Texas A&M Law Review

Volume 7 | Issue 2

February 2020

The Press, National Security, and Civil Discourse: How a Federal Shield Law Could Reaffirm Media Credibility in an Era of "Fake News"

Jenna Johnson
Texas A&M University School of Law (Student), jennagillett@tamu.edu

COMMENTS

THE PRESS, NATIONAL SECURITY, AND CIVIL DISCOURSE: HOW A FEDERAL SHIELD LAW COULD REAFFIRM MEDIA CREDIBILITY IN AN ERA OF "FAKE NEWS"

*By: Jenna Johnson**

ABSTRACT

The Constitution expressly provides protection for the freedom of the press. Yet there is one area in which the press is not so free: the freedom to refuse disclosing confidential sources when subpoenaed by the federal government. Currently, there is no federal reporter's privilege. The Supreme Court has held the First Amendment provides no such protection, and repeated congressional attempts to codify a reporter's privilege in a federal shield law have failed.

Arguments against a shield law include national security concerns and the struggle to precisely define "journalist." Such concerns were evident in the most recently proposed shield law, the Free Flow of Information Act of 2017. This Comment advocates in favor of passing a federal shield law. Specifically, this Comment analyzes the Free Flow of Information Act of 2017 against the backdrop of a post-9/11 America where "fake news" runs rampant. Though far from perfect, the proposed law was a step toward balancing national security concerns with press freedom. Legislators can and should strike an effective balance between these two tensions by accurately defining terms like "national security" and "properly classified" to prevent government overreach. Finally, this Comment argues that a federal shield law is necessary to combat the recent national security concerns raised by "fake news" and thereby reaffirm media credibility.

TABLE OF CONTENTS

* J.D. Candidate, Texas A&M School of Law, May 2020. I would like to thank my advisor, Professor Lisa Rich, for her advice, edits, and encouragement throughout the writing of this Comment (and beyond). I would also like to thank my mother, Julie Gillett, and my husband, Garrett Ross, for their gracious sacrifice and patience during law school. In addition, thank you to my friends in the media industry and to my mentors who sparked my passion about this topic, including: Professor Edward Julbe, Professor Boriana Treadwell, and Dr. Samuel Terilli.

DOI: https://doi.org/10.37419/LR.V7.I2.4

I. Introduction

"I admit that I do not feel toward the freedom of the press that complete and instantaneous love which one accords to things by their nature supremely good. I love it more for considering the evils it prevents than on account of the good it does." –Alexis De Tocqueville[1]

In an era of media distrust and "fake news," yet another proposal for a federal shield law languished and died in Congress.[2] If it had passed, the Free Flow of Information Act of 2017 would have provided reporters a qualified privilege to refuse to reveal confidential sources if subpoenaed by the government.[3] Forty-nine states and the District of Columbia currently provide some form of a reporter privilege either by statute or judicial decision.[4] Yet Congress has repeat-

1. Michael Schudson, *Why Democracies Need the Unlovable Press*, *in* Freeing the Presses: The First Amendment in Action 73, 73 (Timothy E. Cook ed., 2005).
2. Free Flow of Information Act of 2017, H.R. 4382, 115th Cong. (2017).
3. *Id.*
4. Anthony Lewis, Freedom for the Thought That We Hate 98 (2007).

edly failed to codify a federal privilege, and federal courts have issued conflicting rulings about its existence and scope.[5]

Given the lack of a federal reporter privilege or "shield law," journalists must assert a First Amendment privilege to conceal their sources from compelled disclosure.[6] This assertion is premised on the assumption that forced disclosure of sources and information creates a "chilling effect" on the flow of news.[7] The threat of disclosure may prevent sources from speaking to journalists, thus impeding the information reaching the public.[8]

The debate surrounding a federal shield law is not new, but the substantial number of federal subpoenas issued to reporters since the turn of the century has reinvigorated the debate.[9] The most notable example is the 2005 incarceration of *New York Times* reporter Judith Miller, who spent eighty-five days in jail after refusing to reveal her source in a federal grand jury investigation of a CIA leak.[10] Again, in 2011, the government attempted to subpoena *New York Times* reporter James Risen.[11] Risen was subpoenaed to name the CIA agent who acted as a key source for his book: *State of War: The Secret History of the CIA and the Bush Administration*.[12] The shield law debate was revived again in 2018 when federal authorities seized the emails

5. *Shielding Sources: Safeguarding the Public's Right to Know: Hearing on H.R. 4283 Before the Joint Subcomm. on Intergovernmental Affairs & Subcomm. on Healthcare, Benefits, & Admin. Rules of the H. Comm. on Oversight & Gov't Reform*, 115th Cong. 12–14 (2018) [hereinafter *Lee Levine Subcommittee Hearing Statement*] (statement of Lee Levine, Senior Counsel, Ballad Spahr, LLP).

6. *See* LEWIS, *supra* note 4, at 88.

7. Generally, an activity causes a "chilling effect" when it deters some type of First Amendment activity. Donna M. Murasky, *The Journalist's Privilege:* Branzburg *and Its Aftermath*, 52 TEX. L. REV. 829, 851–52 (1974). For example, the activity may deter sources from coming forward with information or deter journalists from pursuing or reporting information. *Id.* at 852. For further discussion on the "chilling effects" caused by compelled disclosure, see *id.*; *see also* Laurence B. Alexander & Ellen M. Bush, *Shield Laws on Trial: State Court Interpretation of the Journalist's Statutory Privilege*, 23 J. LEGIS. 215, 228 (2015).

8. Geoffrey R. Stone, *Why We Need a Federal Reporter's Privilege*, 34 HOFSTRA L. REV. 39, 41–42 (2005).

9. *Lee Levine Subcommittee Hearing Statement*, *supra* note 5, at 9.

10. *Judith Miller Freed From Jail After Agreeing to Testify*, REPS. COMMITTEE FOR FREEDOM OF THE PRESS (Sept. 30, 2005), https://www.rcfp.org/browse-media-law-resources/news/judith-miller-freed-jail-after-agreeing-testify [https://perma.cc/QDE5-VHZR]; *see generally In re* Grand Jury Subpoena, Judith Miller, 438 F.3d 1141, 1144 (D.C. Cir. 2005).

11. *See* Sarah Ellison, *What Was New York Times Reporter James Risen's Seven-Year Legal Battle Really For?*, VANITY FAIR (Mar. 17, 2015, 12:00 PM), https://www.vanityfair.com/news/2015/03/james-risen-anonymous-source-government-battle [https://perma.cc/V2DT-WJFA].

12. After the Supreme Court declined to hear Rosen's appeal, the Attorney General modified the subpoena to ask only certain facts about the book, not identification of sources. *See id.*

and phone records of a former Senate Intelligence staffer who worked with *The New York Times*.[13]

These examples of jailing reporters and issuing federal subpoenas also form part of the post-9/11 narrative of media treatment.[14] In the immediate aftermath of 9/11, the press unearthed several governmental abridgements of civil liberties that were classified as national security secrets.[15] The government responded by "prob[ing] the weaknesses of free press doctrine" for restrictions on publishing such information.[16] As such, subpoenas reflect the difficulty in balancing the government interest in preserving national security secrets with the press's interest in disseminating matters of public concern.[17]

Balancing these interests is further complicated by the "fake news" phenomenon that exploded during the 2016 presidential election, in which fabricated news stories circulated through social media.[18] In a Pew Research poll studying the effect of fake news, 64% of Americans thought fake news caused confusion as to basic current events.[19] Besides public confusion surrounding deceptive stories, the term "fake news" has also evolved into a political weapon wielded by the executive to express disdain for the press.[20] For example, in August 2018, President Trump took to Twitter to criticize the "fake news media," tweeting:

> There is nothing that I would want more for our Country than true FREEDOM OF THE PRESS. The fact is that the Press is FREE to write and say anything it wants, but much of what it says is FAKE NEWS, pushing a political agenda or just plain trying to hurt people. HONESTY WINS![21] / THE FAKE NEWS MEDIA IS THE

13. Carolyn McAttee Certin & Kevin Johnson, *Former Senate Staffer Indicted; Feds Seize 'N.Y. Times' Reporter's Phone, Email Records in Leak Probe*, USA TODAY (June 7, 2018, 10:23 PM ET), https://www.usatoday.com/story/news/politics/2018/06/07/feds-seize-new-york-times-reporters-phone-email-records-leak-probe/683548002/ [https://perma.cc/Y63S-CNDE].

14. Keith Werhan, *Rethinking Freedom of the Press After 9/11*, 82 TUL. L. REV. 1561, 1592 (2008).

15. *Id.* at 1567–68.

16. *Id.* at 1568.

17. *See id.* at 1567–69.

18. Mike Wendling, *The (Almost) Complete History of "Fake News"*, BBC NEWS (Jan. 22, 2018), https://www.bbc.com/news/blogs-trending-42724320 [https://perma.cc/U7Y2-QSHW].

19. Michael Barthel, Amy Mitchell, & Jesse Holcomb, *Many Americans Believe Fake News is Sowing Confusion*, PEW RES. CTR. (Dec. 15, 2016), http://www.journalism.org/2016/12/15/many-americans-believe-fake-news-is-sowing-confusion/ [https://perma.cc/L3AA-2ZJP].

20. Rebecca Morin, *Trump Labels Media the 'Opposition Party' as Newspapers Push Back En Masse*, POLITICO (Aug. 16, 2018, 9:52 AM EDT), https://www.politico.com/story/2018/08/16/trump-calls-media-fake-news-as-newspapers-push-back-against-claim-779555 [https://perma.cc/7QLU-A77Z].

21. President Donald Trump (@realDonaldTrump), TWITTER (Aug. 16, 2018, 7:10 AM), https://twitter.com/realdonaldtrump/status/1030094399362007040?lang=en [https://perma.cc/5G9U-5SAG].

> OPPOSITION PARTY. It is very bad for our Great Country. . . .BUT WE ARE WINNING![22]

Political rhetoric aside, fake news also presents national security concerns. Disinformation campaigns created to "destabiliz[e] states through the subversion of societ[y]"—such as those alleged to have been carried out by Russia and China—add a problematic layer to the issue.[23] It is not entirely clear whether public distrust in the media is a symptom of fake news, a contributing factor, or perhaps a combination of both.[24] Regardless, the fake news phenomenon has underscored the public's diminishing trust in the media as an institution and called into question the role of the press in American society.[25]

This Comment advocates for a federal shield law in a post-9/11 and fake news-ridden America. Specifically, it will explore balancing the government's interest in national security with adoption of a shield law and argue that a shield law will help reaffirm trust in the media. Part II provides relevant background on the First Amendment and press privileges, the development of shield laws, and failed attempts at passing a federal shield law. Part III discusses how the changing nature of the news industry and fake news contribute to media skepticism and raise national security concerns. Part IV explores the historical pattern of curtailing First Amendment freedoms during war and the resulting press–government relationship. Part V analyzes the most recently proposed shield law to examine national security and media implications. Finally, Part VI assesses problems left unanswered by proposed federal shield laws and ultimately argues that a shield law can reaffirm media credibility.

II. The First Amendment and Reporter Privilege

A. *The First Amendment Freedom of the Press*

The Framers of the Constitution and Bill of Rights unquestionably considered the freedom of the press a pillar of democratic society and central to representative self-government.[26] Every proposal to the Bill

22. President Donald Trump (@realDonaldTrump), Twitter (Aug. 16, 2018, 5:50 AM), https://twitter.com/realdonaldtrump/status/1030074380397752320?lang=en [https://perma.cc/G2AH-XT6R].

23. Norman Vasu, Benjamin Ang, Terri-Anne, Teo, Shashi Jayakumar, Muhammad Faizal, & Juhi Ahuja, Fake News: National Security in the Post-Truth Era 5, 9–13 (2018), https://www.rsis.edu.sg/wp-content/uploads/2018/01/PR180313_Fake-News_WEB.pdf [https://perma.cc/3TGU-PD2B].

24. Mark Verstraete & Derek E. Bambauer, *Ecosystem of Distrust*, 16 First Amend. L. Rev. 129, 139 (2017).

25. Philip M. Napoli, *What if More Speech is No Longer the Solution? First Amendment Theory Meets Fake News and the Filter Bubble*, 70 Fed. Comm. L.J. 55, 57 (2018).

26. Lucas A. Powe, Jr., The Fourth Estate and the Constitution 50 (1991).

of Rights contained a press clause.[27] One such proposal, authored by James Madison, read, "and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable."[28] This proposed language evolved into the First Amendment Press Clause we know today: "Congress shall make no law . . . abridging the freedom of speech, or of the press."[29] It is clear from the plain language of the Amendment that the Framers intended for Congress to be "completely without power to pass laws that would abridge . . . freedom of the press."[30] Furthermore, the primary force behind the First Amendment was to "guard[ ] against breaches of trust by public officials."[31] The prevailing thought was that protecting free expression would provide an essential checking function on the government.[32]

Though the First Amendment carved out the right of press freedom, it did not address the *scope* of that freedom.[33] And since the First Amendment's passage, it is precisely the scope of this freedom that the press and the courts have attempted to define.[34] The Supreme Court diligently upheld press rights in the forms of freedom from government prior restraints[35] and from penalties for published content.[36] However, the Court has been far more circumspect regarding press access to information and a claimed reporter's privilege.[37]

B. *Development of Reporter's Privilege and Shield Laws*

Generally, a reporter's privilege is "the legal right to maintain confidentiality" of sources and information without fear of punishment.[38] This privilege protects journalists from having to reveal their sources as part of compulsory proceedings and "facing the contempt citation that might otherwise result" from refusal.[39]

---

27. *Id.* at 47.
28. *Id.* at 45.
29. U.S. CONST. amend. I.
30. POWE, JR., *supra* note 26, at 47.
31. Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. BAR FOUND. RES. J. 521, 527 (1977); Letter from Thomas Jefferson to George Washington (Sept. 9, 1792) ("No government ought to be without censors: and where the press is free, no one ever will.").
32. Blasi, *supra* note 31, at 527.
33. POWE, JR., *supra* note 26, at 48; *see also* Thomas Jefferson, Second Inaugural Address (Mar. 4, 1805) ("[T]he Press, confined to truth needs no other legal restraint; the public judgment will correct false reasonings and opinions, on a full hearing of all parties; and no other definite line can be drawn between the inestimable liberty of the press, and its demoralising licentiousness.").
34. *See* POWE, JR., *supra* note 26, at 48.
35. *See* LEWIS, *supra* note 4, at 96 (citing Near v. Minnesota, 283 U.S. 697 (1931)).
36. *See id.* (citing N.Y. Times v. Sullivan, 376 U.S. 254 (1964)).
37. *Id.* Section II.C of this Comment is devoted to discussion of the Court's rejection of a constitutional federal reporter's privilege in its landmark decision, *Branzburg v. Hayes*. *See infra* Section II.C.
38. POWE, JR., *supra* note 26, at 179.
39. RonNell Andersen Jones, *Rethinking Reporter's Privilege*, 111 MICH. L. REV. 1221, 1223–24 (2013).

Forty-nine states and the District of Columbia have adopted some form of a reporter's privilege either by a judicial decision or by statutes known as "shield laws."[40] State shield laws vary widely in their scope of protection,[41] but most fall into one of two categories: absolute privilege or qualified privilege.[42] Absolute privilege affords journalists broad protection to safeguard their sources. Fourteen states and the District of Columbia provide some form of absolute privilege or near absolute privilege.[43] Oregon, for example, has adopted an absolute privilege by statute, which provides that a reporter is not compelled to reveal sources or information unless there is probable cause to believe the journalist himself has committed or is about to commit a crime.[44]

A qualified privilege, by contrast, sets forth conditions under which newsgatherers may keep certain sources and information confidential.[45] For example, North Carolina grants journalists a "qualified privilege against disclosure in any legal proceeding of any confidential or nonconfidential information, document, or item obtained or prepared while acting as a journalist."[46] To overcome this privilege and compel disclosure, the party requesting the information must meet a three-part test demonstrating that the information (1) is "relevant and material" to the legal proceeding; (2) "cannot be obtained from alternate sources;" and (3) is "essential to the maintenance of a claim or defense."[47] Moreover, North Carolina denies this privilege for any information obtained as a result of the reporter witnessing or observing "criminal or tortious conduct" firsthand.[48]

State shield laws vary in amount of protection, but all recognize the societal value in an autonomous press free from "forced court testimony."[49] Many states passed shield laws as a result of the Supreme Court's decision in *Branzburg v. Hayes*.[50] The *Branzburg* decision remains a leading example of the institutional press "challeng[ing] various manifestations of governmental and social orthodoxy" during the Civil Rights and Vietnam War era.[51]

---

40. LEWIS, *supra* note 4, at 98.

41. *Lee Levine Subcommittee Hearing Statement*, *supra* note 5, at 15.

42. *See* Stone, *supra* note 8, at 49.

43. Bill Kensworthy, *State Shield Statutes and Leading Cases*, FREEDOM FORUM INST., https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-the-press/state-shield-statutes-leading-cases/ (last updated Apr. 2011) [https://perma.cc/J9GB-GB48].

44. OR. REV. STAT. § 44.520 (2017).

45. *See* Alexander & Bush, *supra* note 7, at 218.

46. N.C. GEN. STAT. § 8-53.11(b) (2017).

47. *Id.* § 8-53.11(c).

48. *Id.* § 8-53.11(d).

49. AMY GAJDA, THE FIRST AMENDMENT BUBBLE: HOW PRIVACY AND PAPARAZZI THREATEN A FREE PRESS 151 (2015).

50. *See infra* Section II.D; Branzburg v. Hayes, 408 U.S. 665, 689 n.27 (1972).

51. Blasi, *supra* note 31, at 525.

C. Branzburg*: A Supreme Court Blow to a Federal Reporter's Privilege in the Grand Jury Context*

1. Background

In its landmark decision, *Branzburg v. Hayes*, the Supreme Court expressly rejected the argument that the First Amendment grants a federal reporter's privilege in the context of a grand jury subpoena.[52] Notably, however, the Court did not find that newsgathering lacked First Amendment protection altogether.[53]

The *Branzburg* decision consolidated three cases[54] involving journalists who refused to reveal confidential sources when subpoenaed to testify in court. In the first case, Kentucky reporter Paul Branzburg wrote two articles for a daily paper in Louisville: one detailing his observations of two young men synthesizing hashish from marijuana, and one as a "comprehensive survey of the 'drug scene' in Frankfort, [Kentucky] . . . ."[55] Branzburg was subpoenaed separately for each article, and both times he refused to identify his sources on the grounds that he was entitled to a First Amendment reporter's privilege.[56] Because Branzburg had promised his sources confidentiality, he argued that naming them would destroy his relationships with those sources and greatly damage his reputation as a reporter.[57] The Kentucky Court of Appeals denied his applications seeking writs of mandamus and rejected Branzburg's claim of a First Amendment reporter's privilege.[58]

The second case, *In re Pappas*, involved a reporter–photographer assigned to report on civil disturbances in New Bedford, Connecticut, including an anticipated police raid of the Black Panthers' headquarters.[59] The Black Panthers allowed Pappas to enter its headquarters in exchange for his agreement not to disclose anything except the antici-

52. *Branzburg*, 408 U.S. at 665.

53. *Id.* at 681 ("Nor is it suggested that newsgathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated.").

54. Some scholars have noted the peculiarity in the fact that the Supreme Court lumped all three cases together and "treated them as indistinguishable, even though Branzburg had clearly witnessed the commission of a crime, whereas Caldwell and Pappas had not." POWE, JR., *supra* note 26, at 180.

55. *Branzburg*, 408 U.S. at 667–69.

56. *Id.* at 668–69.

57. *Id.* at 669–70.

58. *Id.* at 670. Specifically, the Kentucky Court of Appeals "tacitly" rejected Branzburg's claim pursuant to the Kentucky Constitution, and found that Kentucky's statutory reporter privilege did not permit Branzburg to refuse to testify about his personal observations. *Id.* at 669. The court also explicitly rejected Branzburg's claim to a First Amendment privilege, citing the "generally recognized rule that the sources of information of a newspaper reporter are not privileged under the First Amendment." *Id.* at 670 (internal quotations and citations omitted).

59. *Id.* at 672.

pated police raid.[60] The police raid never occurred, so Pappas never published the article.[61] When later summoned by a grand jury, Pappas asserted a First Amendment "privilege to protect confidential informants and their information" and refused to answer questions about events that occurred within the headquarters.[62] The Supreme Judicial Court of Massachusetts rejected a First Amendment privilege, instead preferring the public's "right to every man's evidence" over countervailing interests.[63]

In the third case, *United States v. Caldwell*, *New York Times* reporter Earl Caldwell was subpoenaed to testify before a grand jury relating to his coverage of the Black Panther Party.[64] Caldwell moved to quash the subpoenas.[65] He argued that his testimony would "driv[e] a wedge of distrust and silence between the news media and the militants."[66] The Ninth Circuit Court of Appeals concluded that the First Amendment "provided a qualified testimonial privilege to newsmen" to refuse to testify, absent compelling reasons from the government requiring such testimony.[67] The Supreme Court granted certiorari for all three cases.[68]

2. *Branzburg* Majority

The majority opinion, authored by Justice White, rejected the idea that compelled testimony would exert an unconstitutional burden on newsgathering.[69] The Court did not eliminate the potential for reporter privilege altogether, however. Framing the issue narrowly, the majority considered "the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime."[70]

In examining the fairness of forced testimony, the Court recognized several circumstances in which "valid laws serving substantial public interests" could be enforced against the press.[71] Specifically, the Court noted that the press was "regularly excluded" from grand jury proceedings, judicial conferences, meetings of official bodies, private organization meetings, crime scenes when the general public is excluded, and certain trials if press restrictions were necessary to assure the de-

60. *Id.*
61. *Id.*
62. *Id.* at 672–73.
63. *Id.* at 674 (internal quotations and citations omitted).
64. *Id.* at 675–76.
65. *Id.* at 676 (internal quotations and citations omitted).
66. *Id.* (internal quotations and citations omitted).
67. *Id.* at 679.
68. *Id.* at 667, 671, 675, 679.
69. *Id.* at 682.
70. *Id.*
71. *Id.* at 682–83.

fendant a fair trial.[72] The Court also acknowledged that although some states at that time had recognized a reporter's privilege, many had declined to do so, and federal legislation had been introduced but never enacted.[73] In a pragmatic assessment, the Court realized the potential for criminals to abuse a reporter's privilege.[74] Criminal confidential informants' "preference for anonymity" was "presumably a product of their desire to escape criminal prosecution."[75] The Court found this motive undeserving of constitutional protection.[76]

The Court emphasized the constitutionally mandated role a grand jury played in effective law enforcement.[77] It found no basis that this government interest was "insufficient to override the consequential, but uncertain, burden on news gathering . . . ."[78] The petitioner reporters and multiple amici submitted briefs asserting that forced testimony would radically change the news industry by creating a chilling effect on the flow of information.[79] The Court expressed substantial doubt about the premise, noting it "remain[ed] unclear how often and to what extent inform[ants] [were] actually deterred from furnishing information" when reporters were forced to testify.[80] According to the Court, the "symbiotic" relationship between the press and confidential informants was unlikely to be harmed by threat of a subpoena.[81] The Court also observed that the press had "flourished" without "constitutional protection for press informants."[82] In addition, the Court highlighted that the qualified privilege claimed by petitioners would not solve the purported "chilling effect," because confidential informants would still run the risk of exposure whenever a judge deemed the disclosure justified.[83]

Finally, the Court noted that even if it were to accept the reporters' "chilling effect" argument, the public interest in possible future news did not outweigh the public interest in prosecuting criminal activity.[84] Ultimately, the Supreme Court declined to interpret the First Amendment as granting journalists "a testimonial privilege that other citizens

72. *Id.* at 684–85.
73. *Id.* at 689–90. For example, the Court noted that seventeen states had a form of privilege and federal legislation had been introduced in 1959, 1963, 1970, and 1971 with no action. *Id.* at 689 nn.27–28.
74. *See id.* at 691.
75. *Id.*
76. *Id.* ("The preference for anonymity of those confidential informants involved in actual criminal conduct is presumably a product of their desire to escape criminal prosecution, and this preference, while understandable, is hardly deserving of constitutional protection.").
77. *Id.* at 690.
78. *Id.*
79. *See id.* at 693.
80. *Id.*
81. *Id.* at 694.
82. *Id.* at 698–99.
83. *Id.* at 702.
84. *Id.* at 695.

[did] not enjoy."[85] As far as grand jury proceedings were concerned, "the public's right to evidence of [a] crime trumped First Amendment newsgathering freedoms."[86]

3. Justice Powell's Concurrence

Numerous state and federal courts interpreted Justice Powell's concurrence as a modification of the majority opinion—resulting in widespread confusion.[87] In his concurrence, Justice Powell emphasized the "limited nature" of the majority decision.[88] He specifically noted that members of the press were not "without constitutional rights" with respect to newsgathering and safeguarding sources.[89] He indicated that members of the press could prevail if they believed that a grand jury investigation was not being conducted in "good faith" or bore only a "tenuous relationship" to the reporter's work.[90] Finally, Justice Powell advocated that the "asserted claim to privilege should be judged on its facts" and courts should balance societal interests with constitutional interests on a case-by-case basis.[91]

Some courts have interpreted the "case-by-case" method advocated in the concurrence as authorizing a federal reporter's privilege in certain circumstances.[92] Differing interpretations have resulted in an inconsistent patchwork of federal circuit jurisprudence on the topic of reporter's privilege.[93]

4. *Branzburg* Dissent

Justice Stewart authored a strongly-worded dissent in *Branzburg*, in which Justice Brennan and Justice Marshall joined.[94] According to

85. *Id.* at 690.
86. GAJDA, *supra* note 49, at 201.
87. LEWIS, *supra* note 4, at 88.
88. Branzburg v. Hayes, 408 U.S. 665, 709 (1972) (Powell, J., concurring).
89. *Id.*
90. *Id.* at 710.
91. *Id.*
92. GAJDA, *supra* note 49, at 201. For example, in *United States v. Sterling*, the Fourth Circuit found no First Amendment privilege existed in the criminal context but recognized a privilege for civil cases. United States v. Sterling, 724 F.3d 482, 496–97 (4th Cir. 2013). That civil privilege could only be overcome by meeting a three-part test. *Id.* By contrast, the First Circuit recognizes a duty to "balance the potential harm to the free flow of information," and advocates for the "constitutionally sensitized balancing process stressed by Mr. Justice Powell." Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 596, 596 n.13 (1st Cir. 1980). The Second Circuit provides journalists a qualified privilege modeled on Justice Powell's three-part test. United States v. Treacy, 639 F.3d 32, 42 (2d Cir. 2011). Reporter's privilege in the Third Circuit is assessed on a "case-by-case basis." Coughlin v. Westinghouse Broad. & Cable Inc., 780 F.2d 340, 350, 350 n.14 (3d Cir. 1985) (Becker, J., concurring). The other circuits are similarly in conflict. *See Lee Levine Subcommittee Hearing Statement*, *supra* note 5, at 13–14.
93. GAJDA, *supra* note 49, at 201; *see also* LEWIS, *supra* note 4, at 88.
94. Blasi, *supra* note 31, at 595.

Justice Stewart, the majority opinion would allow state and federal authorities to "undermine the historic independence of the press by attempting to annex the journalistic profession as an investigation arm of government."[95] Justice Stewart recounted the indispensable value of a free press to self-government, noting that the Court had expressly held that the "right to publish is central to the First Amendment and basic to the existence of constitutional democracy."[96] He also noted judicial recognition of the right to gather news as a corollary of the right to publish, which implied a right of confidentiality between reporters and sources.[97] In particular, he stated that the press relied on confidential sources in order to "fulfill its constitutional mission."[98] Further, "unbridled subpoena power" would either deter sources from providing information, or effectively act as a prior restraint by deterring reporters from gathering and publishing information.[99]

Instead of focusing on the potential for abuse by criminals, Justice Stewart lamented that government informants would "be fearful of revealing corruption or other governmental wrongdoing" due to the threat of identification through compulsory processes.[100] He also noted the dilemma of a reporter choosing between his journalistic ethics and contempt of the court.[101] To balance the competing interests of the government and press, Justice Stewart suggested that a press privilege should protect reporters from compelled testimony until the government had advanced a "clear showing of a compelling overriding national interest that [could not] be served by any alternative means."[102]

D. Branzburg *Aftermath and Federal Shield Law Attempts*

In the aftermath of *Branzburg*, ten more states quickly passed shield laws.[103] State-by-state enactment of statutory shield laws continued, increasing from seventeen states at the time of the *Branzburg* decision[104] to thirty-nine states and the District of Columbia at present.[105] However, a shield law on the federal level floundered.

---

95. *Branzburg*, 408 U.S. at 725 (Stewart J., dissenting).
96. *Id.* at 726–27 (internal citations omitted).
97. *Id.* at 728.
98. *Id.* at 728–29.
99. *Id.*
100. *Id.* at 731.
101. *Id.* at 732.
102. *Id.* at 747.
103. Nathan Siegel, *Our History of Media Protection*, WASH. POST (Oct. 3, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/10/02/AR2005100201237.html [https://perma.cc/8K8Q-XZM7].
104. *Branzburg*, 408 U.S. at 689 n.27 (noting seventeen states had passed a shield law).
105. Out of the forty-nine states that provide a reporter's privilege, thirty-nine of them provide it through statutory enactment rather than through judicial decision. *See* Kensworthy, *supra* note 43.

In September 1972, six federal shield law bills were introduced in Congress, and sixty-five were introduced the following year.[106] At least six more bills were introduced between 1974 and 1987.[107] None of them passed. More modernly, a federal shield law has been introduced in Congress nearly every session since 2005, each with varying degrees of progression in the enactment process.[108] The Free Flow of Information Act of 2007 in particular garnered significant media attention with House passage[109] before ultimately dying in the Senate.

Various obstacles have prevented the passage of a federal shield law. One of the main impediments, as noted in *Branzburg*, is the practical difficulty in assessing whom a federal shield law would cover.[110] Indeed, Congress has struggled to articulate an acceptable definition of "journalist," attributable to the changing nature of the news industry that includes citizen journalists and bloggers.[111] Congress understandably does not wish to protect those "who publish without hesitation, reflection, or a sense of ethics."[112] However, some scholars stress that the definitional quandary may be more daunting in theory than it is in practice.[113] In the majority of free press cases, the claimant fits squarely "within anyone's definition of 'the press.'"[114] Nonetheless, the debate over who constitutes a "journalist" poses difficult questions given the diversified state of the modern media.

III. Evolution of the American Press

A. *From Pamphlets to Tweets: The Changing Nature of News Media*

Despite the clear importance of press freedom to the Framers, many media scholars note that the Framers' understanding of the "press" likely differed substantially from the institutionalized "press"

106. *A Short History of Attempts to Pass a Federal Shield Law*, Reps. Committee for Freedom of the Press, https://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-fall-2004/short-history-attempts-pass-f (last visited Sept. 22, 2019) [https://perma.cc/7TJH-U65V].

107. *See id.*

108. *See, e.g.*, H.R. 2102, 110th Cong. (2007) (died in the Senate); H.R. 985, 111th Cong. (2009); H.R. 2932, 112th Cong. (2011) (introduced but never passed); H.R. 1962, 113th Cong. (2013).

109. Elizabeth Williamson, *House Passes Bill to Protect Confidentiality of Reporters' Sources*, Wash. Post (Oct. 17, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/10/16/AR2007101601298.html [https://perma.cc/BD3S-4GCA].

110. Branzburg v. Hayes, 408 U.S. 665, 704 (1972) ("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 paper who utilizes the latest photocomposition methods.").

111. Gajda, *supra* note 49, at 152.

112. *Id.*

113. Werhan, *supra* note 14, at 1601.

114. *Id.* at 1600–01.

we know today.[115] The colonial era press was organized to engage in the business of printing products from newspapers to almanacs but not in the "practice of journalism" associated with the modern press.[116] During the Bill of Rights drafting, the institutionalized "press" was "organized through business and political linkages" rather than as a profession in and of itself.[117] Although free from direct government control, the press was driven by political factions to print opinion politics.[118] Thus, some historians argue the "freedom of the press," as the Framers understood it, perhaps "referred to the freedom of people to publish their views" via the printing "press" rather than the "freedom of journalists to pursue their craft."[119]

The dawn of the Industrial Revolution and the invention of the "penny press" in the mid-1800s facilitated mass-circulation—which made the news business more profitable.[120] The late nineteenth century saw the rise of "Yellow Journalism," a period of sensationalist news containing propaganda and occasionally even "outright factual errors."[121] Some scholars note the parallels between early newspaper rivalries using salacious stories to attract readers and the fake news or "click-bait" headlines of today.[122]

Eventually, the press began to shift its focus from partisan politics toward objectivity.[123] Professionalism grew during the Progressive Era of the 1920s with the rise of professional journalism associations and codes of journalistic ethics.[124] The advent of radio and television accentuated the transition to the concept of "undifferentiated mass communication."[125] In the 1960s and 1970s, the press fully demonstrated its capability as a "government watchdog." Journalists were praised for reporting on government scandals like Watergate and revealing the real costs of the Vietnam War.[126]

From roughly the 1920s until the Internet era, the concept of an institutionalized media with fairly discernable definitions for the

115. Craig M. Freeman, *Introduction*, *in* Freeing the Presses: The First Amendment in Action, *supra* note 1, at 29, 29.

116. Charles E. Clark, *The Press the Founders Knew*, *in* FREEING THE PRESSES: THE FIRST AMENDMENT IN ACTION, *supra* note 1, at 33, 40.

117. Timothy E. Cook, *Freeing the Presses: An Introductory Essay*, *in* FREEING THE PRESSES: THE FIRST AMENDMENT IN ACTION, *supra* note 1, at 1, 12.

118. Freeman, *supra* note 115, at 29.

119. David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 446–47 (2002).

120. *Id.* at 447; David S. Allen, 34 FREE SPEECH Y.B. 49, 49 (1996).

121. *Yellow Journalism: The "Fake News" of the 19th Century*, PUB. DOMAIN REV., https://publicdomainreview.org/collections/yellow-journalism-the-fake-news-of-the-19th-century/ (last visited Sept. 12, 2019) [https://perma.cc/M69C-BG3C].

122. *Id.*

123. Allen, *supra* note 120, at 50.

124. *Id.*

125. Ralph Izard, *Introduction*, *in* FREEING THE PRESSES: THE FIRST AMENDMENT IN ACTION, *supra* note 1, at 109.

126. GAJDA, *supra* note 49, at 32.

"press" existed.[127] However, the "new media" of the late 1980s began to transform the media landscape.[128] In the nascent stages of the Internet, new platforms like personal delivery assistants and email changed the way people interacted with news.[129] In particular, the new media distinguished itself from traditional outlets "by the promise of offering greater openness and accessibility to those outside the political and media establishments," as well as by its tendency to defiantly "shun textbook journalistic norms in favor of entertainment values."[130] By the early 2000s, blogging and social media sites began to explode in popularity.[131] As more people engaged with these newer, more dynamic platforms, advertising revenue for traditional platforms started to decrease.[132] As a result, traditional media witnessed a national decline in the number of newspapers, television newsrooms, and job positions for professional journalists.[133]

Meanwhile, online news outlets and social media provided new opportunities for "citizen journalists,"[134] like bloggers, video-bloggers, and podcasters. This interactive system of personal and digital networks blurred the lines between what, and who, constituted the "media." Access to a computer or mobile phone could essentially transform anyone into a reporter.[135] As W. Lance Bennett suggests, the current digital age is ironically "reminiscent of when printers published citizen broadsides at the time of the American Revolution—but on a far larger scale."[136] Today's blogger is the twenty-first century equivalent of a revolutionary-period "lonely pamphleteer."[137]

B. *The Era of Fake News and Civil "Discord"*

"Fake news," broadly defined, is the dissemination of inaccurate information, which predates both the Internet and social media.[138] However, the term itself did not enter the general vernacular until 2016. The fake news phenomenon originated in a small, Macedonian

127. *See* Diana Owen, *"New Media" and Contemporary Interpretations of Freedom of the Press*, *in* FREEING THE PRESSES: THE FIRST AMENDMENT IN ACTION, *supra* note 1, at 139, 139.
128. *Id.*
129. *Id.*
130. *Id.*
131. Irfan Ahmad, *The History of Social Media*, SOCIAL MEDIA TODAY (Apr. 27, 2018), https://www.socialmediatoday.com/news/the-history-of-social-media-infographic-1/522285/ [https://perma.cc/97BZ-X5VA].
132. Napoli, *supra* note 25, at 69 n.74.
133. *Id.*
134. *Id.*
135. W. Lance Bennet, *The Twilight of Mass Media News*, *in* FREEING THE PRESSES: THE FIRST AMENDMENT IN ACTION, *supra* note 1, at 111, 112.
136. *Id.*
137. Branzburg v. Hayes, 408 U.S. 665, 704 (1972); *see also* GAJDA, *supra* note 49, at 91.
138. Napoli, *supra* note 25, at 70.

town.[139] A group of people in that town registered at least 140 websites to publish stories that were completely fabricated.[140] The purpose behind employing such sensationalist strategies was to entice as many people as possible to click on the stories on social media, thus maximizing advertising revenue.[141] It was this get-rich-quick social media scheme that birthed the phrase "fake news."[142]

Though not the sole cause of fake news, social media's ability to allow instantaneous dissemination and sharing of information enhances the reach of false information.[143] In fact, the authors of a recent MIT study found that a "false story reaches 1,500 people six times quicker" than a true story.[144] But blaming digital social media for displacing traditional gatekeepers paints an incomplete picture.[145] Societal shifts may be equally, if not more, responsible.[146] Indeed, the MIT fake news study also confirmed that although bots[147] shared truthful stories and fabricated stories at the same rate, fake news spreads faster because *humans* were more likely to spread it.[148] This suggests a human inclination to engage with sensationalist stories or headlines and a corollary inability to distinguish between accurate and inaccurate information.[149]

Compounding the technological repercussions of fake news is the overlay of partisan politics. In January 2017, then-President-elect Trump used the term to refer to CNN reporter Jim Acosta and later exhibited a pattern of denouncing the "fake news media."[150] Rather than referring to wholly false information, however, President Trump politically commandeered the term to refer to any unfavorable cover-

139. Wendling, *supra* note 18.

140. *Id.*

141. *Id.*

142. *Id.*

143. *See* Napoli, *supra* note 25, at 69–70.

144. Robinson Meyer, *The Grim Conclusions of the Largest-Ever Study of Fake News*, THE ATLANTIC (Mar. 8, 2018), https://www.theatlantic.com/technology/archive/2018/03/largest-study-ever-fake-news-mit-twitter/555104/ [https://perma.cc/X6FW-C4SG].

145. Verstraete & Bambauer, *supra* note 24, at 132.

146. *Id.*

147. An internet "bot" is software designed to perform an automated task over the Internet. *Internet Bot*, TECHOPEDIA, https://www.techopedia.com/definition/24063/internet-bot (last visited Oct. 2, 2019) [https://perma.cc/9NXZ-AMQ6]. The term "bot" can also refer to automated social media accounts which disseminate "low-credibility articles" that later go "viral." Maria Temming, *How Twitter Bots Get People to Spread Fake News*, SCI. NEWS (Nov. 20, 2018, 11:00 AM), https://www.sciencenews.org/article/twitter-bots-fake-news-2016-election [https://perma.cc/Q5TB-JBA9].

148. Meyer, *supra* note 144 (emphasis added).

149. Much like the period of Yellow Journalism, fake news uses the human bias toward the sensationalist and fabricated as a business strategy. *See* Alexandra Samuel, *To Fix Fake News, Look to Yellow Journalism*, JSTOR DAILY (Nov. 29, 2016), https://daily.jstor.org/to-fix-fake-news-look-to-yellow-journalism/ [https://perma.cc/2RDY-6U3A].

150. Wendling, *supra* note 18.

age.[151] Notably, most unfavorable coverage of President Trump came from traditional network news organizations.[152] And although network news outlets are not necessarily the parties culpable for disseminating fake news,[153] some media theorists suggest that the continual use of the term has transformed the traditional media into the public scapegoat.[154] A 2018 Monmouth University poll tends to confirm this hypothesis, reporting that 77% of Americans think that mainstream media organizations and newspaper outlets report fake news.[155]

Besides fostering general confusion and distrust, fake news also poses its own national security concerns. Those who study fake news recognize that one type of fake news spreads falsehoods with the specific intent to undermine national security.[156] This can take the shape of state-sponsored disinformation campaigns.[157] In 2016, disinformation campaigns were allegedly propagated by Russia with the intent to "manipulate the democratic process" in the 2016 U.S. Presidential Election.[158]

Thus, from genuine concerns about inaccuracy and influence in social media to the politicization of the term "fake news," the institutionalized press is struggling to assert its role as a government watchdog in an era of growing media distrust.[159] This media distrust also often accompanies periods when national security concerns are at a peak.

151. *Id.*; Michael C. Dorf & Sidney G. Tarrow, *Stings and Scams: Fake News, the First Amendment, and the New Activist Journalism*, 20 U. PA. J. CONST. L. 1, 3 (2017).

152. Byron York, *Harvard Study: CNN, NBC Trump Coverage 93 Percent Negative*, WASH. EXAMINER (May 19, 2017, 3:21 PM), https://www.washingtonexaminer.com/byron-york-harvard-study-cnn-nbc-trump-coverage-93-percent-negative [https://perma.cc/QE82-JHG8].

153. *Cf.* Napoli, *supra* note 25, at 73.

154. Wendling, *supra* note 18 (noting that political and media obsession with "fake news" is actually hurting the credibility of otherwise credible news outlets).

155. Cristiano Lima, *Poll: 77 Percent Say Major News Outlets Report 'Fake News'*, POLITICO (Apr. 2, 2018, 10:50 AM EDT), https://www.politico.com/story/2018/04/02/poll-fake-news-494421 [https://perma.cc/S8QU-GYQV].

156. VASU ET AL., *supra* note 23, at 5.

157. *Id.*

158. *Id.* at 9.

159. The checking function on the government has historically been regarded as the primary function of a free press. *See* Werhan, *supra* note 14, at 1569 ("The press is constitutionally protected so that it can execute these informing functions. First Amendment doctrine therefore should be judged by its effectiveness in enabling the press to gather and to publish the news that a democracy needs in order to flourish."); *see also* Blasi, *supra* note 31, at 527 ("Indeed, if one had to identify the single value that was uppermost in the minds of the persons who drafted and ratified the First Amendment, this checking value would be the most likely candidate.").

IV. War and Press: National Security Concerns

A. *Modern Historical Tension Between National Security and Press Freedom*

The relationship between press freedom and national security has always been a delicate balancing act. The United States has a history of curtailing press freedom during times of extreme societal stress.[160] This Section discusses the relationship between press freedom and national security from the 1970s through present day.

During the 1970s and 1980s, the Supreme Court settled most of its doctrinal base for freedom of speech and freedom of the press alike.[161] The Court based its freedom of the press rulings on the freedom of publication, accepting the Constitutional role of the press as the facilitator of information and opinion necessary for democratic citizens to monitor their government.[162] However, despite judicial recognition of the "government watchdog" function of the press, the law was much less settled when the press asserted the right to publish national security information.[163]

The Court decided many critical cases defining the scope of press freedom against a backdrop of political turmoil, including the Vietnam War and the "imperial presidency" of President Richard Nixon.[164] Generally, the press was given an unusual amount of freedom in its Vietnam War coverage, and government censorship of the war was "virtually nonexistent."[165] But negative press coverage of the war generated controversy. Some historians maintain that the press effectively "lost" the war in Vietnam by rousing the public's anti-war sentiment.[166] The result was weeks of anti-war demonstrations, as thousands of protestors shook the nation with the "quasi-revolutionary throbbings of a counterculture."[167]

Although the press was given unusually liberal access in Vietnam,[168] it began to lose favor with the government in the early 1970s. Specifically, in 1971, the Nixon Administration sued *The New York Times* for publishing leaked material about the Vietnam War, known as the Pentagon Papers.[169] President Nixon brought suit to enjoin the newspa-

160. Werhan, *supra* note 14, at 1564.
161. *Id.* at 1570.
162. *Id.*
163. *Id.* at 1570–71.
164. Jeffery A. Smith, War & Press Freedom 185 (1999).
165. Paul G. Cassell, *Restrictions on Press Coverage of Military Operations: The Right of Access, Grenada, and "Off-the-Record Wars"*, 73 Geo. L.J. 931, 942 (1985).
166. *Id.* at 941.
167. Smith, *supra* note 164, at 185.
168. Brian William DelVecchio, *Press Access to American Military Operations and the First Amendment: The Constitutionality of Imposing Restrictions*, 31 Tulsa L.J. 227, 232 (1995) ("In terms of complete and open access given to the press, no other war can match that of the conflict in Vietnam.").
169. Smith, *supra* note 164, at 187.

pers from publishing the leaked analysis in *New York Times Co. v. United States* (*The Pentagon Papers Case*),[170] which would come to be known as the seminal case analyzing prior restraints and national security.[171]

The government argued that the First Amendment did not prevent the President from enjoining publication of information posing "a serious risk of immediate and irreparable harm" to national security.[172] But in a short per curiam opinion, the Supreme Court ruled in favor of the press.[173] The Court held that the government's attempt at a prior restraint "[bore] a heavy presumption against its Constitutional validity," ultimately finding that the government had not met its burden to justify imposition of a prior restraint on the press.[174] Justice Potter Stewart's concurrence announced what is widely regarded to be the constitutional standard for justifying prior restraints on national security grounds:[175] the government must prove that publication of a state secret "will surely result in direct, immediate, and irreparable damage" to the country.[176]

Thus, the *Pentagon Papers Case* stands for the proposition that there is a strong presumption against constitutional validity of prior restraints on the press, absent clearly articulable national security concerns.[177] This qualification for national security concerns discussed in several of the concurring opinions highlights the fact that decisions favoring the press, like the *Pentagon Papers Case*, were comparatively rare during this time period.[178] More decisions landed on the side of preserving national security and abridging press freedoms.[179] Indeed, the Court decided *Branzburg*, discussed *supra*, only a year after the *Pentagon Papers Case* but exhibited unwillingness to recognize corollary rights of the press beyond the core right to publish.[180]

170. *Id.* at 186. The Pentagon Papers contained an extensive post-1945 analysis of U.S. involvement in Vietnam. The highly classified study demonstrated that the U.S. government had been deceiving the American people about the extent of U.S. involvement for more than three decades. Jordan Moran, *Nixon and the Pentagon Papers*, UVA MILLER CTR., https://millercenter.org/the-presidency/educational-resources/first-domino-nixon-and-the-pentagon-papers (last visited Sept. 25, 2019) [https://perma.cc/TJ6B-AQP7].

171. DERIGAN SILVER, NATIONAL SECURITY IN THE COURTS 58 (2010).

172. SMITH, *supra* note 164, at 186.

173. New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam).

174. *Id.*

175. Werhan, *supra* note 14, at 1573.

176. *New York Times Co.*, 403 U.S. at 730 (Stewart, J. concurring).

177. *Id.* at 714 (per curiam).

178. SMITH, *supra* note 164, at 65; *see, e.g.*, Snepp v. United States, 444 U.S. 507, 507–10 (1980) (per curiam) (upholding a constructive trust mandating the transfer of a former CIA agent's earnings from his book detailing activities in Vietnam).

179. SMITH, *supra* note 164, at 65.

180. *See* Branzburg v. Hayes, 408 U.S. 665, 684, 690 (1972). Interestingly, the Court also issued the *Branzburg* decision just twelve days after the break-in at Watergate—the event which ultimately would lead to Nixon's resignation from Presidential office.

The conflict between national security and press freedom was also evident in the press–military relations following the Vietnam War. As a result of the unfavorable press coverage in Vietnam, the military "became increasingly restrictive of journalistic access."[181] During the 1983 invasion of Granada, for example, the Pentagon did not allow American correspondents to be part of the invasion force at all, citing national security reasons.[182]

Despite attempts by the media and the military to negotiate guidelines for managing military–media relations,[183] the trend of restricting press access continued during the Gulf War.[184] As President George H.W. Bush initiated war to drive Iraqi invaders out of Kuwait, the executive branch issued a list of "ground rules" for press coverage.[185] Coverage was limited to pool reporting and subject to a security review prior to release.[186] In addition, pool reporters were ordinarily "allowed to talk to soldiers only in the presence of a military public affairs officer."[187] If a reporter disputed the outcome of the security review, such disputes "were to be resolved by the military's Joint Information Bureau in Saudi Arabia" and appealed to the Pentagon's public affair's office.[188] The military detained "[a]t least two dozen reporters and photographers" for attempting to cover the Gulf War outside of the designated press pool, and some journalists temporarily lost their press credentials as a result.[189] Pool reporting and security review "made the Persian Gulf regulations the most strict in the history of press coverage of U.S. military operations."[190]

Leading into the Iraq War, the military chose a middle path between the free reign of journalists in Vietnam and the pre-censorship system of the Gulf War.[191] The "embedded press" system allowed journalists access to the frontlines by embedding them within a military unit.[192] Reporters could talk to soldiers, ride along in Humvees and helicopters, and report insight that only came with such close access.[193] However, scholars have noted the subtly subversive nature of

181. Elana J. Zeide, Note, *In Bed with the Military: First Amendment Implications of Embedded Journalism*, 80 N.Y.U. L. REV. 1309, 1312–13 (2005).
182. Cassell, *supra* note 165, at 943.
183. DelVecchio, *supra* note 168, at 233–34.
184. SMITH, *supra* note 164, at 188; Joshua R. Keefe, *The American Military and the Press: From Vietnam to Iraq*, INQUIRIES J., http://www.inquiriesjournal.com/articles/10/the-american-military-and-the-press-from-vietnam-to-iraq (last visited Dec. 20, 2019) [https://perma.cc/2UYG-7RR8].
185. SMITH, *supra* note 164, at 192.
186. *Id.*
187. *Id.* at 46.
188. *Id.* at 192.
189. *Id.* at 194.
190. DelVecchio, *supra* note 168, at 236.
191. Keefe, *supra* note 184.
192. *Id.*
193. *See id.*; *see also* David Ignatius, *The Dangers of Embedded Journalism, in War and Politics*, WASH. POST (May 2, 2010), http://www.washingtonpost.com/wp-dyn/con-

the embedded press system,[194] effectively granting reporters access in exchange for them "tell[ing] the story the military wanted told."[195] Due to the social cohesion between reporters and soldiers, the embedded press system fostered a "military bubble."[196] Journalists gained access to valuable information but also "inherit[ed] the distortions and biases that [came] with being 'on the bus.'"[197]

Besides the potential for one-sided reporting, the embedded press system was not without its own censorship restrictions. For example, in 1996, reporters were told if they were embedded with U.S. troops in Bosnia for more than twenty-four hours, then they needed specific permission to quote the soldiers.[198] Reporters were to consider everything they heard and saw as being "on background."[199] Additionally, the later years of the Iraq War saw a growing number of reports of U.S. troops harassing journalists, confiscating tapes, and detaining reporters.[200]

From the government's attempt to censor publication in the *Pentagon Papers Case*[201] to restricting press access of military operations,[202] the government has struggled to balance the inevitable conflict between the press and national security during wartime abroad.

B. *National Security and Terrorism*

The terrorist attacks on September 11, 2001 brought the national security concerns that influenced policy abroad to home soil. Militants from the al-Qaeda terrorist group carried out the largest terrorist attack on U.S. soil by crashing two planes into the Twin Towers at the World Trade Center in New York City, one into the Pentagon, and one in a field in western Pennsylvania.[203] Nearly 3,000 people died in the 9/11 attacks.[204]

As an immediate national security response, the federal government engaged in various actions compromising individual liberties: jailing more than 750 aliens on immigration charges and holding them in restrictive conditions without bond, allegedly torturing terrorist suspects at Guantanamo Bay, and using heightened communications sur-

tent/article/2010/04/30/AR2010043001100.html?noredirect=on [https://perma.cc/N6UA-UPR5].

194. Keefe, *supra* note 184.
195. *Id.*
196. Ignatius, *supra* note 193.
197. *Id.*
198. SMITH, *supra* note 164, at 47.
199. *Id.*
200. Keefe, *supra* note 184.
201. SMITH, *supra* note 164, at 186.
202. *See generally* DelVecchio, *supra* note 168.
203. *9/11 Attacks*, HISTORY, https://www.history.com/topics/21st-century/9-11-attacks (last updated Sept. 11, 2019) [https://perma.cc/Q4Z9- EPJM].
204. *Id.*

veillance systems to monitor phone and internet communications.[205] The government classified these events and others as national security information.[206] Some historians indicate that the "national security" justification was used loosely in the post-9/11 period.[207] Both the Bush and Obama administrations asserted a "state secrets" privilege to prevent courts from reviewing claims of wiretapping and torture.[208]

However, the federal government's responses to the "War on Terror" would not have come to light without the press reporting on classified information from government leakers.[209] In response to these leaks, the government announced it would investigate its employees and discover the leakers.[210] In so doing, federal officials "probed the weaknesses of free press doctrine for openings that . . . permit[ted] restrictions on the press's freedom to obtain and to publish such state secrets."[211] Prior to 9/11, *Branzburg*'s potential adverse effect of allowing federal prosecutors to subpoena journalists for sources showed little sign of materializing because of prosecutorial restraint.[212] But as Keith Werhan suggests, federal prosecutorial restraint "may be eroding."[213] This is exhibited by the post-9/11 push for investigating journalists' newsgathering activities and the increased number of journalists jailed for refusing to name confidential sources.[214] The steady flow of federal subpoenas has continued since the drive for a federal shield law in 2007.[215]

The 9/11 attacks left a profound and long-lasting impact on the national psyche. For almost two decades and over the span of three presidential administrations, Americans have consistently stated that "defending the nation against terrorism should be a top policy priority for the White House and Congress."[216] Heightened national security concerns combined with the changes in the media landscape raise questions about who constitutes a "journalist."[217] Both have contributed to judicial reluctance to reconsider a First Amendment reporter's

205. Werhan, *supra* note 14, at 1568 (detailing risks to individual freedoms post-9/11).
206. *Id.*
207. FREDERICK A.O. SCHWARZ JR., DEMOCRACY IN THE DARK: THE SEDUCTION OF GOVERNMENT SECRECY 124–25. (2015).
208. *See id.*
209. Werhan, *supra* note 14, at 1568.
210. *Id.* at 1584.
211. *Id.* at 1568.
212. *Id.* at 1598.
213. *Id.*
214. *Id.* at 1592.
215. *Lee Levine Subcommittee Hearing Statement, supra* note 5, at 10–11.
216. John Gramlich, *Defending Against Terrorism Has Remained a Top Policy Priority for Americans Since 9/11*, PEW RES. CTR. (Sept. 11, 2018), http://www.pewresearch.org/fact-tank/2018/09/11/defending-against-terrorism-has-remained-a-top-policy-priority-for-americans-since-9-11/ [https://perma.cc/X48B-8RTG].
217. *See* Werhan, *supra* note 14, at 1600 (discussing the purported difficulties in defining the press).

privilege.[218] The proposed Free Flow of Information Act of 2017 attempted to address the definition of "journalist," persisting national security concerns, and the need to secure a free press.

V. Analysis of the Free Flow of Information Act of 2017

Congress has introduced a federal shield law in nearly every session since 2005. Each of the proposals was substantively similar, with most differences demonstrating Congress's struggle to define "journalist" or "covered person."[219] None of them passed. And despite renewed calls to enshrine a federal qualified privilege into the law,[220] the Free Flow of Information Act of 2017 died in committee at the adjournment of the 115th Congress. This Section will analyze the major provisions of the most recently proposed shield law with a focus on national security and media perspectives.

A. *Defining "Journalist"*

The Court in *Branzburg* declined to recognize a reporter's privilege in part due to the constitutional questions that would arise if the judiciary defined "reporter" or "journalist."[221] Though Congress, too, has struggled with articulating an acceptable definition,[222] scholars note that defining "journalist" through legislative line-drawing is a far more manageable method.[223] In fact, Congress often draws distinctions between different speakers and publishers, and such differentiation "is constitutional, as long as . . . the differentiation is reasonable."[224]

218. *See id.* at 1567 (acknowledging "Court's failure to accept an auxiliary right of the press to gather the news" in the post-9/11 environment).

219. *See* Lauren J. Russell, Note, *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?*, 93 Or. L. Rev. 193, 209–19 (2014).

220. *See generally Lee Levine Subcommittee Hearing Statement*, *supra* note 5, at 10–11.

221. Branzburg v. Hayes, 408 U.S. 665, 704 (1972) ("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 paper who utilizes the latest photocomposition methods.").

222. Gajda, *supra* note 49, at 152.

223. Stone, *supra* note 8, at 47–48. Interestingly, states that have enacted shield laws have "all defined, through statutory language, who may claim protection behind the shield." Anthony L. Fargo, *Analyzing Federal Shield Law Proposals: What Congress Can Learn from the States*, 11 Comm. L. & Pol'y 35, 56 (2006). Furthermore, the question of who is covered by the shield law has generated little controversy in state court litigation. *Id.* at 58.

224. Stone, *supra* note 8, at 47–48 ("Whereas the Court is wisely reluctant to define "the press" for purposes of the First Amendment, it will grant Congress considerable deference in deciding who, as a matter of sound public policy, should be covered by the journalist-source privilege.").

Section 4 of the Free Flow of Information Act defines the "covered persons" who may claim the protection from compelled disclosure broadly.[225] The term "covered person" is defined as:

> [A] person who regularly gathers, prepares, collects, photographs, records, writes, edits, reports, or publishes news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public . . . for a substantial financial gain and includes a supervisor, employer, parent, subsidiary, or affiliate of such covered person.[226]

Despite the broad array of newsgathering activities included, the proposed bill requires that an individual generate a "substantial financial gain" from newsgathering activities to be considered a "covered person."[227]

Thus, while this definition covers paid freelancers of all types for news entities, it is less certain whether the bill would include student-journalists. The status of "bloggers" and "citizen journalists" is also unclear. According to the proposed bill, a blogger would have to prove derivation of "substantial financial gain" from blogging activities. But what constitutes "substantial financial gain"? Bloggers could potentially argue that revenue derived from advertising on their blog or website is a source of financial gain.[228] Due to the uncertainty surrounding "substantial financial gain," courts would likely revisit the debate about who constitutes a "covered person" in interpreting the shield law.[229]

---

225. Free Flow of Information Act of 2017, H.R. 4382, 115th Cong. § 4(2) (2017).

226. *Id.*

227. *Id.*

228. For reference, bloggers' salaries vary widely. Surveys have shown most bloggers do not make enough to support their lifestyles from blogging, but a small percentage of them can spend less than two hours a day blogging and earn $150,000 a year. *See* Melanie Pinola, *Can I Really Make a Living By Blogging?*, LIFEHACKER (Mar. 6, 2014, 1:00 PM), https://lifehacker.com/can-i-really-make-a-living-by-blogging-1537783554 [https://perma.cc/9EQL-4ZX8]. Similarly, being a social media "influencer" can also be very lucrative. Influencers with social media followings of up to 1 million can command up to $10,000 for a single social media post. Chavie Lieber, *How and Why Do Influencers Make So Much Money? The Head of An Influencer Agency Explains*, VOX (Nov. 28, 2018, 6:00 PM EST), https://www.vox.com/the-goods/2018/11/28/18116875/influencer-marketing-social-media-engagement-instagram-youtube [https://perma.cc/7YBG-8GB8].

229. Paul Fletcher, *Sessions' Testimony Prompts New Federal Shield Law Bill Protecting Journalis*ts, FORBES (Nov. 29, 2017 8:45 AM), https://www.forbes.com/sites/paulfletcher/2017/11/29/sessions-testimony-prompts-new-federal-shield-law-bill-protecting-journalists/#354c1a4a4912 [https://perma.cc/X8FC-HBEJ]. It should be noted that the states with shield laws have all been able to articulate an acceptable definition of "journalist." *See, e.g.*, N.C. GEN. STAT. § 8-53.11(c) (2017) (defining "journalist" as "any person, company, or entity, or the employees, independent contractors, or agents of that person, company, or entity, engaged in the business of gathering, compiling, writing, editing, photographing, recording, or processing information for dissemination via any news medium."); OR. REV. STAT. § 44.510–.520 (2017) (protecting persons "connected with, employed by or engaged in any medium of commu-

Despite this interpretative question, the proposed definition of journalist was a positive one for the media overall. By adopting a broad definition but limiting covered persons to professional newsgatherers engaged in the process of doing their job,[230] the bill recognized the role of the press in disseminating information to society—the very reason motivating a journalist's privilege. Allowing *anyone* who contributes to dissemination of news to qualify as a "covered person" would "fail[ ] to recognize . . . the important contributions that statutes like reporter's shield laws help provide . . . ."[231] Indeed, if some newsgathering—including the promise of secrecy to sources—is to be protected, then it is not only important but necessary "to define who the protected newsgatherers are."[232] The limitation also makes sense from a practical standpoint, as professional journalists "usually have access to government or other insiders" that "citizen journalists" do not.[233]

B. *A Qualified Privilege: National Security Exceptions*

The proposed privilege was not absolute. A federal entity could still compel a "covered person" to appear in court or provide information if the entity seeking disclosure could be able to satisfy the statutory test.[234] This includes ultimately proving that the public interest in newsgathering outweighs the public interest in disclosure.[235]

To compel disclosure, first the government would need to prove that it has "exhausted all reasonable alternative sources" to find the testimony or document sought before subpoenaing the journalist.[236] Arguably, this would not impose a great burden on the government because the requirement was taken "almost verbatim" from the Department of Justice ("DOJ") Guidelines.[237] The DOJ Guidelines on obtaining information and records from members of the news media advise prosecutors to seek information from news media only "after all reasonable alternative attempts have been made to obtain the information from alternative sources . . . ."[238] If a shield law modeled on these guidelines ever passes, failure to comply with these recommendations would be subject to judicial review instead of left to the DOJ's

nication to the public," which includes "any newspaper, magazine or other periodical, book, pamphlet, news service, wire service, news or feature syndicate, broadcast station or network, or cable television system.").

230. *Lee Levine Subcommittee Hearing Statement*, *supra* note 5.

231. GAJDA, *supra* note 49, at 213.

232. *Id.*

233. *Id.*

234. *See* Free Flow of Information Act of 2017, H.R. 4382, 115th Cong. § 2 (2017).

235. *See id.* § 2(a)(4).

236. *Id.* § 2(a)(1).

237. *Lee Levine Subcommittee Hearing Statement*, *supra* note 5.

238. 28 C.F.R. § 50.10(a)(3) (2018).

discretion.[239] In effect, a Free Flow of Information Act would transform the DOJ guidelines into mandatory rules for compelled disclosure.

Second, the government generally must prove a degree of necessity, which varies with the governmental objective.[240] The degree of necessity required in the Free Flow of Information Act of 2017 was also heavily influenced by the DOJ Guidelines.[241] For criminal investigations and prosecutions, the government must prove that there are "reasonable grounds to believe a crime has occurred" based on information obtained from a person other than the journalist.[242] Additionally, the government must prove that the "testimony or document sought is critical" to the criminal investigation, prosecution, or defense.[243] For all other non-criminal matters, to satisfy the second prong, the government must prove that the "testimony or document sought is critical to the successful completion of the matter," again based on information obtained from someone other than the journalist.[244]

The most recently proposed federal shield law specifically enumerated exceptions for which compelling testimony or a document is permitted, even if such information "could reveal the identity of a source . . . ."[245] The exceptions generally allowed disclosure of source identity in cases implicating national security or the illegal disclosure of information.[246]

The first exception allowed disclosing a source's identity if such disclosure was necessary to "prevent, or identify any perpetrator of, an act of terrorism against the United States . . . or other significant and specified harm to national security with the objective to prevent such harm."[247] Relatedly, disclosure of a source could be required if the identity of the source was "necessary to prevent imminent death or significant bodily harm."[248] Therefore, a journalist may be required to identify a source if necessary to either prevent a terror attack or to identify the perpetrator of an attack for prevention purposes.[249]

239. *Lee Levine Subcommittee Hearing Statement*, *supra* note 5, at 40.

240. *See* H.R. 4382 § 2(a).

241. *See* 28 C.F.R. § 50.10(a)(5)(ii) (recommending virtually identical standards for investigations of criminal and civil matters); *see also* 28 C.F.R. § 50.10(g)(1)(i) (authorizing use of DOJ subpoena to prevent or mitigate acts of terrorism or substantial bodily harm).

242. H.R. 4382 § 2(a)(2)(A).

243. *Id.*

244. *Id.* § 2(a)(2)(B).

245. *Id.* § 2(a)(3).

246. *Id.*

247. *Id.* § 2(a)(3)(A).

248. *Id.* § 2(a)(3)(B).

249. *Id.* § 2(a)(3)(A).

With the public continually citing national security as a top governmental priority,[250] it is unsurprising that a national security exception has been in nearly every shield law proposed since 2005.[251] In fact, failure to include such national security exceptions triggered opposition to earlier versions of the bill in 2005 and prompted such an exception in the Senate's revised draft.[252] The 2017 bill also reflected concerns that earlier national security exceptions were too narrow, thus making it too difficult for the government to compel any information.[253] Interestingly, however, the bill does not provide a definition for national security.[254]

The second exception specifically addressed the issue of "leakers." The provision allowed for disclosure of a source's identity if it was "necessary to identify a person who has disclosed" certain information, such as trade secrets, "individually identifiable health information," and "nonpublic personal information" protected by federal consumer protection laws.[255] Importantly, the act would have also created an exception to identify leakers of "properly classified information" that "has caused or will cause significant and articulable harm to the national security."[256]

These provisions appear to restrict the government by requiring a "significant and articulable harm" to national security in order to compel a leaker's identity.[257] However, such provisions could stir controversy among journalists regarding what constitutes an "articulable harm to national security."[258] History demonstrates that the executive branch has used the term "national security" quite loosely.[259] For example, the "national security" label has been used to "justify secret reports on telephone calls made by people like Eleanor Roosevelt, journalists, the chair of the House Agriculture Committee, White House aides, and Supreme Court Justices William Douglas and Potter

250. Gramlich, *supra* note 216.

251. *See* Free Flow of Information Act of 2007, H.R. 2102, 110th Cong. § 3(a)(2)(A) & (b) (2007); Free Flow of Information Act of 2009, S. 448, 111th Cong. § 5 (2009); Free Flow of Information Act of 2011, H.R. 2932, 112th Cong. § 2(a)(3)(A) & (b) (2011); Free Flow of Information Act of 2013, H.R. 1962, 113th Cong. § 2(a)(3)(A) (2013).

252. *See Reporter's Privilege Legislation: Issues and Implications: Hearing Before the Comm. on the Judiciary*, 109th Cong. 5 (2005) (statement of Hon. Richard G. Lugar, Senator from Indiana) [hereinafter *2005 Senate Hearing*].

253. *See id.* at 29 (statements of Senator Feinstein and Geoffrey Stone, University of Chicago Law Professor). The 2005 version of the bill only permitted the use of the national security exceptions if necessary to prevent "imminent danger." Free Flow of Information Act of 2005, S. 1419, 109th Cong. § 2(a)(3)(A) (2005).

254. Free Flow of Information Act of 2017, H.R. 4382, 115th Cong. § 4 (2017).

255. H.R. 4382 § 2(a)(3)(C).

256. *Id.* § 2(a)(3)(D)(i)–(ii).

257. *Id.* § 2(a)(3)(D)(ii).

258. *Id.*

259. SCHWARZ JR., *supra* note 207, at 124–25.

Stewart."[260] In the post-9/11 period, the label was used to "stop courts from reviewing claims based on warrantless wiretapping and torture."[261] National security has even been used as a justification for the Trump administration to impose tariffs on steel and aluminum imports.[262] Given the broad designation of national security, the government would likely not have difficulty articulating a national security interest. Thus, the government could likely compel the name of a government leaker even if the shield law were passed.

Finally, the proposed shield law provided a balancing test.[263] In order to compel disclosure, the government must prove "that the public interest in compelling disclosure of the information or document involved outweighs the public interest in gathering or disseminating news or information."[264] The proposed bill also authorized the court to "consider the extent of any harm to national security" as part of its analysis.[265]

Therefore, national security weighed in favor of the government—and thus in favor of compelled disclosure—in two of the three prongs the government must meet. For example, the second prong allowed disclosure of documents and source identity if "necessary to prevent, or to identify any perpetrator of, an act of terrorism" or, more broadly, to prevent harm to national security.[266] The third prong also allowed consideration of national security in the court's balancing analysis of the public interest in disclosure versus the public interest in newsgathering.[267] In cases implicating national security, the government's burden would be to articulate the national security interest and prove "by a preponderance of the evidence" that they have "exhausted all reasonable alternative sources" before turning to a journalist for the information.[268]

VI. Effect of a Federal Shield Law: Media and National Security Perspectives

Despite its failure to pass, the Free Flow of Information Act of 2017 provides a useful framework for a qualified shield law balancing free press concerns with national security interests. Although modeled

260. *Id.* at 124.
261. *Id.* at 124–25.
262. Glenn Thrush, *Trump's Use of National Security to Impose Tariffs Faces Court Test*, N.Y. Times (Dec. 19, 2018), https://www.nytimes.com/2018/12/19/us/politics/trump-national-security-tariffs.html [https://perma.cc/CLR4-739T].
263. The balancing test borrows from the test advocated by District of Columbia Court of Appeals Judge David Tatel. *See In re* Grand Jury Subpoena, Judith Miller, 397 F.3d 964, 986–1004 (D.C. Cir. 2005) (Tatel, J., concurring).
264. Free Flow of Information Act of 2017, H.R. 4382, 115th Cong. § 2(a)(4) (2017).
265. *Id.* § 2(b).
266. *Id.* § 2(a)(3)(A).
267. *Id.* § 2(a)(4).
268. *Id.* § 2(a).

heavily on the DOJ Guidelines,[269] enshrining guidelines into law would ensure consistent application instead of adherence that fluctuates with each administration. For example, former Attorney General Jeff Sessions vowed to revise the guidelines and publicly refused to make a "blanket statement" to not jail journalists.[270] A statutory shield law would mitigate the discretionary impulses of federal prosecutors by requiring them to adhere to an enforceable framework[271] that is more difficult to change. It would also provide a standard framework for courts tasked with reviewing reporter privilege cases.

A. *Persisting Problems*

Despite the probable benefits of enacting a shield law in general, the most recently proposed shield law contained some of the same ambiguities of previous bills. First, it failed to provide definitions for "properly classified" or for "national security."[272] This problem is twofold. First, as evidenced by the *Pentagon Papers Case* and others, the government has a consistent pattern of overclassifying information.[273] Second, the *Pentagon Papers Case* also categorized the information as a threat to national security, which, too, was inaccurate.[274] Without definitions of what constitutes "properly classified information" or what circumstances give rise to a national security concern, the government will likely continue its pattern of over-classifying information and using "national security" loosely.[275]

Even if the Free Flow of Information Act of 2017 had passed, the effectiveness of the shield for journalists is questionable. The broad exceptions would likely not prevent the perceived chilling effect on journalists.[276] The numerous and wide-ranging exceptions make any journalist's promise of confidentiality come with a hefty disclaimer. Essentially, the journalist can only promise confidentiality to the ex-

269. *See* 28 C.F.R. § 50.10(a)(3) (2018).

270. Mallory Shelbourne, *Sessions Declines 'Blanket' Assurance to Not Jail Journalists*, THE HILL (Oct. 18, 2017, 3:06 PM EDT), https://thehill.com/homenews/administration/356070-sessions-declines-blanket-assurance-to-not-jail-journalists [https://perma.cc/4NQA-AKTR].

271. *See Lee Levine Subcommittee Hearing Statement*, *supra* note 5, at 11–12 (acknowledging most courts have held that the DOJ guidelines are not judicially enforceable).

272. H.R. 4382 § 4. The DOJ Guidelines also fail to provide definitions. *See* 28 C.F.R. § 50.10(a)(3).

273. Werhan, *supra* note 14, at 1597 n.221.

274. *Lee Levine Subcommittee Hearing Statement*, *supra* note 5, at 6 n.17 (noting that the Solicitor General who tried the *Pentagon Papers Case* for the government later wrote that he perceived no threat to national security from publication).

275. *See 2005 Senate Hearing*, *supra* note 252, at 36 (statements of Senator Schumer) ("[W]hen [the law] just says national security, the Government for its own purposes can brand it national security when it should not be.").

276. Stone, *supra* note 8, at 52 (noting the "misguided" nature of qualified privilege, which does not account for the disclosures it prevents from occurring due to uncertainty of the privilege).

tent that the source's information does not implicate one of the shield law's exceptions or impact national security. Such a promise may prove especially hollow in the context of government leakers. If leaking classified government information constitutes a national security concern, or if the court determines that national security concerns outweigh the public interest in disclosure, journalists reporting on government wrongdoing may be forced to name their confidential sources. Accordingly, if "national security" is allowed to envelop government leaks of any nature, any shield law would hardly allow the media to act as a government watchdog.[277]

Applying the 2017 bill to the facts of *Branzburg* is also instructive in determining the strength of the journalist's shield. Although shield laws generally allow reporters significant leeway in reporting on local matters of public concern, that leeway is restricted if those matters implicate federal crimes.[278] For example, in *Branzburg*, petitioner Branzburg witnessed a crime,[279] whereas petitioners Pappas and Caldwell did not.[280] Thus, the 2017 bill would not have shielded Branzburg because it does not prohibit a federal entity from compelling information obtained from witnessing criminal conduct.[281]

By contrast, Caldwell and Pappas did not witness crimes, so the 2017 bill would have shielded them. However, the government could have potentially still compelled their information if it was critical to a prosecution.[282] To compel disclosure, the government would have to prove reasonable grounds to believe the Black Panthers committed a crime, Caldwell or Pappas had information "critical" to that prosecution, and it had exhausted all other reasonable alternative sources.[283] Although there is no guarantee of the outcome for Caldwell or Pappas under the 2017 bill, the heightened burden of proof may have deterred prosecutors from subpoenaing Caldwell or Pappas in the first place.

B. *Unintended Consequences*

Attempts to pass a shield law may give rise to unanticipated consequences. Just as the government probed the weaknesses of the free press doctrine in the wake of 9/11 by subpoenaing journalists,[284] the government would likely continue to take advantage of any statutory loopholes in a federal shield law.

277. *See 2005 Senate Hearing*, *supra* note 252, at 29 (statement of Geoffrey Stone, University of Chicago Law Professor).
278. Free Flow of Information Act of 2017, H.R. 4382 115th Cong. § 2(a)(2)(A) (2017).
279. Branzburg v. Hayes, 408 U.S. 665, 668, 669 (1972).
280. POWE, JR., *supra* note 26, at 180.
281. H.R. 4382 § 2(e).
282. *Id.* § 2(a)(2)(A).
283. *See id.* § 2(a)(1)–(2)(A).
284. Werhan, *supra* note 14, at 1568.

There is already evidence of the government bypassing the subpoena process altogether by simply seizing documents.[285] For example, the government indicted former Senate Intelligence staffer James Wolfe for allegedly leaking confidential information to reporters and lying to authorities.[286] As part of the investigation, the FBI seized years of email and phone records from *New York Times* reporter Ali Watkins, with whom Wolfe previously had a three-year relationship.[287] The DOJ Guidelines state that, like the use of subpoenas, seizing communication records of the news media is an "extraordinary measure."[288] The guidelines also provide that prosecutors should give notice to the news media before seizing information.[289] However, notice is not required if the Attorney General determines that "such notice would pose a clear and substantial threat to the integrity of the investigation, risk grave harm to national security, or present an imminent risk of death or serious bodily harm."[290] As noted above, these guidelines are discretionary. If a federal shield law were enacted, the government may turn to pursuing sources and information through search warrants instead of subpoenas, thus circumventing a statutory test for compelled disclosure.

C. *Reaffirming Media Credibility in the "Fake News" Era*

Press freedom and national security will likely always collide. But the national security concern created by fake news merits expanding press freedom. Sensationalist stories spread by bots and creators of fake news threaten journalistic integrity.[291] At its worst, both state-sponsored disinformation campaigns and misinformation for the domestic political agenda can severely threaten the democratic process and pose harm to national security.[292] As media experts note, fake news is a multidimensional problem requiring a multifaceted approach of legislative, technological, and social solutions.[293] One solution is the development and maintenance of credible fact-checking sites to assess the truth of stories disseminated online.[294] However, fact-checking sites do not solve the problem alone because they fail to

285. Adam Goldman, Nicholas Fandos, & Katie Benner, *Ex-Senate Aide Charged in Leak Case Where Times Reporter's Records Were Seized*, N.Y. TIMES (June 7, 2018), https://www.nytimes.com/2018/06/07/us/politics/times-reporter-phone-records-seized.html?rref=collection%2Fbyline%2Fadam-goldman&action=click&contentCollection=undefined&region=stream&module=stream_unit&version=latest&contentPlacement=1&pgtype=collection [https://perma.cc/W5RS-P2S8].
286. *Id.*
287. *Id.*
288. 28 C.F.R. § 50.10(3) (2018).
289. *Id.* § 50.10(4).
290. *Id.*
291. *See* Wendling, *supra* note 18; *see also* Lima, *supra* note 155.
292. VASU ET AL., *supra* note 23, at 5–6.
293. *Id.* at 26–28.
294. *Id.* at 18.

reach people who are not "predisposed to fact-checking" due to their own "cognitive bias" or "digital illiteracy."[295] This suggests that more truthful counter-speech, like news spread through traditional media outlets, is also needed to combat false stories.[296]

The ability to spread truthful counter-speech is especially necessary considering the following shocking juxtaposition in First Amendment doctrine applied to fake news. Generally, the First Amendment protects "dissemination of opinions and purported statements of fact," even when false.[297] In 2012, the Supreme Court in *United States v. Alvarez* rejected the notion that false information fell outside of First Amendment protection absent a showing of harm.[298] In *Alvarez*, the Court held that the Stolen Valor Act, which made it a crime to falsely claim receipt of military decorations, violated the First Amendment.[299] The Court emphasized that even considering instances of defamation and fraud, "falsity alone" is not enough to exclude speech from First Amendment protection.[300] "The statement must be a knowing or reckless falsehood."[301] And although fake news is often purposely misleading, proving it to be a reckless or knowing falsehood may still be difficult. In the context of news, the defendant will "always claim . . . that some editorial judgment is necessary to turn notes or raw footage into sellable news."[302] Therefore, the First Amendment potentially provides a substantially robust protection for fake news.

By contrast, "efforts to uncover hidden information" of public interest remain legally vulnerable.[303] As discussed at length in this Comment, there is currently no federal constitutional or statutory privilege preventing journalists from forced disclosure of their sources. Promising confidentiality is often necessary to uncover and report on matters of public concern.[304] Moreover, contacting confidential sources is occasionally necessary for understanding context and confirming accuracy of official news pronouncements.[305] Much like the unilateral lens of the embedded press system,[306] the inability to confirm statements of authorities with confidential sources would result in reporters "spoon feeding the public the 'official' statements of public relations officers."[307]

295. *Id.* at 19.
296. *Id.* at 27 ("counter-narratives that challenge fake news must be released expeditiously as fake news can spread *en masse* at great speed due to technology").
297. Dorf & Tarrow, *supra* note 151, at 9.
298. United States v. Alvarez, 567 U.S. 709, 729–30 (2012).
299. *Id.* at 730.
300. *Id.* at 719.
301. *Id.*
302. Dorf & Tarrow, *supra* note 151, at 21.
303. *Id.* at 10.
304. *Lee Levine Subcommittee Hearing Statement*, *supra* note 5, at 2.
305. *Id.* at 4.
306. Keefe, *supra* note 184.
307. *Lee Levine Subcommittee Hearing Statement*, *supra* note 5, at 4.

As a result of this surprising peculiarity in First Amendment doctrine, "[j]ournalism struggles, while fake news thrives."[308] A federal shield law is needed to unearth the truth behind fake news, whether in the form of domestic misinformation from official sources or state-sponsored disinformation campaigns abroad. A secure press uninhibited by the threat of subpoenas can bring a strong voice to counter false information.

VII. CONCLUSION

Many scholars have noted the inherent tension between expanded press freedom and national security. Some have commented that the countervailing interests in a transparent, democratic society and the legitimate need for government secrecy are sometimes difficult, and perhaps even "impossible" to reconcile.[309] The failure of every attempt to pass a federal shield law underscores this idea.

Had the Free Flow of Information Act of 2017 passed, it would have been a promising first step in providing journalists a long-sought federal privilege to shield their sources. However, the numerous qualifications and exceptions likely would have done little to prevent a chilling effect on the flow of information to the public. Future proposed bills should include definitions for "properly classified information" and "national security." This would prevent the government from invoking "national security" generally before subpoenaing a journalist.

In addition, enacting a federal shield law would address the troubling quirk in First Amendment law that protects fake news while leaving attempts to uncover truthful information legally vulnerable. A shield law providing statutory protection for those attempts to uncover information through confidential sources could combat the dissemination of fake news. In a post-9/11 America where fake news creates national security concerns and threatens the integrity of the journalistic profession, journalists need more than a paper shield.

308. Dorf & Tarrow, *supra* note 151, at 23.
309. SILVER, *supra* note 171, at 4.