

Testimony
United States Senate Committee on the Judiciary
Reporters' Shield Legislation: Issues and Implications
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Matthew Cooper

White House Correspondent , Time Magazine Inc.

TESTIMONY OF MATTHEW COOPER
CORRESPONDENT
TIME MAGAZINE

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

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

But let me say first that I come here with real humility--not just because I'm the only ink-stained wretch on this august panel--but because what we in the media are asking for is quite formidable, an exemption from some of the duties of citizenship. We're asking for a privilege that is not afforded farmers or manufacturers, bartenders or bus drivers. To be sure, forty-nine states, through court rulings and statutes, have decided to give journalists, and thus the public, some form of legal protection but it is still much to ask Congress to grant us a degree of federal protection and I think it behooves us to do so humbly. But ask we do--and with good reason. I don't have strong feelings about which statute makes the most sense and how the privilege should be defined. But I do want to talk about how the rules of the road are, to put it mildly, quite confusing for a working journalist such as myself in the absence of any clear federal standard. I might add this also applies to any public official from the school board to the senate or, for that matter, from the grocer to the captain of industry who chooses to talk with the media using some degree of confidentiality. Right now, if I pick up the phone and call a Senator or a civil servant and they say, "Don't quote me on this but...." or "Don't identify me but..." I can't really know what I'm getting myself into assuming that what follows is important and controversial enough to rise to the level of litigation. (And of course no reporter knows whether what follows after ground rules are established will be useless drivel or important information that will benefit the public.) Will it end up in state court where I have protections? Or in federal court where I may have none? If it's a civil trial that

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

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

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

One might ask, why now? Reporters broke scandals without a national shield law so why do we need one? I would offer this thought: In the 33 years since the Branzburg decision regarding journalist’s privilege, the ambiguity in the law has not come at a great cost. True, there have been some notable clashes between the press and prosecutors and occasionally a journalist has found him or herself in jail, generally for just a few hours although occasionally for many months. I have some personal experience with this having almost gone to jail myself, but for a last minute waiver from one of my sources. But those cases have been so rare as to be truly aberrant. For the most part a civil peace was the rule as prosecutors avoided subpoenaing journalists and the two camps generally stayed out of each other’s way. Recently, though, we’ve seen a run of federal subpoenas of journalists, not only in my case but also in others like the investigation into the anthrax killer and even the BALCO baseball steroids case. I don’t want to get into whether those subpoenas are good policy or likely to be upheld through the appellate process, but I do think everyone--prosecutors and journalists alike would benefit from knowing what the rules are.

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

As someone who relies on confidential sources all the time, I simply could not do my job

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