

Testimony of
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on behalf of
News Media for Open Government

before the

House Oversight and Government Reform Committee

Subcommittee on Health Care, Benefits, and Administrative Rules and
Subcommittee on Intergovernmental Affairs

“Shielding Sources: Safeguarding the Public’s Right to Know”
July 24, 2018

Chairman Jordan, Chairman Palmer, Ranking Member Krishnamoorthi, and Ranking Member Raskin,

Thank you for holding this hearing, and for the opportunity to testify today. Thank you as well, Chairman Jordan and Ranking Member Raskin, for your support for a federal shield law to protect the confidentiality of journalists’ sources.

Today I am testifying in my capacity as policy director of the Reporters Committee for Freedom of the Press (RCFP) and on behalf of News Media for Open Government, a coalition of news media associations promoting press freedom and transparency, of which the Reporters Committee is a member. The Reporters Committee was created nearly a half century ago by reporters to provide legal assistance to journalists. At that time, journalists faced subpoena requests to reveal sources who wished to remain anonymous, so this is an issue central to our work.

Beyond RCFP, other members of the coalition include the **American Society of News Editors, The Associated Press, Association of Alternative Newsmedia, National Association of Broadcasters, National Newspaper Association, News Media**

**Alliance, Online News Association, Radio Television Digital News Association,
and Society of Professional Journalists.**

Our coalition supports the bipartisan Free Flow of Information Act of 2017 (H.R. 4382), which would provide a qualified privilege for journalists to protect the identity of sources who wish to remain anonymous.

In my testimony today, I'd like to highlight three points. First, confidential sources are vital to keeping citizens informed about our communities -- our local government, schools, and workplaces -- as well as about national stories that impact us and our lives. Second, conflicts continue over subpoenas and other demands for information obtained during the newsgathering process, including the identities of sources, despite 49 states and the District of Columbia recognizing some privilege for journalist-source communications. Third, the Free Flow of Information Act is a commonsense approach that sets out clear legal standards recognizing that the need to protect sources can co-exist with the government's responsibility to protect human life and enforce the law.

Confidential sources are essential to an informed public and accountable government

Journalists prefer to attach identities to the names of sources. There are times, however, when to bring a story to the public, sources must be protected even though in many cases the source's identity is known to the reporter. When checked with multiple sources, authenticated, and vetted for accuracy, information from unnamed sources can be vital to provide accurate reporting on events. To give the reader, listener or viewer some additional basis to judge the credibility of the story, media outlets may attempt to provide additional context or explain why a source sought confidentiality. A story may include the number of people interviewed, for example.

Unnamed sources have been key to documenting problems veterans face obtaining medical care promised after their military service.¹ Unnamed sources help bring to the public police misconduct and suspected fraud, and I will mention two recent examples. Throughout our nation's history, unnamed sources have helped inform the public about the complicated choices presidents face, including life-and-death decisions to put men and women in harm's way, or about novel national security tools such as drones in military conflict. Coverage of the current administration is no different in that respect.

At the same time, disputes over demands to reveal sources and subpoenas for journalists' records mostly center around newsgathering that has nothing to do with our nation's security.

An unnamed source was critical to getting to the truth about the 2014 shooting of Laquan McDonald in Chicago. Jamie Kalven used a confidential sources (or sources) to learn that the official police account of the shooting did not match what the autopsy showed. His reporting led to an investigation into the police officers' conduct, the release of a video of the shooting, and a murder charge against one of the police officers, Jason Van Dyke, who sought to compel Kalven's testimony to identify his source.

Protecting the identity of his source was critical to bringing an accurate account of the shooting to the public and to securing his ability to do this work in the future. Kalven benefitted from legal and institutional support, including from my attorney colleagues at the Reporters Committee, which enabled him to successfully fight to quash the subpoena, so he was fortunate.²

¹ Dennis Wagner, "The Doctor Who Launched the VA Scandal," *The Arizona Republic*, May 31, 2014. Available at: <https://www.azcentral.com/longform/news/arizona/investigations/2014/05/31/va-scandal-whistleblower-sam-foote/9830057/>; accessed July 22, 2018.

² "Court quashes subpoena of reporter Jamie Kalven," RCFP press release, December 13, 2017. Available at: <https://www.rcfp.org/court-quashes-subpoena-reporter-jamie-kalven>; accessed July 21, 2018.

Sources in the business community at times need confidentiality to expose wrongdoing. Several years ago, Theranos, a startup company, gained widespread attention for its claims of a breakthrough in medical research, but sources wishing to remain confidential in order to protect their careers helped bring to the public the truth. The company's founder would explain she feared needles and developed an alternative method that required only a pin prick and a few drops of blood to accurately test blood at a fraction of the cost of traditional methods. Theranos used those claims to attract millions in investments. When reporters dug into the claims, they discovered sources who wished for anonymity but knew the company could not back up its claims with scientific evidence. That reporting unraveled the story and led to fraud charges against the company's founder.³

Disputes over compelled disclosures are an ongoing problem

Beyond Jamie Kalven's experience, in a little more than a year, reporters have been subpoenaed on a wide range of coverage. For example, in the U.S. District Court for the Middle District of Alabama, three reporters faced subpoenas seeking their testimony about their observations while witnessing executions. In a separate case, a reporter formerly with Oregon Public Broadcasting, John Sepulveda, fought a federal subpoena requiring his testimony detailing his interviews with individuals who in 2016 occupied the Malheur National Wildlife Refuge.⁴

What is clear from these examples is reporters continue to face efforts to obtain their news, recordings, and other information. Sometimes the journalists have expressly agreed to keep the information confidential, and at other times there is no express agreement but the information should still remain confidential to protect newsgathering.

³ "John Carreyrou and the Bad Blood at Theranos," *Corporate Crime Reporter*, July 5, 2018. Available at: <https://www.corporatecrimereporter.com/news/200/john-carreyrou-bad-blood-theranos/>; accessed July 20, 2018.

⁴ A summary of briefs and comments filed by RCFP is available at <https://www.rcfp.org/topics/briefs/10/All>; accessed July 21, 2018.

H.R. 4382 Provides Balanced, Qualified Journalist-Source Protection

H.R. 4382 provides a qualified privilege that sets strong standards for courts to follow when deciding whether to compel a journalist to reveal the identity of a source. The House approved this legislation in a previous Congress with strong bipartisan support, and the Senate Judiciary Committee in 2013 approved a version of the Free Flow of Information Act.

The bill's provisions set clear standards for protecting sources and journalists' information gathered in the course of newsgathering and compelling journalists to testify. The qualified privilege would not generally apply for testimony required to prevent acts of terrorism, to provide eyewitness accounts of criminal activity, and to prevent death, kidnapping or significant bodily harm. The government could not compel testimony in a leak investigation unless the government could show significant and specific harm would result.

Beyond the specific provisions in the bill, even the existence of a federal shield law would go a long way to avoid unnecessary litigation. Our nation's experience with state shield laws shows that when criminal defendants or subjects of unflattering news stories pursue meritless efforts to identify sources or obtain a reporter's notes, and learn their state has a shield law, they often quickly end litigation efforts.

To conclude, Chairman Gowdy and Chairman Palmer, enacting the Free Flow of Information Act would go a long way to protecting journalists and the sources upon which the public relies to be fully informed on a daily basis. Thank you for the opportunity to testify today. I look forward to your questions.