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April 22, 2005

VIA FACSIMILE

Hon. Bill Frist
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416 Senate Dirksen Office Building
Washington, D.C. 20510

Hon. Harry Reid
United States Senate
528 Hart Senate Office Building
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Hon. J. Dennis Hastert
United States House of Representatives
235 Cannon House Office Building
Washington, DC 20515

Hon. Nancy Pelosi
United States House of Representatives
2371 Rayburn House Office Building
Washington, D.C. 20515

Re: "Free Flow of Information Act" H.R. 581/S. 340

Dear Senators Frist and Reid and Representatives Hastert and Pelosi:

I am writing to you on behalf of the Committee on Communications & Media Law of the Association of the Bar of the City of New York, a 135-year-old Bar association with over 22,000 members nationwide ("the Association"). We wish to express to you our firm support for H.R. 581/S. 340, the "Free Flow of Information Act", introduced by Congressmen Mike Pence (R-IN) and Rick Boucher (D-VA) in the House of Representatives and by Senator Richard Lugar (R-IN) in the United States Senate (S. 340) (the "Pence/Lugar Bill"). We urge its enactment. The Association has particular expertise in this area as New York has one of the nation's oldest and most utilized shield laws, and is home to many press entities.

Introduction of this bill comes at a critical time for freedom of the press in this country. The Court of Appeals for the District of Columbia has recently ruled that two reporters cited for contempt may be sent to jail for failing to identify to a grand jury their confidential news sources. *In re Special Counsel Investigation, Judith Miller*, 397 F.3d 964 (D.C. Cir., 2005) ("*In re Judith Miller*"). The court rejected altogether the existence of any constitutional privilege for a reporter in this context. While other courts have upheld the assertion of a common law privilege in the grand jury context, *e.g., the New York Times Co. v. Gonzales*, No. 04-civ-7677, 2005 WL 427911, at *32, 34 (S.D.N.Y. Feb. 24, 2005) (quashing a grand jury subpoena for a journalist's

telephone records where the government failed to overcome the qualified reporters' privilege), the holding of the District of Columbia court underscores the importance of Congressional action. Swift passage of the Pence/Lugar Bill or similar bill[1] is now vital to preserving the protection reporters and their sources have long understood to exist, a protection central to the ability of the press to perform its core functions.

The Pending Bill

The Pence/Lugar Bill is based closely on the U.S. Department of Justice's *Policy With Regard to the Issuance of Subpoenas to the News Media*, 28 C.F.R. § 50.10 (2005); a policy that has been in continuous effect for more than 30 years. By building on the largely successful operation of the Justice Department guidelines -- which we believe have been weakened by a new aggressiveness on the part of the Department in pursuing information from reporters, and by judicial support of these efforts -- the procedures provided by the Pence/Lugar Bill strike an acceptable balance between the public's interest in the free dissemination of information and the public's interest in the fair and effective administration of justice. Specifically, the Pence/Lugar Bill would:

a) Allow testimony to be compelled from a journalist in criminal cases when there is "clear and convincing evidence" that such testimony is essential to the investigation, prosecution or defense of a criminal case except for identification of confidential sources;

b) Allow testimony to be compelled from journalists in civil cases when the testimony sought is essential to resolving an issue of substantial importance except for identification of confidential sources;

c) Impose an "exhaustion" requirement on any request to obtain testimony or documents from a media entity, so that any party seeking such information must first show that it has previously attempted and failed to obtain the same information from an alternative non-media source.

d) Provide additional protection for the identity of confidential sources.

Significantly, the Pence/Lugar Bill applies only in the courts of the United States and to any Federal entity seeking to compel testimony or the production of documents. It does not preempt any existing State statutory shield law, state constitutional privilege, or common law privilege, which currently provide protection to reporters and their sources in the state courts of 48 states. It is the federal courts that are anomalous in their failure to protect confidential sources, and it is this important gap that Pence/Lugar would properly fill.

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[1] Last year, Senator Christopher Dodd (D-CT) introduced a bill, entitled the Free Speech Protection Act of 2000 that would protect the confidentiality of sources of information to journalists. S. 3020, 108th Cong. (2004). We understand that Senator Dodd has reintroduced this bill, S. 369, 109th Cong., and the Association supports both the Dodd bill and the Pence/Lugar bill, both of which provide similar protections to the press.

Discussion

A free press is central to an open and informed democratic society. To ensure an independent media, the newsgathering process itself must likewise be protected. News agencies cannot report in a thorough and critical manner unless their sources are also able to speak with complete candor, and absent concerns of exposure or reprisal.

For many years, federal courts in almost every circuit interpreted existing law to recognize a qualified reporters' privilege, requiring balancing of interests when compulsory process is used to obtain testimony and documents from the press. *E.g., Bruno & Stillman, Inc. v. Globe Newspaper Corp.,* 633 F.2d 583 (1st Cir. 1980); *United States v. Burke,* 700 F.2d 70 (2d Cir. 1983); *United States v. Cuthbertson,* 630 F.2d 139 (3d Cir. 1980); *LaRouche v. NBC,* 780 F.2d 1134 (4th Cir. 1986); *Miller v. Transamerican Press,* 621 F.2d 721 (5th Cir. 1980); *Cervantes v. Time, Inc.,* 464 F.2d 986 (8th Cir. 1972); *Farr v. Pitchess,* 522 F.2d 464 (9th Cir. 1975); *Silkwood v. Kerr-McGee Corp.,* 563 F.2d 433 (10th Cir. 1977); *Zerilli v. Smith,* 656 F.2d 705 (D.C. Cir. 1981).

These courts found, in the majority and concurring opinions in *Branzburg v. Hayes,* 408 U.S. 665 (1972), the identification of several important societal interests that are served by protecting a reporter's newsgathering activities. The courts concluded, correctly we believe, that these interests warrant the recognition of a constitutional privilege against the disclosure of a reporter's confidential sources. *See, e.g., Baker v. F & F Inv.,* 470 F.2d 778, 785 (2d Cir. 1972) (it is "fundamental to our constitutional way of life, that where the press remains free so too will a people remain free"); *Zerilli,* 656 F.2d at 710-11 ("the press' function as a vital source of information is weakened whenever the ability of journalists to gather news is impaired") (quoting *New York Times Co. v. United States,* 403 U.S. 713, 717 (1971) (Black, J., concurring)). Simultaneously, several federal courts, relying on longstanding practices that have served our country well, found a common law reporters' privilege under Rule 501 of the Federal Rules of Evidence. *E.g., Cuthbertson,* 630 F.2d 139; *Riley v. City of Chester,* 612 F.2d 708, 713-16 (3d Cir. 1979); *In re Williams,* 766 F. Supp. 358, 367-69 (W.D. Pa. 1991) *aff'd by an equally divided en banc court,* 963 F.2d 567 (3d Cir. 1991); *Gulliver's Periodicals, Ltd. v. Chas. Levy Circulating Co.,* 455 F. Supp. 1197, 1201 (N.D. Ill. 1978)

Recently, however, there has been a significant rise in the number of subpoenas issued to journalists in federal cases. That some federal courts in reviewing these subpoenas have rejected altogether the notion of *any* privilege protecting journalists and their confidential sources should be a matter of great concern. *See, e.g., In re Special Counsel Investigation,* 332 F. Supp. 2d 26 (D.D.C. 2004) (subpoenas to Matthew Cooper of Time Magazine and Tim Russert of NBC News); *Lee v. United States Dep't of Justice,* 287 F. Supp. 2d 15 (D.D.C. 2003) (subpoenas to five different journalists); *In re Special Proceedings,* 373 F.3d 37 (1st Cir. 2004); *McKevitt v. Pallasch,* 339 F.3d 530 (7th Cir. 2003) (subpoena to journalist writing about crimes in Ireland). In other cases, even when the courts have recognized a privilege, its qualified nature has rendered it ineffectual to block contempt citations against reporters. *E.g., In re Special Proceeding,* 373 F.3d 37 (1st Cir. 2004)(decision upholding contempt finding against Jim Taricani, who was ultimately sentenced to home confinement for criminal contempt for refusing to disclose a confidential source).

On February 15, 2005, the D.C. Circuit affirmed the district court's decision to hold reporters Judith Miller of The New York Times and Matthew Cooper of Time Magazine in contempt for refusing to disclose to the grand jury the identities of their confidential source(s). *In re Judith Miller*, No. 04-3138. The grand jury was investigating the leak of CIA operative Valerie Plame's name to columnist Robert C. Novak and other reporters. The court concluded that there was no First Amendment privilege protecting against the disclosure of confidential sources to a grand jury, and further held that any common law privilege that might exist (an issue not agreed upon by the panel) had been overcome by secret *ex parte* filings of the Special Counsel.[2]

This appellate decision and other recent decisions like it reflect a dangerous trend that threatens the flow of important information to the public. If followed by other circuits, these rulings could cause serious, long-term damage to the media's ability to report on contentious public policy issues. Without the promise of confidentiality, many sources will not provide information that the public needs to know, information that is necessary to hold government and other powerful institutions accountable for their actions. The increased and expansive use of press subpoenas as an investigatory tool further threatens the historic autonomy of American media institutions.[3]

Should this trend continue, the procedures in federal courts would be in conflict with the vast majority of States and the District of Columbia, almost all of which have enacted some form of a reporters' privilege. At least 31 states have done so through statute;[4] another 17 states have recognized the privilege through judicial decision.[5] In almost all of these 48 states, the privilege

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[2] Significantly, this one leak investigation has resulted in *at least* 10 separate demands for journalists' confidential sources. The exact number is not known for sure because of grand jury secrecy.

[3] *E.g.*, Scott Shane, *Anthrax Figure Wins Round on News Sources*, N.Y. TIMES, Oct. 22, 2004 (reports that as a precursor to subpoenas of the press, the Justice Department required dozens of investigators to sign waivers in the 2001 anthrax case); Adam Liptak, *Times Sues Prosecutors on Phone Records*, N.Y. TIMES, Sept. 29, 2004, at 10 (reporters' telephone records subpoenaed in a Muslim charity investigation).

[4] Ala. Code § 12-21-142; Alaska Stat. §§ 09.25.300 *et seq.;* Ariz. Rev. Stat. Ann. § 12-2237; Ark. Code Ann. § 16-85-510; Cal. Const. Art I, § 2(b); Cal. Evid. Code § 1070; Colo. Rev. Stat §§ 13-90-119, 24-72.5-101 *et seq.;* Del. Code. Ann. Tit. 10, §§ 4320 *et seq.;* D.C. Code §§ 16-4701 *et seq.;* Fla. Stat. § 90.5015; Ga. Code Ann. § 24-9-30; 735 Ill. Comp. Stat. §§ 5/8-901 *et seq.;* Ind. Code Ann. § 34-46-4-2; Ky. Rev. Stat. Ann. § 421.100; La. Rev. Stat. Ann. §§ 45:1451 *et seq.;* Md. Code Ann. Cts. & Jud. Proc. § 9-112; Mich. Comp. Laws § 767.5a; Minn. Stat. §§ 595.021 *et seq.;* Mont. Code Ann. §§ 26-1-901 *et seq.;* Neb. Rev. Stat. §§ 20-144 *et seq.;* Nev. Rev. Stat. Ann. § 49.275; N.J. Stat. Ann. § 2A:84A-21 *et seq.;* N.M. Stat. Ann. § 38-6-7; N.Y. Civ. Rights Law § 79-h; N.C. Gen. Stat § 8-53.11; N.D. Cent. Code § 31-01-06.2; Ohio Rev. Code. Ann. § 2739.12; Okla. Stat. Ann. Tit. 12, § 2506; Or. Rev. Stat. §§ 44.510 *et seq.;* 42 Pa. Cons. Stat. Ann. § 5942; R.I. Gen. Laws §§ 9-19.1-1 *et seq.;* S.C. Code Ann. § 19-11-100; Tenn. Code Ann. § 24-1-208.

[5] *Connecticut State Bd. of Labor Relations v. Fagin,* 370 A.2d 1095, 1097 (Conn. Super. Ct. 1976); *State v. Salsbury,* 924 P.2d 208 (Idaho 1996); *Winegard v. Oxberger,* 258 N.W.2d 847 (Iowa 1977); *State v. Sandstrom,* 581 P.2d 812 (Kan. 1978); *In re Letellier,* 578 A.2d 722, 726 (Me. 1990); *In re John Doe Grand Jury Investigation,* 574 N.E.2d 373 (Mass. 1991); *In re Grand Jury Subpoena,* No. 38,664 (Miss. 2d Cir. Ct. Oct. 4, 1989); *Mississippi v. Hand,* No. CR89-49-C (T-@)(Miss. 1st Cir. Ct. July 31, 1990); *State ex rel. Classic III v. Ely,* 954 S.W.2d 650, 653 (Mo. Ct. App. 1997); *State v. Siel,* 444

applies in the grand jury context. Over half of the state shield statutes render *absolute* a reporter's privilege not to disclose confidential sources.[6] And, in virtually all of the remaining statutes, the standard for piercing the reporter's privilege is strict, requiring a showing of more than simple relevancy to the proceeding, the standard now applied in some federal courts.[7] In

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A.2d 499 (N.H. 1982); *Hopewell v. Midcontinent Broad. Corp.*, 538 N.W.2d 780, 782 (S.D. 1995); *Dallas Morning News v. Garcia,* 822 S.W.2d 675, 678 (Tex. App. 1991); *Lester v. Draper,* No. 000906048 (Utah 3d Dist. Ct. Jan 16, 2002); *Utah v. Koolmo,* No. 981905396 (Utah 3d Dist. Ct. Mar. 29, 1999); *State v. St. Peter,* 315 A.2d 254 (Vt. 1974); *Brown v. Commonwealth,* 204 S.E.2d 429 (Va. 1974); *State v. Rinaldo,* 689 P.2d 392, 395 (Wash. 1984); *State ex rel. Hudok v. Henry,* 389 S.E.2d 188, 193 (W. Va. 1989); *State v. Knops,* 183 N.W.2d 93, 98–99 (Wis. 1971).

[6] Alabama, Arizona, California, Delaware, District of Columbia, Indiana, Kentucky, Maryland, Montana, Nebraska, Nevada, New York, Ohio, Oklahoma, Oregon, Pennsylvania.

[7] Alaska Stat. § 09.25.310(b) (withholding of the testimony would (1) "result in a miscarriage of justice or the denial of a fair trial to those who challenge the privilege"; or (2) "be contrary to the public interest"); Ark. Code Ann. § 16-85-510 ("Before any editor, reporter, or other writer for any newspaper, periodical, or radio station, or publisher of any newspaper or periodical, or manager or owner of any radio station shall be required to disclose to any grand jury or to any other authority the source of information used as the basis for any article he may have written, published, or broadcast, it must be shown that the article was written, published, or broadcast in bad faith, with malice, and not in the interest of the public welfare."); Colo. Rev. Stat. § 13-90-119(3) (information must be (a) "directly relevant to a substantial issue involved in the proceeding"; (b) "the news information cannot be obtained by any other reasonable means"; and (c) "a strong interest of the party seeking to subpoena the newsperson outweighs the interests under the first amendment to the United States constitution of such newsperson in not responding to a subpoena and of the general public in receiving news information."); Fla. Stat. § 90.5015(2) (information must be "relevant and material to unresolved issues that have been raised in the proceeding for which the information is sought; (b) The information cannot be obtained from alternative sources; and (c) A compelling interest exists for requiring disclosure of the information"); Ga. Code Ann. § 24-9-30 (information must be (1) "material and relevant", (2) unavailable by reasonable alternative means, and (3) "necessary to the proper preparation of the case"); 735 Ill. Comp. Stat. 5/8-907 ("all other available sources of information have been exhausted [and] disclosure of the information is essential to the public interest"); La.R.S. Ann. § 45:1453 (must be essential to the protection of the public interest); Mich. Comp. Laws § 767.5a (privilege absolute except for investigations of crime punishable by imprisonment for life); Minn. Stat. § 595.024 (there must be probable cause that the information the specific information sought (i) "is clearly relevant to a gross misdemeanor or felony", (2) that "the information cannot be obtained by alternative means or remedies less destructive of first amendment rights, and (3) that there is a compelling and overriding interest requiring the disclosure of the information where the disclosure is necessary to prevent injustice"); N.J. Stat. Ann. §§ 2A:84A-21 *et seq.* (party seeking enforcement of subpoena must show by a preponderance of the evidence that there is a reasonable probability that the subpoenaed materials are relevant, material and necessary to the defense, that they could not be secured from any less intrusive source, that the value of the material sought as it bears upon the issue of guilt or innocence outweighs the privilege against disclosure, and that the request is not overbroad, oppressive, or unreasonably burdensome); N.M. Stat. Ann. § 38-6-7 (disclosure must be "essential to prevent injustice"); N.D. Cent. Code § 31-01-06.2 (failure to disclose "will cause miscarriage of justice"); R.I. Gen. Laws § 9-19.1-3 (substantial evidence that disclosure of the information or of the source of the information is necessary to permit a criminal prosecution for the commission of a specific felony, or to prevent a threat to human life, and that the information or the source of the information is not available from other prospective witnesses); Tenn. Code Ann. § 24-1-208(c)(2)(A-C) (must be shown by clear and convincing evidence that: (A) There is probable cause to believe that the person from whom the information is sought has information which is clearly relevant to a specific probable violation of law; (B) The person

addition to the problems seen recently in cases involving the press's confidential sources, the diminished protection provided by some federal courts for other unpublished press material threatens the independence and integrity of the editorial process necessary for the press to perform its function. *E.g., Gonzales v. National Broadcasting Co.,* 194 F.2d 29 (2d Cir. 1999)(the court said that absent a privilege, "[t]he resulting wholesale exposure of press files to litigant scrutiny would burden the press with heavy costs of subpoena compliance, and could otherwise impair its ability to perform its duties--particularly if potential sources were deterred from speaking to the press, or insisted on remaining anonymous, because of the likelihood that they would be sucked into litigation").

The federal courts are out of step with the nationwide consensus that there should be protection for the newsgathering process. Aside from the great harm to the ability of the press to function effectively that is caused by these highly visible cases, the current state of the law in federal courts frustrates the States' prerogative to protect reporters and their sources. Any promise of confidentiality protected by the States is meaningless if the source's identity could nonetheless be compelled through a federal subpoena. The very purpose of the privilege, to foster reporter-source communications, is defeated if the parties cannot be certain whether their conversations are, in fact, protected under the law. "An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Jaffee v. Redmond,* 518 U.S. 1, 17-18 (1996).

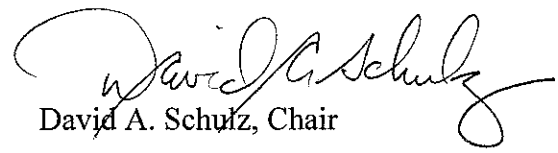
Conclusion

If no federal shield law is adopted, the ability of the media to act as an independent source of information is at risk. A statutory reporters' privilege is now necessary to safeguard the freedom and autonomy of American media institutions intended by the First Amendment. In light of recent developments, and for all the reasons presented above, we urge Congress to adopt the Pence/Lugar Bill.

Thank you for your consideration. Please let us know if we can be of any assistance securing passage of this important legislation.

Very truly yours,

Committee on Communications & Media Law



David A. Schulz, Chair

cc: New York Congressional Delegation
Bettina B. Plevan, Esq.

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has demonstrated that the information sought cannot reasonably be obtained by alternative means; and (C) The person has demonstrated a compelling and overriding public interest of the people of the State of Tennessee in the information).

COMMITTEE ON COMMUNICATIONS & MEDIA LAW

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* Took no part in the preparation or consideration of this letter.