

Testimony of
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Reporter, The New York Times

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Good morning, I am Judith Miller, a reporter for The New York Times. That statement, in and of itself, is extraordinary. Reporters don't usually testify at Congressional hearings. But the circumstances that in July forced me to spend 85 days in the Alexandria Detention Center in Virginia highlight the urgent need for a Federal shield law to protect journalists and their sources. I am here today to urge you to enact the Free Flow of Information Act so that other journalists will not be forced, as I was, to go to jail to protect their sources. I'm here because I hope you will agree that an uncoerced, uncoercable press, though at times irritating, is vital to the perpetuation of the freedom and democracy we so often take for granted.

After almost three months in jail, I managed to secure both a personal letter and a telephone call from my source, I. Lewis Libby, and equally critically, an agreement with the prosecutor to focus his questioning on my main source and the Plame/Wilson affair. Had I not gotten both agreements, I would not have testified. I would still be in jail, as I was during your last hearing on this measure.

Yes, the legal machinations in my case were enormously complex, but the principle I was defending was fairly straightforward: once reporters give a pledge to keep a source's identity confidential, they must be willing to honor that pledge and not testify unless the source gives explicit, personal permission for them to do so, and they are able to protect other confidential sources.

Eventually, when the fuss over my case dies down, I hope journalists and politicians will begin examining the real issues at stake here, especially the question of when and under what circumstances a waiver can be considered voluntary. Struggling with such a weighty question alone in jail was hardly ideal. I did the best I could under rather challenging circumstances. Confidential sources are the life's blood of journalism. Without them, whether they are in government, large or small companies, or in non-profit organizations, people like me would be out of business. As I painfully learned while covering intelligence estimates of Saddam Hussein's weapons of mass destruction, we are only as good as our sources. If they are wrong, we will be wrong. And a source's confidence that we will not divulge their identity is crucial to his or her readiness to come to us with allegations of fraud or abuse or other wrongdoing, or even a dissenting view about government policy or business practices that the American public may need to know.

If journalists cannot be trusted by sources to guarantee confidentiality, then journalists cannot function and there cannot be a free press. Those who need anonymity are not only the poor and the powerless, those whose lives or jobs might be in jeopardy if they speak up publicly, but even

the powerful. All are entitled to anonymity if they are telling the truth and have something of importance to say to the American people. Reporters rarely know when they extend a pledge of confidentiality to a good-faith source what the impact of the information being provided will be. Our history is filled with examples of articles that never would have been written without confidential sources. Last Saturday in Los Angeles, I presented an award to the grandson of Mark Felt, the former deputy director of the F.B.I. who was critical in helping Bob Woodward and Carl Bernstein of the Washington Post turn what was originally denigrated as a third-rate burglary into a tale of corruption and malfeasance that brought down a president. Woodward and Bernstein felt so strongly about their pledge to their source to safeguard his confidentiality they passed up a huge scoop by letting Mr. Felt's family announce to another person the secret they had held for over 30 years: that he, in fact, was, Deep Throat.

Few of us reporters can claim such a famous exclusive. But I know from my 30 years in national security and intelligence reporting that confidential sources in this area, though traditionally the most press-shy and skittish of contacts, are indispensable to government accountability and the people's right to know. I would point to just two examples: in 2000, I relied heavily on such sources in co-writing a series of articles published in January 2001 that described the Clinton Administration's growing concerns about the then still underappreciated military Islamic group, Al Qaeda, which was openly and doggedly pursuing nuclear, biological and chemical weapons. That series, which won one of seven Pulitzer Prizes for The New York Times that year, could never have been written without the pledges of confidentiality I gave to the officials who were so worried about Al Qaeda -- all too presciently, alas -- that they were willing to discuss classified information with me to call attention to how relatively little time and money were being spent countering what they considered the gravest of threats to our nation.

Nor could "Germs," which I co-authored with two Times colleagues, Stephen Engelberg and William Broad, have been written without confidential sources. That book, which discussed what our government and others were doing to counter the growing menace of biological warfare and terrorism, was published a few days before the Sept. 11 attacks and less than a month before the anthrax letter attacks killed five, sickened 17, and put 30,000 people on antibiotics.

Admittedly, the situation that sent me to jail was not as clear-cut - it was not the case of a government or corporate whistleblower, but an all too familiar case of Washington politics. Yet the principle, that confidential sources must be protected, must apply in all cases: indeed, one person's whistleblower is another's snitch. Some have argued that the individual in my case did not deserve confidentiality because his motives were not pure. But whistleblowers or those who engaged in spinning reporters are not usually saints, and journalists should not demand that they be so. While reporters must try to understand why someone is telling them something, what counts far more than their motivation is the truth and significance of what they are saying. Moreover, when offering to keep a source's identity confidential, journalists seldom know in advance whether the information being provided will turn out to be insignificant, or even sufficiently strong to produce a story, or of major national importance. Thus, promises of confidentiality once made, must be respected unless the source specifically and personally waives that privilege, or the public's right to know will suffer.

What rankles me the most is that in the two places I live and work, New York and the District of Columbia, there is absolute protection for confidential sources. In fact, as this panel knows, all but one state - Wyoming - have enacted shield laws or assured such protection through court rulings. But such protection of the public's right to know does not exist at the Federal level because of a more than 30-year old Supreme Court ruling that has spread confusion in Federal

courts and news bureaus throughout the land. Because of that judicial chaos, reporters who ought to be able to rely on a state's law, may not be able to do so. Sometimes, through chance, a case may end up in a Federal rather than a state court. Not only does this lead to a lack of legal predictability and no real basis on which to govern one's behavior, it is also fundamentally unfair. That is yet another reason why a Federal Shield Law is so essential. The Federal government should finally catch up with the will of the states, all but one of which now provide absolute or qualified protection for reporters and their sources. Most of these laws have been adopted in the 30 years since the Supreme Court's decision

A second reason why this bill is so urgently needed is that in the post 9/11 era, dramatically increased amounts and types of information are being classified as secret, and hence, are no longer available for public review. Last year, more documents were classified secret and top secret than ever before in American history. In such a climate, confidential sources, particularly in the national security and intelligence areas, are indispensable to government accountability. Journalists are increasingly being subjected to Federal subpoenas since 9/11. More than two dozen reporters have been subpoenaed in the past two years and are in danger of going to jail. If current trends prevail, the Alexandria Detention Facility may have to open an entire new wing to house reporters.

With respect to the specifics of the proposed Bill, I would just say that I support the exception which has been drafted by its sponsors that would exempt "imminent and actual harm" to the national security, even if it is extended to potential bodily harm. I was an embedded reporter in Iraq in one of the most sensitive missions. I do not underestimate the potential jeopardy facing American soldiers and those who work with them if secret information is disclosed prematurely. But more than 30 states attorneys general, in a brief supporting the reporter's privilege, that the protection of confidential sources was paramount. And not one mentioned an instance in which a hostage or person at risk died or was injured because a journalist insisted on protecting her source, or a prosecution that failed because of a state shield law.

However, while I favor that exception, I would very strongly oppose further amendments to the bill that would exempt any investigation into past criminal speech or activity, usually a leak. For one, most federal subpoenas from prosecutors involve potentially criminal disclosures. The leakers in the Balco case in San Francisco violated grand jury secrecy rules or laws, but their information about steroid use in professional baseball gave Congress the facts and impetus to start hearings and make needed reforms. Daniel Ellsberg arguably violated the Espionage Act, but in retrospect it is clear that The New York Times did well by publishing the Pentagon papers and giving greater historical context to the reasons why we were in Vietnam.

Such leaks, be they criminal or not, often serve a public good. And it is also usually unclear early on whether the leaker is violating a law. Thus, an exception for criminal activity would be unworkable, since at the time a subpoena is issued to a reporter a decision would have to be made on whether the underlying crime had in fact occurred.

Finally, reporters should not be an arm of the law; if government employees illegally leak information, it is up to government, with all its coercive power, to discover the culprit, not a reporter whose primary duty is to inform the public.

In conclusion, I would just say that my 85 days in prison were tempered by the letters I received from friends and supporters throughout the country, and indeed the world. Some of the letters that touched me most were those from journalists and writers overseas, many of whom have always looked to America as a beacon of press freedom. Those writers simply could not understand how a reporter doing her job -- much less a reporter who had never written wrote an

article on this story -- could be imprisoned for keeping her word. Foreigners and Americans alike have been startled and disappointed at the seeming contradiction between our great tradition of a free press and jailing a reporter who was trying to protect a source so that she could continue publishing, as my paper would say, "all the news that's fit to print."

In jail, I had to draft some standards that I felt would help me and perhaps other journalists determine when, and under what circumstances, we could conclude whether a source was truly willing to let a reporter identify him or her and testify before a grand jury. But I would hope that you will act to prevent other journalists from having to conduct such metaphysical debates about free will and what constitutes a source's waiver of confidentiality while in jail.

What has been missed in much of the furor over my case, paraphrasing Paul Levinson, a Fordham University professor, is that the recent hand-wringing should not prevent us from recognizing the most enduring truth: reporters, even flawed reporters, should not be jailed for protecting even flawed sources. When the dust clears, I hope that journalists and newsrooms will be emboldened, not confused or angered by what I have done. And I hope that you will help ensure that no other reporter will have to choose between doing her small bit to protect the First Amendment and her liberty.

Thank you.