

Senate Judiciary Committee Holds Hearing on Reporter's Shield Legislation

Oct. 19, 2005

(List of speakers at end.)

SPECTER:

Good morning, ladies and gentlemen.

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

I regret our slight delay in starting this hearing: We have made it a point on the committee to be very punctual on beginning but, at the moment, we are deeply involved in the confirmation proceedings into Ms. Harriet Miers, and there are some issues we had to consider.

We have been meeting with Senator Leahy and the leadership on scheduling matters and there's a need for both Democrats to meet separately -- which they did yesterday -- and Republicans have just met. So it has run slightly into the 10:30 starting time.

To repeat: I regret keeping people waiting here.

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

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

The issue has been a troublesome one since 1972, when the Supreme Court, in *Branzburg v. Hayes*, said that neither the First Amendment nor common law exempts members of the press from testifying before a grand jury in criminal proceedings. That decision has created some confusion, attributed in large measure to the concurrence of Justice Powell.

Five circuits have applied *Branzburg* to prevent journalists from withholding information. Four of the circuits have a qualified privilege in civil cases. Nine of the 12 circuits apply a balancing task. And on the state level, 31 states plus the District of Columbia have enacted reporter's shield statutes, and 18 states have recognized such a privilege at common law.

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

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

I'm going to yield back almost a full minute. We will have other of the Democrats joining us.

Senator Feinstein, this is extemporaneous, but if that doesn't pose any problem, would you care to take the ranking member's responsibility for an opening statement?

FEINSTEIN:

Well, I don't have an opening statement prepared, Mr. Chairman, but let me just say this, because Mr. Rosenberg is going to be testifying and I'm aware of the position of Justice.

I hope he will address the national security provisions of the shield law that was submitted to us, which we had the prior hearing on.

The problem that I have is I do think it is very legitimate, before a federal grand jury, in an instance of national security, and not necessarily when the challenge is immediate, but when it's near or present, that there be some ability to get information if a reporter has it.

And so I would be most interested in his comments along those lines. And I thank you very much, Mr. Chairman.

SPECTER:

Thank you, Senator Feinstein.

Our first witness is Mr. Chuck Rosenberg, United States attorney for the Southern District of Texas. He has served as chief of staff to Deputy Attorney General James Comey; counselor to the attorney general, John Ashcroft; was counsel to FBI Director Robert Mueller.

We had hoped to have Mr. Comey at the last hearing, and we are glad to have you here today, Mr. Rosenberg, and look forward to your testimony.

ROSENBERG:

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

For 33 years, the Department of Justice has adhered scrupulously to a demanding set of regulations that govern our issuance of media subpoenas. We adhere to these regulations to balance two critical interests: first, to protect the vibrant press, free to gather news on important issues, to use confidential sources and to act as a check on government; and second, to enforce federal criminal law, to protect national security and vital secrets and the public safety.

And through Republican and Democratic administrations alike, our internal regulations have enabled us to balance those interests on a case-by-case basis and to seek information about confidential sources from the press only when it really, really matters.

For this discussion, Mr. Chairman, I believe the numbers are useful. Over the last 14 years, which is the period of time for which we have computerized records, we have issued subpoenas to the media seeking confidential sources 12 times. Twelve times in 14 years: less than one confidential source subpoena per year.

And each one of those 12 subpoenas was reviewed carefully by senior career and political officials in the department, and personally approved by the attorney general.

So I think we must ask: What is broken about the way we are handling matters involving subpoenas to the media?

We rarely issue subpoenas to the media seeking information about confidential sources. And when we do, it is only after painstakingly careful review and meticulous adherence to our internal guidelines.

We should not enter into this debate believing that the First Amendment is under assault by the Department of Justice. It manifestly is not. In fact, I believe any serious observer of the Department of Justice would tell you that our track record, our strict adherence to our own guidelines, and our five levels of internal review are not the problem.

Rather, the overwhelming number of subpoenas issued to the media for confidential-source information arise in the context of private litigation. And, of course, when we are not a party to the litigation, our guidelines do not apply; we play no role at all.

In short, I don't see anything in our work that justifies discarding 33 years of careful practice which has served the media and the nation well.

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

First, it imposes inflexible mandatory standards in place of our existing flexible, prudent guidelines. And second, in the most urgent circumstances, it prevents us from getting information quickly, when we need it the most, to protect the public.

For example, the only exception in the bill to obtain confidential source information comes in a narrow category of cases involving imminent and actual harm to national security. That provision, I submit, simply does not work.

What of the case where harm is imminent, but the harm is not to national security? What happens when confidential-source information could help us recover a child that has been kidnapped? Under the proposed bill, that confidential source information would be off-limits to us, because that case is not a national security case.

What of the case where national security is at risk, but we can't demonstrate that the harm is imminent?

The exception, I submit, is both too little and too late.

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

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

I'm a career prosecutor. I participated in this process at the department. I've seen how it works. I know how meticulous we are in our reviews. I know how rarely we seek information from the press about confidential sources. And I know that when we do it, we do it for the right reasons.

We believe that we have been doing this the right way for decades. We strongly oppose this bill as it applies to our work.

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

SPECTER:

Thank you very much, Mr. Rosenberg.

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

Our next witness, Mr. Joe DiGenova, is well known to the committee and to the Senate generally. He served as counsel to this committee, also to Government Affairs and the Select Intelligence Committee, and chief counsel and staff director for the Senate Rules Committee; was the United States attorney for the District of Columbia for five years in the 1980s and was independent counsel; has a long resume of being involved in some major investigations and prosecutions.

SPECTER:

Thank you for joining us, Mr. DiGenova. And the floor is yours.

DIGENOVA:

Thank you, Mr. Chairman.

Let me just say at the outset that my position may be a little bit more nuanced than opposition to the bill. I actually see a need for the Congress to address this question.

In my testimony, I've indicated that I oppose an absolute privilege, because I don't believe in common law there should be any absolute privileges for the very reason that Mr. Rosenberg gave: that there may be facts and circumstances warranting the piercing of any privilege, including the attorney-client privilege and a journalist privilege if this committee chose to establish one under federal common law.

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

Mr. Rosenberg has testified that the department over the years has done a superb job of supervising its internal guidelines and that there is no reason to address this question.

My proposal would be that, given the purported success of these guidelines and in the department using them, that Congress should have no fear in enacting those guidelines into law and making them a legal requirement.

Under their own terms, the Justice Department guidelines create no enforceable legal rights.

I believe that, notwithstanding the purported success of the department in restraining itself in issuing subpoenas, since it says that it has no problem complying with these guidelines, at a minimum what the committee should do is adopt those guidelines as legislation; and consistent with Mr. Rosenberg's suggestion, modify the legislation to take into account specific instances to avoid what I call a manifest injustice or to deal with manifest necessity, such as securing information from a journalist about the location of a kidnapped child.

All of us understand the necessity for that and the circumstances which would lead a judge to, in a balancing test, certainly agree that a reporter should be required to disgorge that information.

In addition, his national security exception, where the government might not be able to prove the actual imminence of a threat, that can be handled through evidentiary hearings and through presumptions which this committee could draft into law.

What I think the committee needs to address in dealing with this privilege is what happens on the ground in a courtroom. And what happens on the ground in a courtroom, particularly in the grand jury context, is that the person being subpoenaed, whether it's a lawyer or a journalist, does not know what evidence the prosecutor is telling the judge about.

When you address this question -- and I strongly urge you to adopt the Justice Department's guidelines and put them into law; the department should have no objection to that, since it says it complies with it -- in addition to doing that, you should adopt rules under the federal rules of criminal and civil procedure for the manner in which hearings are to be conducted in these key areas, whether it's a journalist or a lawyer. So that when an attempt is made to pierce a vital privilege under U.S. common law, there are safeguards which allow the person being subpoenaed to have access to at least some of the evidence that is being used against them to force the vitiation of the privilege.

This is a problem in the grand jury context which has never been addressed. It was evident from the published reports about the Judith Miller case and the Matt Cooper case that the attorneys representing them were operating vastly in the dark about the nature and extent of the information that was being used to compel them to testify.

Now, there may be reasons in a given case that a judge would order that information not be turned over to the other side so that a true adversarial proceeding could occur to determine whether the premise should be vitiated. But those would be rare.

That might happen in a national security case. But I submit to you that this Congress is perfectly capable of calibrating the circumstances under which information should be turned over to someone who's being subpoenaed.

In the case of a reporter, I think it's vitally important and, obviously, in the case of a lawyer, having been subpoenaed myself and been threatened with jail, I can assure you that when you don't know, as our attorney said in the 3rd Circuit, what the other side has, you're there with a hammer trying to hit a pinata to find out what's on the inside.

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

Thank you, Mr. Chairman.

SPECTER:

Thank you, Mr. DiGenova.

Our next witness on this panel is Mr. Steven Clymer, who worked as a Pennsylvania assistant district attorney and seven years as an assistant U.S. attorney for the Central District of California. He's been on the Cornell Law School faculty since 1995.

I thank you very much for joining us today, Professor Clymer. And we look forward to your testimony.

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

First of all, a federal reporter's privilege that predicts criminal disclosures to reporters would undercut important federal criminal statutes.

Most disclosures to the news media do not in and of themselves violate federal criminal laws. Unfortunately, some disclosures to the news media do.

These laws are designed to safeguard information that, if improperly disclosed, could jeopardize not only national security but the safety of law enforcement officials, such as information about whether a search warrant's going to be executed, could undermine criminal investigations and could destroy the reputations of innocent people.

Some proposals for a federal reporter's privilege, including Senate 1419, draw no distinction between legal disclosures and illegal disclosures. Proposals like this would help to conceal the identity of sources whose disclosures constitute federal felonies.

In this regard, the proposed privilege is more expensive than other well-recognized privileges, such as the attorney-client privilege which has a crime fraud exception. Any reporter's privilege that's enacted should contain a similar exception.

Failure to exempt illegal disclosures from coverage would conflict with the very federal laws that criminalized those disclosures. The privileges would encourage the disclosures that the criminal statutes are meant to deter.

That sort of contradictory message from Congress can only breed disrespect for the laws criminalizing those sorts of disclosures.

In addition, failure to exempt illegal disclosures effectively would immunize people who made those disclosures as long as they disclosed it to a member of the news media. If investigators asked the source whether he made the disclosure the source could assert the Fifth Amendment privilege, thereby curtailing that method of investigation.

If there was a reporter's privilege that protected illegal as well as legal disclosures, it would prevent any investigator speaking to the reporter about the source of the leaks.

As a result, no one could determine who leaked the information or ever prove it in court.

Such an outcome would signal that illegal disclosures of classified or otherwise <sensitive> <information, such as wire-tap information, tax information, grand jury information, no matter how harmful to national security, to police safety, to law enforcement interests or to the personal privacy of innocent people, are immune from criminal prosecution as long as they are made to a recipient who could qualify as a reporter under the privilege.

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

My second point: The federal reporter's privilege should not guard against invalid assertions of the privilege because, in order to do so, courts, not reporters, should determine whether the privilege applies.

There's no good reason to conceal the identity of a source who doesn't want to be kept secret. Any reporter's privilege should apply only if some preconditions are met; namely

that the source has requested an assurance of confidentiality and has received such an assurance, and later has not waived any confidentiality.

I note in passing that S. 1419 is flawed in this regard, as well: It applies even if the source has never sought confidentiality, never received confidentiality and has in fact waived confidentiality.

Other privileges have preconditions like this. And if a witness asserts the privilege, the opponent of the privilege has the right to have a court make a determination whether the preconditions have been met.

Courts, not witnesses and other contacts, decide whether a privilege applies. The same should hold true for any reporter's privilege. Recent widely publicized events demonstrate that courts and litigants should not be required to accept a reporter's assertion of the privilege at face value.

In Providence, Rhode Island, despite a court order, a reporter named Jim Taricani refused to disclose the identity of a source. After he'd been held in contempt of court, the source came forward and said he had never asked to be confidential in the first place. Jim Taricani disputes that claim.

Here in Washington, Judith Miller refused to comply with a court order requiring her to testify before a federal grand jury about a source. After she'd been held in contempt and spent 85 days in federal custody, she claimed that her source finally had given her permission to reveal his identity. But both the source and his lawyer dispute that account, saying that they had waived confidentiality long ago.

It's not clear why the reporters' claims for need for confidentiality in each case were contradicted by their own sources. What is clear, though, is that those assertions should not be accepted at face value. If they are, we'd stand to lose probative evidence for no good reason. Instead, like other privileges, courts, not witnesses, should determine the existence of the privilege.

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

SPECTER:

Thank you very much, Professor Clymer.

We'll now begin our customary five-minute rounds. ...

Mr. Rosenberg ... I was a prosecuting attorney. It would have been very easy to go to newspaper reporters. It would have made it much simpler for me to conduct investigations. But I got along.

Thirty-three states have shield laws; 18 are common law. How can the states get along respecting reporter's privilege and the federal government can't? Are the states just not doing their job? Or are you do much more effective?

ROSENBERG:

Not at all. It's an excellent question, Senator.

First of all, 36 of the states have a qualified privilege, not absolute. But more importantly, the federal government...

SPECTER: Wait a minute. When you stop on "qualify," that's an area worth exploring. I don't know that we're going to grant any absolute privileges. We're just in the middle on the Roberts hearings of the deliberative process privilege, which is qualified.

But here you have a reporter who's in jail for 85 days and millions of Americans were wondering why. There may be a very good reason why she was in jail.

I'm one of those who was wondering why she was in jail. And I asked Ms. Miller, and she couldn't tell me why she was in jail.

And this committee is in the process of seeking to find out, as a matter of our oversight, from the special prosecutor, why she was in jail. What were the factors of such great importance to have a reporter in jail for 85 days and to have that obvious chilling effect on reporters elsewhere?

Whether they should have been chilled or not, there's no doubt that they were chilled.

Congress has very, very substantial oversight authority with respect to legislation, with respect to investigations. And so far, our efforts to find out what is behind the proffer of the special prosecutor have gone to no avail.

And this committee's not finished on its oversight responsibilities with respect to this matter as to: What is the reason for what has occurred? And when Attorney General Gonzales sat where you're sitting, we went over in great detail the authority for this committee's oversight authority.

It doesn't exactly apply to a special prosecutor because he stands in a little different spot. But I think no higher than the attorney general.

But if all the states can get along with qualified privilege at least, why not the federal government?

ROSENBERG:

It's an excellent question, Senator. The federal government, I submit, has a uniquely different role, responsible for conducting international diplomacy, waging war, classifying information.

The state of Pennsylvania for instance -- commonwealth, excuse me -- would not classify a document as secret or top secret. It doesn't contain, it doesn't possess, it doesn't generate...

SPECTER:

None of that's involved in the Judith Miller case.

ROSENBERG:

Well, I don't know what specifically is involved in the Judith Miller case. But if you ask, Senator, why this is different than the states, why the state analogy is inapt...

SPECTER:

But why shouldn't the presiding judge make an inquiry as to what the special prosecutor is after and balance that against 85 days in jail?

ROSENBERG:

They'll both work, Mr. Chairman.

Again, I don't know the specific facts of that case. I've not learned them. Mr. Fitzgerald is a friend of mine but I've not discussed the case with him. I've studiously avoided it.

However...

SPECTER:

Do you think it would have done you any good if you hadn't studiously avoided him and tried to discuss the case with him?

ROSENBERG:

I don't know.

SPECTER:

Think he'd tell you more than he'd tell me?

ROSENBERG:

Probably not. Probably not.

SPECTER:

I agree.

Go ahead, Mr. Rosenberg.

ROSENBERG:

But, Mr. Chairman, we have a unique responsibility. As Professor Clymer noted, when confidential secret, top secret information is leaked, that's not a violation of Pennsylvania law or Ohio law or the law of any state.

It's a violation of federal law. And because we have unique responsibilities to protect the national security and to safeguard our nation's secrets, the fact that there may be a state privilege doesn't quite answer the question of whether there should be a federal privilege.

SPECTER:

Senator Feinstein?

FEINSTEIN:

Thank you very much, Mr. Chairman.

Mr. Rosenberg, let me refer to page two and three of the bill, the Dodd bill which essentially has the exceptions. What problems do you have on those pages?

ROSENBERG:

Well, I have...

FEINSTEIN:

The national security and the law enforcement.

ROSENBERG:

Yes. Senator, there are several problems that I see.

First, by throwing this open to the courts, we're going to have circuit by circuit determinations, for instance, of what imminence means, what is national security, who is and who is not a covered person? Somebody could be covered in the 3rd Circuit but not in the 4th. Some set of facts could be construed to be imminent in the 5th Circuit but not in the 6th.

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

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

FEINSTEIN:

This is your argument then -- I don't mean to interrupt you -- but to have no bill at all, is that right?

ROSENBERG:

That's right.

FEINSTEIN:

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

ROSENBERG:

Not much better, Senator.

FEINSTEIN:

Because of the differential between courts?

ROSENBERG:

Yes, in part. But there's another problem.

One of the things we can do, if we need to, is move very fast. We don't do it often. As my former boss Jim Comey said, we often move at the speed of wood. But when we need to move fast, we can. And the problem is that if you have to go to court -- and most of the time, with the things we do, we of course do go to court -- but if you have to go to court in an imminent harm situation, we don't know how long that's going to take, whether it's appealed, how many layers it goes up.

We need to be able to move.

FEINSTEIN:

Can I stop you there?

ROSENBERG:

Yes.

FEINSTEIN:

I'd like to have Mr. DiGenova respond to that, and Dr. Clymer, if he wishes to.

DIGENOVA:

Certainly, Senator.

The situation is such that it is -- there are always worst-case scenarios.

FEINSTEIN:

No, no, no, no. Stop for a minute. What he's saying is that the DOJ rule set a basic standard which avoids the court essentially and therefore, through negotiations, they are able, they believe, to effect a clear system.

DIGENOVA:

They can still do that if they were enacted into law. That wouldn't prevent negotiation. Someone has to go to court and file a motion to quash a subpoena. At that point, even before that, they will do the same negotiating they do with news organizations every day before the news organizations ever files a motion to quash on a subpoena.

Once that motion to quash is filed, they're in the same position today that they would be with the guidelines that were enacted into law.

There's only one difference. They have to follow the guidelines which, notwithstanding what the department says here today, they don't always do.

FEINSTEIN:

Dr. Clymer, could you respond?

CLYMER:

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

In some measure, it may be easier to get a subpoena to a media source through the court system than it is to get it through main justice. You lose the uniformity. You lose the institutional memory about what gets done and what doesn't get done. And I'm not sure you really gain any benefit.

Unless there's been some evidence that there has been an abuse of the process, it seems to me there's no problem to fix.

FEINSTEIN:

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

CLYMER:

I think that's a bad idea. I don't think this body should be telling state courts what is admissible and inadmissible in state court procedures.

FEINSTEIN:

Everybody agree with that?

DIGENOVA:

I agree with that, Senator.

ROSENBERG:

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

FEINSTEIN:

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

ROSENBERG:

We're certainly opposed to this bill. We always will work with this committee if there's something that we can do to help make a bill better. But this bill does not help. It hurts law enforcement.

FEINSTEIN:

Thank you, Mr. Chairman.

SPECTER:

Thank you, Senator Feinstein.
Senator Cornyn?

CORNYN:

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

Obviously, this is a question of competing values that we're trying to reconcile here.

But, Mr. Rosenberg, in light of the *Branzburg v. Hayes* decision where the Supreme Court said there is no constitutional privilege, on what basis would a reporter offer confidentiality under all circumstances to a source?

ROSENBERG:

A reporter is in a bit of a bind then, Senator. What *Branzburg* said is that there is no privilege if an investigation is conducted in good faith. And I add that gloss because I think it's an important gloss.

If an investigation, God forbid, is brought in bad faith or merely to harass a reporter, *Branzburg* left open the possibility that you can go to court and seek to quash it on First Amendment grounds because the First Amendment would override a bad faith investigation, as it should.

CORNYN:

But it is a fact -- or I should say it is as a matter of law correct -- that a reporter cannot guarantee confidentiality.

ROSENBERG:

I believe that's correct, Senator. But if I may just add quickly: Somehow it's gotten into the drinking water that all leaks are beneficial. Some, frankly, are venal. Some, frankly, as Professor Clymer noted, are a crime in and of themselves.

We only -- and when I say "we," the Department of Justice -- seeks confidential source information in a very narrow set of circumstances when, for instance, the leak itself is a crime.

We're not going after whistleblowers. And I note our history bears that out.

CORNYN:

Professor Clymer, I'd be interested in your response. The court's decision in Branzburg said that if the court was going to recognize a constitutional privilege for journalists, that they would, in effect, be in the business of defining who is and who is not a journalist.

And to me, it strikes me as one of the most difficult aspects of what we're being asking to do here, because I don't know whether that would apply with equal force to the journalist who works for the New York Times or Washington Post or Dallas Morning News or Houston Chronicle or Al Jazeera, or perhaps an Internet blogger who has a cell phone with a camera and maybe a recorder and a laptop computer and is capable of publishing information with almost equal ease of what we would consider to be a professional journalist.

CORNYN:

So would you tell us how we're going to do that?

CLYMER:

Well, I think there are a couple of problems there, Senator.

The first problem is just the language used in any bill. And the proposed bill before the body has language that I think could easily be read to apply to an Internet blogger and would apply to Al Jazeera.

And so the proposal before the Senate now would make those covered people, which would mean that disclosures to those entities would be privileged.

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

And so if you're going to give the privilege to the New York Times, you necessarily have to give it to the Internet blogger as well.

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

CORNYN:

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

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

ROSENBERG:

Excellent question, Senator.

My understanding, because he is appointed by the attorney general in essence, yes, he is.

CORNYN:

But the attorney general recused himself...

ROSENBERG:

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

CORNYN:

Is Mr. Fitzgerald on record as acknowledging that he's bound by the Department of Justice guidelines?

ROSENBERG:

I don't know that he's on record. But if you look at Judge Hogan's opinion, you'll see that he complied with all of our guidelines.

CORNYN:

Thank you very much.

SPECTER:

Thank you very much, Senator Cornyn.
Senator Durbin?

DURBIN:

Thank you, Mr. Chairman.

And thank you to the panel.

Mr. Rosenberg, the hypothetical that you used about a kidnapping victim is exactly the same hypothetical I posed to the last panel and they couldn't come up with an answer.

And as I read this law that we're considering here, if, in fact, a 5-year-old girl was kidnapped, being held somewhere, and the kidnapper calls a reporter to describe in gruesome detail what's happening to that little girl, if confidentiality was promised to the

person, the kidnapper, then, under this law, there would no way for the Department of Justice dealing with a federal crime to compel the disclosure of that kidnapper.

Is that your understanding?

ROSENBERG:

Yes, sir.

DURBIN:

And that, of course, defies the basic attorney-client privilege which says if a commission of a crime is involved, the privilege does not apply. It indeed sweeps more broadly?

ROSENBERG:

Yes, sir.

DURBIN:

That's the easy case scenario. Now let's take it to the more difficult case scenario.

Now we're dealing with a whistleblower and the whistleblower is disclosing classified information to the reporter. The disclosure of that information may be the commission of a crime.

ROSENBERG:

Yes, sir.

DURBIN:

So how would you deal with that situation?

ROSENBERG:

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

DURBIN:

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

ROSENBERG:

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

DURBIN:

Now, let me ask you the more basic thing -- and I don't know how we get to this point - - in the Valerie Plame case, which we're dealing with hear, we weren't obviously dealing

with noble intent or public good or an effort to use the press to disclose wrongdoing. What appeared here to be -- what happened with the Novak disclosure was venal, it was political, and it may have been the commission of a crime itself.

How do you get to the question of the intent of the disclosure of the information? Should that be part of this conversation?

ROSENBERG:

Senator Durbin, if you'll permit me not to speak about that matter. It's an ongoing investigation...

DURBIN:

Certainly.

ROSENBERG:

... and I don't think it would be appropriate.

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

DURBIN:

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

CLYMER:

I think that any privilege should address it the same way other privileges address it, which is to say the witness asserts the privilege. The opponent of the privilege has the ability to challenge that assertion in a court, not the witness, but a court gets to decide whether or not the privilege has been badly asserted.

That may require, in some instances, that the court conduct an in camera hearing with the source, yet undisclosed to the party trying to identify the source, but to determine whether the source waived the privilege, whether the source ever asked for confidentiality, and whether the source did waive, whether the waiver is valid.

DURBIN:

And your argument is that's consistent with other privileges in how they are asserted in court proceedings?

CLYMER:

I've done it. As a prosecutor, I've had people assert the Fifth Amendment privilege, and I've claimed it's an invalid assertion, and we have a hearing and the court decides. I've done it with attorney-client privilege, and we have a hearing and the court decides.

It should not be up to the reporter to decide, and the opponent should not have to accept the reporter's assertion at face value.

DURBIN:

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

CLYMER:

In 35 seconds?

(LAUGHTER)

DURBIN:

I know. That's one of the problems.

CLYMER:

A couple problems. Number one, this law, as written, also protects nonconfidential-source material and news media. That is an entirely separate issue than the one we've been talking about, and I think it requires separate and very close scrutiny because it's not clear to me that there are good reasons for a separate privilege for nonconfidential-source material.

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

Those are my two biggest concerns.

DURBIN:

The second one may be a tough hurdle to clear.

CLYMER:

I agree, sir, it is.

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

DURBIN:

Thank you.

Thank you, Mr. Chairman.

SPECTER:

Thank you, Senator Durbin.

Senator Sessions?

SESSIONS:

Thank you, Mr. Chairman.

The American criminal process has always been a pursuit of truth. We've had, historically, certain limited privileges and certain individuals.

When you go to law school, you just study each one of those, and they're defended and argued for and against, and you have cases that show how abuses occur with the

privileges and how cases that demonstrate why the privileges are legitimate -- the priest penitent, the husband-wife, and many states have a reporter privilege.

I think, though, the first principle we should consider is this: If you have confidence in our government -- and I do -- then to deny the investigators of that government the ability to find truth is a compromise on the ideal of the American legal system. You have to justify that compromise through rational analysis. So I guess that's where we are today. And I'm interested in looking at this.

It does strike me, quite clearly -- and just briefly, because you can see how short our time is -- I would ask each of you, would you agree that the position of the United States government that deals with international relations, that deals with national security, terrorism, war and the ability of a government to unleash deadly force against enemies and to have those enemies desire to unleash deadly force on our soldiers and our people even, that it is -- we have to be more careful than most states.

DURBIN:

Would you disagree with that, Joe?

DIGENOVA:

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

DURBIN:

Professor Clymer?

CLYMER:

I also agree.

DURBIN:

Mister...

ROSENBERG:

I agree.

DURBIN:

You've already stated that in your remarks.

And I think that is true. I was asked by one of my newspapers about it and all the states have it. And I said, "Well, you know, I thought that was pretty" -- I started thinking about that. Why has not the United States Congress passed such a law? And I think it is a qualitative difference.

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

CLYMER:

That's correct. In fact, if the communication at issue was made for the purpose of furthering a crime or a fraud, there is a well-established exception that applies...

DURBIN:

I assume all of you would agree. All right. So it seems to me now that, if a member of the United States government, in violation of the security rules of that government, provides information that's classified to a reporter and that reporter broadcasts it, if it was a lawyer-client, the privilege certainly would not apply in that instance because they would be aiding and abetting the crime or actually being a co-conspirator or a co-participant in the crime.

Is that correct?

CLYMER:

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

DURBIN:

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

DIGENOVA:

Actually, Senator, in most of the instances where the attorney-client privilege is pierced, it's not because the lawyer was wittingly involved, it's that the lawyer was used unwittingly by the client.

SESSIONS:

All right.

DIGENOVA:

They find out about it later. The courts seek their testimony and the lawyer is delighted to testify about what they were told.

That's the majority of the cases where the privilege is pierced.

SESSIONS:

Well, I can see that. And you make a good point.

Well, at any rate, those are the reasons I think we need to be careful here. This is a big deal. It's something that my initial inclination would be, well, why not be supportive of our media?

One reason Senator Specter never called a reporter before the grand jury in Philadelphia is he had to face the Philadelphia Inquirer and they print ink by the barrel. I mean, there is a political reality there.

So even the Department of Justice has to be careful because you take a lot of abuse if you bring a reporter. So there's an inherent discipline on the government not to abuse this power.

ROSENBERG:

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

SESSIONS:

Yes.

ROSENBERG:

You're exactly right.

And that's why not only do we adhere so closely to our internal guidelines, but I can tell you they're rather strict. We have to make all reasonable attempts to obtain information from alternative sources first. Then we must negotiate with the media. And then if that fails, we may seek permission, if there are reasonable grounds to believe a crime has occurred and the information is essential -- that's the word in our guidelines, "essential" -- to a successful investigation.

And that's why if you look at the past 14 years, we've only issued 12 confidential source subpoenas. We take this responsibility very seriously.

SPECTER:

Thank you very much, Senator Sessions.

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

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

ROSENBERG:

Well, I don't believe there is reason to intervene.

But it does raise an ancillary point that I think is important. I don't think *Branzburg* is that unsettled.

I think if there is a good faith grand jury investigation, then there is no privilege. And that's what the D.C. Circuit recently said.

But it goes back to an earlier point in our discussion, Senator Feinstein, when we talked about how inevitably different circuits are going to judge parts of this bill in different ways. And that is a fundamental problem with the legislation.

SPECTER:

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

ROSENBERG:

I believe, Senator, but I'll check, that, that was in the civil context.

In other words, for a criminal grand jury investigation brought in good faith, I think there was one aberrant decision that I know of in the 3rd Circuit, a 1992 case called Williams. Absent that, I believe in a criminal grand jury context good-faith investigation, Branzburg is settled law.

SPECTER:

Well, that's not my staff's research. But you say that...

ROSENBERG:

I could be wrong, and I'm happy to be corrected.

SPECTER:

Well, any of us could be wrong, and we'll double check that.

But you say there is at least a distinction in the 3rd Circuit which moves in a different direction?

ROSENBERG:

There is a 1992 3rd Circuit case, I believe in Ray Williams, which the 3rd Circuit -- it was a split panel, by the way, evenly divided -- I believe improperly focused on Justice Powell's concurrence in Branzburg to find that there could be a qualified privilege in the grand jury context, which I think is a misreading of Branzburg.

ROSENBERG:

I think absent that -- and, again, I'm confining my analysis to criminal grand jury cases.

SPECTER:

OK. You may think it's a misreading of Branzburg but the 3rd Circuit doesn't.

ROSENBERG:

And they win.
(LAUGHTER)

SPECTER:

The 3rd Circuit's a very important circuit. It covers Pennsylvania, right, Professor Clymer?
(LAUGHTER)

CLYMER:

Absolutely.

SPECTER:

But there's a special need for Congress to come into it if the 3rd Circuit's divided.

Mr. DiGenova, you had commented about the need to have access to discovery so that there could be information presented to a court or implementing a balancing test. Would you expand on what you had in mind there?

DIGENOVA:

Yes, Mr. Chairman.

As a result of experiences in the area both with the reporter's privilege and the attorney-client privilege, in the grand jury context, people who are seeking to challenge the subpoenas are not entitled to get the ex parte information that is given to the court.

In those two situations where the privileges are quite substantial and important, the absence of having access to that information...

SPECTER:

Let me interrupt you because I've got a minute, 20 left. Would that idea be applied conceptually to Ms. Miller's case where...

DIGENOVA:

Absolutely.

SPECTER:

... where you think she should have had the right to know what the background was so that there could have been a weighing test by the federal judge in charge, Judge Hogan, who was in charge of the federal grand jury?

DIGENOVA:

Absolutely, because only the government knows the ex parte communication with the court. The person challenging the subpoena does not.

SPECTER:

Professor Clymer, do you agree with Mr. DiGenova?

CLYMER:

No.

SPECTER:

Why not?

CLYMER:

I think that it would be a bad idea if a person who was merely a witness in a grand jury investigation would be able to gain access to 6-E material which is essentially what Mr. DiGenova has suggested.

CLYMER:

I think it would undermine the effectiveness and the function and the historical performance of...

SPECTER:

Why do you say that? Why shouldn't that determination be made by a judge to know what's in the background?

CLYMER:

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

SPECTER:

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

CLYMER:

No. The judge should have access to the information if it's necessary to make a determination. For example, the D.C. Circuit had access to confidential information in the case involving the Judith Miller subpoena.

SPECTER:

Senator Feinstein, do you care to ask additional questions?

FEINSTEIN:

(OFF-MIKE)

SPECTER:

We'll move right to him unless Senator Sessions intercedes.

Thank you very much, Mr. Rosenberg.

Thank you, Professor Clymer.

Thank you, Mr. DiGenova.

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

SPECTER:

Our first witness on this panel is Ms. Judith Miller, author and Pulitzer Prize-winning correspondent for the New York Times, writing about national security issues with emphasis on terrorism in the Middle East.

SPECTER:

She joined the Washington bureau of the Times in 1977, and in 1983 was the first woman to be named chief of the Times bureau in Cairo.

1990, she was the special correspondent of the Persian Gulf crisis. Before joining the Times, worked on National Public Radio and a contributor to The Progressive, a monthly magazine.

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

MILLER:

Thank you, Senator.

SPECTER:

People say that I'm looking better now that I'm growing hair, but you look much, much better than anybody does.

So thank you for joining us and we're very much interested in what you have to say.

MILLER:

Good morning.

I am Judith Miller, a reporter for The New York Times. That statement, in and of itself, is extraordinary.

Reporters don't usually testify at congressional hearings. But the circumstances that in July forced me to spend 85 days in the Alexandria Detention Center in Virginia highlight the urgent need for a federal shield law to protect journalists and their sources.

I am here today to urge you to enact the Free Flow of Information Act so that other journalists will not be forced, as I was, to go to jail to protect their sources.

I'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.

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.

MILLER:

Confidential sources are the life's blood of journalism. Without them, whether they are in government, large or small companies, nonprofit organizations, people like me would be out of business.

As I painfully learned while covering intelligence estimates of Saddam Hussein's weapons of mass destruction, we are only as good as our sources. If they are mistaken, we will be wrong.

And the source's confidence that we will not divulge his identity is crucial to his or her readiness to come to us with allegations of fraud or abuse or other wrongdoing or even a dissenting view about government policy or business practices that the American people may need to know.

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

I would just point to the two examples.

In 2000, I relied heavily on such sources in co-writing a series of articles on Al Qaida which was openly and doggedly pursuing nuclear, biological and chemical weapons.

That series won one of seven Pulitzer Prizes for the New York Times that year, and it could not have been written without pledges of confidentiality I gave to officials who were so worried about Al Qaida -- all too presciently, alas -- that they were willing to discuss classified information with me to call attention to how relatively little time and money were being spent countering what they considered the gravest of threats to our nation.

Admittedly, the situation that sent me to jail was not as clear-cut. It was not the case of a government or corporate whistleblower but an all too familiar case of Washington politics.

Yet the principle, that confidential sources must be protected, must apply in all cases. Indeed, one person's whistleblower is another person's snitch.

One reason why this bill is so urgently needed is in the post- 9/11 era, dramatically increased amounts and types of information are being classified as secret and, hence, are no longer available for public review.

Last year, more documents were classified secret and top secret than ever before in American history. In such a climate, confidential sources, particularly in the national security and intelligence areas, are indispensable to government accountability.

Journalists are increasingly being subjected to federal subpoenas since 9/11. More than two dozen reporters have now been subpoenaed in the past two years and are in danger of going to jail.

If current trends prevail, the Alexandria Detention Center may have to open an entire new wing to house reporters.

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

MILLER:

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 that most enduring truths, reporters, even flawed reporters, should not be jailed for protecting even flawed sources.

When the dust clears, I hope that journalists and newsrooms will be emboldened, not confused or angered, by what I have done. And I hope that you will ensure that no other reporter will have to choose between doing her small bit to protect the First Amendment and her liberty.

Thank you, Senators.

SPECTER:

Thank you very much, Ms. Miller.

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

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

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

WESTIN:

Thank you very much, Mr. Chairman, and thank you to all the members of the committee for having me here today.

I must confess at the outset, I didn't work on Branzburg v. Hayes. It was a few years before I was with Justice Powell.

SPECTER:

Well, that's too bad. I'm sure if you had it would have been clearer.

(LAUGHTER)

WESTIN:

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

In my limited time, I want to make two basic points. As you say, I have served both as a lawyer -- I did have the honor of clerking for Justice Powell and then with Wilmer, Cutler for many years. And now I've been in the newsroom for, approaching, nine years now. So I've seen both sides of this issue.

Today, I'm here not as a lawyer -- I still have my D.C. bar card -- but I'm not as a lawyer here today. I'm really representing the 1,300 men and women of ABC News.

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

The two points I really want to try to make here are, number one, why I believe that it's really important that this committee and Congress do something in this area. As has been pointed out, Branzburg v. Hayes is back from the early '70s now, and we've had some confusion in the federal law for a good long time and we've gotten along.

So a legitimate question is: Why now? What is different?

And the second thing point for me to make is to give you some sense of where, at least, I think it would make sense for Congress to come out if it chose to legislate in this area.

On why it makes a difference, let me talk about confidentiality. Confidentiality is truly important. I've seen this now in the newsroom in doing our reporting.

It doesn't mean -- and I don't want there to be any illusion about this -- it doesn't mean that all of our reporting involves confidential sources or confidential information.

In fact, the vast majority of the reporting we do doesn't involve pledges of confidentiality and it doesn't involve sources who even ask to be kept confidential. But

there are some stories and some information that is important that we cannot get at without giving some assurance of confidentiality.

And everyone knows about Deep Throat, those famous cases, but I can tell you just from ABC News during my tenure there, we've had investigative reports on everything from wrongdoing at Veterans' Administration hospitals to problems in the FBI crime labs, a scandal in the state of Illinois involving corruption in state government, and those stories we really could not have gotten to without giving some pledge of confidentiality.

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

What has changed and what is different, just during my tenure at ABC News, is that when I first came in, the real question was: Is the information you have right, are we confident that it's truthful, number one; and, number two, is it newsworthy?

There now is increasingly a third element that we need to take into account, and that is even though we believe it's true and even though we believe it's newsworthy, are we or our reporters willing to risk subpoena and coercive efforts by prosecutors or by civil litigants or government litigants in a private capacity? Are we willing to risk that for the story?

And that's a further element that's been inserted now within recent years because, simply, of more of these cases coming up and more prominent cases coming up.

And please understand -- I think Mr. Rosenberg misunderstands my position, at least -- I don't mean this as an indictment of the Justice Department. I'm not saying they're doing anything wrong. They may be doing exactly right.

What I can tell you that inside the newsroom this is something we're very, very conscience of, and so it is keeping some information from the American people that otherwise we and others would be reporting.

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

WESTIN:

Now a number of factors go into that: the importance of the offense being investigated, the likelihood that there was an offense in the first place, national security needs to be taken into account. There are a variety of factors.

But the question is: Is it truly necessary and is it true that there's no way other way to get at it?

And, finally -- and perhaps this is the biggest issue because I think, frankly, there's a lot of common ground with the Justice Department.

I think there's a lot in the regulation to be applauded in the fact that they have it. But they recognize in their regulation the First Amendment interest here, implicitly. That's why they have the regulation, even though I note it doesn't apply outside the Justice Department. It doesn't apply to SEC and FTC and other subpoenas.

But the real issue is: Who gets to decide in the end?

It is understandable why prosecutors really believe in what they're doing and are zealous in pursuing their investigations. And, as citizens, we also applaud that. We should want that.

At the same time, there is a legitimate countervailing interest on the part of a robust media that's uncovering some of these stories we can't otherwise get at. And in that circumstance, in the end, I trust the court to sort that out. And that's really the issue.

Do the courts ultimately decide that or should we leave it to the unfettered discretion of the Justice Department? And that's why, on balance, I come out with the need for a balance to be struck. But in order for us to do our job at ABC News, I think it's critical that courts ultimately strike that balance.

Thank you very much.

SPECTER:

Thank you very much, Mr. Westin.

We now turn to Ms. Ann Gordon, managing editor of the Philadelphia Inquirer where she has been since 1999. A graduate of the University of Denver, has worked in the field of journalism at various locales, the Rocky Mountain Business Journal, business editor in the Fort Lauderdale Sun Sentinel, Denver Post, assignment manager for KC&C (ph) Denver radio station and the Cleveland Plain Dealer.

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

GORDON:

Thank you.

Members of the committee, thank you for allowing me to share my experience with you today as I consider this very important legislation.

As a journalist, I work hard to keep my beliefs out of public life. But you've asked me here today to speak on behalf of journalism, a profession that I hold dear and that I believe is bedrock to a free and open society.

But while generation of generation of Americans have added their voices to those of our founding fathers in support of those who dare to speak out, there is today renewed conflict among the government, the judiciary and the press. I urge you to put this conflict to rest.

By passing the Free Flow of Information Act that creates a federal shield law, you can protect the press when it exposes secrets that benefit the public and national security.

The Justice Department has told you that this bill is bad policy. The implication is that when the press tells its readers -- as the Inquirer recently did, for example -- that nearby refineries are vulnerable to attack and accidents that could imperil hundreds of thousands, it is threatening national security.

The threat comes not from inadequate protection of these sites, the Justice Department would seem to reason, but from the use of confidential sources to reveal the story. In fact, not publishing this material threatens national security.

I want the Inquirer to tell its readers that some chemical plants in our region are properly inspected and guarded and some are not.

GORDON:

I want to tell them which levees pose a threat to New Orleans. I want to tell them which campaign donors are profiting from the Iraq war and from contracts to operate the Philadelphia airport.

Some of the information needed to tell these stories does, indeed, come from confidential sources, sources that would not talk, provide documents or point the way to change if it were not for the assurances that they will be protected from reprisals.

The fear of exposure exists at all levels, and from those involving the government to those involving industry and even our most sacred institutions.

These are not cases involving political intrigue in Washington, D.C., but real daily examples of wrongdoing, exposed because of the promise to protect the courageous individual who wants to see justice done.

The debate over a federal shield law has been warped by a cycle of political leaks in Washington. But the reality is that those sorts of discussions are a minor part of a larger field of reporting that uses confidential sources.

It's also important to note that, very often, a confidential source is merely the starting point in an investigation. But without the promise at the onset, the fuller story would never be told.

Last year in the United States more than two dozen reporters were subpoenaed or questioned about their confidential sources in federal court cases. Six journalists were jailed or fined for refusing to disclose a source.

That number may seem small, but these actions sent doubt into the minds and spines of whistleblowers and journalists alike.

Today, 31 states and the District of Columbia provided shield laws that prohibit journalists from testifying about confidential sources. Eighteen other states have recognized a reporter's privilege as a result of judicial decision.

Why, you may ask, does the federal government need to get involved? Quite simply, because state shield laws offer little help in federal proceedings.

Confidential sources are left without any protection other than the hope that the journalist will be willing to violate a court order demanding them to testify. And having no shield in federal proceedings undermines the state shield laws that do exist.

Let me give you an example. The Pennsylvania shield law is, in fact, absolute. Confidential sources are protected under all circumstances. But the lack of federal shield laws undermines the right-minded policy of the Pennsylvania legislature.

If a journalist is subpoenaed in a federal court, even though the reporting was done in Pennsylvania, the journalist can be ordered to disclose a confidential source, something that legislature has otherwise prohibited.

GORDON:

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.

I know of no case where a disclosure of a confidential source would have protected the citizens of my state or our nation.

On the other hand, the disclosure of such sources' identity will jeopardize the public's interest and security because individuals will be too afraid to bring information to light.

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

We can, all of us, each of us, understand why a promise of confidentiality is crucial to disclosure. How many of us have asked a friend for a vow of confidence? Our lawyers are bound by confidentiality, our rabbis, our ministers, our priests and our doctors as well.

Whistleblowers need to be given the same assurances. What is most important here is that wrongdoing is exposed.

When we hear, as a nation, about Watergate or the fact that tobacco 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 it so that Americans understand that journalists who protect their sources are not criminals. Pass it because the lack of clarity at the federal level undercuts state law.

Thank you.

SPECTER:

Thank you very much, Ms. Gordon.

Our final witness is Mr. Dale Davenport. Been in the newspaper business for a long time. Started in 1966 as a staff writer for the Associated Press and was with the (inaudible) Daily Times and the Morning Press and has been with the Patriot-News in Harrisburg since 1972, starting as a reporter and is now editor of the editorial pages.

Mr. Davenport made a special trip to Washington to see me to urge these hearings of some congressional action some months ago and, in part, is a motivating factor.

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

DAVENPORT:

Thank you, Mr. Chairman, Senator Feinstein.

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

The citizens claim that this policy violates the establishment clause of the First Amendment. But another clause of that amendment is also in play here because during discovery, counsel for both the plaintiffs and the defendants in this case subpoenaed two reporters, one for each of the York newspapers that covered the meeting at which this policy was adopted.

DAVENPORT:

The plaintiffs wanted the reporters to verify what happened at the meeting -- essentially what they had written about. The defendants, however, wanted at least of the reporters to produce her notes and e-mails, drafts of her stories and other unpublished material that they claimed would show that she was biased.

Now, what her bias, alleged or not, has to do with the central issue of church and state, I don't know and I can't answer. But it has taken numerous motions and hearings and in camera examination by the trial judge and four court orders to get to where we are today, and that is that the two reporters are still under subpoena to testify as fact witnesses, if they're called, essentially just to verify that they wrote the stories and that they're accurate.

Commendably, the trial judge, Johnny Jones III, has prohibited questions about anything else, including confidential sources.

Now, these lawyers were not seeking the identity of the confidential sources but they sought material that might lead to the identity of sources, confidential or not.

If there were a federal statute in place that defined conditions and set strict limits for journalist testimony, then everyone would know the standards and judges would not have to rely on case law to judge the particular circumstances of a case like this. And it's less likely that reporters would be called to testify in the first place, which would reverse a disturbing trend in Pennsylvania of lawyers increasingly calling journalists to testify.

Journalists ought to be the last resort as witnesses, not first choice. Not only is being called to testify disrupting, but it has a chilling effect on the everyday sources who provide the background or the context for our stories, the glue that holds our stories together.

This Dover story wasn't one where confidential sources supplied the information for the stories; the reporter simply covered a public meeting of public officials.

But that's not to say that these reporters did not have sources who helped them produce the stories who might not have wanted to be quoted or identified.

When I began my newspaper career 42 years ago as a summer relief reporter in my hometown paper -- a little 10,000 circulation daily in central Pennsylvania -- I didn't know the term "confidential source."

But I encountered right away, literally, dozens of people who gave me information, helped me get information who did not expect and often did not want their names identified in the paper as the source of that information.

These were clerks in the (inaudible) offices at the country courthouse. They were the admitting nurse at the hospital, police officers, an ambulance driver, a secretary in the school board headquarters.

Most of these folks were simply doing their jobs, or thought they were doing their jobs, by pointing me in the direction of a document or an official source or confirming some detail of something I'd learned elsewhere.

Throughout my career, I've had more sources of this source than I could ever count. And what these folks want is for the journalist to have all the facts so that the story is accurate, complete and fair.

Americans know that democracy depends upon being informed. And they depend on the media to inform them. And if they can help to make that happen, they tend to do it.

DAVENPORT:

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

This brings me to why I think a shield law is so important. It might keep us out of jail and that would be a good thing. But a shield law is not primarily about protecting journalists. A shield law primarily protects those thousands upon thousands of ordinary Americans who facilitate the free flow of information.

They are helping journalists get the information and report the story often anonymously and often by choice.

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

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

SPECTER:

Thank you very much, Mr. Davenport.

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

MILLER:

Yes, Senator. I had done a three-part series on the danger of Al Qaida.

SPECTER:

When did you do that series?

MILLER:

In January of 2001.

SPECTER:

And I had worked on it the year before and I'd actually gotten interested in Al Qaida soon after its creation and was convinced, based on the intelligence officials that I was talking to and others with access to classified information, that Al Qaida was a very dangerous threat to this country.

MILLER:

They believed that, but they also believed that the then-Clinton administration was not spending enough money countering the threat and that Al Qaida didn't have priority.

And so even though our discussions potentially involved the disclosure of classified information, I was able to work with some of them to get information that ultimately led to this series that talked about Al Qaida as a network of over 50,000 people around the

world who had been through camps and who are trained and who were intending to kill Americans.

SPECTER:

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

MILLER:

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

SPECTER:

An overarching, critical issue is the chilling effect. You talk about more than two dozen subpoenas. The testimony by the government was that there have only been 12 in the last 12 years, and we will check that out.

Can you give us any specific illustrations -- and I'm going to come to the entire panel on this question -- as to what your own experience has been on people, on reporters, who have not done their job because of the chilling effect of the potential of what happened to you, Ms. Miller?

MILLER:

Well, I would hope that anyone who talked to me would be assured that I was now willing to protect them. But in general, I think soon after my experience, my newspaper published a story about the Cleveland Plain Dealer in which that newspaper decided not to publish two articles that it had been working on because it was afraid of the consequences of probes into confidential sources.

MILLER:

And I think that's a very telling example of the chilling effect.

These subpoenas are extremely disruptive also to news rooms, and they took me out of the flow -- have taken me out of the flow of news reporting for well over a year now.

SPECTER:

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

WESTIN:

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

Let me be clear.

We get a number of subpoenas, both private and governmental subpoenas, all the time at ABC News, and the vast majority of those we work out. We negotiate them out, we limit them. You know, sometimes we move to quash and they go away.

It's only a fairly rare exception that really comes in litigation. But what's happened as a practical matter is because the Department of Justice does occupy a leadership position in law enforcement and in the law generally in this country.

The fact that they have pursued some of these very high-profile cases has sent a message throughout civil litigants' ranks and through the states about the danger of this.

And as a result, as I said earlier, there are cases now -- our reporters still do their job. I agree with Judith. But there are cases now where in years past, we said if we know the facts are right and we know this is newsworthy, we will go with the story.

Now we have to ask ourselves a tough question about what sort of a situation we're leading our reporters into, our editors into and ultimately our corporation into, and is the story really worth going for that.

There are stories that still remain so important that they deserve that, but we have to take that into account in deciding what we will pursue and how hard we will pursue it.

SPECTER:

You testify, Mr. Westin, that the standards ought to be that it is truly needed and no other way to get the information.

Do you think on a balancing test that a judge would undertake that there ought to be an inquiry into how important the prosecutor's objectives are, how serious a matter is involved to warrant the jailing of a reporter?

WESTIN:

Personally, yes, I do believe that. I believe that if we're really trying to balance the interest here, there are investigations and then they're investigations. And some go to really vital national interests and law enforcement -- certainly pursued very vigorously. Others are more marginal, and I think that that's a relevant factor for a judge to take into account.

SPECTER:

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

GORDON:

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

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

SPECTER:

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

GORDON:

Absolutely, and certainly it's a subject of much discussion. It has also emboldened our outside people who would like to get information from the newspaper to threaten us, to suggest that they will take us to court, to suggest that they will get a subpoena.

So it has very much heightened the sense that confidentiality is something that can be breached, which is exactly why we need a federal shield law, because the message that is generally out there is that there is no sense of confidentiality, that what you tell someone in Pennsylvania, for instance, with a full shield law is of no importance; it will not stand the test of confidentiality if it's in a federal court, a civil case, or a special prosecutor.

SPECTER:

I'm going to have to interrupt for about two minutes to take a call. So if you'll bear with me, I'll be right back.

(RECESS)

SPECTER:

Let us resume and we won't keep you too much longer. It's been a long morning. Ms. Gordon, you were in the middle of an answer. Had you finished?

GORDON:

Yes, Senator, I had. Thank you.

SPECTER:

OK. So who's the confidential source, Mr. Davenport, in that trial? Darwin?
(LAUGHTER)

DAVENPORT:

It's one of those guys.

SPECTER:

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

DAVENPORT:

I don't think there has been from the standpoint of perhaps having to protect a source into jail somewhere.

But certainly the increase in the number of subpoenas that we get -- and they're primarily in -- once you get out into Harrisburg and, I think, smaller towns, so often the

questioning is by civil litigants, people in private litigation seeking to have reporters come into court and verify the accuracy of a story.

And then they start asking questions about what was left out of the story, how the story was developed. And these are then part of a continuum.

And this legislation, this 1419, certainly deals with that in terms of making the reporter the last resort witness rather than the first. And I think that's a very troubling aspect of what's going on -- and away from national security issues.

SPECTER:

There's really one final question, one slightly different line. On some of the reports, you have been described as a strong-willed person who's going to move in the direction which you see. That's a paraphrase in a more diplomatic context than some of what has been written.

And the question I have for you is: To what extent is that necessary, as you see it, to really do your job you have to shake things up, be a bull in the china closet, get the kind of results you want, to perhaps disagree with some of your editors, to go where you want to go?

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

(LAUGHTER)

MILLER:

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

SPECTER:

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

GORDON:

Well, first of all, Senator, to you earlier point...

SPECTER:

That's an inappropriate question you'll have to answer.

GORDON:

Well-behaved women don't change the world, so I think that's something to consider.

(LAUGHTER)

Secondly, when there is an important story, am I actively engaged knowing what the reporter knows at some level before publication? Absolutely. I think that it's a two-

pronged process. One, confidentiality is not easily given. We work very hard, in fact, to put names on the record on all of our stories.

When that first initial decision is made, that's not the end of it. The second phase is basically it goes through editing, and a lot of discussion about whether in fact there will even be publication. Again, we know here -- we've spoken much about Ms. Miller's article that was never published. So it is important to put that in perspective.

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

SPECTER:

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

DAVENPORT:

It gives us a defense in state court but it doesn't in federal court, obviously.

SPECTER:

Doesn't help you when it's in the federal court.

DAVENPORT:

Sure. And the middle district is headquartered right there, based right there in Harrisburg, and so there's quite a bit of...

SPECTER:

Well, we had a question earlier today about the impact of Branzburg. And the 3rd Circuit, even conceded by the government witness, has the balancing test. But, of course, it didn't get to the 3rd Circuit. But that, obviously, would be the law that Judge Jones would apply in the middle district.

DAVENPORT:

Yes, his first ruling on this was a 21-page opinion, the first order involving these two subpoenas, and it relied on Branzburg and there's a case called Riley (ph), I think, and another one out of the 3rd Circuit that he used.

But he noted that the Pennsylvania shield law had certain applications but not in the federal court.

SPECTER:

The question arose earlier today, as you may recall in my questioning Mr. Rosenberg about whether there was a split in the circuits. And I don't know how far C-SPAN is going while we talk, but we've had calls in that we were correct about that, that there is a split in the circuit.

Got a lot of nodding heads out here, a lot of experts. Got a lot of nodding heads behind me, too.

(LAUGHTER)

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

To the extent that you can supplement your testimony with specific cases where there has been an impact by the threat of subpoena and the lack of a shield would be very helpful.

SPECTER:

And I personally am very fact-oriented in where we go on legislation.

And I think it's fair to say my colleagues are, too. We don't come to these issues with a lot of predispositions. We know of the tremendous value of investigative reporting and what the press does beyond any question.

First thing I do every morning is go to a whole series of newspapers and electronic media and the kind of reference material is invaluable. We don't have staffs which can do the kind of research which is done by the news media. We just do not have that.

And your exposure of corruption and mismanagement and malfeasance is legendary. There's just no doubt about it.

And we want to be sure that you're not harassed. We have countervailing considerations about being sure that criminal law can be enforced and national security interests are protected but that's what we're here to do, to have a balancing test.

There's nothing like going to a judge and having the facts before the judge, weighing these factors and having a judicial decision.

This committee has a very heavy responsibility. John Jones sat in your chair, Mr. Davenport, before he was a judge. He was recommended by the Pennsylvania senators to be a federal judge and we questioned him here, not as thoroughly as we questioned you, but we questioned him so that the independence of the judiciary is very important and there's rockbed confidence in what the judges do.

But they have to be able to have a statute to work with. And I believe we need a statute.

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

(LAUGHTER)

But I wanted to be prepared.

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

That concludes the hearing.

Witnesses:

JUDITH MILLER, REPORTER, NEW YORK TIMES

CHUCK ROSENBERG, U.S. ATTORNEY, SOUTHERN DISTRICT OF TEXAS
DAVID WESTIN, PRESIDENT, ABC NEWS
JOSEPH DIGENOVA, FOUNDING PARTNER, DIGENOVA & TOENSING LLP
ANNE GORDON, MANAGING EDITOR, PHILADELPHIA INQUIRER
DALE DAVENPORT, EDITORIAL PAGE EDITOR, THE PATRIOT-NEWS,
HARRISBURG, PENNSYLVANIA
STEVEN CLYMER, PROFESSOR OF LAW, CORNELL LAW SCHOOL

Senators

U.S. SENATOR ARLEN SPECTER (R-PA) CHAIRMAN
U.S. SENATOR ORRIN G. HATCH (R-UT)
U.S. SENATOR CHARLES E. GRASSLEY (R-IA)
U.S. SENATOR JON KYL (R-AZ)
U.S. SENATOR MIKE DEWINE (R-OH)
U.S. SENATOR JEFF SESSIONS (R-AL)
U.S. SENATOR LINDSEY O. GRAHAM (R-SC)
U.S. SENATOR JOHN CORNYN (R-TX)
U.S. SENATOR SAM BROWNBACK (R-KS)
U.S. SENATOR TOM COBURN (R-OK)
U.S. SENATOR PATRICK J. LEAHY (D-VT) RANKING MEMBER
U.S. SENATOR EDWARD M. KENNEDY (D-MA)
U.S. SENATOR JOSEPH R. BIDEN JR. (D-DE)
U.S. SENATOR HERBERT KOHL (D-WI)
U.S. SENATOR DIANNE FEINSTEIN (D-CA)
U.S. SENATOR RUSSELL D. FEINGOLD (D-WI)
U.S. SENATOR CHARLES E. SCHUMER (D-NY)
U.S. SENATOR RICHARD J. DURBIN (D-IL)