



Investigative Reporting 101

By

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‘Legal Protection’ in the Toolbox

If you choose to do ‘undercover’ investigative journalism, you will need some special ‘tools and skills’ to be successful. One of those tools is legal protection for doing your job.

It has long been my belief that the First Amendment is enough to protect journalists from local, state, and federal governments. The Founders designed a government where journalists would be protected from undue government influence and control. However .. powerful people have done their best through government and business to take away legal protection from journalists who work to uncover what they (the powerful) want to keep hidden from the public. So, what does that mean for investigative journalists?

Legal Protection

If the First Amendment to the Constitution is not strong enough to legally protect journalists, then we need help from lawmakers who can enact laws that codify protection. Many other professions have legal protection from revealing private source information — known as ‘privilege.’ You’ve probably heard of ‘attorney-client privilege’ and ‘doctor-patient privilege,’ so why not ‘journalist-source privilege?’

That’s something I dealt with for years as an investigative reporter, then later as a news manager. While I believed the First Amendment was our strongest tool in the legal toolbox, I began to agree with fellow journalists that we needed even more protection, especially after the Supreme Court’s 5-4 ruling in the 1972 Branzburg v. Hayes case. The Court ruled that the ‘press’ did not have a Constitutional right of protecting confidential sources in a grand jury proceeding. Though the ruling had some ‘limits’ attached, it was of great concern to people like myself who used confidential sources in news stories.

Shield Laws

That ruling by the high court led journalists to battle for legislative protection on a state-by-state basis. That type of protection became known as a ‘shield law’ for journalists. As a member of journalist groups like the Society of Professional Journalists (SPJ), Radio and Television News Directors Association (RTNDA), Reporters Committee for Freedom of the Press (RCFP), Investigative Reporters and Editors (IRE), and other groups, we worked to get state legislators to understand the need for more legal protection for journalists.

Many state legislative bodies passed laws that gave journalists some ‘reporting privilege.’ You can look at [this map of the US](#) to see which states passed laws and what the laws do for journalists. While some states voted to give journalists ‘absolute protection,’ other states passed laws that were not as protective, or didn’t pass any law. I will tell you that ‘absolute protection’ Shield laws can have exceptions, so know as much as you can about those exceptions.

I recommend to all journalists, and especially to those who do investigative work, that they learn what type of ‘shield law’ they have in the state or states where they cover news. I’ve worked in states that had a strong shield law and states that had a weak shield law. I’ve also worked in ‘border’ areas where my coverage of news would take me into two or more states. You may be protected in one state, but less in another. It’s vital that you know what’s in your ‘legal toolbox’ wherever news may take you.

The PRESS Act

As many of us battled to get Shield laws passed in individual states, we often talked about getting a ‘federal’ Shield law that would cover every state. The Free Flow of Information Act was introduced in Congress in the early 2000s, but has not passed — yet.

A new version of that idea has some bi-partisan support in Congress. It’s known as the PRESS Acts (Protect Reporters from Exploitive State Spying). Democrat Jamie Raskin and Republican Kevin Kiley introduced the bill in June of 2023 and it passed the House. Senators Ron Wyden (D-Oregon), Mike Lee (R-Utah), and Richard Durbin (D-Illinois) introduced a companion bill in the same month. Here’s how it reads —

This bill prohibits the federal government from compelling journalists and providers of telecommunications services (e.g., phone and internet companies) to disclose certain protected information, except in limited circumstances such as to prevent terrorism or imminent violence.

Specifically, the bill protects from disclosure any information identifying a source, as well as any records, contents of a communication, documents, or information obtained or created by journalists in the course of their work.

Further, the bill protects specified third parties, such as telecommunications carriers or social media companies, from being compelled to provide testimony or any document consisting of a record, information, or other communication that is stored by the third party on behalf of a journalist. [Congress.gov](https://www.congress.gov)

Investigative reporter Catherine Herridge, who I wrote about a few weeks ago, appeared before Congress recently in support of the PRESS Act. She appeared there with Sheryl Atkinson, another CBS investigative journalist who had challenging experiences with government intrusion into her reporting. You can watch the full House Judiciary Committee's subcommittee hearing with Herridge and Atkinson here.

If the PRESS Act is passed and signed into law, this will be another tool that you can add to your 'legal toolbox.' Whether it passes or not, know how you can use your First Amendment rights (e.g. Free Speech, Free Press), along with rights you have from states and the federal government, to protect yourself and your sources.

If you are a news manager, consider holding some seminars or clinics for your journalists. You can invite First Amendment legal experts to share insights with your team. Many newspapers and broadcast stations have lawyers who would be available for those seminars. You might also consider investing in memberships for some of your team to groups like SPJ, IRE, etc. They could share with your team what they learn through their membership and attendance at local, regional, or national meetings.



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