



AMERICAN BAR ASSOCIATION

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**STATEMENT
OF THE
AMERICAN BAR ASSOCIATION**

submitted to the

**COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE**

on the subject of

REPORTERS' PRIVILEGE LEGISLATION

OCTOBER 19, 2005

The American Bar Association appreciates the opportunity to present this written statement for the hearing record of the Senate Committee on the Judiciary regarding the need for enactment of a federal shield law for journalists. Because events of the past year have clearly demonstrated the need for federal legislation, the Association recently adopted policy urging Congress to enact legislation to confer a qualified privilege on journalists. Our policy, which sets forth reasonable standards for the issuance of subpoenas to journalists compelling disclosure of the names of their sources and information collected in the course of their work, endorses in principle S. 1419 (and its House counterpart, H.R. 3323), legislation currently under consideration by this Committee.

The purpose of shield laws is to enable reporters to obtain information that would not otherwise be forthcoming and to facilitate independent, objective investigations on behalf of the public. Such investigations uncover significant information about government, business and other aspects of daily commerce that is vital for an informed democracy. In order to balance the public's need for information with the fair administration of justice, the ABA policy, adopted August 2005, states that Congress should enact a federal shield law that would require any party seeking to subpoena a journalist to disclose information to demonstrate that:

1. the information sought is essential to a critical issue in the matter;
2. all reasonable alternative sources for acquiring the information have been exhausted; and
3. the need for the information clearly outweighs the public interest in protecting the free flow of information.

The policy further states that a "federal shield law should apply to journalists who disseminate information by print, photographic, broadcast, cable, satellite, electronic, mechanical or any other media through newspaper book, magazine, periodical, radio, TV, programming service, channel, network, new agency or wire service or similar service." So-called "bloggers" and other individuals who post information on the Internet for public dissemination are not covered by this definition. Our policy, therefore, endorses a qualified federal privilege that protects both the

identity of a journalist's confidential sources and work products and recommends baseline standards for the issuance of subpoenas in both criminal and civil matters. We would oppose any federal shield law proposal that doesn't meet these minimum standards.

Currently, 49 states and the District of Columbia recognize a privilege for journalists to protect their sources -- 18 by judicial decisions, the rest by enactment of shield statutes. Thirteen states recognize an absolute privilege for reporters to protect their sources. Regrettably, when a reporter relies upon a state law and enters into an agreement of confidentiality with a source, the state law will not shield him or her from compelled disclosure if the matter becomes relevant to a federal lawsuit or investigation because federal courts do not give any weight to state law in non-diversity matters. Lacking clear federal precedent or statutory guidance, many federal courts have issued decisions that have provided very limited to no protection for subpoenaed journalists. A reporter who promises confidentiality to a source in order to acquire information that would otherwise be unavailable and who relies on state law to make such an agreement should not be put at professional and possibly personal peril if the reporter later is subpoenaed in a federal case where no similar protections are afforded.

There has been great confusion over whether and to what extent the federal courts recognize a reporter's privilege because federal courts in different jurisdictions have applied the law differently ever since 1972, when the United States Supreme Court decided *Branzburg v. Hayes*, 408 U.S. 665, which combined three cases where reporters had refused to identify confidential matters to a grand jury. The court, in a 5-4 decision, said that reporters and other journalists did not have a First Amendment testimonial privilege against compelled disclosure of their sources. The Court, however, opened the door a bit by stating that a bad faith harassment exception might violate the First Amendment.

In a concurring opinion that turned out to read more like a dissenting opinion, Justice Powell seized on this statement and expanded its implications by stating that a reporter who thinks his testimony implicates confidential sources without a legitimate need of law

enforcement could move to quash the subpoena; and the judge who hears the motion must balance the competing interests on the merits.

Federal courts differ significantly in their interpretation of the scope of the privilege and its application in civil and criminal contexts. Even the Supreme Court has sent mixed signals over the meaning of *Branzburg*. Recently, however, more and more federal courts have refused to recognize a reporter's First Amendment privilege. Most notably, earlier this year, in affirming the district court's contempt order requiring the incarceration of Judith Miller, the United States Court of Appeals for the District of Columbia Circuit held that there is no First Amendment reporter's privilege and that a common law privilege, if it in fact exists, is not absolute. *In Re: Grand Jury Subpoena, Judith Miller, No. 04-3138*.

Clearly, neither federal court decisions nor the *Department of Justice Guidelines for Issuance of Subpoenas to News Media*, 28 C.F.R Sec. 5010, 2005 (which apply only to criminal investigations and are not binding on the courts) are sufficient to establish a definitive, uniformly applied federal standard.

In recent years, prosecutors and other litigants around the country have pursued reporters zealously in an effort to learn the identity of their confidential sources and obtain unpublished information. News media leaders have warned Members of Congress and the public that many in the industry have reached the point where the absence of a clearly defined federal reporters' privilege is affecting their editorial decisions, which in turn affects the free flow in information to the public. Others have echoed the same or similar concerns. According to the written statement of Leo Levin (a past chair of the ABA Forum Committee on Communications Law who was speaking in his individual capacity) submitted to your Committee on July 20 during the first hearing on this subject, for almost three decades after *Branzburg*, subpoenas issued to reporters by federal courts were exceedingly rare. That has now changed. Mr. Levin said that three federal proceeding in Washington DC alone have generated subpoenas seeking confidential sources to approximately two dozen reporters and news agencies, seven of whom have

been held in contempt in less than a year. Floyd Abrams, attorney for Judith Miller, stated in testimony before this committee: “We have a genuine crisis before us. In the last year and a half, more than 70 journalists and news organizations have been embroiled in disputes with federal prosecutors and other litigants seeking to discover unpublished information; dozens have been asked to reveal their sources.”

Only two subpoenas seeking confidential source identities were issued between 1976 and 2000 and all three were quashed. In the last four years, three federal courts have affirmed contempt citations in grand jury proceedings. Penalties have been far more severe than in most past cases. For example, in 2001, Vanessa Legett served six months in jail for refusing to disclose the identity of a source in a murder; earlier this year, James Taricani, completed a four-month sentence for refusing to identify the source that provided him with a videotape of alleged corruption by public officials in Rhode Island; and most recently, Judith Miller was sent to jail for 85 days for refusing to disclose her source regarding the Valerie Plame investigation. In addition, a disturbing new trend involves the issuance of subpoenas in private litigation such as those issued in cases relating to the investigations of Dr. Wen Ho Lee, the scientist at Los Alamos Nuclear laboratories and Dr. Steven Hatfell, who was accused of involvement in the anthrax outbreak.

As stated at the beginning of this statement, the Association endorses in principle S. 1419. This legislation, as amended, requires that in order to compel a reporter to testify or produce documents in civil proceedings, a court must determine, by clear and convincing evidence, after providing a notice and opportunity to be heard to the covered person, that the testimony and/or documents are essential to a dispositive issue of substantial importance. In criminal proceedings, a court also needs to establish that there are reasonable grounds to believe that a crime has occurred. The legislation responds to the legitimate concerns law enforcement by establishing a national security exception for the identity of sources: in situations where compelled testimony or document could reveal the identity of source or include information that could reasonably be expected to lead to revelation, the disclosure of the source must be necessary to prevent imminent and

actual harm to national security; compelled disclosure would prevent such harm, and the harm clearly outweighs the public's interest in the free flow of information.

Given the new developments in the investigation of the Valerie Plame unfolding on the heels of Judith Miller's testimony regarding her sources and work products before the grand jury, it is important to point out that adoption of legislation such as S. 1419, would NOT have changed the outcome for Ms. Miller. She still would have been held in contempt of court for her refusal to testify because the Court of Appeals for the District of Columbia Circuit, in addition to holding that there is no First Amendment privilege protecting journalists from disclosing sources before a grand jury, stated that even if a common law privilege exists, it had been overcome in her case by Special Prosecutor Fitzgerald meeting the burden of showing that the information sought was "critical and unobtainable from any other source."

There is a pressing need for Congressional action. Even the courts have urged Congress to take the lead and enact a federal shield law. We are grateful that your Committee has initiated the process by holding these hearings.

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