

PROTECT REPORTERS FROM EXPLOITATIVE STATE
SPYING ACT

DECEMBER 1, 2023.—Committed to the Committee of the Whole House on the State
of the Union and ordered to be printed

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

R E P O R T

[To accompany H.R. 4250]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill
(H.R. 4250) to maintain the free flow of information to the public
by establishing appropriate limits on the federally compelled disclo-
sure of information obtained as part of engaging in journalism, and
for other purposes, having considered the same, reports favorably
thereon without amendment and recommends that the bill do pass.

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Purpose and Summary

H.R. 4250, the Protect Reporters from Exploitative State Spying
Act, introduced by Rep. Kevin Kiley (R-CA), will prohibit the fed-

eral government from compelling journalists and providers of telecommunications services to provide information identifying a source or any other record obtained or created by journalists in the course of their work.

Background and Need for the Legislation

The First Amendment to the U.S. Constitution states that, “Congress shall make no law . . . abridging the freedom of speech, or of the press.”¹ Courts have generally construed these rights broadly. During the formative era for the modern understanding of the First Amendment, the Supreme Court rejected restrictions on the publication of national security information obtained by reporters from government sources.² As recognized by Justice Byron White, the press “serves and was designed to serve as a powerful antidote to any abuse of power by governmental officials.”³

Historically, the federal and state governments have clashed in court with the press over the compelled disclosure of confidential sources. In 1971, when the government prevented the *New York Times* and *Washington Post* from publishing classified material about the Vietnam War that would later become known as the Pentagon Papers, Justice Hugo Black argued “every moment’s continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment [Enjoining the publishing of the news] would make a shambles of the First Amendment.”⁴ Justice Black further stated, “Both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints.”⁵

While the government now rarely seeks to enjoin the publication of certain information by the press, there are still areas where the First Amendment and the government come into conflict. In recent years, this friction has come not in the form of targeting newspapers that publish classified information, but in prosecutions of those who leak classified information to reporters. In these investigations, the government has sought to seize records and documents belonging to journalists and to compel testimony about their sources through both subpoenas and threats of imprisonment.⁶ In some cases, journalists’ records are seized from third-party service providers, like phone and internet companies.⁷

These actions are not limited to leaks of classified information. Beginning in late 2020, the Justice Department targeted Project Veritas over the group’s possession of a diary reportedly belonging to President Biden’s daughter.⁸ Despite never publishing the con-

¹ U.S. CONST. Amend. I.

² See *New York Times v. United States*, 403 U.S. 713 (1971).

³ *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241, 260 (1974) (White, J. concurring).

⁴ *New York Times*, at 715 (Black, J. concurring).

⁵ *Id.* at 717 (Black, J. concurring).

⁶ See, e.g., Charlie Savage, *U.S. Gathered Personal Data on Times Reporter in Case Against Ex-C.I.A. Agency*, N.Y. TIMES (Feb. 25, 2011); Adam Goldman, Nicholas Fandos, and Katie Benner, *Ex-Senate Aide Charged in Leak Case Where Times Reporter’s Records Were Seized*, N.Y. TIMES (Jun. 7, 2018); Charlie Savage & Leslie Kaufman, *Phone Records of Journalists Seized by U.S.*, N.Y. TIMES (May 13, 2013).

⁷ Louis Nelson, *Jordan criticizes DOJ for seizing NYT reporter’s materials in leak case*, POLITICO (Jun. 21, 2018).

⁸ The Editorial Board, *The FBI’s Raid on James O’Keefe*, WALL STREET JOURNAL (Nov. 18, 2021) (“Attorney General Merrick Garland still refuses to retract the memo he sent last month

tents of the diary, investigative reporter James O’Keefe, the group’s founder, had his home raided at dawn by the FBI in November 2021.⁹ In court filings, Project Veritas alleged that the Justice Department secretly seized its emails and placed a gag order on Microsoft, whose servers housed the group’s emails.¹⁰

Journalists argue that these actions have a chilling effect that disincentivizes whistleblowers and informants from coming forward with critical information.¹¹ In turn, Americans may be prevented from learning information of a compelling public interest. In order to ensure that the government does not infringe on the First Amendment rights of journalists, many jurisdictions have adopted shield laws. Shield laws are designed to protect a reporter’s privilege to refuse to disclose confidential sources to the government. At times, journalists rely on confidential sources to gather information vital to holding public and private institutions accountable. Any law that protects a reporter’s privilege to refuse compulsory testimony or the disclosure of confidential information in court is colloquially referred to as a “shield law.”

STATE SHIELD LAWS

While 32 states and D.C. have statutory shield laws and a total of 49 states have either statutory or common law reporter’s privilege, there is no federal shield law.¹² State shield laws serve the common purpose of protecting reporters from revealing sources and confidential information, but states vary in the degree of privilege afforded. For example, some states provide either absolute or qualified privilege depending on whether it is a civil or criminal proceeding.¹³ Additionally, state shield laws can also limit a reporter’s privilege based on the definition of a journalist, whether the journalist is a party to the proceeding, and whether the confidential material is published or unpublished.¹⁴

Many states enacted shield laws in response to the 1972 *Branzburg v. Hayes* Supreme Court case, which found that requiring a reporter to appear before a grand jury to testify about his confidential sources did not violate the First Amendment. In that case, the government required a reporter named Paul Branzburg to testify about unnamed individuals who he had reported were making illegal drugs.¹⁵ The decision called on Congress to act, saying, “Congress has freedom to determine whether a statutory newsman’s privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary.”¹⁶

instructing the Department of Justice to scrutinize parents protesting at local school board meetings. Now his department may have committed another civil-liberties abuse with its raid on Project Veritas leader James O’Keefe.”)

⁹*Id.*

¹⁰*Id.*

¹¹See, e.g., Josh Gerstein, *Leakers on the defensive*, POLITICO (Jan. 13, 2015).

¹²Alan Wehbe, *The Free Press and National Security: Renewing the Case for a Federal Shield Law*, 16 FIRST AMEND. L. REV. 512 (2018).

¹³LUCY DALGISH AND GREGG P. LESLIE, *THE FIRST AMENDMENT HANDBOOK: 7TH EDITION* 23 (2011).

¹⁴*Statutory and common law protections; state shield laws, testimonial privileges, and the Privacy Protection Act*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/electronic-communications-surveillance/legal-and-regulatory-protections-journalists/b-statutory-and-> (last visited July 13, 2018).

¹⁵*Branzburg v. Hayes*, 408 U.S. 665 (1972).

¹⁶*Id.* at 706.

ATTEMPTS AT A FEDERAL SHIELD LAW

In response to public and congressional outrage over the compelled disclosure of journalists' records, the Department of Justice has altered its policies governing the use of certain investigatory tactics in cases involving the press. Most recently updated in July 2021, the Department committed to:

no longer us[ing] compulsory legal process for the purpose of obtaining information from or records of members of the news media acting within the scope of newsgathering activities. . . . This new prohibition applies to compulsory legal process issued to reporters directly, to their publishers or employers, and to third-party service providers of any of the foregoing. It extends to the full range of compulsory process covered by the current regulations, specifically, subpoenas, warrants, court orders issued pursuant to 18 U.S.C. § 2703(d) and § 3123, and civil investigative demands. Further, it applies regardless of whether the compulsory legal process seeks testimony, physical documents, telephone toll records, metadata, or digital content.¹⁷

The policy provides exceptions for investigations into reporters who are engaged in criminal activity outside the scope of their journalistic activity, such as insider trading.¹⁸ It also does not apply to a journalist who has used criminal methods, such as breaking and entering or hacking, to obtain government information.¹⁹ Regarding classified information, the new policy states:

The prohibition does apply when a member of the news media has, in the course of newsgathering, only possessed or published government information, including classified information. This does not, however, affect the Department's traditional ability to use compulsory legal process to obtain information from or records of, for example, a government employee (rather than a member of the news media) who has unlawfully disclosed government information.²⁰

Despite these changes to Justice Department policy, legislation to establish a federal shield law has been and continues to be introduced in various sessions of Congress. In the 109th Congress in 2005, then-Rep. Mike Pence (R-IN) introduced the Free Flow of Information Act in response to *New York Times* reporter Judith Miller being jailed for refusing to name the confidential source who revealed Valerie Plame's covert identity.²¹ In 2007, the legislation overwhelmingly passed the House, but failed in the Senate due in

¹⁷Memorandum for the Deputy Attorney General, the Associate Attorney General, Heads of Department Components, United States Attorneys, and Federal Prosecutors, from U.S. Attorney General Merrick Garland, *Use of Compulsory Process to Obtain Information From, or Records of, Members of the News Media*, U.S. DEP'T OF JUSTICE (July 19, 2021), <https://www.justice.gov/ag/page/file/1413001/download>.

¹⁸*Id.*

¹⁹*Id.*

²⁰*Id.*

²¹Free Flow of Information Act, H.R. 581, 109th Cong. (2005); Bree Nordenson, *The Shield Bearer: How a Conservative Congressman from Indiana Became Journalism's Best Ally in the Fight to Protect Anonymous Sources*, COLUMBIA JOURNALISM REV. (Jun. 2007); See also, *Reporter Jailed After Refusing to Name Source*, N.Y. TIMES (Jul. 7, 2005).

part to opposition from the Bush Administration that the bill would “jeopardize national security” by creating “roadblocks” that would “delay the collection of critical information and ensure that criminals have opportunities to avoid detection.”²²

In the 113th Congress, then-Rep. Ted Poe (R–TX) introduced similar legislation in the aftermath of the revelation that the Obama Administration had secretly seized phone records from the *Associated Press*.²³ The Senate companion, S. 987, was introduced by Senator Chuck Schumer (D–NY) and reported favorably out of the Senate Judiciary Committee. However, no further action was taken on either bill in the 113th Congress. Critics argued the bill’s definition of “journalist” was too narrow and that the bill did not provide strong enough protections for journalists.²⁴

In the 115th Congress, Rep. Jamie Raskin (D–MD) introduced H.R. 4382, the Free Flow of Information Act, with Rep. Jim Jordan (R–OH). Nearly identical to the iteration from the 109th Congress, the legislation conditioned the federally compelled disclosure of information by members of the news media. In July 2018, Rep. Jordan, then-Chairman of the Committee on Oversight and Government Reform’s Subcommittee on Healthcare, Benefits, and Administrative Rules, held a hearing entitled, “Shielding Sources: Safeguarding the Public’s Right to Know,” at which the investigative correspondent Sharyl Attkisson testified about the challenges that reporters face in maintaining the confidentiality of their sources.²⁵

In the 117th Congress, Rep. Raskin introduced H.R. 4330, the Protect Reporters from Exploitative State Spying Act or PRESS Act.²⁶ On April 5, 2022, the Judiciary Committee considered the bill during a business meeting and reported it favorably to the House floor by voice vote. On September 19, 2022, the PRESS Act passed the House under suspension of the rules by voice vote. However, the Senate did not take up the PRESS Act before the end of the Congress. The current version of the PRESS Act, sponsored by Rep. Kiley (R–CA), is identical to the version introduced in the 117th Congress.

The PRESS Act prohibits the federal government from compelling a journalist to disclose protected information except in certain limited circumstances, such as in cases involving terrorism or to prevent a threat of imminent violence or significant bodily harm. The bill similarly prohibits the federal government from seizing a journalist’s records from a third-party service provider except in similar circumstances. In the event that these exceptions apply, the government’s demands must be narrowly tailored and not overbroad or unreasonable.

²² Scott Wong, *Key Conservative Presses for Shield Law After Seizure of NYT Reporter’s Records*, THE HILL (Jun. 15, 2018); See also, Alan Wehbe, *The Free Press and National Security: Renewing the Case for a Federal Shield Law*, 16 FIRST AMEND. L. REV. 512 (2018); See also, *Administration Launches Web Site Opposing Journalist Media Shield*, FOX NEWS (Apr. 3, 2008).

²³ Free Flow of Information Act of 2013, S. 987, 113th Cong. (2013); Reuters Staff, *U.S. Senate Judiciary Committee passes media shield law*, REUTERS (Sept. 12, 2013).

²⁴ Reuters Staff, *U.S. Senate Judiciary Committee passes media shield law*, Reuters (Sept. 12, 2013); See also, Editorial Board, *A shield law is necessary to protect U.S. journalists*, THE WASH. POST (Sept. 22, 2013).

²⁵ *Shielding Sources: Safeguarding the Public’s Right to Know: Hearing Before the H. Comm. on Oversight & Gov’t Reform*, 115th Cong. (2018) (statement of Sharyl Attkisson).

²⁶ H.R. 4330, 117th Cong. (2021).

Hearings

For the purposes of clause 3(c)(6)(A) of House rule XIII, the Committee states that no hearings were held to assist in the formulation of H.R. 4250.

Committee Consideration

On July 19, 2023, the Committee met in open session and ordered the bill, H.R. 4250, favorably reported by a roll call vote of 23 to 0, a quorum being present.

Committee Votes

In compliance with clause 3(b) of House rule XIII, the following roll call votes occurred during the Committee's consideration of H.R. 4250:

1. Vote on favorably reporting H.R. 4250—passed 23 ayes to 0 nays.

COMMITTEE ON THE JUDICIARY

118th CONGRESS

25-19

ROLL CALL

Date:

7/19/23

Vote on: Final passage of H.R. 4250

Roll Call #:

1

REPUBLICANS	AYE	NO	PRESENT	DEMOCRATS	AYE	NO	PRESENT
MR. JORDAN (OH) <i>Chairman</i>	✓			MR. NADLER (NY) <i>Ranking Member</i>	✓		
MR. ISSA (CA)	✓			MS. LOFGREN (CA)	✓		
MR. BUCK (CO)				MS. JACKSON LEE (TX)			
MR. GAETZ (FL)				MR. COHEN (TN)			
MR. JOHNSON (LA)	✓			MR. JOHNSON (GA)			
MR. BIGGS (AZ)	✓			MR. SCHIFF (CA)	✓		
MR. McCLINTOCK (CA)				MR. SWALWELL (CA)			
MR. TIFFANY (WI)	✓			MR. LIEU (CA)			
MR. MASSIE (KY)				MS. JAYAPAL (WA)	✓		
MR. ROY (TX)				MR. CORREA (CA)	✓		
MR. BISHOP (NC)	✓			MS. SCANLON (PA)	✓		
MS. SPARTZ (IN)				MR. NEGUSE (CO)			
MR. FITZGERALD (WI)				MS. McBATH (GA)			
MR. BENTZ (OR)				MS. DEAN (PA)	✓		
MR. CLINE (VA)	✓			MS. ESCOBAR (TX)	✓		
MR. GOODEN (TX)				MS. ROSS (NC)	✓		
MR. VAN DREW (NJ)				MS. BUSH (MO)			
MR. NEHLS (TX)				MR. IVEY (MD)	✓		
MR. MOORE (AL)	✓			MS. BALINT (VT)	✓		
MR. KILEY (CA)	✓						
MS. HAGEMAN (WY)	✓						
MR. MORAN (TX)	✓						
MS. LEE (FL)	✓						
MR. HUNT (TX)							
MR. FRY (SC)							

Roll Call Totals:

Ayes: 23

Nays: 0

Present:

Passed: ☒Failed: ☐

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 rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives does not apply where a cost estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the *Congressional Budget Act of 1974* has been timely submitted prior to filing of the report and is included in the report. Such a cost estimate is included in this report.

Congressional Budget Office Cost Estimate

With respect to the requirement of clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the *Congressional Budget Act of 1974*, the Committee has received the enclosed cost estimate for H.R. 4250 from the Director of the Congressional Budget Office:

H.R. 4250, the PRESS Act			
As ordered reported by the House Committee on the Judiciary on July 19, 2023			
By Fiscal Year, Millions of Dollars	2023	2023-2028	2023-2033
Direct Spending (Outlays)	0	0	0
Revenues	0	0	0
Increase or Decrease (-) in the Deficit	0	0	0
Spending Subject to Appropriation (Outlays)	0	*	not estimated
Increases <i>net direct spending</i> in any of the four consecutive 10-year periods beginning in 2034?	No	Statutory pay-as-you-go procedures apply?	No
		Mandate Effects	
Increases <i>on-budget deficits</i> in any of the four consecutive 10-year periods beginning in 2034?	No	Contains intergovernmental mandate?	No
		Contains private-sector mandate?	No

H.R. 4250 would exempt journalists and third-party service providers, such as telecommunications carriers and Internet service providers, from being compelled to identify a source or disclose other information that was gathered or created as part of newsgathering activities unless such information is necessary to prevent an act of terrorism or a threat of imminent violence. Federal courts would make that determination based on the preponderance of the evidence after the journalist or service provider has had notice and an opportunity to respond.

For matters related to federal cases, the Department of Justice (DOJ) typically files subpoena requests that seek information from journalists. Under existing regulations, federal prosecutors may request a subpoena of a journalist or a third-party service provider only in limited circumstances after an internal review. According to DOJ, only a small number of subpoenas seeking information from journalists are approved each year.

Based on information from DOJ, CBO expects that H.R. 4250 would apply to more people than the existing regulations. However, CBO estimates that the increase in the number of subpoenas subject to the bill's requirements would be small. In addition, CBO expects that the bill's preponderance of evidence standard would increase the amount of work required by federal prosecutors to obtain those subpoenas. In total, CBO estimates that implementing H.R. 4250 would cost less than \$500,000 over the 2024–2028 period. Such spending would be subject to the availability of appropriated funds.

The CBO staff contact for this estimate is Jeremy Crimm. The estimate was reviewed by H. Samuel Papenfuss, Deputy Director of Budget Analysis.

PHILLIP L. SWAGEL,
Director, Congressional Budget Office.

Committee Estimate of Budgetary Effects

With respect to the requirements of clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, 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*.

Duplication of Federal Programs

Pursuant to clause 3(c)(5) of House rule XIII, no provision of H.R. 4250 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. 4250 will prohibit the federal government from compelling journalists and providers of telecommunications services to provide information identifying a source or any other record obtained or created by journalists in the course of their work.

Advisory on Earmarks

In accordance with clause 9 of House rule XXI, H.R. 4250 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clauses 9(d), 9(e), or 9(f) of House Rule XXI.

Federal Mandates Statement

The Committee adopts as its own the estimate of federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the *Unfunded Mandates Reform Act*.

Advisory Committee Statement

No advisory committees within the meaning of section 5(b) of the *Federal Advisory Committee Act* were created by this legislation.

Applicability to Legislative Branch

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act (Pub. L. 104–1).

Section-by-Section Analysis

Section. 1. Short Title. The “Protect Reporters from Exploitative State Spying Act” or the “PRESS Act.”

Section. 2. Definitions. This section defines “covered journalist,” “covered service provider,” “document,” “federal entity,” “journalism,” “personal account of a covered journalist,” “personal technology device of a covered journalist,” and “protected information,” and “specified offense against a minor.”

Section. 3. Limits on Compelled Disclosure from Covered Journalists. This section prohibits the federal government from compelling a journalist to disclose protected information, unless a court determines by a preponderance of the evidence that: (1) disclosure is necessary to prevent, or identify a perpetrator of, an act of terrorism; or (2) disclosure is necessary to prevent a threat of imminent violence, significant bodily harm, death, or specified offenses against a minor, such as kidnapping.

Section. 4. Limits on Compelled Disclosure from Covered Service Providers. This section prohibits the federal government from compelling service providers—such as phone and internet companies—from providing any information relating to a journalist, unless a court determines by a preponderance of the evidence that there is a reasonable threat of imminent violence if the information is not provided. The federal government would be required to notify the court that the information being sought belongs to a journalist and the court would be required to provide the journalist notice of the subpoena and an opportunity to be heard, unless the court determines there is clear and convincing evidence that such notice would provide 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.

Section. 5. Limitation on Content of Information. This section requires that the content of any compelled information is not to be overbroad, unreasonable, or oppressive, and must be narrowly tailored in subject matter and duration.

Section. 6. Rule of Construction. This section prohibits the Act from being construed to: (1) apply to civil defamation, slander, or libel claims; or (2) prevent the federal government from investigating a journalist or organization that is suspected of committing a crime, witness to a crime unrelated to journalism, suspected of being an agent of a foreign power, a specifically designated terrorist, and other such activities.