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Transcript: Left Out in the Cold? The Chilling of Speech, Association, and the Press in Post-9/11 America

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Keywords

Constitution, Free Speech, First Amendment Rights, human rights, 9.11, terrorism

SYMPOSIUM TRANSCRIPTS

LEFT OUT IN THE COLD? THE CHILLING OF SPEECH, ASSOCIATION, AND THE PRESS IN POST-9/11 AMERICA

SEPTEMBER 20–21, 2007

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I. PANEL: CONSTITUTIONAL OVERVIEW OF POST-9/11 BARRIERS TO
FREE SPEECH AND A FREE PRESS

A. *Nadine Strossen**

I am delighted to chime in on this fascinating conversation about overview principles, and I would like to start by responding to a couple of the ideas that have been presented. First, with respect to the constitutional text, I take a somewhat different approach from the fascinating one that Dean Rodney Smolla set out. I think there is great significance to what the Constitution does say and what it does not say about special emergency powers, war powers, and so forth. Our Constitution's Framers did not include a general emergency provision of the sort that Dean Claudio Grossman talked about, which is characteristic of not only international and regional human rights treaties, but also the constitutions of other modern democracies. Those treaties and constitutions provide very stringent preconditions and strict judicial review for the exercise of emergency power.

In contrast, I think it is striking that our Framers made an apparently deliberate decision to include no general emergency exception whatsoever to the usual constitutional framework for limiting government powers and securing individual rights. I think it is apparent that this was an intentional decision because the Framers did include one very specific emergency exception. That one exception allows Congress, under very narrow circumstances, limited to "Cases of Rebellion or Invasion," to suspend the writ of habeas corpus "when . . . the public Safety may require it."¹ The fact that this "Suspension Clause" imposes such strict constraints upon the specific emergency exception that it authorizes bolsters the inference that there is no textual justification for a general emergency exception.

It is not so interesting that I, the ACLU President, reached that conclusion; that should not be surprising. I think it is far more interesting and surprising that the Supreme Court stressed that conclusion in its first post-9/11 decision, in *Hamdi v. Rumsfeld*.² I had been very nervous about what this Supreme Court was going to do post-9/11. In the Vietnam era, the Supreme Court did not decide these kinds of cases. The most recent litigated situation was from

* President, American Civil Liberties Union; Professor of Law, *New York Law School*; J.D., *Harvard Law School*, 1975; A.B., *Harvard College*, 1972.

1. U.S. CONST. art I, § 9, cl. 2.

2. 542 U.S. 507 (2004).

World War II, where the Court pays lip service to applying strict scrutiny, and yet at the same time allows blatant racial discrimination and incarceration without demanding any evidence from the government.³ This shows that regardless of how strictly the tests are formulated, they can always be manipulated or paid lip service. Moreover, the Bush Administration argued that there should be no judicial review at all of its assertions of seemingly boundless executive power in the name of the “War on Terror.” The Administration maintained that the Court should not hear any of these cases, and its fallback position was that if the Court did hear the cases, it should apply the rubber-stamping-type deference of the sort that we had seen in the past. So, although *Hamdi* was hardly a perfect decision from a civil libertarian’s perspective, it was such an enormous relief given the historical background. I could not agree more with both of my co-panelists that over time there has been an evolution of more judicial protection, for more individual rights, in more circumstances, including emergency circumstances.

What I thought was particularly striking was that, of all the different opinions in the *Hamdi* case, the one that most strongly stood up for individual rights protected by courts, even in times of emergency, was the dissent authored by Justice Antonin Scalia, with the strange bedfellow of Justice John Paul Stevens joining the opinion.⁴ This is also very encouraging. That the Court’s most outspoken conservative joined the Court’s most outspoken liberal shows that these issues of individual liberty and checks against government abuses of power do not fall along the usual ideological or partisan political divides. One of the points that the Scalia-Stevens opinion heavily stressed was the point that I noted earlier, that the Constitution itself provides only one exception for only one right in times of war: Congress’s power to suspend the writ of habeas corpus.

Dean Rodney Smolla stopped talking about precedents somewhere around the late-1960s, or perhaps at the beginning of the 1970s, so he did not talk about what I think is the most important precedent for free speech protection in times of war, the *Pentagon Papers* case.⁵ That case took place in 1971, while the United States was still engaged in the Vietnam War. The Nixon Administration made very serious claims about how publishing the Pentagon Papers would undermine the war effort and national security. Notably, these claims were accepted by not only the dissenting Justices, but also two Justices

3. *Korematsu v. United States*, 323 U.S. 214 (1944).

4. *Hamdi*, 542 U.S. at 554 (Scalia, J., dissenting).

5. *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

in the majority. All five of these Justices accepted the Administration's claims that there would be a series of specific harms that would occur through the publication of the Pentagon Papers, including killing of American soldiers overseas and interference with diplomatic efforts to end the war. There is a very short so-called "*per curiam* opinion" for the Court as a whole, followed by nine separate opinions. Although a majority of five Justices actually agreed with the government's assertion that the publication of these papers would lead to enormous harms, including undermining national security, six Justices still voted against restricting freedom of speech in that case.

As other commentators, including Dean Rodney Smolla and Professor Thomas Healy, have suggested, even though the tests for various kinds of free speech restrictions are formulated somewhat differently, they essentially are all variations on the theme of strict scrutiny. Therefore, while the Pentagon Papers case specifically addresses prior restraints, and while *Brandenburg v. Ohio*⁶ specifically addresses incitement, they both use versions of strict judicial scrutiny. The details of the Court's analytical framework in each of these particular factual contexts may be different, but the overall concept is the same. Any restriction on freedom of speech is presumptively unconstitutional, and the government must bear a very heavy burden of proof, an appropriately heavy burden of proof, to overcome that presumption of unconstitutionality.

Strict scrutiny is, of course, a two-part test. First, the government must show that there is an interest of compelling importance. Second, the government must show that the restriction is narrowly tailored, indeed necessary, in order to protect or promote that compelling interest, which in the post-9/11 situation is national security. The courts often say that the government has to use the least restrictive alternative. If it could promote national security without such a heavy invasion into First Amendment freedoms, then the government has to use that less restrictive alternative.

One thing that I like about this strict scrutiny test is that it reflects just plain common sense. After all, why should the government get the power to restrict our freedom if it is not necessary, if the government could effectively promote our national security with less of an invasion on our freedom? Why should we sacrifice freedom when that sacrifice is not necessary to promote national security? That would not be a logical tradeoff. Therefore, I especially

6. 395 U.S. 444 (1969).

appreciate one of the recommendations from the unanimous report of the bipartisan National Commission on Terrorist Attacks upon the United States, commonly known as the Citizens' Commission on 9/11, which essentially said that this form of strict judicial scrutiny should be used as a matter of good common sense, good policy, and good governance.⁷

The first prong of that test is very easy to satisfy. It was easy to satisfy in the Pentagon Papers case, and it is easy to satisfy post-9/11: protecting national security is a compelling interest. Where the rubber hits the road, and where the debate occurs, regards that second prong: is this measure actually necessary? In addressing the second prong, we should consider that many of the measures that are touted as advancing national security have been criticized, including by national security experts, as not even being effective, let alone necessary. Worse yet, too many such measures are even counterproductive to national security, according to national security experts. These concerns specifically apply to many of the post-911 First Amendment restrictions.

These kinds of considerations were cited in a number of the separate opinions in the Pentagon Papers case. As several Justices observed in that case, national security and freedom of speech go hand in hand. When the government denies the public access to information, which is the common theme of so many of the First Amendment violations we are fighting now, it actually undermines national security. Let us consider a few of the statements that the Supreme Court issued in this vein in the Pentagon Papers case, because it is the leading precedent. These statements are completely applicable to the current situation. I hope that when these issues get to the Supreme Court, the Court will be guided by these kinds of statements. Justice Hugo Black wrote: "The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic."⁸ As Congressman Scott noted earlier, even Congress cannot get basic information from the current Administration, and our elected representatives cannot make rational and informed decisions about national security if they do not get this basic information.

Justice William O. Douglas expanded on this core insight by noting that our elected representatives cannot and will not correct their mistakes so long as the mistakes remain hidden under a veil of

7. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 394-95 (2004).

8. *N.Y. Times*, 403 U.S. at 719.

secrecy imposed for the asserted purpose of promoting national security, but that really had a completely different purpose.⁹ Government officials are perennially tempted to use government secrecy to cover-up embarrassing information, which we saw when one of my heroes, Coleen Rowley, blew the whistle on cover-ups of mistakes and misconduct in the FBI. Cautioning against such abuse in his opinion in the Pentagon Papers case, Justice Douglas wrote, “Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors.”¹⁰ He goes on to say, “The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information.”¹¹ In light of history, we have to be alert to the pattern of how and why the government actually uses its powers to impose secrecy. Is the power used to protect “We the People,” or is it really a cover-up for mistakes or misconduct by government officials?

Justice Potter Stewart’s opinion in the Pentagon Papers case contained the most subtle, and I think the most intriguing, argument about the negative interrelationship between government secrecy and national security. He explained that a system of excessive secrecy quickly deteriorates into one, seemingly paradoxically, of inadequate secrecy. As he stated:

When everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical . . . and to be manipulated by those intent on self-protection or self-promotion. . . . [T]he hallmark of a truly effective internal security system would be the maximum possible disclosure, recognizing that secrecy can best be preserved only when credibility is truly maintained.¹²

These general insights about the positive impact that reducing secrecy has on national security were specifically endorsed by the bipartisan Citizens’ Commission on 9/11. The Commission determined that unjustified government secrecy, including over-classification, had undermined national security pre-9/11. It suggested that if more information had been more widely shared, not only among government agencies, but also with the public, the press, and Congress, then there would have been a greater chance of connecting the dots, potentially even averting the terrible tragedy on 9/11. Therefore, moving forward, in the interest of preventing another such catastrophe, the 9/11 Commission expressly

9. *Id.* at 720–24 (Douglas, J., concurring).

10. *Id.* at 724.

11. *Id.* at 723–24.

12. *Id.* at 729 (Stewart, J., concurring).

recommended more government openness. It said, “Secrecy stifles oversight, accountability, and information sharing. Unfortunately, all the current organizational incentives encourage over-classification. This balance should change”¹³ I have to underscore that this recommendation was made not in the spirit of promoting civil liberties, which is the ACLU’s mandate, but rather in the spirit of promoting national security. In short, this is a vivid example of the mutually reinforcing relationship between First Amendment freedoms and national security.

Some of the Justices’ individual opinions in the Pentagon Papers case recognize another fundamental constitutional principle at stake. Protecting the free flow of information and countering undue government secrecy are essential underpinnings, not only of individual freedom, but also of our whole government system of checks and balances. A free press that has access to, and the right to publish information about Executive Branch policies, is a critical pillar of both congressional oversight and judicial review. Conversely, when the Executive Branch stifles or withholds information from the other branches of government, as well as from the public, that corrodes our fundamental political system, as well as individual freedom. Unfortunately, this is exactly what the Executive Branch has been doing since 9/11, as Congressman Scott lamented. In fact, this Administration has been so stubborn in refusing to provide basic information to Congress, and so disdainful of Congress’s requests for information, that it has earned the criticism of even conservative Republicans, who substantively support the Administration’s policies. As they complain, the Administration’s withholding of information undermines their ability to perform their essential functions as our elected representatives, including their responsibilities to maintain oversight of the Executive Branch.

In my limited time, I would like to mention two illustrations of this vital interrelationship between the First Amendment freedoms and our government system of checks and balances. I am going to focus on the courts because under the structure of the Constitution, the courts are designed to serve as the ultimate safety net, especially at times of crisis when the branches of government that are politically accountable tend to be timorous and to act based on expediency rather than principle.

13. NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT: EXECUTIVE SUMMARY, http://www.9-11commission.gov/report/911Report_Exec.htm (last visited Apr. 9, 2008).

As I previously mentioned, since the 9/11 terrorist attacks, many federal judges fortunately have ruled in favor of the ACLU's cases that challenge abuses of government power and defend individual liberty, including freedom of speech. The first illustration is one very important victory that we won exactly two weeks ago today, when a federal judge struck down a provision of the Patriot Act under both the First Amendment and a separation of powers principle,¹⁴ specifically the judicial review powers introduced by *Marbury v. Madison*.¹⁵ In *Doe v. Gonzales*,¹⁶ Judge Victor Marrero of the U.S. District Court for the Southern District of New York quoted from *Marbury v. Madison* repeatedly in his opinion invalidating the section of the Patriot Act that authorizes secret surveillance under National Security Letters or "NSL's." This provision imposed gag orders on all Internet Service Providers, librarians and others who receive NSL's seeking information about their patrons' communications. Judge Marrero struck down this provision specifically because of its tight constraints on judicial review. He stressed the vital interrelationship between the judicial review power and the First Amendment freedoms that the NSL provision violated. For example, Judge Marrero wrote:

The Constitution was designed so that the dangers of any given moment would never suffice as justification for discarding fundamental individual liberties or circumscribing the judiciary's unique role under our governmental system in protecting those liberties and upholding the rule of law. It is the judiciary's independent function to uphold the Constitution even if to do so may mean curtailing Congress's efforts to confer greater freedom on the executive to investigate national security threats.¹⁷

In short, through the power of judicial review, Judge Marrero was able to enforce both First Amendment rights and the judicial review power itself, reinforcing the positive interrelationship between them.

As a second illustration of the relationship between the First Amendment and judicial review, let me give you an example of the dark side, the glass half-empty perspective. It shows how the judicial review power can be thwarted through undue Executive Branch secrecy, thus undermining both checks and balances and First Amendment freedoms. I am specifically referring to how judicial review power has been completely frustrated to an alarming extent by

14. *Doe v. Gonzales*, 500 F. Supp. 2d 379 (S.D.N.Y. 2007).

15. 5 U.S. 137 (1803).

16. *Gonzales*, 500 F. Supp. 2d 379.

17. *Id.* at 414–15.

the government's abuse of, and many courts' acceptance of, the "state secrets privilege." As a result, the Executive Branch has effectively been immunized from any judicial review of even the most egregious violations of constitutional rights, including First Amendment freedoms. Such abuses are analyzed in the powerful new report put together by James Tucker and his ACLU colleagues, which refers to such acts as "governing in the shadows."¹⁸ While this topic is not as well known as it should be, Louis Fisher has written a book on this subject, *In the Name of National Security*,¹⁹ which I recommend to you.

In its origin, the state secrets privilege was designed to protect particular pieces of evidence that were shown to be dangerous to national security if they came to light. That narrow application has been completely expanded, distorted, and exaggerated, so the privilege is now being used systematically to completely dismiss cases before the introduction of any evidence, even cases claiming enormous abuses of the most fundamental human rights, including rendition to countries that we know engage in torture.

This has become such a serious problem that, after considerable deliberation and risk analysis, the ACLU decided to ask the United States Supreme Court to review this issue in two cases, one of which directly involved the First Amendment.²⁰ The ACLU reached this decision because we believe that the overblown use of the state secrets privilege is such a serious threat to all freedoms, including First Amendment rights. Further, we believe that there is a likelihood that the Supreme Court, being part of an independent branch of government with an investment in defending checks and balances, will re-examine and cut back on the abuse of this privilege to undermine both individual rights and the judicial review power to enforce individual rights. Let me read just the closing lines in one of the ACLU's briefs seeking Supreme Court review of this issue, to give you a flavor of what is at stake. Under cover of the government's distorted, exaggerated view of the state secrets privilege, our brief writes,

. . . [T]he government may engage in torture, declare it a state secret, and by virtue of that designation avoid any judicial

18. JAMES THOMAS TUCKER & SOPHIE ALCORN, AM. CIVIL LIBERTIES UNION, RECLAIMING OUR RIGHTS: DECLARATION OF FIRST AMENDMENT RIGHTS AND GRIEVANCES 2 (2007), http://www.aclu.org/symposium/reclaiming_our_rights.pdf.

19. LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE *REYNOLDS* CASE (2006).

20. *El-Masri v. United States*, 479 F.3d 296 (4th Cir.), *cert denied*, 128 S. Ct. 373 (2007); *Edmonds v. U.S. Dep't of Justice*, 323 F.Supp.2d 65 (D.D.C.), *aff'd* 161 Fed. App'x. 6 (D.C. Cir.), *cert. denied* 46 U.S. 1031 (2005).

accountability for conduct that even the government purports to condemn as unlawful under all circumstances. Under a system predicated on respect for the rule of law, the government has no privilege to violate our most fundamental legal norms, and it should not be able to do so with impunity based on a state secrets privilege that was developed to achieve very different ends.²¹

In conclusion, I would like to return to the Pentagon Papers case, the leading case on press freedom, the First Amendment, and national security. I would like to quote the federal trial judge who issued the first opinion in the case, Judge Murray Gurfein of the U.S. District Court for the Southern District of New York.²² I think it is very notable that he was a former prosecutor who had a significant background in military intelligence. It is especially noteworthy that, with that background, Judge Gurfein strongly rejected the government's claims that First Amendment principles should yield to national security concerns, rejecting the notion that these are antithetical concepts. As he declared:

The security of the Nation is not at the ramparts alone. Security also lies in the value of our free institutions. A cantankerous press, an obstinate press, an ubiquitous press must be suffered by those in authority in order to preserve the even greater values of freedom of expression and the right of the people to know. . . . Yet in the last analysis it is not merely the opinion of the editorial writer or of the columnist which is protected by the First Amendment. It is the free flow of information so that the public will be informed about the Government and its actions.²³

II. PANEL: RESTRICTIONS ON FREEDOM OF ASSOCIATION THROUGH MATERIAL SUPPORT PROHIBITIONS AND VISA DENIALS

A. *David Cole**

I am delighted to be here at the *Washington College of Law*, one of the nation's leaders in fighting for human rights and educating on the subject of human rights. I am also honored to be on a panel with representatives of the American Civil Liberties Union and PEN American Center. One of my first cases as a young lawyer at the Center for Constitutional Rights was working with PEN American

21. Petition for Writ of Certiorari, *El-Masri*, 128 S. Ct. 373 (No. 06-1613).

22. *United States v. N.Y. Times Co.*, 328 F. Supp. 324 (S.D.N.Y.) *rev'd en banc per curiam*, 444 F.2d 544 (2d Cir.), *rev'd*, 403 U.S. 713 (1971).

23. *Id.* at 331.

* Professor of Law, *Georgetown University Law Center*, J.D., *Yale Law School*, 1984; B.A., *Yale University*, 1980.

Center and the ACLU in defending Margaret Randall. Margaret was an American-born poet who obtained Mexican citizenship in the 1960s and lived abroad for a long time. She wrote many books very critical of the United States and when she decided she wanted to come back, the United States government initiated deportation proceedings against her for her political views.²⁴ She was accused of having advocated world communism in her poetry and her journals. This was not 1954, but 1984. But her case was a holdover from the guilt by association days of the McCarthy era.

In the 1950s, we were afraid of Communism. We were afraid, in particular, of the Soviet Union, the world's second greatest superpower, which was armed with masses of nuclear warheads aimed at all our largest cities. As a result, we fought the Cold War, engaged in espionage, proxy wars, and an arms race. We also took aggressive preventive measures at home. The principal preventive measure of that period was guilt by association. We made it a crime to be a member of the Communist Party, and we created a whole administrative scheme to implement and enforce this notion of guilt by association.

There were a handful of criminal prosecutions of some leaders of the Communist Party, and they had a substantial chilling effect. Yet more effective than the criminal prosecutions were the administrative mechanisms created to make sure that this theory was infused deeply throughout society. President Truman issued an Executive Order that required loyalty inquiry boards to investigate the political ideologies, affiliations, and magazine subscription practices of virtually all federal employees.²⁵ Many private businesses that worked with the federal government also had to undertake these loyalty inquisitions. The House on Un-American Activities Committee ("HUAC") held congressional hearings, and encouraged the development of a partnership between public and private entities in the name of political repression. The HUAC would "out" people as communists and then private industry, notably Hollywood, would blacklist those individuals from getting any jobs. In the end, millions of Americans were affected. It is now well accepted that guilt by association was a gross overreaction adopted in the name of prevention.

Today, the threat is terrorism, not communism. And as a doctrinal matter at least, guilt by association is barred by the First and Fifth

24. *Randall v. Meese*, 854 F.2d 472 (D.C. Cir. 1988).

25. Exec. Order No. 9835, 12 Fed. Reg. 1935 (Mar. 21, 1947).

Amendments. But we nonetheless see a remarkably similar reaction in place. Instead of targeting association expressly, the government targets “material support” for terrorist organizations. But the essential features of this prohibition are the same. The government employs an extremely broad criminal substantive standard—material support—which encompasses any activity in association with a group classified as a terrorist organization. Giving the organization money is the most obvious example of material support, but even the volunteering of one’s time also constitutes material support.

We not only have a broad criminal statute,²⁶ but we also have administrative and public-private partnership schemes for implementing this prohibition. The Secretary of State, through an administrative process, designates foreign terrorist organizations, and the Secretary of the Treasury, through another administrative process, identifies another list of proscribed terrorist groups, which now includes over 1,000 names. The Treasury Department also facilitates public-private partnerships by setting forth “voluntary guidelines” that charities, foundations, and businesses are encouraged to employ when they are doing their business.²⁷

Attorney General John Ashcroft called this the “paradigm of prevention.”²⁸ He argued that when you are facing terrorists who are willing to commit suicide to inflict mass casualties on civilians, it is not enough to bring them to justice after the fact; we have to prevent the next terrorist attack from occurring. Of course, we all want to prevent the next terrorist attack from occurring; no one wants to see another 9/11. But the measures that the Administration has taken in furtherance of this preventive paradigm are quite extreme.²⁹ They include preventive detention. And in my view, the material support statute is a form of preventive detention.

The material support statutes hold people responsible, not for what they have done in the past—the material support itself may be negligible and there need be no showing that it has actually furthered any kind of terrorist activity— but rather out of the fear that they or those they support might do something bad in the

26. 18 U.S.C. § 2339B(a)(1) (Supp. IV 2004).

27. Anti-terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities, 71 Fed. Reg. 63,838 (Dep’t of the Treasury Oct. 31, 2006).

28. John Ashcroft, Att’y Gen., Dep’t of Justice, Remarks at the Council on Foreign Relations (Feb. 10, 2003), <http://www.usdoj.gov/archive/ag/speeches/2003/021003agcouncilonforeignrelation.htm>.

29. See generally DAVID COLE AND JULES LOBEL, LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR (2007) (cataloguing compromises on the rule of law prompted by Bush administration measures in the “war on terror”).

future. As such, these statutes permit a kind of de facto preventive detention, implemented through the rubric of the criminal law.

The material support statutes raise a host of constitutional problems, both in terms of how groups and individuals get designated as terrorist in the first place, and with respect to the sanctions then imposed on anyone who supports a designated entity. The initial designation process is a largely secret administrative process. Groups first learn that they have been designated as a terrorist group through a notice published in the Federal Register. Groups and individuals overseas may be listed without any notice or opportunity to respond whatsoever. Groups and individuals in the United States are entitled by due process to some notice and opportunity to respond, but the opportunity is largely a sham; groups are not permitted to confront their accusers, are not provided a hearing, and are typically designated on the basis of secret evidence that they have no chance to see or rebut. Designations are simply announced, and the government publishes no statement of reasons or explanation for why any particular entity was designated.

A designated entity may bring a challenge to its designation in court. But it cannot introduce any evidence in that challenge, and it generally cannot see the government's evidence, which if classified is presented to the judge behind closed doors and outside the presence of the designated entity or its lawyers. Not surprisingly, no organization has successfully challenged its designation as a terrorist group.

I am currently representing a group that has not yet been designated but is under investigation for possible designation, and I will describe briefly the process that we have been through. About two years ago, the federal government shut down the organization, froze all its assets, and seized all its documents and records. It did so without any finding—or even allegation—of wrongdoing. The fact of the investigation was enough.

Because this is an American group, as noted above, it is entitled to some notice, and to submit in writing materials in its defense. To that end, the government produced a short stack of documents that it said constituted its “administrative record” regarding the organization. Approximately 95 percent of the documents do not even name the organization that we are representing. There are indictments of other organizations, and miscellaneous documents referring to other organizations. But there is no explanation as to what these documents have to do with our client, or of what, if anything, our client is alleged to have done to warrant being placed

under investigation. We are left to guess in the dark at the government's concerns.

But it is worse than that. The government has also informed us that it is relying on classified evidence that it cannot tell us about. So we must defend the group without knowing the accusations against it, and without seeing most of the evidence in the file.

We do have an opportunity to submit whatever we want—in writing—in our defense. The only problem is that we do not know what the charges are, what the evidence is, and they have all our documents. (Laughter) So we wrote to them and said, “We would actually like to get access to our own documents so that we might prepare a defense.” They replied that the U.S. Attorney sees those, not Treasury, so you will have to deal with the U.S. Attorney. When we wrote to the U.S. Attorney, he said, “I do not have any interest in the Treasury Department and so I am not going to let you see the documents.” So much for due process in the designation of terrorist groups.³⁰

The second set of constitutional issues raised by the material support statutes relates to the prohibitions on support that are triggered by a designation. The principal concern here is that because the prohibition on “material support” is so sweeping, it effectively imposes guilt by association. An example is another case I am handling. I represent the Humanitarian Law Project, a thirty-year-old human rights group in Los Angeles, which has been working with the Kurds in Turkey for a long time. The Kurds are a much-abused group in Turkey. The Humanitarian Law Project was working with them to teach them how to advocate for human rights, for example, training them in petitioning the United Nations, going to the Human Rights Committee, and putting forward a case.³¹ In particular, the Project worked with the Kurdistan Workers Party because it is the principal political representative of the Kurds in Turkey. In 1997, however, the United States designated the Kurdistan Workers Party as a terrorist organization. It then became a crime for my clients to continue to teach the Kurdistan Workers Party how to advocate for human rights. Even though my clients had no intention of furthering terrorism, even though they were actually seeking to *discourage* a resort to violence by encouraging the use of

30. In May 2007, the government provided us with a DVD containing copies of the organization's seized records – but it did so under a protective order barring us from sharing the documents with our clients absent another court order. Thus, the government's position is that the clients cannot even review their own documents for their defense without getting specific document-by-document permission.

31. *E.g.*, Humanitarian Law Project v. Mukasey, 509 F.3d 1122 (9th Cir. 2007).

peaceful means to resolve conflicts, that is no defense. Material support is prohibited regardless of its purpose, and is defined to include all “training,” all “expert advice and assistance,” and all “services” of any kind whatsoever. The United States Court of Appeals for the Ninth Circuit has declared these aspects of the material support statute unconstitutional, finding that they are hopelessly vague and potentially criminalize a wide range of speech and associational activities.

The material support statutes raise First and Fifth Amendment concerns. The First Amendment guarantees the right to associate with groups that engage in both lawful and unlawful activity, as long as one does not intentionally further their unlawful activities. And yet these statutes do not in any way distinguish between support that is designed to further illegal activities and support that is designed to further legal activities.

Second, these statutes raise concerns of vagueness and overbreadth. What do the prohibitions on training, expert advice and assistance, or services really bar? If they are as broad as they seem, then they are constitutionally overbroad, because they prohibit virtually all First Amendment activity in support of one of these organizations. The government tries to avoid that conclusion by contending that individuals are not prohibiting advocacy “on behalf of” a designated organization. But at the same time, the government maintains that the prohibition on providing “services” encompasses anything done “for the benefit of” the organization. So one can advocate on behalf of a group, but if it turns out that one was advocating “for the benefit of” the group, a crime has been committed. And if one thinks his advocacy is on behalf of, but the jury finds that it was actually for the benefit of, he may go to jail for fifteen years.

These laws—imposed in secret designation processes, and carrying sweeping criminal prohibitions—cause a tremendous chilling effect throughout the Muslim community. As these laws demonstrate, the preventive paradigm pushes the government to sweep broadly because it does not know where the threat lies, and it is so afraid of the threat that it is willing to impose penalties on a broad spectrum of actors. I do not think that is a very *effective* strategy for a variety of reasons that I would be happy to go into in question-and-answer, but I am certain that it is an *unconstitutional* strategy. Thank you very much.

III. PANEL: CENSORING AND PROSECUTING THE PRESS—AN
ASSESSMENT OF REPORTERS' SHIELD LEGISLATION

A. *Steven D. Clymer**

I would like to start by thanking the *American University Law Review*, and the American Civil Liberties Union for inviting me to participate in this panel. It is a real privilege to be involved in issues that are as timely and as important as those that are being discussed here.

As the agenda indicates, I have two careers. I am a professor of law at Cornell Law School, and I am also a federal prosecutor with the Department of Justice. In connection with the latter position, I want to make one thing clear. What I say today is my own opinion, not the position of the Department of Justice. That is a very important point because if I say anything that you think is intelligent or insightful, please give me full credit and not the Department of Justice. (Laughter)

I want to be a little different than the other speakers here today. Most of the speakers, with the exception of Jim Tucker, have taken a position consistent with the ACLU's position on the topic. He played devil's advocate for us. I am not going to play devil's advocate; I am going to be the devil's advocate. (Laughter) I am going to tell you that the ACLU position on the reporters' privilege is misguided for a number of reasons. I am going to give you five reasons why I think it is wrong. I will try to be brief because I would like to give you all an opportunity to persuade me that I am wrong or to tell me that I am right.

My first point has to do with the title of this panel. This panel is entitled "Censoring and Prosecuting the Press." That title really bothers me because the issues about the reporters' privilege have nothing to do with either press censorship or with prosecuting the members of the press. Characterizing it that way may be a nice rhetorical flourish, but it distorts, rather than illuminates the issues that we ought to be talking about. What is at issue with reporters' privilege is something quite different. At issue is whether reporters should have a privilege, not available to most other witnesses, to refuse lawful court orders that they testify before a grand jury or before a court.

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In the case of most witnesses, when they get a court order to testify they must testify or go to jail. They must testify even if that testimony may embarrass them, humiliate them, if it may be against their interest, or if it may incriminate their family members or their friends. That is the rule for everybody in this country. The objective of the reporters' privilege is to treat reporters differently. My first point is that we must be honest about what we are talking about. We are talking about whether we should carve out a special legal rule that applies to reporters, but does not apply to most other witnesses.

As I understand it, the argument for this special privilege is not to benefit reporters, nor to benefit their sources. The argument is that it will benefit the public because it will increase the free flow of information to the public. That argument has two steps. Step one notes that confidential sources are the lifeblood of a free, independent, and vigorous press. Without confidential sources, reporters are reduced to simply regurgitating official versions of news events, versions that may be incomplete or inadequate. I agree wholeheartedly with that opinion. I do not take issue with the claim that confidential sources are essential in a free country and that the press must be able to rely on confidential sources.

It is the second step in the argument where there is a problem. The second step of the argument states that unless reporters can give their sources absolute, unqualified assurances of confidentiality, those sources will no longer give information to reporters. My second point is that this proposition is not supported by any solid empirical evidence. There is no proof that a federal journalists' privilege is necessary to persuade sources to leak information. To put it differently, there is no evidence that the absence of such a privilege, which has been the law for years and years, prevents sources from coming forward.

Today Congressman Pence reminded us about the Watergate leak and recalled how important that leak was. He asserted that the law was different then. He was flat out wrong about that; the law was not different. The law at that time was the same as the current law. The Supreme Court has never recognized a First Amendment privilege or a common-law privilege in the context of criminal investigations or grand-jury investigations. Congress has never recognized a federal reporters' privilege, so the law has not changed.

Yet for many years, including very recently, we have had extremely important leaks. In fact, even with the prominence of the reporters' privilege in the news reports, we have seen some of the most important leaks in decades come very recently, including leaks about

secret CIA prisons in Europe, leaks about warrantless wiretapping, and leaks about abuses at Abu Ghraib prison. The absence of a federal reporters' privilege did nothing to deter those sources from leaking that very important information, and nothing to keep you, the public, from getting that information. My second point is that it is not clear that an absolute guarantee of confidentiality is necessary to have sources leak information. This makes sense because there is an extremely small possibility that a reporter will be subpoenaed to give testimony about the source. Not only is it very unlikely to happen, but in fact, many sources may never even ask for that sort of assurance. We do not need that sort of assurance to get the free flow of information to the public.

My third point is that at the same time a reporters' privilege is not necessary, to have it would be very costly. There are real costs in terms of the loss of reliable, probative evidence to litigants, to courts, and to grand juries by having a reporters' privilege. What does that mean on the ground? It means people who are civil litigants and who have suffered damages would be unable to make their claims. Steven Hatfill, whose reputation has been destroyed by leaks in the press, would be unable to recover despite the fact that those leaks may have violated federal law.³² It means criminal defendants may be unable to establish their innocence in court because they cannot gain access to exculpatory evidence that might be in a reporter's possession. It means that grand juries would not be able to solve crimes, and that courts and trial juries would be denied evidence important to make decisions about the guilt or innocence of criminal defendants.

My fourth point regards the claim that it is the public that benefits from the reporters' privilege. In fact, the party that will benefit enormously from a reporters' privilege is the government official who improperly leaks information in violation of the law. Whether we want to admit it or not, most whistleblowers are not Good Samaritans. Many whistleblowers have their own private manipulative agendas for leaking information to the press. Let me give you some examples.

Suppose as a federal prosecutor, I am doing a criminal investigation in front of the grand jury and I do not have enough evidence to indict a person. However, I really want to get this target because I do not like this target; I think he is a crook, but I am frustrated because I cannot indict him. So I could pick up my telephone, call a reporter, and leak secret grand-jury transcripts to that reporter who could now write a story that would destroy the

32. *Hatfill v. N.Y. Times Co.*, 416 F.3d 320 (4th Cir. 2005).

career or the reputation, or both, of this target. What does a reporters' privilege do in this situation? It guarantees that I will never be prosecuted for that crime. If a congressman, for purely partisan reasons, wants to leak classified information, perhaps to influence an election that is coming up, he can now have one of those off-the-record conversations with a reporter. If there is a reporters' privilege, he can sleep soundly at night knowing that he is immune from prosecution.

Why does it immunize a leaker from prosecution? If the investigators go to the leaker, the leaker can assert his Fifth Amendment privilege and not have to give any information. The reporter, if there is a reporters' privilege, can assert the reporters' privilege and not have to give any information. If it is a two-party conversation, there is no other source of information to solve this crime. The people who will benefit from a reporters' privilege, other than supposedly the public, are government officials with access to secret information who decide to violate the laws and leak that information for their own personal or political agendas.

Those are my first four points; let me summarize them quickly. Number one, let us be honest that what we are talking about. It is not prosecution, it is not censorship; it is whether reporters should enjoy some special privilege generally unavailable to other witnesses. Number two, it is not necessary to encourage leaks to have a reporters' privilege; leaks occur all the time without the privilege and have for many years. Number three, a journalist's privilege is very costly and it is going to necessarily result in injustices in both the criminal and civil justice systems. And fourthly, such a privilege will safeguard government officials who illegally leak information for their own purposes. I will assume that some, or perhaps even all of you, are not persuaded by any of those assertions.

I also want to raise a fifth argument. I want to engage you on a value that I have and I suspect that all of you hold; a value of protecting the First Amendment. Because you are here at a conference about the First Amendment, I am going to bet that all of you value the First Amendment and are interested in protecting the free flow of information to the public. In other words, you are opposed to legal rules that prevent information from coming to the public. I want to persuade you that the reporters' privilege is that very thing. The reporters' privilege is a rule that will deny members of the public very important information they ought to have, information about the way the government operates and other newsworthy stories.

Here are several potential newsworthy stories. Story number one: High-level Executive Branch officials conspire together to discredit a critic of the Administration. As part of their plot, they decide to selectively leak information, some of which may be classified, to members of the press. Story number two: A prominent criminal defense attorney violates a court order and releases secret grand-jury testimony in violation of the court order, thereby destroying the reputations of people who gave that grand-jury testimony. In court, the attorney then falsely denies that he leaked the information and, in fact, accuses the prosecution of leaking the information, thereby trying to obstruct justice in a criminal case. Story number three: The government is investigating a successful scientist as a possible threat to national security. Before any charges are brought, government officials leak information about their investigation, which destroys the career and reputation of the scientist.

I think we could all agree that all three of those stories are stories you would want to read about in the newspaper; we would want to know what is going on in those cases. Surely we would want to know about high-level government officials plotting to discredit a critic, a rogue criminal defense attorney trying to obstruct justice, and government officials who leak information to destroy a scientist's career without the presence of any charges against him.

You probably have figured out that these stories are all true. The first story is the Administration's leak of information about Joseph Wilson, a former ambassador, who was a critic of the Bush Administration, in what we now call the Valerie Plame affair. The second story is the BALCO leak investigation, that Professor Eliason has written about, where a criminal defense attorney named Troy Ellerman violated a court order and released grand-jury information. He then lied about it to the court and obstructed justice when he accused the government of leaking the information he himself had leaked. The third story could be the Wen Ho Lee story, who filed a Privacy Act suit³³ because information about his investigation of stealing secrets about U.S. nuclear arsenals and giving them to China was leaked, or it could be the Stephen Hatfill story, the scientist who was suspected in the anthrax mail investigation and has also filed a Privacy Act suit.

All these stories have something in common. In all these cases, a well-financed entity has fought tooth and nail to keep information about these leaks from the public, and consequently has tried to deny

33. *Lee v. Dep't of Justice*, 413 F.3d 53 (D.C. Cir. 2005).

the public free access to the information. It was not the government; it was not criminal defense attorneys; it was the press organizations. Those organizations tried to conceal the true nature of the relationship between Administration officials and friendly reporters in the Plame investigation. They tried to keep the fact that Troy Ellerman was working with reporters who were fully aware of his crimes, but yet continued to publish stories and work with him regarding the disclosed grand-jury information. They have tried to keep from you the identity and the circumstances of the leaks in *Lee v. Department of Justice*³⁴ and *Hatfill v. New York Times Co.*³⁵ cases. The tool that the press organizations have used to try to conceal that information from you is the reporters' privilege by presenting claims in court that a reporters' privilege protects the information.

My final point is that press organizations correctly make the argument that the substance of leaked information is important for an educated public. I agree with that, but at the same time, the circumstances of the leaks and the identity of the leakers are also important newsworthy facts for the public to know. The reporters' privilege conceals from the public information about the circumstances of the leak; what happened, for example, in the Plame case or the other cases, and the identity of the leakers; things that are also very newsworthy.

I do not mean to suggest any bad intent or bad motive on the part of the press. My point is that if our criterion is free flow of information to the press, there are costs to having a reporters' privilege and the cost is very high, for two reasons. First, it may prevent us from holding government officials accountable for their improper actions. Second, as the BALCO case made very clear, it may also prevent us from holding the press accountable for its conduct, from knowing what sort of relationship reporters are forming with leakers and what sort of guarantees reporters are making. That information is also important to have in a free society.

Justice Brandeis once said "sunlight is . . . the best of disinfectants" for a government.³⁶ A journalist's privilege blocks that sunshine by preventing the public from knowing about circumstances of leaks and the identity of leakers. It protects government officials who make those leaks. As the BALCO case makes clear, sometimes the

34. *Lee*, 413 F.3d 53.

35. *Hatfill*, 416 F.3d 320.

36. LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (A.M. Kelley 1986) (1914).

press could use a little sunshine itself, perhaps as a disinfectant. I thank you for your attention.

IV. PANEL: SURVEILLANCE AND ITS IMPACT ON FIRST AMENDMENT RIGHTS

A. *Jameel Jaffer**

Let me start by thanking the *American University Law Review* and my colleagues in Washington at the ACLU for inviting me to participate in this conference.

The previous speakers are clearly right that it is impossible to quantify the chilling effect of government surveillance. But it's important to recognize that the chilling effect is not just an abstraction; it's very real, especially in minority and immigrant communities that are already marginalized. When the other panelists were speaking, I was thinking of a trip I took to Michigan in 2003. We were preparing to file a lawsuit³⁷ challenging section 215 of the Patriot Act,³⁸ a surveillance provision that allowed the Federal Bureau of Investigation unchecked access to records in the hands of political and advocacy organizations, libraries, bookstores, universities, hospitals, and Internet service providers. We thought that the provision was unconstitutional under the Fourth Amendment because it allowed the FBI to compel the disclosure of records without judicial review. We also thought that the provision violated the First Amendment because it categorically foreclosed any organization that received a section 215 order from disclosing to any other person that the FBI had served the order.³⁹ We went to Michigan to meet with representatives of Muslim and Arab-American community organizations that were concerned about the Patriot Act and that had expressed an interest in challenging section 215's constitutionality.

The thing I remember most vividly from that trip is how difficult it was to persuade the individual members of the community organizations to talk to us. It wasn't that they weren't supportive of our work. They were. But they were afraid of attracting attention. The Immigration and Naturalization Service had rounded up

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37. *Muslim Cmty. Ass'n v. Ashcroft*, No. 03-CV-72913 (E.D. Mich. filed July 30, 2003).

38. USA PATRIOT Act of 2001 § 215, 50 U.S.C.A. §§ 1861-1862 (2008).

39. *Id.* § 1861(a)(1).

hundreds of Muslim men and held them without charges for months. Many of these men had been deported after secret hearings. The people we approached hadn't done anything wrong, but they were afraid that participating in a lawsuit, or even talking to the ACLU, could lead to similar consequences for themselves or their families. When we did manage to persuade some of these people to talk to us, they told us of the effect that the government's policies had had on their own activities. They had stopped going to political demonstrations, stopped writing letters to the newspapers, stopped giving money to their mosques. They assumed—or at least feared—that the government was keeping track of everything. A doctor in his fifties told us that he had advised his son, a second-year university student, not to major in politics and not to join the Muslim Students Association because he thought that doing these things would invite government scrutiny.

I don't know how to reduce this kind of thing to a statistic. It's what I think of, though, when people suggest that the chilling effect is insignificant or overstated. The truth is that government surveillance can have a profound chilling effect on individuals' willingness to engage in activities that are protected by the First Amendment—activities that are necessary to the functioning of any democracy. And this chilling effect falls most squarely on communities that are already marginalized.

There's a long line of cases in which the Supreme Court has recognized that the threat of government surveillance can discourage legitimate political association, legitimate religious activity, and legitimate political dissent. Here's what Justice Powell wrote in the *Keith*⁴⁰ case:

History abundantly documents the tendency of government—however benevolent and benign its motives—to view with suspicion those who most fervently dispute its policies. . . . [T]he price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power. Nor must the fear of unauthorized official eavesdropping deter vigorous citizen dissent and discussion of Government action in private conversation. For private dissent, no less than open discourse, is essential to our free society.⁴¹

The *Keith* case involved warrantless wiretaps; the question was whether such wiretaps were permissible if conducted for domestic intelligence purposes. But the Court has recognized the connection between surveillance and the First Amendment in other contexts as

40. United States v. U.S. Dist. Court (*Keith*), 407 U.S. 297 (1972).

41. *Id.* at 314.

well. In *NAACP v. Alabama*⁴² and several other cases decided in the 1950s and 1960s, the Court recognized that government access to the membership lists of political associations was likely to discourage people from joining those organizations.⁴³ Similarly, in *United States v. Rumely*,⁴⁴ the Court recognized that government access to book-purchase records was likely to discourage people from buying controversial books.

One important insight from these cases is that, from a First Amendment perspective, the *threat* of government surveillance can be just as problematic—just as inhibiting of constitutionally protected activity—as the surveillance itself. Incidentally, it was that same insight that animated Jeremy Bentham’s famous Panopticon, a prison that allowed a single guard, located in the center of the prison, to see into every cell. The single guard could not possibly monitor all of the prisoners at once, but Bentham understood that prisoners would be intimidated and pacified by the mere *possibility* that the guard might be monitoring them. From a First Amendment perspective, the problem with unchecked government surveillance is not just the surveillance itself; it’s also the possibility—the threat—of surveillance.

The chilling effect doctrine reflects a similar insight. In *Rumely*, the Supreme Court’s concern was not solely with the people who had already purchased controversial books and whose identities the government sought to obtain, but also with those who might be discouraged from purchasing controversial books because of the threat of future surveillance. In his concurrence, Justice Douglas wrote, “Once the government can demand of a publisher the names of the purchasers of his publications, the free press as we know it disappears. *Then the spectre of a government agent will look over the shoulder of everyone who reads.*”⁴⁵ Justice Douglas was concerned not just about the surveillance that the government was actually conducting but also about the surveillance that it *could* conduct—not just about the government agent but about the “spectre” of the agent as well.

It’s helpful to have that background in mind when you think about the surveillance cases that are in the courts now, and in particular the

42. 357 U.S. 449 (1958).

43. See *NAACP v. Alabama*, 357 U.S. 449, 463 (1958) (“Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.”); see also *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 544, 556–58 (1963) (holding that there was not enough evidence of communist sympathy within the Miami chapter of the NAACP to override the privacy afforded to the group by the First and Fourteenth Amendments).

44. 345 U.S. 41 (1953).

45. *Id.* at 57 (Douglas, J., concurring) (emphasis added).

cases relating to the National Security Agency's warrantless wiretapping program. One difference between these new cases and many of the cases that were decided in the 1960s and 70s—cases like *Keith*, *NAACP v. Alabama*, and *Rumely*—is that the new cases involve a program whose specific targets are unknown. We know how the NSA program *works*, of course; the *New York Times* (and later the President) explained that the program involves the warrantless interception of e-mails and telephone calls that originated or terminated inside the United States. But we don't know whose communications have been intercepted under the program because the government refuses to say. The question before the courts is whether plaintiffs who are unable to show with certainty that their communications have been intercepted under the program can establish standing by demonstrating that the program has had a chilling effect on their First Amendment activity.

As some of you know, this question is a hotly contested one. Everyone agrees, of course, that a litigant can't invoke the jurisdiction of a federal court without first showing that he or she has been injured by the government's conduct.⁴⁶ There is disagreement, though, about what should *count* as an injury in this context. Some appellate courts have said that the only injury that counts is actual interception. With something like the NSA program, however, a showing of actual interception is nearly impossible for plaintiffs to make.

I've been litigating one of these NSA cases since early 2006. After the President acknowledged the existence of the NSA program, we filed a lawsuit against the NSA on behalf of a coalition of journalists, researchers, and criminal defense attorneys.⁴⁷ The plaintiffs were people whose work required them to engage in sensitive communications with witnesses, experts, clients, and sources located overseas. The plaintiffs couldn't show with certainty that their communications had been intercepted by the NSA, but they could show that the NSA program had inhibited them from engaging in constitutionally protected activity. The journalists could show that the program had prevented them from gathering information from sources in Afghanistan and Iraq. The lawyers could show that the

46. See *Warth v. Seldin*, 422 U.S. 490, 499 (1975) ("A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action'" (citation omitted)).

47. *ACLU v. Nat'l Sec. Agency/Central Sec. Serv.*, 438 F. Supp. 2d 754 (E.D. Mich. 2006), *vacated*, 493 F.3d 644 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 1334 (2008).

program had prevented them from gathering information from witnesses in Israel and Palestine. Because they feared that their communications were being monitored by the NSA, some of the plaintiffs had traveled to the Middle East to gather information that they would otherwise have been able to gather over the telephone or by e-mail. To our plaintiffs, the threat of surveillance was just as harmful as the surveillance itself; they had had to adjust their behavior to address the *possibility* that the government might be monitoring their calls. We argued, relying in part on *Keith*, *NAACP v. Alabama*, and *Rumely*, that the harm that the NSA program had caused to our plaintiffs constituted an injury sufficient to establish standing.

The district court agreed with us that we had established standing, and it held that the NSA's program violated statutory law as well as the First and Fourth Amendments. We fared less well, though, in the Sixth Circuit. Two members of the panel found that our plaintiffs did not have standing to sue because they could not prove that their communications had been monitored by the NSA. Those judges also held that the government could properly rely on the state secrets privilege to justify its refusal to disclose whether our plaintiffs had been monitored. (The third member of the panel found that we had established standing and agreed with the district court that the NSA program was unlawful.)

Needless to say, I think the Sixth Circuit majority got it wrong. For one thing, the consequence of the rule adopted by the Sixth Circuit is that the government can insulate its surveillance programs from judicial scrutiny simply by refusing to disclose who its surveillance targets have been. The Sixth Circuit's rule is also inconsistent with a key insight of cases like *Keith*, *NAACP v. Alabama*, and *Rumely*—that the harm to First Amendment rights flows not just from surveillance itself but from the threat of surveillance. The First Amendment implications are the same, maybe even more severe, when there's uncertainty about who the government is monitoring.

To say that the only people who can challenge government's surveillance are those who can prove they were actually monitored is to ignore the corrosive effect that the mere threat of surveillance can have on First Amendment rights. It is not true that the only people injured by government surveillance programs are those who can prove they were targeted individually. Unchecked government surveillance has a broader chilling effect, as the Supreme Court has recognized. If the freedoms of speech, association, and religion are

to be preserved, I think it's critical that this broader effect not be ignored or underestimated by the lower courts.

V. PANEL: SECRECY AND BARRIERS TO OPEN GOVERNMENT

A. *Glenn M. Sulmasy**

The United States' response to 9/11 presents unique challenges to maintaining the ever-delicate balance between a citizen's right to know and a government's right to conduct its affairs in the most efficient and expeditious manner possible. The current debate on this issue is incredibly polarized, and can generally be broken down into two camps: those who view the conflict as a "Global War on Terror" requiring greater government secrecy; and those who see it as a law enforcement action subject to the normal obligations of openness and accountability. In this Essay, I articulate a "third way" of viewing the current conflict, one that justifies greater government secrecy but in such a way that begins by acknowledging basic human rights and civil liberties.

The current debates on balancing privacy and national security, and other debates associated with our current conflict, strongly diverge and become polarized depending upon the paradigm from which one views the current conflict: whether the war against al Qaeda necessitates a law of war analysis or a law enforcement response. In contrast with most of the panelists at the Symposium, I do view the current struggle as an armed conflict. However, I view the armed conflict as, and only refer to it as, the "War on al Qaeda."⁴⁸ It is truly not a war on terror.

The phrase "Global War on Terror" is a confusing misnomer. Critically, we can never defeat terrorism, *per se*. We are not fighting the IRA, the Red Brigades, the Shining Path, or Hamas. Rather, our struggle is focused on a single terrorist network, an identifiable enemy, al Qaeda.

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48. See generally Glenn Sulmasy, *The War on al Qaeda*, S.F. CHRON., Feb. 20, 2007, at B7 (arguing that the United States should realign its mission and focus by re-labeling the "war on terror" as the "war against al Qaeda").

The “war on terror” label has led many scholars, practitioners, and policy makers to be justifiably suspicious of the Administration’s motives. Because of the ambiguous and broad title, many have legitimately questioned whether it is the Administration’s intent to call the conflict a “Global War on Terror” to extraordinarily increase executive power.⁴⁹ Some critics also claim that this conflict was labeled a war to unnecessarily, arbitrarily, or even illegally keep secrets from the citizenry. I truly do not believe that is the case, but I can understand how these criticisms emerge.

The title we give to the current conflict matters a great deal. It impacts strategy, tactics, and the laws used to govern the conflict. A war without end should give pause to all of us—most importantly to those who have committed to serving in the armed forces of the United States. In addition, unlimited periods of war or national emergency are normally associated with curtailing of civil liberties and creating the environment for potential abuse of power and the opportunity for a government to commit myriad human rights violations. Thus, the need for long-term government secrecy, as part of a permanent war on terror, seems contrary to traditional American values.

The name “Global War on Terror” sounds an awful lot like former President Lyndon Johnson’s “War on Poverty,” and the President Reagan/Bush “War on Drugs.” Without question, these are noble, national ambitions but they are not armed conflicts. Critics have used this similarity to argue that, like the “wars” on poverty and drugs, the “Global War on Terror” is nothing more than a title given to show the level of national effort and resource commitment to the struggle. Because these “efforts” have not triggered the employment of a law of war legal regime, neither should the current conflict with al Qaeda.

However, these previous national campaigns were not armed conflicts. The current struggle against international terrorism is clearly some form of armed conflict. In reality, it is a mixture of traditional warfare and law enforcement—it is a hybrid armed

49. Various academics, members of the media, and critics of the Administration have asserted many of the decisions made by the Bush Administration have been part of an orchestrated effort to enhance executive power—and implement the idea of the “Unitary Executive.” See, e.g., Michael P. Allen, *George W. Bush and the Nature of Executive Authority: The Role of Courts in a Time of Constitutional Change*, 72 BROOK. L. REV. 871, 872–73 (2007) (discussing President Bush’s assertions of broad executive power); Dana Milbank, *In Cheney’s Shadow, Counsel Pushes the Conservative Cause*, WASH. POST, Oct. 11, 2004, at A21 (remarking that notions of the unitary executive theory can be found in the White House memorandum justifying torture of terrorism suspects).

conflict. Every day, our men and women in uniform are fighting on numerous fronts against an enemy who has declared war on the United States. The American response to the 9/11 attacks by al Qaeda have utilized the Federal Bureau of Investigation (“FBI”), the National Security Agency (“NSA”), and the Central Intelligence Agency (“CIA”) in greater prominence than ever before.

Thus, by calling the current conflict the “War on al Qaeda,” we can give a face to our enemy and create a framework for victory. It helps ensure this will be a finite war with a decreased likelihood of abuse of power. This conflict label also provides a more workable framework for justifying secrecy in many areas of governmental activity when fighting al Qaeda and international terrorism—distinct from strictly domestic law enforcement operations.

Having declared that we are engaged in an armed conflict, we now turn to the other side of the equation and determine what universally accepted human rights are impacted by secrecy during wartime. As we approach the anniversary of that wonderful, aspirational document, The Universal Declaration of Human Rights⁵⁰ (“UDHR” or “Declaration”), the United States and the West currently struggle to promote peace and national security while still supporting the notions of human rights within the world community. Adopted on December 10, 1948, well ahead of its time, the Declaration asserted various commonly understood human rights.⁵¹

Specifically at issue at our Symposium is the citizens’ “right to know,” which is largely extrapolated from the second clause of Article 19⁵² and Article 21⁵³ of the Declaration. Clearly, it is a vital and universally accepted principle that a government should operate in the open and not in secrecy. It is a universally recognized human right for citizens to be able to fully participate in their government. Many will construe this, if not covered separately in treaties they are parties to, as having become customary international law.

This right, however, is appropriately cast against the legitimate needs of the government to act without public comment or participation during times of armed conflict or emergency. It is a

50. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948).

51. *See, e.g., id.* art. 3–5 (stating rights to life, liberty, and security of person while proscribing persons from being subjected slavery or inhuman treatment or punishment).

52. *See id.* art. 19, cl. 2 (“[The right to freedom of opinions and expression] includes freedom to hold opinions without interference and to seek, receive[,] and impart information and ideas through any media and regardless of frontiers.”).

53. *See id.* art. 21 (providing for the right to take part in the government of one’s country and the right to equal access to public service in one’s country).

delicate balancing test. In peacetime, the public's right to know what their government is doing is essential and has been an integral part of the American way of governing since our founding in the eighteenth century. During times of war, however, the scales tip in favor of the government.

Many today suggest that the scales have tipped too far in favor of the government,⁵⁴ but history reveals similar patterns. Even in the post-Second World War era (post-UDHR), the U.S. government, regardless of party affiliation, maintained a strong pro-secrecy stance. In wartime, secrecy is critical to mission success. It has always been that way and will continue to be that way into the foreseeable future. Once a nation commits to go to war—any war—it is empirically true that the government waging war will seek heightened levels of secrecy. Thus, if the war on al Qaeda is an armed conflict, the balance (as has historically been the case) shifts to the government for the duration of the conflict.

An acceptance of greater government secrecy is a tacit part of the decision making when any democratic nation commits to engage in armed conflict. The great warrior Sun Tzu wrote, “what enables the wise sovereign and the good general to strike and conquer, and achieve things beyond the reach of ordinary men, is foreknowledge.”⁵⁵ It has certainly been that way throughout American history. From the American Revolution, to our Civil War, to the Second World War, to the invasion of Grenada, and through our current armed conflict, we have never been naïve: We have always entered these wars knowing that increased secrecy would be a critical element for our success.

Even the great liberal champion of human rights and the founder most supportive of the dignity of humanity, Thomas Jefferson, understood the need for secrecy in general (and particularly in wartime). Actually, Jefferson was concerned about sharing the secrets of the executive with *Congress*—let alone the

54. *Oversight Hearing on Reform of the State Secrets Privilege Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. (Jan. 29, 2008) (statement of H. Thomas Wells, Jr., President-Elect, American Bar Association) (“More searching judicial review, informed by evidence, would ensure that government assertions of necessity are truly warranted and not simply a means to avoid embarrassment or accountability.”). Also, look to the recent debate and congressional hearings on the necessity of classifying the OLC 2003 memo stating that criminal laws would not apply to interrogators if they acted to “prevent further attacks.” Recent testimony on this issue can be found in the April 30 Hearing before the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Property Rights.

55. SUN TZU, *ON THE ART OF WAR* 59 (Lionel Giles trans., Allandale Online Publishing 2000) (1910).

media and general public.⁵⁶ This need for governmental secrecy was even more pressing for Jefferson when it related to intelligence gathering.

Ben Franklin expressed similar sentiments in 1776. While leading the Committee of Secret Correspondence for the Continental Congress, Franklin asserted the unanimous opinion of the Committee that they could not share sensitive secrets about a French covert operation to assist the Revolution because “[w]e find by fatal experience Congress consists of too many members to keep secrets.”⁵⁷ This sounds awfully familiar, no?

Thus, the founders, as well as many modern administrations in both the twentieth and twenty-first centuries, have strongly insisted that the media, the citizenry, and even Congress are presumptively not privy to most wartime secrets and intelligence activities. The situation should be no different in this War against al Qaeda. In many respects, certainly tactically and strategically, secrecy may be perhaps even more important. This need for secrecy is even more pressing given the twenty-four-hour media coverage that is now an integral part of society. The key remains, however, to not abuse such discretion and ensure the public remains aware of the myriad secret operations as soon as practicable without impeding mission accomplishment or compromising legitimate intelligence collection. Thus, such “secrecy” is critical; the burden remains on the executive branch to be ever mindful of its obligations to be open and transparent with the electorate as soon as hostilities cease or when practicable and reasonable.

As explained in Part II, the conflict with al Qaeda that began on September 11, 2001 defies traditional classification. The al Qaeda fighter does not fit comfortably into either category of criminal or of warrior; he is truly a mix. Additionally, we are fighting this battle with a combination of law enforcement and warfare techniques.⁵⁸ Determining the appropriate balance between the government’s

56. See THOMAS JEFFERSON, *Opinion on the Powers of the Senate* (Apr. 24, 1790), in THE JEFFERSONIAN CYCLOPEDIA (John P. Foley ed., 1900) (“The Senate is not supposed by the Constitution to be acquainted with the concerns of the Executive Department. It was not intended that these should be communicated to them.”).

57. *Wartime Executive Power and the NSA’s Surveillance Authority II: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 15 (2006) (testimony of Robert F. Turner, Associate Director, Center for National Security Law, University of Virginia) (quoting Franklin).

58. See generally Glenn M. Sulmasy, *The Legal Landscape After Hamdan: The Creation of Homeland Security Courts*, 13 NEW ENG. J. INT’L & COMP. L. 1 (2006) (arguing for the adoption of homeland security courts that would function as a hybrid of military commissions and Article III federal courts).

need for secrecy and the citizen's right to know therefore requires recognition of the hybrid nature of the conflict.

This armed conflict, by its asymmetric nature, is one where intelligence gathering is a major part of military operations. Even more so than in past conflicts, aggressive intelligence collection is critical in this struggle. Thus, the government through its various agencies involved in fighting this war (the Department of Justice, Department of Homeland Security, Federal Bureau of Investigation, Defense Intelligence Agency, and National Security Agency) needs secrecy more than ever in order to best protect the homeland. The normal Western and U.S. standards for open government and discussion on the means and methods of such warfare would be dangerous for our men and women in uniform and likely ensure defeat at the hands of the al Qaeda fighters.

Therefore, I would suggest that the need for governmental secrecy in the War on al Qaeda is, by its very nature, greater than before, since we have no nation state to negotiate with, no traditional means of waging war—e.g., troop movements, massive invasions, toppling a government, etc. Preventing attacks from al Qaeda before they occur is the key to success in this conflict.⁵⁹ Open dialogue on intelligence collection and the means and methods employed by our intelligence professionals would be disastrous for our men and women fighting in Iraq and Afghanistan, as well as for those protecting the homeland.

Democracies are, and should be, uncomfortable with governmental secrecy. The United States has traditionally been a nation suspicious of governmental activity. That is the nature of the American psyche. However, in times of war or armed conflict—such as the current armed conflict with al Qaeda—it remains critical that the government retains the right to certain levels of secrecy while fighting an enemy. Thus, although not absolute by any means, the balance between openness and secrecy necessarily tips toward the government—especially in this unique twenty-first century war.

*B. Erwin Chemerinsky**

Thank you. It is an honor and a pleasure to be here. The Bush Administration has been more obsessed with and has invoked more

59. Cf. Richard A. Posner, *A New Surveillance Act*, WALL ST. J., Feb. 15, 2006, at A16 (“National security intelligence is a search for the needle in a haystack. The intelligence services must cast a wide net with a fine mesh to catch the clues that may enable the next attack to be prevented.”).

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efforts at secrecy than any presidency since Richard Nixon. This has taken many different forms. For example, not long after 9/11, the Bush Administration, through a memo by the Chief Immigration Judge, Michael Creppy, imposed blanket closure of all immigration proceedings of those who were accused of any terrorist activity.⁶⁰

Additionally, what has not had nearly as much publicity was the attempt by the Bush Administration and the Justice Department to hold secret trials and proceedings in federal district courts and even appellate proceedings in the federal court of appeals. These matters did not appear on any docket. At the Spring 2002 annual conference of federal defenders, a federal defender said, "I cannot tell you very much about this, but in our district we have an entirely secret file going on against somebody that does not appear on any docket at all." The next year he said, "[I]t is now in the Eleventh Circuit and it does not appear on any docket sheet." I started hearing about these types of proceedings from other people. Eventually, a letter of inquiry was sent to then Chief Judge of the Southern District of New York, Judge Mukasey, by the Legal Director of the ACLU, Stephen Shapiro. Judge Mukasey responded by saying, "Unfortunately, or should I say fortunately, I cannot tell you anything about this."

The Reporters Committee for Freedom of the Press found dozens of instances of entirely secret proceedings that did not appear on any docket in the federal district court here in the District of Columbia alone. Additionally, there have been changes of policies with regard to the Freedom of Information Act,⁶¹ and things that were previously open to the public are no longer being made public.

One part of this secrecy piece is executive privilege. I want to talk about a couple of things with regard to executive privilege. First, I will talk about the general law regarding executive privilege. Second, I will discuss how this Administration has used executive privilege. Regarding the law of executive privilege, it might surprise you to know, there have only been two Supreme Court cases in history that have dealt with executive privilege in any detail. The first, and unquestionably the most important, was *United States v. Nixon*⁶² in 1974. Leon Jaworski, Special Prosecutor during the Watergate Scandal, subpoenaed tapes of White House conversations to use in the prosecution of those who had been involved in the Watergate

60. Memorandum from Michael Creppy, Chief Immigration Judge, to All Immigration Judges and Court Administrators (Sept. 21, 2001), available at <http://news.findlaw.com/hdocs/docs/aclu/creppy092101memo.pdf>.

61. 5 U.S.C.A. § 552 (West 2008).

62. 418 U.S. 683 (1974).

cover-up. President Nixon invoked executive privilege in an effort to keep the tapes secret. District court Judge John Sirica ruled against the President, and the case then went to the United States court of appeals. Before the court of appeals could issue a decision, the Supreme Court granted certiorari and took up the case.

The Brethren: Inside the Supreme Court,⁶³ by Woodward and Armstrong, is a fascinating story about how the opinion was drafted. It tells the story of how then Chief Justice Burger assigned himself to write the opinion, and when the other Justices saw his opinion they determined that it would not receive a passing grade in law school, so they met secretly and parceled out writing the opinion amongst themselves. Justice White had the task of writing the part on grand-jury proceedings, and he wrote a memo to the other Justices indicating that Chief Justice Burger wrote a great opinion except for the part about the grand jury and, therefore, he would substitute it. It is for this reason that the decision does not read like it was written by one person. In a vote of eight to zero, the Supreme Court ruled against the President; Justice Rehnquist did not participate in the decision because he had been an Assistant Attorney General in the Nixon Justice Department.

The Supreme Court, in *United States v. Nixon*, determined that Presidents have executive privilege and that executive privilege is important because it preserves the confidentiality that is necessary for candid discussion and advice to the President, especially when matters of foreign policy are involved. However, the Supreme Court determined that executive privilege is not absolute. It has to yield when there is an overriding need for information, such as when the need for evidence in a criminal trial outweighs executive privilege. The Court would not allow President Nixon to have executive privilege here and keep the federal courts from receiving the evidence necessary to provide due process and fair trials for those involved in the Watergate cover-up. It decided that the President cannot invoke executive privilege in a manner that keeps another branch from fulfilling its constitutional responsibilities. As a result, Nixon was ordered to produce the tapes. One of the tapes had a very famous conversation where President Nixon said he would tell the FBI not to investigate the Watergate break-in because it was a CIA matter. That, by any definition, is obstruction of justice. When that came out, Republicans in Congress and Nixon supporters told the

63. BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* (Simon & Schuster 2005) (1979).

President that he could not go forward, and Nixon announced his resignation.

The only other major Supreme Court case dealing with executive privilege is *Cheney v. United States District Court*,⁶⁴ involving the energy policy study group. The case is unusual because of the strange procedural posture in which it came to the Supreme Court. It was sufficiently unusual that it is fair to say that pretty much all that is discussed about executive privilege is dicta in that opinion. But Justice Kennedy's opinion for the Court did recognize that there is executive privilege. He drew a distinction between the need for evidence in criminal cases and civil proceedings. He said that the need for evidence in criminal cases was more compelling than in civil cases, where perhaps more deference is given to the President's executive privilege.

Given that background, I can spend a few minutes talking about how the Bush Administration has used executive privilege. It has already been alluded to that the Administration did not want the 9/11 Commission to start with, but when it was finally created, they used executive privilege. The current controversy regarding the Bush Administration's use of executive privilege is the refusal of Harriet Miers and Joshua Bolten to testify. I thought about whether it would be appropriate, in the context of this conference about civil liberties and the War on Terrorism, to discuss this issue, but I do think it gives a sense of the doctrine of executive privilege, and it is typical of many of the issues with regard to executive privilege that come up in all contexts.

There has been an attempt by both the House and the Senate Judiciary Committees to investigate the firing of the United States Attorneys across the country. The claim is that United States Attorneys were fired because they were launching investigations that the Administration wanted to stop or that they refused to initiate investigations for partisan political reasons. The Administration has invoked executive privilege to keep Harriet Miers and Joshua Bolten from testifying. I would suggest that this is a particularly weak case for executive privilege and a very strong case for congressional access to the information. We can use this example to get a better sense of what executive privilege is all about.

Let me give you several reasons why this is a weak case for executive privilege. First, it is not clear that executive privilege applies here at all. Both the *Nixon* and *Cheney* cases discussed executive privilege as a

64. 542 U.S. 367 (2004).

protection of confidential communications with the President or Vice President. President Bush has said he had no involvement whatsoever in the firing of the United States Attorneys. A D.C. Circuit case⁶⁵ that involved an investigation of Mike Espy stated that if there is communication that goes on in anticipation of discussions with the President then that could also be protected, but in the case of Miers and Bolten there is no reason to believe that these communications would ultimately be discussed with the President. And no Supreme Court case or D.C. Circuit case has ever recognized that executive privilege could be applied to communications that were not even anticipated to be with the President.

Second, there are technical requirements for the invocation of executive privilege that have not been met. For example, there are D.C. Circuit cases that say that privilege logs need to be turned over, even if the privileged information itself is not.⁶⁶ The Administration has refused to even provide those privilege logs. There is some authority that says it needs to be the President who invokes executive privilege. The President has not done so here. In the past, when a witness before Congress has invoked executive privilege, he or she has personally appeared. Harriet Miers did not even appear before the Senate Judiciary Committee, notwithstanding the subpoena.

Third, the Executive Branch's need for secrecy here is minimal. The need for Executive Branch secrecy is greatest when foreign policy and national security issues are implicated. In *United States v. Nixon*, the Supreme Court stressed that foreign policy and national security were not involved, and similarly there is no reason to believe that the firing of the United States Attorneys touches on matters of foreign policy or national security, nor that it would chill future communications with the President.

Finally, I think the need for congressional information is great. The problem arose because an obscure provision in the Patriot Act renewal gave new authority to the Department of Justice to appoint interim attorneys (for the remainder of the Bush Administration) without approval by the Senate.⁶⁷ Although Congress did change the law, Congress needs to decide what the appropriate statutory provision is, and in order to perform its legislative function, full information is important. There are Supreme Court cases going back

65. *In re Espy*, 346 F.3d 199 (D.C. Cir. 2003).

66. *See, e.g., In re Search of the Rayburn House Office Bldg. Rm No. 2113*, 497 F.3d 654 (D.C. Cir. 2007), *cert. denied*, 76 U.S.L.W. 3528 (2008).

67. USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 (codified in scattered title numbers and sections of the U.S.C.).

to at least the early twentieth century, which state that there is a need for Congress to be able to conduct oversight investigations. *United States v. Nixon* stood for the proposition that a President cannot invoke executive privilege in a way that keeps another branch from performing its core functions. Here, the Administration does exactly that.

Interestingly, if President Nixon had invoked executive privilege in the same way that the Bush Administration has, then there would have never been the successful hearings held by Senator Sam Ervin in the Watergate Senate Select Committee in 1973. President Nixon initially invoked executive privilege because if White House Counsel, John Dean, was not able to speak then Alexander Butterfield, the aide who revealed the taping system, would not be able to speak. However, ultimately the Nixon Administration allowed its officials to testify. The irony in the current situation is that the Bush Administration has said they would allow Miers and Bolten to testify, but only in closed sessions with no report made and not under oath. That very allowance undercuts any claim of a need of secrecy. Unlike the perspective rendered by Commander Glenn Sulmasy, the Constitution puts the presumption on the side of openness and not secrecy, even in wartime. Not absolute openness, of course, some things need to be held secret, but there is a balance. I would like to conclude with the words of James Madison, who said, "Knowledge will forever govern ignorance and a people who mean to be their own governors must arm themselves with the power which knowledge gives."⁶⁸ And, "[a] popular government, without popular information or the means of acquiring it, is but a prologue to a farce, or a tragedy, or perhaps both."⁶⁹

C. *David M. Hardy**

Good morning. I want to thank American University, the law school, the *American University Law Review*, and particularly the ACLU for inviting me here today. I am going to talk about the FBI's policy of processing Freedom of Information Act⁷⁰ ("FOIA") and Privacy

68. Letter from James Madison to W.T. Barry (Aug. 4, 1822), *available at* http://memory.loc.gov/ammem/collections/madison_papers/index.html (search "Search this collection" for "W.T. Barry;" follow "James Madison to W.T. Barry, August 4, 1822" hyperlink).

69. *Id.*

* Chief, Records/Information Dissemination Section, Records Management Division, Federal Bureau of Investigation.

70. 5 U.S.C.A. § 552 (West 2008).

Act⁷¹ requests. These Acts provide the framework for one of the precepts of an open government—access to agency records. The statute is a balance between complete disclosure of agency records and recognizing agency equities. Agency equities are those things that, from the agency's perspective, are necessary to not disclose to the public in order to accomplish the agency's mission. The FBI's policy, as an intelligence and law enforcement agency, regarding what can be withheld and released is divided into two basic areas. The first area is the bureau's determination on the use of exemptions, based largely on the interest of the agency. This is probably the closest to a policy formulation process. The second is the reality of processing FOIA requests, which can actually impact what the requester receives or agency responsiveness to requests. This second point is a pragmatic, rather than academic, endeavor, but it does affect what information the agency is able to provide.

Regarding FBI policy, it is common sense what information the FBI deems important to protect from release. For example, information necessary to protect national security, sensitive information, information about ongoing investigations, information that would allow individuals to circumvent investigations, sensitive techniques, identification of law enforcement officers, and privacy of third parties—all are strong FBI equities. We feel strongly about ensuring that we protect this information before it is released. We, of course, use all the other FOIA exemptions that are written into the statute, as well as those categories of information protected by other statutes.

How does the agency find this balance? Well, we first use the Department of Justice ("DOJ") Freedom of Information Act Guide⁷²—the lavender book—that provides a summary of the case law from DOJ's perspective. It used to be the orange book, which was easy to describe, but I'm not sure what we call it now. If you are a FOIA practitioner, it is the equivalent of your red book of Mao sayings. Although the FBI uses the guide, there are also at any given time about one hundred cases in federal court involving the FBI, and that precedent is followed as it is decided. The courts are instrumental in drawing the balance between the interests of agency and requester as to where the FBI sets the redaction standard.

This is a fairly settled area of law, which provides one of the keystones from which the agency and the requester can predict to a certain degree what is going to occur in any given situation.

71. 5 U.S.C. § 552a (2000).

72. OFFICE OF INFO. & PRIVACY, U.S. DEP'T OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE (2007), available at http://www.usdoj.gov/oip/foia_guide07.htm.

Occasionally, a judge will use equitable principles when making a decision, then at some point either the judge or his law clerk will actually read the statute and the case law and usually make a reconsideration in the FBI's favor. Of course certain circuits are always exciting, it is unclear where they are going to go, but on the whole it is a settled area.

Most of the time when the FBI is spanked in a court opinion, it is because the FBI did not fully explain the rationale for the redactions. Since I am one of the authors working on the declarations, I have to take one of the hits in those areas. From the FBI's perspective, it is a little bit like having to go into overtime at a football game. It was not won within the official time, but there is another chance to re-write it, and the FBI will go ahead and put in more focused effort and do what the judge said in order to prevail at that point. The foundation of success in our declarations is all predicated upon being able to describe a particular harm.

The process is equally pragmatic within the FBI. Within the agency, the FBI discusses the possible harm with our operational divisions because the harm has to be articulable and not speculative. The operational people review the information and with their assistance, by looking at the case law, and looking at the subject matter involved, the FBI will use an exemption for particular information.

The side that people never really seem to grasp is the influence of processing factors in FOIA litigation and FOIA appeals. Many think that the FBI does not look deeply enough within the records for information and that it operates too slowly. Actually, there is truth to the statement that the FBI is too slow, but that will be discussed below. Although one can discuss theory or basic concepts, the bottom line is that there are three factors affecting the processing policy. The first is the reality of resources. The second is a constant need to balance speed versus accuracy, and the third, is the laws of physics.

The resource issue is fairly clear, and will not be elaborated upon. Obviously, agencies have to balance the amount of resources they put into the Freedom of Information Act program with what they need to accomplish their mission; it is a closed environment. If one hundred FOIA analysts are added, that results in the removal of fifty or sixty counterintelligence analysts. Therefore, agencies have to make a balancing decision regarding that issue. Regarding the second element, the FBI devotes a considerable number of people, over two hundred, to Freedom of Information Act work. However, the

number of incoming requests is huge. The agency receives an average of 1,500 requests per month, and while about 400 actually generate real records, all 1,500 have to be searched. These requests can vary from twenty to thirty to tens of thousands per year. As a result, it is somewhat like standing underneath the waterfall as these requests come in, and it is a constant push. There is enormous pressure, both from the exterior, from the Department of Justice, from Congress, and from the general public, to process these requests as quickly as possible.

The FBI puts great emphasis on responding to these requests. The way to tell what a bureaucracy is going to deem important is by looking at the bottom line, whether performance in a particular area is part of management's performance assessment. As someone who is in charge of the Freedom of Information Act processing, my performance evaluation and whether or not I will ever get a bonus, is based in part on my ability to improve the speed at which requests are processed. However, speed presents its own problems because when you try to push things through, accuracy can suffer. If the individual requester wants a thorough and exhaustive search in every possible drawer, every possible computer system for anything that remotely mentions them, this is impossible considering the FBI receives 1,500 requests per month. If the FBI were to search everything in response to each request, the agency would grind to a halt.

Therefore, the FBI makes policies in order to address this balancing act. One of the most litigated issues is the search for main files. When the FBI receives a request, they search the main files and central indices to see if the individual is in a main file. An individual may not have a main file but could be named in other FBI records. But the process of determining whether or not it is in fact that same individual in another FBI file is very time-consuming. Essentially the file has to be pulled, put into context, for example, to see if it is possible that the individual might have lived in Iowa. It takes time. Therefore, the FBI is always balancing time, how fast it can provide the information, against providing the major records of an individual. It is a balancing act that is stated on the FBI webpage.

A main file is opened when an investigation is opened on an individual. Therefore, when an individual sends in a request stating that: On December 3, I was arrested at O'Hare Airport because I had something leaking from my suitcase that alerted people and the FBI interviewed me, there will not be a main file on the individual, which means that the FBI never opened an investigation about them. However, that individual will be in the FBI files and if specific

information is given in the request, it can be found. On the other hand, a request for “everything that is on me” or “everything about an organization and all the cross-references” is a horrendous request.

The third element, the law of physics, relates to the pure reality of the task. The FBI has over one hundred million files and well over a billion pages, in 265 locations. Even with automated indices for everything that occurred after 1995 and manual indices for what occurred before then, it takes time. That is the law of physics. There is no way to make such comprehensive searches and maintain the volume of requests that come in. Another way to look at it is that either some people are going to be very rich and everyone else is going to be in complete poverty or the agency can try to spread the wealth around, which is the approach taken. This pragmatic viewpoint is the most litigated and affects what information is available.

The cure would be for all of the federal agencies to make their records electronic and for the FBI to develop a central repository where all records from the 265 locations can be brought in and put into electronic format. The bottom-line is that if the goal is for greater freedom of information from agencies, there needs to be a push toward more up-to-date record keeping. It is very expensive, but it would significantly impact the agency’s ability to find the records. If there were time and the capacity to identify the individual, the FBI would provide every reference to the person, but the reality is that it has neither. Ultimately, when a judge pins the agency down in litigation, the FBI will go do it. That does not mean go out and litigate, please. (Laughter) The ACLU provides the FBI with a good amount. (Laughter) But that is the reality, and that balancing act is the key ingredient of the FBI’s policy toward responding to information requests.

VI. PANEL: THE ROLE OF WHISTLEBLOWERS TO FACILITATE GOVERNMENT ACCOUNTABILITY

A. *Valerie Caproni**

Good morning, everyone. As a current FBI employee, I will talk about whistleblowing from the agency’s perspective. Panels like this are best when there is a point—counterpoint. “There absolutely

* General Counsel, Office of the General Counsel, Federal Bureau of Investigation; J.D., *University of Georgia School of Law*, 1979; B.A., *Newcomb College of Tulane University*, 1976.

should be a shield law because it is essential to the First Amendment” versus “A shield law is a terrible idea.” “The President’s Terrorist Surveillance Program is a gross invasion of American’s institutional rights.” versus “TSP is an incredibly important program that keeps the country safe.” I regret to say that on this issue, we will not have disagreement along those lines. In principle, whistleblowers serve a useful function in government, and the FBI agrees wholeheartedly that people who in good faith raise issues and concerns should not be retaliated against. Criminal conduct, waste, fraud and abuse are not in the FBI’s best interest, and to the extent such conduct occurs, management needs to know about it.

Although there is no constitutional protection for a whistleblower, there is a fairly robust regulatory scheme to protect whistleblowers within the FBI. The scheme is designed to make sure that whistleblowers are not retaliated against and to get the information outside of the FBI to the extent an employee believes they are being retaliated against. The basic statutory scheme prohibits personnel reprisals against anyone for making a protected disclosure.⁷³ It requires the Attorney General (“AG”) to issue regulations ensuring that such adverse personnel actions will not happen. In fact, the AG has issued regulations, and they appear in the Code of Federal Regulations.⁷⁴ The scheme that exists for the FBI is very similar to that which exists for non-intelligence community agencies. One difference is that whistleblower complaints are considered by the Office of Attorney Recruitment and Management (“OARM”) rather than by the Merit Systems Protection Board (“MSPB”), which is the federal government agency that protects civil service employees from adverse personnel actions. OARM, by regulation, is the entity within the Department of Justice that considers claims of reprisal for the FBI.

What is protected? An employee can make a protected disclosure, and therefore, receive protection from reprisal if he or she reasonably believes there was a violation of a rule, law or regulation, mismanagement, gross waste of funds, abuse of authority, or some substantial and specific danger to public health and safety. Although the regulations appear to include a very limited number of people to whom a protected disclosure can be made, the number is actually fairly large. A protected disclosure can be made to the DOJ, Office of Professional Responsibility (“OPR”), the DOJ Inspector General

73. 5 U.S.C. § 2303 (2000).

74. 28 C.F.R. § 27 (2008).

(“IG”), the Attorney General, or the Deputy Attorney General, or you can go to the FBI Director or the FBI Deputy Director.

For those who do not know the structure of the FBI, within the agency there is only one political appointee—the Director. The Deputy Director is a career employee who has risen to the rank of second in command at the FBI. A whistleblower can go to FBI OPR, which is headed by a career employee and is responsible for discipline within the FBI, to the Special Agent in Charge (“SAC”) of any field office, or the highest-ranking person within the field office. Any of those officials can accept a protected disclosure. This regulatory scheme is created to protect a disclosure because allegations of criminal conduct, fraud, waste or abuse, or substantial danger to public safety are serious.

The regulation is designed so that such disclosures can be made at a level high enough within the organization that something will be done about it, but the disclosure should stay within the department. To that end, disclosures made to the press or to Congress, with one exception, are not protected disclosures. For those who do not think this is right, think about it in the following manner: the goal of whistleblowing is for the agency to do something about the allegations and get the government agency back in line to do what it is they are supposed to do. A scheme that would allow an FBI employee to go public and talk to the press about anything that he or she knows or has some concern about poses very substantial risks to national security and the confidentiality of law enforcement activities.

These risks are magnified by the fact that all FBI employees have top-secret clearances. They are privy to some of the nation’s most sensitive secrets. They are also privy to a lot of confidential information. In Mike German’s introduction, the speaker noted that he was an undercover agent. When he was working undercover, that was an incredibly sensitive fact that could have gotten him or other people killed. However, some employee could decide that he does not like the fact that Mike German is undercover against *X* domestic group and disclose it to the press as a whistleblower. Such an action could put Mike in extreme danger. Danger to our employees is one of several very practical reasons why whistleblowers should stay within the organization and bring their concerns to a high level official, so that appropriate action can be taken.

Even if an employee thinks, for instance, that their own SAC is complicit in the criminality, there are enough different places for them to go. They can go to an IG or to the Department of Justice. There are enough options that no employee should feel that he or

she is in the position of knowing horrible secrets of criminality and have no place to turn. Although there may be issues with the Department of State's IG, no one has ever suggested that the Department of Justice's IG is anything but a vigorous advocate for doing what is right. You have to make the disclosure to the right person, but there is a fairly broad range of people to whom you can make it.

Once an individual makes a disclosure, there is a very detailed process that deals with claims of retaliation. Any employee who believes that he or she has suffered adverse personnel action because of a protected disclosure can complain or make a claim of retaliation to either the Department's OPR or the DOJ's IG. The IG and OPR work out between themselves who is going to investigate, and the agencies have an obligation to conduct an investigation to determine whether there are "reasonable grounds to believe that there has been or will be a reprisal."⁷⁵ If the agency (IG or OPR) does not believe there has been any reprisal, the complainant has to be informed and given an opportunity to persuade the agency that he or she has been retaliated against or is in danger of retaliation.

Interestingly, the procedural rules are tilted toward the complainant, much like employment litigation, to make sure that there is no reprisal. For example, if the IG or OPR concludes that there is no reasonable ground to believe there was reprisal, the government or the agency cannot use that finding in court unless the complainant agrees. Therefore, the complainant can control how that information gets out or if it ever gets out. On the other hand, if the IG or OPR finds that there are reasonable grounds to believe there was reprisal, it would report that together with their recommendation for corrective action to OARM. It is then up to OARM to determine whether in fact there has been reprisal. At this point, OARM becomes the adjudicative branch. If OARM decides that the protected disclosure was a "contributing factor" in the personnel action that was at issue, corrective action will be ordered. The standard used for determining whether it was a contributing factor is incredibly low. Specifically, OARM can conclude that a disclosure was a contributing factor if the person taking the personnel action knew about the protected disclosure, or if the personnel action occurred within a period of time such that a reasonable person would conclude that it was a contributing factor.

75. 28 C.F.R. § 27.3(f) (2008).

Therefore, if there is a disclosure, and an adverse personnel action is taken shortly after, there is essentially a presumption that it was reprisal. Again, this is incredibly protective of the employee. From the FBI's perspective, there is a presumption that if it is close in time, it was a contributing factor. The burden shifts at that point to the agency, and the FBI has to demonstrate by clear and convincing evidence, which is not proof beyond reasonable doubt but is a substantial amount of evidence, that we would have taken the same personnel action regardless of the protected disclosure. At that point you have a decision by OARM, and either side can appeal to the Deputy Attorney General ("DAG") if they disagree with the corrective action—either from the perspective of the FBI, which is ordered to do something that they disagree with, or from the employee's perspective, if he or she thinks the corrective action is inadequate or the finding against the retaliation claim is in error.

That is the basic scheme. But there is one other pertinent statute relevant to intelligence community employees. FBI employees also get the benefit of the Intelligence Community Whistleblowers Protection Act of 1998.⁷⁶ Under that Act, an employee can bring an issue of "urgent concern" to the IG. A matter of "urgent concern" is "[a] serious or flagrant problem, abuse, violation of law or Executive Order, or deficiency relating to the funding, administration, or operations of an intelligence activity involving classified information, but does not include differences of opinions concerning public policy matters."⁷⁷ Interestingly, it also does not include false statements to Congress, which seems a little odd.

If the IG finds the allegation to be credible, the IG is obligated to tell the Director, who is, in turn, required to tell Congress. If the IG finds the allegation is not credible, then the employee can go directly to a member of Congress who is a House or Senate Intelligence Committee member. If the employee chooses to contact a member of Congress, he or she must notify the Director of the FBI and follow the directions given relative to the classified information being disclosed. The Director can impose certain security rules on the employee before he or she can go to Congress, but nonetheless the employee can get to Congress.

The statutory scheme works pretty well. The FBI does not receive a lot of claims of whistleblower reprisal. As General Counsel, there are more claims that employees have been retaliated against for

76. 5 U.S.C. app. § 8H (Supp. II 2002).

77. *Id.* § 8H(h)(1).

exercising their rights under the EEOC claim system than because they are whistleblowers. One concern about this system is that it can be abused. For instance, OARM will still view an allegation by an employee as a protected disclosure if the employee goes first to a member of Congress and then the Congress brings it to our attention, instead of going to one of the employees or officials as provided in the statute or regulation. From our perspective, that thwarts the statutory scheme because it prohibits us from taking initial corrective action. Employees may presume that “management already knows this,” but some FBI managers manage an organization of 40,000 employees all over the world. Lots of things occur in the FBI that I do not know as the General Counsel and certainly the Director does not know. It is useful for us to learn these things from the employee first.

Another question that often arises regarding whistleblowers is whether they are good or bad. The answer is, sometimes they are good, and sometimes they are bad. Sometimes they are just cranky employees that have decided that they know better than everybody else how something should be done and what should be done. When such an employee makes national security information public because they disagree with the policy decisions, then the whistleblower is not a net benefit to the Bureau and is not a net benefit to you, the American people. There is the DOJ, a Presidential appointee in charge of the FBI, and lots of extremely dedicated employees who are trying to do the right thing, and it is not beneficial to set up a scheme where that whole organization of very good, honorable people are held hostage to some nutty whistleblower who decides to go public with information that should never be made available to the public in the first place.

VII. CONGRESSIONAL PANEL: SETTING A POSITIVE LEGISLATIVE AGENDA FOR THE FIRST AMENDMENT

*A. Congressman Robert C. “Bobby” Scott**

Thank you, Caroline for your very kind introduction. When she said she was going to introduce me, I was a little bit nervous. We give a lot of speeches and half the people that introduce us do not know us. (Laughter) They are confined to the script that we give them, so we can be comforted that we are going to get a nice introduction.

* Congressman, Third Congressional District of Virginia

When someone knows you well, they can tell all the truth. Thank you, Caroline for just telling the good stuff.

Thank you to the ACLU for having this forum on the Constitution and First Amendment protections because there are a lot of controversies going on in Congress as we speak. As we talk about protecting the Constitution, and about all that I have done to protect the Constitution, I am reminded of the old man that ended up at the Pearly Gates. He, at a very young age, had survived the Johnstown Flood, and he always liked to tell the story about that flood. As he got older and older, it occurred to him that there were fewer and fewer and fewer people around who could actually validate the facts. And so he took advantage of that, and that flood (Laughter) grew, and grew, and grew, and he showed up at the Pearly Gates and he said, Saint Peter, I want to tell the story about the flood. And Saint Peter said, yeah, yeah, yeah, we have been listening to this, and you have been boring everybody, but I will tell you what: you can tell it once, and that's it. And the old man said, "Okay, okay." And so Saint Peter gathered everybody together to listen to this story and gave the old man a nice introduction, and then said, now, before you tell the story about the flood, remember that Noah is in the audience. (Laughter) So, Caroline, thank you for all you have done for protecting the Constitution. Thank you Nadine Strossen and Ron Smolla, who is from my part of Virginia. All the experts and people who have really been defending the Constitution are here in the audience, and I am supposed to give a speech about protecting the Constitution.

But I can talk about protecting the Constitution from a congressional perspective, because during the last few years, we have had a frontal assault on the Constitution, particularly with things like the Patriot Act ("Act").⁷⁸ The 9/11 attack gave some individuals an opportunity they have not had for a long time because now they could effectively use fear to get a lot of legislation passed. The reason why the Patriot Act passed so quickly and why people could put it together so quickly was that it did not take any original thinking. The drafters just reached up on the shelf, pulled out everything they had not been able to get passed for years, stapled it all together, and then put "Patriotism" as the title. And all of the sudden, using fear, they were able to get this legislation passed.

One of the most egregious parts of the Patriot Act, of course, is its authorization of wiretapping.⁷⁹ As Martin Neimöller once said:

78. USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered title numbers and sections of the U.S.C.).

79. *See id.* tit. II (Enhanced Surveillance Procedures).

“When they came after the communists, I did not complain because I was not a communist; when they came after the trade unionists, I did not complain because I did not belong to a union; when they came after the Jews, I did not complain because I was not Jewish; and when they came after me, there was nobody left to complain.” If you see rights eroding, and fail to complain, and do not try to stop it, it will just get worse.

Wiretapping has gotten worse, to the point where the most recent version has virtually no oversight. Both the FBI director and the director of National Intelligence can authorize the gathering of foreign intelligence even when it involves people in the United States. If a call is being made into the United States, they can authorize a wiretap.

There are a lot of little parts of the wiretapping provisions that are troublesome. The Act authorizes wiretapping of conversations involving foreign intelligence information, without any oversight, if foreign intelligence officials think you are talking about terrorism or so-called “foreign intelligence.” “Foreign intelligence” can be anything that can help in foreign diplomacy, like a trade deal, or anything else. In fact, anything related to diplomacy constitutes “foreign intelligence”—no crime needs to be alleged and the information will still constitute foreign intelligence as long as it will help in diplomacy.

Furthermore, wiretapping can be authorized if foreign intelligence information is a “significant purpose” of the surveillance. Obtaining foreign intelligence information does not have to be the primary purpose of the surveillance, but merely a significant purpose. This, of course, raises a question. If obtaining foreign intelligence information is not the primary purpose, then what is the primary purpose for the wiretap?

A few years ago, I asked then Attorney General Gonzales what could be a legitimate primary purpose of surveillance if it is not gathering foreign intelligence? He said that running a criminal investigation could be a primary purpose, which means that it would be possible to run the criminal investigation without needing to go through the aggravation of having to show probable cause before starting to wiretap people.

The lack of oversight in wiretapping is also a little troublesome in light of the fact that this Administration has not credibly responded to the allegation that it abused the criminal justice process by firing United States Attorneys who were not indicting Democrats in time to effect elections. Some U.S. Attorneys would not bring those

indictments, so they were fired. U.S. Attorneys who were investigating Republicans were also fired. We are now finding out that some U.S. Attorneys, who filed what seemed to be frivolous charges against Democrats in time to affect elections, kept their jobs.

These are the allegations—that the Administration used the criminal justice process for partisan political purposes. Attorney General Gonzales gave a response; however, other Justice Department officials said that he was not telling the truth. One official quit, another one pleaded the Fifth, and White House officials are not showing up in response to subpoenas. Are the allegations true? We do not know, but we do know that the allegations have not been credibly responded to, and so when we consider the Patriot Act, we must consider the appropriateness of giving this Administration new power to wiretap, especially when the primary purpose of the wiretap is not known.

The Act also has some interesting changes in definitions. It says that a warrant is not needed in either of the following scenarios: if the wiretap is directed at people both of whom are overseas; or if the call is “concerning” someone “believed to be overseas.” That is a disconcerting idea, because if you and I are talking about Tony Blair, he is “believed to be overseas.” Does that mean that Administration officials can tap into our conversation? I do not know, but there is enough ambiguity since the words in the next section say notwithstanding any other law they can authorize the wiretaps.

Obviously, once the wiretap is authorized, roving surveillance goes into effect, whereby the Administration can tap any phone that the target of the investigation is using. And there is, in fact, no oversight. The only oversight is that the Administration has to file its plan with the court. The court has to accept the wiretap plan unless the court finds that it is clearly illegal.

The court does not decide whether or not the wiretap is legal. If the wiretap is not clearly illegal, the court must approve the plan. Even if the court finds that the wiretap is clearly illegal, the Administration can appeal. Meanwhile, the Administration can continue implementing its plan during the pendency of the appeal, which can go all the way to the Supreme Court. During that time, although the court has found that the wiretap is clearly illegal, the Administration can still continue to implement its plan anyway. That is what we have come to. Fortunately, most of that is in the part of the bill that expires in six months. But the fact that we have passed it at all should be extremely disturbing to a lot of people.

You get the sense that the Administration is really offended when you suggest that there need to be checks and balances. The Administration acts as if you are questioning its integrity when you say that there ought to be checks and balances. No, it is just checks and balances. When the Administration does something, it should just tell the court; the court will go along with it, but humor me and tell the court. And if the Administration is in a hurry, go ahead and do what needs to be done; just tell the court later, by utilizing provisions for emergency wiretaps.

The Administration keeps saying that we need to, in balancing security and liberties, focus on security. However, this is not a question about security and liberty because there is nothing they can do with this law, i.e., no oversight wiretapping, that they could not do before if they just stopped by the court and told the court what they were doing. Or, if the Administration is in a hurry, it can do what it needs to do and then tell the court on the way back. Thus, the Administration can do anything that would be legal without oversight, with a warrant, if they just go through the little process of obtaining a warrant. In short, you are not balancing your rights and your liberties, you are just having fundamental checks and balances.

The Administration wants to try people using military tribunals; unfortunately, we did not complain about that—it slid through. Military tribunals are not court-martials; a court-martial is a regular trial process. In a military tribunal, there is no right to a public trial. There is only a vague right to an attorney. There is no right against self-incrimination. There is no presumption of innocence. There is no need for proof of guilt beyond a reasonable doubt.

I saw one Senator ask then Attorney General Ashcroft about this: are you requiring guilt beyond a reasonable doubt, or some guilt level beyond just preponderance of the evidence—something like compelling, clear and convincing—and they kept going back and forth. It occurred to me that the Attorney General was not even conceding a preponderance of the evidence standard. It was almost as if a less than clearly erroneous standard could be a basis for guilt. But we did not complain about the standard of proof and the next thing we ended up with was the concept of “enemy combatant,” for whom the Department of Justice did not even bother to have a trial. The Department of Justice simply designates someone as an enemy combatant and locks them up, indefinitely. No charges, no trial, nothing. I asked then Attorney General Ashcroft at a hearing: What happens if you have designated someone as an enemy combatant and they are locked up, but they are actually factually innocent of the

allegations? Suppose the enemy combatant's story is as follows: I saw your informant point in my direction, but he was pointing at the person behind me; he was not pointing at me. Tell me what I am accused of, and I can explain that it was not me. I asked the Attorney General when, in this process of designation and then lockup, does the individual have an opportunity to make his or her case? And the answer was, "At the end of the conflict." At the end of the war on terrorism, you can say that you were locked up without cause. That is what you end up with when you do not take a stand. We did not take a stand regarding military tribunals, and now we have people locked up as enemy combatants.

If you do not take a stand against unreasonable searches and seizures and unreasonable criminal trials, the Administration is not going to stop at those parts of the Constitution; instead, it will move on to the other parts of the Constitution, like the First Amendment—religious liberties. The idea that decisions need to be based on principle is really nowhere to be found. Some will take little innocuous cases and create very difficult analytical problems.

Take the question of whether or not "under God" can legally be part of the Pledge of Allegiance required to be recited in elementary school. I happen to agree with the dissent in the Ninth Circuit,⁸⁰ which said that the reference to God in the Pledge is so innocuous that nobody pays any attention to it and instead it is constitutionally meaningless. Unfortunately, due to the fact that there have been several congressional resolutions,⁸¹ and people have held rallies about the issue, the argument that the phrase is innocuous is difficult to sustain.

Moreover, what standard should be used to evaluate whether the phrase is constitutional? If you are going to determine that something is not innocuous, what standard will you use to evaluate it? Should we use the coercion standard? School children have to go to school and are coerced into reciting the Pledge, which is now considered a meaningful religious message. So on that basis, the policy of reciting the Pledge would have to fail. What about considering whether there is an establishment of one view of religion, i.e., monotheism, because the Pledge includes "under God," not "gods"? That is an establishment, so if we look at the Pledge from an

80. *Newdow v. U.S. Cong.*, 292 F.3d 597, 612 (9th Cir.) (Fernandez, J., dissenting), *amended by* 328 F.3d 466 (9th Cir. 2002), *rev'd sub nom.* *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004).

81. *See, e.g.*, S. Res. 292, 107th Cong. (2002) (expressing support for the Pledge of Allegiance); H.R. Res. 459, 107th Cong. (2002) (expressing the House of Representatives' opinion that *Newdow* was erroneously decided).

establishment analysis, it must fail. How about the *Lemon* Test?⁸² Is there any secular purpose? The Pledge used to be recited without the phrase “under God” in it. The congressional resolution that put “under God” into the Pledge was a separate resolution⁸³ that had no other purpose other than the insertion of the phrase “under God,” into the Pledge. Inserting such a phrase has no secular purpose. So once again, the Pledge fails. If you are trying to have any principled resolution of this issue, once you give up the possibility that the phrase is innocuous, it has to fail.

Sometimes we avoid any analysis at all by using something called “Court-Stripping.” In other words, do not let the courts decide certain issues. Congress is doing that on the issue of gay marriage by passing legislation stripping federal courts from having jurisdiction to hear cases involving the Defense of Marriage Act. This is especially interesting for people in Virginia because it was those so-called “liberal, lifetime-appointed, activist federal judges” who declared Virginia’s laws prohibiting mixed race marriage unconstitutional even though the marriage laws were the properly enacted law in Virginia reflecting the will of the people. I was happy to see those so-called “liberal, lifetime-appointed, activist federal judges” take that position. And if this “Court-Stripping” idea had been in effect back then, I am not sure we could have ever repealed that law (I was a member of the General Assembly of Virginia for fifteen years). Thankfully, those “liberal, lifetime-appointed, activist federal judges” did it for us.

Another issue is the posting of the Ten Commandments. Who wants to decide which version, the Catholic, Protestant, or Jewish version, of the Ten Commandments gets posted? If you can post the Ten Commandments, what else can you post? Those are questions that are best left to the traditional view of the Establishment Clause—you cannot post any of them.

Another issue is the proposed “Flag Burning Amendment.”⁸⁴ There is no analysis in any of the flag cases that makes a prohibition of flag burning legitimate under any analysis of the First

82. See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (ruling that in order to comport with the Establishment Clause a statute must meet three criteria: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . [and third,] the statute must not foster ‘an excessive government entanglement with religion.’”) (citation omitted).

83. H.R.J. Res. 243, 83d Cong., 68 Stat. 294 (1954).

84. The most recent resolution proposing to amend the Constitution to prohibit the physical desecration of the U.S. flag, S.J. Res. 12, 109th Cong. (2006), did not pass.

Amendment.⁸⁵ Laws can proscribe time, place, and manner of speech, but not content. In actuality, this bill is called the Flag Desecration Amendment, not the Flag Burning Amendment, because its supporters do not want it to reach the American Legion. The only time I have seen a flag actually burned was by the American Legion during a flag retirement ceremony. Any Boy Scout will tell you that you dispose of a worn-out flag by holding a respectful ceremony and then burning the flag. That is not “desecration,” that is respect. Desecration is when you have some war protestors say something that offends the local sheriff when they are burning the flag. They say it is action, not speech. No. Burning the flag while saying something nice is okay. But if you burn the flag and insult the sheriff, they want to lock you up. Anybody who has any idea what flag burning and the First Amendment is all about knows that you cannot prohibit desecration under any principled analysis of the First Amendment.

In other religious cases, there is a sense that if you are in the majority, you can get your way. If you are a member of the majority religion, there are privileges that some want to enjoy that members of other religions cannot. The faith-based initiative is right in the middle of that.⁸⁶ If you boil the faith-based initiative down to its essentials, all it does is allow some sponsors of federally funded programs to discriminate with federal money. It does not allow faith-based groups to sponsor federally funded programs. They can do that already. Five percent of the Head Start programs are already sponsored by faith-based organizations. They sponsor them just like everybody else. You have to use the money for the purpose for which it was appropriated, and you have to abide by civil rights laws. Catholic charities and other groups have been getting billions of dollars of federal money for years, and using the money for the purpose for which it was appropriated. They cannot proselytize or use it for a religious program, and they have to comply with civil rights laws. Some religious organizations want to use their Title VII exemption,⁸⁷ under which they can discriminate in hiring with their own congregation’s funding, and carry over that exemption to the federal money that they receive from the faith-based initiative for government-funded programs. For example, the Head Start program would like to say to an applicant: while you would have been a great

85. *E.g.*, *Texas v. Johnson*, 491 U.S. 397 (1989); *United States v. O’Brien*, 391 U.S. 367 (1968).

86. *See* Exec. Order No. 13,199, 66 Fed. Reg. 8499 (Jan. 31, 2001) (establishing the White House Office of Faith-Based and Community Initiatives).

87. 42 U.S.C. § 2000e-2(e) (2000).

Head Start teacher and you are the best applicant that we have, we do not hire people of your religion. Moreover, discrimination based on religion effectively leads to discrimination based on race. For example, a Head Start program employer might say to an applicant: just by looking at you, I can tell we do not have people who look like you that belong to our church. So you cannot get a job here. Where I come from, there are a lot—I do not know if it is most—but there are a lot of religious organizations that are, to the nearest percentage, one hundred percent black or one hundred percent white. If you are picking people just from your church, that has racial overtones. Under these circumstances, if you are discriminating based on religion, then you are also discriminating based on race.

I have asked some of my civil rights lawyer friends if they have ever heard of a racial discrimination case made against a church. None of these civil rights lawyers had heard of even one such case. Thus people in federally funded programs could be discriminating based on religion, race, and other grounds, all under the guise of religion.

There is also another interesting aspect of this issue. If you allow someone to discriminate in a federally funded program based on race and religion, where is your moral authority to tell a devoutly religious businessman what he can do with his own money? In the 1960s, we convinced the requisite portion of the United States that employment discrimination based on race or religion was so reprehensible that we made it illegal. If we now allow such discrimination to occur in a federally funded program, we lose the moral authority to have any civil rights laws to tell someone what they have to do with their own money.

But some believe that since we are in the majority, we can pass the law that will allow that kind of discrimination because, the fact of the matter is, our side will be doing the discriminating. As a result, no harm will be done. We are not going to be discriminated against. In fact, when they talk about civil rights in this respect, they talk about the right of the person discriminating. It used to be that the victim of discrimination was the one that had the power of the federal government on their side. Now, the power of the federal government protects someone's right to discriminate.

One of the problems we have had in this debate is that it is so extreme that nobody believes that the debate is actually going on. I have asked people the following question: if someone offered an amendment that allowed some Head Start programs to tell some people that the programs do not hire people of their religion, what chance do you think that amendment would have to pass? And their

response, generally, is that the provision would be unconstitutional and that the amendment would have no chance of passing. And then I have to explain to them that these provisions have been passing the House for the last six or seven years; actually, we have been voting on this issue for almost ten years, and that a few months ago was the first time we actually won and prevented this type of provision from passing. Every other time we lost the vote; the Republican majority has voted almost unanimously to allow that kind of discrimination.

People just do not believe that this kind of discussion is going on. Indeed, it is still alive and well, and in some programs, they have actually gotten it through. But there is a sense that if you are in the majority you can fix the results.

When you talk about a “fair” trial, the idea is that you cannot fix the result in a trial. The most high profile example of that was the Terri Schiavo case where the court system had consistently ruled on behalf of the next of kin, the husband. The majority in Congress was offended by that decision and wanted to change the result legislatively. We passed a bill⁸⁸ to allow standing for the parents in that case simply because the majority agreed with the parents. In the next case, however, we might agree with the husband, not the other relatives, and we would not want them in court. So, we passed legislation to fix the result in that case only. The bill actually passed the House by an overwhelming margin. I think the public was pretty much offended that we would intervene in that kind of case. And they were certainly offended by the idea that we tried to fix the result after it had been properly considered by the courts and there had been a fair resolution of the case, whether you agreed with the result or not.

But it was not the only trial whose result we wrongly tried to fix. The NAACP and other groups have been suing gun manufacturers based on the idea that somebody who gets shot in the street in New York should be able to sue the gun manufacturer for the way that the gun manufacturer manufactured and distributed the firearms.⁸⁹ Well, that is a stretch. These plaintiffs had not won any cases, but just to make sure, the gun manufacturers’ lobbyist came to Congress seeking immunity for those organizations. In other words, Congress decided that we would try the case in the legislative branch instead of letting the case be tried in the judicial branch, where the parties would be relegated to an impartial judge and jury and the same law applies to

88. Act for the Relief of the Parents of Theresa Marie Schiavo, Pub. L. No. 109-3, 119 Stat. 15 (2005).

89. *E.g.*, *NAACP v. Accusport, Inc.*, 271 F. Supp. 2d 435 (E.D.N.Y. 2003).

everybody else. Instead, we allowed one party to go to the legislative branch, where it could try to influence the result by contributing money to the triers, and where the result would be based on popularity, not the Rule of Law. They passed the bill⁹⁰ and essentially tried the case. In effect, Congress gave immunity to the gun manufacturers in the legislative branch rather than letting the judicial branch take care of it.

The fast food industry did the same thing. There was the “McDonalds makes you fat” legislation,⁹¹ where people sued McDonalds. The plaintiffs had not gotten anywhere, but just to make sure, the House passed a bill to immunize the food industry. Again, no rule of law supported this, but contributions and popularity obviously effected the result. They also, kind of under the radar screen, stuck a lot of products liability and other provisions in there. But we passed that bill in the House.

One case in Northern Virginia⁹² that people remember—although I am not sure that they remember how it actually ended up—was the child custody case involving two doctors, Dr. Morgan and Dr. Foretich. The mother had accused the husband of molesting the child, but visitation was ordered anyway. She took the child, ended up in jail for the year, and the child ended up in Australia somewhere. We entered final judgment to fix the result in that case in a Transportation Appropriations Conference Committee report⁹³—just stuck it in a conference committee report. When the bill came back for an up or down vote, Members had to decide whether they were in favor of federal transportation funding or not, with this little phrase in there that fixed the result of that case. When the bill passed, the individuals came back from Australia to the United States. This was not an example of the Rule of Law; Congress wanted their side to win, so they fixed the result.

We have another situation in which the majority wants to enforce, through the Executive Branch, the disclosure of some testimony. They want to make reporters testify in violation of hundreds of years of tradition. As a result, we are considering a Reporter Shield Law⁹⁴ that will be discussed later this afternoon.

90. Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7901 (Supp. V 2005).

91. Personal Responsibility in Food Consumption Act, H.R. 554, 109th Cong. (2005).

92. *Morgan v. Foretich*, 521 A.2d 248 (D.C. 1987).

93. H.R. REP. NO. 104-785, at 14 (1996) (Conf. Rep.).

94. Free Flow of Information Act of 2007, H.R. Res. 2102, 110th Cong. (2007).

Attorney-client privilege: Is there a right to attorney-client privilege in criminal cases or are individuals and corporations being coerced into waiving that privilege? Congress is going to have to consider attorney-client privilege laws to make sure that individuals and corporations are not coerced into giving up their right to attorney-client privilege.

As a result, we wonder where the Rule of Law is. We wonder if some sponsors of federal programs want to use federal money for religious purposes. Maybe Congress could just vote and pass that, but where is the Rule of Law? They want to win a lawsuit; they just have the case decided by the legislative branch. If they want to listen to conversations of people without probable cause of any crimes, they just get to listen in—there is no respect for the Rule of Law.

If you want to protect the Constitution, then you need a strong ACLU. That is why I am happy to be here this morning. Because if it was not for the ACLU—in spite of all the defeats we have had—it would have been a lot worse. (Laughter) Caroline, Nadine, and others, thank you for your hard work, and keep up the good work.

CAROLINE FREDRICKSON: Thank you so much, Congressman Scott. I have to say, we were starting to feel a little depressed with the litany of lawsuits but you picked me up there at the end; I appreciate that. I had an interesting experience earlier this week on behalf of Nadine who was unable to speak to a group of generals. I spoke to them about a couple of the issues that you mentioned here, particularly about surveillance and about the issue of military commissions and taking away habeas corpus rights from the detainees at Guantanamo. I mentioned the role of checks and balances and how important it was, and they sort of looked at me, a little blankly, and then I said, just remember, we could be talking about President Hillary Clinton. Then they all started nodding—all right, checks and balances. (Laughter)

In light of what you mentioned about checks and balances and, in particular, the way that this Administration has used the State Secrets Privilege and classified documents to such an extent, how does Congress perform its role as a check on the Executive Branch in a world where the Executive Branch denies Congress access to information, and where the courts are cut out as well?

CONGRESSMAN SCOTT: The right of Congress to get information under those circumstances is partly legal, but mostly political because as we try to get information and enforce subpoenas, public opinion really comes into play and politicians get punished for stepping overboard. When the Administration claims executive privilege, it gets away with it unless it is clearly overstepping, because if we try to enforce a subpoena, the judicial branch must order the

enforcement of the subpoena. But the public is actively involved during that process.

When they say something is classified, it is a curious process. I asked the Director of National Intelligence, John Negroponte, if there was some process by which they classify and declassify—so that you know when something is classified, and if it is no longer classified, you know when it was declassified—because we frequently find at congressional hearings that individuals would say, “Oh, no that is classified.” Then, the next day, we would watch CNN and they would be discussing the issue that we had asked about. Well, when was it declassified? When Vice President Cheney or the head of the National Intelligence decided to blurt it out—the minute they blurt it out—is it no longer classified or is there some process, is there some federal record when things are declassified? We do not know.

Then there is the issue of trying to get information from uncooperative executive branch officials. We went through this in the U.S. Attorney situation, where people tried to rephrase the questions we were asking to make the issue about whether the President has the authority to use politics in selecting and firing U.S. Attorneys. Of course he does; that is an easy question. But that was not the issue. The issue was: does he have the right to obstruct justice by firing and threatening to fire people unless they file frivolous charges to get a partisan political result? I think that is the question that we need to ask, and we have not gotten an answer to that question. One official quit and another accused Attorney General Gonzales of not telling the truth; one admitted under oath that she had “crossed the line,” and some will not show for subpoenas. It has been very difficult to get any information.

Some of the Republican-appointed U.S. Attorneys alleged that they were fired because they did not follow the partisan-political agenda. Now these are not left-wing Democrats, these are Republican appointees saying this. And we have not been able to get information even though we subpoenaed Administration officials; they just decided not to show up. I hope we are going to make it clear that the alleged acts constitute obstruction of justice, so I do not think we are going to just drop it. I think we are going to continue to try to get information, but we have been trying to get the most mundane information and it has clearly taken a long time.

What you suggested is a challenging problem. We are working with it—the U.S. Attorneys question and the wiretap question. We are not getting many answers. Part of the problem is this Administration has had essentially no oversight. Congress has not been a check and

balance, rather Congress has been more of a cheerleader for the Administration. For several years, whatever the Administration wanted to do, Congress did not question it; instead, they tried to sell it. Now, the Administration actually has to answer questions, and it is a new experience.

CAROLINE FREDRICKSON: That is certainly different from my experience in the Clinton Administration. Well, thank you very much for your answer. Congressman, you mentioned a couple of issues earlier with the Reporter Shield Legislation. That is obviously a very critical factor, as well as whistleblower protection, to ensure that congressional oversight is complemented by the access that the press has to information and protections for the press, as well as opportunities for whistleblowers to come forward.

CONGRESSMAN SCOTT: The problem with the Reporter Shield Law is that you never needed one on a federal level because people were reasonable. You just did not press so hard to get a reporter to testify. Now, they are just throwing reporters in jail. There has always been a balance between the reporters' right to get information, and the Executive Branch and judicial branch right to get the information. There has always been a tension, and we have always been able to work it out because everybody was reasonable, so you did not have this problem. Now, we have this problem.

There also was no need for an attorney-client privilege statute because people were always reasonable. Now, we need to consider this kind of legislation.⁹⁵ There was never any need for direction about whether or not the Executive Branch could invade a congressional office the way they did where they just went in and took everything. They do not just go in and grab a discrete piece of evidence, like drugs in the bottom-left drawer, get the drugs, and come out. Now they come out with all the computers, all of the legislative work, everything. This never happened in centuries, and then it happened. If a legislative agency went over to the White House and went into Karl Rove's office and started to leave with his computer so that Nancy Pelosi's staff could look at his computer files, people would understand what the problem is. We need to respect each other. They could have worked together to get the necessary information. The Executive Branch officials could have worked with the Capitol Police to figure out how to get into the office to get the necessary information. Instead they just sent the Executive Branch officials there with a subpoena; and while I do not think there is any

⁹⁵ Attorney-Client Privilege Protection Act of 2007, H.R. Res. 3013, 110th Cong. (2007).

question that they had that right, there is a reason why it had never happened before. When you are dealing with an administration that is right on the edge, pushing the envelope time and time again, and when you have never had to deal with these types of questions that we are now having to deal with, it makes things difficult. We will keep doing the best we can. I think the public sentiment will turn and make life very difficult for the Administration. And there are things you can do with a majority of Congress; Congress can start to override vetoes. And there are other things that you can do if you have enough public support behind you.

*B. Congressman Mike Pence**

Thank you all. I had to check my schedule twice this morning to see if I was given the right schedule, and I was handed the right schedule. I am at the ACLU conference. Thank you very much. Honestly on this issue, there is very little daylight between the historic work of this great national champion of civil liberties and the First Amendment and this Indiana Congressman. Thank you for the opportunity to be here.

I am a conservative Republican. I like to tell people I am a conservative, but I am not in a bad mood about it. (Laughter) Hopefully some of the work that I, and my counterpart and mentor, Senator Richard Lugar from Indiana, have done in the last three years to attempt to put a stitch in what I believe is a tear in the First Amendment freedom of the press, provides some evidence of the commonality of these ideas among Americans of diverse views, politically and ideologically. I think all of us, as Americans, cherish the blood-bought liberties that are found and enshrined in the Bill of Rights.

I want to speak to you about those liberties today. It is particularly momentous to be able to come before you today because the legislation that we introduced three years ago, the Free Flow of Information Act,⁹⁶ colloquially referred to as the “Federal Media Shield Bill,” was marked up this summer and reported for the first time ever out of the House Judiciary Committee. As I speak to you today, the Senate Judiciary Committee is marking up and considering the Free Flow of Information Act in the United States Senate. Indeed, we may well have news before dinner tonight that the Free Flow of Information Act and this Federal Media Shield Bill has

* Congressman, Sixth Congressional District of Indiana.

96. H.R. Res. 581, 109th Cong. (2005).

arrived at a place that heretofore was unattainable despite one hundred legislative efforts since the early 1970s.

Let me speak to you about the legislation, and then I would like to take questions. I used to do a call-in radio show. My wife listened to it occasionally (Laughter)—and just occasionally—and I would always ask her, “Well, how do you think the show went?” And she would say, “Well, it got really good after you started taking calls,” (Laughter) which told me that I am probably better at dialogue than monologues. So before I have to cut away here, I would love to get into a dialogue with you all about how we have been building this legislation and about some of the challenges that we have faced.

Colonel Robert R. McCormick, the grandson of the founder of the *Chicago Tribune*, wrote words that are now chiseled into the wall of the lobby of that newspaper’s building. I think these words are an appropriate starting point in this discussion. He wrote, “The newspaper is an institution developed by modern civilization to present the news of the day . . . and to furnish that check upon government which no constitution has ever been able to provide.”

Occasionally reporters have approached me over the last three years, and said, “Now, I saw you doing a Federal Media Shield Bill.” And I say, “Right.” They say, “Do you think the media is kind of liberal or . . .” And I say, “Oh, yeah, the national media is terribly liberal in my view; it is very biased.” And they say, “Well, you know, this kind of helps reporters do . . .” They are kind of checking my IQ; generally, in my experience, this is always a good thing to do with Republicans. (Laughter) But then they look to the left, look to the right, and they kind of say, “Hey, thanks.” (Laughter) And I tell them, number one, as an American, you are welcome. But number two, let me assure you, this legislation is not about protecting reporters; it is about protecting the public’s right to know. Then I generally go on to explain that as a conservative who believes in limited government, I think that a free and independent press is the only check on government power in real time.

We often speak about elections and we often speak about the accountability of the democratic process. But even a casual observer of American government understands that elections come and go in different bi-annual intervals. The day-in and day-out, antiseptic of free and independent press is truly the only limit on government power upon which we can rely. I think our founders enshrined in the First Amendment those words, “Congress shall make no law . . .

abridging the freedom of speech, or of the press,”⁹⁷ for precisely that reason. The Constitution enshrined, I believe, a Republic which is defined by its limited nature and the limited scope of its powers. Our founders certainly did not include protections of the press in the First Amendment because they got good press. All you have to do is Google me once to find out that I occasionally put my foot in my mouth and pay for it in the press. But again, as someone who believes in limited government, it is my conviction that a free and independent press is the only check on government power in real time, and conservatives and liberals ought to be able to understand and embrace this.

Thomas Jefferson warned, “[O]ur liberty . . . cannot be guarded but by the freedom of the press, nor that be limited without danger of losing it.”⁹⁸ During the last three years, we have been working on a bipartisan basis. Senator Lugar, Senator Dodd, Chairman Leahy, former Chairman Specter, and I are working with Congressman Rick Boucher, along with the original co-sponsor, Chairman Conyers of the Judiciary Committee, and the distinguished member, Republican Member Howard Coble. We have come together on a bipartisan basis to advance a very simple principle. That principle is to take those words of the First Amendment to heart, and to take an important step toward repairing what I think is a tear in the First Amendment freedom of the press.

Not long ago, reporters’ assurance of confidentiality was unquestionable. That assurance led to sources providing information to reporters who then brought forward news of extraordinary consequences in the life of the nation like Watergate, where government corruption and misdeeds were brought to light by the dogged persistence of a free and independent press. However, the press cannot, this day, make the same assurance of confidentiality to sources. I say with a heavy heart, we face a real danger in America today that there may never be another Deep Throat.

In recent years, reporters, like Judith Miller, have been jailed. James Taricani was placed on house arrest, and both Mark Fainaru-Wada and Lance Williams were threatened with jail terms. Protections provided by the Free Flow of Information Act are necessary so members of the media can bring forward information to the American public without fear of retribution or prosecution, and so sources will continue to come forward. Compelling reporters to

97. U.S. CONST. amend. I.

98. Letter from Thomas Jefferson to John Jay (Jan. 25, 1786), *in* 5 THE WORKS OF THOMAS JEFFERSON 73 (Paul Leicester Ford, ed., The Knickerbocker Press 1904).

testify, and in particular, compelling them to reveal their confidential sources, is unquestionably a detriment to the public interest. Without the promise of confidentiality, many important conduits of information about our government will be shut down. The dissemination of information by the media to the public on matters ranging from the operation of government, to events in our local communities, is invaluable to the operation of a democracy. Not only in cases involving corruption, but also in cases involving the expenditure of billions of dollars by future generations of Americans; a free and independent press is an essential element in that cause.

Without the free flow of information from sources to reporters, I submit that the public will be ill-equipped to make informed choices as an informed electorate. This is not to say the press is without fail or always gets the story right. One of my favorite quotes from James Madison is where he wrote, "To the press alone, checkered [sic] as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity, over error and oppression"⁹⁹

As a conservative, I believe the concentration of power should be subject to great scrutiny. Integrity in government is not a Democratic or Republican issue. And corruption, sadly, cannot be laid at the feet of any one particular political party. When scandal hits either party, or any branch of government, or any institution of our society, it wounds our nation. The longer I serve in Congress, the more firmly I believe in the wisdom of our Founders, especially as it pertains to the First Amendment freedom of the press. It is imperative that we preserve the transparency and integrity of the American government, and the only way to do that is by ensuring a free and independent press.

It is important to note the legislation that will be considered in the Senate today, that we have introduced to move in the House Judiciary Committee, is not a radical step. Thirty-two states and the District of Columbia have various statutes that protect reporters from being compelled to testify or disclose sources of information in court. Seventeen states have protections for reporters as a result of judicial decisions. The Free Flow of Information Act would simply set national standards similar to those that represent the law of most

99. James Madison's Report on the Virginia Resolutions, *in* THE VIRGINIA AND KENTUCKY RESOLUTIONS OF 1788 AND '99: WITH JEFFERSON'S ORIGINAL DRAUGHT THEREOF; ALSO, MADISON'S REPORT, CALHOUN'S ADDRESS, RESOLUTIONS OF THE SEVERAL STATES IN RELATION TO STATE RIGHTS; WITH OTHER DOCUMENTS IN SUPPORT OF THE JEFFERSONIAN DOCTRINES OF '98, at 36 (Jonathan Elliot, ed., Washington 1832).

states. I would submit to you that not only has the legislation been a productive compromise, as all legislation is, it has also been carefully crafted after reviewing the internal Department of Justice guidelines and state shield laws as templates.

The legislation puts forth, in very specific terms, a qualified privilege, which I believe strikes an appropriate balance between the public's need for information and the fair administration of justice. In most instances under our legislation, a reporter will be able to use the shield provided in the bill to refrain from testifying, providing documents, or revealing a confidential source. However, I want to be clear. The privilege is not absolute or unlimited. Different issues are raised in state jurisdictions, and one has to acknowledge that at the national level, there are different issues as well. The part of our government that is charged with providing for the common defense has different pressures and different challenges than state or local governments ever can or will have. On that basis, testimony of documents can be forced only if all reasonable alternative sources have been exhausted, and the testimony or document sources are critical to a criminal prosecution or civil case, and a judge determines that the public interest in compelling disclosure outweighs the public interest in gathering or disseminating news or information. The addition of this balancing test ensures that a full and fair consideration will be given to both sides in the determination of whether a reporter must testify or turn over documents. Specifically, in a situation where a reporter is being asked to reveal the identity of a confidential source, the bill provides several exceptions whereby the reporter can be compelled to reveal the source.

Before going into that issue, I have never spoken to Bob Woodward about this, and I suspect many of you in the room have talked through these issues with him, but from my reading of his work in the past and following the disclosure of the identity of Deep Throat, it seemed to me that the one overwhelming issue for that source was that his name never be revealed to the public. The truth is that under the law in Supreme Court decisions that existed at the time, Bob Woodward could give that assurance to that source. Let me emphasize again, that assurance cannot be given today. I think that this is having, as the subject of this conference suggests, a chilling effect on men and women, and that it is also influencing the willingness of people like me to talk to people like some of you in this room, who carry a pen and a pad for a living. We do not know when it is happening—that is the very nature of the chilling effect since it is impossible to assess the impact of it—but we know it is happening.

It is hard for me to look at the recent Judith Miller case, whatever you make of it, in which the revealing of a CIA official was at the very core of that case. A White House official, now convicted of perjury—answering to the law—began that case by telling what was, in that moment, the truth to a reporter off the record. Indeed, there was a falsehood that was found before the grand jury later, but I want you to ponder that for a moment and ask yourself what signal that sends to people like me. When a reporter walks up and says, “Seriously just off the record, what is going on here?” That case stands as one of many monuments to the fact that reporters cannot protect confidential sources, and I believe it is having an effect today, in real time, on the free flow of information.

Specifically, regarding the situation where a reporter is being asked to reveal the identity of a confidential source, our bill provides several exceptions. In order for a reporter to be compelled to reveal a source, the situation has to fall specifically in one of these exceptions. Sources can be revealed under exceptions for national security where an imminent threat of bodily harm or death exists. There is an exception where trade secrets have been revealed, or where personal health or financial information has been revealed in violation of the law. We added further clarification in the Judiciary Committee to those exceptions. Under the manager’s amendment, compelled disclosure of a source will only be permitted if it is necessary to prevent—here we changed the language—terrorism or a significant specific harm to national security. Also under the manager’s amendment, it prevented the shield privilege from being claimed by a foreign power or agents of a foreign power.

Our legislation has also dealt with the whole question of who does this apply to, whom are covered persons under the bill. Under our legislation, covered persons are those able to use the shield, and frankly, there is a lot of discussion about Congress defining who is a journalist. I am somewhat troubled at the very prospect of that project. In this legislation we have attempted to make it clear that a covered person is engaged in journalism for financial gain or livelihood and that no terrorist will be able to qualify. Other than that, it is a very, very broad definition and it may yet be broader. At the close of the Judiciary Committee’s mark-up where we reported this bill for the first time, Chairman Conyers challenged the members to form a working group to deal with several issues, including the definition of a journalist, and that working group is diligently pursuing this.

I know the ACLU has had significant input on the development of this legislation and that it is participating through counsel in the working group. We are grateful for that leadership. The objective here—and this comes from someone who first filed the shield bill providing for an absolute privilege—is to read the First Amendment and know that there is not an asterisk next to it. But the nature of the legislative process and the challenges to the national government regarding national security lead us to try to shape that qualified privilege. It does seem to me, however, that we need to guard against distorting it into a manner whereby, for instance, corporations could publish a newsletter and then claim a media shield protection. We want to cover people that are involved in the journalistic enterprise in large ways or in small ways.

Lastly, it is important to know what the bill does not do. It does not give reporters a license to break the law in the name of news gathering, and it does not give them the right to interfere with police or prosecutors who are trying to prevent crimes. It leaves laws on classified information unchanged. It simply gives journalists certain rights and abilities to seek sources and report appropriate information without fear of intimidation or imprisonment. Just as, in the public interest, we allow psychiatrists, clergy, and social workers to maintain confidences. This is not really a radical thought. With such a qualified privilege, reporters will be ensured the ability to get the American people the information they need to make informed choices. As I said before, I believe a free and independent press is the only agency in America that has complete freedom to hold the government accountable.

I am someone that likes to crack open the Old Book from time to time. And the day of our mark-up, I was reading in my morning devotional time and I came across a verse in the Bible that simply challenged the reader to stand firm and to not let himself be burdened again by the yoke of slavery, adding that it was for freedom that Christ set us free. I had to ponder that as I went in, and I ended up making those comments as I closed my remarks in the Judiciary Committee that day.

In a very real sense, it was for purposes of freedom that our Founders, many of whom shared my Christian convictions, enshrined the freedom of press in the First Amendment. The American people, interested parties, and members of Congress all should seize this legislative moment to stand firm and not let ourselves be burdened by any yoke or any action that infringes on our fundamental freedoms as Americans.

I want to thank the ACLU for its strong support of a media shield in a very real sense and for its partnership in this legislative project. And I hope, and literally pray, that before this Congress is out, we will see a strong bipartisan vote in the House and the Senate that sends to the President of the United States legislation that will repair this tear in the First Amendment; it will strengthen the free and independent press for generations to come. Thank you very much. I am happy to take questions.

QUESTION: What are the prospects of the legislation passing when it reports out of the Senate Judiciary Committee?

CONGRESSMAN PENCE: When I introduced this bill in the last Congress, the then Republican chairman of the House Judiciary Committee, Jim Sensenbrenner, expressed a willingness to consider the bill in our Committee, and told me that the challenge, given the nature of the rules of the Senate, is the Senate Judiciary Committee. So in the last Congressional session, we focused on, with the strong support of Chairman Specter, trying to achieve progress in the Senate Judiciary Committee by having not one, but I think two, maybe three, hearings before the Senate Judiciary Committee. I continue to believe that, in terms of the foot race that we are involved in, the highest hurdle we are going to have to overcome could be today.

There is some word, however, that one of the members of the Senate has asked for a one week delay, and that may bump us a week. But the ability of one member of the Judiciary Committee to put a hold on a piece of legislation is pretty heady stuff. One member can say I do not want to proceed and announce a filibuster and that pretty much kills it. We are cautiously optimistic that the version that has been introduced in the Senate which, I am very humbled to say is largely based on the version we have been producing in the House with many improvements, could pass. Then, I think it is just a matter of organizations like the ACLU and freedom-loving groups—on the left, right, and in the center—around the country clamoring for the Congress to move this onto the floor. I have no doubt that if the Free Flow of Information Act was brought to the floor of the House of Representatives, it would receive a decisive bipartisan vote.

Some of my less cheerful conservative colleagues may be not be able to be persuaded, (Laughter) but you would be surprised. Some of the most ardent conservatives on the House Judiciary Committee voted in favor of reporting our bill. I will let them name names, but I was very humbled by that. It was truly a bipartisan vote in the Committee, and I believe it would be a bipartisan vote on the floor.

But I cannot emphasize enough that in my seventh year in Congress, there is what I call the gale force wind that would do something—to borrow an old economic term describing the only real power in Washington, D.C. Okay. When the American people say “Do it,” Congress usually says “Okay” because it has been said the Congress does two things well: nothing and overreact. (Laughter) So we are trying to make sure that by the time they get the message, the country actually cherishes a free and independent press.

I represent a district in Eastern Indiana that is a rural district and includes Muncie, Anderson, and other little towns. People stop me on the street when they hear Senator Lugar and I have been working on this, and they say, “You know, that is really great you are doing that.” Because people understand that reporters are on their side. They do not like reporters anymore than they like us, but they understand reporters are on their side. To the extent that we can convey to the American people that this is not about protecting reporters, but rather about protecting the people’s right to know, then people e-mail, phone, write and clamor in support of this. I have no doubt that we would be able to move this legislation in this Congress, if that occurs. Thank you for the question.

QUESTION: Could you talk a little more about the definition of these bills, the reporters, and how that might have stalled progress in the past?

CONGRESSMAN PENCE: Yes. I would have to ask Josh, who is my legal counsel here, to give you an exact number of versions covered, but let me tell you that the first version apparently applied to some journalists, but not to bloggers. That did not go over very well in the blogosphere. (Laughter) When I Googled my name a couple of years ago and my hard drive crashed, (Laughter) I realized that maybe we have a problem here. We have really been trying to go hammer and tongue on that. Here, is the tension. Because whether you are a Matt Drudge who is making phone calls and posting things on the Internet, when he was doing it on his own, it sure seemed like he was involved in the journalistic enterprise to me. But what you want to avoid is creating a new qualified privilege in the sense of a shield to people that are actually not involved in the enterprise of journalism. I mentioned the corporate newsletter would be one example. We try to deal with this in the definition—that subsidiary corporations cannot acquire a privilege for the corporate parent. For example, take GE—it seems like they own everything. But if GE owns a television network that has a news division, and the corporation ends up involved in a federal case, can it claim the privilege? GE would argue that it is a media company, so this law applies. That has

been the tension that we have been facing and we have the widest possible definition of people involved. The word “livelihood” seems like one that Republicans and Democrats on the Committee felt pretty good about. If you make a living doing this, that might be a good test.

The other thing that we also want to focus on is the issue of news-gathering or fact-gathering. I am actually the first member of Congress to have a blog. I think half of the Members of Congress have blogs, but the *New York Times* put me in its big write-up because we blog in my office and because I blog from all over the world. I am not a journalist. And the very fact that I put information on the Internet or link people to articles that I think are compelling and interesting does not mean that I think the law should necessarily extend additional legal protections to me. That is another part of the challenge that we face. But I would love for you to take a look at our latest iteration. I read all my e-mail, all my mail, and I would love to have your thoughts on it.