

Testimony  
*United States Senate Committee on the Judiciary*  
**Reporters' Shield Legislation: Issues and Implications**  
July 20, 2005

**Norman Pearlstine**  
Editor-in-Chief , Time Inc.

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Testimony Of Norman Pearlstine  
Editor-In-Chief  
Time Inc.  
Before the Judiciary Committee  
United States Senate  
July 20, 2005

Mr. Chairman and Members of the Committee: Thank you for the opportunity to appear before you today.

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federal legislation that would protect journalists from being compelled to testify about confidential sources and other unpublished information obtained during newsgathering.

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

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

Until today, I had never testified in a Senate hearing or, for that matter, in

any other legislative proceeding. As a journalist, I am far more comfortable reporting, writing, or editing news about the government than urging the government to adopt new laws. But the absence of federal legislation protecting sources has created extraordinary chaos, limiting the public's access to important information that is so necessary in a democratic society. The Supreme Court's sharply divided decision 33 years ago in *Branzburg v. Hayes*, 408 U.S. 665 (1972), has mystified courts, lawyers and journalists alike. As a result, the federal courts are in a state of utter disarray about whether a reporter's privilege protecting confidential sources exists. The conflicting legal standards throughout the federal courts defeat the nearly unanimous policies of the States in this area.

This uncertainty chills essential newsgathering and reporting. It also leads to confusion by sources and reporters, and the threat of jail and other harsh penalties for reporters who do not know what promises they can make to their sources. I recently witnessed the problems first hand. As the Committee is no doubt aware, for almost two years, Time Inc. and its reporter Matthew Cooper fought against compelled disclosure of confidential sources in response to grand jury subpoenas in Special Counsel Patrick Fitzgerald's investigation of the Valerie Plame affair. The federal district judge presiding over the matter called this battle a "perfect storm" in which important First Amendment rights clashed with the important interest in law enforcement. We fought all the way to the Supreme Court and lost.

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

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

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

#### THE VALERIE PLAME CASE

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

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

Three days later, we published an article on TIME.com, TIME’s website, coauthored by reporter Matthew Cooper, stating that “some government officials have noted to TIME in interviews . . . that Wilson’s wife, Valerie Plame, is a CIA official who monitors the proliferation of weapons of mass destruction.” Matthew Cooper et al., *A War on Wilson?*, TIME.com (July 17, 2003), available at [www.time.com/time/nation/article/0,8599,465270,00.html](http://www.time.com/time/nation/article/0,8599,465270,00.html). The article, based in part on confidential sources, suggested potential misconduct by government officials in that the leak may have been made to retaliate against and discredit Wilson for his op-ed in the Times. Cooper later contributed reporting to a second article, also based in part on confidential sources, which reported on the Iraq/uranium controversy but did not mention Plame. Michael Duffy et al., *A Question of Trust*, TIME, July 21, 2003, at 22.

After some uproar, the Department of Justice appointed Special Counsel Fitzgerald to determine whether those who leaked Plame’s identity as a CIA operative violated the Intelligence Identities Protection Act, a federal law barring the knowing and unauthorized disclosure of a covert operative’s identity. The Special Counsel impaneled a federal grand jury and subpoenaed Cooper and Time Inc., demanding that we disclose our sources. We declined to do so because we believed that a reporter’s privilege, based on the First Amendment and federal common law, protected this information from compelled disclosure. Chief Judge Thomas F. Hogan, who presides over the grand jury, rejected our claims, finding that no such privilege exists under federal law and that the Supreme Court’s 1972 *Branzburg* decision foreclosed recognition of any such protection. He held Cooper and us in contempt, relying on secret evidence submitted by the prosecutor. The judge ordered that Cooper be jailed for up to 18 months and that Time Inc. be fined \$1,000 a day until we complied with the subpoenas and revealed our confidential sources.

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

The D.C. Circuit Court of Appeals affirmed the district court’s contempt orders. (A copy of the Court of Appeals’ opinion is attached as Exhibit B.) The court interpreted *Branzburg* as an absolute bar to any First Amendment protection for confidential sources, and held that because “[t]he Supreme Court has not overruled *Branzburg*,” it “has already decided the First Amendment issue before us today.” 397 F.3d 964, 972 (D.C. Cir. 2005). The court could not reach a similar consensus on whether a reporter’s privilege existed as a matter of federal common law and Rule 501 of the Federal Rules of Evidence, splintering three

ways in separate concurrences totaling 60 pages. Relying largely on *Branzburg*, Judge Sentelle concluded that no privilege existed; Judge Tatel would have recognized a qualified privilege; and Judge Henderson, while disagreeing with Judge Sentelle's interpretation of *Branzburg*, declined to resolve the question. Judge Sentelle added that, in his view, "[t]he creation of a reporter's privilege, if it is to be done at all, looks more like a legislative than an adjudicative decision. I suggest that the media as a whole, or at least those elements of the media concerned about this privilege, would better address those concerns to the Article I legislative branch for presentment to the Article II executive than to the Article III courts." *Id.* at 981 (Sentelle, J., concurring).

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

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

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

We found ourselves in an exceedingly difficult situation. The Supreme Court had declined to hear our petition despite the fact that important questions about confidential sources, national security, the role of a grand jury, and due process were at issue. But after pursuing every possible judicial remedy without success and in light of the specific set of circumstances we faced in this case, I decided on behalf of Time Inc. that, in accordance with our duties under the law, we should turn over the subpoenaed documents to the Special Counsel. We announced our decision the next day and turned over the documents on July 1. On July 6, our lawyer again appeared before Chief Judge Hogan and argued that, in light of our production of the documents, the Special Counsel should be

required to make a new showing of need before jailing Matt Cooper for refusing to testify about his confidential sources. The judge denied that motion. Mr. Cooper then announced that, just prior to the hearing, he had obtained an express waiver of confidentiality from his source and that he was therefore now prepared to testify before the grand jury, which he did on July 13. The judge ordered that Ms. Miller, who refused to testify, be immediately taken into confinement and imprisoned until she agreed to testify; she remains in prison to this day.

### **THE IMPORTANCE OF PROTECTING CONFIDENTIAL SOURCES**

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

Time Inc. has a long history of fighting to preserve press freedoms because we believe it is in the public interest to do so. It is no coincidence that the Supreme Court held in a case involving our company that freedom of the press was created "not for the benefit of the press so much as for the benefit of all of us." *Time Inc. v. Hill*, 385 U.S. 374, 389 (1967). We know that when gathering and reporting news, journalists act as surrogates for the public. Protecting confidential sources is thus intended not to protect the rights of news organizations, individual reporters or sources, but to safeguard the public's rights. Ronald Dworkin, *The Rights of Myron Farber*, N.Y. REV. BOOKS, Oct. 26, 1978, at 34 ("The special position of the press is justified, not because reporters have special rights but because it is thought that the community as a whole will benefit from their special treatment, just as wheat farmers might be given a subsidy, not because they are entitled to it, but because the community will benefit from that."). Our "Constitution specifically selected the press" to fulfill an "important role" in our democracy. *Mills v. Alabama*, 384 U.S. 214, 219 (1966). The press "serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were elected to serve." *Id.* The press "has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences." *Estes v. Texas*, 381 U.S. 532, 539 (1965).

"[N]ews gathering is essential to a free press" and "[t]he press was protected so that it could bare the secrets of government and inform the people."

Without an unfettered press, citizens would be far less able to make informed political, social, and economic choices. But the press' function as a vital source of

information is weakened whenever the ability of journalists to gather news is impaired.

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

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

As one court explained it:

The interrelationship between newsgathering, news dissemination and the need for a journalist to protect his or her source is too apparent to require belaboring.

A journalist's inability to protect the confidentiality of sources s/he must use will jeopardize the journalist's ability to obtain information on a confidential basis.

This in turn will seriously erode the essential role played by the press in the dissemination of information and matters of interest and concern to the public.

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

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

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

As Professor Alexander Bickel observed in a celebrated essay:

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

on the candid talk of a primary news source.

Alexander Bickel, *The Morality Of Consent*, at 84 (1975); see also Zerilli, 656 F.2d at 711; Dworkin, *supra*, N.Y. REV. BOOKS, Oct. 26, 1978, at 34 (“If reporters’ confidential sources are protected from disclosure, more people who fear exposure will talk to them, and the public may benefit. There is a particular need for confidentiality, for example, and a special public interest in hearing what informers may say, when the informer is an official reporting on corruption or official misconduct, or when the information is information about a crime.”); Theodore B. Olson, *Supreme Confusion in the Plame Case*, WALL ST. J., June 8, 2005, at A14 (“[W]hen reporting on sensitive subjects, particularly misconduct or excesses by government officials, journalists often have no choice but to seek information from individuals who would be at great risk of retaliation or embarrassment if their identities were disclosed. However imperfect the process may sometimes be, we have learned that a robust and inquisitive press is a potent check against abusive governmental power. And the press often cannot perform that service without being able to promise confidentiality to some sources.”) (attached as Exhibit E). In short, some degree of confidentiality is essential if the press is to fulfill its constitutionally assigned role in society.

#### THE URGENT NEED FOR A FEDERAL SHIELD LAW

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

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

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

Administration's decision to go to war.

The Plame case is part of a disturbing trend. In the last two years, dozens of reporters have been subpoenaed to reveal their confidential sources, many of whom face the prospect of imminent imprisonment. See R. Smolkin, *Under Fire*, 27 *Am. Journalism Rev.* 18 (2005). The use of such subpoenas in the Plame case represents a profound departure from the practice of federal prosecutors when this case is compared to other landmark cases involving confidentiality over the past 30 years. Neither Archibald Cox, the Watergate Special Prosecutor, nor Judge John Sirica sought to force *The Washington Post* or its reporters to reveal the identity of "Deep Throat," the prized confidential source. We are deeply concerned that the rulings in the Plame case will exacerbate the danger of prosecutorial excesses when it comes to issuing subpoenas in all types of cases. To be sure, the Department of Justice guidelines limit subpoenas to the press and require the Attorney General's approval of such subpoenas. But the courts in the Plame case held that these regulations are not judicially enforceable. And where a special (or "independent") counsel is leading the investigation, the Attorney General's approval is no longer required, posing special dangers to the press. As Judge Tatel noted in the Plame case:

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

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

To make matters worse, reporters and their sources are subject to a tangle of contradictory privilege rules that vary widely depending on the jurisdiction in which they are subpoenaed. These differing rules lead to arbitrary, unpredictable and conflicting outcomes. This uncertainty has a chilling effect on speech, and ultimately results in less information reaching the public, as many individuals will hesitate to communicate with a reporter if a promise of confidentiality is good in some jurisdictions but not in others. In particular, a state-law reporter's privilege is of little value if it offers no reliable protection from forced disclosure in federal court.

The 34 States and the District of Columbia said it best in their amicus curiae brief urging the Supreme Court to grant review in the Plame case. All of these States and the District have adopted some form of reporter's shield law and these laws, "like those of the other fifteen jurisdictions that have them, share a common purpose: to assure that the public enjoys a free flow of information and

that journalists who gather and report the news to the public can do so in a free and unfettered atmosphere. The shield laws also rest on the uniform determination by the States that, in most cases, compelling newsgatherers to disclose confidential information is contrary to the public interest.” States’ Br. at 2. That the chief law enforcement officers for these 35 jurisdictions weighed in to endorse their reporter’s shield laws is powerful evidence that these laws do not interfere with the government’s ability to prosecute crimes.

At the same time, the States also declared in their brief that a “federal policy that allows journalists to be imprisoned for engaging in the same conduct that these State privileges encourage and protect ‘buck[s] that clear policy of virtually all states,’ and undermines both the purpose of the shield laws, and the policy determinations of the State courts and legislatures that adopted them.” Id. at 2-3. And they emphasized that the States “have a vital interest in this issue independent of protecting the integrity of their shield laws. Uncertainty and confusion . . . have marked this area of the law in the three decades that have passed since . . . Branzburg . . . . This increasing conflict has undercut the state shield laws just as much as the absence of a federal privilege.” Id. at 3.

#### **CONCLUSION**

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