

Testimony of
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TESTIMONY OF FLOYD ABRAMS ON A PROPOSED
FEDERAL JOURNALIST-SOURCE SHIELD LAW
SENATE COMMITTEE ON THE JUDICIARY
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Chairman Specter and Members of the Committee:

It is a great honor for me to have the opportunity to appear once again before this Committee. I'm especially pleased to have the opportunity to do so in order to support the adoption of a federal shield law.

One of the advantages of being "of a certain age," as they say, is that you remember things. Or that you think you do. Now that I find myself routinely described by the Washington Post as a "veteran" defender of the First Amendment and in the context of representing Judith Miller (who I will visit in the Alexandria Detention Center this afternoon) and having represented Matt Cooper and Time for a time, I look back occasionally on some of the things I and my colleagues urged upon the Supreme Court in 1972 in a brief, *amici curiae*, primarily drafted by the inimitable Yale Law Professor Alexander Bickel. The case, of course, was *Branzburg v. Hayes*, 408 U.S. 665 (1972), and there are three paragraphs from our brief with which I would like to begin my testimony today.

The public's right to know is not satisfied by news media which act as conveyor belts for handouts and releases, and as stationary eye-witnesses. It is satisfied only if reports can undertake independent, objective investigations.

There is not even a surface paradox in the proposition, as it might somewhat mischievously be put, that in order to safeguard a public right to receive information it is necessary to secure to reporters a right to withhold information. Clearly the purpose of protecting the reporter from disclosing the identity of a news source is to enable him to obtain and publish information which would not otherwise be forthcoming. So the reporter should be given a right to withhold some information--the identity of the source--because in the circumstances, that right is the necessary condition of his obtaining and publishing any information at all.

Information other than the identity of the source may also need to be withheld in order to protect that identity. Obviously, something a reporter learned in confidence may give a clue to his source, or indeed pinpoint it. That may be the very reason why the source imposed an obligation of confidence on the reporter. Yet off-the-record information obtained in confidence is of the utmost importance to the performance of the reporter's function. It very frequently constitutes the background that enables him to report intelligently. It affords leads to publishable news, and understanding of past and future events. News reporting in the United States would be devastatingly impoverished if the countless off-the-record and background contacts maintained by reporters with news sources were cut off.

Moreover, even where information other than the identity of the source would be unlikely to enable anyone to trace that identity, the information may sometimes need to be withheld, if given in confidence, in order to make it possible for the reporter to maintain access to the source, and thus obtain other, publishable news. It is true of numerous news sources that if they cannot talk freely, and partly in off-the-record confidence, they will not talk at all, or speak only in handouts and releases.

That is the prism through which I ask this Committee to approach this subject. Every word that Professor Bickel wrote--and he personally wrote every word I just quoted to you--is even truer today. Of course, some articles based upon confidential sources since our brief in *Branzburg* was drafted, have become the stuff of journalistic legend--reporting on the Pentagon Papers and the Watergate scandal, for example--but by far the greater use of such information is reflected in day-to-day reporting on the widest range of topics. In the three months after the attack on the United States on September 11, 2001, for example, Ms. Miller and a colleague wrote 78 articles published in *The New York Times* that "contained information from confidential sources on a range of issues including: (1) financing and support of Al Qaeda provided from sources in Pakistan, Saudi Arabia, and the United Arab Emirates; (2) cooperation between Al Qaeda and Pakistani intelligence prior to September 11, 2001; (3) the U.S. government's preparedness for the attacks of September 11, 2001; (4) the U.S. government's efforts to combat Al Qaeda in Afghanistan; (5) the proposed internal reorganization of the FBI; (6) the existence of weapons of mass destruction in Iraq; (7) the spread of anthrax and resulting U.S. government investigations." *New York Times Co. v. Gonzalez*, No. 04 Civ. 7677 (RWS), 2005 WL 427911 (S.D.N.Y. Feb. 24, 2005). All that information is now being sought by the United States in an ongoing effort to obtain telephone records of the *New York Times* for use by a federal grand jury.

As we meet today, the ability of journalists to gather news is imperiled. How could it not be? For all its ambiguity (and more than one lawyer steeped in First Amendment law has made a living over the past 33 years purporting to divine just what Mr. Justice Powell had in mind when he wrote his critical, yet all but indecipherable concurring opinion in the case), *Branzburg* itself has been interpreted by many courts (although by no means all) to foreclose any First Amendment protection for confidential sources in the federal grand jury context, so long as the inquiry was in good faith. That was the holding in the case involving both Judy Miller and Matt Cooper; it is not the way I would read *Branzburg* in light of Justice Powell's none-too-scrutable opinion, not the way a number of Courts of Appeal have read it, but it is undoubtedly one plausible reading of the case. And it is that reading that was the first building block in the opinion of the Court of Appeals for the District of Columbia that led Matt Cooper to the edge of jail and Judy Miller to her present and continuing incarceration.

Why must that be so? Why should federal law offer no protection for journalists who seek to protect their confidential sources when 49 of the 50 states provide considerable--often all but total--protection? How can the United States provide no protection when countries such as France, Germany and Austria provide full protection and nations ranging from Japan to Argentina and Mozambique to New Zealand provide a great deal of protection? Listen to the language of the European Court of Justice on this topic:

Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest. *Goodwin v. United Kingdom*, (1996) 22 E.H.R.R. 123.

A particular issue has arisen in the Judy Miller case which I would like to address. I have little doubt that the "leak" disclosed by columnist Robert Novak--the identification of the name of a CIA "operative," as he put it--was unworthy of any journalist. In fact, Mr. Novak is entitled, in my view, to no kudos for his journalistic contribution that day, only our disdain.

But the protection of journalists' sources should not be made dependent on whether we think a particular story serves or disserves the public. Nor should it turn on whether a particular source means to advance public discourse or to poison it. These are subjective matters as to which our response may be affected by our social views, even our political ones. They should not provide the basis for granting or withholding a privilege established by law.

In my view, when a journalist speaks to her sources and promises them confidentiality, she should keep her word--period. And she should be protected by law in

doing just that except in the most extraordinary circumstances--the sort referred to in the revised Free Flow of Information Act drafted by Senator Lugar and Representative Pence which permits an order requiring disclosure of a source when all non-media sources have been exhausted and disclosure is "necessary to prevent imminent and actual harm to the national security."

When *Branzburg* was decided, it was less than clear to many observers whether a federal shield law was needed. For most of the 33 years that followed, journalists were held to be protected by the First Amendment when they sought to protect their sources from being disclosed. But that has changed radically in recent years and even more so in recent days. We have a genuine crisis before us. In the last year and a half, more than 70 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 confidential sources; some are or were virtually at the entrance to jail; and Judy Miller, not far from here, sits in a cell not many floors removed from that of Zacarias Moussaoui.

It is time to adopt a federal shield law.