

Since the 1970s, there has been a legal and political battle between journalists and the executive overseen by the judicial branch as to whether or not journalists enjoy a privilege to withhold confidential information when subpoenaed by a grand jury. The Supreme Court case of *Branzburg versus Hayes* (1972) is the logical place to start in any such discussion.¹ This case was the first time that the Supreme Court ruled on the issue of journalists privilege. From the journalist perspectives, advocates believe that journalists should enjoy a privilege (similar to other professions) that they claim is contained within the press clause of the First Amendment. However, this legal argument was rejected in the *Branzburg* case leading to calls for a federal shield law. The First Amendment states that "Congress shall make no law abridging the freedom of the press".² These words are the basis of the legal and political struggle that has existed in the American media since the historical case of *Branzburg versus Hayes*.

This case forms the foundation for any debate on the introduction of a federal shield law in America. The case involved a journalist (*Branzburg*) who investigated the manufacturing of marijuana.³ He published his story in two articles which included photographic evidence of the production. *Branzburg* gave his word that he would under no circumstances, reveal the names of his sources. However, due to the sensitive nature of his information, *Branzburg* was subpoenaed before a grand jury. *Branzburg* argued that the free press clause in the first amendment should protect him from any charges resulting in his silence.⁴ The Supreme Court ruled that the First Amendment did not grant him or any other journalists this right and thus set the legal precedent that journalists do not have protection within the First Amendment when instructed in court to hand over confidential sources and material.⁵

Furthermore, journalistic privilege is also referred to in the literature as a shield law.⁶ These laws are statutes to protect journalists from compulsory disclosure of confidential information. These laws explicitly grant journalist privileges to resist compliance with a subpoena or court

¹ Anthony L. Fargo, 'Analyzing Federal Shield Law Proposals: What Congress Can Learn from the States', *Communication Law and Policy* 11, no. 1 (1 January 2006): 35–82, https://doi.org/10.1207/s15326926clp1101_2.

² Joshua A. Faucette, 'Your Secret's Safe with Me - or So You Think: How the States Have Cashed in on *Branzburg's* Blank Check Note', *Valparaiso University Law Review* 44, no. 1 (2010 2009): P.183.

³ 'Branzburg v. Hayes | US Law | LII / Legal Information Institute', accessed 3 March 2020, <https://www.law.cornell.edu/supremecourt/text/408/665>.

⁴ 'Branzburg v. Hayes | US Law | LII / Legal Information Institute'.

⁵ Leila Wombacher Knox, 'The Reporter's Privilege: The Necessity of a Federal Shield Law Thirty Years after *Branzburg* Note', *Hastings Communications and Entertainment Law Journal (Comm/Ent)* 28, no. 1 (2006 2005): 125–44.

⁶ James Thomas Tucker, 'Enacting a Reasonable Federal Shield Law: A Reply to Professors Clymer and Eliason Left out in the Cold - The Chilling of Speech, Association, and the Press in Post-9/11 America September 20-21, 2007', *American University Law Review* 57, no. 5 (2008 2007): P.1291.

order requiring the journalist to testify about confidential sources and unpublished information.⁷ Currently, there is no federal shield law in America; however, multiple states have shield laws of varying degrees of protection for journalists. These different shield laws of different categories are a source of debate between journalists and law officials throughout America. This essay will examine the arguments for and against a federal shield law and consider whether such a law is necessary in the context of existing protections from the First Amendment and state laws.

The initial argument in favour of a federal shield law is the limitations of the First Amendment. Supporters of the shield law believe that it is a necessity for the protection of journalists to have such a law at the federal level and that the judicial interpretation of the First Amendment's press clause is not enough to protect journalists. The Supreme Court makes it clear in *Branzburg versus Hayes* that the court will not extend any First Amendment privilege to reporters.⁸ However, the newsgathering process is not without First Amendment protections. Research suggests that the lower courts strict interpretations of *Branzburg* has lead to a trend of charges of contempt for journalists who fail to comply with grand jury requests.⁹

Given that the Supreme Court fails to recognise a privilege for journalists based on the First Amendment, it is clear why journalists feel that a shield law is necessary which builds upon the current legal interpretation of the First Amendment. Furthermore, supporters of a federal shield law have raised the concern of confidential sources concerns in the absence of a law. They argue that if whistle-blowers are aware that journalist could be compelled to testify then said journalists fear that they will get a reputation amongst whistle-blowers as being an investigated arm of the government and therefore sources to engage with the press in the future.¹⁰ Therefore supporters of the shield law advocate that the lack of clarity from *Branzburg* verses *Hayes* and subsequent lack of alternative rulings illustrates the need for a federal shield law to provide the necessary protections for journalists.¹¹ It is clear, therefore that the First Amendment's press clause provides the intended protections for the media institutions to go about the newsgathering process without fear of interference by the federal government. However, the First Amendment does not afford specific protections to journalists

⁷ Faucette, 'Your Secret's Safe with Me - or So You Think'. P.183

⁸ Knox, 'The Reporter's Privilege'. P.130

⁹ Leslie Siegel, 'Trampling on the Fourth Estate: The Need for a Federal Reporter Shield Law Providing Absolute Protection against Compelled Disclosure of News Sources and Information Note', *Ohio State Law Journal* 67, no. 2 (2006): P.488.

¹⁰ Joel G. Weinberg, 'Supporting the First Amendment: A National Reporter's Shield Law', *Seton Hall Legislative Journal* 31, no. 1 (2007 2006): P.158.

¹¹ Joel G. Weinberg, 'Supporting the First Amendment: A National Reporter's Shield Law', *Seton Hall Legislative Journal* 31, no. 1 (2007 2006): P.166.

so that they may gather confidential information and withhold such information and their sources from a grand jury. From this, it is clear that a shield law would be necessary in order to protect journalists because the First Amendment will not provide such protections.

On the other hand, opponents of the federal shield law claim that it would be unnecessary as journalist's rights are covered to an extent under the First Amendment, thus highlighting its unsuitability for becoming law. Justice White of the *Branzburg vs Hayes* case noted in his remarks that the newsgathering process is not without its First Amendment protections.¹² Opponents to a shield law reference this by saying that journalists already have the appropriate protections as initially intended under the First Amendment within the press clause. However, it is essential to highlight the fact that the idea that journalists have sufficient protections under the First Amendment requires everyone within this process to act in good faith. Such protections would not apply if law officials subpoenaed journalists without probable cause on "fishing expeditions" in the hope of gaining classified information without prior intelligence.¹³

Furthermore, Eliason believes there is an increased likelihood that sources will not come forward if reporters do not have the protections of the shield law. This is known as a chilling effect, which was referenced in the *Branzburg* case.¹⁴ In the courts summary, the Supreme Court noted that it was sceptical that a chilling effect would exist. Eliason states that the court observed that these claims were always made solely by journalists and that the court rebuked these arguments by stating that sources throughout history have provided information without the insurance of the shield law.¹⁵ In addition, agreements are possible between reporters and sources whereby reporters will refuse to disclose the source until appeals have been exhausted and that the source is aware that once this is concluded the journalist will give up the source as directed by the court. Eliason argues that this agreement is reasonable as the source should

¹² Leslie Siegel, 'Trampling on the Fourth Estate: The Need for a Federal Reporter Shield Law Providing Absolute Protection against Compelled Disclosure of News Sources and Information Note', *Ohio State Law Journal* 67, no. 2 (2006): P.483.

¹³ Leslie Siegel, 'Trampling on the Fourth Estate: The Need for a Federal Reporter Shield Law Providing Absolute Protection against Compelled Disclosure of News Sources and Information Note', *Ohio State Law Journal* 67, no. 2 (2006): P.483.

¹⁴ Joel G. Weinberg, 'Supporting the First Amendment: A National Reporter's Shield Law', *Seton Hall Legislative Journal* 31, no. 1 (2007 2006): P.184.

¹⁵ Randall D. Eliason, 'The Problems with the Reporter's Privilege Left out in the Cold - The Chilling of Speech, Association, and the Press in Post-9/11 America September 20-21, 2007', *American University Law Review* 57, no. 5 (2008 2007): P.1354.

have no desire to see the journalist who has agreed to publish their story break the law.¹⁶ These arguments suggest that there could be a case for not needing a federal shield law as an interpretation of the supreme court's scepticism is on the record. However, it is important to note that while the Supreme Court rejected some of the arguments in favour of a shield law; it summarised that it would not block any attempts by Congress to legislate for a shield law if it chose to.¹⁷ This was providing any such law remained within the limits of the First Amendment.

The main argument of opponents against federal shield law is that such a law could violate the First Amendment. This is because any bill presented to Congress would be required to elaborate on the *Branzburg versus Hayes* ruling regarding the issue of covered persons. This means that Congress would be required to define in law those protected under a federal shield law. Opponents argue that this would be a violation of the First Amendment. This because the First Amendment grants freedom of the press to all persons and by excluding certain people within a proposed law such a law would violate the First Amendment.¹⁸ Furthermore, this would violate the judgment of the Supreme Court who instructed that Congress could legislate a shield law as long as such a shield law was within the limits of the First Amendment.¹⁹ These violations can be partially resolved through states legislating in favour of shield laws. Furthermore, the Supreme Court makes reference to this idea within its judgement which provides it with legal backing.

Furthermore, another argument that opponents of the federal shield law present is that the United States of America currently has a system of journalist protection through individual state shield laws. Since the 1970s 35 states and Washington DC have enacted reporter shield laws. However, these state laws are widely acknowledged to have flaws both as a collection and individually.²⁰ Within the American legal system, there are three broad categories of state shield laws; the First provides absolute protection to journalists who are asked to provide sources and notes to a grand jury such a law exists in California.²¹ The second is a recognition

¹⁶ Fargo, 'Analyzing Federal Shield Law Proposals'. P.56

¹⁷ Maurice Van Gerpen, *Privileged Communication and the Press: The Citizen's Right to Know versus the Law's Right to Confidential News Source Evidence*, vol. no.19, Book, Whole (London; Westport, Conn; Greenwood Press, 1979), P.111

¹⁸ Fargo, 'Analyzing Federal Shield Law Proposals'. P.39

¹⁹ Van Gerpen, *Privileged Communication and the Press: The Citizen's Right to Know versus the Law's Right to Confidential News Source Evidence*.P.110

²⁰ Knox, 'The Reporter's Privilege'.P.140

²¹ Knox.P.141

for the need to protect sources but not unpublished material.²² This law is enacted in the State of New York and was explained in the judgement of *Knight-Ridder Broadcasting, Inc v Greenberg* that "The law exists in its current form to protect the free press". The third is that the government is required to prove through the qualified privilege test (which applies to notes and sources) that the information sought is relevant and essential to the underlining proceedings and is unavailable from other sources.²³ Florida has such a law and requires each prosecution to pass the test before a witness can be compelled to supply the requested information. Opponents of the federal shield law and thus supporters of the status quo have argued that those states which use the qualified privilege test demonstrate their competence and fairness through the safeguards that protect journalists against fishing expeditions and compel the government to prove the relevance of the information sought. This type of shield law demonstrates a balance within the state legal system that considers the needs of both sides of the legal process equally. Also, the current system of state laws is cited within the judgement of *Branzburg* where Justice White says "that states are free within the limits of the First Amendment to fashion their own standards within their own constitution as regards to state laws".²⁴ The supporters of state shield laws argue that the states have acted upon the ruling of the Supreme Court which adds robust legal validity and the current system provides the necessary protections which is in addition to the already well-established rights of the First Amendment.

The view that the current system of state laws is sufficient for the protection of journalists is challenged by supporters of a federal shield law, who claim that the current setup is inadequate. Firstly not all state laws are the same, and each state offers varying degrees of protection.²⁵ Some offer protection only for journalists who refuse to give up their sources and others providing blanket protection over the entire process. These variations demonstrate the limitation of state shield laws as journalists become compelled to reveal information based on their geographical location rather than the merits of the case. In this instance, a federal shield law would remove the geographical inadequacies of the current state law system, and this demonstrates why such a law could be necessary as it improves upon the status quo.

²² Knox.P.140

²³ Knox.P.141

²⁴ Paul Brewer, 'The Fourth Estate and the Quest for a Double Edged Shield: Why a Federal Reporters' Shield Law Would Violate the First Amendment Note', *University of Memphis Law Review* 36, no. 4 (2006 2005): P.1087.

²⁵ Faucette, 'Your Secret's Safe with Me - or So You Think'. P.183

Furthermore, there are weaknesses with the different types of state laws. Firstly states that legislate for absolute protections do not always maintain such protections in practice. The state of California demonstrated this when despite offering absolute protection for journalists and their sources, the Californian Supreme Court overturned the absolute protection in certain criminal cases when it deems it appropriate.²⁶ This highlights the fragmented nature of current state laws which does not provide certainty to journalists. Another example of the challenges journalists face at the state level is the example of Maryland which has absolute protection sources. However it uses qualified protection for unpublished material, once again this shows that if a journalist is based in a state like Maryland, they face contempt charges for failing to turn over unpublished material unlike states with absolute protection. However, as with California, absolute protection is not infallible.²⁷

The fact that shields laws exist at the state level presents problems for journalists across the country. These laws are varied across the country, thus leading to a geographical lottery in regards to protections for journalists. This lottery means that the geographical location of the case determines the level of protection for journalists.²⁸ The case is then discharged in accordance with that states constitution. It is clear why some argue that the status quo is inadequate and that a federal shield law would alleviate some of these concerns. However, while a federal shield law would address the geographical inconsistencies, it is worth restating that a proposal for such a law would create new problems that would likely be legally and politically challenged.

The necessity of a federal shield law is a complex debate owing to the various political, legal and constitutional arguments and interpretations presented throughout the years. Firstly regarding the first amendment's protections towards journalists, the evidence suggests that the First Amendment through the press clause provides protection to the institution of journalism so that it may report the news freely without fear of government pressure and oversight. However, as explicitly stated in the case of *Branzburg verses Hayes*, the first amendment does not provide protections for individual journalists to withhold confidential sources and unpublished materials when directed by a grand jury. In regards to the current state law system that is in place, the evidence shows that it is an advancement following the recommendations in the judgement of Justice White that certain protections are in existence. However, it has been

²⁶ Knox, 'The Reporter's Privilege'.P.141

²⁷ Knox, 'The Reporter's Privilege'.P.141

²⁸ Siegel, 'Trampling on the Fourth Estate'.P.469

proven that the current status quo is inefficient as it creates a geographical lottery and promotes considerable uncertainty for journalists. Therefore a federal shield law would not be unnecessary because of the status quo but would instead evolve the current system. It is clear that , there is a need to balance the requirements of both sides of the argument. This balance includes the government need to access potentially confidential information for national security purposes and to advance its legal cases and bring about justice. In addition, journalists need to be able to freely report on stories that might be confidential but ultimately inform the public of events within society. If a person believes that journalists should have a right to protect the identity of confidential sources and withhold confidential information, then a federal shield law is necessary. This is because it would resolve some of the failures of the current state law system, and would explicitly provide legal rights for journalists on this matter thus resolving the ambiguity of the language of the first amendment. However, a federal-state law could only work if it complied with the judgement of the Supreme Court and kept within the limits of the first amendment. In addition, it is important to note that, the legislating of such a federal shield law would open for debate in order to balance the contested views which exist on this matter today.

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