

Testimony  
*United States Senate Committee on the Judiciary*  
**Reporters' Privilege Legislation: An Additional Investigation of Issues and Implications**  
October 19, 2005

**Chuck Rosenberg**

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STATEMENT OF  
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UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE  
COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE  
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Good Morning. Chairman Specter, Ranking Member Leahy, and Members of the Committee, I am pleased to appear before you to discuss the Justice Department's concerns regarding S. 1419, the "Free Flow of Information Act of 2005."

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

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

The Department of Justice understands the concerns that underlie this legislation, and we recognize the importance of striking a balance between the interests of the American people in bringing criminals to justice and the needs of a free press. Current law and Department of Justice regulations governing the issuance of subpoenas to reporters and media organizations reflect an appropriate balance of those competing interests.

Respectfully, as presently drafted, S. 1419 does not.

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

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

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

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

For instance, in the case of the analysis and assessment of damage to national security, where information revealed through unauthorized disclosure originated can be important in determining what has been put at risk. Not all material "leaked" in a given unauthorized disclosure may be published, but nonetheless may be shared with additional parties, further compounding the damage to national security. Damage also is not always temporally confined to a given point in time; sometimes repeated disclosures magnify the impact by serving as corroboration, especially if they come from different sources.

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

Fourth, the bill would bar not only subpoenas issued to reporters for their sources but also any subpoenas issued to certain third parties that reasonably could be expected to lead to the discovery of the identity of a source. The standard is impractical and would

effectively prevent law enforcement from obtaining material that has nothing to do with media sources.

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

Such an expansive definition of "covered person" could unintentionally offer a safe haven for criminals. As drafted, the definition invites criminals to cloak their activities under the guise of a "covered person," so as to avoid investigation by the Federal government. The overbroad definition of a "covered person" could be read to include any person or corporate entity whose employees or corporate subsidiaries publish a book, newspaper, or magazine; operate a radio or television broadcast station; or operate a news or wire service. Additionally, the definition arguably could include any person who sets up an Internet "blog" or any other activity to "disseminate information by print, broadcast, cable satellite[, etc.]," as set forth in the bill.

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

The guidelines set out in the Department's regulations strike the appropriate balance between the need for evidence in a criminal investigation and the interests of a free press. Specifically, 28 C.F.R. § 50.10 already requires the Attorney General personally to approve all contested subpoenas directed to journalists following a rigorous multi-layered internal review process involving various components of the Department. After "all reasonable attempts" have been made to obtain information from alternative sources and negotiations for voluntary production have failed, a prosecutor may seek permission to

issue a subpoena to the media if there are “reasonable grounds to believe, based on information obtained from nonmedia sources, that a crime has occurred, and that the information sought is essential to a successful investigation--particularly with reference to directly establishing guilt or innocence.” Ordinarily, this requires the prosecutor to write a detailed memorandum and obtain the approval of the United States Attorney or Assistant Attorney General responsible for the investigation. The memorandum is then reviewed by the Office of Enforcement Operations and the Assistant Attorney General in the Criminal Division, the Office of Public Affairs, the Office of the Deputy Attorney General, and, ultimately, the Attorney General. The review process is sufficiently exhaustive to deter prosecutors from even making requests that do not meet the standards articulated in the regulations. As a result, subpoenas are issued to the media only when necessary to obtain important, material evidence that cannot be reasonably obtained through other means.

It is also important to note that the bill would effectively overrule the Supreme Court’s decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972), which held that reporters have no privilege, qualified or otherwise, to withhold information from a grand jury conducting a good faith investigation. *Branzburg* has been followed consistently by the Federal courts of appeals, and was recently followed by the United States Court of Appeals for the District of Columbia. Indeed, the bill would create a reporter’s “privilege” – which has not been recognized by the Supreme Court – and give it more protection than other privileges that have been recognized, including the attorney-client privilege and the spousal privileges.

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

## Section 2

Section 2 of the bill would require public mini-trials whenever the Department seeks relevant information in a criminal grand jury investigation or to justify a trial subpoena. That section appears to be intended to codify the requirements of 28 C.F.R. § 50.10 by preventing the Department from issuing subpoenas to members of the news media unless a court determines by clear and convincing evidence: (i) that there are reasonable grounds to believe, based upon non-media evidence, that a crime has occurred; (ii) that the testimony or document sought is essential to the investigation or prosecution; and (iii) that the Department has unsuccessfully attempted to obtain the evidence from non-media sources. The bill, however, departs dramatically from the regulation’s requirements, first, by requiring the Department to make its case before a court, after providing the news media an opportunity to be heard, and, second, by imposing a new “clear and convincing standard” to meet the section’s requirements. The result will be public hearings that require the government to disclose the facts of its investigation or case long before it is prudent to do so.

Paragraph 1 of Section 2(a) would effectively prohibit the Department from expeditiously issuing a subpoena to discover the identity of a source for a press report of the most dire criminal threats to public health and safety, unless the Department had prior independent knowledge of ongoing or impending criminal activity. The crime simply would not yet have occurred, as required by the proposed statute. For example, the Department has recently investigated the distribution and administration of diluted or toxic counterfeit chemotherapy drugs. If such activity were first reported by the press, the Department would need to instantaneously identify and locate any anonymous source for that story in order to minimize the further circulation and injection of these deadly concoctions. This prohibition could effectively subject innocent patients to serious bodily harm or death. Similarly, a “first” press report based on an anonymous source involving extortion and blackmail with a threat to release toxic biologic agents into the public water supply would not lend itself to a hit or miss independent investigation. There simply is no time to develop sources independent of the press when time is of the essence if lives are to be saved.

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

Subsection 2(a)(3) would ban compelling members of the news media to identify their sources of information except in situations where the “disclosure of the identity of a source is necessary to prevent imminent and actual harm to national security.” In all other cases, it would preclude the Department from compelling a journalist to identify a confidential source of information from whom the journalist obtained information. More importantly, it also would prevent the compelled production of any information that reasonably could lead to the discovery of the identity of the source. These limitations are not in the Department’s governing regulation, and, if enacted, would represent a significant departure from the current state of Federal law.

A provision that bars process that might obtain “any information that could reasonably be expected to lead to the discovery of the identity of . . . a source” might effectively end an investigation into very serious Federal offenses simply because the government cannot

demonstrate an “imminent and actual” harm to national security. Moreover, even if the intent of the investigation were not to identify a source, the investigation might be barred because it may compel information that a court could find would reasonably lead to the discovery of a source’s identity. This provision would create a perverse incentive for persons committing serious crimes involving public safety to employ the media in the process.

Historically, in applying its governing regulation to requests involving source information, the Department has carefully balanced the public’s interest in the free dissemination of ideas with the public’s interest in effective law enforcement. The Department’s regulation has served to limit the number of subpoenas authorized for source information to little more than a handful over its 33-year history. The authorizations granted for source information have been linked closely to significant criminal matters that directly affect the public’s safety and welfare. Subsection 2(a)(3) of the bill would preclude the Department from obtaining crucial evidence in vital cases, and would overrule settled Supreme Court precedent that protects the grand jury’s ability to hear every person’s evidence in pursuit of the truth.

The harm that this provision might cause is demonstrably greater than the purported benefit it may serve. It is essential to the public interest that the Department maintain the ability, in certain vitally important circumstances, to obtain information identifying a source when a paramount interest is at stake. For example, obtaining source information may be the only available means of preventing a murder, locating a kidnapped child, or identifying a serial arsonist. Certainly, in the face of a paramount public safety or health concern, the balance should favor disclosure of source information in the possession of the news media.

This provision would go far beyond any common law privilege. As the United States Court of Appeals for the District of Columbia Circuit recently held, there is no First Amendment privilege for journalists’ confidential sources, and if a common law privilege exists, it is not absolute and must yield to the legitimate imperatives of law enforcement. Further, comparing the bill to the existing 31 State and District of Columbia shield laws, and to the 18 States with common law protection, is inapt. None of the States has the responsibility of protecting the national security of the United States and protecting information that could cause serious damage to the nation itself. And no State is tasked with responsibilities for ensuring the nation’s health and safety as a whole. The bill makes no recognition of these critical Federal responsibilities, and would allow no exceptions for situations that endanger the public’s health and safety where “imminent and actual” harm to national security cannot be demonstrated.

The prevention of “imminent and actual” harm standard in the bill, as the basis for disclosure of a confidential source, would be virtually impossible to prove in many meritorious matters, and its limitation to national security risks is far too narrow to reach a wide range of serious felonies. Subsection 2(a)(3) completely bars the Government from obtaining critical evidence of very serious crimes that do not involve the national

security. It would, for example, clearly prevent the Government from obtaining potentially life-saving source information in a murder for hire investigation because, while it may be possible to prove that the murder was "imminent," it would be impossible to show that the murder presented "actual harm to the national security." Indeed, that requirement establishes a threshold so high that it would preclude subpoenaing source information in many cases involving leaks of classified information. Moreover, even in cases where the Government could demonstrate both imminence and actual harm to national security, the bill affords prior notice and an opportunity to be heard to the reporter, thereby requiring the government to present evidence concerning its most sensitive investigations in open court. The failure of the Department to obtain ex parte, in camera judicial review in such cases would inevitably result in the Government's decision to forgo issuing the subpoena in order to prevent the premature disclosure of its evidence.

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

#### Section 4

Section 4 appears to be an attempt to codify 28 C.F.R. § 50.10(g), the regulation governing requests to subpoena the telephone toll records of a member of the news media. It would add restrictions on other business transaction records between a reporter and a third party, such as a telecommunications service provider, Internet service provider, or operator of an interactive computer service for a business purpose.

Taken together with Section 2(a)(3)'s prohibition against obtaining information that reasonably could lead to the identification of a source, in most cases, this section would largely end the ability of law enforcement authorities to conduct any investigation involving third parties. For example, a ransom demand made to a kidnap victim's family's home telephone could be investigated by compulsory process; a ransom demand made by an anonymous person to a media outlet could not be investigated by such compulsory process. Likewise, by closing all avenues of investigation into reporters' sources, section 4 could effectively eliminate the possibility of investigating or prosecuting most leaks of classified information. This provision is inconsistent with common law and goes far beyond any statute in any State.

Like Section 2, Section 4 would require a public mini-trial every time the Department sought telephone or other records from a communications service provider in a grand jury investigation or criminal trial. For the reasons articulated above, Section 4 is also bad public policy. While Section 4 would establish an exception to the notice requirement if the court determines by clear and convincing evidence that notice “would pose a substantial threat to the integrity of a criminal investigation,” the Department, in making its “clear and convincing” case, easily might need to reveal the selfsame information.

## Section 5

The definition of a “covered person” contained in Subsection 5(2)(A) of the bill raises several distinct concerns. Most significantly, it would extend the bill's protections well beyond its presumably intended objective, that is, providing special statutory protections for the kind of news- and information-gathering activities that are essential to freedom of the press under the First Amendment. For example, “covered persons” protected by the bill include non-media corporate affiliates, subsidiaries, or parents of any cable system or programming service, whether or not located in the United States. It could also be read broadly to include any supermarket, department store, or other business that periodically publishes a products catalog, sales pamphlet, or even a listing of registered customers.

The inherent difficulty of appropriately defining a “covered person” in a world in which the very definition of “media” is constantly evolving, suggests yet another fundamental weakness in the bill. What could be shielded here is not so much the traditional media – which already is protected adequately by existing Justice Department guidelines – as criminal activity deliberately or fortuitously using means or facilities in the course of the offenses that would cause the perpetrators to fall within the definition of the media under the bill. As noted, the definition could encompass foreign media and foreign news agencies which are hostile to the United States and have acted in support of foreign terrorist organizations.

In addition, the provisions of the bill reach well beyond the Department of Justice. The bill applies broadly to any “Federal entity,” defined under the bill to include “an entity or employee of the Judicial or Executive branch of the Federal government with the power to issue a subpoena or provide other compulsory process.” The bill also would reach beyond the guidelines in imposing its restrictions upon any requirement for a covered person to testify or produce documents “in any proceeding or in connection with any issue arising under Federal law.” Section 2(a). The meaning of this section is unclear and it could have wide ranging, unintended consequences.

## Conclusion

There are legitimate competing interests involved in the ongoing dialogue on this issue. However, history has shown that the protections already in place, including the Department’s rigorous internal review of media subpoena requests coupled with the media’s ability to challenge compulsory process in the Federal courts, are sufficient and strike the proper balance between the public’s interest in the free dissemination of ideas

and information and the public's interest in effective law enforcement and the fair administration of justice.

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

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**Judith Miller**  
Senior Writer , The New York Times

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TESTIMONY OF JUDITH MILLER

Reporter, The New York Times

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

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

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

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

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

Eventually, when the fuss over my case dies down, I hope journalists and politicians will begin examining the real issues at stake here, especially the question of when and under what circumstances a waiver can be considered voluntary. Struggling with such a weighty question alone in jail was hardly ideal. I did the best I could under rather challenging circumstances.

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

If journalists cannot be trusted by sources to guarantee confidentiality, then journalists cannot function and there cannot be a free press. Those who need anonymity are not only

the poor and the powerless, those whose lives or jobs might be in jeopardy if they speak up publicly, but even the powerful. All are entitled to anonymity if they are telling the truth and have something of importance to say to the American people. Reporters rarely know when they extend a pledge of confidentiality to a good-faith source what the impact of the information being provided will be.

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

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

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

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

privilege, or the public's right to know will suffer.

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

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

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

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

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

Such leaks, be they criminal or not, often serve a public good. And it is also usually unclear early on whether the leaker is violating a law. Thus, an exception for criminal

activity would be unworkable, since at the time a subpoena is issued to a reporter a decision would have to be made on whether the underlying crime had in fact occurred. Finally, reporters should not be an arm of the law; if government employees illegally leak information, it is up to government, with all its coercive power, to discover the culprit, not a reporter whose primary duty is to inform the public.

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

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

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

Thank you.

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**Anne Gordon**  
Managing Editor , Philadelphia Inquirer

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WRITTEN TESTIMONY: Anne Gordon: Philadelphia Inquirer

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

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

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

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

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

from reprisals.

If you think that fear is mere rhetoric, let me give you some examples. The fear of exposure exists at all levels, stories large and small from those involving the government to those involving private industry and our most sacred institutions. Consider the recent case of a local school board that stood accused by a whistleblower of misusing tax money. That whistleblower came to the Inquirer seeking help to right a wrong. She was frightened at the potential consequences of her actions but enraged by the misuse of funds. We gave her anonymity and reported the story. But the school board president has since been relentless in trying to find out who the Inquirer's source was for the story, repeatedly, publicly asking her and others if they talked to our reporters. Or consider the victims and priests who spoke to the Inquirer about the sex scandals that have rocked the Catholic Church in Philadelphia well before the local DA began her investigation. The victims feared that if their names were known, they would be further humiliated. The priests feared they would be shunned by others for speaking out.

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

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

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

Last year, in the United States, more than two dozen reporters have been subpoenaed or questioned about their confidential sources in federal court cases. Six journalists from across the country were jailed or fined for refusing to disclose a source. That number may

seem small to you, but consider that action against these six individuals sent doubt into the minds and spines of whistleblowers and journalists alike.

You might be asking yourselves why you should pass a federal shield law. Today, 31 states and the District of Columbia provide shield laws that protect journalists from testifying about confidential sources and 18 other states have recognized reporter's privilege as a result of judicial decisions. Why does the federal government need to get involved if states have already acted? First of all, a significant number of states have no shield laws. More importantly, even when there are state shield laws those laws offer, little, if no help, in federal proceedings. Confidential sources are left without any protection other than the hope that the journalist will be willing to violate a court order to testify. And, having no shield in federal proceedings undermines the state shields that do exist.

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

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

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

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

too afraid to bring information to light.

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

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

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

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

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

Testimony  
*United States Senate Committee on the Judiciary*  
**Reporters' Privilege Legislation: An Additional Investigation of Issues and Implications**  
October 19, 2005

**Dale Davenport**  
Editorial Page Editor , The Patriot-News

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

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

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

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

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

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

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

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

What is a confidential source?

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

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

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

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

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

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

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

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

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

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

Here’s the situation for journalists today.

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

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

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

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

A few observations on this case.

- News coverage of this issue is irrelevant to the central issue of constitutionality of a specific government action. There is no compelling reason for reporters to testify as witnesses when the action being challenged occurred at an open meeting attended by several other members of the public. Reporters should be the last resort, not the first option. Otherwise, our reporters would spend half their time in court testifying about what they have already written and had published in the newspaper.
- While this is a civil matter, the defendants – who sought to examine unpublished material, reporters’ notes, etc. – in fact are a government agency. They did not seek the identity of confidential sources, but they sought material that may well have contained

the identity of confidential sources in the broader context that I have defined. In addition, once witnesses are sworn to testify as to how they covered a story, the identity of sources, including confidential sources, can become part of the continuum of testimony about the newsgathering process. Even putting aside confidential sources, being examined under oath about the decisions made in the newsgathering process is invasive and inappropriate.

- In considering the motions to quash the subpoenas of the reporters, the trial judge ruled three separate times, narrowing the scope of questioning each time, specifically barring questions concerning confidential sources, but in the end allowing the plaintiffs' counsel to call the reporters and defense counsel to cross-examine. And absent a statute on which to base his rulings, the judge was forced to consider the issue of reporters' privilege as defined in case law, including the 1972 U.S. Supreme Court decision in *Branzburg v. Hayes*, as well as other cases in the Third Circuit. If there were a federal statute in place that defined conditions and strict limits for journalists' testimony, clear and consistent standards would apply to all such inquiries. It would be less likely for reporters to be called to testify in the first place. A statute also would provide a clear basis for appeal.
- Both of these reporters are independent contractors, what we call correspondents or "stringers." They are not employees of the newspapers. They were fortunate that the newspapers that contracted with them for coverage agreed to provide them with legal counsel. Others are not so fortunate, and the lack of a clear and consistent standard would make their burden even heavier.

What else is happening in Pennsylvania?

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

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

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

While this statute appears to provide absolute protection of confidential sources, and historically has been interpreted also to protect unpublished materials in most cases, courts in recent years have seemed more willing to consider the arguments from prosecutors and other legal counsel seeking the testimony of journalists regarding the newsgathering process. In a recent case, the Pennsylvania Supreme Court held that so

long as a source has been identified in a news story, any material provided by that source, though unpublished, is no longer protected under the Shield Law.

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

Conclusions.

There are few instances where the testimony of a journalist is relevant to a legal proceeding involving issues unrelated to the gathering or dissemination of news, much less essential to its prosecution. The question of where a journalist obtained information is even less important, except in those rare cases where public safety may be imperiled. Nevertheless, lawyers increasingly are seeking journalists' testimony, which not only interferes with the free flow of information by disrupting the immediate work of those journalists, but has a chilling effect on the everyday sources who provide the glue for accurate reporting of news stories.

A federal statute such as S. 1419 is clearly needed to protect news reporting by clearly defining those few exceptions where a journalist could be compelled to disclose previously undisclosed information or the identity of someone who provided it. The intent of a shield law is not to protect journalists. A shield law protects the thousands upon thousands of ordinary Americans who facilitate the free flow of information – mostly in anonymity and mostly by choice – that journalists deliver to the public. Thank you again for the opportunity to testify in support of this bill.

Testimony  
*United States Senate Committee on the Judiciary*  
**Reporters' Privilege Legislation: An Additional Investigation of Issues and Implications**  
October 19, 2005

**David Westin**  
President , ABC News

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

Mr. Chairman and Members of the Committee:

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

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

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

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

There are some stories, however, that simply would never come to our attention or that we could not report without the ability to give some protection to sources who do not want to be publicly identified. Often, these are stories about wrongdoing – either in government or in corporations. The sources in such cases are most often either employed by the organization doing the wrong or in some business or other relationship with the organization so that there would be dire retaliation if it were known who was turning

them in.

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

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

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

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

I have always said that we should be held accountable to the public for everything that we publish. We should not be made to go through what we have not decided to publish, however, and explain in detail why we have made the editorial decisions we have made simply because someone suspects that material we have gathered might help them with their court case.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Testimony  
*United States Senate Committee on the Judiciary*  
**Reporters' Privilege Legislation: An Additional Investigation of Issues and Implications**  
October 19, 2005

**Joseph E. diGenova**  
Founding Partner , diGenova & Toensing LLP

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

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

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

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

There are no absolute privileges in common law as they can be vitiated by courts under certain circumstances. For example, the attorney-client privilege can be negated by invocation of the crime-fraud exception if a court determines that a lawyer has wittingly or unwittingly been used by a client to further a crime. Quite routinely the U.S.

Department of Justice seeks to nullify this privilege under Guidelines similar to those it uses to secure compelled testimony from reporters.

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

My recommendation that the Justice Department Guidelines governing subpoenas to

reporters be enacted into law is because, just as in my attorney-client situation, they create no enforceable rights for the journalists. Congress should enact the Guidelines into law to create enforceable rights to ensure the kind of protection they were designed to provide. In considering whether some form of reporter's privilege is needed, this Committee should also exercise oversight that subpoenas to reporters are properly supervised and administered. I can assure you, it has failed to do so for attorney-client subpoenas.

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

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

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

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

In addition, this Committee by law should require that any agency claiming a set of facts constituting a potential violation of law and in which the Government seeks to vitiate a privilege (either reporter or attorney-client) before a grand jury, provide sworn affidavits or sworn testimony about the essential facts forming the basis of the crime. Mere proffers of evidence or a prosecutor's representation would be insufficient evidence in this context. It is my understanding that the CIA in Judith Miller's case did not have to aver to critical elements of the Agent Identities Protection Act, but merely requested an investigation based on a boilerplate form. Before reporters were subpoenaed, at the least a court should have established that Valerie Plame was a covered person under the Act. Another issue you might consider is crafting a uniform standard of proof to show there really is a crime when reporters or lawyers are subpoenaed. As I said, in our case the crime was so flimsy it was later dismissed by a court. The Courts are all over the place on

articulating this standard. Should the prosecutor have to prove there is a crime with “reasonable certainty” or merely “some basis to believe”?

I want to add that some type of balance is also necessary in the civil context, although I have not personally had a civil case on this issue. But any person, in public life or a private citizen, should be able to address false statements made to a reporter and published. If there is an absolute privilege in civil cases, neither the reporter nor the source has to carefully vet possible libelous or defamatory accusations.

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