S. HRG. 109–1040

REPORTERS' PRIVILEGE LEGISLATION: AN ADDITIONAL INVESTIGATION OF ISSUES AND IMPLICATIONS

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

OCTOBER 19, 2005

Serial No. J–109–44

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

46–829 PDF WASHINGTON : 2009

For sale by the Superintendent of Documents, U.S. Government Printing Office
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WEDNESDAY, OCTOBER 19, 2005

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, pursuant to notice, at 10:45 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Arlen Specter, Chairman of the Committee, presiding.

Present: Senators Specter, Kyl, DeWine, Sessions, Cornyn, Feinstein, and Durbin.

Chairman SPECTER. Good morning, ladies and gentlemen.

The Judiciary Committee will now proceed with our second hearing on the issue of reporters' privilege.

I regret our slight delay in starting this hearing. We have made it a point on the Committee to be very punctual in beginning, but at the moment we are deeply involved in the confirmation proceedings of Ms. Harriet Miers, and there are some issues we had to consider. We have met together with Senator Leahy and the leadership on scheduling matters, and there was a need for the Democrats to meet separately, which they did yesterday, and Republicans have just met, so it has run slightly into the 10:30 starting time. So to repeat, I regret keeping people waiting here.

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

Chairman SPECTER. The issue of the reporters' privilege has come into very sharp national and international focus with the incarceration of Ms. Judith Miller, who for 85 days was in a detention center in Virginia.

My staff and I, among many others, visited her there to try to gain some insights into the entire situation and there have been reports about a chilling effect across the country on reporters, and we are taking up the legislation, which has been introduced in the House and Senate by Senator Lugar on our body, and by Representative Pence in the House of Representatives, to decide whether there ought to be a privilege, and if so, to what extent it ought to be extended.

The issue has been a troublesome one since 1972 when the Supreme Court in *Branzburg* v. *Hayes* said that neither the First Amendment or common law exempts members of the press from testifying before a grand jury in criminal proceedings. That deci-

sion has created some confusion, contributed in large measure to the concurrence of Justice Powell. Five circuits have applied *Branzburg* to prevent journalists from withholding information. Four of the circuits have a qualified privilege in civil cases. Nine of the twelve circuits apply a balancing test. And on the State level, 31 States plus the District of Columbia have enacted reporters' shield statutes, and 18 States have recognized such a privilege at common law.

There is no doubt about the value of investigative reporting to the public interest in exposing corruption, malfeasance, misconduct, waste, and the oft-quoted comment by Jefferson cannot be repeated too often, if he really made it, that he would prefer newspapers without Government as opposed to Government without newspapers. That is quadrupled multiplied hearsay. We talk about super precedents and super-duper precedents. That one is worth repetition however many times it has been said.

There are weighty considerations on law enforcement, on their point of view, and national security interests. All of those factors have to be taken into account by the Judiciary Committee and then by the full Senate, and then by the Congress.

I am going to yield back almost a full minute. We will have other of the Democrats joining us. Senator Feinstein, this is extemporaneous, but that does not pose any problem. Would you care to take the ranking member's responsibility for an opening statement?

STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. Well, I do not have an opening statement prepared, Mr. Chairman, but let me just say this, because Mr. Rosenberg is going to be testifying, and I am aware of the position of Justice. I hope he will address the national security provision of the shield law which was submitted to us, which we had the prior hearing on.

The problem that I have is I do think it is very legitimate before a Federal grand jury in an instance of national security, and not necessarily when the challenge is immediate, but when it is near or present, that there be some ability to get information if a reporter has it, and so I would be most interested in his comments along those lines.

And I thank you very much, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Feinstein.

Our first witness is Mr. Chuck Rosenberg, United States Attorney for the Southern District of Texas. He has served as Chief of Staff to Deputy Attorney General James Comey, Counselor to the Attorney General John Ashcroft, and as Counsel to FBI Director Robert Mueller. We had hoped to have Mr. Comey at the last hearing, and we are glad to have you here today, Mr. Rosenberg, and look forward to your testimony.

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STATEMENT OF HON. CHUCK ROSENBERG, U.S. ATTORNEY FOR THE SOUTHERN DISTRICT OF TEXAS, ON BEHALF OF THE U.S. DEPARTMENT OF JUSTICE, HOUSTON, TEXAS

Mr. ROSENBERG. Thank you, Mr. Chairman, members of the Committee. It is an honor to testify today.

For 33 years the Department of Justice has adhered scrupulously to a demanding set of regulations that govern our issuance of media subpoenas. We adhere to these regulations to balance two critical interests: first to protect the vibrant press, free to gather news on important issues, to use confidential sources, and to act as a check on Government; and second, to enforce Federal criminal law, to protect national security and vital secrets and the public safety. And through Republican and Democratic administrations alike, our internal regulations have enabled us to balance those interests on a case-by-case basis and to seek information about confidential sources from the press only when it really, really matters.

For this discussion, Mr. Chairman, I believe the numbers are useful. Over the last 14 years, which is the period of time for which we have computerized records, we have issued subpoenas to the media seeking confidential sources 12 times, 12 times in 14 years, less than one confidential source subpoena per year. And each one of those 12 subpoenas was reviewed carefully by senior career and political officials in the Department and personally approved by the Attorney General.

So I think we must ask what is broken about the way we are handling matters involving subpoenas to the media. We rarely issue subpoenas to the media seeking information about confidential sources, and when we do, it is only after painstakingly careful review and meticulous adherence to our internal guidelines.

We should not enter into this debate believing that the First Amendment is under assault by the Department of Justice. It manifestly is not. In fact, I believe any serious observer of the Department of Justice would tell you that our track record, our strict adherence to our own guidelines, and our five levels of internal review are not the problem. Rather, the overwhelming number of subpoenas issued to the media for confidential source information arises in the context of private litigation, and of course, when we are not a party to the litigation, our guidelines do not apply. We play no role at all. In short, I do not see anything in our work that justifies discarding 33 years of careful practice which has served the media and the Nation well.

The proposed legislation is problematic for many reasons, which I discuss in detail in my written testimony, but here I would like to briefly highlight certain key points, including addressing the concerns that Senator Feinstein has raised.

First, it imposes inflexible mandatory standards in place of our existing flexible, prudent guidelines; and second, in the most urgent circumstances it prevents us from getting information quickly when we need it the most to protect the public. For example, the only exception in the bill to obtain confidential source information comes in the narrow category of cases involving imminent and actual harm to national security. That provision, I submit, simply does not work. What of the case where harm is imminent, but the harm is not to national security? What happens when confidential

source information could help us recover a child that has been kidnapped. Under the proposed bill, that confidential source information would be off limits to us because that case is not a national security case.

What of the case where national security is at risk but we cannot demonstrate that harm is imminent? The exception, I submit, is both too little and too late.

I also would encourage the media to question whether given the restrained approach of the politically accountable Justice Department leadership over the past 33 years, whether shifting the focus of this exercise to the Judicial Branch would produce more or perhaps less protection for journalists and their sources?

I think this is a very important discussion, and I have great respect for the people who have joined the debate. Simply stated, the notion that the Justice Department is the problem and that this legislation is the solution, I submit, is plain wrong.

I am a career prosecutor. I participated in this process at the Department. I have seen how it works. I know how meticulous we are in our reviews. I know how rarely we seek information from the press about confidential sources, and I know that when we do it we do it for the right reasons. We believe that we have been doing this the right way for decades. We strongly oppose this bill as it applies to our work.

I thank you. I look forward to answering your questions.

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

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

I am going to ask the other two witnesses who are going to be testifying against the shield law to come forward at this time, Mr. Joseph diGenova and Professor Steven Clymer, if you would come to the witness table, so that when we begin our round of questioning, we will question all three witnesses who are appearing in opposition to the proposed legislation.

Our next witness, Mr. Joe diGenova, is well known to the Committee and to the Senate generally. He served as Counsel to this Committee, also to Government Affairs and the Select Intelligence Committee, and Chief Counsel and Staff Director for the Senate Rules Committee, was the United States Attorney for the District of Columbia for 5 years in the 1980's, and was Independent Counsel, has a long resume of being involved in some major investigations and prosecutions.

Thank you for joining us, Mr. diGenova, and the floor is yours.

STATEMENT OF JOSEPH E. DIGENOVA, FOUNDING PARTNER, DIGENOVA AND TOENSING, LLP, WASHINGTON, D.C.

Mr. DIGENOVA. Thank you, Mr. Chairman.

Let me just say at the outset that my position may be a little bit more nuance than opposition to the bill. I actually see a need for the Congress to address this question. In my testimony I have indicated that I oppose an absolute privilege because I do not believe in common law there should be any absolute privileges for the very reason that Mr. Rosenberg gave, that there may be facts and circumstances warranting the piercing of any privilege, including

the attorney-client privilege and a journalist privilege if this Committee chose to establish one under Federal common law.

I do believe, however, that if in fact the Committee decides to go down this route, it needs to establish some procedural safeguards for the enforcement of these rights for a journalist, the same way I believe they should it for lawyers.

Mr. Rosenberg has testified that the Department over the years has done a superb job of supervising its internal guidelines, and that there is no reason to address this question. My proposal would be that given the purported success of these guidelines in the Department using them, that Congress should have no fear in enacting those guidelines into law, and making them a legal requirement. Under their own terms, the Justice Department guidelines create no enforceable legal rights.

I believe that notwithstanding the purported success of the Department in restraining itself in issuing subpoenas, since it says that it has no problem complying with these guidelines, at a minimum what the Committee should do is adopt those guidelines as legislation, and consistent with Mr. Rosenberg's suggestion, modify the legislation to take into account specific instances to avoid what I call a manifest in justice, or to deal with manifest necessity such as securing information from a journalist about the location of a kidnapped child. All of us understand the necessity for that, and the circumstances which would lead a judge to, in a balancing test, certainly agree that a reporter should be required to disgorge that information. In addition, his national security exception, where the Government might not be able to prove the actual imminence of a threat, that can be handled through evidentiary hearings and through presumptions which this Committee could draft into law.

What I think the Committee needs to address in dealing with this privilege is what happens on the ground in a courtroom. And what happens on the ground in a courtroom, particularly in the grand jury context, is that the person being subpoenaed, whether it is a lawyer or a journalist, does not know what evidence the prosecutor is telling the judge about. When you address this question—and I strongly urge you to adopt the Justice Department guidelines and put them into law—the Department should have no objection to that since it says it complies with it. In addition to doing that, you should adopt rules under the Federal Rules of Criminal and Civil Procedure for the manner in which hearings are to be conducted in these key areas, whether it is a journalist or a lawyer. So that when an attempt is made to pierce a vital privilege under U.S. common law, there are safeguards which allow the person being subpoenaed to have access to at least some of the evidence that is being used against them to force the vitiation of the privilege. This is a problem in the grand jury context which has never been addressed. It was evident from the published reports about the Judith Miller case and the Matt Cooper case that the attorneys representing them were operating vastly in the dark about the nature and extent of the information that was being used to compel them to testify.

Now, there may be reasons in a given case that a judge would order that that information not be turned over to the other side so that a true adversarial proceeding could occur to determine wheth-

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er the privilege should be vitiated, but those would be rare. That might happen in a national security case, but I submit to you that this Congress is perfectly capable of calibrating the circumstances under which information should be turned over to someone who is being subpoenaed. In the case of a reporter I think it is vitally important, and obviously in the case of a lawyer, having been subpoenaed myself and been threatened with jail, I can assure you that when you do not know, as our attorney said in the Third Circuit, what the other side has, you are there with a hammer trying to hit a pinata to find out what is on the inside.

So I would urge this Committee to adopt the Justice Department guidelines into law, create procedural safeguards for any hearings around them, and finally, require sworn testimony about the basis for the crime.

Thank you, Mr. Chairman.

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

Chairman SPECTER. Thank you, Mr. diGenova.

Our next witness on this panel is Mr. Steven Clymer, who worked as a Pennsylvania Assistant District Attorney, and 7 years as an Assistant U.S. Attorney for the Central District of California, been on the Cornell Law School faculty since 1995. Thank you very much for joining us today, Professor Clymer, and we look forward to your testimony.

STATEMENT OF STEVEN D. CLYMER, PROFESSOR OF LAW, CORNELL LAW SCHOOL, ITHACA, NEW YORK

Mr. CLYMER. Thank you for inviting me today.

If Congress enacts a reporters' privilege, it should be more limited than the proposals currently pending before this body. I want to describe two ways I think it has to be limited if there is to be a reporters' privilege.

First of all, a Federal reporters' privilege that protects criminal disclosures to reporters would undercut important Federal criminal statutes. Most disclosures to the news media do not in and of themselves violate Federal criminal laws. Unfortunately, some disclosures to the news media do. These laws are designed to safeguard information, that if improperly disclosed could jeopardize not only national security, but the safety of law enforcement officials, such as information about whether a search warrant is going to be executed. It could undermine criminal investigations, and it could destroy the reputations of innocent people.

Some proposals for a Federal reporters' privilege, including S. 1419, draw no distinction between legal disclosures and illegal disclosures. Proposals like this would help to conceal the identity of sources whose disclosures constitute Federal felonies. In this regard the proposed privilege is more extensive than other well-recognized privileges such as the attorney-client privilege which has a crime-fraud exception. Any reporters' privilege that is enacted should contain a similar exception.

Failure to exempt illegal disclosures from coverage would conflict with the very Federal laws that criminalize those disclosures. The privileges would encourage the disclosures that the criminal statutes are meant to deter. That sort of contradictory message from

Congress can only breed disrespect for the laws criminalizing those sorts of disclosures.

In addition, failure to exempt illegal disclosures effectively would immunize people who made those disclosures as long as they disclosed it to a member of the news media. If investigators ask the source whether he made the disclosure, the source could assert the Fifth Amendment privilege, thereby curtailing that method of investigation. If there was a reporters' privilege that protected illegal as well as legal disclosures, it would prevent any investigator speaking to the reporter about the source of the leaks. As a result, no one could determine who leaked the information or prove it in court. Such an outcome would signal that illegal disclosures of classified or otherwise sensitive information such as wiretap information, tax information, grand jury information, no matter how harmful to national security, to police safety, to law enforcement interests or to the personal privacy of innocent people, are immune from criminal prosecution as long as they are made to a recipient who could qualify as a reporter under the privilege.

In this regard I think it is worth noting that S. 1419 has a definition of "covered person" who could be potentially broad enough so that a disclosure of sensitive or classified information to an Internet blogger would be covered.

My second point, Federal reporters' privilege should not guard against invalid assertions of the privilege. In order to do so, courts, not reporters, should determine whether the privilege applies. There is no good reason to conceal the identity of the source who does not want to be kept secret. Any reporters' privilege should apply only if some preconditions are met, namely that the source has requested an assurance of confidentiality and has received such an assurance, and later has not waived any confidentially. I note in passing that S. 1419 is flawed in this regard as well. It applies even if the source has never sought confidentiality, never received confidentiality, and has in fact waived confidentiality.

Other privileges have preconditions like this, and if a witness asserts the privilege, the opponent of the privilege has the right to have a court make a determination whether the preconditions have been met. Courts, not witnesses in other contexts, decide whether a privilege applies.

The same should hold true for any reporters' privilege. Recent, widely publicized events demonstrate that courts and litigants should not be required to accept reporters' assertions of the privilege at face value. In Providence, Rhode Island, despite a court order, a reporter named Jim Taricani refused to disclose the identity of a source. After being held in contempt of court, the source came forward and said he had never asked to be confidential in the first place. Taricani disputes that claim.

Here in Washington, Judith Miller refused to comply with a court order requiring her to testify before a Federal grand jury about a source. After she had been held in contempt and spent 85 days in Federal custody, she claimed that her source finally had given her permission to reveal his identity, but both the source and his lawyer dispute that account, saying that they had waived confidentiality long ago. It is not clear why the reporters' claims for

the need for confidentiality in these cases were contradicted by their own sources.

What is clear, though, is that those assertions should not be accepted at face value. If they are, we would stand to lose probative evidence for no good reason. Instead, like other privileges, courts, not witnesses, should determine the existence of the privilege.

In conclusion let me say that the free flow of information to reporters clearly benefits society, but it comes at a price if there is a privilege that is necessary to guard it. The price is a significant one, limits on the truth-seeking functions of both grand juries and courts. Those limits threaten to impair efforts to achieve justice in important matters, and they should be considered very carefully before deciding the scope of any reporters' privilege.

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

Chairman SPECTER. Thank you very much, Professor Clymer. We will now begin our customary 5-minute rounds. I notice, Professor Clymer, in your resume, you were Pennsylvania Assistant District Attorney. Where?

Mr. CLYMER. Philadelphia, sir.

Chairman SPECTER. Philadelphia. Was that after my time or before my time?

Mr. CLYMER. It was after your time, sir.

Chairman SPECTER. I am glad to establish the chronology.

Mr. CLYMER. I was proud to serve in the office that you ran, sir.

Chairman SPECTER. Thank you. That is the best job in the world, being an Assistant District Attorney, especially in Philadelphia County.

Mr. diGenova, you said you were threatened with jail. Did you go to jail?

Mr. DIGENOVA. We did not, Your Honor. My—

Chairman SPECTER. Who is this "we?"

Mr. DIGENOVA. My law partner and I, Victoria Toensing. We did not go to jail because we challenged the subpoena and moved to quash, lost in the district court—

Chairman SPECTER. You did not go to jail and you did not succumb to the threats.

Mr. DIGENOVA. We did not, Your Honor. We went to the Third Circuit where we won, and the history of that is what has led me to be concerned about the way—

Chairman SPECTER. That is enough.

[Laughter.]

Chairman SPECTER. I only have 5 minutes.

Mr. DIGENOVA. Yes, sir.

Chairman SPECTER. Mr. Rosenberg, as Professor Clymer has already noted, I was a prosecuting attorney. It would have been very easy to go to newspaper reporters, would have made it much simpler for me to conduct investigations, but I got along. 33 States have shield laws, 18 a common law. How can the States get along respecting reporters' privilege, and the Federal Government cannot? Are the States just not doing their job or are you so much more effective?

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Mr. ROSENBERG. Not at all. That is an excellent question, Senator. First of all, 36 of the States have a qualified privilege, not absolute. But more importantly, the Federal Government—

Chairman SPECTER. Will you stop on qualified? That is an area worth exploring. I do not know that we are going to grant any absolute privileges. We are just in the middle on the Roberts' hearings of the deliberative process privilege, which is qualified. But here you have a reporter who is in jail for 85 days, and millions of Americans were wondering why. There may be a very good reason why she was in jail. I am one of those who was wondering why she was in jail, and I asked Ms. Miller, and she could not tell me why she was in jail.

This Committee is in the process of seeking to find out, as a matter of our oversight, from the Special Prosecutor why she was in jail. What were the factors of such great importance to have a reporter in jail for 85 days, and to have an obvious chilling effect on reporters elsewhere? Whether they should have been chilled or not, there is no doubt that they were chilled.

Congress has very, very substantial oversight authority with respect to legislation and with respect to investigations, and so far our efforts to find out what is behind the proffer of the Special Prosecutor, have gone to no avail. This Committee is not finished on its oversight responsibilities with respect to this matter as to what is the reason for what has occurred. And when Attorney General Gonzales sat where you are sitting, we went over in great detail the authority for this Committee's oversight authority. It does not exactly apply to a Special Prosecutor because he stands in a little different spot, but I think no higher than the Attorney General. But if all the States can get along with a qualified privilege at least, why not the Federal Government?

Mr. ROSENBERG. That is an excellent question, Senator.

The Federal Government, I submit, has a uniquely different role, responsible for conducting international diplomacy, waging war, classifying information. The State of Pennsylvania, for instance, Commonwealth—excuse me—would not classify a document as secret or top secret. It does not contain, it does not possess, it does not generate, it—

Chairman SPECTER. None of that is involved in the Judith Miller case.

Mr. ROSENBERG. I do not know what specifically is involved in the Judith Miller case, but if you ask, Senator, why this is different than the States, why the State analogy is inapt—

Chairman SPECTER. Pardon me for interrupting, but I have got 14 seconds left.

[Laughter.]

Chairman SPECTER. And I stop when my red light is on. I expect everybody else to also.

But why should the presiding judge not make an inquiry as to what the Special Prosecutor is after and balance that against 85 days in jail?

Mr. ROSENBERG. May I have permission to answer that?

Chairman SPECTER. Oh, no. You are directed to answer that.

[Laughter.]

Mr. ROSENBERG. They will both work, Mr. Chairman. Again, I do not know the specific facts of that case. I have not learned them. Mr. Fitzgerald is a friend of mine, but I have not discussed the case with him. I have studiously avoided it. However—

Chairman SPECTER. Do you think it would have done you any good if you had not studiously avoided him and tried to discuss the case with him?

Mr. ROSENBERG. I do not know.

Chairman SPECTER. Do you think he would tell you more than he would tell me?

Mr. ROSENBERG. Probably not.

Chairman SPECTER. I agree. Go ahead, Mr. Rosenberg.

Mr. ROSENBERG. But, Mr. Chairman, we have a unique responsibility. As Professor Clymer noted, when confidential, secret, top secret information is leaked, that is not a violation of Pennsylvania law or Ohio law or the law of any State. It is a violation of Federal law. Because we have unique responsibilities to protect the national security and to safeguard our Nation's secrets, the fact that there may be a State privilege does not quite answer the question of whether there should be a Federal privilege.

Chairman SPECTER. Thank you, Mr. Rosenberg.

Senator Feinstein.

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

Mr. Rosenberg, let me refer to page 2 and 3 of the bill, the Dodd bill, which essentially has the exceptions. What problems do you have on those pages, the national security and the law enforcement?

Mr. ROSENBERG. Senator, there are several problems that I see. First, by throwing this open to the courts, we are going to have circuit-by-circuit determinations, for instance, of what "imminence" means, what is national security, who is and who is not a covered person. Somebody could be covered in the Third Circuit but not in the Fourth. Some set of facts could be construed to be imminent in the Fifth Circuit but not in the Sixth.

The fact is that we make a very careful determination at the Department of Justice, and we draw on 33 years of experience to do that, and as I mentioned, have only issued these subpoenas in a very small number of cases, and I refer now to confidential source subpoenas.

The problem is that if you throw it open to the courts, number one, you will have those varying interpretations inevitably. But there is another problem and I think it is just as pressing.

Senator FEINSTEIN. This is your argument then—I do not mean to interrupt you—but to have no bill at all; is that right?

Mr. ROSENBERG. That is right.

Senator FEINSTEIN. How would you feel if Mr. diGenova's codification of your procedures were made into law?

Mr. ROSENBERG. Not much better, Senator.

Senator FEINSTEIN. Because of the differential between courts?

Mr. ROSENBERG. Yes, in part, but there is another problem. One of the things that we can do, if we need to, is move very fast. We do not do it often. As my former boss, Jim Comey said, "We often move at the speed of wood." But when we need to move fast, we can. And the problem is that if you have to go to court—and most

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of the time with the things we do, we of course do go to court. But if you have to go to court in an imminent harm situation, we do not know how long that is going to take, whether it is appealed, how many layers it goes up. We need to be able to move.

Senator FEINSTEIN. Can I stop you there?

Mr. ROSENBERG. Yes.

Senator FEINSTEIN. I would like to have Mr. diGenova respond to that, and Dr. Clymer if he wishes to.

Mr. DIGENOVA. Certainly, Senator. The situation is such that it is—there are always worse case scenarios.

Senator FEINSTEIN. No, no, no, no. Stop for a minute, Joe. What he is saying is that the DOJ rules set a basic standard which avoids the courts essentially, and therefore, through negotiation, they are able, they believe, to effect a clear system.

Mr. DIGENOVA. They can still do that if they were enacted into law. That would not prevent negotiation. Someone has to go to court and file a motion to quash a subpoena. At that point, even before that, they will do the same negotiating they do with news organizations every day before the news organization ever files a motion to quash on a subpoena. Once that motion to quash is filed, they are in the same position today that they would be with the guidelines enacted into law. There is only one difference, they would have to follow the guidelines, which notwithstanding what the Department says here today, they do not always do.

Senator FEINSTEIN. Dr. Clymer, would you respond?

Mr. CLYMER. I think there is an additional problem with enacting the DOJ guidelines as law. In my experience the Department is perhaps overly rigorous in the application of those guidelines, if anything. If they are enacted into the law, the Department no longer has the obligation or the need to do that and, instead, the courts decide.

In some measure, it may be easier to get a subpoena to a media source through the court system than it is to get it through main Justice. You lose the uniformity, you lose the institutional memory about what gets done and what doesn't get done, and I am not sure you really gain any benefit. Unless there has been some evidence that there has been a abuse of the process, it seems to me there is no problem to fix.

Senator FEINSTEIN. Quick question of all of you. If there were to be a bill, should it preempt the State laws that now exist?

Mr. CLYMER. I think that is a bad idea. I don't think this body should be telling State courts what is admissible or inadmissible in State court proceedings.

Senator FEINSTEIN. Does everybody agree with that?

Mr. DIGENOVA. I agree with that, Senator.

Mr. ROSENBERG. I don't really have a view on that, Senator.

Senator FEINSTEIN. So, Mr. Rosenberg, let me just be clear. Main Justice is opposed to any bill, no matter how good it might be. Is that correct?

Mr. ROSENBERG. We are certainly opposed to this bill. We always will work with this Committee if there is something that we can do to help make a bill better. But this bill does not help. It hurts law enforcement.

Senator FEINSTEIN. Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Feinstein.

Senator Cornyn.

Senator CORNYN. Thank you, Mr. Chairman, for holding this important hearing.

Obviously, this is a question of competing values that we are trying to reconcile here. Mr. Rosenberg, in light of the *Branzburg* v. *Hayes* decision, where the Supreme Court said there is no constitutional privilege, on what basis would a reporter offer confidentiality under all circumstances to a source?

Mr. ROSENBERG. Well, a reporter is in a bit of a bind, then, Senator. What *Branzburg* said is that there is no privilege if an investigation is conducted in good faith. And I add that gloss because I think it is an important gloss. If an investigation, God forbid, is brought in bad faith or merely to harass a reporter, *Branzburg* left open the possibility that you can go to court and seek to quash it on First Amendment grounds, because the First Amendment would override a bad-faith investigation, as it should.

Senator CORNYN. But it is a matter of law, correct?, that a reporter cannot guarantee confidentiality.

Mr. ROSENBERG. I believe that is correct, Senator, but if I may just add quickly. Somehow it has gotten into the drinking water that all leaks are beneficial. Some, frankly, are venal. Some, frankly, as Professor Clymer noted, are a crime in and of themselves. We only—and when I say "we," the Department of Justice seeks confidential-source information in a very narrow set of circumstances, when, for instance, the leak itself is a crime. We are not going after whistleblowers, and I know our history bears that out.

Senator CORNYN. Professor Clymer, the Court's decision in *Branzburg* said that if the Court was going to recognize a constitutional privilege for journalists, then they would in effect be in the business of defining who is and who is not a journalist. And to me, it strikes me as one of the most difficult aspects of what we are being asked to do here, because I don't know whether that would apply with equal force to the journalist who works for the New York Times or Washington Post or Dallas Morning News or Houston Chronicle, or Al-Jazeera or perhaps an Internet blogger who has a cell phone with a camera and maybe a recorder and a laptop computer and is capable of publishing information with almost equal ease of what we would consider to be a professional journalist.

Would you tell us how we are going to do that?

Mr. CLYMER. Well, I think there are a couple of problems there, Senator. The first problem is just the language used in any bill, and the proposed bill before the body has language that I think could easily be read to apply to an Internet blogger and would apply to Al-Jazeera. And so the proposal before the Senate now would make those covered people, which would mean that disclosures to those entities would be privileged.

The second problem is that even if Congress tries to limit or carefully draft the bill to avoid that problem, there is no telling how courts may interpret it in light of Fifth Amendment or other constitutional concerns. They may decide that you cannot favor one group of media over another group of media. And so if you are

going to give the privilege to the New York Times, you necessarily have to give it to the Internet blogger as well.

I don't have a proposed solution to that problem. All I can tell you is I think it is a problem and I think it is a problem that deserves very serious consideration.

Senator CORNYN. Well, obviously the Internet bloggers, and perhaps others, don't observe the same professional ethics or have the same review by editors and others that are trying to make sure that they are performing their job in a responsible and accurate sort of way.

Let me ask, Mr. Rosenberg, in the 42 seconds I have remaining here, in Mr. Fitzgerald's case, because he is a Special Counsel, is he bound by the Department of Justice guidelines?

Mr. ROSENBERG. Excellent question, Senator. My understanding, because he is appointed by the Attorney General, in essence, yes, he is.

Senator CORNYN. But the Attorney General recused himself.

Mr. ROSENBERG. And made Mr. Comey the Acting Attorney General for purposes of that investigation. The Acting Attorney General, Deputy Attorney General Comey, then delegated his authority to Mr. Fitzgerald.

Senator CORNYN. Is Mr. Fitzgerald on record as acknowledging that he is bound by the Department of Justice guidelines?

Mr. ROSENBERG. I don't know that he is on record, but if you look at Judge Hogan's opinion, you will see that he complied with all the guidelines.

Senator CORNYN. Thank you very much.

Chairman SPECTER. Thank you very much, Senator Cornyn.

Senator Durbin.

Senator DURBIN. Thank you, Mr. Chairman, and thank you to the panel.

Mr. Rosenberg, the hypothetical that you used about a kidnapping victim is exactly the same hypothetical I posed to the last panel and they couldn't come up with an answer. And as I read this law that we are considering here, if in fact a 5-year-old girl is kidnapped, being held somewhere, and the kidnapper calls a reporter to describe in gruesome detail what is happening to that little girl, if confidentiality was promised to the person, the kidnapper, then under this law there would be no way for the Department of Justice, dealing with a Federal crime, to compel the disclosure of that kidnapper. Is that your understanding?

Mr. ROSENBERG. Yes, sir.

Senator DURBIN. And that, of course, defies the basic attorney-client privilege, which says if the commission of a crime is involved, the privilege does not apply.

Mr. ROSENBERG. It indeed sweeps more broadly, yes, sir.

Senator DURBIN. So let's take that to the next—that is the easy-case scenario. Now let's take it to the more-difficult-case scenario. Now we are dealing with the whistleblower, and the whistleblower is disclosing classified information to the reporter. The disclosure of that information may be the commission of a crime.

Mr. ROSENBERG. Yes, sir.

Senator DURBIN. So how would you deal with that exception, or that situation?

Mr. ROSENBERG. Well, the test for a national security case would be imminent actual harm. If we could not show that that leak was imminent actual harm, we may not be able to reach it through this bill. In other words, it may be off limits, even though a crime.

Senator DURBIN. And of course it could be more technical and not classified information, but some other protection of Federal law that would protect the disclosure of certain information which is being given for the purpose of disclosing wrongdoing by other people in the Government.

Mr. ROSENBERG. Yes, sir. And as I noted earlier, it might be something we could reach in one circuit but not in another, setting up a truly bizarre situation.

Senator DURBIN. Let me ask you the more basic thing, and I don't know how we get to this point. In the Valerie Plame case, which we are dealing with here, we weren't, obviously, dealing with noble intent or public good or an effort to use the press to disclose wrongdoing. What appeared here to be, what happened with the Novak disclosure, was venal, it was political, and it may have been the commission of a crime itself. How do you get to the question of the intent of the disclosure of the information? Should that be part of this conversation?

Mr. ROSENBERG. Senator Durbin, if you permit me not to speak about that matter. It is an ongoing investigation and I don't think it would be appropriate.

Senator DURBIN. Certainly.

Mr. ROSENBERG. But your more general question is a difficult one. With this privilege enacted, we have to show imminent harm to national security. If we can show that, then whether the motive was venal or not, we might be able to get to it.

Senator DURBIN. Mr. Clymer, let me ask you. I hope I will be here when Ms. Miller testifies, but there appears to be a problem that she went through with the attorney for Mr. Libby as to whether or not the confidentiality was waived, whether she understood it to be waived by free will or coerced. How would you address that? I mean, you raised that as one of the issues here, the waiver of the confidentiality itself.

Mr. CLYMER. I think that any privilege should address it the same way other privileges address it, which is to say the witness asserts the privilege, the opponent of the privilege has the ability to challenge that assertion, and a court—not the witness, but a court—gets to decide whether or not the privilege has been validly asserted. That may require in some instances that the court conduct an in camera hearing with the source, yet undisclosed to the party trying to identify the source, but to determine whether the source waived the privilege, whether the source ever asked for confidentiality, and whether, if the source did waive, whether the waiver is valid.

Senator DURBIN. And your argument is that is consistent with other privileges and how they are asserted in court proceedings?

Mr. CLYMER. I have done it. As a prosecutor, I have had people assert the Fifth Amendment privilege and I have claimed that it is an invalid assertion, we have a hearing, and the court decides. I have done it with attorney-client privilege, and we have a hearing and the court decides. It should not be up to the reporter to decide,

and the opponent should not have to accept the reporter's assertion at face value.

Senator DURBIN. How would you improve the current law before us other than this area, in terms of the waiver of this privilege?

Mr. CLYMER. In 35 seconds?

Senator DURBIN. I know. That is one of the problems.

[Laughter.]

Mr. CLYMER. A couple of problems. No. 1, this law as written also protects non-confidential-source material in the news media. That is an entirely separate issue than the one we have been talking about, and I think it requires separate and very close scrutiny because it is not clear to me that there are good reasons for a separate privilege for non-confidential-source material.

Second, as I said, I believe that it is a mistake for a body that passes laws making certain disclosures crimes, to turn around and say we are going to conceal the identity of the person as long as they make the disclosure to a media person.

Those are my two biggest concerns.

Senator DURBIN. The second one may be a tough hurdle to clear.

Mr. CLYMER. I agree, sir, it is.

And then the third one is the one you just raised, which is the issue about who gets to decide if the privilege is validly asserted.

Senator DURBIN. Thank you.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator.

Senator Sessions.

Senator SESSIONS. Thank you, Mr. Chairman.

The American criminal process has always been a pursuit of truth. We have had historically certain limited privileges for certain individuals. When you go to law school, you study each one of those, and they are defended and argued for and against, and you have cases that show how abuses occur with the privileges and cases that demonstrate why the privileges are legitimate—the priest-penitent, the husband-wife, and many states have a reporter privilege.

I think, though, the first principle we should consider is this: If you have confidence in our Government—and I do—then to deny the investigators of that Government the ability to find truth is a compromise on the ideal of the American legal system. You have to justify that compromise through a rational analysis.

So I guess that is where we are today, and I am interested in looking at this. It does strike me quite clearly—and just briefly, because you can see how short our time is—I would ask each of you, would you agree that the position of the United States Government that deals with international relations, that deals with national security, terrorism, war, and the ability of our Government to unleash deadly force against enemies and have those enemies desire to unleash deadly force on our soldiers and our people, even, that it is a—we have to be more careful than most States. Would you disagree with that, Joe, and would you—

Mr. DIGENOVA. I would not, Senator. I would agree with that.

Senator SESSIONS. Professor Clymer.

Mr. CLYMER. I also agree.

Senator SESSIONS. Mr. Rosenberg.

Mr. ROSENBERG. I agree.

Senator SESSIONS. You have already stated that in your remarks. And I think that is true. I was asked by one of my newspapers about it and all the States have it. I started thinking about that, well, why has the U.S. Congress not passed such a law? And I think it is a qualitative difference.

Now, Professor Clymer, you talked about the lawyer-client privilege, I believe, or maybe both of you did. But if a lawyer advises a client on how to commit a crime or, in conversation with that client about a crime, takes steps to further that crime, the privilege does not continue. Is that correct?

Mr. CLYMER. That is correct. In fact, if the communication at issue was made for the purposes of furthering a crime or a fraud, there is a well established exception that applies in the privilege—

Senator SESSIONS. I assume all of you would agree.

All right. So it seems to me, now, that if a member of the United States Government, in violation of the security rules of that Government, provides information that is classified to a reporter and that reporter broadcasts it, if it was a lawyer client, the privilege certainly would not apply in that instance because they would be aiding and abetting the crime or actually being a co-conspirator or a co-participant in the crime. Is that correct?

Mr. CLYMER. Although it is worth pointing out that the attorney-client privilege does not require that the attorney be involved in the criminal conduct. If the client asked the attorney questions and the client intends to commit a crime by asking those questions, the attorney can be a completely innocent party and the communication still is not privileged.

Senator SESSIONS. Well, but, you know, he has to be advising the client on how to commit the crime, does he not? Victoria, I see back there, says no.

Mr. DIGENOVA. Actually, Senator, in most of the instance where the attorney-client privilege is pierced, it is not because the lawyer was wittingly involved, it is that the lawyer was used unwittingly by the client, they find out about it later, the courts seek their testimony, and the lawyer is delighted to testify about what they were told. That is the majority of the cases where the privilege is pierced.

Senator SESSIONS. Well, I could see that, and you make a good point. Well, at any rate, those are the reasons I think we need to be careful here. This is a big deal. It is something that my initial inclination would be, well, why not be supportive of our media? One reason Senator Specter never called a reporter before the grand jury in Philadelphia is he had to face The Philadelphia Inquirer and they have ink by the barrel. I mean, there is a political reality there. So even the Department of Justice has to be careful, because you take a lot of abuse if you bring a reporter. So there is an inherent discipline on the Government not to abuse this power.

Mr. ROSENBERG. May I just have a moment, Senator, to respond to that?

Senator SESSIONS. Yes.

Mr. ROSENBERG. You are exactly right. And that is why not only do we adhere so closely to our internal guidelines, but I can tell

you, they are rather strict. We have to make all reasonable attempts to obtain information from alternative sources first. Then we must negotiate with the media. And then, if that fails, we may seek permission, if there are reasonable grounds to believe a crime has occurred and the information is essential—that is the word in our guidelines—essential to a successful investigation. And that is why, if you look at the past 14 years, we have only issued 12 confidential-source subpoenas. We take this responsibility very seriously.

Senator SESSIONS. My time has expired.

Thank you very much, Mr. Chairman.

Chairman SPECTER. Thank you very much, Senator Sessions.

Ordinarily, we limit it to one round. But let us go forward with a few additional questions here.

Mr. Rosenberg, five circuits have applied *Branzburg* to prevent journalists withholding information to the Government. Four other circuits recognize a qualified privilege. The law in the D.C. Circuit appears to be unsettled. Isn't this the kind of a situation on an important issue of public policy that there ought to be uniformity among the circuits, so that there is a special reason for Congress to intervene?

Mr. ROSENBERG. Well, I don't believe there is reason to intervene, but it does raise an ancillary point that I think is important. I don't think *Branzburg* is that unsettled. I think if there is a good-faith grand jury investigation, then there is no privilege. And that is what the D.C. Circuit recently said. But it goes back to an earlier point in our discussion—Senator Feinstein—when we talked about how inevitably different circuits are going to judge parts of this bill in different ways. And that is a fundamental problem with the legislation.

Chairman SPECTER. Well, Mr. Rosenberg, is it incorrect that five circuits have said there is no privilege at all and four circuits use a balancing test?

Mr. ROSENBERG. I believe, Senator, but I will check, that that was in the civil context. In other words, for a criminal grand jury investigation brought in good faith, I think there was one aberrant decision that I know of in the Third Circuit, a 1992 case called *Williams*. Absent that, I believe, in a criminal grand jury context, good-faith investigation, *Branzburg* is settled law.

Chairman SPECTER. Well, that is not my staff's research.

Mr. ROSENBERG. I could be wrong. And I am happy to be corrected.

Chairman SPECTER. Well, any of us could be wrong. We will double-check that. But you say there is at least a distinction in the Third Circuit, which moves in a different direction?

Mr. ROSENBERG. There is a 1992 Third Circuit case, I believe, *In re Williams*, which the Third Circuit—it was a split panel, by the way, evenly divided, I believe—improperly focused on Justice Powell's concurrence in *Branzburg* to find that there could be a qualified privilege in the grand jury context, which I think is a misreading of *Branzburg*. I think absent that—and again, I am confining my analysis to criminal grand jury cases brought in good faith.

Chairman SPECTER. Well, OK, you may think it is a misreading of *Branzburg*, but the Third Circuit doesn't.

Mr. ROSENBERG. And they win.

Chairman SPECTER. The Third Circuit is a very important circuit. It covers Pennsylvania. Right, Professor Clymer?

Mr. CLYMER. Absolutely.

[Laughter.]

Chairman SPECTER. But there is a special need for Congress to come into it if the circuits are divided.

Mr. diGenova, you had commented about the need to have access to discovery so that there could be information presented to a court implementing a balancing test?

Mr. DIGENOVA. Yes.

Chairman SPECTER. Would you expand on what you had in mind there?

Mr. DIGENOVA. Yes, Mr. Chairman. As a result of experiences in the area both with the reporters' privilege and the attorney-client privilege, in the grand jury context people who are seeking to challenge the subpoenas are not entitled to get the ex parte information that is given to the court. In those two situations, where the privileges are quite substantial and important, the absence of having access to that information—

Chairman SPECTER. Well, let me interrupt you because I have a minute–20 left, would that idea be applied conceptually to Ms. Miller's case, where—

Mr. DIGENOVA. Oh, absolutely.

Chairman Specter—[continuing]. Where you think she should have had the right to know what the background was so that there could have been a weighing test by the Federal judge in charge—Judge Hogan, who is in charge of the Federal grand jury?

Mr. DIGENOVA. Yes. Absolutely. Because only the Government knows the ex parte communication with the court. The person challenging the subpoena does not.

Chairman SPECTER. Professor Clymer, do you agree with Mr. diGenova?

Mr. CLYMER. No.

Chairman SPECTER. Why not?

Mr. CLYMER. I think it would be a bad idea if a person who was merely a witness in a grand jury investigation would be able to gain access to 6(e) material, which is essentially what Mr. diGenova is suggesting. I think it would undermine the effectiveness and the function and the historical performance of Federal grand juries.

Chairman SPECTER. Why do you say that? Why shouldn't that determination be made by a judge, to know what is in the background, what—

Mr. DIGENOVA. I don't mean to suggest, Senator, that the judge should not have access to that information. I mean to suggest, I don't see that a person—

Chairman SPECTER. So you think the judge should have access to it on a balancing test?

Mr. DIGENOVA. Well, the judge should have access to the information if it is necessary to make a determination. For example, the

D.C. Circuit had access to confidential information in the case involving the Judith Miller subpoena.

Chairman SPECTER. Senator Feinstein, do you care to ask additional questions?

Senator FEINSTEIN. No, Mr. Chairman. I am very anxious to have the next panel.

Chairman SPECTER. We will move right to them unless Senator Session intercedes.

Thank you very much, Mr. Rosenberg. Thank you, Professor Clymer. Thank you, Mr. diGenova.

We now turn to our next panel, Ms. Judith Miller, Mr. David Westin, Ms. Anne Gordon, Mr. Dale Davenport.

Our first witness on this panel is Ms. Judith Miller, author and Pulitzer Prize-winning correspondent for the New York Times, writing about national security issues with emphasis on terrorism and the Middle East. She joined the Washington bureau of the Times in 1977, and in 1983 was the first woman to be named chief of the Times bureau in Cairo. In 1990 she was a special correspondent in the Persian Gulf crisis. Before joining the Times, worked on National Public Radio and a contributor to The Progressive, a monthly magazine.

Ms. Miller, we appreciate your coming in today. You look so much better than when I last saw you.

Ms. Miller. So do you, Senator.

Chairman SPECTER. People say that I am looking better now that I am growing hair. But you look much, much better than anybody does. So thank you for joining us, and we are very much interested in what you have to say.

STATEMENT OF JUDITH MILLER, INVESTIGATIVE REPORTER AND SENIOR WRITER, THE NEW YORK TIMES, NEW YORK, NEW YORK

Ms. MILLER. Good morning. I am Judith Miller, a reporter for the New York Times. That statement, in and of itself, is extraordinary. Reporters don't usually testify at Congressional hearings, but the circumstances that in July forced me to spend 85 days in the Alexandria Detention Center in Virginia highlight the urgent need for a Federal shield law to protect journalists and their sources.

I am here today to urge you to enact the Free Flow of Information Act so that other journalists will not be forced, as I was, to go to jail to protect their sources. I am here because I hope you will agree that an uncoercable press, though at times irritating, is vital to the perpetuation of the freedom and democracy we so often take for granted.

Yes, the legal machinations in my case were enormously complex, but the principle I was defending was fairly straightforward. Once reporters give a pledge to keep a source's identity confidential, they must be willing to honor that pledge and not testify unless the source gives explicit, personal permission for them to do so and they are able to protect other confidential courses. Eventually, when the fuss over my case dies down, I hope journalists and politicians will begin examining the real issues at stake here, especially the question of when and under what circumstances a waiver can be considered voluntary.

Struggling with such a weighty question alone in jail was hardly ideal. I did the best I could under rather challenging circumstances. Confidential sources are the life's blood of journalism. Without them, whether they are in government, large or small companies, or nonprofit organizations, people like me would be out of business, as I painfully learned while covering intelligence estimates of Saddam Hussein's weapons of mass destruction. We are only as good as our sources. If they are mistaken, we will be wrong. And a source's confidence that we will not divulge his identity is crucial to his or her readiness to come to us with allegations of fraud or abuse or other wrongdoing, or even a dissenting view about Government policy or business practices that the American people may need to know.

I know from my 30 years in national security and intelligence reporting that confidential sources in this area, though traditionally the most press-shy and skittish of contacts, are indispensable to Government accountability and the people's right to know. I would just point to the two examples.

In 2000, I relied heavily on such sources in co-writing a series of articles on al Qaeda, which was openly and doggedly pursuing nuclear, biological, and chemical weapons. That series won one of seven Pulitzer Prizes for the New York Times that year, and it could not have been written without pledges of confidentiality I gave to officials who were so worried about al Qaeda—all too presciently, alas—that they were willing to discuss classified information with me to call attention to how relatively little time and money were being spent countering what they considered the gravest of threats to our Nation.

Admittedly, the situation that sent me to jail was not as clear-cut. It was not the case of a government or corporate whistleblower, but an all-too-familiar case of Washington politics. Yet the principle that confidential sources must be protected must apply in all cases. Indeed, one person's whistleblower is another person's snitch.

One reason why this bill is so urgently needed is, in the post-9/11 era, dramatically increased amounts and types of information are being classified as secret and, hence, are no longer available for public review. Last year, more documents were classified secret and top secret than ever before in American history. In such a climate, confidential sources, particularly in the national security and intelligence areas, are indispensable to Government accountability. Journalists are increasingly being subjected to Federal subpoenas since 9/11, more than two dozen reporters have now been subpoenaed in the past 2 years and are in danger of going to jail. If current trends prevail, the Alexandria Detention Center may have to open an entire new wing to house reporters.

In conclusion, I would just say that my 85 days in prison were tempered by the letters I received from friends and supporters from throughout the world, but many were perplexed why—and they could not understand why a reporter doing her job, much less a reporter who had never written an article about this story, could be imprisoned for keeping her word.

What has been missed in much of the furor over my case, paraphrasing Paul Levinson, a Fordham University professor, is that

the recent hand-wringing should not prevent us from recognizing the most enduring truth: Reporters, even flawed reporters, should not be jailed for protecting even flawed sources. When the dust clears, I hope that journalists and newsrooms will be emboldened, not confused or angered, by what I have done. And I hope that you will ensure that no other reporter will have to choose between doing her small bit to protect the First Amendment and her liberty.

Thank you, Senators.

[The prepared statement of Ms. Miller appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Ms. Miller.

We now turn to Mr. David Westin, President of ABC News, under whose leadership ABC received two of broadcast journalism's highest awards, the Peabody Award and Columbia University's DuPont Award.

In his career before coming to ABC, he was an attorney with Wilmer Cutler and Pickering, and served as law clerk to Associate Justice Lewis Powell. Perhaps he had a hand in the *Branzburg* opinion to raise the areas of doubt and confusion. Or perhaps that was in another era.

Thank you for joining us, Mr. Westin. The floor is yours.

STATEMENT OF DAVID WESTIN, PRESIDENT, ABC NEWS, NEW YORK, NEW YORK

Mr. WESTIN. Thank you very much, Mr. Chairman, and thank you to all the members of the Committee for having me here today. I must confess at the outset, I didn't work on *Branzburg* v. *Hayes*. It was a few years before I was with Justice Powell.

Chairman SPECTER. Well, that is too bad. I am sure if you had, it would have been clearer.

[Laughter.]

Mr. WESTIN. You flatter me, but I wouldn't want to criticize my old boss.

In my limited time, I want to make two basic points. As you say, I have served both as a lawyer—I did have the honor of clerking for Justice Powell, and then with Wilmer Cutler for many years—and now I have been in a newsroom for approaching 9 years now. So I have seen both sides of this issue. Today I am here not as a lawyer. I still have my D.C. Bar card, but I am not as a lawyer here today. I am really representing the 1,300 men and women of ABC News.

I have seen both sides of it and I recognize there are two sides to this issue and that it is a very difficult issue. But I think it is just as important as it is difficult.

The two points I really want to try to make here are, number one, why I believe that it is really important that this Committee and Congress do something in this area. As has been pointed out, *Branzburg* v. *Hayes* is back from the early 1970's now, and we have had some confusion in the Federal law for a good long time and we have gotten along. So a legitimate question is, why now? What is different? And the second point for me to make is to give you some sense of where at least I think it would make sense for Congress to come out if it chose to legislate in this area.

On why it makes a difference, let me talk about confidentiality. Confidentiality is truly important. I have seen this now in the newsroom in doing our reporting. It doesn't mean—and I don't want there to be any illusion about this—it doesn't mean that all of our reporting involves confidential sources or confidential information. In fact, the vast majority of the reporting we do doesn't involve pledges of confidentiality and it doesn't involve sources who even ask to be kept confidential. But there are some stories and some information that is important, that we cannot get at without giving some assurance of confidentiality. And everyone knows about Deep Throat, those famous cases, but I can tell you just from ABC News during my tenure there, we have had investigative reports on everything from wrongdoing at Veterans Administration hospitals to problems at the FBI crime labs and a scandal in the State of Illinois involving corruption in State government. And those stories we really could not have gotten to without giving some pledge of confidentiality.

Now, as a matter of policy within ABC News, we are careful with those pledges. We do not just give them out easily. It has to be a truly important story and we have to believe that it truly is important to give the pledge of confidentiality in order to get at that story. But it does come up, and it is important.

What has changed, and what is different just during my tenure at ABC News, is that, when I first came in, the real question was is the information you have right, are we confident that it is truthful, Number one; and number two, is it newsworthy? There now is increasingly a third element that we need to take into account, and that is, even though we believe it is true and even though we believe it is newsworthy, are we, are our reporters willing to risk subpoena and coercive efforts by prosecutors or by civil litigants or Government litigants in a private capacity, are we willing to risk that for the story? And that is a further element that has been inserted now within recent years because, simply, of more of these cases coming up and more prominent cases coming up.

And please understand, I think Mr. Rosenberg misunderstands my position, at least. I don't mean this as an indictment of the Justice Department. I am not saying they are doing anything wrong. They may be doing exactly right. What I can tell you is, inside the newsroom this is something we are very, very conscious of. And so it is keeping some information from the American people that otherwise we and others would be reporting.

Number two, what really do I think makes sense, given the fact that I do recognize there are two sides to this? I think basically—and I leave the drafting to others—basically I think what we need is a rule that says prosecutors and others can get access to this confidential information only when there is truly a need for it and there truly is no other way to get it.

Now, a number of factors go into that: The importance of the offense being investigated, the likelihood that there was an offense in the first place, national security needs to be taken into account. There are a variety of factors. But the question is, is it truly necessary and is it truly the case that there is no other way to get at it.

And finally—and perhaps this is the biggest issue, because I think frankly there is a lot of common ground with the Justice Department. I think there is a lot in the regulation to be applauded, and the fact that they have it. But they recognize in the regulation the First Amendment interests here, implicitly. That is why they have the regulation—even though I note it doesn't apply outside the Justice Department. It doesn't apply to SEC and FTC and other subpoenas.

But the real issue is who gets to decide in the end? It is understandable why prosecutors really believe in what they are doing and are zealous in pursuing their investigations. And as a citizen, we all should applaud that. We should want that. At the same time, there is a legitimate countervailing interest on the part of a robust media that is uncovering some of these stories we can't always get at. And in that circumstance, in the end I trust a court to sort that out. And that is really the issue. Do the courts ultimately decide that, or should we leave it to the unfettered discretion of the Justice Department? And that is why on balance I come out with the need for a balance to be struck, but in order for us to do our job at ABC News, I think it is critical that the courts ultimately strike that balance.

Thank you very much.

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

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

We now turn to Ms. Anne Gordon, managing editor of The Philadelphia Inquirer, where she has been since 1999. A graduate of the University of Denver, has worked in the field of journalism at various locales—the Rocky Mountain Business Journal, business editor in the Fort Lauderdale Sun Sentinel, and Denver Post, assignment manager for KCNC, a Denver TV station, and Sunday editor of the Cleveland Plain Dealer.

Thank you for coming to Washington today, Ms. Gordon. We look forward to your testimony.

STATEMENT OF ANNE K. GORDON, MANAGING EDITOR, THE PHILADELPHIA INQUIRER, PHILADELPHIA, PENNSYLVANIA

Ms. GORDON. Thank you.

Mr. Chairman and members of the Committee, thank you for allowing me to share my experience with you today as I consider this very important legislation. As a journalist, I work hard to keep my beliefs out of public life, but you have asked me here today to speak on behalf of journalism, a profession that I hold dear and that I believe is bedrock to a free and open society. But while generations of Americans have added their voices to those of our founding fathers in support of those who dare to speak out, there is today renewed conflict among the Government, the judiciary, and the press. I urge you to put this conflict to rest.

By passing the Free Flow of Information Act that creates a Federal shield law, you can protect the press when it exposes secrets that benefit the public and national security. The Justice Department has told you that this bill is bad policy. The implication is that when the press tells its readers, as The Inquirer recently did, for example, that nearby refineries are vulnerable to attacks and

accidents that could imperil hundreds of thousands, it is threatening national security. The threat comes not from inadequate protection of these sites, the Justice Department would seem to reason, but from the use of confidential sources to reveal the story.

In fact, not publishing this material threatens national security. I want The Inquirer to tell its readers that some chemical plants in our region are properly inspected and guarded and some are not. I want to tell them which levees pose a threat to New Orleans. I want to tell them which campaign donors are profiting from the Iraq war and from contracts to operate the Philadelphia airport. Some of the information needed to tell these stories does indeed come from confidential sources, sources that would not talk, provide documents, or point the way to change if it were not for the assurances that they will be protected from reprisals.

The fear of exposure exists at all levels, and from those involving the Government to those involving industry and even our most sacred institutions. These are not cases involving political intrigue in Washington, D.C., but real, daily examples of wrongdoing exposed because of the promise to protect a courageous individual who wants to see justice done. The debate over a Federal shield law has been warped by a cycle of political leaks in Washington. But the reality is that those sorts of discussions are a minor part of the larger field of reporting that uses confidential sources. It is also important to note that very often the confidential source is merely the starting point in an investigation. But without the promise at the onset, the fuller story would never be told.

Last year in the United States, more than two dozen reporters were subpoenaed or questioned about their confidential sources in Federal court cases. Six journalists were jailed or fined for refusing to disclose a source. That number may seem small, but these actions sent doubt into the minds and spines of whistleblowers and journalists alike. Today, 31 States and the District of Columbia provide shield laws that prohibit journalists from testifying about confidential sources. Eighteen other states have recognized a reporters' privilege as a result of judicial decision.

Why, you may ask, does the Federal Government need to get involved? Quite simply, because State shield laws offer little help in Federal proceedings. Confidential sources are left without any protection other than the hope that the journalist will be willing to violate a court order demanding them to testify. And having no shield in Federal proceedings undermines the State shield laws that do exist.

Let me give you an example. The Pennsylvania shield law is in fact absolute. Confidential sources are protected under all circumstances. But the lack of Federal shield laws undermines the right-minded policy of the Pennsylvania legislature. If a journalist is subpoenaed in a Federal court, even though the reporting was done in Pennsylvania, the journalist can be ordered to disclose a confidential source, something that the legislature has otherwise prohibited. The source is left knowing that confidentiality is not guaranteed because a journalist in Federal court may be left with a Hobson's choice of violating the court order and going to jail, or breaking a promise.

I know of no case where a disclosure of a confidential source would have protected the citizens of my State or our Nation. On the other hand, the disclosure of such source's identity will jeopardize the public's interest and security because individuals will be too afraid to bring information to light.

I should add that the Free Flow of Information Act does not allow for absolute protection, which is why it has been supported by major news organizations and the American Bar Association. It allows for disclosure when in fact it would be necessary to prevent imminent harm to this Nation's security.

We can all of us, each of us, understand why a promise of confidentiality is crucial to disclosure. How many of us have asked a friend for a vow of confidence? Our lawyers are bound by confidentiality, our rabbis, our ministers, our priests, and our doctors as well. Whistleblowers need to be given the same assurances. What is most important here is that wrongdoing is exposed. When we hear as a Nation about Watergate or the fact that tobacco worked to make cigarettes more addictive or that Enron was a financial nightmare, we are hearing about promises made and kept, about a pact with our forefathers that this Nation would respect a free press.

I urge you today to pass the Free Flow of Information Act, pass it so that Americans understand that journalists who protect their sources are not criminals, pass it because the lack of clarity at the Federal level undercuts State law.

Thank you.

[The prepared statement of Ms. Gordon appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Ms. Gordon.

Our final witness is Mr. Dale Davenport. Been in the newspaper business for a long time. Started in 1966 as a staff writer for the Associated Press, then was with the Centre Daily Times and The Morning Press, and has been with The Patriot-News in Harrisburg since 1972, starting as a reporter and is now head of the editorial pages. Mr. Davenport made a special trip to Washington to see me, to urge these hearings and some Congressional action some months ago, and in part is a motivating factor.

Thank you for coming, Mr. Davenport. We look forward to your testimony.

STATEMENT OF DALE DAVENPORT, EDITORIAL PAGE EDITOR, THE PATRIOT-NEWS, HARRISBURG, PENNSYLVANIA

Mr. DAVENPORT. Thank you, Mr. Chairman. Senator Feinstein.

In Harrisburg, I think as we speak, there is a trial going on—it has been going on this month—in the U.S. Middle District Court, that you may have heard about. Eleven citizens of the Dover Area School Board in York County, south of Harrisburg, sued the school board over a policy adopted last year that directs 9th grade science teachers to tell their students that life is so complex that it might have been created by an intelligent designer. The citizens claim that this policy violates the Establishment Clause of the First Amendment.

But another clause of that Amendment is also in play here because, during discovery, counsel for both the plaintiffs and the de-

fendants in this case subpoenaed two reporters, one for each of the York newspapers, that covered the meeting at which this policy was adopted. The plaintiffs wanted the reporters to verify what happened at the meeting, essentially what they had written about. The defendants, however, wanted at least one of the reporters to produce her notes and e-mails, drafts of her stories, and other unpublished material that they claimed would show that she was biased.

Now, what her bias, alleged or not, has to do with the central issue of church and State, I don't know and I can't answer. But it has taken numerous motions and hearings and in camera examination by the trial judge and four court orders to get to where we are today, and that is that the two reporters are still under subpoena to testify as fact witnesses, if they are called, essentially just to verify that they wrote the stories and that they are accurate. Commendably, the trial judge, Judge John E. Jones III, has prohibited questions about anything else, including confidential sources.

Now, these lawyers were not seeking the identity of the confidential sources, but they sought material that might lead to the identity of sources, confidential or not. If there were a Federal statute in place that defined conditions and set strict limits for journalist testimony, then everyone would know the standards, the judges would not have to rely on case law to judge the particular circumstances of a case like this. And it is less likely that reporters would be called to testify in the first place, which would reverse a disturbing trend in Pennsylvania of lawyers increasingly calling journalists to testify.

Journalists ought to be the last resort as witnesses, not first choice. Not only is being called to testify disrupting, but it has a chilling effect on the everyday sources who provide the background or the context for our stories, the glue that holds our stories together. This Dover story wasn't one where confidential sources supplied the information for the stories. The reporters simply covered a public meeting of public officials. But that is not to say that these reporters did not have sources who helped them produce the stories who might not have wanted to be quoted or identified.

When I began my newspaper career 42 years ago as a summer relief reporter in my hometown paper, a little 10,000-circulation daily in Central Pennsylvania, I didn't know the term "confidential source." But I encountered right away literally dozens of people who gave me information, helped me get information, who didn't expect and often did not want their names identified in the paper as the source of that information. These were clerks in the row offices at the county courthouse. They were the admitting nurse at the hospital. Police officers, an ambulance driver, the secretary in the school board headquarters. Most of these folks were simply doing their jobs, or thought they were doing their jobs, by pointing me in the direction of a document or an official source or confirming some detail of something I had learned elsewhere.

Throughout my career, I have had more sources of this sort than I could ever count. And what these folks want is for the journalists to have all the facts so that the story is accurate, complete, and fair. Americans know that democracy depends on being informed.

They depend on the media to inform them, and if they can help to make that happen, they tend to do it.

All of these people are sources and all of us in the news business have lots of them. If we had to rely on only official sources, then we would only have the official line in our stories and the free press as we know it would not exist.

This brings me to why I think a shield law is so important. It might keep us out of jail, and that would be a good thing, but a shield law is not primarily about protecting journalists. A shield law primarily protects those thousands upon thousands of ordinary Americans who facilitate the free flow of information. They are helping journalists get the information and report the story, often anonymously and often by choice.

I urge you to pass a Federal shield law that protects all Americans who help to keep this country strong by helping to keep us all informed.

Thank you, Senators, for the opportunity to testify. I look forward to your questions.

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

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

Ms. Miller, in your testimony you refer to sources as to information on al Qaeda. Could you elaborate upon that, please?

Ms. MILLER. Yes, Senator. I had done a three-part series on the danger of al Qaeda.

Chairman SPECTER. When did you do that?

Ms. MILLER. In January 2001. And I had worked on it the year before and I had actually gotten interested in al Qaeda soon after its creation, and was convinced, based on the intelligence officials that I was talking to and others with access to classified information, that al Qaeda was a very dangerous threat to this country. They believed that, but they also believed that the then-Clinton administration was not spending enough money countering this threat and that al Qaeda didn't have priority. So even though our discussions potentially involved the disclosure of classified information, I was able to work with some of them to get information that ultimately led to this series that talked about al Qaeda as a network of over 50,000 people around the world who had been through camps and who were trained and who were intending to kill Americans.

Chairman SPECTER. Was your work with these informants and the specification of confidentiality that they would not be—the source would not be disclosed, instrumental in your getting the information?

Ms. MILLER. Absolutely. I could not have gotten this information without those pledges.

Chairman SPECTER. An over-arching critical issue is the chilling effect. You talk about more than two dozen subpoenas. The testimony by the Government was that there have only been 12 in the last 12 years, and we will check that out. Can you give us any specific illustrations—and I am going to come to the entire panel on this question—as to what your own experience has been on people, on reporters who have not done their job because of the chilling effect of the potential of what happened to you, Ms. Miller?

Ms. MILLER. Well, I would hope that anyone who talked to me would be assured that I was now willing to protect them. But in general, I think soon after my experience, my newspaper published a story about the Cleveland Plain Dealer in which that newspaper decided not to publish two articles that it had been working on because it was afraid of the consequences of probes into confidential sources. And I think that is a very telling example of the chilling effect. These subpoenas are extremely disruptive also to newsrooms, and they took me out of the flow—have taken me out of the flow of news reporting for well over a year now.

Chairman SPECTER. Mr. Westin, have you experienced in your capacity as President of ABC News specific cases where this chilling effect has impeded the work of your reporters?

Mr. WESTIN. It certainly, I am sorry to say, is a factor that we talk about and take into active consideration as part of the editorial process.

Let me be clear. We get a number of subpoenas, both private and governmental subpoenas, all the time at ABC News. And the vast majority of those we work out. We negotiate them out, we limit them, you know, sometimes we move to quash and they go away. It is only a fairly rare exception that really comes in litigation.

But what has happened as a practical matter is, because the Department of Justice does occupy a leadership position in law enforcement and the law generally in this country, the fact that they have pursued some of the very high-profile cases has sent a message throughout civil litigants' ranks and through the States about the danger of this. And as a result, as I said earlier, there are cases now—our reporters still do their job, I agree with Judith. But there are cases now where, in years past, we just said if we know the facts are right and we know this is newsworthy, we will go with the story. Now we have to ask ourselves a tough question about what sort of situation we are leading our reporters into, our editors into, and ultimately our corporation into, and is the story really worth going through that. There are stories that still remain so important that they deserve that, but we have to take that into account in deciding what we will pursue and how hard we will pursue it.

Chairman SPECTER. You testified, Mr. Westin, that the standards ought to be that it is truly needed and no other way to get the information. Do you think on a balancing test that a judge would undertake that there ought to be an inquiry into how important the prosecutor's objectives are, how serious a matter is involved to warrant the jailing of a reporter?

Mr. WESTIN. Personally, yes, I do believe that. I believe that if we are really trying to balance the interests here, there are investigations, and then there are investigations. And some go to really vital national interests and things—law enforcement should certainly be pursued very vigorously. Others are more marginal. And I think that that is a relevant factor for a judge to take into account.

Chairman SPECTER. Ms. Gordon, in your experience have you seen specific cases where reporters or the newspaper has shied away from a story because of the fear of a subpoena and possible incarceration?

Ms. GORDON. Specifically, no, I have not. I don't like to use the verb "chill," because it implies that there is a bunch of frozen reporters out there afraid to act. And in fact, this is a very disturbing trend, but I believe that there is a great deal of courage and civic calling in what we do that pushes this issue forward.

Is it disturbing? Absolutely. Are we, as Mr. Westin said, subpoenaed regularly? Several times a month, and we have the legal bills to prove it. But the reality of it is this is a part of how we do our job. Journalists should not be called to become witnesses for prosecutors. They should not be called to help prosecutors or other lawyers outside of the criminal courts to do their work. We are not another arm of Government. We are something quite distinct and need to be seen as such.

Chairman SPECTER. Did the jailing of Ms. Miller and the notoriety attendant to that have an impact on your reporters at the newspaper?

Ms. GORDON. Absolutely. It certainly is the subject of much discussion. It has also emboldened our outside people who would like to get information from the newspaper to threaten us, to suggest that they will take us to court, to suggest that they will get a subpoena. So it has very much heightened the sense that confidentiality is something that can be breached. Which is exactly why we need a Federal shield law, because the message that is generally out there is that there is no sense of confidentiality, that what you tell someone in Pennsylvania, for instance, with a full shield law, is of no importance, it will not stand the test of confidentiality if it is in a Federal court, a civil case or a special prosecutor.

Chairman SPECTER. I am going to have to interrupt for about 2 minutes to take a call. So if you will bear with me, I will be right back.

[Pause.]

Chairman SPECTER. Let us resume, and I won't keep you too much longer. It has been a long morning.

Ms. Gordon, you were in the middle of an answer. Have you finished?

Ms. GORDON. Yes, Senator, I have. Thank you.

Chairman SPECTER. Okay. So who is the confidential source, Mr. Davenport, in that trial? Darwin?

[Laughter.]

Mr. DAVENPORT. It is one of those guys.

Chairman SPECTER. Have you had, beyond the case which you have just described, situations where there has been a problem, where there has been an apprehension on the part of the paper or reporters about going forward with a hard-hitting investigation?

Mr. DAVENPORT. I don't think there has been from a standpoint of perhaps having to protect a source into jail somewhere. But certainly the increase in the number of subpoenas that we get—and they are primarily in—once you get out into Harrisburg and, I think, smaller towns, so often the questioning is by civil litigants, people in private litigation seeking to have reporters come into court and verify the accuracy of a story, and then they start asking questions about what was left out of the story, how the story was developed. And these are part of a continuum. And this legislation, this S. 1419, certainly deals with that in terms of making the re-

porter the last-resort witness rather than the first. I think that is a very troubling aspect of what is going on away from national security issues.

Chairman SPECTER. Ms. Miller, one final question, on a slightly different line. On some of the reports you have been described as a strong-willed person who is going to move in the direction which you see. That is a paraphrase and a more diplomatic context than some of what has been written. The question I have for you is to what extent is that necessary, as you see it, to really do your job? You have to shake things up, be a bull in a china closet to get the kind of results you want, perhaps disagree with some of your editors to go where you want to go?

I am going to ask you next, Ms. Gordon, if you agree with her, so listen.

[Laughter.]

Ms. MILLER. Well, thank you, Senator. I think in investigative reporting of any kind there is a requirement to be a little pushier than some sources or editors would like. I have always just pushed as hard as I could to get a story. That doesn't mean we will always get it right, but without those qualities I don't think you can be an effective reporter. But it creates some tensions and enemies, yes. It does.

Chairman SPECTER. How closely do you have to supervise your reporters, Ms. Gordon, to make sure that you have seen all their notes? Do you know their confidential sources, or when a reporter comes to you with a confidential source, do you not inquire but ask peripheral questions to satisfy yourself without going to that core issue?

Ms. GORDON. Well, first of all, Senator, to your earlier point—

Chairman SPECTER. If that is an inappropriate question, you don't have to answer.

Ms. GORDON. Well-behaved women don't change the world. So I think that that is something to consider.

Second, when there is an important story, am I actively engaged in knowing what the reporter knows at some level before publication? Absolutely. I think it is a two-pronged process. One, confidentiality is not easily given. We work very hard, in fact, to put names on the record on all of our stories. When that first initial decision is made, that is not the end of it. The second phase is basically it goes through editing and a lot of discussion about whether in fact there will even be publication. Again, we note here we have spoken much about Ms. Miller's article that was never published. So it is important to put that in perspective.

It is a difficult job. It is one that requires a great deal of internal conversation, questioning, pushing back. Hard questions are asked, evidence is demanded. Our own bar is very high, and we would only push that a shield law at the Federal level also set an equally high bar in asking us to reveal our sources. And I believe that the act in front of us today does just that.

Chairman SPECTER. Mr. Davenport, was the Pennsylvania shield law ineffective to give your newspaper, the Patriot-News, a defense for all these subpoenas?

Mr. DAVENPORT. It gives us a defense in State court. But it doesn't in Federal court, obviously.

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Chairman SPECTER. It doesn't help you when it is in the Federal court.

Mr. DAVENPORT. Sure. And the Middle District is based right there in Harrisburg, and so there is quite a bit of activity.

Chairman SPECTER. Well, we had a question earlier today about the impact of *Branzburg*, and the Third Circuit, even conceded by the Government witness, has the balancing test. But of course it didn't get to the Third Circuit. But that obviously would be the law that Judge Jones would apply in the Middle District.

Mr. DAVENPORT. Yes. His first ruling on this was a 21-page opinion, the first order involving these two subpoenas, and it relied on a *Branzburg*, and there is a case called *Riley*, I think, and another one out of the Third Circuit that he used. But he noted that the Pennsylvania shield law had certain application, but not in the Federal court.

Chairman SPECTER. The question arose earlier today, as you may recall, in my questioning Mr. Rosenberg about whether there was a split in the circuits. And I don't know how far C–SPAN is going while we talk. We have had calls in that we were correct about that, that there is a split in the circuits. We have a lot of nodding heads out here, a lot of experts in the field. We have a lot of nodding heads behind me, too.

[Laughter.]

Chairman SPECTER. When the chairman makes a representation, it is nice that he is accurate, based on the staff work. And I am sure all of you feel that same way in your own lines, to have people give you information which is accurate.

To the extent that you can supplement your testimony with specific cases where there has been an impact by the threat of subpoena and the lack of a shield would be very helpful. I personally am very fact-oriented in where we go on legislation. And I think it is fair to say my colleagues are, too. We don't come to these issues with a lot of predispositions. We know the tremendous value of the investigative reporting and what the press does, beyond any question. The first thing I do every morning is go to a whole series of newspapers and electronic media. And this kind of reference material is invaluable. We don't have staffs which can do the kind of research which is done by the news media. We just do not have that. And your exposure of corruption and mismanagement and malfeasance is legendary. There is just no doubt about it. And we want to be sure that you are not harassed.

We have countervailing considerations about being sure that the criminal law can be enforced and national security interests are protected, but that is what we are here to do, to have a balancing test. There is nothing like going to a judge and having the facts before the judge and the weighing of these factors and having a judicial decision. This Committee has a very heavy responsibility. John Jones sat in your chair, Mr. Davenport, before he was a judge. He was recommended by the Pennsylvania Senators to be a Federal judge. And we questioned him here—not as thoroughly as we have questioned you, but we questioned him. So the independence of the judiciary is very important and there is rock-bed confidence in what the judges do. But they have to be able to have a statute to work with. And I believe we need a statute.

We had a hearing fairly early and, as I say, went to see Ms. Miller and have followed the matter very, very closely. And I considered a big part of my preparation for this hearing today to read both of those pages after the front-page edition. My wife looked at the two full pages and said, Two full pages? And then she skipped over to the next page. And I was on the train later on Sunday, and it took me from Wilmington to Baltimore to read the whole story.

[Laughter.]

Chairman SPECTER. But I wanted to be prepared.

Well, thank you all very much for coming in. And to the extent you can supplement with the specifics, I would appreciate it. The Committee would appreciate it.

That concludes the hearing.

[Whereupon, at 12:29 p.m., the Committee was adjourned.]

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

QUESTIONS AND ANSWERS

By Facsimile, Mail & Electronic Mail
November 29, 2005

The Honorable Arlen Specter
United States Senate
Chairman, Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510
Attention: Barr Huefner
Facsimile: (202) 224-9102

Re: Response to Questions of Senator Richard J. Durbin Regarding Proposed Federal Reporters' Shield Legislation

Dear Senator Specter:

I am writing in response to your letter to me dated October 28, 2005 asking that I respond in writing to questions that Senator Richard J. Durbin posed after the October 19, 2005 hearing regarding "Reporter' Privilege Legislation: An Additional Investigation Into Issues and Implications." I have set out Senator Durbin's questions in boldface below. My answers follow each question. As you requested, I am sending an electronic copy of this response to Barr_Huefner@judiciary.senate.gov.

1. In your reading of the bill, would this federal shield law in any way pre-empt or conflict with state courts? If so, in what ways?

I think it unlikely that the version of the federal reporters' shield law set out in S. 1419 would preempt or conflict with state courts. I base that conclusion on Section 2(a), under which (a) only a "Federal entity" (defined as "an entity or employee of the judicial or executive branch or an administrative agency of the Federal Government with the power to issue a subpoena or provide other compulsory process") is prohibited from compelling a covered person to testify or produce documents and (b) the prohibition is applicable only "in any proceeding or in connection with any issue arising under Federal law." There would be potential for conflict only if a Federal entity was litigating in state court a claim involving an issue arising under federal law. Although I cannot say with certainty such a situation never would occur, it strikes me as unlikely.

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?

Preliminarily, it bears mention that, to my knowledge, there is no federal cause of action for libel or defamation. If that is the case (and I do not profess to possess any expertise on civil litigation or defamation law), then any libel or defamation action brought in federal court would be premised on the federal courts' diversity jurisdiction. In such cases, absent any special federal reporters' shield law, Rule 510 of the Federal Rules of Evidence would require that the shield law, if any, of the state that supplied the substantive law of decision under the *Erie* doctrine would control. Specifically, Rule 510 provides in part that: "[I]n 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." If, however, a federal reporters' shield law was enacted, it could (but would not necessarily have to) override this resort to state privilege law.

The question whether any federal reporters' shield law should contain an exception to enable parties to a libel or defamation action to prove or disprove a claim raises the more general question of the proper scope of a shield law. Failure to carve out such an exception for libel and defamation could serve to insulate those responsible for such tortious conduct from any legal sanction. But, as I explained in my prepared testimony, under S. 1419, the same is true for those whose disclosures to the news media are felonies under federal criminal statutes. Thus, if Congress considers creating an exception to the shield law for disclosures to reporters that are defamatory, it certainly should create an equally or more robust exception for felonious disclosures. Otherwise, the resulting shield law would conceal the identity of those who make criminal disclosures to the news media, including disclosures that harm national security and law enforcement, to a greater extent than it insulates the identity of those whose disclosures are merely injurious to the reputations of private parties.

3. **Section 2(a)(3) of S. 1419, the revised proposal, seems to abrogate the balancing test set forth in section 2(a)(2)(B) of the same bill. In your reading, does section 2(a)(3) immunize reporters from ever having to reveal their sources in a civil case? Given the working of section 2(a)(3), can a court ever be able to compel disclosure of a confidential source in a civil case brought under the Privacy Act, where the alleged harm is to the plaintiffs career and reputation? If not, does this bill in effect abrogate the rights for legal redress created under the Privacy Act?**

Section 2(a)(3) of S. 1419 does not "abrogate" the balancing test set out in Section 2(a)(2). Properly understood, S. 1419 creates two different reporters' privileges.

The first privilege, set out in subsections 2(a)(1) and (2), applies to efforts to obtain non-

source information from the news media and requires, among other things, a showing that (a) the party seeking the information has "unsuccessfully attempted to obtain such testimony or document from all persons from which such testimony or document could reasonably be obtained" and (b) the information sought is essential to the investigation or case. This non-source privilege, which is lifted largely from the Department of Justice's internal regulations, is not supported by any claimed need to encourage confidential sources to provide information to the news media or to protect the free flow of information.

The second privilege, which imposes the additional restrictions described in subsection 2(a)(3) on top of those set out in subsections 2(a)(1) and (2), provides an all-but-absolute bar on the use of legal process to acquire source-related information from the news media. It provides for an exception only in the very rare cases in which the party seeking to compel source-related testimony or documents from the news media can demonstrate that such testimony or documents are "necessary to prevent imminent and actual harm to national security" and the need for the testimony or documents "clearly outweighs the public interest in protecting the free flow of information."

Subsection 2(a)(3) does immunize reporters from ever having to reveal their sources in civil cases. If it were to become law, a federal court could not compel disclosure of a confidential source in a civil case brought under the Privacy Act, even in a case in which the alleged harm to the plaintiff's career and reputation was catastrophic. In that regard, S. 1419 undermines the rights for legal redress created under the Privacy Act.

It is worth noting, however, that Section 2(a)(3) would do more than insulate from legal action a government official who does harm to an individual by violating the Privacy Act. By failing to recognize an exception for criminal disclosures, it also would insulate the identity of government officials who leak information in violation of federal criminal laws, such as a politically-motivated rogue IRS agent who illegally reveals to the news media the tax return information of a candidate for public office or a disgruntled government employee who reveals Title III wiretap or other law enforcement sensitive information to the news media, even if the disclosure is intended to and does undermine a federal criminal investigation.

4. 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).

Zerilli did not address the standard of proof that would apply for such a showing, specifically whether it would be a "preponderance of evidence" standard – which

typically applies to evidentiary determinations in federal court, *see, e.g., Bourjaily v. United States*, 483 U.S. 171 (1987)(preliminary determinations of fact bearing on admissibility of evidence must be proven only by a preponderance of the evidence) or the more rigorous "clear and convincing" evidence standard set out in S. 1419. At least one federal district court, in an unpublished decision, appears to have interpreted *Zerilli* to require a showing by clear and convincing evidence. *See Gray v. Hoffman-La Roche, Inc.*, 2002 WL 1801613 (D.D.C.)("More specifically, the plaintiff has not convinced this court, by clear and convincing evidence, that the information sought "goes to `the heart of the matter' " of the pending litigation. . .; that the plaintiff has exhausted alternative means for obtaining the information; and that the disclosure of the information is in the public interest. *See Zerilli*, 656 F.2d at 713. . . .").

5. 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?"

This could be a very difficult standard to meet, depending on how courts applied it. It seems to impose a threshold requirement that the party seeking information from the news media (and, as explained above, this would apply even to non-source information) first identify all possible persons who might be able to provide the information sought and then make reasonable efforts to obtain the information from them. As noted above, this requirement applies to requests for *non-source information*. Even if a party can persuasively make this showing and further demonstrate that the information sought is essential, the proposed legislation still makes source-related information off-limits in almost all cases.

Please feel free to contact me at (607) 255-3814 or sdc7@cornell.edu if you have any other questions.

Very truly yours,

Steven D. Clymer
Professor of Law
Cornell Law School

cc: Chuck Rosenberg, United States Attorney, Southern District of Texas
Joseph diGenova, diGenova & Toensing, LLP

10 November 2005

Senator Patrick Leahy
Ranking Democratic Member
Committee on the Judiciary
United States Senate
Washington, DC 20510-6275

Dear Senator Leahy,

Thank you for the opportunity to elaborate on my Oct. 19 testimony. I'm sorry that I did not get to meet you at the hearing.

I've enclosed my answers to the two questions you posed, about issues that I know have raised some concern. I hope I have answered them satisfactorily for you. Again, thanks for the opportunity to express support for S.1419.

Respectfully,

Dale Davenport

cc: Sen. Arlen Specter

encl: Questions and Answers

Answers from Dale Davenport

1. When the Bill of Rights was enacted, the young nation was awash in written communications. It was the primary means of disseminating information. Freedom of the press as a concept enabled anyone with access to a printing press to enjoy the protection of the First Amendment. Licensing clearly would have violated both the spirit and the letter of the law. Trying to limit those covered by a shield law in the 21st century to members of the traditional media -- by licensing or any other means -- would likewise seem to violate the spirit and letter of the First Amendment. "Journalist" should be defined broadly in a shield law, to protect any person whose occupation involves the regular dissemination of news. It would be up to the court to determine eligibility, of course, so that not just anyone could claim the reporter's privilege.

2. Pennsylvania has a shield law that provides absolute protection to confidential sources. So long as its applicability were limited to the federal court system, a federal law that offered somewhat less protection should have no effect on the state law. And it would offer protection to journalists in a court system where currently none is guaranteed.

diGENOVA & TOENSING, LLP
ATTORNEYS-AT-LAW

November 30, 2005

VIA FACSIMILE 202/224-9102

The Honorable Arlen Specter
United States Senate
C hhairman, Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510
Attention: Barr Huefner

Dear Chairman Specter:

I write in response to your letter transmitting additional questions from Sneator Durbin. I have read the letter from Steven D. Clymer and concur fully in its contents and therefore ask that you submit this letter for the record as my response.

Notwithstanding that, let me reiterate what I said at the hearing: the safest and least intrusive fix to this problem is as outlined in my written testimony. The Congress must enact into law the Department of Justice Guidelines dealing with subpoenas to members of the news media. This will create important procedural safeguards for the news media while not interfering with legitimate investigations. Most important, as I pointed out in my testimony, there must be a hearing process in federal court to test in a classic adversarial manner a prosecutor's assertion that a crime has been committed. As we can see from the Valerie Plame case, there never was a crime committed in the underlying matter (revealing the name of a covert officer of the CIA.) There should have been extensive hearings in the trial court on that issue before any subpoena was ever enforced against any member of the news media.

I appreciate the opportunity to comment further.

Sincerely,

Joseph E. diGenova

901 15TH STREET, N.W. • SUITE 430 • WASHINGTON, DC 20005
202-289-7701 • 202-289-7706 (FAX)

Answer to Question from the Senate Judiciary Committee
From: Judith Miller
December 2, 2005

In intelligence and national security reporting, I have found that most of my sources tend to be officials and weapons and intelligence experts who talk to me because they are concerned that their point of view is not being sufficiently understood or credited, or because they disagree with government assessments and/or policies. Officials also leak to affect the outcome of, or to build support for, government policy. Whether they are "whistleblowers" or "wrongdoers" is usually in the eye of the beholder. One reporter's whistleblower is another's snitch; one reporter's wrongdoer is another's courageous dissenter.

Often a source is simultaneously a "whistleblower" and a "wrongdoer": while criticizing in good faith administration policy or proposals and adding to the public debate, the source may technically be violating some law or executive order. He or she may, for instance, be distributing classified or sensitive information without authorization. Consider the case of Daniel Ellsberg, who provided The New York Times with information of critical importance to the public's understanding of the roots and origins of the Vietnam war, but may have violated the law in so doing.

So in drafting a Federal shield law to protect the free flow of information between sources and reporters, and hence, the public's right to know, it would be futile for Congress to attempt to distinguish between "good" and "bad" leaks or "good" and "bad" sources.

Often, the leaker's accuracy and motivation do not become clear until long after a pledge of confidentiality has been made and the information has been published. Reporters often do not know at the time of giving such a pledge whether the information being provided will turn out to be valid or significant, or even worthy of publication. But they are unlikely to learn the information at all unless they can give a pledge of confidentiality that can realistically be honored. A reporter in a democratic country with a free and independent press should not be expected to go to jail to honor that pledge. That is why a Federal shield law is so essential.

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

April 21, 2006

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Please find enclosed responses to questions arising from the October 19, 2005, appearance of United States Attorney Chuck Rosenberg before the Committee concerning legislation providing for a testimonial shield for members of the press. We hope that this information is helpful.

Thank you for the opportunity to present our views. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

William E. Moschella
Assistant Attorney General

Enclosure

cc: The Honorable Patrick J. Leahy
Ranking Minority Member

October 19, 2005
Hearing Concerning
Reporters' Privilege Legislation
Committee on the Judiciary
United States Senate

Responses of
Chuck Rosenberg
United States Attorney

Responses to Questions from Senator Kyl

1. **Does S. 1419 create substantial hurdles by allowing access to media sources only if necessary to prevent "imminent and actual harm to national security?" Please explain.**

Answer

S. 1419 establishes a number of substantial barriers to effective law enforcement, and the hurdle created by Section 2(a)(3) – which bars access to testimony or documents that could reveal the identity of a source of information or that includes information that could reasonably be expected to reveal the identity of a source of information except in situations where the "disclosure of the identity of a source is necessary to prevent imminent and actual harm to national security" – is among the most significant. The provision's "imminent and actual" harm standard would be virtually impossible to prove in many meritorious matters, and its limitation solely to "national security" risks is much too narrow and bars the Government from obtaining potentially life-saving source information in a wide range of serious crimes. For example, the proposed bill would clearly prevent the Government from obtaining source information in a child kidnapping investigation because, while it might be possible to prove that harm was "imminent," it would be impossible to show that the kidnapping – while egregious – presented an "actual harm to national security." Conversely, this standard would bar access to relevant information or testimony even if access were necessary to prevent "actual harm to national security," merely because it could not also be established that such harm were imminent. This high standard would also preclude the Government from subpoenaing source information in many leak investigations involving classified information. Moreover, even in cases where the Government could meet this standard, S. 1419 affords prior notice and an opportunity to be heard to the reporter, thereby requiring the Government to present evidence concerning its most sensitive investigations in open court. Inability to obtain *ex parte* and *in camera* judicial review in such cases likely would result in the Government deciding to forgo issuing the subpoena in order to prevent premature disclosure of its evidence, thereby denying the Government access to possibly the most important information in the most important cases. Finally, the bill as a whole imposes inflexible and mandatory standards which limit law enforcement's ability to maintain flexibility and adapt to changing circumstances, a proven necessity. The provisions of the bill are highly restrictive and exceed even the protections of recognized privileges such as the attorney-client privilege, which allows for an exception in cases of criminal or fraudulent conduct. These considerations are critical during the current wartime circumstances, when entities hostile to the

United States, or their agents, may be able to invoke the protections of the legislation as "covered persons." Such restrictive legislation is not merited, particularly because there is no evidence that the Department of Justice has abused its subpoena power to obtain source information. Indeed, only 4.9% of the media subpoena requests that have been processed by the Criminal Division since 1991 were for source information, and only 12 such subpoenas have been issued in the last 14 years.

2. S. 1419 would allow a journalist to assert immunity on behalf of a source that leaked classified information in the same manner as a journalist may assert the privilege for any other source of unclassified information. Please explain the Department of Justice's specific concerns relating to classified information.

Answer

The likelihood of harm resulting from a leak of classified information and its public disclosure by the media is far greater than the likelihood of harm resulting from the disclosure of information that is not classified. Media disclosure of classified information can compromise national security, lead to the deaths of persons who are suspected of having assisted the United States Government, cause the loss of clandestine intelligence channels and information, and prompt foreign intelligence services to end their cooperation with the United States. Moreover, to the extent that the disclosure of classified information is a Federal criminal offense, S. 1419 would shield leakers who have disclosed protected information in violation of Federal criminal law and would render meaningless the laws that Congress has enacted to protect classified information.

3. Do the Department's current regulations strike an appropriate balance between allowing the press to assist the essential role of whistleblowers and the countervailing interest of protecting national security?

Answer

The Department's regulations strike an appropriate balance between the needs of the press, including its role in bringing information to the attention of the public, and the Federal government's unique responsibility to protect national security. If anything, the current guidelines may be overly restrictive because they were drafted before the then-unforeseen exigencies of the current war on terrorism. The Federal government has an obligation, however, to thoroughly investigate a situation in which classified national security information has been unlawfully disclosed regardless of who disclosed it or their motivation. As I indicated during my testimony, the notion that all leaks are beneficial is inaccurate. Some leaks are, in and of themselves, a crime, particularly leaks involving classified material. If there are no alternative means for determining the source of an unlawful disclosure, such an investigation may, by necessity, require media source information.

The Department has an established track record of restraint in seeking source information, and there is no indication that it has abused its subpoena power. The Department's regulations have been in place for over thirty years and the Department prides itself on its record of objectivity in reviewing media subpoenas. Over the last 14 years, which is the period of time for which we have the most complete records, we have issued subpoenas to the media implicating confidential sources only 12 times, and only 4.9% of all the media subpoena requests processed by the Department's Criminal Division for Attorney General approval during that period implicated confidential source material. The Department has sought such source information only in a very narrow set of circumstances, such as when the leak itself is a crime, and the authorizations for source information have been closely linked to significant criminal matters that directly affect the public's safety and welfare. Legislation that would impair the discretion of the Attorney General to issue media subpoenas is unwarranted, as there is no evidence that the subpoena power relating to journalists is being abused by the Department.

4. Would the Department support a proposal to codify the Department's existing regulations regarding subpoenaing members of the media?

Answer

The Department would oppose a proposal to codify the Department's existing regulations regarding subpoenaing members of the media. The shifting of the application of regulations that have administratively governed the issuance of media subpoenas from the Department of Justice to the Federal courts would have serious consequences adverse to law enforcement. Moreover, the Department's current guidelines were drafted decades before the ascendancy of contemporary terrorism as a primary threat to national security. Statutory codification of the existing guidelines could deprive the Government of necessary flexibility in some critical circumstances.

The administrative application of the current standards provides a necessary level of flexibility while retaining relative uniformity. The Department's performance over the past 33 years has clearly demonstrated that the administrative application of the current standards serves the media and nation well. In contrast, shifting the application of the standards to the courts would diminish that uniformity and introduce varying interpretations of critical terms in the regulations, including terms defining the class of covered persons and the need for the information sought. For example, some circuits may interpret the current terms of the regulations more broadly than the Department of Justice to permit compulsory process – a request which the Attorney General would deny – while others might view the regulations more restrictively. Inevitably, different circuits will interpret the terms of the regulations differently, and that result is contrary to the expressed media goal of having consistent standards.

The speed of the process also would be adversely affected by codifying the Department's regulations, and thus substituting the courts for the Department of Justice in imposing those standards. In an imminent harm situation, the requirement of judicial review, perhaps involving appellate levels as well, could introduce dangerous delays. If harm is actual and imminent, a

subpoena that requires judicial approval would likely be issued too late to be helpful. It should be emphasized that the media often requests a subpoena even when it is willing to cooperate upon receipt of such process; mandating judicial review, including public mini-trials, will introduce delays that do not exist today when the media is willing to provide information.

Judicial proceedings and the involvement of other parties in those proceedings relating to such on-going criminal investigations would also endanger both the necessary confidentiality of investigations and long-respected principles of grand jury secrecy. While sensitive information is appropriately handled under the existing administrative process, which involves only Department of Justice personnel including the Attorney General, judicial proceedings may reveal investigative information prematurely and cause harm both to important criminal investigations and to innocent third parties.

In conclusion, merely enacting the existing regulations and thus shifting part of the Department's role in applying those regulations to the courts could be expected to have serious adverse consequences to the uniformity, speed, and confidentiality of the process. At a time when law enforcement authorities often need greater flexibility, speed, and confidentiality in responding to terrorist and other serious threats to the public, such action would erode their effectiveness. The Department thus opposes such an approach, and instead urges continued reliance upon a system that has worked very well.

Responses to Questions From Senator Leahy

1. 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 a near-absolute privilege, like the one in the Lugar bill, 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 reporter's privilege that you think would be acceptable?

Answer

The proposed legislation, S. 1419, goes well beyond the current state of the law and overrules well-established Supreme Court precedent. In 1972, the Supreme Court ruled in *Branzburg v. Hayes*, 408 U.S. 665 (1972), that reporters had no privilege, qualified or otherwise, to withhold information from a grand jury conducting a good faith investigation. With the possible exception of the Third Circuit (*see In re Grand Jury Subpoena of Janet Williams*, 963 F.2d 567 (3d Cir. 1992) (*en banc*)), the Federal Courts of Appeals have consistently adhered to the guidance of *Branzburg*, and the United States Court of Appeals for the District of Columbia recently issued an opinion reaffirming that decision. *See In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D.C. Cir. 2005), *rehearing en banc denied*, 405 F.3d 17 (D.C. Cir. 2005).

S. 1419 not only creates a new privilege for reporters, but also gives it more protection than other privileges, such as the attorney-client and spousal privileges, that have been recognized.

State media shield laws are also inapplicable. Unlike the individual States, many of which provide some form of testimonial protection to members of the media, the Federal government has the responsibility for the national security of the United States and for protecting information that could cause serious damage to the nation itself. The bill makes no recognition of such critical and unique Federal responsibilities, as it makes no exceptions for situations that endanger the public's health and safety where prevention of "imminent and actual" harm to national security cannot be demonstrated.

The Department is opposed to S. 1419 for all of the reasons set forth in my prepared statement and in my October 19, 2005 testimony. In short, S. 1419 could significantly harm Federal law enforcement efforts, and the Department will strongly oppose any legislation that creates a reporter's privilege applicable to the Federal criminal law context. The Department prides itself on its record of objectivity in reviewing media subpoenas, and any legislation that would impair the discretion of the Attorney General to issue media subpoenas is unwarranted, as there is no evidence that the subpoena power relating to journalists is being abused by the Department.

b. One of the briefs filed in the case *Branzburg v. Hayes*, 408 U.S. 665 (1972), states, "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?

Answer

The Department does not agree that the leaking of sensitive, confidential, privileged, or classified information to the media by Government officials or employees is in the national interest. We recognize that the media play a vital role in our society. The traditional press and other equally important sources of news and information keep the American people informed, and in a time when news can be sent around the world nearly instantaneously, it is as important as ever that the American people be aware of what is happening overseas, in Washington, D.C., and in their own cities and towns. Confidential sources certainly play a role in the media's ability to keep the American people informed. That is a benefit to us all.

However, there is no basis for believing that the media's ability to utilize confidential sources is under assault by the Department of Justice. The Department rarely issues subpoenas to the media seeking information about confidential sources. In the 33 years that the Department has applied its internal guidelines to media subpoenas, the press has continued to utilize information obtained from confidential sources in its reporting. No one should view S. 1419 as a necessary measure to keep information flowing from confidential sources.

2. The Department has noted 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?

Answer

The Department's media subpoena guidelines apply to every member of the Department, including headquarters attorneys and the United States Attorneys' Offices. The guidelines apply to all litigation in which the Department is involved, including criminal, civil, environmental, tax, and antitrust cases, unless the demand to the media is for purely commercial or financial information that is unrelated to the news gathering function. If an attorney for the Department is assigned to a matter as a special prosecutor, whether because of recusal or otherwise, the guidelines apply to that special prosecutor.

However, there are situations in which a Federal court may appoint a special prosecutor to investigate or prosecute a matter supervised by the court. In those situations, the special prosecutor does not act as a member of the Department of Justice and the media subpoena guidelines would not apply. A special prosecutor acting on behalf of the court would, of course, be required to follow applicable law and rules as they relate to the issuance of subpoenas to members of the media.

3. It is my understanding that the Attorney General guidelines do not apply to 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?

Answer

The Attorney General's guidelines are applicable to civil as well as criminal proceedings. See 28 C.F.R. § 50.10 ("This policy statement is * * * intended to provide protection for the news media from forms of compulsory process, *whether civil or criminal*, which might impair the news gathering function") (emphasis added); 45 Fed. Reg. 76436 (Nov. 19, 1980) (making policy "applicable to subpoenas in civil proceedings"). The guidelines do not, of course, apply to civil cases to which the Federal government itself is not a party. However, as a general matter, Federal courts have recognized a qualified common law reporter's privilege in civil cases. *See, e.g., Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981). The Department does not see a need for a statutory privilege that extends beyond the current contours of the qualified common law privilege, where it exists, and the Attorney General's guidelines.

4. In response to a question during the hearing, you stated that you believe that U.S. Attorney Patrick Fitzgerald, the special prosecutor in the Valerie Plame leak case is bound by the Attorney General Guidelines because he is effectively standing in the shoes of the Attorney General. Others have stated a contradictory view – that is, that special prosecutors are not bound by the guidelines. What is the position of the Department of

Justice on this issue? Is Mr. Fitzgerald bound by the Attorney General guidelines in his investigation of the Plame leak case?

Answer

As stated in response to Senator Leahy's Question # 2 above, the Department's guidelines apply to every prosecutor who acts on behalf of the Department of Justice in a criminal investigation or prosecution. Mr. Fitzgerald and his team act on behalf of the Department of Justice in the Plame investigation, and therefore the guidelines do apply. Chief Judge Hogan of the U.S. District Court for the District of Columbia, who oversees the Plame grand jury investigation, found that the Government satisfied the guideline requirements in the Plame matter. *See In re Special Counsel Investigation,* 332 F. Supp. 2d 26, 32 (D.D.C. 2004).

5. In your testimony, you stated that since 1991, twelve subpoenas have been issued by DOJ prosecutors seeking confidential source information. How many of these cases dealt with criminal leak investigations? With national security issues?

Answer

Since 1991, the Attorney General has approved the issuance of six subpoenas involving possible confidential source information in criminal leak investigations. One of the six subpoenas also involved national security issues.

Responses to Questions from Senator Durbin

1. Would this federal shield law in any way pre-empt or conflict with state courts? If so, in what ways?

Answer

S. 1419 bars any "Federal entity" (defined as "an entity or employee of the judicial or executive branch or an administrative agency of the Federal Government with the power to issue a subpoena or provide other compulsory process") from compelling certain testimony or the production of certain documents. The bill expressly governs the conduct of Federal government personnel only and does not purport to exercise supremacy to pre-empt State laws or govern State personnel. Accordingly, the provisions of the bill appear inapplicable to any State court process which does not depend upon Federal entity involvement in compelling testimony or the production of documents.

The only potential conflict between the bill and State laws would likely occur in the relatively rare event in which a matter is subject to State law but is heard in a Federal court, as is the procedure in certain State criminal prosecutions which are removed to Federal courts because the prosecution involves the alleged conduct of a Federal officer in the performance of that officer's official duties. In that scenario, S. 1419 would appear to bar Federal courts from

applying any State law-derived authority to compel certain testimony or production of documents to the extent that such action by Federal personnel, such as a Federal judge, would be barred by the terms of the bill. The bill's restrictions would apply only to that scenario to the extent that the proceeding itself or the issue in dispute arises under Federal law.

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?

Answer

The Federal government is not subject to suits for defamation. See 28 U.S.C. § 2680(h) (exempting United States from suit under Federal Tort Claims Act for any claim arising out of libel or slander). Accordingly, assuming that a statutory privilege is adopted, the Department takes no position regarding the desirability of an exception to such a privilege for defamation claims. We note, however, that cases recognizing a qualified common law privilege have indicated that the privilege should be given less weight "[w]hen the journalist is a party, and successful assertion of the privilege will effectively shield him from liability * * * ." *Zerilli*, 656 F.2d at 714.

3. Section 2(a)(3) of S. 1419, the revised proposal, seems to abrogate the balancing test set forth in section 2(a)(2)(B) of the same bill. In your reading, does section 2(a)(3) immunize reporters from ever having to reveal their sources in a civil case? Given the wording of section 2(a)(3), can a court ever be able to 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?

Answer

Under proposed Section 2(a)(3), a "covered person" could not be compelled to provide testimony or documents that could reveal the identity of a source or could reasonably be expected to lead to the discovery of the identity of a source unless, *inter alia*, disclosure of the identity "is necessary to prevent imminent and actual harm to national security" and disclosure "would prevent such harm." It is possible that this standard could be satisfied in a civil proceeding instituted by the Federal government. For example, the Federal government has the authority to institute civil proceedings with respect to various threats to national security (*see, e.g.*, 18 U.S.C. § 2339B(c)), and the showing required by Section 2(a)(3) might be made in such proceedings. However, it is difficult to imagine a *private* civil suit in which disclosure of a source would be necessary to prevent imminent and actual harm to national security. The Department cannot foresee a realistic scenario in which a private plaintiff could make such a showing in a suit brought under the Privacy Act.

4. 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).

Answer

Zerilli does not directly address the quantum of evidentiary proof required to overcome an assertion of privilege in a civil case. However, *Zerilli* and its progeny make clear that "the balancing of the relevant factors" is a matter for the "sound discretion of the district court." *Lee v. Department of Justice*, 413 F.3d 53, 59 (D.C. Cir. 2005); *Zerilli*, 656 F.2d at 710 (motion to compel discovery "is committed to the discretion of the district court"). The use of a "clear and convincing evidence" standard could be viewed as limiting the discretion that a district court would otherwise enjoy in balancing the relevant factors under *Zerilli*.

5. Unlike the balancing test set forth in *Zerilli*, Section 2(a)(1) of the proposed legislation requires that the 'party seeking to compel production' 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?'

Answer

Under *Zerilli*, the plaintiff in a civil action must exhaust "every reasonable alternative source of information," 656 F.2d at 713, but "'litigants [need not] be made to carry wide-ranging and onerous discovery burdens where the path [to potential alternative sources of information] is * * * ill-lighted.'" *Lee*, 413 F.3d at 61 (quoting *Carey v. Hume*, 492 F.2d 631, 639 (D.C. Cir. 1974)). Section 2(a)(1) appears to require more extensive and burdensome efforts by the Government to identify and exhaust possible alternative sources of information. Under the standard set forth in Section 2(a)(1), a litigant presumably would have to identify the class of persons who could be expected to have potential knowledge of the information in question. Having done so, the litigant presumably would then have to show either that: (1) he has sought the information, without success, from all members of the class; or (2) to the extent that he has not sought the information from all members of the class, the information could not "*reasonably* be obtained" because of the size of the class, the inability to identify all of its members, or for some other reason.

November 22, 2005

The Honorable Arlen Specter
Chairman
United States Senate Committee on the Judiciary
Washington, D.C. 20510-6275

Dear Chairman Specter:

Thank you for inviting me to appear before your committee on October 19 to testify about "Reporters' Privilege Legislation: An Additional Investigation Into Issues and Implications." And, thank you for your continued interest in this important subject.

Enclosed are my written responses to the questions from Committee members you forwarded to me with your letter of October 28, 2005.

In addition, you asked at your October 19 hearing for any examples of situations where we have curtailed our reporting because of concerns that we could face compulsory process about our confidential sources. I can describe in general terms two recent reports of ABC News where we otherwise would have included certain reporting we had done but specifically withheld that information because of our concern that, if there were legal proceedings, we would not be able to protect sources to whom we had promised confidentiality. One involved an investigative reporting concerning a federal agency involved in law enforcement and the other was about alleged terrorist activities.

I continue to be available to you if I can provide any further help.

Sincerely,

David Westin

Enclosure

Response to Follow-Up Questions from
Senator Patrick Leahy:
Hearing on "Reporters' Shield Legislation:
An Additional Investigation into Issues and Implications
October 19, 2005

1. a. Question: "When a crime is committed, doesn't that trump confidentiality? Even defense attorneys are subject to a crime-fraud exception. Should journalists have a near-absolute privilege when no one else does?"

Answer: When criminal prosecutors seek evidence from journalists who have promised confidentiality to their sources, there are important public interests that can directly conflict. On the one hand, all of us as citizens want our prosecutors to have the tools that they need to find wrongdoing and pursue it. On the other hand, all of us as citizens want the steady stream of information about our government and about the world around us that will help us make important decisions – everything from whom we will vote for to how we will invest our money and how we will care for our families. History has shown time and again that we would never have gotten some of the most important information but for sources had who provided it to journalists in exchange for a promise that their identity would be protected. The question is not whether one of these important public interests should be ignored in favor of the other; the question is where the right balance is to be struck and who, in individual cases, should we trust to strike that balance.

The "crime-fraud exception" to the attorney-client privilege is exceedingly narrow. It applies only where the attorney's failure to disclose the client's confidence would itself be part of the criminal act. It does not apply, for example, simply where the attorney has been told that a crime has been committed in the past; failure to reveal the attorney's knowledge of a past crime is not in itself part of an ongoing criminal act. Certainly if there were some case where a journalist's failure to reveal confidential information was itself part of an ongoing criminal act, the reporters' privilege would not apply. But this is far different from a rule that said that the privilege would be overcome wherever the source arguably committed a criminal act in divulging the information to the journalist in the first place.

It would be wrong to create an automatic exception to the reporters' privilege whenever a leak may have constituted a crime. Determining whether any particular disclosure of confidential information, or even classified information, in itself is a crime is exceedingly difficult, as we have seen recently in the criminal investigation surrounding the leaking of Ms. Valerie Plame's name and status to various members of the press. Even after the completion of a thorough investigation, the prosecutor in the Plame case could not determine that the leak itself was a crime. But in practice, the question whether the reporters' privilege applies comes long before the investigation has been completed. If the privilege simply never applied where there was the mere possibility that the leak was a crime, then as a practical matter the privilege would only rarely apply. The exception would swallow the rule.

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

Answer: There are important public interests in both the free flow of information and in solving crimes. Neither outweighs the other in all cases; either may outweigh the other in a given case. The regulations of the Department of Justice implicitly recognize this need to balance the sometimes-competing public interests by requiring special showings to be made before Justice Department prosecutors may seek discovery from journalists. This regulation does not apply, of course, to proceedings outside of criminal actions brought by the Justice Department.

If the proper balance is to be struck in federal court proceedings of all kinds, Congress must enact legislation setting out the standards to be followed by the courts. As things now stand, different federal courts approach the issue in very different ways. Some defer to one public interest at the expense of the other. Others strike a variety of balances that are confusing and contradictory. The Supreme Court in Branzburg identified the need for a uniform federal approach to the balance of public interests in the free flow of information and invited the Congress in 1972 to set out that balance in legislation. The United States Court of Appeals for the District of Columbia Circuit reiterated this invitation to Congress earlier this year in its decision involving Ms. Judith Miller and Mr. Matthew Cooper.

2. Question: "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?"

   Answer: There is no necessary connection between government regulation and a privilege protecting certain confidences from compulsory disclosure to the government. Although two classes given privileges – lawyers and doctors – are also subject to regulation, other groups of individuals such as the clergy and spouses are given privileges without any connection to regulation. Indeed, the case of the clergy may be most directly relevant to the question of a reporters' privilege, as there is a well-established privilege supported by important public policy for a group whose regulation would raise substantial constitutional questions under the First Amendment.

3. Question: "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?"

   Answer: Because there are a variety of differences among the statutes and decisions of the 49 States with some form of reporters' privilege, any federal statute will necessarily differ from the law prevailing in some States. There are similar differences in a range of procedural and substantive rules between the federal government and state governments. This is inherent in our federal system. The important question is how best to strike the right balance in the public interests represented by the responsibilities of prosecutors and the responsibilities of journalists.

4. Question: "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 so?"

   Answer: By enacting the Free Flow of Information Act, Congress would not be overruling the Supreme Court. To the contrary, the Court in Branzburg explicitly invited the Congress to enact legislation setting out the contours of any reporters' privilege. Nor would any of the formulations proposed to Congress for such a privilege go as far as, much less further than, the existing attorney-client privilege as recognized by the federal courts.

QUESTIONS OF SENATOR RICHARD J. DURBIN

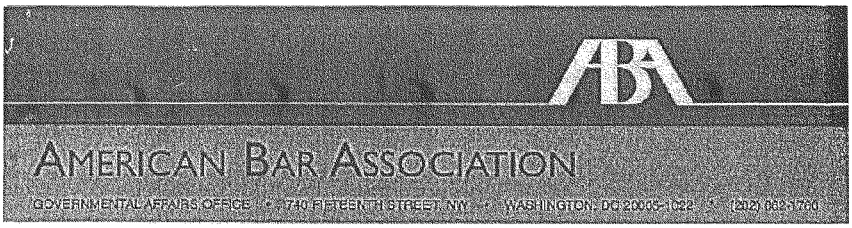
1. Question: "I think it is important to make a distinction between protecting whistleblowers and protecting wrongdoers. Do you believe there should be some exception to the legislative proposal that would address this issue?"

   Answer: The purpose of a reporters' privilege is not to protect wrongdoers; nor does such a privilege have such an effect in practice. Employers, whether public or private, remain free to adopt stringent procedures discouraging employees from disclosing confidential information to outsiders. They are also free to adopt means in the workplace to pursue those who violate rules of confidentiality. And, when it comes to the government, the employer has vast resources at its disposal to trace those who may be disclosing confidential information and to bring them to justice, if some law has been broken.

   A reporters' privilege affects the policing of confidential information in one way: It prevents an employer from automatically tracing each and every disclosure of the confidential information to a member of the press simply by compelling the journalist to divulge their source. To create an "exception" to permit such compulsion would swallow the entire rule represented by the reporters' privilege. No government employee would disclose confidential government information of any type, if the employee knew that the government could simply subpoena the journalist and obtain the identity of the person who provided the information. Under such a rule, the Pentagon Papers would never have been published. Deep Throat would never have given Bob Woodward and Carl Bernstein their leads in pursuing Watergate. And, countless other instances of wrongdoing would have gone undetected. Ironically, many crimes would never have been prosecuted because the underlying facts would not have divulged through press reports.

   It is no response to suggest, as does Professor Geoffrey Stone of the University of Chicago School of Law, that one could preserve the best of "whistle blowing" while pursuing "wrongdoers" simply by allowing the reporters' privilege where doing so "substantially benefits the public interest." How is the source, much less the reporter, to know in advance whether a court at some later time will conclude that there was a "substantial" benefit to the public interest. If this were the test, sources and journalists would no doubt err on the side of caution, thereby preventing the disclosure of much information that it would be in the public interest, indeed the "substantial" public interest to know.

SUBMISSIONS FOR THE RECORD



STATEMENT

OF THE

AMERICAN BAR ASSOCIATION

submitted to the

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

on the subject of

REPORTERS' PRIVILEGE LEGISLATION

OCTOBER 19, 2005

The American Bar Association appreciates the opportunity to present this written statement for the hearing record of the Senate Committee on the Judiciary regarding the need for enactment of a federal shield law for journalists. Because events of the past year have clearly demonstrated the need for federal legislation, the Association recently adopted policy urging Congress to enact legislation to confer a qualified privilege on journalists. Our policy, which sets forth reasonable standards for both compelling and shielding journalists with respect to subpoenas compelling disclosure of the names of their sources and information collected in the course of their work, endorses in principle S. 1419 (and its House counterpart, H.R. 3323), legislation currently under consideration by this Committee.

The purpose of shield laws is to enable reporters to obtain information that would not otherwise be forthcoming and to facilitate independent, objective investigations on behalf of the public. Such investigations uncover significant information about government, business and other aspects of daily commerce that is vital for an informed democracy. In order to balance the public's need for information with the fair administration of justice, the ABA policy, adopted August 2005, states that Congress should enact a federal shield law that would require any party seeking to subpoena a journalist to disclose information to demonstrate that:

1. the information sought is essential to a critical issue in the matter;

2. all reasonable alternative sources for acquiring the information have been exhausted; and

3. the need for the information clearly outweighs the public interest in protecting the free flow of information.

The policy further states that a "federal shield law should apply to journalists who disseminate information by print, photographic, broadcast, cable, satellite, electronic, mechanical or any other media through newspaper book, magazine, periodical, radio, TV, programming service, channel, network, new agency or wire service or similar service." So-called "bloggers" and other individuals who post information on the Internet for public dissemination are not covered by this definition. Our policy, therefore, endorses a qualified federal privilege that protects both the

identity of a journalist's confidential sources and work products and recommends baseline standards for the issuance of subpoenas in both criminal and civil matters. We would oppose any federal shield law proposal that doesn't meet these minimum standards.

Currently, 49 states and the District of Columbia recognize a privilege for journalists to protect their sources -- 18 by judicial decisions, the rest by enactment of shield statutes. Thirteen states recognize an absolute privilege for reporters to protect their sources. Regrettably, when a reporter relies upon state law and enters into an agreement of confidentiality with a source, the state law will not shield him or her from compelled disclosure if the matter becomes relevant to a *federal* lawsuit or investigation. Federal courts do not give any weight to state law in non-diversity matters and, absent clear federal precedent or statutory guidance, many have issued decisions that have provided very limited to no protection for subpoenaed journalists. A reporter, who promises confidentiality to a source in order to acquire information that would otherwise be unavailable and who relies on state law to make such an agreement, should not be put at professional and possibly personal peril if the reporter later is subpoenaed in a federal case where no similar protections are afforded.

There has been great confusion over whether and to what extent the federal courts recognize a reporter's privilege. Federal courts in different jurisdictions have applied the law differently ever since 1972, when the United States Supreme Court decided *Branzburg v. Hayes,* 408 U.S. 665, which combined three cases where reporters had refused to identify confidential matters to a grand jury. The court, in a 5-4 decision, said that reporters and other journalists did not have a First Amendment testimonial privilege against compelled disclosure of their sources. However the Court opened the door a bit by stating that a bad faith harassment exception might violate the First Amendment.

In a concurring opinion that turned out to read more like a dissenting opinion, Justice Powell seized on this statement and expanded its implications by stating that a reporter who thinks his testimony implicates confidential sources without a legitimate need of law

enforcement could move to quash the subpoena; and the judge who hears the motion must balance the competing interests on the merits.

Federal courts differ significantly in their interpretation of the scope of the privilege and its application in civil and criminal contexts. Even the Supreme Court has sent mixed signals over the meaning of *Branzburg.* Recently, however, more and more federal courts have refused to recognize a reporter's First Amendment privilege. Most notably, earlier this year, in affirming the district court's contempt order requiring the incarceration of Judith Miller, the United States Court of Appeals for the District of Columbia Circuit held that there is no First Amendment reporter's privilege, and if there is a common law privilege, it is not absolute. *In Re: Grand Jury Subpoena, Judith Miller, No. 04-3138.*

Clearly, neither federal court decisions nor the *Department of Justice Guidelines for Issuance of Subpoenas to News Media*, 28 C.F.R Sec. 5010, 2005 (which apply only to criminal investigations and are not binding on the courts) are sufficient to establish a definitive, uniformly applied federal standard.

In recent years, prosecutors and other litigants around the country have pursued reporters zealously in an effort to learn the identity of their confidential sources and obtain unpublished information. News media leaders have warned Members of Congress and the public that many in the industry have reached the point where the absence of a clearly defined federal reporters' privilege is affecting their editorial decisions, which in turn, affects the free flow in information to the public. Others have echoed the same or similar concerns. According to the written statement of Leo Levin, a past chair of the ABA Forum Committee on Communications Law, submitted to your Committee on July 20 during the first hearing on this subject, for almost three decades after *Branzburg,* subpoenas issued to reporters by federal courts were exceedingly rare. That has now changed. Mr. Levin said that three federal proceeding in Washington DC alone have generated subpoenas seeking confidential sources to approx two dozen reporters and news agencies, seven of whom have been held in contempt in less than a year. Floyd

Abrams, attorney for Judith Miller, stated in testimony before this committee: "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 sources."

Only two subpoenas seeking confidential source identities were issued between 1976 and 200 and all three were quashed. In the last four years, three federal courts have affirmed contempt citations in grand jury proceedings. Penalties have been far more severe than in most past cases. For example, in 2001, Vanessa Legett served six months in jail for refusing to disclose the identity of a source in a murder; earlier this year, James Taricani, completed a four-month sentence for refusing to identify the source that provided him with a videotape of alleged corruption by public officials in Rhode Island; and most recently, Judith Miller was sent to jail for 85 days for refusing to disclose her source regarding the Valerie Plame investigation. In addition, a disturbing new trend involves the issuance of subpoenas in private litigation such as those issued in cases involving the investigations of Dr. Wen Ho Lee, the scientist at Los Alamos Nuclear laboratories and Dr. Steven Hatfell, who was accused of involvement in the anthrax outbreak.

As stated at the beginning of this statement, the Association endorses in principle S. 1419. This legislation, as amended, requires that in order to compel a reporter to testify or produce documents in civil proceedings, a court must determine, by clear and convincing evidence, after providing a notice and opportunity to be heard to the covered person that the testimony and/or documents are essential to a dispositive issue of substantial importance. In criminal proceedings, a court also needs to establish that there are reasonable grounds to believe that a crime has occurred. The legislation responds to the legitimate concerns law enforcement by establishing a national security exception for the identity of sources: in situations where compelled testimony or document could reveal the identity of source or include information that could reasonably be expected to lead to revelation, the disclosure of the source must be necessary to prevent imminent and

actual harm to national security; compelled disclosure would prevent such harm, and the harm clearly outweighs the public's interest in the free flow of information.

Given the immediacy of new developments on the heels of Judith Miller's testimony regarding her sources and work products before the grand jury, it is important to point out that adoption of legislation such as S. 1419, would NOT have changed the outcome for Ms. Miller. She still would have been held in contempt of court because the Court of Appeals for the District of Columbia Circuit, in addition to holding that there is no First Amendment privilege protecting journalists from disclosing sources before a grand jury, stated that even if a common law privilege exists, it had been overcome in her case by Special Prosecutor Fitzgerald meeting the burden of showing that the information sought was "critical and unobtainable from any other source."

There is a pressing need for congressional action. Even the courts have urged Congress to take the lead and enact a federal shield law. We are grateful that your Committee has initiated the process by holding these hearings.

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Testimony of Steven D. Clymer
Professor of Law, Cornell Law School
On the Proposed Reporters' Privilege Legislation
Before the United States Senate Committee on the Judiciary
October 19, 2005

Mr. Chairman and Members of the Committee: Thank you for inviting me to appear before you today to provide testimony about a proposed statutory "reporters' privilege" in federal trials and proceedings I am a Professor of Law at Cornell Law School, where I teach courses on Evidence and Criminal Procedure. I also have been an Assistant District Attorney in Philadelphia and a federal prosecutor in both California and New York. Most recently, during a leave of absence from Cornell, I served as the Chief of the Criminal Division of the United States Attorney's Office in Los Angeles. I left full-time service with the Department of Justice [DOJ] on June 17, 2005. I now work part-time as a federal prosecutor, on a single case. The opinions that I express are my own and should not be attributed to DOJ.

This Committee has been presented with powerful and eloquent testimony from members of the news media about the need for reporters to guarantee confidentiality to unnamed sources. Those witnesses also have made clear that a federal reporters' privilege, which would make such confidentiality guarantees meaningful, is not for the benefit of reporters, but rather for the public, which profits from the resulting free flow of information.

At the same time, however, a federal reporters' privilege would impose costs. The nature and extent of those costs depends on the scope of the privilege. Because this Committee has heard far more testimony about the benefits of a privilege than its costs, I can best serve the Committee by discussing those costs, some of which are apparent and others which may be less so. I do this not to suggest that there should be no federal reporters' privilege (although one reasonably could draw that conclusion after assessing the costs), but rather to shed light on the proper scope of such a privilege.

1. A Federal Reporters' Privilege Will Impair the Discovery and Presentation of Probative Evidence in Federal Proceedings and Thus Should Be No Broader Than Necessary to Achieve Its Objectives

Like other privileges, a federal reporters' privilege would be truth-defeating: it would deny the government and other participants in the legal system access to probative and important evidence. Unlike the oft-criticized exclusionary rule, which prohibits only the admission of relevant evidence in the prosecution's case-in-chief during trial, a reporters' privilege would deny all parties access to information altogether, both during investigations and throughout trials and other proceedings. Specifically, it would deny federal grand juries

access to information that historically has been available; it would prevent law enforcement officials from solving crimes that they otherwise would solve; it would jeopardize criminal prosecutions by foreclosing prosecutors from presenting crucial incriminating evidence in court; it would deny civil litigants information that they otherwise could discover and prove; and it could well impair the ability of criminal defendants to gain access to and present exculpatory evidence.

In response, supporters of a reporters' privilege have contended that enactment would not really cause the loss of information or evidence. They argue that without a privilege in place, unnamed sources will be fearful of discovery and thus will not provide the information necessary for publication of news articles in the first place. Without the news articles, grand juries, prosecutors, criminal defendants, and civil litigants never will learn of the existence of sources and thus never will seek to identify them. Indeed, without the news articles, the information that the sources know may never come to light at all. Thus, the argument concludes, the privilege doesn't cause the loss of evidence. And, with the privilege, even if investigators and litigants are stymied, the public will receive important information.

Two observations about this argument bear mention. First, as even supporters of the privilege concede, the argument is flawed. Many unnamed sources will and indeed do provide information to the news media without the protection of a reporters' privilege. In truth, discussion of the costs and benefits of the reporters' privilege is, by necessity, ill-informed. We simply do not and cannot know how many news stories are lost because there is no privilege. At the same time, we cannot determine how many criminals would escape prosecution and conviction or how many civil litigants would be denied justice if there was a privilege. In short, it is impossible to accurately assess and weigh these costs and benefits. All that can be said is that (a) it stands to reason that some information is lost without a privilege; and (b) a privilege would work injustice in some cases.

Second, and more significantly here, the argument, whatever its merits, suggests that the scope of any proposed privilege should be no broader than that necessary to achieve its objective. In other words, a federal reporters' privilege should be no more extensive than necessary to ensure that reporters credibly can guarantee confidentiality to unnamed sources who require such guarantees in order to provide information. To the extent that a proposed reporters' privilege denies law enforcement officials, prosecutors, and other civil and criminal litigants access to information beyond that necessary to promote disclosure of newsworthy information by unnamed sources, it imposes significant costs without the above-described benefits.

Some proposal versions of the privilege, including S. 1419, sweep broadly. For example, S. 1419 imposes significant obstacles to those who seek to compel production of information from members of the news media even if has no connection to a confidential source. It requires, among other things, that a federal prosecutor or other litigant first prove to a court "by clear and convincing evidence" that he "has unsuccessfully attempted to obtain such testimony or document" from other sources and that the information sought is

"essential." Even then, "to the extent possible," S. 1419 would limit the testimony to "verifying published information or describing any surrounding circumstances relevant to the accuracy of such published information." These requirements apply without regard to whether confidential source information is involved.

These stringent requirements are lifted largely verbatim from 28 C.F.R. § 50.10, the DOJ internal and non-enforceable regulation governing subpoenas to the news media. They likely are designed to prevent use of subpoenas to the news media as a regular means of obtaining "out-takes" and reporters' background investigative material. Some have argued that routine demands for such materials can "threat[en] administrative and judicial intrusion into the newsgathering and editorial process"; make "journalist[s] appear . . . to be an investigative arm of the judicial system or a research tool of government or of a private party"; create "the disincentive to compile and preserve non-broadcast material; and burden . . . journalists' time and resources in responding to subpoenas." *United States v. La Rouche Campaign*, 841 F.2d 1176, 1181-82 (1st Cir.1988). Federal Courts of Appeal are divided on the persuasiveness of such concerns. For example, compare *United States v. Schoen*, 5 F.3d 1289, 1295 (9th Cir. 1993)(finding arguments persuasive) with *United States v. Smith*, 135 F.3d 963, 970 (5th Cir. 1998) (rejecting similar arguments as non-persuasive). It is worth noting that other businesses and organizations that routinely receive and comply with subpoenas could register similar complaints but receive no special protection.

My point here is not that these arguments for protection of non-confidential-source media information should be either accepted or rejected. Rather, it is that these arguments are very different than those that have been made in support of a privilege protecting source confidentiality. Before Congress enacts a statute that also provides unique protection to the news media for non-confidential-source material, protection that imposes further impediments on the truth-seeking functions of grand juries and courts, these additional arguments should be scrutinized carefully.

2. A Federal Reporters' Privilege That Fails to Exempt Illegal Disclosures Would Be Inconsistent With And Undercut Vital Federal Criminal Statutes

A host of federal statutes impose criminal penalties for the improper disclosure of classified or otherwise sensitive information in the government's possession. Examples include 18 U.S.C. § 798 (disclosure of classified information); 18 U.S.C. § 2511 (disclosure of intercepted oral, wire, and electronic communications); and 26 U.S.C. § 7213 (disclosure of tax return information). Similarly, Rule 6(e) of the Federal Rules of Criminal Procedure prohibits the disclosure of matters occurring before the grand jury and can result in punishment for contempt of court. These laws, and others like them, help to safeguard information that, if improperly disclosed, could jeopardize national security, threaten the safety of law enforcement officials, undermine criminal investigations, or destroy the reputations of innocent people.

Many disclosures to reporters involve information that does not fall within the ambit of these

or similar federal laws. Unfortunately, however, some disclosures to reporters are illegal. And, some proposals for a federal reporters' privilege, including S. 1419, draw no distinction between legal and illegal disclosures. Thus, they help to conceal the identity of sources whose disclosures constitute federal felonies. In this regard, the proposed privilege is more extensive than other well-recognized privileges such as the attorney-client privilege. These established privileges are subject to a "crime-fraud exception," meaning that an otherwise privileged disclosure made in order to further a crime or fraud is not protected. It would be a mistake to enact a reporters' privilege that does not contain a similar exception for disclosures that violate federal criminal law.

First, failure to exempt such illegal disclosures from coverage would conflict with the federal laws that criminalize the disclosures. The purpose of a privilege is to encourage the protected communications. For example, we have an attorney-client privilege in order to promote free communication between clients and their lawyers and we have a patient-psychotherapist privilege in order to encourage full and candid patient discussions with psychotherapists. If Congress were to enact a reporters' privilege that protects illegal disclosures as well as legal disclosures, it would, in effect, be encouraging government officials to make the illegal disclosures. This would be contrary to the purpose of the laws criminalizing and setting out punishments for such disclosures, laws that are intended in to deter them from occurring. Such contradictory messages from Congress may well breed disrespect for these laws.

Second, failure to exempt illegal disclosures effectively would immunize any such disclosures that were made to members of the news media. Typically, disclosures occur in private conversations between a source and a journalist. If asked whether he made an illegal disclosure, the source can assert the Fifth Amendment privilege, which can be overcome only by a grant of use and derivative use immunity, rendering any resulting statements and evidence derived from the statements inadmissible, and likely foreclosing prosecution. Similarly, if the source is threatened with job termination for refusal to answer questions about the disclosure, the rule of *Garrity v. New Jersey*, 385 US 493 (1967) results in *de facto* immunity. If, in addition, a federal reporters' privilege prevents investigators from questioning the journalist about the source of the illegal disclosure, there will be no way to determine who committed the crime or to prove it in court.

Such an outcome would signal that illegal disclosures of classified or sensitive information, no matter how harmful to national security, police safety, law enforcement, or personal privacy, are immune from criminal prosecution as long as they are made to a recipient who qualifies as a "covered person" in the reporters' privilege. Several witnesses have testified that such criminal disclosures are "rare." The enactment of a reporters' privilege that effectively immunizes such criminal conduct from prosecution likely would increase their frequency and the resulting harm. That is a result that should be avoided.

3. A Federal Reporters' Privilege Should Provide For a Preliminary Judicial Determination Whether an Assertion of the Privilege is Valid in Order to Avoid the Unwarranted Loss of Evidence Resulting From Invalid Assertions

Not all unnamed sources demand a promise of confidentiality before making a disclosure. Of those that do, some later change their minds. Others affirmatively waive any right to confidentiality. If, as proponents argue, a federal reporters' privilege is needed in order to ensure that unnamed sources who demand assurances of confidentiality will receive them, the privilege should not apply when a source does not request such an assurance, does not receive it, or later waives any right to confidentiality. Application of the privilege when these preconditions do not exist results in the loss of probative evidence without any accompanying benefit. (S. 1419 is flawed in this regard. It applies even if the source never sought or received any assurance of confidentiality or has waived any right to confidentiality.)

More well-established privileges also have threshold requirements: for example, the Fifth Amendment privilege does not apply unless the witness asserting the privilege reasonably believes that an honest answer to a question could subject him to potential criminal prosecution. It cannot properly be asserted to avoid incrimination of another person. The attorney-client privilege applies only if the communication was made for the purpose of obtaining or providing legal advice. It cannot properly be asserted to avoid giving testimony about non-legal conversations with an attorney. In short, one cannot assert a privilege simply to avoid giving testimony.

A party who opposes a claim of a well-established privilege need not accept the claim at face value. Instead, the party can challenge the assertion of the privilege in court. If the court determines that the assertion is invalid, that the privilege has been waived, or that an exception applies, the privilege is not available and the witness must testify or face contempt sanctions. For example, a prosecutor can challenge an assertion of the Fifth Amendment privilege, claiming that there is no threat of self-incrimination; an assertion of the priest-penitent privilege, claiming that it has been waived; or an assertion of the attorney-client privilege, claiming that the crime-fraud exception applies. In each of these situations, it is for the court, not the party asserting the privilege, to determine whether the assertion of the privilege is valid.

Recent, widely-publicized events demonstrate that courts and litigants should not be required to accept assertions of the reporters' privilege at face value either. In Providence, Rhode Island, despite a court order, WJAR-TV reporter Jim Taricani refused to disclose the identity of a source who had given him an FBI videotape showing a government official accepting a bribe. After Taricani had been convicted of criminal contempt, his source came forward and claimed that he never had asked Taricani to keep his identity secret. Taricani disputes that claim.

Here, in Washington, New York Times reporter Judith Miller refused to comply with a court order requiring her to testify in a federal grand jury about a source. After she had been

held in contempt and spent 85 days in federal custody, she claimed that her source finally had given her permission to reveal his identity. But, both the source and his lawyer provided a different version of events, claiming that they had communicated such approval to her attorney a year earlier.

It is not clear what happened in these two cases. One explanation is that there was a good faith misunderstanding between the source and the reporter (or their lawyers) in one or both cases. Another explanation is that the reporter in one or both cases had reasons for refusing to testify other than safeguarding the identity of the source, and decided to use a claim of reporters' privilege as a means of supporting that refusal. This, of course, would be as impermissible as asserting the Fifth Amendment privilege as a means of avoiding having to give testimony against another person. Whatever happened, one thing is clear: had there been a federal reporters' privilege in place, the assertions of the privilege may well have been invalid, either because there never was a request for confidentiality (in the case of Taricani's source) or because confidentiality had long ago been waived (in case of Miller's source). If so, acceptance of the assertions at face value would have resulted in the unwarranted loss of evidence.

In other contexts, a witness who asserts a privilege does not get to determine if the privilege applies, if it has been waived, or if an exception applies. Instead, the court does. The same should be true for any federal reporters' privilege. Among other things, reporters should not be the arbiters of the validity of any waiver. They should not be empowered to claim, as some do, that they are free to reject waivers that they deem to have been compelled from government employees who may be their sources. Any legislative enactment of a reporters' privilege should set out a process consistent with the operation of other privileges, providing for an opportunity to challenge a reporters' assertion of the privilege and for a judicial determination of the validity of the assertion. This may, at times, require that the court conduct a closed, *ex parte* hearing with the source to test the validity of a reporters' assertion of the privilege.

4. Enactment of a Federal Reporters' Privilege May Lead to Unintended Consequences Including Dangerously Broad Coverage of the Privilege

No matter how carefully drafted, the words in any legislative enactment will be subject to judicial interpretation. In addition to simply determining what ambiguous terms in a statute mean, courts sometimes interpret statutes in a manner that ensures that they comport with constitutional requirements. *See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988). With this in mind, it is important to consider how courts might interpret the terminology used in any proposed statutory reporters' privilege, either to the extent that the terms used are ambiguous, or to avoid concerns about the constitutionality of the statute.

For example, a critical question for any reporters' privilege is who qualifies as a "reporter" or, as used in S. 1419, a "covered person." Although he was pondering a different legal issue – the scope of any claimed federal common law reporters' privilege – Judge

Sentelle's concurring opinion in *In Re: Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D.C. Cir. 2005) explains the possible reach of a reporters' privilege:

> Are we then to create a privilege that protects only those reporters employed by Time Magazine, the New York Times, and other media giants, or do we extend that protection as well to the owner of a desktop printer producing a weekly newsletter to inform his neighbors, lodge brothers, co-religionists, or co-conspirators? Perhaps more to the point today, does the privilege also protect the proprietor of a web log: the stereotypical "blogger" sitting in his pajamas at his personal computer posting on the World Wide Web his best product to inform whoever happens to browse his way? If not, why not?

Id. at 979 (D.C. Cir. 2005)(Sentelle, concurring).

It is easy to envision ways in which a court could interpret a statutory reporters' privilege to extend well beyond the mainstream news media. First, a court simply could construe the terms of a statute to reach that far. For example, Section 5(2)(A)(i) of S. 1419 defines "covered person" to include "an entity that disseminates information by . . . electronic or other means and that publishes a . . .periodical in . . . electronic form." This could be read to include a "blog" on the internet that is published weekly.

Second, even if the language of any proposed legislation is "tightened up" to avoid this result (as is the case with some state statutes), a court may deem broader application of the protection necessary to avoid constitutional concerns. In this regard, it is worth considering language from the Supreme Court decision that rejected the claim that the First Amendment embodies a reporters' privilege, *Branzburg v. Hayes*, 408 U.S. 665 (1972):

> The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order. Sooner or later, 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 who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods. . . . Almost any author may quite accurately assert that he is contributing to the flow of information to the public, that he relies on confidential sources of information, and that these sources will be silenced if he is forced to make disclosures before a grand jury.

Id. at 703-704.

It is true that the quoted passage refers to the difficulty in making distinctions when interpreting a constitutional, not a statutory privilege. That said, it is possible that a lower court could seize on this language to conclude that the only way to save a statutory reporters' privilege from a challenge that it unconstitutionally discriminates by protecting

some components of the "news media" and not others is to apply it across the board.

The point is not that courts should or will interpret any statutory privilege broadly. It is that courts might do so and that the possible consequences merit consideration. Taken in conjunction with the concerns discussed above about unwarranted protection for illegal disclosures, one quickly can recognize, as Judge Sentelle did, a potential recipe for disaster: "[W]ould it not be possible for a government official wishing to engage in the sort of unlawful leaking under investigation in the present controversy to call a trusted friend or a political ally, advise him to set up a web log (which I understand takes about three minutes) and then leak to him under a promise of confidentiality the information which the law forbids the official to disclose?" *In Re: Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 979-80 (D.C. Cir. 2005)(Sentelle, concurring).

Conclusion

I offer one additional thought in closing. There is little doubt that the litigation resulting from the leak of the CIA operative's name sparked interest in a federal statutory reporters' privilege. Even though much remains secret about the grand jury investigation into that matter, we have learned quite a bit about what happened. Unfortunately, few of the participants have come out unscathed. It is reasonably clear, however, that one party to this controversy has behaved professionally and ethically throughout. Even though not all of his decisions have been well received in the media, it appears that the Special Counsel has carried out his responsibilities the way federal prosecutors ought to carry out their responsibilities: thoroughly, diligently, and without regard to political considerations. The District Court Judge who heard the case determined that the Special Counsel had complied with the requirements of the DOJ regulations.

It would be an odd result if the lesson that is taken away from all of this is that Congress ought to reign in the DOJ. Since 1980, DOJ has employed its internal regulations to police itself on the issuance of subpoenas to the news media. In that time, it apparently has issued only a handful of such subpoenas. To my knowledge, there never has been a judicial determination that any of those very few subpoenas were improperly issued. In fact, in the case involving the leak of the CIA operative's name, based on the illegal nature of the disclosure involved, even some members of the media opined that the subpoenas to reporters were proper. Under those circumstances, and without evidence that DOJ ever has ignored its regulations or behaved improperly in this area, might it not make sense to limit application of the reporters' privilege to non-DOJ civil litigants, who are not duty-bound to comply with those regulations?

Statement of Senator John Cornyn

Before the Senate Judiciary Committee

"Reporters' Privilege Legislation:

An Additional Investigation of Issues and Implications"

October 19, 2005

Thank you, Mr. Chairman, for holding this hearing today and for your efforts to address this issue. You have assembled an impressive panel of witnesses and I look forward to hearing their testimony.

The press is essential to providing the public with vital information – much of which is necessary for the public to do their citizen duties. For this reason, we must maintain and defend the freedom of the press. An independent and free press is beneficial to our system of government and beneficial to our everyday life. The better informed we are, the better decisions we will make.

To effectively carry out its mission, the press needs to have access both to people and to information. At times, they will ***only*** be able to obtain certain pieces of valuable information if they are able to promise their sources anonymity. Confidential sources have lead to the discovery of corruption and incompetence both within and without government, and these revelations at times have served to make our society better.

Of course, standards for anonymity differ from outlet to outlet, and I do believe that the highest bar possible should always be applied when determining whether or not to afford such anonymity. But we must realize that at certain times, it is indeed necessary to protect certain sources in this way.

But there are competing values at stake in this debate. We must also be careful not to unnecessarily tie the hands of legitimate law enforcement investigations. We simply ***cannot*** prevent the government from obtaining information while it is conducting legitimate investigations, particularly when that information can be used to save lives, or is relevant to our national security. This is central to the shield legislation debate.

We also need to have a serious discussion of what constitutes the term "reporter." Media consumers no longer rely exclusively on traditional media outlets to obtain information. Today's technology allows for anyone to report information to a vast audience virtually instantaneously, thus creating a new generation of "cyber reporters" or those we know today as bloggers.

At our last hearing, one of our witnesses described bloggers as the modern day equivalent of the revolutionary pamphleteer who passed out news bulletins on the street corner. However, the relative anonymity afforded to bloggers, coupled with a certain lack of accountability, as they are not your traditional brick-and-mortar reporters who answer to an editor or publisher, also has the risk of creating a certain irresponsibility when it comes to accurately reporting information.

Therefore as we consider what protections to afford, it is also important to consider whether bloggers, or reporters for entities such as al Jazeera, or others whose associations perhaps are questionable or even cause for concern, ought to be covered under this type of law.

We are exploring a complex set of issues that require careful interpretation of one of our most fundamental freedoms, and I look forward to working with members of this Committee and with the Chairman to reach a viable solution.

Thank you.

TESTIMONY PREPARED FOR THE OCTOBER 19 HEARING
OF THE SENATE COMMITTEE ON THE JUDICIARY
By Dale Davenport, The Patriot-News, Harrisburg, Pa.

Chairman Specter, Ranking Member Leahy and members of the committee, thank you for the opportunity to testify today in support of a federal shield law.

I am Dale Davenport, editorial page editor of *The Patriot-News* in Harrisburg, Pennsylvania. I joined the newspaper as a reporter in 1972 after completing my military service, and I later worked as an assistant city editor, city editor and managing editor before taking my current position in 1988.

Confidential sources are essential to our ability to inform the public. That's true not just in Washington or New York, but across the country.

And it's certainly true in Harrisburg, where in April 1993 there was a move afoot in the Pennsylvania Legislature to abolish the Pennsylvania Crime Commission, an agency that for 25 years had been investigating corruption, but which had no prosecutorial powers. Each year it would publish its findings, but the prosecution of any of its allegations of criminality was the responsibility of the appropriate district attorney or, in certain cases, the attorney general of Pennsylvania. The attorney general at the time, Ernie Preate, testified in support of the effort to disband the commission, arguing that his office, under a more recently passed statute, had assumed the power to investigate the cases which had been the commission's purview.

Just as the effort was gaining steam, reporters Pete Shellem and Peter J. Shelly of *The Patriot-News* learned and reported that the Crime Commission had subpoenaed the financial records of Attorney General Preate's campaign committee. Its objective was to determine if he had arranged for reduced charges and no jail time for several of his contributors who had been caught in a crackdown on illegal video pokers machines. Preate denied any wrongdoing and said he had returned contributions he had received from video poker operators. The Legislature proceeded to terminate the Crime Commission's funding.

Reporters Shellem and Shelly continued to report the story of the Preate investigation, despite continued denials by the attorney general, who was preparing to run for governor in 1994, and ridicule by other politicians who accused the newspaper of a vendetta. Then the U.S. attorney for the Middle District of Pennsylvania became involved. Two years later, Preate resigned, pleaded guilty to a charge of mail fraud, and served 14 months in prison.

Shellem and Shelly relied heavily on confidential sources for their stories. Without the ability to assure their sources that their identities would remain hidden, their stories could never have been written, and it's anyone's guess whether the case against Preate would have concluded in the attorney general's admission of guilt.

What is a confidential source?

When I began my first newspaper job 42 years ago as a summer vacation relief reporter for a 10,000-circulation morning daily in my hometown, the term "confidential source" hadn't been coined – or at least it had not yet become part of the journalism lexicon in Central Pennsylvania. But as I learned the ropes as a reporter, I encountered a large number of people who helped me get information for my stories who clearly didn't expect me to put their names in the paper as the sources of that information. Some of them wouldn't have wanted me to identify them as a source, out of embarrassment or fear or for some other reason. A lot of these folks were simply doing their jobs, or thought they were, by pointing me in the direction of a document or an official source, or confirming for me some detail of the story that I had learned elsewhere.

I can't recall ever establishing a formal agreement with anyone not to identify him or her in print, although the phrase "Don't quote me" probably came up in conversations, because I still get that a lot today.

So who were these early sources? They were clerks in the row offices in the courthouse. It was the admitting nurse at the hospital. They were numerous police officers; an ambulance driver; the secretary in the school district headquarters. The mother of one of my high school classmates was the county coroner's assistant and made a totally reliable but unofficial source.

Throughout my career I have had more sources of this sort than I could ever count. And the longer a journalist works at one place or covers one beat, the more he or she comes to rely on these folks. And the more these folks come to trust the journalist and help him or her with a story.

Then there are friendships that build with time, and people whom you know and who know you, and who are willing to share information to which they have access, either officially or unofficially. I also couldn't count the times that someone I know has said to me, "You don't know where you heard this, but ..."

All of these people represent what we now call confidential sources. All of us in the news business have them – lots of them. If we had to rely only on official sources for news stories, there would be nothing but the official line in our news stories, and the free press, as we know it in America, wouldn't exist.

In fact, these sources are so numerous and we use them so routinely that we may not immediately think of them as confidential sources. And it's rare that we are even asked about them. Only when the stories begin to get sensitive, when we begin to gather information that someone doesn't want us to report, might that someone ask us, "Who told you about this?"

Another reason we may not refer to someone as a source is that often we don't publish what this person has told us, but, instead, we seek official confirmation of it. Because of professional and public concern about the use of anonymous sources in news stories, we insist on reporting on the record whenever possible. More often than not, what these confidential sources provide us is context, the kind of background that helps us to tie the facts together or to put them in order to accurately represent what happened, or to pick out the most significant aspects of the story.

Today we have a well-defined and well-understood reporter-source relationship known as "background." It draws its name from its original purpose, though we use what we learn differently these days.

Of course, people who speak to journalists "on background" are confidential sources.

Situations such as Judith Miller's make headlines because they involve stories of great moment in the course of the nation's history and include high-level government figures. There are people of stature or rank in Harrisburg who share information with journalists in strict confidence, too, but the stories that result aren't usually the ones about which journalists are called to testify. Much more often, reporters and editors are subpoenaed to testify about stories that are entirely on the record. The lawyers want to know how the reporter assembled the facts, how he or she decided what to put into the story, what was left out. And these questions form a continuum that leads invariably to the question of identity of the reporter's sources.

Here's the situation for journalists today.

In the U.S. District Court for the Middle District of Pennsylvania in Harrisburg, a trial is under way in a civil action brought by 11 residents of the Dover Area School District in rural York County against the Board of School Directors. The school board about a year ago adopted a policy that directs ninth-grade science teachers to tell their students that some people believe life is so complex that it had to be created by an "intelligent designer." The residents allege that the policy violates the Establishment Clause of the First Amendment to the U.S. Constitution.

Two reporters covered the public meeting at which the school board adopted the policy, one for each of the two newspapers in the city of York. During the discovery phase of the litigation, counsel for both the plaintiffs and the defendants issued subpoenas to compel the reporters to testify in depositions about the stories they wrote. The plaintiffs' attorneys wanted the reporters to certify accuracy and authenticity of the clippings that would be entered in evidence. Defense counsel, however, sought to have at least one of the reporters produce her notes, drafts of her stories, e-mails and any other unpublished materials she used in preparation of her stories. The intent, according to the order of Judge John E. Jones III that denied the defendants access to such materials, was to show that her coverage was biased and included false information.

What her reporting had to do with the issue at hand – whether the school district's science policy violates the Constitution – escapes me. Nevertheless, Judge Jones ordered an *in camera* review of this material before ruling it out of bounds.

However, as of the date that this testimony is being submitted – October 17, 2005 – the two reporters remain under subpoena to testify at trial, if called, about what they saw and heard at the meeting at which the policy was adopted, as it was published in their newspapers. In upholding the subpoenas, the judge specifically barred questions about confidential sources or any topic other than the published articles.

A few observations on this case.

- News coverage of this issue is irrelevant to the central issue of constitutionality of a specific government action. There is no compelling reason for reporters to testify as witnesses when the action being challenged occurred at an open meeting attended by several other members of the public. Reporters should be the last resort, not the first option. Otherwise, our reporters would spend half their time in court testifying about what they have already written and had published in the newspaper.
- While this is a civil matter, the defendants – who sought to examine unpublished material, reporters' notes, etc. – in fact are a government agency. They did not seek the identity of confidential sources, but they sought material that may well have contained the identity of confidential sources in the broader context that I have defined. In addition, once witnesses are sworn to testify as to how they covered a story, the identity of sources, including confidential sources, can become part of the continuum of testimony about the newsgathering process. Even putting aside confidential sources, being examined under oath about the decisions made in the newsgathering process is invasive and inappropriate.
- In considering the motions to quash the subpoenas of the reporters, the trial judge ruled three separate times, narrowing the scope of questioning each time, specifically barring questions concerning confidential sources, but in the end allowing the plaintiffs' counsel to call the reporters and defense counsel to cross-examine. And absent a statute on which to base his rulings, the judge was forced to consider the issue of reporters' privilege as defined in case law, including the 1972 U.S. Supreme Court decision in *Branzberg v. Hayes*, as well as other cases in the Third Circuit. If there were a federal statute in place that defined conditions

and strict limits for journalists' testimony, clear and consistent standards would apply to all such inquiries. It would be less likely for reporters to be called to testify in the first place. A statute also would provide a clear basis for appeal.

- Both of these reporters are independent contractors, what we call correspondents or "stringers." They are not employees of the newspapers. They were fortunate that the newspapers that contracted with them for coverage agreed to provide them with legal counsel. Others are not so fortunate, and the lack of a clear and consistent standard would make their burden even heavier.

What else is happening in Pennsylvania?

Our experience in Pennsylvania is that prosecutors and lawyers representing clients in civil cases are much more likely to seek to examine the newsgathering process, which of course opens the issue of confidential sources, on such stories as this, rather than the investigative stories that clearly make use of confidential sources. When clippings or broadcast videotape are sought as evidence to be entered at trial, the trend is to subpoena reporters and editors to produce them and verify, as witnesses under oath, their authenticity, as well as to explain how they were gathered.

It's this examination that produces a chilling effect on the newsgathering process and, in the case of independent contractors like those involved in the Dover School Board case, can impose an onerous burden on the journalists to secure legal counsel to challenge the demand for materials. Demands for unpublished materials – reporters' notes, unpublished drafts and scripts of stories, video that was not broadcast – are even more intrusive into the process.

Pennsylvania is one of 31 states with a shield law (42 Pa.C.S.A. §5942). It states: "No person engaged in, connected with, or employed by any newspaper of general circulation or any press association or any radio or television station, or any magazine of general circulation, for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit."

While this statute appears to provide absolute protection of confidential sources, and historically has been interpreted also to protect unpublished materials in most cases, courts in recent years have seemed more willing to consider the arguments from prosecutors and other legal counsel seeking the testimony of journalists regarding the newsgathering process. In a recent case, the Pennsylvania Supreme Court held that so long as a source has been identified in a news story, any material provided by that source, though unpublished, is no longer protected under the Shield Law.

However imperfect, the Pennsylvania shield law does provide protection for confidential sources. But without a federal shield law, that protection can be illusory. When reporters agree to protect the confidentiality of a source, they don't know if they will be called to testify in state court or in federal court. In state court, they usually can protect their promise. In federal court, they may not be able to. The lack of federal protection makes it difficult for journalists to rely on state shield laws in the real world.

Conclusions.

There are few instances where the testimony of a journalist is relevant to a legal proceeding involving issues unrelated to the gathering or dissemination of news, much less essential to its prosecution. The question of where a journalist obtained information is even less important, except in those rare cases where public safety may be imperiled.

Nevertheless, lawyers increasingly are seeking journalists' testimony, which not only interferes with the free flow of information by disrupting the immediate work of those journalists, but has a chilling effect on the everyday sources who provide the glue for accurate reporting of news stories.

A federal statute such as S. 1419 is clearly needed to protect news reporting by clearly defining those few exceptions where a journalist could be compelled to disclose previously undisclosed information or the identity of someone who provided it.

The intent of a shield law is not to protect journalists. A shield law protects the thousands upon thousands of ordinary Americans who facilitate the free flow of information – mostly in anonymity and mostly by choice – that journalists deliver to the public.

Thank you again for the opportunity to testify in support of this bill.

Testimony of

Joseph E. diGenova

On S-1419

before the

Committee on the Judiciary

of the

United States Senate

October 19, 2005

Washington, DC

Mr. Chairman, thank you for inviting me to testify today on the wisdom of or the need for proposed legislation to create new federal standards for the compelled disclosure of information by reporters in federal proceedings.

I want to address the reporter's privilege in the context of the criminal law. As both a former United States Attorney and Independent Counsel, I have had to decide whether to subpoena reporters to determine their sources in federal grand jury investigations about information published. None of my cases involved imminent or past threats to public safety or national security, or the loss or even potential loss of human life or injury. Thus, I declined to issue subpoenas because the public benefit of compelled disclosure, given the nature of the crime I was investigating, was insufficient when weighed against the burden they would have placed on the reporters.

In 1972, the United States Supreme Court in Branzburg made it clear there is no reporter's privilege in federal criminal law. The flow of information under that regime has not been impeded. Watergate was exposed soon thereafter. Investigative reporting remains robust today.

I do not oppose a reporter's privilege. I oppose an absolute reporter's privilege. Absolute legal privileges are poor public policy; but lack of restraint on a prosecutor's power to destroy privileges is also poor public policy. Therefore, I recommend the Attorney General's Guidelines for subpoenaing reporters be made a statutory requirement.

There are no absolute privileges in common law as they can be vitiated by courts under certain circumstances. For example, the attorney-client privilege can be negated by

invocation of the crime-fraud exception if a court determines that a lawyer has wittingly or unwittingly been used by a client to further a crime. Quite routinely the U.S. Department of Justice seeks to nullify this privilege under Guidelines similar to those it uses to secure compelled testimony from reporters.

My law partner and I are personally familiar with the manner in which the Department has regarded its Guidelines on subpoenaing lawyers to testify against their clients. In our case, an out-of-control U.S. Attorney in Delaware, in a blatant attempt to get our law firm conflicted from representing our client, made up a crime, which has since been thrown out by a federal court. In trying to compel us to testify, this U.S. Attorney violated most of the Department's Guidelines. The U.S. Attorney already had the documents and testimony he subpoenaed from us. Further, the information he sought from us was not necessary for him to indict his case, as he had claimed in court papers, because we appealed the compulsion order and while that appeal was pending, he indicted the case without our testimony and with no statute of limitations problem. The Department's position was that the Guidelines created no enforceable legal rights. In short, in our experience the Department knows it need not comply with Guidelines, an attitude that raises serious questions about their being mere window dressing.

My recommendation that the Justice Department Guidelines governing subpoenas to reporters be enacted into law is because, just as in my attorney-client situation, they create no enforceable rights for the journalists. Congress should enact the Guidelines into law to create enforceable rights to ensure the kind of protection they were designed to provide. In considering whether some form of reporter's privilege is needed, this Committee should also exercise oversight that subpoenas to reporters are properly

supervised and administered. I can assure you, it has failed to do so for attorney-client subpoenas.

Such action by Congress would make those Guidelines enforceable by federal courts and balance the First Amendment with criminal justice needs. Because the Justice Department claims it routinely complies with these standards, it should not object to their being enacted into law.

I want to address Justice Powell's concurrence in Branzburg. I interpret it as dealing with bad faith conduct by a prosecutor. Justice Powell was not creating a balancing test. Rather, he was warning that "good faith" by a prosecutor was the sine qua non for subpoenas to reporters about confidential sources and information. If "bad faith" was suspected, he wanted a remedy for the journalist. I agree. Legislating the Guidelines would enable federal courts to probe the veracity of factual allegations used to justify intrusive subpoenas to reporters.

Let me add some important points about the process in which decisions about privileges are made by federal courts in a grand jury subpoena challenge. Unless you've been through it, you would have no idea of the issues. Whether it is a reporter or a lawyer whose testimony is being compelled, grand jury proceedings are ex parte. That means that only the judge and the prosecutor know the full factual basis allegedly justifying the prosecutor's effort to pierce the privilege. Counsel for the subpoenaed person is not permitted to know the facts the grand jury and prosecutor claim is the basis for the demand to nullify the privilege. As our lawyer observed to the Third Circuit, "I feel like I am hitting a piñata. I have no idea what's there."

This situation puts the subpoenaed person and his or her counsel at an intolerable disadvantage. It forces the judge to be not only the neutral arbiter, but also an advocate. Moreover, it deprives the judge of the information and judgment that come from the adversarial process. Thus, in the course of considering this pending legislation, this Committee should consider modifying federal rules to permit some type of access to ex parte information to the attorneys where a privilege is sought to be vitiated before a grand jury.

In addition, this Committee by law should require that any agency claiming a set of facts constituting a potential violation of law and in which the Government seeks to vitiate a privilege (either reporter or attorney-client) before a grand jury, provide sworn affidavits or sworn testimony about the essential facts forming the basis of the crime. Mere proffers of evidence or a prosecutor's representation would be insufficient evidence in this context. It is my understanding that the CIA in Judith Miller's case did not have to aver to critical elements of the Agent Identities Protection Act, but merely requested an investigation based on a boilerplate form. Before reporters were subpoenaed, at the least a court should have established that Valerie Plame was a covered person under the Act.

Another issue you might consider is crafting a uniform standard of proof to show there really is a crime when reporters or lawyers are subpoenaed. As I said, in our case the crime was so flimsy it was later dismissed by a court. The Courts are all over the place on articulating this standard. Should the prosecutor have to prove there is a crime with "reasonable certainty" or merely "some basis to believe"?

I want to add that some type of balance is also necessary in the civil context, although I have not personally had a civil case on this issue. But any person, in public

life or a private citizen, should be able to address false statements made to a reporter and published. If there is an absolute privilege in civil cases, neither the reporter nor the source has to carefully vet possible libelous or defamatory accusations.

In sum, compelled testimony of a reporter to identify a source or piece of evidence under certain circumstances may be necessary to prevent a miscarriage of justice. But such compelled testimony should proceed only after there has been a judicial proceeding applying statutory requirements based on the Justice Department Guidelines governing subpoenaing reporters. But more change than legislating Guidelines is needed. The judicial process also has issues that need to be addressed. I am recommending limited but crucial changes to balance the need to proceed with a good faith investigation.

28 C.F.R. § 50.10

CODE OF FEDERAL REGULATIONS
TITLE 28--JUDICIAL ADMINISTRATION
CHAPTER I--DEPARTMENT OF JUSTICE
PART 50--STATEMENTS OF POLICY
Current through October 6, 2005; 70 FR 58351

§ 50.10 Policy with regard to the issuance of subpoenas to members of the news media, subpoenas for telephone toll records of members of the news media, and the interrogation, indictment, or arrest of, members of the news media.

Because freedom of the press can be no broader than the freedom of reporters to investigate and report the news, the prosecutorial power of the government should not be used in such a way that it impairs a reporter's responsibility to cover as broadly as possible controversial public issues. This policy statement is thus intended to provide protection for the news media from forms of compulsory process, whether civil or criminal, which might impair the news gathering function. In balancing the concern that the Department of Justice has for the work of the news media and the Department's obligation to the fair administration of justice, the following guidelines shall be adhered to by all members of the Department in all cases:

(a) In determining whether to request issuance of a subpoena to a member of the news media, or for telephone toll records of any member of the news media, the approach in every case must be to 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.

(b) All reasonable attempts should be made to obtain information from alternative sources before considering issuing a subpoena to a member of the news media, and similarly all reasonable alternative investigative steps should be taken before considering issuing a subpoena for telephone toll records of any member of the news media.

(c) Negotiations with the media shall be pursued in all cases in which a subpoena to a member of the news media is contemplated. These negotiations should attempt to accommodate the interests of the trial or grand jury with the interests of the media. Where the nature of the investigation permits, the government should make clear what its needs are in a particular case as well as its willingness to respond to particular problems of the media.

(d) Negotiations with the affected member of the news media shall be pursued in all cases in which a subpoena for the telephone toll records of any member of the news media is contemplated where the responsible Assistant Attorney General determines that such negotiations would not pose a substantial threat to the integrity of the investigation in connection with which the records are sought. Such determination shall be reviewed by the Attorney General when considering a subpoena authorized under paragraph (e) of this section.

(e) No subpoena may be issued to any member of the news media or for the telephone toll records of any member of the news media without the express authorization of the Attorney General: Provided, That, if a member of the news media with whom negotiations are conducted under paragraph (c) of this section expressly agrees to provide the material sought, and if that material has already been published or broadcast, the United States Attorney or the responsible Assistant Attorney General, after having been personally satisfied that the requirements of this section have been met, may authorize issuance of the subpoena and shall thereafter submit to the Office of Public Affairs a report detailing the circumstances surrounding the issuance of the subpoena.

(f) In requesting the Attorney General's authorization for a subpoena to a member of the

news media, the following principles will apply:
(1) In criminal cases, there should be reasonable grounds to believe, based on information obtained from nonmedia sources, that a crime has occurred, and that the information sought is essential to a successful investigation--particularly with reference to directly establishing guilt or innocence. The subpoena should not be used to obtain peripheral, nonessential, or speculative information.
(2) In civil cases there should be reasonable grounds, based on nonmedia sources, to believe that the information sought is essential to the successful completion of the litigation in a case of substantial importance. The subpoena should not be used to obtain peripheral, nonessential, or speculative information.
(3) The government should have unsuccessfully attempted to obtain the information from alternative nonmedia sources.
(4) The use of subpoenas to members of the news media should, except under exigent circumstances, be limited to the verification of published information and to such surrounding circumstances as relate to the accuracy of the published information.
(5) Even subpoena authorization requests for publicly disclosed information should be treated with care to avoid claims of harassment.
(6) Subpoenas should, wherever possible, be directed at material information regarding a limited subject matter, should cover a reasonably limited period of time, and should avoid requiring production of a large volume of unpublished material. They should give reasonable and timely notice of the demand for documents.
(g) In requesting the Attorney General's authorization for a subpoena for the telephone toll records of members of the news media, the following principles will apply:
(1) There should be reasonable ground to believe that a crime has been committed and that the information sought is essential to the successful investigation of that crime. The subpoena should be as narrowly drawn as possible; it should be directed at relevant information regarding a limited subject matter and should cover a reasonably limited time period. In addition, prior to seeking the Attorney General's authorization, the government should have pursued all reasonable alternative investigation steps as required by paragraph (b) of this section.
(2) When there have been negotiations with a member of the news media whose telephone toll records are to be subpoenaed, the member shall be given reasonable and timely notice of the determination of the Attorney General to authorize the subpoena and that the government intends to issue it.
(3) When the telephone toll records of a member of the news media have been subpoenaed without the notice provided for in paragraph (e)(2) of this section, notification of the subpoena shall be given the member of the news media as soon thereafter as it is determined that such notification will no longer pose a clear and substantial threat to the integrity of the investigation. In any event, such notification shall occur within 45 days of any return made pursuant to the subpoena, except that the responsible Assistant Attorney General may authorize delay of notification for no more than an additional 45 days.
(4) Any information obtained as a result of a subpoena issued for telephone toll records shall be closely held so as to prevent disclosure of the information to unauthorized persons or for improper purposes.
(h) No member of the Department shall subject a member of the news media to questioning as to any offense which he is suspected of having committed in the course of, or arising out of, the coverage or investigation of a news story, or while engaged in the performance of his official duties as a member of the news media, without the express authority of the Attorney General: Provided, however, That where exigent circumstances preclude prior approval, the requirements of paragraph (l) of this section shall be observed.
(i) A member of the Department shall secure the express authority of the Attorney General before a warrant for an arrest is sought, and whenever possible before an arrest not requiring a warrant, of a member of the news media for any offense which he is suspected of having committed in the course of, or arising out of, the coverage or

investigation of a news story, or while engaged in the performance of his official duties as a member of the news media.
(j) No member of the Department shall present information to a grand jury seeking a bill of indictment, or file an information, against a member of the news media for any offense which he is suspected of having committed in the course of, or arising out of, the coverage or investigation of a news story, or while engaged in the performance of his official duties as a member of the news media, without the express authority of the Attorney General.
(k) In requesting the Attorney General's authorization to question, to arrest or to seek an arrest warrant for, or to present information to a grand jury seeking a bill of indictment or to file an information against, a member of the news media for an offense which he is suspected of having committed during the course of, or arising out of, the coverage or investigation of a news story, or committed while engaged in the performance of his official duties as a member of the news media, a member of the Department shall state all facts necessary for determination of the issues by the Attorney General. A copy of the request shall be sent to the Director of Public Affairs.
(l) When an arrest or questioning of a member of the news media is necessary before prior authorization of the Attorney General can be obtained, notification of the arrest or questioning, the circumstances demonstrating that an exception to the requirement of prior authorization existed, and a statement containing the information that would have been given in requesting prior authorization, shall be communicated immediately to the Attorney General and to the Director of Public Affairs.
(m) In light of the intent of this Section to protect freedom of the press, news gathering functions, and news media sources, this policy statement does not apply to demands for purely commercial or financial information unrelated to the news gathering function.
(n) Failure to obtain the prior approval of the Attorney General may constitute grounds for an administrative reprimand or other appropriate disciplinary action. The principles set forth in this section are not intended to create or recognize any legally enforceable right in any person.

9-13.410 Guidelines for Issuing Grand Jury or Trial Subpoena to Attorneys for Information Relating to the Representation of Clients

A. **Clearance with the Criminal Division.** Because of the potential effects upon an attorney-client relationship that may result from the issuance of a subpoena to an attorney for information relating to the attorney's representation of a client, the Department exercises close control over such subpoenas. All such subpoenas (for both criminal and civil matters) must first be authorized by the Assistant Attorney General for the Criminal Division before they may issue.

B. **Preliminary Steps.** When determining whether to issue a subpoena to an attorney for information relating to the attorney's representation of a client, the Assistant United States Attorney must strike a balance between an individual's right to the effective assistance of counsel and the public's interest in the fair administration of justice and effective law enforcement. To that end, all reasonable attempts shall be made to obtain the information from alternative sources before issuing the subpoena to the attorney, unless such efforts would compromise the investigation or case. These attempts shall include reasonable efforts to first obtain the information voluntarily from the attorney, unless such efforts would compromise the investigation or case, or would impair the ability to subpoena the information from the attorney in the event that the attempt to obtain the information voluntarily proves unsuccessful.

C. **Evaluation of the Request.** In considering a request to approve the issuance of a subpoena to an attorney for information relating to the representation of a client, the Assistant Attorney General of the Criminal Division applies the following principles:

- The information sought shall not be protected by a valid claim of privilege.
- All reasonable attempts to obtain the information from alternative sources shall have proved to be unsuccessful.
- In a criminal investigation or prosecution, there must be reasonable grounds to believe that a crime has been or is being committed, and that the information sought is reasonably needed for the successful completion of the investigation or prosecution. The subpoena must not be used to obtain peripheral or speculative information.
- In a civil case, there must be reasonable grounds to believe that the information sought is reasonably necessary to the successful completion of the litigation.

- The need for the information must outweigh the potential adverse effects upon the attorney-client relationship. In particular, the need for the information must outweigh the risk that the attorney may be disqualified from representation of the client as a result of having to testify against the client.

- The subpoena shall be narrowly drawn and directed at material information regarding a limited subject matter and shall cover a reasonable, limited period of time.

See also the Criminal Resource Manual at 263.

D. **Submitting the Request.** Requests for authorization are submitted on a standardized form to the Witness Immunity Unit, Office of Enforcement Operations, Criminal Division. (This form, "Request for Authorization To Issue A Subpoena To An Attorney for Information Relating To Representation of A Client," is set out in the Criminal Resource Manual at 264). When documents are sought in addition to the testimony of the attorney witness, a draft of the subpoena *duces tecum* must accompany the completed form.

The completed form and draft subpoena may be mailed to the Witness Immunity Unit, 1001 G Street, N.W., Room 945 West, Washington, D.C. 20001, or faxed to (202) 514-1468. Because of the sensitive nature of these requests, the Witness Immunity Unit will not accept completed forms and draft subpoenas over e-mail. The Witness Immunity Unit will respond to questions concerning attorney subpoenas by telephone, (202) 514-5541.

E. **No Rights Created by Guidelines:** These guidelines are set forth solely for the purpose of internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal, nor do they place any limitations on otherwise lawful investigative or litigative prerogatives of the Department of Justice.

263 Common Factual Settings Involving Subpoenas to Attorneys

The Department's policy applies whenever a subpoena will issue for information relating to representation of a client. Accordingly, authorization must be obtained even for the "friendly subpoena" where the attorney witness is willing to provide the information, but requests the formality of a subpoena.
Departmental authorization is not required in every instance in which a subpoena involves an attorney. There are several common situations in which it is not necessary to seek authorization before issuing a subpoena:

1. A subpoena directed to a bank for the records of an attorney's trust account does not require authorization because the subpoena is not directed to the attorney, and the information maintained at the bank is not a privileged attorney-client communication.

2. While a subpoena which seeks client billing records requires authorization, a subpoena which seeks internal law office business documents (pay records of law office employees, law firm tax returns, etc.) does not, because it relates to the day-to-day business operations of the law firm, and not to the representation of a client.

3. A subpoena seeking information regarding the attorney's personal activities, such as his/her purchase of real estate in a personal, and not representative capacity, does not require authorization.

4. A subpoena which seeks corporate business information, and which is directed to an attorney who serves as a corporate officer, does not require authorization. To make clear that the attorney is being subpoenaed in his/her capacity as a corporate officer, and that no attorney-client information is being sought, the subpoena should be addressed to "John [Jane] Doe, in his/her capacity as secretary of the XYZ Corporation."

264 Form -- Request for Authorization To Issue A Subpoena To An Attorney for Information Relating To Representation of a Client

Requests for Authorization To Issue A Subpoena To An Attorney for Information Relating To The Representation of A Client

To: Edgar N. Brown, Chief
Witness Immunity Unit
Criminal Division
Room 1216
1301 New York Ave., N.W.
Washington, D.C. 20005
Phone No. (202)514-5541
Telefax No. (202)514-1468

From:

Phone No.
Telefax No.

1) Name of Attorney Witness

2) District:

3) Date by which subpoena needed _____

4) Nature of Subpoena: ( ) Trial ( ) Grand Jury

5) Name of Case or Investigation:

6) Nature of Case:

( ) Criminal
( ) Civil _____Tax _____ Forfeiture

_____Other

_____

7) (a) Name of Client:

(b) Status of Client:

( ) Defendant in Criminal Case
( ) Defendant in Civil Case
( ) Subject
( ) Target of Grand Jury Investigation
( ) Other _____

8) Relationship of attorney witness to subjects or defendants or targets(specifically indicate whether the witness currently represents any defendants or subjects in the matter in which the subpoena is to be issued):

9) Information sought by the subpoena (if subpoena calls for testimony, indicate the nature of the anticipated testimony):

10) Summary of case or proceeding (include a citation to the charges pending or under investigation in a criminal case):

11) Relevancy of the information sought to the case or proceeding:

12) Factual statement of the need for the information to the successful completion of the case or proceeding:

13) Are there alternative sources for the information?

( ) Yes ( ) No

14) If there are alternative sources for the information, have attempts been made to obtain information from them:

( ) Yes, but with no success.

( ) Yes, with success. Explain below why the subpoena is necessary.

( ) No. Explain below why the alternative sources have not been pursued.

15) Statement as to adverse impact on attorney-client relationship:

(a) Has the witness been asked to supply the requested information voluntarily?

( ) Yes ( ) No Explain:

_____

_____

_____

(b) Will witness be disqualified from representation of the client as a result of the subpoena being issued and enforced?

( ) Yes ( ) No Explain:

_____

_____

_____

(c) Is witness a target or subject of any investigation or is there a basis to believe that the witness will become one:

( ) Yes ( ) No If yes, Explain:

_____

_____

_____

16) Basis for belief that information is not privileged:

17) Requestor has considered applicable rules of professional conduct.

( )Yes ( ) No

18) Attach copy of subpoena.

_____

Signature of Requestor

_____

Signature of United States Attorney

9-13.400 News Media Subpoenas -- Subpoenas for News Media Telephone Toll Records -- Interrogation, Indictment, or Arrest of Members of the News Media

Procedures and standards regarding the issuance of subpoenas to members of the news media, subpoenas for the telephone toll records of members of the news media, and the interrogation, indictment, or arrest of members of the news media are set forth in 28 C.F.R. § 50.10.

It is the Department's policy to protect freedom of the press, the news gathering function, and news media sources. Therefore, all attorneys contemplating the issuance of such subpoenas, the interrogation of a member of the new media, or the initiation of criminal proceedings against a member of the news media should be aware of the requirements of 28 C.F.R. § 50.10.

Except in cases involving exigent circumstances, such as where immediate action is required to avoid the loss of life or the compromise of a security interest, the express approval of the Attorney General is necessary prior to the interrogation, indictment, or arrest of a member of the news media for an offense which he is suspected of having committed during the course of, or arising out of, the coverage or investigation of a news story, or committed while engaged in the performance of his official duties as a member of the news media. The Attorney General's authorization is also required before issuance of any subpoena to a member of the news media, except in those cases where both a media representative agrees to provide the material sought *and* that material has been published or broadcast. In addition, the Attorney General's permission is required before the issuance of a subpoena for the telephone toll records of a member of the news media. Failure to obtain the pri or approval of the Attorney General, when required, may constitute grounds for disciplinary action.

Whenever the government seeks the Attorney General's authorization pursuant to 28 C.F.R. § 50.10 in a case or matter under the supervision of the Criminal Division, the Policy and Statutory Enforcement Unit of the Office of Enforcement Operations should be contacted at (202) 514-0856. A memorandum or letter requesting Attorney General authorization should summarize the facts of the prosecution/investigation and describe attempts to obtain the voluntary cooperation of the news media through negotiation. Specifically address and elaborate regarding those factors listed at 28 C.F.R. § 50.10 (f)(1-6) or (g)(1-4) as are applicable to the case or matter presented.

In cases or matters under the supervision of other Divisions of the Department of Justice, the appropriate Division should be contacted.

WRITTEN TESTIMONY: Anne Gordon: Philadelphia Inquirer

Mr. Chairman, members of the committee, thank you for allowing me to share my experience with you today as you consider this important legislation. I am not in the habit of coming before this esteemed group to urge changes in federal law. As a journalist, I work hard to keep my beliefs out of public life. But you have asked me here today to speak on behalf of journalism; a profession I hold dear and believe is bedrock to a free and open society.

I have traveled here from Philadelphia, a city with roots deep in the days of our nation's founding. And so I am fortunate to be able to walk past the site of Ben Franklin's home and even pause at his grave to reflect on what it must have been like to help craft a constitution that is such a marvel to behold two centuries later. I can imagine a chain of hard-working men and women who believed as I do that a free press is a living, breathing demonstration of democracy. Most of the people in that chain of life were not journalists. They were judges and lawyers, and priests and rabbis, electricians like my father, housewives like my mother, legislators and immigrants who now call this country home because of the freedom it offers to all, especially those who want to speak out against injustice.

But despite the fact that generation after generation has added its voice to those of our founding fathers in support of those who dare to speak out, there is today renewed conflict among the government, the judiciary and the press. I urge you to put this conflict to rest.

By passing Sen. Richard Lugar and Sen. Mike Pence's bill, the Free Flow of Information Act which creates a federal shield law, you have the opportunity to protect the press when it exposes secrets that benefit the public and national security. The Justice Department has told you this bill is bad policy and a threat to law enforcement and national security. The implication is that when the press tells its readers, as the Inquirer recently did, for example - that nearby refineries are vulnerable to attack and accidents that would imperil hundreds of thousands, it is threatening national security. The threat comes not from inadequate protection of these sites; the Justice Department seems to reason, but from the use of confidential sources to reveal these types of stories. In fact, NOT publishing this material threatens national security.

Some of the information needed to tell such stories does indeed come from confidential sources - sources that would not speak out, leak documents, and point the way to change if it were not for the assurance of the Inquirer's journalists that they will be protected from reprisals.

If you think that fear is mere rhetoric, let me give you some examples. The fear of exposure exists at all levels, stories large and small from those involving the government to those involving private industry and our most sacred institutions. Consider the recent case of a local school board that stood accused by a whistleblower of misusing tax money. That whistleblower came to the Inquirer seeking help to right a wrong. She was

frightened at the potential consequences of her actions but enraged by the misuse of funds. We gave her anonymity and reported the story. But the school board president has since been relentless in trying to find out who the Inquirer's source was for the story, repeatedly, publicly asking her and others if they talked to our reporters. Or consider the victims and priests who spoke to the Inquirer about the sex scandals that have rocked the Catholic Church in Philadelphia well before the local DA began her investigation. The victims feared that if their names were known, they would be further humiliated. The priests feared they would be shunned by others for speaking out.

These are not cases involving political intrigue in Washington D.C., but real, daily examples of wrong doing exposed because of the promise to protect a courageous individual who wants to see justice done. The debate over a federal shield law has been warped by the cycle of political leaks in Washington, but the reality is that those sorts of confidentiality discussions are a minor part of the larger field of reporting that uses confidential sources. It is also important to note that very often the confidential source is merely the starting point in an investigation – but without the promise at the onset, the fuller story would never be told.

A few years ago, the Inquirer reported widespread mistreatment of victims by the very Philadelphia police they had sought help from after a rape. The Inquirer relied, in part, on information from confidential sources - people with knowledge of Police Department practices who were afraid of retaliation if they spoke out openly. As a result of that series of stories, new investigations were opened into rapes and criminals were brought to justice. The police department changed its way of investigating and reporting rapes as a direct result of the stories. The public was served.

Just recently, well-placed sources helped us to report that a nationwide criminal investigation is being conducted by federal authorities into tens of thousands of legal claims asserting heart damage from the former diet drug known as fen-phen. Earlier this year, we reported that a shortage of armored vehicles was endangering American troops – a shortage largely the result of Pentagon miscalculations and not industrial shortfalls as had been claimed. We received some help from documents and other information forwarded to us on a confidential basis by sources in the federal government. The public's interest was served when – as a result of our stories – manufacturing was increased.

Last year, in the United States, more than two dozen reporters have been subpoenaed or questioned about their confidential sources in federal court cases. Six journalists from across the country were jailed or fined for refusing to disclose a source. That number may seem small to you, but consider that action against these six individuals sent doubt into the minds and spines of whistleblowers and journalists alike.

You might be asking yourselves why you should pass a federal shield law. Today, 31 states and the District of Columbia provide shield laws that protect journalists from testifying about confidential sources and 18 other states have recognized reporter's privilege as a result of judicial decisions. Why does the federal government need to get

involved if states have already acted? First of all, a significant number of states have no shield laws. More importantly, even when there are state shield laws those laws offer, little, if no help, in federal proceedings. Confidential sources are left without any protection other than the hope that the journalist will be willing to violate a court order to testify. And, having no shield in federal proceedings undermines the state shields that do exist.

Let me give you an example. The Pennsylvania Shield law is absolute. Confidential sources are protected under all circumstances. Thus, there is a certainty that the promise of confidentiality between a source and a reporter is protected and can not be compelled. This privilege applies to anyone employed by a newspaper, press association, magazine or television station who is involved in the process of gathering, procuring, covering, editing, or publishing news.

Because Pennsylvania's Shield Law is absolute, it allows reporters' and sources' expectations to be firmly set: they will be protected. As a result, sources are more likely to provide information when they know their identities cannot be forced out into the open.

BUT the LACK of a federal shield law destroys that certainty and undermines the right-minded policy of the Pennsylvania legislature. Without a federal shield law, a source cannot be confident that his or her identity will be protected as Pennsylvania law contemplates. If a journalist is subpoenaed in a federal court, even though the reporting was done in Pennsylvania, the journalist can be ordered to disclose a confidential source—something that the Pennsylvania legislature has otherwise prohibited in our Commonwealth. Rather than having confidence that his identity will be protected, the source is left knowing that confidentiality is not guaranteed because the journalist in federal court may be left with the Hobson's choice of violating a court order and going to jail or breaking a promise.

Giving the important function of confidential sources, their identities need to be given the highest protection. While the Justice Department fears that having this protection, undercuts law enforcement efforts, the reality is that Shield Laws have existed in many states for many years, including in Pennsylvania, without jeopardizing the security of the nation. Indeed, I know of no case where the disclosure of a confidential source would have protected the citizens of either my state or our nation. On the other hand, disclosure of such sources' identity, will, indeed, jeopardize the public interest and security because concerned individuals, who fear for their own safety, protection and well being, will be too afraid to bring information to light.

The Free Flow of Information Act that is before you today does not allow for absolute protection - which is why it has been supported by all the major news organizations in this country and the American Bar Association. It allows for disclosure when disclosure of a source would, in fact, be necessary to prevent imminent and actual harm to this nation's security. Therefore, the security concerns have been addressed.

The very act of subpoenaing an Inquirer journalist for notes, the names of sources, or eye witness testimony disrupts the newsgathering process and chills the flow of information to the public. Newspapers are not another arm of the government. When the government subpoenas the work of reporters and uses that work or testimony to convict someone, it undermines the public's view of newspapers as neutral observers of events. The primary job of a free press is to serve as a check on the abuses of government. Not to help convict or indict. And the Free Flow of Information Act, in addition to protecting confidential sources, recognizes those interests and assures that the journalist, even when confidential sources are not involved, will not be the first witness called, but rather the one when no else is available and the information is critical to the case. This protection is essential to maintaining the proper function of journalists in our society.

In sum, we can all – each of us – understand why a promise of confidentiality is crucial to disclosure. How many of us have simply asked a friend for a vow of confidence? Our lawyers are bound by confidentiality, our rabbis and our priests, our doctors as well. Our society respects these promises. Whistleblowers need to be given the same assurances – the promise that the Inquirer would stand beside them as they exposed wrongdoing. These are never promises made lightly or without deliberation, but rather promises made because there was fear and the fear was made to disappear when The Inquirer gave its word. What is most important here is that the wrongdoing was exposed. Wrongdoers were punished. Taxpayers no longer had to fear that the school board was playing with their money instead of helping their children learn. I could give you a hundred examples. But I don't need to. You read about them every day in the newspaper. You see them on TV and hear about these promises on the radio – but you may not know that what you are hearing about is the promise of confidentiality that one journalist made to a man or woman who had a story to tell. When we hear, as a nation, about Watergate, or the fact that tobacco companies worked to make cigarettes more addictive, or that Enron was a financial nightmare, we are hearing about promises made and kept – about a pact with our forefathers that this nation would respect a free press.

I urge you today, to pass the Free Flow of Information Act.

Pass this bill so that all Americans understand that confidential newsgathering is an important part of a free press and that journalists who protect their sources are not criminals. Pass this law because the lack of clarity at the federal level undercuts state law.

Statement of Senator Patrick Leahy,
Ranking Member, Senate Judiciary Committee
Hearing on "Reporters' Shield Legislation: An Additional Investigation of Issues and Implications"
October 19, 2005

I am pleased the Committee is holding a second hearing on this important matter. Members of the Committee were surprised and disappointed when the Deputy Attorney General cancelled his appearance on the morning of the July 20 hearing. Senator Feinstein and I sent a letter to the Chairman asking for this opportunity to hear from the Administration. We appreciate his agreement to schedule a follow-up hearing, but I was very disappointed to learn Monday that the starting time of this morning's hearing was moved back, creating a number of scheduling conflicts for me. Nonetheless, I want to acknowledge the serious effort the Chairman is making to address this issue. I appreciate that and I hope that we can continue to work together and with other members of the Senate to develop legislation.

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 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.

The witnesses at today's hearing represent a wide range of views. We will hear from a U.S. Attorney and two former Federal prosecutors who are skeptical of providing a privilege for reporters. We will also hear from representatives of the news media, who

rely on sources to investigate and publish or broadcast the news. The free flow of information is a cornerstone of our democracy, and our independent press is the envy of the world. I look forward to learning from the witnesses' broad range of experience and expertise, and expect that we will have a healthy debate.

# # # #

TESTIMONY OF JUDITH MILLER

Reporter, The New York Times

Before the Senate Judiciary Committee of the U.S. Senate, October 19, 2005

Good morning, I am Judith Miller, a reporter for The New York Times. That statement, in and of itself, is extraordinary. Reporters don't usually testify at Congressional hearings. But the circumstances that in July forced me to spend 85 days in the Alexandria Detention Center in Virginia highlight the urgent need for a Federal shield law to protect journalists and their sources.

I am here today to urge you to enact the Free Flow of Information Act so that other journalists will not be forced, as I was, to go to jail to protect their sources. I'm here because I hope you will agree that an uncoerced, uncoercable press, though at times irritating, is vital to the perpetuation of the freedom and democracy we so often take for granted.

After almost three months in jail, I managed to secure both a personal letter and a telephone call from my source, I. Lewis Libby, and equally critically, an agreement with the prosecutor to focus his questioning on my main source and the Plame/Wilson affair. Had I not gotten both agreements, I would not have testified. I would still be in jail, as I was during your last hearing on this measure.

Yes, the legal machinations in my case were enormously complex, but the principle I was defending was fairly straightforward: once reporters give a pledge to keep a source's identity confidential, they must be willing to honor that pledge and not testify unless the source gives explicit, personal permission for them to do so, and they are able toi protect other confidential sources.

Eventually, when the fuss over my case dies down, I hope journalists and politicians will begin examining the real issues at stake here, especially the question of when and under what circumstances a waiver can be considered voluntary. Struggling with such a weighty

question alone in jail was hardly ideal. I did the best I could under rather challenging circumstances.

Confidential sources are the life's blood of journalism. Without them, whether they are in government, large or small companies, or in non-profit organizations, people like me would be out of business. As I painfully learned while covering intelligence estimates of Saddam Hussein's weapons of mass destruction, we are only as good as our sources. If they are wrong, we will be wrong. And a source's confidence that we will not divulge their identity is crucial to his or her readiness to come to us with allegations of fraud or abuse or other wrongdoing, or even a dissenting view about government policy or business practices that the American public may need to know.

If journalists cannot be trusted by sources to guarantee confidentiality, then journalists cannot function and there cannot be a free press. Those who need anonymity are not only the poor and the powerless, those whose lives or jobs might be in jeopardy if they speak up publicly, but even the powerful. All are entitled to anonymity if they are telling the truth and have something of importance to say to the American people. Reporters rarely know when they extend a pledge of confidentiality to a good-faith source what the impact of the information being provided will be.

Our history is filled with examples of articles that never would have been written without confidential sources. Last Saturday in Los Angeles, I presented an award to the grandson of Mark Felt, the former deputy director of the F.B.I. who was critical in helping Bob Woodward and Carl Bernstein of the Washington Post turn what was originally denigrated as a third-rate burglary into a tale of corruption and malfeasance that brought down a president. Woodward and Bernstein felt so strongly about their pledge to their source to safeguard his confidentiality they passed up a huge scoop by letting Mr. Felt's family announce to another person the secret they had held for over 30 years: that he, in fact, was, Deep Throat.

Few of us reporters can claim such a famous exclusive. But I know from my 30 years in national security and intelligence reporting that confidential sources in this area, though traditionally the most press-shy and skittish of contacts, are indispensable to government accountability and the people's right to know. I would point to just two examples: in 2000, I relied heavily on such sources in co-writing a series of articles published in January 2001 that described the Clinton Administration's growing concerns about the then still underappreciated military Islamic group, Al Qaeda, which was openly and doggedly pursuing nuclear, biological and chemical weapons. That series, which won one of seven Pulitzer Prizes for The New York Times that year, could never have been written without the pledges of confidentiality I gave to the officials who were so worried about Al Qaeda -- all too presciently, alas -- that they were willing

to discuss classified information with me to call attention to how relatively little time and money were being spent countering what they considered the gravest of threats to our nation.

Nor could "Germs," which I co-authored with two Times colleagues, Stephen Engelberg and William Broad, have been written without confidential sources. That book, which discussed what our government and others were doing to counter the growing menace of biological warfare and terrorism, was published a few days before the Sept. 11 attacks and less than a month before the anthrax letter attacks killed five, sickened 17, and put 30,000 people on antibiotics.

Admittedly, the situation that sent me to jail was not as clear-cut – it was not the case of a government or corporate whistleblower, but an all too familiar case of Washington politics. Yet the principle, that confidential sources must be protected, must apply in all cases: indeed, one person's whistleblower is another 's snitch. Some have argued that the individual in my case did not deserve confidentiality because his motives were not pure. But whistleblowers or those who engaged in spinning reporters are not usually saints, and journalists should not demand that they be so. While reporters must try to understand why someone is telling them something, what counts far more than their motivation is the truth and significance of what they are saying. Moreover, when offering to keep a source's identity confidential, journalists seldom know in advance whether the information being provided will turn out to be insignificant, or even sufficiently strong to produce a story, or of major national importance. Thus, promises of confidentiality once made, must be respected unless the source specifically and personally waives that privilege, or the public's right to know will suffer.

What rankles me the most is that in the two place I live and work, New York and the District of Columbia, there is absolute protection for confidential sources. In fact, as this panel knows, all but one state – Wyoming – have enacted shield laws or assured such protection through court rulings. But such protection of the public's right to know does not exist at the Federal level because of a more than 30-year old Supreme Court ruling that has spread confusion in Federal courts and news bureaus throughout the land. Because of that judicial chaos, reporters who ought to be able to rely on a state's law, may not be able to do so. Sometimes, through chance, a case may end up in a Federal rather than a state court. Not only does this lead to a lack of legal predictability and no real basis on which to govern one's behavior, it is also fundamentally unfair. That is yet another reason why a Federal Shield Law is so essential. The Federal government should finally catch up with the will of the states, all but one of which now provide absolute or qualified protection for reporters and their sources. Most of these laws have been adopted in the 30 years since the Supreme Court's decision

A second reason why this bill is so urgently needed is that in the post 9/11 era, dramatically increased amounts and types of information are being classified as secret, and hence, are no longer available for public review. Last year, more documents were classified secret and top secret than ever before in American history. In such a climate, confidential sources, particularly in the national security and intelligence areas, are indispensable to government accountability.

Journalists are increasingly being subjected to Federal subpoenas since 9/11. More than two dozen reporters have been subpoenaed in the past two years and are in danger of going to jail. If current trends prevail, the Alexandria Detention Facility may have to open an entire new wing to house reporters.

With respect to the specifics of the proposed Bill, I would just say that I support the exception which has been drafted by its sponsors that would exempt "imminent and actual harm" to the national security, even if it is extended to potential bodily harm. I was an embedded reporter in Iraq in one of the most sensitive missions. I do not underestimate the potential jeopardy facing American soldiers and those who work with them if secret information is disclosed prematurely. But more than 30 states attorneys general, in a brief supporting the reporter's privilege, that the protection of confidential sources was paramount. And not one mentioned an instance in which a hostage or person at risk died or was injured because a journalist insisted on protecting her source, or a prosecution that failed because of a state shield law.

However, while I favor that exception, I would very strongly oppose further amendments to the bill that would exempt any investigation into past criminal speech or activity, usually a leak. For one, most federal subpoenas from prosecutors involve potentially criminal disclosures. The leakers in the Balco case in San Francisco violated grand jury secrecy rules or laws, but their information about steroid use in professional baseball gave Congress the facts and impetus to start hearings and make needed reforms. Daniel Ellsberg arguably violated the Espionage Act, but in retrospect it is clear that The New York Times did well by publishing the Pentagon papers and giving greater historical context to the reasons why we were in Vietnam.

Such leaks, be they criminal or not, often serve a public good. And it is also usually unclear early on whether the leaker is violating a law. Thus, an exception for criminal activity would be unworkable, since at the time a subpoena is issued to a reporter a decision would have to be made on whether the underlying crime had in fact occurred.

Finally, reporters should not be an arm of the law; if government employees illegally leak information, it is up to government, with all its coercive power, to discover the culprit, not a reporter whose primary duty is to inform the public.

In conclusion, I would just say that my 85 days in prison were tempered by the letters I received from friends and supporters throughout the country, and indeed the world. Some of the letters that touched me most were those from journalists and writers overseas, many of whom have always looked to America as a beacon of press freedom. Those writers simply could not understand how a reporter doing her job -- much less a reporter who had never written wrote an article on this story -- could be imprisoned for keeping her word. Foreigners and Americans alike have been startled and disappointed at the seeming contradiction between our great tradition of a free press and jailing a reporter who was trying to protect a source so that she could continue publishing, as my paper would say, "all the news that's fit to print."

In jail, I had to draft some standards that I felt would help me and perhaps other journalists determine when, and under what circumstances, we could conclude whether a source was truly willing to let a reporter identify him or her and testify before a grand jury. But I would hope that you will act to prevent other journalists from having to conduct such metaphysical debates about free will and what constitutes a source's waiver of confidentiality while in jail.

What has been missed in much of the furor over my case, paraphrasing Paul Levinson, a Fordham University professor, is that the recent hand-wringing should not prevent us from recognizing the most enduring truth: reporters, even flawed reporters, should not be jailed for protecting even flawed sources. When the dust clears, I hope that journalists and newsrooms will be emboldened, not confused or angered by what I have done. And I hope that you will help ensure that no other reporter will have to choose between doing her small bit to protect the First Amendment and her liberty.

Thank you.

MARCH 2005

The New York Times

JUDITH MILLER – Investigative Reporter and Senior Writer

Judith Miller is an author and Pulitzer Prize-winning investigative reporter at The New York Times.

In 1977 she joined the paper's Washington Bureau, where she covered the securities industry, Congress, politics, and foreign affairs, particularly the Middle East. In 1983, she became the first woman to be named chief of The Times' bureau in Cairo, Egypt, responsible for covering the Arab world. In 1986, she became the Paris correspondent, traveling throughout Europe and North Africa. In 1987 and 1988, she returned to Washington as the Washington Bureau's news editor and deputy bureau chief.

In May, 1989, she became co-coordinator of a newly created unit to enhance the paper's coverage of radio, television, advertising, and publishing. In October, 1990, she was named special correspondent to the Persian Gulf crisis, and after that, The Times' Sunday Magazine's special correspondent.

Before joining The Times, Ms. Miller was Washington bureau chief of The Progressive, a monthly, contributed regularly to National Public Radio's "All Things Considered," and wrote articles for many publications.

Born in New York City, she grew up in Miami and Los Angeles, graduating from Hollywood High School. She attended Ohio State University, Barnard College and the Institute of European Studies at the University of Brussels. She has a bachelor's degree from Barnard and a master's from Princeton University's Woodrow Wilson School of Public and International Affairs.

Ms. Miller has written four books and contributed chapters to several others. Her most recent book is "Germs: Biological Weapons and America's Secret War." (Simon & Schuster, 2001) Written with two Times colleagues, the book topped the best seller's list in the wake of 9/11 and the anthrax letter terrorist attacks. Her previous book, "God Has Ninety-Nine Names," (Simon & Schuster, 1996) explores the spread of Islamic extremism in ten Middle Eastern countries, including Israel and Iran. In 1990, her first book was published: "One, By One, By One," (Simon & Schuster) a highly praised account of how people in six nations have distorted the memory of the Holocaust. That same year, she co-authored "Saddam Hussein and the Crisis in the Gulf," (Times Books, 1990) the first comprehensive account of the Gulf crisis and biography of the man behind it. That, too, was a best-seller which topped The Times Best Seller list during the 1991

Gulf war.

In 2002, Judith Miller was part of a small team that won a Pulitzer Prize for "explanatory journalism" for her January, 2001 series on Osama bin Laden and Al Qaeda. That same year, she won an Emmy for her work on a Nova/New York Times documentary based on articles for her book, "Germs." She was also part of the Times team that won the prestigious DuPont award that year for a series of programs on terrorism for PBS's "Frontline." She has discussed a wide range of national security topics on such programs as "Sixty Minutes," Oprah Winfrey, CNN, ABC's "Night Line" and "Good Morning America," NBC's "Today" show, David Letterman, and "The Charlie Rose Show." She lectures on the Middle East, Islam, terrorism and other national security topics.

She lives in New York with her husband, Jason Epstein, a publisher and writer.

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Department of Justice

STATEMENT

OF

CHUCK ROSENBERG
UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF TEXAS
DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

REPORTERS' PRIVILEGE LEGISLATION: ISSUES AND IMPLICATIONS
S. 1419, THE FREE FLOW OF INFORMATION ACT OF 2005

PRESENTED ON

OCTOBER 19, 2005

VerDate Nov 24 2008 10:24 Feb 27, 2009 Jkt 046829 PO 00000 Frm 00113 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\46829.TXT SJUD1 PsN: CMORC

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Introduction

Good Morning. Chairman Specter, Ranking Member Leahy, and Members of the Committee, I am pleased to appear before you to discuss the Justice Department's concerns regarding S. 1419, the ''Free Flow of Information Act of 2005.''

The Department of Justice recognizes that the media play a vital role in our society. The freedom of the press is enshrined in the Bill of Rights, and its importance is demonstrated by its place as the First Amendment to the Constitution. The press plays a crucial role in keeping the American people informed of what is happening overseas, in Washington, and in their hometowns. Moreover, reporters are critical to the Department's efforts to prevent crime. Every day across the country, reporters file stories on the important work of the Department and thereby help to deter others from committing crimes in the future.

S. 1419 would limit the circumstances and manner in which compulsory process may be issued to members of the media. It would cover compulsory process issued by any Federal entity (including a subpoena issued by any Federal court); therefore, it would apply in a wide variety of litigation settings. The Department does not wish to comment at this time regarding the efficacy of such legislation in the context of private litigation in which the Department is not a party, and in which the Department of Justice guidelines would not apply. Rather, my testimony concerns the legitimate investigative ways in which this legislation could significantly interfere with the Government's own activities in an unnecessary and harmful way.

The Department of Justice understands the concerns that underlie this legislation, and we recognize the importance of striking a balance between the interests of

the American people in bringing criminals to justice and the needs of a free press. Current law and Department of Justice regulations governing the issuance of subpoenas to reporters and media organizations reflect an appropriate balance of those competing interests. Respectfully, as presently drafted, S. 1419 does not.

The Department opposes the bill as presently drafted primarily because the bill would create serious impediments to the Department's ability to effectively enforce the law, fight terrorism, and protect the national security. The Department's concerns center on five main aspects of the bill.

First, the bill imposes inflexible, mandatory standards in lieu of existing voluntary guidelines that can be adapted to changing circumstances. The events of the past four years have shown that law enforcement must be more, rather than less, flexible to meet the challenges posed by international terrorist organizations and sophisticated criminal enterprises.

Second, the bill would bar the Government from obtaining information about media sources even in the most urgent of circumstances affecting the public's health or safety except in a very narrow category of cases involving ''imminent and actual harm to national security.'' This is simply too late and too narrow. Many significant, deadly crimes have nothing to do with national security, and if the harm is actual and imminent, a subpoena for source information that is approved consistent with the proposed approach will likely be too late to be helpful.

Even in cases involving harm to the national security, the Government could obtain information about media sources only if it were necessary to *prevent* imminent and actual harm to the national security. If harm to the national security already had been done, the Government would not be able to obtain the information. This may make it difficult, if not impossible, to obtain vital information on how national security information was disclosed and to whom it was disclosed.

For instance, in the case of the analysis and assessment of damage to national security, where information revealed through unauthorized disclosure originated can be important in determining what has been put as risk. Not all material ''leaked'' in a given unauthorized disclosure may be published, but nonetheless may be shared with additional parties, further compounding the damage to national security. Damage also is not always temporally confined to

a given point in time; sometimes repeated disclosures magnify the impact by serving as corroboration, especially if they come from different sources.

Third, the bill would give courts the authority to evaluate requests for subpoenas to members of the media in an on-going criminal investigation and place an unreasonable burden on the Government to explain to the court, in a public evidentiary proceeding, the reasons it requires non-source information. Such a procedure would pose serious threats to grand jury secrecy and the confidentiality of on-going criminal investigations.

Fourth, the bill would bar not only subpoenas issued to reporters for their sources but also any subpoenas issued to certain third parties that reasonably could be expected to lead to the discovery of the identity of a source. The standard is impractical and would effectively prevent law enforcement from obtaining material that has nothing to do with media sources.

Fifth, the Department objects to the broad definition of "covered person" in section 5(2) that, *inter alia*, encompasses foreign media and foreign news agencies (including government-owned and -operated news agencies), some of which are hostile to the United States and some of which can, and have, acted in support of foreign terrorist organizations (a reporter of the Qatarian news network Al-Jazeera was recently convicted in Spain for acting as a financial courier for Al-Qaeda). The mere fact that such foreign media entities and their reporters may operate primarily abroad does not mean that they do so exclusively, or that their involvement in activity in the United States that may warrant the use of Federal compulsory process against them is a merely hypothetical prospect. Extending special privilege and legal protections to such entities in U.S. criminal and civil law enforcement proceedings, as this bill does, is entirely unwarranted and inconsistent with the Department's law enforcement mission and the war on terrorism.

Such an expansive definition of ''covered person'' could unintentionally offer a safe haven for criminals. As drafted, the definition invites criminals to cloak their activities under the guise of a ''covered person,'' so as to avoid investigation by the Federal government. The overbroad definition of a ''covered person'' could be read to include any person or corporate entity whose employees or corporate subsidiaries publish a book, newspaper, or magazine; operate a radio or television broadcast station; or operate a news or wire service. Additionally, the

definition arguably could include any person who sets up an Internet ''blog'' or any other activity to ''disseminate information by print, broadcast, cable satellite[, etc.],'' as set forth in the bill.

More generally, the Department does not believe that legislation is necessary because there is no evidence that the subpoena power is being abused by the Department in this context. The Department prides itself on its record of objectivity in reviewing press subpoenas, and any legislation that would impair the discretion of the Attorney General to issue press subpoenas - or to exercise any other investigative options in the exercise of the President's constitutional powers - is unwarranted. For the last 33 years, the Department of Justice has authorized subpoenas to the news media only in a small number of cases involving serious allegations of criminal conduct. Since 1991, 3.7% of the media subpoena requests processed by the Criminal Division for Attorney General approval were for confidential source material.

The guidelines set out in the Department's regulations strike the appropriate balance between the need for evidence in a criminal investigation and the interests of a free press. Specifically, 28 C.F.R. § 50.10 already requires 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. After ''all reasonable attempts'' have been made to obtain information from alternative sources and negotiations for voluntary production have failed, a prosecutor may seek permission to issue a subpoena to the media if there are ''reasonable grounds to believe, based on information obtained from nonmedia sources, that a crime has occurred, and that the information sought is essential to a successful investigation--particularly with reference to directly establishing guilt or innocence.'' Ordinarily, this requires the prosecutor to write a detailed memorandum and obtain the approval of the United States Attorney or Assistant Attorney General responsible for the investigation. The memorandum is then reviewed by the Office of Enforcement Operations and the Assistant Attorney General in the Criminal Division, the Office of Public Affairs, the Office of the Deputy Attorney General, and, ultimately, the Attorney General. The review process is sufficiently exhaustive to deter prosecutors from even making requests that do not meet the standards articulated in the regulations. As a result, subpoenas are issued to the media only when necessary to obtain important, material

evidence that cannot be reasonably obtained through other means.

It is also important to note that the bill would 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 conducting a good faith investigation. *Branzburg* has been followed consistently by the Federal courts of appeals, and was recently followed by the United States Court of Appeals for the District of Columbia. Indeed, the bill would create a reporter's ''privilege'' - which has not been recognized by the Supreme Court - and give it more protection than other privileges that have been recognized, including the attorney-client privilege and the spousal privileges.

Before I turn to the Department's concerns with specific provisions of the bill, let me summarize the position of the Department as a fundamental objection to the principle of a reporter's privilege as an exception to every citizen's duty to give testimony in a Federal criminal proceeding.

Section 2

Section 2 of the bill would require public mini-trials whenever the Department seeks relevant information in a criminal grand jury investigation or to justify a trial subpoena. That section appears to be 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 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. The bill, however, 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. The result will be public hearings that require the government to disclose the facts of its investigation or case long before it is prudent to do so.

Paragraph 1 of Section 2(a) would effectively prohibit the Department from expeditiously issuing a subpoena to discover the identity of a source for a press report of the

most dire criminal threats to public health and safety, unless the Department had prior independent knowledge of ongoing or impending criminal activity. The crime simply would not yet have occurred, as required by the proposed statute. For example, the Department has recently investigated the distribution and administration of diluted or toxic counterfeit chemotherapy drugs. If such activity were first reported by the press, the Department would need to instantaneously identify and locate any anonymous source for that story in order to minimize the further circulation and injection of these deadly concoctions. This prohibition could effectively subject innocent patients to serious bodily harm or death. Similarly, a ''first'' press report based on an anonymous source involving extortion and blackmail with a threat to release toxic biologic agents into the public water supply would not lend itself to a hit or miss independent investigation. There simply is no time to develop sources independent of the press when time is of the essence if lives are to be saved.

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 weaken effective law enforcement and thereby undermine the public's interest in the fair administration of justice. We note that media outlets often are willing 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 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(a)(3) would ban compelling members of the news media to identify their sources of information except in situations where the ''disclosure of the identity of a source is necessary to prevent imminent and actual harm to national security.'' In all other cases, 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 compelled production 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, if enacted, would represent a significant departure from the current state of Federal law.

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 into very serious Federal offenses simply because the government cannot demonstrate an ''imminent and actual'' harm to national security. 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 could find would 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 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. Subsection 2(a)(3) 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 preventing a murder, locating a kidnapped child, or identifying a serial arsonist. Certainly, in the face of a paramount public safety or health concern, the balance should favor disclosure of source information in the possession of the news media.

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, 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 the existing 31 State and District of Columbia shield laws, and to the 18 States with common law protection, is inapt. None of the States has the responsibility of protecting the national security of the United States and protecting information that could cause serious damage to the nation itself. And no State is tasked with responsibilities for ensuring the nation's health and safety as a whole. The bill makes no recognition of these critical Federal responsibilities, and would allow no exceptions for situations that endanger the public's health and safety where ''imminent and actual'' harm to national security cannot be demonstrated.

The prevention of "imminent and actual'' harm standard in the bill, as the basis for disclosure of a confidential source, would be virtually impossible to prove in many meritorious matters, and its limitation to national security risks is far too narrow to reach a wide range of serious felonies. Subsection 2(a)(3) completely bars the Government from obtaining critical evidence of very serious crimes that do not involve the national security. It would, for example, clearly prevent the Government from obtaining potentially life-saving source information in a murder-for-hire investigation because, while it may be possible to prove that the murder was "imminent," it would be impossible to show that the murder presented "actual harm to the national security." Indeed, that requirement establishes a threshold so high that it would preclude subpoenaing source information in many cases involving leaks of classified information. Moreover, even in cases where the Government could demonstrate both imminence and actual harm to national security, the bill affords prior notice and an opportunity to be heard to the reporter, thereby requiring the government to present evidence concerning its most sensitive investigations in open court. The failure of the Department to obtain *ex parte, in camera* judicial review in such cases would inevitably result in the Government's decision to forgo issuing the subpoena in order to prevent the premature disclosure of its evidence.

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 compelled production 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

Section 4 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 restrictions on 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 2(a)(3)'s prohibition against obtaining information that reasonably could lead to the identification of a source, in most cases, this section would largely end 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's 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. Likewise, by closing all avenues of investigation into reporters' sources, section 4 could effectively eliminate the possibility of investigating or prosecuting most leaks of classified information. This provision is inconsistent with common law and goes far beyond any statute in any State.

Like Section 2, Section 4 would require a public mini-trial every time the Department sought telephone or other records from a communications service provider in a grand jury investigation or criminal trial. For the reasons articulated above, Section 4 is also bad public policy. While Section 4 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,'' the Department, in making its ''clear and convincing'' case, easily might need to reveal the selfsame information.

Section 5

The definition of a ''covered person'' contained in Subsection 5(2)(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 could also be read broadly to include any supermarket, department store, or other business that periodically publishes a products catalog, sales pamphlet, or even a listing of registered customers.

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. As noted, the definition could encompass foreign media and foreign news agencies which are hostile to the United States and have acted in support of foreign terrorist organizations.

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 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). The meaning of this section is unclear and it could have wide ranging, unintended consequences.

Conclusion

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.

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

December 23, 2005

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed please find the corrected transcript of the testimony of Mr. Chuck Rosenberg, United States Attorney, Southern District of Texas, for the hearing held before your Committee on October 19, 2005, entitled, "Reporters' Privilege Legislation: An Additional Investigation of Issues and Implications."

We would like to take this opportunity to expand on Mr. Rosenberg's response that there is no federal reporters' privilege in the grand jury context after *Branzburg v. Hayes,* 408 U.S. 665 (1972). In *Branzburg*, the Supreme Court held that journalists have no privilege, qualified or otherwise, to refuse to testify before a lawfully constituted grand jury engaged in a good faith criminal investigation. With the possible exception of the Third Circuit, the Federal circuit courts of appeals have uniformly followed the Supreme Court's mandate in *Branzburg*, and have required reporters to testify and otherwise produce evidence in the grand jury setting. *See, e.g.*, *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 970-71, 987-89 (D.C. Cir. 2005); *In re Special Proceedings*, 373 F.3d 37, 44-45 (1st Cir. 2004) (involving a court appointed special counsel); *In re Grand Jury Proceedings,* 5 F.3d 397, 402-03 (9th Cir. 1993); *In re Grand Jury Proceedings*, 810 F.2d 580, 584-86 (6th Cir. 1987). In *In re Grand Jury Subpoena of Janet Williams*, 766 F. Supp. 358 (W.D. Pa. 1991), *aff'd by an equally divided court,* 963 F.2d 567 (3d Cir. 1992) (*en banc*), a district court concluded that a reporter enjoys a qualified privilege when required to give testimony before a grand jury. While the district court's decision was affirmed by virtue of an equally divided Third Circuit sitting *en banc*, the decision has been criticized as contrary to the *Branzburg* Court's holding. *See In re Grand Jury Proceedings*, 5 F.3d at 403. Other than the aberrant decision in the Third Circuit, there is no split in the circuits as to whether a reporter's privilege exists in the grand jury setting.

A number of Federal circuit courts of appeals have adopted a limited reporter's privilege in criminal trial and civil law settings. *See, e.g., Lee v. Dep't of Justice*, 413 F.3d 53,

58 (D.C. Cir. 2005) (civil suit under Privacy Act); *Shoen v. Shoen*, 5 F.3d 1289, 1292-98 (9th Cir. 1993) (civil suit involving defamation); *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986) (criminal trial); *United States v. Burke*, 700 F.2d 70, 76-78 (2d Cir. 1983) (criminal trial and civil proceedings); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 436-37 (10th Cir. 1977) (civil suit related to nuclear power oversight). Other circuits, however, have refused to find a reporter's privilege in criminal trial settings. *See McKevitt v. Pallasch,* 329 F.3d 530, 533 (7th Cir. 2003) (Posner, J.) ("It seems to us that rather than speaking of privilege, courts should simply make sure that a subpoena duces tecum directed to the media, like any other subpoena duces tecum, is reasonable in the circumstances, which is the general criterion for judicial review of subpoenas."); *United States v. Smith*, 135 F.3d 963, 971 (5th Cir. 1998) (holding limited to non-confidential information); *In Re Shain*, 978 F.2d 850, 852 (4th Cir. 1992).

We would ask that you please include this augmentation of Mr. Rosenberg's response in the hearing record.

We trust that you will find this information helpful. If we may be of further assistance, please feel free to contact this office.

Sincerely,

William E. Moschella

William E. Moschella
Assistant Attorney General

Enclosure

Testimony of David Westin
President, ABC News
Before the Senate Judiciary Committee
October 19, 2005

Mr. Chairman and Members of the Committee:

Thank you for allowing me to appear before you today to talk about the Reporter's Privilege Legislation. My name is David Westin, and I serve as the President of ABC News, a position I have held since 1997. Before coming to ABC as General Counsel, I practiced law here in Washington for twelve years with the firm of Wilmer, Cutler & Pickering. At the beginning of my career, I had the honor of serving as a law clerk for Mr. Justice Lewis Powell during the 1978 Term of the Supreme Court of the United States.

I have seen issues of freedom of speech and of the press first-hand as both a lawyer and as the leader of a network news division. I appear today representing the 1,300 men and women of ABC News; I leave it to others to discuss in detail the legal and constitutional issues raised by claims of reporters' privilege. I am very much aware, however, of the competing and sometimes conflicting interests that arise when government prosecutors or other litigants seek to compel reporters to disclose information that they've promised to keep confidential or other, unpublished information that they've collected in the course of their reporting. I do not pretend that these are always easy questions; I can tell you, however, that they are important ones that deserve the attention of Congress.

1. Confidentiality Is an Essential Part of Reporting Some Important Stories.

Let me begin by describing the role of confidential sources in reporting at ABC News. We take very seriously any promise that we make to a news source that we will keep his or her identity secret. We do not make such promises every day. The vast majority of stories that we report do not require any pledge of confidentiality. Indeed, the vast majority of sources that we use do not ask for confidentiality.

There are some stories, however, that simply would never come to our attention or that we could not report without the ability to give some protection to sources who do not want to be publicly identified. Often, these are stories about wrongdoing – either in government or in corporations. The sources in such cases are most often either employed by the organization doing the wrong or in

some business or other relationship with the organization so that there would be dire retaliation if it were known who was turning them in.

All of us are aware of the story of "Deep Throat" and the role he played in the Washington Post reporting on Watergate. But there have been many, less publicized stories in which important ABC News reporting would not have gone forward without our being able to assure sources that we would preserve their confidentiality. These include our reporting on large flaws in the FBI crime laboratory, a corruption scandal that led to the indictment of the Governor of Illinois, and significant shortcomings in the care being given in some Veterans Administration hospitals.

Even though promises of confidentiality are sometimes critical to our reporting, we at ABC News limit when we will make such commitments. We will proceed with a story based solely or largely on confidential sources only if the story meets the highest standards of newsworthiness, we determine that the source is reliable (taking into account the reasons for the request of confidentiality), and we cannot obtain the information in any other way. We depend on confidential sources only when truly necessary. We owe our audience no less.

The proposed Reporter's Privilege Legislation also addresses our own claims as journalists for confidentiality of materials that we have gathered or generated as part of our reporting but that we do not publish. This can include notes, outtakes of interviews and other footage, and internal memoranda. The issue here is not any promise that we've made to third parties to keep secrets. Rather, it's the direct, chilling effect government scrutiny of our internal editorial processes would have on our every day decisions. If those of us responsible for vetting information and deciding what deserves to be published know that our every decision may be scrutinized at some future point, we will not be free to express our views internally. This will necessarily affect many of the editorial decisions we make.

There is a further problem raised when the government seeks our non-published material for their use in legal proceedings. In our system of government, the press is – and must be perceived to be – entirely independent of the government. If those with whom we deal were to conclude that we were, in effect, acting as potential fact-finders for the government, they would be far less willing to tell us what they know. Indeed, when it comes to our working overseas, such a perception could literally endanger the lives and well-being of our reporters.

I have always said that we should be held accountable to the public for everything that we publish. We should not be made to go through what we have not decided to publish, however, and explain in detail why we have made the

editorial decisions we have made simply because someone suspects that material we have gathered might help them with their court case.

2. Congress Needs To Determine Whether Federal Law Offers Any Form of Protection for Reporters Seeking To Keep Their Sources Confidential.

Even though we are careful in giving promises of confidentiality to sources, reporter's privilege issues recently have become part of our editorial decisions in a way that was not imaginable when I first came to ABC News nearly nine years ago. The reason for this is simple: In several, high-profile cases over the last two years prosecutors and other litigants around the country have pursued reporters zealously in an effort to learn the identity of their confidential sources and otherwise obtain unpublished information. In each case, the prosecutor has claimed that the identity of the source was an important lead that he needed to follow in order to determine whether a crime was committed; other litigants have claimed that revealing sources or disclosing unpublished information is important for them to pursue or defend their claims. It is now clear to those of us in the newsroom that whenever we pursue a story based in part on information gathered from a confidential source, we run a real risk of being called before a court and threatened with jail unless we reveal the identity of that source.

This shift in prosecutors' attention to journalists as witnesses is well known in newsrooms around the country. I can tell you from personal experience that it now influences editorial decisions we make at ABC News. More than ever, our decision whether to report a story depends on more than simply whether we are confident of the truth of our story and its importance. Increasingly, we have to consider as well whether – even if we're sure we're right and we believe the story worth reporting – it's worth someone potentially going to jail. There are stories to this day that we believe meet this high standard. But, let's be clear: A certain and direct result of prosecutors pursuing journalists to reveal their sources is that some information is not being told to the American people, despite the fact that the information is true and it otherwise deserves to be told.

The second thing I can tell you from personal experience is that there is great uncertainty about the rules that apply if one of us from ABC News is subpoenaed to testify about our sources in a federal court. If the issue is in state court, we at least know what the rules are and can make some informed judgment about what we should report and how we should report it. Either by statute or by case law, forty-nine states and the District of Columbia recognize some form of privilege for reporters. The law may vary from state to state in some particulars. But, within a state, the law is reasonably settled.

But federal law is uncertain, confusing, and sometimes contradictory. Some courts find there to be no reporter's privilege in grand jury proceedings, but

find there to be such a privilege for trials. Some find a privilege for civil proceedings, but not criminal. And, whether they have acted under the First Amendment or under federal common law, federal courts fashioning a reporter's privilege have come up with a wide range of formulations. In short, there simply is no single, coherent federal law dealing with when prosecutors and other litigants can force reporters to divulge what they know.

More than once, the federal courts – beginning with the Supreme Court more than 30 years ago and continuing right through to the court of appeals in Ms. Miller's case -- have invited Congress to step in and to create a uniform, federal rule governing whether and when federal prosecutors can force reporters to reveal their confidential sources.

Given the importance of the issue, the growing trend of prosecutors to use their powers to compel journalists to reveal their sources, and the real and substantial effect that this trend is having on what is reported to the American people, the time has come for Congress to take up the Supreme Court's invitation at long last and address the question of reporters' ability to keep confidential sources and unpublished information confidential.

3. Federal Law Should Give Specific Protection to a Reporter's Confidential Sources and Unpublished Work Materials.

The First Amendment to our Constitution explicitly recognizes that the press in this Country should receive some special protections not afforded to others. This is not because of any special privileges or status of the press. Rather, it is to ensure that the press can serve the public by collecting and disseminating information that the people need to exercise their ultimate sovereignty.

Whether or not some protection of confidential sources is literally part of our guarantee of "freedom of the press," forty-nine States and the District of Columbia have reflected the values underlying the First Amendment protections in their provision for various forms of shields for reporters – whether by statute or by common law. Indeed, even the Department of Justice recognizes the importance of these values in its policy of treating differently attempts to coerce evidence from reporters.

Although there are a range of formulations for how to give journalists some leeway to protect their confidential sources, it seems to me that the general contours of the privilege are clear and easily stated: To force a journalist to reveal confidential information or sources in cases of potential harm, there must be clear and convincing evidence that there is a compelling need to do so; at a minimum that need must include exhaustion of all other ways of getting similar information, as well as an underlying legal proceeding involving claims of real

public importance. I leave it to others to draft the exact wording, but to me the basic concept is as straightforward as it is important.

Some in law enforcement have raised concerns that any form of privilege given to journalists would interfere with law enforcement or pose potential threats to national security. But, this has not been a problem in the forty-nine States and the District of Columbia that have already recognized a reporter's privilege. And, of course, the scope of the privilege I envision by its very terms provides for the legitimate needs of law enforcement and for cases involving real national security concerns: true needs of law enforcement and national security are the very sort of things a court should consider in weighing whether disclosure by a reporter is truly necessary. This is, of course, a more modest form of protection than is given under the attorney/client or doctor/patient privileges (which themselves could be seen as undercutting law enforcement efforts in some cases). On the other hand, we do law enforcement no favors if we reduce the ability of the press to uncover wrongdoing because sources are afraid to talk with journalists.

4. It Should Be Left to the Courts – Not Prosecutors – To Determine Whether the Federal Shield Should Be Applied.

Finally, if the constitutional values underlying a federal shield law are to be upheld, the ultimate question whether a journalist in any given case should be made to reveal confidential sources should be determined by an independent court. Understandably, those charged with law enforcement would prefer to have unfettered discretion to apply the shield or not. Indeed, the United States Department of Justice has in place a policy that could be seen as reflecting the sort of protection for journalists that I have recommended. But, the Department has also made it plain in its earlier testimony before this Committee that it wants to apply and construe this protection in its sole discretion. And, of course, the guidelines do not govern the conduct of special prosecutors, such as the one pursuing the criminal investigation involving Judith Miller and Matt Cooper.

All of us understand why our prosecutors want to be free zealously to pursue leads wherever they may go. Indeed, as citizens, we want our prosecutors to put the highest importance on their appointed job of pursuing criminals. But, the very nature of a shield law reflects the need to balance competing interests: That of the prosecutor in pursuing possible criminal activity and the First Amendment value of ensuring that the press is able to gather and report information of value to the American people. On behalf of ABC News, I believe a federal shield law is vital to ensuring that the right balance is struck in each and every case.