ker.com/2017/12/11/donaldtrumpsfake-newsstocks.

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

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I. I

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

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

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

In December 2018, a bill was pending in the House of Representatives to create such a law,[5] but it died as the year ended. Previous attempts to pass a federal shield law have failed, most recently in 2013.[6] From journalistsÕ perspectives, that could be a blessing in disguise. The bills introduced to create a shield law between 2005 and 2013 were riddled with exceptions and also exceptions to exceptions. Some of the exceptions, such as for national security purposes, were probably unavoidable in a post-

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

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

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

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

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

The Nugent episode was the start of a long period in which authorities and news organizations periodically clashed over whether journalists could be compelled to name sources of controversial stories. For about 100 years, to ourelmr journa a

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

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

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

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

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

dealers and users.[46]

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

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

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

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

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

was released after her source, Vice President Dick CheneyÕs chief of staff, allowed her to use his name.[71]

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

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

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

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

The series of cases that journalists were losing had two potentially positive effects for the media; they spurred Congress members to introduce bills 0 0 0 sc 0.24 8.3906 593.3 (l) -4.6 (os) 19.4 (i) -4.6 (ng) -228.3 (ha) 9.2 27 135523.8 19.4 (

to various extents, protect journalists from revealing sources and other newsgathering-related information[76] or state court rules that do the same.[77]

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

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

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

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

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76. ALA. CODE ¤ 12-21-142 (LexisNexis Pub. 2012; Supp. 2016); ALASKA STAT. ¤¤ 09.25.300-09.25.390 (2016); ARIZ. REV. STAT. ANN. ¤ 12-2237 (2016); ARK. CODE ANN. ¤ 16-85-510 (2005; Supp. 2015); CAL. EVID. CODE ¤ 1070 (West 2009; Supp. 2017); COLO. REV. STAT. ¤ 13-90-119 (2014: Supp. 2016); CONN. GEN. STAT. ¤ 52-146t (2013; Supp. 2017); DEL. CODE ANN. tit.

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

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

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

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

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

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

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

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

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

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

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

For example, in 2011 the U.N. Human Rights Committee published a General Comment on Article 19 based on observations the Committee had made about individual nationsÕ records on human rights and its decisions on disputes between citizens and their countries over possible violations of Article 19. In a paragraph stating that it was generally impermissible for States to restrict journalistsÕ freedom to travel to attend meetings or investigate possible human

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

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

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

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

142. Id.
143. Id. at 19.
144. Id.
145. Id. at 21.
146. See, e.g., GLENN GREENWALD,

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

A fourth issue addressed in the report is the problem of how to define journalist or journalism at a time when digital tools allow more players and more platforms to enter the market for news and opinion. The report notes that some have called for improvements to whistleblower laws to protect the source more directly, but laws in some nations would still target journalists for publishing leaks even if sources are protected, so the need to define who is entitled to press freedom remains.[154] The report noted that many laws around the world protecting journalists were too narrow in the digital age, often limiting their reach to people working for legacy media organizations or who had considerable publishing credits or proof of substantial income

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

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

As troublesome as Òreal Ó fake news is, there is also the issue of President TrumpÕs frequent criticism of the mainstream news media as purveyors of fake news. While some optimists have suggested that the PresidentÕs attacks on the media have actually strengthened the media, others have noted that his rhetoric has been picked up by authoritarian leaders in other countries who use the phrase Òfake newsÓ to dismiss stories about rights violations and other questionable conduct.[163]

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

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

160. Id.

161.

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

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

V. BUILDING A BETTER U.S. SHIELD LAW

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

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

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

A. How Strong Should Protection Be?

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

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

than a criminal case, the court would have to find the information sought was Òessential to a dispositive issue of substantial importance to that matter.Ó[170] If a covered person was required to provide information, the bills stated that disclosure should be limited to verification of the informationÕs accuracy and be Ònarrowly tailoredÓ both in subject matter and time period.[171]

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

Another bill introduced in the 109th Congress, S. 369, also would have provided absolute protection to confidential sources. The bill provided that no federal entity of any branch of government could compel a covered person to disclose the source of any information Òwhether or not the source [had]

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

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

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

B. What About Third Parties?

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

178. Id. at ¤ 2(a)(2)(B).
179. Id. at ¤ 2(a)(3) & (4).
180. Id. at ¤ 2(d).
181. S.987 at ¤ 4.
182. See New York Times Co. v. Gonzales, 459 F. 3d 160 (2d Cir. 2006); Reporters Comm. for Freedom of the Press v. AT&T, 593 F. 2d 1030 (D.C. Cir. 1978).
183. Charlie Savage & Leslie Kaufman, Phone Records of Journalists Seized by U.S., N.Y. TIMES, May 24, 2013, at A1.

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

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

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

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

extension, their sources) and keep any information obtained before officials

D. What About Fake News?

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

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

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

VI. CONCLUSION

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

Congress has an opportunity to shore up protection for journalists engaged in important public-service reporting and also offer a templa