Testimony of

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Senate Committee on the Judiciary
The Free Flow of Information Act
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Mr. Chairman and Members of the Committee:

Thank you for inviting me to appear before you today to present testimony on the Free Flow of Information Act, which would codify and standardize a limited privilege covering reporters' sources that has already been recognized in one form or another in the great majority of state and federal courts.

I am a partner in the firm of Covington & Burling, LLP., where I practice white-collar criminal defense and S.E.C. and other regulatory enforcement law. In that capacity, I both defend individuals and companies in grand jury, S.E.C. and other regulatory investigations and trials, and perform internal investigations into possible wrongdoing on behalf of companies and their Boards of Directors. Earlier in my career, I was a Special Assistant to the Deputy Attorney General of the United States, and spent nine years as an Assistant United States Attorney for the Southern District of New York, where I served in the organized crime unit, and as Deputy Chief of the Criminal Division, Chief of the Narcotics Unit, and Chief of the Securities and Commodities Frauds Task Force. My organized crime work included a long investigation and eight-month trial of the leadership of the Colombo Organized Crime Family. My securities fraud prosecutions included those of Drexel Burnham Lambert and Michael Milken.

My firm represents the Newspaper Association of America in connection with this legislation although I have not been involved in that work. I do not represent them here today and my testimony is my own.

From the perspective I bring to bear, that of a long-time former prosecutor and a present member of the defense bar, the legislation being considered should not adversely affect either the prosecution or defense of criminal and regulatory cases.

From a prosecutor's perspective, the bill does no more than codify the Department of Justice's policy regarding issuances of subpoenas to members of the news media codified at 50 U.S.C. § 50.10. These guidelines have been in force since I was a prosecutor in the 1980's. The bill will in fact aid prosecutors in understanding the concrete rules in an area now governed by inconsistent judicial interpretations sometimes couched in vague and broad First Amendment terms. The bill itself has words and phrases that will have to be interpreted, but over time, as with any statute, the law in this area will settle and become more consistent. It can also be changed if it proves unworkable in one or another respect. The situation now, with uncertain courts and media

appeals to First Amendment absolutes, is far less certain and sometimes hostile to appropriate efforts by prosecutors to get information under the many judicial variations of the governing balancing test.

During the Wall Street securities investigations of the late 1980s, which I directed in the Southern District of New York, the Wall Street Journal had two terrific reporters who time after time managed to find information through their sources that were beyond anything the government had uncovered. These were big cases - the Wall Street Journal had written stories regarding the cases against Michael Milken and Drexel Burnham Lambert, and a dozen other cases.

The evidence in the Wall Street Journal stories was important, but a look at the Department of Justice Guidelines made clear we should not make an effort to issue subpoenas. That did not stop us from successfully investigating the cases.

From the defense perspective, the bill is also an improvement. For one thing, there is explicit separate recognition of a criminal defendant's potential need in an appropriate case to obtain information from the press. There is also recognition of the similar needs of a party to a civil or administrative enforcement action. Of course, the standards are high for obtaining information, but they are no higher than the standard actually applied in federal courts today and in fact the very existence of a statute may improve a defendant's ability to raise the issue in an appropriate case.

In addition, from the defense perspective, the bill substitutes a statute applicable to all federal agencies and special prosecutors for an internal regulation applicable to Department of Justice prosecutors only.

In the end, this is not an issue that should divide prosecutors and defense counsel. The need for information may sometimes be on one side and sometimes on the other. There should be broad agreement on the need for protection of a vigorous press that looks high and low for information and in so doing benefits all of us. There should also be agreement that a bill with a careful balancing test calibrated for different situations and with appropriate exceptions is a vast improvement over the inconsistent efforts of the federal courts to follow Branzburg v. Hayes.