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REPORTERS' PRIVILEGE LEGISLATION: ISSUES AND IMPLICATIONS

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

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REPORTERS' PRIVILEGE LEGISLATION: ISSUES AND IMPLICATIONS

WEDNESDAY, JULY 20, 2005

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, pursuant to notice, at 9:37 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Arlen Specter, Chairman of the Committee, presiding.

Present: Senators Specter, DeWine, Graham, Cornyn, Leahy, Kennedy, Biden, Feinstein, Feingold, Schumer, and Durbin.

OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Chairman SPECTER. Good morning, ladies and gentlemen. The Judiciary Committee will now proceed with our hearing on the journalist shield law in the context of legislation which has been introduced by Senator Lugar on the Senate side and Representative Pence on the House side, and Senator Dodd has another bill.

We regret the slight delay in starting these proceedings. Senator Leahy and I have been meticulous in beginning at 9:30 on the button, and we are 6 minutes late this morning because of the extraordinary circumstances where we had to work through some problems on the pending nomination of Judge Roberts. And this is a complicated day, as most days are in the Senate, but we are looking at a hearing which is, in my opinion, a very important hearing on what is the appropriate rule for limiting or protecting sources of journalists on grand jury investigations.

Our focus here will be on whether reporters should be granted a privilege to withhold information from the Federal courts, and it arises in the celebrated case on an alleged leak where two reporters have been held in contempt and one reporter has been jailed, as we all know. The scope of this hearing does not include the issue of the leak but the legislation which we are going to be considering.

The Supreme Court of the United States in a 1972 decision, *Branzburg* v. *Hayes*, made a determination that the press' First Amendment right to publish information does not include the right to keep information secret from a grand jury investigating a criminal matter and the common law did not exempt reporters from such a duty. That, of course, leaves it within the purview of the Congress to have a reporters' privilege if the Congress should decide to do so as a matter of public policy.

It is worth noting that some 31 States and the District of Columbia have enacted statutes granting reporters some kind of privilege.

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We are all well aware of the tremendous contribution of a free press in our society and so many lives in ferreting out wrongdoing, in exposing Government corruption, in exposing corruption in the private sector, and we are mindful of Jefferson's famous dictum that if he had to make a choice between a Government without newspapers or newspapers without Government, he would choose newspapers without Government.

So we have some very, very lofty values which are at stake here on the value of a free press and what the free press has contributed to this country contrasted with the rights of a defendant in a criminal case. And one circuit, the Sixth Circuit, has suggested that it would be a denial of constitutional rights to a criminal defendant if that defendant did not have access to information in a certain context. So these are weighty values indeed.

We have many witnesses today, so I am going to curtail my opening statement to less than the customary 5 minutes.

Chairman SPECTER. We have just been advised that Deputy Attorney General James Comey will not be with us. We have his statement and the Government's position, and we have been advised that the House is taking up the PATRIOT Act today, and there is a House conference on it, and he is the key witness, the key Government official to comment about that.

[The prepared statement of Mr. Comey appears as a submission for the record.]

Chairman SPECTER. I now yield to my distinguished colleague, the Ranking Member, Senator Leahy.

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Well, thank you, Mr. Chairman, and I thank you for holding this hearing. We have had a small number of cases that have gotten significant national attention, but the question of whether or not that is a form of privilege for journalists has vexed us since *Branzburg* v. *Hayes* that was decided by the Supreme Court in 1972. Since that time, 31 States and the District of Columbia have enacted statutes granting some form of privilege to journalists. We have tried from time to time to codify a reporters' privilege in Federal law, but those efforts have failed, in part because supporters of the concept found it difficult to agree on how to define the scope of what is meant to be a journalist. And now with bloggers participating fully in the 24-hour news cycle, we have very similar challenges today.

I have long been a champion of a vibrant and an independent press, even when at times they have skewered me. My interest comes honestly and early. I am the son of a Vermont printer who was a struggling publisher of a weekly newspaper in Waterbury, Vermont. In my years in the Senate, I have tried to fulfill the ideals of my father of fighting for a free press and a greater transparency in Government. I have long championed the Freedom of Information Act to shine a light on Government. Earlier this year, I introduced legislation with Senator Cornyn to improve implementation of that critical legislation. We are referred to as "the political odd couple" in this regard. I think not at all, this is something that

should unite both conservatives and liberals to have more sunshine on what our Government does.

Open Government goes hand in hand with freedom of the press. But I also know as a former prosecutor that our democracy is nothing without a healthy respect for the law. We have to weight the public interest in First Amendment press protection and the public interest in solving crime.

The hearing was not called to address the Valerie Plame leak case in particular, but it is impossible to imagine that the investigation is not going to be discussed today. We have heard several supporters of a privilege recognizing the fact that the Plame case is not particularly sympathetic to their cause because it involves an alleged national security leak from the highest level of Government. Then I think we should look at all the different areas where a privilege might come forth.

I want to commend the members that have done the hard work of drafting this legislation, but also the witnesses who come here with a broad variety of views on this.

I was concerned when we heard that Deputy Attorney General Comey had canceled his appearance. I wanted to ask him why the administration opposes these shield laws. I would like to know particularly why. Is it just in this instance, in the current issues before us? Or is it overall? And I think that we leave a big gap without that.

But, Mr. Chairman, I will follow your example. I will put my whole statement in the record. I would like to hear what these witnesses say.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Chairman SPECTER. Well, thank you very much, Senator Leahy.

Our first witness is Senator Richard Lugar. Elected in 1976, very distinguished record before coming to the United States Senate, as the Boy Mayor of Indianapolis, and even more distinguished record since coming to the Senate, where he now chairs the Foreign Relations Committee. He has introduced Senate bill 1419, which is a beginning point of our discussions.

I think it is worth noting just on an introductory basis because I do not intend to ask Senator Lugar any questions—I am not going to run that risk—that his bill and Representative Pence's bill is somewhat broader than the attorney-client privilege and the physician-patient privilege and goes beyond news gathering. But it is a very important piece of legislation which is pending and addresses a subject which is very, very timely.

Senator Lugar, thank you for being with us today, and we look forward to your testimony.

STATEMENT OF HON. RICHARD G. LUGAR, A UNITED STATES SENATOR FROM THE STATE OF INDIANA

Senator LUGAR. Well, thank you, Mr. Chairman, and I ask that my full statement be submitted for the record.

Chairman SPECTER. It will be made a part of the record, and I know it is not necessary to tell panel one about the 5-minute limitation. You men preside all the time, and you impose it rigorously.

Senator LUGAR. Mr. Chairman, Ranking Member Senator Leahy, Senator Cornyn, Senator Feinstein, I appreciate the privilege you have given to me and to my colleagues, Senator Dodd and Congressman Pence, to testify on the need for a Federal media shield law.

I believe that the free flow of information is an essential element of democracy. In order for the United States to foster the spread of freedom and democracy globally, it is incumbent that we first support an open and free press nationally here at home. The role of the media as a conduit between Government and the citizens its serves must not be devalued.

Unfortunately, the free flow of information to citizens of the United States is inhibited. Over two dozen reporters were served or threatened with jail sentences last year in at least four different Federal jurisdictions for refusing to reveal confidential sources. Judith Miller sits in jail today because she refused to release the name of her source or sources for a story she did not write. Matt Cooper, who will share his story today, was likewise threatened with imprisonment but is not in jail because of a release from his obligation to his confidential source. I fear the end result of such action is that many whistleblowers will refuse to come forward and reporters will be unable to provide our constituents with information they have a right to know.

In 1972, the America held in *Branzburg* v. *Hayes* that reporters did not have an absolute privilege as third-party witnesses to protect their sources from prosecutors.

Since *Branzburg*, every State and the District of Columbia, excluding Wyoming, has created a privilege for reporters not to reveal their confidential sources. My own State of Indiana provides qualified reporters an absolute protection from having to reveal any such information in court.

The Federal courts of appeals, however, have an incongruent view of this matter. Each circuit has addressed the question of the privilege in a different manner. Some circuits allow the privilege in one category of cases, while others, like the Seventh Circuit, have expressed skepticism about whether any privilege exists at all.

Congress should clarify the extraordinary differences of opinion in the Federal courts of appeals and the effect it has on undermining the general policy of protection already in place among the States. Likewise, the ambiguity between official Department of Justice rules and unofficial criteria used to secure media subpoenas is unacceptable. There is an urgent need for Congress to state clear and concise policy guidance.

Senator Dodd and I have introduced legislation in the Senate that provides the press the ability to obtain and protect confidential sources. It provides journalists with certain rights and abilities to seek sources and report appropriate information without fear of intimidation or imprisonment. This bill sets national standards based on Department of Justice guidelines for subpoenas issued to reporters by the Federal Government. Our legislation promotes greater transparency of Government, maintains the ability of the courts to operate effectively, and protects the whistleblowers that identify Government or corporate misdeeds and protects national security.

It is also important to note what this legislation does not do. The legislation does not permit rule-breaking, give reporters a license to break the law, or permit reporters to interfere with crime prevention efforts. Furthermore, the Free Flow of Information Act does not weaken national security. We have carefully constructed a three-part test that permits the revelation of a confidential source in any manner where disclosure would be necessary to prevent imminent and actual harm to the national security. The national security exception and continued strict standards relating to classified information will ensure that reporters are protected while maintaining an avenue for prosecution and disclosure when considering the defense of our country.

Recently, Reporters Without Borders reported that 107 journalists are currently in jail around the world, including 32 in China, 21 in Cuba, and 8 in Burma. This is not good company for the United States of America. Global public opinion is always on the lookout to advertise perceived American double standards.

I believe that passage of this bill would have positive diplomatic consequences. This legislation not only confirms America's constitutional commitment to press freedom, it also advances President Bush's American foreign policy initiatives to promote and to protect democracy.

When we support the development of free and independent press organizations worldwide, it is important to maintain these ideals at home.

I thank the Chairman, the Ranking Member, and this distinguished Committee for holding this timely hearing. I look forward to working with each of you to ensure that the free flow of information is unimpeded.

[The prepared statement of Senator Lugar appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Senator Lugar. We turn now to Senator Dodd.

Representative Pence, we pay a lot of attention to seniority around here.

[Laughter.]

Chairman SPECTER. He has been here longer, he has been on the Hill longer than you have. He was elected to the United States Senate in 1980, in a year that brought 18 freshmen Senators, and 50 percent of his class still remains; whereas, Senator Grassley, a member of this Committee, and I only have one-eighth of our class. So his 50 percent to our 12 percent is one of his many notable achievements.

Nice to have you with us, Senator Dodd, and we look forward to your testimony.

STATEMENT OF HON. CHRISTOPHER J. DODD, A UNITED STATES SENATOR FROM THE STATE OF CONNECTICUT

Senator DODD. Thank you. Thank you very much, Mr. Chairman and Senator Leahy and Senator Cornyn, Senator Feinstein as well.

Let me commend my colleague from Indiana. Senator Lugar has made an eloquent statement this morning in support of this legislation, and I am delighted to join him and join Congressman Pence

and Congressman Boucher, who are principal sponsors of our companion bill in the House of Representatives.

This is obviously an unusual occasion for several reasons to be here this morning. For one thing, this Committee's workload has gotten a bit heavier since about 9:00 p.m. last evening, and we appreciate that very much. And for another thing, it is not every day that public officials or elected officials get to examine the press. Usually it is the other way around. And I am sure my colleagues will agree that one of the great privileges of public life is regularly learning about one's shortcomings in the fine media organizations of our country. And while I say that with some dose of humor, there is a nugget of profound truth to it as well, Mr. Chairman.

As you pointed out—and I think it is worthy of repeating—Jefferson, of course, once said that if we were to choose between a free country and a free press, he would choose the latter. He understood that nothing was more important to a free people than the free flow of information.

An informed citizenry is the first requirement of a free and self-governing people. I think James Madison said it best of all, however, Mr. Chairman. He said, "Popular government without popular information or the means of acquiring it is but a prologue to a farce, a tragedy, or perhaps both."

Armed with knowledge, our people can govern themselves and hold accountable their leaders in public and in private life. Today, the principle of a well-informed citizenry as the cornerstone of self-government is at risk, in our view. This morning, as we speak, a journalist named Judith Miller sits in a prison cell. Another journalist, Matt Cooper, who sits behind me, whose testimony you are going to hear shortly, is with us and not in prison with Ms. Miller only by virtue of the particular circumstances of his case.

Some two dozen other journalists stand subpoenaed or prosecuted in our country at this hour. And what did they do to earn these legal burdens and sanctions? Nothing more, in my view, than doing their job. They received information from citizens based on a pledge to keep the identity of those citizens confidential, and they honored that pledge. And for doing their jobs, these men and women face litigation, prosecution, and in some cases incarceration.

We have introduced legislation together to protect the free flow of information in our society. This legislation is not about conferring special rights and privileges on members of the Fourth Estate. To the contrary, it is intended to protect the rights of all citizens to be informed and to inform, including by speaking with journalists in confidence.

The bill is hardly radical in concept. It is based on Justice Department guidelines and on statutes and/or rules that currently exist, Mr. Chairman, in 49 States and the District of Columbia. Those State statutes and rules would not be pre-empted. Instead, the bill would establish a uniform Federal standard for Federal cases involving journalists and their sources. Currently, because there is no such standard, there is confusion and incongruity among Federal courts. That makes it very, very difficult for a working journalist to know the rules of the road when interviewing witnesses and contemplating offers of confidentiality.

Our legislation would balance the legitimate and often compelling interests in law enforcement with the critical need in a free society to protect the free flow of information. It would achieve this balance by protecting the confidentiality of sources while at the same time allowing courts to compel journalists to produce information about wrongdoing if that information is essential to an investigation and could not be obtained from other sources. And revisions we have made to our bill would go further, allowing courts to compel the disclosure of sources in those cases where, and I quote, "necessary to prevent imminent and actual harm to national security."

Mr. Chairman and members of the Committee, the overriding principle we seek to establish with our legislation is rooted in our Constitution and in common sense. A free country cannot exist without a free press. Forcing journalists to reveal their sources must be a last, not a first, resort for prosecutors and civil litigants. Imagine for a moment what would happen if citizens with knowledge of wrongdoing would not or could not come forward and speak confidentially with members of the press. Serious journalism would virtually cease to exist in my view. Wrongdoing would not be uncovered. We would never have learned about the crimes known as Watergate or the massive fraud called Enron but for the willingness of sources to speak in confidence with reporters.

When journalists are hauled into court by prosecutors, when they are threatened with fines and imprisonment if they do not divulge the sources of their information, then we are entering a dangerous territory indeed for a democracy because that is when citizens will fear prosecution simply for stepping out of the shadows to expose wrongdoing. When that happens, the information our citizens need to govern will be degraded, making it more and more difficult to hold accountable those in power. And when the public's right to know is threatened, then all other liberties that we hold dear are threatened in my view.

We are under no illusions, Mr. Chairman, as to the difficulty of our task in advancing this legislation. The Justice Department raises several concerns about our bill, and we have addressed them, I think. We believe we have already addressed them with the revisions contained in Senate bill 1419. Most importantly, as I mentioned a moment ago, we qualify the protection of sources where necessary to prevent imminent harm to the national security.

You may hear the Department, nevertheless, claim, as it does in written testimony, that the legislation would pose a great threat to public safety. If that is so, then wouldn't we expect to see great threats to public safety in those States that have shield laws which are at least as protective as the shield law that we propose? Indiana, which my colleague Senator Lugar has already mentioned, has an absolute protection for reporters from having to reveal any information in court. Senator Lugar and Congressman Pence will correct me if I am wrong, I am sure, but I am unaware that Indiana is beset with any unusual lack of public safety relative to other States.

Moreover, if this legislation is harmful to law enforcement, as the Justice Department suggests, then why did 34 State Attorneys

General submit an amicus brief to the Supreme Court in the Miller and Cooper case, essentially arguing for a Federal shield law along the lines of what we have drafted?

You may also hear the Department tell you that there is no need for Federal legislation in the absence of a showing that sources are drying up and that journalists are unable to conduct investigative reporting. I would respectfully, Mr. Chairman, direct the Committee's attention and the Department of Justice to page 3 of the testimony of Mr. Pearlstine. In it he says, and I quote, "Valuable sources have insisted that they no longer trusted the magazine and that they would no longer cooperate on stories."

I would also direct the Committee and the Department to the June 30, 2005, edition of the Cleveland Plain Dealer, one of our nation's most respected newspapers. On that day, the paper announced that it was withholding publication of two stories, and I quote, "of profound importance to the public." The stories are based on leaked information, and the paper does not want to take the risk that its journalists will be prosecuted to reveal their sources.

Mr. Chairman and members of the Committee, I suggest that the standard for Federal legislation set by the Department of Justice itself has been met, and it is time to act, I think, to draft such legislation.

I thank you for your patience in listening to me.

Chairman SPECTER. Thank you very much, Senator Dodd.

We turn now to Representative Pence, who has introduced companion legislation in the House, House bill 581. Thank you for coming over today, Representative Pence, and the floor is yours.

STATEMENT OF HON. MIKE PENCE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF INDIANA

Representative PENCE. Thank you, Chairman. Thank you for holding this hearing, and my gratitude extends, of course, to the Ranking Member and to all the distinguished members of the Senate Committee on the Judiciary. It is very humbling for me to be here and have the opportunity to address this Committee, and particularly to do so at the side of Senator Chris Dodd, and my Hoosier hero and mentor, Senator Richard Lugar.

Enshrined in the First Amendment of the Constitution, we all know, are these words: "Congress shall make no law...abridging the freedom of speech, or of the press."

The freedom of speech and the press form the bedrock of our democracy by ensuring the free flow of information to the public.

Although Thomas Jefferson warned that, "Our liberty cannot be guarded but by the freedom of the press, nor that limited without danger of losing it," today this freedom is under attack.

As this city engages in a familiar clash along the fault lines of the politics of personal destruction, a much greater scandal languishes in a quiet prison cell in suburban Washington, D.C., in the sad image of an American journalist behind bars, whose only crime was standing up for the public's right to know.

And Judith Miller is not alone.

In the past year, nine journalists have been given or threatened with jail sentences for refusing to reveal confidential sources and

at least a dozen more have been questioned or on the receiving end of subpoenas.

Compelling reporters to testify, and in particular, compelling reporters to reveal the identity of confidential sources, intrudes on the news-gathering process and hurts the public.

Without the assurance of confidentiality, many whistleblowers will simply refuse to come forward, and reporters will be unable to provide the American public with the information they need to make decisions as an informed electorate.

But with all this focus on news gathering, it is important that we state clearly: Protecting a journalist's right to keep a news source confidential is not about protecting reporters; it is about protecting the public's right to know.

As a conservative who believes in limited Government, I believe that the only check on Government power in real time is a free and independent press. And it was in that spirit that introduced the Free Flow of Information Act in the House of Representatives, along with the bipartisan support and cooperation of my colleague, Representative Rick Boucher. I also would acknowledge my profound gratitude for the efforts in the Senate of my colleagues on a similar measure.

Our bill would simply set national standards for subpoenas issued to reporters by any entity of the Federal Government, and we truly believe that it strikes a proper balance between the public's interest in the free dissemination of information and the public's interest in law enforcement.

In 1973, the Department of Justice adopted its Policy with Regard to the Issuance of Subpoenas to Members of the News Media. That policy has been in continuous operation for more than 30 years and sets standards that have to be met by Federal officials before the issuing of a subpoena to a news media in a Federal criminal or civil case. Our bill, it is important to state, uses the standards of that policy as a template for a Federal shield law that would apply to all Federal judicial, executive, and administrative proceedings, except where confidential sources are involved.

In the case of confidential sources, the bill originally provided, as has been said, that a reporter could not be compelled to reveal a source. That language has been changed in legislation filed this Monday in the House and the Senate to allow for a qualified privilege only. Under our revised bill, a reporter cannot be compelling to reveal a source unless the disclosure of the identity of a source is necessary to prevent imminent or actual harm to national security.

Legitimate questions were raised, Mr. Chairman, about our original draft, and we dialogued consistently with the Department of Justice and other outside organizations, and we feel that the revised version of our legislation strikes a careful balance. And while the Department of Justice has commented rather thoroughly on our first bill, we look very much forward to their thoughtful analysis of our revised version of the Free Flow of Information Act.

There are other changes as well. My colleagues have pointed out that this legislation is already the law in 31 States, including Indiana. But I do want to acknowledge, as my colleague Senator Dodd said, that we recognize that it will not be easy for this Committee,

particularly in the wake of last night's events, to move this legislation.

Also, we find ourselves in the midst of an unfurling controversy. Nevertheless, it is my fervent hope and my prayer that this Committee and this Congress will see beyond our times and their controversies and seize the opportunity to develop clear national standards that will protect the news-gathering function and promote good Government.

The Liberty Bell is inscribed with these ancient words: "Proclaim liberty throughout all the land unto all the inhabitants thereof." That is our charge, and I believe now is the time for this Congress to proclaim liberty, to reaffirm our commitment to a free and independent press. Nothing less than the public's right to know is at stake.

[The prepared statement of Representative Pence appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Representative Pence.

Does anybody on the panel have questions?

[No response.]

Chairman SPECTER. Good. Thank you all very much. We appreciate your being here.

Chairman SPECTER. We will now call the panel with Mr. Matthew Cooper, White House correspondent for Time Magazine; Mr. Norman Pearlstine, Editor-in-Chief of Time; Mr. William Safire, New York Times Company, political columnist; Mr. Floyd Abrams, a leading expert on the First Amendment from Cahill, Gordon & Reindel; Mr. Lee Levine, Washington, D.C., firm of Levine, Sullivan, Koch & Schulz; and Professor Geoffrey Stone, Distinguished Professor of Law from the University of Chicago.

Welcome, gentlemen. We will begin with Mr. Matthew Cooper, who has served as White House correspondent for Time Magazine since June of 2003, a post which he previously held for U.S. News & World Report. He has written the "White House Watch" column for the New Republic, been a national correspondent for Newsweek. During the 1980s, he was editor of the Washington Monthly. He has written for publications including the New York Times, the Washington Post, and the Los Angeles Magazine.

Thank you for joining us here today, Mr. Cooper, to tell the Committee about your own personal experience in this very important matter. As I think all of you have been advised, all of the statements will be made fully a particular of the record, and we have limited the oral presentations to 5 minutes to give the maximum amount of time for questions and answers by the panel.

STATEMENT OF MATTHEW COOPER, WHITE HOUSE CORRESPONDENT, TIME MAGAZINE INC., WASHINGTON, D.C.

Mr. COOPER. Thank you, Mr. Chairman, Senator Feinstein, Senator Graham, and Senator DeWine. I am honored to be here today in such distinguished company, especially with my boss, Norman Pearlstine, the editor-in-chief of Time Incorporated. I agree with his eloquent argument for some kind of national shield law.

I do not intend, Mr. Chairman to discuss the ongoing investigation into the leak of a covert CIA agent or my role in it.

Chairman SPECTER. We appreciate that very much.

[Laughter.]

Mr. COOPER. I do, too.

What I do want to do is try to give the perspective of a regular working journalist of 19 years on what it is like to do one's job these days in the absence of a Federal shield law.

But let me say, Mr. Chairman, first that I come here with real humility, not just because I am the only ink-stained wretch on this august panel, but because what we in the media are asking for is quite formidable, an exemption from some of the duties of citizenship. We are asking for a privilege that is not afforded to farmers or manufacturers. To be sure, 49 States, through court rulings and statutes, have decided to give journalists, and thus the public, some form of legal protection, but it is still much to ask Congress to grant us a degree of Federal protection, and I think it behooves us in the media to do so humbly.

But ask we do, and with good reason, I think. I do not have strong feelings about which statute makes the most sense and how the privilege should best be defined. But I do want to talk about how the rules of the road are, to put it mildly, quite confusing for a working journalist such as myself in the absence of any clear Federal standard.

I might add this also applies to any public official, from the school board to the Senate, or from that matter from the grocer to the captain of industry who chooses to talk with the media using some degree of confidentiality.

Right now, if I pick up the phone and call a Senator or his or her staff or a civil servant and they say, "Don't quite me on this but" or "Don't identify me but," I cannot really know what I am getting myself into, assuming that what follows is important and controversial enough to rise to the level of litigation. Will it end up in State court where I have protections? Or in Federal court where I may have none? If it is a civil trial that stems from the conversation, I would seem to have more protection than if it leads to a subpoena before a criminal grand jury. The rules of the road as I try to do my job as a reporter are chaotic at best. In the case of my imprisoned colleague, Judith Miller of the New York Times, several courts held that she had no right to defy a subpoena before a grand jury, but still another Federal court upheld her right and the right of the New York Times to refuse to turn over phone records. So the Supreme Court has not chosen to clarify these rules, but you can.

I have confidence that the thorny question of "who is a journalist" can be reconciled through thoughtful debate and a look at decades of State experience where the press, after all, thrives and law enforcement is able to put criminals in jail every day. The proposed bipartisan statutes are a good starting place.

It is also worth remembering that this privilege is about the public's right to know. Without whistleblowers who feel that they can come forward to the reporters with a degree of confidence, we might never have known the extent of the Watergate scandal or Enron's deceptions or other events that needed to be exposed. So it is not about us journalists as some priestly class, but it is about the public and our democracy.

One might ask, Mr. Chairman, Why now? Reporters broke scandals without a national shield law, so why one now? I would offer this thought: In the 33 years since the *Branzburg* decision, the ambiguity in the law has not come at a great cost. There have been notable clashes between the press and prosecutors, and occasionally a journalist has found him- or herself in jail, generally just for a few hours, although tragically now for longer circumstances. I have some personal experience with this, of course, having almost gone to jail myself but for a last-minute waiver of one of my sources. But those cases generally have been so rare as to be truly aberrant. For the most part, there has been a civil peace between prosecutors who have avoided subpoenaing journalists, and the two camps have generally stayed out of each other's way. Recently, though, we have seen a run of Federal subpoenas of journalists, not only in my case but also in others, like the investigation into the anthrax killer and the case of Wen Ho Lee.

I do not want to get into whether those subpoenas are good policy or likely to be upheld through the appellate process, but I do think everyone—prosecutors and journalists alike—would benefit from knowing what the rules are.

In the meantime, it is hard to imagine another area of American life where the gap between the rights one is afforded in Harrisburg or Montpelier or Sacramento or Austin are so lavish compared to what one is provided under Federal law. Michael Kinsley, the editorial page editor of the Los Angeles Times, who has been a skeptic of a Federal privilege for journalists, has nonetheless noted the cost of confusion. "If journalists routinely promise anonymity and routinely are forced to break those promises, this will indeed create a general 'chilling effect' on leaks. But the real issue is whether the promises should have been made. Under a clear set of rules, the 'chilling effect' would be limited—not perfectly, but primarily—to leaks that ought to be chilled and to promises of anonymity that should not be made."

As someone who relies on confidential sources all the time, Mr. Chairman, I simply could not do my job reporting stories, big and small, without being able to speak to officials under varying degrees of anonymity. It is timely, Mr. Chairman, that Bob Woodward's account of his relationship with Mark Felt, the source known as Deep Throat, has come out this summer for it offers us a powerful reminder of the importance of anonymous sources. Prosecutors chose not to subpoena Woodward and Bernstein, but today I wouldn't be so sure they would show the same restraint. And so we need some clarity. And as a working journalist, I would like to know better what promises I can legally make and which ones I cannot. This would benefit me as a reporter, but, again, it would also benefit those who talk to reporters and the public's right to be informed.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Cooper appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Mr. Cooper.

We turn now to Mr. Norman Pearlstine, editor-in-chief of Time for a decade. He has had extensive experience in the field: executive editor of the Wall Street Journal, executive editor of Forbes

Magazine, a bachelor's degree from Haverford College, a law degree from the University of Pennsylvania, and that suggests, accurately I understand, some Philadelphia area roots.

Thank you for coming in, Mr. Pearlstine, and we look forward to your testimony.

STATEMENT OF NORMAL PEARLSTINE, EDITOR-IN-CHIEF, TIME INC., NEW YORK, NEW YORK

Mr. PEARLSTINE. Thank you very much, Mr. Chairman and members of the Committee. Since 1995, I have served as editor-in-chief of Time Inc., the largest publisher of general interest magazines in the world, including Time, Fortune, and Sports Illustrated, and almost 140 other titles. I am honored to have this opportunity to testify in support of the proposed Federal shield law to protect journalists from being compelled to testify about confidential sources.

This type of protection, which has been adopted in one form or another by 49 States and the District of Columbia, is commonly called a "reporter's privilege," but this is something of a misnomer. The laws are really intended to protect the public by ensuring the free flow of information about governmental activities and other matters of public concern. I believe there is an urgent need for such protection at the Federal level.

The absence of Federal legislation has created extraordinary chaos, limiting the public's access to important information that is so necessary in a democratic society. The Supreme Court's sharply divided decision 33 years ago in *Branzburg* v. *Hayes* has mystified courts, lawyers, and journalists alike. As a result, the Federal courts are in a state of utter disarray about whether a reporter's privilege protecting confidential sources exists. The conflicting legal standards throughout the Federal courts defeat the nearly unanimous policies of the States in this area. This uncertainty chills essential news gathering and reporting. It also leads to confusion by sources and reporters and the threat of jail and other harsh penalties for reporters who do not know what promises they can make to their sources.

I recently witnessed the problems firsthand. As the Committee is no doubt aware, for almost 2 years Time Inc. and its reporter Matthew Cooper fought against compelling disclosure of confidential sources in response to grand jury subpoenas in Special Counsel Patrick Fitzgerald's investigation of the Valerie Plame affair. The Federal district judge presiding over the matter called this battle a "perfect storm" in which important First Amendment rights clashed with the important interest in law enforcement. We fought all the way to the Supreme Court, urging it to overturn *Branzburg*, and we lost.

My decision to turn over confidential documents to the Special Counsel after we had pursued every possible legal remedy was the toughest decision of my career—and one I should never have had to make. The experience has only deepened my commitment to ensure protection for confidential sources and made clear to me how much we need Federal legislation.

It is Time Inc.'s editorial policy that articles in our publications should identify sources by name whenever possible. But sometimes we can obtain information only by promising confidentiality to a

source, because many persons with important information won't speak to the press unless they are assured anonymity. Information given in confidence is especially valuable when it contradicts or undermines public positions asserted by governments or powerful individuals or corporations. Without confidential sourcing, the public would never have learned the details of many situations vital to its interests.

To cite a few recent examples of stories of significant public interest that appeared in our magazines, I recently worked with colleagues at Time on stories about a suicide bomber in Iraq and the vulnerability of our Nation's commercial nuclear facilities, should they be subjected to terrorist attack. And I worked with writers and editors at Sports Illustrated on stories about the use of steroids in professional sports. None of these stories could have been published without reliance on confidential sources.

Following my decision to obey the courts by providing the Special Counsel with Time Inc.'s Plame file, I met last week with Time's Washington bureau and later that day with many of its New York writers and editors. Some of them showed me e-mails and letters from valuable sources who insisted that they no longer trusted the magazine. The chilling effect is obvious.

Federal law recognizes evidentiary privileges for communications between spouses, therapists and patients, attorneys and clients, and clergy and penitents. Although these privileges may lead to the loss of evidence, they are viewed as necessary to protect and foster communications deemed valuable to society as a whole. The same should be true for communications between reporters and confidential sources.

The Plame case is part of a disturbing trend. In the last 2 years, dozens of reporters have been subpoenaed in criminal and civil cases to reveal their confidential sources, many of whom face the prospect of imminent imprisonment. The use of such subpoenas in the Plame case represents a profound departure from the practice of Federal prosecutors when this case is compared to other landmark cases involving confidentiality over the past 30 years. Neither Archibald Cox, the Watergate special prosecutor, nor Judge John Sirica, for example, sought to force the Washington Post or its reporters to reveal the identity of Deep Throat, the prized confidential source.

The 34 States and the District of Columbia said it best in their amicus brief, urging the Supreme Court to grant review in the Plame case. The States declared in their brief that a Federal policy that allows journalists to be imprisoned for engaging in the same conduct that these State privileges encourage and protect bucks that clear policy of virtually all States and undermines both the purpose of the shield laws and the policy determinations of the State courts and legislatures that adopted them.

I strongly believe in the need for confidential sources, and we must protect our sources when we grant them confidentiality. But defying court orders, accepting imprisonment and fines, shouldn't be our only way of protecting sources or resisting coercion. Put simply, the issues at stake are crucial to our ability to report the news to the public. Without some Federal protection for confidential sources, all of this is in jeopardy. The time has come from enact-

ment of a shield law that will bring Federal law into line with the laws of the States and ensure the free and open flow of information to the public on the issues of the day.

Thank you very much.

[The prepared statement of Mr. Pearlstine appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Mr. Pearlstine.

We turn now to Mr. William Safire, for more than three decades a political columnist with the New York Times, a 1978 Pulitzer Prize winner. He joined President Nixon's Presidential campaign in 1968, actually before the President was elected, and later became a senior White House speech writer. He writes a Sunday column of the New York Times on language, and just on a personal note, I have been a fan of Bill Safire's for a long time, and I am sort of interested to hear how he does verbally, whether his syntax is as perfect as it is when he reduces it the written form.

[Laughter.]

Chairman SPECTER. I am especially interested in the Q&A where we can get extemporaneous, Mr. Safire.

Senator Biden. Mr. Chairman, 10 seconds. I have been looking forward to questioning Bill Safire under oath my whole life.

[Laughter.]

Chairman SPECTER. You other five gentlemen are excused.

STATEMENT OF WILLIAM SAFIRE, POLITICAL COLUMNIST, NEW YORK TIMES COMPANY, NEW YORK, NEW YORK

Mr. SAFIRE. I will watch my language.

Mr. Chairman, I am here to urge Congress to pass a law to stop the Government and the courts from their present, dangerous course of trying to deny the public its right to the free flow of news.

The press' freedom to publish the news without prior restraint is not in doubt. But now under attack is what comes before publication: the ability of journalists to gather the news. To do that work effectively, we must have inside sources willing to tell us what Government or corporate officials do not want the public to know. The key to opening up an inside source is to establish mutual trust. When we say we would go to jail to protect their anonymity, that is not just hyperbole. Over the years, trustworthy reporters have established that principle at great cost, just as a courageous woman is doing in prison today.

That is why 49 States and the District of Columbia have shield laws, or case law in State courts, to stop overzealous prosecutors from undermining that trust by forcing reporters to identify sources. By protecting the reporter who is protecting a source, the shield achieves its ultimate goal: to protect the people's access to what is really going on.

Have these State shield laws harmed law enforcement? On the contrary, they have led to the exposure of corruption. That is why the great majority of State Attorneys General recently joined a brief supporting the protection of the identity of reporters' sources. As a card-carrying right-wing libertarian federalist, I am proud that the States have led the way, and now is the moment for the Congress to profit from the experience of the chief law officers of so many States by extending the shield to Federal courts.

Would this mean that the journalists get special treatment? Before compelling a person to testify, the law recognizes the strong social value of the confidentiality of spouses, of lawyers, doctors, and clergy. In 1996, that was extended to psychotherapists. Members of those groups are not above the law because the law recognizes competing values. Judges must balance the citizen's obligation to give evidence with society's obligation to protect relationships built on common solemn confidences.

More than ever, journalists across the Nation are now in danger of being held in contempt. The reasonable protections to reporters' notes and confidences that have been in the Department of Justice guidelines to its prosecutors for three decades are inadequate to the stormy present. The legislation before you incorporates those balancing guidelines, applies them to the crucial issue of the identity of sources, and at last gives them the force of law, even to special prosecutors.

Let me add a personal note. As the Chairman suggested, I have always been a language maven. Thirty years ago, I asked Justice Potter Stewart to help me find the origin of the phrase "chilling effect." He checked around the Supreme Court, and Justice Brennan reported having written a 1965 decision striking down a State's intrusion on civil liberty because of its "chilling effect upon the exercise of First Amendment rights..."

Today we have two chilling effects taking place here in Washington, one general, one specific.

The general chill is on the network of useful contacts and the web of genuine friendships that develop over the years among many journalists and politicians. You run into each other at a ball game or at a dinner, shmooz a little on a bunch of topics, pick up a lead or toss out an idea, later act on it or pass it along to a colleague or forget it. That is how information flows in real life, and it is how the public gets the news beyond the handouts.

But now we see a reporter in prison for not revealing part of a conversation she may have had about a story she did not write. As a result, many of us feel a general chill in the air and will think twice about what we say in private to each other as well as outsiders. In the new world of threatened contempt, there are no innocent questions, and a grunt or a nod can get you in trouble.

And there is a more specific chilling effect taking place right now. It imposes a mental "prior restraint" on the gathering of news and the expression of opinion. I have always been able to write what I have learned and what I believe "without fear or favor," in the Times' phrase, freely taking on the high and mighty. But I cannot do that this morning.

I am seething inside because I cannot tell you what I really think of the unchecked abuse of prosecutorial discretion. I cannot blaze away at the escalating threats of a Federal judiciary that is urgently in need of balancing guidance by elected representatives of the people. For the first time I have to pull my punches.

The reason is I am afraid—I am afraid of retaliation against Federal prisoner 45570093, whose byline in the New York Times is Judith Miller. This Pulitzer Prize winning reporter, who earned the trust of the U.S. forces with whom she was embedded in Iraq, has accepted the painful consequences of daring to call public attention

to the unbalanced, unwise, ever-growing application of the contempt power.

I must not anger or upset those who control her incarceration and who repeatedly threaten to pile on with longer punishment as a criminal unless she betrays her principles as a reporter. Because any harsh criticism of them from me might well be taken out on her, I am constrained to speak gently, as if concerned about the treatment of a hostage. That duress, I submit, is an example of what Justice Brennan had in mind about a "chilling effect." I can testify that it works all too well, which is why I will now shut up and look to Congress to pass a law balancing our values and taking the chill out of the air.

Thank you.

[The prepared statement of Mr. Safire appears as a submission for the record.]

Chairman SPECTER. Thank you. Thank you very much, Mr. Safire.

Our next witness is Mr. Floyd Abrams, the firm Cahill, Gordon & Reindel, Visiting Professor of First Amendment Law at the Columbia Graduate School of Journalism, one of the most distinguished First Amendment lawyers in America, currently represents the New York Times reporter Judith Miller, was co-counsel for the Times in the Pentagon Papers case, and has represented so many media entities the list is virtually endless: ABC, NBC, CBS, CNN, Time, Business Week, The Nation, Reader's Digest. A graduate of Cornell University and the Yale Law School, one of the younger fellow from 1960.

Thank you for rearranging your schedule, Mr. Abrams to join us here today.

STATEMENT OF FLOYD ABRAMS, PARTNER, CAHILL, GORDON & REINDEL, LLP, NEW YORK, NEW YORK

Mr. ABRAMS. Thank you, Chairman Specter, and thank you for inviting me to be here today. It is a great honor for me to appear here once again. I am especially pleased to do so in the context of proposed legislation relating to a Federal shield law.

I would like to make clear at the start that I speak for myself today and not on behalf of any clients.

I am sorry that Deputy Attorney General Comey was unable to be here today since I looked forward to hearing his responses to some of your questions. Notwithstanding that, I thought I would take the liberty of responding on my own to one thing that he does say in his prepared statement; that is, if you were to adopt the legislation before you, you would be, in his language, "effectively overruling the *Branzburg* case." The *Branzburg* case could hardly be clearer that it rests with you to decide if you wish to have a Federal shield law. The language of the Court is clear. At the Federal level, the Court said, "Congress has the 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."

So this is within your purview, and it is up to you to decide what steps, if any, to take in this area. My own view is that as we meet today, the ability of journalists to gather news is imperiled. I have

worked in this area for 37 years now, and that problem, the problem of gathering news, has, in my view, never been as seriously threatened as it is today.

For all the ambiguity of the *Branzburg* case—and more than one lawyer has made a good living over the last 33 years purporting to interpret what Justice Powell's cryptic and enigmatic concurring opinion means—*Branzburg* itself has been interpreted in markedly different ways by lower courts throughout the country, and the Supreme Court has given no indication that it intends, short term at least, to resolve all the conflicts that have arisen as to whether there is any protection in the grand jury area, whether there is any protection in the criminal law area, as to whether there is more protection for journalists in civil cases and the like.

As Matt Cooper testified before you today, there is simply no way to know. And what I would urge upon you is that it is simply unacceptable that Federal law should offer no predictable way for journalists to know what they can do and for them to be in a situation where they can protect their confidential sources in a Nation in which 49 of our 50 States do provide such protection, and in which virtually every democratic country outside the United States, countries without a First Amendment, provide such protection.

The notion that we provide or may provide no protection in Federal courts when countries such as France and Germany and Austria provide full protection and countries from Japan to Argentina and Mozambique to New Zealand provide such protection using language we would understand as being First Amendment-like in its nature is, it seems to me, unacceptable.

In my view, when a journalist speaks to her sources and promises confidentiality, she should keep her word and be protected in keeping her word. That is not the current state of affairs.

When the *Branzburg* case was decided, it was less than clear to many observers, including journalists, that any legislation was needed in this area. And for most of the 33 years that have passed, journalists won most cases and did not suffer much when they lost in most cases. That has changed radically in recent years, and I would say in recent days. In the last year and a half, more than 70 journalists and news organizations have been embroiled in battles with Federal prosecutors. Dozens have been asked to reveal their confidential sources. Some are or were virtually at the entrance to jail, and Judith Miller, not far from here, sits in a cell one floor removed from that of Zacarias Moussaoui.

It is time to adopt a Federal shield law.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Abrams appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Mr. Abrams.

Our next witness is Mr. Lee Levine, founding partner of Levine, Sullivan, Koch & Schulz; one of the Nation's leading First Amendment lawyers, very broad practice in 20 States and the District of Columbia; Adjunct Professor at the Georgetown University Law Center; and author of *News Gathering and the Law*; graduate of the University of Pennsylvania where he got his bachelor's degree, and law degree from Yale. Let me compliment you on two excellent choices, Mr. Levine.

Mr. LEVINE. Thank you.

Chairman SPECTER. And served as law clerk to Judge Irving Kaufman. He represents two news reporters who had produced stories regarding Mr. Wen Ho Lee, the former nuclear scientist.

Thank you for coming in today, Mr. Levine, and the floor is yours.

STATEMENT OF LEE LEVINE, FOUNDING PARTNER, LEVINE, SULLIVAN, KOCH & SCHULZ, LLP, WASHINGTON, D.C.

Mr. LEVINE. Thank you, Mr. Chairman, and members of the Committee. At the Committee's request I will briefly describe recent experience concerning the reporters privilege in the Federal courts.

For almost three decades following the Supreme Court's decision in *Branzburg* v. *Hayes*, subpoenas issued by federal courts seeking the disclosure of journalists' confidential sources were exceedingly rare. It appears that no journalist was finally adjudged in contempt, much less imprisoned, for refusing to disclose a confidential source in a Federal criminal matter during the last quarter of the 20th century. That situation, as you have heard, has now changed. An unusually large number of subpoenas seeking the names of seeking confidential sources have been issued by Federal courts in a remarkably short period of time. Indeed, three Federal proceedings in Washington, D.C. alone have generated such subpoenas to roughly two dozen reporters and news organizations, seven of whom have been held in contempt in less than a year.

In all, over the last four years, three Federal Courts of Appeals have affirmed contempt citations issued to reporters who declined to reveal confidential sources. Each Court imposing prison sentences on journalists more severe than any previously known in American history. Decisions such as these have emboldened private litigants as well, especially since they, like special prosecutors, are not bound by the Department of Justice guidelines.

In one pending civil suit, for example, four reporters have been held in contempt for declining to reveal their confidential sources of information in litigation instituted against the Government by Dr. Wen Ho Lee. And the plaintiff in another civil suit, Dr. Stephen Hatfill, issued subpoenas earlier this year to a dozen news organizations, seeking to compel an even larger number of reporters to disclose the identities of their confidential sources.

Congress and the public should be concerned about the imposition of such severe sanctions. In recent proceedings in the Federal courts, journalist after journalist has convincingly testified about the important role confidential sources play in enabling them to do their jobs. In my written testimony I recount several such examples. Consider just one. In 1977 Walter Pincus of the Washington Post relied on anonymous sources in reporting that President Carter planned to move forward with plans to develop a so-called "neutron bomb," a weapon that could inflict massive casualties through radiation without extensive destruction of property. The public and congressional outcry in the wake of these news reports spurred the United States to abandon plans for such a weapon, and no administration has since attempted to revive it.

Mr. Pincus, who never received a subpoena about the neutron bomb or any other matter in the course of his distinguished decades-long career has now received two, one from the Special Counsel in the Valerie Plame matter and another from Dr. Wen Ho Lee.

Needless to say, the prospect of substantial prison terms and escalating fines for honoring promises to sources threatens that kind of journalism. As Los Angeles Times reporter and Pulitzer Prize recipient Bob Drogin, who himself has been held in contempt in the Wen Ho Lee case, has testified, "I have thought long and hard about this, and unlike you attorneys here in the room, I do not have subpoena power or anything else to gather information. I have what credibility I have as a journalist. I have the word that I give to people to protect their confidentiality. If I violate that trust, then I believe I can no longer work as a journalist."

As you have heard, in the wake of the judicial decisions about which I have spoken this morning, the Cleveland Plain Dealer recently decided that it was obliged to withhold from publication two investigative reports because they were predicated on documents provided by confidential sources. Doug Clifton, the newspaper's editor has explained that the public would have been well served to know about these stories, but that publishing them would, and I quote, "almost certainly lead to a leak investigation and the ultimate choice: talk or go to jail. Because talking isn't an option and jail is too high a price to pay, these two stories will go untold for now."

The situation that currently exists in the Federal courts has not been replicated in the States. As you have heard, the Attorneys General of 34 States, each of whom is responsible for the enforcement of the criminal law in their respective jurisdictions, recently urged the Supreme Court to recognize a Federal reporters' privilege. In so doing, the Attorneys General convincingly demonstrated that their shield laws have had no material impact on law enforcement or on the discovery of evidence in judicial proceedings, civil or criminal.

Journalists have heretofore looked to the Supreme Court to address the confusion that now surrounds the reporters' privilege. The Supreme Court, however, has consistently declined to intervene, most recently in the Miller and Cooper cases.

Nevertheless, in *Branzburg* itself, as Mr. Abrams noted, Justice White's opinion for the Court emphasized that recognition of a reporters' privilege more naturally falls within the province of the Congress. "At the Federal level," Justice White wrote, and I quote, "Congress has the freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad is deemed necessary to deal with the evil discerned."

Members of the Committee, given that, I believe the time has now come for congressional action.

Thank you.

[The prepared statement of Mr. Levine appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Mr. Levine.

Our final witness is Professor Geoffrey Stone, Harry Kalven Distinguished Professor of Law at the University of Chicago since

1994, and previously was Dean at that prestigious law school; served as a visiting professor at New York University School of Law; bachelor's degree from Wharton, and law degree from the University of Chicago; clerked for Judge J. Skelly Wright; widely recognized as one of America's leading experts on the First Amendment.

Thank you for being here today, Mr. Stone, and the floor is yours.

STATEMENT OF GEOFFREY R. STONE, HARRY KALVEN, JR., DISTINGUISHED SERVICE PROFESSOR OF LAW, THE UNIVERSITY OF CHICAGO LAW SCHOOL, CHICAGO, ILLINOIS

Mr. STONE. Thank you for having me, Mr. Chairman.

I strongly support the enactment of a Federal journalist-source privilege, both to protect a free and independent press in this Nation, and to preserve and to protect an open public debate. I want to briefly address three issues.

First you may wonder why it is we are sitting here in 2005 trying to puzzle through this question. Why was this not resolved a long time ago? The reasons essentially is that there has been a longstanding tradition in the United States for some 180 years, that even though there was no law prohibiting it, prosecutors acting as professionals did not subpoena reporters to obtain information because of their respect for the values of a free press.

As often happens, when an event occurs that calls attention to an issue, such as the *Branzburg* decision in 1972, suddenly people say, "Hmm, that is a good idea. Maybe we should start subpoenaing reporters now that we have learned it is constitutional to do so."

And so the fact is that the necessity for this hearing and the necessity for this legislation is actually a fairly recent phenomenon, and as in the situation that currently prevails with a relatively aggressive use of subpoenas of reporters is not the tradition in this Nation. What we face today is a serious anomaly in our history and one that Congress now should address.

Second, the Government argues that there's no need for such a privilege, and essentially says that there is no compelling evidence that in the absence of a privilege potential sources decline to come forward. Frankly, this is a non sequitur. First of all, imagine trying to prove that people are unwilling to come forward because they are afraid to do so. It is an extremely difficult task simply as a matter of evidence. Moreover, the most obvious way of proving that today would be by comparing the experience in those States with a privilege with the experience in those States without a privilege. But of course, only Wyoming today does not have a privilege. So it would be impossible to undertake such an investigation. So the challenge from the Department of Justice to prove the need essentially is an empty set.

Moreover, Congress is free to use common sense. We know that individuals, when they have reason to fear consequences of speaking, are chilled in their speech. That is why we have an attorney-client privilege, it is why we have a doctor-patient privilege, it is why we have a psychotherapist-patient privilege, it is why we have a marital privilege, it is why we have an executive privilege, it is

why we have a speech and debate clause privilege even for members of Congress. The fact is, it would blink reality to imagine that there are not frequent situations when potential sources, having information that would be of significant public value, ask themselves, do I want to run the risk of possibly being prosecuted or possibly being embarrassed or losing my job or being subjected to some other form of retaliation? Of course individuals hesitate in these circumstances. This does not need to be proved in this context any more than it needed to be proved in the attorney-client privilege or in any of the other privileges that we commonly recognize.

Finally, the Government says, what is the cost of the privilege? The cost of the privilege is severe. We lose evidence in a prosecution that may cost the ability of the Government to convict a person who perhaps is guilty.

Now, the problem with this is, first of all, it is the same argument that could be made for every privilege, but more importantly, it completely misconceives the striking of the balance in this situation. If we focus only on the moment at which the reporter invokes the privilege, we in fact then have a totally distorted view of the cost of benefits.

So take a situation in which a congressional staffer suspects that a member of Congress has taken a bribe, and that congressional staffer reveals this confidentially to a reporter. The reporter is subpoenaed, and the court asks the journalist to reveal the name of the staffer so they can investigate further to find out the evidence. If a privilege is recognized, the journalist will not reveal the name of the staffer and it will be more difficult to investigate, and it is that variation that the Government would ask you to focus on. But that is the wrong moment.

What you have to do is go back and ask what happens at the moment that the source, the congressional staffer, thinks about speaking to the reporter in the first place? If the staffer would not be willing to speak in the absence of a privilege, as well might be the case, then the reporter will never have the story, will never publish the story. No one will ever know that there is even a possibility that that Member of Congress took a bribe. There will be no investigation, and it is hard to see how law enforcement or the Nation is better off in a world in which no such information is revealed at all, than one in which it is revealed and made available to the public, and at least opens the opportunity for an investigation that otherwise would not exist. Thank you, Mr. Chairman.

[The prepared statement of Mr. Stone appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Professor Stone.

Turning to the two cases, the one against Ms. Judith Miller and the one against Mr. Matthew Cooper, what were the essential differences? I want to direct this question to you, Mr. Abrams, and also to you, Mr. Pearlstine. What were the essential differences in your views of the law which led to the position to be taken as to Ms. Miller, who is in jail, contrasted with the position taken by Time, Inc., which led to Mr. Cooper's not being in jail.

Mr. Abrams, would you start, please?

Mr. ABRAMS. I do not think that there was any substantive difference as to what the law was. The difference I think is that Mr.

Cooper obtained what he understood and understands to be a clear, unambiguous, uncoerced, waiver from his source, which permitted him to testify, and Ms. Miller is not in that situation, and therefore, has not testified.

As regards the law itself, I will pass to my colleagues on the right, but I do not really think there was any substantive disagreement.

Chairman SPECTER. You are saying it is just a factual matter as to the waiver which Mr. Cooper got, right?

Mr. ABRAMS. Yes.

Chairman SPECTER. Did you disagree with what Mr. Pearlstine said or at least was reported to have said about his view that Time, Inc. had an obligation to obey the law?

Mr. ABRAMS. My own personal view—and I repeat, my personal view; I can lose a lot of clients very quickly today, Senator.

[Laughter.]

Chairman SPECTER. That happens to us all the time.

[Laughter.]

Mr. ABRAMS. My personal view is that I would have wished Time would have acted as the New York Times did in 1978 when there was an order requiring a New York Times reporter to reveal his confidential sources, and an order requiring the New York Times to take steps to compel him to do that. The Times and the reporter both said that they would not do that, they would pay whatever the penalty that was imposed upon them. And they did so, and it was very substantial.

Now, I understand that there are serious—

Chairman SPECTER. It was money.

Mr. ABRAMS. It was money.

Chairman SPECTER. Different from going to jail.

Mr. ABRAMS. Yes, it is different from going to jail, although sometimes it is easier to go to jail in some circumstances if the money gets to be at a point where shareholders may have something to say about it.

Chairman SPECTER. I will not pursue that line because I only have 5 minutes.

But, Mr. Pearlstine, same question, what was the difference in your view, if any, between the New York Times and Ms. Miller and Time, Inc. and Mr. Cooper?

Mr. PEARLSTINE. First of all, I share Mr. Abrams' view as with regard to what the law is and what the implications of the Supreme Court's refusal to hear our appeal are.

I should point out that Time, Inc. was a defendant in this case, whereas the New York Times was not. I do respect the individual act of conscience on the part of Judith Miller to decide to go to jail, and I respected Matt Cooper's willingness to refuse to testify as an individual if that were his decision.

My own feeling is that in this rather exceptional circumstance where we had a Supreme Court refusing to hear our appeal, where we had issues of national security, and where we had a grand jury in place, there were specific circumstances that suggested to me that it was appropriate for us an institution in possession of a file to turn it over to the Special Counsel.

Chairman SPECTER. Had Mr. Cooper not gotten that waiver, what would your decision have been?

Mr. PEARLSTINE. I made the decision prior to Mr. Cooper getting a waiver to turn over our file to the Special Counsel, because I thought on journalistic grounds that we had spent two years pursuing this case, seeking every possible judicial remedy, but that with the Supreme Court's failure to act, and with the absence of a Federal shield law, I thought this was one of these cases and one of these unusual ones where the combination of national security being an issue and a grand jury being enforced where it was the right thing to do.

Chairman SPECTER. Professor Stone, I have 8 seconds, just time enough to ask a question before my red light goes on, which I will reserve. I read—and it is hard to follow—you were critical of the New York Times position. Is that true, and if so, why?

Mr. STONE. I believe that reporters, like the rest of us, should follow the law when the law is clear and when they have exhausted their legal remedies as was true in this case. There are circumstances where I believe civil disobedience is appropriate, but I think they should be reserved to those situations in which there is a reasonable case to be made that the legal system itself or the system of Government is oppressive or unjust, or immoral. In this situation, I think there is a profound disagreement about public policy, but I believe that if that is all there is, and it is what I believe there is, then I think it is their responsibility to comply with the law. So I agree with Mr. Pearlstine's decision. I think that was the correct thing to do, and then to seek to change the law so as to create a privilege so that situations like this do not arise in the future.

Mr. SAFIRE. Mr. Chairman, can I jump in on this waiver business?

Chairman SPECTER. Yes, of course. Mr. Safire.

Mr. SAFIRE. I do not have to pussy foot about this because it is a matter of principle. I think waivers of confidentiality are a sham, a snare and a delusion. When you put somebody's head to a gun or a gun to a head and say, "Would you sign this waiver of confidentiality so we can force the reporter to talk about what you said," you are coercing him in the most forceful way. You are saying, "You will lose your job or you will become a target of grand jury investigation unless you sign this waiver."

I think from the reporters' point of view, from the journalists' point of view, when presented with a waiver, even with my name on it, saying, "Okay, Safire, you can tell them what I said," my reaction should be, "You tell them what you said. Get up and say, I met with this man and I told him this." I then can say, "Yes, that is true," or "No, he has that one wrong." But the notion of putting the onus on the reporter, that he must reveal what happened because a source has been coerced, forced into asking him to talk, I think is a perversion of justice.

Chairman SPECTER. Thank you, Mr. Safire.

Senator Leahy.

Senator LEAHY. Thank you. I am sorry I had to step out briefly because of the Supreme Court matter, but I did read the testimony of all of you. Mr. Safire, I had my "gotcha" staff go through to see if we could find a grammatical error in yours.

[Laughter.]

Senator LEAHY. We did not. I did find interesting your discussion with Potter Stewart about the chilling effect, and I am disappointed that Mr. Comey did not show up because I really did want to ask questions about why the administration is so opposed to the shield law. You pointed out, I guess around three or so States have it by statute, another 19 or so by case law. But you, Mr. Safire, have written about the fundamental right of Americans who have free press to penetrate and criticize the workings of our Government. I agree. One of the reasons I pushed the FOIA as far as I have, I think it does make Government more transparent and it helps hold it accountable. But the question is, does this fundamental right bestow upon the press a right to refuse to testify before a grand jury in a criminal investigation?

Mr. SAFIRE. I believe it does.

Senator LEAHY. Is there ever a circumstance under which a reporter should divulge his or her confidential sources to either a grand jury or even in a civil case?

Mr. SAFIRE. Yes. We are not asking for an absolute privilege. Indeed, in this legislation before you, there is an exception on national security, that if there is an imminent and actual danger that the reporter can indeed be required to testify.

Senator LEAHY. We have seen since 9/11 the enormous flexibility shown in what is considered imminent danger. We see it in the FISA courts. We see it in others. Does this give a great deal of power to the Government to say what is imminent danger?

Mr. SAFIRE. The Government does not define the word. I am in the semantics business. I know what imminent means. Imminent means about to occur. It does not mean potential. There is an element of urgency to it. Now, it is used and misused by a lot of people, but I think every lexicographer will agree that imminent means about to occur and that if a national security crisis is about to occur, then let us face it, as citizens reporters have to help.

But here is the thing. Journalism and reporters are not the fingers at the end of the long arm of the law. We are not agents of the Government. Consider the weapons that the Government has to get evidence. It can put people under oath and threaten to jail them if they do not tell the truth. It can subpoena e-mails. It can wiretap. It can offer immunity that overcomes the Fifth Amendment. These are huge, powerful methods of gaining evidence.

What do we have? We have the power of trust. We have the ability to say to a source, "You can trust us. We will not reveal who you are. You will not be involved. What is the truth?" Now, that is our power, that is our weapon, and it is being seized and taken away from us.

Senator LEAHY. Let me pursue this a little bit further, some of the things I would have with Mr. Comey. Let me take you and Mr. Levine perhaps to answer this. And I am sympathetic, somewhat sympathetic to the *Branzburg* decision to accept the argument that public interest and possible future news about crime from undisclosed, unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes.

But when a crime is committed, why would that not trump confidentiality? I mean even defense attorneys are subject to a crime

fraud exception. Should journalists have this absolute privilege when no one else does?

Mr. SAFIRE. We are not asking for an absolute privilege, Senator, quite the contrary.

Senator LEAHY. But when a crime has already been committed—I am not talking about the future—crimes have already been committed.

Mr. SAFIRE. You go into court and a defendant is threatened with the loss of his freedom, and you have a conflict between the First Amendment and the Sixth Amendment. What do judges do? They strike a balance. They say, "How important is this testimony, and can we get it from someplace else?" They recognize the importance of the First Amendment and the protection of the right of the free press to help the flow of news. At the same time you are not going to put somebody in jail because there is no other way of getting the information except from the reporter. So this is something that judges do every day. As you know, prosecutors have to use their discretion on whether or not the case is so important and this is the only way they can get the information, and when the accused is faced with serious punishment, most of the time—and I guess my legal counsels here can say this better—most of the time judges come down on the side of the Sixth Amendment, and that does not bother us.

The fact is that we are sensible people. We do not push this thing to absolutes.

Mr. ABRAMS. Could I add to that, Senator, that in all the States that we have outlined for you in our testimony that have shield laws, they have addressed the very issue that you have asked Mr. Safire about. I mean in the District of Columbia, in New York and Indiana, and 16 States around the country, there are what could be called absolute shield laws. There are, in any event, shield laws which say, in response to your hypothetical, that, yes, in a criminal case a journalist cannot be required to reveal his or her source.

Some States do it on a balancing basis. A number of States, with no difficulty and with no harm so far as we can tell to the rights of defendants or prosecutors, have gone farther and said it is so important to protect the confidentiality, that will have what is a nearly absolute rule in the same way we have for lawyers. I mean there is no balance struck about what Judith Miller told me about the right of a court to ask me to answer the question, "Who is your source?" I know who her sources are. No one would think of asking me because I am a lawyer and because we all live in a system in which we understand and accept the idea that you cannot have a functioning legal system unless lawyers and clients are free to talk to each other, and it is our position that something like that is applicable or should be held to be applicable in this area of journalists as well.

Mr. SAFIRE. And the key word is "balance." We balance the right of a free press against the right to a fair trial. Another field, we balance civil liberties against the need to crack down on terrorism. This balancing business is what the Constitution is all about.

Senator LEAHY. Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Senator Leahy.

As is the custom of the Committee, we will now proceed on what we call the "early bird rule," and that makes Senator Cornyn next, even if other Senators were present. And on the Democratic side, we have Senator Feinstein, Senator Durbin, Senator Biden, Senator Feingold and Senator Kennedy, in order of arrival.

Senator Cornyn?

Senator CORNYN. Thank you, Mr. Chairman.

In Thomas Friedman's book, *The World is Flat*, he writes about this fascinating story of Bob Schieffer being encountered outside of a Sunday morning talk show by a young reporter, but not one that we would perhaps identify in traditional terms. This young man took out his cell phone and asked Mr. Schieffer to stand there while he took his picture, and then went back and wrote on a website that he had created for himself, and the story of the day—I cannot recall the context of the story, but the fact is that there are new and different types of people reporting information and making it available literally to anyone in the world.

I would just like to ask each of our distinguished panelists—we have of course two great institutions, journalistic institutions the New York Times and Time Magazine represented, and other distinguished witnesses. Would you extent this privilege to a blogger or to the type of person that Mr. Friedman writes about that is basically an individual who has taken the initiative to create a story and publish it to the world? Mr. Safire, let me start with you if I might.

Mr. SAFIRE. There are maybe 9 or 10 million bloggers out there, and growing all the time. I do not think journalism should profess to be a profession. I think the lonely pamphleteer has the same rights as the New York Times. When you start saying who is a journalist, I think you as well as we can agree on certain principles to draw a line somewhere. I think one important principle is regularity. Are you in this business once a year or once a week or daily? Another thing is, are you in the business of gathering news?

It is a tough line to draw, but that comes I think from practice and case law. I would like to see the "who is a journalist" issue developed by good faith legislating and deciding it in courts. It has been done before.

Floyd, has it ever been done before?

Mr. ABRAMS. Well, it has been done by all the States that have shield laws of course, because they all have definitions, so all 31 of those States have provided a definition. Some of them are very specific. You have to work for a newspaper, magazine, broadcaster a certain amount of time. Some of them are a little more open-ended and address your question a little more directly by adopting a sort of functional test, do people do the sort of things that we would call journalists as doing? It is difficult but it is not an impossible task. I mean it reminds me of the task the courts have had in religion cases in which the question is, who is a minister? Who is a priest? And the courts, quite rightly, have shied away from trying to define what is a religion for fear of seeming to license religions, but they have come up with sort of common sense definitions of people who do the sort of things that historically priests and ministers and rabbis and others have done.

Senator CORNYN. Professor Stone?

Mr. STONE. I think that it is important to recognize that the purpose of the privilege is to encourage sources to be willing to make confidential disclosures. And therefore, the definition of the journalist really need not be focused on a sort of credentialism as much as what is the reasonable belief of the source in any given situation? If a source reasonably believed that the person to whom he is making a confidential disclosure is an individual who disseminates information to the public, and the source's purpose is to enable that individual to disseminate information, then that is probably the functional test that one needs in a situation like this. Even in the attorney-client privilege, it focuses not on who is an attorney, but whether the person who thinks he is a client reasonably believes the person to whom he is speaking is an attorney.

Senator CORNYN. Unfortunately, my time is just about to run out, but let me just say, to me this is something we need to explore a little further because it strikes me that anonymity also has the risk of creating non-accountability, indeed, irresponsibility when it comes to accurately reporting information, and certainly getting accurate information seems like a value that ought to be taken into account here, because inaccurate information can cause a great deal of harm, and journalists, professional journalists are bound by a code of conduct and a code of ethics, but certainly the technology has made it possible for many people to publish information in anonymity that could cause a great deal of harm as well. So it seems like a consideration we certainly need to take into account.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Cornyn.

Senator Feinstein.

Senator FEINSTEIN. Thanks very much, Mr. Chairman. I would just like to say that I very much regret the Department of Justice is not testifying here today. I have read the written remarks of Deputy Attorney General Comey, and it is a rather serious indictment of the legislation in front of us on many points. I think it has to be taken seriously, and I think we have to explore the points.

So, Mr. Chairman, my request would be that we have another hearing and that we do have the Justice Department testify. They have made some very strong allegations in this written testimony.

Chairman SPECTER. Senator Feinstein, I am disappointed that Mr. Comey is not here as well. I learned about it just this morning, and we will consider another hearing, This is a complicated matter, and a lot of ramifications, and we have a jammed agenda, but we will certainly consider another hearing to have him come in.

Senator FEINSTEIN. Good. Thank you very much.

Now a question, if I might, of the panel, and thank you very much for your testimony. In my home State, California, we have a constitutional provision as well as a statute that protects reporters. However, it is very carefully drafted, and it balances the needs of reporters along with the needs of law enforcement, defendants and others in a given case.

California has a qualified immunity against contempt sanctions, rather than an absolute privilege. In addition, through case law, California has developed balancing tests depending upon the specifics of the case, including whether the information is being requested for a criminal or a civil case.

The legislation before us is extraordinarily broad. My initial reading of it is rather startled by it. I think the national security provisions are particularly broad. I speak as a member of the intelligence community, where we are so cautioned against even indicating something that has been in a newspaper if we have heard it in the Committee. And it seems to me that under the ABC of the national security provisions in this, they are virtually impossible. They would not even make the outing of Valerie Plame effective as far as this is concerned.

My question to the panel is whether you are rock solid in saying that this legislation is the only legislation, or whether the panel is willing to look at what other States have done that have a background of case law, and that have affected I think a more balanced piece of legislation.

Could we start with you, Professor Stone?

Mr. STONE. Sure. First of all, I had no hand of course in drafting the bill, so I have no responsibility for that, but I think the key problem with balancing, open-ended balancing, is again we have to keep the focus on the fact that the purpose of a privilege is to encourage a source who is reluctant to come forward with information, to do so. The more uncertainty that exists in whether or not a privilege will in fact be honored, the greater the reluctance on the part of the source to come forward with the information, and in some sense the balancing can be self-defeating because if it becomes so uncertain to the source whether a prosecutor will be able to make a certain showing four months down the road or whether certain circumstances will come to pass, that they just have no idea whether they are going to be protected or not, then many sources, perhaps most sources, will simply say the better part of wisdom is to remain silent.

So I think the danger of—

Senator FEINSTEIN. Could you talk national security, please, because that is my big concern.

Mr. STONE. Okay. If the issue is only national security, then I think the problem is much less, because national security leaks are of course only a very tiny percentage of all of the circumstances in which we are dealing with a potential journalist-source privilege.

In the national security context, if at least it is clear to the source that they are dealing with information relevant to the national security, then I think the risk of chilling effect, which I was talking about a moment ago, is less severe. What really matters is that the rules need to be clear. If the Congress believes, for example, that the leak of any classified information period is both criminal and may not be subject to a privilege, then we should say so, and then at least sources and reporters will know what the rules are, so clarity is the key.

Senator FEINSTEIN. Let me just debate you about this for a minute.

Mr. STONE. Sure.

Senator FEINSTEIN. Do you really have to reveal Mrs. Wilson's name to have the law apply? I mean I am interested in the timeline of the calls that went back and forth, and then, bingo, the Novak article identifying her, violating a law clearly.

Mr. STONE. I would say that under my understanding of the relevant law in that situation, there is no necessity to actually identify the name to violate that statute. It is sufficient to provide enough information so that the individual, the reporter with whom I am speaking or the other individual with whom I am speaking could discern the name. So, no, I do not think there is any defense to the statute that one did not use the name, Mrs. Wilson.

Senator FEINSTEIN. Anybody else want to comment?

Mr. LEVINE. Let me just say a word, Senator Feinstein, about the California statute, because I think it is an illustrative example. In fact, the California statute on its face is in many ways—and of course it does not deal with national security for obvious reasons, but in many ways it is broader or at least as broad as this statute. Where the California has been narrowed in application, as you pointed out, has been by case law, and that would happen with this Federal shield law as well. California has recognized, for instance, that the Sixth Amendment right of a defendant to a fair trial is a constitutional right, that in appropriate cases needs to be balanced against the statutory rights granted by the shield law. And I think we all fully expect that this statute will be subject to judicial interpretation in the same way.

On your other question, I too did not have any role in drafting this statute, but I think I have gotten very clear signals from everyone who has been involved, and all of us here, are interested in working with the Committee, and that this is not written in stone.

Senator FEINSTEIN. Appreciate that. I would just ask if you have some better language with respect to Section 2A, B, C, as it relates to national security, because it seems to me that this is so broad that I mean to prevent—Mr. Safire, I think well-explained what imminent is—but this would mean basically there is no ability to compel anything. I could not conceive of a case where under this statute information could be received.

Does anyone else have a comment?

Mr. ABRAMS. I would just add, Senator, that I too had nothing to do with the language, but I thought on first reading at least, that the necessary to prevent imminent and actual harm, national security, was a good try, but this is not written in stone, and I am confident that the drafts people or others involved in this would be glad to sit with you and your colleagues and try to deal with any broader problems that you perceive.

Senator FEINSTEIN. I appreciate that.

Chairman SPECTER. Senator Feinstein, you are 3 minutes over. How much more time would you like on this round?

Senator FEINSTEIN. No, no, no, please. That is fine. Thank you very much.

Chairman SPECTER. Senator Durbin.

Senator DURBIN. Thank you very much, Mr. Chairman.

It is clear that freedom of the press has been enshrined in our Constitution for good reason. It is an opportunity to put a check on Government, to expose corruption, deception, abuse of power clearly in the public interest of the United States. Because of Mr. Novak's publication, we are now being drawn into a more specific debate about how far this confidentiality should extend.

Under common law and State laws we have privilege that is extended in the attorney-client situation, but it is privilege that is circumscribed. In most States, I think perhaps in all States, I could not, as the attorney of a person, conceal a crime if that is the information disclosed to me by a client. And so I could not assert the privilege if it would in any way protect that person from criminal penalty for what they have done.

The law that we are considering today in its most recent revision, Mr. Safire is right is not absolute. But the law certainly is more specific and narrower than what I have just described. The only crimes that would clearly be covered by this relate to national security. Those are the only exceptions. And so it raises at least two issues, three issues in my mind, and one I will close with a hypothetical and leave it open to the panel.

First, what if the disclosure of the information is in and of itself a crime, as in the case of Valerie Plame? The disclosure of her identity was a crime. Then I would think you would still have to go through this bill to prove that disclosing the source of her name is in some way necessary to prevent imminent actual harm to national security and more.

Secondly, if the whole motive of confidentiality for the press is the public interest, what are we to do with situations like Valerie Plame, where clearly the motive in disclosing her name had little to do with public interest; it was a selfish, mendacious effort by those in the White House to discredit her husband and the article that he had written for the New York Times? Little public interest was being served here, and to argue that now we have to rise to the occasion of protecting that kind of disclosure, which is not in the public interest, I think raises a second major issue.

And the third issue is this: Assume I am a reporter who receives a telephone call from someone who identifies himself as the kidnaper of a child. That child is still alive. And I, as kidnaper, tell the story to the press about what I have done with that child and where that child is. As I understand it, from this law and the way it is written, I could not be compelled, if I asserted my right as a reporter to confidentiality, to even disclose the identity of a kidnaper or sexual predator because it does not fall into the exception related to national security. It has nothing to do with terrorism. This is a sexual predator who has kidnaped a child. Now a great story has been written.

As I understand it, that reporter could not be compelled to disclose the identity of that kidnaper under this law. I would like to leave it open to the panel to respond.

Mr. LEVINE. Perhaps I could take the kidnapping example, Senator. First a couple of points. As you have heard here today, many States have written shield laws and 49 have some form of privilege. You would think that episodes involving kidnaping or other threats like that would arise at the State level more frequently than they would at the Federal level.

As far as we can tell in going back and researching it, we are aware of no situation in American history where a news organization has been in possession of that kind of information, and has asserted any kind of privilege.

Senator DURBIN. Assuming it is a Federal crime of kidnaping and the circumstances I have just described, could the reporter be compelled to disclose the source under the Dodd-Lugar bill?

Mr. LEVINE. Under this statute, no, and I think you raise a fair point, that I do not think anybody on the—any reporter or any journalistic organization would have any problem with addressing that situation in the statute. What I am suggesting to you though is our experience demonstrates that journalists and news organizations live and work in communities. They are citizens, and there is no evidence ever in American history that I am aware of that any news organization in that kind of situation has not voluntarily come forward without the need of a subpoena or asserting any kind of privilege when that kind of situation has occurred.

Senator DURBIN. Would you address the second part of the question? If we are not dealing with a disclosure to reporter in the public interest, but rather, the disclosure of secret grand jury testimony, clearly designed to put the witness and the grand jury or the target of the investigation in a terrible position, bargaining for their freedom. Is that in and of itself—should that be treated the same way as whistleblower disclosures in the public interest?

Mr. LEVINE. I think you have to be very careful about drawing a line based on the level of public interest or the public good that will be served by a disclosure for a number of reasons. First, from the journalist perspective—and the journalists on the panel can speak to this better than I can—it is impossible to know in advance. It is impossible to know when you make the promise before you receive the information whether what you are going to be getting is the Pentagon papers or whether it is going to be something else. So you put, as Professor Stone was saying, you put both the person who is seeking the promise of confidentiality, and more importantly, the reporter, in an impossible situation if you impose that kind of test, and in the end of the day provide really no protection at all.

The second thing is that the concept is incredibly elastic. One person's whistleblower is another person's slander mongerer. I mean it depends on where you sit, and as one of the panelists said before, I would hope that in considering this legislation—and I am confident that you will—that you will look beyond the political exigencies of the day to the broader picture of the general public good that is served by allowing reporters to honor these promises.

Senator DURBIN. Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Durbin.

Senator Feingold.

Senator FEINGOLD. Thank you, Mr. Chairman.

Recent events have obviously made this proposed Federal shield law a hot topic. The sight of reporters in handcuffs is not a pleasant thing for any of us to see, and as our witnesses have noted, these scenes are becoming more and more common. 33 years after the *Branzburg* decision it is time for Congress to act. I have cosponsored the bill introduced by Senator Dodd, Senate Bill 369, and I will also shortly co-sponsor Senator Lugar's new bill.

The important thing is to end the uncertainty and the incongruities caused by having protection for anonymous sources in 49 States and the District of Columbia, but not in Federal cases.

I do not take lightly the issues raised by the Deputy Attorney General in his written testimony. We must certainly consider the effect that a shield law might have on investigations and prosecutions of terrorism and other serious crimes, but anonymous sources have been too important to exposing Government and corporate wrongdoing to let the current situation continue. It is not, in my view, a credible argument to say that because high profile anonymous sources have continued to work with reporters even without a shield law in the decades since *Branzburg*, that that will continue indefinitely.

The chilling effect that our witnesses have mentioned is a gradual lowering of the temperature, not an instant ice age. The more high profile contempt prosecutions of journalists we have, the greater the chances that potential sources will be deterred from coming forward.

Another argument made be the Deputy Attorney General with which I disagree is that congressional action or legislation in this area would overrule *Branzburg*. I think that is incorrect. *Branzburg* stands for the proposition that the protection of the identity of anonymous sources is not required under the First Amendment. But many judges ruling in these cases have invited Congress to legislate. This is an area where Congress has the power and the responsibility to set out the parameters under which testimony of this kind can be compelled. A free society cannot long survive without a robust free press.

And so I am very grateful to the witnesses for the tremendous expertise that they bring to this subject, and I look forward to working with all of you to help design a workable and effective Federal shield law.

The press will certainly benefit from the law, but more importantly, the Nation will benefit.

In my remaining time I would like to ask the panel, the Deputy Attorney General wrote in his testimony that the evidentiary showing required by S. 340 to compel a person covered by the Act to testify or produce a document would jeopardize traditional notions of grand jury secrecy. And I realize that this may not be your core area of expertise, but can any of you talk about that concern?

Mr. ABRAMS. May I say, Senator, that having been in the position representing Judith Miller and having represented Matt Cooper in earlier stages in his case, that the proceeding went along just fine without showing us anything. We never got to see anything that had been submitted to the grand jury, even though the Special Counsel made submissions of it to the court. And while that was not to our liking and we urge that it was a due process violation, the Court of Appeals for the District of Columbia held that it was indeed constitutional.

So if there are grand jury materials which need be shown to a court in order to make a ruling, at least at this point, it appears to be constitutional to do that even without showing it to opposing counsel.

Senator FEINGOLD. Now, I would have thought that a better way to do that is to do it under a protective order in which opposing counsel, at least counsel would have the right to see the materials,

and to proceed on that basis in secret, in camera, but one way or the other, it would not destroy the principle of grand jury secrecy.

Mr. ABRAMS. May I chime in?

Senator FEINGOLD. Mr. Safire.

Mr. ABRAMS. Not only is the testimony that you referred to from the Department of Justice not supported by an individual here on the panel, but the testimony itself is about 3 days out of whack. You will notice how it stresses national security, and evidently, to read the amended act, or the act as it now is presented to us, it has been changed, it has been brought up to date. The argument about national security has been incorporated into it, and that powerful line about imminent and actual danger is in. So here you have the Department of Justice with a brief that does not take into consideration the changes that Senator Lugar and others have made in it.

Senator FEINGOLD. Anybody else want to comment?

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Senator Feingold.

Senator Kennedy.

Senator KENNEDY. Thank you, Mr. Chairman. This has been enormously informative and helpful, and as one that is a strong believer in the First Amendment, and recognizes that it is the amendment that gives life to our democracy and protects the freedom of all Americans including the right to criticize. I remember being in law school and listening to bill Douglas, Justice Douglas answer a question from a student, and said, "What is America's greatest export?" And he mentioned the First Amendment.

I think we listened to the discussions and the exchanges of my colleagues about the exception, and I think Mr. Safire mentioned the imminent national danger, the exception.

I would like to ask Mr. Pearlstine, if this legislation had been in law, would you have acted the same way as you did?

Mr. PEARLSTINE. In turning over?

Senator KENNEDY. Yes.

Mr. PEARLSTINE. I think that if this law, as I now read it, were enforced, we would not have been required to turn over the file. But I say that not knowing exactly what the special counsel alleged in terms of national security because in the court of appeals decision we have eight blank pages where the Justices, if you will, had a chance to consider what the Special Counsel thought the security issues were, and we have never seen those.

Senator KENNEDY. Well, doesn't this raise the question whether these words were defined sufficiently to do what all of you have asked to do? Mr. Levine?

Mr. LEVINE. I think on the question that you put to Mr. Pearlstine, I think we can say two things about the statute with confidence that would have been different than actually happened in the case involving Mr. Cooper and Ms. Miller. One is they would know that they had a presumptive privilege, which the courts in their case said they did not. Second, we would know what the test is, and it is the test that you have spoken about, Senator. What we do not know is how that test would have been applied in the circumstances of either the case of Ms. Miller or Mr. Cooper because we do not know what the evidence was.

So I think that the role of the court would be clearer; the test that would be required to apply would be clearer; but none of us can predict except perhaps for Mr. Fitzgerald, who is not here and is not talking, what the outcome of that exercise would be.

Senator KENNEDY. Just finally, those words "imminent national danger," is there anything else that you want to suggest to the Committee that is better, stronger, more effective? Or should we live with those words as far as the panel is concerned?

Mr. STONE. I think it would be possible to expand, as was suggested earlier by Senator Feinstein, from national security to other grave crimes that could be committed, such as the kidnapping example. And I also think that, as Senator Durbin suggested, some attention might well be placed on the issue of whether the disclosure itself is unlawful. Since the purpose of the privilege is to encourage sources to disclose information, if the disclosure is itself unlawful, then the law has already determined that we do not wish to encourage those disclosures. And I think that would be a relevant issue to consider in the statute for a case like the one involving the disclosure of Valerie Plame's identity. If that disclosure is unlawful to the reporter, then it seems to me that should be a relevant fact in deciding whether a privilege should apply.

Mr. ABRAMS. May I say, Senator Kennedy, I think that it is troubling to import the notion of the disclosure of the information to the journalist herself or himself. The disclosure of the Pentagon Papers may well have been illegal by the Times' source, but to have a statute which, therefore, strips the Times or in those days stripped the Times of the right not to reveal who the source was would effectively have meant they couldn't have accepted the information, or else if they had and the Government had pursued this, would have been in the same sort of fix that we have seen in recent days.

So I would be loath to sign on to the notion that simply because the disclosure is illegal—if it is a crime, prosecute that crime. But I would not make that an element in deciding whether journalists have a privilege or not.

Mr. LEVINE. I Would also be very careful about expanding it beyond the areas of national security and perhaps matters of life and death and public safety, like Senator Durbin was talking about. We have a whole raft of statutes on the books—I will mention just one, the Federal Privacy Act—that purport to forbid Government officials from disclosing information about identifiable persons. That statute on its face is incredibly broad. If you enforce that, as has been suggested by some of the civil litigants who are bringing Privacy Act claims, it would render illegal the communications that go on every day between reporters and sources in Washington, D.C., and elsewhere. And making that the linchpin on whether there is a privilege or not would effectively gut it, I think.

Senator KENNEDY. Thank you very much.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Senator Kennedy.

Senator Schumer?

Senator SCHUMER. Thank you, Mr. Chairman.

Before I question the witnesses, I would just like to second Senator Feinstein's request that Mr. Comey come before us at some fu-

ture time. I think we really need to have him here to answer questions. I had a bunch of questions for him. So if you could make that request in strong terms, that would be great.

Chairman SPECTER. Senator Schumer, I noted when Senator Feinstein made her point, I saw your body language. I have already marked you down as a seconder.

[Laughter.]

Senator SCHUMER. Thank you.

Mr. LEVINE. Make me a third-er.

Senator SCHUMER. Vermont body language is a little less easy to perceive than Brooklyn body language.

In any case, let me just speak for a minute and then ask questions. My sympathies in general are with protecting sources and having disclosure. I think our society depends on it and needs it, more now than ever before. So I am sympathetic to the journalistic side of this.

But you do run into a few roadblocks, and I would like to explore those, and it is why I have not cosponsored the bill. I still might vote for it, but I am not yet ready to cosponsor.

Ninety-nine percent of all leaks, I think, are unassailable because they do some good. They are not violations per se of the law, which I think Professor Stone mentioned. When somebody in the FDA is upset that they have done a rotten job on a test and tells a reporter, that is good thing for society. And we need to do that, and we need to encourage it. And I think, my guess is, there would be broad support certainly on this side of the aisle, and I even think on the other, for laws that protected that. That is probably 99 percent of all undisclosed sources or leaks.

One percent do involve violations of law. I am not sure I agree with Mr. Abrams that if the leak per se is a violation of law that it is in the same category as everything else. This statute is very narrowly drawn. There is virtually no justification for leaking the name of an undercover agent.

Let's get a little broader—grand juries. One of my problems here is I have seen grand jury leaks, illegal because grand jury by law is secret, that have actually made it hard for somebody to prove their innocence. So I have a rough time figuring out why do we justify grand jury leaks—or not justify, but not prosecute them. I have talked to prosecutors about leaks. They say—so it is not easy to—Mr. Abrams says prosecute them anyway. Most prosecutors will tell you with a shield law it is virtually impossible to prosecute leaks. And I have talked to people in the New York City D.A.'s office, in the Federal offices, so I don't think it is so easy to just pass that by. I think you are in an either/or situation.

And then the tougher one—so those two are fairly narrow, even though grand jury leaks is a much broader situation than the other. And I have questions about whether a shield law should apply to them. I am just going to ramble here a little and then ask you all to comment.

The third one is a tougher one. It is more elastic. It is national security, not imminent danger. I think most people would agree that the Pentagon Papers should have been made public. But when it just says national security, the Government for its own purposes can brand it national security when it should not be. So those are

the three categories I look at this. Ninety-nine percent of leaks, they are good. They do not violate the law. The toughest cases, which these cases are—this is the toughest case. I do not know what the expression is. I am far away from law school. Good case makes—bad case makes good—I don't know.

[Laughter.]

Mr. PEARLSTINE. Bad case makes bad law.

Senator SCHUMER. Bad case makes bad law. This is one of those, unfortunately, for Mr. Cooper and certainly Ms. Miller. But those are narrow, whether it is grand jury or that, and then you deal with the secrecy issue.

So I have a couple of questions here. And first, one other point. I agree with Professor Stone and not with Senator Feinstein. You want this to be a bright-line test because my first question which hasn't yet been proved is if there were a bright-line test, what is the relationship between the Category A of leaks and the Category B of leaks? Why should an FDA employee fear leaking if he knows or she knows that it is not a violation of law—and I would make it statutory, not departmental regulatory—to leak? So we need to establish the link between this hard case and the 99 percent easier cases.

And then the second question is: If you do make that—but it has got to be bright line. Just to say balance it, that is going to inhibit journalists—that is going to inhibit leakers to go to journalists. But if it is a bright-line test, I know it is a grand jury, I am not sure I should leak. Or I would have to know the consequences to doing it because it is a violation of law, period.

So, two questions. One, especially for those of you—you know, Mr. Safire—and, by the way, I am glad to see we have not a majority but 50 percent New Yorkers here at the table, and I particularly welcome the three of you, as I do welcome everybody else, of course. So what is the relationship, to Mr. Safire and Mr. Abrams, between Category A and Category B? Why should a law include Category B as well as Category A? Because it may get deadlocked, you certainly want to protect those 99 percent, which there would be much broader consensus. And then the third question, the tough question is: How do you deal with Category C, the secrecy issue in general? You want a bright-line test, but you do not want to allow self-serving by the Government to classify things as secret when they should not be.

I have finished my questions, and I would just have the whole panel chime in.

Mr. STONE. As I said earlier, I do think that the unlawful leak is different from the ordinary whistleblower situation and that the Government has a more legitimate interest and the source has less legitimate interest in claiming protection. There are various ways of dealing with that. One is to simply say that unlawful leaks are not protected at all. Another is to say unlawful leaks are fully protected and it makes no difference that it is unlawful. And in between, it seems to me there are two types of factors one might want to consider. One is the kind of qualified privilege, that is, how serious is the Government interest, and is it sufficient to justify invoking the privilege even though it was an unlawful leak? And the other is how valuable is the information?

So the Pentagon Papers is completely different from the leak of the name of Valerie Plame in the context in which that leak took place. And so one could say that even if Daniel Ellsberg is protected and the New York Times or the Washington Post would not be required to disclose his identity because of the public value associated with the leak, even though unlawful, that doesn't need to extend to a leak of the identity of a CIA agent, which seems to serve no significant public value.

Senator SCHUMER. So what you are saying is maybe limit the—

Chairman SPECTER. Senator Schumer, you are 3 minutes over time. You have got I don't know how many questions pending.

[Laughter.]

Chairman SPECTER. How much more time do you need?

Senator SCHUMER. I think these are interesting questions. Not much. I mean, I was just going to say, I was just going to comment, so what Stone is advocating is a balancing test just for a narrow ground and a clear bright-line test for most everything else.

Mr. STONE. Precisely.

Senator SCHUMER. Okay.

Chairman SPECTER. Are there further answers from the panel?

Mr. ABRAMS. Yes, I will just try one example, really. Even in the area of grand jury information—you could make a bright-line exception—there are leaks, the BALCO leaks recently, where because of the leaks of grand jury information in the BALCO case, we had congressional investigations, proposals of legislation, new rules governing drugs in baseball and the like. I don't know how a balancing test would work. I mean, I appreciate one could simply throw it to a judge and say try to balance the general social harm of any grand jury leak against the possible social good of this particular leak. But I am just expressing concern about what we would be asking judges to do. It is difficult. I might take the liberty of writing a little bit to the Committee on your question, if I may.

Senator SCHUMER. I would ask, without objection, you be given a week to submit some answers in writing, for all panelists, since I asked this whole line of questions.

Chairman SPECTER. Anybody want to respond further to Senator Schumer's questions or submit answers in writing?

Mr. LEVINE. Let me just make one point, Senator Specter, if I may.

Chairman SPECTER. Sure.

Mr. LEVINE. That is, I go back to where you started, Senator Schumer, with which I quite agree, that 99 percent of leaks are beneficial and there may be 1 percent that are not. The problem is where we currently stand, we are in jeopardy of losing the 99 percent to save the 1, and I think when you come right down to it, when the percentages tilt as much as they do, we ought to as a free society be willing to risk the 1 to get the 99.

Senator SCHUMER. Just if the Chairman would indulge me, you could cut that the other way and just have a law that deals with all unlawful leaks and still save the 99.

Mr. LEVINE. But there are a number in the 1 percent—the unlawful leaks that do fall in the 99 percent side.

Chairman SPECTER. Thank you very much, Senator Schumer.

Mr. Cooper, you mentioned Mark Felt, and certainly Bob Woodward has done a phenomenal job, and I am one of his many fans. I haven't read all of his books but have read some of them. When Mark Felt's identity was disclosed as Deep Throat recently and the comment was made that Mr. Felt had gone to Mr. Woodward because there was no one else to go to—he could not go to the higher-up in the FBI because Mr. Felt felt he had reason not to trust L. Patrick Gray, that he couldn't go to the White House because the White House was under investigation, and I was cheering him on back in 1974. But since then I have had a little more experience, and the thought crossed my mind: Why didn't Mr. Felt come to the Speaker of the House of Representatives or the Majority Leader? What he was really dealing with here amounted to potentially impeachable offenses? And if the comment is made to Bob Woodward, it goes to the Washington Post. If it goes to the Speaker of the House, who may take it to the Judiciary Committee Chairman—occasionally Chairmen of Judiciary Committees act—there might have been an earlier start of impeachment proceedings.

Now, we do not quite get into all the ramifications of source, and nobody was about to go to jail, and nobody subpoenaed Bob Woodward to find out who Deep Throat was. But had that information been in the public domain, you would have had public officials who had the power to do something about it in a very tangible way—not that writing a series in the Washington Post didn't perhaps have the same result. This may be beyond the purview of our discussion, but when you mentioned him, that concern came to my mind. Do you think Mark Felt would have had a decent reception if he had gone to the Speaker of the House of Representatives or the Majority Leader of the Senate?

Mr. COOPER. Well, Mr. Chairman, it is an interesting question you pose. I obviously cannot speak for Mr. Felt and what his motives were at the time. I do know that there are a number of people who have important information to disclose who feel more comfortable bringing them to journalists than they would to the Government Accountability Office or the Speaker of the House because they trust journalists to keep their confidences and believe that that is the most effective avenue for revealing what they have to say.

Chairman SPECTER. Mr. Safire, you—

Mr. COOPER. May I add one other thing, Mr. Chairman?

Chairman SPECTER. Certainly.

Mr. COOPER. I do think the experience of Mr. Felt, the more we learn about what happened, does show the difficulties of distinguishing between what might be called good leaks and bad leaks and the motives of leakers. I think, you know, as it emerges that much of what motivated Mr. Felt was, you know, bureaucratic warfare between the FBI and the White House and the FBI wanting to preserve its prerogatives to do some things, which in retrospect we wish did not, I think it is a reminder that trying to draw a bright line between the good leak and the bad leak, the good leaker and the bad leaker, is not as easy as we may think.

Chairman SPECTER. Well, I think that is certainly true, but Mr. Felt was not without remedies, and you had a constitutional crisis

in this country, and there are some public officials you can trust if you search hard.

Mr. Safire, you were in the White House in President Nixon's time. You departed before all of this erupted.

Mr. SAFIRE. About a week before.

[Laughter.]

Chairman SPECTER. Did you have any special reason for your timing?

[Laughter.]

Mr. SAFIRE. Blind luck.

Mr. ABRAMS. Remember the Fifth Amendment, Bill.

Mr. SAFIRE. Blind luck, Mr. Chairman.

Chairman SPECTER. He does not believe in waivers, Mr. Abrams.

[Laughter.]

Chairman SPECTER. What do you think about going to the Speaker of the House of Representatives or the Majority Leader in constitutional process and reporting it to some officials—they are really law enforcement officials in a sense—to bring impeachment proceedings to really go to the place where some very effective action can be taken?

Mr. SAFIRE. Well, if I were Mark Felt at the time, being the Deputy to J. Edgar Hoover for many years, I would think twice about going to the Judiciary Committee because the Chairman would say, "Hey, what is this about black-bag jobs and illegal wiretaps that you were in charge of?"

So there might be a reluctance on the part of a Government employee who has been doing some funny business to point to some funny business elsewhere. That is not a problem he would face going to the press. Maybe someday when his name would come out 30 years later, but at the time the smart thing for somebody who was out to either get even with an administration that did not give him the job that he wanted or was motivated by some noble motive that suddenly hit him after a lifetime of black-bag jobs and wiretaps, so he goes to the Washington Post.

My only regret there is that he went to the wrong paper.

[Laughter.]

Chairman SPECTER. Spoken out of true principle.

[Laughter.]

Chairman SPECTER. I think if he had gone to the Speaker or the Majority Leader—Mansfield was the Majority Leader, a man of impeccable integrity—they would not have looked for other defalcations on his part. And if they had found them, law enforcement officials overlook the minor if you have something bigger, something more important to do.

Well, I just raise that because in all of the commentary on Mr. Felt—and there was a lot of it—nobody ever suggested that there was someplace that he could have gone. And my comments have very limited circulation today, but I think people ought to know that there are places where you can go. And if you are dealing with potential impeachable offenses, that is of the utmost magnitude for the importance of this country, and there are remedies besides talking to the media. But I start from the proposition of being very concerned about reporters' sources and the great good the press has done over the years in exposing corruption and malfeasance.

One final point before adjourning, and this has been a long and a very productive session, I think. Mr. Abrams, I want to come back for just a moment to the fine in 1978 that the New York Times paid and to discuss with you for just a moment or two at least my view of the difference between a jail sentence and a fine. I watch what is happening with these fines being levied, and the Judiciary Committee would like to put that on the agenda, too, as to—well, oversight of the Department of Justice as to whether these fines are really meaningful.

I don't know when Corporation X pays Y dollars how much it really hurts anybody, but I do know a jail sentence is very, very tough medicine. And when Ford Firestone came up, I put a provision in the bill that I would like to expand, and we have legislation in the works, we put criminal penalties. If you knowingly and recklessly place someone's life in danger or grievous bodily harm, that constitutes actual malice, and that supports a prosecution for murder in the second degree under common law, which characteristically draws a 20-year sentence under common law.

And we have a lot of corporate conduct and a great many lines where we have seen—in Ford Pinto, for example, they put the gas tank in a certain spot where it was dangerous and killed people because it saved $8. They made a calculation as to how much money it would save. And the prosecutor, as I recollect it, in Indiana went after Ford but did not have the resources to really do the job.

We are going to be exploring whether that kind of criminal liability might attach where it really has an impact. Ford and GM pay punitive damages, which are infinitesimal when lives are taken. And we have seen what is happening in the pharmaceutical industry.

So let me ask you, my question to you is: Is a fine really sufficient if—I am not saying the New York Times should have been fined or held in contempt or anything should have happened. But once you get to that point, is a fine really sufficient?

Mr. ABRAMS. First, the fines in the 1978 matter—which totaled almost $300,000 and would have been considerably more if the trial had gone on longer. The only reason they were cut off is that they ended when the trial ended, and Mr. Farber, the journalist, was let out of jail and the judge lost the power to continue to fine the Times.

Obviously different corporations have different tolerances for pain, and the amount of money has a direct impact on that. I mean, when—

Mr. SAFIRE. Three hundred thousand dollars back then was a lot of money.

Mr. ABRAMS. When John L. Lewis' union was fined, you know, a million, two million dollars a day for the strike back in the 1940s, that was, you know, an enormous amount of money. That can have and was supposed to have a major effect on the entity.

I think it is hard to talk about the examples that you have cited, Senator, and mesh them with the journalistic examples that we have been talking about most of the morning. But I do think, indeed, I think I know that in the traditional corporate sense, the examples that you gave, even the risk of any corporate executive going to jail for doing the sorts of things that you were talking

about would have a genuine, an enormous effect on corporate behavior.

I remember when I was clerking in Wilmington, Delaware, a hundred years ago, it was not long after in Philadelphia the GE sentences were imposed.

Chairman SPECTER. Did you have Professor Dreschen at Yale, Mr. Abrams?

Mr. ABRAMS. No, I did not. But the impact on the marketplace of jailing a few executives in the GE case was enormous. And I look forward to the results of your hearings in that respect.

Chairman SPECTER. Well, thank you very much, gentlemen. This has been one of our lengthier hearings to have people sitting so long in one place for some 2½ hours, but this is a matter which the Committee is going to pursue, and it has been enormously enlightening, and you drew quite a crowd. We have more Senators than witnesses. That is kind of unusual for this Committee.

[Laughter.]

Chairman SPECTER. Thank you all very much. That concludes the hearing.

[Whereupon, at 11:58 a.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

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March 14, 2006

Re: Reporters' Shield Legislation

Dear Senator Specter:

I have received certain follow-up questions from Senators Leahy and Durbin stemming from my testimony about potential reporters' shield legislation on July 20, 2005. My responses follow. For good order's sake, I list below each of the questions and my responses.

Follow-Up Questions of Senator Leahy

Q. Mr. Comey argues in his written statement that "in the absence of a credible demonstration that the subpoena power is being abused by the Department in this area, such that sources have dried up, with the result that journalists are unable to do effective investigative reporting, there is no need for a legislative fix that substantially skews the carefully maintained balance against legitimate law enforcement interests." You have litigated these cases. Does Mr. Comey have a point? Is there credible evidence that sources are drying up?

A. It is difficult for me to respond definitively to the question of the degree to which sources are "drying up". For one thing, potential sources that are unwilling to confide in journalists because of their concern about subpoenas previously threatened or served by the Department of Justice may well not contact journalists (not to say their lawyers) in the first place. Moreover, it was not until recently that the Department of Justice began to subpoena journalists in highly publicized matters, the very sort of matters that would be expected to become known by other prospective sources. In the same vein (and necessarily speaking generally) it was not until the last few years that the Supreme Court's 1972 ruling in *Branzburg v. Hayes* began to be interpreted by a number of courts to strip journalists of any legal rights bottomed in the First Amendment to protect their confidential sources.

While I thus cannot furnish the committee with definitive evidence that sources are drying up, I can offer some personal opinions based on my own immersion in cases in this area. Within the last year, to focus on my own experience, I have worked on more confidential source matters than in any other year since the issuance of the *Branzburg* ruling in 1972. In fact, I have spent considerably more time in the last year on such matters than on all such matters in the last decade. Three of the matters I have worked on recently have been actively litigated in the courts — the Judith Miller/Matt Cooper subpoenas, the Wen Ho Lee case subpoenas and the subpoenas (which may or may not have yet been served) on telephone carriers of the New York Times that are currently at issue in the Second Circuit. Beyond that, I have recently provided advice to clients with respect to at least another dozen prospective subpoenas.

Let me turn now to the crux of the question. Have sources dried up? My answer is this: How can we even imagine that they have not? The way I would urge the committee to consider this question is the same way the Supreme Court approached, in 1996, the issue of whether the absence of a privilege for psychotherapists and social workers would "dry up" the willingness of their patients and clients to repose confidences in them. In *Jaffee v. Redmond*, 518 U.S. 1 (1996), the Court concluded that under Federal Rule of Evidence 501, individuals in both categories would be deemed privileged not to reveal what they had learned in confidence. No empirical evidence was cited by the Court which simply used its common sense to determine that "[i]f the privilege were rejected, confidential communications between psychotherapists and their patients would *surely* be chilled . . . ." *Id.* at 12 (emphasis added) The same is true here. Whatever ambiguity may have existed before about the law, journalists and — more importantly, — their sources surely cannot be anything but chilled by the ruling of the Court of Appeals in the *Judith Miller* case that journalists have *no* First Amendment-rooted privilege to refuse to reveal their sources to a federal grand jury that seeks their revelation in good faith.

Q. Mr. Comey asserts that the Attorney General guidelines have limited the number of subpoenas against reporters for source information to just a handful of instances over the 33-years. He further stated that authorizations granted for source information have been closely linked to significant criminal matters that directly affect the public's safety and welfare. Do you believe this to be accurate? Have you seen a trend in recent years toward more aggressive use of subpoenas?

A. I cannot speak about the internal workings of the Department of Justice, except to note that in the *Judith Miller* case the Attorney General's Guidelines were not even applicable since Mr. Fitzgerald was acting on his own without any direct oversight by the Department of Justice. I can offer you, however, my own experience in *New York Times Co. v. Gonzalez*, the Second Circuit case I referred to above in which the Department of Justice, in yet another "leak investigation" — the sort of grand jury investigation, tellingly, that was all but unknown in the past — has announced its intention to subpoena the telephone companies that service the New York Times in an effort to determine who provided information to the Times in the weeks immediately after September 11, 2001 that permitted it to call certain Islamic charities to obtain their comment on forthcoming

(and widely reported) efforts of the government to block their assets. The facts of the case are set forth in a 121-page opinion of U.S. District Judge Robert Sweet, and I will not repeat them here. It should suffice to say at this time two things: (a) notwithstanding repeated language in the Attorney General's Guidelines instructing government attorneys to negotiate with the press in an effort to avoid conflict, if at all possible, Deputy Attorney General James Comey, refused even to meet with me and my co-counsel, Kenneth W. Starr, to discuss the government's stated intention to subpoena the Times' telephone records (b) notwithstanding the clearest statements in the Attorney General's Guidelines, 28 C.F.R. § 50.10, that subpoenas were *not* to issue to the press or their telephone providers unless they are drawn as narrowly as possible, they cover a reasonable period of time and all reasonable alternative investigative steps had been taken before issuing such a subpoena, the government had wholly failed to demonstrate that any such thing was true. The government, Judge Sweet concluded, had made "no meaningful showing that (1) the subpoena is as narrowly drawn as possible, (2) that it covers a reasonable period of time, and (3) that the government pursued all reasonable alternative investigation steps prior to issuance of the subpoena." The district court concluded that the government had not made "any showing" that the records were "necessary, relevant, material and unavailable from other sources".

Putting aside the question of whether the District Court's ultimate ruling granting declaratory relief to *The Times* will be affirmed (although I am confident it will)[1] it certainly appears that the government failed to abide by the Attorney General's Guidelines when Deputy Attorney General Comey refused even to meet with us or when the government could not begin to justify its decision to issue the subpoena in the first place.

Q. It has been argued that the Free Flow of Information Act, would overrule the Supreme Court and give more protection to the reporter's "privilege" — which has not been recognized by the Supreme Court — than exists for other forms of privilege that are recognized, such as the attorney-client privilege or the spousal privilege. Why should this be?

The notion that the Free Flow of Information Act ("FFIA") "would overrule the Supreme Court" is simply incomprehensible. The *Branzburg* case itself stated that "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 to deal with the evil discerned . . . ." 408 U.S. at 706.

As for the suggestion that the proposed legislation would give broader protection than is the case with respect to other privileges, I respectfully disagree. The proposed statute certainly

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1 As I write this letter, the case (set forth at 2005 WL 427911 (S.D.N.Y. February 24, 2005)) is on appeal to the Court of Appeals for the Second Circuit.

would not provide broader protection than already exists in the District of Columbia, which offers far more protection than is set forth in FFIA. *See*, D.C. Code Ann. § 16-4701-4704. Nor is the statute broader than that in effect in New York, N.Y.Civil Rights Law § 79(b), California, Const. § Z; Cal. Evid. Code 51070, or in 17 other states that provide essentially absolute protection.

The allegation that FFIA would provides more protection than the attorney-client privilege is also overstated. FFIA has a national security exemption; the attorney-client privilege has none. It is true that the latter privilege has a crime-fraud exception not set forth in FFIA but that provision would not fit comfortably in a statute that is designed, as I understand it, to protect communications to journalists such as occurred in the Pentagon Papers case, where the source may conceivably have committed a crime but the simple and lawful receipt of the information was not criminal. *See* generally, *United States* v. *New York Times*, 403 U.S. 713 (1971); *Bartnicki* v. *Vopper*, 532 U.S. 514 (2001)

Follow-up Questions of Senator Durbin

1. **In your written testimony, you argued that "protection of journalists' sources should not be made dependent on whether we think a particular story serves or disserves the public." But the point of a reporter's privilege is to permit reporting that serves the public. Should we create a privilege that allows journalists to be used as a tool to disservice the public?**

A. To answer your question, I start with basic First Amendment principles. One is that generally we don't make legal distinctions based on the content of speech. Another is that we don't trust government officials, judges included, to decide which speech is virtuous and which not —or, to put it in the precise terms of the question, which speech serves and which disserves the nation.

Consider the ongoing controversy about the disclosure by *The New York Times* of information obtained at least in part from confidential sources revealing that by order of the President the NSA is engaged in (and has been engaged in) warrantless eavesdropping of American citizens. Some people, myself included, think the disclosure served the country; that the President's action was likely illegal because it violated the FISA law; that the action may be unconstitutional as well; and that in any event the conduct — and possible misconduct — of the Administration was surely newsworthy. On the other hand, some claim the President's conduct and that of his Administration was not only lawful but essential to protect national security, that the leakers, at the least, behaved illegally, and that the action of *The Times* in publishing the material grievously harmed the national interest.

Who is right? I have already told you my views but I cannot be certain the courts, not to say the Administration, will agree. So how is a newspaper to know when it promises confidentiality of the sources on such a story, what the final judgment will be on whether it served or disserved the public? It cannot. And if it cannot know for sure and the ultimate determination of whether it

has served or disserved the public is critical, it either must abandon its story or take the gravest risks in deciding whether or not to publish.

The same quandary is routinely presented in other confidential source cases. In the Pentagon Papers case, the Times thought it was serving the public interest by publishing Top Secret material obtained from a confidential study about how this nation became embroiled in combat in Viet Nam; the government argued that irreparable harm would befall the nation if the newspaper published such material. In other cases that I have been involved in, as well, newspapers published and radio and television stations broadcast material they considered newsworthy and that the government concluded imperiled one significant social interest or other.

I do not think a decision on whether a particular confidential source should or should not be protected can or should be made based on an after the fact *ad hoc* decision by a judge about whether the public was or was not served by a journalist's revelations. I do not mean that no "balancing" at all may occur, only that a decision in hindsight that the public turns out to have been better or worse off because of the disclosure provides no breathing room at all for speech and thus should not be utilized to determine when confidential sources should be protected.

2. I know that this bill is not intended to preempt any of the reporter's privilege protections that have developed in 48 states or here in the District of Columbia. Would this federal shield law in any way preempt or conflict with state courts?

A. Not at all. In fact, it would help to assure that the state statutes and common law rulings are given effect. As the *Jaffee* case I cited above (518 U.S. 1 (1996)), makes plain, one of the reasons federal common law now protects the psychoanalyst-patient and social worker-patient relationship is to conform practice in the federal courts with that in the state courts. As the Court there stated:

> "Because state legislatures are fully aware of the need to protect the integrity of the fact finding functions of their courts, the existence of a consensus among the States indicates that 'reason and experience' support recognition of the privilege. In addition, given the importance of the patient's understanding that her communications with her therapist will not be publicly disclosed, any State's promise of confidentiality would have little value if the patient were aware that the privilege would not be honored in a federal court."

518 U.S. at 18.

The same is true here.

3. Unlike many of the state shield laws, the proposed federal shield law does not make any exceptions for cases of libel or defamation. Should exceptions be made in cases of libel or defamation, where disclosure of a source's identity or other compelled disclosures may be necessary to prove or disprove a claim?

A. It is unnecessary to do so. Libel cases are routinely tried in state courts, where state privileges govern; when they are heard in federal courts when diversity jurisdiction is asserted, state privilege law applies. There is no federal libel law and as a result no libel cases in which FFIA would apply.

4. Most of the state shield laws do not provide as absolute a privilege as the proposed federal shield law. In crafting a federal shield law, how important is uniformity between federal and state law? Should the final version of a federal shield law more closely resemble the majority of state shield laws so that reporters could have more certainty as to which promises of confidentiality would be upheld, regardless of where a claim is brought?

A. Journalists are currently deeply troubled by their inability to know whether they may wind up in a state or federal forum. As Judith Miller testified before this committee, it was ironic that she should be jailed for not revealing the identity of her sources to a federal grand jury sitting in the District of Columbia, a site that has an "absolute" shield law that would have protected her without question if the grand jury had been the more local one that passes on matters relating to the District itself. In that respect, I would note again that eighteen states, as well as the District of Columbia, provide absolute protection for journalists. As drafted, FFIA would provide less protection for journalists than do those states.

That said, however, the suggestion in the question that the interest of journalists would somehow be served if Congress provided *less* protection than it otherwise would in the service of assuring more certainty misses the point. The particular danger of uncertainty in this area of law is that it may ultimately lead journalists to make the decision or assumption that they must act in a manner consistent with the least protective jurisdiction that may sit in judgment on them. Ms. Miller, reporting in Washington , would thus have to assume that she has no protection at all before a federal grand jury acting in good faith, notwithstanding the clear intent of the D.C. Shield Law to protect her, If her choice, with respect to another story after the adoption of a statute such as FFIA, was to assume the application of a less protective state shield law rather than the more expansive terms of FFIA, that would (at worst) leave her still safe to report the story, even if she assumed that she had less protection than it ultimately turned out that she did.

5. Can a court ever compel disclosure of a confidential source in a civil case brought under the Privacy Act, where the alleged harm is to the plaintiff's career and reputation? If not, does this bill in effect abrogate the rights for legal redress created under the Privacy Act?

A. No and no.

The theory of the Privacy Act was to provide a remedy against government officials who leak certain information about government employees, not to injure or harm journalists who receive and disseminate relevant and newsworthy information that they receive lawfully. Many — I would say most —Privacy Act cases proceed routinely from start to finish without any need, let

alone critical need, for journalists to reveal their sources. To protect journalists from being obliged to identify their confidential sources in such cases would only rarely prevent a potentially meritorious case from prevailing. In fact, I think its fair to say that we would know now if any such case had ever occurred, notwithstanding the significant protection ostensibly afforded the press in *Zerilli* v. *Smith*, 656 F. 2nd 705 (D.C. Cir. 1981), and that we know of none. On the other hand, to permit courts to require such revelations in cases such as the Wen Ho Lee litigation, would inevitably impair the ability of the press to report even the most significant matters relating to the safety of the nation.

6. Would the "clear and convincing" evidence standard found in Section 2(a)(2)(B) require a stronger evidentiary showing than is required under the current "*Zerilli*" balancing test used in civil cases? *See Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981) (holding that a civil plaintiff seeking such information must show that the information is central to the case and that the plaintiff has exhausted all other reasonable sources of discovery).

A. To some extent. While there is only a small gap, in practice, between what FFIA provides and what *Zerilli* appears to require, the recent case of *Lee v. Department of Justice*, 413 F.3d 53 (D.C. Cir. 2005) interprets *Zerilli* in what I believe is a rather grudging manner — *i.e.* a manner that diminishes or limits the protections afforded the press by *Zerilli*. Whatever may be the merits of that view, the *less* protection *Zerilli* is read to provide the press, the more significant (and needed) the provisions of FFIA would be.

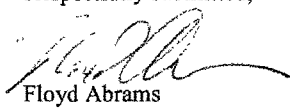
7. Unlike the balancing test set forth in *Zerilli*, Section 2(a)(1) of the proposed legislation requires that the "party seeking to compel production" must show that he has attempted to obtain the information from "all persons" from whom such information could "reasonably be obtained other than a covered person." How would the party seeking disclosure show that it has attempted to obtain the information from "all persons?"

A. The words "all persons" should not be read without equal focus on the succeeding language beginning with "reasonably be obtained . . . ." The statute thus requires no more of the government than that it try to obtain the information *first* from non-journalists. I believe that language would thus be read consistently with the Attorney General's Guidelines themselves, 28 C.F.R. § 50.10(b) (2005), which provide that "[a]ll reasonable attempts should be made to obtain information from alternative sources before considering issuing a subpoena to a member of the news media."

* * * * *

In conclusion, I want to thank you, Senator Specter, and the entire committee for holding the July 20, 2005 hearing and for posing then and now the probing and incisive questions put to all witnesses.

Respectfully submitted,



Floyd Abrams

Senator Arlen Specter
Chairman
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Attention: Barr Huefner

Matthew Cooper
Time Magazine

QUESTIONS OF SENATOR RICHARD J. DURBIN

1. In your oral and written testimony, you described the difficulty of promising confidentiality to a source without knowing whether the material might eventually be litigated in a state court where the source's confidentiality would be protected or in a federal court where it would not be. You testified that, "I'd like to know better what promises I can legally make and which ones I can't." Do you think your ability to do your job as a reporter would be inhibited by a federal shield law that did not provide absolute source protection but instead employed a qualified source protection similar to that employed by the majority of state shield laws?

As a journalist, a qualified federal shield law would certainly be an improvement over the current situation where there seems to be none or little protection afforded the confidential source-journalist relationship in the federal courts. I recognize that no privilege is ever truly absolute, even those which are more widely recognized such as the attorney-client or clergy-parishioner relationships. I do think that the closer Congress can craft any shield law to these other privileges would be better for the free flow of information so essential to our democracy. Those states with something akin to an absolute privilege such as New York and the District of Columbia have found their more expansive definition of privilege to be entirely compatible with law enforcement and our grand jury system,

2. In your work as a journalist, how often do you interview people as a source for a story who turn out to be a whistleblower? How often do you interview people as a source for a story who turn out to be a wrongdoer?

Most persons I interview who want a degree of anonymity can't be easily categorized as either a whistleblower or a wrongdoer. Mostly they are people with an agenda who want to shed light on some aspect of government. They're neither ferreting out criminal wrongdoing nor engaging in criminal mischief. I think as we've seen in the case of the most famous whistleblower of all, Mark Felt, the FBI official now acknowledged to be the Deep Throat of Watergate fame, that it's hard to distinguish always between what might be called a good or bad leaker or leak. Felt's revelations are widely recognized to have been good for society, but his motives--reportedly a mix of personal pique over not having been made FBI Director and jealousy over the Nixon White House honing in on the clandestine and controversial practices of J. Edgar Hoover's FBI--suggest, as the columnist Margaret Carlson has said, that good and bad leaks cannot be separated like so many white and dark socks in the laundry.

46018.009

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March 8, 2006

VIA HAND DELIVERY

Barr Huefner
Hearing Clerk
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Follow-Up Questions from Committee Members Regarding July 20, 2005 Hearing, "Reporters' Shield Legislation: Issues and Implications"

Dear Ms. Huefner:

Attached please find responses to follow-up questions from Committee Members regarding the above-referenced hearing. Because Senator Durbin asks specifically about Privacy Act litigation involving Dr. Wen Ho Lee, I have also enclosed a copy of the petition for *certiorari* that was filed in that case on January 31, 2006.

Please let me know if I may be of any additional assistance.

Sincerely,

LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.

By Lee Levine / CRB
Lee Levine

Enclosure

Questions of Senator Richard J. Durbin

1. **You have argued that a federal shield law is necessary to allow the press to engage in "important, public-spirited journalism." I understand that you are representing two of the reporters whose sources were subpoenaed in the Wen Ho Lee case. As I understand it, the investigation into whether racial bias was the underlying reason his name was leaked to the press depends upon identifying these journalist's sources. Don't you think that preventing an investigation into discriminatory intent in government officials is important and in the public spirit?**

I am aware that Dr. Wen Ho Lee has alleged that the federal criminal investigation that led to his indictment and guilty plea was motivated in significant part by ethnic discrimination. I am also aware that such allegations – and other serious questions about the legitimacy of the government's case against Dr. Lee – were in fact brought to the public's attention by the press, in some cases through reporting made possible only by information provided by confidential sources.[1] Such public scrutiny of the government's investigation and its treatment of Dr. Lee exemplifies the kind of important, public-spirited journalism that would be stifled if reporters cannot safely promise confidentiality to their sources. So do the several press reports about the potential threat to our national security posed by breaches of security at our nation's most sensitive nuclear facilities that were written by the journalists who have been held in contempt in Dr. Lee's Privacy Act case for declining to disclose the identities of the confidential sources who made such reporting possible.

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[1] *See, e.g.*, William J. Broad, *Official Asserts Spy Case Suspect Was a Bias Victim*, N.Y. TIMES, Aug., 18, 1999, at A1; Bob Drogin, *Chinese Spy Case Produces Heavy Fallout, Little Else*, L.A. TIMES, Sept. 20, 1999, at A1; Bob Drogin, *Lack of Evidence Led to Wider China Spy Inquiry*, L.A. TIMES, Oct., 3, 1999, at A34; John Solomon, *FBI Chased Lee Despite Spy Doubts*, A.P., Dec. 11, 1999.

The Privacy Act litigation instituted by Dr. Lee, in which those journalists have been held in contempt, does not encompass and has nothing to do with any investigation of "whether racial bias was the underlying reason his name was leaked to the press." Rather, that lawsuit seeks money damages from the government based on the single allegation that three federal agencies violated the Privacy Act, which prohibits the public disclosure of the contents of "records pertaining to an individual." There is no issue in that case, nor could there be in any analogous Privacy Act suit, concerning "racial bias" or "discriminatory intent."

By the same token, the compelled disclosure of the press's confidential sources in Privacy Act litigation poses significant risks to the ability of journalists to report on matters of vital public concern. As one federal appeals judge wrote in the *Lee* case, without such a privilege in Privacy Act cases, any public official, modern-day Watergate suspect or even convicted felon could file a Privacy Act suit and, unless confidential news sources themselves came forward voluntarily, compel the disclosure of their identities. *Lee v. Department of Justice*, 428 F.3d 299, 302-03 (D.C. Cir. 2005) (Garland, J., dissenting from denial of rehearing en banc). This is because, at bottom, Dr. Lee's case is based on the contention that the Privacy Act is violated whenever information reflected in a government record about an identifiable individual is disclosed to the public, without regard to whether the information disclosed relates to a matter of legitimate public concern. Thus, according to Dr. Lee's legal theory, when the government publicly announced that an unnamed nuclear scientist had been dismissed because he was under

active investigation for engaging in espionage, the subsequent public disclosure of any information about him or the investigation constituted a per se violation of the Privacy Act.

If this theory of Privacy Act liability is accepted by the courts, public officials will literally be precluded – on pain of criminal and civil liability – from disseminating to the public any information about their investigations of crimes of undeniably legitimate public concern that happens to reside in a government record. No court has squarely addressed the efficacy of a Privacy Act claim in such circumstances, but it is highly doubtful that Congress ever intended the statute, passed shortly after Watergate as a governmental reform measure, to preclude officials from disseminating information of such obvious significance to its citizens. One federal appeals court has spoken to this issue, albeit in *dicta*:

> [I]t might be questioned whether current newsworthy information of interest to the community, ... even falls within the strictures of the Privacy Act. As the legislative history indicates, the Privacy Act was primarily concerned with the protection of individuals against the release of stale personal information contained in government computer files to other government agencies or private persons. The legislative history of the Act does not evidence any intent to prevent the disclosure by the government to the press of current, newsworthy information of importance and interest to a large number of people.

Cochran v. United States, 770 F. 2d 949, 959 n.15 (11th Cir. 1985) (citation omitted). This, I respectfully submit, is the overriding public interest that is in fact threatened when reporters are subpoenaed to reveal the identities of confidential sources in Privacy Act cases.

Attached for your information is the petition for a writ of *certiorari* filed by three of the journalists subpoenaed by Dr. Lee, captioned *Drogin v. Lee*, which is currently pending in the Supreme Court.

2. Unlike many of the state shield laws, the proposed federal shield law does not make any exceptions for cases of libel or defamation. Should exceptions be made in cases of libel or defamation, where disclosure of a source's identity or other compelled disclosures may be necessary to prove or disprove a claim?

Because the proposed shield law applies only to causes of action arising under federal law, there is no need for a defamation exception because, by definition, defamation claims arise under state law. When a federal court hears a defamation claim by virtue of its limited diversity jurisdiction, 28 U.S.C. § 1332, that court must apply state law in determining whether a journalist may assert a privilege and thereby resist compelled disclosure of the identity of a confidential source.

This rule has long been established by Federal Rule of Evidence 501, which provides that "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law." The Advisory Committee notes articulate the reason for this rule: "The rationale underlying the proviso is that federal law should not supersede that of the States in substantive areas such as privilege absent a compelling reason. The Committee believes that in civil cases in the federal courts where an element of a claim or defense is not grounded upon a federal question, there is no federal interest strong enough to justify departure from State policy." This rule is routinely applied to defamation actions in federal court. *See, e.g.*, *Price v. Time, Inc.*, 416 F.3d 1327, 1335 (11th Cir. 2005) (footnote omitted) ("We take up the state shield law first, because it bestows an absolute privilege which, if applicable, would end the matter. State privilege defenses have full force and

effect in federal court in diversity jurisdiction cases by virtue of Fed. R. Evid. 501. If the Alabama courts would apply that state's shield law in this case if it had not been removed to federal court, then we must apply it; if they would not, then we must not. Our task is to decide whether Alabama's courts would apply the shield law to magazine reports and publishers.").

3. Most of the state shield laws do not provide as absolute a privilege as the proposed federal shield law. In crafting a federal shield law, how important is uniformity between federal and state law? Should the final version of a federal shield law more closely resemble the majority of state shield laws so that reporters could have more certainty as to which promises of confidentiality would be upheld, regardless of where a claim is brought?

For a reporter who must decide whether he can promise confidentiality to a source without knowing in what court he may ultimately be served with a subpoena, the central problem is the current lack of consistency between federal and state law: All but one state recognizes a reporter's privilege – including thirty-one states and the District of Columbia that do so by statute – while there is no such federal statute and the federal courts are increasingly fractured over the extent of constitutional or common law protection available to journalists. The proposed legislation would narrow the differences between the protection afforded reporters in state and federal courts significantly. For reporters, the bottom line is that, so long as state and federal law both protect against compelled disclosure of confidential news sources in all but the most exceptional cases, they can make the promises necessary to gather important news.

In addition, the fact is that the proposed legislation would afford *less* protection than many state shield laws. For example, eighteen states establish an absolute privilege against the compelled disclosure of confidential sources, including major population centers such as New

York, California, Pennsylvania, New Jersey and Maryland, as well as the District of Columbia.[2] The proposed legislation would be "less absolute" than these laws.

4. Can a court ever compel disclosure of a confidential source in a civil case brought under the Privacy Act, where the alleged harm is to the plaintiff's career and reputation? If not, does this bill in effect abrogate the rights for legal redress created under the Privacy Act?

The privilege established by the proposed legislation would prohibit the compelled disclosure of confidential news sources in all civil cases. This evidentiary privilege does not, however, serve to abrogate any rights afforded by the Privacy Act. The civil cause of action created by the Privacy Act provides for an award of money damages when a federal agency has improperly maintained, used, or disclosed records it holds about the plaintiff. The proposed federal shield law does no more than afford non-party journalists an evidentiary privilege to decline to provide the identity of their confidential sources of information – just as the law currently allows a lawyer, psychotherapist, spouse, or priest who may learn the same information through a privileged communication to protect that confidence in a Privacy Act case. None of these evidentiary privileges preclude a litigant from establishing a Privacy Act claim against the government. Rather, such privileges reflect a judgment that certain societal ends – be they encouraging mental health treatment, protecting the attorney-client relationship, or preserving the

[2] Ala. Code § 12-21-142; Ariz. Rev. Stat. § 12-2237; Ark. Code Ann. § 16-85-510; Cal. Const. § 2; Cal. Evid. Code § 1070; Del. Code Ann. tit. 10 § 4323; D.C. Code Ann. §§ 16-4701-4704; Ind. Code §§ 34-46-4-1, 24-46-4-2; Ky. Rev. Stat. Ann. § 421.100; Md. Code Ann., Cts. & Jud. Proc., § 9-112; Mont. Code Ann. §§ 26-1-902, 26-1-903; Neb. Rev. Stat. § 20-146; Nev. Rev. Stat. § 49.275; N.J. Stat. Ann. §§ 2A:84A-21-84A-21.8; N.Y. Civ. Rights Law § 79-h; Ohio Rev. Code §§ 2739.04, 2739.12; Okla. Stat. tit. 12, § 2506; Or. Rev. Stat. §§ 44.510-44.540; Pa. Stat. Ann. tit. 42, § 5942.

effective functioning of the press – are sufficiently important to require litigants to look to other sources of evidence to make their case.

5. Would the "clear and convincing" evidence standard found in Section 2(a)(2)(B) require a stronger evidentiary showing than is required under the current "*Zerilli*" balancing test used in civil cases? *See Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981) (holding that a civil plaintiff seeking such information must show that the information is central to the case and that the plaintiff has exhausted all other reasonable sources of discovery).

Section 2(a)(2)(B) of the proposed legislation does require a stronger evidentiary showing than *Zerilli*, at least as the test set forth in that case has most recently been interpreted in the D.C. Circuit. *See Lee v. Department of Justice*, 413 F.3d 53 (D.C. Cir. 2005). Such a heightened showing is, however, required by other federal circuits, *see, e.g.*, *In re Petroleum Products Antitrust Litigation*, 680 F.2d 5, 7-8 (2d Cir. 1982) (requiring a "clear and specific showing" to overcome privilege), and by several state shield laws, *e.g.*, Md. Cts. & Jud. Proc. Code Ann. § 9-112 (requiring "clear and convincing evidence" to overcome privilege); Minn. Stat. Ann. § 595.024 (same); Tenn. Code Ann. § 24-1-208 (same); *see also* Fla. Stat § 90.5015(2) (requiring a "clear and specific showing" to overcome privilege); N.Y. Civ. Rights Law § 79-h(c) (same); Okla. Stat. Ann. tit. 12 § 2506 (same). The logic of requiring such a showing is based on the recognition that, as the Supreme Court has explained, "the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." *Speiser v. Randall*, 357 U.S. 518, 520-21 (1958). As a result, where First Amendment interests are implicated as they are in the proposed legislation, such moderately heightened evidentiary standards are not unusual and are typically deemed to be both necessary

and appropriate. *See, e.g.*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

6. Unlike the balancing test set forth in *Zerilli*, Section 2(a)(1) of the proposed legislation requires that the "party seeking to compel production" must show that he has attempted to obtain the information from "all persons" from whom such information could "reasonably be obtained other than a covered person." How would the party seeking disclosure show that it has attempted to obtain the information from "all persons?"

The exhaustion requirement is premised on the simple notion that discovery from news reporters should be the "last resort after pursuit of other opportunities has failed." *Carey v. Hume*, 492 F.2d 631, 638-39 (D.C. Cir. 1974). Indeed, the current Department of Justice guidelines require that "[a]ll reasonable attempts should be made to obtain information from alternative sources before considering issuing a subpoena to a member of the news media." 28 C.F.R. § 50.10(b) (2005). And the requirement that a litigant first attempt to obtain information from "all persons from which such testimony or document could reasonably be obtained" mirrors the test as it is articulated in most federal circuits that recognize either a federal common law or First Amendment-based privilege. *See, e.g.*, *Riley v. City of Chester*, 612 F.2d 708, 716 (3d Cir. 1979) ("All courts which have considered this issue have agreed that the federal common law privilege of news writers shall not be breached without a strong showing by those seeking to elicit the information that there is no other source for the information requested."); *In re Petroleum Prods. Antitrust Litig.*, 680 F.2d 5, 8 (2d Cir. 1982) (no exhaustion despite "hundreds of depositions" because deponents not asked about reporters). I can see no material difference

between the wording of the exhaustion requirement in the proposed legislation and the articulation of that requirement in existing judicial decisions and state shield laws.

Questions of Senator Leahy

Q. Mr. Comey argues in his written statement that "in the absence of a credible demonstration that the subpoena power is being abused by the Department in this area, such that sources have dried up, with the result that journalists are unable to do effective investigative reporting, there is no need for a legislative fix that substantially skews the carefully maintained balance against legitimate law enforcement interests." You have litigated these cases. Does Mr. Comey have a point? Is there credible evidence that sources are drying up?

Although it is always difficult to prove a negative – to demonstrate that a specific source did not provide information he otherwise would have to a specific reporter – the circumstantial evidence that the public is currently being deprived of important information is overwhelming. First, an unusually large number of subpoenas seeking the names of confidential sources have been issued by federal courts in a remarkably short period of time to a variety of media organizations and the journalists they employ. Three federal proceedings in Washington, D.C. alone have generated subpoenas seeking confidential sources to roughly two dozen reporters and news organizations, seven of whom have been held in contempt in less than a year. By way of comparison, the last significant survey of news organizations conducted in 2001 by The Reporters Committee for Freedom of the Press revealed only two subpoenas seeking confidential

source identities issued from any judicial or administrative body that year, federal or state.[3] There appear to have been only two decisions from 1976-2000 arising from subpoenas issued by federal grand juries or prosecutors to journalists seeking confidential sources. Both involved alleged leaks to the media, and in both the subpoenas were quashed.[4] Yet in the last four years, three federal courts of appeals have affirmed contempt citations issued to reporters who declined to reveal confidential sources, each imposing prison sentences more severe than any previously known to have been experienced by journalists in American history.

Second, as I testified before the Committee last July, compelling reporters to choose between their promises to sources and fines or jail in this manner self-evidently threatens reporting about matters of obvious public concern:

- Reporting on the illegal accounting practices of Enron, a corporation that had "routinely made published lists of the most-admired and innovative companies in America." Rebecca Smith & John R. Emshwiller, *Trading Places: Fancy Finances Were Key to Enron's Success, And Now to its Distress*, WALL ST. J., Nov. 2, 2001, at A1.
- Accounts of abuse of detainees at Abu Ghraib prison. 60 Minutes II, Apr. 28, 2004, www.cbsnews.com/ stories/2004/04/27/60II/main614063.shtml?

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[3] *See* A Report on the Incidence of Subpoenas Served on the News Media in 2001, Material the Subpoenas Sought (2001), *available at* www.rcfp.org/agents/material.html.

[4] *See, e.g.*, *In re Williams*, 963 F.2d 567 (3d Cir. 1992) (en banc); *In re Grand Jury Subpoenas*, 8 Media L. Rep. 1418 (D. Colo. 1982).

CMP=ILC-SearchStories (last visited Mar. 2, 2006); Seymour M. Hersh, *Torture at Abu Ghraib*, THE NEW YORKER, May 10, 2004, at 42.

- Articles about the extent to which performance-enhancing drugs had infiltrated both professional and amateur sports that prompted congressional hearings and significant reform in Major League Baseball. *See, e.g.*, Mark Fainaru-Wada & Lance Williams, *Giambi Admitted Taking Steroids*, S.F. CHRONICLE, Dec. 2, 2004, at A1; Lance Williams & Mark Fainaru-Wada, *What Bonds told BALCO Grand Jury*, S.F. CHRONICLE, Dec. 3, 2004, at A1.

In the last two years alone, reporter after reporter has testified under oath that, without confidential sources, they simply cannot do their jobs effectively. As WJAR reporter James Taricani testified before being sentenced to house arrest for declining to reveal the identity of a confidential source,[5] he could not have reported a host of important stories without providing "a meaningful promise of confidentiality to sources," including a report on organized crime's role in the illegal dumping of toxic waste that sparked a grand jury investigation and a report on the misuse of union funds that led to the ouster of the union president.[6] Pierre Thomas, formerly of CNN and now with ABC, has testified that use of confidential sources allowed him to report on

[5] *In re Special Proceedings*, 373 F.3d 37 (1st Cir. 2004).

[6] Mr. Taricani's testimony, as well as that of the other journalists quoted herein, is taken from a compendium of affidavits submitted to the Supreme Court by a coalition of media organizations in *Miller v. United States* and *Cooper v. United States*. *See* Brief for ABC, Inc., et al. as Amici Curiae Supporting Certiorari at B40-41,125 S. Ct. 2977 (2005) (Nos. 04-1507, 04-1508), 2005 WL 1199075 (May 18, 2005). The affidavits submitted to the Supreme Court are from journalists employed by news organizations who have been subpoenaed in recent federal proceedings. Their testimony more fully documents the role played by confidential sources in the reporting of public matters.

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the progress of the Oklahoma City bombing investigation in a manner that proved instrumental in helping a nervous public understand that the bombing was not the work of foreign terrorists, and his award-winning coverage of the September 11 attacks unearthed important information, provided by confidential sources, about the FBI's advance knowledge of the activities of those responsible for that tragedy.[7] Indeed, news reporting based on confidential source material regularly receives the nation's most coveted journalism awards, including the Polk Awards for Excellence in Journalism[8] and the coveted Pulitzer Prize.[9]

Third, anecdotal evidence demonstrates that sources are indeed drying up. As the editor-in-chief of Time, Inc., Norman Pearlstine, testified to this Committee last year, the consequences of a subpoena on his news organization were immediate and profound:

> Following my decision to obey the courts by providing the Special Counsel with the subpoenaed documents, I met last week with TIME's Washington bureau, and later that day with many of its New York writers and editors. Many of them showed me e-mails and letters from valuable sources who insisted that they no longer trusted the magazine and that they would no longer cooperate on stories. The chilling effect is obvious. Without confidentiality — that express promise or

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[7] *Id.* at B22.

[8] In 2004, the Polk Awards for Magazine Reporting, Military Reporting, and Sports Reporting all went to articles based, in significant part, on information and other material provided by confidential sources. *See* www.brooklyn.liu.edu/polk/polk04.html (listing awards) (last visited Mar. 2, 2006).

[9] For example, the 1996 Pulitzer Prize for National Reporting was awarded to the *Wall Street Journal* for its articles reporting on the use of ammonia to heighten the potency of nicotine in cigarettes, which was based on information revealed in confidential, internal reports prepared by a tobacco company. *See, e.g.*, Alix M. Freedman, *'Impact Booster': Tobacco Firm Shows How Ammonia Spurs Delivery of Nicotine*, WALL ST. J., Oct. 18, 1995, at A1. In 2002, the Prize was awarded to the staff of *The Washington Post* for "for its comprehensive coverage of America's war on terrorism, which regularly brought forth new information together with skilled analysis of unfolding developments." *See* www.pulitzer.org/year/2002/national-reporting (last visited Mar. 2, 2006). The *Post*'s series was based, in significant part, on information provided by unnamed public officials, both here and abroad. *See e.g.*, Barton Gellman, *U.S. Was Foiled Multiple Times in Efforts To Capture Bin Laden or Have Him Killed*, WASH. POST, Oct. 3, 2001, at A1.

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> implied understanding that a source's identity won't be revealed — it will often be impossible for our reporters to sustain relationships with sources and to obtain sensitive information from them.

See Testimony of Norman Pearlstine to the United States Senate Committee on the Judiciary (July 20, 2005), *available at* http://judiciary.senate.gov/testimony.cfm?id=1579&wit_id=4505 (last visited Mar. 2, 2006). This result is unsurprising, and not isolated. *See, e.g.*, Grant Penrod, *Diverging Interests*, NEWS MEDIA & THE LAW, Vol. 29, No. 3 (July 1, 2005) at 4 (quoting assistant general counsel to *The New York Times* describing a spreading reluctance from governmental sources to provide information). Indeed, according to a 1971 empirical study, subpoenas of the press demonstrably result in "poisoning the atmosphere" of trust with sources, making reporting more difficult. Vincent Blasi, *The Newsman's Privilege: An Empirical Study*, 70 Mich. L. Rev. 229 (1971), *as cited in* Steven D. Zansberg, *The Empirical Case: Proving the Need for the Privilege*, MLRC White Paper on the Reporter's Privilege at 148 n.3 (Media Law Resource Center, Inc., 2004).

Q. Mr. Comey asserts that the Attorney General guidelines have limited the number of subpoenas against reporters for source information to just a handful of instances over the 33-years. He further stated that authorizations granted for source information have been closely linked to significant criminal matters that directly affect the public's safety and welfare. Do you believe this to be accurate? Have you seen a trend in recent years toward more aggressive use of subpoenas?

Please see the first paragraph of my response to your previous question, which I incorporate here by this reference. In addition, I note that the Department has in fact used its subpoena power to attempt to compel testimony from journalists in more than a "handful" of cases. Between 1991 and September 6, 2001, the most recent period for which statistical data of

this sort is available, the Department issued 88 subpoenas to reporters, 17 of which sought the identity of confidential sources. These statistics, of course, do not include subpoenas issued by special prosecutors. Indeed, these voluntary, internal Department regulations (1) do not apply to federal civil litigants who are subpoenaing reporters in unprecedented numbers; (2) do not apply to special prosecutors; and (3) do not apply to lawyers representing criminal defendants in federal proceedings.

Q. As you know, I am a champion of the First Amendment and an adamant supporter of a free and independent press, but I also want to ensure that crimes are prosecuted. I am sympathetic to the *Branzburg* majority's refusal to accept the argument that "the public interest in possible future news about crime from undisclosed, unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes." Please allow me to play devil's advocate by asking the following questions.

a. We all want to preserve the independence of the press and to prevent a chilling effect on sources' willingness to share information with reporters. But when a crime is committed, does that trump confidentiality? Even defense attorneys are subject to crime-fraud exception. Should journalists have an absolute privilege when no one else does?

As the Supreme Court concluded in recognizing a psychotherapist-patient privilege as a matter of federal common law, the absence of an evidentiary privilege of the kind envisioned by the proposed legislation would have little, if any, impact on law enforcement because, in such circumstances, the underlying communications would be deterred from ever taking place. *See Jaffee v. Redmond*, 518 U.S. 1, 12 (1996) ("Without a privilege, much of the desirable evidence to which litigants such as petitioner seek access—for example, admissions against interest by a party—is unlikely to come into being. This unspoken 'evidence' will therefore serve no greater

truth-seeking function than if it had been spoken and privileged."). This subject is explored at some length in Professor Stone's testimony to the Committee last July and I commend it to you.

Moreover, the proposed legislation does not afford journalists a privilege in this context that is broader than that afforded criminal defense attorneys. To the contrary, the privilege contemplated by the proposed legislation is significantly more narrow. For example, the proposed legislation authorizes the government to seek testimony and unpublished documents from reporters and media entities following a showing that (1) the government has unsuccessfully attempted to obtain the information from other sources and (2) the information is relevant to the matter for which it is sought. No other privilege, including the attorney-client privilege, is subject to such qualification. Even the proposed legislation's privilege for the identities of confidential sources is not absolute and is not as broad as that afforded attorneys, who may only be required to testify about attorney-client communications where there is "probable cause to believe both that a crime or fraud has been attempted or committed and that the particular communications were intended in some way to facilitate or to conceal the criminal activity." 3 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 503.31[1] (2005) (quotations omitted). This crime/fraud exception you cite applies only to *ongoing* or *prospective* crimes or frauds. Discussions about a completed crime are and always have been privileged – indeed it is the very essence of the information protected by the attorney-client privilege. *Id.* § 503.31[2].

b. Do you believe that the public interest in the free flow of information outweighs the public interest in solving crimes?

As illustrated by my answer to the preceding question, I do not believe the two interests are genuinely in conflict. Indeed, last year the Attorneys General of thirty-four states and the District of Columbia – each of whom is, by definition, ultimately accountable for the enforcement of the criminal law in their respective states – filed a "friend-of-the-court" brief urging the Supreme Court to recognize a federal reporters' privilege.[10] In their brief, the Attorneys General noted that the states "'are fully aware of the need to protect the integrity of the factfinding functions of their courts,'" yet they have reached a nearly unanimous consensus that some degree of legal protection for journalists against compelled testimony is necessary.[11] Indeed, the experience of the states demonstrates that shield laws have had no material impact on law enforcement or on the discovery of evidence in judicial proceedings, criminal or civil.

As I have noted, the proposed legislation permits the Department of Justice to seek testimony and unpublished documents from the press upon a showing of exhaustion and relevance. This standard is substantively identical to, and in many cases *less* stringent than, the tests contained in each of the 32 state shield laws. And it is consistent with the terms of the Department of Justice's own internal discretionary guidelines, which have been in operation for more than 30 years and have not had a material impact on law enforcement.

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[10] Brief of State of Oklahoma, et al. as Amici Curiae Supporting Certiorari at 1, *Miller*, 125 S. Ct. 2977, 2005 WL 1317523.

[11] *See id.* at 6 (citing *Jaffee v. Redmond*, 518 U.S. 1, 13 (1996)).

Q. The Federal Rules grant privileges to certain types of professionals, such as attorneys and psychiatrists, under certain conditions. These individuals are duly licensed professionals. Do you fear that the move to enact a shield law would result in a demand for the licensing of individual reporters? What implications would such a trend have on the freedom of the press?

I am not aware of any evidence in any of the thirty-one states or the District of Columbia in which there are currently shield laws on the books that the existence of such laws has led to a single demand that individual reporters be licensed. Such a demand would, in any event, run afoul of the First Amendment. The proposed federal shield law, like its counterparts in the states, is not a licensing statute. Neither is the Privacy Protection Act of 1980, which provides the press with protection against search warrants directed at its newsrooms. 42 U.S.C. § 2000aa(a) (applying to "a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication"). Neither is the federal statute that grants certain categories of publishers reduced postal rates. 39 U.S.C. § 3622(b)(8) (rates may be set to reflect "the educational, cultural, scientific, and informational value to the recipient of mail matter"); *see also* 707 Domestic Mail Manual 4.4 (defining "periodicals"), *available at* http://pe.usps.gov/text/dmm300/707.htm#wp1058639707 (last visited Mar. 6, 2006). Neither is the Freedom of Information Act ("FOIA"), which provides journalists and others with the ability to gain access to government information without paying a fee. 5 U.S.C. § 552(a)(4)(A)(ii)(II) ("fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by … a representative of the news media"). As you noted as a sponsor of the Freedom of Information Reform Act of 1986, which added this language to FOIA, the term should be

interpreted broadly to mean "any person or organization which regularly publishes or disseminates information to the public." 132 Cong. Rec. S14298 (daily ed. Sept. 30, 1986) (quoted by *Nat'l Sec. Archive v. Dep't of Def.*, 880 F.2d 1381, 1386 (D.C. Cir. 1989)) (quotations omitted). The proposed shield legislation similarly contains a functional definition of a person or entity that "disseminates information by print, broadcast, cable, satellite, mechanical, photographic, electronic, or other means." As one federal judge has recently noted, "whereas any meaningful reporter privilege must undoubtedly encompass … full-time journalists for *Time* magazine and the *New York Times*, … future opinions can elaborate more refined contours of the privilege – a task shown to be manageable by the experience of the fifty jurisdictions with statutory or common law protections." *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 995 (D.C. Cir.) (Tatel, J., concurring in the judgment), *cert. denied*, 125 S.Ct. 2977 (2005). Indeed, such line-drawing has proved "manageable" not only in applying the reporter's privilege, but also in defining the clergy for purposes of applying the priest-penitent privilege, which courts have successfully done for more than 200 years consistently with the First Amendment's Establishment Clause. *See* 3 Weinstein, *supra*, § 506.04[1][a] (defining privilege as applicable to "a minister, priest, rabbi, or other similar functionary of a religious organization").

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Q. There is a danger that if Congress enacts a Federal Shield law, the resulting statute could be weaker than those provided by some states. Do you fear this outcome? Given that the reporters' privilege debate is relevant to civil and criminal cases, how would a weak Federal law impact diversity cases?

As I have noted in my response to Senator Durbin's second question, the details of which I incorporate by reference here, the proposed legislation will necessarily have little effect on diversity cases.

* * *

William Safire
6200 Elmwood Road
Chevy Chase MD 20815

March 7, 2006

Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington DC 20510

Attn: Barr Huefner, Hearing Clerk

Here are my answers to the two questions you submitted to me from Committee members following my testimony of July 20, 2005 regarding reporters' shield legislation. Your request was directed to my former office at the New York Times and I have since become chairman of the Dana Foundation, 900 15th Street, Washington, D.C. 20005, hence the communications delay.

Question 1. "You testified that the Plame case has already created a chilling effect across America. How much will the passage of a federal shield law do to undo that damage?"

My answer: We are now in the midst of a judicial "open season" against journalists who dare to make public what officialdom, especially prosecutors, want to keep secret. Until recently, prosecution of reporters for refusing to reveal the source of their information was relatively rare. Federal custom, recognizing not only the First Amendment but also the action of so many states to pass shield laws that enabled whistleblowers to reveal wrongdoing to reporters in confidence, was to refrain from coercing journalists with threat of jail except as a last resort in the most exceptional circumstances.

Now that traditional judicial and prosecutorial restraint is rapidly eroding. First in high-profile federal criminal cases such as Plame, then in civil cases brought by litigants in federal court, a dangerous trend has developed that upsets the balance that for so long prevailed in the federal court system. Subpoenas to reporter and editors, to publishers and broadcasters --- carrying the implicit threat of contempt prosecution --- are becoming more commonplace. Zealous prosecutors, blinkered judges and intimidating lawyers in litigation have found an easy way to pursue their particular interests, uninterested in the effect of this explosion of coercion on the public interest.

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The virus in vogue in federal courts has infected the federal regulatory system. Recently enforcement officials of the Securities and Exchange Commission brandished the contempt weapon at two investigative columnists, seeking their sources, phone records and e-mails while covering a stock fraud case. The SEC chairman, who had been unaware of the zealotry in the field, promised new guidelines to restrain agents, but the Justice Department has long had such guidelines and they were ignored by special counsel and federal judges in the Plame case. After the SEC issues its own guidelines, will the FCC and FTC and FDA and Federal Reserve be far behind? Rather than leave it to administrative employees at diverse regulatory agencies to draw up a hodgepodge of toothless guidelines about a matter of such constitutional importance, isn't it the responsibility of Congress to write law applicable to the entire federal system --- thereby stopping this growing abuse of the subpoena power?

A federal shield law would provide a uniform set of federal standards, reaffirming the traditions supported by almost all the states, to stop the unprecedented explosion of coercion now threatening investigative journalism. Just as the Plame investigation led to what potential litigants saw as an open invitation to subpoena reporters, a federal shield would send this clear message to prosecutors and defense lawyers, regulators and judges: that the U.S. Congress values the need to protect the public's need to unearth information from whistleblowers (including those derogated by the embarrassed or exposed officials or executives as leakers or snitches). Passage of the Free Flow of Information Act would demonstrate that our elected representatives recognize the central role of the press in informing the public of corporate scandal, official malfeasance and ethical breaches that would otherwise never see the light of day.

Passage of a federal shield law cannot undo the damage done to the journalist Judith Miller, then of the New York Times. She suffered through 85 days in jail for upholding the principle of confidentiality until personally released by her source and a prosecutor agreed to limit the scope of his intrusion. But the law would demonstrate that her sacrifice of three months of freedom was not in vain.

Question 2. "Do you think the post-Plame chilling effect that you describe impacts local journalists covering, say, a corruption case in city hall, compared to a national reporter covering the White House? If so, how would a federal shield law address that local problem?"

My answer: Consider a specific recent example of what the lack of a federal shield law has had on punishing a local reporter, James Taricani, for alerting local citizens to local corruption in Rhode Island by broadcasting a videotape of the former mayor of Providence receiving a $1000 bribe.

The former mayor was convicted in federal court in 2002, under the federal RICO statute, for racketeering conspiracy. A protective order had been entered in his criminal case that barred counsel from releasing the videotape. When Taricani refused to reveal the source of the video tape that had been given him, he was held first in civil and then in criminal contempt, and served a six-month sentence (in house arrest because of ill health).

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This is a vivid example of how a local reporter, serving the public by exposing local corruption, can be swept into federal litigation and punished for protecting the confidentiality of a source. He testified that protecting the identity of sources was essential to his reporting not only in this case but in his reporting on illegal handling of local toxic wastes and the misuse of local union funds.

Law enforcement officials, federal as well as the majority of states' attorneys general, know how wrongdoing is often first exposed in the press, and know that the longstanding tradition of treating a reporter's source as inviolate often leads to successful prosecution. Early reporting on illegal practices with the Enron organization in Houston depended on confidentiality. Reports on steroid use by professional athletes originating in San Francisco rested on the ability of journalists to promise confidentiality to sources. Reporting on the Oklahoma City bombings required sources who did not want to be identified publicly.

Federal law has demonstrable local impact. A federal shield, with the reasonable exceptions such as in the bill before the Committee, would replace the feckless guidelines and conflicting decisions that are shutting down communication between source and press. It would facilitate law enforcement by allowing the press to continue to develop leads from sources with a variety of motives --- admittedly not all good or unselfish -- who would otherwise remain not just anonymous but silent. A federal shield will help stem the current tide of contemptuous coercion that, unless unchecked by law, will flood our courts and put honest reporters in jail while sources clam up and miscreants go free.

Sincerely,

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Geoffrey R Stone
Harry Kalven, Jr Distinguished Service Professor of Law

March 7, 2006

Barr Huefner
Senate Judiciary Committee
224 Dirksen Office Building
Washington, D. C. 20510-6275

Dear Senator Specter:

Thanks for your letter soliciting my responses to the questions of Senators Durbin and Leahy following-up on my testimony on July 20, 2005 regarding "Reporters' Shield Legislation: Issues and Implications."

Reply to Senator Durbin's Question: Logically, it makes no sense to extend the privilege to a person whose disclosure is unlawful. The purpose of the privilege is to encourage sources to reveal information to reporters. But if the disclosure is unlawful, we have already decided that we do *not* want the source to reveal the information. It is contradictory both to discourage and encourage the leak.

I thus start with the assumption that unlawful disclosures should not be protected by the privilege. But, as you note, it's not always clear to the source whether the disclosure is unlawful. The right question then becomes: What do we want sources to do when they are in doubt about the legality of the disclosure? If we want them to err on the side of nondisclosure, then we should hold that the privilege does not attach if the judge finds that the disclosure was unlawful. If we want sources to err on the side of disclosure, then we should hold that the privilege applies as long as the source could reasonably have believed that the disclosure was lawful.

A factor that complicates this analysis is that we are sometimes ambivalent about whether we want to encourage or discourage even unlawful leaks. The Pentagon Papers is the example. Daniel Ellsberg's leak was unlawful. But should the *New York Times* have been required to reveal his identity as the source? The problem is that we are of two-minds about the leak. We do not want to encourage government employees to act unlawfully, but (in at least some cases) we do want the public to know the information. A "compromise" would allow the privilege to attach when the source discloses information of substantial public value, even though the source could be punished. This is not logical. It is simply a reflection of our ambivalence..

You ask whether the two conditions I have proposed (whether the source could reasonably have believed that the leak was lawful and whether the disclosure is of a matter of substantial public interest) create too much uncertainty and thus would deter

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sources from disclosing. Yes and no. Relative to a rule that bars the privilege whenever the disclosure is unlawful, these conditions increase the likelihood of disclosure. Relative to a rule that applies the privilege even to unlawful leaks, these conditions decrease the likelihood of disclosure.

In sum, there are three possible approaches: (1) The privilege covers no unlawful disclosures. (2) The privilege covers all unlawful disclosures. (3) The privilege covers some unlawful disclosures. I have tried to define the content of (3), although (1) and (2) obviously have the virtue of simplicity.

Reply to Senator Leahy's First Question: I do not think the enactment of a shield law would in any way require the licensing of the press. Forty-nine states and the District of Columbia have shield laws, and none of them has found it necessary to license reporters. Even with respect to attorneys, doctors, and psychotherapists, the issue is not whether the individual is licensed, but whether the client or patient reasonably believes he is. There is, of course, a problem of defining who is a journalist for purposes of the privilege. But the experience of fifty jurisdictions suggestions that this is not a serious problem. What matters most, in my judgment, is that the source reasonably believe that the person to whom he discloses information is someone who regularly disseminates information to the public, and that he discloses the information for that purpose.

Reply to Senator Leahy's Second Question: I do not see how the existence of a federal shield law would make things any worse than they are now. One way to think of this is that there already is a federal shield law, but it gives no protection to anyone. I am not an expert in diversity cases, so I hesitate to comment on that aspect of the question. But I assume the issue would be no different in this context than when other privileges exist under both state and federal law.

Reply to Senator Leahy's Third Question: This is similar to Senator Durbin's question. I would take the definition of substantial public value from *Bartnicki v. Vopper*, 532 U.S. 514 (2001), which deals with a related issue under the First Amendment.

I hope these answers are useful.

Sincerely yours,

Geoffrey R. Stone

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Follow-Up Questions of Senator Leahy
Hearing on "Reporters' Shield Legislation: Issues and Implications"
July 20, 2005

Questions for Deputy Attorney General James Comey

Reporters' Privilege

Q. Senator Lugar reintroduced a modified version of his bill last week. It grants a near absolute privilege for confidential sources. Testimony can be compelled only in the event of imminent harm to national security. What are the Department's views on the modified Lugar approach? Does this new bill address your concerns about threats to national security?

Q. As a former prosecutor, I share some of your concerns about absolute privileges. I remain undecided about the legislation that has been introduced. That said, allow me to play devil's advocate and ask you some questions about why you think an absolute privilege is harmful to law enforcement.

a. The Federal Rules of Evidence and the Supreme Court have recognized several evidentiary privileges, including attorney-client privilege. Many states have recognized additional privileges, such as priest-penitent or doctor-patient. Is there a form of a reporters' privilege that you think would be acceptable?

b. Thirty-one states plus the District of Columbia recognize a privilege of some kind in statute. Another 18 states provide common law protection. Some states have recognized an absolute privilege for confidential sources for decades; in fact, Maryland enacted an absolute privilege in 1896, over a century ago. We do not hear frequent complaints from state prosecutors; in fact, 34 state Attorneys General signed an amicus brief to the Supreme Court in favor of Judith Miller and Matthew Cooper's appeal. Is there a reason the Federal government should not follow the lead of the States in this area?

c. In his testimony, Mr. Abrams quotes from a brief filed in *Branzburg v. Hayes*, 408 U.S. 665 (1972), stating, "Clearly the purpose of protecting the reporter from disclosing the identity of a news source is to enable him to obtain and publish information which would not otherwise be forthcoming." Does the Department acknowledge that confidential sources result in a greater flow of information, and the publication of stories which might otherwise never be reported? Would you agree that this is to the benefit of all Americans?

Q. You note in your testimony that the Attorney General guidelines have been in place and have worked well for over 30 years. Do these guidelines apply to an investigation by a Special Prosecutor? If not, does a Special Prosecutor follow any guidelines?

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Q. It is my understanding that the Attorney General guidelines do not apply in civil cases filed in Federal court. Would the Department support any kind of privilege for reporters who are called to testify in civil cases, such as in cases alleging violations of the Privacy Act?

QUESTIONS OF SENATOR RICHARD J. DURBIN

To: James Comey, Deputy Attorney General

1. You submitted your testimony in advance of the Senate Judiciary Committee's hearing of July 20, 2005, but unfortunately, you did not appear in person to testify at the hearing. Additionally, the statement you submitted announced the position of the Department of Justice in opposition to S. 340, the proposed federal shield law. That bill has been revised and the sponsor has introduced a new version of the bill as S. 1419. The sponsor has explained that the revised version addresses some of the Department of Justice's concerns. Would you please submit for the record an updated statement reflecting the Department of Justice's position on S. 1419, the amended proposal?

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SUBMISSIONS FOR THE RECORD

TESTIMONY OF FLOYD ABRAMS ON A PROPOSED FEDERAL JOURNALIST-SOURCE SHIELD LAW

SENATE COMMITTEE ON THE JUDICIARY
JULY 20, 2005

Chairman Specter and Members of the Committee:

It is a great honor for me to have the opportunity to appear once again before this Committee. I'm especially pleased to have the opportunity to do so in order to support the adoption of a federal shield law.

One of the advantages of being "of a certain age," as they say, is that you remember things. Or that you think you do. Now that I find myself routinely described by the Washington Post as a "veteran" defender of the First Amendment and in the context of representing Judith Miller (who I will visit in the Alexandria Detention Center this afternoon) and having represented Matt Cooper and Time for a time, I look back occasionally on some of the things I and my colleagues urged upon the Supreme Court in 1972 in a brief, *amici curiae*, primarily drafted by the inimitable Yale Law Professor Alexander Bickel. The case, of course, was *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), and there are three paragraphs from our brief with which I would like to begin my testimony today.

> The public's right to know is not satisfied by news media which act as conveyor belts for handouts and releases, and as stationary eye-

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> witnesses. It is satisfied only if reports can undertake independent, objective investigations.
>
> There is not even a surface paradox in the proposition, as it might somewhat mischievously be put, that in order to safeguard a public right to receive information it is necessary to secure to reporters a right to withhold information. Clearly the purpose of protecting the reporter from disclosing the identity of a news source is to enable him to obtain and publish information which would not otherwise be forthcoming. So the reporter should be given a right to withhold some information—the identity of the source—because in the circumstances, that right is the necessary condition of his obtaining and publishing any information at all. Information other than the identity of the source may also need to be withheld in order to protect that identity. Obviously, something a reporter learned in confidence may give a clue to his source, or indeed pinpoint it. That may be the very reason why the source imposed an obligation of confidence on the reporter.
>
> Yet off-the-record information obtained in confidence is of the utmost importance to the performance of the reporter's function. It very frequently constitutes the background that enables him to report intelligently. It affords leads to publishable news, and understanding of past and future events. News reporting in the United States would be devastatingly impoverished if the countless off-the-record and background contacts maintained by reporters with news sources were cut off. Moreover, even where information other than the identity of the source would be unlikely to enable anyone to trace that identity, the information may sometimes need to be withheld, if given in confidence, in order to make it possible for the reporter to maintain access to the source, and thus obtain other, publishable news. It is true of numerous news sources that if they cannot talk freely, and partly in off-the-record confidence, they will not talk at all, or speak only in handouts and releases.

That is the prism through which I ask this Committee to approach this subject. Every word that Professor Bickel wrote—and he personally wrote every word I just quoted to you—is even truer today. Of course, some articles based

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upon confidential sources since our brief in *Branzburg* was drafted, have become the stuff of journalistic legend—reporting on the Pentagon Papers and the Watergate scandal, for example—but by far the greater use of such information is reflected in day-to-day reporting on the widest range of topics. In the three months after the attack on the United States on September 11, 2003, for example, Ms. Miller and a colleague wrote 78 articles published in *The New York Times* that "contained information from confidential sources on a range of issues including: (1) financing and support of Al Qaeda provided from sources in Pakistan, Saudi Arabia, and the United Arab Emirates; (2) cooperation between Al Qaeda and Pakistani intelligence prior to September 11, 2001; (3) the U.S. government's preparedness for the attacks of September 11, 2001; (4) the U.S. government's efforts to combat Al Qaeda in Afghanistan; (5) the proposed internal reorganization of the FBI; (6) the existence of weapons of mass destruction in Iraq; (7) the spread of anthrax and resulting U.S. government investigations." *New York Times Co.* v. *Gonzalez*, No. 04 Civ. 7677 (RWS), 2005 WL 427911 (S.D.N.Y. Feb. 24, 2005). All that information is now being sought by the United States in an ongoing effort to obtain telephone records of the New York Times for use by a federal grand jury.

As we meet today, the ability of journalists to gather news is imperiled. How could it not be? For all its ambiguity (and more than one lawyer steeped in First Amendment law has made a living over the past 33 years purport-

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ing to divine just what Mr. Justice Powell had in mind when he wrote his critical, yet all but indecipherable concurring opinion in the case), *Branzburg* itself has been interpreted by many courts (although by no means all) to foreclose *any* First Amendment protection for confidential sources in the federal grand jury context, so long as the inquiry was in good faith. That was the holding in the case involving both Judy Miller and Matt Cooper; it is not the way I would read *Branzburg* in light of Justice Powell's none-too-scrutable opinion, not the way a number of Courts of Appeal have read it, but it is undoubtedly one plausible reading of the case. And it is that reading that was the first building block in the opinion of the Court of Appeals for the District of Columbia that led Matt Cooper to the edge of jail and Judy Miller to her present and continuing incarceration.

Why must that be so? Why should federal law offer no protection for journalists who seek to protect their confidential sources when 49 of the 50 states provide considerable—often all but total—protection? How can the United States provide no protection when countries such as France, Germany and Austria provide full protection and nations ranging from Japan to Argentina and Mozambique to New Zealand provide a great deal of protection? Listen to the language of the European Court of Justice on this topic:

> Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of

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> conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest. *Goodwin* v. *United Kingdom*, (1996) 22 E.H.R.R. 123.

A particular issue has arisen in the Judy Miller case which I would like to address. I have little doubt that the "leak" disclosed by columnist Robert Novak—the identification of the name of a CIA "operative," as he put it—was unworthy of any journalist. In fact, Mr. Novak is entitled, in my view, to no kudos for his journalistic contribution that day, only our disdain.

But the protection of journalists' sources should not be made dependent on whether we think a particular story serves or disserves the public. Nor should it turn on whether a particular source means to advance public discourse or to poison it. These are subjective matters as to which our response may be affected by our social views, even our political ones. They should not provide the basis for granting or withholding a privilege established by law.

In my view, when a journalist speaks to her sources and promises them confidentiality, she should keep her word—period. And she should be pro-

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tected by law in doing just that except in the most extraordinary circumstances—the sort referred to in the revised Free Flow of Information Act drafted by Senator Lugar and Representative Pence which permits an order requiring disclosure of a source when all non-media sources have been exhausted and disclosure is "necessary to prevent imminent and actual harm to the national security."

When *Branzburg* was decided, it was less than clear to many observers whether a federal shield law was needed. For most of the 33 years that followed, journalists were held to be protected by the First Amendment when they sought to protect their sources from being disclosed. But that has changed radically in recent years and even more so in recent days. We have a genuine crisis before us. In the last year and a half, more than 70 journalists and news organizations have been embroiled in disputes with federal prosecutors and other litigants seeking to discover unpublished information; dozens have been asked to reveal their confidential sources; some are or were virtually at the entrance to jail; and Judy Miller, not far from here, sits in a cell not many floors removed from that of Zacarias Moussaoui.

It is time to adopt a federal shield law.

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STATEMENT OF
JAMES B. COMEY
DEPUTY ATTORNEY GENERAL
UNITED STATES DEPARTMENT OF JUSTICE

FOR THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING
REPORTERS' PRIVILEGE LEGISLATION: ISSUES AND IMPLICATIONS
S. 340 AND H.R. 581, THE FREE FLOW OF INFORMATION ACT OF 2005

JULY 20, 2005

Introduction

This statement will focus on S. 340, the "Free Flow of Information Act of 2005." An identical bill has been introduced in the House of Representatives as H.R. 581. S. 340 would establish a Federal shield law that would preclude the Federal government from issuing compulsory process to obtain information about sources from members of the news media. It would shift from the Department of Justice to the courts the authority to evaluate requests for subpoenas to members of the media and make final decisions during criminal investigations and prosecutions as to whether subpoenas should be issued. It would create a bar against any subpoena issued to certain third parties that reasonably could be expected to lead to the discovery of the identity of a source. It would apply to all forms of Federal compulsory process, including court orders and national security letters used in terrorism and espionage investigations, to selected categories of news and informational outlets. The bill would create serious impediments to the Department's ability to effectively enforce the law and fight terrorism.

S. 340 would significantly impair the flexibility of the Executive branch in enforcing Federal law, both by imposing inflexible, mandatory standards in lieu of existing voluntary ones and by applying its restrictions on the use of compulsory process more broadly than existing regulations. The bill is bad public policy primarily because it would bar the Government from obtaining information about media sources – even in the most urgent of circumstances affecting the public's health or safety or national security – and would place an unreasonable burden upon the Government to justify to the court, in a public evidentiary proceeding, that it requires non-source information from the media in connection with sensitive grand jury investigations.

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The Department of Justice recognizes that the media plays a critical role in our society. The freedom of the press is a hallowed American right, and in a time when news can be sent around the world almost instantaneously, it is as important as ever that the American people be kept informed of what is happening overseas, in Washington, and in their hometowns. For this reason, the Department's disciplined approach to subpoenas directed towards members of the news media carefully balances the public's interest in the free dissemination of ideas and information with the public's interest in effective law enforcement and the fair administration of justice.

For the last 33 years, the Department of Justice has authorized subpoenas to the news media only in the most serious cases. The guidelines set out in 28 C.F.R. § 50.10 require the Attorney General personally to approve all contested subpoenas directed to journalists, following a rigorous multi-layered internal review process involving various components of the Department.

S. 340 would disrupt the Department's ability to balance the competing interests involved in a decision to subpoena a member of the media and would strip the Department of its ability to obtain crucial evidence in criminal investigations and prosecutions. It would also effectively overrule the Supreme Court's decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972), which held that reporters have no privilege, qualified or otherwise, to withhold information from a grand jury. *Branzburg* has been followed consistently by the federal courts of appeals, and was recently reaffirmed by the United States Court of Appeals for the District of Columbia in *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 364 (D.C. Cir.), *cert. denied*, 2005 U.S. Lexis 5190 (June 27, 2005). Indeed, the bill would give more protection to the reporter's "privilege" – which has not been recognized by the Supreme Court – than exists for other forms of privilege that are recognized, *e.g.*, the attorney-client privilege or the spousal privilege.

These results are completely unjustified and would pose a great threat to public safety. In the absence of a credible demonstration that the subpoena power is being abused by the Department in this area, such that sources have dried up, with the result that journalists are unable to do effective investigative reporting, there is no need for a legislative fix that substantially skews the carefully maintained balance against legitimate law enforcement interests. The next part of this statement will address the specific provisions of the bill.

Section 2

Section 2 of the bill is intended to codify the requirements of 28 C.F.R. § 50.10 by preventing the Department from issuing subpoenas to members of the news media unless a court determines by clear and convincing evidence: (i) that there are reasonable grounds to believe, based upon non-media evidence, that a

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crime has occurred; (ii) that the testimony or document sought is essential to the investigation or prosecution; and (iii) that the Department has unsuccessfully attempted to obtain the evidence from non-media sources. While, to some degree, subsection 2(a) is similar to the guidelines the Department follows in its governing regulation, the bill departs dramatically from the regulation's requirements, first, by requiring the Department to make its case before a court, after providing the news media an opportunity to be heard, and, second, by imposing a new "clear and convincing standard" to meet the section's requirements. In effect, this provision would require public mini-trials whenever the Department seeks relevant information in a criminal grand jury investigation or to justify a trial subpoena.

The bill would seriously jeopardize traditional notions of grand jury secrecy and unnecessarily delay the completion of criminal investigations. To meet the bill's "clear and convincing" standard, the Department frequently will have to present other evidence obtained before the grand jury. It is unclear how the Department can present such justifying evidence consistent with its secrecy obligations under Rule 6(e) of the Federal Rules of Criminal Procedure. Further, the provision would require that in order to issue to the media a trial subpoena for non-source information, such as a reporter's eyewitness testimony or video outtakes, the Department must showcase its evidence prematurely. These new burdens could significantly cripple effective law enforcement and thereby wreak havoc on the public's interest in the fair administration of justice. We note that media outlets often are happy to provide certain types of non-sensitive information to the Federal government, but are more comfortable doing so in response to a subpoena. By making it quite difficult to issue almost any type of subpoena, the bill would make it more difficult for media outlets to cooperate with the Federal government.

Subsection 2(b) is directed toward codifying 28 C.F.R. § 50.10(f)(4) by limiting compelled evidence from a member of the media to: (i) verifying published information; or (ii) describing surrounding circumstances relevant to the accuracy of published information. But the regulatory provision in subparagraph 50.10(f)(4) has been interpreted consistently to permit compulsion of additional types of evidence if it is apparent that there are no other sources to obtain the information and that the information is otherwise essential to the case. While subsection 2(b) includes language that the limitation is applicable "to the extent possible," it is manifestly unclear under what circumstances the court would allow other types of evidence to be subpoenaed. The provision certainly would substitute the judgment of the court for that of the prosecutor in determining what evidence was necessary in a criminal investigation or prosecution.

Section 4

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Section 4 would ban compelling members of the news media to identify their sources of information. It would preclude the Department from compelling a journalist to identify a confidential source of information from whom the journalist obtained information. More importantly, it also would prevent the compulsion of any information that reasonably could lead to the discovery of the identity of the source. These limitations are not in the Department's governing regulation and represent a significant departure from the state of Federal law.

The effect of this provision cannot be overstated. A provision that bars process that might obtain "any information that could reasonably be expected to lead to the discovery of the identity of . . . a source" might effectively end an investigation, particularly one that involved release of national security information. Moreover, even if the intent of the investigation were not to identify a source, the investigation might be barred because it may compel information that a court may find could reasonably lead to the discovery of a source's identity. This provision would create a perverse incentive for persons committing serious crimes involving public safety and national security to employ the media in the process.

Historically, in applying its governing regulation to requests involving source information, the Department has carefully balanced the public's interest in the free dissemination of ideas with the public's interest in effective law enforcement. The Department's regulation has served to limit the number of subpoenas authorized for source information to little more than a handful over its 33-year history. The authorizations granted for source information have been linked closely to significant criminal matters that directly affect the public's safety and welfare. Section 4 of the bill would preclude the Department from obtaining crucial evidence in vital cases, and would overrule settled Supreme Court precedent that protects the grand jury's ability to hear every person's evidence in pursuit of the truth.

The harm that this provision might cause is demonstrably greater than the purported benefit it may serve. It is essential to the public interest that the Department maintain the ability, in certain vitally important circumstances, to obtain information identifying a source when a paramount interest is at stake. For example, obtaining source information may be the only available means of abating a terrorist threat or locating a kidnapped child. Certainly, in the face of a paramount public safety or health concern or a national security imperative, the balance should favor disclosure of source information in the possession of the news media. For example, on September 11, 2001, the U.S. Attorney's Office for the Northern District of California requested authorization to subpoena facsimiles that were sent to a San Francisco, California television station from individuals who had predicted eight weeks earlier that September 11th would be "Armageddon." Under the bill, the Government would have been unable to obtain that information.

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This provision would go far beyond any common law privilege. As the United States Court of Appeals for the District of Columbia Circuit recently held in *Miller*, there is no First Amendment privilege for journalists' confidential sources, and if a common law privilege exists, it is not absolute and must yield to the legitimate imperatives of law enforcement. Further, comparing the bill to existing state shield laws is inapt. None of the states deals with classified information in the way that the Federal government does, and no state is tasked with defending the nation as a whole or conducting international diplomacy. The bill makes no recognition of these critical Federal responsibilities, and would allow no exceptions for situations that endanger the national security or the public's health and safety.

Finally, section 4's definition of a confidential source is overly broad. Under subparagraph 4(1)(B), any individual whom the journalist subjectively claims to be a confidential source automatically would be afforded that status. This is the case although the source may have not sought confidential status with the journalist or even cared whether his or her identity was disclosed.

Section 5

Section 5 appears to be an attempt to codify 28 C.F.R. § 50.10(g), the regulation governing requests to subpoena the telephone toll records of a member of the news media. It would add other business transaction records between a reporter and a third party, such as a telecommunications service provider, Internet service provider, or operator of an interactive computer service for a business purpose.

Taken together with section 4's prohibition against obtaining information that reasonably could lead to the identification of a source, this section largely ends the ability of law enforcement authorities to conduct *any* investigation involving third parties. For example, a ransom demand made to a kidnap victim's family home telephone could be investigated by compulsory process; a ransom demand made by an anonymous person to a media outlet could not be investigated by such compulsory process. This provision is inconsistent with common law and goes far beyond any statute in any State.

Like section 2, section 5 would require a public mini-trial every time the Department sought telephone or other communications service provider records in a grand jury investigation or criminal trial. For the reasons articulated above, section 5 is also bad public policy. While section 5 would establish an exception to the notice requirement if the court determines by clear and convincing evidence that notice "would pose a substantial threat to the integrity of a criminal investigation," there are no built-in mechanisms to protect from public disclosure

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the very information that the Department would be seeking to protect by resisting notice.

Section 6

Even if the information sought has already been published or disseminated, section 6 of the bill would continue the ban on compelling source material and would continue to require court approval for other media evidence. The purpose of this provision is unclear. Moreover, reporters could use the provision to provide selective testimony; they could choose what facts to disclose in testimony, while every court would be barred from ordering the reporter to provide any information that the reporter chose not to share.

It is possible that the provision is intended to protect a reporter from disclosing source information that already has been publicly disclosed (inadvertently or otherwise) by someone else. Other well-established privileges are waived under certain circumstances when the information sought to be protected has been disclosed. We believe that the issue of waiver should be determined on a case-by-case basis.

Section 7

The definition of a "covered person" contained in subparagraph 7(1)(A) of the bill raises several distinct concerns. Most significantly, it would extend the bill's protections well beyond its presumably intended objective, that is, providing special statutory protections for the kind of news- and information-gathering activities that are essential to freedom of the press under the First Amendment. For example, "covered persons" protected by the bill include non-media corporate affiliates, subsidiaries, or parents of any cable system or programming service, whether or not located in the United States. It would also include any supermarket, department store, or other business that periodically publishes a products catalog, sales pamphlet, or even a listing of registered customers.

Far more dangerously, it would cover criminal or terrorist organizations that also have media operations, including many foreign terrorist organizations, such as *al Qaida* (which, from its founding, maintained a media office that published a newsletter). Indeed, the inherent difficulty of appropriately defining a "covered person" in a world in which the very definition of "media" is constantly evolving, suggests yet another fundamental weakness in the bill. What could be shielded here is not so much the traditional media – which already is protected adequately by existing Justice Department guidelines – as criminal activity deliberately or fortuitously using means or facilities in the course of the offenses that would cause the perpetrators to fall within the definition of the media under the bill.

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In addition, the provisions of the bill reach well beyond the Department of Justice. The bill applies broadly to any "Federal entity," defined under the bill to include "an entity or employee of the judicial, legislative, or executive branch of the Federal Government with the power to issue a subpoena or provide other compulsory process." The bill also would reach beyond the guidelines in imposing its restrictions upon any requirement for a covered person to testify or produce documents "in any proceeding or *in connection with any issue arising under Federal law*." Section 2(a). For example, although section 3 of the bill attempts to exclude from coverage "requests for . . . commercial or financial information unrelated to news gathering or news and information dissemination," the meaning of this section is unclear and may not be sufficient to prevent the bill from empowering news companies to block legitimate antitrust investigations into their potentially anticompetitive mergers and business practices.

Conclusion

Recent events no doubt have raised the public's awareness of the issue of compelling evidence from journalists. There are legitimate competing interests involved in the ongoing dialogue on this issue. However, history has shown that the protections already in place, including the Department's rigorous internal review of media subpoena requests coupled with the media's ability to challenge compulsory process in the federal courts, are sufficient and strike the proper balance between the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice.

The Justice Department looks forward to working with the Committee on these important issues going forward.

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TESTIMONY OF MATTHEW COOPER

CORRESPONDENT

TIME MAGAZINE

Before the Judiciary Committee

of the United States Senate

July 20, 2005

Mr. Chairman, I'm Matthew Cooper, a correspondent for Time magazine, and I am honored to be here today and grateful that your staff reached out to me a couple of weeks ago to be on this panel. I'm honored to be in such distinguished company especially with my boss, Norman Pearlstine. I agree with his eloquent argument for some kind of national shield law.

I don't intend to discuss the ongoing investigation into the leak of a covert CIA agent or my role in it. What I do want to do is try to give the perspective of regular working journalist of 19 years on what it's like to do one's job these days in the absence of a federal shield law.

But let me say first that I come here with real humility--not just because I'm the only ink-stained wretch on this august panel--but because what we in the media are asking for is quite formidable, an exemption from some of the duties of citizenship. We're asking for a privilege that is not afforded farmers or manufacturers, bartenders or bus drivers. To be sure, forty-nine states, through court rulings and statutes, have decided to give journalists, and thus the public, some form of legal protection but it is still much to ask Congress to grant us a degree of federal protection and I think it behooves us to do so humbly.

But ask we do--and with good reason. I don't have strong feelings about which statute makes the most sense and how the privilege should be defined. But I do want to talk about how the rules of the road are, to put it mildly, quite confusing for a working journalist such as myself in the absence of any clear federal standard. I might add this also applies to any public official from the school board to the senate or, for that matter, from the grocer to the captain of industry who chooses to talk with the media using some degree of confidentiality. Right now, if I pick up the phone and call a Senator or a civil servant and they say, "Don't quote me on this but...." or "Don't identify me but..." I can't really know what I'm getting myself into assuming that what follows is important and controversial enough to rise to the level of litigation. (And of course no reporter knows whether what follows after ground rules are established will be useless drivel or important information that will benefit the public.) Will it end up in state court where I have protections? Or in federal court where I may have none? If it's

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a civil trial that stems from the conversation, I would seem to have more protection than if it leads to a subpoena before a criminal grand jury. The rules of the road as I try to do my job are chaotic at best. In the case of my imprisoned colleague Judith Miller of The New York Times several courts held that she had no right to defy a subpoena before a grand jury, but still another federal court upheld her right to refuse to turn over phone records. The Supreme Court has chosen not to clarify these rules, but you can.

I have confidence that the thorny question of "who is a journalist" or whether the privilege should be qualified or absolute can be reconciled through thoughtful debate and a look at decades of state experience where the press, after all, thrives and law enforcement is able to put criminals in jail every day. The proposed, bipartisan statutes are a good starting place.

It's also worth remembering that this privilege is about the public's right to know. Without whistleblowers who feel they can come forward to the reporters with a degree of confidence, we might never have known the extent of the Watergate scandal or Enron's deceptions or events that needed to be exposed. So it's not about us journalists as some priestly class but it is about the public and our democracy.

One might ask, why now? Reporters broke scandals without a national shield law so why do we need one? I would offer this thought: In the 33 years since the

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Branzburg decision regarding journalist's privilege, the ambiguity in the law has not come at a great cost. True, there have been some notable clashes between the press and prosecutors and occasionally a journalist has found him or herself in jail, generally for just a few hours although occasionally for many months. I have some personal experience with this having almost gone to jail myself, but for a last minute waiver from one of my sources. But those cases have been so rare as to be truly aberrant. For the most part a civil peace was the rule as prosecutors avoided subpoenaing journalists and the two camps generally stayed out of each other's way. Recently, though, we've seen a run of federal subpoenas of journalists, not only in my case but also in others like the investigation into the anthrax killer and even the BALCO baseball steroids case. I don't want to get into whether those subpoenas are good policy or likely to be upheld through the appellate process, but I do think everyone--prosecutors and journalists alike would benefit from knowing what the rules are.

In the mean time, it's hard to imagine another area of American life where the gap between the rights one is afforded in Harrisburg or Montpelier are so lavish compared to what is provided under federal law. Michael Kinsley, the editorial page editor of the Los Angeles Times and a friend, who has been a skeptic of a federal privilege for journalists, has nonetheless noted the cost of confusion. "If journalists routinely promise anonymity and routinely are forced to break those promises, this will indeed create a general "chilling effect" on leaks. But the real issue is whether the promises should have been made. Under a clear set of rules, the "chilling effect" would be limited — not perfectly, but primarily — to

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leaks that ought to be chilled and to promises of anonymity that should not be made. "

As someone who relies on confidential sources all the time, I simply could not do my job reporting stories big and small without being able to speak with officials under varying degrees on anonymity. In most organizations only a handful of designated press spokesmen are authorized to speak with the media and, with all due respect, they cannot always be counted on to provide the most fulsome description of what is going on behind the scenes. For that we need anonymous sources. It's timely that Bob Woodward's account of his relationship with Mark Felt; the source known as Deep Throat has come out this summer for it offers a powerful reminder of the importance of anonymous sources. Prosecutors chose not to subpoena Woodward and Bernstein but today I wouldn't be so sure they'd show the same restraint today. And so we need some clarity. As a working journalist, I'd like to know better what promises I can legally make and which ones I can't. This would benefit me as a reporter but again it would also benefit those who talk to reporters and the public's right to be informed. Thank you.

Contact: **Trevor Miller**
(202) 224-8657

Statement of U.S. Senator Russ Feingold
At the Senate Judiciary Committee
Reporters' Shield Hearing

July 20, 2005

Mr. Chairman, I want to thank you for holding this hearing. I want to welcome our witnesses, especially my friend Floyd Abrams. The last time I saw him he was arguing against the constitutionality of the McCain-Feingold bill. Fortunately, he lost that case, but he is truly a legendary First Amendment lawyer and we are honored to have him here today. I am also pleased to be back on the same side of a First Amendment debate with him, and with the rest of this panel. Thanks to all of the panelists for their excellent testimony and willingness to be here today.

Mr. Chairman, recent events have certainly made the proposed federal shield law a hot topic. The sight of reporters in handcuffs is not a pleasant thing for any of us to see. As our witnesses have noted, these scenes are becoming more and more common. Thirty-three years after the *Branzburg* decision, it is time for Congress to act. I have cosponsored a bill introduced by Senator Dodd, S. 369, and I will certainly have a close look at Senator Lugar's bill as well. The important thing is to end the uncertainty, and the incongruities caused by having protection for anonymous sources in 49 states and the District of Columbia, but not in federal cases.

I do not take lightly the issues raised by the Deputy Attorney General. We must certainly consider the effect that a shield law might have on investigations and prosecutions of terrorism and other serious crimes. But anonymous sources have been too important to exposing government and corporate wrongdoing to let the current situation continue. It is not a credible argument to say that because high profile anonymous sources have continued to work with reporters even without a shield law in the decades since *Branzburg* that that will continue indefinitely. The chilling effect that our witnesses have mentioned is a gradual lowering of the temperature, not an instant ice age. The more high profile contempt prosecutions of journalists we have, the greater the chances that potential sources will be deterred from coming forward.

Another argument made by the Deputy Attorney General with which I disagree is that congressional legislation in this area would overrule *Branzburg*. That is incorrect. *Branzburg* stands for the proposition that the protection of the identity of anonymous sources is not required under the First Amendment. But many judges ruling in these cases have invited Congress to legislate. This is an area where Congress has the power, and the responsibility, to set out the parameters under which testimony of this kind can be compelled.

A free society cannot long survive without a robust free press. I am very grateful to our witnesses for the expertise they bring to this subject and I look forward to working with them and others to design a workable and effective federal shield law. The press will certainly benefit from such a law, but more importantly, the nation will benefit.

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Statement of Senator Patrick Leahy,
Ranking Member, Senate Judiciary Committee
Hearing on "Reporters' Shield Legislation: Issues and Implications"
July 20, 2005

I am pleased the Committee is holding this hearing today on such an important matter. While a small number of cases have garnered significant national attention, the question of whether or not to enact some form of privilege for journalists has vexed us since *Branzburg v. Hayes* was decided by the Supreme Court in 1972. Since that time, 31 states and the District of Columbia have enacted statutes granting some form of privilege to journalists. Efforts have been made from time to time to codify a reporters' privilege in federal law, but these attempts failed, in part because supporters of the concept found it difficult to agree on how to define the scope of what it means to be a "journalist." With bloggers now participating fully in the 24-hour news cycle, we might face similar challenges in defining terms today.

I have long been a champion of a vibrant and independent press. My interest comes honestly and early as the son of a struggling Vermont printer from Montpelier. In my many years in the Senate, I have aspired to fulfill the ideals of my father, fighting for a free press and greater transparency in government. For example, I have long championed the Freedom of Information Act, which shines a light on the workings of government and has proven to be an invaluable tool for both reporters and ordinary citizens. Earlier this year, I introduced legislation with Senator Cornyn to improve implementation of that critical legislation. Open government goes hand in hand with freedom of the press and that is why I have advocated so strongly for it.

As a former county prosecutor, I also understand that our democracy is nothing without a healthy respect for the law. The issue before us today is especially important because it requires us to carefully weigh the public interest in First Amendment press protection and the public interest in solving crime. Indeed, recent high profile cases have shown just how thorny this issue can be.

This hearing was not called to address the Valerie Plame leak case in particular, but it is impossible to imagine that the investigation will not be discussed today. I have heard from several supporters of a privilege that they recognize that the facts of the Plame case are not particularly sympathetic to the cause because they involve an alleged national security leak from the highest level of government. I hope that our discussion also delves into the many different circumstances under which a privilege might be raised, both in civil and criminal cases.

I look forward to hearing from the witnesses' broad range of experience and expertise on all sides of the question. I also want to commend the members who have done the hard work of drafting legislation that attempts to address this problem and am eager to hear their statements.

We learned just about 9 o'clock this morning that Deputy Attorney General Comey cancelled his appearance before the Committee. I am disappointed by this. I looked forward to a meaningful exchange on the issues.

Thank you Mr. Chairman.

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Testimony of Lee Levine
Before the
United States Senate Committee on the Judiciary

July 20, 2005

Introduction

Mr. Chairman, and Members of the Committee. Thank you for inviting me to testify today. At the Committee's request, I will address recent developments regarding the so-called "reporters' privilege" in the federal courts, the historical record concerning the role that confidential sources have played in the reporting of news, and the experience of the States with respect to their recognition of a journalist's right to maintain a confidential relationship with his or her sources.[1]

Recent Developments Regarding The Reporters' Privilege

For almost three decades following the Supreme Court's decision in *Branzburg v. Hayes*,[2] subpoenas issued by federal courts seeking the disclosure of journalists' confidential sources were rare. It appears that no journalist was finally adjudged in contempt or imprisoned for refusing to disclose a confidential source in a federal criminal matter during the last quarter of the twentieth century. That situation, however, has now changed. An unusually large number of subpoenas seeking the names of anonymous sources has been issued by federal courts in a remarkably short period of time to a variety of media organizations and the journalists they employ. Indeed, three federal

[1] Any opinions expressed in this testimony are my own and are not necessarily those of my law firm or its clients. My testimony is substantially derived from a "friend-of-the-court" brief recently submitted to the Supreme Court by my law firm on behalf of a coalition of media organizations in *Miller v. United States* and *Cooper v. United States*, Nos. 04-1507, 04-1508, available at 2005 WL 1199075. The Media Law Resource Center has published a comprehensive treatment of issues related to the privilege entitled *White Paper On The Reporters' Privilege*, available at www.medialaw.org (last visited July 18, 2005).

[2] 408 U.S. 665 (1972).

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proceedings in Washington, D.C. alone have generated subpoenas seeking confidential sources to roughly two dozen reporters and news organizations, seven of whom have been held in contempt in less than a year. By way of comparison, the last significant survey of news organizations conducted in 2001 by The Reporters Committee for Freedom of the Press revealed only two subpoenas seeking confidential source identities issued from any judicial or administrative body that year, federal or state.[3]

There appear to have been only two decisions from 1976-2000 arising from subpoenas issued by federal grand juries or prosecutors to journalists seeking confidential sources. Both involved alleged leaks to the media and in both, the subpoenas were quashed.[4] Yet in the last four years, three federal courts of appeals have affirmed contempt citations issued to reporters who declined to reveal confidential sources, each imposing prison sentences more severe than any previously known to have been experienced by journalists in American history.[5] In 2001, writer Vanessa Leggett served nearly six months in prison for declining to reveal sources of information related to a notorious murder, almost four times longer than any prison term previously imposed on

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[3] *See* www.rcfp.org/agents/material.html (last visited May 13, 2005).

[4] *See, e.g., In re Williams*, 963 F.2d 567 (3d Cir. 1992) (en banc); *In re Grand Jury Subpoenas*, 8 Media L. Rep. 1418 (D. Colo. 1982). There appear to be no reported judicial decisions at all addressing subpoenas to reporters until roughly the beginning of the twentieth century. Only roughly a half-dozen can be found prior to the 1950s, and several of those arose because the journalist himself was the target of a criminal investigation. *See Branzburg*, 408 U.S. at 685-86 (citing cases). Indeed, prior to the late 1960s, there appear to be only two federal court decisions related to federal grand jury or criminal trial subpoenas issued to journalists, and both excused the reporters from testifying on grounds unrelated to privilege. *See Burdick v. United States*, 236 U.S. 79 (1915) (journalist was entitled to assert a Fifth Amendment privilege); *Rosenberg v. Carroll*, 99 F. Supp. 629 (S.D.N.Y. 1951) (excusing journalist because information sought was not sufficiently relevant). And, during those brief, exceptional periods in American history when subpoenas were issued to reporters in significant numbers, most notably in the years immediately surrounding the Supreme Court's decision in *Branzburg*, both the states and most lower federal courts promptly responded by recognizing a formal legal privilege. *See infra* note 44.

[5] The longest sentence previously known to have been served by a reporter for refusing to reveal a source was 46 days in a case arising shortly after *Branzburg*. *See Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975); www.rcfp.org/jail.html (*Los Angeles Herald-Examiner* reporter William Farr).

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any reporter by any federal court.[6] Earlier this year, James Taricani, a reporter for WJAR-TV in Rhode Island, completed a four-month sentence of home confinement for declining to reveal who provided a videotape to him that captured alleged corruption by public officials in Providence.[7] And, on July 6, Judith Miller of *The New York Times* was incarcerated for declining to reveal the identities of her confidential sources in response to a grand jury subpoena and it now appears that she will remain in prison for at least four months.[8]

Decisions such as these appear to have encouraged private litigants and the federal courts adjudicating their cases to demand confidential source information from reporters in similarly unprecedented fashion. In one pending civil suit, four reporters employed by *The New York Times*, *Los Angeles Times*, *Associated Press* and *CNN* have been held in contempt for declining to reveal their confidential sources of information about Dr. Wen Ho Lee, who claims such information was provided to them by government officials in violation of the Privacy Act.[9] Contempt proceedings are currently pending against a fifth reporter in the same case. The five reporters in the *Lee*

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[6] *See In re Grand Jury Subpoenas*, 29 Media L. Rep. 2301 (5th Cir. 2001) (per curiam).

[7] *See In re Special Proceedings*, 373 F.3d 37 (1st Cir. 2004).

[8] *See In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D.C. Cir. 2005). The trial court ordered Ms. Miller and *Time* magazine reporter Matthew Cooper confined for the duration of the grand jury term, which expires in October 2005. The sentence had been stayed pending the exhaustion of the reporters' appeals. *See, e.g.*, Adam Liptak, *Judge Gives Reporters One Week to Testify or Face Jail*, N.Y. TIMES, June 30, 2005, at A18; Adam Liptak, *Reporter Jailed After Refusing to Name Source*, N.Y. TIMES, July 7, 2005, at A1.

[9] *See Lee v. U.S. Dep't of Justice*, 327 F. Supp. 2d 26 (D.D.C. 2004), *aff'd in relevant part*, 2005 WL 1513086 (D.C. Cir. June 28, 2005); *Lee v. U.S. Dep't of Justice*, 287 F. Supp. 2d 15 (D.D.C. 2003), *aff'd in relevant part*, 2005 WL 1513086 (D.C. Cir. June 28, 2005). The trial court's orders holding these four journalists in contempt were affirmed on appeal the day after the Supreme Court denied petitions for writs of *certiorari* filed in *Miller v. United States* and *Cooper v. United States*. *See Lee v. U.S. Dep't of Justice*, 2005 WL 1513086 (D.C. Cir. June 28, 2005). My law firm serves as counsel of record for two of the journalists held in contempt in the *Lee* case.

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case include two Pulitzer Prize winners. And, in the wake of the success of Dr. Lee and the Special Counsel in the Judith Miller case, the plaintiff in another civil suit alleging violations of the Privacy Act, Dr. Steven Hatfill, issued subpoenas earlier this year to a dozen news organizations seeking to compel an even larger number of reporters to disclose the identities of their confidential sources.[10]

The Importance of Confidential Sources

Congress and the public should be concerned about the imposition of such severe sanctions against journalists for honoring promises of confidentiality because such sources are often essential to the press's ability to inform the public about matters of vital concern. The uncertainty that has now developed regarding the existence and scope of a reporters' privilege in the federal courts threatens to jeopardize the public's ability to receive such information. As the Supreme Court has recognized, the press "serves and was designed to serve [by the Founding Fathers] as a powerful antidote to any abuses of power by governmental officials."[11] The historical record demonstrates that the press cannot effectively perform this constitutionally recognized role without some confidence in its ability to maintain the confidentiality of those sources who will speak only on a promise of anonymity.

There can be no real dispute that journalists must occasionally depend on anonymous sources to report stories about the operation of government and other matters of public concern. One recent examination of roughly 10,000 news media reports concluded that fully thirteen percent of front-page newspaper articles relied at least in

[10] *See Special Report: Reporters and Federal Subpoenas*, Reporters Comm. for Freedom of the Press, www.rcfp.org/shields_and_subpoenas.html (last visited May 13, 2005). My law firm represents several of the journalists that received subpoenas in the *Hatfill* litigation.

[11] *Mills v. Alabama*, 384 U.S. 214, 219 (1966).

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part on anonymous sources.[12] While there is healthy debate within the journalism profession about the appropriate uses of anonymous sources, all sides of that debate agree that confidential sources are at times essential to effective news reporting.[13]

In recent proceedings in the federal courts, journalist after journalist has convincingly testified about the important role confidential sources play in enabling them to report about matters of manifest public concern. As WJAR reporter James Taricani testified before being sentenced to house arrest:

> In the course of my 28-year career in journalism, I have relied on confidential sources to report more than one hundred stories, on diverse issues of public concern such as public corruption, sexual abuse by clergy, organized crime, misuse of taxpayers' money, and ethical shortcomings of a Chief Justice of the Rhode Island Supreme Court.[14]

Indeed, Mr. Taricani described a host of important stories that he could not have reported without providing "a meaningful promise of confidentiality to sources," including a report on organized crime's role in the illegal dumping of toxic waste that sparked a grand jury investigation and a report on the misuse of union funds that led to the ouster of the union president.

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[12] *See generally State of the News Media 2005*, www.stateofthemedia.org /2005/index.asp (last visited May 13, 2005).

[13] *See generally Reporters and Confidential News Sources Survey 2004*, www.firstamendment center.org/news.aspx?id=14922 (last visited May 13, 2005). Much of the debate regarding confidential sources concerns whether such sources are overused or misused. At bottom, while it is undoubtedly true that "[t]he right to remain anonymous may be abused when it shields fraudulent conduct," it remains the case that, "in general, our society accords greater weight to the value of free speech than to the dangers of its misuse." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995).

[14] Mr. Taricani's testimony, as well as that of the other journalists quoted herein, is taken from a compendium of affidavits submitted to the Supreme Court by a coalition of media organizations in *Miller v. United States* and *Cooper v. United States*. *See Appendix B to the Brief Amici Curiae of ABC, Inc, et al.*, *supra* note 1. The affidavits submitted to the Supreme Court are from journalists employed by news organizations who have been subpoenaed in recent federal proceedings. Their testimony more fully documents the role played by confidential sources in the reporting of public matters.

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Pierre Thomas, recently held in contempt in the *Wen Ho Lee* case, recounted many similar examples in his testimony in that litigation. For example, information received from confidential sources enabled Mr. Thomas to report on the progress of the Oklahoma City bombing investigation in a manner that proved instrumental in helping a nervous public understand that the bombing was not the work of foreign terrorists, and his award-winning coverage of the September 11 attacks unearthed important information, provided by confidential sources, about the FBI's advance knowledge of the activities of those responsible for that tragedy. As Mr. Thomas testified: "If I had no ability to promise confidentiality to these sources, they would not have furnished vital information for these articles."

Confidential sources are not only critical to investigative journalists like Messrs. Taricani and Thomas, but are equally important to the daily reporting of more routine news stories. Reporters regularly consult background sources to confirm the accuracy of official news pronouncements and to understand their broader context and significance. Without the ability to speak off the record to sources in the government who are not officially authorized to do so, there is substantial evidence that reporters would often be relegated to spoon feeding the public the "official" statements of public relations officers. For this reason, among others, news reporting based on confidential source material regularly receives the nation's most coveted journalism awards, including the Polk Awards for Excellence in Journalism[15] and the Pulitzer Prize.[16]

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[15] This year, the Polk Awards for Magazine Reporting, Military Reporting, and Sports Reporting all went to articles based, in significant part, on information and other material provided by confidential sources. *See* www.brooklyn.liu.edu/polk/polk04.html (listing awards).

[16] For example, the 1996 Pulitzer Prize for National Reporting was awarded to the *Wall Street Journal* for its articles reporting on the use of ammonia to heighten the potency of nicotine in cigarettes, which was based on information revealed in confidential, internal reports prepared by a tobacco company.

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The history of the American press provides ample evidence that the information anonymous sources make available to the public through the news media is often vitally important to the operation of our democracy and the oversight of our most powerful institutions, both public and private. While the *Washington Post's* "Watergate" reporting is perhaps the most celebrated example of journalists' reliance on such sources,[17] as the recent identification of W. Mark Felt as "Deep Throat" reminds us, there are countless other compelling examples of valuable journalism that would not have been possible if a reporter could not credibly have pledged confidentiality to a source. Consider the following examples:

Pentagon Papers – The Pentagon's secret history of America's involvement in Vietnam was, of course, leaked to *The New York Times* and *The Washington Post*.[18] In refusing to enjoin publication of the leaked information, several members of the Supreme Court noted that the newspapers' sources may well have broken the law, and they were in fact prosecuted, albeit unsuccessfully, after later coming forward.[19] Nevertheless, as

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See, e.g., Alix M. Freedman, *'Impact Booster': Tobacco Firm Shows How Ammonia Spurs Delivery of Nicotine*, WALL ST. J., Oct. 18, 1995, at A1. In 2002, the Prize was awarded to the staff of the *Washington Post* "for its comprehensive coverage of America's war on terrorism, which regularly brought forth new information together with skilled analysis of unfolding developments." *See* www.pulitzer.org/year/2002/national-reporting. The *Post*'s series was based, in significant part, on information provided by unnamed public officials, both here and abroad. *See, e.g.*, Barton Gellman, *U.S. Was Foiled Multiple Times in Efforts To Capture Bin Laden or Have Him Killed*, WASH. POST, Oct. 3, 2001, at A1.

[17] Notably, several journalists, including Bob Woodward and Carl Bernstein, were subpoenaed to reveal their confidential sources in 1973 in the context a civil action brought by the Democratic National Committee against those allegedly responsible for the burglary of the committee's offices at the Watergate building. *See Democratic Nat'l Comm. v. McCord*, 356 F. Supp. 1394, 1397 (D.D.C. 1973). One year after the Supreme Court's decision in *Branzburg*, the district court quashed the subpoenas, explaining that it "cannot blind itself to the possible 'chilling effect' the enforcement of these broad subpoenas would have on the flow of information to the press, and so to the public." *Id.*

[18] *See New York Times Co. v United States*, 403 U.S. 713 (1971).

[19] *See, e.g., id.* at 754 (Harlan, J., dissenting); Sanford J. Ungar, *Federal Conduct Cited As Offending 'Sense of Justice'; Charges Dismissed in 'Papers' Trial*, WASH. POST, May 12, 1973, at A1.

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Justice Black emphasized at the time, "[i]n revealing the workings of the government that led to the Vietnam war, the newspapers nobly did precisely that which the Founders had hoped and trusted they would do,"[20] and there is now a broad consensus that there was no legitimate reason to hide the Papers from the public in the first place.[21]

Neutron Bomb – Journalist Walter Pincus of *The Washington Post* relied on anonymous sources in reporting that President Carter planned to move forward with plans to develop a so-called "neutron bomb," a weapon that could inflict massive casualties through radiation without extensive destruction of property.[22] The public and congressional outcry in the wake of these news reports spurred the United States to abandon plans for such a weapon and no Administration has since attempted to revive it.[23] Mr. Pincus, who never received a subpoena concerning the neutron bomb or any other matter in his distinguished, decades-long career, has recently received *two*—one from the Special Counsel in the Valerie Plame matter and one in the *Wen Ho Lee* case.

Fertility Fraud – In 1996, the *Orange County Register* received the Pulitzer Prize for its reporting on the unethical practices of the previously acclaimed UCI fertility clinic in Irvine, California. Using putatively confidential medical records obtained from an anonymous source, the paper documented how eggs retrieved from one patient were

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[20] *New York Times Co.*, 403 U.S. at 717 (Black, J., concurring).

[21] Solicitor General Erwin N. Griswold, who argued the government's case, wrote some twenty years later that he had not "seen any trace of a threat to the national security from the publication." Erwin N. Griswold, *Secrets Not Worth Keeping; The Courts and Classified Information*, WASH. POST, Feb. 15, 1989, at A25.

[22] *See, e.g.*, Walter Pincus, *Carter Is Weighing Radiation Warhead*, WASH. POST, June 7, 1977, at A5; Walter Pincus, *Pentagon Wanted Secrecy On Neutron Bomb Production; Pentagon Hoped To Keep Neutron Bomb A Secret*, WASH. POST, June 25, 1977, at A1.

[23] *See* Don Phillips, *Neutron Bomb Reversal; Harvard Study Cites '77 Post Articles*, WASH. POST, Oct. 23, 1984, at A12 (quoting former Defense Secretary Harold Brown as stating that "[w]ithout the [*Post*] articles, neutron warheads would have been deployed").

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implanted in another, without the knowledge or consent of the donor.[24] The newspaper eventually discovered and reported that at least sixty women were victims of such theft by the clinic.[25] The disclosure of these records to the *Register* may have violated applicable law, yet the facts that the newspaper reported resulted in the criminal prosecution of the physicians involved, "prompted the American Medical Association to rewrite its fertility-industry guidelines," and instigated legislative action.[26]

Enron – In a series of articles published in 2001, the *Wall Street Journal* relied on confidential sources and leaked corporate documents to reveal the illegal accounting practices of a corporation that had "routinely made published lists of the most-admired and innovative companies in America."[27] Among other things, confidential sources provided the *Journal* with "confidential" information about two partnerships operated by Enron Chief Financial Officer Andrew Fastow, which were used to hide corporate debt from the company's investors.[28]

Abu Ghraib – In April 2004, CBS News and Seymour Hersh, writing for *The New Yorker*, first reported accounts of abuse of detainees at Abu Ghraib prison in Iraq.[29]

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[24] Susan Kelleher & Kim Christensen, *Fertility Fraud; Baby Born After Doctor Took Eggs Without Consent*, ORANGE COUNTY REGISTER, May 19, 1995, at A1.

[25] Susan Kelleher, Kim Christensen, David Parrish & Michael Nicolosi, *Clinic Scandal Widens*, ORANGE COUNTY REGISTER, Nov. 4, 1995, at A16.

[26] Kim Christensen, *Fertility Bills Seen as Effective Steps*, ORANGE COUNTY REGISTER, Aug. 30, 1996, at A26.

[27] Rebecca Smith & John R. Emshwiller, *Trading Places: Fancy Finances Were Key to Enron's Success, And Now to its Distress*, WALL ST. J., Nov. 2, 2001, at A1.

[28] Rebecca Smith & John R. Emshwiller, *Enron CFO's Partnership Had Millions in Profit*, WALL ST. J., Oct. 19, 2001, at C1; John R. Emshwiller & Rebecca Smith, *Corporate Veil: Behind Enron's Fall, A Culture of Operating Outside Public's View*, WALL ST. J., Dec. 5, 2001, at A1.

[29] 60 Minutes II, Apr. 28, 2004, www.cbsnews.com/ stories/2004/04/27/60II/main614063.shtml? CMP=ILC-SearchStories; Seymour M. Hersh, *Torture at Abu Ghraib*, THE NEW YORKER, May 10, 2004.

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Relying on photographs graphically depicting such abuse in the possession of Army officials and a classified report by Major General Antonio M. Taguba that was "not meant for public release,"[30] CBS and Mr. Hersh documented the conditions of abuse in the Iraqi prison. After these incidents became public, other military sources who had witnessed abuse stepped forward, but only "on the condition that they not be identified because of concern that their military careers would be ruined."[31]

BALCO – In 2004, the *San Francisco Chronicle* published details of grand jury testimony given by some of the most prominent athletes in professional sports, part of a Pulitzer-Prize winning series of articles about the extent to which performance-enhancing drugs had infiltrated both professional and amateur sports.[32] Baseball players Barry Bonds and Jason Giambi and other prominent athletes testified before the federal grand jury investigating the distribution of undetectable steroids by the Bay Area Laboratory Cooperative ("BALCO"). In some instances, their testimony was at odds with their public denial of steroid use.[33] While the *Chronicle's* sources may have violated grand jury secrecy rules, the newspaper's reporting led to congressional hearings on steroid use

[30] Hersh, *supra* note 29.

[31] *See, e.g.*, Todd Richissin, *Soldiers' Warnings Ignored*, BALT. SUN, May 9, 2004, at A1 (interviewing anonymous soldiers who had witnessed abuse at Abu Ghraib); Miles Moffeit, *Brutal Interrogation in Iraq*, DENVER POST, May 19, 2004, at A1 (relying on confidential "Pentagon documents" and interview with a "Pentagon source with knowledge of internal investigations into prisoner abuses").

[32] *See, e.g.*, Mark Fainaru-Wada & Lance Williams, *Giambi Admitted Taking Steroids*, S.F. CHRONICLE, Dec. 2, 2004, at A1; Mark Fainaru-Wada & Lance Williams, *What Bonds told BALCO Grand Jury*, S.F. CHRONICLE, Dec. 3, 2004, at A1.

[33] *See, e.g.*, Mark Fainaru-Wada & Lance Williams, *Sprinter Admitted Use of BALCO 'Magic Potion,'* S.F. CHRONICLE, June 24, 2004, at A1.

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in Major League Baseball as well as a decision by its Commissioner to tighten rules regarding the use of banned substances.[34]

Needless to say, the prospect of substantial prison terms and escalating fines for honoring promises to sources threatens this kind of journalism. As *New York Times* reporter Jeff Gerth, another Pulitzer Prize-winning reporter who was held in contempt by the trial court in the *Wen Ho Lee* case has testified:

> Compelling journalists to testify about their conversations with confidential sources will inevitably hinder future attempts to obtain cooperation from those or other confidential sources. It creates the inevitable appearance that journalists either are or can be readily converted into an investigative arm of either the government or of civil litigants. . . . Persons who would otherwise be willing to speak to me would surely refuse to do so if they perceived

[34] Such reliance by the press on confidential sources is by no means a modern phenomenon. When the First Amendment was enacted, the Founders understood the importance of such speech to maintaining an informed citizenry:

> Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts. Along about that time the Letters of Junius were written and the identity of their author is unknown to this day. Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names.

Talley v. California, 362 U.S. 60, 64-65 (1960). Indeed, the controversy that is credited with first establishing uniquely American principles of freedom of the press – the prosecution and acquittal of New York publisher Jon Peter Zenger on charges of seditious libel – arose out of Zenger's refusal to identify the source(s) of material appearing in his newspaper harshly criticizing New York's royal government. Even after Zenger was arrested and charged with criminal responsibility as the publisher, he maintained his refusal to disclose his "sources." *McIntyre*, 514 U.S. at 361 (Thomas, J., concurring). Similarly, in 1779, Elbridge Gerry and other members of the Continental Congress sought to institute proceedings to compel a Pennsylvania newspaper publisher to identify the author of a column criticizing the Congress. Ultimately, arguments that "'[t]he liberty of the Press ought not to be restrained'" prevailed and the Congress did not take action to compel such disclosure. *Id.* at 361-62 (citation omitted). In 1784, the New Jersey Legislature embarked on another unsuccessful effort to compel a newspaper editor to identify the author of a critical article. *Id.* at 362-63. These episodes were fresh in the mind of the Framers who, as Justice Thomas chronicled in *McIntyre*, unanimously "believed that the freedom of the press included the right to publish without revealing the author's name." *Id.* at 367.

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> me to be not a journalist who keeps his word when he promises confidentiality. . . .[35]

Or as *Los Angeles Times* reporter and Pulitzer Prize recipient Bob Drogin, also currently in contempt of a federal court, testified in the *Lee* litigation:

> I have thought long and hard about this, and unlike you attorneys here in the room, I do not have subpoena power or anything else to gather information. I have what credibility I have as a journalist, I have the word that I give to people to protect their confidentiality. If I violate that trust, then I believe I can no longer work as a journalist.[36]

Indeed, in the wake of the judicial decisions about which I have spoken this morning, the *Cleveland Plain Dealer* recently decided that it was obliged to withhold from publication two investigative news stories because they were predicated on documents provided to the newspaper by confidential sources.[37] Doug Clifton, editor of the newspaper, has explained that the "public would be well-served to know" these stories, but that publishing them "would almost certainly lead to a leak investigation and the ultimate choice: talk or go to jail. Because talking isn't an option and jail is too high a price to pay," Mr. Clifton explained to his readers, "these two stories will go untold for now. How many more are out there?"[38]

State Law Recognition of The Reporters' Privilege

The situation that currently exists in the federal courts has not been replicated in the States. In fact, forty-nine states and the District of Columbia recognize some form of

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[35] *See Appendix B to the Brief Amici Curiae of ABC, Inc, et al.*, *supra* note 1. The trial court order holding Mr. Gerth in contempt was reversed late last month. *See Lee v. U.S. Dep't of Justice*, 2005 WL 1513086 (D.C. Cir. June 28, 2005).

[36] Dep. of R. Drogin, *Lee v. U.S. Dep't of Justice*, Civ. A. No. 99-3380, Jan. 8, 2004, at 38:2-9.

[37] Robert D. McFadden, *Newspaper Withholding Two Articles After Jailing*, N.Y. TIMES, July 9, 2005, at A10.

[38] *Id.*

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reporters' privilege.[39] Of those jurisdictions, thirty-two have enacted "shield laws."[40] Although these statutes vary in the degree of protection that they grant to journalists, they "rest on the uniform determination by the States that, in most cases, compelling newsgatherers to disclose confidential information is contrary to the public interest."[41]

Indeed, the Attorneys' General of thirty-four states and the District of Columbia – each of whom is, by definition, ultimately accountable for the enforcement of the criminal law in their respective states – also recently filed a "friend-of-the-court" brief urging the Supreme Court to recognize a federal reporters' privilege.[42] In their brief, the Attorneys' General noted that the States "'are fully aware of the need to protect the integrity of the factfinding functions of their courts,'" yet they have reached a nearly unanimous consensus that some degree of legal protection for journalists against compelled testimony is necessary.[43]

Perhaps most significantly, the experience of the States demonstrates that shield laws have had no material impact on law enforcement or on the discovery of evidence in judicial proceedings, criminal or civil.[44] As the Attorneys' General have explained, a

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[39] *See generally The Reporter's Privilege*, Reporters Comm. for Freedom of the Press, www.rcfp.org/ privilege/index.html (last visited July 18, 2005). It does not appear that a Wyoming state court or that state's legislature has yet addressed the issue. *See id.*

[40] *See id.* at www.rcfp.org/cgi-local/privilege/item.cgi?i=intro.

[41] *Brief Amici Curiae Of The States Of Oklahoma, et al., Miller v. United States; Cooper v. United States*, Nos. 04-1507, 04-1508, available at 2005 WL 1317523.

[42] *See id.*

[43] *See id.* (citing *Jaffee v. Redmond*, 518 U.S. 1, 13 (1996)).

[44] In 1896, Maryland became the first state to pass a shield law, spurred by the jailing of a *Baltimore Sun* reporter who refused to identify his sources for a story about public corruption to a grand jury. In the late 1920s and early 1930s, several reporters in various states were similarly imprisoned for refusing to appear before grand juries. Ten states responded by enacting laws similar to Maryland's. In the early 1970s, federal prosecutors began regularly issuing grand jury subpoenas to journalists, a development that culminated in the *Branzburg* decision. At the time of the *Branzburg* decision, seventeen states had

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"federal policy that allows journalists to be imprisoned for engaging in the same conduct that these State privileges encourage and protect" serves to undermine "both the purpose of the [States'] shield laws, and the policy determinations of the State courts and legislatures that adopted them."[45] Indeed, the Attorneys' General have aptly observed that

> [t]he consensus among the States on the reporter's privilege issue is as universal as the federal courts of appeals decisions on the subject are inconsistent, uncertain and irreconcilable. ... These vagaries in the application of the federal privilege corrode the protection the States have conferred upon their citizens and newsgatherers, as an "'uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.'"[46]

The experience of the States is by no means unique. Particularly in other democratic nations that consider freedom of speech and of the press to be an essential liberty, there is a clear consensus that the protection of journalists' confidential sources "is one of the basic conditions for press freedom."[47] Perhaps most notably, the European Court of Human Rights has held that requiring a journalist to disclose confidential sources of information, in the absence of an "overriding requirement in the public interest," violates Article 10 of the European Convention for the Protection of Human

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statutory privileges. *Branzburg*, 408 U.S. 689 n.27. Ten more states passed shield laws in its immediate wake and still others recognized the privilege by judicial decision. Today, as noted, thirty-one states and the District of Columbia have shield laws, with eighteen others affording common law protection.

[45] *Brief Amici Curiae Of The States Of Oklahoma, et al., supra* note 41.

[46] *Id.* (citing *Jaffee*, 518 U.S. at 18) (additional citation omitted).

[47] *Goodwin v. United Kingdom*, 22 EHRR 123, 143 (1996). *See generally* Floyd Abrams & Peter Hawkes, *Protection of Journalists' Sources Under Foreign and International Law, Media Law Resource Center White Paper On The Reporters' Privilege*, available at www.medialaw.org. As Messrs. Abrams and Hawkes demonstrate, "protection for journalists' sources is recognized in countries on every inhabited continent, under very diverse legal systems, based on sources ranging from statutes to constitutional interpretation to the common law." *Id.* (citing, *inter alia*, legal protections afforded under the laws of Australia, Canada, France, Germany, Japan, Nigeria, and Sweden).

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Rights and Fundamental Freedoms.[48] "Without such protection," the court explained, "sources may be deterred from assisting the press in informing the public in matters of public interest."[49]

Here in the United States, journalists have heretofore looked to the Supreme Court to address the confusion that now surrounds the scope and application of the reporters' privilege in the federal courts. The Court, however, has consistently declined to intervene, most recently in the context of the Miller and Cooper cases. As a result, it has now been more than thirty years since the decision *Branzburg v. Hayes*, the first and last time the Supreme Court addressed this important issue.

In *Branzburg* itself, Justice White's opinion for the Court indicated that recognition of a reporters' privilege might more naturally fall within the province of the Congress. "At the federal level," Justice White wrote, "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 to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate."[50]

More recently, in his opinion in the Miller and Cooper cases, Judge Sentelle of the U.S. Court of Appeals for the District of Columbia expressed the similar view that "reasons of policy and separation of powers counsel against" the courts exercising whatever authority they may possess to recognize a reporters' privilege as a matter of

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[48] *Goodwin*, 22 EHRR at 143.

[49] *Id.*

[50] *Branzburg*, 408 U.S. at 706.

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federal common law.[51] Instead, Judge Sentelle recommended that "those elements of the media concerned about this privilege[] would better address those concerns to the Article I legislative branch … [rather] than to the Article III courts."[52]

Conclusion

The recent surge in the number of subpoenas, the increase in the severity of contempt penalties, and the lack of clear guidance concerning the recognition and scope of a reporters' privilege in the federal courts, will almost certainly restrict the ability of the American public to receive information about the operation of its government and the state of the world in which we live. There is, therefore, now a palpable need for congressional action to preserve the ability of the American press to engage in the kind of important, public-spirited journalism that is often possible only when reporters are free to make meaningful commitments of confidentiality to their sources.

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[51] *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d at 979.

[52] *Id.* at 981.

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Testimony to be submitted for the record

Free Flow of Information Act Testimony

I. Introduction

Mr. Chairman, Ranking Member Leahy, and members of the Committee, I appreciate the opportunity you have given to me, and my colleagues, Senator Dodd, Congressman Pence and Congressman Boucher, to testify on the need for a federal media shield.

I believe that the free flow of information is an essential element of democracy. If the United States is to foster the spread of freedom and democracy around the world, it is incumbent that we support an open and free press to help build democracies and protect human rights. This is why both President Bush and the Congress have acted to support the development of free, fair, legally protected and sustainable media in developing countries. In fact, the National Endowment for Democracy is proceeding with implementation of this initiative.

Our Constitution makes very clear that freedom of the press should not be infringed. A cornerstone of our society is the open market of information which can be shared through ever expanding mediums. The media serves as a conduit of information between our governments and communities across the country.

Unfortunately, the free flow of information to citizens of the United States is under threat. Over two dozen reporters were served or threatened with jail sentences last year in at least four different Federal jurisdictions for refusing to reveal confidential sources. Judith Miller sits in jail today because she refused to release the name of her source or sources for a story she did not write. Matt Cooper, who will share his story today, was likewise threatened with imprisonment but is not in jail because of a release from his obligation to his confidential source. It is important that we ensure reporters certain rights and abilities to seek sources and report appropriate information without fear of intimidation or imprisonment. Compelling reporters to testify and, in particular, forcing them to reveal the identity of their confidential sources without extraordinary circumstances, hurts the public interest. The result will be that many whistleblowers will refuse to come forward and

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reporters will be unable to provide our constituents with information they have a right to know.

The legislation that Senator Dodd and I have introduced is designed to provide the press with the ability to obtain and protect confidential sources. This bill would set national standards for subpoenas issued to reporters by an entity or employee of the federal government. I believe that it strikes a reasonable balance between the public's right to know and the fair administration of justice.

II. How the law has evolved

In 1972, the Supreme Court held in *Branzburg v. Hayes*, 408 U.S. 665 (1972), that reporters did not have an absolute privilege as third party witnesses to protect their sources from prosecutors. The majority's opinion focused itself, as the Department of Justice and its supporters do today, on reporters who witnessed or provided cover for persons engaged in criminal activities. The court claimed that any damage to reporters was indirect, theoretical, uncertain and tenuous.

The majority's ruling rejected the call of their dissenting colleagues for a bright line "compelling interest" standard that would have applied strict scrutiny for government actors seeking access to media sources. Instead, the majority declined to create an absolute privilege in the context of criminal proceedings, while at the same time acknowledging the existence of First Amendment protection for newsgathering. In a concurrence that established the rule of the case by adopting a balancing test for determining when government investigators could compel reporters to reveal their sources, Justice Powell emphasized the "limited nature of the Court's holding" and wrote that government is not free to annex the news media as an investigatory service. For Justice Powell, a reporter should not have to testify when "called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation." (Id. at 710).

Since *Branzburg*, states and the federal courts have pursued different courses of action with regard to extending a reporters' privilege against disclosing confidential sources. Today every state and the District of Columbia, except Wyoming, has, through either legislation or the judiciary, created a privilege for reporters not to reveal their confidential sources. My own state of Indiana has a shield law that provides an absolute protection for

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qualified reporters having to reveal any information in court, whether published or unpublished, across a variety of media formats.

The federal courts of appeals, however, have an incongruent view of this matter. The 11th Circuit allows the privilege to extend to civil and criminal cases. The 9th Circuit applies the privilege to civil and criminal cases but not in grand juries. The 5th Circuit holds that reporters are only permitted protection from government subpoenas when they are intended to harass the media. The 7th Circuit has yet to decide whether there is a privilege, although, in one case, it expressed skepticism of the federal courts of appeals that had concluded that *Branzburg* established a privilege.

III. Why the Law needs to evolve more

The *Branzburg* decision is relevant today as we consider the need to give the press the ability to provide information to the public.

First and foremost, Congress should take the opportunity to clarify the extraordinary differences of opinion in the federal courts of appeals and the affect it has on undermining the general policy of protection already in place among the states. Congress should accept the invitation of the *Branzburg* decision "to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned ...as experience ... may dictate." (Id. at 705).

Second, although the Department of Justice claims that its guidelines regarding the subpoenaing of reporters do not need revision, it is becoming clear that the internal guidelines for DOJ are insufficient. For example, Mark Corallo, the former Director of the Public Affairs office at the Department of Justice under John Ashcroft, said in a July 1st *Wall Street Journal* article that the subpoenas against Matt Cooper and Judith Miller would not have met the Department's internal guidelines. The article continued by saying that "In the U.S. Attorneys' Manual, a prosecutor can obtain a subpoena for a member of the media without prior approval of the attorney general only when the action is necessary to 'avoid the loss of life or the compromise of a security interest.' Under Mr. Ashcroft, he noted, three unofficial criteria to secure media subpoenas were added for prosecutors to get approval from the attorney general: The information being sought should be a matter of life and death, national security or imminent danger." (WSJ, July 1, 2005, A4).

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While the additional criteria that former Attorney General Ashcroft required may be appropriate, this generality of language highlights the need for clear and concise policy guidance by Congress. Passage of this law is important because it would apply not just to the Department of Justice, but also to the entire Executive Branch and the Administrative agencies, as well as special prosecutors, who often do not feel obligated to abide by DOJ policies. There would be less discrepancy in the implementation of this policy across the board.

Furthermore, the Department of Justice's guidelines do not apply to civil cases in federal court. For example, many reporters are being threatened with contempt for refusing to divulge their confidential sources in private civil lawsuits. Under the proposed law, a reporter may not be compelled to disclose information in non-criminal proceedings unless the information sought is "essential to a dispositive issue of substantial importance to that matter." The law thus establishes an important limit that will help curtail private litigants' subpoenas of reporters.

Some have contended that this legislation is unnecessary because it is the grand jury system that is in need of repair. I will leave it to this Committee to examine whether any action is necessary towards ensuring that federal grand juries operate in an appropriate manner. However, this would not diminish the right of reporters to be protected from revealing confidential sources.

Finally, as Chairman of the Foreign Relations Committee, I believe that passage of this bill would have positive diplomatic consequences. For some time now, the United States has supported efforts to develop free and independent press organizations in developing countries and those building new democracies. It is no secret that these nations look to our constitutional structure and the limits it is supposed to place on government as a model for their own burgeoning press corps.

Recently, Reporters Without Borders reported that 107 journalists are currently in jail. Thirty-two (32) are in China; 21 in Cuba and 8 in Burma. That is not good company for the United States of America. Global public opinion is always on the lookout to advertise perceived American double standards. This is evident in the ironic international response we have witnessed regarding the jailing of Judith Miller. For instance, Moscow news

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has reported that "the Russian Interior Ministry has denounced the arrest of U.S. journalist Judith Miller. ... [saying] 'The journalist's right to keep his sources secret is part of the press freedom mechanism in a democratic society.'" ("Russia Says U.S. Journalist's Arrest Violates Press Freedom," The Moscow News, July 7, 2005) The Guardian in London wrote "The American constitution no longer protects the unfettered freedom of the press. That is the only conclusion that can be drawn from the remarkable case of the New York Times journalist Judith Miller." (Comment, "Miller's Tale," The Guardian, Friday July 8, 2005).

Passage of this bill will have tremendous implications both nationally and internationally. Not only will citizens here have the access to information that they are due, but additionally, members of other nations will have a working model to observe and learn from as they seek to accomplish similar democratic efforts.

IV. What will happen when this law is passed?

It is important to note what this legislation does not do. The legislation does not permit rule breaking. It does not give reporters a license to break the law in the name of gathering news. It does not give reporters the right to interfere with police and prosecutors who are trying to prevent crimes. The legislation does not prohibit compelling a reporter to testify.

The Free Flow of Information Act leaves laws on classified information unchanged. It simply provides journalists certain rights and abilities to seek sources and report appropriate information without fear of intimidation or imprisonment. This principle is similar to the manner in which, in the public interest, we allow psychiatrists and social workers to maintain confidences. In essence, this bill sets national standards that must be met before a federal entity may issue a subpoena to a member of the news media in any federal criminal or civil case.

In the case of a confidential source, the bill permits a reporter to be compelled to reveal the source in certain national security situations. The language of this provision was developed in response to the concerns that several of our colleagues and the Department of Justice had regarding the need for an exemption in cases of national security. The result is the formulation of a three-part test that permits the revelation of a confidential

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source where disclosure would be "necessary to prevent imminent and actual harm to national security."

In the case of other information, it sets out certain tests that civil litigants or prosecutors must meet before they can force a journalist to turn over information. Litigants or prosecutors must show, for instance, that they have tried, unsuccessfully, to get the information other ways. They must also prove that the information would be crucial to "an issue of substantial importance" in the case. If they were seeking confidential information in a criminal case, they must show that a crime has been committed and the information being sought is essential to the investigation.

V. Conclusion

In closing, I thank the Chairman, Ranking Member, and this Committee for looking at this signal and timely issue. This legislation will offer enough protections to assure that a whistleblower's identity would be protected if he or she were to come forward with information about corporate or government misdeeds. At the same time, it would promote greater transparency of government and judicial activity while maintaining the ability of the courts and other federal agencies to operate in an effective manner. I look forward to working with each of you to ensure that the free flow of information is unimpeded. Thank you.

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Testimony Of Norman Pearlstine
Editor-In-Chief
Time Inc.

Before the
Judiciary Committee
United States Senate
July 20, 2005

INTRODUCTION

Mr. Chairman and Members of the Committee: Thank you for the opportunity to appear before you today. My name is Norman Pearlstine. Since January 1995, I have served as editor-in-chief of Time Inc., which is the largest publisher of general interest magazines in the world. We publish over 140 titles in the United States and abroad, including TIME, *Fortune*, and *Sports Illustrated*. I am honored to have this opportunity to testify in support of the proposed federal legislation that would protect journalists from being compelled to testify about confidential sources and other unpublished information obtained during newsgathering.

This type of protection, which has been adopted in one form or another by 49 States and the District of Columbia, is commonly called a "reporter's privilege," but this is something of a misnomer. The laws are really intended to protect the public, not reporters, by ensuring the free flow of information about governmental activities and other matters of public concern and interest. I believe there is an urgent need for such protection at the federal level.

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Although I have spent the last 37 years working as a journalist in the United States, Asia and Europe, I received a law degree and am an inactive member of the District of Columbia Bar Association, having passed its bar examination. Among other things, prior to joining Time Inc., I worked for *The Wall Street Journal* from 1968 to 1992, except for a two-year period, 1978-1980, when I was an executive editor of *Forbes* magazine. While at the *Journal*, I served as a staff reporter in Dallas, Detroit and Los Angeles (1968-1973); Tokyo bureau chief (1973-1976); managing editor of *The Asian Wall Street Journal* (1976-1978); national editor (1980-1981); editor and publisher of *The Wall Street Journal/Europe* (1982-1983); managing editor (1983-1991); and executive editor (1991-1992). (My bio is attached as Exhibit A.)

Until today, I had never testified in a Senate hearing or, for that matter, in any other legislative proceeding. As a journalist, I am far more comfortable reporting, writing, or editing news about the government than urging the government to adopt new laws. But the absence of federal legislation protecting sources has created extraordinary chaos, limiting the public's access to important information that is so necessary in a democratic society. The Supreme Court's sharply divided decision 33 years ago in *Branzburg v. Hayes*, 408 U.S. 665 (1972), has mystified courts, lawyers and journalists alike. As a result, the federal courts are in a state of utter disarray about whether a reporter's privilege protecting confidential sources exists. The conflicting legal standards throughout the federal courts defeat the nearly unanimous policies of the States in this area.

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This uncertainty chills essential newsgathering and reporting. It also leads to confusion by sources and reporters, and the threat of jail and other harsh penalties for reporters who do not know what promises they can make to their sources.

I recently witnessed the problems first hand. As the Committee is no doubt aware, for almost two years, Time Inc. and its reporter Matthew Cooper fought against compelled disclosure of confidential sources in response to grand jury subpoenas in Special Counsel Patrick Fitzgerald's investigation of the Valerie Plame affair. The federal district judge presiding over the matter called this battle a "perfect storm" in which important First Amendment rights clashed with the important interest in law enforcement. We fought all the way to the Supreme Court and lost.

My decision to turn over confidential documents to the Special Counsel after we had pursued every possible legal remedy was the toughest decision of my career — and one I should never have had to make. The experience has only deepened my commitment to ensure protection for confidential sources and made clear to me the urgent need for federal legislation.

I shall begin my testimony by providing a brief summary of the Plame matter. I shall then discuss why the careful use of confidential sources is indispensable to ensuring that the press can fulfill its constitutionally established duty of providing vital information to the public so that people can make informed decisions about the government and thereby fully participate in democracy.

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Finally, I shall explain why I so strongly believe that federal legislation is necessary — and long overdue.

THE VALERIE PLAME CASE

In the summer of 2003, a public controversy arose over the justification for the invasion of Iraq, including whether Iraq possessed, or had been seeking to develop, weapons of mass destruction. In the midst of that controversy, on July 6, 2003, the *New York Times* published an op-ed piece by former Ambassador Joseph Wilson challenging the Bush Administration's justifications for the invasion. Wilson asserted that the CIA had dispatched him to Niger in February 2002 to investigate whether Iraq had attempted to purchase uranium from Niger as part of its effort to develop nuclear weapons. He stated that he had found no credible evidence of such efforts, and had reported that conclusion to the CIA. *See* Joseph C. Wilson, *What I Didn't Find in Africa*, N.Y. TIMES, July 6, 2003, § 4, at 9.

On July 14, 2003, the *Chicago Sun-Times* published a column by Robert Novak reporting that "two senior administration officials" had told him that the CIA had selected Wilson for the Niger mission at the suggestion of Wilson's wife, Valerie Plame, described by Novak as "an agency operative on weapons of mass destruction." Robert Novak, *The Mission to Niger*, CHI. SUN-TIMES, July 14, 2003, at 31.

Three days later, we published an article on TIME.com, TIME's website, co-authored by reporter Matthew Cooper, stating that "some government officials have noted to TIME in interviews . . . that Wilson's wife, Valerie Plame, is a CIA

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official who monitors the proliferation of weapons of mass destruction." Matthew Cooper *et al.*, *A War on Wilson?*, TIME.com (July 17, 2003), available at www.time.com/time/nation/article/0,8599,465270,00.html. The article, based in part on confidential sources, suggested potential misconduct by government officials in that the leak may have been made to retaliate against and discredit Wilson for his op-ed in the *Times*. Cooper later contributed reporting to a second article, also based in part on confidential sources, which reported on the Iraq/uranium controversy but did not mention Plame. Michael Duffy *et al.*, *A Question of Trust*, TIME, July 21, 2003, at 22.

After some uproar, the Department of Justice appointed Special Counsel Fitzgerald to determine whether those who leaked Plame's identity as a CIA operative violated the Intelligence Identities Protection Act, a federal law barring the knowing and unauthorized disclosure of a covert operative's identity. The Special Counsel impaneled a federal grand jury and subpoenaed Cooper and Time Inc., demanding that we disclose our sources. We declined to do so because we believed that a reporter's privilege, based on the First Amendment and federal common law, protected this information from compelled disclosure. Chief Judge Thomas F. Hogan, who presides over the grand jury, rejected our claims, finding that no such privilege exists under federal law and that the Supreme Court's 1972 *Branzburg* decision foreclosed recognition of any such protection. He held Cooper and us in contempt, relying on secret evidence submitted by the prosecutor. The judge ordered that Cooper be jailed for up to 18 months and that

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Time Inc. be fined $1,000 a day until we complied with the subpoenas and revealed our confidential sources.

The Special Counsel was simultaneously seeking to force disclosure of confidential source information from *New York Times* reporter Judith Miller. As with Cooper and Time Inc., the district court rejected Miller's reporter's privilege claims, held Miller in contempt and ordered her to be jailed when she refused to comply with subpoenas.

The D.C. Circuit Court of Appeals affirmed the district court's contempt orders. (A copy of the Court of Appeals' opinion is attached as Exhibit B.) The court interpreted *Branzburg* as an absolute bar to any First Amendment protection for confidential sources, and held that because "[t]he Supreme Court has not overruled *Branzburg*," it "has already decided the First Amendment issue before us today." 397 F.3d 964, 972 (D.C. Cir. 2005). The court could not reach a similar consensus on whether a reporter's privilege existed as a matter of federal common law and Rule 501 of the Federal Rules of Evidence, splintering three ways in separate concurrences totaling 60 pages. Relying largely on *Branzburg*, Judge Sentelle concluded that no privilege existed; Judge Tatel would have recognized a qualified privilege; and Judge Henderson, while disagreeing with Judge Sentelle's interpretation of *Branzburg*, declined to resolve the question. Judge Sentelle added that, in his view, "[t]he creation of a reporter's privilege, if it is to be done at all, looks more like a legislative than an adjudicative decision. I suggest that the media as a whole, or at least those elements of the media

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concerned about this privilege, would better address those concerns to the Article I legislative branch for presentment to the Article II executive than to the Article III courts." *Id.* at 981 (Sentelle, J., concurring).

In rejecting our claims, the court also relied on eight pages of Judge Tatel's opinion analyzing the Special Counsel's secret evidentiary submission. But the court redacted the entirety of this discussion and so those pages are blank. The court rejected our argument that basic due process afforded us a right to see this evidence and thus denied us any insight into the Special Counsel's reasons for seeking to force Cooper and Miller to testify. Our petition for rehearing by the full D.C. Circuit was denied.

We then filed a petition for writ of certiorari, arguing that these issues cried out for resolution by the Supreme Court. (A copy of our petition is attached as Exhibit C.) The chief law enforcement officers for 34 States and the District of Columbia filed a friend-of-the-court brief urging the Court to grant review. Emphasizing that 49 States and the District have now adopted reporter's "shield laws," they declared that the lack of a comparable federal protection — and "[u]ncertainty and confusion" regarding the existence of such protection — "undermines both the purpose of the shield laws, and the policy determinations of the State courts and legislatures that adopted them." States' Br. 2-3. (A copy of the States' brief is attached as Exhibit D.) On June 27, 2005, the Court denied review.

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On June 29, our lawyer appeared before Chief Judge Hogan and asked for the chance to submit additional briefs on the contempt and reporter's privilege issues based on changed circumstances and the D.C. Circuit opinions, but the judge indicated he would be unwilling to entertain further arguments and that contempt fines (which had been stayed pending appeal) would be assessed and increased unless Time Inc. complied within one week. The Special Counsel and the judge hinted that failure to comply might result in criminal, not just civil, contempt sanctions being imposed against Time Inc., Cooper and Miller.

We found ourselves in an exceedingly difficult situation. The Supreme Court had declined to hear our petition despite the fact that important questions about confidential sources, national security, the role of a grand jury, and due process were at issue. But after pursuing every possible judicial remedy without success and in light of the specific set of circumstances we faced in this case, I decided on behalf of Time Inc. that, in accordance with our duties under the law, we should turn over the subpoenaed documents to the Special Counsel. We announced our decision the next day and turned over the documents on July 1.

On July 6, our lawyer again appeared before Chief Judge Hogan and argued that, in light of our production of the documents, the Special Counsel should be required to make a new showing of need before jailing Matt Cooper for refusing to testify about his confidential sources. The judge denied that motion. Mr. Cooper then announced that, just prior to the hearing, he had obtained an express waiver of confidentiality from his source and that he was therefore now prepared to testify

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before the grand jury, which he did on July 13. The judge ordered that Ms. Miller, who refused to testify, be immediately taken into confinement and imprisoned until she agreed to testify; she remains in prison to this day.

THE IMPORTANCE OF PROTECTING CONFIDENTIAL SOURCES

It is Time Inc.'s editorial policy that articles in our publications should identify sources by name whenever possible. But sometimes we can obtain information only by promising confidentiality to a source, because many persons with important information won't speak to the press unless they are assured anonymity. Information given in confidence is especially valuable when it contradicts or undermines public positions asserted by governments or powerful individuals or corporations. Without confidential sourcing, the public would never have learned the details of many situations vital to its interests, from Watergate to the controversies that led to the impeachment (and then acquittal) of President Clinton to the Enron and Abu Ghraib scandals.

Time Inc. has a long history of fighting to preserve press freedoms because we believe it is in the public interest to do so. It is no coincidence that the Supreme Court held in a case involving our company that freedom of the press was created "not for the benefit of the press so much as for the benefit of all of us." *Time Inc. v. Hill*, 385 U.S. 374, 389 (1967). We know that when gathering and reporting news, journalists act as surrogates for the public. Protecting confidential sources is thus intended not to protect the rights of news

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organizations, individual reporters or sources, but to safeguard the public's rights. Ronald Dworkin, *The Rights of Myron Farber*, N.Y. REV. BOOKS, Oct. 26, 1978, at 34 ("The special position of the press is justified, not because reporters have special rights but because it is thought that the community as a whole will benefit from their special treatment, just as wheat farmers might be given a subsidy, not because they are entitled to it, but because the community will benefit from that."). Our "Constitution specifically selected the press" to fulfill an "important role" in our democracy. *Mills v. Alabama*, 384 U.S. 214, 219 (1966). The press "serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were elected to serve." *Id.* The press "has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences." *Estes v. Texas*, 381 U.S. 532, 539 (1965).

"[N]ews gathering is essential to a free press" and

> "[t]he press was protected so that it could bare the secrets of government and inform the people." Without an unfettered press, citizens would be far less able to make informed political, social, and economic choices. But the press' function as a vital source of information is weakened whenever the ability of journalists to gather news is impaired.

Zerilli v. Smith, 656 F.2d 705, 710-11 (D.C. Cir. 1981) (quoting *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring)).

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Some reliance on confidential sources is necessary to protect the press's ability to fulfill its constitutionally ordained role. Over the years TIME and our other magazines have published many stories regarding issues of significant public interest that could not have been published unless we could rely on confidential sources. To cite a few examples from the weeks prior to the Supreme Court's denial of our petition for certiorari, I worked with colleagues at TIME on important stories about a suicide bomber in Iraq, the treatment and interrogation of a detainee at Guantanamo, and the vulnerability of our nation's commercial nuclear facilities should they be subjected to terrorist attack. None of these stories could have been published without the use of information from confidential sources.

As one court explained it:

> The interrelationship between newsgathering, news dissemination and the need for a journalist to protect his or her source is too apparent to require belaboring. A journalist's inability to protect the confidentiality of sources s/he must use will jeopardize the journalist's ability to obtain information on a confidential basis. This in turn will seriously erode the essential role played by the press in the dissemination of information and matters of interest and concern to the public.

Riley v. Chester, 612 F.2d 708, 714 (3d Cir. 1979) (citations omitted).

Following my decision to obey the courts by providing the Special Counsel with the subpoenaed documents, I met last week with TIME's Washington bureau, and later that day with many of its New York writers and editors. Many of them showed me e-mails and letters from valuable sources who insisted that they no longer trusted the magazine and that they would no longer cooperate on stories.

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The chilling effect is obvious. Without confidentiality — that express promise or implied understanding that a source's identity won't be revealed — it will often be impossible for our reporters to sustain relationships with sources and to obtain sensitive information from them.

As Professor Alexander Bickel observed in a celebrated essay:

> Indispensable information comes in confidence from officeholders fearful of superiors, from businessmen fearful of competitors, from informers operating at the edge of the law who are in danger of reprisal from criminal associates, from people afraid of the law and of government — sometimes rightly afraid, but as often from an excess of caution — and from men in all fields anxious not to incur censure for unorthodox or unpopular views. . . . Forcing reporters to divulge such confidences would dam the flow to the press, and through it to the people, of the most valuable sort of information: not the press release, not the handout, but the firsthand story based on the candid talk of a primary news source.

Alexander Bickel, *The Morality Of Consent*, at 84 (1975); *see also Zerilli*, 656 F.2d at 711; Dworkin, *supra,* N.Y. REV. BOOKS, Oct. 26, 1978, at 34 ("If reporters' confidential sources are protected from disclosure, more people who fear exposure will talk to them, and the public may benefit. There is a particular need for confidentiality, for example, and a special public interest in hearing what informers may say, when the informer is an official reporting on corruption or official misconduct, or when the information is information about a crime."); Theodore B. Olson, *Supreme Confusion in the Plame Case*, WALL ST. J., June 8, 2005, at A14 ("[W]hen reporting on sensitive subjects, particularly misconduct or excesses by government officials, journalists often have no choice but to seek information from individuals who would be at great risk of retaliation or

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embarrassment if their identities were disclosed. However imperfect the process may sometimes be, we have learned that a robust and inquisitive press is a potent check against abusive governmental power. And the press often cannot perform that service without being able to promise confidentiality to some sources.") (attached as Exhibit E). In short, some degree of confidentiality is essential if the press is to fulfill its constitutionally assigned role in society.

THE URGENT NEED FOR A FEDERAL SHIELD LAW

The need for a federal shield law has never been clearer. Judith Miller is in jail and Matthew Cooper would have been had his source not released him at the last minute from his bond of confidentiality. As we argued in our certiorari petition, *see* Exhibit C, at 8-19, the law is a mess — so much so that the three judges on the D.C. Circuit panel each took a very different view of whether the federal common law recognizes a reporter's privilege. Some judges, like Judge Sentelle, believe that *Branzburg* bars not only First Amendment protection, but any form of judicially recognized privilege, and the Supreme Court has refused to revisit that decision, leaving federal legislation as the sole realistic possibility for a uniform federal rule. As the Supreme Court in *Branzburg* recognized, "[a]t the federal level, 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 to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate." 408 U.S. at 706.

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Federal law recognizes many other evidentiary privileges, including privileges protecting spousal communications, and communications between social workers and those seeking counseling from them, doctors and patients, attorneys and clients, and clergy and penitents. These privileges may lead to the loss of evidence in some instances, but they are viewed as necessary to protect and foster communications deemed valuable to society as a whole. The same is true for communications between reporters and confidential sources.

When courts compel disclosure of confidential sources, it endangers our ability to do our jobs, and this practice inevitably stems the flow of information on public events vital to an informed citizenry and a healthy democracy. In this case, for instance, Cooper's story *A War on Wilson?* raised the important question whether government officials improperly retaliated against a critic of the Administration's decision to go to war.

The Plame case is part of a disturbing trend. In the last two years, dozens of reporters have been subpoenaed to reveal their confidential sources, many of whom face the prospect of imminent imprisonment. *See* R. Smolkin, *Under Fire*, 27 Am. Journalism Rev. 18 (2005). The use of such subpoenas in the Plame case represents a profound departure from the practice of federal prosecutors when this case is compared to other landmark cases involving confidentiality over the past 30 years. Neither Archibald Cox, the Watergate Special Prosecutor, nor Judge John Sirica sought to force *The Washington Post* or its reporters to reveal the identity of "Deep Throat," the prized confidential source. We are deeply

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concerned that the rulings in the Plame case will exacerbate the danger of prosecutorial excesses when it comes to issuing subpoenas in all types of cases.

To be sure, the Department of Justice guidelines limit subpoenas to the press and require the Attorney General's approval of such subpoenas. But the courts in the Plame case held that these regulations are not judicially enforceable. And where a special (or "independent") counsel is leading the investigation, the Attorney General's approval is no longer required, posing special dangers to the press. As Judge Tatel noted in the Plame case:

> [I]ndependent prosecutors . . . may skew their assessments of the public interests implicated when a reporter is subpoenaed. After all, special prosecutors, immune to political control and lacking a docket of other cases, face pressure to justify their appointments by bagging their prey. *Cf. Morrison v. Olson, 487 U.S. 654, 727-28, 101 L. Ed. 2d 569, 108 S. Ct. 2597 (1988)* (Scalia, J., dissenting) (noting "the vast power and the immense discretion that are placed in the hands of a prosecutor with respect to the objects of his investigation" and observing that "the primary check against prosecutorial abuse is a political one") . . . . [T]hese considerations — the special counsel's political independence, his lack of a docket, and the concomitant risk of overzealousness — weigh against his claim to deference in balancing harm against news value.

397 F.3d at 999 (Tatel, J., concurring).

To make matters worse, reporters and their sources are subject to a tangle of contradictory privilege rules that vary widely depending on the jurisdiction in which they are subpoenaed. These differing rules lead to arbitrary, unpredictable and conflicting outcomes. This uncertainty has a chilling effect on speech, and ultimately results in less information reaching the public, as many individuals will hesitate to communicate with a reporter if a promise of confidentiality is good in

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some jurisdictions but not in others. In particular, a state-law reporter's privilege is of little value if it offers no reliable protection from forced disclosure in federal court.

The 34 States and the District of Columbia said it best in their *amicus curiae* brief urging the Supreme Court to grant review in the Plame case. All of these States and the District have adopted some form of reporter's shield law and these laws, "like those of the other fifteen jurisdictions that have them, share a common purpose: to assure that the public enjoys a free flow of information and that journalists who gather and report the news to the public can do so in a free and unfettered atmosphere. The shield laws also rest on the uniform determination by the States that, in most cases, compelling newsgatherers to disclose confidential information is contrary to the public interest." States' Br. at 2. That the chief law enforcement officers for these 35 jurisdictions weighed in to endorse their reporter's shield laws is powerful evidence that these laws do not interfere with the government's ability to prosecute crimes.

At the same time, the States also declared in their brief that a "federal policy that allows journalists to be imprisoned for engaging in the same conduct that these State privileges encourage and protect 'buck[s] that clear policy of virtually all states,' and undermines both the purpose of the shield laws, and the policy determinations of the State courts and legislatures that adopted them." *Id.* at 2-3. And they emphasized that the States "have a vital interest in this issue independent of protecting the integrity of their shield laws. Uncertainty and

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confusion . . . have marked this area of the law in the three decades that have passed since . . . *Branzburg* . . . . This increasing conflict has undercut the state shield laws just as much as the absence of a federal privilege." *Id.* at 3.

CONCLUSION

I strongly believe in the need for confidential sources and that we must protect our sources when we grant them confidentiality. This is an obligation I take with the utmost seriousness. I also believe we must resist government coercion. But defying court orders, accepting imprisonment and fines, shouldn't be our only way of protecting sources or resisting coercion. Put simply, the issues at stake are crucial to our ability to report the news to the public. Without some federal protection for confidential sources, all of this is in jeopardy. The time has come for enactment of a shield law that will bring federal law into line with the laws of the States and ensure the free and open flow of information to the public on the issues of the day.

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TESTIMONY OF REP. MIKE PENCE
ON FREE FLOW OF INFORMATION ACT
SENATE COMMITTEE ON THE JUDICIARY
JULY 20, 2005

Enshrined in the First Amendment of the Constitution of the United States are these words: "Congress shall make no law...abridging the freedom of speech, or of the press."

The Freedom of speech and the press are two of the most important rights we Americans possess under our Constitution. They form the bedrock of our democracy by ensuring the free flow of information to the public.

Although Thomas Jefferson warned that, "Our liberty cannot be guarded but by the freedom of the press, nor that limited without danger of losing it," today these rights are under attack.

As politicians engage in a very familiar clash along the fault lines of the politics of personal destruction, a much greater scandal languishes in a quiet prison cell in suburban Washington, D.C. in the sad image of an American journalist behind bars, who's only crime was standing up for the public's right to know.

And Judith Miller is not alone.

In the past year, nine journalists have been given or threatened with jail sentences for refusing to reveal confidential sources and at least a dozen more have been questioned or on the receiving end of subpoenas.

Compelling reporters to testify, and in particular compelling reporters to reveal the identity of their confidential sources, intrudes on the newsgathering process and hurts the public interest.
Without the assurance of confidentiality, many whistle-blowers will simply refuse to come forward, and reporters will be unable to provide the American public with information they need to make decisions as an informed electorate.

As the Reporters Committee for the Freedom of the Press observes in the First Amendment Handbook, "Apart from diverting staff and resources from newsgathering, subpoenas issued to the news media present serious First Amendment problems. The forced disclosure of sources or information threatens the constitutional right to a free press by undercutting the media's independence from government and deterring coverage

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of matters likely to generate subpoenas. Indeed, the U.S. Court of Appeals in Philadelphia (3rd Cir.) recognized more than 25 years ago that 'the interrelationship between newsgathering, news dissemination, and the need for a journalist to protect his or her source is too apparent to require belaboring.'"[1]
But with all this focus on newsgathering, it is important that we state clearly; protecting a journalist's right to keep a news source confidential is not about protecting reporters, it's about protecting the public's right to know.

As a conservative who believes in limited government, I believe that the only check on government power in real time is a free and independent press.

It was in that spirit that I introduced the Free Flow of Information Act, or federal "Shield Law," with the bipartisan support of Rep. Rick Boucher (D-VA). I would also acknowledge my profound gratitude for similar action in the Senate led by Sen. Richard Lugar (R-IN), and Sen. Chris Dodd (D-CT).

Our bill would set national standards for subpoenas issued to reporters by an entity of the federal government and strikes a proper balance between the public's interest in the free dissemination of information and the public's interest in effective law enforcement and the fair administration of justice.

In 1973, the Department of Justice of the United States adopted its Policy with Regard to the Issuance of Subpoenas to Members of the News Media. The Policy, which has been in continuous operation for more than 30 years, sets standards that must be met before federal officials may issue a subpoena to a member of the news media in any federal criminal or civil case. Our bill uses the standards of the Policy as a template for a federal shield law that would apply in all federal judicial, executive and administrative proceedings (whether government cases or private cases), except where confidential sources are involved.

In the case of a confidential source, the bill originally provided that a reporter could not be compelled to reveal the source. That language has been changed to allow for a qualified privilege only. Under our revised bill, a reporter cannot be compelled to reveal a source unless the disclosure of the identity of a source is necessary to prevent imminent and actual harm to the national security.

In the case of other information, it sets out certain tests that civil litigants or prosecutors must meet before they can force a journalist to turn over information. Prosecutors must show, for instance, that they have tried unsuccessfully to get the information in other ways and that the information would be crucial to "an issue of substantial importance" in the case. If they seek confidential information in a criminal case, they would have to show that a crime had been committed and that the information being sought was essential to the investigation. These protections are enough to ensure that a whistle-blower's identity would be protected when he or she comes forward with information

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[1] *Riley v. City of Chester*, 612 F. 2nd 708, 714 (1979)

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about corporate or government misdeeds, but they would still allow the courts and other federal agencies to do their jobs.

As I mentioned, in the past several months, there have been legitimate questions raised by some offices concerning the scope of the Act in light of the national security interests of the United States. The Department of Justice also has raised issues about the breadth of certain provisions of the Act. In light of these concerns, on Monday of this week, we filed a revised version of the Free Flow of Information Act that would narrow the Act to its core purposes and increase its precision. These revisions would accomplish the following goals:

1. ***Eliminate the "absolute privilege" for confidential sources.*** The current Act provides, in its Section 4, that Federal courts cannot compel the disclosure of confidential sources from covered persons. This revision eliminates that section. Under the revised language, then, there would be no absolute protection for confidential sources. In cases of potential harm to the national security, which is the matter of most concern to many offices and the Department of Justice, a Federal court could compel disclosure of confidential sources.

The revision accomplishes this change by deleting Section 4 and adding a new provision to Section 2 that permits a Federal entity to compel the disclosure of confidential sources if (1) the general conditions for disclosure (lack of alternative sources and a high degree of relevance to the proceeding) are met; and (2) disclosure of the identity of a source is necessary to prevent imminent and actual harm to the national security. The provision also includes a balancing test requiring a finding that the harm to be addressed by disclosure outweighs the public interest in protecting the free flow of information. (This balancing test is drawn from the concurring decision of Judge Tatel in *Miller v. United States*.)

2. ***Narrowed scope of coverage.*** The Act currently provides that a covered person includes "a parent, subsidiary or affiliate of such an entity" because many news organizations publish through separate corporate forms. If a newspaper publishes through a subsidiary and a subpoena is directed to the parent company, for example, the parent company should be covered. Questions were raised, however, about publishing entities owned by large companies with many non-media holdings, such as General Electric. Although we believe that the Act's Section 3 makes it clear that such non-media parents, subsidiaries and affiliates would not be entitled to claim the protections of the Act, we have nonetheless proposed narrowing the scope of this subpart of the definition so that it applies only to "a parent, subsidiary, or affiliate of such an entity, to the extent that such parent, subsidiary or affiliate is engaged in newsgathering or the dissemination of news and information."

3. ***Elimination of Congress from scope of coverage.*** This revision would eliminate Congress from the definition of "Federal entity." The definition would

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cover all remaining Federal entities that could issue or enforce a subpoena against a covered entity (Federal courts, the executive branch or administrative agencies).

4. ***Deletion of "activities not constituting a waiver" section.*** Section 6 of the Act was meant to ensure that reporters who continue to cover a matter on which they have received a subpoena have not waived the protections available to them under Section 2 of the Act. This section had raised questions, however, because of its general phrasing. Given that it seems highly unlikely that a Federal court would find that a covered entity has, in fact, waived any rights granted under Section 2 by continued reporting on such a matter, we believe that this section can be deleted without harming any interests in protecting whistleblowers or expressive freedoms. This should narrow the scope of the Act and resolve some questions that have been raised concerning it.

5. ***Narrow the scope of protection of information held by third parties.*** The current Act provides, in its Section 5, that covered persons must have notice and an opportunity to be heard before information is sought from any third parties with whom a covered person does business. This general concept was taken from the Department of Justice's Guidelines, which provide similar procedures for subpoenas to telephone companies for phone records of reporters. This revision of the Act would make it clear that these procedures would apply only to communications records of covered persons, much like the Guidelines, rather than all companies doing business with covered persons. In recognition of the fact that many parties now provide communications services to covered persons in addition to telephone companies, this revision includes a more modern definition of "communications service provider" drawn from the Communications Act of 1934. The revision also clarifies that it applies to third-party litigants (one of the parties in civil litigation seeking documents from a communications service provider, for example).

6. ***General clarifications.*** In addition to these substantive changes, there have been two minor clarifications proposed in the language of the Act so that it better reflects its intent. First, in Section 2(a)(1), the revision would clarify that it is the proponent of obtaining evidence from a covered person, not the Federal court, which must attempt to obtain the information sought from non-media sources. Second, in the definition for "covered person," this revision would clarify that electronic publishers of newspapers, magazines and periodicals would be covered.

It is important to note what the bill does not do.

It doesn't give reporters a license to break the law in the name of gathering news. It doesn't give them the right to interfere with police and prosecutors who are trying to prevent crimes. It leaves laws on classified information unchanged. It simply gives journalists certain rights and abilities to seek sources and report appropriate information without fear of intimidation or imprisonment, much as, in the public interest, we allow psychiatrists, clergy and social workers to maintain confidences.

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It is important to note that this bill is not a radical step. Thirty-one states, including Indiana, plus the District of Columbia, already have their own "shield laws." Eighteen other states have recognized a reporter's privilege through judicial decisions. Most of the provisions in our bill come directly from internal Justice Department guidelines instituted more than 30 years ago during Richard M. Nixon's presidency. Strengthened in the 1980s, the guidelines have been maintained by Republican and Democratic administrations ever since. With the alarming rise in the number of reporters being threatened with jail, it's time to put these guidelines into law and expand Indiana's time-tested approach to federal proceedings nationwide.

In the midst of an unfurling controversy, I recognize that passing this legislation will not be easy. But, it is my fervent hope and prayer that this Committee and this Congress will see beyond our times and develop clear national standards that will protect the newsgathering function and promote good government.

The Liberty Bell is inscribed with these ancient words, "Proclaim liberty throughout all the land unto all the inhabitants thereof." (Leviticus 25:10)

Now is the time for Congress to proclaim liberty and reaffirm our commitment to the ideal of a free and independent press. Now is the time for the Free Flow of Information Act. Nothing less than the public's right to know is at stake.

Testimony of William Safire
Before the Senate Judiciary Committee
Wednesday, July 20, 2005

I am here to urge Congress to pass a law to stop the government and the courts from their present, dangerous course of trying to deny the public its right to the free flow of news.

The press's freedom to publish the news without prior restraint is not in doubt. But now under attack is what comes before publication: the ability of journalists to gather the news. To do that work effectively, we often must have inside sources willing tell us what government or corporate officials often do not want the public to know. The key to opening up an inside source is to establish mutual trust. When we say we'd go to jail to protect their anonymity, that's not just hyperbole: over the years, trustworthy reporters have established that principle at great cost, just as a courageous woman is doing in the same prison holding the "20th hijacker" today.

Not all sources are angels, and some of us grant anonymity too quickly; responsible editors are correcting that. But the essence of news gathering is this: if you don't have sources you trust and who trust you, then you don't have a solid story --- and the public suffers for it.

That's why 49 states and the District of Columbia have "shield" laws, or case law in state courts, to stop over-zealous prosecutors from undermining that trust by forcing reporters to identify sources --- thereby drying up the flow of news. By protecting the reporter who is protecting a source, the shield achieves its ultimate goal: to protect the people's access to what's really going on.

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Have these state shield laws harmed law enforcement? On the contrary, they have led to the exposure of corruption. That's why the great majority of States Attorneys General recently joined a brief supporting the protection of the identity of reporters' sources. As a card-carrying rightwing libertarian federalist, I am proud that the states have led the way; now is the moment for the Congress to profit from the experience of the chief law officers of so many states by extending the shield to Federal courts.

Would this mean that journalists get special treatment denied to other citizens? In this case of keeping the flow of information free, "no man is above the law" is a slogan, not an argument. Before compelling a person to testify, the law traditionally recognizes the strong social value of considering the confidentiality of spouses, of lawyers, doctors, and clergy; in 1996 that was extended to psychotherapists. Members of those groups are not "above" the law because the law recognizes competing values; judges must balance the citizen's obligation to give evidence with society's obligation to protect relationships built on solemn confidences.

Americans successfully perform that balancing act all the time. Right now, we are weighing the immediate needs of homeland security against the long-range need to protect civil liberties. In the same way, we have long lived with the tension of the First Amendment's free press versus the Sixth Amendment's fair trial. If any one side were to win absolutely, we would tear our finely balanced Constitution apart.

More than ever, journalists across the nation are now in danger of being held in contempt, nearly two dozen in Federal courts alone. It should be obvious that the reasonable protections to reporters' notes and documents and confidences that have been in the Department of Justice guidelines to its prosecutors for three

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decades are inadequate to the stormy present. The legislation before you incorporates those balancing guidelines, applies them to the crucial issue of the identity of sources, and at last gives them the force of law. But the protection the Free Flow of Information Act would offer is by no means absolute: journalists would be required to reveal their sources if a court, after exhausting all other means, decides that disclosure was "necessary to prevent imminent and actual harm to the national security". And [itals]imminent[unitals] does not mean "potential" --- it means "about to occur". That balance protects both the nation and its freedoms.

Let me add a personal note. I've always been a language maven; 30 years ago I asked Justice Potter Stewart to help me find the origin of the phrase "chilling effect". He checked around the Supreme Court, and Justice Brennan reported having written a 1965 decision striking down a state's intrusion on civil liberty because of its "chilling effect upon the exercise of First Amendment rights..."

Today we have two chilling effects taking place here in Washington, one general, one specific.

The general chill is on the network of useful contacts and the web of genuine friendships that develop over the years among many journalists and politicians. Information is exchanged, advice is given, mutual respect is built. You run into each other at a ballgame or at a dinner, shmooz a little on a bunch of topics, pick up a lead or toss out an idea, later act on it or pass it along to a colleague or forget it. That's been my experience inside and outside the White House; it's how information flows in real life, and it's how the public gets the news beyond the handouts. We slam the door on that at great peril to our freedom.

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But now we see a reporter in prison, for not revealing part of a conversation she may have had about a story she did not write. As a result, many of us feel a general chill in the air, and will think twice about what we say in private to each other as well as outsiders. I know that lifelong friends and sources will be forced to be guarded in what we say anywhere about everything. In the new world of threatened contempt there are no innocent questions, and a grunt or a nod can get you in trouble.

And there is a more specific chilling effect taking place right now. It imposes a mental "prior restraint" on the gathering of news and the expression of opinion. I've always been able to write what I have learned and what I believe "without fear or favor", freely taking on the high and mighty. But I cannot do that this morning.

I am seething inside because I cannot tell you --- with no holds barred --- what I think of the unchecked abuse of prosecutorial discretion, and of the escalating threats of a Federal judiciary that is urgently in need of balancing guidance by elected representatives of the people. But for the first time, I have to pull my punches.

The reason is that I am afraid of retaliation against Federal prisoner 45570083, whose byline in the New York Times is Judith Miller. This Pulitzer prizewinning reporter, who earned the trust of the U.S. forces with whom she was embedded in Iraq, has accepted the painful consequences of daring to call public attention to the unbalanced, unwise, ever-growing application of the contempt power.

I must not anger or upset those who control her incarceration, and who repeatedly threaten to pile on with longer punishment as a criminal unless she betrays her principles as a reporter. Because any harsh criticism of them from me might well be taken out on her, I am constrained to speak gently, as if concerned about

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treatment of a hostage. That duress, I submit, is an example of what Justice Brennan had in mind about a "chilling effect". I can testify that it works all too well, which is why I will now shut up and look to Congress to pass a law balancing our values and taking the chill out of the air.

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TESTIMONY OF GEOFFREY R. STONE*
ON A PROPOSED JOURNALIST-SOURCE PRIVILEGE
SENATE COMMITTEE ON THE JUDICIARY
JULY 20, 2005

I am delighted to have this opportunity to share with the Committee my thoughts on a proposed federal journalist-source privilege. Over the past year, I have publicly criticized members of the press for overstating their First Amendment rights and *New York Times* reporter Judith Miller for refusing to abide by the rule of law. When journalists disregard lawful court orders because they are serving a "higher" purpose, they endanger the freedom of the press itself. At the same time, though, the rule of law must respect the legitimate needs of a free press. A strong and effective journalist-source privilege is essential to a robust and independent press and to a well-functioning democratic society.

THE NATURE OF A PRIVILEGE

The goal of most legal privileges is to promote open communication in circumstances in which society wants to encourage such communication. There are many such privileges, including the attorney-client privilege, the doctor-patient privilege, the psychotherapist-patient privilege, the privilege for confidential spousal communications, the priest-penitent privilege, the executive privilege, the "Speech or Debate Clause" privilege for members of Congress, and so on.[1]

In each of these instances, three judgments implicitly support recognition of the privilege: (1) the relationship is one in which open communication is important to society; (2) in the absence of a privilege, such communication will be inhibited; and (3) the cost to the legal system of losing access to the privileged information is outweighed by

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[1] Not all privileges take this form. The privilege against compelled self-incrimination, for example, has a separate and distinct rationale, designed to deter abusive interrogation practices, avoid reliance upon unreliable confessions, and respect the dignity of the individual. The trade secret privilege is designed in part to encourage open communication, but is also designed to protect property rights.

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the benefit to society of open communication in the protected relationship.

Consider, for example, the psychotherapist-patient privilege. If patients know that their psychotherapists could routinely disclose or be compelled to disclose their confidential communications made for the purpose of treatment, they would naturally be more reluctant to reveal intimate or embarrassing facts about their experiences, thoughts, and beliefs. But without those revelations, psychotherapists would be hindered in their ability to offer appropriate advice and treatment to their patients. To facilitate treatment, we might create a privilege that prohibits psychotherapists from disclosing confidential matters revealed to them by their patients, unless the patient elects to waive the privilege.

Suppose, for example, Patient tells Psychotherapist that he was sexually abused by Teacher several years earlier. Teacher is now under investigation for sexual abuse of his students, and Psychotherapist is called to testify before the grand jury. Psychotherapist is asked, "Did Patient tell you he had been sexually abused by Teacher?" If a psychotherapist-patient privilege exists in the jurisdiction, Psychotherapist will be barred from answering the question without Patient's permission. The effect of the privilege is to deprive the investigation of relevant evidence in order to promote open communication in the treatment setting.

At this point, it is important to note a critical feature of privileges. If Patient would not have disclosed this information to Psychotherapist in the absence of a psychotherapist-patient privilege, then the criminal investigation loses *nothing* because of the privilege. This is so because, without the privilege, Psychotherapist would not have learned about Teacher's abuse of Patient in the first place. In that circumstance, the privilege creates the best of all possible outcomes: it promotes effective treatment at no cost to the legal system.

Of course, it is not that simple. It is impossible to measure precisely the cost of privileges to the legal process. If Patient would have revealed the information to Psychotherapist *even without the privilege*, then the privilege imposes a cost because it shields from disclosure a communication that would have been made even in the absence of a privilege. The ideal rule would privilege only those communications that would not have been made without the privilege.

This highlights another important feature of privileges: the privilege "belongs" to the person whose communication society wants to encourage (*i.e.*, the client or patient), not to the attorney or doctor. If the client or patient is indifferent to the confidentiality of the

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communication at the time it is made, or elects to waive the privilege at any time, the attorney or doctor has no authority to assert the privilege. The attorney or doctor is merely the agent of the client or patient.[2]

THE JOURNALIST-SOURCE PRIVILEGE

The logic of the journalist-source privilege is similar to that described above. Public policy certainly supports the idea that individuals who possess information of significant value to the public should ordinarily be encouraged to convey that information to the public. We acknowledge and act upon this policy in many ways, including, for example, by providing copyright protection.

Sometimes, though, individuals who possess such information are reluctant to have it known that they are the source. They may fear retaliation, gaining a reputation as a "snitch," losing their privacy, or simply getting "involved." A congressional staffer, for example, may have reason to believe that a Senator has taken a bribe. She may want someone to investigate, but may not want to get personally involved. Or, an employee of a corporation may know that his employer is manufacturing an unsafe product, but may not want coworkers to know he was the source of the leak.

In such circumstances, individuals may refuse to disclose the information unless they have some way to protect their confidentiality. In our society, often the best way to reveal such information is through the press. But without a journalist-source privilege, such sources may decide silence is the better part of wisdom.

A journalist-source privilege thus makes sense for the same reason as the attorney-client privilege, the doctor-patient privilege, and the psychotherapist-patient privilege. It is in society's interest to encourage the communication, and without a privilege the communication will often be chilled. Moreover, in many instances the privilege will impose no cost on the legal system, because without the privilege the source may never disclose the information at all. Consider the congressional staffer example. Without a privilege, the staffer may never report the bribe and the crime will remain undetected. With the privilege, the source will speak with the journalist, who may publish the

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[2] The attorney-client privilege is recognized in every jurisdiction in the United States. Other privileges are recognized in varying forms in different jurisdictions.

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story, leading to an investigation that may uncover the bribe. In this situation, law enforcement is actually better with the privilege than without it, and this puts to one side the benefit to society of learning of the alleged bribe independent of any criminal investigation.

For this reason, forty-nine states and the District of Columbia recognize some version of the journalist-source privilege either by statute or common law.[3] It is long-past time for the federal government to enact such a privilege as well. There is no sensible reason for the federal system not to recognize a journalist-source privilege to deal with situations like the whistleblower examples of the congressional staffer and the corporate employee. In these circumstances, the absence of a journalist-source privilege *harms* the public interest. There are, of course, more difficult cases, and I will return to them later. But some form of journalist-source privilege is essential to foster the fundamental value of an informed citizenry.

Moreover, the absence of a federal privilege creates an intolerable situation for both journalists and sources. Consider a reporter who works in New York whose source is willing to tell her about an unsafe product, but only if the reporter promises him confidentiality. New York has a shield law, but the federal government does not. If the disclosure results in litigation or prosecution in the state courts of New York, the reporter can protect the source, but if the litigation or prosecution is in federal court, the reporter cannot invoke the privilege. This generates uncertainty, and uncertainty breeds silence. The absence of a federal privilege directly undermines the policies of forty-nine states and the District of Columbia and wreaks havoc on the legitimate and good faith understandings and expectations of sources and reporters throughout the nation. This is an unnecessary, intolerable and, indeed, irresponsible state of affairs.

THE FIRST AMENDMENT

One response to the call for federal legislation in this area is that such a law is unnecessary because the First Amendment should solve the problem. This is wrong at many levels. Most obviously, constitutional law sets a minimum baseline for the protection of individual liberties. It does not define the ceiling of such liberties. That a particular practice or policy does not violate the Constitution does not

[3] Thirty-one states have recognized the privilege by statute and eighteen have recognized it by judicial decision. The only state that has not recognized the privilege in any form is Wyoming.

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mean it is good policy. This is evident in an endless list of laws that go far beyond constitutional requirements in supporting individual rights, ranging from the Civil Rights Act of 1964, to legislative restrictions on certain surveillance practices, to tax exemptions for religious organizations, to regulations of the electoral process.

Moreover, the journalist-source privilege poses not only a question of individual liberties, but also an important public policy issue about how best to support and strengthen the marketplace of ideas. Just as the non-constitutional attorney-client privilege is about promoting a healthy legal system, the non-constitutional journalist-source privilege is about fostering a healthy political system.

Returning to the First Amendment, in 1972 the Supreme Court, in *Branzburg v. Hayes*,[4] addressed the question whether the First Amendment embodies a journalist-source privilege. The four dissenting justices concluded that "when a reporter is asked to appear before a grand jury and reveal confidences," the government should be required to "(1) show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information."

The opinion of the Court, however, rejected this conclusion and held that, as long as an investigation is conducted in good faith and not for the purpose of disrupting "a reporter's relationship with his news sources," the First Amendment does not protect either the source or the reporter from having to disclose relevant information to a grand jury.

If this were all there was to *Branzburg*, it would seem clearly to have settled the First Amendment issue. But Justice Powell did something quite puzzling, for he not only joined the opinion of the Court, but also filed a separate concurring opinion that seemed directly at odds with the Court's opinion. Specifically, Powell stated that in each case the "asserted claim of privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct."

Thus, Justice Powell seemed to embrace an approach between that of the four justices in dissent and the four other justices in the majority. Had he not joined the majority opinion, his concurring

[4] 408 U.S. 665 (1972).

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opinion, as the "swing" opinion, would clearly have stated the "law," even though no other justice agreed with him. But because he joined the opinion of the Court, no one has ever quite been sure what to make of his position. The result has been chaos in the lower federal courts about the extent to which the First Amendment embodies a journalist-source privilege.[5] Is there essentially no privilege, as suggested in the majority opinion, or is Powell's balancing approach the constitutional test? For more than thirty years, the Court has allowed this confusion to percolate in the lower federal courts.

This is another reason why a federal statute is necessary. We have lived too long with this uncertainty. The current state of affairs leaves sources, journalists, prosecutors, and lower federal courts without any clear guidance, and the scope of the First Amendment-based journalist-source privilege differs significantly from one part of the nation to another. A federal law recognizing a journalist-source privilege would eliminate this confusion and offer much-needed guidance about the degree of confidentiality participants in the federal system may and may not expect. Especially in situations like these, where individuals are making difficult decisions about whether to put themselves at risk by revealing information of significant value to the public, clear rules are *essential.*

This brings me back to the relationship between constitutional law and federal legislation. If a robust journalist-source privilege is not required by the First Amendment, why (apart from considerations of uniformity) should Congress enact a privilege that goes beyond whatever the Court held in *Branzburg*? Beyond the point made earlier that the Constitution by no means exhausts sound public policy, the Court in *Branzburg* relied heavily on two important First Amendment doctrines to justify its decision, neither of which is relevant to the issue of federal legislation. Indeed, that is why, despite *Branzburg*, forty-nine states and the District of Columbia have felt comfortable recognizing some form of the journalist-source privilege.

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[5] Building upon Justice Powell's concurring opinion in Branzburg, most federal courts of appeals have held that the First Amendment protects some form of journalist-source privilege. See, *e.g.*, *United States v. Caporale*, 806 F.2d 1487 (11th Cir. 1986); *LaRouche v. National Broadcasting Company*, 780 F.2d 1134 (4th Cir. 1986); *Zerill v. Smith*, 656 F.2d 705 (D. C. Cir. 1981); *Stillman v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980); *United States v. Criden*, 633 F.2d 346 (3rd Cir. 1980); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977); *Farr v. Pritchess*, 522 F.2d 446 (9th Cir. 1975); *Baker v. F & F Investment*, 470 F.2d 778 (2d Cir. 1972).

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First, as a general matter of the First Amendment interpretation, the Court is reluctant to invalidate a law merely because it has an *incidental* effect on First Amendment freedoms. Laws that *directly* regulate expression (*e.g.*, "No one may criticize the government" or "No one may distribute leaflets on the Mall") are the central concern of the First Amendment. Laws that only incidentally affect free expression (*e.g.*, a speed limit as applied to someone who speeds to get to a demonstration on time or who speeds in order to express his opposition to speed limits) will almost never violate the First Amendment. Except in highly unusual circumstances, in which the application of such a law would have a devastating effect on First Amendment freedoms,[6] the Court routinely rejects such First Amendment challenges.[7]

The reason for this doctrine is not that such laws cannot dampen First Amendment freedoms, but that the implementation of a constitutional analysis that allowed *every* law to be challenged whenever it allegedly impinged even indirectly on someone's freedom of expression would be a judicial nightmare. Does an individual have a First Amendment right not to pay taxes, because taxes reduce the amount of money she has available to support political causes? Does an individual have a First Amendment right to violate a law against public urination, because he wants to urinate on a public building to express his hostility to government policy? Does a reporter have a First Amendment right to violate laws against burglary or wiretapping, because burglary and wiretapping will enable him to get an important story?

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[6] See, *e.g.*, *NAACP v. Alabama*, 357 U.S. 449 (1958) (holding that for the state to require the NAACP to disclose its membership lists in Alabama at the height of the civil rights movement would effectively destroy the NAACP's ability to operate)..

[7] See, *e.g.*, *Arcara v. Cloud Books*, 478 U.S. 697 (1986) (upholding as an "incidental" restriction on speech a law requiring the closing of any building used for prostitution, as applied to an "adult" bookstore); *Wayte v. United States*, 470 U.S. 598 (1985) (upholding as an "incidental" restriction on speech the government's policy of enforcing the selective service registration requirement only against those men who advised the government that they had failed to register or who were reported by others as having failed to register); *United States v. O'Brien*, 391 U.S. 367 (1968) (upholding as an "incidental" restriction on speech a federal law prohibiting any individual to destroy a draft card, as applied to an individual who burned a draft card to protest the Vietnam War); *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969) (upholding the Sherman Antitrust Act, as applied to the press); *Oklahoman Press Publishing Co. v. Walling*, 327 U.S. 186 (1946) (upholding the Fair Labor Standards Act, as applied to the press). See generally Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. Chi. L. Rev. 46, 99-114 (1987).

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To avoid such intractable and ad hoc line-drawing, the Court simply *presumes* that laws of general application are constitutional, even as applied to speakers and journalists, except in extraordinary circumstances. Predictably, the Court invoked this principle in *Branzburg*: "[T]he First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability."

This is a sound basis for the Court to be wary of constitutionalizing a strong journalist-source privilege, but it has no weight in the *legislative* context. Courts necessarily proceed on the basis of precedent, and they are quite sensitive to the dangers of "slippery slopes." Legislation, however, properly considers problems "one step at a time" and legislators need not reconcile each law with every other law in order to meet their responsibilities.

For the Court to recognize a journalist-source privilege but not, for example, a privilege of journalists to commit burglary or wiretapping, would pose a serious challenge in the judicial process. But for Congress to address the privilege issue without fretting over journalistic burglary or wiretapping is simply not a problem. This is a fundamental difference between the judicial and legislative processes.

Second, recognition of a journalist-source privilege necessarily requires someone to determine who, exactly, is a "journalist." For the Court to decide this question *as a matter of First Amendment interpretation* would fly in the face of more than two hundred years of constitutional wisdom. The idea of defining or "licensing" the press in this manner is anathema to our constitutional traditions. The Court has never gone down this road, and with good reason. As the Court observed in *Branzburg*, if the Court recognized a First Amendment privilege "it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer [just] as much as of the large metropolitan publisher."

Although this was a serious constraint on the Court in *Branzburg*, it poses a much more manageable issue in the context of legislation. Government often treats different speakers and publishers differently from one another. Which reporters are allowed to attend a White House press briefing? Which are eligible to be embedded with the military? Broadcasting is regulated, but print journalism is not. Legislation treats the cable medium differently from both broadcasting and print journalism. These categories need not conform perfectly to the undefined phrase "the press" in the First Amendment. Differentiation among different elements of the media is constitutional,

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as long as it is not based on viewpoint or any other invidious consideration, and as long as the differentiation is reasonable.[8] Whereas the Court is wisely reluctant to define "the press" for purposes of the First Amendment, it will grant Congress considerable deference in deciding who, as a matter of sound public policy, should be covered by the journalist-source privilege.

Thus, the primary reasons relied upon by the Court in *Branzburg* for its reluctance to recognize a robust First Amendment journalist-source privilege do not stand in the way of legislation to address the issue. To the contrary, the very weaknesses of the judicial process that make it difficult for a court to address this problem as a constitutional matter are precisely the strengths of Congress to address it well as a legislative matter.

THE COSTS OF A JOURNALIST-SOURCE PRIVILEGE

The primary argument against *any* privilege is that it deprives the judicial or other investigative process of relevant evidence. Of course, there is nothing novel about that. Almost all rules of evidence deprive the fact-finder of relevant evidence. This is true not only of privileges, but also of rules against hearsay and opinion evidence, rules excluding proof of repairs and compromises, the exclusionary rule, the privilege against compelled self-incrimination, and rules protecting trade secrets and the identity of confidential government agents. This is so because the law of evidence inherently involves trade-offs between the needs of the judicial process and competing societal interests. But it is important to recognize that there is nothing unique about this feature of privileges.

A central question in assessing any such rule is how much relevant evidence will be lost if the rule is enacted. It is impossible to know this with any exactitude, because this inquiry invariably involves unprovable counterfactuals. But, as noted earlier, privileges have a distinctive feature in this regard that must be carefully considered.

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[8] See, e.g., *Turner Broadcasting Inc. v. Federal Communications Commission*, 512 U.S. 622 (1994) (upholding "must carry" provisions that favored broadcast over cable programmers); *Leathers v. Medlock*, 499 U.S. 439 (1991) (upholding a state law exempting newspapers and magazines but not cable television from a gross receipts tax); *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 357 (1969) (upholding regulations for broadcasting that would be unconstitutional for print media).

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If, in any given situation, we focus on the moment the privilege is invoked (for example, when the reporter refuses to disclose a source to a grand jury), the cost of the privilege will seem high, because we appear to be "losing" something quite tangible because of the privilege. But if we focus on the moment the source speaks with the reporter, we will see the matter quite differently.

Assume a particular source will not disclose confidential information to a reporter in the absence of a privilege. If there is no privilege, the source will not reveal the information, the reporter will not be able to publish the information, the reporter will not be called to testify before the grand jury, and the grand jury will not learn the source's identify. Thus, in this situation, the absence of the privilege will deprive the grand jury of the *exact same evidence* as the privilege. But at least with the privilege, the public and law enforcement will gain access to the underlying information through the newspaper report. In this situation, the privilege is *costless* to the legal system, and at the same time provides significant benefits both to law enforcement and the public.

Of course, some, perhaps many, sources will reveal information to a reporter even without a privilege. It is the evidentiary loss of *those* disclosures that is the true measure of the cost of the privilege. (The same analysis holds for other privileges as well, such as attorney-client and doctor-patient). It is essential to examine the privilege in this manner in order to understand the actual impact of the journalist-source privilege.

Here are two ways to assess the relative costs and benefits. (1) On balance, it is probably the case that the most important confidential communications, the ones that are of greatest value to the public, are those that would get the source in the most "trouble." Thus, the absence of a privilege is most likely to chill the most valuable disclosures. (2) If one compares criminal prosecutions in states with an absolute privilege with those in states with only a qualified privilege, there is almost certainly no measurable difference in the effectiveness of law enforcement. Even though there may be a difference in the outcomes of a few idiosyncratic cases, the existence of even an absolute privilege probably has no discernable effect on the legal system *as a whole*. If we focus, as we should, on these large-scale effects, rather than on a few highly unusual cases when the issue captures the public's attention, it seems clear that the benefits we derive from the privilege significantly outweigh its negative effects on law enforcement. This is so because the percentage of cases in which the issue actually arises is vanishingly small and because, in serious cases, prosecutors are almost always able to use alternative ways to investigate the crime.

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My conclusion, then, like that of forty-nine states and the District of Columbia, is that public policy strongly supports the recognition of a journalist-source privilege. Indeed, the absence of a federal journalist-source privilege seems inexplicable.

FRAMING A FEDERAL JOURNALIST-SOURCE PRIVILEGE

Many issues arise in framing such a privilege. I will address three of them here: Who can invoke the privilege? Should the privilege be absolute? What if the disclosure by the source is itself a crime?

Who can invoke the privilege? At the outset, it must be recalled that the privilege belongs to the source, not to the reporter. When the reporter invokes the privilege, she is merely acting as the agent of the source.[9] With that in mind, the question should properly be

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[9] In several cases, courts have held that the journalist-source privilege belongs to the reporter and cannot be waived by the source. See, *e.g., Palandjian v. Pahlavi*, 103 F.R.D. 410, 413 (D.D.C. 1984); *Los Angeles Memorial Coliseum Comm'n v. NFL*, 89 F.R.D. 489, 494 (C.D. Cal. 1981); *United States v.Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980). This view of the privilege seems to assume that the primary purpose of the privilege is to maintain the independence of the press rather than to encourage open communication by sources. This view makes sense insofar as the issue is whether journalists should enjoy a "work product" privilege analogous to the attorney's work product doctrine. To the extent such a doctrine applies to journalists, it would then be necessary to define precisely who is a journalist. Proposals for a "work product" doctrine for journalists generally assume that a qualified privilege would be adequate to protect this interest, as it is in the attorney work product situation. See, *e.g.*, Free Speech Protection Act of 2005, S. 369, 109th Cong., 1st Sess. (2005) (proposed by Senator Dodd).

On the attorney work product doctrine, see *Hickman v. Taylor*, 329 U.S. 495, 510-511 (1947):

> It is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. . . .
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> This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways. . . . Were such materials open to opposing counsel on mere demand, much of what is now put down in

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rephrased as follows: To whom may a source properly disclose information in reasonable reliance on the belief that the disclosure will be protected by the journalist-source privilege?

The answer should be a functional one. The focus should not be on whether the reporter fits within any particular category. Rather, the source should be protected whenever he makes a confidential disclosure to an individual, reasonably believing that that individual regularly disseminates information to the general public, when the source's purpose is to enable that individual to disseminate the information to the general public.

Such a definition does not resolve every possible problem of interpretation. "General public," for example, should include specific communities, such as a university or a specialized set of readers. But the essence of the definition is clear. What we should be most concerned about is the *reasonable* expectations of the source, rather than the formal credentials of the recipient of the information.

Absolute or qualified privilege? Thirty-six states have some form of qualified journalist-source privilege. [10] In these states, the government can require the journalist to reveal the confidential information if the government can show that it has exhausted alternative ways of obtaining the information and that the information is necessary to serve a substantial government interest. There are many different variations of this formulation, but this is the essence of it. The logic of the qualified privilege is that it appears never to deny the government access to the information that the government really "needs." Correlatively, it appears to protect the privilege when breaching it would serve no substantial government interest. As such, it appears to be a sensible compromise. Nothing could be farther from the truth.

> writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

[10] Eighteen states have a qualified statutory privilege, including Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Illinois, Louisiana, Michigan, Minnesota, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Rhode Island, South Carolina, and Tennessee. Another eighteen states have a qualified judicial privilege.

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Although the qualified privilege has a superficial appeal, it is deeply misguided. It purports to achieve the best of both worlds, but probably achieves the opposite. For quite persuasive reasons, other privileges, such as the attorney-client, doctor-patient, psychotherapist-patient, and priest-penitent privileges, which are deeply rooted in our national experience, do *not* allow such ad hoc determinations of "need" to override the privilege.

The qualified privilege rests on the illusion that the costs and benefits of the privilege can properly be assessed at the moment the privilege is asserted. But as I have indicated earlier, this is false. It blinks the reality that the real impact of the privilege must be assessed, not when the privilege is asserted, but when the source speaks with the reporter. By focusing on the wrong moment in time, the qualified privilege ignores the disclosures it *prevents* from ever occurring. That is, it disregards the cost to society of all the disclosures that sources *do not make* because they are chilled by the uncertainty of the qualified privilege. It is thus premised on a distorted "balancing" of the competing societal interests.

Moreover, the qualified privilege undermines the very purpose of the journalist-source privilege. Imagine yourself in the position of a source. You are a congressional staffer who has reason to believe a Senator has taken a bribe. You want to reveal this to a journalist, but you do not want to be known as "loose-lipped" or "disloyal." You face the prospect of a qualified privilege. At the moment you speak with the reporter, it is impossible for you to know whether, four months hence, some prosecutor will or will not be able to make the requisite showing to pierce the privilege. This puts you in a craps-shoot.

But the very purpose of the privilege is to *encourage* sources to disclose useful information to the public. The uncertainty surrounding the application of the qualified privilege directly undercuts this purpose and is grossly unfair to sources, whose disclosures we are attempting to induce. In short, the qualified privilege is a bad business all around. And that is precisely why other privileges are not framed in this manner.

Does this mean the journalist-source privilege must be *absolute*? Thirteen states and the District of Columbia have reached this conclusion.[11] And, indeed, there is considerable virtue in a simple, straightforward, unambiguous privilege. At the same time, however,

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[11] The thirteen states with an absolute privilege are Alaska, Delaware, Indiana, Kentucky, Maryland, Montana, Nebraska, Nevada, New York, Ohio, Oregon, and Pennsylvania.

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there may be *some* narrowly-defined circumstances in which it may seem quite sensible to breach the privilege.

For example, if a journalist broadcasts information, obtained from a confidential source, about a grave crime or serious breach of national security that is likely to be committed imminently, it may seem irresponsible to privilege the identity of the source. More concretely, suppose a reporter broadcasts a news alert that, according to a reliable, confidential source, a major terrorist attack will strike New York the next day, and law enforcement authorities want the reporter to reveal the name of the source so they can attempt to track him down and possibly prevent the attack. Is this a sufficiently compelling justification to override the privilege? It would certainly seem so, and this would be analogous to the rule in the psychotherapist-patient context that voids the privilege if the psychotherapist learns that her patient intends imminently to inflict serious harm on himself or others.

But even in this situation the matter is not free from doubt. It must be borne in mind that, as a practical matter, without an absolute privilege the source might not be willing to disclose this information. Thus, in the long-run, this exception could well hinder rather than support law enforcement. Public officials are better off knowing that a threat exists, even if they do not know the identity of the source, than knowing nothing at all. Thus, breaching the privilege in even this seemingly compelling situation may actually prove counterproductive in the long-run. It is for this reason that the attorney-client privilege generally provides that no showing of need is sufficient to pierce the privilege.[12] Apart from this very narrowly-defined exception, however, an absolute privilege will best serve the *overall* interests of society.

What if the source's disclosure is itself unlawful? A relatively rare, but interesting twist occurs when the source's disclosure is itself a criminal act. Suppose, for example, a government employee unlawfully reveals to a reporter classified information that the United States has broken a terrorist code or confidential information about a private individual's tax return. As we have seen, the primary purpose of the privilege is to encourage sources to disclose information to journalists because such disclosures promote the public interest. But when the act of disclosure is itself unlawful, the law has already determined that the public interest cuts *against* disclosure. It would

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[12] See, *e.g.*, *Admiral Insurance Co. v. U.S. District Court*, 881 F.2d 1486, 1495 (9th Cir. 1989) ("The attorney-client privilege cannot be vitiated by a claim that the information sought is unavailable from any other source. . . . Such an exception would either destroy the privilege or render it so tenuous and uncertain that it would be little better than no privilege at all.")

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thus seem perverse to allow a journalist to shield the identity of a source whose disclosure is itself punishable as a criminal act. The goal of the privilege is to foster whistleblowing and other lawful disclosures, not to encourage individuals to use the press to commit criminal acts.[13]

A rule that excluded all unlawful disclosures from the scope of the journalist-source privilege would be consistent with other privileges. A client who consults an attorney in order to figure out how to commit the perfect murder is not protected by the attorney-client privilege, and a patient who consults a doctor in order to learn how best to defraud an insurance company is not protected by the doctor-patient privilege. And this is so regardless of whether the attorney or doctor knew of the client's or patient's intent at the time of the conversation. Such use of doctors and lawyers is not what those privileges are designed to encourage.

By the same reasoning, a source whose disclosure is unlawful is not engaging in conduct that society intends to encourage. To the contrary, the very purpose of prohibiting the disclosure is to *discourage* such conduct. It would therefore seem sensible to conclude that such a source is not entitled to the protection of the journalist-source privilege.

There are, however, several objections to such a limitation on the privilege. In some circumstances, it may not be clear to the reporter, or even to the source, whether the disclosure is unlawful. Because of the complexity of the relevant criminal statute, this may have been the case in the Karl Rove/Matt Cooper situation. If the privilege does not cover unlawful disclosures, but it is unclear whether a particular disclosure was unlawful, how is the reporter to know whether to promise confidentiality?

The answer is simple. As in all privilege situations, a promise of confidentiality should be understood as binding *only to the extent allowed by law.* A similar question may arise in the imminent crime/ national security situation. Ultimately, it is for the court, not the reporter, to resolve these issues. In the unlawful disclosure context, the court should protect the privilege unless it finds that the source knew or should have known that the disclosure was unlawful.

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[13] An interesting question is whether the same principle should apply when the leak is not a crime, but a tort. For example, suppose a confidential source makes a false statement of fact to a newspaper, which publishes the statement, attributing it to a confidential source. Can the newspaper be compelled to reveal the identify of the source on the theory that there is no public policy to encourage people to make false statements of fact to newspapers?

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A second objection to an unlawful disclosure limitation is that some unlawful disclosures involve information of substantial public value. The *Pentagon Papers* case[14] is a classic illustration. Although the government can ordinarily punish an employee who unlawfully leaks classified information,[15] it does not *necessarily* follow that the privilege should be breached if the information revealed is of substantial value to the public. This is a difficult and tricky question.

In the context of unlawful leaks, the journalist source privilege may be seen as an intermediate case. On the one hand, government employees ordinarily can be punished for violating reasonable confidentiality restrictions with respect to information they learn during the course of their employment.[16] On the other hand, the media ordinarily may publish information they learn from an unlawful leak, unless the publication creates a clear and present danger of a grave harm to the nation.[17] The journalist-source privilege falls between these two rules. Because the leak is unlawful, it seems perverse to shield the source's identity. But because the press has a constitutional right to publish the information, it seems perverse to require the press to identify the source.

The best resolution is to uphold the privilege in this situation if the unlawful leak discloses information of substantial public value. This strikes a reasonable accommodation between full protection of the source's identify and no protection of his identity, based on the contribution of the leak to public debate. To illustrate what I mean by "substantial public value," I would place the Pentagon Papers and the leak of the Abu Ghraib scandal on one side of the line, and Karl Rove's conversation with Matt Cooper about Valerie Plame and James Taricani's leak of grand jury evidence in Rhode Island,[18] on the other.[19]

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[14] *New York Times v. United States*, 403 U.S.713 (1971).
[15] It is important to note that if the leaker cannot constitutionally be punished for the leak, then the leak is not unlawful, and this entire analysis is irrelevant.
[16] See, e.g., *Snepp v. United States*, 444 U.S. 507 (1980) (upholding a restriction on the publication by a former CIA agent of information learned during the course of his employment by the CIA).
[17] See, e.g., *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (holding that the government cannot prohibit the publication of confidential information); *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976) (holding that the government cannot prohibiting the publication of confessions and other facts strongly implicative of the accused in a criminal case); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (holding that the government could not enjoin publication of the Pentagon Papers).
[18] See *In Re Special Proceedings*, 373 F.3d 37 (1st Cir. 2004).

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Although this rule will inevitably involve some uncertainty in marginal cases, it would apply only in cases in which the leak is itself unlawful, so any chilling effect would be of relatively minor concern.

CONCLUSION

I will conclude with a few specific observations. First, when is a communication between a source and a journalist "confidential"? Not every conversation is confidential. To meet this standard, the journalist must either expressly promise confidentiality, or the circumstances and content of the conversation must be such that the source would reasonably assume confidentiality. Needless to say, journalists should promise confidentiality only when necessary, only when such a promise is consistent with the law, and only according to prevailing professional standards.

Second, to reiterate a point I made earlier, reporters have no legal or moral right to promise confidentiality beyond what is recognized in the law. Such promises should always be interpreted as "subject to the rule of law." It is the responsibility of the source as well as the reporter to understand that the reporter cannot legally promise more than the law allows. If a reporter expressly promises more than the law allows, that promise is legally ineffective, like any other promise that is contrary to public policy. A reporter who knowingly deceives a source by promising more than the law authorizes is properly subject to professional discipline and civil liability to the source.

Third, supporters of an absolute journalist-source privilege argue that anything less than an absolute privilege will "chill" free expression. Certainly, this is true. Some disclosures that should not occur will be chilled, and some disclosures that should occur will be chilled. The former is the reason for a less than absolute privilege; the latter is the cost of a less than absolute privilege.

It is in the nature of free speech that it is easily discouraged. Most people know that their decision to participate in public debate by attending a demonstration, signing a petition, or disclosing information

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[19] This is a higher standard of newsworthiness than the Supreme Court has applied in deciding when the press has a First Amendment right to publish or broadcast information obtained from unlawful sources. See Bartnicki v. Vopper, 532 U.S. 514 (2001) (holding that a radio commentator could not constitutionally be held liable for damages for broadcasting an unlawfully recorded telephone call, where the broadcast involved "truthful information of public concern."

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to the press is unlikely to change the world in any measurable way. Except in extraordinary circumstances, any one person's participation will have no discernable impact. As a consequence, any risk of penalty for speech will often cause individuals to forego their right of free expression. This is a serious concern whenever we shape rules about public discourse.

But this argument can be made against *any* restriction of free expression. Taken to its logical conclusion, it means that no restriction of speech is ever permissible, because every restriction will chill some speech that should not be chilled. The chilling effect argument must be used with some restraint. As I have already suggested, in my view, in part because of chilling effect concerns, the complete absence of a federal journalist-source privilege is indefensible and the qualified journalist-source privilege strikes the wrong balance. But an absolute privilege may go too far.

A rule that limits the privilege (a) when the government can convincingly demonstrate it needs the information to prevent an imminent and grave crime or threat to the national security or (b) when the disclosure is unlawful and does not substantially contribute to public debate seems to me to strike the right balance. It unduly sacrifices neither compelling law enforcement interests nor the equally compelling interests in promoting a free and independent press and a robust public discourse.

Finally, in light of the substantial interstate effects of the media, it seems appropriate and sensible for Congress to enact a shield law that governs not only federal proceedings, but state and local proceedings as well. Because of the interstate nature of modern communications, a common set of expectations among sources, journalists, law enforcement officials, and courts is essential, and federal legislation is the best way to achieve this result.[20]

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[20] Under the Supremacy Clause, states could not offer a weaker journalist-source privilege than that provided in such federal legislation, but they could of course offer a more protective privilege for state and local proceedings. Thus, such a law would not interfere with the thirteen states that currently recognize an absolute journalist-source privilege.

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Statement by Congressman Greg Walden

July 20, 2005
Senate Committee on the Judiciary
Hearing on "Reporters' Shield Legislation: Issues and Implications"

Mr. Chairman, thank you for the opportunity to submit testimony to your committee on this very important issue.

As the owner of five radio stations with a degree in journalism, I know firsthand how important it is that we enact a federal shield law for reporters. The majority of states have seen fit to address this issue on their own accord.

My home state of Oregon has a shield law more encompassing than most, providing journalists with protection regardless of whether their confidential information has been published or not. Additionally, Oregon's state-level shield law protects the files of a reporter from being searched. As you know, while this law provides protection for journalists at our state level, they are not valid should a journalist face a federal court. The fact that several newspapers in my district have editorialized in favor of enacting a federal shield law is not surprising, rather it proves the importance of this legislation to the journalism community.

As lawmakers, we have a responsibility to uphold the protections afforded all Americans under the auspices of the Constitution, such as the right to freedom of the press. Reporters should feel secure in their efforts to gather information and disseminate it for public knowledge, especially when the issue at hand is one of a controversial or sensitive nature, hinging on sources who must remain anonymous. These sources, and the journalists they speak through, should not be afraid, but rather feel secure in sharing bona fide information with the public. Imprisonment should not be used to coerce disclosure.

By passing legislation to enact a federal shield law and protecting journalists from compelled disclosure of confidential sources we are neither encouraging nor condoning reporters to engage in the regular practice of anonymity in their work, tossing aside the preferred use of attributable sources. Nor are we suggesting that confidential sources not

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be verified and validated; professional journalists know their ethical responsibility as it pertains to confirming information. We are simply reaffirming their rights.

While my support for federal protection of journalists is strong, I do acknowledge that there will be extenuating circumstances in which these protections clash with the need for federal law enforcement. It may be appropriate to require a reporter to testify or provide information on their sources during investigation into serious criminal acts such as murder or when faced with a threat to homeland security, but compelled disclosure should be reserved as an exception, not a rule.

Thomas Jefferson once said, "Our liberty cannot be guarded but by the freedom of the press, nor that be limited without danger of losing it." His words rang true during the founding days of our country and they still ring true today.

As evidenced by the broad support for both my colleague Congressman Pence's legislation and Senator Lugar's legislation, this is an issue of importance to us all regardless of party, constituency or background.

Its passage has everything to do with shining the bright light of public disclosure to enhance public knowledge and discourse, and nothing to do with who controls Congress, lives in the White House, oversees the Pentagon, or holds the title of Attorney General.

Thank you, again, for your time and for holding a hearing on this important issue.

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