

Statement for the Record
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I.
INTRODUCTION

Chairman Hoekstra, Representative Harman, members of the Select Committee, thank you for inviting me to testify on the role and responsibility of journalists in covering classified subjects.

The subject of today's hearing carries particular significance for me as someone who regularly works in both the law and the media. On the legal side, I hold the Shapiro Chair for Public Interest Law at George Washington University where I teach relevant subjects that range from constitutional law to defamation to criminal procedure. In addition to writing on national security subjects as an academic, I have served as counsel in a variety of national security and espionage cases, including as lead counsel in the current terrorism case *United States v. Al-Timimi*. My litigation background includes cases that have dealt with attorney and journalistic privileges as well as executive privilege and the military and state secrets privilege. Due

to my work in cases handling classified material, I have held a clearance since the 1980s.

On the media side, I have worked as a legal commentator for roughly two decades. I am a member of the *USA Today* Board of Contributors and write regularly for various newspapers, including *The Washington Post*, *Los Angeles Times*, *Chicago Tribune*, and other publications. I have also had four stints under contract with NBC and CBS news and continue to appear as a legal analyst regularly on various broadcast and cable programs.

Many lawyers and journalists have become increasingly alarmed by the erosion of protections for the media in this country. While we often refer to our country as the cradle of press freedom, it is not true that the United States currently represents the high water mark for journalistic rights and privileges. Despite our great tradition of a free press and our extensive media industry, other nations now extend greater protections to their reporters and recent coercive measures against reporters have made the United States an area of considerable concern for international organizations.¹

¹ For example, the European Court of Human Rights has recognized protections akin to a federal shield law that can only be overcome with a very high burden that seeks to avoid even the “chilling effect” on the media. *Goodwin v. United Kingdom* (No. 7), 1996-II Eur. Ct. H.R. 483, 500.

The recent controversy over press freedom comes at a time when we have never been more dependent on the Fourth Estate to challenge and check the government's otherwise unbridled authority. In the last few years, we have faced one of the most serious constitutional crises in our history. President Bush has claimed the authority to violate or to circumvent federal law when he deems it to be in the nation's interest. There continues to be a raging debate over the President's authority to order warrantless domestic surveillance and other controversial (and potentially criminal) operations.² These are controversies that the Administration obviously would have preferred to avoid. Much anger has been directed at the media and there have been calls for new penalties and prosecutions for reporters and their sources.

² I have already testified in Congress about the NSA operation and the reasons that operation constitutes a clear and unambiguous federal crime. *See generally* United States House of Representatives, Subcommittee on Homeland Security, "Protection of Privacy in the DHS Intelligence Enterprise," April 6, 2006 (testimony of Professor Jonathan Turley); United States House of Representatives, House Judiciary Committee (Democratic members), "The Constitutionality of NSA Domestic Surveillance Operation," January 20, 2006 (testimony of Professor Jonathan Turley). It is not my intention to revisit that subject or my prior criticism of congressional oversight on such operations. *See Jonathan Turley, Down to the Fourth Estate*, USA Today, May 17, 2006, at 11A. Rather, I appear today to address a growing threat to journalists and their sources. Not only do I believe that additional penalties are not warranted for journalists, I believe that Congress must act without further delay in establishing new protections, particularly a federal shield law.

Ironically, this backlash was triggered by one of the great successes of the first amendment. While I understand the criticism of some members of this Committee, these recent stories have served to force a needed debate over the extent to which liberty interests are being sacrificed to security interests. There is obviously a considerable difference in how these articles are viewed among members of the Congress and members of the Fourth Estate. For many reporters and academics, however, this may prove to be a golden age of modern journalism. From the NSA domestic surveillance program to torture at Abu Graib to secret prison camps in Europe, reporters have been revealing serious violations of domestic and international law by our government. The post-Watergate generation of journalists has now surpassed even that legendary period of investigative reporting. With the help of officials who have put their very freedom at risk, these reporters have revealed operations that are considered violations of domestic and international law. The reporters responsible for two of these stories – the NSA domestic surveillance program and the secret prisons – were recently honored with Pulitzer Prizes.³

Rather than fully investigate and respond to the alleged unlawful conduct inherent in these operations, leaders have instead sought to deter

³ Tim Rutton, *A Nasty Turn in Criticism of Press*, Los Angeles Times, May 6, 2006, at E1.

further disclosures by seeking to uncover any sources and to threaten journalists with prosecution. Indeed, last Sunday, Attorney General Alberto Gonzales reaffirmed that the Administration was considering prosecuting journalists for covering classified operations – something that has never occurred in our history. When asked about such prosecutions on *ABC This Week*, General Gonzales stated:

It depends on the circumstances. There are some statutes on the book which, if you read the language carefully, would seem to indicate that that is a possibility. That's a policy judgment by the Congress in passing that kind of legislation. We have an obligation to enforce those laws. We have an obligation to ensure that our national security is protected. We have an obligation to enforce the law and to prosecute those who engage in criminal activity.

Initially, beyond the obvious threat itself, what is most striking about this statement is the tentative basis that General Gonzales states for this authority to prosecute journalists. It appears that “*if you read the language carefully*” it “*would seem*” that the prosecution of journalists “*is a possibility.*” Despite the obviously strained effort to claim such authority, General Gonzales then states the prosecution of journalists as “an obligation” as if he is being compelled to pursue such cases. It is a telling manifestation of an obvious desire to find such authority despite the absence of any clear authority to prosecute journalists for covering these programs. Congress has never

passed the “kind of legislation” that allows for the prosecution of journalists who cover classified subjects.

Finally, it is worth noting that General Gonzales himself is accused of participation in the approval of criminal violations in the NSA domestic surveillance program. It is, therefore, especially alarming to hear that General Gonzales is marshalling the powers of his office in a potentially unprecedented move against reporters, reporters who not only won the Pulitzer Prize for this work but who disclosed evidence of his own personal wrongdoing.

Recently, General Gonzales attempted to backtrack on his statements by stating that he would continue to focus on the leakers and would “try to persuade journalists that it would be better not to publish those kind of stories.”⁴ It is not clear whether General Gonzales is retracting the earlier threat, but his clarification only stated a preference for persuasion not a retraction of his claimed authority to prosecute. Moreover, his earlier comments (as I will show below) reflect the radical interpretation given national security laws in federal court.

⁴ Walter Pincus, *Gonzales Defends Phone-Data Collection*, Washington Post, May 24, 2006, at A06 (quoting General Gonzales as stating “Let me try to reassure journalists that my primary focus, quite frankly, is on the leak -- on leakers who share the information with journalists. . . [and would] prefer to “try to persuade” journalists “that it would be better not to publish those kind of stories.”).

I believe that General Gonzales is wrong about this asserted authority as a legal matter and that, as a constitutional matter, the suggested prosecution of reporters would undermine the very foundation of our free society. Historically, it has been the free press and not Congress that has been the catalyst for the greatest reforms in our country. The recent coverage of classified and covert programs should be a source of celebration not condemnation for our press and our constitutional system.

II.

A HISTORICAL BALANCE BETWEEN THE NEED TO SECURE SECRETS AND THE PUBLIC'S RIGHT TO KNOW

The centrality of a free press to our constitutional system should not be seriously in question. As James Madison wrote in one of his most cited passages:

[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. Knowledge will forever govern ignorance. And a people who mean to be their own Governors must arm themselves with the power which knowledge gives.⁵

Of course, the “power which knowledge gives” is often a discomfoting thought for those who control not just governmental power but much of the information on the use of that power. This has led to a long tension between journalists and the subjects of their coverage. Journalists must have “the

⁵ 9 *Writings of James Madison* 103 (Galliard Hunt ed., 1910).

means of acquiring” information and that means is often found among the ranks of government officials.

The issue of reporting classified facts has long been a matter left in a type of intentional ambiguity. In years past, there has been an implied recognition that this is an area that defies a simple codification of rules and responsibilities. On one hand, we all agree on the need to protect classified information and the corresponding authority to prosecute those individuals who intentionally violate classification laws. On the other hand, there is also the recognition that governments will often classify facts that would reveal their own negligent or criminal conduct. While the government has a need to protect classified information, the media has a countervailing duty to disclose such facts when they are matters of great public interest.

Faced with these two competing values – the right of the government to classify and the right of the media to report – we have relied on the self-restraint and good judgment of both government officials and journalists. Historically, this informal understanding has functioned well. While government officials have often criticized leaks and the media, they have generally not sought to root out sources in stories with obvious public interest. They have also refrained from threatening reporters with prosecution. For their part, reporters have tended to show an equal level of

restraint. Reporters receive an endless stream of leaks from government officials and the vast majority of those leaks never make it into print or broadcast. Indeed, recently the White House admitted that the President himself authorized a leak of information from the highly classified National Intelligence Estimate – though the White House claims that he declassified the information. When faced with such disclosures, media organizations go through considerable effort to confirm not only the truth of a classified story but the potential danger in reporting the classified facts. This involves discussions with government officials, internal deliberations, and often extensive editing to release only those facts that are essential to the story.

Ironically, the controversies that triggered the current backlash against the media should serve to demonstrate how conservative the media has been in handling such stories. Indeed, at times, the media proved far too conservative in holding such stories. For example, many of us were highly critical of *The New York Times* in holding the story of the NSA's domestic surveillance program for a year while they conferred with the government and debated the matter internally. According to most experts and both Republican and Democratic members, this operation was clearly unlawful. Yet, the *New York Times* sat on a story that indicated that the President may have ordered a federal crime, not once but thirty times. The other

contemporary stories show similar act of self-restraint. The disclosure of the secret prisons in Eastern Europe was wisely edited to remove locational information, even though such information would be quite newsworthy to specific countries where the prisons are located.

There is no question that aspects of the relationship between the government and the media is parasitic. The media lives off the coverage of the government and, to some extent, the flow of leaks from its vast array of offices and agencies. However, there is also an element of symbiosis. Most government officials privately recognize (particularly after they leave office) that the media serves to check abuses and improve the performance of the government.

For the most part, journalists have worked under the assumption that, while their sources may be violating classification laws and non-disclosure agreements (NDAs), they are not engaged in unlawful conduct when they are reporting on such subjects. Reporters do not sign NDAs as a general rule and they are not servants of the executive branch. Most national security laws refer to government employees or people who have been given classified information in the course of their public service. Indeed, the ubiquitous NDA forms are designed to give not just notice but a clear legal basis for punishing anyone who releases information that is given to them in

the course of their government work (or representational work, in the case of private attorneys given clearances). As for reporters, the assumption has been that they are not covered in the same way. Accordingly, journalists confine their role to the receipt of information from either sources or public resources. Their status changes if they take more direct action to gain access. Thus, reporters cannot personally steal classified material. They cannot engage in trespass or the interception of communications. They cannot hack into computers for such a purpose. They cannot serve as a conduit or resources for a foreign power. Their role is largely confined to being the recipient of information – albeit a willing and eager recipient in some cases.

For this reason, past controversies for reporters have focused on efforts of prior restraint and compelled testimony – rather than any suggestion of possible prosecution. The Supreme Court has effectively barred prior restraint of news publications, even with claims of a threat to national security. In *New York Times v. United States*,⁶ the Supreme Court rejected assertions that the publication of a classified study would cause great harm to the national security. In a plurality decision, the Court stated that such prior restraint required an exceptionally high burden. Indeed,

⁶ 403 U.S. 713 (1971).

Justice William Brennan described the burden as “proof that [a] publication must inevitably, directly and immediately cause” injury to the national security. Justice White and Stewart required a showing of “direct, immediate, and irreparable damage.” It is a standard that was viewed as so high that the government largely abandoned prior restraint efforts.

With the decline of prior restraint attempts, most of the past conflicts concern the testimony of reporters and the use of subpoenas to acquire journalistic notes.⁷ In contrast to the prior restraint area, the government has been largely successful in defeating efforts to refuse such access in the federal system due to the absence of a federal shield law. While 49 states and the District of Columbia have shield laws (either by statute or judicial decision), the Congress continues its inexplicable refusal to pass a federal shield law. Congress has maintained this position despite a filing from thirty-four states in the case of Judith Miller and Matt Cooper complaining that their state rules are undermined by the absence of a federal shield law. As a result of this failure, reporters have been routinely called before grand juries and forced to choose between disclosure and jail.

⁷ In response to the decision in *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), Congress did pass some protection for the media in the Privacy Protection Act of 1980 in terms of search warrants but notably not subpoenas. See 42 U.S.C. 2000aa (2000).

The difference between the contempt sanctions and the current threat of prosecution is that an incarceration under a contempt order is generally limited in time by the duration of the grand jury. A conviction under one of the national security laws would ordinarily carry a ten-year sentence. This would create a new rule that the government cannot engage in prior restraint, but it can prosecute you after your newspaper runs the story. It is a threat that would have seemed absurd just a few years ago, but now appears a real possibility under the current interpretations of this Administration.

III. THE GROWING THREAT TO A FREE PRESS IN THE UNITED STATES

The implied threat in General Gonzales' recent statement is so worrisome because the Administration has already taken steps to lay the foundation for the prosecution of journalists. In Alexandria, Virginia, the Justice Department is prosecuting two former lobbyists for the American Israel Public Affairs Committee (AIPAC).⁸ Steven J. Rosen and Keith Weissman have been accused for violations of the 1917 Espionage Act. 18 U.S.C. §793(g). Rosen and Weissman are accused of receiving classified information *orally* from Lawrence Franklin, a former defense employee.

⁸ See generally Jonathan Turley, *Living in a City of Spies*, The Baltimore Sun, April 3, 2006, at 15A.

They were also charged with “aiding and abetting” Franklin in his criminal acts. 18 U.S.C. §793(d). Franklin has already been sentenced for the disclosure of classified information to unauthorized individuals. Franklin’s prosecution is not particularly surprising. However, the government then moved against the two lobbyists and asserted an interpretation of the Espionage Act that would threaten any researcher, academic, or reporter who “acquires” classified information in conversations with third parties.

The government’s unprecedented interpretation of the Espionage Act does not distinguish between the motive or function of the party who hears classified information. Rosen and Weissman could have just as well have been working for ABC as AIPAC. They were trying to determine the current policies and issues relating to Israel. James Risen and Eric Lichtblau were performing the same function in their prize-winning investigation into the NSA domestic surveillance program. It is difficult to distinguish a Rosen from a Risen when the violation is alleged to be the simple receipt orally of classified information. In my view, the government’s interpretation of the statute is wrong as a matter of statutory construction as well as constitutional law. There is no evidence that Congress ever intended such a sweeping meaning in this Act and, as applied, it would violate a host of constitutional principles ranging from free speech to overbreadth. If successful, the Bush

Administration would make every reporter covering a classified subject into either a violator of the espionage act or an aider and abettor, or (as here) both.

Other statutes may also be used by the Administration in such a crackdown. For example, Section 798 of Title 18 makes it a crime for anyone who

knowingly and willfully communicates, furnishes, transmits, or otherwise makes available to an unauthorized person, or publishes, or uses in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States any classified information [concerning communications intelligence or devices or processes].

This provision has always been viewed with great suspicion due to its seemingly unlimited reach. Presumably, if General Gonzales gives this provision the same liberal interpretation, it would allow a reporter to be charged and sentenced to ten years for covering an espionage trial where he reported some issue of cryptology that the accused compromised.

We have already seen the Administration's willingness to extend laws to the breaking point in prior prosecution, such as its ill-fated attempt to convict the entire environmental group Greenpeace of the crime of "sailor-mongering" and threats to the national security.⁹ Where it has had a desire,

⁹ Jonathan Turley, *Political Critics. Protesters and Artists are Among*

the Administration often appears to follow Oscar Wilde's rule that the best way to be rid of temptation is to yield to it.

The Administration's irresistible temptation to strike out at sources and reporters has been evident in other areas. The Administration has coerced whole offices to sign general waiver forms, waiving any confidentiality agreement with reporters. These generic forms force a whistleblower to either self-identify by refusing to sign the form or to sign a form falsely, which can lead to additional charges. It has also implemented sweeps of random polygraphs to identify anyone who has spoken with the media without approval. It has also enforced strict limitations on employees in various agencies, including scientists, in their discussions with anyone in the media. For their part, various members of Congress have encouraged this internal hunt for leakers while blocking enactment of a federal shield law.¹⁰ When combined with the AIPAC case and General Gonzales' threat, this mosaic reveals a comprehensive attack on the media and its sources that may be unprecedented in our history.

Victims of Ashcroft, The Baltimore Sun, June 23, 2004, at 15A; Jonathan Turley, *Students, Nuns, and Sailor-Mongers Beware*, The Los Angeles Times, October 17, 2003, at A15.

¹⁰ This is a view shared by the Administration. See Reporters' Privilege Legislation: Issues and Implications: Hearing on S. 340 and H.R. 581 Before the S. Comm. on the Judiciary, 109th Cong. (July 20, 2005) (denouncing a federal shield law as "bad public policy.").

IV.
THE CAUSE
AND THE PROPER RESPONSE TO GOVERNMENTAL LEAKS

Rather than striking out at the media and whistleblowers, Congress would be wiser to look at the cause for these leaks. Leaks occur when whistleblowers have no other practical avenue to disclose an abuse or illegality. As someone who has represented whistleblowers and intelligence workers, I can attest to the lack of faith in the current system. The internal procedures in these agencies are viewed collectively as a bad joke. They are viewed as a meaningless mechanism that rarely results in change while serving to force whistleblowers to self-identify. Moreover, there is little faith in the oversight committee in Congress. This view is only reinforced by the fact that there has been no substantive investigation into the alleged criminal acts committed in the NSA operation (and the internal investigation was shutdown due to a refusal to give clearances and access to investigators). The result is that the media often appears the only viable option for a conscientious employee who believes that he or she has witnessed improper or criminal conduct.

In my view, the media has proven its value not its threat to this nation in these important stories. Rather than discussing the responsibilities of the media, it is worth discussing the responsibilities of Congress in light of the

recent scandals. Congress should take a comprehensive response to this controversy, including the following steps:

1. Congress should pass a federal shield law, as have virtually all of the states;
2. Congress should order a full and independent investigation of the NSA domestic surveillance program;
3. Congress should reform the current oversight system of the intelligence committees;
4. Congress should legislatively bar the use of laws like the Espionage Act against individuals for simply hearing classified information, particularly members of the media; and
5. Congress should strengthen whistleblower laws to allow for greater protection and access to federal courts.

While I am not so naïve as to expect the rapid enactment of these reforms, they are sorely needed. General Gonzales does not have to actually prosecute a large number of journalists and sources to create a chilling effect on the reporting of alleged misconduct. This chilling effect will become positively glacial if Congress does not act to protect the vital role of the media in the area of national security reporting.

V.
CONCLUSION

The last few years have shown the central role that the media plays in the guarantee of good government. The framers gave us a free press as the final safety net if all other checks and balances in the three branches of government should fail. We most need a free press during times of war or national unrest, a painful lesson learned from our history.

We are certainly living through dangerous times. The attacks of September 11th revealed such dangers from terrorists who would destroy this nation and what it represents. However, history has shown that some of our greatest dangers are often found in our response to threats rather than the threats themselves. Indeed, our greatest injuries historically have been self-inflicted; terrible crimes committed against our fellow citizens out of fear or prejudice. Worse yet, these infamous acts have often been carried out by our own government and with either the consent or acquiescence of Congress. From the anti-sedition prosecutions to the military tribunals of the Dakota wars to the Palmer raids to the internment of Japanese-Americans, these acts now appear in hindsight like grotesque forms of self-mutilation; the rejection of the very values that we professed to be defending.

Without additional protections, reporters will face an increasingly difficult environment to report on alleged abuses and crimes by the

government. This administration is carrying out a comprehensive campaign against both reporters and sources that could succeed in silencing its last major check on power. As I noted recently in a column in *USA Today*, this effort has taken on a Zen-like quality: if a crime occurs and no one is around to reveal it or to report it, does it really exist?¹¹

Practically, the answer is no. Under the approach of this Administration, some of the most important stories in history would never have been reported or, if they were, they would have ended in the incarceration of those who brought them to the public's attention. Watergate, the Pentagon Papers, and other scandals would have been treated as classified matters and their public reporting treated as crimes. We cannot afford such a crackdown, particularly in these difficult times. With the loss of the free press reporting on these stories, the public will be placed in the blind at a time when we must be most vigilant in the protections of our rights. It will indeed be, as Madison warned, "a Prologue to a Farce or a Tragedy; or perhaps both."

Thank you for the opportunity to speak with you today and I would be happy to answer any questions that you might have at this time.

¹¹ See Jonathan Turley, *Down to the Fourth Estate*, *USA Today*, May 17, 2006, at 11A.

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