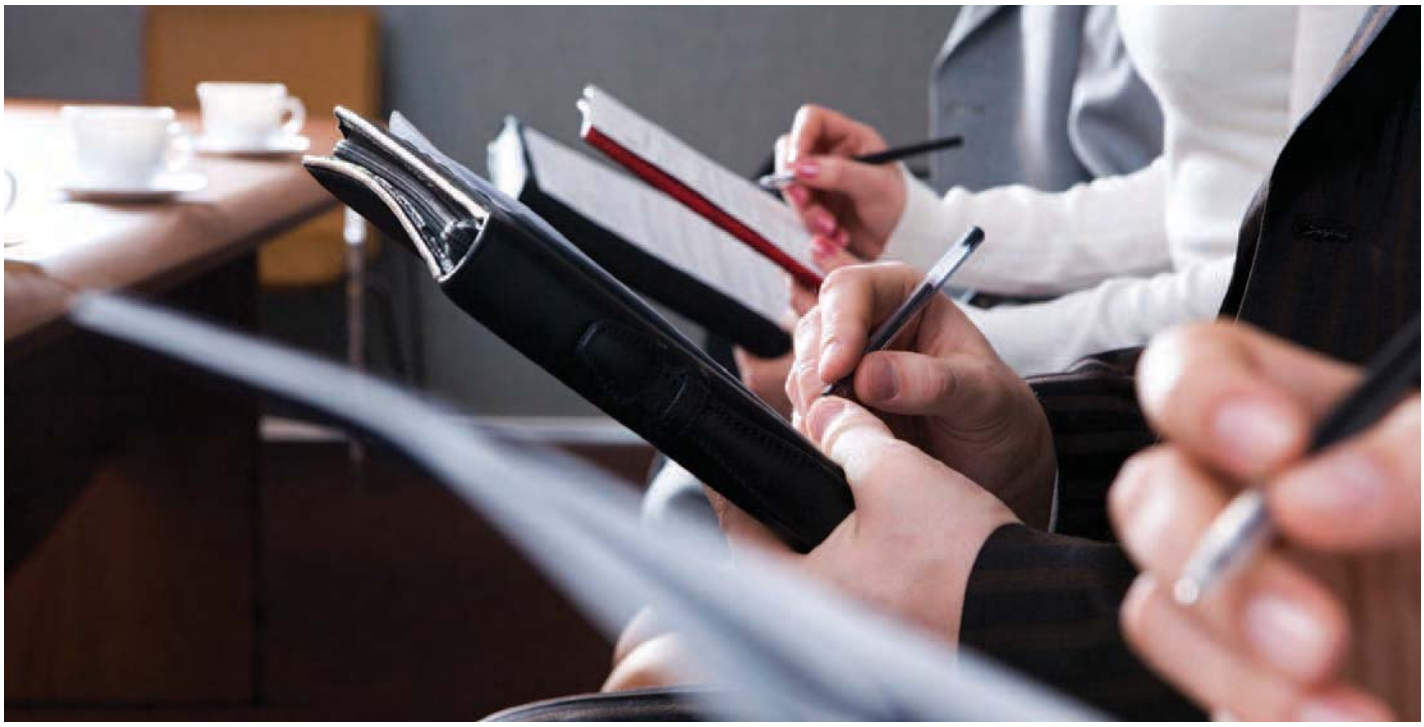

The Reporter's Privilege and Its Uncertain Boundaries in the National Security Context

by Brian N. Biglin

Journalists familiar with the broad protections of the reporter's privilege may find themselves in a less protected—and more undefined—position when they investigate issues relating to national security. Exceptions to the 'qualified' reporter's privilege are nothing new. However, the boundaries of these exceptions are unsettled, particularly in connection with federal criminal proceedings. The legal contours in this field are more crucial than ever in light of the current standoff between the executive branch and the press.

The Reporter's Privilege: New Jersey and Federal Law

The reporter's privilege protects information obtained in the process of newsgathering. Its purpose is to protect the free flow of information, and thereby benefit the public good and ensure government accountability.

In New Jersey, this "far-reaching" privilege[1] is codified by its 'shield law,' at N.J.S.A. § 2A:84A-21. The statute allows persons "engaged in, connected with, or employed by news media for the purpose of gathering, procuring, transmitting, compiling, editing or disseminating news for the general public" to refuse disclosing "[a]ny news or information obtained in the course of pursuing his professional activities," and "the source, author, means, agency or person from or through whom any information was procured[.]"

Shield laws vary widely by state. In fact, some states do not have a shield law statute, relying instead on case law or state constitutional provisions. In the overall landscape, New Jersey has a particularly protective and comprehensive shield law.[2] New York, by contrast, limits protection to information gathered by *professional* journalists, and distinguishes between confidential and non-confidential sources.[3]

In federal court proceedings, where Fed. R. Evid. 501 governs, federal common law on reporter's privilege controls in disputes involving federal claims.[4] There is no federal reporter's shield statute—a bone of contention for many.[5] Rather, it is a common law privilege, commonly understood as emanating from the First Amendment.[6] Although a federal court may consider and give weight to a state's shield law, it is not bound by it unless it is deciding claims arising exclusively under that state's substantive law.[7] As explored in the next section, the federal common law contains exceptions and gray areas relevant to journalists investigating matters related to national security.

A National Security Exception?

As summarized by the Third Circuit Court of Appeals, "[t]he strong public policy which supports the unfettered communication to the public of information, comment and opinion and the Constitutional dimension of that policy, expressly recognized in *Branzburg v. Hayes*, lead us to conclude that journalists have a federal common law privilege, albeit qualified, to refuse to divulge their sources."[8] It is the inherently 'qualified' nature of this privilege that gives rise to exceptions for law enforcement generally.[9]

In *Riley*, the Third Circuit, in passing, noted that civil and criminal matters are viewed differently. It also held that the "requisite balancing [test]" for determining whether the privilege applies entails considering whether there are other sources of the information sought.[10] The court expressed a need for "restraint in the judicial imposition of sanctions on the press," and exhorted "trial courts [to] be cautious to avoid an unnecessary confrontation between the courts and the press."[11]

Other circuits have *not* avoided such confrontations, and in doing so have created uncertainty for reporters, particularly those who received leaked information related to criminal prosecutions and/or national security interests.

In its controversial *U.S. v. Sterling* opinion, a divided Fourth Circuit Court of Appeals changed the landscape of the federal reporter's privilege, and invoked national security as a compelling interest that could pierce the privilege. The majority opinion set forth the prevailing post-*Branzburg* test for overcoming the reporter's privilege: "(1) whether the information is relevant, (2) whether the information can be obtained by alternative means, and (3) whether there is a compelling interest in the information."[12] To the shock of many, the Fourth Circuit announced that this test does not apply where the government seeks confidential information in a criminal proceeding.[13]

Sterling concerned the espionage prosecution of a former CIA agent, Sterling, who provided *New York Times* reporter James Risen with classified documents and information concerning CIA operations related to Iran. After an April 2003 meeting with George Tenet and Condoleezza Rice, the CIA director and national security advisor, respectively, *The New York Times* opted not to publish a story that could damage "national security interests" and "personal safety of the CIA asset involved."[14] Later, in 2006, Risen published a book disclosing the classified information he had received. After a grand jury indicted Sterling on six espionage-type charges, then-Attorney General Eric Holder authorized a trial subpoena on Risen, seeking his testimony on the source of the information he published. Risen claimed reporter's privilege, based on the First Amendment and/or federal common law, and the District Court for the Eastern District of Virginia quashed the subpoena, applying the three-part test *supra* and ruling that the government failed to show a compelling interest or the unavailability of the information from another source.[15]

Though acknowledging that courts had long applied some variant of a balancing test arising from *Branzburg* (and the concurring opinion of Justice Lewis Powell Jr.), including in criminal proceedings, the Fourth Circuit's majority opinion ruled that this was a misreading of *Branzburg*, and that so long as the government propounds a "good faith" subpoena based on "legitimate need," no privilege applies and the government need not make any "special showing."[16] Risen could "provide the *only* first-hand account of the commission of a most serious crime indicted by the grand jury—the illegal disclosure of classified, national security information[,]" thus could not refuse to testify.[17] The Fourth Circuit majority further opined that *even if* its former three-part balancing test applied, the "government [ ] also demonstrated a compelling interest in presenting Risen's testimony[,]" reasoning that "'[i]t is "obvious and unarguable" that no government interest is more compelling than the security of the nation[,]'" and such "interest extends to…'the secrecy of information,'" and even the "'appearance of confidentiality so essential to the effective operation of our foreign intelligence service.'"[18]

Judge Roger L. Gregory wrote a vigorous dissent. He opined that the three-part test for piercing the reporter's privilege should apply, even in a criminal proceeding concerning national security, and that two additional factors should be considered if the reporter prevails on the initial test: "the harm caused by the public dissemination of the information, and the newsworthiness of the information conveyed."[19] He concluded that Risen was protected under the initial test, and the record was not developed concerning the alleged harm, as the government never "clearly articulated the nature, extent, and severity of the harm resulting from the leak."[20] Judge Gregory opined that the privilege exists—whether said to arise from the First Amendment and *Branzburg,* or simply the "common law"—and deemed it "sad that the majority departs from Justice Powell's *Branzburg* concurrence and our established precedent to announce for the first time that the First Amendment provides no protection for reporters."[21]

He reasoned:

> Undoubtedly, the revelation of some government secrets is too damaging to our country's national security to warrant protection by evidentiary privilege. Yet the trial by press of secret government actions can expose misguided policies, poor planning, and worse. More importantly, a free and vigorous press is an indispensable part of a system of democratic government. Our country's

> Founders established the First Amendment's guarantee of a free press as a recognition that a government unaccountable to public discourse renders that essential element of democracy—the vote—meaningless. The majority reads narrowly the law governing the protection of a reporter from revealing his sources, a decision that is, in my view, contrary to the will and wisdom of our Founders.[22]

The Supreme Court declined to certify the question for its review.[23] *Sterling* has thus created new uncertainty about the scope of the federal reporter's privilege.

The *Sterling* decision was not without a precursor. The Second Circuit Court of Appeals, in a matter involving a federal investigation of post-9/11 apparent leaks of information that *The New York Times* used to seek comment from certain organizations the government was preparing to raid on suspected ties to terrorism, ruled that the reporter's privilege had been overcome.[24] The *Times* had sought a declaratory judgment that it need not divulge its source, and that phone records—capable of revealing its source—were similarly privileged. The district court sided with the *Times*.[25] The Second Circuit, over the dissent of Judge Robert Sack (known as a First Amendment expert), overturned the ruling. While the court applied—and did not question—the prevailing three-part test arising from *Branzburg*, it ruled that the government made "a clear showing of a compelling government interest in the investigation," and that the information was essential to the grand jury's ability to decide whether to indict whoever leaked information.[26]

In his dissent, Judge Sack set forth his differing analysis but, just as significantly, resolved what he presciently saw as a larger issue: the question of "which branch of government decides whether, when, and how any such [reporter's privilege] protection is overcome."[27] By articulating the issue in this way, and by reviewing the Department of Justice's controversial guidelines for obtaining information from the press, Judge Sack highlighted the tension between the executive branch and the Judiciary concerning who decides what newsgathering material is privileged—particularly in criminal investigations and any matter involving leaks of sensitive and/or security-related information.[28]

Of course, as even the majority opinion inherently recognized, the executive branch does *not* have "wholly unsupervised authority to police the limits of its own power under these circumstances."[29] Judge Sack's dissent can be read as underscoring the necessity that the government "exhaust" other channels before relying on a reporter to obtain information about a leak, and articulate in detail the "public interest" in it obtaining the information.[30]

In sum, the reporter's privilege to withhold confidential sources and leaked information in federal court is poorly defined. Even the majority opinion in *Sterling* conceded that the post-*Branzburg* framework is "about as clear as mud."[31] Yet few would say that the *Sterling* majority's ruling curtailing the reporter's privilege in criminal proceedings—at odds with prior statements and other circuits—did anything to elucidate journalists' rights.

Federal Shield Law Failures

This update, though concededly brief, would not be complete without mentioning the series of failed attempts by Congress to pass a nationwide shield law. Such a statute would resolve—for better or for worse—the 'clear as mud' federal case law interpreting *Branzburg*. In the space of a decade or so, numerous states have passed shield laws to codify their reporter's privilege, but Congress has failed to do the same. Given the frequency with which the federal courts are asked to make rulings on the privilege in federal suits, the utility of a proper federal shield law seems clear.

In 2005, 2007, 2009, 2011, and 2013, legislators, including then-Representative Mike Pence, introduced the Free Flow of Information Act in the House of Representatives. It passed the House in 2007 and 2009, but died in the Senate, despite bipartisan support.[32] In 2013, the Obama administration expressed support for the bill.[33] In 2015, the House passed another reporter shield measure, that time in an amendment to an appropriations bills, but it failed to become law.[34]

National security concerns, and how to deal with leakers (particularly after the Edward Snowden affair), have clouded the debates over a federal shield law.[35] Moreover, as with state shield laws, there has been important debate over who is a 'journalist' for purposes of the statute.[36] Party politics, though, have been less of an impediment. Frequent sponsor Pence stated in 2007, for example, that "[a]s a conservative…I believe the only check on government power in real time is a free and independent press…Let's put a stitch in this tear in the first amendment freedom of the press."[37] One would understandably query whether such a stance would be politically feasible for Pence and many of his conservative colleagues today.[38] With this in mind, it would seem the window for writing a federal shield law has, at least for now, been closed.

Concern Over National Security Letters

This article similarly would be incomplete without at least mentioning the Federal Bureau of Investigation's (FBI's) national security letter (NSL) practice, as it has directly affected—and will continue to directly affect—reporters and media companies in the name of national security. The topic is worthy of its own comprehensive article, and many have already written on the details of the practice.[39]

The FBI uses NSLs, administrative subpoenas that do not require warrants and are not subject to the Department of Justice's published procedures for subpoenas upon the press, at 28 C.F.R. § 50.10, to

obtain evidence of communications (*i.e.*, phone and email records)—provided the information is 'relevant' to a national security investigation. While the authorizing statutes, such as the Stored Communications Act,[40] do not allow the FBI to obtain the contents of communications, the tool is highly potent and affects information ordinarily subject to the reporter's privilege. For example—and as illustrated in the *Gonzales* case, *supra*—phone records can easily reveal the identity of confidential sources.[41] Recently, journalists obtained a copy of the FBI's unpublished, classified internal rules for NSLs.[42]

Media outlets experienced an uptick in the use of NSLs during the Obama administration. Of particular concern is the fact that each NSL comes with a gag order; thus, if a media outlet receives a request for a reporter's communications, it technically cannot discuss the matter with the reporter. The gag orders have spurred litigation.[43]

Needless to say, concerns about this practice are heightened in this time of political tension, increased national security awareness, and an executive who openly decries the press. Make no mistake, the new administration enjoys powers that the previous administration forged, but what comes next is uncertain. Journalists and the media law bar are well advised to monitor pending and future legal challenges to this practice. ⚖

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ENDNOTES

1. *Maressa v. New Jersey Monthly*, 89 N.J. 176, 187 (1982) (discussing legislative intent), *cert. denied*, 459 U.S. 907 (1982).
2. *Too Much Media, LLC v. Hale*, 206 N.J. 209, 228 (2011).
3. *Trump v. O'Brien*, 403 N.J. Super. 281, 290-91 (App. Div. 2008) (*quoting* N.Y. Civ. Rights § 79-h).
4. *Downey v. Coal. Against Rape & Abuse, Inc.*, 2001 U.S. Dist. LEXIS 25669, at *7 (D.N.J. Dec. 6, 2001) (*citing Wm. T. Thompson Co. v. General Nutrition Corp., Inc.*, 671 F.2d 100, 103-104 (3d Cir. 1982)) ("Where a case has both federal and state law claims presented together, it is the general practice to apply the federal common law of privilege to all the claims, [ ] but a court should look to both federal and state law and consider the policies underlying each."); *see also Riley v. City of Chester*, 612 F.2d 708, 715 (3d Cir. 1979).
5. *E.g.,* Editorial: Journalists need a federal shield law, *LA Times*, April 16, 2009.
6. *But see United States v. Sterling*, 724 F.3d 482, 495-96 (4th Cir. 2013) (rejecting the previously prevailing understanding and announcing that there is no First Amendment-based protection of privileged materials in criminal proceedings). *See* discussion *infra*.
7. *Downey*, 2001 U.S. Dist. LEXIS 25669, at *8-9; *see Riley*, 612 F.2d at 715.
8. *Riley*, 612 F.2d at 715 (*citing Branzburg v. Hayes*, 408 U.S. 665, 707 (1972)).
9. *Id.* ("there are countervailing interests which will suffice to transcend the journalist's privilege to refuse to divulge sources").
10. *Id.* at 716.
11. *Id.* at 718.
12. *Sterling*, 724 F.3d at 523 (*quoting La Rouche v. Nat'l Broad. Co.*, 780 F.2d 1134, 1139 (4th Cir. 1986)).
13. *Id.* at 496, 498.
14. *Id.* at 489.
15. *Id.* at 490-491.
16. *Id.* at 496-497.
17. *Id.* at 498. While the Fifth Amendment's privilege against self-incrimination may also protect reporters under certain circumstances, in this case Risen was granted immunity from prosecution. *Cf. Convertino v. U.S. DOJ*, 795 F.2d 587 (6th Cir. 2015) (affirming Fifth Amendment privilege claim of *Detroit Free Press* reporter who published leaked information from internal investigation of assistant U.S. attorney accused of misconduct in terrorism prosecution).
18. *Id.* at 509 (*quoting Haig v. Agee*, 453 U.S. 280, 307 (1981) and *U.S. v. Abu Ali*, 528 F.3d 210, 247 (4th Cir. 2008)).
19. *Id.* at 524-525.
20. *Id.* at 529-530.
21. *Id.*
22. *Id.* at 520.
23. *Risen v. United States*, 134 S. Ct. 2696 (2014).
24. *N.Y. Times Co. v. Gonzales*, 459 F.3d 160 (2d Cir. 2006).
25. *New York Times Co. v. Gonzales*, 382 F. Supp. 2d 457 (S.D.N.Y. 2005).
26. 459 F.3d 160, 171-174.
27. *Id.* at 175.
28. *See id.*; 28 C.F.R. § 50.10.
29. 459 F.3d at 177.
30. *Id.* at 188-89.
31. 724 F.3d 482, 523.
32. H.R. 3323 (109th) (2005); H.R. 1267 (110th) (2007); S.1267 (110th) (2007); H.R. 985 (111th) (2009); S. 448 (111th) (2009); H.R. 2932 (112th) (2011); H.R. 1962 (113th) (2013); S. 987 (113th) (2013).
33. Charlie Savage, Criticized on Seizure of Records, White House Pushes News Media Shield Law, *N.Y. Times*, May 15, 2013.
34. *See* Josh Gerstein and Seung Min Kim, House passes reporter's shield measure, again, *Politico*, June 3, 2015.
35. *E.g.*, Gabriel Schoenfeld, Time for a Shield Law?, *Nat. Affairs*, Spring 2014.
36. *E.g.,* Editorial: Journalists need a federal shield law, *LA Times*, April 16, 2009.
37. 153 Cong. Rec. 11,492 (2007).
38. Noah Bierman, After Trump calls media an enemy of the people, White House bars many news outlets from briefing, *LA Times*, Feb. 24, 2017.
39. *E.g.*, Richard Brust, Letters of the Law: National Security Letters Help the FBI Stamp Out Terrorism But Some Disapprove, *ABA Journal*, Sept. 1, 2012.
40. 18 U.S.C. § 2701 *et seq*.
41. *See generally* Cora Currier, Secret Rules Make It Pretty Easy For the FBI to Spy on Journalists, *The Intercept*, Jan. 31, 2017, https://theintercept.com/2017/01/31/secret-rules-make-it-pretty-easy-for-the-fbi-to-spy-on-journalists-2/.
42. *Id.*
43. *See, e.g., Twitter, Inc. v. Lynch*, 139 F. Supp. 3d 1075 (N.D.Ca 2015); *Merrill v. Lynch*, 151 F. Supp. 3d 342 (S.D.N.Y. 2015).