Testimony of

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TESTIMONY OF

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ON BEHALF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS

BEFORE THE

THE SENATE JUDICIARY COMMITTEE
UNITED STATES SENATE

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Good morning, Chairman Specter, and Members of the Committee. Thank you for your kind invitation to testify today about the merits of codifying a reporter privilege. I am testifying today on behalf of the National Association of Manufacturers. The NAM is the nation's largest industrial trade association representing small and large manufacturers, in every industrial sector, and in all 50 states. Through its direct membership and affiliate organizations -- the Council of Manufacturing Associations, the Employer Association Group and the State Associations Group -- the NAM represents more than one hundred thousand manufacturers. The views stated today are based on my experience in business litigation and in teaching evidence law.

In S. 2831, the "Free Flow of Information Act," Congress is considering codifying a broad media shield privilege stating that a federal entity may not compel a reporter to testify or produce any document in any proceeding or in connection with any issue arising in federal courts, regardless of whether the basis for the claim arises under federal or state law. The focus of my testimony will be on the impact that S. 2831 could have on the ability of businesses to protect valuable trade secrets, personnel files and other types of proprietary information that rightly should be kept confidential. It will not focus on matters that fall under the stated purpose of the bill: "to guarantee the free flow of information to the public through a free and active press as the most effective check upon government abuse, while protecting the right of the public to effective law enforcement and the fair administration of justice." These matters have First Amendment and other very different public policy overtones than the private sector concerns that I will address.

In short, it is my belief that any reporter privilege should include reasonable checks and balances so that courts can protect journalists when appropriate, but supersede that protection when other

values outweigh the benefit of such a special protection.

I. EVIDENTIARY PRIVILEGES IN AMERICAN JURISPRUDENCE

A. Purpose of Evidentiary Privileges

Reporter privileges are "personal" privileges. Personal evidentiary privileges deny plaintiffs and defendants the ability to use truthful information that may be crucial to their legal claims and defenses. Consequently, Congress and the courts have long recognized that personal privileges should be rare and narrow. The Supreme Court of the United States has held that "exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." Rather, the Court found that "there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional."

Traditional evidentiary privileges protect information shared in the context of a special relationship. WIGMORE ON EVIDENCE, America's leading authority on the rules of evidence, explains that "the mere fact that a communication was made in express confidence . . . does not create a privilege. . . . [A] confidential communication to a clerk, to a trustee, to a commercial agency, to a banker, to a journalist, or to any other person, not holding one of the specific relations hereafter considered, is not privileged from disclosure."

Also, virtually no personal privileges are absolute; the United States Supreme Court has held that even the privileges rooted in the Constitution must give way sometimes to the need to know the truth. Not even lawyers, doctors, or priests have absolute protection. The attorney-client privilege, perhaps the most important of traditional privileges, can be negated if a court determines that an attorney-client communication has been used to further a crime. Doctors and priests may reveal information if the person is planning imminent physical harm to others.

Well-respected evidence scholar Charles T. McCormick acknowledged the central role that judges have in assuring that privileges are not abused: "If the trial judge is permitted a lee-way, he can prevent those disclosures of marital or professional secrets which needlessly shock our feelings of delicacy, but at the same time he can override these minor amenities when it appears necessary in order to secure the facts essential to do justice in the case before him."

B . Congress Has Specifically Declined to Codify Evidentiary Privileges

In 1975, when the Federal Rules of Evidence were adopted, the Judicial Federal Rules Advisory Committee (FRAC) proposed that Congress codify traditional, generally accepted privileges. The FRAC draft included nine personal evidentiary privileges, including attorney-client, therapist-patient, husband-wife, clergy-penitent, and trade secrets, among a few others. It did not include a reporter privilege.

In a most unusual action, Congress rejected FRAC's proposal to codify the traditional privileges, stating in Rule 501 that privileges "shall be governed by the principles of common law" and developed under the judicial system "in light of reason and experience." The Senate Report on this matter issued in 1974 states:

"[O]ur actions should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case-by-case basis."

The Chairman of the House Judiciary Subcommittee on Criminal Justice at the time noted with favor that, with regard to a reporter privilege, Rule 501

"permits the courts to develop a privilege for newspaper people on a case-by-case basis. The language cannot be interpreted as a congressional expression in favor of having no such privilege, nor can the conference action be interpreted as denying to newspeople any protection

they may have from state newsperson's privilege laws."
The Supreme Court of the United States fully recognized what Congress had done. The Court has stated:
In rejecting the proposed rules and enacting 501, Congress manifested an affirmative intention not to freeze the law of privilege. Its purpose rather was to provide the courts with the flexibility to develop the rules of privilege on a case-by-case basis and to leave the door open to change.
C. The Reporter Privilege Under S. 2831 Differs from Traditional Privileges
S. 2831, which would codify a reporter privilege in federal courts, would create a privilege with significant differences from the other traditional privileges. For example:
? Traditional privileges exist to keep information confidential after the privileged communication. A reporter privilege exists to expose information.
? Traditional privileges are balanced with meaningful public policy-based exceptions. This bill provides for a near absolute privilege with regard to source information.
? "Clergymen, doctors, and lawyers - all holders of common law privilege - are especially trained and certified." There is no corresponding qualification to hold a privilege under this bill, reporter or otherwise.
? Traditional privileges rest with the person who conveys the information, not the professional. A reporter privilege rests with a reporter, not a source.
II. CURRENT STATUS OF FEDERAL AND STATE REPORTER PRIVILEGES
A. Most Federal Circuits Have Recognized a Common Law Reporter Privilege; All Use Meaningful Balancing Tests
Currently, most federal circuits have accepted that a reporter may have qualified common law immunity from answering subpoenas about source information. These circuits have implemented meaningful balancing tests so that judges can weigh a reporter privilege against the rights of the parties who are seeking justice in the courts.
Several circuits, including the Fourth, Fifth, Ninth, Tenth, Eleventh, and D.C. Circuits, employ a defined balancing test. These tests generally assess whether (1) the information is relevant to the case; (2) the information can be reasonably obtained by alternative means; and (3) there is a legitimate interest in the information.
Other circuits use a more general balancing approach. As the First Circuit held, "[n]ot all information as to sources is equally deserving of confidentiality," and a "fact-sensitive approach" is appropriate to assess "the shifting weights of the competing interests." The Second, Third, Sixth, and Eighth Circuits follow this same non-formulaic approach. The Seventh Circuit's test is whether enforcing a subpoena against a reporter is reasonable under the circumstances.
These courts acknowledge, as Justice Powell wrote in his concurring opinion in the landmark case Branzburg v. Hayes, that any reporter privilege "should be judged on its facts by the striking of a proper balance between freedom of press and the obligation of all citizens to give relevant testimony with respect to criminal conduct."
B. S. 2831 Would Not Bring National Uniformity
Reporter privileges among the states, which are not affected by this legislation, vary widely. For example, states differ on whether reporter immunity applies differently to civil and criminal cases; whether it applies differently if the reporter is a witness or party to the case; and whether it applies to confidential and non-confidential material in the same way. Many states specifically exempt libel and defamation suits from the reporter privilege. In addition, while a minority of states offer the type of broad immunity at issue in the federal bills, most states adhere to some form of meaningful balancing test, either under statutory or common law.

Currently, thirty-two states and the District of Columbia have reporter immunity statutes for when reporters must comply with a subpoena for source identity. Among those states, Colorado, Florida, Illinois, New Mexico, North Carolina, South Carolina, and Tennessee apply a three-part test similar to the one followed by some of the federal circuits. Statutes in Alaska, Louisiana, and North Dakota use a more general miscarriage of justice standard.

Other states follow completely different approaches. For example, in California, there is no privilege, but an immunity from contempt of court. Thus, other sanctions are not precluded, and a reporter may not use the shield to avoid taking the stand. And, in Ohio, a reporter can only be required to identify a source that gave factual information (not rumor or innuendo) for which the source had first-hand knowledge. States also differ as to whether there must be an understanding of confidentiality with the source.

Of the remaining states, seventeen have a common law reporter privilege. Twelve of them allow some form of protection for sources, including Hawaii, Idaho, Kansas, Massachusetts, Maine, Missouri, South Dakota, Vermont, Washington, West Virginia, and Wisconsin. Iowa protects information, not sources. Wyoming has no reporter privilege.

III. ADVERSE UNINTENDED CONSEQUENCES OF OVERLY BROAD REPORTER PRIVILEGES

Case law and, more importantly, life experiences have shown that there are significant adverse consequences when courts cannot provide any checks or balances in applying a reporter privilege in private sector disputes. Cases typically involve businesses, public figures, and those concerned about individual privacy. In these situations, there are no government First Amendment overtones.

A. Protecting Illegally Obtained Information

Of most concern is that this bill would create an environment where a person's reasonable expectation of privacy could be violated without repercussion. This could occur even where Congress has enacted laws to require that the information be kept confidential, such as with medical records, tax returns, and intellectual property. When such information is stolen and leaked to a reporter, actual facts do not support the notion that the privilege is protecting the public's "right to know."

Geoffrey Stone, a professor at the University of Chicago Law School who favors a qualified reporter privilege, explained to the members of the Senate Committee on the Judiciary that "when the act of disclosure is itself unlawful, the law has already determined that the public interest cuts against disclosure." Professor Stone drew parallels to the attorney-client privilege, which does not allow a person to consult a lawyer in order to commit the perfect murder. He also showed that the doctor-patient privilege does not allow someone to plot insurance fraud. "A rule that excluded all unlawful disclosures from the scope of the journalist-source privilege," he testified, "would be consistent with other privileges."

An episode involving Representative (and now House Majority Leader) John Boehner offers a good illustration. A cell phone conversation Mr. Boehner had with then-Speaker Newt Gingrich was illegally recorded by private citizens and ultimately given to a Florida newspaper. "[L]ogic suggests," as the trial judge in the Boehner case wrote, "that a criminal cannot launder the stains off illegally obtained property simply by giving it to someone else, when that other person is aware of its origins." Indeed, the Supreme Court of the United States foreshadowed this issue in Branzburg: "Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news."

Other examples of privacy laws that could be violated with near impunity if S. 2831 were enacted include judicial protective orders, the Health Insurance Portability and Accountability Act ("HIPAA"), and the Uniform Trade Secrets Act, among many others. Earlier this year, Apple Computer was engaged in litigation over leaks of its trade secrets. The case was decided under California's very broad law, and Apple was not permitted to access the records of the blogger who posted the stolen trade secrets. Sources who steal and leak information from the private sector that is protected by federal or state laws or judicial orders should be prosecuted or fined, not protected by a reporter privilege. This conduct is completely different from whistle-blowing, which deserves protection.

The Freedom of Information Act, a fundamental weapon to promote the free flow of information, recognizes this distinction. It specifically does not apply at all to "trade secrets and commercial or financial information obtained from a person and privileged or confidential," or "personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

Additionally, there is concern that by legitimizing the illegal activity of leaking trade secrets and other types of proprietary and personal information, Congress would be creating an incentive, even a roadmap, for people to engage in corporate espionage or invasion of an individual's privacy, and avoid legitimate, needed prosecutions.

B. Blocking Defamation Suits by Public Figures

Courts also have recognized that reporter privileges, unless they offer reasonable exceptions, would make it nearly impossible for public figures, such as elected officials, athletes, and Hollywood personalities, to succeed in defamation suits.

In suits brought by such public figures, plaintiffs must demonstrate actual malice, which requires clear and convincing evidence that the reporter had specific knowledge of falsity or recklessly disregarded the truth. Proof is generally offered by showing that no reliable source existed, that the source was fabricated, that the reporter misrepresented the actual source, or that the reporter's reliance upon the source was reckless.

As the D.C. Circuit held, knowing the source's identity is the "logical, initial element of proof"; when a reporter is a party to the suit, "successful assertion of the privilege will effectively shield him from liability." The Fifth Circuit concurred, stating that "[t]he only way that the [plaintiff] can establish malice and prove his case is to show that [the defendant] knew the story was false or that it was reckless to rely on the informant. In order to do that, he must know the informant's identity."

V. CONCLUSION

I hope that the Committee finds it helpful to have some light placed on an area of potential unintended consequences of this bill that have nothing to do with its clearly stated purpose or issues involving the First Amendment restraints on the power of government. Judges have handled the issue of privilege in purely private litigation well. Congress has respected the judicial branch's ability to balance the need for stability and to accommodate change in this important area. On behalf of the thousands of both large and small businesses, I suggest that this well-earned respect continue.