

Anatomy of a Federal Shield Law: The Legislative and Lobbying Process

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The driving forces behind establishing a federal shield law in Congress are, no doubt, the incarceration of *New York Times* reporter Judith Miller and the home detention sentence served by Rhode Island television reporter James Taricani, as well as the threatened sanctions against a half dozen other journalists who have thus far refused to identify their confidential sources. But the genesis of the shield law effort was, in the eyes of many, the pen of Judge Richard Posner, the influential jurist who sits on the U.S. Court of Appeals for the Seventh Circuit.

It was Judge Posner who in July 2003 scoffed at the notion that the 1972 U.S. Supreme Court decision in *Branzburg v. Hayes*¹ afforded journalists a privilege not to disclose confidential sources or other unpublished information. For more than thirty years, the overwhelming majority of state and federal courts had read *Branzburg* as conferring a First Amendment privilege, based largely on Justice Lewis Powell's concurring opinion. The judicial consensus had been that the First Amendment provides journalists with a qualified privilege to resist efforts to compel testimony about their confidential sources or about unpublished information gained in the course of researching a story.² In *McKevitt v. Pallach*,³ however, Judge Posner reexamined *Branzburg* and declared the earlier decisions to be misguided. In a dismiss-

sive tone, he wrote that "some [courts have] audaciously declare[d] that *Branzburg* actually created a reporter's privilege," adding that "rather than speaking of privilege, courts should simply make sure that a subpoena duces tecum is reasonable in the circumstances, which is the general criterion of judicial review of subpoenas."⁴ In refusing to quash the subpoenas on Taricani and Miller, judges in Rhode Island and the District of Columbia found that the First Amendment provides no protection for reporters who are called upon to provide evidence in criminal investigations.

With intensity not previously seen and with the media industry united as never before, the push for a federal shield law is now in full swing. The task is to convince members of Congress, who count a few confidential informants among them, that it is in the public's interest to confer a testimonial privilege on journalists similar to those for spouses, the clergy, and psychotherapists.

Although past experiences suggest that this new effort is an uphill climb, previous efforts to enact a federal shield statute did not have a unified media industry or the urgency of the current situation in which a number of reporters have served time in jail or may soon face contempt citations. There is now a coordinated effort among nonprofit journalism associations, such as the Newspaper Association of America (NAA), the Society of Professional Journalists (SPJ), the American Society of Newspaper Editors (ASNE), and the Radio-Television News Directors Association (RTNDA), plus a large and growing number of media companies, to lobby for a federal shield law.

The Early Efforts

The first major effort to secure passage of a federal privilege law came in the early 1970s just after the Supreme Court's 1972 ruling in *Branzburg*.

During the late 1970s, a second push followed the jailing of *New York Times* reporter Myron Farber for his refusal to divulge confidential research files to a defendant in a murder trial.⁵ According to a House committee report, ninety-nine bills for a federal shield law were introduced, albeit unsuccessfully, in the six years after *Branzburg*.

The proposals failed for two principal reasons. First, supporters of the legislation could not agree on how the law should define *journalist*. Second, press groups at the time insisted on an absolute privilege against the disclosure of confidential information instead of a qualified privilege that would require reporters and journalists to disclose information only under certain circumstances.⁶

In 1974, the American Bar Association (ABA) House of Delegates voted 157-122 against a shield law for reporters, with opponents contending that the media were putting themselves "above the law" and arguing that the immunity would extend to the underground press and "college dropouts" claiming to be journalists. The same year, Sen. Sam Ervin Jr., who presided over subcommittee hearings concerning the reporter's privilege, attributed congressional inaction to several factors: the media's insistence on absolute privilege, which was politically impossible; fear by some reporters that protective legislation would open the door to legislative regulation of the press; judicial interpretations that *Branzburg* conferred a qualified reporter's privilege; prosecutorial restraint against subpoenaing journalists; and the consuming national and congressional obsession with the ramifications of the Watergate scandal.⁷

A third effort came in the late 1980s after the U.S. Department of Justice (DOJ) issued to television networks a number of subpoenas that sought production of TV footage of the hijacking

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of a TWA plane in Beirut and Algiers for use in a grand jury proceeding to identify one of the hijackers. According to the Reporters Committee for Freedom of the Press, Sen. Harry Reid, D-Nev., approached press organizations about filing a bill but dropped those plans when they could not agree on what they wanted. Reid's general counsel at the time, Evan J. Wallach, described the split as follows:

The reason there was no consensus was because there were two groups: the "purists" who refused to believe that the *Branzburg* trilogy was the last word and felt that any protection provided by legislation could be abrogated, and the "realists" who were willing to take what they could get. The realists were mostly lawyers, and the purists were mostly reporters.⁹

Ervin's comment that courts were willing to interpret *Branzburg* as conferring a privilege proved prescient. Starting in the late 1970s and into the 1990s, numerous state and federal courts read *Branzburg* to support the existence of a constitutional privilege. Simply put, the media were doing well enough in court to avoid Congress.

Laying the Groundwork

But with Judge Posner's decision in *McKevitt* and the subsequent court decisions affecting James Taricani, Judith Miller, Matthew Cooper, and others, media organizations began to rethink their strategy.¹⁰ As a starting point, the Media Law Resource Center (MLRC),¹¹ with a grant from the McCormick Tribune Foundation, commissioned a white paper during summer 2004 to examine the origins of the reporter's privilege, provide an historical overview of the constitutional privilege after *Branzburg*, survey legislative and regulatory developments, and argue that the Supreme Court's First Amendment jurisprudence supports the protection of journalists in their newsgathering efforts.¹²

After the white paper was published, more than twenty different media companies, plus another ten journalism organizations, joined forces to explore the contours of a shield law proposal. Leading media lawyers began speaking publicly of the need for a shield law,¹³

and both the MLRC and the Practicing Law Institute sponsored symposia in November 2004 to discuss, in part, whether to push for a shield law in Congress. In December, the NAA, the primary lobbying arm of major American newspaper publishers, created its own media coalition in Washington and, in frequent consultation with MLRC members, began devising a long-term strategy to win support in Congress.

Senator Dodd Makes the First Move

Sen. Christopher Dodd, D-Conn., launched shield law legislation in mid-November 2004. Media representatives provided feedback to Dodd's staff regarding his approach to the legislation. His proposal, the Free Speech Protection Act of 2004 (S. 3020), ultimately drew heavily from the District of Columbia Shield Law, one of the strongest state law privilege statutes on the books.¹⁴ It included an absolute privilege against disclosure of confidential sources, and a qualified privilege for nonconfidential sources that could be met only if the party seeking disclosure could demonstrate that the news or information sought was "critical and necessary to the resolution of a significant legal issue," an even stronger standard than that contained in the D.C. shield law.¹⁵

In a statement on the Senate floor when introducing the legislation, Dodd cited the circumstances surrounding Taricani and Miller as part of the reason why this legislation was necessary. But he also emphasized the public's interest in the legislation, remarking that

Congress cannot afford to stand idly by and allow our sacred First Amendment freedoms to be threatened. Let me be clear. The legislation I submitted to the desk, the Free Speech Protection Act of 2004, is not merely about protecting the press. Instead, this legislation is about consumer protection. It is about openness, debate, the free flow of information and deliberation—the very ideals that the Senate holds so dear.

It is also about ensuring that our constituents, the American citizenry, have access to the knowledge and information they need to make educated decisions and fully participate in our democracy.¹⁶

Dodd knew no action would be taken on the bill in the final days of the 108th Congress but promised to reintroduce it when the new Congress convened in January 2005. Meanwhile, dozens of newspapers weighed in with editorials in late November 2004 supporting the Dodd legislation.¹⁷

Drafting a New Bill

As Congress adjourned for the winter recess, John Sturm, NAA's president, and Paul Boyle, NAA's senior vice president for public policy, pondered possible sponsors from the Republican ranks to champion a new shield law. Meanwhile, two respected representatives separately were already talking with their staffs about federal shield legislation. The first was Rep. Mike Pence, R-Ind., a former radio talk-show host and chairman of the influential Republican Study Committee. In a story he relates with relish, Pence tells audiences that his interest in a shield law came after reading an editorial in the *New York Times* that suggested such a law would never garner Republican support in Congress. Next came Rep. Rick Boucher, D-Va., a highly regarded moderate who, upon learning of Pence's interest, quickly joined forces with him to form a bipartisan team. Boucher's interest in a shield law stems in part from having argued a reporter's privilege case in a moot court competition while attending the University of Virginia Law School more than thirty years ago. Although Pence and Boucher were willing to lead the charge, they wanted to craft a bill that attacked the problem in a different fashion than Dodd's approach in the Senate.

With the assistance of the House Legislative Counsel (an office of lawyers who turn policy ideas into legislative language), Pence and Boucher's staffs decided to look to DOJ guidelines that govern the issuance of subpoenas to members of the news media, an approach that was encouraged by the media coalition.¹⁸ By drawing on the DOJ guidelines, the sponsors could ensure that the legislation applied standards that were proven over time to pro-

tect journalists but also acknowledged the legitimate and important interests in law enforcement and the fair administration of civil justice. Adopted in 1973, the DOJ guidelines have been in continuous operation for more than thirty years. They set standards that the federal government must meet before DOJ can request the issuance of a subpoena against the news media in any government civil or criminal case, but do not apply to other civil proceedings or, as some have argued, to investigations led by special prosecutors.

Pence and Boucher solicited support from their colleagues in a January 27, 2005, "Dear Colleague" letter:

As you are well aware, the dissemination of information by the media to the public on matters ranging from the operation of our government to events in our local communities is invaluable to the operation of our democracy. Without the free flow of information from sources to reporters, the public is ill equipped to make informed decisions.

Unfortunately, last year, almost a dozen reporters were served or threatened with jail sentences in at least three different federal jurisdictions for refusing to reveal confidential sources. Compelling reporters to testify, and in particular, compelling them to reveal the identity of their confidential sources, is a detriment to the public interest. Without the promise of confidentiality, many important conduits of information about our government will be shut down.¹⁹

The Pence-Boucher bill, dubbed the Free Flow of Information Act (H.R. 581), was introduced on February 2, 2005. Fortuitously, Pence had breakfast with his Hoosier colleague, Sen. Richard Lugar, the week after H.R. 581 was introduced. Lugar, chairman of the Senate Foreign Relations Committee, immediately took an interest and the next day introduced companion legislation (S. 340) in the Senate. In a statement released by his office, Lugar said:

It is important that we ensure reporters certain rights and abilities to seek sources and report appropriate information without fear of intimidation or imprisonment. Without such protection, many whistleblowers will refuse to step forward and reporters

will be disinclined to provide our constituents with the information that they have a right to know. Promises of confidentiality are essential to the flow of information the public needs about its government.²⁰

Having Lugar take the lead in the Senate was seen as significant. As chairman of the Senate Foreign Relations Committee, he would be in a powerful position to back the legislation when the inevitable concerns were raised about the law's potential ramifications for national security.

Details of the Pence-Boucher & Lugar Proposals

The essence of the Pence-Boucher (H.R. 581) and Lugar (S. 340) bills can be summarized as follows:

Confidential sources would be protected by an absolute privilege, meaning that the right to withhold the source's name could not be overcome by the subpoenaing party under any circumstances.

Other information would be protected by a qualified privilege. Subpoenaing parties could demand information from reporters if they show, by "clear and convincing evidence" and after giving the reporter "notice and an opportunity to be heard" in court, that they have unsuccessfully attempted to obtain the information "from all persons from which such testimony or document could reasonably be obtained," and (1) in criminal cases, that "(i) there are reasonable grounds to believe that a crime has occurred; and (ii) the testimony or document sought is essential to the investigation, prosecution, or defense," or (2) in other cases, that "the testimony or document sought is essential to a dispositive issue of substantial importance" to the case.

Third-party records, such as telephone records and e-mail, would be protected to the same extent as other material held by journalists. The bill would further require that journalists be notified before such subpoenas are issued and be given an opportunity to contest them before the deadline for submission of the records.

The bills would cover publishers, broadcasters, and wire services, and

those who work for them. The definition of *journalist* would include freelance journalists who are working for a publisher or broadcaster but not those journalists without contracts. Bloggers are not explicitly mentioned and thus likely would have to fall under the above categories in order to be afforded the law's protection.²¹

The full text of the legislation as originally introduced appears on page 9–13.

Garnering Support

To drum up support, the Senate's primary sponsors, Dodd and Lugar, espoused the cause in an op-ed column published in *USA Today* on March 16, 2005. They wrote that "[a]n independent press that is free to question, challenge and investigate is in our nation's best interest—regardless of which political party holds power. An effective shield law would not simply protect the rights of reporters, but all the liberties we cherish as a nation."²³

To buttress the sponsors' efforts for congressional backing, several press organizations, including NAA, SPJ, ASNE, RTNDA, and the Reporters Committee, solicited support from their members. NAA's Sturm sent a letter to major newspaper publishers urging support that said in part:

The public expects newspapers and other media to provide important news and information on matters of public concern, including matters relating to public policy and the government. If reporters are prevented from getting the real story because their access to confidential sources is insecure, citizens do not receive the information to which they are entitled and the public interest isn't served. Information will trickle out rather than flow, diminishing the public's ability to stay informed and hold its government accountable.²⁴

Media organizations and companies began their education and lobbying campaign on Capitol Hill, focusing on members of the House and Senate Judiciary Committees. Initially there was slow but steady progress. By mid-April, eighteen House members (nine Republicans and nine Democrats) had co-sponsored H.R. 581 while four sena-

tors (three Republicans and one Democrat) had co-sponsored S. 340. But those lobbying for the legislation were running into some hurdles on both sides of the aisle.

Running into Roadblocks

Some Democrats apparently were reluctant to support the legislation, concerned that they would be seen as bailing the White House out of the investigation into the Valerie Plame leak. Republican and Democratic members alike expressed concerns that an absolute privilege against forced disclosure of the identity of a confidential source would limit the government from vigorously pursuing some criminal investigations, particularly those involving national security or intelligence. This reaction was especially common among Judiciary Committee members, many of whom are former judges or prosecutors. Given the post-9/11 world, some politicians were treading carefully on any issue that had homeland security implications. Perhaps not surprisingly, DOJ likewise was very skeptical about granting an absolute privilege to reporters. The department's lack of support was another reason why some Republican members in particular were hesitant to sign on.

Nevertheless, the education campaign continued. At NAA's national convention on April 19, 2005, a panel discussion featured Judith Miller and Arthur Sulzberger of the *New York Times*, Tom Curley of the Associated Press, Joan Walsh of salon.com, and media attorney Bruce Sanford. After the panel discussion, NAA's president made a renewed pitch to publishers to become actively involved in promoting the legislation.

To better understand DOJ's objections to the legislation, two media coalition representatives met with three high-ranking DOJ officials in early May 2005. It quickly became clear that without several modifications to the legislation, a shield law was never going to win the department's backing, and consequently the prospects on the Hill

would be greatly diminished, if not dashed altogether. But progress nevertheless was being made with the number of co-sponsors increasing to thirty-one in the House and six in the Senate.

Back to the Drawing Board

In May and June 2005, the NAA media coalition went back to work to offer suggestions to the bills' sponsors that would allay concerns raised by some members of Congress and DOJ officials. Ultimately, the sponsors made several revisions, the most critical being Section 4, which would have provided an absolute privilege against disclosure of confidential sources. The revisions took the following form:

Eliminate the absolute privilege for confidential sources. The original legislation would have provided that federal courts could not compel the disclosure of confidential sources from covered persons. The revised language would offer no absolute protection for confidential sources. In cases of potential harm to national security, which is the matter of most concern to many congressional offices and DOJ, federal courts could compel the disclosure of confidential sources.

The revision accomplishes this change by deleting Section 4 and adding a new provision to Section 2 that would permit a federal entity to compel the disclosure of confidential sources if (1) the general conditions for disclosure (lack of alternative sources and a high degree of relevance to the proceeding) are met and (2) disclosure of the identity of a source is necessary to prevent imminent and actual harm to the national security. The provision also includes a balancing test requiring a finding that the harm to be addressed by disclosure outweighs the public interest in protecting the free flow of information.

Narrow the scope of coverage. The original bill would have provided that a covered person includes "a parent, subsidiary or affiliate of such an entity." If a newspaper published through a subsidiary and a subpoena was directed to the parent company, for example, the parent company would be covered. But

potential supporters had raised concerns about publishing entities owned by large companies, such as General Electric, that also have numerous nonmedia holdings. Although the original drafters believed that Section 3 clearly indicated that such nonmedia parents, subsidiaries, and affiliates would not be entitled to protection under the Act, the new version proposed narrowing the scope of this subpart of the definition so that it applies only to "a parent, subsidiary, or affiliate of such an entity, to the extent that such parent, subsidiary or affiliate is engaged in news-gathering or the dissemination of news and information."

Eliminate Congress from the scope of coverage. This revision would eliminate Congress from the definition of *federal entity*. The definition would cover all other federal entities that could issue or enforce a subpoena against a covered entity, e.g., federal courts, the executive branch, and administrative agencies. Subpoenas issued by congressional committees would not be subject to the Act.

Delete the section on "activities not constituting a waiver." Section 6 of the original bill was meant to ensure that reporters who continue to cover a matter on which they have received a subpoena have not waived the protections available to them under Section 2 of the Act. Given that it seems highly unlikely that a federal court would find that a covered entity has, in fact, waived any rights granted under Section 2 by continued reporting on such a matter, this section was deleted without harming any interests in protecting whistleblowers or expressive freedoms.

Narrow the scope of protection of information held by third parties. Section 5 of the original bill would have provided that covered persons must have notice and an opportunity to be heard before information is obtained from any third parties with whom a covered person does business. This general concept was taken from the DOJ guidelines, which provide similar procedures for subpoenas to telephone companies for phone records of reporters. This proposed revision of the

Act makes it clear that these procedures, much like the guidelines, would apply only to communications or records of covered persons rather than the records of all companies doing business with covered persons. In recognition of the fact that many parties, in addition to telephone companies, now provide communications services to covered persons, this revision includes a more modern definition of *communications service provider* drawn from the Communications Act of 1934. The revision also clarifies that it applies to third-party litigants, such as a party in civil litigation who is seeking documents from a communications service provider.

Define covered persons. In the definition for *covered person*, the revision would clarify that electronic publishers of newspapers, magazines, and periodicals would be covered. Proponents of this definition, including the journalism organizations, believe this definition is broad enough to cover traditional journalists as well as book authors and some freelance journalists and online journalists. Under the definition, freelance journalists operating under contract or who are gathering, editing, taking photographs, recording, preparing, or disseminating for a covered entity would be protected from forced disclosure. But the language would grant discretion to the court to determine whether freelance journalists who were not yet working “for” a covered entity, either by contract or an informal agreement, would be covered.²⁵

The type of Internet activity that would be covered remains less clear. A journalist who maintains a blog under the aegis of a traditional media entity, such as *Washington Post’s* Campaign for the Supreme Court, would be covered because the media entity would be protected. For individual bloggers, people seeking protection under the Act would have to show that they disseminate information and publish a “newspaper, book, magazine, or other periodical in print or electronic form.”

Numerous members of Congress clearly indicated that a shield law that explicitly protected all bloggers would never pass. Whether a particular blog qualifies

as a magazine or an electronic periodical would determine whether the person receives the Act’s protection. That decision would be left to the courts.

The Outing of “Deep Throat”

In the midst of this redrafting came the dramatic revelation that W. Mark Felt, the former assistant director of the FBI, was Deep Throat, perhaps the most famous confidential source of the twentieth century. The revelation of Deep Throat’s identity and the corresponding publicity prompted shield law supporters to become more visible. Pence and Boucher used the occasion to call on colleagues to support their legislation in another “Dear Colleague” letter on June 6, which reads in part:

Two things are clear about the role that government whistleblower W. Mark Felt played in the infamous Watergate scandal: Deep Throat exposed corruption in high places because of his absolute confidence that his identity would be protected, and Deep Throat would not have that protection today.

. . . .

Unless Congress enacts a federal media shield law, it is likely there will be no more Deep Throats because of the professional risk that public officials face by revealing information that the public has a right to know.²⁶

The redrafting prompted the House and Senate sponsors to submit the new legislation under new bill numbers, S. 1419 and H.R. 3233, just two days before a Senate Judiciary Committee hearing on July 20, 2005.

The Legislative Wheels Turn

As the hoopla surrounding Deep Throat began to subside, shield law supporters were both buoyed and a bit dismayed by a hearing called by Senate Judiciary Committee Chairman Arlen Specter, R-Penn. In the first panel of witnesses, the lead sponsors of the legislation, Lugar, Dodd, and Pence, stressed that the legislation had been changed to address concerns raised by DOJ and some members of the House and Senate judiciary committees. Specifically, they discussed how the legislation had moved

from an absolute to a qualified privilege that would allow for the disclosure of the identity of a confidential source when the information being sought was necessary to prevent “imminent and actual harm to national security.”

The second panel of witnesses included William Safire, former political columnist for the *New York Times*; Mathew Cooper and Norman Pearlstine of Time, Inc.; Floyd Abrams, counsel for *New York Times* reporter Judith Miller; Professor Geoffrey Stone of the University of Chicago Law School; and Lee Levine, who has represented a number of reporters subpoenaed in civil cases.

To the surprise of many, representatives from the Justice Department failed to appear before the committee. A day before the hearing, the department had submitted testimony that was extremely critical of the earlier version of the Free Flow of Information Act, calling it “bad public policy.” But the statement failed to acknowledge that the sponsors, with the media coalition’s support, had revised the original legislation to address many of DOJ’s concerns.

Committee members were generally receptive. Several senators, including Dianne Feinstein, Richard Durbin, and Charles Schumer, Democrats from California, Illinois, and New York, respectively, raised questions over such issues as the reporter’s privilege in situations where the public safety is at risk; what to do when the leak is a crime; whether the privilege should apply to leaks of grand jury information; and the definition of *journalist*. NAA’s Paul Boyle was upbeat. “Today was a very good day in our effort to enact a federal shield law,” he wrote to NAA’s media coalition. “In short, there was general support for protecting confidential sources to ensure the free flow of information to the public. The question is how we get there.”

Getting There

As members of Congress rushed home for summer vacations and meetings with constituents, shield law supporters were encouraged by several new developments. The first was an August 9, 2005, vote by the ABA House of

Delegates adopting a resolution by voice vote supporting a federal shield law.²⁷ The ABA's imprimatur was especially important given that the organization had rejected the shield law proposal some thirty years ago. The second was a *New York Times* op-ed column written by former Senate majority leader and Republican presidential candidate Bob Dole. He wrote in part:

As someone with a long record of government service, I must admit that I did not always appreciate the inquisitive nature of the press. But I do understand that the purpose of a reporter's privilege is not to somehow elevate journalists above other segments of society. Instead, it is designed to help guarantee that the public continues to be well informed. . . . As [Judith Miller] sits in jail, Congress can honor her commitment to principle and her courage, and that of all reporters who have helped expose wrongdoing by protecting their sources, by passing the Lugar-Pence bill and creating a federal privilege for reporters.²⁸

Some congressmen were lobbied by their hometown media during the recess with encouraging results. Of particular significance, perhaps, Judiciary Committee Chairman Specter told his local media that he supported a shield law. As of October 11, 2005, sixty-three House members had co-sponsored the Pence-Boucher bill,²⁹ and eleven senators had co-sponsored the Lugar bill.³⁰ The number of media organizations endorsing the legislation has topped eighty.³¹

The Road Ahead

Support has been slowly growing, and veteran observers of Congress find the prospects for federal shield legislation to be further along than expected at this point, especially in view of the attention that the Senate Judiciary Committee has had to focus on two Supreme Court vacancies. Specter held a second committee hearing on October 19, 2005, with Judith Miller making a compelling witness. Released from jail on September 29, Miller had addressed 1,000 journalists at the Society of Professional Journalists' annual meeting the day before her congressional testimony.

Efforts in the House have been quieted, largely because the House Judiciary Committee has yet to hold hearings on the Pence-Boucher bill. Supporters of the federal shield law will focus on adding other House members to the more than sixty who have already signed on as co-sponsors.

The road is likely to become smoother in the House with the shakeup of the Republican leadership. One of the fifteen Republican co-sponsors in the House includes Rep. Roy Blunt, who recently assumed the post of acting House majority leader in the wake of the DeLay indictments. Pence, who is both articulate and passionate on the shield law issue, recently told NAA's board of directors that he foresees a softening of opposition by the Justice Department in light of revisions made to the original bill. Finally, some DOJ personnel changes may allow shield law supporters to get a more sympathetic ear at the Justice Department.

Endnotes

1. 408 U.S. 665 (1972).
2. For discussions of post-*Branzburg* developments, see Len Niehoff, *The Constitutional Privilege After Branzburg: An Historical Overview*, in WHITE PAPER ON THE REPORTER'S PRIVILEGE 61-82 (2004); C. THOMAS DIENES, LEE LEVINE & ROBERT LIND, NEWSGATHERING AND THE LAW § 14-5 (1st ed. 1997).
3. 339 F.3d 530 (7th Cir. 2003).
4. *Id.* at 532.
5. Myron A. Farber, *A Reporter's Reluctant Education in the Law*, 22:4 COMM. LAW. 5 (Winter 2005).
6. See Monica Dias, *Leggett's Case Revives Talk About Shield Law*, 26:1 NEWS MEDIA & LAW 7 (Winter 2002).
7. See REPORTERS COMM. FOR FREEDOM OF THE PRESS, THE REPORTER'S PRIVILEGE: A COMPENDIUM (Feb. 7, 2002).
8. See Dias, *supra* note 6 (interest in shield law resurfaced after book author Vanessa Leggett served 168 days in a federal jail in Houston for refusing to disclose confidential information and unpublished, nonconfidential information to a federal grand jury).
9. *Id.*
10. See *Gonzales v. Nat'l Broad. Co.*, 186 F.3d 102 (2d Cir. 1999) (privilege recognized for nonconfidential information); see also LAURA R. HANDMAN & REBECCA R. REED, REPORTER'S PRIVILEGE UNDER FEDERAL LAW CIRCA 2000 AND BEYOND (1999).
11. The Media Law Resource Center (formerly the Libel Defense Resource Center) consists largely of major media companies, nonprofit journalism associations, and law firms that defend media interests in cases involving libel, privacy, and related torts.
12. MEDIA LAW RESOURCE CTR., WHITE PAPER ON THE REPORTER'S PRIVILEGE (2004), available at www.medialaw.org/content/NavigationMenu/Publications/MLRC_Bulletin/Bulletin_Archive/2004-2WhitePaper.pdf.
13. See William Kates (AP), *Media Lawyer Says Shield Law Needed to Protect Reporters' Sources*, NEWSDAY, Oct. 21, 2004 (describing the keynote speech given by Bruce W. Sanford at a gathering of journalists celebrating the fortieth anniversary of Syracuse University's Newhouse School of Public Communications).
14. See D.C. CODE ANN. § 16-4703.
15. See *id.* § 16-4703(a)(1).
16. 150 CONG. REC. S11647 (daily ed. Nov. 19, 2004) (statement of Sen. Dodd).
17. The newspapers included the *San Antonio Express-News*, the *Pittsburgh Post-Gazette*, the *Detroit Free Press*, and the *Rocky Mountain News*.
18. 28 C.F.R. § 50.10.
19. "Dear Colleague" letter from Reps. Mike Pence & Rick Boucher (Jan. 27, 2005).
20. Press Release, U.S. Sen. Richard Lugar (Feb. 9, 2005).
21. See REPORTERS AND FEDERAL SUBPOENAS: FEDERAL SHIELD LAW EFFORTS, www.rcpf.org (website of the Reporters Committee for Freedom of the Press).
22. Dodd reintroduced his legislation, the Free Speech Protection Act of 2005 (S. 369), on Feb. 14, 2005. As noted below, Dodd later joined forces with Senator Lugar by co-sponsoring the updated version of S. 340.
23. Christopher J. Dodd & Richard Lugar, *Secrecy: It Can Work for You*, USA TODAY, Mar. 16, 2005.
24. John Sturm, President and CEO of the Newspaper Association of America, Letter to Publishers (Feb. 15, 2004).
25. DOJ raised two concerns that were not incorporated into the new language: (1) the potential for secret grand jury testimony to be disclosed in open court; and (2) emergency requests for information, such as in a bomb threat situation. The drafters determined that federal courts clearly have the inherent discretion to maintain grand jury secrecy as well as the ability to address emergencies by handling motions to compel testimony. The proposed legislation does not change existing law in either regard.
26. "Dear Colleague" letter from Reps. Mike Pence & Rick Boucher (June 6, 2005).
27. See www.abanet.org/leadership/2005/annual/dailyjournal/104b.doc

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An Overview of the Free Flow of Information Act (S. 340/H.R. 581), As Originally Introduced

SECTION	Text	Analysis*
SECTION 1: SHORT TITLE	This Act may be cited as the “Free Flow of Information Act of 2005.”	
SECTION 2: CONDITIONS FOR COMPELLED DISCLOSURE	<p>(a) Conditions for Compelled Disclosure—</p> <p>No Federal entity may compel a covered person to testify or produce any document in any proceeding or in connection with any issue arising under Federal law unless a court determines by clear and convincing evidence, after providing notice and an opportunity to be heard to the covered person—</p> <p>(1) that the entity has unsuccessfully attempted to obtain such testimony or document from all persons from which such testimony or document could reasonably be obtained other than a covered person; and</p> <p>(2) that—</p> <p style="padding-left: 20px;">(A) in a criminal investigation or prosecution, based on information obtained from a person other than a covered person—</p> <p style="padding-left: 40px;">(i) there are reasonable grounds to believe that a crime has occurred; and</p>	<p>The Act is meant to apply to any Federal entity that can compel testimony or the production of documents. It does not, however, preempt any of the thirty-one current state shield laws or the common law reporter’s privilege that has developed under state law. It also is not intended to interfere with the practice of Federal courts sitting in diversity jurisdiction to apply, under Federal Rule of Evidence 501, the shield law that would be applied by a state court hearing the same case under state law. To ensure that courts require the government or the moving party to make a serious and documented showing of need for the testimony or documents sought from a covered entity, this section uses the well-established “clear and convincing evidence” standard. This standard is familiar to federal courts, which have used it for forty years in connection with defamation claims and substantially longer in connection with other types of criminal and civil cases. It also provides that a covered person must have effective notice and an opportunity to be heard.</p> <p>This section applies the familiar “exhaustion” requirement on any request to obtain testimony or documents from the media. It is taken from the DOJ Guidelines’ provisions restricting subpoenas in civil and criminal cases, which require the party seeking to compel testimony or subpoena documents to “have unsuccessfully attempted to obtain the information from alternative nonmedia sources.” 28 C.F.R. § 50.10(f)(3). This standard also is consistent with the federal common law that has developed in this area in the past thirty years.</p> <p>The standard used here for investigations or criminal cases, taken from the DOJ Guidelines found at 28 C.F.R. § 50.10(f)(1), ensures that the information sought is central to the investigation or case. The protection that there must be “reasonable grounds to believe that a crime has occurred” is an important safeguard taken directly from the DOJ Guidelines. <i>Id.</i> The</p>

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(ii) the testimony or document sought is essential to the investigation, prosecution, or defense; or

(B) in a matter other than a criminal investigation or prosecution, based on information obtained from a person other than a covered person, the testimony or document sought is essential to a dispositive issue of substantial importance to that matter.

(b) Limitations on Content of Information—

The content of any testimony or document that is compelled under subsection (a) shall, to the extent possible—

- (1) be limited to the purpose of verifying published information or describing any surrounding circumstances relevant to the accuracy of such published information; and
- (2) be narrowly tailored in subject matter and period of time covered.

DOJ Guidelines also provide that this limitation is critical to ensuring that a “subpoena should not be used to obtain peripheral, nonessential, or speculative information.” *Id.*

This section applies the DOJ Guidelines standard for civil litigation found at 28 C.F.R. § 50.10(f)(2) to all civil cases, administrative and legislative matters, and other proceedings that are not criminal investigations or prosecutions. This standard is based on the familiar policy consideration that any information sought must be “essential” to the case. As provided in the DOJ Guidelines, further, subpoenas against the media should only be sought in cases “of substantial importance.” *Id.* This standard is, for practical purposes, identical to the common law that has developed in the federal courts over the past thirty years, which generally provides that the information sought must be “necessary” to a party’s claim or defense and must go to the “heart of the case.”

This section is taken directly from the DOJ Guidelines, 28 C.F.R. § 50.10(f)(4), which provides that subpoenas generally should be limited to verifying published material. This principle from the DOJ Guidelines properly recognizes that the verification of information already made public is less intrusive and thus more protective of the free flow of information than requiring a covered entity to make public information that is internal or confidential. The DOJ Guidelines also provide that subpoenas should “be directed at material information regarding a limited subject matter, should cover a reasonably limited period of time, and should avoid requiring production of a large volume of unpublished material,” 28 C.F.R. § 50.10(f)(6), a principle carried forward in this section.

SECTION 3: COMMERCIAL OR FINANCIAL INFORMATION

The provisions of section 2 do not apply to a request by a Federal entity for any testimony or document that consists of only commercial or financial information unrelated to newsgathering or news and information dissemination by a covered person.

To ensure that this Act is not read to restrict discovery in routine commercial disputes involving covered entities, this section provides that the Act’s standards will not apply to such requests. *See* DOJ Guidelines, 28 C.F.R. § 50.10(m).

SECTION 4: COMPELLED DISCLOSURE PROHIBITED

Notwithstanding any provision of section 2, in any proceeding or in connection with any issue arising under Federal law, no Federal entity may compel a covered person to disclose—

- (1) the identity of a source of information—
 - (A) from whom the covered person obtained information; and
 - (B) who the covered person believes to be a confidential source; or
- (2) any information that could reasonably be expected to lead to the discovery of the identity of such a source.

This section provides that no federal entity may compel disclosure of the identity of a confidential source. As is the case with section 2, it is not intended to preempt state statutory or common law. The public interest in the flow of information is particularly strong when the information is provided to reporters by confidential sources. Without protection for the identity of these sources, many matters of crucial public importance would not become publicly known. Therefore, section 4 provides heightened protection for the identities of confidential sources. The protection of the identity of confidential sources is essential not only to particular cases in which an understanding of confidentiality exists, but to future cases in which sensitive information may be provided to a covered entity. Protection in current cases reassures future sources that promises of confidentiality will be secure, and that covered entities will not be annexed as an investigative arm of the government or used by private litigants to further their claims. The section also recognizes that protecting the confidentiality of a source from being revealed through testimony is a hollow promise without a parallel protection for other information held by covered persons that could reveal the identity of confidential sources. Accordingly, that category of information is provided parallel protection.

SECTION 5: COMPELLED DISCLOSURE FROM THIRD PARTIES

(a) Conditions for Compelled Disclosure—
The provisions of sections 2, 3, and 4 shall apply to any testimony or document that a Federal entity seeks from a third party if such testimony or document consists of any record, information, or other communication that relates to a business transaction between such third party and a covered person. Such record, information, or other communication includes any telephone record or other record held by a telecommunications service provider, Internet service provider, or operator of an interactive computer service for a business purpose.

The DOJ Guidelines recognize that it is important to protect not only sensitive information held by the news media, but information held by companies outside the news media that nonetheless could reveal confidential sources and other information that is otherwise protected. In particular, the identity of confidential and other sources could be easily determined by obtaining the telephone, e-mail, and Internet records of covered entities, thus undermining the protections provided by sections 2 and 4 of the Act. Accordingly, the DOJ Guidelines were amended in 1980 to provide a broad range of protections to information held by telephone companies. DOJ Guidelines, 28 C.F.R. § 50.10(g).

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(b) Notice and Opportunity Provided to Covered Persons—

A court may compel the testimony or disclosure of a document under this section only after the party seeking such a document provides the covered person who is a party to the business transaction described in subsection (a)—

(1) notice of the subpoena or other compulsory request for such testimony or disclosure from the third party not later than the time at which such subpoena or request is issued to the third party; and

(2) an opportunity to be heard before the court before the time at which the testimony or disclosure is compelled.

(c) Exception to Notice Requirement—

Notice under subsection (b)(1) may be delayed only if the court determines by clear and convincing evidence that such notice would pose a substantial threat to the integrity of a criminal investigation.

The DOJ Guidelines recognize that the news media must have effective notice and a meaningful opportunity to be heard before a third party is required to provide information concerning the news media to the government. 28 C.F.R. § 50.10(g)(1)(3). Often, the entity to which a subpoena is directed has no incentive to resist disclosure. Such an entity usually will have no ability to know that records sought concern a covered person, and privacy provisions in federal law may make it impossible for such an entity to apprise the subject of a subpoena about the scope and nature of materials requested by a subpoena. Accordingly, this section requires that notice of any subpoena or process to a third party that concerns a covered person must be provided to the covered person at the time that subpoena or process is issued.

This section recognizes that in certain investigations providing notice to a covered person before information is sought from a third party may threaten the integrity of a criminal investigation. It thus adopts the standard set out in the DOJ Guidelines for the delay of such notice in the few extraordinary cases in which a delay is warranted. 28 C.F.R. § 50.10(g)(3).

SECTION 6: ACTIVITIES NOT CONSTITUTING A WAIVER

The publication or dissemination of any testimony or document (or portion of such testimony or document) sought under section 2 shall not waive the requirements of such section. The publication or dissemination of any testimony or document (or portion of such testimony or document), identity, or information described in section 4 shall not waive the prohibition described in such section.

This section is meant to recognize the reality that covered persons often continue to gather and publish information concerning matters in which testimony or documents are sought from them. It thus provides that continued publication of information relating to these matters will not constitute a waiver of any arguments the covered person has made against compelled disclosure. Without such a section, the public could be deprived of a covered person's continued publication of information relating to these issues, which often occurs in follow-up stories and continued coverage of news events.

SECTION 7: DEFINITIONS:

(1) The term "covered person" means—

(A) an entity that disseminates information by print, broadcast, cable, satellite, mechanical, photographic, electronic, or other means and that—

(i) publishes a newspaper, book, magazine, or other periodical;

This section is meant to apply the protections of the Act to the entities that are most directly responsible for ensuring the free flow of information to the American public. Newspapers, magazines, book publishers, television networks and stations, cable and satellite networks, channels and programming services, news agencies, and wire

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(ii) operates a radio or television broadcast station (or network of such stations), cable system, or satellite carrier, or a channel or programming service for any such station, network, system, or carrier; or

(iii) operates a news agency or wire service;

(B) a parent, subsidiary, or affiliate of such an entity; or

(C) an employee, contractor, or other person who gathers, edits, photographs, records, prepares, or disseminates news or information for such an entity.

(2) The term "document" means writings, recordings, and photographs, as those terms are defined by Federal Rule of Evidence 1001 (28 U.S.C. App.).

(3) The term "Federal entity" means an entity or employee of the judicial, legislative, or executive branch of the Federal Government with the power to issue a subpoena or provide other compulsory process.

(4) The term "third party" means a person other than a covered person.

services all make essential daily contributions toward the free flow of information. These entities continue to change their means of reaching the public as technology develops, and this section recognizes that Internet and other electronic publications by these entities will be protected (along with publication in other media that may not yet be deployed). This definition is not meant to extend broadly to protect any individual operating a personal website or web log (blog) because of the potential overbreadth of restricting disclosure of information from the millions of Americans using the Internet to communicate personal ideas and information.

Covered persons rely not only on their employees for the information that they will disseminate to the public, but also on individuals who operate as freelancers under contract with covered persons. This section provides that these freelancers are encompassed by the definition of "covered person." It also provides that "other persons" who gather information "for" a covered person may be covered if the court finds that they should be treated as covered persons, thus permitting a court the discretion (but not the requirement) to protect disclosure from freelance journalists operating without a firm contractual relationship with a covered person.

The definition of "Federal entities" is meant to be read broadly so that any instrumentality of the federal government that has the power to compel testimony or seek documents from covered persons in any forum or proceeding whatsoever is subject to the Act. This definition would encompass federal courts, administrative agencies, legislative bodies, executive bodies, and any other federal tribunal, commission, or body.

*Prepared by Kurt Wimmer, Covington & Burling, and Paul Boyle, Newspaper Ass'n of America

Federal Shield Law

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28. Bob Dole, *The Underprivileged Press*, N.Y. TIMES, Aug. 16, 2005.

29. As of October 11, 2005, co-sponsors of H.R. 3323 were Gary L. Ackerman (D-N.Y.), Robert E. Andrews (D-N.J.), Bob Beauprez (R-Colo.), Shelley Berkley (D-Nev.), Timothy H. Bishop (D-N.Y.), Earl Blumenauer (D-Or.), Roy Blunt (R-Mo.), Jo Bonner (R-Ala.), Dan Boren (D-Okla.), Rick Boucher (D-Va.), Sherrod Brown (D-Ohio), G.K. Butterfield Jr. (D-N.C.), Joseph Crowley (D-N.Y.), Danny K. Davis (D-Ill.), Jim Davis (D-Fla.), Diana DeGette (D-Colo.), Rahm Emanuel (D-Ill.), Anna G. Eshoo (D-Cal.), Luis G. Fortuno (R-P.R.), Charles A. Gonzalez (D-Tex.), Gene Green (D-Tex.), Jane Harman (D-Cal.), Alcee L. Hastings (D-Fla.), Maurice D. Hinchey (D-N.Y.), Tim Holden (D-Pa.), Rush D. Holt (D-N.J.), Steve Israel (D-N.Y.), Sheila Jackson-Lee (D-Tex.), William L. Jenkins (R-Tenn.), Eddie Bernice Johnson (D-Tex.), Patrick J. Kennedy (D-R.I.), Rick Larsen (D-Wash.), John B. Larson (D-Conn.), Ron Lewis (R-Ky.), Zoe Lofgren (D-Cal.), Connie Mack IV (R-Fla.), Carolyn B. Maloney (D-N.Y.), Carolyn McCarthy (D-N.Y.), Martin T. Meehan (D-Mass.), Dennis Moore (D-Kan.), James P. Moran (D-Va.), John P. Murtha (D-Penn.), Major R. Owens (D-N.Y.), Frank Pallone Jr. (D-N.J.), William J. Pascrell Jr. (D-N.J.), Ted Poe (R-Tex.), Deborah Pryce (R-Ohio), Steven R. Rothman (D-N.J.), C.A. Dutch Ruppersberger (D-Md.), Jim Ryun (R-Kan.), Linda T. Sanchez (D-Cal.), Janice D. Schakowsky (D-Ill.), Christopher Shays (R-Conn.), Ellen O. Tauscher (D-Cal.), Mike

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30. As of October 11, 2005, co-sponsors of S. 1419 were Joseph R. Biden Jr. (D-Del.), Christopher J. Dodd (D-Conn.), Pete V. Domenici (R-N.M.), Russell D. Feingold (D-Wisc.), Lindsey Graham (R-S.C.), Chuck Hagel (R-Neb.), James M. Jeffords (I-Vt.), John F. Kerry (D-Mass.), Frank R. Lautenberg (D-N.J.), Bill Nelson (D-Fla.), and Barack Obama (D-Ill.).

31. Shield law endorsers include ABC Inc., Advance Publications, Inc., Advanstar, American Business Media, American City Business Journals, American Federation of Television & Radio Artists, American Society of Magazine Editors, American Society of Newspaper Editors, The Ann Arbor News, Association of American Publishers, Association of Capitol Reporters and Editors, The Bay City Times, Belo Corp., The Birmingham (AL) News, Bridgeton (NJ) News, Cable News Network, California Broadcasters Association, California Newspaper Publishers Association, CBS, CMP Media, LLC, Colorado Broadcasters Association, Community Newspaper Holdings, The Condé Nast Publications, The Copley Press, Court TV, Cox Enterprises, Inc., Butler Auto Auction, El Campo Leader-News, Crain Communications, Daily News, L.P., The Dallas Morning News, Denton Record-Chronicle, The (Easton, PA) Express-Times, Fairchild Publications, Farm Journal Media, The Flint (MI) Journal, Forbes Inc., Freedom Communications, Inc., Gannett

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