

Proposed Federal Shield Law Remains Stalled in

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The U.S. Supreme Court case of *Branzburg v. Hayes* offers reporters limited constitutional protection from subpoenas compelling the disclosure of confidential sources or other source material. The limitations of *Branzburg* and the lack of a federal shield law to complement state statutes first came into public consciousness in 2004 with the well-publicized Valerie Plame case. The effort to compel testimony from various Washington reporters about their contacts with White House officials was just one in what some perceived as a marked increase in the number of subpoenas served on journalists.

In response, a federal shield law—called the Free Flow of Information Act—was introduced in Congress in 2005. That act, like many state shield statutes, provides a qualified privilege for reporters that can only be overcome if the federal entity seeking disclosure can show that (1) there is no other reasonable way to get the sought-after information; (2) the information is “essential” to the case; (3) that nondisclosure of the information would be contrary to the public interest, taking into account both the public interest in compelling disclosure and the public interest in gathering news and maintaining the free flow of information; and (4) that:

- (A) disclosure of the identity of such a source is necessary to prevent imminent and actual harm to national security with the objective to prevent such harm;
- (B) disclosure of the identity of such a source is necessary to prevent imminent death or significant bodily harm with the objective to prevent such death or harm, respectively; or
- (C) disclosure of the identity of such a source is necessary to identify a person who has disclosed:
 - (i) a trade secret of significant value in violation of a State or Federal law;
 - (ii) individually identifiable health information . . . in violation of Federal law; or
 - (iii) nonpublic personal information . . . of any consumer in violation of Federal law.

The act also requires that the compelled disclosure be narrowly tailored and as limited as possible.

The Free Flow of Information Act passed the House in October 2007 but a slightly different version of has been stalled in the Senate ever since. Despite overwhelming support in the House and the Senate Judiciary Committee, it is unclear when, if ever, the Senate will move forward on the bill. It should also be noted that since the increase in federal subpoenas in 2003 and 2004, the

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number issued in 2005 and 2006 has decreased significantly. In 2006, for example, only three federal subpoenas were issued to reporters, as compared to nineteen in 2004.