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THE FEDERAL MEDIA SHIELD FOLLY

BRAD A. GREENBERG*

INTRODUCTION

News organizations have pushed for a federal law protecting journalists from compelled disclosure of confidential sources and unpublished information since the Supreme Court ruled more than four decades ago that reporters lack such a privilege under the Constitution.[1] Journalists' concerns are two-fold: first, compelled disclosures will chill the flow of information from sources, and, second, a secretive or grudging Executive Branch could use subpoenas to harass inquisitive journalists. The campaign for a so-called federal media shield was renewed this year following revelations that the Justice Department broadly subpoenaed Associated Press phone records over a two-month period,[2] and further invigorated following the public's discovery that the Justice Department had labeled a Fox News reporter a "criminal co-conspirator" in order to track his movements and obtain phone and e-mail records.[3]

The Free Flow of Information Act of 2013 purports to "maintain the free flow of information to the public" by providing various degrees of protection to journalists, conditioned on whether the matter is germane to a civil or criminal case, or relates to national security.[4] Journalists and publishers from traditional media overwhelmingly have endorsed the bill and urged passage. The bill also enjoys bipartisan support in the Senate and from President Obama. The only cognizable debate has concerned whether the law should limit its scope to *professional* journalists or extend

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1. Branzburg v. Hayes, 408 U.S. 665, 697–98 (1972).

2. Charlie Savage, *Criticized on Seizure of Records, White House Pushes News Media Shield Law*, N.Y. TIMES, May 16, 2013, at A19, *available at* http://www.nytimes.com/2013/05/16/us/politics/under-fire-white-house-pushes-to-revive-media-shield-bill.html.

3. Brian Stelter & Michael D. Shear, *Justice Dept. Investigated Fox Reporter Over Leak*, N.Y. TIMES, May 21, 2013, at A16, *available at* http://www.nytimes.com/2013/05/21/us/politics/white-house-defends-tracking-fox-reporter.html.

4. S. 987, 113th Cong. (2013), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-113s987rs/pdf/BILLS-113s987rs.pdf. A similarly worded bill has been introduced in the House. H.R. 1962, 113th Cong. (2013), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-113hr1962ih/pdf/BILLS-113hr1962ih.pdf.

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to anyone *doing journalism*.[5] However, the bill, which purports to preserve the flow of information by protecting sources' expectations of confidentiality, would do little to thwart government pursuit of reporters' records; worse, it distracts public debate from a more serious threat to press freedom.

While discussing the breadth of the shield's national security exception, this Essay focuses on two core concerns regarding the bill's ability to serve its stated purpose. The first is substantive, namely that the bill overlooks the 800-pound gorilla known as the third-party doctrine. In 1979, the Supreme Court, colored by experiences of dialing a switchboard and asking an operator to connect the caller with a given phone number, held that an individual did not have a Fourth Amendment interest in his phone records.[6] In light of contemporary reporting practices and the third-party doctrine's expansion to cellular and digital technologies, I argue that any meaningful shield law must burden access to phone, e-mail, and related records. Second, I address a practical concern. Internal Justice Department guidelines indicate that a reporter can only be subpoenaed with the approval of the Attorney General.[7] Yet, if passed, a federal media shield law would diffuse responsibility across Congress and the Judiciary—in effect, reciprocally shielding the Executive Branch from public accountability.

While the substantive concern suggests that the bill needs further reworking to provide the desired protections, the practical account implies that some shield laws would impose more cost than benefit. Whereas journalism advocates tend to see the shield debate as binary—yes or no, good or bad—it is riddled with complexity. That is, *some* shield is not necessarily better than *no* shield. Yet, in light of recent threats to the free flow of information and the democratic role information plays in empowering people and holding officials accountable, additional

5. Philip Bump, *The Value of a New Media Shield Law Depends on Your Definition of 'Media'*, THEWIRE.COM (June 5, 2013, 2:04 PM), http://www.thewire.com/politics/2013/06/value-new-media-shield-law-depends-your-definition-media/65930/; Dylan Byers, *Shield Law Broadens Definition of 'Journalist'*, POLITICO (Sept. 12, 2013, 9:41 AM), http://www.politico.com/blogs/media/2013/09/new-shield-law-broadens-definition-of-journalist-172479.html ("The Senate Judiciary Committee spent significant time debating the definition of 'journalist' this summer . . . ."); Letter from Jim Brady, President, Online News Assoc., et. al., *ONA Working to Ensure Federal "Shield Law" Truly Protects Journalists*, JOURNALISTS.ORG (Sept. 18, 2013, 12:46 PM), http://journalists.org/2013/09/18/ona-working-to-ensure-federal-shield-law-truly-protects-journalists/ (stating that the amended shield bill comports with the organization's view that "a journalist is defined less by the title on his or her business card than by the acts of journalism she or he commits").

6. Smith v. Maryland, 442 U.S. 735 (1979).

7. 28 C.F.R. § 50.10 (2012).

protections are needed. In this Essay, I argue that, at the least, the shield bill in Congress needs to provide stronger limitations on the third-party doctrine. Without those reforms, a reporter can give a source little guarantee of confidentiality.

I. OFF THE RECORD AND VERY HUSH-HUSH

The news business trades in information. Reporters compete against those at rival papers for the biggest revelations, with the most sought-after stories being those based on leaks, confidential documents, and unparalleled access. As Max Frankel, then the *New York Times*' Washington, D.C. bureau chief, said about top journalists in his 1971 affidavit in the Pentagon Papers case: secrets are "the coin of our business."[8] Much of this trading in information relies on the promise of confidentiality. But reporters repeatedly have resisted compelled disclosure even of unpublished records, such as notes, tapes, and observations, and of information not obtained under a confidentiality agreement—even to the point of being jailed for contempt.[9]

Journalists give many reasons for needing to keep unpublished information private, but the justifications boil down to promoting the flow of information by (1) protecting the confidentiality of speakers who want to remain anonymous and (2) shielding the press from government interference or harassment.[10] The former concerns the source's right to speak[11] and the public interest in not being denied access to the

8. Affidavit of Max Frankel at ¶16, United States v. N.Y. Times Co., No. 71 Civ. 2662, 1971 WL 224067 (S.D.N.Y. June 17, 1971).

9. *See, e.g.*, *Paying the Price: A Recent Census of Reporters Jailed or Fined for Refusing to Testify*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, http://www.rcfp.org/jailed-journalists (last visited Dec. 28, 2013) (noting five journalists jailed since 2000, including a *New York Times* reporter, a local TV news reporter, and a freelance video blogger); Anthony L. Fargo, *The Year of Leaking Dangerously: Shadowy Sources, Jailed Journalists, and the Uncertain Future of the Federal Journalist's Privilege*, 14 WM. & MARY BILL RTS. J. 1063 (2006).

10. *See, e.g.*, *The Reporter's Privilege Compendium: An Introduction*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, http://www.rcfp.org/browse-media-law-resources/guides/reporters-privilege/introduction (last visited Dec. 28, 2013) (arguing that the free flow of information is chilled by compelled disclosure of confidential information and that editorial resources and time are wasted by compelled disclosure of non-confidential information); The Plain Dealer Editorial Bd., *Congress Needs to Embrace Media Shield Law in the Face of a Worrying Assault on Reporters' First Amendment Rights: Editorial*, CLEVELAND PLAIN DEALER (July 27, 2013, 4:40 PM), http://www.cleveland.com/opinion/index.ssf/2013/07/congress_needs_to_embrace_medi.html. *See also* RonNell Andersen Jones, *Media Subpoenas: Impact, Perception, and Legal Protection in the Changing World of American Journalism*, 84 WASH. L. REV. 317 (2009).

11. RonNell Andersen Jones, *Rethinking Reporter's Privilege*, 111 MICH. L. REV. 1221 (2013) (arguing that, rather than making the reporter the locus of the constitutional inquiry into privilege over confidential information, courts should focus on the anonymous speech rights of the source).

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information. The latter is also concerned with public access to empowering information,[12] but it is grounded in the theory that the press acts as a check on government, the so-called Fourth Estate.[13]

Recently, numerous high-profile incidents have called into question whether journalist-source communications really are private and whether journalists can actually fulfill promises to keep sources in confidence. In early May, the Associated Press (AP) discovered and reported that the Justice Department had subpoenaed two months of phone records for "the work and personal phone numbers of individual reporters, for general AP office numbers in New York, Washington and Hartford, Conn., and for the main number for the AP in the House of Representatives press gallery . . . ."[14] The government refused to say why it sought the records, but the AP inferred that the government was seeking information regarding how the AP learned of a foiled airline-bombing plot.[15] A few days later, the *Washington Post* reported that the Justice Department had investigated Fox News reporter James Rosen as a suspected co-conspirator of a former government official who allegedly leaked classified information to Rosen.[16] Though Rosen was not charged, journalists and government watchdog groups claimed the inquiry, which Attorney General Eric Holder defended as "appropriate,"[17] threatened to "criminalize" journalism.[18]

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12. The Freedom of Information Act, 5 U.S.C. § 552 (2012), offers a distinct vehicle for accessing information about government activities. Anyone can submit a FOIA request, stating specifically the government documents sought. However, though FOIA requests help improve transparency, the process is plagued by delay, improper redactions and denials, and judicial deference. David C. Vladeck, *Information Access—Surveying the Current Legal Landscape of Federal Right-to-Know Laws*, 86 TEX. L. REV. 1787, 1798–99 n.72 (2008); Daniel Peng, The Freedom of Information Act: Holding Government Accountable (Dec. 15, 2005) (unpublished manuscript) (on file with author). Only a small percentage of denials are litigated. Margaret B. Kwoka, *The Freedom of Information Act Trial*, 61 AM. U. L. REV. 217 (2011). Moreover, journalists often would not know what documents to FOIA but for information received from confidential sources.

13. *See* Leigh v. Salazar, 677 F.3d 892, 900 (9th Cir. 2012); Soc'y of Prof'l Journalists v. Sec. of Labor, 832 F.2d 1180, 1182 & n.2 (10th Cir. 1987); *see also* Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. B. FOUND. RES. J. 521 (1977).

14. Mark Sherman, *Gov't Obtains Wide AP Phone Records in Probe*, ASSOCIATED PRESS (May 13, 2013, 10:53 PM), http://bigstory.ap.org/article/govt-obtains-wide-ap-phone-records-probe.

15. *See* Statement of Gary Pruitt, AP president and CEO, *Updated: AP Responds to Latest DOJ Letter* (May 13, 2013), *available at* http://blog.ap.org/2013/05/13/ap-responds-to-intrusive-doj-seizure-of-journalists-phone-records/.

16. *See* Ann E. Marimow, *A Rare Peek Into a Justice Department Leak Probe*, WASH. POST (May 19, 2013), http://articles.washingtonpost.com/2013-05-19/local/39376688_1_press-freedom-justice-department-records.

17. Lisa Barron, *Holder Calls James Rosen Investigation 'Appropriate'*, NEWSMAX (June 20, 2013, 12:35 PM), http://www.newsmax.com/newsfront/holder-rosen-investigation-appropriate/2013/06/20/id/510995.

18. *See* Michael Calderone & Ryan J. Reilly, *DOJ Targeting of Fox News Reporter James Rosen Risks Criminalizing Journalism*, HUFFINGTON POST (May 20, 2013, 3:28 PM), http://www.huffington

Meanwhile, *New York Times* investigative reporter Jim Risen has spent years fighting Justice Department efforts to compel his testimony in the case against a former CIA official accused of leaking information to Risen.[19] The Fourth Circuit Court of Appeals ruled in July that Risen must testify at the former CIA official's trial, and Risen's petition for rehearing was denied.[20] At the time of this Essay's publication, Risen was awaiting the Supreme Court's decision on whether to grant certiorari.[21]

II. A BRIEF HISTORY OF SHIELD LAWS—AND THE PENDING FUTURE

Whether and to what extent a reporter could be compelled to disclose information in federal court depends on the relevant jurisdiction. The circuit courts have split multiple ways on the extent of a reporter's constitutional privilege against compelled disclosure.[22] This fracturing stems from Justice Powell's concurrence in *Branzburg v. Hayes*,[23] in which the Supreme Court effectively split 4–1–4.[24] Justice Powell joined the majority opinion saying there was no privilege on the record before the Court, but seemed to side with the four dissenting justices on the availability of a constitutional reporters' privilege under different facts, specifically if the subpoena was not issued by a grand jury.[25]

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post.com/2013/05/20/doj-fox-news-james-rosen_n_3307422.html (last updated May 21, 2013, 12:33 AM); Ann E. Marimow, *Justice Department's Scrutiny of Fox News Reporter James Rosen in Leak Case Draws Fire*, WASH. POST (May 20, 2013), http://articles.washingtonpost.com/2013-05-20/local/39391158_1_justice-department-classified-information-crime.

19. Glenn Greenwald, *Climate of Fear: Jim Risen v. the Obama Administration*, SALON (June 23, 2011, 4:24 AM), http://www.salon.com/2011/06/23/risen_3/.

20. Charlie Savage, *Court Rejects Appeal Bid by Writer in Leak Case*, N.Y. TIMES Oct. 16, 2013, at A16, http://www.nytimes.com/2013/10/16/us/court-rejects-appeal-bid-by-writer-in-leak-case.html.

21. Petition for Writ of Certiorari, Risen v. United States (proceeding below as United States v. Sterling, No. 11–5028 (4th Cir. 2013)) (asking the Court whether journalists in a federal criminal trial have a qualified constitutional privilege against revealing confidential sources or should have a common law privilege under Federal Rule of Evidence 501).

22. James Thomas Tucker & Stephen Wermiel, *Enacting a Reasonable Federal Shield Law: A Reply to Professors Clymer and Eliason*, 57 AM. U. L. REV. 1291, 1307–08 (2008) (noting that nine circuits have acknowledged, and only the Sixth Circuit has rejected, a qualified privilege for confidential information in civil cases, and that four circuits extend the privilege in criminal cases and some over non-confidential information in civil cases).

23. Branzburg v. Hayes, 408 U.S. 665, 709–10 (1972).

24. The majority held "that the Constitution does not, as it never has, exempt the newsman from performing the citizen's normal duty of appearing and furnishing information relevant to the grand jury's task." *Id.* at 691.

25. His brief concurrence stated, in pertinent part:

> The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources. . . .
>
> . . . Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to

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States have long recognized reporters' privileges,[26] with forty-nine states and the District of Columbia offering various statutory[27] or common law protections.[28] "Wyoming is the only unenlightened one," in the words of a former Society of Professional Journalists president.[29] Because state-based reporters' privileges involve restricting what state courts may compel in the production of evidence, federalism constraints prevent Congress from creating uniformity across state courts by preempting state shield laws or setting a national baseline protection.

But the *Branzburg* majority stated that Congress could legislate a protection against compelled disclosure in federal court.[30] And for the past four decades, passage of a federal reporter shield law has been a frequent priority of news organizations and industry coalitions. The Free Flow of Information Act of 2013 is the latest in a long line of such bills; already through committee review in the Senate, the bill has bipartisan support and the backing of President Obama. Its stated purpose is "[t]o maintain the free flow of information to the public by providing conditions for the federally compelled disclosure of information by certain persons connected with the news media."[31] The bill makes no mention of protecting journalists from government interference.

> believe that his testimony implicates confidential source relationship without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.
>
> In short, the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection.

Id. (Powell, J., concurring). The dissent predicted that "Justice Powell's enigmatic concurring opinion gives some hope of a more flexible view in the future," *id.* at 725 (Stewart, J., dissenting), and that has been the case. But his concurrence also has bred confusion and inconsistent application.

26. In 1896, Maryland enacted the first media shield law. MD. CODE ANN. CTS. & JUD. PROC. § 9-112 (West 2010).

27. *Shield Laws and Protection of Sources by State*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, http://www.rcfp.org/browse-media-law-resources/guides/reporters-privilege/shield-laws (last visited Dec. 28, 2013); *see also State-by-State Guide to the Reporter's Privilege for Student Media*, STUDENT PRESS LAW CTR., http://www.splc.org/knowyourrights/legalresearch.asp?id=60 (last visited Dec. 28, 2013).

28. *See* Anthony L. Fargo, *Analyzing Federal Shield Law Proposals: What Congress Can Learn from the States*, 11 COMM. L. & POL'Y 35, 47–48 (2006) (detailing common law protections in states that, at the time, had not enacted a shield statute).

29. Christine Tatum, *Federal Shield Law Would Help Public's Right to Know*, SOC'Y OF PROF'L JOURNALISTS, http://www.spj.org/rrr.asp?ref=58&t=foia (last visited Dec. 27, 2013) (referring to an earlier proposed federal media shield).

30. *Branzburg*, 408 U.S. at 706.

31. S. 987, 113th Cong. Preamble (2013), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-

The Free Flow of Information Act would replace the inconsistent applications of reporter's privileges with default federal rules for subpoenaing journalist records. The most debated aspect of the bill, the covered-journalist provision, states that the shield applies to anyone who is, or on the relevant date was: associated with a media organization with the primary intent to gather and disseminate information about matters of public interest; a freelancer with an established record; or a post-secondary journalism student.[32] Significantly, the bill provides judges discretion to find that those not within the statute's express definition were acting as journalists, and are therefore protected.[33] The underlying theory driving the bill—whether source expectations or press independence—is ambiguous from the bill's plain language. But the bill's protections are directed solely at source expectations of confidentiality and the effect on the free flow of information.

The bill's provisions vary depending on circumstances, with Section 2 providing the standards for civil and criminal cases. In civil cases, a reporter may be subpoenaed to testify or produce evidence when the information sought is "essential to the resolution of the matter;" the party seeking the information has exhausted all reasonable alternatives; and that party demonstrates that its interest outweighs the public interest in gathering and disseminating that information and in maintaining the free flow of information.[34] The requirements in criminal cases go further and largely codify long-standing Justice Department guidelines: there must be reasonable grounds to believe a crime has occurred and the information sought is essential to the matter; the Attorney General must certify that internal policies have been followed; the party seeking the information has exhausted reasonable alternatives; and the journalist or news organization does not prove by clear and convincing evidence that the public interest outweighs the interest of the party seeking disclosure.[35] Section 2 is limited by the bill's national security exception, which exempts protections when the information would "materially assist" the federal government in preventing or mitigating a terrorist attack or "significant and articulable" threat to national security.[36] The national security exception circumvents the general requirements for subpoenas to

113s987rs/pdf/BILLS-113s987rs.pdf.

32. *Id.* § 11.
33. *Id.* § 11(1)(B).
34. *Id.* § 2(a)(2)(B).
35. *Id.* § 2(a)(2)(A).
36. *Id.* § 5.

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journalists in civil and criminal cases. Further, the government need not demonstrate, for example, that it has exhausted all reasonable alternatives. The exception also directs judges to defer to the Executive agency on the existence or extent of harm to national security.[37] Finally, under Section 6, the bill also requires federal investigators to notify a news organization before executing a search warrant on records held by a third-party, such as telephone logs,[38] but the notification requirement is subject to a delay of up to ninety days after the search.[39]

News organizations and industry coalitions have resoundingly endorsed the bill as "a critical first step toward protecting the public's right to know."[40] The subhead of a *Los Angeles Times* editorial echoed common sentiments that the "Free Flow of Information Act isn't perfect, but it's a good start in protecting anonymous sources."[41] And the president of the Society of Professional Journalists enthusiastically reported that his informal yes-or-no poll of five media law scholars found that four thought the law would benefit reporters.[42] The only substantial debate has been over the covered-journalist provision,[43] and little attention has been given to other questions of scope. Since the bill's introduction, news organizations have taken a dangerously myopic view in assuming that "some protection is better than none at all."[44]

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37. *Id.* § 5(b).

38. *Id.* § 6(b).

39. *Id.* § 6(c).

40. Press Release, Newspaper Ass'n of America, NAA Applauds Senate Judiciary Committee for Passing Shield Law Protecting Confidential Sources and the Public's Right to Know (Sept. 12, 2013), *available at* http://www.naa.org/News-and-Media/Press-Center/Archives/2013/NAA-Applauds-SJC-For-Passing-Shield-Law.aspx; *see also* Editorial Bd., *A Shield Law is Necessary to Protect U.S. Journalists*, WASH. POST (Sept. 22, 2013), http://articles.washingtonpost.com/2013-09-22/opinions/42299450_1_u-s-journalists-journalist-shield-law-federal-judges (arguing for a shield law that "protect[s] journalists from being forced to disclose information about the sources, methods and content of their reporting to the government").

41. The Times Editorial Bd., *Journalists Need This Federal 'Shield'*, L.A. TIMES (Sept. 23, 2013), http://articles.latimes.com/2013/sep/23/opinion/la-ed-shield-law-journalists-confidential-sources-20130923.

42. David Cuillier, *4 Out of 5 Media Law Experts: 'Yes' on Federal Shield Law*, FREEDOM OF THE PREZ (Oct. 1, 2013, 12:22 PM), http://blogs.spjnetwork.org/president/2013/10/01/4-out-of-5-media-law-experts-yes-on-federal-shield-law/.

43. *See supra* note 5. There are at least two notable exceptions. *See* Mac McKerral, *Counterpoint: 'I Opposed the Federal Shield Then, and I Oppose It Now'*, SOC'Y OF PROF'L JOURNALISTS, http://www.spj.org/shieldlaw-counterpoint.asp (last visited Dec. 29, 2013) (noting the bill's carveout for matters of "national security" and saying he has more faith in judges and public opinion than Congress); Eric Newton, *Paying Attention to the Shield Law's Critics*, COLUM. JOURNALISM REV. (Sept. 24, 2013, 6:50 AM), http://cjr.org/behind_the_news/paying_more_attention_to_the_s.php (criticizing the media's superficial treatment of the proposed shield and reporting that national security reporters fear it will afford them little benefit).

44. *Shield Law 101: Frequently Asked Questions*, SOC'Y OF PROF'L JOURNALISTS,

III. CALCULATING THE COSTS AND BENEFITS

Reporters are bound by professional[45] and legal[46] duties when promising sources confidentiality. The consequences of breach could be a tarnished reputation and legal liability. For the sake of protecting those interests, the proposed shield would be of some benefit. In civil cases, particularly, reporters would be less likely to face the decision: either violate a court order or imperil two careers (the reporter's and the source's) and possibly face a subsequent lawsuit.

This protection against compelled disclosure is not insignificant, as demonstrated by several high-profile civil cases in the past decade, including Privacy Act actions brought against the government by Steven Hatfill and Wen Ho Lee. Hatfill, a virologist and bio-weapons expert, was identified by former Attorney General John Ashcroft as a "person of interest" in the 2001 anthrax attack that killed five people.[47] In 2004, Hatfill subpoenaed more than a dozen non-party news organizations and journalists for records that could help determine who provided information about his life to news media.[48] Wen Ho Lee, a former Department of Energy scientist, subpoenaed five reporters for evidence about their confidential sources for stories accusing Lee of spying on U.S. nuclear weapons for China in 2002.[49] The shield would also provide relief in some

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http://www.spj.org/shieldlaw-faq.asp (last visited Dec. 29, 2013); *see also* Emily Bazelon, *Better Than No Shield at All*, SLATE (Sept. 24, 2013, 1:23 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/09/media_shield_law_matt_drudge_is_wrong_the_senate_bill_is_pretty_good.html. A media shield could be cobbled incrementally, accreting rights over time. But the challenge of getting on Congress's agenda and, in recent years, the general standstill of federal legislation suggest that a broad protection for news gatherers is unlikely to be aggregated from narrow gains.

45. *See* SOC'Y OF PROF'L JOURNALISTS, CODE OF ETHICS, *available at* http://www.spj.org/pdf/ethicscode.pdf (last visited Dec. 29, 2013).

46. Cohen v. Cowles Media Co., 501 U.S. 663, 665 (1991) (holding that the First Amendment does not prohibit a plaintiff from "recovering damages, under state promissory estoppel law, for a newspaper's breach of a promise of confidentiality given to the plaintiff in exchange for information"); Daniel J. Solove & Neil M. Richards, *Rethinking Free Speech and Civil Liability*, 109 COLUM. L. REV. 1650 (2009); Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261 (1998).

47. Richard B. Schmitt, *Hatfill Tries to Track Anthrax News Leaks*, BALT. SUN (Dec. 18, 2004), http://articles.baltimoresun.com/2004-12-18/news/0412180278_1_hatfill-anthrax-subpoenas. The Justice Department settled Hatfill's lawsuit in 2008 for $5.82 million and subsequently exonerated him. David Freed, *The Wrong Man*, THE ATLANTIC (Apr. 13, 2010, 9:00 AM), http://www.theatlantic.com/magazine/archive/2010/05/the-wrong-man/308019/.

48. *Id.*; Patrick Gavin, *Hatfill to Subpoena Journos . . . Again*, FISHBOWLDC (May 7, 2007, 11:01 AM), http://www.mediabistro.com/fishbowldc/hatfill-to-subpoena-journos-again_b6797.

49. *See* Jack Shafer, *Thanks for that Subpoena!*, SLATE (Mar. 24, 2006, 6:08 PM), http://www.slate.com/articles/news_and_politics/press_box/2006/03/thanks_for_that_subpoena.html.

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criminal cases, including, possibly, precluding the eighteen-month prison sentences two *San Francisco Chronicle* reporters received for refusing to reveal who leaked information about the grand jury investigating steroid use by Barry Bonds and other star athletes.[50] And those high-profile cases represent a tiny fraction of media-wide subpoenas in a given year. RonNell Andersen Jones found that in 2006, daily newspapers and network-affiliate television news organizations in Washington, D.C., and forty-nine states received 7,244 subpoenas, mostly in civil cases.[51] The 7,244 subpoenas marked roughly a 23 percent increase from 2002, though most subpoenas were at the state level and thus would be beyond the reach of a federal shield.[52]

Journalists also could benefit from the shield's symbolic value. That is, the public and judges could interpret passage as communicating that journalists are different and deserve special treatment under the law generally, even if only loosely tied to the shield's scope. That perspective could improve morale among journalists, which has been suffering amid a decade of massive newsroom contraction,[53] and could lead judges to afford journalists broader protections or more favorable treatment within and beyond the shield context.

The shield also could serve its purpose by giving sources the appearance of security. But that consideration assumes that sources are aware of whether a reporter could be compelled to disclose information or an identity provided in confidence. In fact, source knowledge is an underlying premise of all media shield laws. Yet, no study has provided a qualitative or quantitative output on sources' understanding of press freedom from compelled disclosure.[54] Future empirical research is needed to better understand what chills the flow of information. Intuitively, though, sources are most likely to know about a reporter's limited

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50. Bob Egelko, *Silence Means Prison, Judge Tells Reporters*, S.F. CHRON. (Sept. 22, 2006, 4:00 AM), http://www.sfgate.com/news/article/Silence-means-prison-Judge-tells-reporters-He-2488258 .php. Reporters Mark Fainaru-Wada and Lance Williams avoided prison when a defense attorney admitted he was the leak. Bob Egelko, *Lawyer Admits Leaking BALCO Testimony*, S.F. CHRON. (Feb. 14, 2007, 4:00 AM), http://www.sfgate.com/bayarea/article/lawyer-admits-leaking-balco-testimony-he-agrees-2617522.php.

51. RonNell Andersen Jones, *Avalanche or Undue Alarm? An Empirical Study of Subpoenas Received by the News Media*, 93 MINN. L. REV. 585, 626–27 (2008).

52. *Id.* at 628, 637.

53. *See* Brad A. Greenberg, *A Public Press? Evaluating the Viability of Government Subsidies for the Newspaper Industry*, 19 UCLA ENT. L. REV. 189, 192–94 (2012).

54. Two studies by leading scholars on reporter's privilege have found that journalists tend to be poorly informed about their legal protections and exposures, but that says nothing about source awareness. *See* Vince Blasi, *The Newsman's Privilege: An Empirical Study*, 70 MICH. L. REV. 229, 275–76 (1971); Jones, *supra* note 10, at 384–93.

protection from compelled disclosure following a high-profile incident, such as a reporter being held in contempt for refusing to turn over information. Thus, a reporter faces a Hobson's choice in which she can quietly breach a confidentiality agreement and face professional and legal repercussions but possibly mitigate a broader chill on the flow of information, or she can fight a subpoena and draw attention to the precarious existence of reporter-source confidentiality agreements. The proposed shield is likely to address the flow of information that would otherwise be throttled by high-profile subpoena fights.

But assuming sources are moderately sophisticated—and that is likely a fair assumption of at least the most coveted sources: government leakers[55]—the bill is insufficiently tailored to serve its stated purpose of maintaining the free flow of information. Though the latest draft offers some protection to more journalists than previous proposals, the bill still leaves no protection for some journalists in all situations and for all journalists in some situations.

National security exception—A broad category capable of encompassing much of the news originating from the Washington press corps, the national security exception means that the American journalists in greatest need of a shield will be largely outside the bill's ambit. Indeed, the government's investigation of James Rosen and subpoena of James Risen, and likely the AP phone records, would be subsumed by the national security exception. The revelations of the National Security Agency's mass surveillance program[56] demonstrate the breadth of the "national security" label,[57] and the bill directs judges to defer to government lawyers on the existence or extent of harm. It does not require the government to first exhaust all reasonable alternatives for identifying the source. This process reduces the ability to conduct a meaningful

55. For an exhaustive structural account of the government's leak culture and why some leakers are prosecuted, see David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condones Unlawful Disclosures of Information*, 127 HARV. L. REV. 512 (2013).

56. *See* Ryan Lizza, *State of Deception: Why Won't the President Rein in the Intelligence Community?*, NEW YORKER, Dec. 9, 2013, at 48 (discussing the history of N.S.A. surveillance programs and why President Obama refuses to rein it in).

57. The NSA surveillance program also poses unique challenges to the free flow of information—that is, how does a reporter convince a source that any conversation, on any matter, is actually private when the NSA is following phone records and reading emails of millions of Americans? *See* TOW CENTER FOR DIGITAL JOURNALISM ET AL., COMMENT TO REVIEW GROUP ON INTELLIGENCE AND COMMUNICATIONS TECHNOLOGIES REGARDING THE EFFECTS OF MASS SURVEILLANCE ON THE PRACTICE OF JOURNALISM (Oct. 4, 2013), *available at* http://towcenter.org/wp-content/uploads/2013/10/Letter-Effect-of-mass-surveillance-on-journalism.pdf.

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independent evaluation of the connection between the information sought and national security.

However, reining in the national security exception, particularly while simultaneously expanding legal definitions of a *journalist*, would likely overwhelm the political appetite for a shield law.[58] Ours is a hyper-vigilant time and, as the NSA surveillance and public reaction thereto demonstrate, there is a substantial law/norm gap on national security protective measures—and even those laws that do not align with societal norms may be exceeded by overzealous application and generous legal interpretations. Though the arguments for the national security label are at times specious,[59] they at least are consistent with a theory that a reporter's duties to disclose vary depending on the informational content. That is, from a strictly descriptive standpoint, matters implicating national security are different, and so too are the rules limiting the government's ability to stop the dissemination of related information.

Third-party doctrine—On the other hand, the third-party doctrine is not anchored to the content of the disclosed information. Instead, it is based on the notion that a journalist or source waives any privacy right in the existence of his or her communications. The third-party doctrine, as applied to service provider records, originated in the 1979 case of *Smith v. Maryland*, in which the Court held that people do not have a reasonable expectation of privacy in phone numbers dialed because "[a]ll telephone users realize that they must 'convey' phone numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed."[60] The third-party doctrine is an investigatory tool, and over the decades the doctrine has expanded with technological advances.[61] Meanwhile, journalism has moved into the digital age,[62] and

58. Indeed, simply extending a shield to cover WikiLeaks apparently would have doomed the Free Flow of Information Act. *See* Clarence Page, *Who in the Wiki-Age is a Journalist?*, CHI. TRIB. (Sept. 18, 2013), http://articles.chicagotribune.com/2013-09-18/news/ct-oped-0918-page-20130918_1_julian-assange-journalist-wikileaks-founder-assange.

59. Examples of this include the Justice Department's investigation of James Rosen as a "criminal co-conspirator" under the Espionage Act, *see* Stelter & Shear, *supra* note 3, and, though within a different legal system, the United Kingdom's claim that journalist Glenn Greenwald's partner was involved in "espionage" and "terrorism" when he tried to courier documents on the NSA surveillance efforts to Greenwald from Edward Snowden. *See* Mark Hosenball, *UK: Snowden Reporter's Partner Involved in 'Espionage' and 'Terrorism'*, REUTERS (Nov. 1, 2013, 7:23 PM), http://www.reuters.com/article/2013/11/01/us-uk-nsa-idUSBRE9A013O20131101.

60. Smith v. Maryland, 442 U.S. 735, 742 (1979).

61. *See* Daniel J. Solove, *Fourth Amendment Codification and Professor Kerr's Misguided Call for Judicial Deference*, 74 FORDHAM L. REV. 747 (2005) (discussing the statutory rights that stand in for the Fourth Amendment in protecting some digital data).

62. Albeit reluctantly. *See* Brad A. Greenberg, *The News Deal: How Price-Fixing and Collusion*

reporters now conduct many interviews on cell phones and by email; moreover, demand of faster output has pushed more interviews away from face-to-face encounters.

This poses a problem for the free flow of information because sources have no guarantee that a reporter can keep their identity secret. In fact, a reporter attributing leaked information to an anonymous source invites government investigators to execute a search warrant on that reporter's phone logs. From there, simple sleuthing could lead an investigator back to the source.

Courts have not explained the application of the third-party doctrine to journalists' phone records. But the Free Flow of Information Act purports to treat journalists differently in regards to searching phone records by requiring the government to notify the news organization beforehand, with an exception that permits delay of up to ninety days when notification would "pose a clear and substantial threat" to an investigation.[63] In doing so, the bill's backers have indicated that the privacy of journalist communications are different—because the consequences implicate unique policy considerations—but has done so in a manner that would not actually meet purported goals. The exception from notification is too broad to provide a source any guarantee that a journalist who promises confidentiality could actually keep it—or even challenge a government attempt to collect records linking reporter to source.

So how should a shield law address the third-party doctrine if it is to preserve the shield's purpose of protecting the free flow of information? To begin, third-party records should be subjected to the same protections as records in the journalist's possession. The government should not be able to avoid a news organization's adversarial challenge by delaying notification. A proper shield should cover both journalist and third-party records under Section 2. This contention is not a direct attack on the *Smith v. Maryland* rationale; I leave that debate to others.[64] But, in the shield context, the third-party doctrine's costs are amplified and undermine the

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Can Save the Newspaper Industry—and Why Congress Should Promote It, 59 UCLA L. REV. 414, 420–24 (2011) (discussing recent challenges to the print business model).

63. S. 987, 113th Cong. § 6(c)(1)–(3) (2013), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-113s987rs/pdf/BILLS-113s987rs.pdf.

64. *See, e.g.*, CHRISTOPHER SLOBOGIN, PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT (2007); Gerald G. Ashdown, *The Fourth Amendment and the "Legitimate Expectation of Privacy"*, 34 VAND. L. REV. 1289, 1315 (1981); Lewis R. Katz, *In Search of a Fourth Amendment for the Twenty-first Century*, 65 IND. L.J. 549, 564–66 (1990); Orin S. Kerr, *The Case for Third-Party Doctrine*, 107 MICH. L. REV. 561 (2009); Paul Ohm, *The Fourth Amendment in a World Without Privacy*, 81 MISS. L.J. 1309 (2012).

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shield's purported goal. Moreover, Congress has offered no reason for treating media records with third parties different from records in a journalist or news organization's possession.

Narrowing the third-party doctrine's ability to reach journalist records without overturning it writ large would involve giving journalists preferential treatment. Yet, *Branzburg* seems to support this proposition. Though the majority said that journalists have the same civic responsibility to aid investigations as other citizens, Justice Powell and the four dissenting justices said that in some circumstances journalists should be treated more favorably.[65] Moreover, the majority recognized that Congress could choose to elevate the rights of journalists to protect them from disclosure of their records.[66]

Normalizing subpoenas to journalists—By codifying the Justice Department's internal policies for subpoenaing journalists, the bill facilitates what David Pozen calls "the paradox of legitimation by judicialization."[67] By this he means: "requiring judges to supervise a worrisome government activity can produce more, not less, discretion for officials to engage in that activity."[68]

Currently, the decision to subpoena a reporter is made wholly within the Justice Department and must be approved by the Attorney General. When the public learns of a subpoena and disagrees with the logic as imprudent or inappropriate, it is the Attorney General, and by extension the President, who is accountable for the issuance. And when public backlash is sufficiently strong, the Justice Department may choose to revise its polices, which is what happened this past summer in response to the Rosen-AP revelations.[69] To be sure, the Justice Department guidelines are not enforceable in court and offer no accountability when the public does not learn of a subpoena to a journalist. Yet, except on rare occasions, the guidelines have sufficed to curb government subpoenas of journalists, operating as—in the words of Adam Liptak, then the *New York Times*' legal counsel and currently its Supreme Court correspondent—a "hidden federal shield law."[70]

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65. Branzburg v. Hayes, 408 U.S. 665, 709–10, 725–28 (1972).

66. *Id.* at 706.

67. David Pozen, *Why a Media Shield Law May Be a Sieve*, JUST SECURITY (Oct. 21, 2013, 10:20 AM), http://justsecurity.org/2013/10/21/media-shield-law-sieve-david-pozen/.

68. *Id.*

69. DEP'T OF JUSTICE, REPORT ON REVIEW OF NEWS MEDIA POLICIES (July 12, 2013), *available at* http://www.justice.gov/iso/opa/resources/2202013712162851796893.pdf.

70. Adam Liptak, *The Hidden Federal Shield Law: On the Justice Department's Regulations Governing Subpoenas to the Press*, 1999 ANN. SURV. AM. L. 227.

The Free Flow of Information Act would disrupt Executive accountability by diffusing responsibility across the three branches of the government (and the Fourth Estate). As Pozen notes, the Attorney General could deflect criticism by telling the public he "was just following a statute that Congress passed, federal judges help administer, and the media overwhelmingly endorsed."[71] In this way, the law would reciprocally shield the Executive Branch from public criticism. It also could lead to rights dilution as government lawyers become looser with their application of department policies. Justice Department public image costs will be small if a judge denies a subpoena because there is no public or private notice requirement and similarly small if a judge authorizes a subpoena for the reasons just discussed. This, in turn, marginalizes risk and lowers incentives for government lawyers to hesitate before drawing up a subpoena to a journalist. And that could impose additional costs on the free flow of information.

CONCLUSION

A shield law is not cost-free. It normalizes the process of subpoenaing reporter information and removes accountability from the Executive by diffusing responsibility across government. Shield law discussions also distract from other dangers to press freedom, such as the third-party doctrine, mass surveillance, and liberal application of the "espionage" and "terrorism" labels to journalists' activities. Press advocates should not simply see *some* shield as superior to *no* shield. If a shield law is to ensure the free flow of information to the public, it must account for the costs and benefits of what is covered and what is not. And it must offset those costs by doing more than protecting journalists from compelled disclosures in civil litigation, which is unaffected by government activities. Shield proponents should start by looking to limit the reach of the third-party doctrine.

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71. Pozen, *supra* note 67.

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