Testimony of

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I am here to urge Congress to pass a law to stop the government and the courts from their present, dangerous course of trying to deny the public its right to the free flow of news.

The press's freedom to publish the news without prior restraint is not in doubt. But now under attack is what comes before publication: the ability of journalists to gather the news. To do that work effectively, we often must have inside sources willing tell us what government or corporate officials often do not want the public to know. The key to opening up an inside source is to establish mutual trust. When we say we'd go to jail to protect their anonymity, that's not just hyperbole: over the years, trustworthy reporters have established that principle at great cost, just as a courageous woman is doing in the same prison holding the "20th hijacker" today.

Not all sources are angels, and some of us grant anonymity too quickly; responsible editors are correcting that. But the essence of news gathering is this: if you don't have sources you trust and who trust you, then you don't have a solid story --- and the public suffers for it.

That's why 49 states and the District of Columbia have "shield" laws, or case law in state courts, to stop over-zealous prosecutors from undermining that trust by forcing reporters to identify sources --- thereby drying up the flow of news. By protecting the reporter who is protecting a source, the shield achieves its ultimate goal: to protect the people's access to what's really going on.

Have these state shield laws harmed law enforcement? On the contrary, they have led to the exposure of corruption. That's why the great majority of States Attorneys General recently joined a brief supporting the protection of the identity of reporters' sources. As a card-carrying rightwing libertarian federalist, I am proud that the states have led the way; now is the moment for the Congress to profit from the experience of the chief law officers of so many states by extending the shield to Federal courts.

Would this mean that journalists get special treatment denied to other citizens? In this case of keeping the flow of information free, "no man is above the law" is a slogan, not an argument. Before compelling a person to testify, the law traditionally recognizes the strong social value of considering the confidentiality of spouses, of lawyers, doctors, and clergy; in 1996 that was extended to psychotherapists. Members of those groups are not "above" the law because the law

recognizes competing values; judges must balance the citizen's obligation to give evidence with society's obligation to protect relationships built on solemn confidences.

Americans successfully perform that balancing act all the time. Right now, we are weighing the immediate needs of homeland security against the long-range need to protect civil liberties. In the same way, we have long lived with the tension of the First Amendment's free press versus the Sixth Amendment's fair trial. If any one side were to win absolutely, we would tear our finely balanced Constitution apart.

More than ever, journalists across the nation are now in danger of being held in contempt, nearly two dozen in Federal courts alone. It should be obvious that the reasonable protections to reporters' notes and documents and confidences that have been in the Department of Justice guidelines to its prosecutors for three decades are inadequate to the stormy present. The legislation before you incorporates those balancing guidelines, applies them to the crucial issue of the identity of sources, and at last gives them the force of law. But the protection the Free Flow of Information Act would offer is by no means absolute: journalists would be required to reveal their sources if a court, after exhausting all other means, decides that disclosure was "necessary to prevent imminent and actual harm to the national security". And [itals]imminent[unitals] does not mean "potential" --- it means "about to occur". That balance protects both the nation and its freedoms.

Let me add a personal note. I've always been a language maven; 30 years ago I asked Justice Potter Stewart to help me find the origin of the phrase "chilling effect". He checked around the Supreme Court, and Justice Brennan reported having written a 1965 decision striking down a state's intrusion on civil liberty because of its "chilling effect upon the exercise of First Amendment rights..."

Today we have two chilling effects taking place here in Washington, one general, one specific.

The general chill is on the network of useful contacts and the web of genuine friendships that develop over the years among many journalists and politicians. Information is exchanged, advice is given, mutual respect is built. You run into each other at a ballgame or at a dinner, shmooz a little on a bunch of topics, pick up a lead or toss out an idea, later act on it or pass it along to a colleague or forget it. That's been my experience inside and outside the White House; it's how information flows in real life, and it's how the public gets the news beyond the handouts. We slam the door on that at great peril to our freedom.

But now we see a reporter in prison, for not revealing part of a conversation she may have had about a story she did not write. As a result, many of us feel a general chill in the air, and will think twice about what we say in private to each other as well as outsiders. I know that lifelong friends and sources will be forced to be guarded in what we say anywhere about everything. In the new world of threatened contempt there are no innocent questions, and a grunt or a nod can get you in trouble.

And there is a more specific chilling effect taking place right now. It imposes a mental "prior restraint" on the gathering of news and the expression of opinion. I've always been able to write

what I have learned and what I believe "without fear or favor", freely taking on the high and mighty. But I cannot do that this morning.

I am seething inside because I cannot tell you --- with no holds barred --- what I think of the unchecked abuse of prosecutorial discretion, and of the escalating threats of a Federal judiciary that is urgently in need of balancing guidance by elected representatives of the people. But for the first time, I have to pull my punches.

The reason is that I am afraid of retaliation against Federal prisoner 45570083, whose byline in the New York Times is Judith Miller. This Pulitzer prizewinning reporter, who earned the trust of the U.S. forces with whom she was embedded in Iraq, has accepted the painful consequences of daring to call public attention to the unbalanced, unwise, ever-growing application of the contempt power.

I must not anger or upset those who control her incarceration, and who repeatedly threaten to pile on with longer punishment as a criminal unless she betrays her principles as a reporter. Because any harsh criticism of them from me might well be taken out on her, I am constrained to speak gently, as if concerned about treatment of a hostage. That duress, I submit, is an example of what Justice Brennan had in mind about a "chilling effect". I can testify that it works all too well, which is why I will now shut up and look to Congress to pass a law balancing our values and taking the chill out of the air.