Journalists' Privilege: Overview of the Law and Legislation in Recent Congresses

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Summary

In *Branzburg v. Hayes*, 408 U.S. 665, 679-680 (1972), the Supreme Court wrote journalists claim "that to gather news it is often necessary to agree either not to identify the source of information published or to publish only part of the facts revealed, or both; that if the reporter is nevertheless forced to reveal these confidences to a grand jury the source so identified and other confidential sources of other reporters will be measurably deterred from furnishing publishable information, all to the detriment of the free flow of information protected by the First Amendment." The Court held, nonetheless, 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 "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."

Though the Supreme Court concluded that the First Amendment does not provide a journalists' privilege in grand jury proceedings, 49 states have adopted a journalists' privilege in various types of proceedings; 33 have done so by statute, and 16 by court decision. Journalists have no privilege in federal proceedings.

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.

Congress has considered creating a journalists' privilege for federal proceedings, and bills to adopt a journalists' privilege have been introduced in the 110th and 111th Congresses, in both the House and the Senate. These bills generally would provide for a more narrow privilege than the privileges provided by state laws. Three bills were introduced in the 110th Congress: S. 1267, S. 2035, and H.R. 2102. On October 16, 2007, the House passed H.R. 2102. In the 111th Congress, two bills were introduced: H.R. 985 and S. 448. H.R. 985 was passed by the House of Representatives on March 31, 2009. S. 448 was passed by the Senate Judiciary Committee, but was never voted on by the full Senate.

Since 2009, the movement to adopt a federal statutory journalists' privilege appears to have lost momentum. Nonetheless, the issue does have bipartisan support. Should the issue gain prominence again, it is possible that the 112th Congress may again attempt to create a federal statutory journalists' privilege. As of this writing, proposals to create a federal journalists' privilege have not been introduced in the 112th Congress.

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Introduction

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. Forty-nine states afford journalists some protection from compelled release of their confidential sources.[1] The question remains, however, as to whether a concomitant federal privilege exists.[2] 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.[3] 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.

Overview of the Law

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."[4]

In *Branzburg v. Hayes*, 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."[5] 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."[6]

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[1] For an overview of state laws that provide journalist privileges, *see* CRS Report RL32806, *Journalists' Privilege to Withhold Information in Judicial and Other Proceedings: State Shield Statutes*, by Henry Cohen.

[2] *See* discussion of *In re: Grand Jury Subpoena, Judith Miller*, *infra*, note 9.

[3] 408 U.S. 665 (1972).

[4] *Id.* at 680.

[5] *Id.* at 667.

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

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."[7] 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.[8]

Powell's opinion leaves it uncertain whether the First Amendment provides a qualified privilege for journalists to refuse to testify before grand juries.[9] But "courts in almost every circuit around 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."[10]

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.[11] Congress has not enacted a journalists' privilege, though bills that would do so have been introduced in the 110th and 111th Congresses and are discussed below. Thirty-three states and the District of Columbia have enacted journalists' privilege statutes, which are often called "shield" statutes.[12]

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[7] *Id.* at 691.

[8] *Id.* at 710.

[9] 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 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).

[10] 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).

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

[12] These statutes are set forth in CRS Report RL32806, *Journalists' Privilege to Withhold Information in Judicial and Other Proceedings: State Shield Statutes*, by Henry Cohen. 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* (continued...)

As for 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."[13] 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."[14]

As for state courts, those in 16 states provide common law protection, making a total of 49 states plus the District of Columbia that have a journalists' privilege.[15] Wyoming is the state without either a statutory or common-law privilege.

In 1980, the Department of Justice adopted a rule, which remains in effect without amendment, providing 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."[16]

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.[17] 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

(...continued)

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).

[13] 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.

[14] *In re: Grand Jury Subpoena*, *supra*, note 9, at 972.

[15] The figure of 18 appears in *In re: Grand Jury Subpoena*, *supra*, note 9, at 994, but after the decision in this case, two more states enacted shield statutes. Citations to 14 of these 18 appear in footnote 6 on page 18 of Association of the Bar, *supra*, note 10.

[16] 28 C.F.R. § 50.10.

[17] *In re: Grand Jury Subpoena*, *supra*, note 9.

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.[18]

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."

Congressional Response in the 110th Congress

On May 2, 2007, companion bills, titled the "Free Flow of Information Act of 2007," were introduced in the Senate and the House (S. 1267 and H.R. 2102) by Senator Lugar and Representative Boucher, respectively. On August 1, 2007, after lengthy debate, the House Judiciary Committee approved H.R. 2102 with amendments added by voice vote, despite reports of concern expressed by some Members that the definition of "journalist" remained unclear in the final version of the bill.[19] The bill was reported on October 10, 2007,[20] and the House passed it with amendments on October 16, 2007, by a vote of 398-21.

The companion bill, S. 1267, remained in committee, and a new version of the Free Flow of Information Act of 2007, S. 2035, was introduced in the Senate on September 10, 2007, by Senator Arlen Specter. On October 22, 2007, the Senate Committee on the Judiciary reported it with amendments but without a written report. The motion to proceed to consideration of S. 2035 on the Senate floor was withdrawn on July 28, 2008.

S. 1267, S. 2035, and H.R. 2102 would have established a qualified privilege with respect to both the identity of a source and other information obtained by covered persons with the assurance of confidentiality.

[18] 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.

[19] Elaine S. Povich, *Journalist Shield Legislation Moves to the House Floor*, CongressDaily, August 1, 2007, *available at* http://nationaljournal.com/members/markups/2007/08/mr_20070801_7.htm.

[20] H.Rept. 110-370, 110th Cong., 1st sess. (2007).

H.R. 2102, as Passed by the House

Where would the privilege apply?

H.R. 2102 would have applied the privilege in cases arising under federal law in which a "Federal entity" sought disclosure. The bill defined 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. The privilege provision in the bill would not have applied in state courts or other state entities.

What would be protected from disclosure?

H.R. 2102 would have protected (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 (outlined below) applied, H.R. 2102 would have placed limitations on compelled disclosure. Disclosure that was compelled 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."

Who could refuse to disclose?

H.R. 2102 provided that a "covered person" meant "a person who regularly gathers, prepares, collects, photographs, records, writes, edits, reports, or publishes news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public for a substantial portion of the person's livelihood or for substantial financial gain and includes a supervisor, employer, parent, subsidiary, or affiliate of such covered person." This definition was narrower than the definition of "covered person" in H.R. 2102 as it was introduced. The version of H.R. 2102 that passed the House also would have provided that "covered persons" would not have included foreign powers or agents of foreign powers, any organization designated by the Secretary of State as a foreign terrorist organization, any person included on the Annex to Executive Order No. 13224, any person who was a specially designated terrorist, or any terrorist organization. H.R. 2102 would have defined "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."

The bill's privilege also would have applied to compelled disclosure from communications service providers. The privilege would have applied to any document, record, information, or other communication that related to a business transaction between a communications service provider and a covered person, if that document or testimony would have fallen under the privilege when it was sought from the covered person. A "communications service provider" would have been 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))." In other words, this provision would have allowed a covered person's telephone company or Internet service provider, for example, to assert a privilege not to disclose the covered person's phone or e-mail records.

The third party or federal entity that sought to compel testimony or a document from a communications service provider would have been required to give notice to the covered person who was a party to the business transaction with the communications service provider. The covered person would have been entitled to be heard by the court before the testimony or disclosure was compelled.

What exceptions would permit disclosure to be compelled?

H.R. 2102's privilege would have been qualified with respect both to the identity of a source and to other information. A federal entity would not have been permitted to compel disclosure of any testimony or document that would reveal sources or other information, unless a court determined by a preponderance of the evidence, after providing notice and an opportunity to be heard to the covered person, that the entity "[had] exhausted all reasonable alternative sources (other than a covered person) of the testimony or document."

In addition, "in a criminal investigation or prosecution based on information obtained from a person other than the covered person," the court would have been required to find, for disclosure to be compelled, that "there [were] reasonable grounds to believe that a crime [had] occurred" and that "the testimony or document sought [was] critical to the investigation or prosecution or to the defense against the prosecution.... [I]n a matter other than a criminal investigation or prosecution, based on information obtained from a person other than the covered person, the testimony or document sought [would have been required to be] critical to the successful completion of the matter."

To compel disclosure of the identity or of information that could reasonably have been expected to lead to the discovery of the identity of a source, the court would have been required to find that disclosure was (A) "necessary to prevent, or to identify any perpetrator of, an act of terrorism against the United States or its allies or other significant and specified harm to national security"; (B) "necessary to prevent imminent death or significant bodily harm"; (C) "necessary to identify a person who [had] disclosed" a trade secret, individually identifiable health information, or nonpublic personal information; or (D) "essential to identify in a criminal investigation or prosecution a person who without authorization disclosed properly classified information and who at the time of such disclosure had authorized access to such information; and such unauthorized disclosure has caused or will cause significant and articulable harm to national security."

After determining that the evidence satisfied one of the above provisions, the court would then have been required to determine, before compelling disclosure of the information, "that the public interest in compelling disclosure of the information or document involved [outweighed] the public interest in gathering or disseminating news or information." For the purposes of making this determination "a court [was allowed to consider] the extent of any harm to national security."

H.R. 2102 would have created a further exception from the privilege for information, records, documents, or items "obtained as the result of the eyewitness observation by the covered person of alleged criminal conduct or as the result of the commission of alleged criminal or tortious

conduct by the covered person"; it would have permitted disclosure in such cases if a federal court determined that the party seeking disclosure had exhausted all other reasonable efforts to obtain the information from alternative sources. This exception to the privilege would not have applied in cases where "the alleged criminal conduct observed by the covered person or the alleged criminal or tortious conduct committed by the covered person [was]the act of transmitting or communicating the information, record, document or item sought for disclosure."

S. 1267[21]

Where would the privilege apply?

S. 1267 would have applied the privilege in any "Federal entity," which the bill defined to include the executive branch; the judicial branch; and any "administrative agency of the Federal Government with the power to issue a subpoena or other compulsory process," but not the legislative branch. The privilege provision in the bill would not have applied in state courts or other state entities.

What would be protected from disclosure?

S. 1267 would have protected (subject to qualifications discussed below) any testimony and any documents, defined as "writings, recordings and photographs as defined by Federal Rule of Evidence 1001 (28 U.S.C. App.)."

Who could refuse to disclose?

S. 1267 provided that a "covered person" meant "a person engaged in journalism and includes a supervisor, employer, parent, subsidiary, or affiliate of such covered person." Journalism was defined 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."

The bill's privilege also would have applied to compelled disclosure from communications service providers. The privilege would have applied to any document, record, information or other communication that related to a business transaction between a communications service provider and a covered person, if that document or testimony would have fallen under the privilege if it had been sought from the covered person. A "communications service provider" would have been 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))." In other words, this provision would have allowed a covered person's telephone company or Internet service provider, for example, to assert a privilege not to disclose the covered person's phone or e-mail records.

[21] S. 1267 is identical to H.R. 2102 as introduced in the House.

The third party or federal entity that sought to compel testimony or a document from a communications service provider would have been required to give notice to the covered person who was a party to the business transaction with the communications service provider. The covered person would have been entitled to be heard by the court before the testimony or disclosure was compelled.

What exceptions would permit disclosure to be compelled?

S. 1267's privilege would be qualified with respect both to the identity of a source and to other information. A federal entity would not have been permitted to compel disclosure of any testimony or document—that would have revealed sources or other information—unless a court determined by a preponderance of the evidence, after providing notice and an opportunity to be heard to the covered person, that the entity "[had] exhausted all reasonable alternative sources (other than a covered person) of the testimony or document."

In addition, "in a criminal investigation or prosecution based on information obtained from a person other than the covered person," the court would have been required to find, for disclosure to be compelled, that "there [were] reasonable grounds to believe that a crime [had] occurred" and that "the testimony or document sought [was] essential to the investigation or prosecution or to the defense against the prosecution.... [I]n a matter other than a criminal investigation or prosecution, based on information obtained from a person other than the covered person, the testimony or document sought [would have been required to be] essential to the successful completion of the matter."

To compel disclosure of the identity or of information that could reasonably be expected to lead to the discovery of the identity of a source, the court would have been required to find, in addition to the above items, that disclosure was (A) "necessary to prevent imminent and actual harm to national security;"; (B) "necessary to prevent imminent death or significant bodily harm"; or (C) "disclosure of a source [was] necessary to identify a person who [had] disclosed" a trade secret of significant value, individually identifiable health information, or nonpublic personal information.

The court must also have found "that nondisclosure of the information would [have been] contrary to the public interest, taking into account both the public interest in compelling disclosure and the public interest in gathering news and maintaining the free flow of information."

S. 2035

S. 2035 was substantially similar to both S. 1267 and H.R. 2102, but differed from those two in the exceptions it would have created to the privilege. Under the exceptions, the federal entity would not have been required to make the initial showing in order to compel testimony of a covered person. S. 2035 also sought to more precisely define what types of information, sources, and work product would have been protected by the privilege.

What circumstances are excepted from the privilege?

S. 2035 would have created three situations that would have been excepted from the protections the bill would have provided. First, the privilege would not have applied to

> any information, record, document, or item obtained as the result of the eyewitness observations of criminal conduct or commitment of criminal or tortious conduct by the covered person, including any physical evidence or audio recording of the observed conduct, if a Federal court [determined] that the party seeking to compel disclosure [had] exhausted reasonable efforts to obtain the information from alternative sources.

However, when "the alleged criminal or tortious conduct [was] the act of communicating the documents or information at issue," this exception to the privilege would not have applied.

S. 2035 would not have applied the privilege to "any protected information that [was] reasonably necessary to stop, prevent or mitigate a specific case of death; kidnapping; or substantial bodily harm."

S. 2035 also would have provided an exception for the prevention of terrorist activity or harm to national security. The privilege would not have applied "to any protected information that a Federal court [had] found by a preponderance of the evidence would [have assisted] in preventing a specific case of terrorism against the United States; or significant harm to national security that would [have outweighed] the public interest in newsgathering and maintaining the free flow of information to citizens."

What sources are considered confidential?

S. 2035 would have provided that only those sources who provide information, records, communication data, or documents with the promise of confidentiality would have been covered by the privilege.

What is protected information?

S. 2035 defined protected information as

> information identifying a source who provided information under a promise or agreement of confidentiality made by a covered person as part of engaging in journalism; or any records, communications data, documents or information that a covered person obtained or created as part of engaging in journalism; and upon a promise or agreement that such records, communication data, documents, or information would be confidential.

On October 4, 2007, the Senate Judiciary Committee approved S. 2035 with minor amendments, according to the National Journal, and ordered it to be reported to the full Senate.

Congressional Response in the 111th Congress

Bills entitled "The Free Flow of Information Act of 2009" were introduced in both houses in the 111th Congress. These bills would have created a qualified privilege for "covered persons" in federal court. The House bill would have created a higher hurdle for compelling disclosure than would have the Senate bill.

H.R. 985

H.R. 985 was identical to H.R. 2102 as it was passed by the House of Representatives in the 110th Congress. H.R. 985 was passed without amendment by the House of Representatives on March 31, 2009. Therefore, see the above summary of H.R. 2102, as passed by the House in the 110th Congress, for a summary of H.R. 985, as introduced and as passed by the House in the 111th Congress.

S. 448

Where would the privilege apply?

S. 448[22] would have applied the privilege in cases arising under federal law in which a "Federal entity" sought disclosure of "protected information" from a "covered person." The bill defined 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. The privilege provision in the bill would not have applied in state courts or other state entities or to state law claims that were brought in federal court.

Who is eligible to invoke the privilege?

The bill defined "covered persons" to be those individuals who engage in "journalism," as defined by the bill. "Journalism" meant "the regular 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." Supervisors, employers, parents, subsidiaries, and affiliates of such persons were covered as well. Covered persons would not have included agents of foreign powers, or persons affiliated with terrorist organizations as defined in a variety of areas of the law.

What information may be protected from disclosure?

Whereas H.R. 985 would have applied to all information obtained or created by covered persons as part of engaging in journalism, S. 448 would apply only to a subset of such information, which the bill would define as "protected information." The main difference between the bills was that S. 448 would only have protected information gathered by covered persons engaged in journalism if that information were obtained upon a promise of confidentiality. As defined by S. 448, "protected information" was "information identifying a source who provided information under a promise or agreement of confidentiality made by a covered person as part of engaging in journalism; or any contents of a communication, documents or information that a covered person obtained or created as part of engaging in journalism and upon a promise or agreement that such records, contents of a communication, documents, or information would be confidential."

[22] This report summarizes the reported version of S. 448.

When would the privilege apply?

Under the bill, federal entities would not have been 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 by a preponderance of the evidence that one of the following exceptions applied:

Disclosure may have been compelled if the court found 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."

Disclosure may have been compelled if the court found that, in a criminal investigation or prosecution, 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; and in a criminal prosecution of an unauthorized disclosure of properly classified information by a person with authorized access to such information, such disclosure [had] caused or [would have caused] significant articulable harm to the national security."

Disclosure may have been compelled if the court found that, in matters other than a criminal investigation or prosecution, based on information obtained from sources other than the covered person, "the testimony or document sought [was]essential to the successful completion of the matter."

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

When the court found that documents or testimony may be compelled, the content of those documents or testimony would have, to the extent possible, "[been] 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 have been 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."

What are the exceptions to the privilege?

S. 448 enumerated three scenarios in which the privilege would not have applied. First, the privilege would not have applied 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 have applied to any protected information that is "reasonably necessary to stop, prevent, or mitigate a specific case of death, kidnapping, or substantial bodily harm." Third, the privilege would not have applied if a federal court had found by a preponderance of the evidence that the protected information would have assisted in preventing an act of terrorism, or other significant and articulable harm to national security that would outweigh the public interest in newsgathering and maintaining a free flow of information to citizens.

How does the privilege apply to communications service providers?

The privilege would have applied to communications service providers in the same way that it would have if the information were sought from the covered person. If information is sought from a communications service provider, notice and an opportunity to be heard would have been required to be provided to the covered person who is a customer or party to the communication sought to be disclosed.

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