

Testimony of Nadine Farid Johnson
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Before the House Committee on the Judiciary
Subcommittee on the Constitution and Limited Government

Hearing on "Fighting for a Free Press: Protecting Journalists and their Sources"

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Thank you, Chairman Roy, Ranking Member Scanlon, and members of the Subcommittee and Committee for convening today's hearing. My name is Nadine Farid Johnson, and I serve as the Policy Director for the Knight First Amendment Institute at Columbia University. It is an honor and a privilege to present this testimony.

The Knight First Amendment Institute's mission is to defend the freedoms of speech and the press in the digital age. Our work is concentrated on the intersection of First Amendment freedoms and new technology, and dedicated to protecting and promoting a system of free expression that serves contemporary democracies.

Our press freedom projects, like all our work, focus on fortifying the infrastructure of First Amendment law and values to meet twenty-first century pressures. For journalists and media organizations, those pressures are formidable: they stem from surveillance tools in both government and private hands that create new vulnerabilities for reporters and reporting; powerful government and private entities that are fiercely resistant to public oversight and accountability; and the capacity of machines to generate and disseminate news, and news-like, creations.

We have several key undertakings aimed at addressing these critical issues. Our lawsuit against the spyware manufacturer NSO Group, on behalf of over a dozen members of the Salvadoran newsroom *El Faro*, asks the court to compel NSO Group to reveal the state actor behind the surveillance attacks on our clients—one of whom is a U.S. citizen—in order to deter other regimes from using spyware to intimidate other journalists.

We are also supporting journalists and researchers who use digital tools to study the tech platforms and advocating against unwarranted searches of journalists' laptops and cell phones at U.S. borders. Via our major research project, "The Future of the Press: Democracy, Law, and the News in Changing Times," we are identifying new

ways that law and policy can define and protect core press functions in our tech-driven democracy.

We are working to strengthen journalists' constitutional right of access to the courts as well as their statutory right of access to information about government. At the local level, we filed a lawsuit on behalf of three Texas newspapers, challenging a Texas county's policy of holding all bail-setting proceedings behind closed doors. At the national level, we led landmark litigation that has unlocked a library of previously secret legal memos issued by the Justice Department's Office of Legal Counsel (OLC). We are fighting excessive government secrecy and working to ease the need for news organizations to pursue case-by-case litigation to force disclosure of OLC memos. And we are protecting whistleblower sources, journalists, and news organizations by confronting the attempts to prosecute whistleblowers, journalists, and publishers under the Espionage Act.

Through litigation, policy efforts, research, and public education, the Institute is a leading voice for the First Amendment rights of journalists and news organizations to publish vital information in the public interest. Our aim is to strengthen constitutional and statutory protections that will minimize threats and ensure that journalists and news organizations can carry out their vital work.

No single piece of legislation is as strongly correlated with these efforts as the bipartisan "Protect Reporters from Exploitative State Spying," or PRESS Act, introduced in this Congress by Representative Kiley, of this Subcommittee, and co-led by Representative Raskin.

The need for a federal press shield law

Modern newsgathering requires that reporters be able to give assurances of confidentiality to their sources. Testimonial protections for journalists ensure the flow of information from source to journalist, allowing reporters to honor those assurances. Such protections are essential to core First Amendment values. Yet Supreme Court jurisprudence on the protection of journalists' source materials is ambiguous. In its seminal case on the topic, *Branzburg v. Hayes*, 408 U.S. 665 (1972), the Court declined to recognize a First Amendment privilege that would allow newsgatherers to refuse to answer grand jury questions about their sources' criminal conduct. The majority did acknowledge that "news gathering is not without its First Amendment protections," but did not delineate what those protections might be.

The murkiness of the *Branzburg* decision has led to confusion about its holding and inconsistency in its application. As Professor Christina Koningisor has noted, aside from the foundational point that the government "cannot compel confidential information in bad faith," judges and scholars "have diverged on virtually every other" aspect of *Branzburg*'s meaning. Illustrating this is the patchwork of federal circuit court tests that has emerged in the 52 years since the Court's decision. The contours of this privilege vary widely. Courts differ on whether the privilege applies only when the reporter has expressly promised the source confidentiality. Courts also disagree about the contexts in which the privilege applies, with some

distinguishing between criminal and civil cases. The differences in approach result in unpredictability and inconsistency, and ultimately compromise the ability of journalists to do the work we need them to do.

Without strong First Amendment protections, journalists are less likely to be able to engage confidential sources, as fewer will come forward. When the flow of information stops at its source, that means the American public is less informed. According to the Reporters Committee for Freedom of the Press, 49 states and the District of Columbia have enacted shield laws or have court-recognized reporters' privileges. Yet the precarious landscape at the federal level remains, and given the longstanding uncertainty surrounding the proper interpretation of the Supreme Court's 1972 decision in *Branzburg*, Congressional action is urgently needed.

A federal press shield law would ensure that core First Amendment protections are enjoyed by journalists, protect confidential sources that enable the press to do its job, and facilitate the free flow of information to the American public in furtherance of the people's right to know about their government. And as Senators Graham and Schumer noted in a *Dear Colleague* letter urging support for their federal media shield law introduced in 2013, over a decade ago, the U.S. needs "unambiguous and fair rules of the road," and a federal press shield bill "would provide clear and meaningful protection . . . for journalists against improper intrusion into the free press."

For these reasons, the Knight Institute fully supports the bipartisan PRESS Act, and we thank Representatives Kiley and Raskin for their leadership on the bill. As we have noted in our public statements about the bill, the American public relies on a free press to participate in democracy and hold powerful actors to account. Law enforcement actions requiring the disclosure of source materials can impair investigative newsgathering and reporting. We believe the bill is critical to a free press, protecting journalists from state-sanctioned surveillance and reaffirming their First Amendment rights.

Defining journalists and journalism in the digital age

Passing the PRESS Act is also important because of the changing nature of what it means to be a journalist today. Much turns on how the government defines a "journalist" or a "member of the news media," and more broadly, how it scopes the act of "journalism." There may be no question that reporters for *The Wall Street Journal* and *National Public Radio*, for example, are "members of the news media." Yet we know that in the digital age, a significant amount of important reporting is done by journalists who do not fit this traditional mold. Whether writing for *The Washington Post* or offering a subscription on *Substack*, journalists should be afforded clear, consistent, predictable protections via a set of policies that account for a range of legitimate and valuable journalistic activities. Similarly, the conventional wisdom as to what constitutes newsgathering—or even the practice of journalism itself—has expanded and adapted with changes in how news is investigated, reported, and consumed. Having clarity on these issues is critical to preventing misguided attempts by the government to compel journalists and media

outlets to reveal source information in contravention of their First Amendment rights.

One illustration of the need for codification in this area is in the Justice Department's policy concerning its use of compulsory legal process—including subpoenas, warrants, and court orders—to obtain journalists' records. In 2022, responding to a July 2021 directive by Attorney General Garland, the Justice Department revised its relevant regulations, limiting the scope of investigatory and prosecutorial use of compulsory process. Though this was a welcome change in policy to better protect journalists and their sources, it was a change that was instituted at the discretion of the Justice Department, and it may just as easily be altered by a future administration for the worse. Moreover, as strong as the policy is, it still contains a notable gap. Specifically, the regulations reference "members of the news media," but do not define that term. A document obtained through a lawsuit filed by the Knight Institute and the Freedom of the Press Foundation showed that the Justice Department's internal criteria give the agency substantial latitude when making a determination as to who would be considered a "member of the news media," leaving open the possibility that, despite facially better protections in the new regulations, some journalists could be denied protection.

Clarifying who qualifies for protection via a federal shield bill would ensure durability across administrations, leading to less uncertainty for journalists and media outlets across the country. The PRESS Act addresses this issue via definitions that appropriately account for the broad landscape of journalism today. Its definition of "covered journalist" for purposes of the act is "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," and it defines "journalism" as "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." These definitions will better protect an appropriately wide swath of reporters and reporting activity.

Another commendable provision in the PRESS Act protects journalists' data. The PRESS Act limits compulsory disclosure of a covered journalist's "record[s], information, or other communications stored by a covered provider" on the journalist's behalf, meant to ensure that information held by third party cellular phone and internet providers is not secretly seized by the government. The act also provides the journalist an opportunity to be heard in court in the event such information is sought from the third-party providers. These provisions are critical to protecting journalists' rights under the First Amendment.

Balancing concurrent interests with journalists' First Amendment protections

There are of course situations in which competing interests will be at play in the determination of whether compelling the disclosure of information gained in the course of an investigation or other journalistic act is warranted. These include considerations of national security, public safety, and effective law enforcement.

The PRESS Act appropriately addresses these concerns with a series of exceptions.

Conclusion

With the PRESS Act, the unambiguous, fair rules and meaningful protection for journalists called for by Senators Graham and Schumer in promoting their own media shield bill are in sight. Passage of this federal press shield bill into law would provide critical support to the free press, benefiting all Americans.

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Thank you, again, for the opportunity to testify today.