Testimony of

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Mr. Chairman, thank you for inviting me to testify today on the wisdom of or the need for proposed legislation to create new federal standards for the compelled disclosure of information by reporters in federal proceedings.

I want to address the reporter's privilege in the context of the criminal law. As both a former United States Attorney and Independent Counsel, I have had to decide whether to subpoena reporters to determine their sources in federal grand jury investigations about information published. None of my cases involved imminent or past threats to public safety or national security, or the loss or even potential loss of human life or injury. Thus, I declined to issue subpoenas because the public benefit of compelled disclosure, given the nature of the crime I was investigating, was insufficient when weighed against the burden they would have placed on the reporters.

In 1972, the United States Supreme Court in Branzburg made it clear there is no reporter's privilege in federal criminal law. The flow of information under that regime has not been impeded. Watergate was exposed soon thereafter. Investigative reporting remains robust today.

I do not oppose a reporter's privilege. I oppose an absolute reporter's privilege. Absolute legal privileges are poor public policy; but lack of restraint on a prosecutor's power to destroy privileges is also poor public policy. Therefore, I recommend the Attorney General's Guidelines for subpoenaing reporters be made a statutory requirement.

There are no absolute privileges in common law as they can be vitiated by courts under certain circumstances. For example, the attorney-client privilege can be negated by invocation of the crime-fraud exception if a court determines that a lawyer has wittingly or unwittingly been used by a client to further a crime. Quite routinely the U.S. Department of Justice seeks to nullify this privilege under Guidelines similar to those it uses to secure compelled testimony from reporters.

My law partner and I are personally familiar with the manner in which the Department has regarded its Guidelines on subpoenaing lawyers to testify against their clients. In our case, an out-of-control U.S. Attorney in Delaware, in a blatant attempt to get our law firm conflicted from representing our client, made up a crime, which has since been thrown out by a federal court. In trying to compel us to testify, this U.S. Attorney violated most of the Department's Guidelines. The U.S. Attorney already had the documents and testimony he subpoenaed from us. Further, the information he sought from us was not necessary for him to indict his case, as he had claimed in court papers, because we appealed the compulsion order and while that appeal was pending, he indicted the case without our testimony and with no statute of limitations problem. The Department's position was that the Guidelines created no enforceable legal rights. In short, in our experience the Department knows it need not comply with Guidelines, an attitude that raises serious questions about their being mere window dressing.

My recommendation that the Justice Department Guidelines governing subpoenas to reporters be enacted into law is because, just as in my attorney-client situation, they create no enforceable

rights for the journalists. Congress should enact the Guidelines into law to create enforceable rights to ensure the kind of protection they were designed to provide. In considering whether some form of reporter's privilege is needed, this Committee should also exercise oversight that subpoenas to reporters are properly supervised and administered. I can assure you, it has failed to do so for attorney-client subpoenas.

Such action by Congress would make those Guidelines enforceable by federal courts and balance the First Amendment with criminal justice needs. Because the Justice Department claims it routinely complies with these standards, it should not object to their being enacted into law.

I want to address Justice Powell's concurrence in Branzburg. I interpret it as dealing with bad faith conduct by a prosecutor. Justice Powell was not creating a balancing test. Rather, he was warning that "good faith" by a prosecutor was the sine qua non for subpoenas to reporters about confidential sources and information. If "bad faith" was suspected, he wanted a remedy for the journalist. I agree. Legislating the Guidelines would enable federal courts to probe the veracity of factual allegations used to justify intrusive subpoenas to reporters.

Let me add some important points about the process in which decisions about privileges are made by federal courts in a grand jury subpoena challenge. Unless you've been through it, you would have no idea of the issues. Whether it is a reporter or a lawyer whose testimony is being compelled, grand jury proceedings are ex parte. That means that only the judge and the prosecutor know the full factual basis allegedly justifying the prosecutor's effort to pierce the privilege. Counsel for the subpoenaed person is not permitted to know the facts the grand jury and prosecutor claim is the basis for the demand to nullify the privilege. As our lawyer observed to the Third Circuit, "I feel like I am hitting a piñata. I have no idea what's there."

This situation puts the subpoenaed person and his or her counsel at an intolerable disadvantage. It forces the judge to be not only the neutral arbiter, but also an advocate. Moreover, it deprives the judge of the information and judgment that come from the adversarial process. Thus, in the course of considering this pending legislation, this Committee should consider modifying federal rules to permit some type of access to ex parte information to the attorneys where a privilege is sought to be vitiated before a grand jury.

In addition, this Committee by law should require that any agency claiming a set of facts constituting a potential violation of law and in which the Government seeks to vitiate a privilege (either reporter or attorney-client) before a grand jury, provide sworn affidavits or sworn testimony about the essential facts forming the basis of the crime. Mere proffers of evidence or a prosecutor's representation would be insufficient evidence in this context. It is my understanding that the CIA in Judith Miller's case did not have to aver to critical elements of the Agent Identities Protection Act, but merely requested an investigation based on a boilerplate form. Before reporters were subpoenaed, at the least a court should have established that Valerie Plame was a covered person under the Act.

Another issue you might consider is crafting a uniform standard of proof to show there really is a crime when reporters or lawyers are subpoenaed. As I said, in our case the crime was so flimsy it was later dismissed by a court. The Courts are all over the place on articulating this standard. Should the prosecutor have to prove there is a crime with "reasonable certainty" or merely "some basis to believe"?

I want to add that some type of balance is also necessary in the civil context, although I have not personally had a civil case on this issue. But any person, in public life or a private citizen, should be able to address false statements made to a reporter and published. If there is an absolute privilege in civil cases, neither the reporter nor the source has to carefully vet possible libelous or

defamatory accusations.

In sum, compelled testimony of a reporter to identify a source or piece of evidence under certain circumstances may be necessary to prevent a miscarriage of justice. But such compelled testimony should proceed only after there has been a judicial proceeding applying statutory requirements based on the Justice Department Guidelines governing subpoenaing reporters. But more change than legislating Guidelines is needed. The judicial process also has issues that need to be addressed. I am recommending limited but crucial changes to balance the need to proceed with a good faith investigation.