

PROTECT REPORTERS FROM EXPLOITATIVE STATE
SPYING ACT

JUNE 7, 2022.—Committed to the Committee of the Whole House on the State of
the Union and ordered to be printed

Mr. NADLER, from the Committee on the Judiciary,
submitted the following

R E P O R T

[To accompany H.R. 4330]

The Committee on the Judiciary, to whom was referred the bill (H.R. 4330) to maintain the free flow of information to the public by establishing appropriate limits on the federally compelled disclosure of information obtained as part of engaging in journalism, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Protect Reporters from Exploitative State Spying Act” or the “PRESS Act”.

SEC. 2. DEFINITIONS.

In this Act:

29-006

(1) **COVERED JOURNALIST.**—The term “covered journalist” means a person who regularly gathers, prepares, collects, photographs, records, writes, edits, reports, investigates, or publishes news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public.

(2) **COVERED SERVICE PROVIDER.**—

(A) **IN GENERAL.**—The term “covered service provider” means any person that, by an electronic means, stores, processes, or transmits information in order to provide a service to customers of the person.

(B) **INCLUSIONS.**—The term “covered service provider” includes—

(i) a telecommunications carrier and a provider of an information service (as such terms are defined in section 3 of the Communications Act of 1934 (47 U.S.C. 153));

(ii) a provider of an interactive computer service and an information content provider (as such terms are defined in section 230 of the Communications Act of 1934 (47 U.S.C. 230));

(iii) a provider of remote computing service (as defined in section 2711 of title 18, United States Code); and

(iv) a provider of electronic communication service (as defined in section 2510 of title 18, United States Code) to the public.

(3) **DOCUMENT.**—The term “document” means writings, recordings, and photographs, as those terms are defined by Federal Rule of Evidence 1001 (28 U.S.C. App.).

(4) **FEDERAL ENTITY.**—The term “Federal entity” means 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.

(5) **JOURNALISM.**—The term “journalism” means gathering, preparing, collecting, photographing, recording, writing, editing, reporting, investigating, or publishing news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public.

(6) **PERSONAL ACCOUNT OF A COVERED JOURNALIST.**—The term “personal account of a covered journalist” means an account with a covered service provider used by a covered journalist that is not provided, administered, or operated by the employer of the covered journalist.

(7) **PERSONAL TECHNOLOGY DEVICE OF A COVERED JOURNALIST.**—The term “personal technology device of a covered journalist” means a handheld communications device, laptop computer, desktop computer, or other internet-connected device used by a covered journalist that is not provided or administered by the employer of the covered journalist.

(8) **PROTECTED INFORMATION.**—The term “protected information” means any information identifying a source who provided information as part of engaging in journalism, and any records, contents of a communication, documents, or information that a covered journalist obtained or created as part of engaging in journalism.

SEC. 3. LIMITS ON COMPELLED DISCLOSURE FROM COVERED JOURNALISTS.

In any matter arising under Federal law, a Federal entity may not compel a covered journalist to disclose protected information, unless a court in the judicial district in which the subpoena or other compulsory process is, or will be, issued determines by a preponderance of the evidence, after providing notice and an opportunity to be heard to the covered journalist that—

(1) disclosure of the protected information is necessary to prevent, or to identify any perpetrator of, an act of terrorism against the United States; or

(2) disclosure of the protected information is necessary to prevent a threat of imminent violence, significant bodily harm, or death, including specified offenses against a minor (as defined by section 111(7) of the Adam Walsh Child Protection and Safety Act of 2006 (34 U.S.C. 20911(7))).

SEC. 4. LIMITS ON COMPELLED DISCLOSURE FROM COVERED SERVICE PROVIDERS.

(a) **CONDITIONS FOR COMPELLED DISCLOSURE.**—In any matter arising under Federal law, a Federal entity may not compel a covered service provider to provide testimony or any document consisting of any record, information, or other communications stored by a covered provider on behalf of a covered journalist, including testimony or any document relating to a personal account of a covered journalist or a personal technology device of a covered journalist, unless a court in the judicial district in which the subpoena or other compulsory process is, or will be, issued determines by a preponderance of the evidence that there is a reasonable threat of imminent violence unless the testimony or document is provided, and issues an order authorizing the Federal entity to compel the disclosure of the testimony or document.

(b) NOTICE TO COURT.—A Federal entity seeking to compel the provision of testimony or any document described in subsection (a) shall inform the court that the testimony or document relates to a covered journalist.

(c) NOTICE TO COVERED JOURNALIST AND OPPORTUNITY TO BE HEARD.—

(1) IN GENERAL.—A court may authorize a Federal entity to compel the provision of testimony or a document under this section only after the Federal entity seeking the testimony or document provides the covered journalist on behalf of whom the testimony or document is stored pursuant to subsection (a)—

(A) notice of the subpoena or other compulsory request for such testimony or document from the covered service provider not later than the time at which such subpoena or request is issued to the covered service provider; and

(B) an opportunity to be heard before the court before the time at which the provision of the testimony or document is compelled.

(2) EXCEPTION TO NOTICE REQUIREMENT.—

(A) IN GENERAL.—Notice and an opportunity to be heard under paragraph (1) may be delayed for not more than 45 days if the court involved determines there is clear and convincing evidence that such notice would pose a clear and substantial threat to the integrity of a criminal investigation, or would present an imminent risk of death or serious bodily harm, including specified offenses against a minor (as defined by section 111(7) of the Adam Walsh Child Protection and Safety Act of 2006 (34 U.S.C. 20911(7))).

(B) EXTENSIONS.—The 45-day period described in subparagraph (A) may be extended by the court for additional periods of not more than 45 days if the court involved makes a new and independent determination that there is clear and convincing evidence that providing notice to the covered journalist would pose a clear and substantial threat to the integrity of a criminal investigation, or would present an imminent risk of death or serious bodily harm under current circumstances.

SEC. 5. LIMITATION ON CONTENT OF INFORMATION.

The content of any testimony, document, or protected information that is compelled under sections 3 or 4 shall—

(1) 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

(2) be narrowly tailored in subject matter and period of time covered so as to avoid compelling the production of peripheral, nonessential, or speculative information.

SEC. 6. RULE OF CONSTRUCTION.

Nothing in this Act shall be construed to—

(1) apply to civil defamation, slander, or libel claims or defenses under State law, regardless of whether or not such claims or defenses, respectively, are raised in a State or Federal court; or

(2) prevent the Federal Government from pursuing an investigation of a covered journalist or organization that is—

(A) suspected of committing a crime;

(B) a witness to a crime unrelated to engaging in journalism;

(C) suspected of being an agent of a foreign power, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801);

(D) an individual or organization designated under Executive Order 13224 (50 U.S.C. 1701 note; relating to blocking property and prohibiting transactions with persons who commit, threaten to commit, or support terrorism);

(E) a specially designated terrorist, as that term is defined in section 595.311 of title 31, Code of Federal Regulations (or any successor thereto); or

(F) a terrorist organization, as that term is defined in section 212(a)(3)(B)(vi)(II) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(vi)(II)).

Purpose and Summary

H.R. 4330, the “Protect Reporters from Exploitative State Spying Act” or the “PRESS Act,” would create a qualified federal statutory privilege that protects covered journalists from being compelled by a federal entity (i.e., an entity or employee of the judicial or execu-

tive branch of the federal government with power to issue a subpoena or other compulsory process) to reveal confidential sources and information. It would provide a similar privilege for a covered service provider (such as a telecommunications carrier, interactive computer service, or remote computing service) from being compelled by a federal entity to disclose testimony or documents stored by the provider on behalf of a covered journalist or relating to the covered journalist’s personal account or personal technology device. The measure also contains exceptions to the covered journalist’s privilege where a court determines, by a preponderance of the evidence and pursuant to notice and hearing requirements, that disclosure of information is necessary to prevent or identify any perpetrator of an act of terrorism or to prevent a threat of imminent violence, significant bodily harm, or death. Similarly, the bill allows a federal entity to overcome the privilege for a covered service provider when a court determines, after the federal entity seeking the information provides the affected covered journalist with notice and an opportunity to be heard in court, that there is a reasonable threat of imminent violence, and the court issues an order authorizing the federal entity to compel the disclosure. The bill contains a number of other measures clarifying its scope and applicability. The Committee concludes that this legislation is necessary to ensure that the constitutional guarantees of press freedom and freedom of speech are protected from unwarranted government compulsion that threatens to chill the exercise of such rights.

Representatives Jamie Raskin, Ted Lieu, and John Yarmuth introduced H.R. 4330 on July 1, 2021. A coalition of civil liberties and journalists’ organizations have endorsed H.R. 4330, including the American Civil Liberties Union, Demand Progress, the Society of Professional Journalists, News Media Alliance, National Association of Broadcasters, National Press Photographers Association, Radio Television Digital News Association, News Leaders Association, MPA—The Association of Magazine Media, Project for Privacy and Surveillance Accountability, Protect The 1st, and Reporters Committee for Freedom of the Press.

Background and Need for the Legislation

A. CONSTITUTIONAL PROTECTIONS AND JOURNALIST SUBPOENAS

The First Amendment to the United States Constitution provides, in relevant part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press”¹ The Supreme Court, however, has interpreted the Amendment’s press freedom guarantee to exclude protection for a journalist from a grand jury subpoena,² although some circuit courts have narrowly interpreted this precedent to allow for some protections for reporters.³ When facing compulsory process, members of the press have argued generally that they can only obtain truthful information from sources if the sources are assured that their identities will be protected—analagizing this need to the need for attorney-client

¹U.S. Const. amdt. I.

²*Branzburg v. Hayes*, 408 U.S. 665 (1972).

³E.g., the Second Circuit found in *The New York Times Co. v. Gonzales* a qualified reporters’ privilege under the First Amendment. *The New York Times Co. v. Gonzales*, 459 F.3d 160 (2d Cir. 2006).

privilege: “forced disclosure of confidential or unpublished sources and information will cause individuals to refuse to talk to reporters, resulting in a ‘chilling effect’ on the free flow of information and the public’s right to know.”⁴ In addition, when asked to produce notes and other materials inherent to the journalistic process, members of the press have maintained that compulsory process in such circumstances is a violation of their First Amendment right to free speech.⁵

The Supreme Court has also held that neither the First Amendment nor the Fourth Amendment—which prohibits unreasonable searches and seizures by the government and generally requires the government to obtain a warrant before searching a person’s property—prohibits the government from obtaining a search warrant for evidence of a crime simply because the owner or possessor of the place to be searched is not reasonably suspected of criminal activity.⁶ Moreover, the Court has held that preconditions for the issuance of a warrant provide adequate safeguards to protect First Amendment interests.⁷ Notably, the Court has also observed that the “Fourth Amendment does not prevent or advise against legislative or executive efforts to establish nonconstitutional protections” for individuals engaged in First Amendment-protected activities.⁸

B. STATE PRESS SHIELD LAWS

While the Supreme Court has declined to interpret the First and Fourth Amendments to provide the basis for a journalist’s privilege from compelled disclosure of sources and information, most state legislatures and state courts have provided, to varying degrees, such protection for journalists. In *Branzburg v. Hayes*, the Supreme Court made it clear that states are “within First Amendment limits, to fashion their own standards.”⁹ Forty states and the District of Columbia have enacted press shield laws, while others afford similar privileges through their state constitutions and common law.¹⁰ Only Hawaii and Wyoming provide no such privilege either through statute or common law.¹¹ These laws aim to protect journalists from being compelled to disclose information under certain circumstances.¹² They vary in how they define: (1) who is a journalist; (2) what unpublished information or type of source is protected; and (3) what exceptions are permitted.¹³

Press shield laws vary in how they define what it means to be a journalist—some base their definition by function and others by employment. For example, Alabama journalists are protected if they work for newspapers or television stations, but not maga-

⁴ *Introduction to the Reporter’s Privilege Compendium*, THE REPORTERS COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/introduction-to-the-reporters-privilege-compendium/>.

⁵ *Id.*

⁶ *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978).

⁷ *Id.*

⁸ *Id.* at 567.

⁹ 408 U.S. 665 (1972).

¹⁰ *Introduction to the Reporter’s Privilege Compendium*, THE REPORTERS COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/introduction-to-the-reporters-privilege-compendium/>.

¹¹ *Id.*

¹² *Reporter’s Privilege Compendium*, THE REPORTERS COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/reporters-privilege/>.

¹³ *Id.*

zines.¹⁴ Others, such as Colorado, broadly protect “newspersons” and define them as individuals who participate in the process of disseminating information to the public.¹⁵ Meanwhile, other states do not expressly define who is a “journalist” and would provide some measure of protection so long as the individual is engaged in legitimate journalistic efforts and protecting journalistic interests.¹⁶ Some state shield laws, such as Connecticut’s, are broad enough to cover independent contractors, agents, and student journalists.¹⁷

The scope of information that is protected by state press shield laws varies from state to state. For example, Kentucky provides some protection for reporters from disclosing the identity of a source and not the information provided by the source, but only if the information is published or broadcasted.¹⁸ Some states, such as North Dakota, do not distinguish between confidential and non-confidential information and sources.¹⁹ In California, the law only explicitly protects against contempt sanctions, and the California state courts have interpreted the law to provide protections, including a four-part test to protect unpublished information.²⁰

Most states also allow for journalists’ privileges to be overcome if the material sought meets specific criteria, including that the material is necessary and relevant; is not available through less intrusive means; or concerns an overriding public interest. The most common exceptions are related to national security interests or libel actions. For example, Pennsylvania’s protection is absolute in civil cases, but qualified in criminal or defamation cases.²¹

C. DEPARTMENT OF JUSTICE (DOJ) INVESTIGATIONS OF PRESS LEAKS

Over the past several decades, Presidential administrations have attempted to crack down on classified leaks to media outlets. These efforts have been conducted by both Republican and Democratic Presidents and have included efforts to obtain journalists’ records, illustrating the need for stronger federal protections for journalists and their sources. Indeed, one of the most important roles the free press plays in a democracy is reporting on the making of government policy, including allegations of wrongdoing or malfeasance. This important form of journalism often depends on the journalist’s ability to protect the confidentiality of their sources.

1. *The George W. Bush Administration*

In response to a 2005 *New York Times* article detailing the National Security Agency’s (NSA’s) warrantless surveillance program after the September 11, 2001 attacks,²² the Bush Administration convened a special task force to hunt for the sources of that arti-

¹⁴ Jane E. Kirtley, *Shield Laws*, FIRST AMEND. ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/1241/shield-laws>.

¹⁵ COLO. REV. STAT. ANN. Sections 24–72.5–101 to 24–72.5–106.

¹⁶ Me. Rev. Stat. Ann. tit. 16, § 61.

¹⁷ Conn. Gen Stat § 52–146t.

¹⁸ KY. REV. STAT. ANN. § 421.100.

¹⁹ N.D. CENT. CODE § 31–01–06.2

²⁰ Reporter’s Privilege guide: Alabama—Illinois, SPLC, Aug. 29, 2019, https://splc.org/2019/08/reporters-privilege-guide-1/?_h=97ebff0e-4462-4d05-9a11-18d3ce11b089.

²¹ 42 PA. CONS. STAT. ANN. § 5942.

²² Cora Currier, *How The NSA Started Investigating The New York Times’ Warrantless Wire-tapping Story*, THE INTERCEPT, June 26, 2015.

cle.²³ Although the New York Times was never notified of a subpoena, a former administration official was later presented with his own phone records from conversations with one of the article’s authors during a grand jury proceeding on a different matter regarding the latter’s sources.²⁴ On January 21, 2009, a whistleblower and former NSA analyst said that “the Bush Administration targeted and eavesdropped on the conversations of American journalists,”²⁵ and in 2008, then-Federal Bureau of Investigation (FBI) Director Robert Mueller III apologized to the New York Times and the Washington Post for the FBI’s improper acquisition of reporters’ phone records in 2004, although he did not disclose the investigative purpose for the search.²⁶

2. The Obama Administration

On May 13, 2013, it became public that the then-Deputy Attorney General authorized broad subpoenas for the telephone records of 20 members of the Associated Press (AP)²⁷ in relation to “leaked information to the news organization about a foiled plot involving the al-Qaeda affiliate in Yemen.”²⁸ DOJ guidelines at the time required prosecutors “to notify the media organization in advance unless that would pose a substantial threat to the integrity of the investigation.”²⁹ The AP, however, was given no advance notice.³⁰

On May 19, 2013, the Washington Post ran a story detailing DOJ’s 2010 search of Fox News reporter James Rosen’s e-mails.³¹ Rosen had reported intelligence in June 2009 that North Korea was likely to continue its nuclear tests—information from a top-secret report leaked to him by government advisor Stephen Jin-Woo Kim.³² In this case, DOJ went a step further, and listed Rosen as a suspected co-conspirator in violation of the Espionage Act. A judge found probable cause—as required under the Privacy Protection Act—and issued the search warrant for Rosen’s e-mails.³³

3. The Trump Administration

On May 7, 2021, the Washington Post reported that DOJ had seized three Post reporters’ phone records during 2020 and attempted to obtain their emails.³⁴ On May 20, 2021, CNN disclosed that DOJ also sought journalist Barbara Starr’s phone and non-

²³ Charlie Savage and Katie Benner, *Trump Administration Secretly Seized Phone Records of Times Reporters*, N.Y. TIMES, June 2, 2021.

²⁴ Philip Shenon, *Leak Inquiry Said to Focus on Calls With Times*, N.Y. TIMES, Apr. 12, 2008.

²⁵ *Ex-NSA analyst: Agency spied on news organizations*, REPORTERS COMM. FOR FREE. OF THE PRESS, Jan. 22, 2009.

²⁶ *F.B.I Says it Obtained Reporters’ Phone Records*, N.Y. TIMES, Aug. 8, 2008.

²⁷ Letter from The Reporters Committee for Freedom of the Press, et al., to Eric Holder, Att’y Gen., Dep’t of Justice and James M. Cole, Dep. Att’y Gen., Dep’t of Justice, May 14, 2013, available at: <https://www.rcfp.org/wp-content/uploads/imported/Media-coalition-letter-re-AP-subpoena.pdf>.

²⁸ Ann E. Marimow, *A rare peek into a Justice Department leak probe*, WASH. POST, May 19, 2013.

²⁹ Carrie Johnson, *Justice Department Secretly Obtains AP Phone Records*, NPR, May 14, 2013.

³⁰ Charlie Savage, *Holder Tightens Rules on Getting Reporters’ Data*, N. Y. TIMES, Jul. 7, 2013.

³¹ Ann E. Marimow, *A rare peek into a Justice Department leak probe*, WASH. POST, May 19, 2013.

³² *Id.*; Kim pled guilty to disclosing national defense information under Section 793(d) of the Espionage Act on February 7, 2014 and was sentenced to 13 months in prison. (Josh Gerstein, *Contractor pleads guilty in leak case*, POLITICO, Feb. 7, 2014.

³³ *Id.*

³⁴ Devlin Barrett, *Trump Justice Department secretly obtained Post reporters’ phone records*, WASH. POST, May 7, 2021.

content email records in 2020.³⁵ Attorneys for CNN challenged the subpoena before agreeing to a deal on January 26, 2021, which included a “limited set of e-mail logs.”³⁶ DOJ’s efforts included putting CNN’s general counsel under a gag order, prohibiting him from sharing details of the government’s efforts with anyone except the CNN President.³⁷ On June 2, 2021, the *New York Times* reported that DOJ obtained a court order to seize four of its reporters’ phone records.³⁸

4. *The Biden Administration*

The legal battle for reporters’ emails continued throughout the early months of the Biden Administration. CNN settled with DOJ on January 26, 2021.³⁹ DOJ also continued in its legal battle with the *New York Times* well into the first quarter of the year.⁴⁰ On June 5, 2021, the Administration announced that it would not seek journalists’ records.⁴¹ On June 11, 2021, the DOJ Inspector General announced it is “initiating a review of DOJ’s use of subpoenas and other legal authorities to obtain communication records of Members of Congress and affiliated persons, and the news media . . . The review will examine the Department’s compliance with applicable DOJ policies and procedures, and whether any such uses, or the investigations, were based upon improper considerations.”⁴²

D. JAILING OF JOURNALISTS FOR REFUSALS TO DISCLOSE SOURCE IDENTITIES

Numerous journalists have received jail time or been sentenced to home confinement for refusing to name sources over the past several decades. For example, in 1990, Brian Karem, a television reporter, was held in contempt of court and sentenced to six months in jail for refusing to identify a confidential source; he was only released after his source released him from his promise to keep her identity confidential.⁴³ In 2004, Jim Taricani, an investigative reporter, was sentenced to six months of home confinement for refusing to reveal the identity of the person who gave him an FBI tape showing a mayoral aide accepting a bribe.⁴⁴ In 2005, *New York Times* reporter Judith Miller was found in contempt of court

³⁵ Adam Goldman, *Trump Justice Dept. Seized CNN Reporter’s Email and Phone Records*, N. Y. TIMES, May 20, 2021.

³⁶ Katelyn Polantz and Evan Perez, *Trump administration pursued CNN reporter’s records in months-long secret court battle*, CNN, Jun. 9, 2021.

³⁷ *Id.* Rep. Nadler’s NDO Fairness Act would address the abuse of gag orders, by requiring a written determination from the court finding a non-disclosure order necessary to prevent a substantially likely adverse result; providing for strict scrutiny analysis to grant a gag order request under 18 U.S.C. 2705(b); establishing a 30-day limit for gag orders, with the opportunity for additional 30-day extensions; requiring notice be given to the customer within 72 hours of the expiration of the delay, including what information was disclosed; and allow providers to contest gag orders in court. NDO Fairness Act, H.R. 7072, 117th Cong. (2022).

³⁸ Charlie Savage and Katie Benner, *Trump Administration Secretly Seized Phone Records of Times Reporters*, N. Y. TIMES, June 2, 2021.

³⁹ Katelyn Polantz and Evan Perez, *Trump administration pursued CNN reporter’s records in months-long secret court battle*, CNN, Jun. 9, 2021.

⁴⁰ Charlie Savage and Katie Benner, *U.S. Waged Secret Legal Battle to Obtain Emails of 4 Times Reporters*, N. Y. TIMES, Jun. 9, 2021.

⁴¹ Veronica Stracqualursi, *Biden’s Justice Department says it will no longer seize reporters’ records for leak investigations*, CNN, Jun. 5, 2021.

⁴² Statement of Michael E. Horowitz, U.S. Dep’t of Justice Inspector General, Press Release, Jun. 11, 2021.

⁴³ *Jailed Reporter Is Freed After Source Allows Name to Be Used*, LOS ANGELES TIMES July 11, 1990.

⁴⁴ Jonathan Finer, *R.I. Reporter Sentenced To Home Confinement*, WASH. POST Dec. 10, 2004.

for refusing to cooperate in a grand jury investigation related to the leak of Valerie Plame’s identity and spent 85 days in jail until her informant gave her permission to reveal his identity.⁴⁵

E. SUPPORT FOR A FEDERAL SHIELD LAW FROM FEDERAL AND STATE OFFICIALS

Several high ranking federal and state officials have called for Congress to pass a federal shield law. For example, in 2006 remarks about a reporter shield bill similar to H.R. 4330 that he introduced, then-Representative Mike Pence said, “the Constitution of the United States reads in part that Congress shall make no law abridging freedom of the press. This freedom represents a bedrock of our democracy by ensuring the free flow of information to the public. But, sadly, this freedom is under attack. Over the last few years, more than a dozen reporters have been issued subpoenas and questioned about confidential sources. . . . and I close with Daniel Webster’s missive that ‘the entire and absolute freedom of the press is essential to the preservation of government on the basis of a free constitution.’”⁴⁶

In June 2008, the Attorneys General of 41 states urged the Senate to adopt a federal reporters’ shield law, explaining how the federal courts’ division over the existence and scope of a reporter’s privilege was “producing inconsistency and uncertainty for reporters and the confidential sources upon whom they rely.”⁴⁷ In his second term, President Obama called on Congress to pass a federal shield law to “guard against government overreach.”⁴⁸ In May 2013, Attorney General Eric Holder reaffirmed the Obama Administration’s support for a federal shield law.⁴⁹

Hearings

For the purposes of clause 3(c)(6)(A) of House Rule XIII, the following hearing was used to develop H.R. 4330: On June 30, 2021, the Committee on the Judiciary held a hearing on “Secrecy Orders and Prosecuting Leaks: Potential Legislative Responses to Deter Prosecutorial Abuse of Power.” The witnesses were: (1) Mr. Tom Burt, Corporate Vice President, Customer Security & Trust, Microsoft Corporation; (2) Ms. Eve Burton, Executive Vice President & Chief Legal Officer, Hearst Corporation; (3) Ms. Lynn Oberlander, Of Counsel, Ballard Spahr LLP; and (4) Professor Jonathan Turley, J.B. and Maurice C. Shapiro Professor of Public Interest Law, The George Washington University Law School. The witnesses discussed instances where federal prosecutors targeted persons, including journalists, during leak investigations, as well as the related policy problem of government demanding data from third-party electronic communications providers while seeking gag orders to accompany those demands. Professor Turley and Ms. Oberlander testified in support of a federal reporters’ shield law.

⁴⁵ Kathleen Ann Ruane, *Journalists’ Privilege: Overview of the Law and Legislation in Recent Congresses*, Congressional Research Service (Jan. 19, 2011) (“CRS Report”).

⁴⁶ 152 Cong. Record. H887–H.878 (daily ed. Mar. 14, 2006) (Statement of Congressman Pence).

⁴⁷ Letter from Attorneys Generals to Sens. Harry Reid and Mitch McConnell (June 23, 2008). Published in S. Rep. No. 113–118 at 139 (2013).

⁴⁸ Brett LoGiurato, *OBAMA: I Am Troubled By The Possibility That Leak Investigations May Chill Investigative Journalism*, BUS. INSIDER, May 23, 2013.

⁴⁹ Lauren Fox, *AG Holder Supports a Shield Law for the Press*, U.S. NEWS (May 15, 2013).

Committee Consideration

On April 5, 2022, the Committee met in open session and ordered the bill, H.R. 4330, favorably reported with an amendment in the nature of a substitute, by voice vote, a quorum being present.

Committee Votes

No recorded votes occurred during the Committee's consideration of H.R. 4330.

Committee Oversight Findings

In compliance with clause 3(c)(1) of House rule XIII, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of House Rule X, are incorporated in the descriptive portions of this report.

Committee Estimate of Budgetary Effects

Pursuant to clause 3(d)(1) of House rule XIII, the Committee adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

New Budget Authority and Congressional Budget Office Cost Estimate

Pursuant to clause 3(c)(2) of House rule XIII and section 308(a) of the Congressional Budget Act of 1974, and pursuant to clause (3)(c)(3) of House rule XIII and section 402 of the Congressional Budget Act of 1974, the Committee has requested but not received from the Director of Congressional Budget Office a budgetary analysis and a cost estimate of this bill.

Duplication of Federal Programs

Pursuant to clause 3(c)(5) of House rule XIII, no provision of H.R. 4330 establishes or reauthorizes a program of the federal government known to be duplicative of another federal program.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of House rule XIII, H.R. 4330 would create a qualified federal statutory privilege that protects covered journalists from being compelled by a federal entity to reveal confidential sources and information. The legislation also generally prohibits a federal entity from compelling a covered service provider to disclose testimony or documents consisting of any record, information, or other communication stored by the covered service provider on behalf of a covered journalist, as well as testimony or documents relating to the covered journalist's personal account or personal technology device unless a court determines that there is a reasonable threat of imminent violence and the court issues an order authorizing the federal entity to compel the disclosure.

Advisory on Earmarks

In accordance with clause 9 of House rule XXI, H.R. 4330 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of House rule XXI.

Section-by-Section Analysis

Sec. 1. Short Title. Section 1 sets forth the short title as the “Protect Reporters from Exploitative State Spying Act” or the “PRESS Act”.

Sec. 2. Definitions. Section 2 sets forth the definitions for certain terms used in the Act.

Section 2(1) defines “covered journalist” as a person who regularly gathers, prepares, collects, photographs, records, writes, edits, reports, investigates, or publishes news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public.

Section 2(2) defines “covered service provider” as “any person that, by an electronic means, stores, processes, or transmits information in order to provide a service to customers of the person,” which is further defined to specifically include: a telecommunications carrier and a provider of an information service (as such terms are defined in section 3 of the Communications Act of 1934; a provider of an interactive computer service and an information content provider (as such terms are defined in section 230 of the Communications Act of 1934); a provider of remote computing service; and a provider of electronic communication service (as defined in section 2711 of title 18, United States Code); and a provider of electronic communication service (as defined in section 2510 of title 18, United States Code) to the public.

Section 2(3) defines “document” to mean writings, recordings, and photographs, as those terms are defined by Federal Rule of Evidence 1001.

Section 2(4) defines “Federal entity” to mean 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.

Section 2(5) defines “journalism” to mean the gathering, preparing, collecting, photographing, recording, writing, editing, reporting, investigating, or publishing news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public.

Section 2(6) defines “personal account of a covered journalist” to mean an account with a covered service provider used by a covered journalist that is not provided, administered, or operated by the employer of the covered journalist.

Section 2(7) defines “personal technology device of a covered journalist” to mean a handheld communications device, laptop computer, desktop computer, or other internet-connected device used by a covered journalist that is not provided or administered by the employer of the covered journalist.

Section 2(8) defines “protected information” as any information identifying a source who provided information as part of engaging in journalism, and any records, contents of a communication, docu-

ments, or information that a covered journalist obtained or created as part of engaging in journalism.

Sec. 3. Limits on Compelled Disclosure from Covered Journalists. Section 3 prohibits a federal entity from compelling a covered journalist to disclose protected information in any matter arising under federal law. Section 3 also provides two exceptions to this privilege. A federal entity can compel such disclosure if a court in the judicial district in which the subpoena or other compulsory process is, or will be, issued determines by a preponderance of evidence that disclosure of the protected information is necessary: (1) to prevent, or to identify any perpetrator of, an act of terrorism against the United States; or (2) to prevent a threat of imminent violence, significant bodily harm, or death. This section also provides that the court can make the determination that one of these exceptions applies only after the court provides notice and an opportunity to be heard to the covered journalist.

Sec. 4. Limits on Compelled Disclosure from Covered Service Providers. Section 4 generally provides a statutory privilege for covered service providers from being compelled by a federal entity to disclose information related to a covered journalist and outlines an exception to this general protection. Specifically, section 4(a) prohibits a federal entity from compelling a covered service provider to provide testimony or documents stored by the provider on behalf of a covered journalist. Additionally, Section 4(a) contains an exception, allowing a federal entity to defeat this privilege and compel such information disclosure if (1) a court in the judicial district in which the subpoena or other compulsory process is, or will be, issued; (2) determines by a preponderance of the evidence that there is a reasonable threat of imminent violence absent the provision of the testimony or document that the federal entity seeks; and (3) the court issues an order authorizing the federal entity to compel the disclosure of the testimony or document.

Section 4(b) requires a federal entity seeking to compel the disclosure of testimony or any document described in Section 4(a) to inform the court that its compulsory request to a covered service provider relates to a covered journalist.

Section 4(c)(1) is a notice requirement, prohibiting a court from authorizing a federal entity to compel disclosure under section 4(a) unless the federal entity provides the covered journalist who is a party to the transaction with a covered service provider described in section 4(a): (1) notice of the subpoena or other compulsory request by the time the subpoena or request is issued to the covered service provider; and (2) an opportunity for the covered journalist to be heard before the court before the covered service provider can be compelled to disclose the testimony or document.

Section 4(c)(2) provides an exception to the notice and hearing requirements under 4(c)(1). Specifically, section 4(c)(2)(A) provides that the court may delay notice by up to 45 days if it determines that there is clear and convincing evidence that such notice would pose a clear and substantial threat to the integrity of a criminal investigation or would present an imminent risk of death or serious bodily harm. Section 4(c)(2)(B) provides that the court may extend the delay period for additional periods of no more than 45 days if the court makes a new and independent determination that there is clear and convincing evidence that providing the covered jour-

nalist notice would pose a clear and substantial threat to the integrity of a criminal investigation or imminent risk of death or serious bodily harm.

Sec. 5. Limitation on Content of Information. Section 5 provides that the content of any testimony, document, or protected information that is compelled under sections 3 and 4 of the Act 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 in subject matter and period of time covered so as to avoid compelling the production of peripheral, nonessential, or speculative information.

Sec. 6. Rule Of Construction. Section 6 is a rule of construction that provides that nothing in this Act shall be construed to apply to civil defamation, slander, or libel claims or defenses under State law or to prevent the Federal Government from pursuing an investigation of a covered journalist or organization that is suspected of committing a crime; a witness to a crime unrelated to engaging in journalism; suspected of being an agent of a foreign power, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978; an individual or organization designated under Executive Order 13224 (relating to blocking property and prohibiting transactions with persons who commit, threaten to commit, or support terrorism); a specially designated terrorist, as that term is defined in section 595.311 of title 31, Code of Federal Regulations (or any successor thereto); or a terrorist organization, as that term is defined in section 212(a)(3)(B)(vi)(II) of the Immigration and Nationality Act.