Journalists' Privilege: Overview of the Law and Legislation in the 113th Congress

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Summary

In May of 2013, news broke that the Department of Justice (DOJ) had subpoenaed telephone toll records for numerous telephone lines, including some personal telephone lines, of reporters at the Associated Press (AP). The DOJ had issued these subpoenas and obtained the toll record information prior to notifying the AP The AP and many other news organizations have responded critically, noting that the DOJ's failure to negotiate with the AP regarding the release of the records deprived AP of the ability to attempt to quash the subpoena in federal court. The media argues this action enabled the DOJ to evade judicial review of its subpoenas. In defending its decision to issue the subpoenas, the DOJ argued that it had complied with its own internal guidelines regarding obtaining information from news media in the course of a criminal investigation, which allowed the agency to circumvent a requirement to negotiate with the affected news media entities if negotiations would pose a substantial threat to the integrity of the investigation.

When controversies surrounding the government gaining access to reporters' confidential information arise, news media and other journalists often respond by arguing that journalists should receive special protection from government investigation and interference because the First Amendment's protections of a free press are of paramount importance in a free society. The circumstances surrounding the DOJ subpoenas of AP toll records have been no different.

The Supreme Court has only decided one case related to a constitutional privilege allowing journalists to refuse to divulge confidential information to the government. In *Branzburg v. Hayes*, 408 U.S. 665, 679-680 (1972), the Supreme Court held that the First Amendment did not provide even a qualified privilege for journalists to refuse "to appear and testify before state or federal grand juries." The only situation it mentioned in which the First Amendment would allow a reporter to refuse to testify was in the case of harassment or grand jury investigations instituted in bad faith. Nonetheless, a concurrence by Justice Powell that has been followed by a number of federal circuits suggested that there may be a qualified privilege for journalists in grand jury investigations.

Despite the fact that there may be either limited or no constitutional protection for journalists, statutory and common law protections do exist. Though many states do have either judicially created or statutory "shield laws" in place, there is no federal statutory shield law. It has been argued that if there had been a federal shield law in place at the time the controversial AP toll record subpoenas were issued, many of the issues raised by the incident could have been avoided. The Obama Administration announced a renewed interest in enacting a federal statute that would grant a qualified evidentiary privilege to reporters. New versions of the Free Flow of Information Act, which has been debated by a number of Congresses in the past, have already been introduced in the House (H.R. 1962) and Senate (S. 987). This report will provide an overview of the constitutional status of a journalist's privilege under the First Amendment; a description of two recent cases in which the government sought confidential information from the press (the Judith Miller case, and the recent AP case); and an analysis of the current proposals for enacting a federal shield law.

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Introduction

In May of 2013, news broke that the Department of Justice (DOJ) had subpoenaed telephone toll records for numerous telephone lines, including some personal telephone lines, of reporters at the Associated Press (AP).[1] The DOJ had issued these subpoenas and obtained the toll record information prior to notifying the AP The AP and many other news organizations have responded critically, noting that the DOJ's decision not to negotiate with the AP regarding the release of the records deprived AP of the ability to attempt to quash the subpoena in federal court. Some in the media argue this action enabled the DOJ to evade judicial review of its subpoenas.[2] In defending its decision to issue the subpoenas, the DOJ argued that it had complied with its own internal guidelines regarding obtaining information from news media in the course of a criminal investigation, which allowed the agency to circumvent a requirement to negotiate with the affected news media entities if negotiations would pose a substantial threat to the integrity of the investigation.[3]

When controversies surrounding the government gaining access to reporters' confidential information arise, news media and other journalists often respond by arguing that journalists should receive special protection from government investigation and interference because the First Amendment's protections of a free press are of paramount importance in a free society. For example, on July 6, 2005, a federal district court in Washington, DC, found Judith Miller of the *New York Times* in contempt of court for refusing to cooperate in a grand jury investigation relating to the leak of the identity of an undercover CIA agent. The court ordered Ms. Miller to serve time in jail. Ms. Miller spent 85 days in jail. She secured her release only after her informant, I. Lewis Libby, gave her permission to reveal his identity. This incident drew attention to the question whether journalists should have a right to withhold information sought in judicial proceedings and a number of proposals were introduced in Congress to create a federal shield law. The circumstances surrounding the DOJ subpoenas of AP toll records have drawn attention to the issue again in 2013.

Forty-nine states afford journalists some protection from compelled release of their confidential sources.[4] The question remains, however, as to whether a concomitant federal privilege exists.[5] The Supreme Court has addressed the issue of journalists' privilege under the First Amendment only once; in *Branzburg v. Hayes*, it held that the First Amendment provided no privilege to refuse to testify before a grand jury, but it left open the question of whether the First Amendment provides journalists with a privilege in any other circumstances.[6] But, whether or not the First Amendment provides a privilege for journalists to refuse to reveal confidential sources, Congress may provide a privilege through legislation.

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[1] Erin Madigan White, Updated: AP Responds to Latest DOJ Letter, AP Blog (May 13, 2013) http://blog.ap.org/2013/05/13/ap-responds-to-intrusive-doj-seizure-of-journalists-phone-records/.

[2] Lynn Oberlander, The Law Behind the Associated Press-Phone Record Scandal, The New Yorker (May 14, 2013) http://www.newyorker.com/online/blogs/newsdesk/2013/05/ap-phone-record-scandal-justice-department-law.html?mbid=nl_Daily%20%28243%29.

[3] 28 C.F.R. 50.10.

[4] For an overview of state laws that provide journalist privileges, *see* Reporters Committee for Freedom of the Press, The Reporters Privilege (last visited May 29, 2013) http://www.rcfp.org/reporters-privilege.

[5] *See* discussion of *In re: Grand Jury Subpoena, Judith Miller*, *infra*, note 12.

[6] 408 U.S. 665 (1972).

Current Federal Law and Recent Developments

The Supreme Court has written only one opinion on the subject of journalists' privilege: *Branzburg v. Hayes*, in which the Court decided three cases. After explaining the grounds on which journalists seek a privilege, the Court noted that the reporters in the cases it was considering were seeking only a qualified privilege not to testify: "Although the newsmen in these cases do not claim an absolute privilege against official interrogation in all circumstances, they assert that the reporter should not be forced either to appear or to testify before a grand jury or at trial until and unless sufficient grounds are shown for believing that the reporter possesses information relevant to a crime the grand jury is investigating, that the information the reporter has is unavailable from other sources, and that the need for the information is sufficiently compelling to override the claimed invasion of First Amendment interests occasioned by the disclosure."[7]

In *Branzburg*, however, the Court held that the First Amendment did not provide even a qualified privilege for journalists to refuse "to appear and testify before state or federal grand juries."[8] The only situation it mentioned in which the First Amendment would allow a reporter to refuse to testify was in the case of "grand jury investigations ... instituted or conducted other than in good faith.... Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification."[9]

The reporters in all three of the cases decided in *Branzburg* had sought a privilege not to testify before grand juries. At one point in its opinion, however, the Court wrote that "reporters, like other citizens, [must] respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial."[10] The reference to criminal trials should be considered dictum, and therefore not binding on lower courts.

Branzburg was a 5-4 decision, and, though Justice Powell was one of the five in the majority, he also wrote a concurring opinion in which he found that reporters have a qualified privilege to refuse to testify regarding criminal conduct:

> 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 believe that his testimony implicates confidential source relationships 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.[11]

Powell's opinion leaves it uncertain whether the First Amendment provides a qualified privilege for journalists to refuse to testify before grand juries.[12] But "courts in almost every circuit around

[7] *Id*. at 680.

[8] *Id*. at 667.

[9] *Id*. at 707-708.

[10] *Id*. at 691.

[11] *Id*. at 710.

[12] Justice Stewart's dissenting opinion in *Branzburg* referred to "Justice Powell's enigmatic concurring opinion." *Id*. at 725. Judge Tatel of the D.C. Circuit wrote, "Though providing the majority's essential fifth vote, he [Powell] wrote (continued...)

the country interpreted Justice Powell's concurrence, along with parts of the Court's opinion, to create a balancing test when faced with compulsory process for press testimony and documents outside the grand jury context."[13]

Whether or not the First Amendment provides a journalists' privilege, Congress and state legislatures may enact statutory privileges, and federal and state courts may adopt common-law privileges.[14] Congress has not enacted a journalists' privilege, though bills that would do so were introduced in the 110th and 111th Congresses. Thirty-three states and the District of Columbia have enacted journalists' privilege statutes, which are often called "shield" statutes.[15]

In federal courts, Federal Rule of Evidence 501 provides that "the privilege of a witness ... shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."[16] The federal courts have not resolved whether the common law provides a journalists' privilege. The U.S. Court of Appeals for the District of Columbia, for one, "is not of one mind on the existence of a common law privilege [in federal court].... However, all [three judges on the panel for the case] believe that if there is any such privilege, it is not absolute and may be overcome by an appropriate showing."[17]

As for state courts, many states without statutory privileges provide common law protection, making a total of 49 states plus the District of Columbia that have a journalists' privilege.[18] Wyoming is the state without either a statutory or common-law privilege.

Outside of the potential existence of a qualified federal privilege, in 1980, the Department of Justice adopted a rule for obtaining information from media organizations, which remains in

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separately to outline a 'case-by-case' approach that fits uncomfortably, to say the least, with the *Branzburg* majority's categorical rejection of the reporters' claims." *In re: Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 987 (D.C. Cir. 2005) (Tatel, J., concurring) (citation omitted), *rehearing en banc denied*, 405 F.3d 17 (D.C. Cir. 2005) (Tatel, J., concurring), *cert. denied*, 545 U.S. 1150 (2005), *reissued with unredacted material*, 438 F.3d 1141 (D.C. Cir. 2006).

[13] Association of the Bar of the City of New York, *The Federal Common Law of Journalists' Privilege: A Position Paper* (2005) at 4-5, *available at* http://www.abcny.org/pdf/report/white%20paper%20on%20reporters%20privilege.pdf. For example, the Second Circuit has a common law journalists' privilege. *See e.g.*, Gonzales v. NBC, 194 F.3d 29 (2d Cir. 1999); In Re Petroleum Prods Antitrust Litig., 680 F.2d 5, 7-8 (2d Cir. 1982). However, that privilege is not without its limits. Recently, the Second Circuit refused to recognize a privilege for the outtakes of a movie called *Crude*, which documented an oil dispute in Ecuador. The court found that the documentary filmmaker was not sufficiently independent from the subject of the reporting to qualify for the privilege and ordered him to disclose the film. Chevron Corp. v. Berlinger, Nos. 10-1918-cv(L), 10-1966-cv(CON) (2d Cir. January 13, 2011).

[14] Branzburg v. Hayes, 408 U.S. at 706.

[15] These statutes are set forth in archived CRS Report RL32806, *Journalists' Privilege to Withhold Information in Judicial and Other Proceedings: State Shield Statutes*, by (name redacted). Eighteen of these statutes existed at the time of *Branzburg*; 15 states and the District of Columbia have enacted them since 1972. Laurence B. Alexander, *Looking Out for the Watchdogs: A Legislative Proposal Limiting the Newsgathering Privilege to Journalists in the Greatest Need of Protection for Sources and Information*, 20 Yale Law and Policy Review 97, 110 (2002).

[16] Rule 501 also provides that, in civil actions and proceedings brought under state law, the privilege shall be determined in accordance with state law. The Federal Rules of Evidence are codified in title 28 of the U.S. Code.

[17] *In re: Grand Jury Subpoena*, *supra*, note 12, at 972.

[18] The figure of 18 appears in *In re: Grand Jury Subpoena*, *supra*, note 12, at 994, but after the decision in this case more states have enacted shield statutes. Citations to 14 of these 18 appear in footnote 6 on page 18 of Association of the Bar, *supra*, note 13. A more complete guide to the state laws granting reporters privileges is available through the Reporters Committee on the Freedom of the Press, *supra*, note 4.

effect without amendment. The rule provides, in part, "In determining whether to request issuance of a subpoena to a member of the news media, or for telephone toll records of any member of the news media, the approach in every case must be to strike the proper balance between the public's interest in effective law enforcement and the fair administration of justice."[19]

In re: Grand Jury Subpoena, Judith Miller

In re: Grand Jury Subpoena, Judith Miller is the federal court of appeals decision that declined to overturn the finding of civil contempt against journalists Judith Miller and Matthew Cooper for refusing to give evidence in response to subpoenas served by Special Counsel Patrick Fitzgerald in his investigation of the disclosure of the identity of a CIA agent.[20] After the Supreme Court declined to review the decision, Matthew Cooper agreed to testify, but Judith Miller continued to refuse and was imprisoned as a result.

The case was decided by a three-judge panel that issued an opinion for the court written by Judge Sentelle, with all three judges—Sentelle, Henderson, and Tatel—issuing separate concurring opinions. The court's opinion, citing *Branzburg*, held that the First Amendment does not permit journalists to refuse to testify before a grand jury and said (as quoted above) that the court was not of one mind on the existence of a common-law privilege but that, even if there is one, the special counsel had overcome it.

As for the three concurring opinions, Judge Sentelle expressed his view that there is no common-law privilege; Judge Henderson expressed her view that, in the interest of judicial restraint, the court should not "decide anything more today than that the Special Counsel's evidentiary proffer overcomes any hurdle, however high, a federal common-law reporter's privilege may erect"; and Judge Tatel addressed the issues of both the constitutional privilege and the common-law privilege.[21]

As for the constitutional privilege, Judge Tatel said that he was "uncertain," in the light of Justice Powell's "enigmatic concurring opinion" in *Branzburg*, that there is no "constitutional reporter privilege in the grand jury context." Even if there is, however, he agreed that such a privilege would not benefit Miller or Cooper in the case before the court. As for the common-law privilege, Judge Tatel concluded that "'reason and experience' [quoting Federal Rule of Evidence 501] as evidenced by the laws of forty-nine states and the District of Columbia, as well as federal courts and the federal government, support recognition of a privilege for reporters' confidential sources." Judge Tatel found, however, that, in the present case, "the special counsel has established the need for Miller's and Cooper's testimony."

The existence of a qualified reporters' privilege, whether constitutional or otherwise, therefore, remained unresolved following *In re Grand Jury Subpoena, Judith Miller*.

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[19] 28 C.F.R. § 50.10.

[20] *In re: Grand Jury Subpoena*, *supra*, note 12.

[21] Judge Tatel also wrote that, to conclude, as Judge Henderson had, "that the Special Counsel's evidentiary proffer overcomes any hurdle, however high, a federal common-law reporter's privilege may erect," requires the adoption of a standard by which to determine when the privilege is overcome. But, to adopt a standard without first determining that a privilege exists would be, if a privilege does not exist, to "establish a precedent, potentially binding on future panels, regarding the scope of the assumed privilege, even though resolving that question was entirely unnecessary." This would be "an undertaking hardly consistent with principles of judicial restraint." *Id*. at 989-990.

DOJ Subpoena of AP Telephone Toll Records

Up to this point, this report has discussed court cases analyzing the existence of a reporters' privilege in federal law, because the reporters in question had the opportunity to oppose the requirement that they produce the information or testimony in court. In a recent example, reporters did not have that opportunity because the government obtained the information without informing the journalists involved. As discussed above, the DOJ, without first consulting the AP, subpoenaed two months of telephone records for more than 20 telephone lines used by AP reporters. The records were presumably obtained from phone companies. While there is no federal statutory shield law, Department of Justice guidelines exist for determining whether to request subpoenas for the news media, or the telephone toll records of the news media.[22] The DOJ acknowledges that the "approach in every case must be to strike the proper balance between the public's interest in effective law enforcement and the fair administration of justice."

The guidelines say that negotiations with the affected members of the news media should be pursued in all cases where a subpoena may be issued for telephone toll records, provided that the responsible Assistant Attorney General determines that such negotiations would not pose "a substantial threat to the integrity of the investigation in connection with the records" being sought.[23] The determination that negotiating would not pose a substantial threat to the integrity of the investigation must be authorized by the Attorney General. Furthermore, any subpoena issued for the toll records of a member of the news media must be authorized by the Attorney General. However, in this case, Attorney General Eric Holder recused himself, but later clarified that the deputy attorney general in charge of the case signed off on the subpoenas.[24] Lastly, the guidelines say that if a subpoena is issued, it should be limited as to scope, time, and volume of unpublished material requested.

Deputy Attorney General (DAG.) James M. Cole, in his letter to Gary Pruitt, the president and CEO of AP, explained that the toll records had been subpoenaed as part of a criminal investigation into the unauthorized disclosure of classified information.[25] DAG Cole assured the AP that the DOJ had conducted a thorough investigation, exhausting all other avenues of obtaining the information needed before issuing the subpoenas. Cole also explained that the DOJ believed this to be a case in which a substantial threat to the integrity of the investigation existed; therefore, the DOJ did not negotiate with AP. Cole stated this was all accomplished in accordance with the DOJ's guidelines, and that the subpoenas were limited in scope, covering only a two-month period of time.

The AP disagrees that the subpoenas were limited in scope and duration, as the DOJ claims, and instead contends that the obtained "records potentially reveal communications with confidential sources across all of the newsgathering activities undertaken by the AP during a two-month period, provide a road map to AP's newsgathering operations, and disclose information about

[22] 28 C.F.R. §50.10.

[23] *Id*.

[24] Ryan J. Reilly, James Cole Authorized AP Subpoenas, Eric Holder Confirms, Huffington Post (May 15, 2013) http://www.huffingtonpost.com/2013/05/15/james-cole-ap-subpoena_n_3280527.html.

[25] Aaron Blake, In Letter to AP, Justice Department Maintains It Acted Properly, Washington Post (May 14, 2013) http://www.washingtonpost.com/blogs/post-politics/wp/2013/05/14/in-letter-to-ap-justice-department-maintains-it-acted-properly/.

AP's activities and operations that the government has no conceivable right to know."[26] The Reporters Committee for Freedom of the Press has called the seizure of records in this case an unprecedented and overreaching dragnet that "puts an arctic chill on the invaluable information reporters glean from confidential sources every day."[27] The organization has, therefore, asked the DOJ to return the records obtained through the subpoenas to the AP. Lynn Oberlander, the general counsel for *The New Yorker*, has argued that the AP should have been notified prior to the issuance of the subpoenas in order to give the AP the opportunity to fight the subpoenas in federal court.[28] Other prominent news media organizations have voiced their criticism of the DOJ's actions, as well.[29]

It is unclear whether the DOJ adhered to its own guidelines based on the limited amount of information currently publicly available. Nonetheless, this incident, not unlike the case of Judith Miller in 2005, appears to have revived the debate over whether Congress should enact a federal statutory shield law for reporters. The Reporters Committee for Freedom of the Press has already suggested such a remedy.[30] The White House announced its support for the enactment of a federal shield law, as well.[31]

Congressional Response in the 113th Congress

Those supporting the enactment of a federal shield law argue that the controversy surrounding the subpoena of the AP toll records would have been avoided had there been a federal statute in place. The theory is that under a federal shield law, like the bills that would have created a qualified privilege for journalists proposed in previous Congresses, the DOJ likely would not have been permitted to seek the AP's toll records in secret. Instead, the DOJ would have been required to negotiate with the AP for the release of the records and the AP likely would have had the opportunity to oppose the subpoenas in federal court. While the DOJ may have obtained the records anyway, the process would have been subject to judicial review, and, it is possible that the scope of the records covered by the subpoena would have been narrowed.

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[26] Letter from Gary B. Pruitt, President and CEO of the Associated Press, to Eric Holder, Attorney General of the United States (May 13, 2013) (http://www.ap.org/Images/Letter-to-Eric-Holder_tcm28-12896.pdf).

[27] Press Release, Reporters Committee for Freedom of the Press, Media Organizations Call on Justice Department to Mitigate Damage From Broad Subpoena of Journalists' Phone Records (May 14, 2013) (http://www.rcfp.org/media-organizations-call-justice-department-mitigate-damage-broad-subpoena-journalists-phone-records).

[28] Lynn Oberlander, The Law Behind the Associated Press-Phone Record Scandal, The New Yorker (May 14, 2013) http://www.newyorker.com/online/blogs/newsdesk/2013/05/ap-phone-record-scandal-justice-department-law.html?mbid=nl_Daily%20%28243%29.

[29] See, e.g., Editorial, Spying on the Associated Press, N.Y. TIMES, May 14, 2013, at http://www.nytimes.com/2013/05/15/opinion/spying-on-the-associated-press.html?hp&_r=1&; Editorial, Damage to Press Freedom Likely Outweighs National Security Gain, WASH. POST, May 14, 2013, at http://www.washingtonpost.com/opinions/damage-to-press-freedom-likely-outweighs-national-security-gain/2013/05/14/4a67dd24-bcd8-11e2-89c9-3be8095fe767_story.html; Editorial, Spying on the AP, L.A. TIMES, May 14, 2013, at http://www.latimes.com/news/opinion/editorials/la-ed-ap-phone-records-20130515,0,1659197.story.

[30] Press Release, Reporters Committee for Freedom of the Press, Media Organizations Call on Justice Department to Mitigate Damage From Broad Subpoena of Journalists' Phone Records (May 14, 2013) (http://www.rcfp.org/media-organizations-call-justice-department-mitigate-damage-broad-subpoena-journalists-phone-records).

[31] Charlie Savage, Under Fire, White House Pushes New Media Shield Law, N.Y. TIMES, May 15, 2013, at http://www.nytimes.com/2013/05/16/us/politics/under-fire-white-house-pushes-to-revive-media-shield-bill.html?_r=0.

On May 14, 2013, Representative Poe introduced H.R. 1962, which is a new version of the Free Flow of Information Act in the House of Representatives. The following day, Senator Charles Schumer introduced companion legislation in the Senate, S. 987, also entitled the Free Flow of Information Act. The bills are substantially similar to legislation that was introduced and debated in 2007 and 2009.[32] The bills would create statutory procedures by which federal entities would be required to abide when obtaining testimony or records from journalists and their communications service providers. The result of the enactment of these procedures would be a privilege for journalists against testifying or providing documents to the federal government unless the journalists were given notice and an opportunity to be heard in court and the government has met its burden for requiring the production of the documents or testimony.

H.R. 1962, The Free Flow of Information Act of 2013

Where would the privilege apply?

H.R. 1962[33] would apply the privilege in cases arising under federal law in which a "Federal entity" sought to compel testimony or the production of any document in the possession of a person covered by the privilege. The bill would define a "Federal entity" as "an entity or employee of the judicial or executive branch or an administrative agency of the Federal Government with the power to issue a subpoena or issue other compulsory process," but not the legislative branch. In other words, any time the federal government (with the exception of Congress or any legislative agency) sought to compel journalists to disclose information created as a part of engaging in journalism, the privilege would apply. The privilege would not apply in state court or to matters arising under state law.

What would be protected from disclosure?

H.R. 1962 would protect (subject to qualifications discussed below) any testimony and any documents, defined as "writings, recordings, and photographs, as those terms are defined by Federal Rule of Evidence 1001 (28 U.S.C. App.)," that were obtained or created by a "covered person as part of engaging in journalism."

Even if one of the exceptions allowing disclosure applies, H.R. 1962 would place limitations on compelled disclosure. Disclosure that is compelled if the privilege is overcome could "not be overbroad, unreasonable, or oppressive and, as appropriate, be limited to the purpose of verifying published information or describing any surrounding circumstances relevant to the accuracy of such published information; and be narrowly tailored ... so as to avoid production of peripheral, nonessential, or speculative information."

[32] The primary house bill from the 110th Congress was H.R. 2102, which successfully passed the House. H.R. 985 was another version of the Free Flow of Information Act introduced in the 111th Congress. The Senate introduced S. 1267 and S. 2035 in the 110th Congress and S. 448 in the 111th Congress.

[33] H.R. 1962, 113th Cong., appears to be substantially similar to H.R. 2102 as it was passed by the 110th Congress, though the definition of covered person in H.R. 2102 appears to be more narrow than the definition that H.R. 1962 would provide.

Who is a journalist?

One of the thornier questions facing this legislation is the question of how to define the group of people covered by the privilege. It is clear that lawmakers and media advocates believe that the privilege should apply to journalists employed by *The New York Times*, the Associated Press, or the *Cleveland Plain Dealer*. However, the question of whether a person should be considered a journalist becomes murkier when the entity or person in question is a blogger, or a web site like Wikileaks.org.

H.R. 1962 would define "covered person" to mean a person who, for financial gain or livelihood, is engaged in journalism, and includes any entity that employs that person, but does not include foreign powers or those designated as terrorist organizations. The bill goes on to define journalism as the "gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing of news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public." In other words, people who earn money as journalists, and those entities that employ them, are covered by the bill. Whether an entity that acts solely as a host or conduit for information it receives from outside sources, such as Wikilieaks.org, could be said to be engaging in journalism under this definition is unclear, and would likely need to be determined by a court.

When can the government compel disclosure from a journalist?

H.R. 1962 would allow the government to compel testimony or the production of information from journalists after the journalist has been given notice and an opportunity to be heard in court if the government shows by a preponderance of the evidence that the information is necessary to a criminal investigation or civil matter. The burden of proof would be higher when the government is seeking information that would reveal the identity of a confidential source.

In a civil case, a federal entity would not be permitted to compel disclosure of most testimony or information unless a court determined that the government had exhausted all reasonable alternatives for obtaining the information it sought, and that the testimony or document sought is necessary to the successful completion of the matter. In a criminal case, a federal entity would not be permitted to compel disclosure unless a court determined first that the government had exhausted all reasonable alternatives for acquiring the testimony or information, that there were reasonable grounds to believe a crime had occurred, and that the testimony or document is critical to the investigation, prosecution, or defense.

If the information or testimony sought in either a criminal or civil case could lead to the revelation of the identity of a confidential source, in addition to the findings in the previous paragraph, the court also would have to find that one of three special circumstances were met before compelling the disclosure or testimony. First, confidential source information may be compelled if it was necessary to prevent an act of terrorism, or other significant harm to national security with the objective of preventing that harm. Second, confidential source information could be disclosed if the information is necessary to prevent imminent death or significant bodily harm. Third, disclosure of confidential source information could be compelled if it was necessary to identify a person who had disclosed a trade secret in violation of the law, individually identifiable health information in violation of federal law, or nonpublic personal financial information protected by the Gramm Leach Bliley Act. Noticeably, the exception for disclosure related to national security threats relates only to disclosure that would *prevent* terrorist attacks or other breaches of national security, and does not appear to cover identifying confidential sources that

may have provided information about attacks or breaches that occurred in the past. Furthermore, it is also worth noting that the exceptions for revealing the identity of confidential sources that may have broken the law do not apply to those sources who may have leaked classified government information in violation of federal law.

Lastly, after weighing all of the above factors in either a criminal or civil case where the government seeks to compel disclosure by a journalist, the court would then be required to determine that the public interest in compelling disclosure outweighs the public interest in gathering or disseminating news and information before ordering the journalist to produce the documents in question or provide testimony.

How would the privilege apply when the records sought are in the possession of communications service providers?

The bill's privilege also would apply to compelled disclosure from communications service providers. Generally, if the privilege would apply to the person whose records are being sought, the government must provide notice to that covered person and an opportunity for that person to be heard in court in the same manner described above, before the communications service provider may be compelled to produce that document, record or testimony, under this bill. A "communications service provider" would be defined as "any person that transmits information of the customer's choosing by electronic means; and ... includes a telecommunications carrier, an information service provider, an interactive computer service provider, and an information content provider (as such terms are defined in the sections 3 and 230 of the Communications Act of 1934 (47 U.S.C. 153, 230))."

The bill would allow notice of the covered person to be delayed until after disclosure had been compelled only if a court determined by clear and convincing evidence that such notice would pose a substantial threat to the integrity of a criminal investigation. Under this exception, the government would be able to obtain the telephone or communications records of a journalist or a media company without the knowledge of the journalists involved, but the exception still would require a high burden of proof on the part of the government and the review and approval of a court. Furthermore, notice could only be delayed, not prevented entirely. The government would be required to disclose to the journalists that it did obtain the records after the threat to its criminal investigation had abated.

S. 987, The Free Flow of Information Act of 2013

It should be noted that S. 987 would create a more narrow privilege, in general, than H.R. 1962. S. 987 would cover only certain information gathered by covered persons, instead of all information. Furthermore, it would define those eligible to be covered by the privilege more narrowly than the House bill. Lastly, the bill would create a more narrow privilege in general, making compelled disclosure by the federal government easier, particularly in the case of criminal investigations that implicate national security, than the House version of the bill.

Where would the privilege apply?

Under the Senate's version of the Free Flow of Information Act of 2013, like the House version, the privilege would apply in cases arising under federal law in which a "Federal entity" seeks

disclosure of "protected information" from a "covered person." An important distinction between the House and Senate bills is that H.R. 1962's privilege would apply whenever *any* information is sought from a covered person by a federal entity, but S. 987's privilege only would apply when the information sought is "protected information" as defined by the bill. This distinction will be discussed more fully below. Like H.R. 1962, S. 987 defines a "Federal entity" as "an entity or employee of the judicial or executive branch or an administrative agency of the Federal Government with the power to issue a subpoena or issue other compulsory process," but does not include the legislative branch. The privilege provision in the bill would not apply in state courts or other state entities or to state law claims that were brought in federal court.

Who would be journalists?

S. 987 defines those eligible to invoke the privilege more narrowly than the House version described above. Under the Senate bill, "covered persons" would be defined as those individuals, and the organizations that employ them, who investigate events and procure material via collection of documents, interviews, personal observations, and analysis on a regular basis; have primary intent to disseminate such news and analysis at the inception of the information gathering process; and obtain the information or news in order to disseminate the news to the public by one of the many means of distributing media. One of the primary differences between this definition and the House bill's definition is that it explicitly requires that the person have the intent to disseminate the information at the beginning of the information gathering process. Furthermore, the Senate bill provides a longer list of individuals that would be excluded from the definition of covered persons including agents of foreign powers, individuals on the terrorist watch list, those affiliated with designated terrorist organizations, and those who have committed terrorist acts.

What information may be protected from disclosure?

Whereas H.R. 1962 would apply to all information obtained or created by covered persons as part of engaging in journalism, S. 987 would apply only to a subset of such information, which the bill would define as "protected information." The main difference between the bills is that S. 987 would protect information gathered by covered persons engaged in journalism if that information were obtained upon a promise of confidentiality or if the information would reveal the identity of a confidential source who had provided information to the covered person under a promise of confidentiality.

When would the privilege apply?

S. 987 would create a tiered system for the federal government to obtain information from covered persons in which it would be most difficult to obtain information in the course of a civil case, and least difficult to obtain information in the course of a criminal case or investigation, particularly one that involves matters of national security. More specifically, under the bill, federal entities would not be allowed to compel disclosure of "protected information" from a "covered person," unless a court, after notice and an opportunity for the "covered person" to be heard, determined that one of the following exceptions applied.

For cases other than criminal investigations (civil cases and investigations), disclosure may be compelled if the court found, by a preponderance of the evidence, that the party seeking production of the testimony or document had exhausted "all reasonable alternative sources (other than the covered person) of the testimony or document," and, based on information obtained from

sources other than the covered person, "the protected information sought [was]essential to the successful completion of the matter." Lastly, for disclosure to be compelled, the party seeking to compel the disclosure would be required to establish that the government interest in disclosure clearly outweighed the public interest in gathering and disseminating news.

In criminal cases or prosecutions, the government would face a lower bar to compelling disclosure from covered persons. Furthermore, the government would not be required to demonstrate that disclosure is in the public interest in criminal cases. Instead, the burden would be on the covered person to demonstrate that disclosure is *not* in the public interest. In criminal cases under S. 987, disclosure may be compelled if the court found, first, that the party seeking to compel disclosure had exhausted all reasonable alternative sources other than the covered person; second, that, based on information obtained from sources other than the covered person, "there [were] reasonable grounds to believe that a crime [had] occurred; the testimony or documents sought [were] essential to the investigation, or prosecution, or to the defense against prosecution"; if the information is being sought by the Justice Department, that the Attorney General certified that the decision to request the information be compelled was made in a manner consistent with the Justice Department's regulations for compelling disclosure from the media; and, finally, the covered person had not established by clear and convincing evidence that the disclosure of the protected information would be contrary to the public interest.

What would be the exceptions to the privilege?

Unlike H.R. 1962, S. 987 enumerates three explicit instances in which the privilege is not available to covered persons when the federal government seeks to obtain protected information. In other words, in these enumerated scenarios, covered persons are not required to be given notice or an opportunity to be heard in court prior to being required to disclose the protected information, further narrowing the availability of the privilege under the Senate version of the bill.

First, the privilege would not apply to any "information, record, document, or item obtained as a result of the eyewitness observations of alleged criminal conduct or commitment of alleged tortious conduct by the covered person," unless the alleged criminal or tortious conduct is the act of communicating the information at issue.

Second, the privilege would not apply to any protected information that is "reasonably necessary to stop, prevent, or mitigate a specific case of death, kidnapping, substantial bodily harm," criminal conduct against a minor, or the incapacitation or destruction of critical infrastructure.

Third, the privilege would not apply in a criminal investigation of the allegedly unlawful disclosure of classified information, if a federal court had found by a preponderance of the evidence that the protected information would assist in preventing an act of terrorism, or other significant and articulable harm to national security; and in any other criminal investigation, the privilege would not apply where the court found by a preponderance of the evidence that the information sought would materially assist the government in preventing, mitigating, or identifying the perpetrator of an act of terrorism, or other acts that have caused or are reasonably likely to cause significant harm to national security. In assessing whether the harm to national security is or would be significant, the court would be required to give deference to the executive branch's assessment. Lastly, S. 987 would limit the availability of this exception for cases involving the unauthorized disclosure of classified information to only those cases in which the information is sought in order to mitigate harm related to an act of terrorism or other significant

harm to national security. As a result, not every criminal investigation into the unauthorized disclosure of classified information would be unprotected by the privilege; only those investigations related to acts of terrorism and threats to national security would be unprotected.

What would the limits on the information which may be compelled be?

When the court does find that documents or testimony may be compelled, under S. 987, the content of those documents or testimony would be required, to the extent possible, to be "limited to the purposes of verifying published information or describing the surrounding circumstances relevant to the accuracy of published information." Furthermore, the documents and testimony compelled, to the extent possible, would be required to be "narrowly tailored in subject matter and period of time covered so as to avoid compelling production of peripheral, nonessential, or speculative information." These limitations are similar to the limitations in the House bill.

How would the privilege apply when the records sought are in the possession of communications service providers?

Under S. 987, the privilege would apply to information pertaining to covered persons held by communications service providers in the same way that it would if the information were sought from the covered person, unless the disclosure was being sought pursuant to 18 U.S.C. §2709, which lays out procedures for disclosure to federal investigators of telephone toll records for counterintelligence purposes. If disclosure is sought pursuant to §2709, a modified privilege would apply. When information or records pertaining to a covered person is sought from a communications service provider, notice and an opportunity to be heard would be required to be provided to the covered person who is a customer or party to the communication sought to be disclosed. However, notice may be delayed if a federal court determines by "clear and convincing evidence that notice would pose a substantial threat to the integrity of a criminal investigation, a national security investigation, or intelligence gathering, or that exigent circumstances exist."

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