

AMENDED IN ASSEMBLY JULY 1, 2009

CALIFORNIA LEGISLATURE—2009—10 REGULAR SESSION

Assembly Joint Resolution

No. 16

Introduced by Assembly Member Evans
(Principal coauthor: Senator Leno)

April 30, 2009

Assembly Joint Resolution No. 16—Relative to journalism shield laws.

LEGISLATIVE COUNSEL'S DIGEST

AJR 16, as amended, Evans. Journalism shield laws.

This measure would urge the Congress and President of the United States to work together to enact a shield law for America's journalists.

Fiscal committee: no.

1 WHEREAS, A free press is vital to the publication of important
2 news within our society so that our government is accountable to
3 its citizens; and
4 WHEREAS, A journalist's promise of confidentiality to a source
5 of information is often the only way the public can learn about
6 waste, fraud, and abuse in government and the private sector, and
7 the forced disclosure of confidential sources and information will
8 cause individuals to refuse to talk to journalists, resulting in a
9 chilling effect on the free flow of information and the public's
10 right to know; and
11 WHEREAS, The most famous confidential source in United
12 States history, W. Mark Felt, also known as Deep Throat,
13 voluntarily revealed his identity as a resident of Santa Rosa 33

years after the Watergate scandal revealed corruption in the highest levels of the Nixon White House; and

WHEREAS, Shield laws promote the free flow of information to the public and prevent government from making journalists its investigative agents because they prohibit courts from holding journalists in contempt for refusing to disclose unpublished news sources or information received from those sources; and

WHEREAS, California’s shield law was first enacted in 1935 and later incorporated as subdivision (b) of Section 2 of Article I of the California Constitution in 1980 to provide that a journalist may not be held in contempt for refusing to disclose a news source or unpublished information gathered for news purposes; and

WHEREAS, California’s shield law was broadened in 2000 to also provide that no testimony or other evidence given by a journalist under subpoena in a civil or criminal proceeding may be construed as a waiver of immunity rights provided by the California Constitution, that a journalist subpoenaed in any civil or criminal proceeding shall be given at least five days’ notice, except in exigent circumstances, and that a judge must set forth findings on the record stating why the testimony of a journalist is essential to guarantee the defendant’s constitutionally guaranteed right to a fair trial when presiding over a criminal trial wherein a journalist is asserting protection under the media shield law; and

WHEREAS, In *O’Grady v. Superior Court* (2006) 139 Cal.App.4th 1423, the application of California’s shield law was further broadened to include the gathering and collection of news by journalists publishing information through the Internet; and

WHEREAS, ~~Thirty-six~~ *Thirty-seven* states: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, *Texas*, Utah, and Washington, and the District of Columbia, have statutory shield laws giving journalists some form of privilege against compelled production of confidential or unpublished information; and

WHEREAS, ~~Thirteen~~ *Twelve* states: Idaho, Iowa, Kansas, Massachusetts, Mississippi, Missouri, New Hampshire, South Dakota, ~~Texas~~, Vermont, Virginia, West Virginia, and Wisconsin

1 have established varying confidentiality privileges for journalists
2 through their courts; and

3 WHEREAS, In 2009, legislation was introduced in ~~three~~ *two*
4 states, ~~Kansas, Massachusetts, and Texas~~ *Kansas and*
5 *Massachusetts*, to establish a statutory shield law and in two states,
6 Maine and New York, to expand their shield laws; and

7 WHEREAS, Two companion measures in the 111th Congress,
8 House Resolution 985 and Senate Bill 448, would establish a
9 federal shield law for journalists through the enactment of the Free
10 Flow of Information Act; and

11 WHEREAS, House Resolution 985 passed the House of
12 Representatives on March 31, 2009, by a voice vote, demonstrating
13 the broad bipartisan support for the bill, and Senate Bill 448 is
14 expected to be considered by the Senate Judiciary Committee soon;
15 and

16 WHEREAS, President Barack Obama cosponsored media shield
17 legislation when he was a Senator in the 110th Congress; and

18 WHEREAS, Attorney General Eric Holder, during his Senate
19 confirmation hearing in January 2009, expressed support for media
20 shield legislation; and

21 WHEREAS, The pending Free Flow of Information Act in the
22 111th Congress establishes that a federal entity may not compel a
23 journalist to divulge confidential sources unless a court determines
24 by a preponderance of the evidence that: (1) all reasonable
25 alternative sources of information have been exhausted, (2)
26 information is needed to prevent an act of terrorism or other
27 significant harm to national security, to prevent death or substantial
28 bodily harm, to investigate a leak of properly classified information
29 or private trade secret, health or financial information, and to
30 furnish eyewitness observations of a crime, and (3) taking into
31 account the public interest in, disclosure of a confidential source
32 and the public interest in gathering and disseminating news and
33 information; and

34 WHEREAS, The pending Free Flow of Information Act in the
35 111th Congress stipulates that the testimony or documents sought
36 by a federal entity from a journalist should be narrowly and
37 appropriately tailored in scope and time period; and

38 WHEREAS, A 2008 University of Arizona survey found that
39 there were 335 federal subpoenas in 2006 seeking information
40 obtained by a reporter following a promise of confidentiality and,

1 of these, 21 sought the names of confidential sources and 13 sought
2 other information obtained under a promise of confidentiality; and

3 WHEREAS, Over the last seven years, four federal courts of
4 appeals, the First Circuit, the Fifth Circuit, the Ninth Circuit, and
5 the Circuit for the District of Columbia, have affirmed contempt
6 citations issued to reporters who declined to reveal confidential
7 sources; and

8 WHEREAS, Federal courts are imposing prison sentences that
9 are increasingly severe on journalists for nondisclosure of
10 confidential sources, most recently demonstrated in 2008 by the
11 United States District Court for the District of Columbia in *Hatfill*
12 *v. Mukasey* (D.C. Cir. Mar. 7, 2008, No. 031793), in which the
13 court ordered fines of up to \$5,000 a day on a journalist and
14 expressly prohibited the journalist from seeking assistance from
15 her employer in paying the fines, even though the fine related to
16 activities occurring within the course and scope of her employment;
17 and

18 WHEREAS, In relation to *Miller v. United States* (2005) 125
19 S.Ct. 2977, and *Cooper v. United States* (2005) 125 S.Ct. 2977,
20 the Attorneys General of 34 states: Arizona, California, Colorado,
21 Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Iowa,
22 Kentucky, Louisiana, Maine, Maryland, Massachusetts,
23 Mississippi, Montana, Nebraska, New Mexico, North Carolina,
24 North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South
25 Carolina, South Dakota, Tennessee, Texas, Utah, Vermont,
26 Washington, West Virginia, and Wisconsin, and the District of
27 Columbia, stated in an amicus brief submitted to the United States
28 Supreme Court, “A federal policy that allows journalists to be
29 imprisoned for engaging in the same conduct that these State
30 privileges encourage and protect buck[s] that clear policy of
31 virtually all states, and undermines both the purpose of the shield
32 laws, and the policy determinations of state courts and legislatures
33 that adopted them”; and

34 WHEREAS, Confidentiality of certain communications has
35 long been protected in order to further important interests, both
36 public and private, including communications between doctor and
37 patient, lawyer and client, and priest and penitent; and

38 WHEREAS, A May 2005 poll conducted by the First
39 Amendment Center and American Journalism Review found that
40 69 percent of Americans agree with the statement: “Journalists

1 should be allowed to keep a news source confidential”; now,
2 therefore, be it

3 *Resolved by the Assembly and the Senate of the State of*
4 *California, jointly,* That the Legislature of the State of California
5 respectfully urges the Congress and President of the United States
6 to work together to enact a shield law for America’s journalists;
7 and be it further

8 *Resolved,* That the Chief Clerk of the Assembly transmit copies
9 of this resolution to the President and the Vice President of the
10 United States, to the Senate Majority Leader, to the Speaker of the
11 House of Representatives, and to each Senator and Representative
12 from California in the Congress of the United States.