

**Statement of Senator Patrick Leahy,  
Ranking Member, Judiciary Committee  
Hearing on “Reporters’ Privilege Legislation:  
Preserving Effective Federal Law Enforcement”  
September 20, 2006**

Today is the fourth hearing this Committee has held on reporters’ shield legislation and related matters. More than a dozen journalists and First Amendment experts have come before this Committee to share their views on these matters. We have also heard from a number of current and former prosecutors. Colleagues in both houses of Congress and from both parties have weighed in during this debate. A lot of hard work has gone into this important bipartisan legislation. Yet a minority of the majority of this Committee is still holding it up. I hope today that they will tell us why, and that it will be a better explanation than simply following the orders of the Bush-Cheney Administration, which opposes the bill.

Last week, this Committee was rushed by the Republican leadership into reporting an entirely partisan and deeply flawed bill that would give the Administration unprecedented power to snoop on ordinary Americans without even having to obtain a warrant after the fact. In contrast to last week’s effort to gut FISA, the bill before us today would make it easier for ordinary Americans to find out what their Government is doing, by enabling reporters to continue to gather information from confidential sources without fear that keeping their promises of confidentiality will land them in jail for contempt.

While reporter shield legislation has been sitting dormant in this do-nothing Congress, with bipartisan support, the Administration has subpoenaed dozens of reporters.

In the last year, half a dozen journalists have been jailed or fined for protecting their sources. Of course, we have no idea how many potential whistleblowers and other confidential sources have been silenced, and how many investigative journalists have failed to cover important stories, by the fear that journalists will be unable to protect their sources. And the American people may never know what important information they might have told us.

Investigative journalism is vitally important to our democracy. My father was a Vermont printer, and he taught me the importance of the First Amendment’s guarantee of a free press. That guarantee is essential to democracy because it protects investigative journalism.

The Framers did not guarantee a free press to protect the kind of propaganda the Bush-Cheney Administration has repeatedly resorted to when it has paid so-called journalists to present fake news supporting its party line about its education policies, its prescription drug program, and the situation in Iraq. Nor did the Framers guarantee a free press to protect the kind of journalism that functions as a medieval court scribe in conveying without examination the daily presidential talking points. Government propagandists and court scribes do not need the protection of the First Amendment because the Government looks after its own messengers.

But investigative journalism is the essence of the First Amendment. Investigative journalism is how whistleblowers, skeptics and dissenters get out the facts that they know to the public.

And it is how the public obtains the facts that may contradict and expose the Government's official line. Investigative journalism using confidential sources blew the lid off of Watergate. More recently, investigative journalism based on confidential sources has been critical in exposing to scrutiny many of the current Administration's appalling blunders in Iraq, in New Orleans, and elsewhere. Investigative journalism has uncovered profound incompetence and financial irregularities in the Administration's Coalition Provisional Authority in Iraq; cronyism and bureaucratic infighting in its dysfunctional Department of Homeland Security; brutality and betrayals of fundamental American values at Abu Ghraib and secret prisons scattered around the world; and appalling corruption among members of Congress, for which two House Republicans have pleaded guilty.

What investigative journalism tells us is often not welcome news – think of the pictures at Abu Ghraib. But it is precisely the news that the people of a democracy need to make informed choices and hold those in power accountable. No Government – whatever its ideological hue – can be trusted to tell the people about its blunders as well as its successes. That is why I have long championed the Freedom of Information Act, which forces the Government to disclose sometimes embarrassing information, and introduced legislation with Senator Cornyn to strengthen it. And that is why the present bill is needed to protect whistleblowers and other confidential informants so that information the Government might prefer to hide can emerge.

As for the Justice Department's stated concerns about the bill, the current version of the bill amply addresses them. As a former prosecutor myself, I fully agree that criminal wrongdoing must be punished. In a democracy, the rule of law must bind all of us equally. Good intentions should not excuse overzealous private investigators from stealing Government information illegally in a way that compromises Americans' security, any more than they should not excuse overzealous Government investigators from stealing private information illegally in a way that compromises Americans' privacy. But the legislation before us strikes a reasonable balance between safeguarding our free press and ensuring our ability to solve crimes.

And by providing substantial, although not absolute, protections to confidential sources, it also furthers important law enforcement objectives by encouraging whistleblowing that can bring to light fraud and abuse that might otherwise go unreported and unprosecuted. I am once again dismayed at the inability of the Bush-Cheney Administration to appreciate the value of whistleblowers to law enforcement and to the broader public interest. Instead of welcoming the valuable information that whistleblowers can provide, the Administration has repeatedly harassed and disparaged those who have told the public the truth. Its opposition to this bill only serves to demonstrate its eagerness to threaten journalists in order to get to confidential whistleblowers, in order to keep embarrassing information hidden. This Administration's allergy to fact-based accountability is itself the strongest proof of why this bill is needed.

The Administration is also quite wrong in suggesting that there is anything novel or radical about the bill. More than 30 states have enacted statutes granting some form of privilege to journalists, and this bill builds upon their analysis and experience in balancing the competing interests at issue. It also builds on the Justice Department's own internal guidelines for issuing subpoenas to members of the news media.

There is, of course, nothing at all novel about protecting important interests of confidentiality even in the context of criminal litigation. Federal and state courts routinely honor confidentiality between doctors and patients and lawyers and clients. Communications between whistleblowers and investigative journalists that were secured by promises of confidentiality are also important, and have no less need for the promise of confidentiality to be honored.

As I have already mentioned, the bill before us is a bipartisan bill. Therefore, while I condemn the stalling of the Bush-Cheney Administration and its allies, I want to acknowledge the Senators on both sides of the aisle who have worked hard to develop the balanced, bipartisan legislation before us. I will continue working together with them to bring this bill to a vote of the full Senate and getting it promptly signed into law, before further damage is done to investigative journalism.

It should be but one element in a series of broader efforts to push back against the efforts of the Bush-Cheney Administration to bully and threaten everyone – be they whistleblowers, journalists, members of Congress or ordinary Americans – who attempts to hold it to account. But this bill will be an important first step, if we can move a genuinely bipartisan bill forward in this Congress and get past the stalling tactics of the Administration and its allies.

**Testimony of  
Deputy Attorney General Paul J. McNulty  
Senate Judiciary Committee**

Chairman Specter, Senator Leahy, and Members of the Committee, thank you for the opportunity to appear today to discuss S. 2831, the "Free Flow of Information Act of 2006," and unauthorized disclosures of classified information by the media. While others at the Department of Justice previously have testified on these matters, this is my first opportunity to talk with you about them. The issues are weighty, and I commend the careful attention you are giving them.

Let me begin with these facts and observations, upon which we should all agree. The Department of Justice shoulders the important obligation of enforcing the law and ensuring the public safety against foreign and domestic threats. We also are duty bound to administer justice with fairness. Our work requires a constant balancing of interests.

A determination to commence prosecution requires a careful assessment of all facts and

circumstances. Our guidepost, as stated in the United States Attorneys' Manual, is whether the "fundamental interests of society require the application of the criminal laws to a particular set of circumstances," recognizing that any decision to bring charges "entails profound consequences" for all affected persons. U.S. Attorneys' Manual 6 9.27.001. In all instances, the Department's attorneys represent and must protect the public's interest in the fair and balanced administration of justice.

How we conduct investigations is no less important. We owe crime victims, those suspected of committing crimes, and the public the duty of conducting diligent and thorough investigations. Our search is for the truth, and our record shows that our approach has reflected measured and careful judgments. Overreaching does not serve justice, and the Department's men and women understand and respect that principle.

Our measured approach manifests itself in the daily administration of justice around the country. Our attorneys, for example, take great care to ensure that grand jury investigations are both full and fair. Indeed, the very institution of the grand jury<sup>4</sup> consisting as it does of ordinary citizens-provides an added layer of balance to our investigations. To be sure, though, a grand jury operates with a broad and time-honored mandate: to search broadly for the truth and enlist everyone with potentially useful information in that search. As the Supreme Court has explained, the "investigative power of the grand jury is necessarily broad if its public responsibility is to be adequately discharged." *Branzburg v. Hayes*, 408 U.S. 665, 700 (1972).

In our investigations and prosecutions we always respect civil liberties, including the First Amendment rights of citizens and the media. Since the Founding era, journalists have contributed invaluable to our public discourse. Every schoolchild learns of the importance of Thomas Paine's contention, penned as it was in a revolutionary-era pamphlet, that "common sense" compelled a separation from England and the establishment of a new nation. More modern examples abound. Indeed, it is difficult, if not impossible, to read any newspaper or Internet news site and not find commentary on issues of enormous importance to our communities and nation. The Department of Justice fully respects and is committed to protecting the media's right to comment, however favorably or critically, upon the course of government and the actions of public officials.

Striking the right balance today between vigorously investigating and prosecuting crime and protecting civil liberties presents unique challenges. Our nation is engaged in a war on terror, and the Department's highest priority is to prevent another attack. Our prevention efforts must be tailored to the nature of the enemy we face-extremists constantly searching for ways to penetrate our communities and inflict death and destruction upon our people. Secrecy and surprise are cornerstones of our enemy's approach. Our response must follow suit. Our counterterrorism arsenal must include secrecy among its weapons. To publish the full contours of our prevention efforts would provide our enemy with unacceptable opportunities. Certain information must be kept classified and outside the public domain.

In making this point, the Department fully appreciates that there is not unity of opinion as to how America should conduct its war on terror. We are fighting a new kind of war that regularly presents new kinds of challenges, and Americans rightly are asking new kinds

of questions. This debate is healthy and welcomed.

But our public dialogue, in which journalists play an essential role, cannot be permitted to itself breach our nation's security. In this regard, the media bears the important responsibility of striking the proper balance in its reporting-to keep Americans informed and to comment broadly without arming our enemy or risking danger to our troops, communities, or nation. The Department appreciates the care with which the media has undertaken this responsibility.

My larger point is that our Constitution permits the proper balance to be struck. As a nation, we are fully capable of both protecting our security and preserving the media's right to engage in robust reporting on controversial issues. Security and free speech are not mutually exclusive. Or, as Justice Goldberg famously observed, the Constitution is "not a suicide pact." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144,160 (1963).

The Department of Justice has developed a strong record in striking the right balance. I want to describe that record by explaining how we investigate leaks of classified information. Let me emphasize at the outset the seriousness of the problem posed by the unauthorized disclosure of classified information. An individual who leaks classified national defense information commits a crime. To talk about such leaks, then, is to talk about criminal conduct. There is no virtue in leaking; it reflects a profound breach of public trust and is wrong and criminal.

The consequences of leaking are extraordinarily grave. Leaks lay bare aspects of our national defense; they provide a window into steps we are taking to secure our country; they risk arming terrorists with precisely the information needed to avoid detection in plotting an attack upon our troops or communities; in short, they expose and damage our nation. These concerns and realities have been echoed by the President and Members of Congress in both the House and the Senate, including Members of this Committee.

Some skeptics have tried to paint those who unlawfully leak classified information to the press as whistleblowers caught in an intractable dilemma between, on the one hand, allowing what they believe may be unlawful activity to continue within the Government and, on the other hand, unlawfully disseminating information to someone with no authority to receive it. These so-called whistleblowers, the argument runs, escape the dilemma by conditioning a disclosure of classified information upon a journalist's promise of confidentiality.

This dilemma is a false one. It incorrectly assumes that the media is an individual's only outlet. Not so. Congress took care to ensure that no Government employee faces such a dilemma by enacting the Intelligence Community Whistleblower Act of 1998. That statute established mechanisms through which members of the intelligence community could voice concerns while ensuring that classified information would remain secure. In the first instance, the statute directs individuals to relay their concerns to their agency's Inspector General. Employees who are dissatisfied with their Inspector General's response are then authorized to bring their concerns to an appropriate committee of Congress in its oversight capacity.

With these mechanisms in place, it is a mistake to dub an individual who leaks classified information a whistleblower. A leaker commits a crime; a whistleblower, by contrast, follows the legal course of disclosure enacted into law by Congress. The difference is significant and should not be lost on the Committee.

Upon learning of a leak of classified information to the media, our primary focus is on identifying and prosecuting the leaker, not the reporter or media organization who received the leaked information. This focus is reflected in the Department's guidelines for the issuance of subpoenas and other compulsory process to the media. Codified at 28 C.F.R. 50.10, the guidelines demonstrate how seriously the Department takes any investigative or prosecutorial decision that implicates members of the news media. This policy, by its terms, seeks to "balanc[e] 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." 28 C.F.R. § 50.10.

The details are important. The guidelines provide that "[all] reasonable attempts should be made to obtain information from alternative sources before considering issuing a subpoena to a member of the news media." Id. 50.10(b). They also call for undertaking negotiations with the media before resorting to a subpoena. Even then the prosecutor should do so only 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." & § 50.10(f)(1).

This process ordinarily plays out across multiple levels within the Department of Justice. A prosecutor seeking confidential source information from a journalist must justify the request in writing. If the request receives approval from a United States Attorney, it then comes to Washington for careful vetting within our Criminal Division, Office of Public Affairs, the Office of the Deputy Attorney General, and, ultimately, the Office of the Attorney General. The Attorney General's approval is mandatory in all cases in which cooperation fails with a particular journalist.

This exhaustive and rigorous process is undertaken for a reason-to enable close scrutiny by career prosecutors and to ensure that subpoenas seeking confidential source information from journalists are issued only as a matter of last resort. In the past 15 years, the Attorney General has approved only approximately 13 requests for media subpoenas that implicated source information. This record reflects restraint: we have recognized the media's right and obligation to report broadly on issues of public controversy and, absent extraordinary circumstances, have committed to shielding the media from all forms of compulsory process. The Department of Justice will steadfastly continue to strike this same balanced approach in our investigations.

Our approach fully complies with the law. While the Supreme Court repeatedly has stressed the importance of the media's role in our society, it also has decisively declared that the media is not exempt from the general obligation-shared by all citizens-to provide evidence to grand juries investigating crimes. The seminal case is *Branzburg v. Hayes*, 408 U.S. 665 (1972). The Supreme Court in *Branzburg* held that journalists had no First Amendment right to refuse to comply with a subpoena and provide testimony to a grand

jury regarding information received from a confidential source. See *id.* at 690-91. The Court's message was plain: "[W]e cannot accept the argument that the public interest in possible future news about crime from undisclosed, unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future." *Id.* at 695. Other courts have reinforced this conclusion. See, e.g., *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1146-48 (D.C. Cir. 2006); *New York Times v. Gonzales*, No. 05-2639, 2006 WL 2130645, at \*11-12 (2d Cir. Aug. 1, 2006).

No aspect of the legal landscape or the Department's guidelines has inhibited the media from robustly reporting and commenting on controversial issues. To the contrary, journalists have time and again proven themselves more than able to gather information and disseminate news and commentary on the most controversial matters of the day. Only in extraordinarily rare circumstances—approximately 13 cases in 15 years—has the Department determined that the interests of justice warranted compelling information implicating sources from a journalist. We have struck the right balance and will continue to do so in the future.

I want to turn now to S. 283 1, the "Free Flow of Information Act of 2006." The Department of Justice firmly opposes the bill. In recent months, at least three Department officials have provided statements or offered testimony on the proposed legislation, and on June 20 of this year we detailed our objections in a views letter. I do not intend to rehash all of the points made in our letter or prior testimony. Allow me instead to focus on the bill's most serious deficiencies and to address the practical consequences that would befall the administration of justice and criminal defendants if the bill became law.

As an initial matter, proponents of the bill contend that it is a necessary response to certain recent high-profile cases in which the Department's actions have purportedly signaled a newfound eagerness to stop journalists from reporting of leaks. The contention is misguided. The Department has not changed its policy or approach to investigating leaks. We continue to follow the same guidelines and processes that have resulted in the issuance of subpoenas implicating source information in only approximately 13 cases in the last 15 years. We continue to regard journalists as a source of last resort. There is not one shred of evidence supporting the notion that the Department of Justice is out to get the media.

Nor is there anything but conjecture to support the contention that journalists are writing in fear. Indeed, the argument parallels the same ones presented to, and rejected by, the Supreme Court in *Branzburg* in 1972. The Supreme Court dismissed as "speculative" the assertion that reporting would be chilled by requiring journalists to provide confidential source information to a grand jury. *Branzburg*, 408 U.S. at 694. If the critics in *Branzburg* were to be believed, we would have seen a marked decline in press freedoms in the ensuing years. Of course, the opposite has occurred. We live in an age in which news and critical commentary is everywhere—in print, over airwaves, and throughout the Internet. The proponents of the bill have not proven their case; they have failed to demonstrate that the Department of Justice has sought to compel confidential source information from journalists more aggressively or in greater numbers than it has in the past. The proposed bill is a solution in search of a problem.

Let there also be no doubt about the ramifications the bill would have on the administration of justice. The bill would work a dramatic change in current practice and severely hamper our ability to investigate and prosecute serious crimes, including acts of terrorism.

Under Section 9 of S. 283 1, a court must determine "by a preponderance of the evidence" that "an unauthorized disclosure has significantly harmed the national security in a way that is clear and articulable" and that such harm "outweighs the value to the public of the disclosed information." By its terms, then, the bill not only transfers to the judiciary the authority to second-guess the Executive's determinations regarding what does and does not harm the national security, it also licenses courts to find that a reporter's promise to conceal a source's identity can override national security interests, even when harm to national security is conceded. The only necessary finding is that the public interest was sufficiently strong to justify disclosure of the classified information.

The Department of Justice is particularly concerned about Section 9 and its transfer of authority to make national security determinations to the federal judiciary. The bill would force federal judges into making extremely difficult decisions about the national security implications of a particular leak—decisions that would require extensive and nuanced knowledge about our larger national security strategy, the details of classified programs, and the ground-level impact of certain information being disseminated to the public. The process would require the submission of ample evidence and consume inordinate amounts of time, which we rarely can afford to lose when confronted with the dynamics that define national security challenges today. Perhaps Judge Wilkinson put these concerns best in his concurring opinion in *United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988):

Evaluation of the government's [national security] interest . . . would require the judiciary to draw conclusions about the operation of the most sophisticated electronic systems and the potential effects of their disclosure. An intelligent inquiry of this sort would require access to the most sensitive technical information, and background knowledge of the range of intelligence operations that cannot easily be presented in the single 'case or controversy' to which courts are confined. Even with sufficient information, courts obviously lack the expertise needed for its evaluation. Judges can understand the operation of a subpoena more readily than that of a satellite. In short, questions of national security and foreign affairs are of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry. *Id.* at 1082-83 (Wilkinson, J., concurring).

Section 9 of the bill would thrust the judiciary into law enforcement matters reserved by the Constitution to the Executive branch. Within the context of confidential investigations and secret grand jury proceedings, determinations regarding the national security interests are best made by members of the Executive branch—officials with broad access to the full scope of information necessary to protect our national security. As Justice Stewart explained in his concurring opinion in the *Pentagon Papers* case, "it is the constitutional duty of the Executive as a matter of sovereign prerogative and not as a matter of law as the courts know law—through the promulgation and enforcement of executive regulations,

to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense." *New York Times Co. v. United States*, 403 U.S. 713,729-30 (1971) (Stewart, J., concurring).

Let me be clear about what is at stake in Section 9. Under existing law, an individual wishing to challenge a subpoena bears the burden of proving that the request for particular evidence is unreasonable or oppressive. The proposed bill, by contrast, saddles the Government with the obligation of going into a federal court and producing evidence of a quantity sufficient to prove clear and articulable harm to our nation's security. In addition to infringing upon constitutionally-conferred executive authority, the bill goes a step further and makes matters all the worse: it places a thumb on the scale in favor of the reporter's privilege. The Government cannot obtain confidential source information unless it first proves that the harm to our national security would outweigh the public's interest in maintaining the free flow of leaked information. Our national security is too important to be subjected to these standards and burdens.

Section 9, in short, would reflect bad policy and make bad law. The practical impact, moreover, could be enormous. To provide a simple example, consider a journalist who publishes a detailed story about covert classified efforts to track the movements of international terrorists. The story also contends that aspects of the covert program have encroached on privacy interests of certain individuals by mistakenly identifying them as terrorists. The journalist attributes the information to a confidential source and describes the source as a government insider who is so concerned about the program that he intends to resign and relocate outside the United States, taking with him documents detailing the program's operation.

Despite their best efforts, the Department of Justice and the intelligence community are unable to identify the confidential source through independent means, and the journalist refuses to cooperate voluntarily with the Department. To prevent further harm to national security, the Attorney General quickly approves a narrowly-tailored subpoena that seeks only the identity of the journalist's source. The journalist believes the public has a right to know about the covert program and the potential privacy problems and thus challenges the subpoena in court.

Under current law, to prevail on a motion to quash, the journalist would be required to prove the subpoena request was unreasonable and oppressive. Given the circumstances, it is unlikely the journalist could make such a showing and thus the Department would learn the leaker's identity and apprehend him in time to prevent additional harm to our national security.

Under the proposed bill, however, the Department would first be required to provide affirmative proof that the leak damaged our national security. While it is possible that such a showing could be made in this scenario, it is equally likely that a court could find that the harm was not yet realized or capable of specification. That finding would be enough to defeat the subpoena, even though the journalist would have done nothing other than file the motion to quash, thereby shifting the burden of proof to the Government. Moreover, even if a court credited the Department's showing of harm, the court nevertheless could find that public's interest in learning about the alleged privacy

violations outweighed the Government's interests. That finding would defeat the subpoena.

This example is both realistic and revealing. It proves that the proposed legislation would impose significant and potentially crippling burdens on federal law enforcement in cases directly affecting our national security. Given the Department's record of restraint in compelling confidential source information from journalists, the bill would inflict unjustifiable harm upon a proven approach to effective law enforcement.

Section 9 is by no means the only provision of S. 283 1 with serious deficiencies. The bill is deficient in the simplest of dimensions. Take, for example, the definition of "journalist" in Section 3. It includes only journalists who work for financial gain and thereby discriminates against individuals who, for no money, contribute a story to a local newspaper. This deficiency leaves the bill wide open to serious constitutional challenge on the ground that it unjustifiably discriminates against categories of speakers.

Section 5 of the bill raises grave constitutional concerns of an altogether different variety. The Sixth Amendment entitles defendants to compel witnesses to appear in court and testify.

Section 5, however, would permit defendants to access such a witness only if, "based on an alternative source," they are able to show that the witness had information relevant to a successful trial defense. The Sixth Amendment imposes no such "alternative source" requirement. Section 5 is egregiously defective in a more basic way. It requires a court to balance criminal defendant's "constitutional rights" against the "public interest in newsgathering and in maintaining the free flow of information." Such a balancing requirement is indefensible; individuals facing grave criminal penalties, say, for example, a life sentence, should not have their "constitutional rights"-indeed, their liberty-thwarted by the interest of "newsgathering."

Other points warrant emphasis. Some supporters of S. 283 1 have suggested that the bill is no more than a codification of the Department's own guidelines. That view is badly mistaken.

The Department's guidelines preserve the constitutional prerogatives of the Executive branch with respect to key decisions regarding, for example, the kind of evidence that is presented in grand jury investigations and what constitutes harm to the national security. The proposed legislation, by contrast, would shift ultimate authority over these and other quintessentially prosecutorial decisions to the judiciary. Furthermore, the proposed legislation would replace the inherent flexibility of the Department's guidelines, which can be adapted as circumstances require-an especially valuable attribute in a time of war-with a framework that is at once more rigid (by virtue of being codified by statute) and less predictable (by virtue of being subject to the interpretations of many different judges, as opposed to a single Department with a clear track record of carefully balancing the competing interests).

I have also heard it suggested that the Department's concerns are overblown because many states have enacted workable media shield laws. Such analogies are entirely misplaced. An individual state's decision to provide a reporter with protection against a subpoena from a prosecutor investigating crimes under state law, serious though those

crimes may be, says little about the virtues of providing journalists with such protections at the federal level. The Federal Government, unlike state and local governments, is uniquely responsible for providing for the national defense, working with our international partners to prevent acts of terrorism, and investigating crimes with expansive national and international ramifications, such as terrorism, espionage, and leaks of classified information.

In closing, I wish to end where I began. The issues before the Committee are of enormous significance. They require each of us to acknowledge the necessity of balancing important interests and then to focus on the Department of Justice's record in striking that balance. That record, as I have explained, is one of success and restraint. We seek to work cooperatively with the media, and only rarely has the Department determined that the interests of justice warranted seeking to compel a journalist to reveal information obtained from a confidential source. The rarity of those occasions reflects the Department's commitment to respecting the media's important role within our society. The media has been and will remain a source of last resort in our investigations.

Against the backdrop of the Department's record and the lack of any evidence showing that our approach has meaningfully chilled robust reporting by the media, I respectfully urge the Committee not to support S. 2831. The bill would significantly weaken the Department of Justice's ability to obtain information of critical importance to protecting our nation's security, inject the federal judiciary to an extraordinary degree into affairs reserved by the Constitution for decision within the Executive branch, and, at bottom, encourage the leaking of classified information.

Thank you again for the opportunity to testify, and I look forward to answering the Committee's questions.

**Testimony of Steven D. Clymer  
Professor of Law, Cornell Law School**

Mr. Chairman and Members of the Committee: Thank you for inviting me to appear before you today to testify about a proposed statutory “journalists’ privilege” in federal trials and proceedings. I am a Professor of Law at Cornell Law School, where I teach courses on Evidence, Criminal Procedure, Terrorism and the Law, and Criminal Law. 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.

The “Free Flow of Information Act of 2006” attempts to strike a balance between two interests that are fundamental in a free society: (a) the dissemination of accurate information, including information about government operations, to the public through the news media; and (b) the truthseeking function of federal grand juries, federal courts, and federal administrative proceedings.

Although that objective is a worthy one, the proposed legislation fails to accomplish its stated goal of “guarantee[ing] the free flow of information to the public through a free and active press.” Unfortunately, it nonetheless imposes considerable costs on “effective law enforcement and the fair administration of justice.”

My observations fall into two categories. First, I offer the general view that the proposed legislation is unlikely to have its desired effect of persuading reluctant sources to divulge newsworthy information to journalists. The legislation sets out a privilege qualified by at least eight exceptions, some of which apply only upon satisfaction of multiple requirements and involve the application of a subjective and unstructured balancing test. Although, if enacted, this legislation would offer lawyers, judges, and law professors much to ponder and discuss, for reluctant sources deciding whether to leak information to the news media, it would provide more confusion than clarity or assurance. Confusion would not be the only byproduct. The legislation also would result in the loss of reliable, probative evidence in criminal, civil, and administrative proceedings; delay investigations; and encumber courts with additional litigation.

Second, I identify several concerns about specific features of the proposed legislation.

#### 1. It is Unlikely That the Proposed “Free Flow of Information Act of 2006” Will Appreciably Increase the Flow of Information to the Public

When assessing the proposed legislation, it is critical to understand that the benefit, if any, of a journalists’ privilege accrues at a different time than the costs. The desired benefit – the increased flow of information to the news media and the public – occurs, if at all, when a source who desires anonymity seeks an assurance from a journalist that a court will not or cannot compel the journalist to reveal the source’s identity. For the privilege to result in an increased flow of information, it must enable journalists to honestly provide guarantees of anonymity that are sufficient to persuade a significant number of otherwise unwilling sources to leak information.

The costs come later, when federal grand juries, federal courts, federal prosecutors, criminal defendants, civil litigants, and administrative bodies are denied access to reliable and probative evidence that may have a bearing on indictment, guilt, innocence, sentencing, or liability. This loss of evidence is a direct result of the restrictions imposed on federal courts’ ability to compel journalists to provide such information. Significantly, even if the proposed legislation fails to encourage more disclosures, it still will impose costs by suppressing the truth.

The view that the proposed legislation will increase the flow of information to the news media is premised on two claims. First, there is the claim that the law in its present state – in which some federal courts and many states recognize a “journalists’ privilege” of some sort – deters sources from providing information because they fear that a federal court later will compel the journalist to whom they made disclosure (or the journalist’s employer) to identify them. Second, there is the claim that the proposed legislation, if it were to become law, would remove that deterrent and prompt a significant number of reluctant sources to make disclosures.

Both of these claims merit scrutiny. As to the first claim, it bears mention that even

without a federal statutory journalists' privilege, many sources provide information, including classified information, to journalists. For example, there have been recent and prominent leaks to the news media on sensitive topics such as the National Security Agency's [NSA] warrantless wiretapping program and the Central Intelligence Agency's [CIA] overseas detention and interrogation of al Qaeda operatives. Significantly, these leaks occurred in the face of widespread news coverage of the jailing of former New York Times reporter Judith Miller, coverage that made clear that there is little or no federal protection of the anonymity of news sources. Those who were involved in the NSA and CIA leaks had to have been aware that federal law usually does not permit journalists to conceal their sources from federal grand juries and courts, and that the journalists to whom they leaked the classified information could be compelled to identify their sources. Despite that, they leaked the information.

Information flows to journalists despite the absence of a federal statutory journalists' privilege because sources correctly perceive that there is only a very small risk that the government or a private litigant will seek and a court will compel disclosure of their identity, or because they have reasons for making disclosure that outweigh perceived risks. In addition, some journalists may promise sources that they will disobey a court order compelling them to testify and go to jail rather than disclose a source. If a prospective source believes such an assurance, the existence or nonexistence of a federal shield law may not affect the decision to leak information.

To be sure, however, there likely are journalists who are unwilling to disobey a court order and sources who are unwilling to disclose information without a guarantee of confidentiality. A true measure of the proposed legislation is its effect when a source who requires such a guarantee contacts a journalist who will provide it only if the law safeguards him from being compelled to disclose his source.

This leads to examination of the second claim: that the proposed legislation will result in an increase in the flow of information to the public through the news media. That claim does not withstand scrutiny. As things now stand, without a federal statutory journalists' privilege, a journalist (who is unwilling to disobey a court order) cannot assure confidentiality. He can, however, tell a potential source that: (a) it is not common for journalists to receive subpoenas for source information; (b) if a DOJ attorney seeks to learn the source's identity, the request will be subject to rigorous internal DOJ scrutiny detailed in federal regulations, scrutiny that rarely results in approval of a subpoena for source information; (c) if the journalist is subpoenaed, there sometimes are ways to resolve subpoenas without revealing sources; (d) if the journalist is subpoenaed, the subpoena cannot be resolved, and the litigation is in state court, the journalist may have a privilege to refuse to disclose the source's identity, depending on the specifics of the law that applies in the state in which the litigation occurs; and (e) if the litigation is in federal court, the journalist may or may not be compelled to disclose the source's identity, depending on the specifics of the law that applies in the federal circuit in which the litigation occurs and whether the subpoena was issued in a criminal or a civil case. In the event that the source asks for additional details, and if the journalist knows details, the journalist can explain the potentially applicable state shield law and federal decisional law. Ultimately, however, with so many variables at issue, the journalist cannot truthfully provide the source with a clear-cut assurance that a court will not compel disclosure or a

meaningful estimate of the probability of court-ordered disclosure of the source's identity.

The proposed legislation does nothing to eliminate that uncertainty. Instead, it creates a privilege subject to multiple possible exceptions. Different rules apply when government attorneys seek disclosure in criminal investigations and proceedings [Section 4(b)]; when criminal defendants seek disclosure [Section 5(b)]; when litigants in civil or administrative actions seek disclosure [Section 6(b)]; when journalists participate in criminal or tortious conduct [Section 7(A)]; when journalists witness criminal conduct [Section 7(B)]; when disclosure is "reasonably necessary" to prevent death, kidnaping, or serious bodily injury [Section 8]; when disclosure "would assist in preventing" an act of terrorism or specified harm to national security [Section 9(a)(1)]; and when the source reveals "properly classified information" to which he had "authorized access" [Section 9(a)(2)]. The exceptions apply only upon satisfaction of various requirements and, in some cases, only if a court determines that "nondisclosure of the information [about the source's identity] would be contrary to the public interest, taking into account both the public interest in compelling disclosure and the public interest in newsgathering and maintaining the free flow of information to citizens."

At the moment of truth – when the source seeks an assurance of anonymity – it will not be clear which exception or exceptions, if any, may ultimately apply. For example, in the case of a source deciding whether to leak classified information, it is possible, depending on circumstances, that a court later will apply one or more of the exceptions contained in Sections 4(b), 5(b), 6(b), 9(a)(1), and 9(a)(2),<sup>1</sup> all of which contain different requirements. It will be impossible to predict in advance what legal test will apply if the journalist is subpoenaed, much less whether a court will order disclosure. If the proposed legislation were to become law, no journalist could honestly guarantee confidentiality unless he was willing to disobey a court order to disclose a source's identity and go to jail.<sup>2</sup> At most, the legislation would enable journalists to tell reluctant sources that if a subpoena is issued, and if the subpoena involves a federal matter, and if the subpoena is not resolved without litigation, the new federal law makes it marginally less likely that the reporter will be compelled to testify than it was before the new law. The bottom line is this: If journalists understand the proposed legislation and are honest with their sources about it, they cannot offer the sort of robust guarantees of confidentiality that likely are necessary to cause an appreciable increase in disclosures of newsworthy information.

Although benefits from the legislation in the form of greater information flow are speculative and unlikely, the costs are tangible and unavoidable. The statutory privilege will deny federal grand juries access to probative evidence that bears on decisions whether to indict; jeopardize criminal prosecutions by foreclosing prosecutors from discovering and presenting in court crucial incriminating evidence; impair criminal defendants from gaining access to evidence that may exculpate them; and deny civil litigants information that they otherwise could discover and prove. Even in cases in which those seeking access to the truth are able to satisfy a court that one of the exceptions to the proposed privilege applies, that effort will require litigation, delay, and the expenditure of considerable resources.

Unfortunately, any effort to increase the certainty of journalists' guarantees to sources

would require the elimination of exceptions, thus resulting in the loss of even more probative evidence and increasing the costs of the proposed legislation. Ultimately, the price that must be paid for an effective privilege – meaning one that has few or no qualifications and thus will provide real assurance to reluctant sources when they decide whether to leak information – likely is too high for the federal criminal and civil justice systems to bear.

2. The Proposed “Free Flow of Information Act of 2006” Imposes Requirements on Federal Prosecutors in Criminal Matters That Do Not Apply to Civil Litigants or Criminal Defendants A comparison of the various exceptions to the proposed privilege reveals that Section 4(b), which applies to government attorneys seeking source information “in any criminal investigation or prosecution,” imposes more rigorous requirements than Section 5(b), which applies to requests by criminal defendants, and Section 6(b), which applies to requests in civil or administrative actions. For example, only government attorneys in criminal matters must demonstrate, among other things, that the information sought “is critical to the investigation or prosecution, particularly with respect to directly establishing guilt or innocence.” Criminal defendants need show only that the information sought “is relevant [not critical] to the question of guilt or innocence.” Civil litigants need establish only that the evidence sought “is critical to the successful completion of the civil action,” without the added hurdle of “particularly with respect to directly establishing guilt or innocence.” Similarly, under the proposed legislation, federal prosecutors, but not criminal defendants, must, to the extent possible, limit subpoenas to journalists to “verification of published information” and “surrounding circumstances relating to the accuracy of the published information.” One apparent feature of the higher burden on criminal prosecutors is that they, unlike other litigants, are not entitled to judicial compulsion to obtain source information if it constitutes or will reveal only circumstantial evidence, specifically, evidence that does not “directly establish[ ] guilt or innocence.”<sup>3</sup>

One can imagine a situation in which a journalist has one or more sources of information about events that later result in both criminal and civil litigation. Under the proposed legislation, it is possible that a court would compel the journalist to reveal source information to a criminal defendant who needs it to exonerate himself and to a civil litigant who needs it to prove his case, but, at the same time, refuse to compel the same journalist to reveal the same source information to a grand jury or prosecutor, despite their need for it as part of a criminal investigation or prosecution.

Although there may be unique constitutional concerns with limiting criminal defendants’ access to source information, it is difficult to justify legislation making it more difficult for federal prosecutors to obtain information than criminal defendants and civil litigants. If anything, federal prosecutors should be subject to fewer, if any, constraints on their efforts to obtain source information. First, federal prosecutors seek such information as part of their obligation to enforce federal criminal law, an objective more important to public welfare than a civil litigant’s personal lawsuit. Second, unlike criminal defendants and private civil litigants, federal prosecutors must comply with rigorous internal Department of Justice regulations set out in 28 C.F.R. §50.10 before seeking access to source information from journalists. Third, DOJ has a powerful institutional interest in carefully limiting its issuance of subpoenas to journalists because abuses could trigger

legislation restricting DOJ's discretion in that area. In contrast, neither criminal defendants nor private civil litigants are subject to the regulations or any centralized oversight of their decisions to seek source information from journalists. Nor are they "repeat players" who are constrained by concerns about the long-term effects of overly aggressive use of subpoenas to members of the news media.

### 3. The Section 4(b) Exception Requires Disclosure of Sensitive Investigative Information and Involves Courts in Prosecutorial Decision-Making

The proposed exception for source information by government attorneys in criminal investigations and prosecutions in Section 4(b) requires federal courts to make determinations that "the information sought is critical to the investigation or prosecution"; the government "has exhausted reasonable alternative sources of information"; and that "nondisclosure of the information would be contrary to the public interest." The exception further provides that the journalist (or communications service provider) be given "notice and an opportunity to be heard" on the applicability of the exception. In addition, by implication, the proposed legislation requires that prosecutors turn over to subpoenaed journalists the information necessary to persuade courts that the above-described requirements are satisfied.<sup>4</sup>

The Section 4(b) exception thus would force the government to reveal to both the court and the subpoenaed journalist or media outlet evidence demonstrating the significance of the source information to the overall investigative strategy or prosecution, the nature and extent of the prosecution's other evidence, the investigative steps that it has taken relative to the desired source information, and the overall scope and importance of its prosecution. Such disclosures of law enforcement sensitive information could jeopardize ongoing investigations and prosecutions and are contrary to federal laws requiring the secrecy of investigative information such as matters occurring before grand juries, non-consensual interceptions of communications, and tax-related information.

In addition, Section 4(b) empowers federal courts to scrutinize government investigative strategy and second-guess prosecutorial judgments about the need for source information or the role of such information in the overall investigation. It is by no means clear that courts have the competence or constitutional authority to engage in those endeavors.

### 4. The Balancing Tests in Sections 4(b)(5), 5(b)(4), 6(b)(5), and 9(a)(2) Are Subjective and Beyond the Expertise of Federal Courts

Sections 4(b)(5), 5(b)(4), 6(b)(5), and 9(a)(2) of the proposed legislation all require that courts conduct so-called "balancing tests" when deciding whether an exception to the statutory privilege applies. In Sections 4, 5 and 6, the test requires that a court determine whether "nondisclosure of the [source] information would be contrary to the public interest, taking into account both the public interest in compelling disclosure and the public interest in newsgathering and maintaining a free flow of information to citizens."<sup>5</sup>

By mandating judicial consideration of "the public interest in newsgathering and maintaining a free flow of information to citizens," this test appears to require that federal courts assess the general effect that an order requiring a journalist to disclose a source's

identity will have on future newsgathering. It is not clear how a federal judge would have access to sufficient information to intelligently make such an assessment, at least absent full hearings involving, among others, media experts and various confidential media sources, all of whom could provide their views on the likely impact of a single federal court's disclosure order on future source and journalist behavior. Although federal courts certainly are competent to assess the effect in the case before them of the admission or exclusion of evidence, they have no special insight into or expertise about the impact that a disclosure order will have on future newsgathering. In short, this test calls for a policy determination – one that is within the expertise of Congress – not a judicial determination.

Similarly, in cases involving disclosure of classified information, Section 9(a)(2) requires that a federal court determine whether the “unauthorized disclosure has significantly harmed national security in a way that is clear and articulable and the harm caused by the unauthorized disclosure of such information outweighs the value to the public of the disclosed information.” Such a determination may require the government to disclose to the court large amounts of related classified information so that the court will have a full understanding of all of the national security implications and concerns triggered by the unauthorized leak of classified information. Even if a federal court were fully informed in this way, it is by no means clear that they have the expertise or constitutional authority to balance threats to national security against the benefits of disclosure. Such national security matters are the responsibility of the Executive Branch .

Supporters of legislation creating a journalists' privilege often make a collateral argument – that a federal journalists' privilege statute will promote more uniform treatment across the federal system. Although federal Courts of Appeal have reached differing conclusions about the existence and scope of a journalists' privilege, it is unlikely that the proposed legislation will promote uniformity. Most notably, the balancing tests provides no real guidance to federal courts and invite idiosyncratic decisions based on the subjective predilections of individual federal judges.

#### 5. The “Foreign Power” and “Agent of a Foreign Power” Carve-Out From the Definition of “Journalist” is Problematic

In an apparent response to DOJ concerns that media outlets related to terrorist organizations would be privileged under the proposed legislation, an amendment provides that the term journalist “shall not include any person who is a ‘foreign power’ or ‘agent of a foreign power’” under the Foreign Intelligence Surveillance Act of 1978 [FISA]. Although well intentioned, this carve-out is problematic.

When the government seeks to prove that a person or entity is a “foreign power” or an “agent of a foreign power,” it typically does so using classified evidence as part of an application to the FISA court for an order for FISA electronic surveillance or physical searches. If the government wants to employ such surveillance and searches, it strives to keep secret from the target of the FISA coverage that it is under investigation. If, as the amendment provides, the government were required to allege and prove “foreign power” or “agent of a foreign power” status to a court in order to avoid application of the journalists' privilege, it may be forced to reveal classified information or tip its hand to a

FISA target.

A better approach might be to tie the carve-out to the designation of a journalist or media outlet as a “Specially Designated Global Terrorist” [SDGT] under Executive Order 13224, and perhaps include non-designated media outlets that are associated with designated SDGTs. The President, the Secretary of the Treasury, the Secretary of State, and the Attorney General are involved in the process by which persons and entities are designated as SDGTs based on their status as or affiliations with terrorist organizations and terrorists. Because SDGT designations are made public, and can be based on undisclosed classified evidence, use of SDGT status or association with an SDGT as the trigger for the carve-out will not jeopardize classified information or otherwise imperil national security.

#### 6. The Section 10 Requirement of a Promise or Agreement of Confidentiality is Problematic

Section 10 conditions application of the journalists’ privilege on “a promise or agreement of confidentiality made by a journalist.” It is unclear what this condition requires. Under the proposed legislation, a journalist cannot honestly provide a blanket “promise or agreement of confidentiality” to a source because of the numerous exceptions to the legislation (unless, of course, the journalist is prepared to ignore a court’s order to disclose source information and go to jail). Thus, Section 10 cannot mean that application of the journalist’s privilege is dependent on the making of an unqualified promise or agreement. A more plausible interpretation is that the privilege is triggered only by a promise or agreement of confidentiality absent a court order requiring disclosure. If so, the legislation should state this explicitly.

An additional difficulty arises because Section 10 is silent on the issue of waiver. In several recent high profile cases, including the Judith Miller incident, despite journalists’ claims to the contrary, sources of information claimed that they either never requested confidentiality or later waived it.<sup>6</sup>

Those cases reveal that it should not be left to journalists to decide whether the privilege applies or whether a source has waived confidentiality. As is the case with other privileges, such as the attorney-client privilege, a court, not a journalist, should determine the validity of an assertion of the privilege and whether a source has waived confidentiality. Any legislation should so provide.

1 Indeed, Section 7 of the Act provides that Sections 1 through 6 and 8 through 10 apply to illegal disclosures of documents and information.

2 Section 10 of the proposed legislation renders the statutory privilege inapplicable unless there is a “promise or agreement of confidentiality made by the journalist.” This section apparently is intended to avoid conferring a privilege when there no assurance of confidentiality has been given. As noted in the text, however, if the legislation were passed, a journalist who was honest with a source could at best offer only a qualified promise or agreement of confidentiality. (This issue is discussed later in the text.)

Because, under the proposed legislation, it would cost the journalist nothing to make such a promise, journalists likely would provide such assurances even if the source might be persuaded to provide information without a promise.

3 If the words “particularly with respect to directly establishing guilt or innocence,” which appear only in the Section 4(b) exception, are meant to limit federal prosecutors and grand juries to direct evidence of guilt or innocence, as opposed to circumstantial evidence, the limitation is contrary to judicial understanding of the two forms of evidence and present federal practice. Federal courts do not distinguish between the probative value of direct and circumstantial evidence. See, e.g., *United States v. Ramirez-Rodriguez*, 552 F.2d 883, 884 (9th Cir. 1977). Indeed, some federal courts instruct jurors that the two forms of evidence merit equal treatment during deliberations. See, e.g., Ninth Circuit Model Jury Instruction 1.6 (“The law permits you to give equal weight to both [direct and circumstantial evidence], but it is for you to decide how much weight to give to any evidence.”).

4 Section 9 provides for ex parte and in camera judicial review only in connection with the Section 9(a) exception involving leaks that threaten national security interests, thereby suggesting that no similar procedures are available under Section 4(b).

5 It is worth noting application of the balancing test in Section 5(b) could, in some cases, result in violations of criminal defendants’ due process rights to exculpatory and mitigating evidence. The Section 5(b) exception appears to permit a federal court to deny a criminal defendant access to such evidence, no matter how relevant and probative, if the court decides that the public interest in newsgathering outweighs the public interest in disclosure of the source information.

6 As I described in earlier testimony: 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. . . . 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.

### **Testimony of Theodore B. Olson**

Good morning, Chairman Specter, ranking Member Leahy, and Members of the Committee.

Thank you for the opportunity to appear before the Committee to testify about an issue that has important implications not just for reporters and the press, but is particularly critical to the ability of citizens to monitor the activities of, and to exercise a democratic check on, their government. One of the most vital functions of our free and independent press is to function as a watchdog on behalf of the people—working to uncover stories

that would otherwise go untold. Journalists in pursuit of such stories often must obtain information from individuals who are unwilling to, or cannot, be publicly identified. Those journalists—often reporting on high-profile legal and political controversies—cannot function effectively without offering some measure of confidentiality to their sources.

In recognition of the importance of preserving this confidentiality, forty-nine States and the District of Columbia have laws protecting reporters from subpoenas in certain circumstances. Numerous federal courts grant similar protections, and the Justice Department has internal standards preserving confidentiality for journalists and their sources. Yet there is no uniform protection in federal law. Thus reporters may be shielded if they are subpoenaed in state court, but not protected at all if the identical subpoena is issued by certain federal courts.

The Free Flow of Information Act of 2006 provides such federal protection. It builds on the patchwork of standards developed by many federal courts, replacing it not with an absolute “reporter’s privilege” but with a requirement, among other things, that a party seeking information from a journalist be able to demonstrate that the need for that information is real and that the information is not available from other sources.

The Act is modeled in large part on the Justice Department guidelines, which were in place when I served as Solicitor General of the United States from 2001 to 2004, and during my time as Assistant Attorney General for the Office of Legal Counsel from 1981 to 1984.<sup>1</sup> Like those guidelines, the Act does not hamper law enforcement. It does not pose a threat to matters involving classified information or national security. In fact, it contains a specific provision for such highly sensitive situations. Nor does it give reporters any special privilege beyond those already afforded other types of communications, such as those between lawyer and client, where confidentiality furthers broad social goals. Instead, it simply extends to federal courts the nearly unanimous determination by the States that forcing journalists to disclose the identity of their confidential sources is often likely to do more damage than provide any concrete benefit to the public welfare.

I.  
PROTECTING CONFIDENTIAL SOURCES IS ESSENTIAL  
TO A FREE AND VIBRANT PRESS AND TO JOURNALISTS’ ABILITY  
TO PERFORM THE FUNCTION THAT THE CONSTITUTION  
EXPLICITLY SANCTIONS.

Confidential sources are critical to reporting on matters of public importance and thus are vital to self-governance. When 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; many sources with important information simply will not speak to reporters unless they are granted anonymity. This process may be imperfect, but we have learned through Watergate and other incidents that a robust and inquisitive press is a potent check against abusive governmental power. The press often cannot perform this service without being able to promise confidentiality to some sources.

In reporting these stories, journalists act as surrogates for all of us. They explore the places that are inaccessible to the public as a whole—shedding light on vital information in locations where it otherwise would be kept secret, from corporate boardrooms to medical facilities to the halls of government. The Supreme Court has repeatedly recognized the important role of the press in obtaining and communicating information to the public. That role, the Court has held, is part of our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). The press is “a mighty catalyst in awakening public interest in governmental affairs,” *Estes v. Texas*, 381 U.S. 532, 539 (1965), and it “was protected so that it could bare the secrets of government and inform the people.” *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring). The news media fulfills an “important role” in our democracy, serving “as a powerful antidote to any abuses of power by government officials as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were elected to serve.” *Mills v. Alabama*, 384 U.S. 214, 219 (1966).

Our history and judicial decisions teach that the compelled disclosure of reporters’ confidential sources endangers their ability to perform these constitutionally-protected functions. And that, in turn, inhibits the flow of information concerning public matters that is vital to an informed citizenry and a healthy democracy. The Court has recognized “the timidity and self-censorship which may result from allowing the media to be punished for publishing truthful information.” *Florida Star v. B.J.F.*, 491 U.S. 524, 535 (1989) (internal quotation omitted). Lower courts have been even more explicit: 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 . . . will seriously erode the essential role played by the press in the dissemination of information and matters of interest and concern for the public. *Riley v. Chester*, 612 F.2d 708, 714 (3d Cir. 1979) (citations omitted).

And that is exactly what is happening here. Reporters are increasingly being subpoenaed and held in contempt for declining to reveal their confidential sources. In grand jury investigations—from the Valerie Plame imbroglio to the use of steroids by professional baseball players—federal prosecutors round up the reporters, haul them before a court, and threaten them with heavy fines and jail sentences if they don’t reveal names and details concerning their sources. Even in civil litigation, such as the *Wen Ho Lee* case, private plaintiffs now subpoena reporters in an effort to gain information that will help them win their claims for money damages.

These compulsory proceedings undermine reporters’ ability to get their stories, creating an obvious chilling effect. Under these circumstances, journalists cannot in good faith promise confidentiality to their sources, and they cannot establish the mutual trust that is key to cultivating a relationship with those who wish to speak. Worse, as discussed in detail below, reporters, editors, publishers and their lawyers cannot with assurance articulate the rules governing confidentiality because legal standards are hopelessly muddled. Fearing the consequences of exposure, sources withdraw. They decline to serve as background sources—even for routine news stories, where their knowledge and

experience help reporters understand complex topics and disseminate information to the public. And they certainly will not talk when the stakes are high—when they know that reporters could be forced to disclose to the very government they are investigating the names of persons providing them with the information that government wishes to conceal. Important and even lifesaving stories go untold.

This need not occur. Reporters should not be (and do not expect to be) above the law—categorically and in all cases protected from disclosing any confidential information, no matter the circumstances or need. But they should be afforded some protection so that they can perform their vital role in this free and open society in ensuring the uninhibited flow of information and exposing fraud, dishonesty and improper conduct without being threatened after the fact with imprisonment.

## II.

### THE FREE FLOW OF INFORMATION ACT PROVIDES A MUCH-NEEDED, UNIFORM FEDERAL STANDARD THAT EFFECTIVELY BALANCES CONFIDENTIALITY WITH INTERESTS FAVORING DISCLOSURE IN SOME CASES.

The concept of a reporter's privilege is not new. Indeed, forty-nine States and the District of Columbia already recognize some sort of reporter's shield, as do many federal courts. Additionally, the Justice Department has guidelines concerning when it can seek to force reporters to respond to subpoenas, although its guidelines are not judicially enforceable. The Free Flow of Information Act of 2006 does not work a dramatic expansion of the reporter's privilege or a realignment of public policy. Instead, it is long overdue precisely because the privilege is already in place and the decisions underlying such a policy have already been made by key officials. The unsettled state of federal law has a chilling effect on speech and the dissemination of important information to the public. The Act regularizes the rules for reporters, their sources, publishers, broadcasters, and judges—harmonizing the various federal standards and providing consistency on which journalists and their sources can rely.

Protecting the confidentiality of certain communications is well-recognized within the law, and the Act does not grant reporters any special license beyond the common-sense protections we already give to certain professionals and individuals. Laws already recognize the competing values of confidentiality and the collection of evidence; privileges are accorded to spousal communications, and communications between doctors and patients, or attorneys and clients. These privileges protect—and encourage—communications and relationships that are valuable to society as a whole, and they do so despite the inability to obtain evidence in some cases. The same principles apply to communications between journalists and vulnerable, sensitive sources. In many cases, the public will be better served by a reporter's having access to the information from a protected source than having no information at all.

In the 34 years since the Supreme Court's decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972), many federal courts of appeals have recognized some form of reporter's privilege, "though they do not agree on its scope." *McKevitt v. Pallasch*, 339 F.3d 530, 532 (7th Cir. 2003).<sup>2</sup> For example, the Third Circuit has recognized a common-law

privilege in civil cases, see *Riley v. City of Chester*, 612 F.2d 708, 715 (3d Cir. 1979), as well as in criminal trials. See *United States v. Cuthbertson*, 630 F.2d 139, 146 (3d Cir. 1980). The Fourth Circuit has held that the First Amendment provides a reporter's privilege in civil cases but not in criminal cases. See *LaRouche v. Nat'l Broad. Co.*, 780 F.2d 1134, 1139 (4th Cir. 1986). This lack of uniformity creates intolerable uncertainty regarding when a meaningful promise of confidentiality may be made. For example, a reporter in Raleigh, North Carolina could be forced to reveal a source's identity in federal court when the same reporter in Harrisburg, Pennsylvania would be protected under federal law—even when both North Carolina and Pennsylvania's state laws would shield that reporter in the respective state courts. See N.C. GEN. STAT. § 8-53.11; 42 PA. CONS. STAT. § 5942(a). No one benefits from this bewildering array of federal standards, which frustrates the public interest in effective newsgathering and leaves reporters and sources wondering whether a promise of confidentiality is simply the first step down the inevitable path toward disclosure or the jailhouse doors.

Reporters already enjoy protection in most States and in some federal contexts, but the confusion illustrated above renders many provisions ineffective. Reporters cannot foresee where or when they may be summoned into court for questioning regarding a particular story. They therefore cannot guarantee confidentiality with assurance that their promise will be honored. The Free Flow of Information Act does not create an entirely new, substantive privilege, but it establishes a clear federal rule, which is essential where reporters and sources are making difficult determinations about whether to put themselves at risk by promising confidentiality or providing certain information. The Act also does not give reporters an absolute privilege to resist disclosing their sources. Instead, it requires, among other things, that a party seeking information from a journalist in a criminal or civil case be able to demonstrate that the need for that information is real, that it cannot be gleaned from another source, and that nondisclosure would be contrary to the public interest. The Act does not give the same privilege to reporters who themselves witness crimes or are engaged in criminal or tortious conduct, nor to reporters who possess information that is necessary to prevent death or serious bodily harm. And it treats differently those matters involving classified information and national security, as discussed in Part III, below.

Reasonable minds can disagree on the value of anonymity granted for one story or another—or even on the concept of a reporter's privilege. But there should be no disagreement that uniform rules are better than a hodgepodge federal system that leaves all parties in a state of confusion when a source requests anonymity or when a confidentially-sourced story is published. The underlying policy has now received near-unanimous adoption by the States, and congressional action is necessary to remove the remaining inconsistencies, which are largely jurisdictional, not substantive, but have created intense and unnecessary confusion.

### III.

#### THE ACT DOES NOT COMPROMISE NATIONAL SECURITY OR BURDEN LAW ENFORCEMENT EFFORTS.

Contrary to what its opponents may claim, the Free Flow of Information Act does not compromise national security. It contains an express national security exception in addition to the general balancing test described above. Nor does the

Act hamper law enforcement since it largely mirrors decades-old Justice Department guidelines, and it provides a privilege already recognized by nearly every State. Indeed, far from compromising national security or law enforcement interests, the Act promotes them—standardizing the rules of the game, and allowing reporters to subject government programs and actions to proper scrutiny while ensuring that important information cannot be withheld solely on the grounds of privilege.

Certainly, no issue deserves more attention from our elected representatives than ensuring that the American people are defended from terrorist enemies and other security threats, and any reporter's privilege must take national security interests into account. The Act in Section 9 addresses two principal national security concerns: reporters who possess information necessary to government officials in the interest of national security, and the investigation of leaks that have caused significant harm. It does not protect journalists who possess information that would assist in preventing an act of terrorism, or where harm to national security would "outweigh the public interest in newsgathering" if the information were not disclosed. And the law does not shield reporters where a court determines that a leak has caused "clear and articulable" harm to national security that outweighs the value of the information disclosed. These provisions strike a proper balance. They protect reporters whose stories address critical topics such as public corruption, homeland security and intelligence gathering, but lower the threshold for overcoming that protection where reporters possess vital information that the public interest demands be disclosed.

Similarly important are the interests of federal law enforcement officials in protecting citizens from crime and discovering evidence once a crime has occurred. Based, as it is, in large part on Justice Department guidelines that have been in place without amendment since 1980, see 28 C.F.R. § 50.10, the Act does not burden law enforcement. The Department's guidelines bar subpoenaing a journalist in a criminal investigation unless the information sought is "essential," and require officials 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." § 50.10(f)(1),(a). They provide "protection for the news media from forms of compulsory process, whether civil or criminal, which might impair the news gathering function," and make plain that "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." § 50.10 Such strong language has been the voluntarily-adopted standard governing the Department's practices for more than a quarter century, and there is no basis for believing that codifying those standards will harm the Department or other federal law enforcement efforts. The Act simply extends comparable protections to civil matters between private parties, where any interest in compelling journalists to testify is substantially reduced. Additionally compelling is the fact that all but one State already operate under judicially enforceable shield laws, and officials in a majority of those States support a federal privilege. Thirty-five state attorneys general—the chief law enforcement officers of their respective States and the District of Columbia—endorsed the recognition of a uniform federal privilege in the Judith Miller case. Far from expressing concern about the effect of shield laws on law enforcement or judicial

proceedings, they argued that the lack of a federal counterpart to the state laws “corrode[s] the protection the States have conferred upon their citizens and newsgatherers,” creating a situation that “is little better than no privilege at all.” Brief for the State of Oklahoma et al. as Amici Curiae Supporting Petitioners, at 7, *Miller v. United States*, cert. denied 125 S. Ct. 2977 (2005) (No. 04-1507), 2005 WL 1317523 (quotation omitted). The attorneys general expressed support for a privilege based on their States’ shield laws, which “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.” *Id.* at 2. The policies supporting the state laws apply with equal force here, and the need for federal action is even greater considering the current state of affairs, which “allows journalists to be imprisoned for engaging in the same conduct that these State privileges encourage and protect.” *Id.*

\* \* \*

I would like to thank the Committee for the opportunity to testify today. I look forward to answering any questions members of the Committee may have.

1 Although I am a former government official and current member of the President’s Privacy and Civil Liberties Oversight Board, I am appearing in my personal capacity and not on behalf of any client. The views that I express are solely my own and do not necessarily represent the views of any other person or entity.

2 Courts have granted protection to reporters in varying degrees. See, e.g., *In re Madden*, 151 F.3d 125, 128-29 (3d Cir. 1998); *United States v. Smith*, 135 F.3d 963, 971 (5th Cir. 1998); *Shoen v. Shoen*, 5 F.3d 1289, 1292-93 (9th Cir. 1993); *In re Shain*, 978 F.2d 850, 852 (4th Cir. 1992); *United States v. LaRouche Campaign*, 841 F.2d 1176, 1181-82 (1st Cir. 1988); *von Bulow v. von Bulow*, 811 F.2d 136, 142 (2d Cir. 1987); *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986); *Zerill v. Smith*, 656 F.2d 705, 712 (D.C. Cir. 1981); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 438-39 (10th Cir. 1977).

**TESTIMONY OF VICTOR E. SCHWARTZ  
SHOOK, HARDY & BACON LLP  
ON BEHALF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS**

Good morning, Chairman Specter, and Members of the Committee. Thank you for your kind invitation to testify today about the merits of codifying a reporter privilege. I am testifying today on behalf of the National Association of Manufacturers. The NAM is the nation’s largest industrial trade association representing small and large manufacturers, in every industrial sector, and in all 50 states. Through its direct membership and affiliate organizations — the Council of Manufacturing Associations, the Employer Association Group and the State Associations Group — the NAM represents more than one hundred thousand manufacturers. The views stated today are based on my experience in business litigation and in teaching evidence law.

In S. 2831, the “Free Flow of Information Act,” Congress is considering codifying a broad media shield privilege stating that a federal entity may not compel a reporter to

testify or produce any document in any proceeding or in connection with any issue arising in federal courts, regardless of whether the basis for the claim arises under federal or state law. The focus of my testimony will be on the impact that S. 2831 could have on the ability of businesses to protect valuable trade secrets, personnel files and other types of proprietary information that rightly should be kept confidential. It will not focus on matters that fall under the stated purpose of the bill: “to guarantee the free flow of information to the public through a free and active press as the most effective check upon government abuse, while protecting the right of the public to effective law enforcement and the fair administration of justice.” These matters have First Amendment and other very different public policy overtones than the private sector concerns that I will address. In short, it is my belief that any reporter privilege should include reasonable checks and balances so that courts can protect journalists when appropriate, but supersede that protection when other values outweigh the benefit of such a special protection.

## I. EVIDENTIARY PRIVILEGES IN AMERICAN JURISPRUDENCE

### A. Purpose of Evidentiary Privileges

Reporter privileges are “personal” privileges. Personal evidentiary privileges deny plaintiffs and defendants the ability to use truthful information that may be crucial to their legal claims and defenses. Consequently, Congress and the courts have long recognized that personal privileges should be rare and narrow. The Supreme Court of the United States has held that “exceptions to the demand for every man’s evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.” Rather, the Court found that “there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional.” Traditional evidentiary privileges protect information shared in the context of a special relationship. WIGMORE ON EVIDENCE, America’s leading authority on the rules of evidence, explains that “the mere fact that a communication was made in express confidence . . . does not create a privilege. . . . [A] confidential communication to a clerk, to a trustee, to a commercial agency, to a banker, to a journalist, or to any other person, not holding one of the specific relations hereafter considered, is not privileged from disclosure.”

Also, virtually no personal privileges are absolute; the United States Supreme Court has held that even the privileges rooted in the Constitution must give way sometimes to the need to know the truth. Not even lawyers, doctors, or priests have absolute protection. The attorney-client privilege, perhaps the most important of traditional privileges, can be negated if a court determines that an attorney-client communication has been used to further a crime. Doctors and priests may reveal information if the person is planning imminent physical harm to others.

Well-respected evidence scholar Charles T. McCormick acknowledged the central role that judges have in assuring that privileges are not abused: “If the trial judge is permitted a lee-way, he can prevent those disclosures of marital or professional secrets which needlessly shock our feelings of delicacy, but at the same time he can override these minor amenities when it appears necessary in order to secure the facts essential to do justice in the case before him.”

### B. Congress Has Specifically Declined to Codify Evidentiary Privileges

In 1975, when the Federal Rules of Evidence were adopted, the Judicial Federal Rules Advisory Committee (FRAC) proposed that Congress codify traditional, generally

accepted privileges. The FRAC draft included nine personal evidentiary privileges, including attorney-client, therapist-patient, husband-wife, clergy-penitent, and trade secrets, among a few others. It did not include a reporter privilege.

In a most unusual action, Congress rejected FRAC's proposal to codify the traditional privileges, stating in Rule 501 that privileges "shall be governed by the principles of common law" and developed under the judicial system "in light of reason and experience." The Senate Report on this matter issued in 1974 states:

"[O]ur actions should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case-by-case basis."

The Chairman of the House Judiciary Subcommittee on Criminal Justice at the time noted with favor that, with regard to a reporter privilege, Rule 501

"permits the courts to develop a privilege for newspaper people on a case-by-case basis. The language cannot be interpreted as a congressional expression in favor of having no such privilege, nor can the conference action be interpreted as denying to newspeople any protection they may have from state newsperson's privilege laws."

The Supreme Court of the United States fully recognized what Congress had done. The Court has stated:

In rejecting the proposed rules and enacting 501, Congress manifested an affirmative intention not to freeze the law of privilege. Its purpose rather was to provide the courts with the flexibility to develop the rules of privilege on a case-by-case basis and to leave the door open to change.

C. The Reporter Privilege Under S. 2831 Differs from Traditional Privileges

S. 2831, which would codify a reporter privilege in federal courts, would create a privilege with significant differences from the other traditional privileges. For example:

- Traditional privileges exist to keep information confidential after the privileged communication. A reporter privilege exists to expose information.
- Traditional privileges are balanced with meaningful public policy-based exceptions. This bill provides for a near absolute privilege with regard to source information.
- "Clergymen, doctors, and lawyers – all holders of common law privilege – are especially trained and certified." There is no corresponding qualification to hold a privilege under this bill, reporter or otherwise.
- Traditional privileges rest with the person who conveys the information, not the professional. A reporter privilege rests with a reporter, not a source.

## II. CURRENT STATUS OF FEDERAL AND STATE REPORTER PRIVILEGES

### A. Most Federal Circuits Have Recognized a Common Law Reporter Privilege; All Use Meaningful Balancing Tests

Currently, most federal circuits have accepted that a reporter may have qualified common law immunity from answering subpoenas about source information. These circuits have implemented meaningful balancing tests so that judges can weigh a reporter privilege against the rights of the parties who are seeking justice in the courts.

Several circuits, including the Fourth, Fifth, Ninth, Tenth, Eleventh, and D.C. Circuits, employ a defined balancing test. These tests generally assess whether (1) the information is relevant to the case; (2) the information can be reasonably obtained by alternative means; and (3) there is a legitimate interest in the information.

Other circuits use a more general balancing approach. As the First Circuit held, "[n]ot all information as to sources is equally deserving of confidentiality," and a "fact-sensitive

approach” is appropriate to assess “the shifting weights of the competing interests.” The Second, Third, Sixth, and Eighth Circuits follow this same non-formulaic approach. The Seventh Circuit’s test is whether enforcing a subpoena against a reporter is reasonable under the circumstances.

These courts acknowledge, as Justice Powell wrote in his concurring opinion in the landmark case *Branzburg v. Hayes*, that any reporter privilege “should be judged on its facts by the striking of a proper balance between freedom of press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.”

#### B. S. 2831 Would Not Bring National Uniformity

Reporter privileges among the states, which are not affected by this legislation, vary widely. For example, states differ on whether reporter immunity applies differently to civil and criminal cases; whether it applies differently if the reporter is a witness or party to the case; and whether it applies to confidential and non-confidential material in the same way. Many states specifically exempt libel and defamation suits from the reporter privilege. In addition, while a minority of states offer the type of broad immunity at issue in the federal bills, most states adhere to some form of meaningful balancing test, either under statutory or common law.

Currently, thirty-two states and the District of Columbia have reporter immunity statutes for when reporters must comply with a subpoena for source identity. Among those states, Colorado, Florida, Illinois, New Mexico, North Carolina, South Carolina, and Tennessee apply a three-part test similar to the one followed by some of the federal circuits. Statutes in Alaska, Louisiana, and North Dakota use a more general miscarriage of justice standard.

Other states follow completely different approaches. For example, in California, there is no privilege, but an immunity from contempt of court. Thus, other sanctions are not precluded, and a reporter may not use the shield to avoid taking the stand. And, in Ohio, a reporter can only be required to identify a source that gave factual information (not rumor or innuendo) for which the source had first-hand knowledge. States also differ as to whether there must be an understanding of confidentiality with the source.

Of the remaining states, seventeen have a common law reporter privilege. Twelve of them allow some form of protection for sources, including Hawaii, Idaho, Kansas, Massachusetts, Maine, Missouri, South Dakota, Vermont, Washington, West Virginia, and Wisconsin. Iowa protects information, not sources. Wyoming has no reporter privilege.

### III. ADVERSE UNINTENDED CONSEQUENCES OF OVERLY BROAD REPORTER PRIVILEGES

Case law and, more importantly, life experiences have shown that there are significant adverse consequences when courts cannot provide any checks or balances in applying a reporter privilege in private sector disputes. Cases typically involve businesses, public figures, and those concerned about individual privacy. In these situations, there are no government First Amendment overtones.

#### A. Protecting Illegally Obtained Information

Of most concern is that this bill would create an environment where a person’s reasonable expectation of privacy could be violated without repercussion. This could occur even where Congress has enacted laws to require that the information be kept confidential, such as with medical records, tax returns, and intellectual property. When such information is stolen and leaked to a reporter, actual facts do not support the notion

that the privilege is protecting the public's "right to know."

Geoffrey Stone, a professor at the University of Chicago Law School who favors a qualified reporter privilege, explained to the members of the Senate Committee on the Judiciary that "when the act of disclosure is itself unlawful, the law has already determined that the public interest cuts against disclosure." Professor Stone drew parallels to the attorney-client privilege, which does not allow a person to consult a lawyer in order to commit the perfect murder. He also showed that the doctor-patient privilege does not allow someone to plot insurance fraud. "A rule that excluded all unlawful disclosures from the scope of the journalist-source privilege," he testified, "would be consistent with other privileges."

An episode involving Representative (and now House Majority Leader) John Boehner offers a good illustration. A cell phone conversation Mr. Boehner had with then-Speaker Newt Gingrich was illegally recorded by private citizens and ultimately given to a Florida newspaper. "[L]ogic suggests," as the trial judge in the Boehner case wrote, "that a criminal cannot launder the stains off illegally obtained property simply by giving it to someone else, when that other person is aware of its origins." Indeed, the Supreme Court of the United States foreshadowed this issue in *Branzburg*: "Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news." Other examples of privacy laws that could be violated with near impunity if S. 2831 were enacted include judicial protective orders, the Health Insurance Portability and Accountability Act ("HIPAA"), and the Uniform Trade Secrets Act, among many others. Earlier this year, Apple Computer was engaged in litigation over leaks of its trade secrets. The case was decided under California's very broad law, and Apple was not permitted to access the records of the blogger who posted the stolen trade secrets. Sources who steal and leak information from the private sector that is protected by federal or state laws or judicial orders should be prosecuted or fined, not protected by a reporter privilege. This conduct is completely different from whistle-blowing, which deserves protection. The Freedom of Information Act, a fundamental weapon to promote the free flow of information, recognizes this distinction. It specifically does not apply at all to "trade secrets and commercial or financial information obtained from a person and privileged or confidential," or "personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

Additionally, there is concern that by legitimizing the illegal activity of leaking trade secrets and other types of proprietary and personal information, Congress would be creating an incentive, even a roadmap, for people to engage in corporate espionage or invasion of an individual's privacy, and avoid legitimate, needed prosecutions.

#### B. Blocking Defamation Suits by Public Figures

Courts also have recognized that reporter privileges, unless they offer reasonable exceptions, would make it nearly impossible for public figures, such as elected officials, athletes, and Hollywood personalities, to succeed in defamation suits.

In suits brought by such public figures, plaintiffs must demonstrate actual malice, which requires clear and convincing evidence that the reporter had specific knowledge of falsity or recklessly disregarded the truth. Proof is generally offered by showing that no reliable source existed, that the source was fabricated, that the reporter misrepresented the actual source, or that the reporter's reliance upon the source was reckless.

As the D.C. Circuit held, knowing the source's identity is the "logical, initial element of

proof”; when a reporter is a party to the suit, “successful assertion of the privilege will effectively shield him from liability.” The Fifth Circuit concurred, stating that “[t]he only way that the [plaintiff] can establish malice and prove his case is to show that [the defendant] knew the story was false or that it was reckless to rely on the informant. In order to do that, he must know the informant’s identity.”

## V. CONCLUSION

I hope that the Committee finds it helpful to have some light placed on an area of potential unintended consequences of this bill that have nothing to do with its clearly stated purpose or issues involving the First Amendment restraints on the power of government. Judges have handled the issue of privilege in purely private litigation well. Congress has respected the judicial branch’s ability to balance the need for stability and to accommodate change in this important area. On behalf of the thousands of both large and small businesses, I suggest that this well-earned respect continue.

### **Testimony of Bruce A. Baird Partner, Covington & Burling LLP**

Mr. Chairman and Members of the Committee:

Thank you for inviting me to appear before you today to present testimony on the Free Flow of Information Act, which would codify and standardize a limited privilege covering reporters’ sources that has already been recognized in one form or another in the great majority of state and federal courts.

I am a partner in the firm of Covington & Burling, LLP., where I practice white-collar criminal defense and S.E.C. and other regulatory enforcement law. In that capacity, I both defend individuals and companies in grand jury, S.E.C. and other regulatory investigations and trials, and perform internal investigations into possible wrongdoing on behalf of companies and their Boards of Directors. Earlier in my career, I was a Special Assistant to the Deputy Attorney General of the United States, and spent nine years as an Assistant United States Attorney for the Southern District of New York, where I served in the organized crime unit, and as Deputy Chief of the Criminal Division, Chief of the Narcotics Unit, and Chief of the Securities and Commodities Frauds Task Force. My organized crime work included a long investigation and eight-month trial of the leadership of the Colombo Organized Crime Family. My securities fraud prosecutions included those of Drexel Burnham Lambert and Michael Milken.

My firm represents the Newspaper Association of America in connection with this legislation although I have not been involved in that work. I do not represent them here today and my testimony is my own.

From the perspective I bring to bear, that of a long-time former prosecutor and a present member of the defense bar, the legislation being considered should not adversely affect either the prosecution or defense of criminal and regulatory cases.

From a prosecutor’s perspective, the bill does no more than codify the Department of Justice’s policy regarding issuances of subpoenas to members of the news media codified at 50 U.S.C. § 50.10. These guidelines have been in force since I was a prosecutor in the 1980’s. The bill will in fact aid prosecutors in understanding the concrete rules in an area now governed by inconsistent judicial interpretations sometimes couched in vague and

broad First Amendment terms. The bill itself has words and phrases that will have to be interpreted, but over time, as with any statute, the law in this area will settle and become more consistent. It can also be changed if it proves unworkable in one or another respect. The situation now, with uncertain courts and media appeals to First Amendment absolutes, is far less certain and sometimes hostile to appropriate efforts by prosecutors to get information under the many judicial variations of the governing balancing test. During the Wall Street securities investigations of the late 1980s, which I directed in the Southern District of New York, the Wall Street Journal had two terrific reporters who time after time managed to find information through their sources that were beyond anything the government had uncovered. These were big cases – the Wall Street Journal had written stories regarding the cases against Michael Milken and Drexel Burnham Lambert, and a dozen other cases.

The evidence in the Wall Street Journal stories was important, but a look at the Department of Justice Guidelines made clear we should not make an effort to issue subpoenas. That did not stop us from successfully investigating the cases. From the defense perspective, the bill is also an improvement. For one thing, there is explicit separate recognition of a criminal defendant's potential need in an appropriate case to obtain information from the press. There is also recognition of the similar needs of a party to a civil or administrative enforcement action. Of course, the standards are high for obtaining information, but they are no higher than the standard actually applied in federal courts today and in fact the very existence of a statute may improve a defendant's ability to raise the issue in an appropriate case. In addition, from the defense perspective, the bill substitutes a statute applicable to all federal agencies and special prosecutors for an internal regulation applicable to Department of Justice prosecutors only.

In the end, this is not an issue that should divide prosecutors and defense counsel. The need for information may sometimes be on one side and sometimes on the other. There should be broad agreement on the need for protection of a vigorous press that looks high and low for information and in so doing benefits all of us. There should also be agreement that a bill with a careful balancing test calibrated for different situations and with appropriate exceptions is a vast improvement over the inconsistent efforts of the federal courts to follow *Branzburg v. Hayes*.