

# **THE FREE PRESS AND NATIONAL SECURITY: RENEWING THE CASE FOR A FEDERAL SHIELD LAW**

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## **ABSTRACT**

Freedom of the press is a cherished freedom enshrined in the First Amendment and upheld in myriad contexts. However, under the prevailing case law and without a federal shield law, the executive branch may be able to “annex the journalistic profession as an investigative arm of government” to reveal its ‘confidential’ sources as aid to prosecution. This would serve to chill the freedom of the press and conflicts with the spirit of the First Amendment. In many cases, courts have failed to extend the common law to such protection. The legislative branch should step in to make such protection clear. For example, in the field of national security, where the stakes are so high, the Government utilizes federal laws, such as the Espionage Act, to prosecute so state shield laws provide inconsistent and insufficient protection against federal prosecution. The case for a federal shield law is heightened in the matters of national security, which is different and where, arguably, the stakes are higher. Based upon the aforementioned discussion, this Article reinvestigates the argument in favor of a federal reporter’s shield law, specifically implemented as an evidentiary privilege under the Federal Rules of Evidence.

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By sunset on August 13, 2017, after a day of tensions and sometimes-violent protests, three people died in Charlottesville, Virginia.<sup>2</sup> The event surrounded the highly charged decision by the City of Charlottesville to remove the name and statue of Confederate General Robert E. Lee from a local park.<sup>3</sup> The ensuing legal drama of permits and city politics quickly took a back seat to the human drama of protests, counter-protests, and eventually the alleged murder of a woman in attendance that day.<sup>4</sup> In the immediate aftermath, many compelling legal and societal issues surfaced (or resurfaced), such as whether to identify the events as fueled by bigotry and hate and whether to label the alleged murder as an act of domestic terrorism.<sup>5</sup> The magnitude of attention these events received clearly underscores the importance in our national psyche of the First Amendment and its protections on freedoms of expression, association, and the press.<sup>6</sup>

### I. INTRODUCTION

*Freedom of the press can be obliterated overnight by some dictator's imposition of censorship or by the slow*

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<sup>2</sup> Jason Hanna et al., *Virginia Governor to White Nationalists: 'Go home . . . Shame on You,'* CNN, (Aug. 13, 2017, 1:34 AM), <http://www.cnn.com/2017/08/12/us/charlottesville-white-nationalists-rally/index.html>; see also Josh Blackman, *The First Amendment on the Grounds in Charlottesville*, LAWFARE: FIRST AMEND. (Aug. 14, 2017, 2:00 PM), <https://lawfareblog.com/first-amendment-grounds-charlottesville>.

<sup>3</sup> Blackman, *supra* note 2; Jacey Fortin, *The Statute at the Center of Charlottesville's Storm*, N.Y. TIMES (Aug. 13, 2017), <https://www.nytimes.com/2017/08/13/us/charlottesville-rally-protest-statue.html>.

<sup>4</sup> James Wilson, *Charlottesville: Man Charged With Murder Was Pictured at Neo-Nazi Rally*, THE GUARDIAN (Aug. 13, 2017, 12:36 PM), <https://www.theguardian.com/us-news/2017/aug/13/charlottesville-james-fields-charged-with-was-pictured-at-neo-nazi-rally-vanguard-america>.

<sup>5</sup> Peter Bergen, *Charlottesville Killing Was an Act of Domestic Terrorism*, CNN (Aug. 13, 2017, 12:30 PM), <http://www.cnn.com/2017/08/13/opinions/charlottesville-act-of-domestic-terrorism-bergen/index.html>; Mark Berman, *Was the Charlottesville Car Attack Domestic Terrorism, a Hate Crime or Both?*, WASH. POST (Aug. 14., 2017), <https://www.washingtonpost.com/news/post-nation/wp/2017/08/14/was-the-charlottesville-car-attack-domestic-terrorism-a-hate-crime-or-both/>; Charlie Savage & Rebecca R. Ruiz, *Sessions Emerges as Forceful Figure in Condemning Charlottesville Violence*, N.Y. TIMES (Aug. 14, 2017), <https://www.nytimes.com/2017/08/14/us/politics/domestic-terrorism-sessions.html>.

<sup>6</sup> U.S. CONST. amend. I.

*nibbling away at a free press through successive bits of repressive legislation enacted by a nation's lawmakers.*<sup>7</sup>

Freedom of the press is a cherished freedom enshrined in the First Amendment and upheld in myriad contexts.<sup>8</sup> However, under the prevailing case law and without a federal shield law, the executive branch may be able to “annex the journalistic profession as an investigative arm of government” to reveal its “confidential” sources as aid to prosecution.<sup>9</sup> This would serve to chill the freedom of the press and conflicts with the spirit of the First Amendment.<sup>10</sup> In many cases, courts have failed to

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<sup>7</sup> United States v. Progressive, Inc., 467 F. Supp. 990, 995 (W.D. Wis. 1979).

<sup>8</sup> U.S. CONST., amend. I; see also *Palko v. United States*, 302 U.S. 319, 326–27 (1937), *overruled on other grounds by McDonald v. City of Chicago*, 561 U.S. 742 (2010) (“This is true, for illustration, of freedom of thought and speech. Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom.”); Peter B. Edelman, *Free Press v. Privacy: Haunted by the Ghost of Justice Black*, 68 TEX. L. REV. 1195, 1217 (1990) (“If judges have . . . by their own fiat today created a right of privacy equal to or superior to the right of a free press that the Constitution created, then tomorrow . . . judges can create more rights that balance away other cherished Bill of Rights freedoms.” (quoting *Time, Inc. v. Hill*, 385 U.S. 374, 400 (1967) (Black, J., concurring))); Cynthia D. Love, Sean T. Lawson, & Avery E. Holton, *News from Above: First Amendment Implications of the Federal Aviation Administration Ban on Commercial Drones*, 21 B.U. J. SCI. & TECH. L. 22, 68 (2015) (stating that “our most cherished constitutional rights [are] of free speech and a free press.”); Kim Ruckdaschel-Haley, Note, *The Florida Star v. B.J.F.: Balancing Freedom of the Press and the Right to Privacy upon Publication of a Rape Victim’s Identity*, 35 S.D. L. REV. 94, 94 (1990) (“Freedom of press and the right to privacy are cherished values in American society.”).

<sup>9</sup> *Branzburg v. Hayes*, 408 U.S. 665, 725 (1972) (Stewart, J., dissenting); see also *id.* at 667, 709 (holding that newsmen can be required to testify in state or federal courts in order to reveal confidential sources); see generally *United States v. Sterling*, 724 F.3d 482, 517 (4th Cir. 2013) (reversing an Eastern District of Virginia ruling supporting First Amendment and/or common law reporter’s privilege); Jane E. Kirtley, *Reporter’s Privilege in the 21st Century: Despite the Ongoing Controversy Concerning Adoption of a Federal Reporter’s Privilege Statute, the Idea is Neither New, Nor Novel*, 25 DEL. LAW. 12, 13 (2008) (discussing ways in which the government has attempted to “annex” journalists); Kathryn A. Rosenbaum, Note, *Protecting More than the Front Page: Codifying a Reporter’s Privilege for Digital and Citizen Journalists*, 89 NOTRE DAME L. REV. 1427 (2014) (discussing the government’s targeting of journalists in prosecutions and arguing for a federal shield law); Leslie Siegel, Note, *Trampling On The Fourth Estate: The Need For A Federal Reporter Shield Law Providing Absolute Protection Against Compelled Disclosure Of News Sources And Information*, 67 OHIO ST. L.J. 469 (2006) (arguing for a federal shield law while discussing *Branzburg* and subsequent cases).

<sup>10</sup> U.S. CONST., amend. I; see also Mary-Rose Papandrea, *Citizen Journalism and the Reporter’s Privilege*, 91 MINN. L. REV. 515, 561 (2007) (noting “just as the lack of a privilege would chill communications between psychologists and their patients and prevent the information litigants seek from ever coming into evidence, the lack of a journalist privilege will chill communications from sources”); Robert T. Sherwin, Comment, *“Source” of Protection: The Status of the Reporter’s Privilege in Texas and a Call to Arms for the State’s Legislators and Journalists*, 32 TEX. TECH. L. REV. 137 (2000) (discussing the news industry’s argument that compelling disclosures chills news sources).

extend the common law to such protection,<sup>11</sup> so the legislative branch should step in to make such protection clear. For example, in the high stakes field of national security, the Government utilizes federal laws (such as the Espionage Act)<sup>12</sup> to prosecute. State shield laws provide inconsistent and insufficient protection against federal prosecution.<sup>13</sup> The case for a federal shield law is heightened in the matters of national security, which is different, and where, arguably, the stakes are higher.<sup>14</sup>

## II. FREEDOM OF THE PRESS

An informed populace is a hallmark of the American representative democracy.<sup>15</sup> The free press is a necessary and integral part of informing the populace.<sup>16</sup> As District Judge Warren noted, the free press can be obliterated by broad strokes, or little by little.<sup>17</sup> In addition to the threat of government overreach, the free press also faces threats from the importance of headlines and ratings; an ever-expanding and amorphous

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<sup>11</sup> See, e.g., *Branzburg*, 408 U.S. at 667; *Sterling*, 724 F.3d at 517; see generally Laurence B. Alexander, *Looking Out For The Watchdogs: A Legislative Proposal Limiting the Newsgathering Privilege to Journalists in the Greatest Need Of Protection For Sources And Information*, 20 YALE L. & POL'Y REV. 97 (2002) (arguing for a narrowly-tailored federal shield law); *Protecting the New Media: Application of the Journalist's Privilege to Bloggers*, in *Developments in the Law: The Law of Media*, 120 HARV. L. REV. 996 (2007) (discussing shield laws and bloggers).

<sup>12</sup> The Espionage Act of 1917, Pub. L. No. 65-24 (codified as amended at 18 U.S.C. § 792 (2012)).

<sup>13</sup> See generally William E. Lee, *Probing Secrets: The Press and Inchoate Liability for Newsgathering Crimes*, 36 AM. J. CRIM. L. 129 (2009) (discussing state shield laws, the Espionage Act, and related issues); W. Cory Reiss, *Crime That Plays: Shaping a Reporter's Shield to Cover National Security in an Insecure World*, Comment, 44 WAKE FOREST L. REV. 641 (2009) (arguing for a federal shield law that balances competing governmental interest in national security).

<sup>14</sup> See, e.g., *Katz v. United States*, 389 U.S. 347, 358 n.23 (1967) ("Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case.").

<sup>15</sup> U.S. CONST., amend. I; Chief Justice R. Fred Lewis, *A Call to Justice: The Importance of Civic Education*, 80 FLA. B.J. 12, 13 (2006) ("[W]ithout a populace informed about their civic duties, the rights and freedoms promised by our constitutional structure may not be realized."); Dianne Post, *Soundoff: Failing Grade*, 50 ARIZ. ATT'Y 8, 8 (May 2014) ("In order for a democracy to flourish, it needs an educated populace who have been taught the basic values of the country, the political process and factual knowledge.").

<sup>16</sup> See generally Monica Langley & Lee Levine, *Branzburg Revisited: Confidential Sources and First Amendment Values*, 57 GEO. WASH. L. REV. 13 (1988) (noting the importance of a free press in informing citizens); Joel G. Weinberg, *Supporting the First Amendment: A National Reporter's Shield Law*, 31 SETON HALL LEGIS. J. 149 (2006) (discussing, in part, the important role the press plays in keeping the citizenry informed).

<sup>17</sup> *United States v. Progressive, Inc.*, 467 F. Supp. 990, 995 (W.D. Wis. 1979).

definition of what is a journalist; and in the specific case of national security—legitimate tension with government and public safety interests.<sup>18</sup> This Article argues that reinvigorating and revising the case for a federal shield law will solve this problem, especially in matters related to national security.

#### A. News Industry Challenges

The news media is focused on headlines and ratings in the current environment, distracting in many cases from an actual search for the truth.<sup>19</sup> In a 2015 talk, Lara Setrakian argues that there are three ways to fix the problems in the news industry which include building a news that is “built on deep-domain knowledge,” with a “kind of Hippocratic oath for the news industry, a pledge to first do no harm,” and one able to “embrace complexity . . . to make sense of a complex world.”<sup>20</sup> These recommendations frame the aspirational side of this argument, which is that the argument desires a noble and diligent press.<sup>21</sup> This also raises the question of how to define what or who makes up the press, what or who is a journalist, and should those classifications further constrain what or who gets the protections proposed herein.<sup>22</sup> In making such a determination, questions arise as to how inclusive to make the definition and whether the press should enjoy protections that the citizenry otherwise does not enjoy.<sup>23</sup>

These issues also raise the question of journalistic integrity and editorial discretion.<sup>24</sup> The “Russia Dossier” about then-President-elect Trump, allegedly obtained by CNN and BuzzFeed, shows an example of the type of question faced by the news industry and an opportunity to exercise editorial discretion.<sup>25</sup> Specifically, BuzzFeed published a document

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<sup>18</sup> See generally, e.g., Geoffrey R. Stone, *Government Secrecy vs. Freedom of the Press*, 1 HARV. L. & POL’Y REV. 185 (2007) (comparing government interest and freedom of the press).

<sup>19</sup> Lara Setrakian, *3 Ways to Fix a Broken News Industry*, TED (Jan. 2017), [https://www.ted.com/talks/lara\\_setrakian\\_3\\_ways\\_to\\_fix\\_a\\_broken\\_news\\_industry](https://www.ted.com/talks/lara_setrakian_3_ways_to_fix_a_broken_news_industry).

<sup>20</sup> *Id.*

<sup>21</sup> See, e.g., Stephen Daly, *Refrain from Crude Behavior: The Need for Journalism Standards in Documentary Filmmaking*, 31 ENT. & SPORTS LAW. 1 (2014) (arguing that journalistic ethics should be part of defining a journalist under shield laws); see also *SPJ Code of Ethics*, SOC’Y OF PROF’L JOURNALISTS, <https://www.spj.org/ethicscode.asp> (last revised Sept. 6, 2014, 4:49 PM).

<sup>22</sup> See discussion *infra* Section IV.A.

<sup>23</sup> See, e.g., *Branzburg v. Hayes*, 408 U.S. 665 (1972); Rosenbaum, *supra* note 9.

<sup>24</sup> *SPJ Code of Ethics*, *supra* note 21; Setrakian, *supra* note 19.

<sup>25</sup> Sydney Ember & Michael M. Grynbbaum, *BuzzFeed Posts Unverified Claims on Trump, Igniting a Debate*, N.Y. TIMES (Jan. 10, 2017), <https://www.nytimes.com/2017/01/10/business/buzzfeed-donald-trump-russia.html?src=mv>.

“carrying explosive, but unverified, allegations about ties between the Russian government and President-elect Donald J. Trump.”<sup>26</sup> At the same time, other news media outlets either declined to report on the document at all (such as Lawfare), or reported only about the existence of such an unverified document (such as CNN).<sup>27</sup> This example underscores an important motivator for the news industry (as discussed by Setrakian): the tension between a search for truth and ratings.<sup>28</sup> This tension further casts light on an important question regarding classifying journalists (and whether they should have different protections), particularly in the context of arguing for, as here, additional legal protections for journalists.<sup>29</sup>

### B. National Security Tensions

Courts have routinely held that there are instances in which national security interests change a court’s analysis of a legal issue.<sup>30</sup> This analysis contributes to increased tension when

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Compare Scott Campbell, *BBC is a Slave to Ratings and Copies Us, Says ITV*, TELEGRAPH (Jan. 14, 2014, 6:00 AM), <http://www.telegraph.co.uk/finance/newsbysector/mediatechnologyandtelecoms/media/10569856/BBC-is-a-slave-to-ratings-and-copies-us-says-ITV.html>, with Andrew Selbst, *The Journalism Ratings Board: An Incentive-Based Approach to Cable News Accountability*, 44 U. MICH. J.L. REFORM 467 (2011) (assuming the decline of the news media and proposing an accountability mechanism).

<sup>29</sup> See generally Clay Calvert, *And You Call Yourself a Journalist?: Wrestling with a Definition of “Journalist” in the Law*, 103 DICK. L. REV. 411 (1999) (discussing the challenge of defining journalist in law); Stephanie J. Frazee, Note, *Bloggers as Reporters: An Effect-Based Approach to First Amendment Protections in a New Age of Information Dissemination*, 8 VAND. J. ENT. & TECH. L. 609 (2006) (discussing whether bloggers are reporters).

<sup>30</sup> See, e.g., *Katz v. United States*, 389 U.S. 347, 363 (1967) (Harlan, J., concurring) (“In joining the Court’s opinion, I note the Court’s acknowledgment that there are circumstances in which it is reasonable to search without a warrant . . . We should not require the warrant procedure and the magistrate’s judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable.”); *United States v. Reynolds*, 345 U.S. 1, 10–11 (1953) (noting that government privilege exists when there is a reasonable danger that compulsion of evidence will expose matters which, in the interest of national security should not be divulged, if so privilege is absolute (i.e., not subject to other party’s countervailing interest)); *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 598 (1952) (Frankfurter, J., concurring) (“The power to seize . . . has been restricted to particular circumstances such as ‘time of war or when war is imminent,’ the needs of ‘public safety’ or of ‘national security or defense,’ or ‘urgent and impending need.’”); *Steel Seizure*, 343 U.S. at 635–38 (Jackson, J., concurring) (outlining, in a famous concurrence, executive branch powers and developing a framework where executive power falls into three categories: action with express or implied authority, action contrary to express or implied congressional action, and action in the absence of congressional action.); *United States v. U.S. Dist. Court*, 407 U.S. 297 (1972) (leaving open the question of whether there is a national security or foreign intelligence exception to the Fourth Amendment); *Totten v. United States*, 92 U.S.

it comes to freedom of the press related to news about national security matters.<sup>31</sup> In further articulating this balance, Justice Stewart noted in his concurrence, “the hallmark of a truly effective internal security system would be the maximum possible disclosure, recognizing that secrecy can best be preserved only when credibility is truly maintained.”<sup>32</sup> This shows one learned jurist’s viewpoint that secrecy in national security and government transparency are interdependent.<sup>33</sup> This also brings forth the question of where whistleblowers and leakers fall into this discussion,<sup>34</sup> ultimately leading to the question of whether a reporter should be able to protect the identity of such individuals in the context of reporting on national security matters. To be absolutely clear, the argument presented herein does not seek to protect any criminal activities, especially not those such as the unauthorized disclosure of classified information or the possession of stolen property.<sup>35</sup>

### C. Summary of Analysis and Recommendations

Based upon the aforementioned discussion, this Article reinvestigates the argument in favor of a federal reporter’s shield law, specifically implemented as an evidentiary privilege under the Federal Rules of Evidence. In making this case, Section III will look at the background and context of the argument for and against a federal shield law, including surveying a collection of states’ shield laws. Section III will also include a review of select previous efforts to enact a federal shield law and consider why such efforts did not succeed. Finally, Section III will consider the executive branch’s recourse embodied by the ability to prosecute, acknowledging a number of mechanisms by which it can be done.

In Section IV, this Article will examine the integrity of the press and delve briefly into the question of how to define a

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105, 107 (1875) (holding that public policy forbids the trial of something which would reveal state secrets); *In re Directives* [redacted text] Pursuant to Section 105B of the Foreign Intelligence Surveillance Act, 551 F.3d 1004, 1012 (FISA Ct. Rev. 2008) (holding that “a foreign intelligence exception to the Fourth Amendment’s warrant requirement exists when surveillance is conducted to obtain foreign intelligence for national security purposes and is directed against foreign powers or agents of foreign powers reasonably believed to be located outside the United States”); *see generally* *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d. 1070 (9th Cir. 2010) (*en banc*) (granting a huge deference to the government in considering *Totten* bar or *Reynolds* privilege).

<sup>31</sup> Stone, *supra* note 18.

<sup>32</sup> *N.Y. Times Co. v. United States*, 403 U.S. 713, 729 (1971).

<sup>33</sup> *Id.*

<sup>34</sup> *See generally, e.g.*, Mary-Rose Papandrea, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 IND. L.J. 233 (2008) (discussing the press, whistleblowers, and national security).

<sup>35</sup> *See* discussion *infra* Section IV.



journalist (including the necessary corollary of whether the press should enjoy protections herein that are not otherwise available to the general public). Section IV will also examine deficits of state reporters' shield laws, including their ineffectiveness against federal prosecution, the challenge of jurisdiction, and the related question of inconsistent application of the protection. Finally, Section IV will acknowledge the tension between protecting a reporter and allowing the Government to fully prosecute national security-related crimes.

Section V will make the recommendation of a federal shield law. Section V will address the challenge of how to define the scope of the protections, note that it should have civil and criminal applications, and note that this law should not protect otherwise illegal activity. Finally, this Article will conclude acknowledging the numerous challenges outside the scope of this discussion but argue that they are nonetheless addressed by the solution proposed herein.

### III. SHIELD LAWS & *BRANZBURG*

The discussion about a federal reporters' shield law begins with a survey of state shield laws, an examination of how they function, and where they are found within the state statutory framework.<sup>36</sup> This survey necessarily leads to the Supreme Court's ruling in *Branzburg v. Hayes*,<sup>37</sup> and related cases,<sup>38</sup> which will be discussed in greater detail.<sup>39</sup> That discussion will lead to review of previous attempts to enact a federal shield law.<sup>40</sup> Finally, one must consider a note on how the executive branch may pursue enforcement of its national security secrets, after which the discussion can move on to implementation.<sup>41</sup>

#### A. State Shield Laws

According to the Digital Media Law Project, as of "December 2007, thirty-two states and the District of Columbia

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<sup>36</sup> See, e.g., Laurence B. Alexander & Ellen M. Bush, *Shield Laws on Trial: State Court Interpretation of the Journalist's Statutory Privilege*, 23 J. LEGIS. 215 (1997) (discussing state shield laws generally); *Shield Laws and Protections of Sources by State*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, <http://www.rcfp.org/browse-media-law-resources/guides/reporters-privilege/shield-laws> (last visited May 3, 2018) (displaying, in map form, the existence and type of shield laws among the fifty states); see also discussion *infra* Section III.A.

<sup>37</sup> 408 U.S. 665 (1972).

<sup>38</sup> E.g., *United States v. Sterling*, 724 F.3d 482 (4th Cir. 2013).

<sup>39</sup> See discussion *infra* Section III.B.

<sup>40</sup> See discussion *infra* Section III.C.

<sup>41</sup> See Stone, *supra* note 18; discussion *infra* Sections III-IV.

have statutory shield laws.”<sup>42</sup> The Digital Media Law Project further asserted that, “a number of state courts have also recognized a privilege based on their state constitutions, common law, or the First Amendment.”<sup>43</sup> According to Reporters Committee for Freedom of the Press, “[m]any states have recognized a reporter’s privilege based on state law . . . [i]n addition to case law, 31 states and the District of Columbia have enacted statutes—shield laws—that give journalists some form of privilege against compelled production of confidential or unpublished information.”<sup>44</sup> While many states have unique legal underpinnings to this protection, it is useful to specifically look at three states, each of which has a different approach. In New York, the reporters’ protections are found in civil rights law.<sup>45</sup> In California, this protection can be found in the evidence code.<sup>46</sup> In Maryland, the protection is found under “Courts and Judicial Proceedings.”<sup>47</sup>

New York’s provision operates as an exemption from being adjudged in contempt,<sup>48</sup> with a waiver provision for the journalist.<sup>49</sup> The statute first provides a number of key definitions.<sup>50</sup> The New York law defines a professional journalist as:

one who, for gain or livelihood, is engaged in gathering, preparing, collecting, writing, editing, filming, taping or photographing of news intended for a newspaper, magazine, news agency, press association or wire service or other professional medium or agency which has as one of its regular functions the processing and researching of news intended for dissemination to the public; such person shall be someone performing said function either as a regular employee or as one otherwise professionally affiliated for gain or livelihood with such medium of communication<sup>51</sup>

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<sup>42</sup> *State Shield Laws*, DIG. MEDIA LAW PROJECT, <http://www.dmlp.org/state-shield-laws> (last visited Apr. 15, 2017).

<sup>43</sup> *Id.*

<sup>44</sup> *The Reporter’s Privilege Compendium: An Introduction*, REPORTER’S COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/browse-media-law-resources/guides/reporters-privilege/introduction> (last visited Apr. 1, 2018).

<sup>45</sup> N.Y. CIV. RIGHTS LAW § 79-h (McKinney 2018).

<sup>46</sup> CAL. EVID. CODE § 1070 (West 2018).

<sup>47</sup> MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (West 2017).

<sup>48</sup> CIV. RIGHTS §§ 79-h(b)–(c).

<sup>49</sup> See 81 N.Y. JUR. 2D *Newspapers* § 36 (2018).

<sup>50</sup> CIV. RIGHTS § 79-h(a).

<sup>51</sup> *Id.* § 79-h(a)(6).

The New York law then provides two exemptions from contempt, an “absolute protection for confidential news,”<sup>52</sup> and a “qualified protection for nonconfidential news.”<sup>53</sup> To summarize the protection, a “professional journalist” having been working for a qualifying type of news organization (defined in the statute), is exempt from being found in contempt in criminal or civil proceedings for refusing to disclose “any news obtained or received in confidence or the identity of the source of any such news coming into such person's possession in the course of gathering or obtaining news for publication.”<sup>54</sup> If the person receives such information not in confidence, then the qualified protection of Section 79-h(c) applies, which requires the party seeking to compel such testimony to show that:

the news: (i) is highly material and relevant; (ii) is critical or necessary to the maintenance of a party's claim, defense or proof of an issue material thereto; and (iii) is not obtainable from any alternative source.<sup>55</sup>

The statute also has a few other provisions, including that information obtained in violation of Section 79-h is inadmissible (including “in any action or proceeding or hearing before any agency”);<sup>56</sup> that protected persons cannot be fined or imprisoned for failure to disclose information protected by Section 79-h(b) or (c);<sup>57</sup> and that privilege extends to certain third parties such as supervisors or employers.<sup>58</sup> Section 79-h also includes a voluntary waiver provision.<sup>59</sup>

In California, the protections are found as a privilege under the California Evidence Code.<sup>60</sup> The “*Refusal to disclose news source*” section is found in the California Evidence Code's section on privileges at Section 1070.<sup>61</sup> Section 1070 does not include a section on definitions, but does include one definition.<sup>62</sup> Section 1070 states that the protections therein

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<sup>52</sup> *Id.* § 79-h(b).

<sup>53</sup> *Id.* § 79-h(c).

<sup>54</sup> *Id.* § 79-h(b).

<sup>55</sup> *Id.* § 79-h(c).

<sup>56</sup> *Id.* § 79-h(d).

<sup>57</sup> *Id.* § 79-h(e).

<sup>58</sup> *Id.* § 79-h(f).

<sup>59</sup> *Id.* § 79-h(g).

<sup>60</sup> CAL. EVID. CODE § 1070 (West 2018).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* § 1070(c) (defining “unpublished information” as “information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated and includes, but is not limited to, all notes, outtakes, photographs, tapes or other data of whatever sort not itself

provided apply to, “[a] publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed.”<sup>63</sup> The California Evidence Code then exempts such persons from being adjudged in contempt “for refusing to disclose . . . the source of any information procured . . . or for refusing to disclose any unpublished information.”<sup>64</sup> The protections again apply when the protected person is acting in his/her capacity as news media.<sup>65</sup> Section 1070(b) extends those protections to radio or television news reporters, but does not appear to include any voluntary waiver provision.<sup>66</sup> The California approach also has mixed results, as discussed in *Delaney v. Superior Court*.<sup>67</sup>

The Maryland *News Media Privilege* is found in the Maryland Code under the heading “Courts and Judicial Proceedings,” specifically at Title 9, Witnesses.<sup>68</sup> The *News Media Privilege* is codified at Section 9-112 and includes definitions and provisions for compelled disclosure.<sup>69</sup> Section 9-112 specifically applies to persons who fall under one of three categories: employed by the news media as defined in the statute, independent contractors of the news media, and students engaged with the news media organizations.<sup>70</sup> The Maryland Code defines the type of information covered by this privilege, which includes sources of information as well as information gathered for the news, but not published.<sup>71</sup> However, unlike New York and California, Maryland has a specific section for compelled disclosure.<sup>72</sup> In order to compel disclosure, the court

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disseminated to the public through a medium of communication, whether or not published information based upon or related to such material has been disseminated”).

<sup>63</sup> *Id.* § 1070(a).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* § 1070(b).

<sup>67</sup> 50 Cal. 3d. 785 (1990); see also Timothy L. Alger, Comment, *Promises Not to be Kept: The Illusory Newsgatherer’s Privilege in California*, 25 LOY. L.A. L. REV. 155, 177–78 (1991) (expressing skepticism in the effectiveness of the California Reporter’s Shield privilege); Ian W. Craig, Note, *Delaney v. Superior Court: Balancing the Interests of Criminal Defendants and Newspapers Under California’s Shield Law*, 22 PAC. L.J. 1371, 1397–98 (1991) (examining the California Supreme Court’s application of the California Shield Law in a specific case).

<sup>68</sup> MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (West 2017).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* § 9-112(b). “News media” is defined as “(1) Newspapers; (2) Magazines; (3) Journals; (4) Press associations; (5) News agencies; (6) Wire services; (7) Radio; (8) Television; and (9) Any printed, photographic, mechanical, or electronic means of disseminating news and information to the public.” *Id.* § 9-112(a).

<sup>71</sup> *Id.* § 9-112(c).

<sup>72</sup> *Id.* § 9-112(d).

must find by clear and convincing evidence: relevance to the issue at hand; that the information “could not, with due diligence, be obtained by any alternate means”; and an “overriding public interest in disclosure.”<sup>73</sup> It does note that this provision cannot be used to compel disclosure of sources protected under Section 9-112(c)(1) and that the protected person does not waive protection from compulsion by otherwise disseminating the information gained hereby.<sup>74</sup> Maryland also claims to have the first state shield law, but not necessarily the most effective.<sup>75</sup>

*B. The Problem with Branzburg*

In 1972, the Supreme Court held that “requiring newsmen to appear and testify before state or federal grand juries [does not] abridge[] the freedom of speech and press guaranteed by the First Amendment.”<sup>76</sup> This example further makes a case for the importance of a federal shield law, in part by the boundaries it draws among what protections are inherent under the First Amendment’s guarantee of the freedom of expression and of the press. The legislative branch should pursue legislation that makes these protections clear, and eliminates the tension left by *Branzburg*.

Paul M. Branzburg was a reporter employed by the *Courier-Journal*, a newspaper in Louisville, Kentucky.<sup>77</sup> In November of 1969, the *Courier-Journal* published a story by Branzburg, which described two individuals making hashish, included a photograph of “a pair of hands working above a laboratory table on which was a substance identified by the caption as hashish,” and included that the author promised to protect their identity.<sup>78</sup> Branzburg was then subpoenaed by a state grand jury; he appeared, and he refused to identify the individuals from his story.<sup>79</sup> A state trial court judge ordered Branzburg to answer, and he appealed under the First Amendment, the Kentucky Constitution, and Kentucky’s reporters’ privilege statute, Ky. Rev. Stat. Section 421.100.<sup>80</sup> The

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.* § 9-112(e).

<sup>75</sup> *Id.*; see also Timothy M. Mulligan, *The Court of Special Appeals of Maryland to the Press Shield Law: “Good Night, and Good Luck*, 41 U. BALT. L.F. 1 (2010) (noting that Maryland’s shield law was originally passed in 1896 but that current treatment by the courts has been less than absolute).

<sup>76</sup> *Branzburg v. Hayes*, 408 U.S. 665, 667 (1972).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 667–68.

<sup>79</sup> *Id.* at 668.

<sup>80</sup> *Id.*; Kentucky’s Evidence Code includes § 421.100, entitled “Newspaper, radio or television broadcasting station personnel need not disclose source of information,”

Kentucky Court of Appeals held, in part, that while the privilege allowed a newsman to refuse to divulge a source, it did not permit the reporter to refuse to testify about what “he had observed personally, including the identities of those persons he had observed.”<sup>81</sup>

In a separate case, which was consolidated during appeal, Branzburg reported on drug use in Frankfurt, Kentucky.<sup>82</sup> Branzburg was again subpoenaed to testify regarding, in this case, “the matter of violation of statutes concerning use and sale of drugs.”<sup>83</sup> Branzburg sought to quash the subpoena, meeting with mixed results.<sup>84</sup> Specifically, he was directed to testify to things that he observed, but was allowed to protect the confidential sources.<sup>85</sup> The Kentucky Court of Appeals held consistent with the prior case, and Branzburg sought writ of certiorari to the Supreme Court of the United States, which was granted.<sup>86</sup> *Branzburg* also included cases out of Massachusetts and California.<sup>87</sup>

As the Supreme Court noted, “[t]he heart of the claim is that the burden on news gathering resulting from compelling reporters to disclose confidential information outweighs any public interest in obtaining the information.”<sup>88</sup> Concurrently, the Court noted that First Amendment jurisprudence clearly did not “invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability.”<sup>89</sup> The Court then outlined a number of limits to the First Amendment protection of a free press, specifically including:

that the press is not free to publish with impunity everything and anything it desires to publish. Although it may deter or regulate what is said or

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which simply provides, “No person shall be compelled to disclose in any legal proceeding or trial before any court, or before any grand or petit jury, or before the presiding officer of any tribunal, or his agent or agents, or before the General Assembly, or any committee thereof, or before any city or county legislative body, or any committee thereof, or elsewhere, the source of any information procured or obtained by him, and published in a newspaper or by a radio or television broadcasting station by which he is engaged or employed, or with which he is connected.” KY. REV. STAT. ANN. § 421.100 (LexisNexis 2018).

<sup>81</sup> *Branzburg*, 408 U.S. at 669.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* (internal citation omitted).

<sup>84</sup> *Id.* at 669–70.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 671.

<sup>87</sup> *Id.* at 671–79.

<sup>88</sup> *Id.* at 681.

<sup>89</sup> *Id.* at 682.

published, the press may not circulate knowing or reckless falsehoods damaging to private reputation without subjecting itself to liability for damages, including punitive damages, or even criminal prosecution.<sup>90</sup>

The Court went on to attempt to put the question into the context of whether the press had certain privileges of access or confidentiality.<sup>91</sup>

Justice Stewart, in dissent, lamented the Court's view of a reporter's protection under the First Amendment, writing, "[n]ot only will this decision impair performance of the press'[s] constitutionally protected functions, but it will, I am convinced, in the long run, harm rather than help the administration of justice."<sup>92</sup> Justice Stewart went on to note "the guarantee [of a free press] is 'not for the benefit of the press so much as for the benefit of all of us.'"<sup>93</sup> Justice Stewart further opined that the right to a free press included certain other rights that the Court was not upholding, including the right to truly protect the information-gathering process, notably including informants and confidential sources.<sup>94</sup> Finally, and most presciently, Justice Stewart noted that "[a]fter today's decision, the potential informant can never be sure that his identity or off-the-record communications will not subsequently be revealed through the compelled testimony of a newsman."<sup>95</sup>

The problem with *Branzburg*, therefore, is that it creates an artificial and false dichotomy between a reporter's ability to protect confidential sources and the reporter's obligation to testify about facts (to include the source's identity) that he or she personally knows or observes. This is a distinction without a difference. Where reporters are faced with a Hobson's choice, they can protect their source's identity, unless they have seen, met, or know whom the source is—in that case they can be compelled to testify to what they know.

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<sup>90</sup> *Id.* at 683–84 (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 147 (1967); *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 277 (1971)).

<sup>91</sup> *Id.* at 683–87.

<sup>92</sup> *Id.* at 725 (Stewart, J., dissenting).

<sup>93</sup> *Id.* at 726 (citing *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967)).

<sup>94</sup> *Id.* at 727–29.

<sup>95</sup> *Id.* at 731.

### C. *Prior Attempts at a Federal Shield Law*

Several efforts to enact a federal shield law have failed,<sup>96</sup> and at least one scholar has argued that the time for such a law has passed.<sup>97</sup> For example, in 2007, a bill was brought to the senate called the Free Flow of Information Act of 2007.<sup>98</sup> A companion bill was passed in the House of Representatives,<sup>99</sup> but the Free Flow of Information Act of 2007 ultimately failed cloture in the Senate and died in the 110th Congress.<sup>100</sup> The Act started with a section on compelled disclosures from “covered persons,” which set forth due process that would be required in order to compel a covered person to testify or provide documents.<sup>101</sup> Specifically, a federal court would have to make three findings, by a preponderance of the evidence.<sup>102</sup>

First, a court would have to find that the party seeking disclosure had exhausted all other reasonable sources.<sup>103</sup> The second finding required was split into whether or not the matter dealt with a criminal investigation or prosecution; if it did, then the party seeking disclosure would have to show that there were “reasonable grounds” to believe a crime occurred, the disclosure was essential to the prosecution, and that (in the case of leaking related to classified information) the leak “caused significant, clear, and articulable harm to the national security.”<sup>104</sup> If not a criminal case, the finding is simply that the disclosure sought is “essential to the resolution of the matter.”<sup>105</sup> Finally, the court would have to find that nondisclosure would be contrary to the public interest.<sup>106</sup> The proposed legislation then had several exceptions, including those disclosures related to “criminal or tortious conduct . . . to prevent death, kidnapping, or substantial

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<sup>96</sup> Free Flow of Information Act of 2007, S. 2035, 110th Cong. (2007) (passed by the House of Representatives, but did not pass a cloture vote in the Senate in 2008); Free Flow of Information Act of 2013, S. REP. NO. 113-118 (2013).

<sup>97</sup> See generally William E. Lee, *The Priestly Class: Reflections on a Journalist's Privilege*, 23 CARDOZO ARTS & ENT. L.J. 635 (2006) [hereinafter Lee, *The Priestly Class*] (concluding that “[u]nfortunately, the current political climate is not conducive to the enactment of a shield law with a broad class of covered persons. Nor is the current political climate favorable to the creation of an absolute privilege.”); William E. Lee, *The Demise of the Federal Shield Law*, 30 CARDOZO ARTS & ENT. L.J. 27 (2012) [hereinafter Lee, *The Demise of the Federal Shield Law*] (discussing that the Supreme Court is unlikely to revise *Branzburg* and that Congress appears unwilling to pursue federal shield law).

<sup>98</sup> S. 2035.

<sup>99</sup> H.R. 2102, 110th Cong (2007).

<sup>100</sup> S. 2035.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* § 2(a).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*



bodily injury . . . to prevent terrorist activity or harm to the national security.”<sup>107</sup> The proposal also included a definitions section.<sup>108</sup> Of particular note, the proposal defined “covered person” as “a person who is engaged in journalism and includes a supervisor, employer, parent, subsidiary, or affiliate of such person.”<sup>109</sup> The term “journalism” was defined as, “the regular 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.”<sup>110</sup> These definitions stand in stark contrast to the complexity and nuances addressed in statutes from New York,<sup>111</sup> California,<sup>112</sup> and Maryland,<sup>113</sup> for example.

While the 2007 bill enjoyed some support, passing in the House of Representatives, it was unable to survive the Senate and was opposed by the Bush administration generally and the Attorney General, Director of National Intelligence, Defense Secretary, and Secretary of Homeland Security specifically.<sup>114</sup> The bill was re-introduced in the 111th Congress as the Free Flow of Information Act of 2009,<sup>115</sup> but this time failed to even come out of committee despite the Obama administration’s support.<sup>116</sup> It is interesting to note that although the Obama administration had been accused of increasing prosecution of leakers to a draconian extent,<sup>117</sup> the Obama administration appears to have fully supported the bill in 2009 and apparently again in 2013.<sup>118</sup>

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<sup>107</sup> *Id.* §§ 3–5.

<sup>108</sup> *Id.* § 8.

<sup>109</sup> *Id.* § 8(2).

<sup>110</sup> *Id.* § 8(5).

<sup>111</sup> N.Y. CIV. RIGHTS LAW § 79-h (McKinney 2018).

<sup>112</sup> CAL. EVID. CODE § 1070 (West 2017).

<sup>113</sup> MD. CODE ANN., CTS & JUD. PROC. § 9-112 (West 2018).

<sup>114</sup> Ian McCaleb, *Administration Launches Web Site Opposing Journalist Media Shield*, FOX NEWS (Apr. 3, 2008), <http://www.foxnews.com/story/2008/04/03/administration-launches-web-site-opposing-journalist-media-shield.html>.

<sup>115</sup> S. 448, 111th Cong. (2009).

<sup>116</sup> 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?\\_r=0](http://www.nytimes.com/2013/05/16/us/politics/under-fire-white-house-pushes-to-revive-media-shield-bill.html?_r=0); Sean Sullivan et al., *White House Pushes Media Shield Law as Holder Faces Questions on Capitol Hill*, WASH. POST (May 15, 2013) [https://www.washingtonpost.com/politics/on-capitol-hill-holder-to-face-questions-on-ap-phone-records-irs-scandal/2013/05/15/d0dfc52c-bd70-11e2-89c9-3be8095fe767\\_story.html?utm\\_term=.04cd4bb4d2b5b](https://www.washingtonpost.com/politics/on-capitol-hill-holder-to-face-questions-on-ap-phone-records-irs-scandal/2013/05/15/d0dfc52c-bd70-11e2-89c9-3be8095fe767_story.html?utm_term=.04cd4bb4d2b5b).

<sup>117</sup> Cora Currier, *Charting Obama’s Crackdown on National Security Laws*, PROPUBLICA (July 30, 2013, 3:40 PM), <https://www.propublica.org/article/sealing-loose-lips-charting-obamas-crackdown-on-national-security-leaks>.

<sup>118</sup> Savage, *supra* note 116; Sullivan et al., *supra* note 116.

The Free Flow of Information Act of 2013<sup>119</sup> was introduced during the 113th Congress with many of the major features of the Free Flow of Information Acts of 2007 and 2009, discussed above. There were some changes, however, including making it more explicit that compelling disclosure specifically imposed obligations upon the government.<sup>120</sup> In addition, the 2013 bill added a requirement for certification by the Attorney General.<sup>121</sup> The 2013 bill also added an affirmative defense to disclosure if the covered person could, by clear and convincing evidence, show that disclosure would be contrary to the public interest.<sup>122</sup> Interestingly, the definition of “covered person” morphed into “covered journalist” and grew significantly more nuanced.<sup>123</sup> The new definition provided for two types of covered persons and spanned more than 720 words,<sup>124</sup> while the definition in the 2007 version of the bill (before amendment) was twenty-six words.<sup>125</sup> The new definition was much more expansive in defining the type of organization for which a “covered journalist” must work and included internal references to other statutory provisions, such as the Communications Act of 1934.<sup>126</sup> The 2013 bill also provided the types of activities that a “covered journalist” would be engaged in (interviews, direct observations) and the intent of such activities.<sup>127</sup> Finally, the 2013 bill had a subsection in the definition that seemed to be directed specifically at WikiLeaks.<sup>128</sup>

According to William E. Lee, the efforts at a federal shield law fail because the Supreme Court “remains committed to treating the First Amendment’s press and speech clauses as interchangeable,” meaning that the courts are unlikely to create such law and that “Congress has been unable to solve the problem of national security leaks in a manner that garners bipartisan support.”<sup>129</sup> Lee further argues that Congress will remain unable to garner sufficient support, in part, because of

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<sup>119</sup> S. 987, 113th Cong. (2013).

<sup>120</sup> *Id.* § 2(a)(2).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* § 11(1).

<sup>124</sup> *Id.*

<sup>125</sup> S. 2035, 110th Cong. (2007) (“The term ‘covered person’ means a person who is engaged in journalism and includes a supervisor, employer, parent, subsidiary, or affiliate of such person.”).

<sup>126</sup> S. 987 § 11(1).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* § 11(1)(A)(iii)(I) (stating in part that a “covered journalist . . . does not include any 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”).

<sup>129</sup> Lee, *The Demise of the Federal Shield Law*, *supra* note 97, at 29.

“the emergence of bloggers and ‘citizen-journalists.’”<sup>130</sup> This Article argues that these are the very reasons that a federal reporter’s shield law is needed.

*D. A Note on Prosecution*

Lee’s point is consequential, particularly in the field of national security where the government interest is great and the threat considerably grave.<sup>131</sup> However, that is not a sufficient argument to defeat the benefits provided by a federal shield law.<sup>132</sup> Rather, Congress can pass or amend legislation that allows the Government to prosecute the actual crimes surrounding national security such as the Espionage Act<sup>133</sup> or the Atomic Energy Act.<sup>134</sup> Further, the more nuanced definition of “covered journalist,” under the Free Flow of Information Act of 2013 provided exceptions related to national security and terrorism.<sup>135</sup> Perhaps more importantly, this fear conflates leakers with whistleblowers, when they are in fact very different—one being desirable and the other quite detestable.<sup>136</sup> Nonetheless, this supports the argument that the Government should exercise its prosecutorial discretion, rather than the argument that crafting a proper shield law is too difficult and therefore not worthy of the Congress’s time and attention.<sup>137</sup>

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<sup>130</sup> *Id.*

<sup>131</sup> See, e.g., Beverly E. Bashor, *The Liberty/Safety Paradigm: The United States’ Struggle to Discourage Violations of Civil Liberties in Times of War*, 41 W. ST. U.L. REV. 617 (2014) (discussing the tension between civil liberties and the grave threats posed by terrorism); David B. Sandlow, *A Grave and Gathering Threat*, BROOKINGS (Mar. 12, 2004), <https://www.brookings.edu/opinions/a-grave-and-gathering-threat/> (explaining the threat that climate change poses to the public and the strong government interest in mitigating it).

<sup>132</sup> See *supra* notes 93–95 and accompanying text.

<sup>133</sup> 18 U.S.C. § 792 (2012).

<sup>134</sup> Atomic Energy Act of 1954, Pub. L. 79-585, 60 Stat. 755 (1954) (codified as amended at 42 U.S.C. § 2011-2210 (2012)).

<sup>135</sup> S. 987, 113th Cong. (2013).

<sup>136</sup> Compare Mika C. Morse, *Honor or Betrayal? The Ethics of Government Lawyer-Whistleblowers*, 23 GEO. J. LEGAL ETHICS 421, 422 (2010) (examining the treatment of lawyer-whistleblowers, but using leaker and whistleblower somewhat interchangeably), with Dan Meyer & David Berenbaum, *The Wasp’s Nest: Intelligence Community Whistleblowing & Source Protection*, 8 J. NAT’L SECURITY L. & POL’Y 33, 39–40 (2015) (distinguishing, in part, between whistleblowers and leakers).

<sup>137</sup> See, e.g., Sandra Davidson & David Herrera, *Needed: More Than a Paper Shield*, 20 WM. & MARY BILL RTS. J. 1277, 1360–61 (2012) (arguing for a federal reporter’s shield law); Josh Gerstein & Bryan Bender, *Trump Anti-Leak Drive Could Prompt Prosecutions*, POLITICO (Feb. 17, 2017, 7:42 AM) <http://politico.com/story/2017/02/trump-leaks-prosecution-235125> (explaining Trump’s intentions to create legal consequences for those who leak government information, regardless of the reasoning behind their choice).

#### IV. OBSTACLES TO A FEDERAL REPORTER'S SHIELD LAW

As discussed through Sections I and II, many scholars have written on, and professional organizations have called for, a federal reporter's shield law.<sup>138</sup> These arguments and discussions reveal that there are a number of questions that must be addressed in order to fashion an adequate reporter's shield law that effectively supports the freedom of the press while not unnecessarily protecting criminal activity. The first issue is to acknowledge the challenge in defining who is a journalist.<sup>139</sup> The next question is whether to be explicit that these protections should not immunize criminal activity.<sup>140</sup> Finally, to support this argument, it is important to benefit from lessons learned with state shield laws to overcome their deficits while *not* protecting criminal activity of any kind.<sup>141</sup>

##### A. *Who is a Journalist*

The question easiest to ask, but perhaps hardest to frame, is, who is a journalist?<sup>142</sup> Merriam-Webster defines journalist as “a person engaged in journalism; especially: a writer or editor for a news medium,” or “a writer who aims at a mass audience.”<sup>143</sup> Dictionary.com offers a similar definition: “a person who practices the occupation or profession of journalism,” defining journalism as, in part, “the occupation of reporting, writing, editing, photographing, or broadcasting news or of conducting any news organization as a business.”<sup>144</sup> The Cambridge Dictionary offers the following: “someone who collects and

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<sup>138</sup> See discussion *supra* Sections I–II.

<sup>139</sup> See discussion *infra* Section IV.A.

<sup>140</sup> See discussion *infra* Section IV.B.

<sup>141</sup> See discussion *infra* Section IV.C.

<sup>142</sup> Compare Thomas Kent, *Who's a Journalist: Closing in on a Definition*, HUFFPOST (Oct. 3, 2013, 10:47 AM), [http://www.huffingtonpost.com/thomas-kent/whos-a-journalist-closing\\_b\\_4033856.html](http://www.huffingtonpost.com/thomas-kent/whos-a-journalist-closing_b_4033856.html) (discussing the evolution of the definition of “journalist,” including in the law), and *A Day in the Life of a Journalist*, PRINCETON REV., <https://www.princetonreview.com/careers/85/journalist> (last visited Apr. 16, 2017) (“There are many types of journalists, from the local beat newspaper reporter to the foreign correspondent, the magazine feature writer to the freelance book reviewer, and so on. It is difficult to pin down the daily routine of an average journalist.”), with *What Does a Journalist Do?*, AM. PRESS INST., <https://www.americanpressinstitute.org/journalism-essentials/what-is-journalism/journalist/> (last visited May 3, 2018) (“Asking who is a journalist is the wrong question, because journalism can be produced by anyone.”).

<sup>143</sup> *Journalist*, MERRIAM-WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/journalist> (last updated Mar. 28, 2018).

<sup>144</sup> *Journalist*, DICTIONARY.COM, <http://www.dictionary.com/browse/journalist> (last visited May 3, 2018); *Journalism*, DICTIONARY.COM, <http://www.dictionary.com/browse/journalism> (last visited Apr. 3, 2018).

writes news stories and articles for newspapers, magazines, radio, and television.”<sup>145</sup>

As discussed above, the various state shield laws have also, some more meaningfully than others, attempted to define “journalist.”<sup>146</sup> The New York definition starts with the clause, “one who, for gain or livelihood,” before even discussing what said person does (“gathering, preparing, collecting, writing, editing, filming, taping or photographing of news”).<sup>147</sup> The New York definition includes that the activity is carried on, “intended for dissemination to the public.”<sup>148</sup> The California Evidence Code, as discussed partially above, does not explicitly include a definition of journalist, but implicitly identifies that the protections of Section 1070 apply to a “person connected with or employed” by certain organizations specified.<sup>149</sup> The Maryland Code also appears to be focused on association or affiliation of the person at the time of the activity in question, specifically whether the individual is “employed by the news media in any news gathering or news disseminating capacity,” including independent contractors and students.<sup>150</sup>

The proposals for the Free Flow of Information Acts (2007, 2009, and 2013) also had evolving definitions of “journalist.” As discussed above, the initial definition of “covered person” (standing in the place of “journalist” in the act, for the purposes of this discussion), was simply a “person who is engaged in journalism.”<sup>151</sup> By the 2009 version, the definition expanded in complexity and included a number of factors, including that the person has the “primary intent to investigate events and procure material in order to disseminate to the public news or information.”<sup>152</sup> The 2009 definition also makes clear that the term journalist does not include those that can roughly be described as spies or terrorists.<sup>153</sup> Finally, the 2013 definition, topping out at over 720 words, includes a preliminary clause that the person is an employee, contractor, or other type of agent of a

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<sup>145</sup> *Journalist*, CAMBRIDGE DICTIONARY, <http://dictionary.cambridge.org/us/dictionary/english/journalist> (last visited Apr. 16, 2017).

<sup>146</sup> See discussion *supra* Section III.A.

<sup>147</sup> N.Y. CIV. RIGHTS LAW § 79-h(a)(6) (McKinney 2018).

<sup>148</sup> *Id.*

<sup>149</sup> CAL. EVID. CODE § 1070(a) (West 2018).

<sup>150</sup> MD. CODE ANN., CTS & JUD. PROC. § 9-112(b)-(c) (West 2017).

<sup>151</sup> S. 2035, 110th Cong., § 8(2) (2007) (defining journalism as “the regular 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”).

<sup>152</sup> S. 448, 111th Cong., § 11(2)(A) (2009).

<sup>153</sup> *Id.*

news service.<sup>154</sup> However, the 2013 definition includes other types of persons, including those with the “primary intent to investigate issues or events.”<sup>155</sup>

While a more robust discussion of this issue can fill the pages of many papers, this more abbreviated analysis reveals a few key components of the definition, specifically: what does the individual do, why does the individual do it, and for what or whose benefit is it done? In determining how important the definition is, Congress would have to consider whether (as in *Branzburg*), the citizenry should enjoy the same protections as the press.<sup>156</sup>

*B. Doesn't a Federal Shield Law Protect Criminal Activity?*

One argument against a federal shield law is that it protects criminal activity by, for example, allowing criminals to shield themselves with or by media exposure.<sup>157</sup> While this is a very real concern when considering an evidentiary privilege, it is not the intent of a federal reporter's shield law. For example, as discussed in Section III above, the Free Flow of Information Act of 2013 included several exceptions for criminal conduct.<sup>158</sup> Section 3 specifically excepts information “obtained during the course of, alleged criminal conduct by the covered journalist.”<sup>159</sup>

The section does include a provision allowing for the journalist to receive the information, apparently if not otherwise involved in the criminal activity.<sup>160</sup> Section 4 includes a provision excepting (meaning the journalist does not have protection) situations to “prevent death, kidnapping, substantial bodily injury, sex offenses against minors, or incapacitation or destruction of critical infrastructure,” in a provision reminiscent of the Model Rules of Professional Conduct, Rule 1.6(b).<sup>161</sup> Section 5 includes a national security exception, similar to Section 4, but oriented to “prevent terrorist activity or harm to the national security.”<sup>162</sup> Ultimately, the goal is to draft a law that

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<sup>154</sup> S. 987, 113th Cong., § 11(1)(A) (2013).

<sup>155</sup> *Id.*

<sup>156</sup> *Branzburg v. Hayes*, 408 U.S. 665, 682 (1972).

<sup>157</sup> See, e.g., John T. White, Comment, *Smoke Screen: Are State Shield Laws Really Protecting Speech or Simply Providing Cover for Criminals Like the Serial Arsonist?*, 33 ARIZ. ST. L.J. 909, 909–10 (2001) (discussing the case of a reporter attempting to shield the identity of a serial arsonist after assuring confidentiality prior to an interview).

<sup>158</sup> See S. 987 §§ 3–5.

<sup>159</sup> *Id.* § 3.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* § 4; MODEL RULES OF PROF'L CONDUCT r. 1.6(b) (Am. Bar Ass'n 1983).

<sup>162</sup> S. 987 § 5.

has clear enough boundaries to prevent the unintentional side effect of immunizing criminal activity.<sup>163</sup>

### C. *Deficits of State Shield Laws*

There are many potential approaches for states to implement a reporter's shield law, such as the approaches discussed above,<sup>164</sup> but each has many challenges and deficits related to applicability, uniformity, and complexity.<sup>165</sup> One such problem is that the absence of a federal shield law has led to the states each pursuing their own approach (or lack thereof), which results in great disparity in protection from state to state.<sup>166</sup> Further, the state shield laws examined herein did not seem to have broad application to citizen-journalists, bloggers, or the like.<sup>167</sup> Moreover, the state laws have arguably distinct applicability depending on whether they are found in the evidentiary code, rules of procedure, or other places in the state code.<sup>168</sup> For example, the New York provision, as discussed above, also applies to actions before an agency,<sup>169</sup> but does the California evidentiary privilege? Importantly, state shield laws simply do not protect journalists in federal court, where—especially with regard to national security—prosecution or subpoena may be most likely to occur.<sup>170</sup>

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<sup>163</sup> See Michelle C. Gabriel, *Plugging Leaks: The Necessity of Distinguishing Whistleblowers and Wrongdoers in the Free Flow of Information Act*, 40 LOY. U. CHI. L.J. 531, 554 (2009) (emphasizing that a federal shield law should not protect criminal activity); see generally Michael D. Saperstein, Jr., *Federal Shield Law: Protecting Free Speech or Endangering the Nation?*, 14 COMM.LAW CONSPECTUS 543 (2006) (examining *Branzburg*).

<sup>164</sup> See discussion *supra* Section III.A.

<sup>165</sup> See Joshua Rich, Comment, *New Media and the News Media: Too Much Media*, LLC. v. *Hale and the Reporter's Privilege in the Digital Age*, 45 LOY. L.A. L. REV. 963, 965–66, 976–80 (2012) (noting multiple definitions made apparent in a state-centric approach); see generally Paula D. Salinger, *California's Media Shield Law: Is it Possible to Simultaneously Protect the Free Flow of Information and Due Process Rights?*, 32 MCGEORGE L. REV. 801 (2001) (discussing the evolution of Section 1070 of the California Evidence Code).

<sup>166</sup> See, e.g., Caroline Lynch Pieroni, Note, *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, 811–16 (2009) (discussing challenges with states having disparate shield laws).

<sup>167</sup> See generally Amy Bauer, Note, *Blogging on Broken Glass: Why the Proposed Free Flow of Information Act Needs a Specific Test for Determining when Media Shield Laws Apply to Bloggers*, 10 MINN. J.L. SCI. & TECH. 747 (2009) (examining the applicability of the 2009 version of the Free Flow of Information Act to bloggers).

<sup>168</sup> See *id.*

<sup>169</sup> N.Y. CIV. RIGHTS LAW § 79-h(d) (McKinney 2018).

<sup>170</sup> See generally U.S. CONST., art. VI, cl. 2; see also Anthony L. Fargo, *Analyzing Federal Shield Law Proposals: What Congress Can Learn from the States*, 11 COMM. L. & POL'Y 35 (2006) (discussing application of state shield laws and the lack of statutory protection in federal courts).

## V. RECOMMENDATIONS

Given these obstacles and the record of failure in achieving a federal reporter's shield law in the 2007, 2009, and 2013 evolutions, a solution is needed that is relatively simple to apply, but more importantly, can hope to gain bipartisan support.<sup>171</sup> In order to do so, there should be three qualities: a threshold determination of what constitutes a journalist, a narrowly defined scope of the protection, and an explicit carve out for criminal behavior.

### A. *Threshold Determination of What Constitutes a Journalist*

Given the Supreme Court's rationale in *Branzburg*,<sup>172</sup> and the previous failed attempts at the Free Flow of Information Act,<sup>173</sup> the threshold determination of what a journalist is needs to be clear and workable. The previous attempts to make this determination appear to have failed because of a cobbled together definition with criteria ranging from whether the individual is employed by the right type of organization to what intent the individual has at the time of the activity in question. These definitions are probably too complicated and likely focused on the wrong issue if they focus on the individual's employment. Rather, the law should be drafted such that the dispositive criteria are the intent of the individuals (why they are doing the activity), and whether the individual adheres to an identifiable journalistic ethic.<sup>174</sup> The intent behind these two criteria is that it will tend to automatically include those we think of as traditional journalists (i.e. writers for the *New York Times*, correspondents for CNN, etc.), but also provide a path of inclusion for *conscientious* bloggers or citizen-journalists. Whereas it may not include BuzzFeed, when behaving as discussed above, it could certainly include a blogger who intends to behave like a "journalist."<sup>175</sup> In other words, the protection applies to those who behave in the way we would expect a journalist to behave. This is important because it provides the type of accountability that is desirable given the scope of protection in this proposal. Once the protected individuals are established, it remains to establish the scope of the protection.

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<sup>171</sup> See discussion *supra* Section III.C.

<sup>172</sup> *Branzburg v. Hayes*, 408 U.S. 665 (1972).

<sup>173</sup> See discussion *supra* Section III.C.

<sup>174</sup> See, e.g., *SPJ Code of Ethics*, *supra* note 21.

<sup>175</sup> See Ember & Grynbaum, *supra* note 25.



### B. *Scope of Protection*

The protection provided for journalists, as defined above, should be narrow but nearly absolute. This configuration will tend to give journalists, and thus the citizenry, a uniform expectation of what it means to talk to the press in a confidential manner. To that end, the protection should be nearly absolute, allowing for very specific exceptions that prevent specific serious harms (as outlined above in the proposed Free Flow of Information Act of 2013<sup>176</sup>). The law should provide a basic protection for the journalist against the need to reveal his or her sources. That is the primary protection. The law should be narrowly drawn in order to only accomplish this goal. Further, the law should be a combination of an evidentiary privilege and a broader law. To that end, the law should be drafted similarly to the New York Section 79-h, but probably also implement an evidentiary privilege as seen in the California version. This dual-application of the protection can achieve the goal of effectively shielding properly defined journalists in the narrow set of circumstances intended.

### C. *No Immunity for Criminal Prosecution*

Lastly, it is most important to note that the reporter's shield law should be carefully drafted so as not to have the effect of immunizing criminality. As discussed above, there are a number of ways that criminality could manifest itself, but to make this point, consider the case of an individual claiming to be an intelligence community whistleblower who indiscriminately discloses classified information (leaks in violation of the Espionage Act) to a blogger (who behaves like a journalist and would meet the proposed definition). Further assume, *arguendo*, that the blogger reasonably believes that the information he or she has been given (which includes documents) is properly classified as United States Government documents. If the blogger, operating in accordance with an articulated journalistic code of ethics, elects to report about the fact of the disclosures, but upon demand of the United States Government, and an appropriate finding by a federal court, returns the documents at issue to the United States Government, then the proposed protections should shield the reporter from either being prosecuted for possession of the documents (since they were immediately returned after the court's finding) or compelled to disclose the source of the information and documents. The shield law should absolutely not prevent prosecution of the underlying source; it should simply prevent the executive branch from being able to "annex the journalistic profession as an investigative arm

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<sup>176</sup> S. 987, 113th Cong. (2013).

of government”<sup>177</sup> in order to reveal its “confidential” sources as aid to prosecution.<sup>178</sup>

## VI. CONCLUSION

The time for a federal shield law has come. This proposal seeks to acknowledge the imperative of freedom of the press while balancing the keen government interest in protecting national security. The issue of protections that ought to be afforded to journalists has been obscured on two metrics. First, in the context—and name—of national security, the Government has increasingly powerful (if not effective) tools designed to root out or prosecute individuals with the apparent ability to enlist the press as an investigative arm by compelling journalists to disclose sources. It is the federal government and federal courts that have the most power, and therefore, state law simply cannot sufficiently guard the diligent journalist. Second, given the proliferation of internet communication and the ease by which one purported journalist can reach massive audiences, it becomes increasingly difficult to adequately define “journalist,” but increasingly important in order to effectuate adequate protections. Nonetheless, many states have endeavored to do so with state shield laws. And the fact that such an overwhelming majority of states have endeavored to enact shield laws certainly shows that there is a widespread and public desire for such protections. To that end, the proposed legislation would settle the door left open by *Branzburg* and settle many of the discussions opened by the scholars cited throughout this Article. Specifically, it would provide a clearly defined privilege for reporters that is predictable and consistent throughout its application across the country. Not only would these protections benefit the new industry, they would also accommodate the growing body of non-standard journalists and provide the government with a predictable and well-defined boundary in seeking to prevent leaks or prosecute spies and leakers.

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<sup>177</sup> *Branzburg*, 408 U.S. at 725.

<sup>178</sup> See Rosenbaum, *supra* note 9, at 1432, 1454, 1455–56 (discussing the government’s targeting of journalists in prosecutions and arguing for a federal shield law).