfect nature of the proposed shield law, it remains a positive step toward the ultimate goal of codifying the reporter's privilege and encouraging a robust media to perform its essential function as the fourth estate without fear of prosecution for keeping

²¹⁹ See H.R. 1962; Free Flow of Information Act of 2013, S. 987, 113th Cong. (2013).

confidential sources. This Comment acknowledges that providing an overbroad protection to anyone claiming to be a journalist would render the law toothless. However, limiting protections to only those who enjoy an employment status as a journalist unnecessarily—and unwisely—excludes from protection those who contribute to the free flow of information without prearranged work arrangements or expectations of compensation. A broader, more inclusive definition of journalist, free of any reference to financial or employment status, would embody the principles inherent in the act of journalism and better serve society.

