FREE FLOW OF INFORMATION ACT OF 2007

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

ON

H.R. 2102

JUNE 14, 2007

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JUNE 14, 2007

FREE FLOW OF INFORMATION ACT OF 2007

THURSDAY, JUNE 14, 2007

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to call, at 10:06 a.m., in Room 2141, Rayburn House Office Building, the Honorable John Conyers, Jr. (Chairman of the Committee) presiding.

Present: Representatives Conyers, Berman, Boucher, Scott, Lofgren, Jackson Lee, Delahunt, Cohen, Johnson, Sherman, Ellison, Smith, Sensenbrenner, Coble, Keller, Issa, Pence, Franks, and Jordan.

Staff present: Stacey Dansky, Majority Counsel; Blaine Merritt, Minority Counsel; and Matt Morgan, Staff Assistant.

Mr. CONYERS. The Committee will come to order. Good morning.

Without objection, the Chair is authorized to declare a recess, if necessary.

This is quite an unusual cause that brings us together in the Committee on the Judiciary today. We consider the import of the Nation's core liberties: freedom of the press and the right of reporters to maintain confidential sources.

So the first question that comes to my mind is, could we have freedom of the press if reporters aren't allowed to maintain confidential sources, and what are the implications of which way we go?

So to my colleagues, Rick Boucher, and my friend, Mr. Pence, the legislation they put together has been very important to me.

[The bill, H.R. 2102, follows:]

I

110TH CONGRESS
1ST SESSION

H. R. 2102

To maintain the free flow of information to the public by providing conditions for the federally compelled disclosure of information by certain persons connected with the news media.

IN THE HOUSE OF REPRESENTATIVES

MAY 2, 2007

Mr. BOUCHER (for himself, Mr. PENCE, Mr. CONYERS, Mr. COBLE, Mr. YARMUTH, and Mr. WALDEN of Oregon) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To maintain the free flow of information to the public by providing conditions for the federally compelled disclosure of information by certain persons connected with the news media.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Free Flow of Information Act of 2007''.

SEC. 2. COMPELLED DISCLOSURE FROM COVERED PERSONS.

(a) CONDITIONS FOR COMPELLED DISCLOSURE.—In any proceeding or in connection with any issue arising under Federal law, a Federal entity may not compel a covered person to provide testimony or produce any document related to information possessed by such covered person as part of engaging in journalism, unless a court determines by a preponderance of the evidence, after providing notice and an opportunity to be heard to such covered person—

(1) that the party seeking to compel production of such testimony or document has exhausted all reasonable alternative sources (other than a covered person) of the testimony or document;

(2) that—

(A) in a criminal investigation or prosecution, based on information obtained from a person other than the covered person—

(i) there are reasonable grounds to believe that a crime has occurred; and

(ii) the testimony or document sought is essential to the investigation or prosecution or to the defense against the prosecution; or

(B) in a matter other than a criminal investigation or prosecution, based on information obtained from a person other than the covered person, the testimony or document sought is essential to the successful completion of the matter;

(3) in the case that the testimony or document sought could reveal the identity of a source of information or include any information that could reasonably be expected to lead to the discovery of the identity of such a source, that—

(A) disclosure of the identity of such a source is necessary to prevent imminent and actual harm to national security with the objective to prevent such harm;

(B) disclosure of the identity of such a source is necessary to prevent imminent death or significant bodily harm with the objective to prevent such death or harm, respectively; or

(C) disclosure of the identity of such a source is necessary to identify a person who has disclosed—

(i) a trade secret of significant value in violation of a State or Federal law;

(ii) individually identifiable health information, as such term is defined in section 1171(6) of the Social Security Act (42 U.S.C. 1320d(6)), in violation of Federal law; or

(iii) nonpublic personal information, as such term is defined in section 509(4) of the Gramm-Leach-Bliley Act (15 U.S.C. 6809(4)), of any consumer in violation of Federal law; and

(4) that nondisclosure of the information would be contrary to the public interest, taking into account both the public interest in compelling disclosure and the public interest in gathering news and maintaining the free flow of information.

(b) LIMITATIONS ON CONTENT OF INFORMATION.—The content of any testimony or document that is compelled under subsection (a) shall, to the extent possible—

(1) be limited to the purpose of verifying published information or describing any surrounding circumstances relevant to the accuracy of such published information; and

(2) be narrowly tailored in subject matter and period of time covered so as to avoid compelling pro-

duction of peripheral, nonessential, or speculative information.

SEC. 3. COMPELLED DISCLOSURE FROM COMMUNICATIONS SERVICE PROVIDERS.

(a) CONDITIONS FOR COMPELLED DISCLOSURE.—With respect to testimony or any document consisting of any record, information, or other communication that relates to a business transaction between a communications service provider and a covered person, section 2 shall apply to such testimony or document if sought from the communications service provider in the same manner that such section applies to any testimony or document sought from a covered person.

(b) NOTICE AND OPPORTUNITY PROVIDED TO COVERED PERSONS.—A court may compel the testimony or disclosure of a document under this section only after the party seeking such a document provides the covered person who is a party to the business transaction described in subsection (a)—

(1) notice of the subpoena or other compulsory request for such testimony or disclosure from the communications service provider not later than the time at which such subpoena or request is issued to the communications service provider; and

(2) an opportunity to be heard before the court before the time at which the testimony or disclosure is compelled.

(c) EXCEPTION TO NOTICE REQUIREMENT.—Notice under subsection (b)(1) may be delayed only if the court involved determines by clear and convincing evidence that such notice would pose a substantial threat to the integrity of a criminal investigation.

SEC. 4. DEFINITIONS.

In this Act:

(1) COMMUNICATIONS SERVICE PROVIDER.—The term ''communications service provider''—

(A) means any person that transmits information of the customer's choosing by electronic means; and

(B) includes a telecommunications carrier, an information service provider, an interactive computer service provider, and an information content provider (as such terms are defined in sections 3 and 230 of the Communications Act of 1934 (47 U.S.C. 153, 230)).

(2) COVERED PERSON.—The term ''covered person'' means a person engaged in journalism and includes a supervisor, employer, parent, subsidiary, or affiliate of such covered person.

(3) DOCUMENT.—The term ''document'' means writings, recordings, and photographs, as those terms are defined by Federal Rule of Evidence 1001 (28 U.S.C. App.).

(4) FEDERAL ENTITY.—The term ''Federal entity'' means an entity or employee of the judicial or executive branch or an administrative agency of the Federal Government with the power to issue a subpoena or issue other compulsory process.

(5) JOURNALISM.—The term ''journalism'' means the gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing of news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public.

○

Mr. CONYERS. Freedom of the press is the cornerstone of our democracy. Without it, we can't have a well-informed electorate and a Government that truly represents the will of the people. And so this cornerstone is, to me, very carefully, very deliberately under siege today.

And there are a lot of reasons: an increasingly consolidated and corporate media. And I am in a funny position today, because, as a friend of the media, I know what the state of the media really is. It is corporatized and intimidation of the press by those in power and a lot of other little shaping of ideas and attitudes and positions of our Government. And the treatment of journalists as people to be utilized and used as they think necessary is really under reexamination.

Just now, the name of William Randolph Hearst comes to mind, a media person who could start a war and did.

So I hope this hearing will raise three discussions, and I know everyone is not in agreement with what I am saying, but that is what freedom of the press is about.

Why is it that a shield law will definitely not impede legitimate law enforcement efforts, and what are the appropriate safeguards to be put on shield legislation? Why is a shield law necessary? Why will it not impede legitimate enforcement efforts? And what are the safeguards we want to consider?

I have a lot to say about that and I think I will be able to do it without taking any more time.

So I am happy to recognize the Ranking Member of the House Judiciary Committee, the gentleman from Texas, Lamar Smith.

Mr. SMITH. Thank you, Mr. Chairman.

Mr. Chairman, in our democracy, the press is guaranteed their freedom by the first amendment to the Constitution. As Thomas Jefferson once said, "The only security of all is in a free press."

Our Nation would be much poorer if we did not allow a forum where wrongdoing could be exposed and minority opinions could be expressed without fear of Government interference or retribution. However, our Nation also cannot exist if we do not have the ability to protect certain confidential information.

Often, information related to our national security, a defendant's criminal case, or a company's trade secrets or personal customer information should remain confidential. And while H.R. 2102 does a better job than last year's bill of addressing these concerns, the legislation still has its critics.

Some in the private sector and, also, law enforcement officials believe it diminishes legal rights, public safety and national security.

The hearing today will shed some light on the many issues we must face when deciding whether to create a new Federal privilege for reporters. One matter we must address is whether Congress should legislate in an area that has been the traditional domain of common law and the courts.

In addition, how do we draft a law that defines a real journalist? Traditional print media has been joined by blogs, podcasts, instant messages and online newspapers. They bring us the news on demand anywhere in the world. Also, the Federal Government defends our national security.

Pardon me, I skipped a sentence here.

Bloggers are playing a larger role in news-gathering, and any legislation we consider should look at them as an emerging news source. But are they really in the category of journalists?

It is also important to remember that, for better or for worse, Congress creates legislation that paints with a broad brush. Legislation giving protections to the press would not only extend to well-respected publications but also to tabloids that thrive on gossip and misinformation.

We must ensure that whistleblowers can expose crimes, waste and wrongdoing, but we should not create a loophole so broad that it becomes a tool for those who would purposely destroy people's reputations, businesses and privacy.

Also, the Federal Government defends our national security. So in the Federal realm, we must weigh the benefits of a reported privilege with the problems it may cause for those who protect our country.

Finally, Mr. Chairman, I urge the Committee to remain open-minded about the bill's text. My home state of Texas was recently confronted with the same task before us today: how to draft a shield bill that appropriately addresses the needs of reporters, businesses, law enforcement authorities and the general public.

The Texas legislature considered a statute that accommodated all these diverse parties, and I am relieved that H.R. 2102 incorporates some of the same ideas. These include qualifying the privilege, ensuring the bill does not override protections for medical and financial records as well as trade secrets, creating a balancing test to weigh the interests of all parties, and changing the burden of proof.

I hope the primary sponsors of H.R. 2102, both Mr. Boucher and Mr. Pence, with whom I have spoken, are willing to consider further modifications along the way.

Mr. Chairman, before I yield back the balance of my time, let me make a confession both to our colleagues and to perhaps our witnesses, as well, and that is that for many, many years, at least I considered myself a reporter. I was editor of the newspaper in high school and in law school.

And in law school, I actually wrote an article for the Texas Bar Journal that was called, "Politicians Versus the Press: Libel in Texas." And I further confess that I came down on the side of the press, not the politicians.

So I sort of have a longstanding interest in this subject. And, in fact, for 2 years after college, I worked as a reporter for a newspaper, as well. So I have certain sympathies, shall we say, but the sympathies are somewhat qualified, as I feel that our privilege that we are discussing today should be, as well.

Mr. Chairman, I will yield back the balance of my time.

Mr. CONYERS. What a confession. We have got to watch you more carefully on this bill than any that we have ever worked on before. Some of your past is now coming out. [Laughter.]

Rick Boucher, Virginia, not always progressive, but a heck of a great guy to work with when we are on the same page. I am so proud that he is a sponsor of this legislation. And I am happy to recognize him now.

Mr. BOUCHER. Well, thank you very much, Mr. Chairman, I think. [Laughter.]

I appreciate your holding today's hearing, and I particularly want to thank you for your co-authorship of the legislation that we have put forward, the "Free Flow of Information Act."

And today I also want to commend our Committee colleague, the gentleman from Indiana, Mr. Pence, for his devotion of time and effective effort to this cause. He is the lead Republican sponsor of our bill, and I can say that it has been a tremendous privilege and pleasure to work with Mr. Pence as we have put this measure forward.

We are joined by 43 other Members of the House as co-sponsors of the bill, who, on a bipartisan basis, believe that the time has arrived for Congress to extend to journalists a privilege to refrain from revealing their confidential information sources in Federal court proceedings.

The privilege our bill provides is similar to those currently extended by 33 States and the District of Columbia.

The ability to assure confidentiality to people who provide information is essential to effective news-gathering and reporting on highly sensitive and important issues. Typically, the best information about corruption in Government or misdeeds within a large private organization, whether that is a large charity or a corporation, will come from someone on the inside who feels a responsibility to call a reporter and bring that matter to public scrutiny.

But that person truly has a lot to lose if his or her identity becomes known. In many cases, the person responsible for the corruption or the misdeeds can punish the source by dismissal or some more subtle form of retribution in the event that that individual's identity is revealed.

In the most sensitive cases, it is only by assuring confidentiality to the source that a reporter is able to understand what has happened and bring that information to public scrutiny.

I personally long thought that the ability to protect the confidentiality of sources is so essential to effective news-gathering that the first amendment the U.S. Constitution should be interpreted in a way that extends that protection as a matter of constitutional law.

Now, unfortunately, the Supreme Court has not to date extended that protection, at least not to the extent that we think is appropriate. And given the increasing use of subpoenas in recent years to extract confidential information in Federal court proceedings, I think the time has clearly arrived for Congress to adopt this statutory privilege.

And so we have put forward the "Free Flow of Information Act" in pursuit of the extension of that privilege to reporters.

While extending a broad privilege, we have included some exceptions, for instance, in which source information can be disclosed, where a strong public interest compels that disclosure. The exceptions are three in number, and they are carefully tailored.

The first is to prevent an imminent and actual harm to national security. And in including this exception, we have taken notes of the requests that have been made by the Department of Justice in order to protect national security. We think we do so fully through this exception.

Secondly, to prevent imminent death or significant bodily harm; and, third, to determine who has disclosed trade secrets or personal health or financial information where that disclosure is in violation of law.

An exception to the privilege would only apply if the court determines that the public interest in disclosing the information outweighs the public interest in protecting news-gathering and the free flow of information. And so, where any of those three exceptions is asserted, the balancing test would then have to be applied by the court.

The bill is a carefully crafted measure which will provide a needed privilege, and its passage clearly is necessary to protect the public's right to know.

I again want to thank Mr. Pence for his longstanding effective advocacy of this measure. It is a pleasure working with him, and I look forward to our further steps in this process.

I would note that a measure identical to ours has been introduced in the Senate by Senators Dodd and Lugar, and I thank them for their leadership also.

I point out for the benefit of Members that numerous journalistic organizations, ranging from the National Association of Broadcasters and the largest association of newspaper publishers to individual news organizations, including News Corp and the *New York Times,* have urged passage of this bill. And I thank each of them for their efforts, as well.

Your assistance, Chairman Conyers, has been absolutely invaluable to this effort. And I want to thank you for the helpful suggestions that you and your staff have made, which are reflected in the legislation before us. And I want to thank you for your co-sponsorship and also for scheduling today's hearing.

I welcome today's witnesses, and I want to thank them for taking time to share their views on this matter with us.

And I am pleased, Mr. Chairman, to yield back at this time.

Mr. CONYERS. Thank you very much, Rick Boucher.

I am now pleased to recognize the gentleman from Indiana, Mike Pence, for his great work on this measure.

Mr. PENCE. Thank you, Mr. Chairman. I am very humbled by your comments and the importance that you have personally placed on this legislation. Your sponsorship and your leadership has been seminal, and I am grateful for your support for the "Free Flow of Information Act."

I also want to welcome the qualified sympathies of the Ranking Member for this qualified privilege and would assure him of my desire, as I do on every issue before this Committee, to work closely with him.

Let me also say what a genuine pleasure it has been to work with Congressman Rick Boucher of Virginia on this issue. I will concede, Mr. Chairman, that it was my intention that this legislation be the Pence-Boucher bill. [Laughter.]

But I am honored to work on the Boucher-Pence version of the legislation, the American people having rearranged the order.

So, Mr. Boucher, our witnesses may be glad to know and those looking in, I saw Mr. Boucher work through extraordinary tragedy in his district in Virginia Tech but never lose sight on this issue

and so many other issues of the work of the American people. And I am grateful to have the opportunity to partner with him on this.

Also, I would like to acknowledge our partners in the Senate, my senior Senator from Indiana, Senator Richard Lugar, and Senator Chris Dodd of Connecticut.

And one last indulgence, Mr. Chairman. The son of one of my great inspirations in life is in the audience today, Jeff Brown, the head of a newspaper organization in the state of Indiana. His father, the late Robert N. Brown, had an enormous impact on my life and continues to be a loadstar to me of what it is to have integrity in journalism. And very much his example inspired my work on this.

As a conservative who believes in limited Government, I know that the only check on Government power in real-time is a free and independent press. The "Free Flow of Information Act" is not about protecting reporters. It is about protecting the public's right to know.

Our founders did not add the freedom of the press to the Constitution because they got good press, and I am certainly not advocating a free and independent press because I always get good press.

Enshrined in the first amendment are these words—"Congress shall make no law abridging the freedom of the press."

We all remember when, not long ago, a confidential source brought to light abuses at the highest levels of our Government, in the long national nightmare of Watergate. History, though, records, with the revelation of the identity of W. Mark Felt, that he would have never come forward without the absolute assurance of confidentiality.

But 30 years later, the press cannot make such assurances to sources, and we face the real danger that there may never be another Deep Throat. Protections provided by the "Free Flow of Information Act," I submit, are necessary. The members of the media can bring forward information to the American people without fear of retribution or prosecution.

In recent years, reporters such as Judith Miller have been jailed, Mark Fainaru-Wada and Lance Williams have been threatened with jail sentences. They are but a few names among many who have been subpoenaed for taking a stand for the first amendment and refusing to reveal confidential sources.

Compelling reporters to testify and, in particular, compelling them to reveal the identity of their confidential sources is a detriment to the public interest. Without the promise of confidentiality, many important conduits of information about our Government will be shut down.

The dissemination of information by the media to the public on matters ranging from the operation of our Government to events in our local communities is invaluable to the operation of democracy. Without the free flow of information from sources to reporters, the public can be ill-equipped to make decisions as an informed electorate.

And it is important to note, Mr. Chairman, that this bill is not a radical step. Thirty-two States and the District of Columbia have various statutes that protect reporters from being compelled to tes-

tify or disclose sources of information in court. The Ranking Member just favorably made reference to a recent compromise bill that passed in his home state of Texas. Seventeen States have protections for reporters as a result of judicial decisions. The "Free Flow of Information Act" would set simply national standards to those that are already in effect in most States.

And most of the provisions of this bill come from the internal Department of Justice guideline instituted more than 30 years ago during the Nixon presidency. Strengthened in the 1980's, the guidelines have been maintained by Republican and Democrat administrations ever since. In doing so, this legislation strikes a balance between the public's need for information and the fair administration of justice.

But in response to issues raised last year by the Department of Justice, the bill has been revised, not once, but twice, to narrow the scope of the privilege and create an exception to allow for compelled disclosure of a source that is necessary to prevent imminent or actual harm to national security, and this is altogether appropriate.

This year, the bill, again, has been revised and updated in order to address legitimate concerns that were raised with regard to the scope of the privilege. The national security exception has been maintained and additional exceptions have been added to allow for compelled disclosure of a source, situations involving imminent bodily harm or death, or in cases where a trade secret or personal medical or financial information are revealed in violation of the law.

In such cases, a judge will perform a balancing test to determine whether compelling disclosure of the source would be contrary to the public interest, taking into account the public's interest in compelling disclosure and the countervailing interest in maintaining the free flow of information.

It is also important to note what the bill does not do. It does not give reporters a license to break the law in the name of gathering news. It does not give them the right to interfere with police or prosecutors who are trying to prevent crime. It leaves laws on classified information unchanged.

It simply gives journalists certain rights and abilities to seek sources and report information without fear of intimidation or imprisonment, much as in the public interest, we allow psychiatrists, clergy, social workers to maintain confidences.

With this qualified privilege, reporters will be ensured the ability to get the American people the information they need. A free and independent press is the only agency in America that has the complete freedom to hold Government accountable.

And let me close with this, Mr. Chairman. Integrity in Government is not a Democrat or Republican issue. Corruption cannot be laid at the feet of one party or another. When scandal hits our national Government, whoever is responsible, it wounds our Nation.

As a conservative, I believe the concentrations of power should be subject to great scrutiny. The longer I serve in Congress, the more firmly I believe in the wisdom of our founders, especially as it pertains to the first amendment and freedom of the press.

It is important that we preserve the transparency and integrity of our American Government. And the only way to do that ultimately is by preserving a free and independent press.

Thomas Jefferson warned, "Our liberty cannot be guarded but by the freedom of the press, nor that limited without the danger of losing it." This Congress would be wise to heed those words.

Now is the time to repair this tear in the first amendment, pass a Federal media shield law. I look forward to working with the Chairman, my partner, Mr. Boucher, and many on this distinguished panel of witnesses to achieve just that.

And I yield back.

Mr. CONYERS. I thank you so much.

Darrell Issa?

Mr. ISSA. Thank you, Mr. Chairman. I guess I will be the first to speak that hasn't co-sponsored the bill, because I have some concerns about it.

I, too, like the authors, believe that the first amendment, in no uncertain terms, should shield the right for discovery purposes of the press. No member of the press should ever be forced to reveal a conversation they have with a source or potential source.

However, in the language as drafted, not the principal behind it, but the language as drafted, I fear that what we are doing is creating a situation in which known, what I would call, mischief becomes condoned.

It is not, in fact, the press's ability to glean information that I am concerned about or their right to protect the sources that they hear. It is, in fact, the fruit of that misused should not be protected.

Just yesterday, 25 feet on the other side of my left, I saw Administrator Doan of the GSA forced to answer a Washington Post article that released the names and activities of people that she commented to in a private deposition, under oath. Those names were released and her comments. She was held to have released, at least in the opinion of the Chairman, confidential information, when, in fact, The Washington Post released those informations based on the fruit of a known illegal leak.

Information was given to The Washington Post before it was even given to the people involved in the case, and it was published.

Now, The Washington Post could have redacted the names. They could have done what was appropriate to recognize that they had a fruit that, in fact, was illegal to be released. An individual who was releasing it in the Office of Special Counsel, a part of our Government, was releasing it for some purpose to promote their prosecution, I would believe. And they released that information, and then they used it inappropriately.

Even though I appreciate a great deal what The Washington Post does, The Washington Post had an opportunity to make it better. The reporter had an opportunity to recognize that they could get the entire story that the special counsel was doing something and that that activity, in that reporter's opinion, was extremely important to the balance of Government.

I have no objections to the article, but the release of the information and the source that gave them that information, that now has

tarnished multiple individuals who worked for the GSA—is, in fact, under this bill, the way I read it, unreachable.

I believe it is, in fact, that we must re-draft in order to make it clear that if, not just all the sources, but the fruit harms no one or is harming them only to the extent necessary for a free press, that we should shield that, but we should shield no more than that. Because, again, it is not the chilling effect on the press that we can only be concerned about.

We must be concerned about the chilling effect on people in their day-to-day lives or in Government service doing their job and finding a press often misused and, in many cases, by their very enemies within the Government using the press for this purpose.

So I hope to take a positive role here in the hearings today and in such drafting changes as would be necessary to protect against exactly what happened 20 feet over yesterday.

With that, I yield back.

Mr. CONYERS. Thank you, Darrell. Thanks so much.

Steve Cohen?

Mr. COHEN. Thank you, Mr. Chairman. I appreciate your having this hearing and the gentlemen from Indiana and Virginia bringing us this bill.

I am a co-sponsor, and, like the Ranking Member, I have a confession. Although not Catholic, but it is still good for the soul, I am an admitted press sympathizer, having a history in high school and college with the press.

I think this is a good thing. Watergate has been brought up. Nobody has brought up Mark Foley, but there are all kind of incidences that we have had in Government where, if it weren't for the press, they probably wouldn't have come to light. Watergate probably being a seminal event that changed the course of this country, and we would not have known of that illegal conduct otherwise.

I would hope, in your testimony—and I know you have written testimony—that you all would give us some clear examples of instances and cases where you think this would have indeed benefited the American people, having shield laws in other States or where the shield law might have been helpful. And also the Scooter Libby situation, how that might have affected that case, if we would have gotten to the bottom of that or not.

And I appreciate your being here.

Thank you, Mr. Chairman.

Mr. CONYERS. Thank you.

The former Chairman of this Committee, Jim Sensenbrenner.

Mr. SENSENBRENNER. Thank you very much, Mr. Chairman.

As you know, I am not a co-sponsor of this legislation, and I have serious concerns about it. With every right is to be given a responsibility. And my view of some of the things certain elements of the news media have done certainly hasn't been responsible, in terms of publishing information. And let me give two examples.

The *New York Times* published how our Government tracks money laundering by terrorists and other people who are contributing to illegal activities through a system that is located in Brussels, Belgium.

There was no allegation of illegality on the part of anybody in the Government. This was a perfectly legal request for information that the Government had subpoenaed, and the subpoena was complied with, and as a result of that publication, anybody that wanted to transfer money would be using other means for that, because it simply was tipped off. And, again, there was no allegation of misconduct. This was just a newsworthy story.

Now, what is the difference between shielding who leaked that information and which newspaper reporters got that information with who leaked the information and which newspaper reporters got the identity of an undercover CIA agent?

Now, their leaking the undercover identity of the CIA agent was a crime, it was misconduct, but here we saw the press harm the national security when there was no misconduct involved. It might have been a good story, but the people who are trying to blow us up or the people who are trying to launder money for illegal purposes were simply tipped off by the gratuitous publication by the *New York Times* of the story on the check clearing or the money transfer clearing operation in Belgium.

I don't see very much responsibility there. And it seems to me that the burden of proof in showing that a press shield will be used responsibly should be on the news media.

Thank you.

Mr. CONYERS. Thank you so much.

Howard Coble?

Mr. COBLE. Thank you, Mr. Chairman. I will be very brief. I won't use my 5 minutes.

Mr. Chairman, I traditionally——

Mr. CONYERS. You don't have 5 minutes.

Mr. COBLE. I am glad to know that. Thank you, Mr. Chairman.

I traditionally do not sponsor legislation. To get me to sponsor legislation, you have to put a gun to my head. But on this legislation, you would probably have to put a gun to my head to keep me off of it, because I see far more good than bad in this bill put together by Congressman Pence and Congressman Boucher.

Mr. Chairman, I think it establishes a national standard for dealing with confidential media sources. And the standard, it is my belief, will give reporters and their sources a safe harbor to freely discuss sensitive legislation, which would also provide several exceptions for national security, imminent death, bodily harm, trade secrets.

I think there is a provision about medical information that should be protected, but other than that, I think it provides a lot of sunlight and transparency that is badly needed.

And I yield back, Mr. Chairman.

Mr. CONYERS. Thanks, Howard Coble.

Our first witness is the Assistant Attorney General for Legal Policy at the Department of Justice, Rachel Brand. She was previously Principal Deputy Assistant Attorney General and then Associate Counsel to the President.

And so we are delighted to start off our testimony. We have a distinguished group of witnesses.

And we are happy to have you representing the Department of Justice. Please begin.

TESTIMONY OF THE HONORABLE RACHEL BRAND, ASSISTANT ATTORNEY GENERAL FOR THE OFFICE OF LEGAL POLICY, U.S. DEPARTMENT OF JUSTICE

Ms. BRAND. Thank you, and good morning to all the Members of the Committee.

This hearing touches on two matters of paramount concern to the Department of Justice—protecting the safety and security of the Nation and protecting freedom of speech and of the press.

We appreciate that H.R. 2102 is motivated by a genuine interest in balancing these values, but we believe the existing legal and policy framework strikes a better balance.

We also have a number of specific concerns with the way this particular bill is formulated. We do not believe the case has been made that any legislation is necessary on this subject. It has been suggested that subpoenas to the media are on the rise. But at least as to subpoenas from the Department of Justice, the numbers contradict that claim.

Evidence gathered by the Department's Criminal Division reflect that the Attorney General has approved subpoenas to the media seeking source-related information in only 19 cases since 1991. Only four of those cases have occurred since 2001.

The Department's record of restraint in this area is a result of adherence to longstanding guidelines. These guidelines require the Attorney General to approve personally any contested subpoena to the media and require that the prosecuting office seeking the subpoena show, among other things, that the information sought is essential to the investigation and cannot be obtained through other means.

The Department's policy stresses the need to balance the public interest in the free dissemination of information and in effective law enforcement and fair administration of justice.

I would like to point out a few of the Department's most significant concerns about this particular legislation. First, we believe the bill will make it virtually impossible to investigate and prosecute many leaks of classified national security information to the press.

There is broad recognition of the serious harm that these leaks can cause. In many such cases, there is no way to determine the source of a leak without testimony from the person to whom it was leaked.

This bill would place the Department in a catch-22 when we tried to investigate these cases. The bill would allow a subpoena to issue for source-related information only where the Government could show by a preponderance of the evidence that disclosure of the information was necessary to prevent imminent and actual harm to national security.

In a case where a leak had already been made, the classified information already published, and the harm already done, the Government could never meet this standard, because it would be attempting to bring a leaker to justice, not necessarily to prevent additional harm.

Even in cases where the classified information had been published and the Government believed that grave harm was still likely to occur, the Government might not have evidence that the harm

was imminent and, therefore, could not bring a leaker to justice in that case either.

Even assuming the Department could show that obtaining the information would prevent imminent harm to the national security, in practice the bill would require the Government to produce even more classified information in court, compounding the harm that had already occurred when the leak was made.

Moreover, in a case in which truly imminent harm to the national security could be abated by obtaining source information from a reporter, it is unlikely that the judicial proceeding required by the bill could move quickly enough to allow the harm to be averted.

We are concerned that the bill would encourage more leaks of classified information by giving someone considering a leak comfort that it would be so difficult for the Government to investigate the leak that he almost certainly would never be found out or prosecuted.

These concerns do not apply only in the national security context. Also of significant concern is the damage this legislation would cause to our ability and the courts' ability to investigate leaks of grand jury information. Disclosure of grand jury information jeopardizes criminal investigations, shows contempt for the court, and can damage the reputations of individuals who are under investigation, but later exonerated.

In some grand jury leak cases, the courts order the Department to investigate the leak. The bill would make it virtually impossible for either the Department or the court to investigate such a case for the same reasons it would make it very difficult to investigate leaks of classified information to the press.

Nor would the bill prevent only the Government from obtaining information. It might also violate the sixth amendment in cases in which its procedures prevented a criminal defendant from obtaining information for their defense.

These concerns are compounded by the bill's very broad definition of journalism, which includes anyone who publicly disseminates any news or information that he has written or gathered on any matter of public interest. This would enable many millions of people in the United States and abroad, including, for example, the media components of terrorist organizations, to refuse to provide testimony or evidence in criminal investigations.

We are concerned that this legislation would scrap a system that has successfully balanced the competing interests of Federal law enforcement and the free flow of information to replace it with one that, at best, will yield inconsistent results in 94 judicial districts around the country and it would do so without evidence that the freedom of the press is being impaired by the efforts of law enforcement to investigate and prosecute crime.

For these reasons and others discussed in my written statement, we oppose this legislation.

I am happy to be here, and I am happy to take your questions.

[The prepared statement of Ms. Brand follows:]

PREPARED STATEMENT OF RACHEL L. BRAND

Statement of

Rachel L. Brand
Assistant Attorney General, Office of Legal Policy

United States Department of Justice

Before the

Committee on the Judiciary
United States House of Representatives

Concerning

"The Free Flow of Information Act of 2007"

Presented on

June 14, 2007

Mr. Chairman, Ranking Member Smith, and Members of the Committee, thank you for the opportunity to testify before you today. This hearing addresses the sometimes difficult intersection of one of the government's most fundamental obligations – providing for the safety of the people by investigating, prosecuting, and deterring criminal activity – and two of our most cherished constitutional rights – the freedoms of speech and press protected by the First Amendment.

My testimony today will cover three general topics. First, I will explain the Department's longstanding commitment to striking a balance between the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice. Second, I will provide the Department's views of the law in this area as it currently stands. Third, and finally, I will argue that the protections currently provided by the law and by the Department's own internal policies have been and continue to be effective in striking an appropriate balance between these two important interests, and that the proposal pending before this committee – H.R. 2102, "The Free Flow of Information Act" – would upset that balance, with serious and harmful affects.

I. The Department's Policy Reflects an Appropriate Balance

The Department of Justice has long recognized that the media plays a critical role in our society, a role that the Founding Fathers protected in the First Amendment. In recognition of this, the Department has, for over 35 years, provided guidance to its prosecutors that limits the circumstances in which they may issue subpoenas to members of the press.

The guidelines – codified at 28 C.F.R. § 50.10 and reiterated in the United States Attorney's Manual – demonstrate how seriously the Department takes any investigative or prosecutorial decision that implicates, directly or indirectly, members of the news media. This policy seeks to "balanc[e] the concern that the Department of Justice has for the work of the news media and the Department's obligation to the fair administration of justice." 28 C.F.R. § 50.10(a).

Specifically, 28 C.F.R. § 50.10 requires that the Attorney General personally approve all contested subpoenas directed to journalists, following a rigorous and multi-layered internal review process involving numerous components of the Department. Only after "all reasonable attempts" have been made to obtain information from alternative sources and negotiations for voluntary production have failed may a prosecutor seek permission to issue a subpoena to the media. Id. § 50.10(b) Even then the prosecutor may do so only if there are "reasonable grounds to believe, based on information obtained from nonmedia sources, that a crime has occurred, and that the information sought is essential to a successful investigation – particularly with reference to directly establishing guilt or innocence." Id.

Ordinarily, this requires the prosecutor to write a detailed memorandum setting forth the justification for the subpoena and establishing the prosecutor's compliance with the guidelines. The memorandum is then reviewed by the Criminal Division's Office of Enforcement Operations, the Assistant Attorney General responsible for the investigation, the Office of the Deputy Attorney General, and, ultimately, the Attorney General.

The exhaustiveness and rigor of this process is no accident: it is designed to deter prosecutors from making requests that do not meet the standards set forth in the Department's guidelines. As a result, prosecutors seek to subpoena journalists and media organizations only when it is necessary to obtain important, material evidence that cannot reasonably be obtained through other means.

The effectiveness of this policy, and the seriousness with which it is treated within the Department, contradict the allegations some have made about the Justice Department's alleged disregard for First Amendment principles. The fact is that the Department issues subpoenas to the media very rarely. Since 1991, the Department has approved the issuance of subpoenas to reporters seeking confidential source information in only 19 cases. The authorizations granted for subpoenas of source information have been linked closely to significant criminal matters that directly affect the public's safety and welfare.

The Department does not believe a case has been made that the availability of subpoenas to the media, given how rarely and judiciously they have been used, has restricted the freedom of the press or the free flow of information to the public. Things were much the same in 1972 when the Supreme Court noted in Branzburg v. Hayes that "the evidence fails to demonstrate that there would be a significant constriction of the flow of news to the public if this Court reaffirms the prior common-law and constitutional rule regarding the testimonial obligations of newsmen. Estimates of the inhibiting effect of such subpoenas on the willingness of informants to make

disclosures to newsmen are widely divergent and to a great extent speculative." 408 U.S. 665, 693-94 (1972).

II. There Is No Exemption for Journalists from the General Obligation to Abide by the Law

The Justice Department's policy provides greater protections for journalists and the newsgathering process than the governing law requires. Neither the Constitution nor the common law provide an exception for journalists from the general obligation of all citizens to obey the law – whether it be the law governing unauthorized disclosure of classified information or what the Supreme Court has called "the longstanding principle" that the grand jury has a right to every man's evidence.

As the members of this Committee are well aware, the intersection of the law and the media's newsgathering function has received heightened attention in recent years as a result of serious leaks of classified information to the press. As President Bush has said, such leaks have threatened our national security, damaged our ability to pursue terrorists, and put our citizens and armed forces at risk. Then-CIA Director Porter Goss stated last year that leaks have alerted our enemies to intelligence collection technologies and operational tactics, and that it has "cost America millions of dollars" to repair the damage. These concerns have been echoed by Members of Congress in both the House and the Senate, including some Members of this Committee.

Nevertheless, it is a reflection of the Department's abiding respect for First Amendment principles and the vital role played by the press in our free society that the Department has never in its history prosecuted a member of the press under any of the several statutory provisions that prohibit the unauthorized disclosure of certain categories of classified information – even though such a prosecution is possible under the law. The Attorney General has repeatedly stated that the Department's primary focus is on the leakers of classified information, and not the media recipients of those leaks. It is the Department's strong preference to work with the press to prevent the dangerous revelation of classified information.

Just as courts have recognized that the laws forbidding unauthorized disclosure of classified information fail to provide an exemption for any particular profession or class of person, including journalists, so, too, have federal courts declined to recognize a "reporter's privilege" to withhold information from a grand jury conducting a good faith investigation. The Supreme Court made clear why this is so in Branzburg v. Hayes. In that case, the Court noted that "[f]air and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in this process." Branzburg, 408 U.S. at 690. This "fundamental function of government," the Court held, outweighed "the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or trial." Id. at 690-91.

Branzburg has been followed consistently by the federal courts of appeals, including two recent decisions involving media subpoenas in the United States Courts of Appeals for the District of Columbia and the Second Circuit. In refusing to recognize the existence of such a "reporter's privilege," courts have relied not only on the importance of the governmental interest in "fair and effective law enforcement," but also on what the Supreme Court in Branzburg called the "practical and conceptual difficulties" that administering such a privilege would present.

The Branzburg Court noted, among other potential problems, (1) the difficulty of "defin[ing] those categories of newsmen who qualified for the privilege"; (2) the danger that "[s]uch a privilege might be claimed by groups that set up newspapers in order to engage in criminal activity and therefore be insulated from grand jury inquiry, regardless of Fifth Amendment grants of immunity"; and (3) the danger that "courts would be inextricably involved in distinguishing between the value of enforcing different criminal laws." Id. at 703-4.

The potential practical and conceptual difficulties identified by the Court in Branzburg would obtain regardless of whether the asserted "reporter's privilege" was constitutional or statutory in nature. And those difficulties only multiply when one considers how a reporter's privilege would operate in the context of the ongoing effort to investigate, prosecute, and deter the unauthorized disclosure of classified information.

The dangers of according a privilege to reporters as recipients of such leaks has long been apparent, as is evidenced by one of the rare cases brought under the Espionage Act, United States v. Morison, 844 F.2d 1057 (4th Cir. 1988). In that case, a government employee was prosecuted for leaking classified information to *Jane's Defence Weekly*. The defendant asserted that his activity was not covered by the Espionage Act because that statute reached only "classic spying" and not "leaking" to the media, and that to hold otherwise would be to unnecessarily chill activity protected by the First Amendment.

The court rejected this defense, noting that it was supported neither by the plain language of the statute nor by its legislative history. In his concurring opinion in the Morison case, however, Judge Wilkinson noted the dangers inherent in according a privilege against prosecution in the context of a leak of classified information. "Rather than enhancing the operation of democracy," Judge Wilkinson wrote, "this course would install every government worker with access to classified information as a veritable satrap. Vital decisions and expensive programs set into motion by elected representatives would be subject to summary derailment at the pleasure of one disgruntled employee." Id. at 1083 (Wilkinson, J., concurring).

To avoid these difficulties, Federal courts wisely have refused to endorse a "reporter's privilege." In doing so, many of these same courts have predicted – and experience has confirmed – that the free flow of information will not be imperiled by the absence of such a privilege.

III. The Appropriate Balance Achieved by the Law and Justice Department Policy Would Be Upset by the Creation of a Federal "Reporter's Privilege"

Thus, while the Department of Justice understands the concerns that have motivated this Committee to take up these issues and to consider legislation in this area, it is the Department's firm belief that current law and Department of Justice policy governing the issuance of subpoenas to reporters and media organizations reflect an appropriate balance between the interest of the American people in the vigorous prosecution of criminals and the needs of a free press. In the Department's view, the proposal currently under consideration by this Committee – H.R. 2102, "The Free Flow of Information Act" – would upset that balance, to the detriment of law enforcement and, ultimately, the American people.

As an initial matter, supporters of the proposed reporter's privilege have pointed to certain recent high-profile cases as "proof" that the Department is breaking dangerous new ground and imperiling cherished First Amendment freedoms in its pursuit of media subpoenas. Such criticism, however, is long on rhetoric and short on substance, just as it was when the forerunners of today's critics made the very same arguments in the early 1970s – arguments the Supreme Court in Branzburg dismissed as "speculative" and unsupported by the evidence. If those critics were to be believed, we would have seen a marked decline in press freedoms in the wake of the Branzburg decision – but if anything, the opposite has occurred.

The claims of today's critics are no less speculative. When one gets past the overheated rhetoric, there is simply no evidence that the Department is now pursuing subpoenas of the press more aggressively or in greater numbers than it has in the past. Congress should demand a more rigorous demonstration that there is problem in need of a remedy before it legislates a sweeping overhaul of a system that has effectively balanced the news-gathering functions of the news media and the needs of law enforcement for decades.

The proposal currently being considered by this Committee would have a dramatic and, it must be said, negative effect on the ability of federal law enforcement to prosecute serious crimes – including terrorism and other national security offenses. Several Justice Department officials have testified in congressional committees over the last two years regarding the Department's opposition to proposed legislation in this area. Rather than repeat all of the Department's objections that have been outlined by these other witnesses, I will outline several of the most serious flaws in the proposed legislation.

First, the proposed legislation would extend its broad "journalist's privilege" to a far larger class of "covered person[s]" than the prior versions of the legislation. Under section 4(2) of the bill, a "covered person" means "a person engaged in journalism and includes a supervisor, employer, parent, subsidiary, or affiliate of such covered person." Section 4(5) of the bill then broadly defines "journalism" to mean "the gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing of news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public." Under this expansive definition, anyone who publicly disseminates (*e.g.*, in a comment sent to an electronic bulletin board on the internet) any news or information that he has written or gathered on any matter of public interest constitutes a "covered person." Nationality, affiliation, occupation, and profession are irrelevant to this privilege.

Such a broad definition would accord the status of "covered person" to a terrorist operative who videotaped a message from a terrorist leader threatening attacks on Americans, because he would be engaged in recording news or information that concerns international events for dissemination to the public. It is no exaggeration to say that this open-ended definition extends to many millions of persons in the United States and abroad – including those who openly wish to do us harm. Any documents or information "related to" information possessed by such persons "as part of engaging in journalism" are immune from government process under the bill unless its complex and burdensome standards for overcoming the privilege are satisfied. H.R. 2102 compounds this definitional problem by extending its protections to "covered persons" regardless of whether the covered person and the "source of information" have a pre-existing agreement to keep the source's identity a secret, and regardless of whether the source has freed the journalist from an agreement to maintain the source's anonymity.

Second, H.R. 2102 would violate the Sixth Amendment rights of criminal defendants by imposing impermissibly high standards that must be satisfied before such defendants can obtain testimony, information, and documents that are necessary to their defense. Under H.R. 2102, a criminal defendant can only obtain testimony, documents, or information for his defense if he can persuade a court that (1) he has exhausted all reasonable alternative sources; (2) the testimony or document sought is "essential" to his defense, rather than merely relevant and important; (3) the testimony or document is not likely to reveal the identity of a source of information or to include information that could reasonably be expected to lead to the identity of such source; and (4) nondisclosure of the information "would be contrary to the public interest." *See* Bill section 2(a). These burdensome standards go far beyond what is permissible in restricting defendants' Sixth Amendment rights in this context. See, e.g., United States v. Lindh, 210 F. Supp. 2d 780, 782 (E.D. Va. 2002) (a defendant's "Sixth Amendment right to prepare and present a full defense to the charges against him is of such paramount importance that it may be outweighed by a First Amendment journalist privilege only where the journalist's testimony is cumulative or otherwise not material."); United States v. Libby, 432 F. Supp. 2d 26, 47 (D.D.C., May 26, 2006) ("[T]his Court agrees with the defendant that 'it would be absurd to conclude that a news reporter, who deserves no special treatment before a grand jury investigating a crime, may nonetheless invoke the First Amendment to stonewall a criminal defendant who has been indicted by that grand jury and seeks evidence to establish his innocence.'").

The third and perhaps most troubling flaw in the proposed legislation is the dramatic structural change it would work with respect to current law-enforcement practice – a change that will severely hamper our ability to investigate and prosecute serious crimes, including acts of terrorism. Under the proposed legislation, before allowing the issuance of a subpoena to the news media for information "that could reasonably be expected to lead to the discovery" of a confidential source, a court must determine "by a preponderance of the evidence" that "disclosure of the identity of such a source is necessary to prevent imminent and actual harm to national security" and that "nondisclosure of the information would be contrary to the public interest." H.R. 2102 at § 2(a)(3).

By its terms, then, H.R.2102 not only cedes to the judiciary the authority to *determine*

what does and does not harm the national security, it also gives courts the authority to *override* the national security interest where the court deems that interest insufficiently compelling – even when harm to the national security is established. In so doing, the proposed legislation would transfer to the judiciary authority over law enforcement determinations reserved by the Constitution to the Executive branch. In the context of confidential investigations and grand jury proceedings, determinations regarding the national security interests are best made by members of the Executive branch—officials with access to the broad array of information necessary to protect our national security. As Justice Stewart explained in his concurring opinion in the Pentagon Papers case, "it is the constitutional duty of the Executive—as a matter of sovereign prerogative and not as a matter of law as the courts know law—through the promulgation and enforcement of executive regulations, to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense." New York Times Co. v. United States, 403 U.S. 713, 729-30 (1971) (Stewart, J., concurring).

The Constitution vests this function in the executive branch for good reason: the executive is better situated and better equipped than the judiciary to make determinations regarding the national security interest. Judge Wilkinson outlined the reasons why this is the case in his concurring opinion in United States v. Morison, 844 F.2d 1057 (4th Cir. 1988):

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

Id. at 1082-83 (Wilkinson, J., concurring).

The import of the structural change that H.R. 2102 would make is not merely speculative, as becomes apparent when one considers how the law would work in practice. Under the current system, the issuance of subpoenas in a criminal matter is governed by Federal Rule of Criminal Procedure 17. That rule contains a provision whereby the recipient of a subpoena can move to quash the subpoena. Under the current rule, the recipient is required to file a motion with the court and make a showing that the subpoena in question is "unreasonable and oppressive." Fed. R. Crim. P. 17(c)(2). That is to say, the burden is on the party seeking to quash the subpoena to demonstrate its unreasonableness or oppressiveness.

The proposed legislation, however, shifts this burden to the government, while

simultaneously increasing the amount of proof the government must introduce before subpoena can issue to a member of the media. This is not an insignificant change: the allocation of the burden, as a legal matter, can have a tremendous effect on the outcome of a proceeding, for it requires the party carrying the burden not only to produce evidence, but to produce it in sufficient quantity and quality in order to carry the day.

Because the privilege created by H.R. 2102 could only be overcome when disclosure of a source "is necessary to prevent imminent and actual harm to national security" or "death or significant bodily harm" "with the objective to prevent such harm," the legislation creates a bar so high that few criminal investigations could satisfy the standard. Indeed, the bill would have the perverse effect of placing a greater burden on the government in criminal cases – including cases implicating national security – than in cases in which the government sought to identify a confidential source who has disclosed a valuable trade secret, personal health information, or nonpublic consumer information. For example, in cases in which the government sought the identity of a source who unlawfully disclosed national security-related information, the bill would require the government to show that disclosure of the source was necessary to prevent imminent and actual harm to the national security. This would mean that where damage had already been done to the national security as a result of a leak of classified information, the government could not obtain the identity of the source. But the government would not be required to make such a showing in order to find the identity of a source who had violated federal law by disclosing a trade secret. The person who leaks classified war plans or nuclear secrets would still be protected by the privilege if the journalist to whom he leaked the information has already published it, while the person who leaked trade secrets would not. Thus, the evidentiary threshold proposed by H.R. 2102 would create a perverse incentive for "covered persons" to protect themselves by immediately publishing the leaked information, even if national security would be harmed, because once the harm actually occurs it will be harder to investigate the source.

Even if we assume the government could meet the H.R. 2102's very high standard, doing so in cases involving national security and terrorism will almost always require the government to produce extremely sensitive and even classified information. It is therefore not an overstatement to say that the legislation could encourage more leaks of classified information – by giving leakers a formidable shield behind which they can hide – while simultaneously discouraging criminal investigations and prosecutions of such leaks – by imposing such an unacceptably high evidentiary burden on the government that it virtually requires the disclosure of additional sensitive information in order to pursue a leaker.[1]

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[1] The Department also notes that H.R. 2102 imposes several additional requirements over and above the extremely high evidentiary hurdles outlined above, including a requirement that "any document or testimony that is compelled . . . be limited to the purpose of verifying published information." H.R. 2102 § 2(b)(1). This provision of the bill leaves prosecutors in an apparently inescapable bind. If prosecutors may only seek confidential source information in order to "verify published information," then they will never be able to obtain source

* * * *

As I noted at the outset, when confronted with a direct conflict between public's interest in effective law enforcement and the its interest in the free flow of information, courts have very consistently found that the former outweighs the latter. The proposed legislation upsets this balance. It would summarily scrap a system that has successfully balanced the competing interests of law enforcement and the free flow of information only to replace it with one that, at best, will yield uncertain results at a time when the nation can ill afford it. And it does so without any hard evidence that the public's interest in the free flow of information is in any way being harmed or impaired by the efforts of law enforcement to investigate and prosecute crime.

The Department recognizes that there are legitimate competing interests at stake when the newsgathering process and the criminal justice system intersect. But history has demonstrated that the protections already in place, including the Department's own rigorous internal review of media subpoena requests, are sufficient and strike the appropriate balance between the free dissemination of information and effective law enforcement.

The Justice Department looks forward to working with the Committee on these important issues. I would be happy to answer any questions you may have.

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information concerning a leak of national security information: If the information is published, then the harm has already been done, and prosecutors would no longer be preventing a threat to national security sufficient to satisfy section 2(a)(3)(A) of H.R. 2102, and so could not compel disclosure. If the leaked national security information is not published, then prosecutors would not be seeking information "limited to the purpose of verifying published information," as required by section (2)(b)(1) of the bill, and so could not compel disclosure. In other words, the bill would seem to provide absolute immunity to leakers of sensitive national security information.

Mr. CONYERS. Thank you so much for giving us the Department's position.

We were debating whether we have ever had a Pulitzer Prize winner before the Committee, and we are checking it out, but we know we have one this morning. And we are honored to have William Safire with us.

I don't like to bring this up, but I see you so little. Now, when you put this famous quote into American political discourse, "the nattering nabobs of negativism," were you talking about the press?

Mr. SAFIRE. May I answer right now? That was in a speech I wrote for Vice President Agnew in San Diego, and it was not about the press. It was about the defeatists in America. And I was looking for a phrase that I admired in Adlai Stevenson's speech, where he talked about the prophets of gloom and doom.

And so, looking around for a similar either rhyme or alliteration, I came up with "the nattering nabobs of negativism."

Mr. CONYERS. We are so honored to have you here, William Safire. I hope we don't inspire some other phrase after this hearing. [Laughter.]

Welcome.

TESTIMONY OF WILLIAM SAFIRE, CHAIRMAN, THE DANA FOUNDATION

Mr. SAFIRE. Thank you.

Mr. Chairman, Committee Members, I am here today to urge Congress to pass a law to stop the Federal Government and the courts from continuing down the dangerous path of denying Americans our right to the free flow of news.

For 30 years, I was a political columnist for the *New York Times* and now write a weekly language column for the Times Magazine. Before that, I was a speech writer in the Nixon White House. The opinions I express today are my own.

For the past few years, the process of gathering the news has been under unprecedented attack. That is because prosecutors and judges have been stripping away the single most important tool a reporter has for digging out information—the ability to gain the trust of a source by promising to keep his or her identity confidential.

The movement to force journalists to reveal their sources is an attempt to turn the press into an arm of the law. That trend defeats the administration of justice. The reason that almost all of the States have set up shields for journalists is that the exposure of corruption, malfeasance, official incompetence and stultifying secrecy often starts with the press. It helps the law because it is independent of the law.

I am here as a journalist to testify from my real world that "a chilling effect," in Justice Brennan's phrase, is being felt by today's reporters and columnists. Believe me, when a journalist is threatened with jail or, indeed, is jailed for refusing to blow the whistle on a whistleblower or to betray a trusting source, he or she feels a coercive chill.

And when a reporter is faced with legal expenses that his midsized publication cannot afford to pick up and the choice is ratting out a source or going into bankruptcy, that hits home. Don't

believe that ordinary citizens, as well as public officials, won't think twice about trusting a reporter to respect the confidence. It is happening right now as never before.

Here is something else I hope you won't believe: that a Federal shield law, like those now helping police and prosecutors in almost all the States, means that journalists will be placed above the law that requires other citizens to give testimony.

That is a slogan, not an argument. Lawyers have that privilege and are not above the law, same with clergy of all faiths, same with doctors and, since 1996, same with psychotherapists. And that same right to clam up exists with husbands and wives, including, I think, divorced spouses, not to be forced to betray confidences about each other.

When you stop to think about it, it means that more than half the people in America must have the privilege. Are they all above the law? Of course, those time honored protections are in effect because our society, in many cases, for good reason, puts trust and mutual confidence first. There are always practical limitations. For example, you cannot refuse to testify in order to help commit a future crime.

That sense of balance is why the bill before you makes sense and is overdue. It takes the public interest in compelling disclosure of the source and balances it with the public interest in gathering news.

Last year, the Justice Department's central objection to a journalist shield was national security. This bill responds to that concern by making it possible to break confidence "when necessary to prevent imminent and actual harm to national security."

I am in the word business. "Imminent," rooted in the Latin for "threat," does not mean "soon." It means about to happen, without delay. If the Committee is interested, I have a few concrete insider examples to illustrate the connection between source and reporter.

Under Department of Justice guidelines about subpoenas to journalists, I have some information about how and why they were drawn up and how they have been subverted and made meaningless; on the latest chilling effect technique, how a prosecutor can play the media hostage card, the spiteful criticism of him by an otherwise gutsy columnist; on how a reporter makes and keeps contact with sources instead of relying on that old over-the-transom missive that cannot be verified and should be distrusted.

How many people remember what a transom was?

On the long-term relationship between source and reporter that led to the story of the first use of poison gas at Halabja in Iraq, which was broadcast on CBS and ignored, and I have information to partake and pass along on how much to trust a source and when to stop trusting him in connection with the director of CIA in Iran.

Finally, how and when a prosecutor got to a source with the help of a reporter in connection with the U.N. oil for food scandal.

My purpose in offering you these tidbits is to take the subject out of the legal and academic area for a few moments and give you a sense of life in the real world of news gathering. It is a cityscape of two-way streets, sometimes frowned upon as symbiotic relationships, under attack by well-meaning people, eager to penetrate confidence to protect secrecy.

It needs the protection of a new Federal law to give clarity to the present confusion in the minds of judges, prosecutors, litigants, and, yes, deepening concern in the world of reporters and the sources who trust them.

[The prepared statement of Mr. Safire follows:]

PREPARED STATEMENT OF WILLIAM SAFIRE

Mr. Chairman, committee members: I am here today to urge Congress to pass a law to stop the Federal government and the courts from continuing down the dangerous path of denying Americans our right to the free flow of news.

For thirty years, I was a political columnist for the New York Times, and now write a weekly language column for the Times magazine. Before that, I was a speechwriter in the Nixon White House. The opinions I express are my own.

For the past few years, the process of gathering the news has been under unprecedented attack. That's because prosecutors and judges have been stripping away the single most important tool a reporter has for digging out information: the ability to gain the trust of a source by promising to keep his or her identity confidential.

The movement to force journalists to reveal their sources is an attempt to turn the press into an arm of the law. That trend defeats the administration of justice. The reason that almost all of the states have set up shields for journalists is that the exposure of corruption, malfeasance, official incompetence and stultifying secrecy often starts with the press. It helps the law because it is independent of the law.

I'm here as a journalist to testify from my real world that a "chilling effect", in Justice Brennan's phrase, is being felt by today's reporters and columnists. Believe me, when a journalist is threatened with jail, or indeed is jailed, for refusing to blow the whistle on a whistleblower, or to betray a trusting source, he or she feels a coercive chill. And when a reporter is faced with legal expenses that his mid-sized publication cannot afford to pick up, and the choice is "ratting out" a source or going into bankruptcy, that hits home hard. Don't believe that ordinary citizens as well as public officials won't think twice about trusting a reporter to respect a confidence—it's happening right now as never before.

Here's something else I hope you won't believe; that a Federal shield law—like those now helping police and prosecutors in almost all the States—means that journalists will be placed "above the law" that requires other citizens to give testimony. That's a slogan, not an argument. Lawyers have that privilege and are not "above the law". Same with clergy of all faiths; same with doctors, and since 1996, same with psychotherapists. And the same right to clam up exists with husbands and wives, including divorced spouses, not to be forced to betray confidences about each other. When you stop to think about it, it means that more than half the people in America must have the "privilege"; are they all "above the law"?

Of course, those time-honored protections are in effect because our society, in many cases and for good reason, puts trust and mutual confidence first. But there are always practical limitations; You cannot refuse to testify in order to help commit a future crime.

That sense of balance is why the bill before you makes sense. And is overdue. It takes the public interest in compelling disclosure of the source and balances it with the public interest in gathering news. Last year the Justice Department's central objection to a journalists' shield was "national security". This bill responds to that concern by making it possible to break confidence when "necessary to prevent imminent and actual harm to national security". I'm in the word business: "imminent", rooted in the Latin for "threat", does not mean "soon"—it means "about to happen, without delay."

If the committee is interested, I have a few concrete "insider's" examples to illustrate the connection between source and reporter.

On the Department of Justice "guidelines" about subpoenas to journalists: I have some information about how and why they were drawn up and how they have been subverted and made meaningless.

On the latest "chilling effect" technique: how a prosecutor can play the media hostage card to stifle criticism of him by an otherwise gutsy columnist.

On how a reporter makes and keeps contact with sources instead of relying on the old "over the transom" missive that cannot be verified and should be distrusted.

On the long-term relationship between source and reporter that led to the story of the first use of poison gas at Halabja in Iraq—broadcast on CBS and ignored.

On how much to trust a source and when to stop trusting him, in connection with the director of CIA and Iran.

On when and how a prosecutor got to a source with the help of a reporter, in connection with the UN oil-for-food scandal.

My purpose in offering you these tidbits is to take the subject out of the legal and academic area for a few moments and give you a sense of life in the real world of newsgathering. It's a cityscape of two-way streets, sometimes frowned upon as "symbiotic relationships". Under attack by well-meaning people eager to penetrate confidence to protect secrecy, it needs the protection of new Federal law to give clarity to the present confusion in the minds of judges, prosecutors, litigants and yes—deepening concern in the world of reporters and the sources who trust them.

Mr. CONYERS. Thank you so much. Appreciate your being with us for this discussion.

Lee Levine has been in the Supreme Court on the subject matter that brings us here more times than anyone I know. He is teaching at Georgetown University Law Center, and we are very pleased to have him with us today.

TESTIMONY OF LEE LEVINE,
LEVIN SULLIVAN KOCH & SCHULZ

Mr. LEVINE. Thank you, Mr. Chairman, Members of the Committee.

For almost three decades following the Supreme Court's 1972 decision in *Branzburg v. Hayes,* subpoenas issued by Federal courts seeking disclosure journalists' confidential sources were very, very rare. It appears that no journalist was finally judged in contempt, much less imprisoned, for refusing to disclose a confidential source in a Federal criminal matter during the last quarter of the 20th century.

That situation has now changed. An unprecedented number of subpoenas seeking the names of confidential sources have been issued by Federal courts in a remarkably short period of time. Three Federal proceedings in Washington, D.C. alone generated such subpoenas to roughly two dozen reporters and news organizations, seven of whom were held in contempt in less than 1 year.

Since 2001, four Federal Courts of Appeals have affirmed contempt citations issued to reporters, each court imposing prison sentences on reporters more severe than any previously known in American history.

Decisions such as these have emboldened private litigants as well, especially since they, like special prosecutors, are not bound by the Department of Justice guidelines. In one civil suit, five reporters, including two that I represented, were held in contempt for declining to reveal their confidential sources in litigation instituted against the Government by Dr. Wen Ho Lee.

They were spared the imposition of judicial sanctions only because the news organizations for whom they worked paid a total of $750,000 to Dr. Lee, even though neither the reporters nor their employers were or lawfully could have been held liable to Dr. Lee in that case.

Now, the plaintiff in another civil suit, Dr. Steven Hatfill, has issued subpoenas and/or moved to compel disclosure of the identities of confidential sources from eight news organization and six reporters, several of whom I also represent.

There could be no dispute that this deluge of subpoenas in the Federal courts has now reached epidemic proportions. This should be a matter of great concern to the Congress and to the public.

In recent proceedings in Federal courts, journalist after journalist has convincingly testified about the important role confidential sources play in enabling them to do their jobs. In my written testimony, I recount several such examples.

Consider just one. In 1977, Walter Pincus, of The Washington Post, relied on confidential sources in reporting that President Carter planned to move forward with plans to develop a so-called neutron bomb, a weapon that could inflict massive casualties through radiation without extensive destruction of property.

The public and congressional outcry in the wake of these news reports spurred the United States to abandon plans for such a weapon and no Administration has since attempted to revive it.

Mr. Pincus, who never received a subpoena about the neutron bomb or any other matter in the course of his distinguished decades long career, has now received two, one from the special counsel in the Valerie Plame matter and another from Dr. Lee.

Needless to say, the prospect of substantial prison terms and escalating fines for honoring promises to sources threatens this kind of journalism. As Los Angeles Times reporter and Pulitzer Prize recipient Bob Drogin, who himself was held in contempt in the Wen Ho Lee case, has testified, "I have thought long and hard about this and unlike you attorneys here in the room, I do not have subpoena power or anything else to gather information. I have what credibility I have as a journalist. I have the word that I give to people to protect their confidentiality. If I violate that trust, then I believe I can no longer work as a journalist."

Indeed, in the wake of some of the judicial decisions about which I have spoken this morning, the Cleveland Plain Dealer, to cite just one example, decided that it was obliged to withhold from publication two investigative reports because they were predicated on documents provided by confidential sources.

Doug Clifton, the newspaper's editor, explained that the public would have been well-served to know about these stories, but that publishing them would "almost certainly lead to a leak investigation and the ultimate choice: talk or go to jail. Because talking isn't an option and jail is too high a price to pay, these two stories will go untold for now."

The situation that currently exists in the Federal courts has not been replicated in the States. In fact, 49 States and the District of Columbia recognize some form of reporter's privilege. Thirty-four of them have now enacted shield laws.

In a submission to the U.S. Supreme Court, the attorneys general of those States, each of whom is responsible for the enforcement of the criminal law in their respective jurisdictions, have convincingly demonstrated that their shield laws have had no material impact on law enforcement or on the discovery of evidence in judicial proceedings, civil or criminal.

Up until now, journalists have looked to the Supreme Court to address the confusion that now surrounds that reporter's privilege. The court, however, has consistently declined to intervene. In *Branzburg,* itself, Justice White's opinion for the court emphasized that "Congress has the freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion

standards and rules as narrow or broad as deemed necessary to deal with the evil discerned."

Members of the Committee, the time has now come for congressional action.

Thank you.

[The prepared statement of Mr. Levine follows:]

PREPARED STATEMENT OF LEE LEVINE

Testimony of Lee Levine
Before the
Committee on the Judiciary of the
United States House of Representatives

June 14, 2007

Introduction

Mr. Chairman, and Members of the Committee. Thank you for inviting me to testify today. At the Committee's request, I will address recent developments regarding the so-called "reporters' privilege" in the federal courts, the historical record concerning the role that confidential sources have played in the reporting of news, and the experience of the States with respect to their recognition of a journalist's right to maintain a confidential relationship with his or her sources.[1]

Recent Developments Regarding The Reporters' Privilege

For almost three decades following the Supreme Court's decision in *Branzburg v. Hayes*,[2] subpoenas issued by federal courts seeking the disclosure of journalists' confidential sources were rare. It appears that no journalist was finally adjudged in contempt or imprisoned for refusing to disclose a confidential source in a federal criminal matter during the last quarter of the twentieth century. That situation, however, has now changed. An unprecedented number of subpoenas seeking the names of confidential

[1] Any opinions expressed in this testimony are my own and are not necessarily those of my law firm or its clients. My testimony is substantially derived from "friend-of-the-court" briefs submitted by my law firm on behalf of a coalition of media organizations to the United States Supreme Court in *Miller v. United States* and *Cooper v. United States*, Nos. 04-1507, 04-1508, available at 2005 WL 1199075, and to the United States Court of Appeals for the Ninth Circuit in *In re Grand Jury Subpoenas to Mark Fainaru-Wada & Lance Williams* and *In re Grand Jury Subpoena to The San Francisco Chronicle*, Nos. 06-16995 & 06-16996. The Media Law Resource Center has published a comprehensive treatment of issues related to the privilege entitled *White Paper On The Reporters' Privilege*, available at www.medialaw.org (last visited June 13, 2007). In addition, the Reporters Committee for Freedom of the Press offers a frequently updated summary and analysis of cases in which journalists have been subpoenaed, entitled *Special Report: Reporters and Federal Subpoenas*, on its website at www.rcfp.org/shields_and_subpoenas.html (last visited June 13, 2007).

[2] 408 U.S. 665 (1972).

sources has been issued by federal courts in a remarkably short period of time to a variety of media organizations and the journalists they employ. Indeed, three federal proceedings in Washington, D.C. alone recently generated subpoenas seeking confidential sources to roughly two dozen reporters and news organizations in less than a year, many of whom were held in contempt. By way of comparison, a survey of news organizations conducted in 2001 by The Reporters Committee for Freedom of the Press revealed only two subpoenas seeking confidential source identities issued from any judicial or administrative body that year, federal or state.[3]

There appear to have been only two decisions from 1976-2000 arising from subpoenas issued by federal grand juries or prosecutors to journalists seeking confidential sources. Both involved alleged leaks to the media and in both, the subpoenas were quashed.[4] Yet, beginning in 2001, four federal courts of appeals have affirmed contempt citations issued to reporters, each imposing prison sentences more severe than any previously known to have been experienced by journalists in American history.[5] In 2001, writer Vanessa Leggett served nearly six months in prison for declining to reveal sources

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[3] *See* www.rcfp.org/agents/material.html (last visited June 13, 2007).

[4] *See, e.g., In re Williams*, 963 F.2d 567 (3d Cir. 1992) (en banc); *In re Grand Jury Subpoenas*, 8 Media L. Rep. 1418 (D. Colo. 1982). There appear to be no reported judicial decisions at all addressing subpoenas to reporters until roughly the beginning of the twentieth century. Only roughly a half-dozen can be found prior to the 1950s, and several of those arose because the journalist himself was the target of a criminal investigation. *See Branzburg*, 408 U.S. at 685-86 (citing cases). Indeed, prior to the late 1960s, there appear to be only two federal court decisions related to federal grand jury or criminal trial subpoenas issued to journalists, and both excused the reporters from testifying on grounds unrelated to privilege. *See Burdick v. United States*, 236 U.S. 79 (1915) (journalist was entitled to assert a Fifth Amendment privilege); *Rosenberg v. Carroll*, 99 F. Supp. 629 (S.D.N.Y. 1951) (excusing journalist because information sought was not sufficiently relevant). And, during those brief, exceptional periods in American history when subpoenas were issued to reporters in significant numbers, most notably in the years immediately surrounding the Supreme Court's decision in *Branzburg*, both the states and most lower federal courts promptly responded by recognizing a formal legal privilege. *See infra* note 49.

[5] The longest sentence previously known to have been served by a reporter for refusing to reveal a source was 46 days in a case arising shortly after *Branzburg*. *See Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975); www.rcfp.org/jail.html (*Los Angeles Herald-Examiner* reporter William Farr).

of information related to a notorious murder, almost four times longer than any prison term previously imposed on any reporter by any federal court.[6] In 2005, James Taricani, a reporter for WJAR-TV in Rhode Island, completed a four-month sentence of home confinement for declining to reveal who provided a videotape to him that captured alleged corruption by public officials in Providence.[7] In 2005, Judith Miller of *The New York Times* was incarcerated for 85 days for declining to reveal the identities of her confidential sources in response to a grand jury subpoena, and was released only when her source waived the protection of the promise she had extended to him.[8] Earlier this year, videographer Joshua Wolf was released from prison after serving some seven months after he declined to provide federal authorities with unpublished video footage of a protest he covered at a G-8 summit.[9] And, finally, although it was ultimately not enforced because the identity of their confidential source was discovered through other means, *San Francisco Chronicle* reporters Lance Williams and Mark Fainaru-Wada were sentenced to up to 18 months in prison for refusing to reveal who gave them information revealed to a federal grand jury about steroid use in professional sports.[10]

Decisions such as these have emboldened private litigants and the federal courts adjudicating their cases to demand confidential source information from reporters in

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[6] *See In re Grand Jury Subpoenas*, 29 Media L. Rep. 2301 (5th Cir. 2001) (per curiam).

[7] *See In re Special Proceedings*, 373 F.3d 37 (1st Cir. 2004).

[8] *See In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D.C. Cir. 2005); *see, e.g.*, David Johnston & Douglas Jehl, *Times Reporter Free from Jail; She Will Testify*, N.Y. TIMES, Sept. 30, 2005, at A1; Adam Liptak, *Reporter Jailed After Refusing to Name Source*, N.Y. TIMES, July 7, 2005, at A1.

[9] *See In re Grand Jury Subpoena (Joshua Wolf)*, 201 Fed. Appx. 430 (2006); *see also, e.g.*, Associated Press, *Videographer is freed after cutting a deal*, KANSAS CITY STAR, April 14, 2007, at A4.

[10] *In re Grand Jury Subpoenas to Mark Fainaru-Wada & Lance Williams*, No. CR 06-90225 (JSW), 2006 U.S. Dist. LEXIS 73134 (N.D. Cal. Sept. 25, 2006); *see, e.g.*, Bob Egelko, *Lawyer Who Leaked Athletes' Testimony Seeks Less Prison Time*, S.F.CHRONICLE, June 7, 2007, at B2.

similarly unprecedented fashion. Five reporters employed by *The New York Times*, *Los Angeles Times*, *The Washington Post*, *Associated Press* and *CNN* were held in contempt for declining to reveal their confidential sources of information about Dr. Wen Ho Lee, who had sued several federal agencies claiming that such information was provided to the press by government officials in violation of the Privacy Act.[11] They were spared the imposition of judicial sanctions only because the news organizations for which they worked collectively paid $750,000 to Dr. Lee, even though neither the reporters nor their employers were, or lawfully could have been, defendants in his case against the government.[12] Most recently, the plaintiff in another civil suit alleging violations of the Privacy Act in federal court, Dr. Steven Hatfill, issued subpoenas to and/or moved to compel disclosure of the identities of confidential sources from eight news organizations and six reporters.[13] There can be no legitimate dispute that this deluge of subpoenas in the federal courts is unprecedented in American history.

The Importance of Confidential Sources

Congress and the public should be concerned about the imposition of severe sanctions against journalists for honoring promises of confidentiality because such sources are often essential to the press's ability to inform the public about matters of vital

[11] *See Lee v. U.S. Dep't of Justice*, 327 F. Supp. 2d 26 (D.D.C. 2004), *aff'd in relevant part*, 2005 WL 1513086 (D.C. Cir. June 28, 2005); *Lee v. U.S. Dep't of Justice*, 287 F. Supp. 2d 15 (D.D.C. 2003), *aff'd in relevant part*, 2005 WL 1513086 (D.C. Cir. June 28, 2005). The trial court's orders holding these journalists in contempt were affirmed on appeal the day after the Supreme Court denied petitions for writs of *certiorari* filed in *Miller v. United States* and *Cooper v. United States*. *See Lee v. U.S. Dep't of Justice*, 413 F.3d 53 (D.C. Cir. 2005), *reh'g en banc denied*, 428 F.3d 299 (D.C. Cir. 2005). My law firm served as counsel for two of the journalists held in contempt in the *Lee* case.

[12] *See, e.g.*, Paul Farhi, *U.S., Media Settle with Wen Ho Lee; News Organizations Pay to Keep Sources Secret*, WASH. POST, June 3, 2006, at A01.

[13] *See Special Report: Reporters and Federal Subpoenas*, Reporters Comm. for Freedom of the Press, www.rcfp.org/shields_and_subpoenas.html (last visited June 12, 2007). My law firm represents journalists and news organizations that have received subpoenas in the *Hatfill* litigation.

concern. The uncertainty that has now developed regarding the existence and scope of a reporters' privilege in the federal courts threatens to jeopardize the public's ability to receive such information. As the Supreme Court has recognized, the press "serves and was designed to serve [by the Founding Fathers] as a powerful antidote to any abuses of power by governmental officials."[14] The historical record demonstrates that the press cannot effectively perform this constitutionally recognized role without some confidence in its ability to maintain the confidentiality of those sources who will speak only on a promise of anonymity.

There can be no real question that journalists must occasionally depend on confidential sources to report stories about the operation of government and other matters of public concern. An examination of roughly 10,000 news media reports, conducted in 2005, concluded that fully thirteen percent of front-page newspaper articles relied at least in part on confidential sources.[15] While there is healthy debate within the journalism profession about the appropriate uses of confidential sources, all sides of that debate agree that they are at times essential to effective news reporting. [16]

In recent proceedings in the federal courts, journalist after journalist has convincingly testified about the important role confidential sources play in enabling them

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[14] *Mills v. Alabama*, 384 U.S. 214, 219 (1966).

[15] *See* http://www.stateofthenewsmedia.org/2005/narrative_overview_contentanalysis.asp?cat=2&media=1.

[16] *See generally 2004 Confidential-Sources Survey*, http://www.firstamendmentcenter.org/about.aspx?item=2004_confidential_sources (last visited June 13, 2007). Much of the debate regarding confidential sources concerns whether such sources are overused or misused. At bottom, while it is undoubtedly true that "[t]he right to remain anonymous may be abused when it shields fraudulent conduct," it remains the case that, "in general, our society accords greater weight to the value of free speech than to the dangers of its misuse." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995).

to report about matters of manifest public concern. As WJAR reporter James Taricani testified before being sentenced to house arrest:

> In the course of my 28-year career in journalism, I have relied on confidential sources to report more than one hundred stories, on diverse issues of public concern such as public corruption, sexual abuse by clergy, organized crime, misuse of taxpayers' money, and ethical shortcomings of a Chief Justice of the Rhode Island Supreme Court.[17]

Indeed, Mr. Taricani described a host of important stories that he could not have reported without providing "a meaningful promise of confidentiality to sources," including a report on organized crime's role in the illegal dumping of toxic waste that sparked a grand jury investigation and a report on the misuse of union funds that led to the ouster of the union president.

Pierre Thomas, who was held in contempt in the *Wen Ho Lee* case, recounted many similar examples in his testimony in that litigation. For example, information received from confidential sources enabled Mr. Thomas to report on the progress of the Oklahoma City bombing investigation in a manner that proved instrumental in helping a nervous public understand that the bombing was not the work of foreign terrorists, and his award-winning coverage of the September 11 attacks unearthed important information, provided by confidential sources, about the FBI's advance knowledge of the activities of those responsible for that tragedy. As Mr. Thomas testified: "If I had no ability to promise confidentiality to these sources, they would not have furnished vital information for these articles."

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[17] Mr. Taricani's testimony, as well as that of the other journalists quoted herein, is taken from a compendium of affidavits submitted to the Supreme Court by a coalition of media organizations in *Miller v. United States* and *Cooper v. United States*. *See Appendix B to the Brief Amici Curiae of ABC, Inc, et al.*, in *Miller v. United States* and *Cooper v. United* States, *supra* note 1. The affidavits submitted to the Supreme Court are from journalists employed by news organizations who have been subpoenaed in recent federal proceedings. Their testimony more fully documents the role played by confidential sources in the reporting of public matters.

Confidential sources are not only critical to investigative journalists like Messrs. Taricani and Thomas, but are equally important to the daily reporting of more routine news stories. Reporters regularly consult background sources to confirm the accuracy of official news pronouncements and to understand their broader context and significance. Without the ability to speak off the record to sources in the government who are not officially authorized to do so, there is substantial evidence that reporters would often be relegated to spoon feeding the public the "official" statements of public relations officers. For this reason, among others, news reporting based on confidential source material regularly receives the nation's most coveted journalism awards, including the Polk Awards for Excellence in Journalism[18] and the Pulitzer Prize.[19]

The history of the American press provides ample evidence that the information anonymous sources make available to the public through the news media is often vitally important to the operation of our democracy and the oversight of our most powerful institutions, both public and private. While the *Washington Post's* "Watergate" reporting is perhaps the most celebrated example of journalists' reliance on such sources,[20] as the

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[18] In 2005, for example, the Polk Awards for Television Reporting, National Reporting, and Foreign Reporting all went to articles based, in significant part, on information and other material provided by confidential sources. *See* http://www.brooklyn.liu.edu/polk/press/2005.html (listing awards) (last visited June 13, 2007).

[19] For example, the 1996 Pulitzer Prize for National Reporting was awarded to the *Wall Street Journal* for its articles reporting on the use of ammonia to heighten the potency of nicotine in cigarettes, which was based on information revealed in confidential, internal reports prepared by a tobacco company. *See, e.g.*, Alix M. Freedman, *'Impact Booster': Tobacco Firm Shows How Ammonia Spurs Delivery of Nicotine*, WALL ST. J., Oct. 18, 1995, at A1. In 2002, the Prize was awarded to the staff of the *Washington Post* "for its comprehensive coverage of America's war on terrorism, which regularly brought forth new information together with skilled analysis of unfolding developments." *See* www.pulitzer.org/year/2002/national-reporting. The *Post*'s series was based, in significant part, on information provided by unnamed public officials, both here and abroad. *See, e.g.*, Barton Gellman, *U.S. Was Foiled Multiple Times in Efforts To Capture Bin Laden or Have Him Killed*, WASH. POST, Oct. 3, 2001, at A1.

[20] Notably, several journalists, including Bob Woodward and Carl Bernstein, were subpoenaed to reveal their confidential sources in 1973 in the context a civil action brought by the Democratic National Committee against those allegedly responsible for the burglary of the committee's offices at the Watergate

identification of W. Mark Felt as "Deep Throat" reminded us, there are countless other compelling examples of valuable journalism that would not have been possible if a reporter could not credibly have pledged confidentiality to a source. Consider the following examples:

Pentagon Papers – The Pentagon's secret history of America's involvement in Vietnam was, of course, leaked to *The New York Times* and *The Washington Post*.[21] In refusing to enjoin publication of the leaked information, several members of the Supreme Court noted that the newspapers' sources may well have broken the law, and they were in fact prosecuted, albeit unsuccessfully, after later coming forward.[22] Nevertheless, as Justice Black emphasized at the time, "[i]n revealing the workings of the government that led to the Vietnam war, the newspapers nobly did precisely that which the Founders had hoped and trusted they would do,"[23] and there is now a broad consensus that there was no legitimate reason to hide the Papers from the public in the first place.[24]

Neutron Bomb – Journalist Walter Pincus of *The Washington Post* relied on confidential sources in reporting that President Carter planned to move forward with plans to develop a so-called "neutron bomb," a weapon that could inflict massive

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building. *See Democratic Nat'l Comm. v. McCord*, 356 F. Supp. 1394, 1397 (D.D.C. 1973). One year after the Supreme Court's decision in *Branzburg*, the district court quashed the subpoenas, explaining that it "cannot blind itself to the possible 'chilling effect' the enforcement of these broad subpoenas would have on the flow of information to the press, and so to the public." *Id.*

[21] *See New York Times Co. v United States*, 403 U.S. 713 (1971).

[22] *See, e.g., id.* at 754 (Harlan, J., dissenting); Sanford J. Ungar, *Federal Conduct Cited As Offending 'Sense of Justice'; Charges Dismissed in 'Papers' Trial*, WASH. POST, May 12, 1973, at A1.

[23] *New York Times Co.*, 403 U.S. at 717 (Black, J., concurring).

[24] Solicitor General Erwin N. Griswold, who argued the government's case, wrote some twenty years later that he had not "seen any trace of a threat to the national security from the publication." Erwin N. Griswold, *Secrets Not Worth Keeping; The Courts and Classified Information*, WASH. POST, Feb. 15, 1989, at A25.

casualties through radiation without extensive destruction of property.[25] The public and congressional outcry in the wake of these news reports spurred the United States to abandon plans for such a weapon and no Administration has since attempted to revive it.[26] Mr. Pincus, who never received a subpoena concerning the neutron bomb or any other matter in his distinguished, decades-long career, has now received *two*—one from the Special Counsel in the Valerie Plame matter and one in the *Wen Ho Lee* case.

Walter Reed Army Medical Center – This year, Dana Priest and Anne Hull of *The Washington Post* revealed the plight of outpatient soldiers at Walter Reed Army Medical Center, who were being kept in squalid conditions while waiting to be treated, discharged, or returned to duty.[27] Their report, which relied extensively on information provided by patients and staff members who insisted that their identities be kept confidential, resulted almost immediately in the firing of the Medical Center's commander, and prompted highly publicized efforts to improve conditions at Walter Reed and other military medical facilities.[28]

Fertility Fraud – In 1996, the *Orange County Register* received the Pulitzer Prize for its reporting on the unethical practices of the previously acclaimed UCI fertility clinic in Irvine, California. Using putatively confidential medical records obtained from an

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[25] *See, e.g.*, Walter Pincus, *Carter Is Weighing Radiation Warhead*, WASH. POST, June 7, 1977, at A5; Walter Pincus, *Pentagon Wanted Secrecy On Neutron Bomb Production; Pentagon Hoped To Keep Neutron Bomb A Secret*, WASH. POST, June 25, 1977, at A1.

[26] *See* Don Phillips, *Neutron Bomb Reversal; Harvard Study Cites '77 Post Articles*, WASH. POST, Oct. 23, 1984, at A12 (quoting former Defense Secretary Harold Brown as stating that "[w]ithout the [*Post*] articles, neutron warheads would have been deployed").

[27] *See* Dana Priest & Anne Hull, *Soldiers Face Neglect, Frustration at Army's Top Medical Facility*, WASH. POST, Feb. 18, 2007 at A01.

[28] *See, e.g.*, Steve Vogel & William Branigin, *Army Fires Commander of Walter Reed*, WASH. POST, Mar. 2, 2007 at A01.

anonymous source, the paper documented how eggs retrieved from one patient were implanted in another, without the knowledge or consent of the donor.[29] The newspaper eventually discovered and reported that at least sixty women were victims of such theft by the clinic.[30] The disclosure of these records to the *Register* may have violated applicable law, yet the facts that the newspaper reported resulted in the criminal prosecution of the physicians involved, "prompted the American Medical Association to rewrite its fertility-industry guidelines," and instigated legislative action.[31]

Enron – In a series of articles published in 2001, the *Wall Street Journal* relied on confidential sources and leaked corporate documents to reveal the illegal accounting practices of a corporation that had "routinely made published lists of the most-admired and innovative companies in America."[32] Among other things, confidential sources provided the *Journal* with "confidential" information about two partnerships operated by Enron Chief Financial Officer Andrew Fastow, which were used to hide corporate debt from the company's investors.[33]

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[29] Susan Kelleher & Kim Christensen, *Fertility Fraud; Baby Born After Doctor Took Eggs Without Consent*, ORANGE COUNTY REGISTER, May 19, 1995, at A1.

[30] Susan Kelleher, Kim Christensen, David Parrish & Michael Nicolosi, *Clinic Scandal Widens*, ORANGE COUNTY REGISTER, Nov. 4, 1995, at A16.

[31] Kim Christensen, *Fertility Bills Seen as Effective Steps*, ORANGE COUNTY REGISTER, Aug. 30, 1996, at A26.

[32] Rebecca Smith & John R. Emshwiller, *Trading Places: Fancy Finances Were Key to Enron's Success, And Now to its Distress*, WALL ST. J., Nov. 2, 2001, at A1.

[33] Rebecca Smith & John R. Emshwiller, *Enron CFO's Partnership Had Millions in Profit*, WALL ST. J., Oct. 19, 2001, at C1; John R. Emshwiller & Rebecca Smith, *Corporate Veil: Behind Enron's Fall, A Culture of Operating Outside Public's View*, WALL ST. J., Dec. 5, 2001, at A1.

Abu Ghraib – In April 2004, CBS News and Seymour Hersh, writing for *The New Yorker*, first reported accounts of abuse of detainees at Abu Ghraib prison in Iraq.[34] Relying on photographs graphically depicting such abuse in the possession of Army officials and a classified report by Major General Antonio M. Taguba that was "not meant for public release,"[35] CBS and Mr. Hersh documented the conditions of abuse in the Iraqi prison. After these incidents became public, other military sources who had witnessed abuse stepped forward, but only "on the condition that they not be identified because of concern that their military careers would be ruined."[36]

BALCO – In 2004, the *San Francisco Chronicle* published details of grand jury testimony given by some of the most prominent athletes in professional sports, part of a Pulitzer-Prize winning series of articles about the extent to which performance-enhancing drugs had infiltrated both professional and amateur sports.[37] Baseball players Barry Bonds and Jason Giambi and other prominent athletes testified before the federal grand jury investigating the distribution of undetectable steroids by the Bay Area Laboratory Cooperative ("BALCO"). In some instances, their testimony was at odds with their

[34] 60 Minutes II, Apr. 28, 2004, www.cbsnews.com/ stories/2004/04/27/60II/main614063.shtml?CMP=ILC-SearchStories (last visited June 13, 2007); Seymour M. Hersh, *Torture at Abu Ghraib*, THE NEW YORKER, May 10, 2004, at 42.

[35] Hersh, *supra* note 34.

[36] *See, e.g.*, Todd Richissin, *Soldiers' Warnings Ignored*, BALT. SUN, May 9, 2004, at A1 (interviewing anonymous soldiers who had witnessed abuse at Abu Ghraib); Miles Moffeit, *Brutal Interrogation in Iraq*, DENVER POST, May 19, 2004, at A1 (relying on confidential "Pentagon documents" and interview with a "Pentagon source with knowledge of internal investigations into prisoner abuses").

[37] *See, e.g.*, Mark Fainaru-Wada & Lance Williams, *Giambi Admitted Taking Steroids*, S.F. CHRONICLE, Dec. 2, 2004, at A1; Mark Fainaru-Wada & Lance Williams, *What Bonds told BALCO Grand Jury*, S.F. CHRONICLE, Dec. 3, 2004, at A1.

public denial of steroid use.[38] The newspaper's reporting led to congressional hearings on steroid use in Major League Baseball as well as a decision by its Commissioner to tighten rules regarding the use of banned substances. Nevertheless, the reporters who wrote these stories were held in contempt and sentenced to prison.[39]

Needless to say, the prospect of substantial prison terms and escalating fines for honoring promises to sources threatens this kind of journalism. As *New York Times* reporter Jeff Gerth, another Pulitzer Prize-winning reporter who was held in contempt by the trial court in the *Wen Ho Lee* case has testified:

> Compelling journalists to testify about their conversations with confidential sources will inevitably hinder future attempts to obtain cooperation from those or other confidential sources. It creates the inevitable appearance

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[38] *See, e.g.*, Mark Fainaru-Wada & Lance Williams, *Sprinter Admitted Use of BALCO 'Magic Potion,'* S.F. CHRONICLE, June 24, 2004, at A1.

[39] *See supra* p. 3. Such reliance by the press on confidential sources is by no means a modern phenomenon. When the First Amendment was enacted, the Founders understood the importance of such speech to maintaining an informed citizenry:

> Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts. Along about that time the Letters of Junius were written and the identity of their author is unknown to this day. Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names.

Talley v. California, 362 U.S. 60, 64-65 (1960). Indeed, the controversy that is credited with first establishing uniquely American principles of freedom of the press – the prosecution and acquittal of New York publisher Jon Peter Zenger on charges of seditious libel – arose out of Zenger's refusal to identify the source(s) of material appearing in his newspaper harshly criticizing New York's royal government. Even after Zenger was arrested and charged with criminal responsibility as the publisher, he maintained his refusal to disclose his "sources." *McIntyre*, 514 U.S. at 361 (Thomas, J., concurring). Similarly, in 1779, Elbridge Gerry and other members of the Continental Congress sought to institute proceedings to compel a Pennsylvania newspaper publisher to identify the author of a column criticizing the Congress. Ultimately, arguments that "'[t]he liberty of the Press ought not to be restrained'" prevailed and the Congress did not take action to compel such disclosure. *Id.* at 361-62 (citation omitted). In 1784, the New Jersey Legislature embarked on another unsuccessful effort to compel a newspaper editor to identify the author of a critical article. *Id.* at 362-63. These episodes were fresh in the mind of the Framers who, as Justice Thomas chronicled in *McIntyre*, unanimously "believed that the freedom of the press included the right to publish without revealing the author's name." *Id.* at 367.

> that journalists either are or can be readily converted into an investigative arm of either the government or of civil litigants. . . . Persons who would otherwise be willing to speak to me would surely refuse to do so if they perceived me to be not a journalist who keeps his word when he promises confidentiality. . . .[40]

Or as *Los Angeles Times* reporter and Pulitzer Prize recipient Bob Drogin, who was also held in contempt of a federal court, testified in the *Lee* litigation:

> I have thought long and hard about this, and unlike you attorneys here in the room, I do not have subpoena power or anything else to gather information. I have what credibility I have as a journalist, I have the word that I give to people to protect their confidentiality. If I violate that trust, then I believe I can no longer work as a journalist.[41]

Indeed, in the wake of some of the judicial decisions about which I have spoken this morning, the *Cleveland Plain Dealer* decided that it was obliged to withhold from publication two investigative news stories because they were predicated on documents provided to the newspaper by confidential sources.[42] Doug Clifton, editor of the newspaper, explained that the "public would be well-served to know" these stories, but that publishing them "would almost certainly lead to a leak investigation and the ultimate choice: talk or go to jail. Because talking isn't an option and jail is too high a price to pay," Mr. Clifton explained to his readers, "these two stories will go untold for now. How many more are out there?"[43]

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[40] *See Appendix B to the Brief Amici Curiae of ABC, Inc, et al.* in *Miller v. United States* and *Cooper v. United States, supra* note 1. The trial court order holding Mr. Gerth in contempt was ultimately reversed. *See Lee v. U.S. Dep't of Justice*, 413 F.3d 53 (D.C. Cir. 2005).

[41] Dep. of R. Drogin, *Lee v. U.S. Dep't of Justice*, Civ. A. No. 99-3380, Jan. 8, 2004, at 38:2-9.

[42] Robert D. McFadden, *Newspaper Withholding Two Articles After Jailing*, N.Y. TIMES, July 9, 2005, at A10.

[43] *Id.*

State Law Recognition of The Reporters' Privilege

The situation that currently exists in the federal courts has not been replicated in the States. In fact, forty-nine states and the District of Columbia recognize some form of reporters' privilege.[44] Of those jurisdictions, thirty-four have enacted "shield laws."[45] Although these statutes vary in the degree of protection that they grant to journalists, they "rest on the uniform determination by the States that, in most cases, compelling newsgatherers to disclose confidential information is contrary to the public interest."[46]

The Attorneys' General of thirty-four states and the District of Columbia – each of whom is, by definition, ultimately accountable for the enforcement of the criminal law in their respective states – have urged the Supreme Court to recognize a federal reporters' privilege.[47] In doing so, the Attorneys' General noted that the States "'are fully aware of the need to protect the integrity of the factfinding functions of their courts,'" yet they have reached a nearly unanimous consensus that some degree of legal protection for journalists against compelled testimony is necessary.[48]

Perhaps most significantly, the experience of the States demonstrates that shield laws have had no material impact on law enforcement or on the discovery of evidence in

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[44] *See generally The Reporter's Privilege*, Reporters Comm. for Freedom of the Press, http://www.rcfp.org/privilege/index.php (last visited June 13, 2007). It does not appear that a Wyoming state court or that state's legislature has yet addressed the issue. *See id.*

[45] *See, e.g.*, http://www.rcfp.org/news/2007/0530-con-report.html (last visited June 13, 2007). The most recent state to pass such a law was Washington, *see* H.B. 1366-2007-08. The law will go into effect on July 22, 2007.

[46] *Brief Amici Curiae Of The States Of Oklahoma, et al., Miller v. United States; Cooper v. United States*, Nos. 04-1507, 04-1508, available at 2005 WL 1317523.

[47] *See id.*

[48] *See id.* (citing *Jaffee v. Redmond*, 518 U.S. 1, 13 (1996)).

judicial proceedings, criminal or civil.[49] As the Attorneys' General have explained, a "federal policy that allows journalists to be imprisoned for engaging in the same conduct that these State privileges encourage and protect" serves to undermine "both the purpose of the [States'] shield laws, and the policy determinations of the State courts and legislatures that adopted them."[50] Indeed, the Attorneys' General have aptly observed that

> [t]he consensus among the States on the reporter's privilege issue is as universal as the federal courts of appeals decisions on the subject are inconsistent, uncertain and irreconcilable. ... These vagaries in the application of the federal privilege corrode the protection the States have conferred upon their citizens and newsgatherers, as an "'uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.'"[51]

The experience of the States is by no means unique. Particularly in other democratic nations that consider freedom of speech and of the press to be an essential liberty, there is a clear consensus that the protection of journalists' confidential sources "is one of the basic conditions for press freedom."[52] Perhaps most notably, the European

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[49] In 1896, Maryland became the first state to pass a shield law, spurred by the jailing of a *Baltimore Sun* reporter who refused to identify his sources for a story about public corruption to a grand jury. In the late 1920s and early 1930s, several reporters in various states were similarly imprisoned for refusing to appear before grand juries. Ten states responded by enacting laws similar to Maryland's. In the early 1970s, federal prosecutors began regularly issuing grand jury subpoenas to journalists, a development that culminated in the *Branzburg* decision. At the time of the *Branzburg* decision, seventeen states had statutory privileges. *Branzburg*, 408 U.S. at 689 n.27. Ten more states passed shield laws in its immediate wake and still others recognized the privilege by judicial decision. Today, as noted, thirty-three states and the District of Columbia have shield laws, with sixteen others affording common law protection.

[50] *Brief Amici Curiae Of The States Of Oklahoma, et al., supra* note 46.

[51] *Id.* (citing *Jaffee*, 518 U.S. at 18) (additional citation omitted).

[52] *Goodwin v. United Kingdom*, 22 EHRR 123, 143 (1996). *See generally* Floyd Abrams & Peter Hawkes, *Protection of Journalists' Sources Under Foreign and International Law, Media Law Resource Center White Paper On The Reporters' Privilege,* available at www.medialaw.org. As Messrs. Abrams and Hawkes demonstrate, "protection for journalists' sources is recognized in countries on every inhabited continent, under very diverse legal systems, based on sources ranging from statutes to constitutional

Court of Human Rights has held that requiring a journalist to disclose confidential sources of information, in the absence of an "overriding requirement in the public interest," violates Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[53] "Without such protection," the court explained, "sources may be deterred from assisting the press in informing the public in matters of public interest."[54]

Here in the United States, journalists have heretofore looked to the Supreme Court to address the confusion that now surrounds the scope and application of the reporters' privilege in the federal courts. The Court, however, has consistently declined to intervene, most recently in the context of the Miller and Cooper cases. As a result, it has now been more than thirty years since the Court's decision in *Branzburg v. Hayes*, the first and last time it addressed this important issue.

In *Branzburg* itself, Justice White's opinion for the Court indicated that recognition of a reporters' privilege might more naturally fall within the province of the Congress. "At the federal level," Justice White wrote, "Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate."[55]

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interpretation to the common law." *Id.* (citing, *inter alia*, legal protections afforded under the laws of Australia, Canada, France, Germany, Japan, Nigeria, and Sweden).

[53] *Goodwin*, 22 EHRR at 143.

[54] *Id.*

[55] *Branzburg*, 408 U.S. at 706.

More recently, in his opinion in the Miller and Cooper cases, Judge Sentelle of the U.S. Court of Appeals for the District of Columbia expressed the similar view that "reasons of policy and separation of powers counsel against" the courts exercising whatever authority they may possess to recognize a reporters' privilege as a matter of federal common law.[56] Instead, Judge Sentelle recommended that "those elements of the media concerned about this privilege[] would better address those concerns to the Article I legislative branch ... [rather] than to the Article III courts."[57]

Conclusion

The recent surge in the number of subpoenas, the increase in the severity of contempt penalties, and the lack of clear guidance concerning the recognition and scope of a reporters' privilege in the federal courts, has impaired the ability of the American public to receive information about the operation of its government and the state of the world in which we live. There is, therefore, now a palpable need for congressional action to preserve the ability of the American press to engage in the kind of important, public-spirited journalism that is often possible only when reporters are free to make meaningful commitments of confidentiality to their sources.

[56] *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d at 979.

[57] *Id.* at 981.

Mr. CONYERS. Thank you, sir.

Randall Eliason lectures at the Washington University Law School and was Chief of the Public Corruption Government Fraud section in the U.S. attorney's office in the District of Columbia. He is well-known for his work in this area, and I am very pleased to have him before the Committee this morning.

TESTIMONY OF RANDALL ELIASON, PROFESSOR, GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

Mr. ELIASON. Thank you very much, Mr. Chairman. Good morning.

Mr. Chairman and Members of the Committee, thank you for asking me to be here today.

As a former Federal prosecutor of public corruption cases, I have a great respect and admiration for the importance of a free press and for the power of investigative journalism. But I do not support the Federal reporter's privilege, and the reason is that I am convinced it won't do what the law says it will do.

It will not affect the flow of information to the public, and it will not keep reporters from going to jail. The law will, however, impose substantial costs, both by excluding relevant evidence in a wide variety of cases and by encouraging or by increasing litigation costs and delays as parties battle over the privilege's terms.

The main rationale for the privilege has always been that without it, there will be a chilling effect on confidential sources, who will not come forward without a privilege for fear of having their identities revealed.

Although this chilling effect is widely assumed to exist, I believe it is very unlikely that the presence or absence of a Federal privilege statute would have any significant role in a source's decision about whether or not to come forward.

In the 35 years since the landmark case of *Branzburg v. Hayes,* there has been no Federal reporter's privilege law. During that time, the press in this country has flourished. Major stories from Watergate and Iran Contra up through Abu Ghraib, secret CIA prisons, and unlawful surveillance by the Government, all have been reported without a Federal privilege law.

Confidential sources are indeed important to journalism, but that doesn't mean that a privilege law is required. A reporter can promise a great deal of confidentiality simply by promising not to name a source in an article and never to reveal her name voluntarily. A source given this promise knows that she would be identified by the reporter only if, at the end of a long, drawn-out legal process, the court ordered the reporter to name her.

The odds of that happening are extremely remote, and thus the source can be assured of a high degree of confidentiality from the reporter's promise alone.

And the flipside of this argument is that even if we had an ironclad, airtight shield law, a reporter can't really promise a source confidentiality or that she will never be identified.

People who leak information to the press face many risks that they will be discovered through internal leak investigations, through investigations by third parties or other lawsuits that don't involve compelling the reporter to testify, and other means, Com-

pared to those risks, the risk that a court someday a year or 2 or more down the road might order the reporter to testify is actually very small.

And a source who has decided to face those much more significant risks and to come forward, I submit, is very unlikely to be deterred by the far more remote chance that someday a judge might order the reporter to testify.

A final fact that cuts against this chilling effect argument is the availability of anonymous tips. Advocates of the privilege like to analogize it to the attorney-client privilege, the doctor-patient privilege, the spousal privilege. Well, you can't have an anonymous communication with your wife or husband or your doctor or your lawyer, but you can give an anonymous tip to a reporter.

And so any sources that truly are chilled by the absence of a privilege law can always leak information to the press by providing documents or making a call without identifying themselves.

A Federal privilege law also will not keep reporters out of jail. Because the privilege will not be absolute, there will be cases where a court overrides the privilege and orders the reporter to testify. And if that happens, history shows us that many reporters will refuse to honor that court order and will be held in contempt and will go to jail.

Reporters don't go to jail because of the lack of a Federal privilege law. They go to jail because they are placing themselves above the law that does exist and refusing to honor valid court orders, even when there is a privilege.

Finally, concerning H.R. 2102 in particular, I believe that the nearly absolute protection for the identity of sources is a concern, particularly where the leak to a reporter is itself a crime, as with the leak of classified information. This provision would effectively grant immunity from prosecution to a great many offenders.

The exceptions to the privilege also seem, to me, difficult to justify. For example, a source could be identified if necessary to discover who leaked a corporate trade secret, but not to obtain critical evidence to prosecute terrorism or other serious crimes.

The bill's definition of journalism is also, I think, problematic. It is extremely broad and includes essentially anyone who gathers information and disseminates it to the public. In the age of the Internet, we are all journalists under this bill, and this renders the potential scope of the privilege, I believe, unacceptably broad.

And my final point relates to a case I know you are all familiar with, the BALCO case from San Francisco. I know that case has been cited by many as evidence that we need a Federal privilege law.

I would be happy to discuss that case in more detail, but in short, I don't believe that case demonstrates the privilege law would be a good thing. In fact, I think it demonstrates just the opposite.

Thank you again for the opportunity to be here, and I look forward to answering any of your questions. Thank you.

[The prepared statement of Mr. Eliason follows:]

PREPARED STATEMENT OF RANDALL D. ELIASON

Mr. Chairman and Members of the Committee: Thank you very much for inviting me to be here today to testify concerning the proposed federal reporter's privilege or shield law. I am a former federal prosecutor, and worked as an Assistant United States Attorney in the District of Columbia for more than twelve years. From 1999 to 2001, I served as the Chief of the Public Corruption/Government Fraud section of that office. I now teach a course on white collar crime at the George Washington University Law School and at the American University, Washington College of Law.

As a former prosecutor of public corruption cases, I am a great fan of investigative journalism. Many significant corruption cases are first exposed through reports in the press; the Jack Abramoff and Randy "Duke" Cunningham scandals are just two of the most recent examples. I believe that a vigorous, free press is vital to our democracy, and I fully appreciate the critical role the press plays as a watchdog over both the government and the private sector.

Nevertheless, I do not support a federal reporter's shield law. I believe such a law is extremely unlikely to achieve its stated goals: to encourage and increase the free flow of information to the public and to keep reporters from going to jail to protect their sources. The law will, however, impose substantial costs, both by excluding relevant evidence from consideration in particular cases and by adding to litigation expense and delays as parties battle over the privilege's terms. In addition, I believe that technology, particularly the rise of the Internet, has so fundamentally transformed journalism that a reporter's privilege today is neither practical nor constitutionally workable.

COSTS AND BENEFITS OF A PRIVILEGE

The primary rationale for a reporter's privilege is that, in the absence of a privilege, confidential sources will not speak to the press for fear of having their identities revealed. This claimed "chilling effect" on sources will supposedly hamper the ability of the press to uncover sensitive information and report it to the public. Accordingly, the argument runs, the privilege is necessary to encourage sources who wish to remain anonymous to share information with the press. Virtually all judicial, academic, and policy discussions of the privilege proceed from the assumption that this chilling effect is real; rarely is the claim held up to any critical scrutiny. I would like to challenge this assumption. I submit there is little or no evidence that this chilling effect exists, and thus little reason to believe that any real benefits would flow from the passage of a privilege law.

By contrast, there can be no doubt that privileges have costs, and this law would be no exception. All evidentiary privileges shield relevant evidence from consideration by a jury or other fact-finder; as the Supreme Court has noted, privileges are in derogation of the search for truth. The exclusion of relevant evidence may directly impact the rights of criminal defendants or civil litigants, or may prevent prosecutors from bringing criminals to justice. As a result, privileges have the potential to lead to errors or injustice in any given case. Privileges also result in litigation costs, as parties and the courts devote time and resources to resolving questions concerning the privilege's applicability. Before creating new privileges, therefore, we should be fairly confident that the resulting benefits will outweigh the costs. The reporter's privilege inspires no such confidence.

HISTORY SUGGESTS THE PRIVILEGE IS NOT NECESSARY

In 1972, in the landmark case of *Branzburg v. Hayes,* the United States Supreme Court held that the First Amendment does not provide a privilege for reporters to refuse to testify, at least in grand jury proceedings. The majority in *Branzburg* was quite skeptical of the underlying factual premise of the proposed privilege; namely, that in the absence of a privilege sources would be deterred from speaking to the press. The Court observed that the nation's history of a vigorous free press seemed to undercut that claim. The Court also noted that claims about the effect of a privilege on newsgathering were largely speculative and consisted primarily of the opinions of journalists themselves, and thus had to be viewed in light of the professional self-interest of those making the claims.

In the thirty-five years since *Branzburg*, there has been no federal reporter's privilege statute. Yet the country has been blessed with a robust free press, with great ability to ferret out and publish information from confidential informants and other sources. The examples are legion: from the Watergate scandal which exploded in the media around the time *Branzburg* was decided, to recent press revelations concerning Abu Ghraib prison, potentially unlawful domestic surveillance by the government, and secret overseas CIA prisons. Indeed, the latter stories were pub-

lished by journalists who apparently received confidential leaks even while the highly-publicized CIA leak/Valerie Plame case was going on and journalists were being jailed and compelled to reveal their sources. The Plame case was a very visible demonstration that reporters often cannot protect their sources, and yet other sources were not deterred. It would appear that sources are quite impervious to the chills.

Proponents of a privilege often cite the importance of confidential sources to the reporting of such historic events as Watergate, the Pentagon papers, or the Iran-Contra scandal. What they usually fail to note is that those stories all were reported *despite* the lack of any federal reporter's privilege law. Leaking to the press is widespread, occurs for many reasons, and is a pervasive part of our culture. As a historical matter, it's hard to make the case that the free press in this country has suffered as a result of the lack of a federal privilege.

THE MEANING AND LIMITS OF CONFIDENTIALITY

There is little doubt that confidential sources are important to journalism. Clearly many sources request confidentiality, and presumably most do so for a reason. Journalists seem to be virtually unanimous in their belief that the use of confidential sources is essential to their work. This may be true as well, although there is currently a healthy debate taking place within the journalism community itself over whether reliance on confidential sources has become excessive.

But granting that reporters need to be able to promise "confidentiality" leaves unanswered the question of exactly what that means. Privilege proponents argue that, in the absence of a privilege, reporters will be unable to promise confidentiality and thus their craft—and the public's right to know—will suffer. The necessary corollary to this argument is that *with* a privilege, reporters will be able to assure confidentiality and the problem will be solved. But these claims are misleading for two different reasons: first, a reporter can promise a great deal of confidentiality even in the absence of a privilege law; and second, even with an ironclad privilege law, a reporter cannot really guarantee confidentiality.

It is important to distinguish between a reporter's promise of confidentiality and the existence of a legal evidentiary privilege. The former may indeed be quite important in encouraging sources to come forward; the latter seems unlikely to play much of a role in a source's decision. Therefore, even granting that reporters sometimes need to promise confidentiality and that confidential sources are essential to journalism, it does not follow that a reporter's privilege is necessary or even particularly important. We may assume for argument's sake that confidential sources are, as former *New York Times* reporter Judith Miller testified before the Senate, the "life's blood of journalism." The question still remains whether the presence or absence of a reporter's privilege has any effect on the blood flow.

There are many different degrees and types of confidentiality. Presumably the most pressing concern for any confidential source is that he not be named in an article the reporter writes tomorrow, not that a judge might order the reporter to testify in some hypothetical case months or even years in the future. Typically a journalist is speaking with a source in connection with a story that will appear fairly soon. The first and foremost meaning of a guarantee of confidentiality is that, in any story the journalist prepares, the source will not be identified. In the overwhelming majority of cases, in fact, that is the end of the matter: the information is relayed, the story is reported, no one seeks to identify the source, and confidentiality is maintained.

By simply promising never voluntarily to reveal a source's name, therefore, a reporter can assure a high degree of confidentiality. Even if there is no privilege statute, a reporter may tell a source: "I will do all I can to protect your identity. I will not publish it, will not reveal it to anyone else voluntarily, and if I am ever subpoenaed I will fight as far and as hard as I can to avoid having to divulge it. Only if I'm compelled to do so by a valid court order after exhausting all of my appeals would I reveal your name." A source given these assurances knows that he will be identified by the reporter only if: 1) the reporter actually writes a story that includes the source's information; *and* 2) the story results in a lawsuit or investigation; *and* 3) a party to that case actually subpoenas the reporter; *and* 4) the reporter and the party are unable to reach some compromise that would still shield the source's identity; *and* 5) the party chooses to pursue the matter to the bitter end and not simply give it up in light of the reporter's refusal; *and* 6) all relevant trial and appellate courts eventually agree there is no basis for the reporter to withhold the information. The odds of all this happening are extremely remote. Relative to the total number of press reports involving confidential sources, the number of cases in which a reporter is actually compelled to testify is vanishingly small. Even if the reporter is ultimately forced to testify, it will likely be a year or more after the story

appears. Thus for the vast majority of sources, the reporter's simple promise not to reveal the source's name voluntarily can satisfy any reasonable concern for confidentiality, quite independent of the existence of a privilege law.

Equally important, it is false to suggest that if we have a privilege law a reporter will be able to guarantee a source that her identity will remain a secret. Even if there were an ironclad, absolute reporter's privilege, a source could hardly breathe easily. A potential leaker faces many risks of exposure if she decides to pass information along to a reporter, even under the reporter's promise of confidentiality. Court-ordered compulsion of the reporter is only one way that the source's identity may be revealed, and is actually one of the least likely avenues.

First, the source's identity may be discovered through investigative methods that do not involve testimony from the reporter. Perhaps the most significant risk is that the source's company or agency will conduct an internal investigation of the leak. Such an investigation may include taking employee statements under oath, examining e-mail or telephone records, and other methods. For example, in one recent case, a career intelligence officer was fired by the Central Intelligence Agency for leaking classified information to reporters about secret overseas CIA prisons. Her identity was discovered through an internal CIA investigation that included the administration of polygraph examinations to employees. As a result of that investigation the leaker was exposed, with no need to seek to compel the reporter to reveal her sources.

In addition to internal investigations, there may be investigations of the leak launched by outside parties. If a reporter's article results in civil litigation or a criminal investigation, those may lead to discovery of the source's identity through many means other than subpoenaing the reporter. Civil discovery or a grand jury investigation may uncover e-mails, computer files, or other documents or witnesses that identify the source. The source may be deposed or subpoenaed to testify in the grand jury, and will then be forced to admit her role in the leak (unless she is willing to commit perjury).

In any serious case, a thorough investigation of the leak is almost guaranteed. Companies and agencies concerned with safeguarding their secrets have a great incentive to track down the source of any leaks. In addition, courts that do recognize the privilege, as well as the Department of Justice guidelines for media subpoenas, require a party to exhaust all reasonable efforts to obtain the information from other sources before seeking to compel testimony from a reporter. A source can therefore be almost certain that before any issue of subpoenaing the reporter will even arise, the party seeking the information will exhaust every other reasonable means to discover the leaker's identity.

A potential source faces other significant risks as well. The reporter may in fact reveal the source's identity, either deliberately or inadvertently, or may waive the privilege by disclosing the source's identity to a third party. For example, in a recent, highly-publicized case in Rhode Island, reporter Jim Taricani was sentenced to six months home confinement after being convicted of criminal contempt for refusing to identify a confidential source who illegally provided him with an FBI videotape from a corruption probe. Shortly before he was convicted, however, Taricani made an inadvertent comment to an FBI agent about a document he had seen, which allowed the agent to deduce the identity of Taricani's source. The source then came forward and admitted leaking the videotape, after learning he was about to be subpoenaed by prosecutors.

There are still other risks. Details in the reporter's article may make it possible for others to guess the source's identity. Others may overhear the source's conversations with the reporter, or may stumble across an e-mail or document revealing the conversations. The source's colleagues may be contacted by a reporter who is trying to investigate further, and may deduce from those contacts the identity of the reporter's source. Others who knew about or participated in the source's conversations with the reporter may later decide to turn on the source and expose him, as recently happened in the BALCO case in San Francisco.

All of these risks exist whether or not there is a privilege or a subpoena to the reporter. A reporter therefore could not guarantee a source that her identity would remain a secret, even if there were an absolute, airtight privilege law. There are far too many ways for a source's identity to be discovered that are simply out of the reporter's hands. Leaking will never be free from risk, regardless of the state of the law on reporter's privilege.

An individual who has decided to leak confidential information to the press has necessarily decided to assume a significant risk that she will be exposed, and presumably has determined the public good (or personal gain) that will result from bringing the information to light outweighs those risks. Proponents of a reporter's privilege are therefore necessarily arguing that some substantial number of con-

fidential sources, having otherwise decided to assume all of these more immediate and concrete risks of exposure, would be dissuaded from coming forward *solely* by the very slight, incremental additional risk that the reporter might be compelled to testify in some hypothetical litigation sometime well off in the future. This seems very unlikely.

It is also reasonable to assume that those potential sources most likely to be deterred by the small additional risk resulting from the absence of a privilege would be those sources with the most to fear personally from having their identities revealed. That presumably would be those who fear not merely embarrassment, opprobrium in the eyes of their colleagues, or loss of a job, but criminal prosecution. The sources who are apt to be most concerned about being exposed will be those who either have engaged in prior criminal conduct or are committing a criminal act by disclosing the information to the reporter. But society has little interest in providing a shield for communications from those engaged in criminal activity. As the Supreme Court said in *Branzburg*, upholding a privilege in such cases would be to argue that it is more important to write about crime than to do something about it. A reporter's privilege may well have the perverse effect of being most likely to promote the types of communications that society has the least interest in encouraging or shielding from disclosure.

UNCERTAINTY UNDERCUTS THE ABILITY OF A PRIVILEGE TO ENCOURAGE SOURCES

The existence of a privilege will only encourage confidential sources to come forward if they can be relatively certain the privilege will apply. At the time they are considering reaching out to a reporter, sources have to be confident that the privilege will protect them. An absolute privilege, or one that is virtually absolute, would be the most likely to accomplish this goal. As outlined above, I believe it is extremely unlikely that the presence or absence of a legal privilege (as opposed to a reporter's promise of confidentiality) plays a significant role in a source's calculations. However, if we assume for argument's sake that the privilege can encourage otherwise reluctant sources to come forward, then I agree with privilege advocates that the only type of privilege likely to do this is one that is virtually absolute. As the Supreme Court has noted, an uncertain privilege, or one that is applied inconsistently by different courts, is little better than no privilege at all.

The Free Flow of Information Act does not provide for an absolute privilege. There are a number of exceptions to the privilege that apply in certain types of cases. A source considering whether to talk to a reporter would therefore be forced to look into the future to guess whether a judge, some months or years down the road, might decide that one of those exceptions applies. It's very unlikely that a source can do this in a meaningful way. The more uncertainty and exceptions there are in a privilege, the less likely it is to give a source any confidence that his identity will be protected. Adding to the uncertainty is the fact that a source can't know in advance whether any suit seeking the source's identity will be filed in federal or state court—and if the latter, which state. State privilege statutes and court rulings vary widely in terms of what is protected. Accordingly, even if the Free Flow of Information Act were to become law, the overall state of the law on reporter's privilege would still be so uncertain that sources could not have any confidence that a legal privilege would ultimately shield them from exposure. In the face of such uncertainty, otherwise reluctant sources will not be moved to reveal what they know.

CONCERNED SOURCES HAVE THE OPTION OF REMAINING ANONYMOUS

A final factor that undercuts the assumption about sources needing a privilege before they will come forward is the availability of anonymous tips. It is impossible to have an anonymous communication with your spouse, doctor, or attorney, or in other relationships traditionally protected by an evidentiary privilege. By contrast, a source who wants to leak information to a reporter but is worried about being identified always has the option of making an anonymous phone call.

Reporters presumably would argue that an anonymous tip is not as useful or reliable as a known source, and that is probably true. But the issue should be whether the press gets the information at all, not whether it gets the information in what the press considers to be an ideal form. Once information from an anonymous source is in their hands, diligent journalists may start digging to verify the tip. Reporters may contact other potential sources, some of whom may not have the same hesitation about speaking out. They may conduct additional research to attempt to verify the anonymous information through documents, public records, and the like. Even when a confidential source's identity is known, responsible journalists will rarely run a story without doing some additional investigation to attempt to corrobo-

rate the source. The same investigation may be done even when the initial source has chosen to remain anonymous.

Any potential confidential sources who are truly "chilled" by the absence of a privilege statute, therefore, can always slip their documents over the proverbial transom. Given a choice between not revealing the information at all and doing so anonymously, most sources who are eager to see the information made public presumably will choose the latter. The public interest in giving the press access to the information is served, and the source need not worry about having her identity revealed—at least by the reporter—because the reporter does not know it. This alternative, which is unavailable for any of the more traditional privileged relationships, further undercuts the argument that a reporter's privilege is essential to encourage these particular communications.

A FEDERAL SHIELD LAW WILL NOT KEEP REPORTERS OUT OF JAIL

Many recent calls for a federal reporter's privilege statute have been fueled by the jailing of former *New York Times* reporter Judith Miller. Supporters maintain a federal law is necessary in order to avoid the specter of journalists being jailed to protect their sources. Passage of the Free Flow of Information Act will not, however, accomplish this goal.

When reporters are jailed in privilege disputes, they are not being punished for newsgathering or for the content of anything that they wrote. They are being held in contempt for refusing a valid court order to testify. In that regard, they are being treated no differently from any other witness who asserts an unsuccessful privilege claim. For example, if I am subpoenaed to a grand jury and believe that my testimony would incriminate me, I have a right to assert my Fifth Amendment privilege to remain silent. If a court disagrees with my claim and orders me to testify, I may appeal that order. If I am unsuccessful, however, I must comply with the court order and testify, no matter how firmly convinced I am that the court is wrong. If I refuse, I will be held in contempt and likely jailed until I agree to testify. The courts are the final arbiters of the privilege question, and the rule of law requires that their orders be obeyed.

Journalists who assert a privilege, however, frequently do not abide by this legal process. They appear to believe that their professional obligations require them to refuse to reveal their sources regardless of what a court says. Even where there is a privilege, therefore, if a court rules it does not apply in a given case, the reporter will often refuse to obey the court's order. Doctors, lawyers, and others in privileged relationships routinely honor judicial decisions about whether the privilege applies; many members of the media, however, believe they are acting nobly when they decide for themselves what the law should require.

The Free Flow of Information Act provides for a qualified privilege. That means there will be cases where a court rules that, under the terms of the statute, the privilege may be overridden and a reporter may be ordered by a court to testify. History demonstrates that, when that happens, many reporters will refuse to comply and will be jailed for contempt. Indeed, the Reporter's Committee for Freedom of the Press has advised on their website that if Congress passes a qualified privilege law, reporters who want to protect a source must still be prepared to go to jail if a court rules that the privilege does not apply.

Journalists rely on our legal system to protect them from unjustified libel suits, or from those who would impose prior restraints on the press to keep certain material from being published. When it comes to decisions about reporter's privilege, however, many journalists refuse to accept the judgments of that same legal system. Reporters expect their adversaries to honor court rulings upholding the privilege, but many will not themselves honor court rulings that go against them. In seeking passage of the Free Flow of Information Act, therefore, journalists are asking Congress for a new legal protection, while at the same time preparing to defy that law themselves when they don't agree with a judge's decision.

Supporters of the privilege have argued that the jailing of journalists in this country is a disgrace and places us in the company of regimes that oppress the media, such as China, Burma, or Cuba. I believe these arguments miss the mark. In totalitarian societies, journalists are jailed because of the content of what they write. When journalists are jailed in the United States, it is because they are refusing to abide by a lawful court order, entered after a full and fair hearing and due process of law. Rather than demonstrating that the United States is akin to a totalitarian regime, these jailings demonstrate just the opposite: that we are a society governed by the rule of law, and that no one gets to pick and choose for herself which laws she will obey.

Journalists don't go to jail simply because of the lack of a federal reporter's privilege. They go to jail in part due to a professional culture that insists on an absolute privilege, chastises reporters who comply with court orders to testify, and lionizes those who defy the law as martyrs for the First Amendment. Passage of a federal privilege law will not alleviate that problem.

PARTICULAR CONCERNS ABOUT H.R. 2102

Scope of Protection for Sources of Information

The proposed legislation provides extremely broad protection for sources. Under Section 2(a)(3), a reporter may be compelled to identify a source only: 1) when necessary to prevent imminent and actual harm to national security; 2) when necessary to prevent imminent death or significant bodily harm; or 3) when necessary to identify a person who has illegally disclosed: a) a trade secret, b) individually identifiable health information, or c) nonpublic personal information. Unless a case falls into one of these categories, the protection for the identity of sources is absolute. There is no requirement that confidentiality was requested by the source or promised by the journalist; presumably a reporter could refuse to identify a source even if the source had expressed no desire to remain anonymous.

This protection for sources is much broader than that provided for in the Department of Justice guidelines for subpoenaing members of the media. Under those guidelines, the ability to obtain a subpoena for information from a reporter, including confidential source information, is not limited to particular categories of cases. A subpoena may be sought in any type of case, provided the need for the information is sufficiently compelling, other avenues for obtaining the information have been exhausted, and other requirements of the guidelines have been satisfied.

In my view, the proposed legislation's sweeping protection for source identities is unwise. For example, assume a heinous crime has been committed, such as a mass murder, the bombing of a public building, or a child abduction and rape. The Department of Justice learns that a reporter has spoken with a confidential source who either participated in the crime or has critical information about it. All other attempts to obtain that information have been unsuccessful. Under this legislation, assuming that the death or significant bodily harm has already happened and no new injury is imminent, the reporter could not be compelled to reveal that source—even if that means the criminals are never brought to justice. This would be true no matter how serious the crime or how severe the harm that resulted.

There is a special concern when the leak to a reporter is itself a crime. For example, suppose a source illegally provides classified information to a reporter. Suppose further that as a result of the reporter's story based on that information, significant harm results; perhaps troops are killed or a covert investigation of terrorist activity is compromised. Assuming that the harm to national security has already taken place and no further harm is imminent, under this legislation the reporter could not be compelled to identify the lawbreaker.

In a case where the leak to a reporter is itself a crime, there often will be only two witnesses: the reporter and the source. Even if the source's identity is suspected, he or she will have a Fifth Amendment privilege not to testify. That leaves the reporter as the only witness to the crime—and under this legislation, the reporter usually could not be compelled to testify. This would effectively grant immunity from prosecution to many who leak classified information, no matter how grave the resulting harm, provided they are careful to leak it only to a journalist (which, as discussed below, under this statute could be virtually anyone with an Internet connection). As a result, this legislation may well have the undesired effect of increasing illegal leaks of classified information or other illegal communications with reporters, by assuring potential leakers that the reporter will not be forced to identify them. A privilege should not shield and encourage conduct that has already been determined to be unlawful.

The response to this argument is often, "What about the next Pentagon Papers case?" It is true that the most difficult cases are those where it seems that an illegal leak of classified information ended up serving the larger public good. At the same time, presumably all agree that, in the interest of national security, the government must be able to keep at least some secrets. As a matter of policy, it makes no sense to criminalize the disclosure of classified information and then, in a different statute, effectively to immunize those who disclose such information to the media. Part of the solution may lie in a re-examination of what materials actually deserve to be classified. It may be, though, that those who wish to leak such material in the name of the public interest must be willing to run the risk of exposure and prosecution, trusting that public opinion will support them and history will judge them kindly. Alternatively, those wishing to leak such material may do so anonymously,

avoiding the risk that they will be identified by the reporter (although not, as detailed above, avoiding the more substantial risk that they will be exposed in some other way).

The list of exceptions to the privilege provided in the proposed legislation is also open to question. Why, for example, would we allow the privilege to be overcome and a confidential source to be discovered in a civil suit concerning trade secrets or private health information, but not in a criminal investigation of a large-scale terrorist attack? Surely the public interest in obtaining the information is far greater in the latter case than in the former. Crime victims and the general public will be hard-pressed to understand why the privilege is allegedly so important that we must allow criminals to walk free to preserve it if necessary, and yet that same privilege can be breached in order to protect a corporation's trade secrets.

If a federal shield law is to be enacted, it would be more appropriate to track the Department of Justice guidelines so that, in any type of case in which a court finds that the need is sufficiently compelling, the privilege may be overridden, even where the identity of a confidential source is involved. A judge should have the power to determine in any given case whether the overall public interest weighs in favor of the privilege or in favor of disclosure.

Who May Invoke the Privilege

One of the most difficult challenges in crafting a federal reporter's privilege in the age of the Internet is deciding to whom the privilege should apply. Even more than thirty years ago in *Branzburg*, the Supreme Court observed that trying to define who was a "newsman" deserving of the privilege would be extremely problematic. In the simpler *Branzburg* era of daily newspapers and three television networks, determining the proper scope of a privilege was challenging enough; in the age of the Internet, satellite communications, and cable television, that question is exponentially more complicated.

With other evidentiary privileges, it is generally not difficult to determine whether the person involved in the communication is a member of the class the privilege is designed to protect. Lawyers, doctors, and social workers all have certain educational and licensing requirements, and are monitored by professional associations to ensure their credentials; whether or not someone is a witness's spouse likewise is usually easy to determine. Anyone, however, can call himself a journalist. There are no particular educational requirements, and no licensing regulations. I may set up a blog on my home computer, or use desktop publishing to create my own local newspaper, and claim the First Amendment's protection as legitimately as the *Washington Post.*

The traditional approach to limiting the scope of the reporter's privilege has been to focus on the format of the journalism in question. Many state statutes specify the types of media that qualify for the privilege; for example, limiting its application to those who work for newspapers, magazines, television, or other periodical publications. This approach may have made sense when most of the statutes were drafted, before the rise of the Internet and modern communications. Today, though, any statute that sought to limit its application only to certain forms of the media would be constitutionally suspect. The legislative creation of a favored class of journalists entitled to a legal benefit would be incompatible with First Amendment values. What's more, a statute that included, for example, newspapers and television but excluded Internet bloggers, would be difficult to justify. If the purpose of the privilege is to increase the flow of information to the public, on what rational basis could the law grant the privilege to a reporter for a small local newspaper with a few hundred readers but deny the privilege to the proprietor of a political blog read by hundreds of thousands of people each day?

H.R. 2102 avoids this dilemma by adopting a functional approach to defining who qualifies as a journalist. The bill provides that the privilege may be invoked by anyone "engaged in journalism," which is defined to mean "the gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing of news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public." Sec. 4(5). There is no requirement that a person be earning their livelihood as a journalist or be employed by or contracted to a media company. There is also no requirement that the information be disseminated through a particular format, such as a newspaper or television station. This definition effectively avoids discriminating among different types of media and journalists, and would appear to apply equally to an individual pajama-clad blogger and a reporter for the *New York Times.*

But although this broad definition of a journalist avoids one dilemma, it creates another: the scope of such a privilege in the Internet age is breathtaking. The essence of journalism is, as the bill recognizes, the gathering and transmission of in-

formation to the public. When *Branzburg* was decided, this usually required at least some capital investment or material not readily accessible to the general public: a printing press, a book contract, or a job with a newspaper or television station. Now, however, all it requires is a computer and an Internet connection, which may be obtained for free at the public library. In the Internet age, anyone can be a journalist. A citizen can gather information, post it on the Internet, and thereby disseminate it to hundreds of millions around the world. If, for example, someone takes a video of a public event with his cell phone and posts it on his MySpace page, there is no apparent reason he could not claim the protections of this statute. Millions of people who share information on-line could potentially invoke this privilege if for any reason they did not want to testify or turn over evidence in their possession. This will result in an enormous amount of information potentially being excluded from the justice system, and an enormous amount of additional litigation over the privilege.

The statute will also invite litigation over what constitutes "news" or "matters of public interest," as parties challenging the privilege try to narrow its terms. This will necessarily place courts in the position of making judgments about the importance to the public of particular reporting, based on its content. This also is incompatible with First Amendment values, under which the worth of particular information is to be evaluated by the public in the free marketplace of ideas, not by judicial referees.

The reality is that technology may have outstripped the law to such a degree that the entire notion of a journalist's privilege today is no longer workable. A narrow privilege that applied only to certain media formats would likely be unconstitutional, but a broader privilege such as that proposed in H.R. 2102 is far too sweeping to be acceptable. Technology has transformed journalism and has eroded the traditional lines between the institutional press and the overall public marketplace of ideas. As those lines break down, so does the rationale for special legal protections for the press not enjoyed by the millions of other contributors to the information age.

THE BALCO CASE

I would like to conclude by discussing one of the most significant recent disputes concerning the reporter's privilege, the Bay Area Laboratory Co-Operative (BALCO) steroids case. In that case, two *San Francisco Chronicle* reporters were held in contempt by a federal judge and were facing jail for refusing to identify a confidential source for some of their BALCO reporting. As their case was about to be argued in the U.S. Court of Appeals for the 9th Circuit, their source, defense lawyer Troy Ellerman, was identified by other means. On Feb. 15, 2007, Ellerman pleaded guilty to obstruction of justice and related charges. As a result, prosecutors withdrew their subpoenas of the reporters.

The BALCO case is frequently cited as evidence that the federal reporter's privilege is needed. The BALCO reporters themselves have been advocates for the federal privilege law. Far from demonstrating the need for the privilege, however, BALCO highlights the damage to the justice system that can occur when a sweeping claim of reporter's privilege is abused by journalists. I submit that the BALCO saga does not demonstrate that enacting a federal reporter's privilege would be good public policy; in fact, it suggests just the opposite.

In 2002, a federal grand jury in San Francisco began investigating allegations that BALCO employees had illegally supplied anabolic steroids and other performance-enhancing drugs to a number of professional athletes. On Feb. 12, 2004, the grand jury indicted the head of BALCO, Victor Conte, and three other defendants for illegal distribution of steroids and other offenses. Troy Ellerman represented one of the defendants.

The Chronicle reporters, Mark Fainaru-Wada and Lance Williams, had been reporting on the BALCO investigation for some time and had written dozens of articles about it. In June and December of 2004, however, they wrote articles that included verbatim excerpts from the confidential grand jury testimony of several star athletes, including sprinter Tim Montgomery and Major League Baseball sluggers Barry Bonds and Jason Giambi. It was clear from the articles that the reporters had been given unlawful access to grand jury material that was subject to a federal judge's protective order.

After the first articles appeared, all parties and lawyers involved in the case—including Ellerman—filed sworn declarations with the court denying responsibility for the leaks. In October 2004, the defense lawyers—again including Ellerman—filed a motion accusing the government of leaking grand jury material to the press. They claimed that the resulting publicity had made it impossible for their clients to obtain a fair trial, and they argued that the court should dismiss the indictment

based on this "outrageous government misconduct." The court ultimately denied their motion, and the BALCO defendants later pleaded guilty to various charges.

The BALCO judge asked the Justice Department to investigate the illegal leaks. During that investigation, the reporters refused to testify before the grand jury, citing their obligation to protect the identity of their confidential source. The judge ruled that there was no privilege and ordered the reporters to testify. When they refused, the judge held them in contempt. They were prepared to go to jail rather than comply with the court's order, until Ellerman's guilty plea made that unnecessary.

It's now clear exactly what the *Chronicle* reporters were protecting. Ellerman admitted during his guilty plea that he had illegally allowed Fainaru-Wada to review copies of the grand jury testimony on two occasions. Ellerman thus leaked the grand jury information to the media himself, denied doing so in a sworn statement to the judge, and then tried to get his client's criminal case dismissed by pointing to the resulting newspaper articles and blaming the *government* for the leaks. This is the scheme that ultimately resulted in Ellerman's guilty plea to obstruction of justice and related charges.

The *Chronicle* reporters knew that Ellerman had committed a fraud on the court, and that he had used their own reporting as a means to execute that fraud. They did not come forward to expose this criminal use of their work; in fact, they continued to deal with Ellerman as he committed additional crimes. After Ellerman had lied to the judge and filed his motion falsely accusing the government of the leaks, Fainaru-Wada met with him again, reviewed more grand jury transcripts, and published more articles with Williams disclosing additional grand jury information.

Fainaru-Wada and Williams also wrote a successful book about the BALCO scandal. They accepted prestigious journalism awards for their reporting, and were generally seen as heroes by many in the journalism community for their refusal to testify.

Now that the facts have come to light, the reporters no longer look so noble. Their source was not some selfless whistle-blower intent on informing the public about the evils of steroids, but a defense lawyer who manipulated the media and committed perjury in an unlawful attempt to thwart his client's criminal prosecution. For their part, the reporters went to great lengths to prevent Ellerman from being brought to justice, while profiting from his crimes and portraying themselves as victims.

Supporters argue that the *Chronicle* reporters were only protecting the public's right to know. They claim that because the steroids scandal was such an important story, it was appropriate for the reporters to encourage Ellerman to break the law and then help to conceal his crimes. This "ends justify the means" argument is more than a little self-serving. If a reporter hired a burglar to break into a private residence, or set up an illegal wiretap, we would not excuse that conduct on the grounds that it resulted in an important story. Why, then, would we laud reporters who encouraged and then shielded a criminal who used their work to defraud the criminal justice system?

The public generally does not have a "right to know" what happens inside a grand jury. That is the whole point of grand jury secrecy, which exists for a number of good reasons, including protecting the rights of criminal suspects. Grand jury witnesses are assured that their testimony will be confidential, which allows them to feel comfortable being completely forthcoming. If grand jury witnesses see that their testimony may in fact be splashed on the front pages of the newspaper, they may be much more likely not to reveal what they know about a criminal matter. The irony of a case like BALCO is that in the next investigation involving high-profile witnesses, those witnesses may be much more likely to lie in the grand jury or conceal information relevant to the criminal investigation, out of fear that their testimony may be leaked to the media. We can't consider the public good that may have resulted from exposure of the steroids scandal without also considering the harm that may have been done to future cases and investigations by this very public breach of grand jury secrecy.

Publishing grand jury information was not in fact necessary in order to inform the public about steroid use and BALCO. Williams and Fainaru-Wada wrote more than 100 articles about BALCO that did not contain illegally leaked grand jury material. The public was already receiving a wealth of information from these articles, the ongoing criminal case, and other sources. Even the particular details about big-name athletes using steroids almost certainly would have come to light eventually. Information that explosive does not stay buried forever. There were (and are) multiple investigations, hearings, civil suits, and criminal proceedings exploring the facts related to BALCO. The lead defendant, Victor Conte, even began giving television interviews about his conduct.

Working with Ellerman and concealing his criminal scheme was not essential to the public's ultimate right to know. It did, however, allow the *Chronicle* reporters to get the "scoop" by reporting certain information first, and to obtain exclusive material and greater publicity for their book. All of this advanced their careers considerably. It appears that the reporters' desire to be out front on this story and their zeal to protect their source at any cost led them to close their eyes to Ellerman's crimes and to the significant harm caused by their own actions.

Some sources don't deserve to be protected. At some point, reporters have an obligation to refuse to shield those who manipulate the media for their own improper or illegal ends. In my view, the actions of the reporters in the BALCO case were deplorable, not heroic. Under H.R. 2102, the reporters would have been free to remain silent even if Ellerman's scheme to obstruct justice had succeeded and the criminal case against the BALCO defendants had been dismissed. Federal law should not provide a cover for such behavior.

Mr. CONYERS. And thank you for your presentation.

Jim Taricani, award-winning investigative reporter from Providence, RI, with a career in the print media, radio, television, and who has written and taught extensively.

We are delighted that you are our final witness for the morning.

TESTIMONY OF JIM TARICANI, INVESTIGATIVE REPORTER, WJAR/NBC10 PROVIDENCE, NEW BEDFORD, RI

Mr. TARICANI. Thank you, Mr. Chairman, and thank you, Members of the Committee, for inviting me here to testify.

My testimony today is that of a working reporter and, like my written statement, it is based on my memory and not a review of the official court record. Because of that and because I am not a lawyer, I would refer you to the court record for details of the proceeding in which I was involved.

Despite my own experience, nothing I say here today should be considered disrespect for our Federal judiciary.

In February of 2001, when my station was owned and operated by *NBC News*—it is now owned by Media General, Inc.—I heard a videotape made by the FBI. The tape showed an FBI informant bribing then Providence Mayor Vincent "Buddy" Cianci's right-hand man with a $1,000 cash bribe to get a city contract.

While the videotape had been put under court seal, the sealing order did not pertain to the press or the public. I had obtained the tape from a confidential source. This tape showed the most vivid example of public corruption I had seen in my three decades as a reporter.

The trial justice in this case prior to trial told the press that even after he introduced his evidence, these tapes would still not be made public. So my station, along with NBC News, decided to air the tape. A special prosecutor was appointed by the Federal judge overseeing the case, code named Operation Plunder Dome, to find out who gave me the tape. I refused to disclose my confidential source to the special prosecutor and was found, first, in civil contempt of court and fined a total of $83,000.

Eventually, I was found guilty of criminal contempt of court. On December 9, 2004, U.S. District Court Judge Earnest Torres, in Providence, Rhode Island, sentenced me to 6 months home confinement, even though my source came forward 5 days before my sentencing.

The judge said he would have sent me to prison, but he took into account the fact that I am a heart transplant recipient and out of concern for my health, he sent me home wearing an ankle bracelet.

I was ordered to disconnect my internet. I was confined to the inside of my house. I was not allowed to talk to the press. I was not allowed to do any work the court considered professional. I was subjected to drug tests every week.

In other words, I was treated as a common criminal, all for airing a story of great importance to the public.

Sending journalists to prison might be the remedies courts use in Russia or China, but here in America? Sending journalists to prison, in my opinion, flies in the face of the freedom of press clause in the first amendment.

I am just one of several reporters in recent years that have been sent to prison or threatened with subpoenas for refusing to disclose a confidential source.

I feel, along with many of my fellow journalists, that we need shield laws both in the State and Federal levels in order to do our job the way the founding fathers would have wanted us to do our job. We in the press are supposed to be the watchdogs over our Government, yet we are being forced to be de facto investigators every time we are ordered to reveal a confidential source that was used for a story that allowed the public to be better informed.

We are supposed to have a free press in this country. The first amendment should give us the protection we need to pick our sources. The Federal court interpretations have left journalists out in the cold.

Every time a reporter or news organization doesn't do a story because of fear of being held in criminal contempt, it is the public that loses.

Despite claims by those who oppose a Federal shield law, I have personal knowledge of news organizations that are withholding publishing or broadcasting stories of public importance because they fear costly fines or, worse, seeing their reporters to go to prison.

Sending reporters to prison for protecting their sources results in a chilling effect on the press.

I spent 121 days in home confinement and, as you know, Judy Miller, formerly of the New York Times, spent the same amount of time in jail over the Scooter Libby case.

Two reporters from the San Francisco Chronicle are facing 18 months in jail for exposing the baseball steroid scandal. Some 33 States have some form of shield law for reporters. On behalf of my fellow journalists, it would be wonderful and pleased to have Congress pass the proposed "Free Flow of Information Act of 2007." If you do, it will help journalists do their jobs without fear of prison or outrageous fines.

The press has a vital role to play in our democracy. If Congress passes the shield law, it will go far in preserving that role and will help keep the public informed on their Government.

Thank you.

[The prepared statement of Mr. Taricani follows:]

PREPARED STATEMENT OF JAMES TARICANI

TESTIMONY OF JAMES TARICANI ON H.R. 2102 THE FREE FLOW OF INFORMATION ACT OF 2007

MR. CHAIRMAN AND MEMBERS OF THE HOUSE JUDICIARY COMMITTEE, THANK YOU FOR THIS OPPORTUNITY TO TESTIFY HERE THIS MORNING.

MY NAME IS JIM TARICANI. I HAVE BEEN A BROADCAST AND PRINT JOURNALIST FOR THE PAST 34 YEARS. I AM CURRENTLY AN INVESTIGATIVE REPORTER FOR WJAR T.V. IN PROVIDENCE, RHODE ISLAND, WHICH IS OWNED BY THE MEDIA GENERAL COMPANY.

I AM HERE TO TESTIFY IN FAVOR OF THE FREE FLOW OF INFORMATION ACT OF 2007.

IN FEBRUARY OF 2001, WHEN MY STATION WAS OWNED AND OPERATED BY NBC NEWS, I AIRED A VIDEO TAPE MADE BY THE FBI...THE TAPE SHOWED AN FBI INFORMANT BRIBING THEN PROVIDENCE MAYOR BUDDY CIANCI'S RIGHT HAND MAN WITH $1,000 CASH...TO GET A CITY CONTRACT.

WHILE THE VIDEO TAPE HAD BEEN PUT UNDER COURT SEAL.THE SEALING ORDER DID NOT PERTAIN TO THE PUBLIC OR THE PRESS.

I HAD OBTAINED THE TAPE FROM A CONFIDENTIAL SOURCE....THIS TAPE SHOWED THE MOST VIVID EXAMPLE OF PUBLIC CORRUPTION I HAD EVER SEEN IN MY THREE DECADES AS A REPORTER.

THE COURT HAD ORDERED PRIOR TO TRIAL, THAT THESE TAPES, EVEN AFTER INTRODUCED AS EVIDENCE...WOULD STILL NOT BE RELEASED TO THE PUBLIC.

SO MY STATION, ALONG WITH NBC NEWS, DECIDED TO AIR THE TAPE.

A SPECIAL PROSECUTOR WAS APPOINTED BY THE FEDERAL JUDGE OVERSEEING THE CASE, CODE NAMED " OPERATION PLUNDER DOME" TO FIND OUT WHO GAVE ME THE TAPE.

I REFUSED TO DISCLOSE MY CONFIDENTIAL SOURCE TO THE SPECIAL PROSECUTOR, AND WAS FOUND IN CONTEMPT OF COURT.

I WAS FINED $1,000 PER DAY. AFTER 83 DAYS AND A COST OF $83,000, I WAS THEN CHARGED WITH CRIMINAL CONTEMPT FOR REFUSING TO DIVULGE MY CONFIDENTIAL SOURCE TO THE SPECIAL PROSECUTOR.

EVENTUALLY I WAS FOUND GUILTY OF CRIMINAL CONTEMPT OF COURT.

ON DECEMBER 9TH, 2004, JUDGE ERNEST TORRES IN PROVIDENCE, RHODE ISLAND SENTENCED ME TO 6 MONTHS HOME CONFINEMENT....EVEN THOUGH MY SOURCE CAME FORWARD 5 DAYS BEFORE MY SENTENCING.

THE JUDGE SAID HE WOULD HAVE SENT ME TO A FEDERAL PRISON...BUT HE TOOK INTO ACCOUNT THE FACT THAT I AM A HEART TRANSPLANT RECIPIENT, AND OUT OF CONCERN FOR MY HEALTH, HE SENT ME HOME WEARING AN ANKLE BRACELET.

I WAS ORDERED TO DISONNECT MY INTERNET

I WAS CONFINED TO THE INSIDE OF MY HOUSE

I WAS NOT ALLOWED TO TALK TO THE PRESS

I WAS NOT ALLOWED TO DO ANY WORK THE COURT CONSIDERED PROFESSIONAL

I WAS SUBJECTED TO DRUG TESTS ONCE A WEEK...

IN OTHER WORDS, I WAS TREATED AS A COMMON CRIMINAL...ALL FOR AIRING A STORY OF GREAT IMPORTANCE TO THE PUBLIC.

SENDING JOURNALISTS TO PRISON MIGHT BE THE REMEDIES COURTS USE IN RUSSIA OR CHINA....BUT HERE IN AMERICA?

SENDING JOURNALISTS TO PRISON FLIES IN THE FACE OF THE FREEDOM OF PRESS CLAUSE IN THE FIRST AMENDMENT

I AM JUST ONE OF SEVERAL REPORTERS IN RECENT YEARS THAT HAVE BEEN SENT TO PRISON, OR THREATENED WITH SUBPOENAS FOR REFUSING TO DISCLOSE A CONFIDENTIAL SOURCE.

I FEEL, ALONG WITH MANY OF MY FELLOW JOURNALISTS, THAT WE NEED SHIELD LAWS BOTH ON THE STATE AND FEDERAL LEVELS IN ORDER TO DO OUR JOBS...THE WAY THE FOUNDING FATHERS WOULD HAVE WANTED US TO DO OUR JOBS.

WE IN THE PRESS ARE SUPPOSED TO BE THE WATCHDOGS OVER OUR GOVERNMENT...

YET WE ARE BEING FORCED TO BE DEFACTO INVESTIGATORS, EVERY TIME WE ARE ORDERED TO REVEAL A CONFIDENTIAL SOURCE THAT WAS USED FOR A STORY THAT ALLOWED THE PUBLIC TO BE BETTER INFORMED.

WE ARE SUPPOSED TO HAVE A FREE PRESS IN THIS COUNTRY....THE FIRST AMENDMENT SHOULD GIVE US THE PROTECTION WE NEED TO PROTECT OUR SOURCES..BUT FEDERAL COURT INTERPRETATIONS HAVE LEFT JOURNALISTS OUT IN THE COLD.

EVERY TIME A REPORTER OR NEWS ORGANIZATION DOESN'T DO A STORY BECAUSE OF FEAR OF BEING HELD IN CRIMINAL CONTEMPT...IT'S THE PUBLIC THAT LOSES....

DESPITE CLAIMS BY THOSE WHO OPPOSE A FEDERAL SHIELD LAW, I HAVE PERSONAL KNOWLEDGE OF NEWS ORGANIZATIONS THAT ARE WITHHOLDING PUBLISHING OR BROADCASTING STORIES OF PUBLIC IMPORTANCE, BECAUSE THEY FEAR COSTLY FINES, OR WORSE, SEEING THEIR REPORTERS FACE PRISON.

SENDING REPORTERS TO PRISON FOR PROTECTING SOURCES RESULTS IN A CHILLING EFFECT ON FREEDOM OF THE PRESS.

I SPENT 121 DAYS IN HOME CONFINEMENT...AS YOU KNOW; JUDY MILLER FORMERLY OF THE NEW YORK TIMES SPENT THE SAME AMOUNT OF TIME IN JAIL OVER THE SCOOTER LIBBY CASE...

TWO REPORTERS FROM THE SAN FRANCISCO CHRONICLE WERE FACING 18 MONTHS IN JAIL FOR EXPOSING THE BASEBALL STEROIDS SCANDAL.

SOME 34 STATES HAVE SOME FORM OF SHIELD LAW FOR REPORTERS...ON BEHALF OF MY FELLOW JOURNALISTS, PLEASE PASS THE PROPOSED FREE FLOW OF INFORMATION ACT OF 2007.

IF YOU DO, IT WILL HELP JOURNALISTS TO DO THEIR JOBS WITHOUT FEAR OF PRISON, OR OUTRAGEOUS FINES.

THOMAS JEFFERSON ONCE SAID: OUR LIBERTY DEPENDS ON FREEDOM OF THE PRESS..WHICH CANNOT BE LIMITED WITHOUT BEING LOST.

THE PRESS HAS A VITAL ROLE TO PLAY IN OUR DEMOCRACY. PASSING THIS SHIELD LAW WILL GO FAR IN PRESERVING THAT ROLE.....AND IT WILL HELP KEEP THE PUBLIC INFORMED ON THEIR GOVERNMENT.

THANK YOU

Mr. CONYERS. Thank you so much, all of you.

The honorable William Safire, we don't get this opportunity to talk much in public. Synthesize for us, if you will. You have heard us up here. You have heard a lot of discussion here. What is your feeling about the prospects and the significance of this kind of a measure that we are examining today?

Mr. SAFIRE. Well, the prospects you would know better than me. The significance, I think I can best express it by——

Mr. CONYERS. Pull the mike a little closer, sir.

Mr. SAFIRE. Let me give you, what we do in journalism, a specific in answer to that.

I visited Judy Miller in jail a few times. It was not a walk in the park. It was a real Federal prison. She slept on a two-inch mattress. She was losing weight. She looked, in her own words, terrible, and she was suffering. Eighty-five days is a long time.

At that point, I had, in the very beginning, criticized the prosecutor, who had no guidelines to follow. As you know, the Department of Justice has these guidelines, created, curiously enough, by John Mitchell. He did not promulgate them. He felt a little guilty about what was going on with subpoenas and wiretaps, and so he drafted it and Elliot Richardson, after Mitchell went to jail, put them into effect.

But they are meaningless, because whenever a criticism arises or a fear of criticism arises in an Attorney General, he simply appoints a special counsel, who is not affected by these guidelines.

And so what happened was I, at the very beginning, in the New York Times, denounced the idea of a runaway prosecutor. That is what columnists do. It was a legitimate thing. I took a pop at him, because, frankly, I read the law and saw there was no possibility of prosecution under that act, because there was no intention to harm the United States.

Plus, as we later learned, the Department of Justice already knew who the leaker was. The Under Secretary of State had come forward and told them.

So it was a process crime. It was a crime committed by the result of the investigation.

So here I am visiting my colleague in prison and I wanted to give them a real zap. But I was chilled. And what chilled me? The prospect of the prosecutor getting angry. And under the law, he had the right then to go not just keep her in jail for the length of the grand jury, but to take the next step and cite her for criminal contempt and keep her in jail for years.

And so what effect did that have on a supposedly gutsy columnist? Am I going to take this hostage and endanger her more or am I going to shut up? And I elected to shut up. And am I ashamed of myself for that? No, but I would hate to see other reporters and columnists subjected to that chill and that shouldn't be happening in America.

That is happening now. The Justice Department can say, "Gee, there are very few cases." We have just seen an example of somebody incarcerated at home and although these are individual cases, we live with individual cases and these cases, I think, militate toward dealing with this terrible trend and that is what responsibility this Committee carries.

Mr. CONYERS. Thank you so much.

Lamar Smith?

Mr. SMITH. Thank you, Mr. Chairman.

Ms. Brand, you mentioned three flaws that the Department of Justice sees in this legislation. How, generally, would you correct them and how briefly would you correct them?

Ms. BRAND. Well, as I said in my testimony, we don't think a case has been made for any legislation in this area. So I don't want to give you the wrong impression. There may be ways to fix some of the language here, but I am not sure that would—in fact, I know it wouldn't entirely eliminate our concerns with the bill.

But one of the specific objections that we had was the—and we appreciate the effort to put a national security exception in the bill, but the exception is no narrowly tailored that it would really only apply in cases where prospective harm was going to be averted and only where the prospective harm could be shown to be imminent. As Mr. Safire noted, imminence is a fairly high standard to meet. It is not that it is going to happen soon, it is going to happen right away.

So in the case of a leak of classified national security information that already had resulted in death or had resulted in other obvious harm to the national security, this exception wouldn't apply.

So if there were a case where, having exhausted all other means of determining who the leaker was, the only way to do it was talk to the reporter, we wouldn't be able to issue a subpoena in that type of case, That is one of our significant concerns.

Mr. SMITH. Thank you.

Mr. Eliason and Mr. Levine, if someone were to illegally leak employee records, other than perhaps medical records, would their identity be protected under this legislation?

Mr. Levine?

Mr. LEVINE. I have a little difficulty with the question, Congressman, because it is unclear what law we would be talking about being violated here.

Mr. SMITH. It would be various privacy laws on leaking information about employees, personal information.

Mr. LEVINE. I am unaware of Federal legislation, other than the legislation that is specifically identified in the statute now as an exception, Federal law, that would provide a safeguard for private employee information.

There are various State statutes that provide protection in those circumstances. And I think it is very important to emphasize and for the Committee to understand that this bill only provides a reporter's privilege in cases arising under Federal law.

So if someone was prosecuted in a State court or there was a civil litigation in a State court involving the situation that you have just posited, the reporter could not come in and raise this shield law as a protection to prevent him from testifying.

Mr. SMITH. More generally, do you or Mr. Eliason see any areas of confidentiality that are not protected by this legislation that you feel should be protected by this legislation?

Mr. Eliason?

Mr. ELIASON. I am sorry, Congressman. Confidentiality in terms of information related to the reporter or confidentiality in terms of personal privacy?

Mr. SMITH. In terms of personal privacy.

Mr. ELIASON. I am sorry. I am not sure I understand what you are asking me, Congressman.

Mr. SMITH. What I was trying to get at was, should this legislation be modified in any as far as making sure that confidentiality is protected in ways that are not already covered by the legislation?

Mr. ELIASON. I think when it comes to the disclosure of information or, frankly, any kind of disclosure, if there is going to be a bill, it seems to me it is more appropriate to have one that actually more closely follows the Department of Justice guidelines that allow the court, not depending on a certain kind of case or not only when we have a certain kind of information leaked or not that we apply it, but allow the court to look at any kind of case and balance the interests and decide whether or not the privilege should be upheld.

So it seems to me when you start carving out exceptions, that that becomes more problematic. So for the reasons I have said, I don't believe there is need for a bill at all. But if there were going to be one, I think it would be more appropriate to more closely follow the Department of Justice guidelines.

Mr. SMITH. It sounds to me like both you and Ms. Brand are saying the same thing. It is hard to make the modifications necessary in this bill to craft a bill that you all would support, even though you have suggestions as to how we might improve it. Is that a fair statement?

Mr. ELIASON. I think that is a fair statement, yes.

Ms. BRAND. I would add that we are, obviously, always happy to look at any language that you have. I wouldn't totally preclude the idea that there might be some acceptable language, but we would, obviously, have to see it first.

Mr. SMITH. Thank you, Mr. Chairman.

Mr. CONYERS. The Chairman of the Courts and Intellectual Property Subcommittee, Howard Berman.

Mr. BERMAN. Thank you, Mr. Chairman.

Ms. Brand, is Mr. Safire correct that a special prosecutor is not bound by the guidelines of the Justice Department on this issue?

Ms. BRAND. Well, the Department's guideline require the personal approval of the Attorney General for the issuance of a contested subpoena and in a case where the Attorney General is recused from the investigation, he would not be able to provide that approval.

So I think that is what takes a case involving a special prosecutor outside of the regular Department of Justice process.

Mr. BERMAN. Is he bound by the standards of the guidelines in terms of weighing and balancing?

Ms. BRAND. I am not sure what the legal answer to your question is. I can tell you that just based on what I have seen publicly, Pat Fitzgerald said that he considered himself bound by them and that the judge in the District of D.C. found that he had complied with them. But I would have to go back and get you a legal answer to your question.

Mr. BERMAN. I guess perhaps to Mr. Levine, on the national security issue, I want to make sure I understand what, on the surface, seems like a very simple phrase, to prevent imminent and actual harm.

This is not that use of "and" that says imminent or actual harm, right? It is both. The harm has to be quite real and it has to come almost immediately. Is that the right interpretation?

Mr. LEVINE. I would concur in Mr. Safire's definition of imminent, meaning that it has to be both actual and something that is going to——

Mr. BERMAN. It is the word "actual" here. Actual means it is not an incidental harm, it is a real harm or it is a harm that already happened?

Mr. LEVINE. It is looking prospectively. It is not looking in the past. But I think it is important to emphasize that in determining whether or not a source of information to a reporter is necessary to prevent imminent future harm, the history of what has happened, that is, if there has been past harm, will certainly be a relevant consideration in making that determination.

Mr. BERMAN. In terms of actual harm.

Mr. LEVINE. And the imminence of it.

Mr. BERMAN. Well, does it? I guess that is my question.

A story comes up that causes one to reasonably conclude that involved real harm, perhaps including death and injury to people as a result of it coming out, the belief is that only someone with access to extremely sensitive, classified, secret information could have been the source of that. And the prosecutor now and the investigative agencies think the person who could have done that could do something else. And in order to prevent that something else from happening, not to punish him for what he did, but to prevent it from happening again, we want to find out who that source is.

How does imminent fit in that context?

Mr. LEVINE. I think the argument, as you have articulated it, is exactly the argument that the prosecutor or the Justice Department in that case would make to the court and would make the case that because this person has leaked in the past, because this person, based on the information we have, likely has access to information that——

Mr. BERMAN. But the most he can say is it may never happen, it may happen sometime in the future, or it might happen imminently. I have no idea whether it is going to happen imminently. It is the potential that it could happen and happen imminently that I want you to come down on the side of forcing that reporter to disclose.

Mr. LEVINE. I think it is fair to say that the language here is designed to track the language in several Supreme Court decisions that talk about the circumstances in which the publication of information relating to the national security or threatening other kinds of harm can be prescribed in some way.

And those cases require an imminence in the sense that there needs to be not just conjecture and not just hypothesis, but a real reason to believe that something is about to happen or could reasonably be presumed to happen.

And I would also add that even in the cases that the Justice Department cotes in its written testimony, I am thinking specifically of the Morrison case in the Fourth Circuit, courts emphasize how much deference they pay to the Government in matters of national security.

A judge getting a plea from the United States that there is about to be serious and imminent harm to the national security is not easily going to say, "I disagree, and we are not going to allow you to compel the disclosure of this source." Courts defer on national security issues within the realm of reason.

What this legislation does is, in that area, I think, provide a very mild check on the unilateral ability of the Department of Justice to make that determination on its own.

And if I could just take 1 more second and respond to your question to Ms. Brand. In the Valerie Plame investigation, all of the journalists who were subpoenaed, including Ms. Miller, made arguments to the court that Mr. Fitzgerald needed to be bound by the Justice Department guidelines and that the court needed to review whether or not he had, in fact, complied with the guidelines. And the courts unanimously held that special counsel and special prosecutors are not bound by the guidelines.

Mr. CONYERS. Thank you very much.

The distinguished gentleman from North Carolina, Howard Coble.

Mr. COBLE. Thank you, Mr. Chairman. You are giving me 5 minutes this time, right, Mr. Chairman?

Mr. CONYERS. You get 5 this time.

Mr. COBLE. I probably won't use 5.

Good to have you all with us, folks.

Ms. Brand, can reporters use information from the confidential source without fear of being prosecuted for failure to disclose the source's identity?

Ms. BRAND. Are you asking whether the reporter can be prosecuted for publishing the information or for refusing to——

Mr. COBLE. Well, for using the information he or she received and then failing subsequent to identify the source.

Ms. BRAND. Well, I think those are two different questions. The first question is whether, if you are talking about classified information, for example, publishing that information could subject a reporter to prosecution. That is theoretically possible under the espionage laws.

Mr. COBLE. You said classified. I said confidential, not necessarily the same.

Ms. BRAND. Well, then that would depend. In a non-classified setting, no, they could not. As for the question about whether they could be prosecuted for failure to disclose a source, the only thing I can think of is if they were in criminal contempt of court, but that would be further down the line.

Mr. COBLE. Well, that is a vague answer, but maybe that is my fault in not—Mr. Safire, do you want to weigh in on——

Ms. BRAND. I may not have answered your question either.

Mr. COBLE. I see your body language telling me you may want to weigh in.

Mr. SAFIRE. My body language just came from an itch. [Laughter.]

Mr. COBLE. Mr. Levine, you will recall I listed some exceptions in my opening statement. Do you believe these exceptions will strengthen the reporter's privilege?

Mr. SAFIRE. There is no question in my mind, Congressman.

Mr. COBLE. That it will.

Mr. SAFIRE. That it will.

Mr. COBLE. I concur with that. That was a rhetorical question, and I thought that was the answer.

Mr. LEVINE. Happy to oblige.

Mr. COBLE. All right. Thank you, sir.

Mr. Safire, let me come back to you. How does access to information impact what stories are covered by the media and is it your belief that this bill will necessarily increase reporters' access to information?

Mr. SAFIRE. I think it will definitely help reporters who are digging in investigative work in doing their job, no doubt about it.

When you talk about access to information, information is all over the place. It comes in in handouts. We get calls from everybody, and too many of us just react to that and cover what is accessible and easy.

But what distinguishes a journalist is going beyond what is accessible, readily accessible, and reaching out and getting the confidential sources.

Now, I don't want to take up your whole 5 minutes, but there is a process, a mysterious process that goes on between sources and reporters. If you are in this business for a long time, you develop these sources.

I used to go to the golden place for sources, which was at RFK Stadium, the Vince Lombardi room, where senators and congressmen and reporters and CIA operatives would all gather before a ballgame or at halftime. And over the years, there developed a certain not just camaraderie but trust, mutual trust, and we could call each other and bump into each other.

These were not anonymous sources. These were people that you trusted, and that is what goes on in this city, and it goes on in every American city. So the access is based on mutual trust, and that is what this bill will support.

Mr. COBLE. Thank you, Mr. Safire.

Mr. Taricani, I had a similar question to you, and I suspect you would concur with what Mr. Safire said, would you not?

Mr. TARICANI. Sure, absolutely. I have talked to people who are very aware of all the ongoing highly publicized cases of reporters being found in contempt or being sent to jail and some of these people who could provide information are not. They are very leery about what might happen, what they might get tangled up with. So, sure, this bill would go a long way in allaying those fears.

Mr. COBLE. I thank you, sir.

And before the Chairman drops the hook on me, I am going to yield back my time before that red light illuminates.

Mr. CONYERS. I was going to give you 6 minutes.

Mr. COBLE. Now you tell me, Mr. Chairman.

Mr. CONYERS. The author of this bill, Rick Boucher?

Mr. BOUCHER. Thank you very much, Mr. Chairman.

Mr. Levine, you mentioned in your testimony that there has been a cascade of subpoenas to reporters to reveal their confidential sources during the course of this decade, and you compared that to the previous quarter of a century, when there were a few, if any.

Can you quantify how many there have been in the last 7 years?

Mr. LEVINE. In the past 7 years, I don't know that I can give you a precise number. I can tell you that, especially when you are talking about confidential sources, we used to talk about—in my written testimony, I think I have the numbers of reported decisions involving confidential sources for the period of years before 2001, and I forget the exact number of years, but there were two reported decisions involving confidential sources issued by Federal courts.

Since 2001, we have not only had several reporters sent to jail by Federal courts, we have had at least a dozen held in contempt. We have had at least two dozen that are currently the subject of subpoenas or have recently been the subject of subpoenas involving confidential sources specifically.

And search your own memories. This is in stark contrast to what happened in the period following *Branzburg v. Hayes* and up until starting with the 2001 incarceration of Vanessa Leggett.

Mr. BOUCHER. So you are talking about numbers in the mid 30's over the last 6 years or so, as compared to only two, I think you mentioned, in the quarter-century or so prior to that.

Mr. LEVINE. I hesitate to quote an exact number, because it is very hard to get data on this. The Reporters Committee for Freedom of the Press did a FOIA request to the Department of Justice and got some data only with respect to subpoenas issued by the Criminal Division in proceedings in which the Department of Justice was a party. I believe I cite those in my written testimony.

Mr. BOUCHER. That is good enough for now. Thank you. We will make a further inquiry in order to refine that information, to some extent.

Mr. Safire, let me ask you to talk a little bit about how the flow of information really is chilled in the absence of this kind of statutory protection. I think in your opening statement, you recited an instance in which you yourself felt chilled in the willingness to pursue a series of questions.

But let's talk about it from the other perspective. What about the source? Is the source chilled in the absence of a statute that assures that the reporter cannot be held in contempt and placed in jail until that reporter is willing to reveal a source?

Mr. SAFIRE. I think, definitely, yes. The idea that it is easy for a source to simply send in anonymous document and expect any results from it is unrealistic. No good reporter will take a tip or a document from an anonymous source that he can't get back to and ask questions of and check out. That is the whole idea of reporting, is to see if you can trust our source.

Now, there are times you can trust a source and times when you can't. Let me give you an example. Bill Casey was an old friend of mine. I handled his congressional campaign back in the 1970's and worked with him in the Nixon administration when he was running the SEC, and he was a good source over the years.

When he became the director of CIA, I could call him and get some good inside information, and I trusted him. Then I got a tip from the FBI saying, "Hey, you know, your friend Casey, he has been meeting with Bob Woodward late at night, often. Just thought you would like to know."

Well, here is a competitor. So I said to Bill, "Look, I don't care if you are talking to Woodward, he is a good reporter, but shouldn't you be talking to me, as well?" And he said, "It is not true. I am not talking to Woodward."

So he lied in his teeth. That put a little note in my head saying, "Watch out. Bill's trust with you is changing." And then during the Iran-Contra business, he called me with a story that I felt was wrong, and I countered him on it, and he blew up at me. And later on, it turned out that he indeed was trying to sell me something that wasn't so, and it had to do, I think, with his brain tumor at the time. There was a physical reason for this change.

But what I am trying to get at here is the trust that is generated between reporter and source changes necessarily. You don't trust anybody implicitly, and that person doesn't trust you implicitly.

Now, what does this latest trend, which the Justice Department denies is a trend but it is a trend, what does that do to the source? Is he more likely or less likely to trust a reporter's confidence?

And I think it is demonstrable that the leaks, the whistleblowings are drying up. People are more cautious about talking to reporters and there has been testimony in Congress about that very thing.

Mr. BOUCHER. Thank you, Mr. Safire. That is very helpful.

Thank you, Mr. Chairman.

Mr. CONYERS. Mr. Ric Keller, the gentleman from Florida?

Mr. KELLER. Thank you, Mr. Chairman.

I want to appreciate my colleague, Mike Pence, for working on this issue for many years and, also, Mr. Boucher for their great work in trying to move this forward.

Overall, I believe it is a very important and positive thing for our free press to have access to off-the-record confidential sources to get to the truth. On the other hand, I think this bill should be modified to make sure that a newspaper cannot defame the heck out of a public figure with a false controversial story without having to reveal their sources.

Let me give you a simple example. Imagine there is a conservative family-value Congressman Jones from Florida, and a rumor is going around that he was picked up for drunk driving, with a prostitute, and the cops let him go because of his great power, and that is why there are no records about it. And the political opponents are whispering that into every reporter's ears, and the newspapers are salivating over this story, and they have competitive pressures.

And, finally, let's say the New York Times and the New Republic publish a story, "Congressman Jones caught with a prostitute, drunk driving." The story, it turns out, is 100 percent false, and it was spread by political opponents, two of whom claimed they had information about it and whispered confidentially in the reporter's ears.

Congressman Jones turns around and files a suit in Federal court against the *New York Times* and the *New Republic.* He uses the Federal rules of civil procedure to get access to this information about who spread this information. He gets a Federal judge to issue a court order.

What would the newspapers likely do? They would likely hold up *New York Times v. Sullivan* and say, "This is a public figure. You have got to show that it is false, and it is, but also that we recklessly disregarded the truth. And we didn't recklessly disregard the truth. We had two sources. They told us they saw it. They had inside information." "Well, who are those sources?" "Well, we don't have to tell you. We have a shield bill, and we are not going to have to reveal those sources."

Now, some might say that would never happen. These are good newspapers, and they are not going to allow some renegade reporter to go off and write some scandalous story based on flimsy sources, that they would have adult supervision from editors, and you would never get that into the paper. Really? You ever heard of Jason Blair of the New York Times? You ever heard of Stephen Glass of the New Republic?

I like the idea of the media having as much information as possible, and I think it is pretty true that folks are often more candid off the record. But let me ask you, Mr. Eliason, do you have concerns about the possibility that this privilege could tempt newspapers to publish controversial stories that are false?

Mr. ELIASON. I think it certainly has the potential to have that effect, Congressman. I think, again, the breadth of the privilege is a concern for any type of case, I think not simply in a libel case, that it makes it just difficult, if not impossible, to discover information about sources and——

Mr. KELLER. Let me cut you off, because I am focusing on that narrow issue.

Mr. Safire, you have listened to me. We are in sync with you totally about getting you the best possible information. But what do you think about some sort of language in the bill that would make it crystal clear that there would be no free rein here for newspapers to be able to publish false, defamatory information about public figures and then be able to use this bill as the shield to say, "We don't have to disclose who these weak sources are"?

Mr. SAFIRE. I think that would be putting too much into the bill. What you are doing is picking several instances of the failures of journalism, and you can go back over 250 years and find a lot more, but you can't shoot an elephant gun off at a rabbit.

Mr. KELLER. What about that poor Congressman Jones? I mean, what do you say to him when he said, "I want you to tell me, New York Times, who these people are, because I know that was false. I was with my family in Europe. I couldn't have been pulled over with a cop. Tell me who your sources are."

Mr. SAFIRE. It wouldn't have happened in the Times.

Mr. KELLER. It wouldn't have happened at the Times?

Mr. SAFIRE. No. And I can't speak for the New Republic, but I doubt it would have happened there.

There are shortcomings that happen in every institution, whether it is a newspaper or a Congress, and you can't pass laws to make sure that every single thing is covered.

Mr. KELLER. Where did Jason Blair work?

Mr. SAFIRE. He worked at the New York Times, and that was covered by the Times, a front page, 6,000-word story laying out what we did wrong, and we didn't try to cover it up. I am very sensitive to cover-up.

But I think in trying to do too much in a bill and cover all possibilities, you vitiate the most important thing you are doing, which is reestablishing the trust between sources and reporters.

Mr. KELLER. Thank you, Mr. Chairman. My time has expired.

Mr. CONYERS. The Chair recognizes the Chairman of the Subcommittee on Crime and Judiciary, Bobby Scott of Virginia.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Chairman, the problem I have with this legislation is it attempts to try to codify common sense. If you look through the past, as Mr. Levine has mentioned, you go through past Democratic and Republican administrations, we haven't needed to try to legislate common sense.

But if you look at the bill, it has got reasonable all over it, public interest, the kinds of things that you would have thought would have been considered before we got into this thing.

But the problem we have with this Administration is not whether the policies are consistent with precedent. The question of standard is, has it ever happened before?

You have picked up people as enemy combatants, United States citizens, lock them up, no trial, no charges, searches. And the news this week is there have been abuses in searches, wiretapping without probable cause, the invasion in congressional office, never done before.

Maybe it is okay, maybe it isn't, but has it ever been done before? And so maybe we need to legislate some common sense. I don't know, after this Administration, whether it is going to make any difference, because it appears to just codify the practice that has been going on for a couple hundred years.

I have a couple of questions. One, if any of the panelists can help on, with the State laws, has there been any problem interpreting what a journalist is and what is a journalist and what isn't, whether a blogger is a journalist? And I assume that has been worked out over the States, and maybe it is a problem, maybe it isn't.

But before we get to that, I wanted to go back and talk about some of the problems in a criminal case. If a person has been indicted on a criminal case and there is a news report that the evidence was planted, we have inside information that the evidence was planted, can the reporter—I mean, the way the bill is written, you have to satisfy one, two, three and four, which means there has got to be imminent death or bodily harm and public interest.

Can you make the reporter reveal who knows that the evidence was planted, if this bill passes?

Ms. BRAND. I don't see that as falling within any of the exceptions to the bill. I wouldn't read any of the exceptions to cover that circumstance.

Mr. SCOTT. So the defendant is on trial. What happens in the trial? Can he use the hearsay, a reporter said the evidence was planted?

Mr. SAFIRE. Congressman, the rules governing what is admissible in a trial in a criminal case are totally unaffected by this statute.

Mr. SCOTT. Well, then you have got hearsay, and you can't admit it.

Mr. SAFIRE. Right.

Mr. SCOTT. Then what? Does he go to jail, can't get the evidence of his innocence?

Mr. SAFIRE. No. He can undertake discovery from the Government itself in the context of the discovery rules. And, in fact, the press would serve a vital function in that case by reporting that story and alerting the defense that that issue was out there for them to explore through their own resources.

What they couldn't do is go and get that information compelled from the reporter who dug it out in the first place.

Mr. SCOTT. And if you can't find out who they talked to and who told them, what happens?

Mr. SAFIRE. That would be an issue for the trial judge. If it was established that the information was, in fact, planted, it would seem to me that the source of the information would be almost beside the point. But that would be an issue for the trial judge to work out in the context of the case separate and apart from——

Mr. SCOTT. If you can't get to the bottom of the story, what happens?

Mr. SAFIRE. In the context of the criminal prosecution itself?

Mr. SCOTT. Right.

Mr. SAFIRE. If the defendant cannot establish evidence, then, of course, he can't admit evidence on the point. But he is not powerless in his ability to establish and seek out evidence simply because he can't get that from the source.

Mr. SCOTT. So the reporter would be shielded in that case.

In a civil case, if a news report says essentially that the defendant has been negligent and there is no public interest and no imminent harm involved and the only issue is whether the plaintiff gets the money, there is not a whole lot of public interest there, what happens in that civil trial? Is the reporter shielded, the information shielded in that case?

Mr. SAFIRE. As I read the bill, Congressman, in most civil cases, the identities of confidential sources will be protected for the very good reason that you just articulated, that if you weigh the public interest and, presumably, information about public concern, about a matter of public concern being disseminated against the pecuniary interest of a civil litigant in recovering money damages, the public interest ought to, it seems to me, win out.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. CONYERS. Darrell Issa from California?

Mr. ISSA. Thank you, Mr. Chairman.

I think since the Chairman noted the presence of a Pulitzer Prize winner, I am going to start, put you on the spot.

Mr. Safire, the balance between the right and, for that matter, the unquestioned integrity of the New York Times, if somebody is

going to spend 1 day in jail, 1 day in jail as a result of the inability to get a source, or 100 days or 1,000 days or the rest of their life or have a needle put in their arm, at what point does the balance switch toward that individual who will be incarcerated or executed from the right of a reporter to not reveal a source?

Mr. SAFIRE. Well, if you are dealing with the principle, the principle is you don't reveal your source and you hang tough and——

Mr. ISSA. So I am going to take you at your word and I am going to put words in your mouth, if you don't mind, because this is Congress after all. It is okay for someone to get a needle in their arm and be executed if it preserves the principle that a reporter not reveal their source.

Mr. SAFIRE. You are talking about the death penalty.

Mr. ISSA. Well, I started with 1 day, then 100 days and 1,000 days, and I ended up with a needle in the arm. I asked you, for good reason, at what point does the balance of the individual to be able to prove—and Mr. Scott started off this very well—at what point does it switch?

I am concerned. I don't want to see any reporter ever put in jail again. I want to see every reporter know, if possible, that there is a bright line: Here you have to answer, here you don't have to answer.

I would hope that the shield law helped do that, not just by saying when you don't have to, in which case a judge not put them in jail, but, also, if you are not covered by it, then put it out.

I want to make sure that we are not going to provide a shield today and the industry from which you come say, "Well, that shield is only partially right and, therefore, we have everything Congress gave us and everything else."

Mr. SAFIRE. I think what we are talking about here is a balance of interests and just as we have had the balance between the first amendment and the sixth amendment. That is decided in courts, and you don't just say, "This is the way it has got to be" and take an absolute 100 percent view.

What you are doing here is working out an arrangement where you don't undermine the freedom of the press and, at the same time, you don't codify it to such an extent that you can uncodify it later.

Mr. ISSA. But as of right now—and maybe I will go to Ms. Brand—as of right now, as I understand the legislation, it is silent as to this. If I am going to face a 5-year prison sentence and a news article indicates that, by its article, that a source would be able to free me, but it is hearsay, right now I can't get to that under this statute.

I am not having any harm, because it doesn't define a day, a week, a month or life in jail as harm, does it?

Ms. BRAND. That is right. I would read the bill the same way that you read it.

There are two problems there. One is the sixth amendment problem, and presumably courts would find the law unconstitutional as applied if it were infringing upon a defendant's sixth amendment rights, but query whether Congress wants to enact a law where courts would have to go through that exercise.

And, secondly, the definition of journalism in this bill is so broad that we are not talking about the *New York Times* alone. I have to think that some *New York Times* reporters might have a conscience that would prevent them from allowing someone to be executed in the circumstances you mentioned, but——

Mr. ISSA. They might leak the source to somebody else, and somebody else could do it.

Ms. BRAND. Well, I don't know, but I have a hard time believing that someone would actually be executed because the New York Times was sitting on a source, but——

Mr. ISSA. Thanks for that.

Ms. BRAND [continuing]. The definition in the statute——

Mr. ISSA. Mr. Safire, I wanted you to say that you wouldn't let someone be executed.

Ms. BRAND. The definition is just so broad that it really includes anybody who wants to post something to the Web. So if you want to protect yourself from having to provide evidence in a grand jury or a criminal trial, make yourself a journalist by posting something to the Web.

Mr. ISSA. My final question in the remaining time is it also doesn't have an *in camera* discussion. It doesn't talk about, if you will, an absolute right for at least the judge to be able to determine through getting sufficient information *in camera*.

And that is one of the protections I am hoping we add to this, is that no matter what the first test, second test, hopefully, and it doesn't say it right now, I just want to confirm that, the idea that the source can be revealed to the judge *in camera* and that that source then is still protected, but at least you can go through the procedure of finding out, in the case of the examples we were given, whether or not those sources exist.

Is that also correct, that it is not in the bill?

Ms. BRAND. Yes. There is no ex parte or *in camera* provision in this bill.

Mr. ISSA. Mr. Chairman, hopefully, those are the two areas that we will work on between now and the time it hits the floor.

Thank you. I yield back.

Mr. CONYERS. I thank the gentleman.

Sheila Jackson Lee, the gentlelady from Houston, Texas?

Ms. JACKSON LEE. Mr. Chairman, thank you.

I cannot imagine, in this climate of national security issues and cloak-and-dagger matters that seem to confront of our White House, to have chosen a better time for this very important discussion and this very important legislation.

And I thank both the Chairman and the Ranking Member, but I also want to thank the proponents of this legislation. Many of us have engaged in initiatives like this in the past, and it is now very good that we can come together.

I do want to indicate that my distinguished friend from California may have missed the direct language, and I am not sure if the representative from the Department of Justice might have missed it as well, but in the bill, there are two distinct provisions that I think are key in this backdrop of post-9/11.

And it is, in fact, an issue, a disclosure provision that talks about to prevent imminent and actual harm to national security. Obvi-

ously, that is the glaring war on terror. And then it also indicates that there should be disclosure if that is necessary to prevent imminent death or significant bodily harm, with the objective to prevent such death or harm.

So I think, although all legislative initiatives can be made better and more defined, that there is that element.

Let me just pose this framework for you. I think Texas raises itself as a center of an issue or a particular individual, Professor Vanessa Leggett, in my district, who, after 4 years researching the question of a death in Texas, was asked by a local newspaper to reveal sources or the law enforcement, but, by the way, had all the information, and found herself locked up in the Federal detention facility for a very long time.

We spent time together. I visited her and expressed the outrage as we pursued her release. We have seen that happen over and over again. And so I think we are here at this place because there is some value to the first amendment.

Mr. Safire, if I might ask you, because we are now in a technological atmosphere, and so would you consider the journalism definition to cover bloggers and Internet messaging and others who proliferate by the second?

And I yield to you.

Mr. SAFIRE. I would always resist the Government saying, "This is what a journalist is." And the only thing I liked about Justice Byron White's decision was the reference to "the lonely pamphleteer," who has to be covered, as well as the great newspapers.

I think that the definition you have here is a good one, because it goes to: Who is this aimed at? What do you do as a journalist? What you do as a journalist is gather information for the public. You don't gather information for a private enterprise or a private source or a private or secret organization.

The whole purpose of, whether you are a blogger or whether you are the *New York Times* or *CBS* or the Wall Street Journal, if what you are doing is aimed at informing the public, then you are a journalist, whether you get paid for it or not.

Ms. JACKSON LEE. I can't see your name, the last gentleman, if you would answer, and I apologize.

Mr. TARICANI. Taricani.

Ms. JACKSON LEE. Thank you. I can't see it turned around. Thank you. If you would answer the same question. Do you consider bloggers, Internet messengers and others——

Mr. TARICANI. Yes. I agree with Mr. Safire, but the key there, as Mr. Safire said, is people who gather information and I would add that the information goes through some type of an editing process in most cases or some type of verification process and is dispensed for the public.

Instant messenging is not necessarily meant to be dispensed to the public and other forms of electronic communication, but in the spirit of our original pamphleteer, sure.

Ms. JACKSON LEE. You have no fear then that legislation like this that would cover that expanse would be jeopardizing one's life and limb or the national security of this Nation.

Mr. TARICANI. No. They would be held to the same standards by a court, I would imagine. I am not a lawyer. That they would have

to conform to this bill and if they are acting as a journalist, then they would fall under the bill. But, again, I am not a lawyer. That is just my own point of view.

Ms. JACKSON LEE. Ms. Brand, could you find comfort in the exemptions that are here and see any reason why the first amendment should not be upheld for the protection of the press, which has been a sacred right of this country?

Ms. BRAND. Well, with respect to the definition of journalism, I think I understand why the drafters of the bill made it so broad. Presumably you want to avoid the first amendment problem that you would have if you tried to define who the press was, because like Mr. Safire said, it ranges from the lonely pamphleteer to the New York Times.

But the problem then, and this is something that the Supreme Court recognized in *Branzburg,* when they talked about the difficulties of drawing lines about who is a journalist, because the definition must be so broad to capture all legitimate journalists, is that it captures almost everybody else too.

And so you then have a situation where, if the Government needs critical evidence in a criminal investigation, they have to go through the procedures of this bill for anybody who decides that they want to try to avoid giving it to the Government by posting that information to the web or labeling themselves a journalist.

And so you are between a bit of a rock and a hard place. It is difficult to define the press narrowly without implicating the first amendment, but if you define it broadly, you cause significant problems for law enforcement.

Ms. JACKSON LEE. Thank you, Mr. Chair. It is difficult, but not impossible. I think that is the basis framework of this legislation. I yield back.

Mr. CONYERS. Thank you.

Mr. Trent Franks, Ranking Member on the Constitution Subcommittee, from Arizona.

Mr. FRANKS. Well, thank you, Mr. Chairman.

And thank you for the courtesy here, Mr. Pence.

Mr. Chairman, I know all of us have a deep commitment to freedom of the press, certainly I do, and I suppose, like many Members of the Committee, we are having a little difficult time wrapping our brain completely around this one.

But it occurs to me that we have been without a shield law on the Federal level, as I understand, for about 200 years and that the ostensible rationale for this bill, again, very well-meaning, is that there is a surge in subpoenas for reporters to reveal their sources and I think at least there is some indication that there is more than perhaps there has been in recent years.

But I am wondering if that could be traced to perhaps the post-9/11 environment that we live in. Is there any historical precedent, Ms. Brand, related to, say, when we were dealing with World War II or other conflicts that required intense press activity that had to do with national security?

Because my concern here is simply this. I know there has been some discussion about who becomes a journalist, but it occurs to me that Hamas outlets certainly would be covered under this, that

they would be—and I am sure that we would have probably responsible judiciary that would try to sort through all of that.

But I do think that there are some national security components here and I am just wondering, number one, is this surge, is it—I know there is debate, but give me your perspective. Is it real? Is the rationale for this needed now something that is real?

And, number two, the implications as far as national security especially as it relates to someone like—outlets like Hamas that could really have a lot more latitude under this, unless I am just completely misunderstanding the situation.

So I will give you a shot here.

Ms. BRAND. With respect to the number of subpoenas, the only information I can provide relates to subpoenas issued by the Department of Justice through our process that I described earlier.

So whether courts are appointing special prosecutors who are issuing more subpoenas or whether private litigants are issuing more subpoenas, that I can't answer because I don't have that information in hand.

But I can tell you that with respect to source-related subpoenas, in particular, there have only been those subpoenas in four matters since 2001. And since 1991, when the Department started keeping that information, it has happened in 19 cases. So I don't view that as a surge, at least with respect to Department of Justice.

And to go to your second point, we are very concerned, about the broad definition of journalism for a variety of reasons, but specifically including the one you mentioned. Terrorist organizations do have media components, some of them do.

For example, Hezbollah's media arm has been separately designated as a terrorist organization. Other terrorist organizations have newsletters or other media outlets. All of those entities are covered by this bill.

Mr. FRANKS. Well, Mr. Chairman, let me just say I think it might be a wise thing for the Committee to ask both like Mr. Levine and Ms. Brand to give us, number one, what you think is the core most important need in the bill that you think needs to be addressed.

In your case, Ms. Brand, what you think is some type of an amendment or some type of modification that might address the concerns that you have about the over-broad definition of journalism and, also, perhaps even some of the underlying elements of the bill.

Because I think that while I support deeply the commitment to freedom of the press, that the New York Times—I know we are not talking about what they did with information they had, but I think that in revealing some of our NSA terrorist surveillance programs and things of this nature, I think they broke the law.

I think that they harmed national security, and I think it is very important that we tread very carefully on something that has been in place for 200 years and make sure that we are acting wisely.

And I would hope that there would be some input on the part of those on the panel that have relevant information to make sure that when we go to markup here, that we have the best bill possible.

Thank you, Mr. Chairman.

Mr. CONYERS. Thank you, sir.

A former State prosecutor, in his earlier life, William Delahunt.

Mr. DELAHUNT. Thank you, Mr. Chairman.

I just would note for the record that included in the bill is a national security exception, in an effort to respond to my friend from Arizona.

And I would note he uses the term "surge." I think what we are confronting here, as we step back and look at the current scene, is a surge in secrecy. And let me pose this to the panel and maybe the journalists on the panel can respond.

Mr. Leonard, who heads the National Archives, indicated that there has been an explosion in the number of documents that are now classified and he indicated concern about that. We have had our own experiences here in Congress dealing with the executive branch in terms of information coming to Congress.

It certainly hasn't been an Administration or a Justice Department that has been forthcoming. Let me just cite one example.

There were a series of hearings conducted by the Government Reform Committee about misconduct in the Boston office of the FBI. There was a 40-year-old memorandum, prosecutorial memorandum. The then-Chairman of the Committee, Congressman Burton, certainly no, he wouldn't describe himself as some liberal from the Northeast, had to threaten contempt to get that before the Committee.

So I think what we have here is really an obsession with secrecy in terms of this Administration. It goes, it comes depending on the Administration. But what I find particularly interesting, for example, is there has been information that was classified, that was then declassified and months, even years later, is reclassified.

I think that can only be described as absurd. It has a certain "Alice in Wonderland" quality to it; up is down, and down is up.

But the title of this bill—and I intend to support the bill, and I think we can tweak it. I think, Ms. Brand, you mentioned the fact that there is no *in camera* provision in the bill to deal with sensitive issues. I would hope that one would infer that that would be within the discretion of the trial judge.

Do you agree with that?

Ms. BRAND. It would depend on the circumstances, I think.

Mr. DELAHUNT. Maybe, okay. I understand that. Well, then I think that we can work with the sponsors of the legislation and put that in this particular bill.

Mr. SAFIRE. Sir, can I just respond to the basic point that you make, which is absolutely right, that——

Mr. DELAHUNT. Well, I am glad that you agree with me, Mr. Safire.

Mr. SAFIRE. It is so easy to classify and so difficult to declassify. I remember I was working on a speech on Vietnam for Nixon, and I had a bunch of documents, and I wrote my speech and then I sent it in to him to edit, and I put on the top of it, "Top-secret eyes only."

And I waited to get the draft back from the President, and nothing happened for a couple of days, and the speech was about to be made, and I went to Bob Haldeman and I said, "Hey, where is the draft of the speech? I have to incorporate the President's edition."

And he said, "Look, you typed 'top-secret eyes only' on the top, and you are not cleared for top-secret eyes only." And that is there today, and nobody can get at it.

Mr. DELAHUNT. There is an excellent op-ed piece by Bruce Fine in the June 13th edition of the Washington Times. It is entitled "Secret Government." And he indicates when—we here on this Committee inquired of a representative of the Justice Department when the Department of Justice and the Administration decided that the authorization to use military force, allowing us to go into Iraq, when that date became a rationale for the so-called terrorist surveillance initiative, simply the date. And their response was, "We cannot discuss the operational details or history of the terrorist surveillance program," just the date. I mean, common sense would tell you that is absurd.

So what we have is a growing sense of secrecy or growing secrecy within the executive branch. It could be true of this Administration or the next one or those in the past, and the American public is being denied information that they have to have to make informed decisions.

It is the predicate, if you will, for the need for this law, in my judgment, and until we address it, we are putting at risk our democracy.

And I yield back.

Mr. CONYERS. Anyone want to comment on that before his time has expired?

Mr. ELIASON. My only comment on that would be that there may well be an issue about what material gets classified, but I would just suggest that a bill like this is not the best way to address that issue. Because, assuming we all agree that there are some things that do deserve to be classified, then what this bill does is make it much easier for people to leak that kind of information, as well, and effectively immunize them from prosecution if they do.

And so it leaves in the hands of sources and journalists the sort of decision about what should be classified and what isn't. So if we think there is a problem with too much material being classified, I would suggest there may be better ways to approach that problem.

Mr. SAFIRE. Mr. Chairman, could I take some issue with that? The premise of a lot of this discussion and what Mr. Eliason just said is that short of compelling a reporter to disclose the identity of a source, you are immunizing criminal conduct or immunizing the person who discloses classified information, that is simply not true.

The Federal Government has awesome prosecutorial powers at its disposal to investigate leaks internally. It can do that without going after the reporter. And more importantly, what is missed in this discussion is that when a reporter writes a story that exposes some information of public importance, by definition, that scoop, if you will, is the way the public is learning about the information.

Without that source coming forward, nobody would ever know about the information. It would remain secret. So there would be no information out there for people to act upon.

In the criminal context, the hypothetical that was given earlier about the person on death row, if the press didn't come forward—

if a source didn't feel comfortable going to the press and disclosing that information that exculpates the person on death row, he would remain silent. No one would ever know about it.

You need the press to be able to disclose that information and you need people feeling comfortable that their confidences are going to be kept secret and protected.

Ms. BRAND. Can I jump in there, with the leave of the Chairman?

I think that Mr. Levine overestimates the ease with which the Government can internally investigate leaks. It is often very difficult to investigate those leaks. And the Department's guidelines already require that before a subpoena to the media can be considered, the prosecutor and the investigators have considered and exhausted all other sources of information.

So we are only talking about a subpoena to the media when the Government can't get the information any other way.

And the second point I would make is that it is not accurate to say that leaking information to the media is the only way for information to get out or for an employee to come forward and blow the whistle. There is an Intelligence Committee Whistleblower Protection Act of 1998 that applies to many of the intelligence community's agencies. It allows employees to talk to their agency's inspector general and, if that person does nothing, to come to the intelligence committees of Congress.

All the other agencies of Government have their own inspectors general to whom employees can go. And employees can go to Congress. It is just not the case that leaking classified information to the press is the only way to be a whistleblower.

Mr. CONYERS. You really raised the important question, Mr. Delahunt. I am glad that you did.

Before I call on the author of the bill, Mike Pence, who is acting Ranking Member, I want to acknowledge the presence of Martha Reeves, the Councilwoman from Detroit, who is here on a completely different matter, trying to get royalties from performances of music. She is a Motown star, a constituent of mine, and I am going to ask her to meet with my staff while we continue this hearing.

And I thank you for coming and joining us. I know you have to leave at 12:30. So if you would, they will take you back to the back where we meet, and thank you for being with us.

Mike Pence, author of the measure before us, we thank you so much for the work that you have done.

Mr. PENCE. Thank you, Chairman, and I really want to thank this entire panel and your leadership in assembling these very thoughtful voices on this issue.

I keep going back to the actual Ranking Member's comments that he had qualified enthusiasm for this bill and my friends at the Department of Justice might know that my enthusiasm is qualified. I understand that different from the 49 States that have protections either in statute or in common law today, none of them are charged with the protection of the Nation and our national defense.

There are unique challenges, and I want to recognize that.

I want to thank you, Ms. Brand, for your service to the country as Assistant Attorney General, but your testimony today, as well as the balance of this panel.

I would like to direct my question first to you. It may be helpful to point out that the legislation specifically as to your most immediate point that you made about the DOJ guidelines, under the Boucher-Pence bill, the party seeking to compel production would have to show that they had "exhausted all reasonable alternative sources," as well, and that very much is among many of the provisions of our legislation that is reflective of the DOJ guidelines, and I want to encourage you with that.

My question is there clearly is a dispute over whether this is a solution in search of a problem or whether this is an avalanche, as one of the witnesses testified. I know that in response to a 2006 Freedom of Information request from the Reporters Committee, they were informed that there were some 65 requests for media subpoenas that were approved by the Attorney General.

I don't want to get into the numbers game here.

Ms. BRAND. The 19 I mentioned are source-related information. So that may be a different——

Mr. PENCE. Maybe source-related. Thank you. That is helpful.

Ms. BRAND. I don't know.

Mr. PENCE. In any event, I guess my question would be very basic and then I really want to shift, if I can, to this issue of the chilling effect and whether it exists or doesn't exist.

You have testified, as others have, and Mr. Comey last year before the Senate testified that the DOJ guidelines—it is the judgment of the Department that they are working well.

If that is the case, why not just codify the guidelines so that they apply to special prosecutors and civil litigants? Is there a sense in the Justice Department that creating statutory certainty to otherwise internal guidelines of the Department is contrary to the public interest or could you speak to that briefly?

Ms. BRAND. Well, we appreciate that the bill takes a lot of the language from the DOJ guidelines. It doesn't quite codify the guidelines, though. It is different in a couple of important respects.

Mr. PENCE. That is true.

Ms. BRAND. The flexibility point that you mention is one issue. But the way the process works now, the Department gets approval from the Attorney General in a case where a subpoena is issued to the media, and then the media can move to quash. In that case, the burden of proof is on the media to show that the subpoena was burdensome or oppressive.

The other issue is that this bill would require the Government to show by a preponderance of the evidence that certain things have been done, that certain conditions have been met.

The preponderance of the evidence standard is an evidentiary standard that usually applies at the end of a trial or proceeding. The standard at the beginning stages of an investigation, when you might be using a subpoena, is usually relevance or a much lower standard. And so those are a couple of issues that we have concerns about.

Mr. PENCE. Let me raise one more question before my time is up.

Mr. SAFIRE. Can I answer that one a little bit more?

Mr. PENCE. Most certainly.

Mr. SAFIRE. The Government is not just the Justice Department and when you talk about codifying the Justice Department's guidelines, what about the guidelines throughout the rest of the Government?

The only way you can do that is through a law and there are subpoenas, administrative subpoenas issued by agencies and other departments of Government that we haven't even discussed at all today. And the only way you can get at that is for Congress to step up to the plate.

Mr. PENCE. Thank you. Let me shift to the next question.

There is really a startling and interesting contrast in the testimony today, and that is that, Mr. Safire, you testified that you perceive that in the marketplace of the national Government today, there is a "coercive chill." I think to borrow from your testimony, you said that it is happening right now.

By contrast, Professor Eliason testified that with regard to a chilling effect, that the current law or the possibility of disclosure by a source would have, I think your phrase was, "very little role in a source's decision to come forward."

I would observe that in the wake of seeing an American journalist incarcerated for 85 days, in the wake of an extraordinary trial that just came to conclusion that found, at its genesis, a Chief of Staff of the Vice President of the United States who told a reporter something off the record and that reporter was unable to protect the identity of their source, not speaking to the perjury charges or the validity thereof.

I am speaking at the very essence, reporters in this city, it seems to me, and, more importantly, public men and women, people working in Government are getting something of a deafening message that off the record ain't off the record.

And I really would like to ask—and maybe, Mr. Safire, you first, and I would love to hear from Mr. Taricani—in the real world, ought the public to be concerned today that there is a coercive chill that is beginning to settle on Washington, D.C., that will act as a barrier to the free flow of information to the public in the future?

And I would be happy to let the professor address this.

Does the reality of this present progeny of cases and subpoenas and incarcerations have, in the real world, little effect on people's——

Mr. SAFIRE. Well, I would point out the professor is not chilled, and good for you, Professor. I am chilled. I have seen it happen, and I have seen it happen all across the country among reporters who read about what has happened, who saw the Judy Miller case come to fruition and what happened in it.

And maybe we should get away from the word "chilled," Justice Brennan's word, and get to what it really is, and that is scared. We don't want to go jail. We don't want to be bankrupted. And certainly the publishers of our newspapers don't want huge fines coming from contempt citations.

This is a problem. This is not a fake problem. This is not a tangential problem. This goes right to the heart of gathering news.

And the only way to handle it is to do for the national Government what the States have done for the State governments, and it

works there. And all the give-and-take that is required in developing case law is being done in the States, and what we have happen now is in the Federal system. And the only way that we are going to make that happen is to take up the Supreme Court on its challenge to the Congress, which is if you want to fix this, you fix it.

It is not a constitutional issue. It is something that Congress can handle, and it hasn't had to handle it before, because the problem didn't emerge. It has emerged now, and I say it is up to you to fix it.

Mr. PENCE. Mr. Taricani or the professor, I would be happy to hear from either one.

Mr. TARICANI. Sure. In a very real-world example, many news organizations, like the one I work for, because of these cases, when we sit face-to-face with a potential source now, I have to tell that source, before they give me any information, that my company will back up my promise of confidentiality and, in my region, up until the First Circuit of Appeals, and if we lose there, then we are going to ask you to sign an affidavit saying that you will come forward.

Well, you can imagine the chilling effect on that source. Most sources are just going to laugh it off and walk away.

So that is what is happening all across the country. Obviously, I don't work for a national news organization, but I serve my community and that is a definite chilling effect on our ability to gather information and dispense it to the public.

Mr. PENCE. Professor, since I paraphrased you, I wanted to give you a chance to speak.

Mr. ELIASON. Thank you, Congressman. A couple of different points.

First of all, as I said in my written testimony, I just don't think history really bears out the idea of the chilling effect. And just look at the most recent history, for example. While the Judith Miller case was going and there was this very public demonstration of a journalist being jailed and journalists being compelled to give up their sources, we had a lot of new leaks about secret CIA prisons and unlawful surveillance by the Government and other stories. So it is not as though sources sort of dried up, even when that high-profile case was going on.

I think another important point is that sources face a lot of risks. Leaking is never going to be risk-free, and, frankly, most sources are exposed by something other than the reporter having to testify.

So when they are looking at this whole basket of risks that they are facing when deciding whether or not to talk to a journalist, really, the fact that the journalist might be compelled to testify is one of the most remote risks. And even if there is a law, they can't look at it and say, "Well, 2 years from now, will a judge say one of these exceptions applies and so they are going to make the reporter testify anyway?"

So it is not likely to have a substantial effect on their decision. And then a final thing I think that is important to remember about this handful of high profile cases we have had in the last few years—and it really is a handful, I think we have to recognize, in terms of the thousands and thousands of stories reported each day.

You have heard everybody here talk about the same three or four cases all morning. It really is a handful of cases and, by and large, those cases involved sources that were committing wrongdoing by leaking to the press.

In the Judith Miller case, you had a source leaking classified information about the CIA. In BALCO, you had a source committing perjury and obstruction of justice and violating a court order. Mr. Taricani's case was the same thing, violating a court protective order.

And as Judge Tatel pointed out in the Judith Miller case—or Wen Ho Lee, sources violating the Privacy Act. These are sources that are committing misconduct by their very conversation with the reporter, and as Judge Tatel pointed out in the Judith Miller case, if those kind of leaks are chilled, that is a good thing. That is what the public interest requires.

Mr. BOUCHER. [Presiding.] Mr. Eliason, our time is growing a bit short here.

Mr. ELIASON. Thank you.

Mr. BOUCHER. And we have exhausted the time for this question period.

Mr. PENCE. Thanks, Mr. Chairman.

Mr. BOUCHER. Thank you very much, Mr. Pence.

The gentleman from Georgia, Mr. Johnson, is recognized for 5 minutes.

Mr. JOHNSON. Thank you.

Today, in a climate where we have had consolidation of media interests to where you have one company that owns the means of media in—or you have one or two companies may be the sole sources of information for people, both print, radio, TV, all of these things being consolidated and you are starting to get your news through and your information through a smaller funnel, if you will, and then the media basically in bed with the public officials, public officials leak information to the press to achieve a shaping of public opinion and the press is a willing participant, because the more inside information they have, then the more news that they can—or "news" that can be generated and ratings are increased.

And the news and information that we get is, a lot of times, biased. It is not fair. It is in favor of the conservative viewpoint, sometimes the liberal viewpoint or progressive viewpoint, whatever one might want to call it.

But this is where we find ourselves now. It is not a pure pursuit that we find the media in at this time. And then we have got a number of different areas of concern here. We have got Government leaks and the pursuit of information by the Government as to who leaked the information.

We have got those classes of issues. We have got the issue of whether or not there should be immunization of the press from having to reveal sources in criminal cases where an accused is seeking to defend themselves or where the Government is trying to prosecute someone.

We have got the whistleblower cases. We have got other civil cases involving trade secrets, which, by the way, are included in this new legislation. And then we have this legislation which seeks to apply a one-size-fits-all approach to all of these issues that I just

raised and this legislation would provide that instead of the issuance of a subpoena and then a motion to quash the subpoena, as would be done now, it would impose a new scheme where a subpoena-er would have to go into court and get pre-clearance to get the subpoena issued.

And I am pretty skeptical about that new approach and the fact that when it comes down to a criminal case, the only way that you could get the source of the information from the press would be if there is a national security issue or if the information is necessary to prevent imminent death or bodily harm or is necessary to help identify a person who disclosed trade secrets. For some reason, that is thrown in right there. But a commercial situation, in other words.

And so I feel that with our current system of being able to issue a subpoena, with the Government being able to issue a subpoena and then the person who has been subpoenaed or entity that has been subpoenaed have the option of going into court to quash the subpoena based on rules now in effect, that has held us in good stead up to this point and I think we can look forward to do the same thing in the future.

I am concerned about the assertions that we are having an upsurge in the number of subpoenas being issued for source information. There is a dispute about it.

You say, Ms. Brand, that there are only 19 cases since 1991, four matters since 2001. And you, Professor Levine, assert that it is much more than that. I am concerned about that discrepancy, and I would look for us to be able to be a little bit more discriminatory in terms of what areas are covered by this legislation.

So as it is proposed now, I don't see myself being in support of it.

And if anyone would like to comment, if we have time, I certainly would like to hear it.

Mr. LEVINE. Congressman, can I just offer two observations?

One is that there is no pre-clearance requirement in this statute. Procedurally, it would work exactly the way things work now. Somebody would issue a subpoena. The person receiving it would have to bring a motion to quash. It would be litigated before a judge pursuant to the substantive criteria as laid out in this statute. All this does is put a judicial check on the process. It doesn't require somebody to go to court and say, "Please allow me to issue a subpoena."

The second thing is with respect to the criminal cases that you have expressed concern about, I think it is important to emphasize that this is a statute. This statute has to be construed consistently with the Constitution of the United States, including the sixth amendment.

If there were a criminal case in which an accused's right to a fair trial was, in fact, jeopardized by the application of this statute in that particular case, a court would have the authority to say the sixth amendment trumps. That is what happens in those States now where shield laws provide absolute protection against disclosure of confidential sources in any circumstances, much more broadly than this proposed statute.

In California, for instance, where that is the case, the California Supreme Court has said, "But in a criminal case, where it is the criminal defendant who is asking to have the source disclosed, if the failure to compel the disclosure of that information would deprive him of his right to a fair trial, the statute has to give way."

And because this is a statute that is similarly subject to the Constitution, the same process would apply here.

Ms. BRAND. Can I jump in there? I guess we read the bill very differently than Mr. Levine does. The issuance of a grand jury subpoena, we refer to that as compulsory process.

It would be interesting for us to know, I guess, whether the drafters of the bill did not intend the Department of Justice or another litigant to have to go to the court for pre-approval to issue a subpoena. We read the bill to require us to do that, and maybe that is something that we could get clarification on later.

Mr. BOUCHER. Thank you very much, Mr. Johnson.

The gentleman from California, Mr. Sherman, is recognized for 5 minutes.

Mr. SHERMAN. I thank the Chair.

We are here dealing with journalists, sources and the Government and we want to avoid chilling those sources who might be chilled for fear of revelation.

The first comment that we have in this country (or at this time around the world), the strangest communication system one can imagine, where so much of our information comes from sources that want to be anonymous, but validated.

We have always had people writing things on the walls anonymously and we have always had people who will stand up and say what they want to say in their own voice. It is just now we have people who want the credibility of speaking in their own voice and the anonymity of being the unnamed source.

Second, I would observe that usually we have witnesses there in front of us who are in the best position to tell us how to achieve the goal. The strange thing here is, here, it is up here we have perhaps the people most familiar with what we are trying to do, in that we are all sources. And the goal of this statute is source comfort, not so much journalist comfort.

In fact, I have never seen a source who wanted to leak something and, well, one journalist wouldn't take it, so they go to another one. There are lots of journalists, but for some stories, there is only one source. So the goal is to make us sources comfortable.

And I would say, Professor Eliason, you have it right. When I, as a source, choose, as so many of those with a little bit of authority here in Washington do, to try to reveal something without putting my name on it, the least thing I am worried about is the Justice Department.

I believe someone used the figure that there have been 19 cases since 1991 where sources have faced revelation from the Justice Department. I have been outed 19 times since 1991 and the Justice Department has had no role.

How many times does a journalist say it is on background and then publish your name? Whoops, happens all the time. We had a case just last week where an aide in my office was told, "Well, thanks for the information and we won't identify you by name or

by title." They just identified them as an aide to Congressman Sherman.

I would say that for every time a source's name is revealed by action of the Justice Department, there are 10,000 times or 100,000 times when a source is revealed because of miscommunication between the source and the journalist, where you though it was off the record and, whoops, it wasn't or the journalist was wrong on that or the source was wrong on that or the journalist made a mistake or the journalist's notes went to another journalist and whether intentionally or with great just zeal to make it a good story.

So I would say you would have to be crazy to be a source and worry about the Justice Department. It is like worrying about being hit by lightning as opposed to all the other ways in which a source's name can be revealed.

I would like to focus on the definition of journalism found in the bill that this hearing focuses on.

Ms. Brand, the definition of journalism in the bill would include almost everyone I know would qualify as a journalist, certainly every Member of Congress. We are all engaged in gathering, preparing, collecting, recording and writing and publishing news and information of concern on local, national or international events or matters of public interest.

That certainly covers every blogger. It certainly covers everybody with a Web site that deals with issues of national concern. It may cover everybody who just contributes to other folks' blogs.

The Justice Department has guidelines. Who qualifies as a journalist under those guidelines?

Ms. BRAND. I don't believe that the Department's guidelines define the media. I think everyone sort of understands what the media——

Mr. SHERMAN. That would give me a grave risk, because I would think Attorney General Gonzales would consider certain—in drawing the line, might exclude from journalists some of my liberal and progressive friends and include some folks with conservative views.

So as long as we have extremely vague standards in the Justice Department, I would hate to be a stringer for the Trotskyite newspaper and love to be a stringer for Fox News if human beings at the Justice Department was going to determine who qualified.

Ms. BRAND. I am quite sure that distinctions are not made on the basis of an impression of the bent of a paper one way or the other. Our primary concern with the definition of journalism in the bill is that it would enable anyone who doesn't want to provide evidence, for one reason or another, to find a way to put themselves within that broad category.

Mr. SHERMAN. Yes. I would say anyone engaged in any illegal action would immediately put up a blog and try to get journalistic protection, because—and all of us could be—as I think all of my friends are journalists and anybody who wanted to avail themselves of this bill could easily qualify as a journalist under this definition.

I look forward to trying to find a better definition. And I believe my time has expired.

Mr. BOUCHER. Thank you very much, Mr. Sherman.

The gentleman from Minnesota, Mr. Ellison, is recognized for 5 minutes.

Mr. ELLISON. Thank you, Mr. Chair.

I just have a few questions about the bill, just to be clear.

Could someone help me understand why, in section two, that one of the exceptions would include or is necessary to identify a person who has disclosed trade secrets? What is the theory behind including that provision of the bill?

Is there someone who could share that with me?

Mr. SAFIRE. Perhaps one of the bill's drafters.

Mr. BOUCHER. Would the gentleman yield?

Mr. ELLISON. Certainly.

Mr. BOUCHER. I guess I will be a witness for a moment.

The purpose of including that exemption, as well as the exemption for personal financial information and personal health information that is disclosed in violation of law, is to address what are really very serious kinds of disclosures for which there really is no public policy underlying the disclosure.

And in these instances, we thought it was appropriate, in part, to encourage nondisclosure that we provide these exceptions.

Mr. ELLISON. Claiming my time back. I don't see disclosure of personal health information and a trade secret quite the same.

Do you think there is a distinction to be made between those two things? Because I can see circumstances under which it might be a very good trying for the public to know—for a trade secret to be disclosed, if there is some sort of—do you want to respond to that?

Mr. BOUCHER. Well, if the gentleman will yield.

Mr. ELLISON. I will.

Mr. BOUCHER. I would point out the rest of that clause, which says that the disclosures have to be in violation of law. And so I think by definition, any disclosure that is in violation of law probably does not serve a valid public purpose.

And so some policymakers, State legislatures or this congress will have made a decision that that information should remain private and that its disclosure is not in pursuit of a public purpose.

I would say to the gentleman that I would be happy to have further conversations with him perhaps beyond this hearing about our intent with regard to these provisions and try to answer any further questions that he has and receive any suggestions you might have for possible modifications.

Mr. ELLISON. Thank you.

Ms. Brand, earlier in your presentation, you pointed out that perhaps Hezbollah might claim that they are a journalist enterprise and, therefore, use that as a means to not disclose information.

Wouldn't the third provision that talks about national security—yes, yes. Wouldn't that national security provision sort of deal with this question of some sort of a terrorist organization claiming that it is a journalism enterprise?

Isn't that addressed in the bill?

Ms. BRAND. It might address certain situations, but this national security exception is so narrow. It is limited to where the Government can show by a preponderance of the evidence that imminent and actual national security harm is going to occur.

If information has already been disclosed and harm has already occurred, for example, this exception wouldn't apply. If the harm is likely to occur, but somewhat speculative or not going to occur right away, again, that wouldn't fall within the exception.

So this is just very narrow.

Mr. ELLISON. But you would agree with me that a court would be construing this provision and I think I would feel pretty comfortable that a judge is going to read this provision in a way that it is going to protect national security.

Wouldn't you agree?

Ms. BRAND. I guess I would assume that the court would read the language on it face. And Congress must have meant something, if this bill were enacted, by mentioning imminent harm to the national security.

Judges don't just read words out of the statute, so——

Mr. ELLISON. Well, I mean, you agree, though, that judges do apply canons of statutory interpretation, which would go beyond simply what is written on the page, right?

Ms. BRAND. The canons of statutory construction, there is a saying that you can find a canon to support any interpretation you want, but——

Mr. ELLISON. I guess my point is, Ms. Brand, that I—is it legitimate to say that the terrorists are going to get us and so we shouldn't have this law? I mean, that struck me as somewhat hyperbole and I just want to know what your reaction is.

Ms. BRAND. Well, one of the interests that we think is undermined by this bill is the Government's interest in punishing leaks that have already damaged national security.

It is a crime to disclose, in an unauthorized way, classified national security information, and sometimes those disclosures cause harm to the national security. The only way, in some cases, for the Government to bring someone to justice who has caused that kind of harm by a leak is to talk to a reporter.

Those cases are very rare, but they do occur, and this bill would effectively prevent the Government from investigating those cases. This imminent harm to the national security exception would not help us prosecute that type of case.

Mr. ELLISON. Mr. Eliason, how might we improve the definition of journalist in order to make it a little bit narrower?

I think that Representative Sherman's point is pretty well-taken. It is pretty broad. I was thinking that some language in there that might refer to an agency dedicated to the enterprise of news gathering, not simply anyone who does it.

Have you thought about how this definition might be made a little better?

Mr. ELIASON. Yes, Congressman. As I said in my written testimony, I think this is actually a good definition in terms of defining a journalist, because anything narrower, I think, is going to run into severe first amendment problems. But that is part of the problem, I think, with the notion of drafting a Federal privilege today.

I mean, at the time of *Branzburg,* we had newspapers and television and even then the Court noted that it is really hard to define who would actually deserve to claim this privilege, who would be a newsman worthy of the privilege.

Now, with the rise of the Internet and satellite and cable television and everything else, to adequately protect the first amendment, I think you need a definition that is this sweeping. Otherwise, the bill would be open to serious constitutional challenge.

But then the flipside is, it has already been mentioned, by defining it that way, you make the bill so broad that anybody who films a public event with their cell phone and posts it on their MySpace page is probably a journalist.

And so today, when we are all journalists, I think it has become very difficult, if not impossible, to draft a bill that accomplishes both of those purposes, staying reasonably narrow and, at the same time——

Mr. ELLISON. But you would agree that we are not really all journalists. I mean, we might all do things that are journalistic sometimes, but that is quite a bit different from, for example, what Mr. Safire has dedicated his life to.

Mr. ELIASON. Absolutely.

Mr. ELLISON. Don't you think there is a difference to be made?

Mr. ELIASON. Absolutely, practically speaking, there is, and there are some State statutes that refer to people making their livelihood from journalism.

Mr. ELLISON. Well, Mr. Safire, maybe you could jump into this. Is what you have dedicated your life to the same thing as somebody filming a political rally and putting it on MySpace? It is a little different, wouldn't you say? And my question is, can we craft language that would make the difference?

Mr. SAFIRE. I think there are journalists and there are journalists.

Mr. ELLISON. Thanks for your precision.

Mr. SAFIRE. And I think the attempt to define it is a mistaken attempt. I would, in this case, agree with Professor Eliason for the only time this morning.

Mr. BOUCHER. Well, on that pleasing note, we are going to conclude today.

The time of the gentleman from Minnesota has expired.

I want to say thank you on behalf of the Committee to our witnesses. You have been here now for 3 hours. You have shared thoughtful commentary with us, and we are most appreciative of your prepared testimony and even more so of your very candid answers provided to the questions that we posed to you.

Members of the Committee may have additional questions that they would like to pose. And so, without objection, the record of this hearing will remain open for a period not to exceed 10 days, during which time questions can be propounded to you and answers can be received.

With this Committee's thanks once again to the witnesses, this hearing stands adjourned.

[Whereupon, at 12:55 p.m., the Committee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE STEVE COHEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TENNESSEE, AND MEMBER, COMMITTEE ON THE JUDICIARY

H.R. 2102, the "Free Flow of Information Act of 2007," establishes a long overdue federal reporter's privilege that protects, among other things, against the compelled disclosure of a confidential source's identity except under a few limited circumstances. A federal reporter's shield law is needed to ensure that confidential sources are encouraged to divulge information that may be of public concern to a journalist. Ensuring meaningful confidentiality to a source is critical to allowing the press to fulfill its role as a check on government and on other powerful institutions.

Contrary to what critics claim, H.R. 2102 will not hamper effective law enforcement. The bill contains several clearly defined exceptions to the federal reporter's privilege where disclosure of certain information, including the identity of a confidential source, can be compelled from a journalist. Moreover, empirical evidence does not support the critics' argument. Almost every state and the District of Columbia recognize some sort of journalist's privilege against being compelled to disclose the identity of a confidential source, and none of these jurisdictions has seen any real impediments to law enforcement as a result of that privilege.

For all of these reasons, I am a co-sponsor of the "Free Flow of Information Act of 2007" and I urge its passage.

LETTER FROM THE AMERICAN BEVERAGE ASSOCIATION, THE ASSOCIATION FOR COMPETITIVE TECHNOLOGY, THE CHAMBER OF COMMERCE OF THE UNITED STATES, THE NATIONAL ASSOCIATION OF MANUFACTURERS, AND THE RUBBER MANUFACTURERS ASSOCIATION, DATED JUNE 14, 2007, TO CHAIRMAN CONYERS AND RANKING MEMBER SMITH

PRIVATE SECTOR CONCERNS ABOUT H.R. 2102

June 14, 2007

The Honorable John Conyers
The Honorable Lamar Smith
United States House of Representatives
Washington, D.C. 20515

Dear Chairman Conyers and Ranking Member Smith:

We support and appreciate the need for a strong, vibrant and free press in our society. It is in that spirit that we raise with you the impact that H.R. 2102, the Free Flow of Information Act, could have on the ability of businesses and individuals to protect information that rightly should be kept confidential. It is our hope that this bill will not protect the unethical or unlawful disclosure of such information, particularly when that information is protected by federal or state law or court order.

Congress, state legislatures and the courts have taken significant steps in certain circumstances to assure confidentiality. Examples of protected information include, pre-patent research, a trade secret, a person's medical records, the fact that someone may have sought mental health care, information related to a victim of sexual violence, the location of a domestic abuse safe house, an individual's credit record, a tax return, an employee's record, and other such matters. With these very private subjects, there are significant legal, moral or fiduciary obligations that people have to protect them, and their disclosure could cause serious and irrevocable hardships. People who improperly disclose them should not be protected through a media shield law just because they gave the information to a reporter or blogger, and not someone else.

Historically, when Congress has enacted public access legislation, it has balanced the competing rights of personal and business privacy. Consider the Freedom of Information Act, one of the most important "public right to know" statutes in this country's history. FOIA specifically exempts from disclosure information protected by law, proprietary or privileged business information, and information that could lead to unwarranted invasions of personal privacy. Similarly, whistleblower laws only protect the reporting of information related to suspected wrongdoing, not the disclosure of all private information. Congress's longstanding commitment to these distinctions in protecting confidential and proprietary information can and should be continued in H.R. 2102.

We very much appreciate that this legislation has been significantly moderated from its original form in the last Congress. Nevertheless, we, along with you and many others in Congress, have recognized that personal information and information property are more valuable and vulnerable in today's Information Age, particularly on the Internet, than in the past. Please let us know if we can assist the Committee in its deliberations on H.R. 2102 in ways that address these concerns.

Sincerely,

American Beverage Association
Association for Competitive Technology
Chamber of Commerce of the United States
National Association of Manufacturers
Rubber Manufacturers Association

Cc: Members of the House Judiciary Committee

PREPARED STATEMENT OF THE NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters (NAB) respectfully submits this statement for the record in the Judiciary Committee's June 14, 2007 hearing on the Free Flow of Information Act of 2007 (H.R. 2102). NAB is a trade association that advocates on behalf of more than 8,300 free, local radio and television stations and also broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the Courts. Radio and television broadcasters provide a free, over-the-air service that reaches virtually every household in America, keeping local communities—and your constituents—informed and connected. Our members serve listeners and viewers throughout the country with the news and public affairs programming vital to a well-functioning democracy.

NAB wishes to commend Chairman Conyers, Representatives Boucher and Pence, and all co-sponsors for your collective leadership on the critical and timely issue of protecting the free flow of information to journalists and ultimately to the public we serve through a federal shield law. As you have recognized in your statements, the need for such protection is compelling. Increasingly, subpoenas to journalists have become a weapon of first resort for those seeking information concerning confidential sources. Without the ability to protect the identity of sources, newsrooms are less able to gather the facts necessary to bring to light injustice, fraud and abuse in both government and private sector. As crafted, the Free Flow of Information Act of 2007 strikes the appropriate balance between preserving the flow of information from a free press to the public and protecting other important governmental interests, including national security. The legislation also brings federal law into better conformance with state law in this area.

PASSAGE OF H.R. 2102 WILL HELP ENSURE THAT THE PUBLIC IS INFORMED OF VITALLY IMPORTANT MATTERS

Enactment of the Free Flow of Information Act of 2007 will further the ability of the press to perform fully its role in our democracy—serving as a surrogate for the public. Over two hundred years ago, in drafting our Bill of Rights, the Founders singled out the press as the only private industry to merit its own specific guarantee against government intrusion.[1] The Supreme Court has consistently recognized this unique role that the press plays in "informing and educating the public, offering criticism, and providing a forum for discussion and debate."[2] The Court has also noted that media entities differ from other companies and institutions "in that their resources are devoted to the collection of information and its dissemination to the public."[3] Indeed, just last month, Secretary of Defense Robert Gates told the graduating U.S. Naval Academy Class of 2007 that the press is a "critically important guarantor of our freedom."

At times, members of the press must rely on confidential sources to fulfill their important role of informing and educating the public. Confidential sources have been vital to a number of groundbreaking stories, ranging from Watergate to illegal accounting practices at Enron to the abuse of steroids in baseball. Stories based on confidential source material have regularly received the most coveted journalism awards, including the Pulitzer Prize and the George Polk Awards for Excellence in Journalism.[4] As broadcast television reporter James Taricani has previously at-

[1] *See Mills v. Alabama,* 384 U.S. 214, 219 (1966) (the "Framers of our Constitution thoughtfully and deliberately selected" the press "to play an important role in the discussion of public affairs" and to "keep [our society] free").

[2] *First Nat. Bank of Boston v. Bellotti,* 435 U.S. 765, 781 (1978). *See also Mills,* 384 U.S. at 219 (the press "was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve").

[3] *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652, 667 (1990).

[4] For example, the Pulitzer Prize in Investigative Journalism for 2005 was awarded to Nigel Jaquiss, of *Willamette Week,* who relied on confidential sources in his investigation exposing a former governor's long-concealed sexual misconduct with a 14-year-old girl. The 1999 Pulitzer for National Reporting went to Jeff Gerth and staff at *The New York Times* for a series of articles disclosing the government-approved sales of American technology to China, despite these sales' national security risks—stories that prompted investigations and significant changes in policy. This series relied heavily on confidential source material, both interviews and documents. In 2005, the George Polk Awards for Magazine Reporting, Military Reporting and Sports Reporting all went to articles based on confidential source material. *See* Brief *Amicus Curiae* of 36 News and Journalist Organizations in *In re Grand Jury Subpoenas to Mark Fainaru-Wada & Lance Williams and In re Grand Jury Subpoena to the San Francisco Chronicle,* Nos. 06–16995 & 06–16996 (9th Cir. Dec. 8, 2006), at 21–25 (discussing these and other significant and prize-winning stories that depended on confidential sources).

tested, during his 30-year career in journalism, he has relied on confidential sources to report well over 100 stories on diverse issues of public concern, including public corruption, sexual abuse by clergy, organized crime, misuse of taxpayers' money, the misuse of union funds leading to the ouster of a union president, and the ethical shortcomings of a Chief Justice of the Rhode Island Supreme Court.[5]

Investigative journalists in particular perform a great deal of the press's vital work. Unfortunately, nearly a dozen of them have recently faced criminal prosecution and other severe consequences simply for doing their jobs. Overall, more than 30 reporters have been subpoenaed or questioned about their confidential sources, their notes, and their work product over the past few years in civil and criminal cases in federal court.

For example, in November 2004, U.S. District Judge Ernest C. Torres found Jim Taricani, an investigative reporter for WJAR-TV in Providence, RI, in contempt of court for refusing to reveal the source of a videotape that aired on his television station. Three years prior, a confidential source gave Taricani the videotape, which showed a city official receiving cash. The tape was later used as evidence in the corruption trial of former Providence mayor Buddy Cianci and his aide, who accepted the money. Both were convicted and served federal prison sentences.

A special prosecutor pursued Taricani, trying to force him to reveal his source. Judge Torres imposed $1,000 a day in fines, and, when Taricani refused to identify his source, Judge Torres gave Taricani two weeks to change his mind or face jail time.

Taricani, however, took a courageous stand over a very important principle. When he accepted the videotape from his source, he promised not to disclose the source's identity. He kept his promise even though time in jail could endanger his health. Taricani received a heart transplant in 1996, and was vulnerable to infection.

For refusing to name his source, Judge Torres sentenced Taricani to confinement for six months. Fortunately, Judge Torres permitted Taricani to serve his sentence at home, but with restrictions. Taricani was denied access to the Internet, could leave home only to visit doctors, and could receive visitors only during specific hours. And during his confinement, the residents of Providence were denied the benefits of Taricani's investigative reports.

Less than two weeks after he was set free, Jim Taricani spoke to a large group of broadcasters at the RTNDA@NAB 2005 annual convention in Last Vegas. He provided a clear explanation of the immediate need for a federal shield law. Recognizing that courts must work with the current law, Taricani told us that he had been threatened with contempt of court three times during the course of his career. The first two cases were state cases, and state shield laws kept him out of prison. Interestingly, in one of those state cases, the judge was the very same one who sent Taricani to prison several years later from the federal bench.

Jim Taricani's sobering story illustrates the most important point in this discussion. In two cases involving protection of his sources, Taricani was faced with the same judge, but two different sets of laws, and the outcomes were dramatically different. The state law protected Taricani and recognized his and his profession's significant contributions to democracy. The federal law, however, failed to protect him from punishment for simply doing his job.

PASSAGE OF H.R. 2102 WILL BRING FEDERAL LAW INTO CONFORMANCE WITH THE STATES, WHICH CONSISTENTLY RECOGNIZE THAT THE FAILURE TO PROTECT REPORTERS' SOURCES WILL REDUCE THE FLOW OF INFORMATION TO THE PUBLIC

Thirty-three states and the District of Columbia have shield laws enabling journalists to protect the identity of sources. Seventeen other states have judicially recognized reporter's privileges, and legislation is pending in several of these states to codify the privilege. Clearly, the overwhelming sentiment among state legislators and judges in this country is that shield laws are necessary to further the public interest.

Significantly, 34 state attorneys general joined forces in 2005 to urge the Supreme Court to recognize a reporter's right to keep sources confidential in a case involving the leak of an undercover Central Intelligence Agency officer's identity. These attorneys general stressed that the states' recognition of a reporter's shield rested on the belief that an "informed citizenry and the preservation of news information sources

[5] Brief *Amici Curiae* of 24 News and Journalist Organizations in *Judith Miller v. USA* and *Matthew Cooper and Time Inc. v. USA,* Nos. 04–1507 & 04–1508 (Sup. Ct. May 18, 2005), at 7.

are of vital importance to a free society."[6] Without a federal reporter's shield, journalists "would find their newsgathering abilities compromised, and citizens would find themselves far less able to make informed political, social and economic choices."[7] Moreover, according to the state attorneys general, the lack of a federal reporter's shield undermined the legislative and judicial determinations of all the states recognizing such a shield.[8]

Some have questioned whether requiring confidential sources to disclose information would in fact impair investigative journalism and the flow of information from sources to the public. For example, Judge Torres wrote that the claim that disclosure of confidential sources chills newsgathering is a "myth" perpetuated by the news media. Those who believe that this is a "myth" are mistaken.

An article in the most recent *American Journalism Review* documented recent changes that have occurred in the relationships between journalists and their sources.[9] The article explains that, while journalists used to be able to promise simply that they would protect their sources unconditionally, the emerging practice involves holding more explicit conversations about the extent of the protections being offered to a source and even requests to sources to sign written agreements. These agreements define exactly under what circumstances the source is or is not protected. By obtaining detailed agreements from sources, the theory goes, reporters protect themselves from threats of imprisonment and protect their employers from incurring hefty fines.

But these agreements can also chill newsgathering. It is myth to suggest that journalists will be able to unearth the information they need from sources when they must explain the procedures of a grand jury proceeding and a subpoena before every interview. Just imagine the important stories (including those discussed above) that would in all likelihood have been lost if the sources had been asked to review a detailed written agreement each time they met with a journalist.

Clearly, it is time for the federal government to bring itself in line with the states and ensure that news sources feel safe in giving information to journalists about issues of public concern. Passage of the Free Flow of Information Act will ensure that sources with information about fraud, waste, abuse and injustice in government and the private sector are not inhibited from communicating with the news media—and thus with the public as a whole.

H.R. 2102 STRIKES THE APPROPRIATE BALANCE BETWEEN PRESERVING THE FLOW OF INFORMATION TO THE PUBLIC AND PROTECTING OTHER GOVERNMENTAL INTERESTS

With regard to the bill itself, NAB believes that it strikes a reasonable balance between the need to preserve a free flow of information to the public and our collective concern in protecting national security and other significant government interests. The legislation essentially does no more than codify and make binding the Department of Justice's established policy on issuing subpoenas to reporters. The privilege it provides is qualified—it would require journalists to testify at the request of criminal prosecutors, criminal defendants and civil litigants who have shown by a preponderance of the evidence that they have met the various tests for compelled disclosure. A confidential source's identity can be compelled if disclosure is necessary to prevent "imminent and actual harm" to national security, to prevent "imminent death or significant bodily harm," or to identify a person who has disclosed significant trade secrets or certain financial or medical information in violation of current law. Importantly, the legislation provides a uniform set of standards to govern when testimony can be sought from reporters.

NAB emphasizes that passage of this bill should not be delayed. As the state attorneys general have stressed, the "present confusion and lack of clarity as to the existence and the scope of a federal" reporter's shield "disserve[s] the public, sources and reporters."[10] If Congress does not ensure that journalists retain access to confidential sources without fear of legal reprisal, we can rest assured that sooner rather than later another journalist will face a dilemma like the one that faced Jim Taricani. Forcing reporters to make choices between going to jail or breaking promises of confidentiality will increase the reluctance of potential sources to come for-

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[6] Brief *Amici Curiae* of 34 States and the District of Columbia in *Judith Miller v. USA* and *Matthew Cooper and Time Inc. v. USA,* Nos. 04–1507 & 04–1508 (Sup. Ct. May 27, 2005), at 3–4 (State Attorneys General Brief).

[7] *Id.* at 4.

[8] *Id.* at 3.

[9] *See* Lori Robertson, *Kind of Confidential,* American Journalism Review (June/July 2007).

[10] State Attorneys General Brief, at 8.

ward with information about matters of public concern. All of us will be less informed about important issues as a result.

CONCLUSION

Again, NAB commends the sponsors of this bill from both parties for their efforts to protect the flow of vital information to journalists and ultimately to the public we serve through a federal shield law. H.R. 2102 strikes the appropriate balance between promoting an informed public and other governmental interests, and will bring federal law into conformance with the states on this important issue. NAB urges the Committee to swiftly pass the Free Flow of Information Act of 2007 and bring it to the House floor.

LETTER FROM DENIS A. CARDMAN, ACTING DIRECTOR, AMERICAN BAR ASSOCIATION, DATED JUNE 13, 2007, TO CHAIRMAN CONYERS

Defending Liberty
Pursuing Justice

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June 13, 2007

Honorable John Conyers, Chair
Committee on the Judiciary
United States House of Representatives
Washington, DC 20510

Dear Chairman Conyers:

We are writing to thank you for holding hearings on the need for a federal reporters' shield law and to support in principle H.R. 2102, the Free Flow of Information Act of 2007. We request that this letter be made part of the hearing record. This bipartisan compromise bill, the product of several years of Congressional deliberation and negotiation, has been carefully crafted to preserve the free flow of information to the public through a free and active press while protecting the public's right to effective law enforcement and ensuring the fair administration of justice.

It is indisputable that journalists play a critical role in an informed democracy. Reporters who have relied on confidential sources have informed us about undisclosed governmental activities, corporate scandals and other criminal activities -- revelations that have prompted citizens to take action, Congress to pass remedial legislation and prosecutors to file lawsuits.

The ability and willingness of the press to uncover information to which the American people would not otherwise have access is a hallmark of our democracy. A free press acts as an additional check and balance, and promotes public confidence in both our government and social institutions. Maintaining the free flow of information may not always be a popular position, especially during trying times, but it is essential in a democracy.

That 49 states and the District of Columbia already recognize an absolute or qualified privilege for journalists to protect their sources is strong evidence that a national consensus exists over the need to shield reporters so that they can undertake independent, objective investigations on behalf of the public and share information that would not otherwise be forthcoming. That not one state or the District of Columbia has repealed its reporters' shield law

similarly suggests that these laws are working and are not interfering with criminal investigations or the daily work of government.

Despite the wealth of experience at the state level, federal protections lag far behind. In the absence of a uniform federal law and clear Supreme Court precedent, federal courts have applied different judicial standards developed on a case-by-case basis. Not only is there no uniformity among the circuits, often there is no uniformity within a circuit. The resulting state of confusion has created unpredictability and encouraged litigation.

Reporters and news agencies are, with increasing frequency, finding themselves embroiled in contentious federal lawsuits. In recent years, prosecutors and other litigants around the country have pursued reporters zealously in an effort to learn the identity of their confidential sources and obtain unpublished information. News media leaders have warned Members of Congress and the public that many in the industry have reached the point where the absence of a clearly defined federal reporters' privilege is affecting their editorial decisions, which in turn affects the free flow of information to the public. Others have echoed the same or similar concerns. In the last several years, more than70 journalists and news organizations have been embroiled in disputes with federal prosecutors and other litigants seeking to discover unpublished information; dozens have been asked to reveal their sources.

Recognizing the critical role that journalists play in an informed democracy and concerned by recent trends, the ABA adopted policy in August 2005 urging Congress to enact a federal shield law that would require any party seeking to subpoena a journalist to force disclosure of information to demonstrate that:

1. the information sought is essential to a critical issue in the matter;
2. all reasonable alternative sources for acquiring the information have been exhausted; and
3. the need for the information clearly outweighs the public interest in protecting the free flow of information.

The ABA supports H.R. 2102 in principle because it respects these principles while responding to the concerns of government officials that a federal shield law must not impede legitimate criminal investigations or threaten national security.

We hope that this bill, like its predecessors, generates productive discussion and culminates in the enactment this Congress of a qualified federal shield law that that will eliminate the current confusing patchwork of court rulings and provide a clear, uniformly applied federal standard.

Sincerely,

Denise A. Cardman

Denise A. Cardman
Acting Director

cc: Members of the Committee

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