

# Once More Unto The Breach: An Update On The Reporters' Shield Bill

By Mara Gassmann

Amidst cries of fake news, violence against journalists, and stripping reporters of press credentials and the ability to ask questions, the media bar knows well that this is a uniquely challenging time for our clients. Yet one glimmer of hope may be a Reporters' Shield Bill recently reintroduced in the U.S. House of Representatives. The sponsors of the legislation, who held a hearing on the bill in July, assert they are committed to moving the legislation forward.

## The Legislation

In November 2017, Rep. Jim Jordan (R-OH) and Rep. Jamie Raskin (D-MD) introduced the [Free Flow of Information Act of 2017 \(H.R. 4382\)](#). Those who have been tracking shield legislation for some time will remember that then-Rep. Mike Pence introduced an identical bill in the 110<sup>th</sup> Congress (H.R. 2102) that was overwhelmingly passed by the House in 2007. That same bill was re-introduced (H.R. 985) in the 111<sup>th</sup> Congress and passed in 2009. Both times the legislation died in the U.S. Senate.

The bill creates a qualified privilege in any matter arising under federal law for journalists to withhold testimony or documents obtained in the course of reporting. To overcome the privilege, a party seeking to compel disclosure must show that it has exhausted all reasonable alternative sources of the information; that the information is critical to prosecution, defense or other resolution of the underlying criminal or civil matter; and that the public interest in disclosure outweighs the public interest in news reporting. Additionally, where the information sought could reveal the identity of a confidential source, or include any information that could reasonably lead to the discovery of a source, it must be shown that disclosure is necessary to prevent an act of terrorism or identify the perpetrator thereof; to prevent imminent death or significant bodily harm; or to identify an individual who disclosed properly classified information and who at the time of such disclosure had authorized access to such information, if such a disclosure has caused or will cause significant and articulable harm to national security. The exceptions to the privilege against revealing source-identifying information also contain a provision by which the privilege can be overcome if it would identify a person who has disclosed, in violation of federal law, a trade secret, certain individual private health information, or nonpublic personal consumer information.

Further, requests for information or documents compelled under the statutory exceptions described above cannot be overbroad, unreasonable, or oppressive and where "appropriate"

**The sponsors of the legislation, who held a hearing on the bill in July, assert they are committed to moving the legislation forward.**

*(Continued on page 11)*

(Continued from page 10)

must be limited to “verifying published information or describing any surrounding circumstances relevant to the accuracy of such published information.” They must also be narrowly tailored in subject matter and time period to avoid intrusion into peripheral and speculative matters.

The provisions outlined above also apply to federal court subpoenas issued to communications service providers. Moreover, compulsory process to a service provider must be preceded by notice and an opportunity to be heard by a journalist-subscriber whose records are sought, unless the court finds “by clear and convincing evidence” that advance notice would substantially threaten the integrity of an underlying criminal investigation.

So who is shielded from compelled testimony under this bill? By its terms, it covers any person or entity that regularly gathers or publishes news or information for public dissemination “for a substantial portion of the person’s livelihood or for substantial financial gain.” Student journalists are therefore not necessarily covered under the bill.

Efforts to enact the bill over the years have been endorsed by the Society of Professional Journalists and other media groups. [Writing for \*The New Yorker\*](#), Steve Coll, the dean of the Graduate School of Journalism at Columbia University, described the legislation as “politically plausible” and “much, much better than the status quo.”

### The Hearing

On July 24, 2018, two subcommittees of the House Oversight and Government Reform Committee held a [joint hearing](#) on the legislation. Three witnesses testified about the need for a Reporters’ Shield Bill. From the media bar, Ballard Spahr senior counsel Lee Levine [testified](#) about the necessity of confidential sources to public spirited journalism and provided examples of investigative reporting made possible in part by the use of unnamed sources. These examples included several deeply-reported stories – many award-winning and history-changing – that never would have come to light absent promises of confidentiality. He also discussed the current disarray in the state of the law among the federal circuits and the ongoing use of compulsory process for records of reporters like Ali Watkins, James Risen, and James Rosen. Levine, who testified on the identical House bill in 2007 and on a shield bill before the Senate Judiciary Committee in 2005, observed that as legislative efforts have repeatedly died in Congress, the drumbeat of subpoenas has continued. Nor have the DOJ guidelines issued under the Obama Administration, its *mea culpa* after its own targeting of journalists, eased the situation. As Levine testified, not only have the guidelines been deemed non-enforceable in federal court, it is [unclear whether the current DOJ follows them at all](#). Based on his experience representing journalists and media coalitions in federal actions seeking the identities of reporters’ sources, Levine urged action on this legislation now.

These sentiments were shared by Rick Blum, policy director of the Reporters Committee of The Reporters Committee for Freedom of the Press, who emphasized that 49 states and the

(Continued on page 12)

*(Continued from page 11)*

District of Columbia recognize some privilege for journalist-source communications, and that law enforcement and criminal justice have not been undermined as a result. Blum [testified](#) both for RCFP and the News Media for Open Government, a press freedom and transparency coalition of news organizations. He explained that the coalition supports the House bill as “a commonsense approach that sets out clear legal standards recognizing that the need to protect sources can co-exist with the government’s responsibility to protect human life and enforce the law.”

Finally, journalist Sharyl Attkisson testified that, during her career, she has relied on confidential sources to break important stories, such as her Emmy-winning reports on fraud at the Red Cross following the September 11 attacks and cover-ups of deadly tire defects, as well as reports on the BP Gulf oil spill, misdeeds by companies such as Enron and Halliburton, Chinese espionage, and others.

For their part, the Representatives present at the hearing asked questions that manifested support for the effort and a desire to ensure the legislation was viewed by the news media as a true protection for reporting. In particular, Rep. Jordan (one of the subcommittee Chairman) appeared to share the view of then-Congressman Pence, who in 2007 described the earlier, identical version of the Reporters’ Shield Bill as good government legislation that should be embraced by anyone who favors of limited government.

### **The Bill’s Future**

It is currently unclear whether the legislation has the backing to pass the [House Judiciary Committee](#), before which it is pending. However, the support among politically diverse members present at the hearing provided some reason for optimism. Rep. Gary Palmer (R-AL), the other subcommittee Chairman, described the federal shield law as “critical.” Ranking Member Raskin – echoing then-Representative Pence’s belief that the qualified privilege is not a Republican or Democratic issue – asserted that passage of the bill was “long overdue,” and given the support it has achieved across party lines, the time is ripe for its enactment. Rep. Mark Meadows (R-SC) also praised the bipartisan effort on the bill and suggested that the members present together “use a little leverage” to make sure it gets a floor vote in the House.

[Mara Gassmann](#) is an associate at Ballard Spahr LLP in Washington, D.C.