The Society of Professional Journalists and Baker & Hostetler LLP present

The 2005 Pulliam Kilgore Report

“A Questionable Procedure”? Deciding Who Should Be Covered by a Federal Shield Law

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INTRODUCTION

When the U.S. Supreme Court ruled that the First Amendment doesn’t protect reporters from testifying before criminal grand juries, Justice Byron White wrote that recognizing such a privilege would create “practical and conceptual difficulties of a high order.” Although the Court noted that some states had worked through these difficulties, the justices left Congress to decide whether to embark upon the task, cautioning:

Sooner or later, it would be necessary to define those categories of newsmen who qualify for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as the large metropolitan publisher who utilizes the latest photocomposition methods.

For many, “sooner or later” had arrived by July 6, 2005, when New York Times reporter Judith Miller was taken into federal custody for refusing to testify about information she never reported. Though the debate surrounding a federal shield law has shifted from carbon paper and mimeographs to blogs and podcasts, during the past year these discussions were rampant on editorial pages and talk shows and within journalism and media law circles. Since the 1972 Branzburg decision, more than a hundred proposals to create a federal shield law have been introduced in Congress. But the news media is more united in the current efforts than in any of

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3 Id.
the initial attempts after the Supreme Court ruling, Society of Professional Journalists president Irwin Gratz said.  

The year began with Jim Taricani in home confinement for refusing to identify a source who gave him a video tape showing a Providence city official accepting a bribe. Contempt appeals were ongoing in another case involving Jeff Gerth and James Risen of The New York Times, H. Josef Hebert of the Associated Press, Bob Drogin of the Los Angeles Times, and former CNN reporter Pierre Thomas, now at ABC. They had been subpoenaed to testify about their sources for stories about former Los Alamos nuclear scientist Wen Ho Lee who sued the government under the Privacy Act for allegedly revealing information to the press about him during an espionage investigation. Finally, Miller and Matt Cooper, of Time magazine, had been held in contempt for refusing to testify before a federal grand jury looking into the disclosure of Valerie Plame's identity as a CIA agent, and their appeals were ongoing.

In early February, legislation was introduced in Congress to provide reporters with a qualified federal statutory protection from testifying or providing evidence to federal entities and an absolute protection from identifying confidential sources. On February 15, the day after the last piece of shield law legislation was introduced, the U.S. Court of Appeals for the District of Columbia affirmed the contempt rulings against Miller and Cooper. The two asked the Supreme Court to review their case, eventually gaining support from the attorney generals of 34 states and

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the District of Columbia who were concerned with the uncertain role of state shield laws during federal investigations.

While waiting to hear if the case would be heard, Washington's, if not the nation's, best-kept secret was at last laid bare. Washington Post reporter Bob Woodward's anonymous source on the Watergate break-in, leading to President Richard Nixon's resignation, was revealed: Deep Throat was former FBI deputy director W. Mark Felt. The identification of history's most famous source provided timely validation for the careful use of anonymous sources.

"Two things are clear about the role that government whistleblower W. Mark Felt played in the infamous Watergate scandal: Deep Throat exposed corruption in high places because of his absolute confidence that his identity would be protected, and Deep Throat would not have that protection today," Rep. Mike Pence, R-Ind., wrote to members of Congress in a "Dear Colleague" letter.

Still, on June 27, the Supreme Court announced that it would not review the Plame leak case. The next day, the U.S. Court of Appeals for the District of Columbia upheld the contempt citations for four of the reporters subpoenaed in Lee's lawsuit. (The contempt order against Gerth was vacated.) Time magazine executive editor Norman Pearlstine decided to turn over Cooper's e-mails to the grand jury as the legal challenges had failed, and then Cooper agreed to testify after receiving an "express personal release" from his source, presidential adviser Karl Rove, to reveal his identity.

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6 Lee v. Dep't of Justice, 413 F.3d 53, 55 (D.C. Cir. 2005).
7 Id. at 63-64.
8 Adam Liptak, For Time reporter, decision to testify came after frenzied last-minute calls, N.Y. Times, June 10, 2005 at 12.
A week and two days later, Miller, still refusing to testify, was taken to jail in Alexandria, Virginia, where she remained for 85 days. "If journalists cannot be trusted to guarantee confidentiality, then journalists cannot function and there cannot be a free press," she said before being taken from the courtroom. She was released only after agreeing to testify, which she did after she was satisfied that I. Lewis Libby's waiver of anonymity as her source was voluntary and genuine.

In the months prior to Miller's incarceration, Bruce W. Sanford, SPI's counsel at Baker & Hostetler LLP in Washington, D.C., co-authored influential opinion pieces in The Wall Street Journal and The Washington Post arguing that the government could not overcome Miller's privilege to protect her sources because it lacked a compelling interest in the information. According to Sanford, the prosecutor would never be able to build a case based on the Intelligence Identities Protection Act, the law under which he was pursuing his investigation. With the inquiry into the CIA leak now approaching two years in duration, no indictments have been made.

While the renewed interest in creating a federal shield law has received widespread support, earlier efforts had failed in part because of divergent views about shield laws among press advocates. The traditional view is that the First Amendment is the only protection reporters need, and any attempts to codify a privilege would be a step toward government licensing of journalists. Another view is that the only acceptable legislation must create an absolute protection. The final view is that receiving some amount of statutory protection, even if

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qualified, is better than relying solely on the First Amendment, a view that may be gaining popularity today because of the increase in high-profile subpoenas against journalists.

"The big sticking point related to shield laws was that we believed that the public's right to know was based on the First Amendment -- now that's not all we need," said SPJ 2005-2006 president David Carlson.¹⁰

Among shield law supporters there are a variety of opinions about what the privilege should protect and, if qualified, what the burdens to overcome it should be. While most advocates have accepted the political reality that Congress will not pass legislation with an absolute privilege, the question of who should be covered by a qualified privilege continues to create considerable debate.

"Politically, that is probably the stickiest part of it," Carlson said.¹¹

This year's Pulliam Kilgore report will examine the different ways the law has defined who a journalist is and how that history may impact the discussions about a federal shield law. Part I will set out the theoretical framework of the role of the press and will look at the often conflicting ideas of whom the public and journalists consider to be journalists. It will also look at the impact of developing technologies in creating new outlets for reporting and increasing ways to share information. Part II will show how state legislatures have defined who will be covered by state shield laws and how courts have interpreted and applied those definitions. Part III will review the development of the balancing tests that federal courts have used to determine whether someone qualifies for a First Amendment-based protection when it has been recognized.

¹¹ Id.
Part IV will look at how the federal government defines journalists in other regulatory settings, including the Freedom of Information Act and federal campaign finance laws. Finally, Part V will discuss to whom the two proposed federal shield laws apply and the strengths and weaknesses of their scopes of coverage.

PART I – DEFINING JOURNALISTS

Discussions about the role of the press and the philosophical basis for protecting speech have been ongoing since before the First Amendment existed. While the founders listed a protection for “the press” distinct from other institutions, the idea that the Fourth Estate is entitled to protections greater from those accorded to ordinary citizens remains an issue of contention. Some theorists on the First Amendment believe that protections for the press are designed to maintain an educated public capable of self-government, therefore reserving the highest levels of protection for speech with particular political or governmental value. Others argue that all speech should be protected equally because a free market of ideas will correct falsehoods and will allow those with conflicting views to strengthen or refine their points without chilling the speech rights of those who hold inaccurate beliefs. Still, a third view believes that speech should be protected as a necessary freedom for individuals to achieve self-fulfillment through personal expressions. Additionally, while some think the First Amendment should apply to everyone equally, others believe that the press, by virtue of being uniquely identified in the Constitution, has heightened protections. In interpreting the First Amendment, Justice Potter Stewart posited that listing the freedom of speech and the freedom of the press separately was

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“no constitutional accident, but an acknowledgement of the critical role played by the press in American society” and urged the courts to recognize that “the Constitution requires sensitivity to that role, and to the special needs of the press in performing it effectively.”

The idea that perhaps the press no longer plays as critical a role in society as it once did is the greatest threat to the approach supported by Stewart -- and today, attitudes towards journalists and the media seem bleak. Seventy-two percent of the public think that the press is one sided. Three quarters think the press is primarily concerned with getting a bigger audience while only 19 percent think its primary concern is informing the public. Forty-three percent of Republicans and 27 percent of Democrats think the press is harmful to democracy, a challenge even to protections focused on political speech. Asking the public to support a law regrettably referred to as a reporter’s “privilege” is a daunting task.

Because journalism is a rightfully unlicensed profession, there are no uniform standards, guidelines or characteristics that can be easily applied to weigh whether a person is a journalist. Instead most organizations that have attempted to define journalists do it in terms of the function of a person or the goals and ethical guidelines that a journalist should follow, not the person’s status. The SPJ Code of Ethics, for example, states that a journalist should seek truth and report it, minimize harm, act independently and be accountable. The Project for Excellence in

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15 Houchins v. KQED, 438 U.S. 1, 17 (1978) (Stewart, J., concurring).

16 See, Richard Posner, Bad News, The New York Times, July 31, 2005 (Book Review) (describing the threats facing the media, including political polarization, blogs, sensationalism, readership decline and advertising decline). Posner is also a federal judge for the 7th Circuit Court of Appeals and authored McKeveit v. Pallasch, a ruling that strongly rejected finding a First Amendment based reporter’s privilege.

Journalism suggests that a key element of journalism is to inform the public so its members are capable of participating in civic duties. The project defines nine conventions it calls the “elements of journalism.”

Journalism’s first obligation is to the truth.  
Journalism’s first loyalty is to citizens.  
Journalism’s essence is a discipline of verification.  
Journalism’s practitioners must maintain an independence from those they cover.  
Journalism must serve as an independent monitor of power.  
Journalism must provide a forum for public criticism and compromise.  
Journalism must strive to make the significant interesting and relevant.  
Journalism must keep the news comprehensive and proportional.  
Journalism’s practitioners must be allowed to exercise their personal conscience.

While following a set of ethical guidelines could be one way to evaluate whether someone is a “good” journalist, throughout history there are plenty of writers who have failed the ethics test but who were still considered journalists. Benjamin Franklin wrote newspaper advice columns under a pen name, hiding from all accountability. Nellie Bly posed as a patient in a mental hospital to expose conditions in the New York facility, creating a fictitious identity that today would be considered unethical by most contemporary standards. Joseph Pulitzer, the namesake of the most honored journalism award, also played a major role creating the media sensationalism known as “yellow journalism.” Hunter S. Thompson, who defined journalism as “a low trade and a habit worse than heroin,” never claimed objectivity or independence from those he covered, often becoming part of the story. Was Thompson, the notorious founder of “gonzo journalism,” very different from a blogger who has the freedom to intermix his or her own thoughts with events, unlike most “hard news” reporters in the mainstream media?

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18 Bill Kovach & Tom Rosenstiel, Elements of Journalism: What Newspeople Should Know and the Public Should Expect (Three Rivers Press 2001). The Project for Excellence in Journalism is part of the Columbia University Graduate School of Journalism and is supported by the Pew Charitable Trusts. The book is the culmination of three years of research into the core principles journalists share.
While the public and the press don't seem to agree about who is a journalist within traditional news outlets, technological advances create even more uncertainty. Technology, as it always has and will, can increase an individual's ability to capture and disseminate information. Today, a personal Web site could easily draw an audience greater than that of a small print newspaper. In July, when London's public transportation was attacked by a series of bombs, surviving victims used cell phones with cameras and video recorders to capture some of the first and closest images of the event. The photographs and videos were then uploaded on image-sharing Web sites, published on Web sites and blogs, and even used by some traditional news sources, including CNN, the BBC, Fox News and ABC.

"These days, you just have to be in the wrong place at the right time, and you too can cover the news," CNN president Jonathan Klein told the Los Angeles Times. 19

The idea that anyone can cover the news is a fundamental roadblock to defining who would be protected by a new federal shield law. During a Senate Judiciary Committee hearing on the proposed statute, Sen. John Cornyn, R-Tex., questioned whether anyone with a blog would be covered by the legislation. Law enforcement would doubtless be hindered if anyone who was subpoenaed could create a Web site and claim a reporter's protection from disclosing the sought-after information. Though much of the attention in the current discussions focuses on bloggers, freelance journalists, book authors and student journalists have also found themselves at odds with court interpretations and statutory definitions of journalists that require the person seeking the protection to be employed by a news organization or earning a living full time from practicing journalism. Still, the evolving nature of blogs and the fact that some report objective information while others simply consist of personal reflections add to the concerns that a federal

shield law could sweep far too broadly and undermine the notion that the public has a right to everyone’s evidence.

A blogger is anyone who updates an internet site using blogging software, said Kurt Opsahl, an Electronic Frontier Foundation staff attorney. This means that journalists can be bloggers, and bloggers can be journalists. Some bloggers consider themselves journalists and others do not. Because creating a blog can subject an individual to legal issues ranging from libel and defamation to invasion of privacy and employment issues, EFF created a legal guide for bloggers. To determine whether a blogger is protected by the reporter’s privilege, the guide suggests looking at whether the blogger is gathering news for the public.

“What makes a journalist a journalist is whether she is gathering news for dissemination to the public, not the method or medium she uses to publish,” Opsahl said. “If you are engaged in journalism, your chosen medium of expression should not make a difference. The freedom of the press applies to every sort of publication that affords a vehicle of information and opinion, whether online or offline.”

Thomas Goldstein, the director of mass communications at the University of California at Berkley, provided EFF with his thoughts on what defines journalism to assist EFF in defending two bloggers who were subpoenaed by Apple computer in a case about leaked trade secrets. Goldstein, who also has a law degree, argued that California’s statutory shield law should apply to the two bloggers, writing:

There is no all encompassing definition of journalism or journalists. What distinguishes journalism from other activities is not the formal training or credentials of its practitioners but the

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20 Telephone interview with Kurt Opsahl, Staff Attorney, Electronic Frontier Foundation (June 20, 2005).

activities those practitioners engage in. Journalists are those who
gather, sift, analyze, verify, prepare, and present information to an
audience. They collect unorganized and fragmented bits of data,
information, and observation and through a process of
organization, analysis, selection, and presentation, they digest and
transform that raw information into something that exceeds the
sum of its part in its usefulness to its audience. Journalists search
for the truth so they can present it to their audience. No single
code of conduct governs journalism beyond the notion that
journalists strive for accuracy in the information they present to
their chosen audience.\(^ {22} \)

Despite EFF’s efforts, the California Superior Court declined to protect the identity of the
sources based on the state shield law, though that decision is being appealed.\(^ {23} \) The court did not
decide whether the bloggers were journalists, but said violating the laws protecting trade secrets
would outweigh the qualified privilege even if it were applied.

Others have argued for a more restrictive definition of journalists to protect the
professional standards of the trade. Danny Glover, the managing editor of The National
Journal’s Technology Daily and editor of Beltway Blogroll typifies this skepticism. During a
forum sponsored by the Heritage Foundation, he posited that “doing journalism doesn’t make
you a journalist any more than doing first aid makes you a doctor ... any more than representing
yourself in court makes you a lawyer [or] any more than loaning money to a friend makes you a
banker.”\(^ {24} \)

The idea that anyone who reports something is a reporter still leaves the question of
whether any “reporter” is a “journalist” -- and still further, who should get shield law protections.

\(^ {22} \) Thomas Goldstein, declaration, available at
http://www.eff.org/Censorship/Apple_v_Does/declaration_goldstein.pdf.

protective order).

\(^ {24} \) “Are Bloggers and Journalists Friends or Enemies?” Heritage Foundation, July 8, 2005.
Writing for the Columbia Journalism Review blog, CJR Daily, Samantha Henig critiqued the rush to embrace the idea that anyone reporting an event is transformed into a journalist:

Yes, people with camera phones provide viewers with disturbing images of the evacuation of the Tube – images that just a few years ago would have been left to the imagination. But does that magically turn them into journalists? Or are they simply eyewitnesses with impressive phones? ... If being a reporter has some journalistic standards attached to it, then only those upholding such standards should qualify for the title.  

Though anyone can from time to time function as a reporter, creating a definition that is so elastic as to be meaningless is not practical. While journalists may use ethical standards to guide themselves, granting legal protections based on ethical behavior seems dangerously close to government licensing. Instead, creators of a federal shield law should look at the successes and failures of other laws defining journalists to create a definition that will cover individuals engaged in newsgathering regardless of formal training, graduate degrees, employment, or reputation.

PART II – STATE SHIELD LAWS

When trying to decide who a federal shield law should cover, members of Congress do not have to start with a blank slate. Thirty-one states and the District of Columbia have existing statutes that provide journalists some degree of protection from disclosing information in state

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proceedings. In all but one of the remaining 19 states, courts have recognized a common law protection for journalists based on the First Amendment or provisions in state constitutions.

Though there is little uniformity in the state statutes, most include a definition of who will be covered in terms of being employed by or connected with an established media outlet. The media outlet is then defined usually by its medium, the regularity with which it publishes or, in a few instances, the fact that it has paying subscribers. Modeling a federal definition based on the language used in these state shield laws, which look at employment status -- not the activities in which an individual is engaged in -- would give the government the ability to say someone should not be protected even if he or she is practicing journalism. Further, creating strict requirements could limit the protections to established publications and media outlets.

"They make it a little too easy for some bureaucrat to define someone and categorize them as not a journalist," said Lucy Dalglish, the executive director of the Reporters Committee for Freedom of the Press, referring to state shield law language.

**The Typical State Definition of Coverage: Connection to a Media Outlet**

Maryland, which became the first state to enact a shield law in 1896, has become a model for the way most shield laws define their scope of coverage. The statute provides coverage for people "employed by" the news media -- including "any printed, photographic, mechanical or electronic means of disseminating news and information to the public" -- in a news gathering or

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27 Wyoming is the only state that has not recognized a protection for the relationship between a journalist and source. However, the state's courts have not denied the protection -- rather no state case has addressed the issue.

28 Telephone Interview with Lucy Dalglish, Executive Director, Reporters Committee for Freedom of the Press (July 19, 2005).
disseminating role.\textsuperscript{29} Since its enactment, the statute has been amended to include new technologies in its definition of covered employees of the "news media."

North Carolina, the most recent state to enact shield legislation, has similar requirements that apply the protection to any "person, company, or entity, or the employees, independent contractors, or agents of that person, company, or entity, in the business of gathering, compiling, writing, editing, photographing, recording, or processing information for dissemination via any news media."\textsuperscript{30} The "news media" is then defined as "any entity regularly engaged in the business of publication or distribution of news via print, broadcast, or other electronic means accessible to the general public."

Two phrases that should concern freelancers, student journalists, interns and other part-time reporters are the terms "employed by" and "earning a living from," said Mark Goodman, who is the director of the Student Press Law Center. Those terms could exclude someone who is practicing journalism but is working for free, receiving a minimal stipend, or is not engaged in journalism as a full-time profession.

"Certainly a student could be working 40 hours a week engaged in journalism and be doing it as a volunteer," Goodman said. "Corporate funding is not the marker of a journalistic standard."

Both Delaware and Florida have statutes with livelihood requirements. The Delaware law specifies how many hours someone must spend obtaining or preparing information for dissemination, providing protection for anyone who


\textsuperscript{30} N.C. Gen. Stat. § 8-53.11.
at the time he or she obtained the information that is sought was earning his or her principal livelihood by, or in each of the preceding 3 weeks or 4 of the preceding 8 weeks had spent at least 20 hours engaged in the practice of, obtaining or preparing information for dissemination with the aid of facilities for the mass reproduction of words, sounds, or images in a form available to the general public...  

The Florida statute is not as specific but still requires that the person regularly engage in collecting, photographing, recording, writing, editing, reporting, or publishing news, for gain or livelihood, who obtained the information sought while working as a salaried employee of, or independent contractor for, a newspaper, news journal, news agency, press association, wire service, radio or television station, network, or news magazine.  

The definition of a “news entity” can also be used to restrict statutory protections. One of the more restrictive definitions of a news entity is Rhode Island’s shield law that, on its face, does not cover someone working for a free newspaper. The statute applies only to a “person directly engaged in the gathering or presentation of news for any accredited newspaper, periodical, press association, newspaper syndicate, wire service or radio or television station.” It further defines “newspaper” as “a newspaper or periodical ... [that] must be issued at regular intervals and have a paid circulation.” While a court could determine that a free newspaper was a periodical, there have been no cases interpreting the language.

**Broadly Defined Coverage**

While many of the statutes are detailed in who they cover, other states allow more room for judicial interpretation. For example, the Oregon statute applies to any “person connected

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31 10 Del. C. § 4320 (4).
32 Fla. Stat. § 90.5015.
with, employed by or engaged in any medium of communication to the public.”\textsuperscript{34} The portion of
the statute defining its scope, which has not be interpreted by courts, states that “‘medium of
communication’ has its ordinary meaning and includes, but is not limited to, any newspaper,
magazine or other periodical, book, pamphlet, news service, wire service, news or feature
syndicate, broadcast station or network, or cable television system.” In Michigan, the shield law
simply states that it applies to “a reporter or other person who is involved in the gathering or
preparation of news for broadcast or publication.”\textsuperscript{35} Before it was amended in 1986, the statute
did not include the term “broadcast,” and a television reporter was held in contempt of court after
an appeals court ruled that he did not qualify for any protections from testifying before a state
grand jury.\textsuperscript{36} However, since the amendment, there have not been any rulings regarding the
scope of the statute.

When a statute does list the specific media outlets that will be covered, it is important that
lawmakers allow for changes in technology and protect news content equally, regardless of the
medium. Recently, the U.S. Court of Appeals for the Eleventh Circuit ruled that a \textit{Sports
Illustrated} reporter was not covered by Alabama’s shield law, which provides an absolute
protection for a “person engaged in, connected with or employed on any newspaper, radio
broadcasting station or television station, while engaged in a news-gathering capacity,” because

\textsuperscript{34} ORS § 44.510 (2003).

\textsuperscript{35} MCL § 767.5a.

\textsuperscript{36} \textit{In re Contempt of Stone}, 154 Mich. App. 121, 125 (1986) (holding that “publication” in its commonly
understood sense means printed material for public dissemination, that the legislatures of other states have
specifically referred to television and radio reporters, and that the Michigan Legislature could have
included a reference to television and radio news reporters on those occasions, but it chose not to do so).
he worked for a magazine. This case illustrates the risks that are created when a state decides to establish a restrictive list of news entities that will be covered by a shield law.

**Coverage Based on the Function of the Person Seeking Protection**

Minnesota is the only state that employs a function-based test without an additional requirement based on a person's place of employment. The state provides a qualified privilege for any "person who is or has been directly engaged in the gathering, procuring, compiling, editing, or publishing of information for the purpose of transmission, dissemination or publication to the public."

Since the statute was enacted in 1973, there have been no published cases to address whether someone should be considered a journalist under the law.

Despite concerns that most state shield laws define journalists too narrowly, the state laws also show that it is possible to balance the interests of law enforcement and the free press. The First Amendment Center's ombudsman, Paul McMasters, said he used to oppose shield laws because he worried the government might afford the protection to those it favored and discriminate against others. However, seeing the laws work is one of the factors that has changed his mind about supporting the current efforts. "We've had nearly three decades of experience with state shield laws with none of the horrors that many of us, including myself, were concerned about," he said, adding that the need for a federal shield law is greater now because the federal judiciary has shifted away from recognizing a privilege based on the First Amendment and attorneys have become more aggressive in seeking information from journalists.

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37 Price v. Time, 416 F.3d 1327 (11th Cir. 2005).
39 Phone Interview with Paul McMasters, Ombudsman, First Amendment Center (July 12, 2005).
PART III - FEDERAL JUDICIAL INTERPRETATION

In the 1972 Branzburg ruling, Justice Lewis Powell's concurring opinion discussed the importance of striking "a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct."

His suggestion that newsgathering has some First Amendment protections has been the basis of rulings from nine federal circuits that have recognized some form of a First Amendment-based reporter's privilege.

Federal judges in good conscience can always find a way to recognize the First Amendment dimensions in conflicts between journalists and civil or criminal investigations, McMasters has argued. He noted that U.S. District Judge Charles Ritchey quashed subpoenas seeking the identity of Deep Throat less than two years after the Branzburg decision. However, an influential decision by Judge Richard Posner in 2003 may have sparked the current trend in the federal judiciary to not recognize a First Amendment-based protection. In McKevitt v. Pallasch, the U.S. Court of Appeals for the Seventh Circuit held that a journalist whose tape recorded interviews were being sought for a criminal investigation in Ireland must turn over the tapes. Posner determined that Illinois's shield law did not apply because of "the federal interest in cooperating in the criminal proceedings of friendly foreign nations." In deciding the case, Posner further rejected the idea that journalists should receive special considerations when challenging subpoenas, stating:

It seems to us that rather than speaking of privilege, courts should simply make sure that a subpoena duces tecum directed to the

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40 Branzburg, 408 U.S. at 710.
42 McKevitt v. Pallasch, 339 F.3d 530 (7th Cir. 2003).
43 Id. at 532.
media, like any other subpoena duces tecum, is reasonable in the circumstances, which is the general criterion for judicial review of subpoenas. We do not see why there need to be special criteria merely because the possessor of the documents or other evidence sought is a journalist.\(^{44}\)

He then reviewed the varying ways that other federal circuits have interpreted Branzburg, calling it "rather surprise[ing]" that courts have recognized a reporters’ privilege at all or had "audaciously declared" that Branzburg created a privilege.\(^{45}\)

As Posner described, before the McKevitt ruling, nine of the 12 federal circuits had recognized a reporter’s privilege. Each of these nine circuits had grappled with deciding who would be afforded the privilege, with the most recent test looking at whether the person had the intent to distribute news to the public when he or she began to gather information. A past history in journalism can be used to show the person’s intent, but, under this test, it is not required. Using this standard, courts have applied the protection to a variety of individuals acting as journalists, including a reporter for a newspaper published by the Department of Defense; Matt Drudge, the author of the www.DrudgeReport.com; university professors working on a scholarly article; a law student writing for a campus newspaper without pay; an investment banker who prepared reports for potential investors; The National Enquirer tabloid; and a reporter for a trade publication for truck drivers.\(^{46}\)

\(^{44}\) Id. at 533.

\(^{45}\) Id. at 532.

\(^{46}\) See Condit v. Nat’l Enquirer, Inc., 289 F. Supp. 2d 1175 (E.D. Cal. 2003) (finding that a tabloid’s claims of a reporter’s privilege should prevail because the plaintiff had not exhausted all other reasonable sources of the information); Tripp v. Dep’t of Def., 284 F. Supp. 2d 50, 58 (D. D.C. 2003) (holding that a reporter for Stars & Stripes qualified for a First Amendment-based shield protection because the reporter “engaged in traditional newsgathering activities such as keeping notes,” and her “article qualifies as a writing distributed to the public to inform”); Blumenthal v. Drudge, 186 F.D.R. 236 (D. D.C. 1999) (holding that the plaintiff had done nothing to satisfy the burdens required to overturn a qualified reporter’s privilege); In re Michael A. Cusumano and David B. Yoffie, 162 F. 3d 708, 714 (1\(^{st}\) Cir. 1998) (holding that “whether the creator of the materials is a member of the media or of the academy, the courts will make a measure of (continue)
Initial Intent of Person Seeking Coverage

In one of the first federal appellate level cases on reporter’s privilege after Branzburg, the Second Circuit denied protection to Andrea Reynolds, an “intimate friend” and “steady companion” of Claus von Bulow, who was charged with attempting to murder his wife. Reynolds had taken notes during the criminal trial about the proceedings and the von Bulow children. She initially turned over her notes and reports but refused to provide a book manuscript she had prepared. During a deposition, Reynolds said she had never published any writings under her name and that she had negotiated to cover the trial for the New York Post, but the negotiations were unsuccessful. Further, she admitted she did not prepare the manuscript under any contract for publishing, and her initial purpose in reporting the events was to vindicate von Bulow.

In denying Reynolds protection, the court held that newsgathering does have qualified protections under the First Amendment, but Reynolds did not qualify for them. The court ruled that a person’s ability to claim coverage of a reporter’s privilege “must be determined by the person’s intent at the inception of the information-gathering process.” The court noted that this test could be met by a person demonstrating that he or she was “involved in activities traditionally associated with the gathering and dissemination of news, even though he [or she] may not ordinarily be a member of the institutionalized press.”

(continued)

 protección available to him as long as he intended at the inception of the newsgathering process to use the fruits of his research to disseminate information to the public”); Blum v. Schlegel, 150 F.R.D. 42, 45 (W.D. N.Y. 1993) (holding that an unpaid law student writing for a school publication was protected by a federal reporter’s privilege even though the New York shield law only applied to “professional journalists” because “the question is how the person asserting the privilege intended to use the information gathered”); Summit Tech., Inc. v. Healthcare Capital Group Inc., 141 F.R.D. 381, 384 (D. Mass. 1992) (holding that an investment banker who prepared a report distributed to potential investors could claim a reporter’s privilege because “it appears that he is engaged in the dissemination of investigative information to the investing (continue)
Medium Not Considered In Granting Coverage

A few years later, the U.S. Court of Appeals for the Ninth Circuit relied on the von Bulow decision in finding that Ronald Watkins, an author writing a book about the family feud surrounding control of the U-Haul business, was protected by reporter’s privilege. The court reasoned that “what makes journalism journalism is not its format but its content.” Indeed it would be unthinkable to have a rule that an investigative journalist, such as Bob Woodward, would be protected by the privilege in his capacity as a newspaper reporter writing about Watergate, but not as the author of a book on the same topic,” the court continued.

The court held that a book author could claim a privilege if he or she “had the intent to use material – sought, gathered or received, to disseminate information to the public and [whether] such intention existed at the inception of the newsgathering process.” In the ruling, the court noted that it would not decide whether a person writing a book on a historical figure would be able to claim a reporter’s privilege on the grounds that the book would arguably not be disseminating “news.”

News Values of Information Reported

In 1998, the U.S. Court of Appeals for the Third Circuit heard a case involving the question of whether a commentator who provided tape-recorded remarks of World Championship Wrestling fights on a commercial call-in hotline could qualify for a reporter’s

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business community”); Miller v. Transamerican Press, 621 F.2d 721 (5th Cir. 1980) (applying a qualified First Amendment-based privilege to a reporter for a trade magazine with a national distribution to truckers).

47 Shoen v. Shoen, 5 F.3d 1289 (9th Cir. 1993).

48 Id. at 1293.

49 Id.
privilege. In determining that the commentator, Mark Madden, was not eligible for the protection of a First Amendment-based privilege for the press, the court looked at the Shoen decision and distinguished Madden's case because Madden was producing fictitious entertainment – not news.\footnote{51}

The court noted that Madden was not denied the coverage because his content was distributed through the phone line. The court acknowledged that "it makes no difference whether the intended manner of dissemination was by newspaper, magazine, book, public or private broadcast or handbill because the press, in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion."\footnote{52} Rather, the proper determination of whether the newsgathering activity would be protected by a reporter's privilege was whether the party claiming the privilege had "an intent at the inception of the newsgathering process to disseminate investigative news to the public."\footnote{53}

To determine that Madden was not disseminating investigative news, the court relied on his admission that he was "an entertainer, not a reporter, disseminating hype, not news."\footnote{54} Additionally the court noted that WCW executives directly gave Madden all of the information he used, and he did not do any independent investigations or uncover his own sources. The court determined that investigative reporters should be given a greater protection than other writers because fiction or entertainment writers are "permitted to view facts selectively, change the

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\footnote{50} \textit{id.}

\footnote{51} \textit{In re Madden}, 151 F.3d 125 (3rd Cir. 1998).

\footnote{52} \textit{id.} at 129.

\footnote{53} \textit{id.} (emphasis added).

\footnote{54} \textit{id.} at 130.
emphasis or chronology of events or even fill in factual gaps with fictitious events – license a journalist does not have.\textsuperscript{55}

Though federal shield law supporters may not claim to have a desire to protect fiction writers, drawing a line between news and entertainment is a difficult task. Plenty of the news features in the mainstream media have entertainment value. Entertainment magazines are not void of information, though Tom Cruise’s latest outburst is rarely cited as the type of news that helps democracy function. News sources that report press releases as fact without independent verification would seemingly fail to meet the standards of investigative journalism. Distinguishing between hype and news seems more a question of personal values than news values.

\textbf{Sidestepping The Question}

In a recent case where a reporter was jailed for refusing to reveal information, the court recognized the theoretical existence of a protection based on the First Amendment, but deemed that the protections were outweighed by other compelling interests.\textsuperscript{56} When Vanessa Leggett, an English teacher and aspiring freelance writer, refused to turn over information she had gathered while researching a book, many were curious to see if the courts would apply a First-Amendment based reporter’s privilege to her. SPJ decided to support Leggett because she was performing the function of a journalist even though she only had one published article. The U.S. Court of Appeals for the Fifth Circuit declined to say whether she was a journalist, holding instead that even if she were, any privilege would be overcome because the case involved a criminal grand

\begin{footnotesize}
\textsuperscript{55} \textit{Id.}
\textsuperscript{56} \textit{In re Grand Jury Subpoenas, No. 01-20745, slip op. (5\textsuperscript{th} Cir. Aug. 17, 2001).}
\end{footnotesize}
jury. However, the court did note that the proper test of whether someone should be protected by a reporter's privilege is to ask if the person "(1) is engaged in investigative reporting; (2) is gathering news; and (3) possesses the intent at the inception of the news gathering process to disseminate the news to the public."\(^{58}\)

When faced with the functional test that the federal courts have established, like the one suggested by the Fifth Circuit, there are still questions left unanswered. How will a court determine what news is? Is the court considering investigating reporting distinct from other reporting? Should it? How will it make the distinction? How will a court determine someone's intent? Trusting these questions to judges and lawyers rather than media critics, journalists and communications professors would be inevitable if a federal shield law passes. However, reviewing each situation on a case-by-case basis will still allow both sides to work through the court system by presenting their cases, likely relying on expert testimony, and appealing any rulings thought to threaten either the First Amendment or efforts of law enforcement. This seems the most workable as it would not create any requirements related to the medium of distribution, allows for changes in technology, and permits freelancers and novice reporters who are genuinely gathering news to claim the protection.

**PART IV – FEDERAL STATUTES**

It is not unprecedented for the federal government to create laws that treat journalists differently from members of the public. Federal laws, for example, recognize the significance of the media's role with policies for expedited responses for Freedom of Information Act requests.

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\(^{57}\) "id. at 6.

\(^{58}\) "id."
and fee waivers for research and copying costs. The Privacy Protection Act of 1980 restricts newsroom searches and protects journalists' "work product." A Department of Justice policy deters subpoenas to members of the news media with a balancing test before compelling disclosure. Additionally, federal campaign finance laws have exceptions for the news media, providing that media coverage cannot be considered a regulated campaign expenditure.

Freedom of Information Act

The Freedom of Information Act provides that "fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media." There have been several court cases challenging an agency's determination of whether a requester qualifies as a representative of the news media. In deciding those cases, courts have taken an expansive approach. The current standard prescribed by the U.S. Court of Appeals for the District of Columbia, which hears the majority of these appeals, is that a representative of the news media "is, in essence, a person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience."

61  28 C.F.R. § 50.10.
Courts have ruled that the Electronic Privacy Information Center, a public interest research center, and the National Security Archives, a research institute and library, both fall within the definition of a representative of the news media. In each case, the court looked to the functions the groups performed. In the 1989 National Security Archives case, the court considered that the group had only published one book, but determined the group’s work on an upcoming documentary was evidence that the group gathered information in the public’s interest, created a distinct product, and distributed that product to the public. In the 2003 EPIC case, the court refined the earlier test by noting the group “must disseminate actual ‘news’ to the public, rather than solely self-promoting articles about that organization.” The “actual news” requirement followed the court’s finding that the group’s e-mail newsletter was sufficient to qualify as distributing information to a wide audience. However, the court did not want to suggest that any group with a promotional newsletter would qualify for a fee waiver. There have not been subsequent cases to further interpret or apply an “actual news” requirement.

The Freedom of Information Act also provides preferential treatment to the news media by expediting reviews of “request[s] made by a person primarily engaged in disseminating information, [involving] urgency to inform the public concerning actual or alleged federal government activity.” The Code of Federal Regulations, which contains the rules guiding executive branch actions, further clarifies that requests should be fast tracked if there is “an urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information” or if there is a “matter of widespread


and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence.  

To determine whether a request meets these standards, courts more often have questioned the news value of the information – not the qualifications of the person seeking the information. One of the few cases to directly address this issue involved a FOIA request submitted by Harrod's owner Mohamed Al Fayed, who also owned *Punch*, a British humor magazine. Al Fayed sought information related to the deaths of his son, Dodi Al Fayed and Princess Diana, following a 1997 car crash. The court determined that he was not entitled to an expedited review because "there was no showing of any urgency to inform the public concerning the events involved in the requests." While the deaths several years earlier had been newsworthy around the globe, the information Al Fayed requested was not part of any unfolding story. The court also noted that Al Fayed did not show any adverse affects from not receiving an expedited review.

Even though Al Fayed was a magazine publisher, his request for expedited review was declined while those not claiming to be journalists can received expedited review when requesting information that is "a matter of widespread and exceptional media interest" concerning "possible questions about the integrity of the government that affect public confidence." In one case, an FBI linguist requested information related to allegations about security lapses in the translation program that the media, including the *Associated Press*, *The Washington Post*, and the *Chicago Tribune*, had covered. In granting her request for an

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68  28 C.F.R. § 16.5 (d).
69  *Al Fayed v. CIA*, 254 F.3d 300 (D.C. Cir. 2001).
expedited review, the court clarified that the government should not require a showing of adverse consequences in determining whether to grant expedited review. While basing an expedited process on the content of the information might work for determining whether a FOIA request should be expedited, a comparable definition for a shield law that looked at the content of the information being protected would be unworkable and ineffective as journalists often do not know the exact content of the information they will receive when they agree to grant a source confidentiality.

The Privacy Protection Act of 1980

After the Supreme Court ruled that issuing a search warrant for the newsroom of a student newspaper at Stanford University was constitutional, Congress reacted with public support for two substantial protections for a broadly defined class of journalists. The first protection came with the passage of the Privacy Protection Act of 1980, which prevents journalists’ work product from being seized unless the federal entity seeking the information overcomes several burdens. Secondly, many lawmakers publicly reaffirmed their support for Department of Justice guidelines aimed at limiting subpoenas to journalists. President Jimmy Carter actively supported the measures, saying that newsroom searches “could have a chilling effect on the ability of reporters to develop sources and pursue stories.”

The protections against newsroom searches apply the restrictions to “a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other

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71 Zurcher v. Stanford Daily, 436 U.S. 547 (1978) (holding that the search, which police hoped would find photographs to identify people involved with a violent campus riot, was not unreasonable, and the First Amendment did not require additional protections beyond the safeguards already required for issuing search warrants, such as requiring probable cause and reasonableness).


similar form of public communication.” The limitations do not apply to a journalist if there is probable cause to suspect the journalist “committed or is committing the criminal offense to which the materials relate.” While this exception does not apply to criminalized offenses of receiving, possessing, obtaining or withholding information, the government possibly could still search and seize information if it is classified, relates to national defense, child pornography or atomic energy. For example, these exceptions might allow the government to attempt to seize classified information that is illegally leaked to a media outlet.

In determining whether police violated the Privacy Protect Act by seizing evidence, courts must consider whether police should have “reasonably believed” the person intended to disseminate the work product. In Lambert v. Polk County, the court found that a videographer, who had been a freelance photographer, would probably not succeed in a case brought under the Privacy Protection Act because he did nothing to indicate to police that he intended to disseminate news to the public even though that was his purpose. The court noted that he did not tell police officers of his intent nor was he a news station employee. Still, the court ruled in his favor because it was likely the police violated his constitutional rights under the Fourth Amendment against unreasonable searches and seizures by taking the video. In another case, however, a court applied the law when police sought a video taken by a tourist with no previous journalism experience who happened to record a murder while filming scenes of Kansas City. The court applied the protection because the tourist sold the tape to a television station a few

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See, e.g., Depugh v. Sutton, 917 F. Supp. 690 (W.D. Mo. 1996) (holding that the government did not violate the Privacy Protection Act by seizing photographs of illegal child pornography).

hours after recording it, and the television station aired portions of the film on the evening news.77

This definition is useful in that it looks at the purpose of the person who has the information law enforcement is seeking. Having an intent to disseminate information to the public at the time the information is gathered is one of the more successful tests used by courts that have recognized a reporter’s privilege and is often suggested as a means for defining the scope of a federal reporter’s shield law. In applying these restrictions, though, something of a discrepancy exists as courts have looked at the purpose of whoever possesses the information when the police seek it and not necessarily at the purpose of the person who gathered the information. This allowed the tourist’s tape, later purchased by a TV station, to be protected under the statute; but it did not protect the videographer’s tape in the first case even though the factual findings of the case state that he intended to disseminate the information and was unfortunately ineffective at communicating his intent to police.

This discrepancy likely allows for a broader protection because it protects accidental newgatherers as well as intentional journalists so long as they make their intentions clear. (Police should not be expected to magically know a journalist’s intentions.) However, how the policy would apply to someone who self-publishes has not been addressed by courts. For example, suppose someone unintentionally videotaped a crime occurring, as in Citicasters, and uploaded portions of the video to a Web site onto the internet. If police sought the rest of the video and the person refused, courts would have to decide whether the person had a purpose to disseminate work product to the public, but the law does not specify when the person must have the purpose. Therefore, it could be argued either that the person should not be covered because

77 Citicasters v. McCaskill, 89 F.3d 1350 (8th Cir. 1996).
he or she did not intend to provide the public with the tape when they began taping or that he or she should be covered by the law because when they put it on the Web site, they intended to distribute it to the public.

**Department of Justice Guidelines**

The Department of Justice also has guidelines about subpoenas it issues to “members of the news media” that Attorney General John Mitchell first announced in 1970 during an American Bar Association meeting. The guidelines, which were published in *The New York Times* on August 11, 1970, are similar to the guidelines that currently exist and require that subpoenas can only be issued when a series of burdens are overcome. The guidelines, however, do not describe who should be considered a “member of the news media.” Because they do not provide a private right of action for someone to sue to enforce them, there are no court rulings further defining to whom the policy should apply. Instead, most of the decisions involving the policy are brought by members of the mainstream media claiming in a challenge to a subpoena that the burdens to issue the subpoena were met or that the First Amendment warranted a greater protection.

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79 28 C.F.R. § 50.10.

Still, in at least one known instance, the Department of Justice issued a subpoena without following the guidelines. When the freelance author, Vanessa Leggette, challenged the subpoenas, the court ruled that the burdens to issue the subpoena would have been overcome even if Attorney General John Ashcroft had applied the guidelines to the freelance writer. SPJ and the Reporters Committee for Freedom of the Press argued that Leggette should be considered a journalist following the functional tests used in federal courts, and that the guidelines would not have allowed for such a sweeping and speculative demand for information.  

The Justice Department guidelines are not ideal because they provide no relief for someone who believes they have been violated – and little assurances as to whether the guidelines were even applied. Though the media was generally satisfied by them, in recent years there has been growing concern that the Justice Department is either not applying the regulations across the board to all journalists or is issuing subpoenas without meeting its burdens. Additionally, court decisions have not required special prosecutors to follow the guidelines while independent counsels had previously been required to follow the restrictions except for receiving the Attorney General’s personal approval.  

This loop-hole allows the Attorney General to appoint a special prosecutor, who has full investigatory and prosecutorial powers, to demand information from journalists without regard to the sensitive role of the media lawmakers recognized in requiring the guidelines.

Federal Campaign Finance Laws

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Federal campaign laws require candidates to report contributions they receive and limit the amount of money people and corporations can give to or spend on behalf of a candidate. While media coverage of a candidate likely increases the public's knowledge of the candidate and could perhaps theoretically be considered spending on behalf of a candidate, Congress did not intend the regulations to "limit or burden in any way the first amendment freedoms of the press and of association." To ensure that news articles and editorial endorsements were not considered campaign expenditures, the law exempts "any news story, commentary, or editorial distributed through the facilities of such broadcasting station, newspaper, magazine or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate."

The Federal Elections Commission, which enforces federal campaign finance laws, held hearings this summer about whether internet communications, which had previously been unregulated, should be regulated or put explicitly within the media exception. The Center for Democracy and Technology urged the FEC to create a "short, easily understandable rule ... that will clear the doubts of ordinary individuals who fear they may be running afoul of campaign laws." Markos Moulitsas Zuniga, whose political blog DailyKos receives about 12 million unique visits per year, testified during an FEC public hearing that the internet is inherently

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85 2 U.S.C. § 431(9)(B)(i). See, e.g., FEC v. Phillips Publishing, 517 F. Supp. 1308, 1313-14 (D.D.C. 1981) (holding that "if the press entity is not owned or controlled by a political party or candidate and it is acting as a press entity the FEC lacks subject matter jurisdiction and is barred from investigating the subject matter of the complaint").
democratic because of the low barriers to participate and unlimited nature, therefore political speech online should not be regulated. "Anyone who wants a voice can have a voice, and anyone who wants to listen to or read them can do so," he said, noting that using the Internet for political corruption has failed because "the free market of ideas policed itself, and it worked." 87

However, others worry that giving bloggers the protections of media entities would create a legal loop-hole for wealthy individuals or corporations to pour money into politics. Carol Darr, the director of the Institute for Politics, Democracy and the Internet, argued that blogs sponsored by corporations could be used as a way for the corporation to exert more influence over the election. 88 "My concern is not with average citizens who choose to publish a blog and share his or her viewpoints on the Internet but with large corporations and unions who seek to unfairly influence campaigns by spending large amounts of money under the guise of being a blog," she said.

The media exception has allowed traditional media entities to critique and endorse political candidates freely, something any blog or Web site creator should have the same right to do. If Congress were to use the FEC definition of a media entity for a federal shield law, it would exclude entities set up with specifically partisan purposes, something at conflict with the idea that political speech should be afforded the highest levels of protection. While the interest in fair elections persuaded Congress to exclude political parties from media classifications in the context of campaign finance laws, requiring an unbiased intention for a person seeking a


88 Id.
reporter’s privilege would obviously be problematic especially when an opinion columnist sought coverage.

PART V– CURRENT PROPOSALS IN CONGRESS

Three different versions of shield law legislation were introduced in Congress as of early September 2005. The legislation that has garnered the most attention is the Free Flow of Information Act, sponsored by Sen. Richard Lugar and Rep. Mike Pence, both Indiana Republicans. The two introduced the legislation in early February and then introduced an amended version July 18, just days before the Senate Judiciary Committee held a hearing on the bill. The other shield law proposal is the Free Speech Protection Act, sponsored by Sen. Christopher Dodd, D-Conn.

The amended version of the Free Flow of Information Act defines a “covered person” as:

(A) an entity that disseminates information by print, broadcast, cable, satellite, mechanical, photographic, electronic, or other means and that--
   (i) publishes a newspaper, book, magazine, or other periodical in print or electronic form;
   (ii) operates a radio or television broadcast station (or network of such stations), cable system, or satellite carrier, or a channel or programming service for any such station, network, system, or carrier; or
   (iii) operates a news agency or wire service;
(B) a parent, subsidiary, or affiliate of such an entity to the extent that such parent, subsidiary, or affiliate is engaged in news gathering or the dissemination of news and information; or
(C) an employee, contractor, or other person who gathers, edits, photographs, records, prepares, or disseminates news or information for such an entity.

Proponents of this definition, which include SPJ, the American Society of Newspaper Editors, the Newspaper Association of America and the Reporters Committee from Freedom of the Press, among others, believe this definition is broad enough to cover traditional journalists as well as book authors and some freelance journalists and online journalists. Under this definition,
freelance journalists operating under contract or who are gathering, editing, photographic, recording, preparing or disseminating for a covered entity would be protected from forced disclosures. However, the language allows a court discretion in determining whether a freelance journalist who was not yet working "for" a covered entity – either by official contract or an informal agreement – would be covered by the protection.

It is less clear what type of Internet activity would be covered. A journalist who maintains a blog based within a traditional media entity, such as The Washington Post's Campaign for the Supreme Court or the St. Petersburg Times' Tech Time, would be covered as the media entity itself would be protected. For an individual's blog to be covered, the person seeking coverage would have to show that he or she disseminates information and publishes a "newspaper, book, magazine, or other periodical in print or electronic form." Whether a blog qualifies as a magazine or an electronic periodical will determine whether the person receives the protection.

As long as these determinations are made on a case-by-case basis and each side gets to present its case, Gratz said he is comfortable using the definition of journalists found in the Free Flow of Information Act. "That's what judges are there for," he said. "We really do not want the government defining journalists but as a practical matter they have to set some sort of schemes."

Opponents of the legislation have sensationally suggested that the legislation could protect terrorist organizations. "Criminal or terrorist organizations that also have media operations, including many foreign terrorist organizations, such as al Qaida" might be covered, wrote Deputy Attorney General Richard Comey in prepared testimony to the Senate Judiciary Committee. However, Comey's comments do not acknowledge the exception allowed to prevent
imminent and actual harm to national security. This exception would allow the government to obtain information provided to any news entity from a person or group threatening the country or from any group claiming to be a media entity that is threatening imminent or actual harm to national security. The law is certainly not designed to allow someone to escape criminal or civil liability by publishing a newsletter. Investigations of terrorist organizations have not been hindered by state shield laws, and at the federal level, the Privacy Protection Act has not been misused in this manner either.

Comey also wrote that the law could apply to “any supermarket, department store, or other business that periodically publishes a products catalog, sales pamphlet or even a listing of registered customers.” Again, the legislation contains a two-tiered requirement that the covered entity or person disseminate information and produce one of the listed publications or other means to distribute news. A products catalog, sales pamphlet or list of registered customers is simply not a “newspaper, book, magazine or other periodical in print or electronic form,” or “a radio or television broadcast station,” “cable system, or satellite carrier, or a channel or programming service,” or “news agency or wire service.” Though Comey includes that the catalog, pamphlet and listing are published “periodically,” the items would still not meet the definition of “periodical” commonly used to categorize information, which is:

A serial publication with its own distinctive title, containing a mix of articles, editorials, reviews, columns, short stories, poems, or other short works written by more than one contributor, issued in softcover more than once, generally at regular stated intervals of less than a year, without prior decision as to when the final issue will appear. Although each issue is complete in itself, its relationship to preceding issues is indicated by enumeration, usually issue number and volume number printed on the front cover. Content is controlled by an editor or editorial board.\(^8\)

Further, the court hearings that Comey calls "unreasonable burden[s]" would provide the government with ample opportunity to challenge any baseless claims of coverage.

The Free Flow of Information Act provides many of the characteristics that have been successful in defining journalists for other legal purposes. It is a definition partially based on function and partially based on a connection to an established publication, though not a rigid livelihood requirement. Likely some will think that the entity requirement should be abolished as it provides little protection for the self-published and vanity press. However, bloggers and freelance journalists could argue that they are media entities by filing papers of incorporation in their home states.

Additionally, the legislation's scope could be limited to assuage the government's concerns about hindering law enforcement by restricting people from claiming the privilege if they perform additional tasks not traditionally associated with newsgathering, as New Jersey did in denying the protection to a public relations firm. In the case, a public relations firm argued that it gathered and distributed information, but because of the additional tasks that it performed, such as providing spokespersons and advising companies on effective ways to communicate publicly, the court determined that the firm was "part of the news rather than a member of the news media" and that it did not qualify for the state shield law's protection.90 As long as the legislation allows each party a chance to present its side and appeal any determinations of whether it qualifies for the protection, this should be a workable foundation for a federal shield law.

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The Free Speech Protection Act provides a less detailed definition of who it would apply
to, using a test more similar to the ones used by federal courts when they have chosen to
recognize a privilege. The bill would cover a person who "engages in the gathering of news or
information; and has the intent, at the beginning of the process of gathering news or information,
to disseminate the news or information to the public." Concerns that people not engaged in
newsgathering could claim protection under this statute are somewhat valid as the bill would
protect news or information and does not set any parameters for a medium required. For
example, under this bill a librarian, public records clerk or public relations representative could
argue that they qualify. Additionally, the grocery store, department store or other business that
publishes a catalog pamphlet or listing of customers could qualify as they likely would have the
intent to distribute the information when they begin to gather it. However, this bill is making
less progress in Congress, and it is very unlikely it will become law.

CONCLUSION

Because federal courts in the past several years have been less likely to grant reporters a
protection based on the First Amendment, a federal statutory protection is vital to protect
journalists' ability to gather news without becoming an investigatory arm of the government.
The federal shield law would therefore carry such importance that it is vital not to limit its scope
based on employment status as many state shield laws do. Though Minnesota's shield law
comes the closest to a function-based definition, a better definition would combine elements that
federal courts have used when applying a First-Amendment based protection, mainly an intent to
gather news and distribute it publicly at the inception of the newsgathering process, with an
additional qualifier that would allow courts to look at the totality of the functions the person
performed. When there is a dispute as to whether someone qualifies for protection, a case-by-
case look at the function the person performs is the best way to resolve the dispute. By looking at the full context of the functions performed, Congress could find sensible ways to limit the range of people who could qualify for protection under a federal shield law.

Defining journalists for a federal shield law is a difficult task but not an impossible one. The media are largely no longer asking for an absolute shield. There are recognized times when legitimate concerns about public safety and national security would allow the government to compel information. In all other instances, the flow of information to the public must be protected by allowing reporters to gather information without fear of prosecution. As New York Times columnist William Safire testified to the Senate Judiciary Committee on June 20, 2005, “by protecting the reporter who is protecting a source, the shield achieves its ultimate goal: to protect the people’s access to what’s really going on.”