Testimony of

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Reporters' Privilege Legislation:
Preserving Effective Federal Law Enforcement
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Good morning, Chairman Specter, ranking Member Leahy, and Members of the Committee. Thank you for the opportunity to appear before the Committee to testify about an issue that has important implications not just for reporters and the press, but is particularly critical to the ability of citizens to monitor the activities of, and to exercise a democratic check on, their government. One of the most vital functions of our free and independent press is to function as a watchdog on behalf of the people--working to uncover stories that would otherwise go untold. Journalists in pursuit of such stories often must obtain information from
individuals who are unwilling to, or cannot, be publicly identified. Those journalists--often reporting on high-profile legal and political controversies--cannot function effectively without offering some measure of confidentiality to their sources.

In recognition of the importance of preserving this confidentiality, forty-nine States and the District of Columbia have laws protecting reporters from subpoenas in certain circumstances. Numerous federal courts grant similar protections, and the Justice Department has internal standards preserving confidentiality for journalists and their sources. Yet there is no uniform protection in federal law. Thus reporters may be shielded if they are subpoenaed in state court, but not protected at all if the identical subpoena is issued by certain federal courts.

The Free Flow of Information Act of 2006 provides such federal protection. It builds on the patchwork of standards developed by many federal courts, replacing it not with an absolute "reporter's privilege" but with a requirement,
among other things, that a party seeking information from a journalist be able to demonstrate that the need for that information is real and that the information is not available from other sources.

The Act is modeled in large part on the Justice Department guidelines, which were in place when I served as Solicitor General of the United States from 2001 to 2004, and during my time as Assistant Attorney General for the Office of Legal Counsel from 1981 to 1984.1 Like those guidelines, the Act does not hamper law enforcement. It does not pose a threat to matters involving classified information or national security. In fact, it contains a specific provision for

such highly sensitive situations. Nor does it give reporters any special privilege beyond those already afforded other types of communications, such as those between lawyer and client, where confidentiality furthers broad social goals. Instead, it simply extends to federal courts the nearly unanimous determination by the States
that forcing journalists to disclose the identity of their confidential sources is often likely to do more damage than provide any concrete benefit to the public welfare.

I.
PROTECTING CONFIDENTIAL SOURCES IS ESSENTIAL
TO A FREE AND VIBRANT PRESS AND TO JOURNALISTS' ABILITY
TO PERFORM THE FUNCTION THAT THE CONSTITUTION
EXPLICITLY SANCTIONS.

Confidential sources are critical to reporting on matters of public importance and thus are vital to self-governance. When reporting on sensitive subjects, particularly misconduct or excesses by government officials, journalists often have
no choice but to seek information from individuals who would be at great risk of retaliation or embarrassment if their identities were disclosed; many sources with important information simply will not speak to reporters unless they are granted anonymity. This process may be imperfect, but we have learned through Watergate and other incidents that a robust and inquisitive press is a potent check against abusive governmental power. The press often cannot perform this service without being able to promise confidentiality to some sources.

In reporting these stories, journalists act as surrogates for all of us. They explore the places that are inaccessible to the public as a whole--shedding light on vital information in locations where it otherwise would be kept secret, from
corporate boardrooms to medical facilities to the halls of government. The Supreme Court has repeatedly recognized the important role of the press in obtaining and communicating information to the public. That role, the Court has held, is part of our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." New York Times v. Sullivan, 376 U.S. 254, 270 (1964). The press is "a mighty catalyst in awakening public interest in governmental affairs," Estes v. Texas, 381 U.S. 532, 539 (1965), and it "was protected so that it could bare the secrets of government and inform the people." New York Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring). The news media fulfills an "important role" in our democracy,
serving "as a powerful antidote to any abuses of power by government officials as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were elected to serve." Mills v. Alabama,
384 U.S. 214, 219 (1966).

Our history and judicial decisions teach that the compelled disclosure of reporters' confidential sources endangers their ability to perform these constitutionally-protected functions. And that, in turn, inhibits the flow of information concerning public matters that is vital to an informed citizenry and a
healthy democracy. The Court has recognized "the timidity and self-censorship which may result from allowing the media to be punished for publishing truthful information." Florida Star v. B.J.F., 491 U.S. 524, 535 (1989) (internal quotation omitted). Lower courts have been even more

explicit:
The interrelationship between newsgathering, news dissemination and the need for a journalist to protect his or her source is too apparent to require belaboring. A journalist's inability to protect the confidentiality of sources . . . will seriously erode the essential role played by the press in the dissemination of information and matters of interest and
concern for the public. Riley v. Chester, 612 F.2d 708, 714 (3d Cir. 1979) (citations omitted).

And that is exactly what is happening here. Reporters are increasingly being subpoenaed and held in contempt for declining to reveal their confidential sources. In grand jury investigations--from the Valerie Plame imbroglio to the use of
steroids by professional baseball players--federal prosecutors round up the reporters, haul them before a court, and threaten them with heavy fines and jail sentences if they don't reveal names and details concerning their sources. Even in civil litigation, such as the Wen Ho Lee case, private plaintiffs now subpoena reporters in an effort to gain information that will help them win their claims for money damages.

These compulsory proceedings undermine reporters' ability to get their stories, creating an obvious chilling effect. Under these circumstances, journalists cannot in good faith promise confidentiality to their sources, and they cannot
establish the mutual trust that is key to cultivating a relationship with those who wish to speak. Worse, as discussed in detail below, reporters, editors, publishers and their lawyers cannot with assurance articulate the rules governing
confidentiality because legal standards are hopelessly muddled. Fearing the consequences of exposure, sources withdraw. They decline to serve as background sources--even for routine news stories, where their knowledge and experience help reporters understand complex topics and disseminate information to the
public. And they certainly will not talk when the stakes are high--when they know that reporters could be forced to disclose to the very government they are investigating the names of persons providing them with the information that government wishes to conceal. Important and even lifesaving stories go untold.

This need not occur. Reporters should not be (and do not expect to be) above the law--categorically and in all cases protected from disclosing any confidential information, no matter the circumstances or need. But they should be afforded some protection so that they can perform their vital role in this free and open society in ensuring the uninhibited flow of information and exposing fraud, dishonesty and improper conduct without being threatened after the fact with imprisonment.

II.
THE FREE FLOW OF INFORMATION ACT PROVIDES A MUCH-NEEDED, UNIFORM FEDERAL STANDARD THAT EFFECTIVELY BALANCES CONFIDENTIALITY WITH INTERESTS FAVORING DISCLOSURE IN SOME CASES.

The concept of a reporter's privilege is not new. Indeed, forty-nine States and the District of Columbia already recognize some sort of reporter's shield, as do many federal courts. Additionally, the Justice Department has guidelines concerning when it can seek to force reporters to respond to subpoenas, although its guidelines are not judicially enforceable. The Free

Flow of Information Act of 2006 does not work a dramatic expansion of the reporter's privilege or a realignment of public policy. Instead, it is long overdue precisely because the privilege is already in place and the decisions underlying such a policy have already been made by key officials. The unsettled state of federal law has a chilling effect on speech and the dissemination of important information to the public. The Act regularizes the rules for reporters, their sources, publishers, broadcasters, and judges--harmonizing the various federal standards and providing consistency on which journalists and their sources can rely.

Protecting the confidentiality of certain communications is well-recognized within the law, and the Act does not grant reporters any special license beyond the common-sense protections we already give to certain professionals and individuals. Laws already recognize the competing values of confidentiality and the collection of evidence; privileges are accorded to spousal communications, and communications between doctors and patients, or attorneys and clients. These privileges protect--and encourage--communications and relationships that are valuable to society as a whole, and they do so despite the inability to obtain evidence in some cases. The same principles apply to communications between journalists and vulnerable, sensitive sources. In many cases, the public will be better served by a reporter's having access to the information from a protected source than having no information at all.

In the 34 years since the Supreme Court's decision in Branzburg v. Hayes, 408 U.S. 665 (1972), many federal courts of appeals have recognized some form of reporter's privilege, "though they do not agree on its scope." McKevitt v. Pallasch, 339 F.3d 530, 532 (7th Cir. 2003).2 For example, the Third Circuit has recognized a common-law privilege in civil cases, see Riley v. City of Chester, 612 F.2d 708, 715 (3d Cir. 1979), as well as in criminal trials. See United States v. Cuthbertson, 630 F.2d 139, 146 (3d Cir. 1980). The Fourth Circuit has held that the First Amendment provides a reporter's privilege in civil cases but not in criminal cases. See LaRouche v. Nat'l Broad. Co., 780 F.2d 1134, 1139 (4th Cir. 1986). This lack of uniformity creates intolerable uncertainty regarding when a meaningful promise of confidentiality may be made. For example, a reporter in Raleigh, North Carolina could be forced to reveal a source's identity in federal court when the same reporter in Harrisburg, Pennsylvania would be protected under federal law--even when both North Carolina and Pennsylvania's state laws would shield that reporter in the respective state courts. See N.C. GEN. STAT. § 8-53.11; 42 PA. CONS. STAT. § 5942(a). No one benefits from this bewildering array of federal standards, which frustrates the public interest in effective newsgathering and leaves reporters and sources wondering whether a promise of confidentiality is simply the first step down the inevitable path toward disclosure or the jailhouse doors.

Reporters already enjoy protection in most States and in some federal contexts, but the confusion illustrated above renders many provisions ineffective. Reporters cannot foresee where or when they may be summoned into court for questioning regarding a particular story. They therefore cannot guarantee confidentiality with assurance that their promise will be honored. The Free Flow of Information Act does not create an entirely new, substantive privilege, but it establishes a clear federal rule, which is essential where reporters and sources are

making difficult determinations about whether to put themselves at risk by promising confidentiality or providing certain information. The Act also does not give reporters an absolute privilege to resist disclosing their sources. Instead, it
requires, among other things, that a party seeking information from a journalist in a criminal or civil case be able to demonstrate that the need for that information is real, that it cannot be gleaned from another source, and that nondisclosure would be contrary to the public interest. The Act does not give the same privilege to reporters who themselves witness crimes or are engaged in criminal or tortious conduct, nor to reporters who possess information that is necessary to prevent death or serious bodily harm. And it treats differently those matters involving classified information and national security, as discussed in Part III, below.

Reasonable minds can disagree on the value of anonymity granted for one story or another--or even on the concept of a reporter's privilege. But there should be no disagreement that uniform rules are better than a hodgepodge federal system that leaves all parties in a state of confusion when a source requests
anonymity or when a confidentially-sourced story is published. The underlying policy has now received near-unanimous adoption by the States, and congressional action is necessary to remove the remaining inconsistencies, which are largely jurisdictional, not substantive, but have created intense and unnecessary confusion.

III.
THE ACT DOES NOT COMPROMISE NATIONAL SECURITY
OR BURDEN LAW ENFORCEMENT EFFORTS.
Contrary to what its opponents may claim, the Free Flow of Information Act does not compromise national security. It contains an express national security exception in addition to the general balancing test described above. Nor does the
Act hamper law enforcement since it largely mirrors decades-old Justice Department guidelines, and it provides a privilege already recognized by nearly every State. Indeed, far from compromising national security or law enforcement interests, the Act promotes them--standardizing the rules of the game, and
allowing reporters to subject government programs and actions to proper scrutiny while ensuring that important information cannot be withheld solely on the grounds of privilege.

Certainly, no issue deserves more attention from our elected representatives than ensuring that the American people are defended from terrorist enemies and other security threats, and any reporter's privilege must take national security interests into account. The Act in Section 9 addresses two principal national security concerns: reporters who possess information necessary to government officials in the interest of national security, and the investigation of leaks that have caused significant harm. It does not protect journalists who possess information that would assist in preventing an act of terrorism, or where harm to national security would "outweigh the public interest in newsgathering" if the information were not disclosed. And the law does not shield reporters where a court
determines that a leak has caused "clear and articulable" harm to national security that outweighs the value of the information disclosed. These provisions strike a proper balance. They protect reporters whose stories address critical topics such as
public corruption, homeland security and intelligence gathering, but lower the threshold for

overcoming that protection where reporters possess vital information that the public interest demands be disclosed.

Similarly important are the interests of federal law enforcement officials in protecting citizens from crime and discovering evidence once a crime has occurred. Based, as it is, in large part on Justice Department guidelines that have been in place without amendment since 1980, see 28 C.F.R. § 50.10, the Act does
not burden law enforcement. The Department's guidelines bar subpoenaing a journalist in a criminal investigation unless the information sought is "essential," and require officials to "strike the proper balance between the public's interest in
the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice." § 50.10(f)(1),(a). They provide "protection for the news media from forms of compulsory
process, whether civil or criminal, which might impair the news gathering function," and make plain that "the prosecutorial power of the government should not be used in such a way that it impairs a reporter's responsibility to cover as broadly as possible controversial public issues." § 50.10 Such strong language has been the voluntarily-adopted standard governing the Department's practices for more than a quarter century, and there is no basis for believing that codifying those standards will harm the Department or other federal law enforcement efforts. The Act simply extends comparable protections to civil matters between private parties, where any interest in compelling journalists to testify is substantially reduced.
Additionally compelling is the fact that all but one State already operate under judicially enforceable shield laws, and officials in a majority of those States support a federal privilege. Thirty-five state attorneys general--the chief law
enforcement officers of their respective States and the District of Columbia--endorsed the recognition of a uniform federal privilege in the Judith Miller case. Far from expressing concern about the effect of shield laws on law enforcement or judicial proceedings, they argued that the lack of a federal counterpart to the state laws "corrode[s] the protection the States have conferred upon their citizens and newsgatherers," creating a situation that "is little better than no privilege at all."
Brief for the State of Oklahoma et al. as Amici Curiae Supporting Petitioners, at 7, Miller v. United States, cert. denied 125 S. Ct. 2977 (2005) (No. 04-1507), 2005 WL 1317523 (quotation omitted). The attorneys general expressed support for a privilege based on their States' shield laws, which "share a common purpose: to assure that the public enjoys a free flow of information and that journalists who gather and report the news to the public can do so in a free and unfettered atmosphere. The shield laws also rest on the uniform determination by the States that, in most cases, compelling newsgatherers to disclose confidential information is contrary to the public interest." Id. at 2. The policies supporting the state laws apply with equal force here, and the need for federal action is even greater
considering the current state of affairs, which "allows journalists to be imprisoned for engaging in the same conduct that these State privileges encourage and protect." Id.
* * *
I would like to thank the Committee for the opportunity to testify today. I look forward to answering any questions members of the Committee may have.

1 Although I am a former government official and current member of the President's Privacy and Civil Liberties Oversight Board, I am appearing in my personal capacity and not on behalf of any client. The views that I express are solely my own and do not necessarily represent the views of any other person or entity.

2 Courts have granted protection to reporters in varying degrees. See, e.g., In re Madden, 151 F. 3d 125, 128-29 (3d Cir. 1998); United States v. Smith, 135 F.3d 963, 971 (5th Cir. 1998); Shoen v. Shoen, 5 F.3d 1289, 1292-93 (9th Cir. 1993); In re Shain, 978 F.2d 850, 852 (4th Cir. 1992); United States v. LaRouche Campaign, 841 F.2d 1176, 1181-82 (1st Cir. 1988); von Bulow v. von Bulow, 811 F.2d 136, 142 (2d Cir. 1987); United States v. Caporale, 806 F.2d 1487, 1504 (11th Cir. 1986); Zerill v. Smith, 656 F.2d 705, 712 (D.C. Cir. 1981); Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 438-39 (10th Cir. 1977).