

Testimony of
David Westin

President
ABC News
October 19, 2005

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Mr. Chairman and Members of the Committee:

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

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other litigants seek to compel reporters to disclose information that they've promised to keep confidential or other, unpublished information that they've collected in the course of their reporting.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

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

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

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

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

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

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

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

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

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

Even though we are careful in giving promises of confidentiality to sources, reporter's privilege issues recently have become part of our editorial decisions in a way that was not imaginable when I first came to ABC News nearly nine years ago. The reason for this is simple: In several, high-profile cases over the last two years prosecutors and other litigants around the country have pursued reporters zealously in an effort to learn the identity of their confidential sources and otherwise obtain unpublished information. In each case, the prosecutor has claimed that the identity of the source was an important lead that he needed to follow in order to determine whether a crime was committed; other litigants have claimed that revealing sources or disclosing

unpublished information is important for them to pursue or defend their claims. It is now clear to those of us in the newsroom that whenever we pursue a story based in part on information gathered from a confidential source, we run a real risk of being called before a court and threatened with jail unless we reveal the identity of that source.

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

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

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

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

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

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

The First Amendment to our Constitution explicitly recognizes that the press in this Country should receive some special protections not afforded to others. This is not because of any special

privileges or status of the press. Rather, it is to ensure that the press can serve the public by collecting and disseminating information that the people need to exercise their ultimate sovereignty.

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

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

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

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

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

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