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CHECKING THE TEMPERATURE:
WHERE DOES THE U.S. STAND ON FEDERAL SHIELD LAWS?

A Thesis

Presented in partial fulfillment of requirements

for the degree of Master of Arts

in the School of Journalism

The University of Mississippi

Austin Clay Vining

August 2016

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ABSTRACT

This research helps to identify the history of attempts at passing a federal shield law for journalists in the United States, tracing back to when the need was originally recognized after the Supreme Court's landmark *Branzburg v. Hayes* decision in 1972. The research also aims to help determine where journalists stand today, based on state statutes and court precedents, in terms of three pertinent issues: revealing anonymous sources, handing over newsgathering materials, and prosecuting journalists under the Espionage Act. To find this information, different historical and legal research methods were applied. By tracing through previous research, online guides and news articles, a better picture is painted of the history of these issues, and the attempted legislative processes can be better understood. It seems the current state of affairs in the United States leaves the media largely unable to fulfill their role of serving as the Fourth Estate by serving as a system of checks and balances for the other three branches of government due to their lack of legal protection, and the American people are the ones left to suffer.

DEDICATION

This thesis is dedicated to those who came before me: you inspired me to reach my full potential; to those still working in the professional field of journalism: keep up the good work; and to those who will come after me: you can do this, I promise.

ACKNOWLEDGMENTS

Thank you to all of the educators who prepared me to for a graduate education at the University of Mississippi, especially Dr. Reginald Owens, Dr. Judith Roberts, Dr. Beth Christian, Dr. Mary Margaret Livingston, and Dr. Donna Thomas. Another thank you goes to those who helped get me through my education at Ole Miss: my thesis committee, Mr. Charles Mitchell, Mr. R.J. Morgan, and Dr. James Lumpp; my program chair, Dr. Joseph Atkins; and my mentor and friend, Dr. Jeanni Atkins.

Thank you to my family, friends, and coworkers, without whom, none of this would have been possible. To my parents, Holli and Tim Vining, thank you for your unwavering support of me in everything I have ever done. To my wife, Allison East Vining, thank you for being one of my biggest sources of encouragement and my favorite proofreader. To my friends, thanks goes to each and every one of you for cheering me on throughout this journey.

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STATEMENT OF THE PROBLEM

The release of Reporters Without Borders' 2015 World Press Freedom Index listed the United States at number 49, dropping 16 places from the 2013 index. The World Press Freedom Index measures press freedom in 180 countries around the world using a methodological approach including several categories such as media independency and legislative framework.¹ Reporters Without Borders identifies post-9/11 conflicts between the United States national security initiatives, and its obligation to the First Amendment as a significant detriment to press freedom.²

¹ World Press Freedom Index – methodology, http://rsf.org/index2014/data/2014_wpfi_methodology.pdf

² World Press Freedom Index 2014, <http://rsf.org/index2014/en-americas.php>

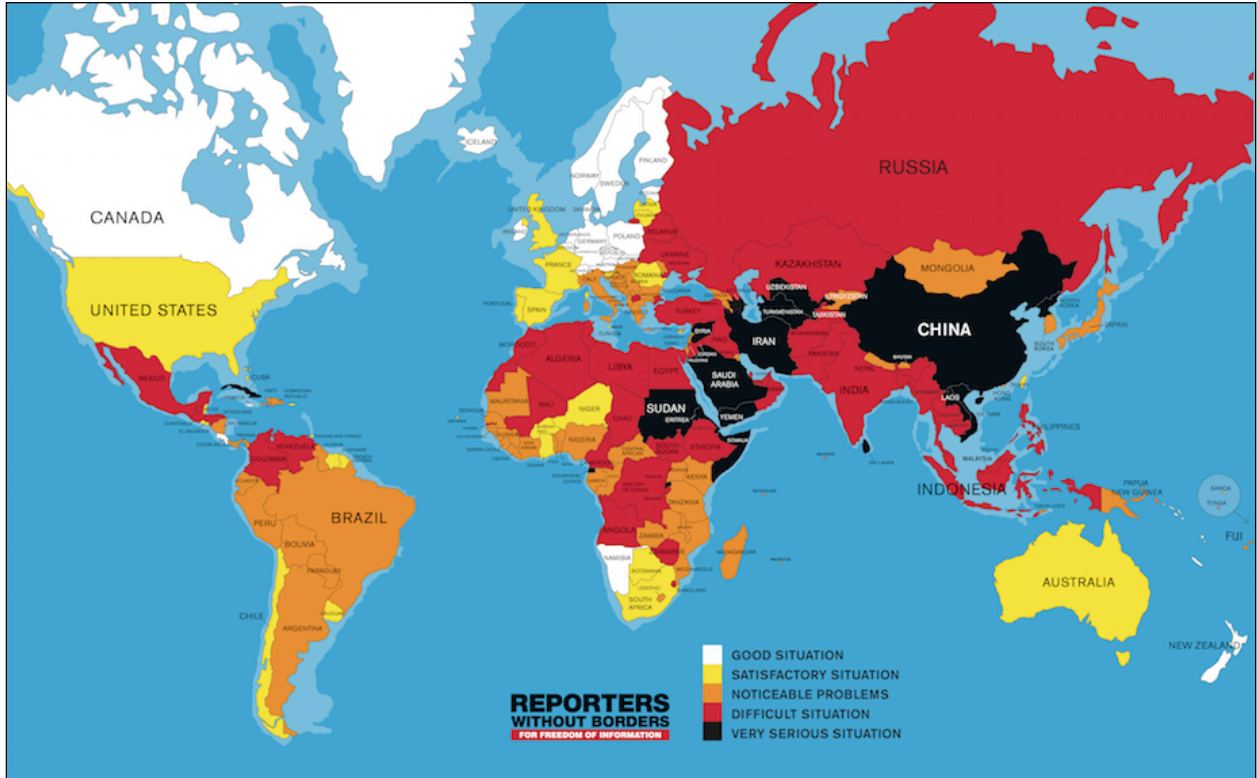


Figure 1. 2015 Index. Reporters Without Borders’ 2015 World Press Freedom Index listed the United States at number 49. From Reporters Without Borders.

After the September 11 attacks on the United States, the liberties enshrined by the First Amendment also fell under attack. Under George W. Bush’s administration, journalists’ freedoms were slashed as they began to be harassed and imprisoned for failing to reveal sources and surrender files. However, since Barack Obama assumed office the focus has shifted from journalists to whistleblowers, but journalists are often still pressed to identify these individuals.³ Now concern is being raised regarding the possibility of using the Espionage Act or similar laws to prosecute journalists, as they could be interpreted as sharing the government’s secrets.⁴

While the Bush administration charged three individuals under the Espionage Act, at

³ Ibid.
⁴ D. Meier, “Changing With the Times: How the Government Must Adapt to Prevent the Publication of Its Secrets,” *Review of Litigation*, 28(1), 213, 2008.

least eight have been charged since Obama took office in 2008. Recent years have been marked with famous cases of whistleblowers and their prosecution by the United States, such as WikiLeaks founder Julian Assange's informant Private Chelsea/Bradley Manning, who is serving a 35-year jail term.⁵ Other notable instances involving widely publicized leaks include the National Security Agency's whistleblower Edward Snowden, Pulitzer-Prize winning journalist James Risen for information published in "State of War," and The Associated Press scandal, involving the Department of Justice seizing the news agency's phone records.⁶

⁵ World press freedom index 2014.

⁶ Ibid.

PURPOSE OF THE STUDY

In light of recent events, along with a history of injustices against the First Amendment, many have called for a federal shield law. Such a law would protect reporters from revealing information and sources used in gathering and disseminating news. While many states have instituted shield laws, some with more protection and some with less, there have been no federal laws passed to shield journalists from this line of questioning, leading to many journalists being jailed or fined for contempt of court. There is also a need to further examine the potentially chilling effects laws such as the Espionage Act could have if they are used to prosecute journalists.

Why do we need a federal shield law? Is it of such great importance that journalists be able to keep their information and sources confidential that the federal government should protect this privilege? What does society stand to lose with the continued absence of a federal shield law? Who should be entitled to protection under a shield law and how should this be defined? What privileges should such an act entail, and what limitations might it need to impose? Many in the past have gone to great lengths to pass such a law, but why? Why have previous efforts failed, and what would need to happen in order to pass such legislation? What precedents have the courts set to outline the current state of journalists' privilege?

To answer these questions it is important to understand the argument, taking into account

the central themes of both proponents and opponents of a federal shield law. It is also important to examine what events have transpired over time leading to the formation of these views, including previous attempts at passing a federal shield law. Some states have successfully passed shield laws and may provide a model for successful federal legislation but still no such federal law exists. This issue is of growing importance as the world looks to the United States to be a leader in civil liberties. The world is watching the United States, and when liberties are restricted in this country, the implications are global.

METHODOLOGY

In order to address the aforementioned questions, a literature review will be conducted to identify relevant articles, books, reports, and documents pertaining to federal shield laws. A combination of legal and historical research approaches will be used to examine the course of the need and advocacy for a federal shield law in the United States. The legal aspect of this research will trace the path of legislation, case law and prosecution relating to the United States placing limitations on the press' freedom to inform, and the historical research will examine the same issues outside of the courtrooms, including the ideas of theorists, media professionals, and government officials. Additionally, research will be conducted to provide a more thorough map of where the efforts have come and where they currently stand today. These goals will be to detail the current state of shield laws and to provide a variety of approaches and attitudes to the issue and its potential solutions.

THEORETICAL FRAMEWORK

The need for a federal shield law is echoed by some normative theories, which seek to explain how the press should ideally work in a society. Normative theories in the United States have come from Libertarian theory, authoritarian theory, and social responsibility theory, which was developed as a compromise of the first two theories. For the purpose of this study, the focus will be on the United States, so this research aims to look at how the media should ideally operate within that society.

A perspective from authoritarian theory, technocratic control, which was once made popular by Harold Lasswell and Walter Lippmann, advocates for the direct regulation of the media. This approach suggests the media cannot be trusted to responsibly fulfill the needs of the public, and rather the government should regulate what information should and should not reach the public.⁷ Presenting consequences for journalists who refuse to reveal their sources or information does not involve prior restraint but does constitute as censorship by means of intimidation.

Those in the Libertarian camp are known as First Amendment absolutists, who take the freedoms granted by the First Amendment very literally. Supreme Court Justice Hugo Black

⁷ S. Baran and D. Davis, *Mass Communication Theory: Foundations, Ferment, and Future* (California: WADSWORTH Publishing CO., 2012), 101.

once put this sentiment into words when he famously opined, “No law means no law.”⁸

Libertarian theorists, along with proponents of shield laws, view the media as the Fourth Estate of government, implying that it serves a role as a watchdog against the three main branches of government.⁹ Under the Libertarian concept, prosecuting journalists for refusing to reveal sources or information impedes this role of the press.

The model the United States uses is the social responsibility theory, which prescribes press freedom so long as there is accountability. This theory suggests the press should have the freedom to regulate itself, but should it ever fall short of fulfilling this duty, government intervention would prove necessary.¹⁰ It is because of this model’s development as a combination of ideas that issues regarding shield laws arise. Supporters of shield laws maintain that the press is fulfilling its obligation to society by serving as the Fourth Estate and a watchdog of the government, while the opposition holds that journalists are only punished when the media has failed its obligation to avoid violence by publishing matters involving national security.

⁸ Ibid., 101.

⁹ Ibid., 110.

¹⁰ Ibid., 101.

SIGNIFIGANCE OF STUDY

The implications of these issues are far-reaching, impacting much of the developed world as established and emerging democracies look to the United States as a model for their own legislation. When a global leader such as the United States, whose First Amendment is a central tenet within society, allows for those freedoms to be abridged, the door is opened for other countries to follow suit. Conversely, taking the steps to ensure the media is allowed to serve its watchdog role without fear of retribution from the government would set an example of how the Fourth Estate should operate without regulation.

As for the Americans and citizens of other countries that would be influenced, the risks and rewards of a federal shield law are of great significance. If a federal shield law were to be passed, the media could become increasingly and unnecessarily vicious in their watchdog role and, without fear of retribution, put the nation at an increased risk by revealing matters of national security. On the other hand, as the government continues to go after whistleblowers and journalists, more and more may elect not to release information of interest to the public, which could in turn lead to more corruption and secrecy within the government without fear of being found out.

Research pertaining this issue should provide a more definitive solution in determining need for a federal shield law and what the implications of various outcomes could mean for the

United States and the global community. Both proponents and opponents will be able to point to this research as a means to identify strengths and weaknesses in both arguments. Additionally, information concluded in the research will potentially be useful for legislators to use as reference in drafting future legislation. With arguments for both sides laid out as well as ideas that have worked well, perhaps a compromise between all sides can be reached.

LITERATURE REVIEW

Presenting a Need for a Federal Shield Law

The need for a federal shield law was created in 1972 when the Supreme Court first interpreted that the Constitution did not already protect journalists' privilege. This case, *Branzburg v. Hayes*, involves one of Louisville Courier-Journal reporter Paul Branzburg's articles, which included thorough coverage of two individuals making hashish from marijuana. Published long with the article was a photo of a laboratory scene featuring hands working and hashish on the table. The article made note that Branzburg had assured the sources they would remain confidential.¹¹

Branzburg's disclaimer would soon be tested when he was subsequently subpoenaed to testify in front of a grand jury. The Kentucky court said the state's law protected Branzburg from revealing his source but the law did not protect him from testifying about events he had personally observed. That is to say, even if a journalist witnesses illegal activity as part of the news-gathering process, he or she is still compelled to testify in regard to that activity in the same way a layperson would.¹²

The Supreme Court upheld this decision in a 5-4 rule and signaled that the First Amendment did not shield journalists from incarceration. The ruling did however specify that the

¹¹ S. Davidson and D. Herrera, "NEEDED: MORE THAN A PAPER SHIELD," *William & Mary Bill of Rights Journal*, 20(4), 1298-1300, 2012.

¹² *Ibid.*, 1299.

federal government or states were at liberty to pass legislation granting privileges for journalists. Today a majority of the states have shield laws protecting journalists' rights, some to a greater extent than others, but still more than four decades later no federal shield law has been enacted.¹³

Non-Confidential News Privilege and Who Should be Afforded Reporter's Privilege

As previous measures for a federal shield law have gone before Congress and failed, it is necessary to examine why these attempts have failed. Though there has been bipartisan support in favor of a federal shield law, the legislation has not been passed due largely in part to a disagreement on who should be able to invoke reporter's privilege. This issue can be illustrated by the case of Josh Wolf, a freelance video-journalism blogger. Wolf documented the events of a protest and when an investigation was launched to press charges against unknown protesters, Wolf's footage was subpoenaed. Wolf was not forthcoming, citing his First Amendment right to protect information gained in the process of newsgathering. When a federal court judge disagreed on the grounds that Wolf did not qualify for reporter's privilege, he was imprisoned for 226 days.¹⁴

Some legislators have offered that individuals without professional training or affiliation with traditional media organizations should not be afforded reporter's privileges. This view stems from the idea that a broad shield law would allow nearly anyone to invoke reporter's privilege, leading to negative social and economic consequences. At the forefront of these concerns is the idea that a broad application of the law would lead to a vast amount of information to be shielded from the legal system, hindering the due process of justice. Another

¹³ Ibid., 1299.

¹⁴ S. B. Turner, "Protecting Citizen Journalists: Why Congress Should Adopt a Broad Federal Shield Law," *Yale Law & Policy Review*, 30(2), 503-504, 2012.

concern suggests an open definition of the law may lead to significant litigation costs as courts are forced to make distinctions in the law as opposing parties argue its applicability.¹⁵

Conversely, other lawmakers suggest that the costs of having too narrow of a shield law would also present threats to society by inhibiting the public's right to be informed. A shield law is intended to secure that the media are able to fulfill their role of serving as the Fourth Estate by serving as a system of checks and balances for the other three branches of government. A shield law would protect this role by ensuring journalists are able to give an unfiltered report and that sources are able to openly communicate to journalists without fear of exposure. Without the protection the media would theoretically serve the government as an investigative branch, significantly limiting the institution's ability to carry out its obligation to society.¹⁶

A core component to this stance lies within the fact that freedom of the press is not meant to imply simply newspapers and other traditional, organized forms of media but rather it serves to protect the transmission of ideas to the public through any vehicle. Such legislators insist that citizen journalists, like Wolf, provide the same services as traditional journalists and should therefore be granted the same reporter's privileges. Citizen journalists have repeatedly proven their capability of serving society in the same vital way traditional journalists have done. Over time citizen journalists have uncovered political scandals, enhanced coverage of natural disasters, and provided first-hand accounts of riots and other events, serving the public in the same way conventional journalists have done.¹⁷

With critics claiming a broadly defined shield law could afford every layperson unwarranted privileges and others asserting a too narrowly defined shield law could rob society

¹⁵ Ibid., 505-506.

¹⁶ Ibid., 506.

¹⁷ Ibid., 507.

of a true free marketplace of ideas, research has pointed to some states' shield laws as a compromise. Such a compromise would maintain the balance between journalists' function in society and the effectiveness of the justice system. The key to passing a federal shield law is shifting the focus from protecting journalists based on for whom they work to what they do and the role in which they serve society, similar to the legislation passed by California and New Jersey.¹⁸

The shield laws passed by California and New Jersey offer protection to more than traditional journalists who publish through traditional news sources but do not over-extend reporter's privilege to each and every member of society. In effect, These laws have implicated that protection is granted to journalists who use vehicles similar to traditional news media. The rationale behind this identifies that traditional media has a wide and ready audience and is therefore qualified to carry out the purposes of reporter's privilege. Examples of similar media mentioned by these courts include blogs, podcasts, web radio, and video-sharing platforms, while journalists communicating through chat rooms, instant messaging, or Facebook would not be afforded protection.¹⁹

In light of recent attempts at a federal shield law passing through the House of Representatives by a large margin, research suggests congress take notice of the laws passed in California and New Jersey and use the legislation as a model in moving forward. Because of the laws' definitions of who qualifies for protection, society will be able to receive the benefits of a free press, appeasing critics of a narrow shield law. On the other hand, critics of a broad law can see from evidence of the existing state laws that the implications are not excessively negative.

¹⁸ S. B. Turner, "Protecting Citizen Journalists: Why Congress Should Adopt a Broad Federal Shield Law," 515-516.

¹⁹ Ibid., 517.

New Jersey's shield law was established in 1977, suggesting that if there have been adverse societal and economic effects, they have not been significant.²⁰

Confidential Source Privilege and Issues with the Balancing Test

The Obama administration has made clear that it seeks to impose consequences for leakers, and often journalists are left to take the fall. In 2010 former CIA officer Jeffrey Sterling was charged for giving New York Times reporter James Risen classified information involving matters of national defense and a CIA program designed to stunt Iran's development of nuclear weapons. The Bush administration was made aware of the leak in 2003, which led to senior officials including Condoleezza Rice persuading the New York Times not to print Risen's article. Risen was not so easily deterred. In 2006 he published "State of War: The Secret History of the CIA and the Bush Administration" including a piece chronicling the botched mission involving foiling Iran's nuclear weapon advances. This resulted in the government calling Risen to testify about his relationship with his source, Sterling. Risen has maintained that he refused to reveal confidential sources, insisting, as many other journalists have, that breaking the trust of confidential sources would leave him unable to continue covering national security, intelligence, and terrorism.²¹

At the time the research was conducted, the final outcome of the Risen case was still pending a decision due to an appeal by the United States. As it currently stood however, Risen was succeeding in his right to silence. United States District Court Judge Leonie M. Brinkema quashed the subpoena requiring Risen give up his sources, pointing to the First Amendment for

²⁰ Ibid., 518.

²¹ W. E. Lee, "THE DEMISE OF THE FEDERAL SHIELD LAW," 27-28.

rationale. Brinkema asserted that the criminal trial subpoena was “not a free pass for the government to rifle through reporter’s notebook,” and Brinkema insisted that the government had not proven a great enough need to override Risen’s First Amendment rights. For example, the government had other ways of linking Risen and Sterling already such as emails, phone records, and computer files. While Brinkema ruled Risen’s testimony was not needed to prove Sterling’s guilt, the United States has pushed back, appealing the case on the grounds that reporter’s privilege in relation to a criminal trial is not constitutionally protected.²²

The issue of journalist’s privilege within the law is full of ambiguity and uncertainty. The level of protection afforded to journalists varies greatly from jurisdiction to jurisdiction. Recent research criticizes most state shield laws and the federal court’s First Amendment-based protections because they are based on subjective opinions on the balancing the reporter’s privilege against the government’s need for information. This approach does not fully allow for the dynamics necessary between journalists and confidential sources because neither is able to accurately predict the resulting implications that could lead to a voided reporter’s privilege.²³

The interpretations of First Amendment-based protections of journalists have raised issues in determining whether the freedoms of the press and the public are equal and interchangeable or if the journalists are entitled to additional protection from the constitution. In the recent case of *Citizens United v. Federal Election Commission* the Supreme Court reaffirmed the previous notion that the rights of the media and the public are interchangeable by reversing a law that afforded media corporations the right to participate in the political dialogue but prohibited these actions by all other types of corporations. With this decision Justice Anthony

²² Ibid., 28.

²³ Ibid., 29.

Kennedy opined that political speech should not be restricted due to its vital role in democracy. The justices also identified three reasons in not allowing the existing media exemption rule: 1. The law's underpinning in antidistortion could lead to restrictions on the press; 2. The court reaffirmed its previous stance that the Constitution does not afford special privileges to the press, and; 3. Justice Kennedy echoed the growing concern of the difficulty in discerning between the media and non-media.²⁴

The issue of discerning between who qualifies for constitutional protection and who does not has been met with the Supreme Court's simple answer of avoiding making a distinction between speakers at all. It is important to note that this applies to First Amendment rights but still allows for Congress to assign a preferred position to the press in regard to other laws (E.g. shield laws). However, some lower federal courts provided examples of some specific instances when journalists are afforded privilege by the First Amendment, for example the Risen case. This atmosphere changed during 2004 and 2005 as the lower courts began to reshape and restrict the previous precedents of journalist's privilege, leading to a revived effort to pass a federal shield law.²⁵

Subsequently, legislation for a federal shield law was introduced in Congress in 2005, 2006, and 2007. Under threat of a veto from the Bush administration, these attempts were all fruitless. The Bush administration pointed to the law's protection of sources of national security leaks as its unacceptable flaw. In 2009 Congress came close to passing a federal shield law but ran out of time before a vote could be held. Since then the odds of a federal shield law being passed have been significantly reduced following the 2010 Wikileaks scandal and Republicans

²⁴ Ibid., 29-30.

²⁵ Ibid., 30-31.

taking back control of the House in 2011.²⁶

The core of the Bush administration and present Republican opposition to recent federal shield law proposals can be seen in the balancing test presented in Judge David Tatel's concurring opinion in the Miller trial. Such a test, as previously mentioned, seeks to weigh the harm caused by a leak versus the leak's informational value. Opponents to prior proposals believed the potential legislation offered too broad of a shield, which would in turn encourage the leaking of more classified information. Another precautionary stance of these potential laws recognizes the inappropriate role granted to the judicial branch to assess the harm to national security, which is a traditional function of the executive branch.²⁷

In addressing these issues the Obama administration and a group of Senate Democrats negotiated a compromise. This compromise introduced two different tiers of handling national security leaks. The first tier is characterized by cases that present journalists have information that could likely help the United States prevent or mitigate significant harm to national security via terrorism or other acts. In this scenario, no balancing test would be required; rather journalists would be compelled to reveal their sources or information. The compromise also gave a more direct set of instructions to apply with other cases involving national security where the court is responsible for determining the extent of damage already done. In assessing these damages, the compromise required the head of an executive branch provide a specific and factual account of the damage. Any other case involving national security leaks would then follow the same guidelines as general civil or criminal cases by assessing which outcome would greater serve the public's interest. This approach takes care to weigh the public's interest in the success

²⁶ Ibid., 31-32.

²⁷ Ibid., 32.

of the institution of the press and also the public's interest in receiving justice for any harm done.²⁸

As mentioned the previous research posits reserves against the use of the balancing system. One issue raised from the compromise is the still-broad label of serious harm to national security and the responsibility of the courts to make such subjective decisions. However, the larger issue falls at the very core of the institution of the press. This criticism implies that the balancing system theoretically hinders the flow of information because it focuses on the wrong period of time. Journalists and their sources cannot confidently enter into confidentiality agreements because they may not know what sort of outcome could result from the publication of information nor could they anticipate how a court would balance any potential damage caused. This type of legislation serves neither the journalist who may fear the judicial consequences of upholding a confidentiality agreement nor the source would fear that the journalist could fold under judicial pressure and in turn reveal them.²⁹

The 2009 federal shield law was proposed with the intent of encouraging the exposure of scandals and corruption within the government. The Democrats behind this proposition positioned that need as greater than the need to prohibit leaking of classified information. On the other hand the Republican opponents suggested leaking is disloyal and does not present a greater value to society than it does hinder the government. A senior Republican aide with the Judiciary Committee explained the argument:

The debate on this issue comes down to a simple proposition. Federal law makes it a felony for anyone with classified information to provide it to unauthorized people—and that includes reporters. You either believe it's a crime, or you believe the press should have an unfettered right to seek out and publish classified information. That's the

²⁸ Ibid., 32-33.

²⁹ Ibid., 33.

fundamental difference between Republicans and Democrats on this bill.³⁰

Journalists and the Espionage Act

In addition to the aforementioned consequences journalists face such as being held in contempt of court, research suggests that journalists could also be at risk of being prosecuted under the Espionage Act and similar ambiguously worded statutes. Though no journalists have been prosecuted under the Espionage Act to date, the law certainly provides opportunity. In publishing government secrets, the media directly goes against the limitations imposed by the Espionage Act.³¹

The research illustrates this point by offering a scenario involving the editor of the New York Times secretly giving away the Pentagon Papers to foreign governments. In this instance it is assumed that few would argue whether or not the New York Times should be charged under the Espionage Act. Through this illustration a comparison is made between secretly handing over government secrets and publishing them for the world to see.³²

Recent research also posits that it may be in the best interest of the government to pursue these options. As there is much shift in the function of the media in today's time, now may be the government's best opportunity to set a new precedent in the way it handles leaks. The means are available to use criminal prosecution, and the United States has an obligation to protect its own self-interest by retaining classified documents. This line of research concludes by recommending that the United States go after as many leakers as possible for fear that leaks will become more

³⁰ Ibid., 33-34.

³¹ D. Meier, "Changing With the Times: How the Government Must Adapt to Prevent the Publication of Its Secrets," 213.

³² Ibid., 213.

and more difficult to control and that taking action now may help the United States to deter future leaks.³³

³³ Ibid., 213.

EXAMINING THE CURRENT SYSTEM

The Supreme Court's first and only decision on a constitutionally based reporter's privilege came in 1972 with *Branzburg v. Hayes*. The court rejected the idea that journalists were protected from revealing information related to criminal activity they have witnessed to a grand jury in a 5-4 decision. However, the three dissenting justices along with Justice Lewis Powell in a separate concurring opinion recognized the need to balance First Amendment rights of journalists with the need for information to be disclosed. Qualified privilege, as it's known, asserts that courts should consider three factors: relevancy to the case at hand; a compelling and overriding interest in the information; and efforts have been exhausted to obtain the information elsewhere. A fifth justice, William O. Douglas, also dissenting, opined the First Amendment grants journalists nearly complete immunity from testifying before a grand jury, which in turn gave the idea of qualified privilege a majority, and it has been the status quo since 1972.³⁴

While the Supreme Court has acknowledged qualified privilege as the law of the land — the interpretation of the First Amendment — many states have additional protections based on state constitutions, common law, court rules, and state statutes. The protection granted under these provisions widely varies. Some allow journalists to protect confidential news sources but

³⁴ The Reporter's Privilege Compendium: An Introduction, <http://www.rcfp.org/browse-media-law-resources/guides/reporters-privilege/introduction>.

do not afford the same protection to unpublished materials. Others balance the type of protection, absolute or qualified, with the type of case at hand, civil or criminal, and the journalist's involvement, whether he or she is the defendant or an independent third party. Only one state, Wyoming, offers no form of reporter's privilege through courts or legislature.³⁵

Forty states plus the District of Columbia have passed state statutes offering some form of protection to journalists from revealing sources. These laws greatly vary in the protections they afford between states, but as a whole, they tend to provide more protection to journalists than many state constitutions or the U.S. Constitution. Still, there are limitations. Many statutes limit those protected as those who work full-time for a newspaper or broadcast station, leaving freelance writers, book authors, internet journalists and many others to rely on the First Amendment and qualified privilege as a source of protection. Many exemptions also exist that threaten to strip away the statutory protections, including eyewitness testimony for libel defendants and other situations that often present some of the greatest examples of need for a shield.³⁶

³⁵ Confidential Sources and Information. (n.d.). Retrieved March 19, 2016, from <http://www.rcfp.org/first-amendment-handbook/introduction-legislative-protection-news-sources-constitutional-privilege-a>.

³⁶ Ibid.

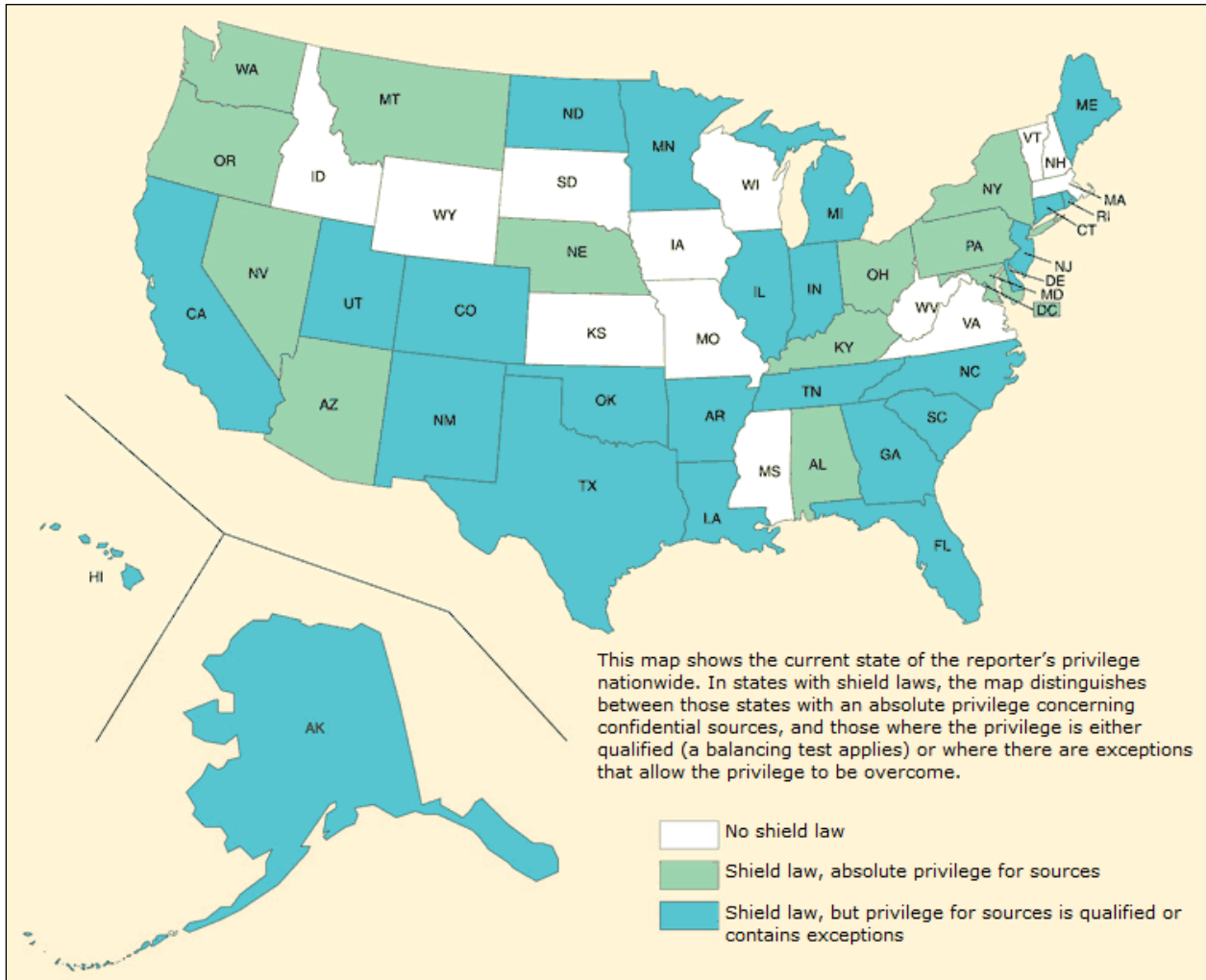


Figure 2. State Shield Laws. Thirty-one states plus the District of Columbia have passed state statutes offering some form of protection to journalists from revealing sources. From the Reporter's Committee for Freedom of the Press.

In many states without shield laws, state courts have recognized some form of qualified privilege from existing state laws. The Supreme Court of New York established qualified privilege of confidential and non-confidential materials through the New York State Constitution. The issue at hand, *O'Neill v. Oakgrove Construction Inc.* (1988), centered around

non-confidential photographs a journalist took, which the Supreme Court of New York affirmed were protected, regardless of confidentiality, because the material was obtained through the process of newsgathering.³⁷

Other states have established reporter's privilege through common law, including Washington state. In 1982, the Supreme Court of Washington opined in *Senear v. Daily Journal-American* that there is a qualified reporter's privilege. Later the privilege was extended to include both civil cases and criminal trials. Washington has no state laws regarding reporter's privilege, and as such, the Supreme Court of Washington established the ruling based on common law, citing a need to make a ruling based on reason and common sense relating to present-day situations.³⁸

When state laws and common law are absent, journalists may also find protection in court rules. For example, though a New Mexico shield law was ruled unconstitutional, the state's supreme court established a court rule to allow a qualified privilege of confidentiality to journalists in *Ammerman v. Hubbard Broadcasting* (1977).³⁹ Still, in the absence of legislative protection, common law protection or court rules, journalists have had some success in convincing courts to quash subpoenas by invoking protections such as state rules of evidence. In *Indiana v. Milam* (1998), the Indiana Supreme Court refused to acknowledge any federal or state constitutional privilege protecting non-confidential information, but did accept that the state's Trial Rules do not allow for subpoenaing information "whose materiality is only a matter of pure

³⁷ *O'Neill v. Oakgrove Construction Inc.*, 71 N.Y.S.2d 521 (1988).

³⁸ *Senear v. Daily Journal-American*, 97 Wash.2d 148, 641 P.2d 1180 (1982), on remand, 8 Media L. Rep. 2489 (Wash. Super. Ct. 1982).

³⁹ *Ammerman v. Hubbard Broadcasting*, 3 Media L. Rep. 1616 (N.M. Ct. App. 1977), cert. denied, 572 P.2d 1257 (N.M. 1977), cert. denied, 436 U.S. 906 (1978); N.M. Sup. Ct. R. of Evidence 11-514.

speculation.”⁴⁰

From reporter Paul Branzburg to blogger Josh Wolf, it has become solidified there is no federal shield law for journalists. A 2008 study by RonNell Andersen Jones found that in 2006, more than 7,000 state and federal subpoenas were issued to journalists, some of which were seeking confidential information.⁴¹ As seen in the literature review, these subpoenas can lead to jail time and hefty fines for reporters who refuse to give up their confidential sources.

Previous Attempts at Passage

Since the Branzburg case was decided in 1972, there have been numerous attempts at passing a federal shield law. During this era, investigative journalism was causing the public to rethink its idea of the media’s role in society. With the Pentagon Papers and Watergate, the public was beginning to realize the importance of the media as the fourth estate. With this rationale, there was an increased support of protecting the press’s ability to fulfill its watchdog duties without interference from the government.⁴²

This time period saw a transformation in the way journalists saw themselves. There was a transformation of journalists who in the 1950s saw themselves as merely notetakers for the government becoming increasingly aggressive watchdogs in the 1960s, including a whole new generation of hungry journalists. Journalists became concerned with holding government accountable, and they did so by pushing for open-government laws and fighting against closed, difficult government leaders. The free press became a defining characteristic in American

⁴⁰ *Indiana v. Milam*, 690 N.E.2d 1174 (Ind. 1998).

⁴¹ Jones, RonNell Andersen. “Avalanche or Undue Alarm? An Empirical Study of Subpoenas Received by the News Media.” 93 Minn. L. Rev., 585, (2008).

⁴² *Ibid.*

journalism: a press that dug into what the government was doing to serve as a balance that was previously less noticeable. In doing so, reporters had to increase reliance upon anonymous sources.⁴³

With the surge of prodding and use of anonymous sources, a war was waged. Legal scholars supported adding constitutional and statutory protections in order to secure the free press and its vital functions to society. As the same time, many government officials were making known their disdain for the truth. In an effort to establish the role of the media, Justice Stewart opined the founders of the United States wrote the Press Clause of the First Amendment with the understanding that a “free press meant organized, expert scrutiny of government.”⁴⁴ Still, it hasn’t been enough: to date, no federal shield law has been passed, but there have been numerous attempts.

Soon after the Branzburg case, evidence of FBI surveillance of journalists was made public, and there was a flood of new bills coming through Congress to establish a federal shield law. In 1972, six bills were brought before Congress and during the next year, 65 additional bills were brought up. Two representatives, Republican Charles Whalen Jr. and Democrat William Moorhead proposed legislation that would protect the news media, the press, and freelancers. Whalen’s proposed bill was formed from a suggestion of a group of news organizations known as the Joint Media Committee, and it aimed to shield “any information or the source of any information procured for publication or broadcast.”⁴⁵

Arguments against shield law legislation were seen in 1974 when the American Bar

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ A short history of attempts to pass a federal shield law. (2004). *The News Media & The Law*, 28(4), 9.

Association rejected reporter's privilege in a 157-to-122 vote. Some said journalists were unjustly trying to place themselves "above the law," and others worried the legislation could be used to protect those in nontraditional journalism roles and those who weren't trained properly, as it was put, "college dropouts." Conversely, three years later in 1977, the International Executive Board of The Newspaper Guild issued "Grand Jury Reform and Reporter Privilege" to advise Congress to protect journalists from grand jury subpoenas. The guild's report praised bills introduced by Democrat Representatives John Conyers and Joshua Eilberg and Senator James Abourezk. Their legislation proposed reducing contempt of court jail terms from 18 months to 6 months, disallowing journalists to be rejailed for refusing to answer previous questions, requiring grand juries vote on subpoenas involving the media, and mandate prosecutors provide justification for subpoenas involving the news media.⁴⁶

Throughout the next decade, a number of other attempts were made to pass a federal shield law, but none were passed. In 1978 and again in 1981, Republican Representative Philip Crane submitted a bill outlawing federal, state or other governmental powers from using search warrants or subpoenas on journalists. Often, specific cases will re-motivate Congress to look at passing law to establish reporter's privilege, such as when New York Times reporter Myron Farber was jailed in 1978, leading Democrat Representative Richard Ottinger to propose a bill shielding journalists from providing both confidential sources and information obtained from those sources. Republican Representative Bill Green introduced a bill in 1979 that would have established absolute privilege from revealing "any news, or source of any news," including to grand juries. Nearly a decade later in 1987, Democrat Senator Harry Reid consulted a version of

⁴⁶ Ibid.

a federal shield law to assorted news organization with the understanding that past attempts had excluded a general agreement by the news media regarding what the legislation should look like. Reid's eventual bill aimed to stop any "court, grand jury, administrative or legislative body of the United States or a state to require a journalist to disclose any news, the source of any news or any unpublished information." The bill did include an exception for defamation and criminal defense cases.⁴⁷

Attempts to pass a federal shield law in 2005-2007 offered protection to a much wider set of people than most state laws, but this approach was met by extreme opposition from the Bush administration. One of the would-be laws defined a protected person someone who engages in journalism livelihood or other financial gain. The Department of Justice disapproved on the grounds that the internet affords virtually anyone to meet the vague criteria, suggesting, "Many blogs or websites run by people who have other jobs and livelihoods also generate advertising revenue ... A simple banner advertisement of the sort that appears on literally thousands of blogs worldwide would likely be sufficient to establish." The Department of Justice echoed previous sentiments regarding this broad definition by reasoning that such a far-reaching approach would hinder law enforcement and the effective administration of justice by allowing anyone to hide behind such a shield.⁴⁸

With another failed attempt at legislation the Bush administration raised concern that it would even be possible for lawmakers to come up with a definition without over-or-under-including necessary individuals. The Obama administration met this challenge in 2009 when it worked with Senate Democrats to provide a workable compromise. This legislative proposition

⁴⁷ Ibid.

⁴⁸ W. E. Lee, "THE DEMISE OF THE FEDERAL SHIELD LAW," *Cardozo Arts & Entertainment Law Journal*, 30(1), 36-37, 2012.

would potentially protect an array of people, from journalists who work for news outlets to freelance authors and bloggers, barring they meet the conditions in the law: 1. those with a primary intent to gather information for dissemination to the public; 2. those who regularly practice newsgathering, be it interviews, observations, or collecting documents, and; 3. those who seek information for the purpose of delivering it to the public through some form of mass communication. In accordance with recommendation from the Obama administration, the proposed federal shield law also included exceptions to cases related to terrorism or organizations such as Wikileaks.⁴⁹

The Free Flow of Information Act of 2013 was another attempt at passing a federal shield law, which sought to settle the issue of defining who constitutes as a journalist. The bill was amended to not include a distinct definition of a journalist, but rather it left the power in the hands of judges to determine and protect those they deemed as practicing journalists. This approach has been praised by some like the Electronic Frontier Foundation, which is in favor of the less strict definition as it gives protection to nontraditional journalists. However, the EFF did warn of the importance of monitoring how the judicial system would handle its newfound duties. Ultimately, the Free Flow of Information Act of 2013 was not passed, leaving those in the news media to still rely upon reporter's qualified privilege.⁵⁰

States and those previously attempting to pass a federal shield law have tried a few different ways of defining who qualifies as a journalist. Some used a "functional definition," applying protection to anyone who functions as a journalist by collecting information with the intent of distributing it to the public. Others have used a "status definition," electing to protect

⁴⁹ Ibid., 37.

⁵⁰ Senate Revises Media Shield Law for the Better, But It's Still Imperfect.
<https://www.eff.org/deeplinks/2013/09/senate-revises-media-shield-law-better-its-still-imperfect>

those who have employment or some other affiliation with a news organization. Critics have suggested the status definition is not adequate as it leaves nontraditional journalists such as bloggers and citizen journalists unprotected.⁵¹

⁵¹ Ibid.

RECENT APPLICATION OF ISSUES

Revealing Sources

In 1982, Minnesota Republican gubernatorial candidate staffer Dan Cohen provided negative information about Democratic Lieutenant Governor candidate Marlene Johnson, which was printed in *The Minneapolis Star-Tribune* under the promise of anonymity. The paper's editor ignored the reporter and printed Cohen's name, which caused him to lose his position at an advertising agency. Cohen sued and won, but when the case went to the Minnesota Supreme Court, the decision was reversed.⁵²

The case made its way to the Supreme Court to determine whether or not the paper's decision to print Cohen's name was a promissory estoppel and he deserved an award for damages. The Court determined the newspaper had in fact violated the promissory estoppel and the Minnesota Supreme Court decision was reversed. The dissent was issued by Justice Blackman, who said, "Because I believe the State's interest in enforcing the newspaper's promise of confidentiality is insufficient to outweigh the interest in unfettered publication of the

⁵² FindLaw | Cases and Codes,
<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=501&invol=663>.

information revealed in this case, I respectfully dissent.”⁵³

Recent Application

In more recent years, the Obama administration has made clear that it seeks to punish those who break the law, and often journalists are left to take the fall. In 2010 former CIA officer Jeffrey Sterling was charged for giving New York Times reporter James Risen classified information involving matters of national defense and a CIA program designed to stunt Iran’s development of nuclear weapons. The Bush administration was made aware of the leak in 2003, which led to senior officials including Condoleezza Rice to persuade *The New York Times* not to print Risen’s article.⁵⁴

Risen was not so easily deterred. In 2006 he published “State of War: The Secret History of the CIA and the Bush Administration” including a piece chronicling the botched mission involving foiling Iran’s nuclear weapon advances. This resulted in the government calling Risen to testify about his relationship with his source, who is now known to be Sterling. Risen has maintained his refusal to reveal confidential sources, insisting, as many other journalists have, that breaking the trust of confidential sources would leave him unable to continue covering national security, intelligence, and terrorism.⁵⁵

In 2011, United States District Court Judge Leonie M. Brinkema quashed the subpoena requiring Risen give up his sources, pointing to the First Amendment for rationale. Brinkema asserted that the criminal trial subpoena was “not a free pass for the government to rifle through reporter’s notebook,” and Brinkema insisted that the government had not proven a great enough

⁵³ Ibid.

⁵⁴ W. E. Lee, “THE DEMISE OF THE FEDERAL SHIELD LAW,” 27-28.

⁵⁵ Ibid., 27-28.

need to override Risen's First Amendment rights. For example, the government had other ways of linking Risen and Sterling already such as emails, phone records, and computer files. While Brinkema ruled Risen's testimony was not needed to prove Sterling's guilt, the United States has pushed back, appealing the case on the grounds that reporter's privilege in relation to a criminal trial is not constitutionally protected.⁵⁶

When the case reached a divided three-judge panel at the Fourth Circuit, the decision was reversed, and the *Branzburg* decision was cited. Judge William B. Traxler Jr. issued the majority statement, saying "Clearly, Risen's direct, firsthand account of the criminal conduct indicted by the grand jury cannot be obtained by alternative means, as Risen is without dispute the only witness who can offer this critical testimony." Judge Roger Gregory offered the dissent, offering, "the First Amendment was designed to counteract the very result the majority reaches today. The majority exalts the interests of the government, while unduly trampling those of the press, and in doing so, severely impinges on the press and the free flow of information in our society."⁵⁷

In 2014, the Supreme Court refused to hear Risen's case, effectively upholding the decision of the lower court. The Executive Editor of *The New York Times* Dean Baquet said this announcement was a disappointment. "Journalists like Jim depend on confidential sources to get information the public needs to know. The court's failure to protect journalists' right to protect their sources is deeply troubling," he said. Since *Branzburg v. Hayes* the Supreme Court has not directly addressed whether or not journalists are protected from subpoenas. In that 1972 case, the court ruled in a 5-4 decision that the First Amendment provided no additional protections to

⁵⁶ Ibid., 28.

⁵⁷ Adam Liptak, "Supreme Court Rejects Appeal From Times Reporter Over Refusal to Identify Source," *The New York Times*, June 2, 2014.

journalists that regular citizens do not hold.⁵⁸

Because of the close decision and Justice Lewis F. Powell Jr.'s hesitation, the ruling has been ambiguous. Justice Powell, who joined the majority, wrote in his concurrence that judges should strike the "proper balance between freedom of the press and the obligation of all citizens to give relevant testimony." Due to this effectively split decision, journalists have enjoyed success in the courts as they have argued a broad interpretation of the concurrence.⁵⁹

The lower courts have done so with the use of a three-part test, suggested by Justice Potter Stewart in his dissent in *Branzburg*. The first part is the relevance test, holding the government must "show that there is probable cause to believe that the newsman has information which is clearly relevant to a specific probable violation of the law." The second is the alternative means test, indicating the government must "demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights." The final test is the compelling interest test, instructing the government must "demonstrate a compelling and overriding interest in the information."⁶⁰

United States Court of Appeals for the Seventh Circuit Judge Richard A. Posner said that success began to wane in 2003. "A large number of cases concluded, rather surprisingly in light of *Branzburg*, that there is a reporter's privilege," he wrote. A conglomeration of news organizations issued a supporting brief calling for the Supreme Court to hear Risen's case to bring clarity to the years of ambiguity. The joint brief said all those concerned "would benefit from this court addressing these fundamental issues about the protections available to a free press

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Thomas L. Tedford, *Freedom of Speech in the United States*, (New York: Random House, 1985,) 270.

in a democracy.’’⁶¹

Current Policy

Despite court rulings in the government’s favor, Attorney General Eric H. Holder Jr. decided against allowing prosecutors to force Risen to reveal his sources. In a court hearing in early 2015, Risen repeated that he would not reveal sources or any information pertaining to the case, and prosecutors were instructed not to demand answers since doing so could have left Risen to face charges of contempt of court. Prosecutors wrote, “Mr. Risen’s under-oath testimony has now laid to rest any doubt concerning whether he will ever disclose his sources or sources for Chapter 9 of “State of War.” He will not. As a result, the government does not intend to call him as a witness at trial.’’⁶²

Risen’s attorney Joel Kurtzberg said from the beginning Risen has held he would not identify confidential sources or information related to the case. “The significance of this goes beyond Jim Risen. It affects journalists everywhere. Journalists need to be able to uphold that confidentiality in order to do their jobs,” he said. Kurtzberg said though Risen was not forced to testify, the Justice Department effectively used the case to create a court precedent that could be used to force journalists to testify in the future. Future administrations may not use the same discretion as Holder, and they will be free to do so under what Kurtzberg calls the “bad precedent” set by Holder. ⁶³

⁶¹ Adam Liptak, “Supreme Court Rejects Appeal From Times Reporter Over Refusal to Identify Source.”

⁶² Matt Apuzzo, “Times Reporter Will Not Be Called to Testify in Leak Case,” *The New York Times*, January 12, 2015.

⁶³ Ibid.

Handing Over Materials

The first instance of police literally rifling through reporters' notebooks happened the year before the *Branzburg* case was decided in 1971. In April of that year, four police officers searched the offices of Stanford University's student newspaper, *Stanford Daily*, looking for evidence pertaining to a crime none of the newspaper's staff was involved in. The incident in question pertained to a riot that had taken place on campus the day before, and the police were searching for photographs taken, which may have helped identify the individuals involved. The officers had a warrant allowing them to look for "negatives and photographs and films" relevant to the investigation, but the permit did not allow them to open locked drawers or rooms. The officers found no materials relevant to the case as part of their investigation.⁶⁴

Regardless, the newspaper's staff sued the police chief Zurcher, district attorney, and others involved claiming they violated their First, Fourth and Fourteenth Amendment rights. The case eventually made its way before the Supreme Court, which ruled in *Zurcher v. Stanford Daily* (1978) the same way it did in the *Branzburg* case. The court held that journalists did not have any special protections from search warrants, insisting they held the same rights as any other citizens.⁶⁵

Justice White noted that though the staff was not suspected of committing any crime, there was "reasonable cause to believe that the specific things to be searched for (such as photographs of the rioters) and seized are located on the property to which entry is sought. It is untenable to conclude that property may not be searched unless its occupant is reasonably suspected of crime and is subject to arrest." White continued to add that newsroom searches are

⁶⁴ Thomas L. Tedford, *Freedom of Speech in the United States*, 274.

⁶⁵ *Ibid.*, 274-275.

rare and there were already protections in the Constitution regarding searches. The Court did add, as it did in the *Branzburg* case, Congress could pass legislation protecting journalists from police searches, but the Court would not be the ones to do so.⁶⁶

The media widely condemned the decision, and files and photographs began to be systematically destroyed. Newsrooms across the nation put policies into place requiring newsgathering materials to be destroyed if they were deemed unnecessary to a story. Many members of the media held that police were lazy and incompetent of doing their own work and misused search warrants to abuse the media into doing their work for them. The uproar was so strong Congress was forced to act in a way that would lessen some of the effects of the *Zurcher* ruling.⁶⁷

In 1980, the Privacy Protection Act was passed and signed into law, which outlawed searches of journalist's work materials, but the law did specify four exceptions. The first exception the law allows search if death or injury may be prevented. The second makes search legal if there is evidence the documents are about to be destroyed. The third exception permits search if a subpoena has failed to provide appropriate documents, and the final clause excludes journalists' protection if they are believed to have been involved in a crime. Of special interest is that the act does not prohibit subpoenas, which are generally less objected because the slower process allows time for negotiation and arbitration — The “surprise searches,” or warrants are what many members of the media are so strongly against.⁶⁸

Recent Application

⁶⁶ Ibid., 275.

⁶⁷ Ibid., 275.

⁶⁸ Ibid., 275.

The federal government has raised the bar on obtaining records from journalist's in recent years, causing another uproar from the media and eventually another change in policy. In 2013, investigators from the Justice Department informed The Associated Press that it had secretly seized two months of phone records of its reporters and editors. The timing and journalists targeted pointed to an ongoing government investigation into the search of who leaked information about the Central Intelligence Agency's disruption of a Yemen-based terrorist plot to bomb an airliner as the reason for the seizure. The Associated Press called the event a "serious interference with AP's constitutional rights to gather and report the news."⁶⁹

In a letter to Holder, president and chief executive of The Associated Press Gary Pruitt called the federal government's seizure a massive and unprecedented intrusion into news-gathering activities, which violated the First Amendment. "There can be no possible justification for such an overbroad collection of the telephone communications of The Associated Press and its reporters. These records potentially reveal communications with confidential sources across all of the news gathering activities undertaken by The AP during a two-month period, provide a road map to AP's news gathering operations, and disclose information about AP's activities and operations that the government has no conceivable right to know," he wrote.⁷⁰

Current Policy

After this and other similar instances, President Obama called on Holder to review the Justice Department's procedures for leak investigations. Obama said he was "concerned that such inquiries chilled journalists' ability to hold the government accountable." The new

⁶⁹ Charlie Savage and Leslie Kaufman, "Phone Records of Journalists Seized by U.S.," *The New York Times*, May 13, 2013.

⁷⁰ Ibid.

regulations are intended to ensure that the Justice Department “strikes the proper balances among several vital interests,” like protecting national security and “safeguarding the essential role of the free press in fostering government accountability and an open society.” This revision came after the Obama administration’s crackdown on leaks. The administration has brought charges on eight cases, whereas previous administrations had brought forth three charges altogether.⁷¹

One of the key changes in the revision of rules involves a policy that prosecutors will inform media organizations prior to attempting to obtain their communications records. Holder’s revision addresses the Privacy Protection Act, clarifying that the exception of when the reporter is a criminal suspect cannot be invoked for conduct based on “ordinary news-gathering activities. The rules also cover grand jury subpoenas used in criminal investigations, exempt wiretap and search warrants obtained under the Foreign Intelligence Surveillance Act and “national security letters,” which are a kind of administrative subpoena used to obtain records about communications in terrorism and counterespionage investigations.⁷²

The Espionage Act

In addition to the aforementioned consequences journalists face, including being held in contempt of court, research suggests that journalists could also be at risk of being prosecuted under the Espionage Act and similar ambiguously worded statutes. Though no journalists have been prosecuted under the Espionage Act to date, the law certainly provides opportunity. In publishing government secrets, the media directly violates the laws outlined in the Espionage

⁷¹ Charlie Savage, “Attorney General Signs New Rules to Limit Access to Journalists’ Records,” *The New York Times*, February 21, 2014.

⁷² *Ibid.*

Act.⁷³

The Espionage Act of 1917 prohibits actions that hurt the United States or benefit a foreign country by collecting or communicating information that would harm the national defense. The act also makes entering an installation or obtaining a document connected to the national defense in order to hurt the United States or benefit a foreign country illegal. According to the Espionage Act, knowingly receiving classified information that has been obtained illegally, as well as passing it on, is against the law. Because the federal government has never prosecuted a journalist under the act, the Supreme Court, or any court for that matter, has never had the opportunity to clarify the law and review its constitutionality when applied to journalists.

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After the September 11th attacks on the United States, the liberties enshrined by the First Amendment also fell under attack. Under George W. Bush's administration, journalists' freedoms were slashed as they began to be harassed and imprisoned for failing to reveal sources and surrender files. However, since Barack Obama assumed office the focus has shifted from journalists to whistleblowers, but journalists are often still pressed to identify these individuals.⁷⁵ Now concern is being raised regarding the possibility of using the Espionage Act or similar laws to prosecute journalists, as they could be interpreted as sharing the government's secrets.⁷⁶

While the Bush administration charged three individuals under the Espionage Act, at least eight have been charged since Obama took office in 2008. The past years have been marked with famous cases of whistleblowers and their prosecution by the United States, such as

⁷³ D. Meier, "Changing With the Times: How the Government Must Adapt to Prevent the Publication of Its Secrets," 213.

⁷⁴ Emily Peterson, "WikiLeaks and the Espionage Act of 1917," Reporters Committee for Freedom of the Press.

⁷⁵ World press freedom index 2014, <http://rsf.org/index2014/en-americas.php>

⁷⁶ D. Meier, "Changing With the Times: How the Government Must Adapt to Prevent the Publication of Its Secrets," *Review of Litigation*, 28(1), 213, 2008.

WikiLeaks founder Julian Assange's informant Private Chelsea/Bradley Manning who is serving a 35-year jail term.⁷⁷ Other notable instances involving widely publicized leaks include the National Security Agency's whistleblower Edward Snowden, Pulitzer-Prize winning journalist James Risen, and the Associated Press scandal, involving the Department of Justice seizing the news agency's phone records.⁷⁸

Recent Application

The New York Times v. United States presents the closest example available to what would happen if the act were to be challenged in the courts. The case addresses the government's attempt to prevent *The New York Times* and *The Washington Post* from publishing a leaked copy of the Pentagon Papers, a top-secret study of the Vietnam War. The court ruled in favor of the publications, issuing that the government had not met its heavy burden of justifying a prior restraint on publication. Justice Potter Stewart pointed out in his concurring opinion that the Court was asked to "prevent the publication ... of material that the Executive Branch insists should not, in the national interest, be published." He wrote he was "convinced that the Executive is correct with respect to some of the documents involved. But I cannot say that disclosure of any of them will surely result in direct, immediate, and irreparable damage to our Nation or its people."⁷⁹

Though Justice White and others sided with the publications, White cautioned that the opinion was based on the government's attempt at prior restraint. White emphasized that Congress could impose criminal sanctions on a newspaper after they had published classified

⁷⁷ World press freedom index 2014.

⁷⁸ Ibid.

⁷⁹ Ibid.

information. “Prior restraints require an unusually heavy justification under the First Amendment, but failure by the Government to justify prior restraints does not measure its constitutional entitlement to a conviction for criminal publication. That the Government mistakenly chose to proceed by injunction does not mean that it could not successfully proceed in another way,” White wrote in his concurring opinion.⁸⁰

Current Policy

In an event similar to the federal government’s seizure of The Associated Press’ reporters and editors’ communication records, the government disclosed that it had obtained emails from the Google account of Fox News’s James Rosen in 2010. The emails in question pertained to correspondence with a State Department analyst who was suspected of leaking classified information about North Korea. Because Congress has outlawed search warrants for journalists’ newsgathering materials if they are not suspected of committing a crime, alternative means for obtaining the information proved necessary.⁸¹

The Federal Bureau of Investigation agent who sought the warrant wrote in an affidavit that the warrant was necessary because the State Department analyst had deleted the emails in his own account. The agent suggested Rosen qualified for the exception because the reporter had committed a crime: he violated the Espionage Act by seeking secrets to report. Attorney General Eric Holder signed off on the warrant request. The Obama administration has insisted it has no intentions of prosecuting an American journalist for publishing classified information. However,

⁸⁰ Ibid.

⁸¹ Ethan Bronner, Charlie Savage, and Scott Shane, “Leak Inquiries Show How Wide a Net U.S. Cast,” *The New York Times*, May 25, 2013.

it is important to note the option does exist.⁸²

⁸² Ibid.

SUMMARY AND CONCLUSIONS

As major works of investigative journalism have continued to wane, many possible answers have been suggested. Legal consequences posed to journalists by the government certainly remain an ominous warning of what can happen if they successfully perform as watchdogs of the government. As long as journalists can be held in contempt of court, being fined and jailed for not revealing sources or other information, investigative reporting will be limited. In a climate where journalists work and communications records can be seized, under any circumstances, the ability to investigate will be hindered. And the ever-looming threat of being charged as a spy has undoubtedly cast a chilling effect on investigative journalism in recent times.

The current state of affairs in the United States leaves the media largely unable to fulfill their role of serving as the Fourth Estate by serving as a system of checks and balances for the other three branches of government due to their lack of legal protection. As it stands now, the legal environment presents a threat to society by inhibiting the public's right to be informed. At this point laws and policies need to be enacted to allow journalists to give an unfiltered report and sources to openly communicate to journalists without fear of exposure. Without the protection from the government, the media may

continue to increasingly scale back investigative efforts, significantly limiting the institutions ability to carry out its obligation to society.

Further research should continue to look at different solutions to the issue at hand in hopes of finding a solid answer to the passage of a federal shield law. Researchers should more closely examine states such as California and New Jersey's laws to find a workable solution that has provided well throughout decades in existence to point toward a sustainable federal law. It would also be of interest to examine the different political processes involving Republicans and Democrats to understand the different ideologies at work behind the supporting and opposing views concerning the passing of a federal shield law.

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