MEDIA LAW RESOURCE CENTER, INC.

2005 Annual Dinner: A Discussion on the Reporter’s Privilege
MR. HENRY HOBERMAN: I’m Henry Hoberman and it’s my pleasure tonight on behalf of the board, the members and the staff of the Media Law Resource Center to welcome you to our Annual Dinner and thank you very much for coming. One of the great perils of inviting world class journalists to participate in our panel every year, in our dinner panel every year is that they sometimes have the nerve to put news gathering responsibilities ahead of speaking to a group of 600 lawyers and so it came to be that we lost Diane Sawyer tonight. Diane had to conduct an exclusive interview out of town tonight, she could not be with us, she asked me to send her regards and to convey her disappointment that she couldn’t be here tonight, and if you’re interested in the exclusive interview I won’t tell you who it is but you can watch Good Morning America tomorrow morning and find out, small shameless plug there.

We are very fortunate to have with us tonight, Terry Moran who will be pinch-hitting for Diane Sawyer. Terry Moran, you may know is ABC’s White House correspondent and he’s one of the newly named anchors of Nightline. I can’t even begin to say how grateful we are to Terry tonight, he was so gracious right from the get-go when he was asked to pinch-hit really at the 11th hour. Terry was on vacation with his family and he agreed to cut that vacation short and fly back
a day early so he could be with us tonight, so I’d like to thank my colleague Terry Moran, let’s give him a round of applause.

[Applause]

MR. HOBERMAN: I also want to thank the panelists tonight. We first selected this topic, ‘Reporter’s Privilege’ about six months ago, and at that time we were very worried that it would no longer be topical on November 9th. In fact those were the days before Judy Miller was a rock star and when you could still have a two Martini lunch with George Freeman because he had time.

One look at today’s headlines though shows that we had nothing at all to be concerned about. Judy Miller and the Times have made some news today and while I will let Terry Moran deal with that, if he chooses to go there, I’m not going to touch that.

But there’s another headline today which was from an Associated Press article and the headline is “CIA Pushes Enquiry on Secret Prison Story.” And for those of you who haven’t heard about this, it’s a new leak investigation, as if one weren’t enough, and it has to do with the Washington Post’s story about secret CIA prisons in foreign countries including some former Eastern Bloc countries.

The General Counsel of the CIA and several Congressmen have requested an investigation by the Department of Justice. So, here we go again. The Chairman of the House Intelligence Committee was quoted in this Associated Press article as
saying that he expects that the probe will raise
“serious First Amendment press freedom issues”.
So, even as we assemble here tonight there’s
another gathering storm in Washington on this
very same issue. Before, I turn it over to Sandy
Baron our Executive Director who will introduce
the panelists tonight I want to take a moment to
recognize an important milestone in this
organization’s history. The Media Law Resource
Center is 25 years old this year.

[Applause]

MR. HOBERMAN: In June of 1980 the Media Law
Resource Center was founded at the Playboy
Mansion in Chicago. I did not make that up. It
is absolutely true, and you can add your own
punch lines and about the significance of the
location of the birth. There are two articles in
today’s program that I want to commend to you,
one is by Henry Kaufman and the other is by Harry
Johnston, that kind of reminisce about the
history of the MLRC.

In reading those pieces and talking to the
founders of the MLRC I was struck by the
parallels between the circumstances that
compelled the formation of the MLRC in 1980 and
the situation we find ourselves in today. In
1980 media lawyers were rudely awakened from a
robust period of expansion of First Amendment
rights. The previous decade had brought all
forms of manna from courts, including decisions
that extended actual malice to false light cases,
extended actual malice to public figures and
determined that the actual malice standard had to be proved by clear and convincing evidence. It was indeed a good time to be a First Amendment Lawyer. Then the courts started to cut back some of the principles that media lawyers held dear. The Supreme Court issued a series of unfortunate decisions to name a few; \textit{Gertz, Firestone, Walston, Hutchinson}, and the climate for media lawyers became chilly again.

To quote Harry Johnston in the piece that’s in your program, the rollback of First Amendment rights in the years leading up to the formation of the MLRC inspired “media defense attorneys to brush off the mothballs from their turrets and resume their positions again.”

From this resolve sprang a new organization dedicated to the goal of organizing individual media companies and their lawyers in a “collective self-defense,” to use Harry’s words, by sharing data and resources and providing a forum for the best minds in our industry to discuss First Amendment threats of that time and in the future. Does all this sound familiar? It should. In the last few years the members of the MLRC have again endured a rude awakening. After decades of case law confirming the existence of a reporter’s privilege it’s all begun to unravel. As Harry Johnston said so eloquently at that time 25 years ago, “It’s time to brush the mothballs off the turrets and resume position again,” only this time, the stakes are higher. Losing doesn’t necessarily mean only the threat of ruinous
monetary damages. Losing as many of the
panelists, some of the panelists with us tonight,
know all too well, can mean a loss of individual
liberty.

As we think about the lessons of the past and
the implications for the present, I just want to
take an opportunity to recognize and thank those
people who dusted off their turrets 25 years ago
and started it all for this organization. They
are the founders of the MLRC and we’re fortunate
enough to have some of them with us tonight. I’m
going name a few who are present tonight, ask
them to stand and if you could please hold your
applause till the end I’d appreciate that. Victor
Kovner, Chad Milton, my former partner, friend
and colleague Bruce Sanford, Larry Worrell. I
also want to acknowledge a few other founders who
are not here tonight with us because of conflicts
but who remain very active in the organization to
this day and they are Floyd Abrams, Bruce Rich
and Harry Johnston. Thanks to all of you, let’s
give them a round of applause.

[Applause]

MR. HOBBERMAN: And I hope I mentioned Henry
Kaufman, if I didn’t Henry, thank you as well and
plea, please stand up.

[Applause]

MR. HOBBERMAN: I have one additional order of
business today and that is to thank the life
blood of MLRC, the person whose tireless and
indomitable personality is the heart and soul of
this organization. The enthusiasm, intelligence
and work ethic that she brings to the job are legendary, I’m talking about our Executive Director Sandy Baron. Sandy, thank you.

[Applause]

MR. HOBERMAN: I also want to thank the staff of MLRC who do such a great job and in particular those who put together tonight’s dinner so seamlessly and that’s many people but, chief among them, Maherin Gangat, Debby Seiden and Kelly Chew.

[Applause]

MR. HOBERMAN: Thank you. I want to thank Media/Professional for sponsoring the reception tonight and most of all I want to thank all of you. We have shattered the all-time record for attendance with tonight’s dinner. Thank you so much for your support of this organization over the years, thank you for your support of its work and I hope you enjoy the evening. Ladies and gentlemen, the Executive Director of the MLRC, Sandy Baron.

MS. BARON: Good evening. As Henry Hoberman noted, the reporter’s privilege has generated the most disturbing media law developments of this past year and likely well into next year, as suggested by last week’s DC Circuit decision to deny rehearing *en banc* to the journalists subpoenaed in the *Wen Ho Lee* civil suit. Journalists threatened with and serving time for contempt for refusal to identify confidential sources generated headlines not nearly in the media world but throughout the world. Indeed,
Journalists Without Borders ranked the United States 44th in the world for press freedom; 44th, a massive drop in ranking as a result of the erosion of protection for journalists and their sources.

MLRC, as most of you know, responded among other things with a White Paper on the Reporter’s Privilege, with a mass coalition of members who organized and continue to meet around the principle that this nation needs a federal shield law, and with a task force that has developed a proposed model shield law that even in draft form is already being used in a number of states as a basis for legislative initiatives on new local shield laws.

And that, some might say, is the phoenix rising. A number of States currently without shield laws are considering adopting them in the wake of the house restraint of Jim Taricani, the imprisonment of Judy Miller and the threats to Matt Cooper and other journalists in the last years. Other states we hope will take a look at their antiquated laws, if they are indeed antiquated, with an eye toward updating and expanding them.

And Congressman Mike Pence of Indiana along with Representative Boucher of Virginia introduced the Free Flow of Information Act, a strong and comprehensive federal shield law proposal with a companion bill in the Senate introduced by Indiana Senator Richard Lugar. Two rounds of hearings have been held on the Bill in...
the Senate, there are currently 63 co-sponsors for the Bill in the House and 11 for the Bill in the Senate.

Our panel tonight, as you all know, could not be better positioned to talk about the current situation, future concerns and the potential for a responsive federal shield law; men and woman of courage and conviction, who’ve undertaken the fight on the reporter’s privilege very directly. We’ve included longer bios on each of them in the program but let me introduce you to them and ask them also if they don’t mind to come on up.

[Applause]

MS. BARON: Matt Cooper, on the end, has worked in TIME’s Washington bureau since 1999, first as the Deputy Bureau Chief where he helped manage the magazine’s Beltway coverage and since 2003 as a White House correspondent.

Judy Miller, identifiable for no other reason than she’s the woman in the group, Judy Miller who’s sitting dead center, is author of four books including most recently Germs: Biological Weapons and America’s Secret War and is a Pulitzer Prize-winning correspondent who I understand has just parted company with the New York Times.

As I presume everyone in the room knows these two journalists vigorously fought subpoenas issued by a grand jury in connection with an investigation by Special Prosecutor Patrick Fitzgerald into the disclosure of the identity of a CIA covert agent Valerie Plame, subpoenas that
sought the identities and information about conversations these journalists had with confidential sources. In the end, both received waivers from the relevant sources and testified before the grand jury but not before Judy Miller spent 85 days in a federal prison as penalty for civil contempt.

Jim Taricani who is sitting over here, second from your right, is an award-winning investigative reporter who works for the NBC Universal owned and operated Station WJAR-TV in Rhode Island. He served four months of a six month sentence of home confinement for refusing to reveal to a Federal Special Prosecutor the source of a videotape that caught a mayoral aide accepting a bribe.

Congressman Mike Pence who is sitting second from the left, has represented the 6th Congressional District which encompasses much of Eastern Indiana since 2000. In addition to his role as author and co-sponsor of the Free Flow of Information Act, Congressman Pence is Chairman of the House Republican Study Committee, the largest caucus in the House, and among his committee assignments sits on the House Judiciary Committee.

And our moderator Terry Moran. Last month Terry Moran was named co-anchor of ABC News’s Nightline and will assume anchor duties at the end of this month. Based in Washington DC, he currently is anchor of World News Tonight Sunday as well as ABC News’s Chief White House
Correspondent and with that I turn it over to Terry.

[Applause]

MR. TERRY MORAN: Thank you. Well, thank you very much. Let’s get started. Before I worked for ABC I worked for Court TV where I learned a couple of things. First, I was in so many courthouses around the country that I realized I never wanted to be in a courthouse in any other capacity but as a reporter, because you always bump into people who are having the worst day of their lives.

[Laughter]

MR. MORAN: As some of our panelists, and then the guy who ran Court TV, Steve Brill, told me, the best thing that can happen to a reporter is to become the subject of a story because then you really learn how important fairness and accuracy and, yes, even ordinary human sympathy is, in our work. And with that, let’s get to the news.

Judy, with this ordinary human sympathy I’ve got for you, you retired from the New York Times today. Why?

MS. JUDITH MILLER: Yes. Because I had become part of the story. I had actually become the news, and that’s something that no New York Times reporter wants to be. And also because I think that just so much had happened from the time that I came out of jail to the present day that I really thought it was time to move on.

the Times is a great institution, it’s a great
newspaper. I’m very happy with my career there, but it’s time to start something new.

MR. MORAN: And I, I’m going to follow-up, if I can. You spent 28 years there and some of what, as you say, some of what’s happened since you got out of jail is downright nasty. Why did that happen?

MS. MILLER: I don’t know really why it happened. I’m going to be thinking about that on the break that I was supposed to take when I came out of jail and never got to take -- at least one week in a spa which will be a new experience for me.

I don’t really know why it happened, I think because some of my colleagues did not think that I should have come out of jail, they did not think that I should have testified. I think that the paper perhaps didn’t explain the decision that I had made and support me as well as we might have, and so there was a lot of confusion about it. This was a very, very difficult experience, not only for me but for the paper and I think people didn’t understand that there were circumstances under which I was prepared to testify, which was securing a voluntary explicit and personal waiver from my source-

MR. TERRY MORAN: [Interposing] but it,

MS. MILLER: -and being able to protect my other sources, other non-Plame/Wilson sources, and that, once I had achieved those two conditions, I really felt that staying in prison, in jail, would be an act of self-martyrdom and
self-aggrandizement. I didn’t wish to do it and if you want to know more you can read it in the New York Times tomorrow on the website because I have an explanation of it and I will continue to also have explanations of it on my own website.

MR. MORAN: Okay, obviously your case, Matt’s, Jim’s, crystallize the issues we’re talking about here and I want to get to those specifics. But Mike Pence, I think the last time we spoke was on the north lawn of the White House when you were very gently but pointedly hammering the President of the United States about his profligacy with the Federal Budget. You’re a Conservative’s Conservative in a lot of ways. What are you doing here?

[Laughter]

CONGRESSMAN MIKE PENCE: Really asking myself that question Terry.

[Laughter]

CONGRESSMAN PENCE: I’m actually very humbled to be here. My wife, Karen, and I are very grateful to the Center, to literally share a stage with really three heroic Americans. The reason I’m here, and the reason I was motivated about a year ago this time to begin to develop what became the Free Flow of Information Act, was really born of my Southern Indiana belief in limited government.

I’ve had a passion since my early teens for the Constitution. I honestly don’t believe that our founders included the freedom of the press in The First Amendment because they got good press.
I think they included it because they understood that the only check on government power in real time is a free and independent press and as someone who believes in limited government and believes that government ought to say what it means and mean what it says and be transparent in a society where we the people rule. I saw nothing more consistent with those convictions than to be a part of this effort along with Richard Boucher in the House, my Democrat colleague, and Senator Lugar and Senator Dodd in the Senate and it’s—

MR. MORAN: [Interposing] Is this bill going to pass?

CONGRESSMAN PENCE: Well, we are very encouraged about the legislation to date. There have been, as Sandy said, two separate hearings in the Senate Judiciary Committee and Judith participated in the most recent one with great distinction, and there does seem to be a great willingness for members of the Senate Judiciary Committee to dialogue about this issue. In the House of Representatives, while we’ve not had formal action, I can tell everyone here, you know, off the record—

[Laughter]

CONGRESSMAN PENCE: -that we’ve been-

MR. MORAN: [Interposing] This conversation never happened.

CONGRESSMAN PENCE: -Yeah.

MR. MORAN: Just us.
CONGRESSMAN PENCE: We’ve been in a very continuous dialogue with the people who work within the Justice Department -- who do really what we pay them to do to protect the Nation’s secrets -- in trying to build a balanced piece of legislation that permits us to protect the secrets that are unique to the Federal Government, but also allows for that Free Flow of Information. The House Judiciary Committee I believe will have hearings this Fall.

Depending on the timing of that, which Matt and Judith are directly involved, we’re hopeful that the passage of a federal media shield statute could be a silver lining or a positive antecedent to what has been an unpleasant and troubling chapter in the history of the freedom of the press.

MR. MORAN: Well, Matt the unpleasantness may just have begun, because if indeed you and Judy are call as witnesses in the trial of Scooter Libby you’re going to face cross-examination about your own credibility. The Prosecutor will elicit a statement from you on what Libby did or did not say and then Libby’s lawyer will go after you hammer and tongs.

MR. MATT COOPER: Are we going to start the murder boards tonight? [Laughter]

MR. MORAN: What are your plans? What are your Lawyer’s plans?

MR. COOPER: Well, [Laughter] I’m going to have to get all my college newspaper clips together and –
MR. MORAN: That won’t help you, that’s not going to help you.

MR. COOPER: No, look, it is a very strange position to be in, but this case has been about nothing but strange positions and strange twists and turns. Let’s see if it plays out. Let’s see if we in fact do get to trial because there is always a possibility we don’t. But assuming there is a trial, there are going to be a lot of witnesses, virtually everyone named in the lengthy indictment against Mr. Libby, and if I’m called, I’ve said I’ll go ahead and testify.

MR. MORAN: But, my questions are, are you drawing lines around the cross-examination because in cross-examination Libby’s lawyer is going to want to say you can’t believe Matt Cooper, you can’t believe Judy Miller because they’re dishonest in other ways.

MR. COOPER: Well, I assume that may well happen, but I’ll go ahead and testify truthfully and completely as I did at the grand jury and if they’re aggressive about it so be it. I won’t obviously get in the business of disclosing other sources and try to avoid going down that road again, but look, I’ll take my lumps if I have to go, go and get banged up in Court. I assume that may well happen.

MR. MORAN: If the defense lawyer wants to go into other stories you may have written and show how you did those in a way that he’s going to argue or she will argue to the jury they ought
not to believe you because you’ve behaved in this way before.

MR. COOPER: Well, I think if they involve confidential sources and I haven’t approached this yet with lawyers either from Time Inc., who represent me personally -- by the way, I think at this point in the case everyone in this room has represented me at some point [Laughter] so we can all speak under privilege, a real privilege -- if they want to go after confidential sources, we’ll go back again and fight this case. And I think we’re, as I understand although I’m still a novice to all this after a year, that we have a slightly better shot in the criminal court context than in the grand jury context. But look, we’ll, as I’ve learned in this case, cross the bridge when you come to it.

MR. MORAN: It could get ugly, and that brings me to you Jim [Laughter], the experience you had. I mean, I was just talking to you over here about this. You, spent time in jail after your source had essentially outed himself.

MR. JIM TARICANI: Right.

MR. TERRY MORAN: Now honestly, you must have gotten on the bad side of somebody, because this is an important context. We’re talking about a national case, the national media shines the bright light on. It’s a very important story you covered, but at the local level, a prosecutor, a judge, who has it out for somebody might be able to exercise that attitude. Is that what happened?
MR. JIM TARICANI: I don’t know what happened, but I can tell you this, in my case I aired this tape made by the FBI, which was under court seal. The seal did not apply to reporters. I was subject to an investigation by a special prosecutor appointed by the judge. But the lead prosecutor -- the federal prosecutor in this case, called the Plunder Dome case, which was an investigation into Providence Mayor Vincent Cianci, who is now in prison -- he played the same tape at a party at his house and the judge who sentenced me to six months home confinement, sentenced him with a $500 fine and 30 days suspension of not working on the case. So I’ll let that speak for itself, but I think it speaks volumes about what the judge thinks about the press and the First Amendment.

MR. TERRY MORAN: Well speak a little more, do you get the sense- [Laughter]

MR. TERRY MORAN: -that you ran into a judge with an attitude about the meeting.

MR. JIM TARICANI: I think I ran into a judge who does not have a great appreciation for the First Amendment and a great appreciation for the vital role we play in a democracy. I really don’t think he has that appreciation. And I feel there are plenty of examples of that by this judge’s rulings on a number of First Amendment issues, some of which have been overturned by the First Circuit Court of Appeal in Boston. So it’s no secret in Providence; I think if you talk to
lawyers in Providence, they will probably tell you the same thing.

MR. TERRY MORAN: Now the judges in the big leak investigation took a somewhat different tack and Mike, I want to ask you about this. What the prosecutor, what Mr. Fitzgerald said in his press conference, was that the reason he had to go after Matt and Judy, because they weren’t in the same position as Jim here, was not that they received something. His claim was that they were the actual witnesses to the crime itself; a crime that he argued affected national security because it might have broken the trust that confidential agents and people with classified identities have, in people keeping that information secret. Would your law cover these two sitting next to you? And why should it?

CONGRESSMAN MIKE PENCE: Well it’s a tough question for me because I somewhat steadfastly avoided getting into the deep weeds of this case. There are over a dozen reporters facing subpoenas and the threat of subpoenas. But let me say that with regard to the Free Flow of Information Act, when Senator Lugar and I first filed it, it included an absolute privilege of confidentiality, which I believe is perfectly consistent with the spirit in the letter of the First Amendment of the Constitution. We have to recognize that while 49 states in the District of Columbia have either statutes or common law protection, for reporters to keep sources confidential, the Federal Government is
different. We have nuclear weapons, we operate in the broad interest of the nation in a dangerous world. And so we revised the legislation to include where there is an imminent or actual threat to national security.

And the question you pose Terry -- I honestly don’t know the answer, in this case, or even in the headline case today that Sandy mentioned, whether or not the disclosure itself represented a threat to national security and therefore, the publication of information derived there represented a similar threat. I know from what Mr. Fitzgerald said, who I have deep respect for, it was the opinion of the judge that it was such a case. I have wondered aloud with colleagues about where there is not a charge against that official for violations of the law regarding the revealing of confidential information, how then can it be a threat to national security if the law itself was not violated.

It’s precisely the reason why we need a statute. I really believe all of this uncertainty -- while it may result in billable hours for some people in the room, which I used to be very much for when I practiced law--

[Laughter]

-is, as one investigative reporter who is here tonight proved to me, blowing a chill wind across the body politic. And I had an investigative reporter of great stature tonight tell me, “I am losing sources.” We can have an honest debate about whether our legislation would
apply to this case or that, but I am confident that we could develop legislation that the courts would then have the ability to unpack on a case by case basis, as they do in every other area. But this uncertainty is breaking that connection between the information that the public needs to be an informed electorate and the public, and we have to add certainty back to that in the form of a federal statute.

MR. MORAN: You’ve got a great investigative reporter sitting right next to you here. Judy, do you think, he’s right, do you think that there is a chill wind blowing across sources? And in a way, doesn’t the story in the Washington Post about these black sites, the secret prisons that are out there, that came after you spent 85 days in jail, after this chill wind started blowing, won’t there always be somebody who wants information out? Hasn’t it been your experience to some degree?

MS. MILLER: Well, I think so, and I would hope that my sources at least would be assured that I’m willing to protect them. 85 days seemed, you know, to indicate that but, yes, of course, that’s what’s happening. The blanket waivers, which I hope now reporters will not accept, the fear that people in the bureaucracy have about talking to a reporter, the Washington Post case now, the other subpoenas that have gone out, all of these are really frightening developments. And I think that it highlights the need for Congressman Pence’s legislation for all
of us in our profession, and I would hope that
the legislation would stay drafted as it is, that
there aren’t so many exceptions that you could
drive trucks through it, because that won’t
protect reporters. It will result in even more
billable hours, but it won’t protect reporters.
So, I’m truly worried and I wish that the media
had spent more time discussing these issues than
some of the issues they did in connection with
our case.

MR. MORAN: Like what?

MS. MILLER: Who said what to whom at what
point. I think these will all be things that
will be re-echoed if there’s a trial. I would
have liked to have seen some more discussion
about, for example, about other people who’d
gotten subpoenas, how they were affected by my
going to jail, and by Matt’s near-death
experience, and by what happened to Jim. Yet I
didn’t see a lot of articles about that when I
was in prison.

I think the media tends to be focused on the
wrong issues, when there’s so much at stake. We
take the First Amendment for granted, but I don’t
think we can, given the judicial decisions that
have been handed down, and the number of
reporters who’ve now faced subpoenas. We’re in a
very serious crisis here.

MR. MORAN: Let me ask you, do you think that
some of the very harsh press you’ve got, from
your own newspaper, is political, is because you
were perceived as being helpful to an
administration that, let’s face it, probably most people on the New York Times or ABC News, don’t support?

MS. MILLER: I really don’t know. Bob Woodward, when he was asked about this on Larry King, said that clearly the fact that this was not a classic whistle-blower situation was making some in the media reluctant to endorse the position I had taken. I think it had to be a factor, I’m not sure it’s the only factor. And, yes it is hard to defend. You know, the problem with defining sources politically is that one person’s whistle-blower is another person’s snitch, and they all have to be defended, if any of them is going to be defended. So I was a little disappointed that some of my colleagues didn’t seem to get that.

MR. MORAN: Jim, let me ask you, you spent the most time, I guess-

MR. JIM TARICANI: [Interposing] No, I think we’re equal. [Laughter]. Pretty close, yeah.

MS. MILLER: Pretty close.

MR. MORAN: Did you get a nickname in jail by the way?

MR. TARICANI: I was in home confinement-

MR. MORAN: [Interposing] Oh you were at home-

MR. TARICANI: [Interposing] Well, my wife had a lot of nicknames but we won’t get into that.

[LAUGHTER]
MR. MORAN: How did your neighbors, and the people in your community perceive you. How did they approach what you had done, what you were doing? Were you seen as somebody defending a, a worthwhile principle, or somebody defending a snitch?

MR. TARICANI: Well, it was interesting, Terry. When my case first started, when it became public that I was going to be investigated by a special prosecutor, I received a lot of negative feedback from the community in general. They just kind of didn’t get it. But as the case went on, the press covered my case more and more, and there was a more detailed explanation of what I was doing, why I was doing it, and more importantly what it meant to the citizens in our community -- why the press was important to them, why we protect sources so that they can get the information they need as citizens. By the end of the case, when I was sentenced, I think my station kept track of e-mail and phone calls, and there was about a 10:1 ratio in favor of what I did. And I think it was a real education for the people in Rhode Island, Southern Massachusetts, and Eastern Connecticut, the area we cover, as to what the press really is here for. And it’s not here for us, it’s not here for people on TV to be on TV, it’s not for Matt and Judy to get bylines, we’re here as a conduit for them. I think at least my case provided that amount of education for the people in Rhode Island because I think
they really have a much better understanding of what we do and why we do it.

MR. MORAN: They got it?

MR. TARICANI: They got it. They finally-

MR. MORAN: [Interposing] You got better press, you got better press than Judy-

MR. TARICANI: [Interposing] Oh boy, did I.

[LAUGHTER]. And maybe Matt too.

MR. MORAN: One of the things that these cases always do Matt, is open up the sausage-making process. How did that feel when your e-mail to your superiors about what Rove told you on double super-secret background or some such thing?

MR. COOPER: Well, that was surprising to say the least. [LAUGHTER] I guess I became an American object lesson on the lack of privacy in e-mail. After that e-mail got out, and I certainly regret having put the name of a source in an email, that was my error -- I didn’t imagine that the story I was working on would lead to litigation, let alone, my notes being turned over. I take some solace in that. But then, nonetheless, it was stupid of me to put it in there. And, look, I think it’s been helpful, healthy to have a debate about the use and misuse of anonymous sources; when they’re appropriate and when they’re not. I don’t think that’s been a bad side effect of this case. I think that’s all been too good.

MR. MORAN: Do you do your work differently now?
MR. COOPER: Well I’m definitely more careful with the e-mail.

[LAUGHTER]

MR. MORAN: Sure. [LAUGHS]

MR. COOPER: Of course, one of the funniest parts of this whole thing was when this e-mail was exposed -- that it said, “I just spoke to Rove on double super-secret background,” -- was to watch the journalistic and legal punditocracy scratch their chins, and say, “Huh, double super-secret background, what [LAUGHTER] did he mean by double super-secret.” Whereas all fans of Animal House know [LAUGHTER] there was an homage to Dean Wermer and the double super-secret probation he gave John Belushi’s frat. That was probably the funniest part of this whole thing.

[LAUGHTER]

MR. MORAN: Let me go at that, aside from the e-mail-

MR. COOPER: [Interposing] Yeah aside from the e-mail.

MR. MORAN: Aside from the e-mail, with, in your relationship with sources, you are now a person that they know will go to the mat, but at the end, I guess because you got this waiver-

MR. COOPER: [Interposing] Yeah.

MR. MORAN: Talk about your source.

MR. COOPER: Well I must say, life goes on. I think whenever there are these sort of periods in journalism, there’s always kind of a crisis atmosphere that institutions or individuals won’t be able to go on again. I’ve continued to do
reporting, using confidential sources, *Time* magazine has done great stories since then.

I think there was a lot of worry at the time, when Norman Perlstein, the head of Time Inc. made the decision to turn over my notes because they were the property of Time Inc. There was a lot of feeling of, “Well my God, how can, how can Time Inc. go on and what’s this going to do to the profession?” The fact is, in the weeks following, *Time* magazine broke major stories using confidential sources, everything from nuclear power plant safety to Guantanamo Bay. I think, in the end, the sort of hydraulic pressure of leaking, and the culture of talking continues. I think once a reporter has established that they can be trusted, and I think I did that in this case, life goes on and mine does too.

MR. MORAN: Let me go back to Congressman Pence here, these are three reporters with established news organizations. I have a brother who has a website called rightwingnuthouse.com — there’s one in every family, it’s actually a very good website but...

[LAUGHTER]

MR. MORAN: He’s a fine writer, bit of a loon but...would he be covered? That’s the question of the moment, I noticed in the first sentence of your bill, it covers “certain persons” Is my brother a “certain person”? [LAUGHTER]

CONGRESSMAN PENCE: Sounds like it.

[LAUGHTER]
CONGRESSMAN PENCE: It’s a great question though, Terry, and one that we try to address in
the draft of this legislation. The issue of “covered persons” in organizations was addressed
by using the most commonly-used definition for a journalist -- we surveyed the State Statutes that
have long been vetted, lots of case law. The answer to whether or not a blogger would be
covered, I actually believe, would be decided using our definition on a blog-by-blog basis by
the courts. There are some bloggers that come to mind -- Salon, Drudge -- that actually are in the
news-gathering business, that are in the business of collecting facts, distilling them and
publishing, albeit on the Internet. You know, journalistic product. There are, however, other
bloggers, who simply create links to the work of other journalists and where the former, I believe, would easily be covered by the
definition that we have drafted, the latter would be more problematic. And, which I am always very
quick to say, is not to say that we would ever intrude on your brother’s, or any other
blogger’s, First Amendment right to freedom of speech. This gets fudged sometimes in the public
debate, they are certainly free to put whatever they desire on the Internet and express whatever
opinions they desire. The question here is whether or not they would have an additional
privilege to be able to protect sources. And I think the courts could use the definition that we
have written to discern.
MR. COOPER: And I think it makes sense, as the Congressman said, to do it by what you do rather than the medium by which you do it. You know, Vanessa Leggett, who served the longest sentence of any journalist for contempt of court, did so largely because she was writing a book in Texas about a murder case and had confidential sources. And because she didn’t work for a radio station or a magazine or a newspaper, found herself, you know, less than protected.

So, you know, I think it makes sense to try to cover as many people as you can. That said, as a practical matter, for what it takes to get legislation passed, you may want to speak to this. I mean if it’s easier to get it passed, just applying the traditional media, then that’s probably the best thing to do for now.

CONGRESSMAN PENCE: Well we have tried, in the definition, to allow for those kinds of enterprises; at least with regard to the Internet. And we also dialed in a little bit on the definition of covered organizations, what I call -- and this isn’t a slap if you represent them, it’s just an example -- the “GE exception”. We didn’t want, in investigations of white collar crime, we didn’t want those investigations to necessarily be hindered because as part of the family of companies that a major corporation owns, they happen to have a television station in Terre Haute, Indiana. And so we tried to narrowly focus the federal statute that we have drafted to journalistic enterprises and
organizations and not necessarily to diffuse that
definition to people that aren’t actually in the
news-gathering business.

MR. MORAN: That is hard, isn’t it? I mean I
would like both of your thoughts on this, because
I missed the meeting where they handed out the
badges -- who’s the heroes and who’s not. And it
is...it’s a matter of what we do, but in the end,
practically, as Matt points out, it’s who we do
it for too, is that right?

MR. TARICANI: Well, I agree with Matt to
some extent, but I think the bloggers, today’s
bloggers, are pretty much like the pamphleteers
of the 1700s, 1800s; if they are gathering news
and they are doing it, I think they should be
afforded some protection. The problem with that
though, is that they are un-vetted. I mean they
can put anything on a blog, as you know, and it
can be totally wrong, inaccurate; so there is a
problem with that. But if they are gathering
news and they are informing the public of
something, I do think they should be afforded
some protection.

MR. MORAN: Judy, what do you think?

MS. MILLER: The duck test; if it walks like
a duck and quacks like a duck and acts like a
duck, it’s a duck.

MR. MORAN: And who’s going to say it’s a
duck or not?

MS. MILLER: Well under Congressman Pence’s
law, it would be the courts; and I think that’s a
pretty good place to start.
MR. MORAN: You would trust that decision to the judge in Jim’s case?

MR. TARICANI: No, it’s definitely not.

[Laughter]

MR. TARICANI: Not that judge, some other judge.

MS. MILLER: It’s not perfect, but it’s better than what we have now.

MR. MORAN: I want to come back to this interest against the notion of a reporter’s privilege, which is always expressed in terms of the state and the government prosecutor and the truth-seeking function of the court.

Flip it over now, and once again, think of Mr. Libby, whose liberty is at stake here. Why should reporters be able to throw up a shield against somebody whose life or liberty is at stake? Aren’t we on weaker moral ground? Anybody?

[Laughter]

MR. COOPER: Well look, all of these privileges, whether it’s a clergyman and parishioner, attorney and client, doctor/patient, husband/wife; according to the Supreme Court in the Jaffe case, a licensed social worker and their client, all these privileges, to some degree, will stymie law enforcement. That’s the nature of a privilege. And we should be intellectually honest about it. But that said, we as a society have made a decision that these privileges are worth it; that encouraging open communication between these groups of people is
important enough, that we are willing to accept what might be a road block in the way of law enforcement.

MR. MORAN: Well, what about an innocent man or woman who needs your evidence?

MR. COOPER: Well, I think that’s a worthy question.

MR. MORAN: Answer it.

[Laughter]

MR. COOPER: I don’t know. I think if you should look at it the other way, if you basically had no protection in civil litigation -- let’s say Wen Ho Lee was wronged in this case -- you could have a fishing expedition. I think originally the plaintiffs did want to have a fishing expedition of literally hundreds of news organizations and sources and such. You would be opening up the confidential sources of lots and lots of organizations. Now you have to balance that against the harm potentially done to one man. But we, as a society, have made that decision in other ways.

MR. TARICANI: You just can’t have a free press if the press is going to be made to be an arm of the investigative branch of the government. And there may be some cases, some isolated cases, where an innocent person doesn’t get the information they need because a reporter can’t be forced to give that information. But for the vast majority of stories we all do, the sources we use are whistleblowers. They are not violating the law. They are informing us on
wrongdoing by public officials. And I think -- although I’m not a historian expert -- our Founding Fathers really wanted a free press to be the watchdog of government, not a lapdog for government. And so I think we have that very important role to play and I think I would sacrifice the very few cases that may work against some person, for the overall free press that we enjoy in this country.

MR. MORAN: Easy for you to say.

[Laughter]

CONGRESSMAN PENCE: I would just add that I’ve had some very entertaining interactions with reporters since I filed this Bill. They’ll walk up to me outside the House chamber and say: “You’re Mike Pence. You’re filing the media bill, right?” “Yeah.” They look to the left, look to the right, then say, “Thanks”.

[Laughter]

CONGRESSMAN PENCE: And I’ve said, “Well you’re welcome”. But I’m always very quick to say, because of the point that you said, this really isn’t about protecting reporters, this is about protecting the public’s right to know. And there is a higher social good at ensuring the free flow of information to the public. I lived it two years ago this month, where I was one of 25 House conservatives who attempted to stop my own president, in our own party, from creating the first new entitlement in 40 years. The reason that’s relevant is because, I will say to all of you, that had information been in the
public domain, that the first 10 years of that
Bill would cost $150 billion more than the
sticker price that was advertised, that Bill
would not have passed and future generations of
Americans, like Karen and my three small kids,
would not be faced with trillions of dollars in
unfunded obligations in Medicare that we added in
a single vote in a single night. And so for me,
maintaining this current, this flow of
information, these whistleblowers -- while
allowing that we have to protect the nation’s
secrets and that law enforcement people have to
do their job -- that at the end of the day,
ensuring that information reaches the public in a
timely way, so that elected officials have the
information that they need and the public have
the information they need to make informed
choices, has real world consequences that I think
have to be weighed against individual issues in
individual cases.

MR. MORAN: Want to raise one more issue up
here and then take a couple of questions. And
this is something that I think we in the MSM, the
Mainstream Media are living with today -- a sense
that we’re already too privileged, not legally,
but socially. A resentment I think, that has
been brewing out there on the right and the left.
“Who are you”, they say to me, “to talk to the
president that way?” “Or to hold forth.” Is
there any risk, when we think about our
positions, our credibility in society, that we
may set ourselves beyond the communities we cover
in a way that’s not healthy for us, if we get a privilege. Judy?

MS. MILLER: I think only if the reason for the privilege is not well explained. I think that when people understand that this is not a reporter’s protection act, but the people’s protection act. The people’s right to know is what’s at stake here. People get it, they understand it. I know of the letters that I got in jail, like Jim, 99% of them were hugely supportive of this concept of a shield and why I was in jail. I think sometimes the people get it before some reporters get it.

MR. MORAN: Back to that. Matt, you work for Time? Are you concerned about that at all, the big MSM establishment media organization?

MR. COOPER: Well sure, look, I think the media always has popularity problems and I think the rise of the blog culture and alternative media cultures are reflective of what a lot of people see as a complacent media. But that’s just part of living in a free society and the marketplace is all sorted out. I think alternative media will rise and fall and mainstream media will rise and fall and that’s just all part of the churning that’s to the good.

MR. MORAN: Jim, do you think it was worth it, what you did?

MR. TARICANI: Yeah, absolutely.

MR. MORAN: Why?

MR. TARICANI: Because I think what I did wasn’t for me. I didn’t do it, you know, to go
out and get speaking fees on these panels that I’ve been doing ... which have been a lot, but it’s been interesting.

MR. MORAN: There’s a fee here?

[Laughter]

MR. TARICANI: No, God no.

[Laughter]

MS. MILLER: You mean there’s not a fee here?

[Laughter]

MR. TARICANI: I think it was worth it because, as I said before, the people in our community really had an education on what the First Amendment in a free press is all about. I attended a conference last week in Chicago, the American Society of Newspaper Writers and a gentleman, I think he’s the publisher or editor from USA Today, brought up an interesting point. We do a horrible job in the press of marketing ourselves. We talk about ourselves as the media. If we started to talk about ourselves, and educate the public -- that we are the free press and we are here for them, we are here for the citizens of this country. We are not here for us, we’re not here to get headline for ourselves or to feed our egos on TV or in the newspaper -- we are here for them -- I think we would increase our credibility with the public and diminish the perceived arrogance that a lot of people think we are.

MR. TERRY MORAN: Okay, in the spirit of free and fierce enquiry, we will take some questions.
I don’t think we have a mic, right? So just 

holler. Right here.

MALE VOICE: Special prosecutors are generally 

appointed because of a perceived conflict of 

interest in an administration investigating 

themselves. I would like to ask Judy, in a case 

where a newspaper and its reporters and editors 

become the subject of the story in such an 

intense way, can we really expect that newspaper 

to fairly report on the story with its own 

reporters and editors. Or should it similarly, 

in the interest of fairness, look outside itself 

and appoint special reporters and editors to 

accurately report on the story?

MR. MORAN: Geez, there’s a question. I mean 

should the New York Times have really covered the 

story given their vested interest.

MS. MILLER: I think they had to cover the 

story. I mean I remember jumping up and down, 
screaming in jail, saying, “Where are the 

stories? Where are the stories?” There were 

many editorials. I have to be a little careful 

what we say here because Matt and I may actually 

be witnesses. But there would have been more 

pressure, had there been more news. And there 

would have been...and I think that all a 

newspaper can do is acknowledge that it has a dog 
in this fight. That might not be the way I’d put 
it in print, but yes, we do; we are covering this 
because we have Jim Taricani under house arrest 
or Judy Miller in jail; but to move on with the 

story. That should not affect the way that we
cover it or the extent to which it should be covered. This was clearly a story that deserved, and deserves media attention.

MR. MORAN: News fit to print?

MS. MILLER: News fit to print.

MR. MORAN: News fit to print. Anybody else? Here, yeah?

FEMALE VOICE: The theme emerging here is the public’s right to know.

MR. MORAN: We do have a mic.

FEMALE VOICE: The theme emerging here is the public’s right to know and I’d like to ask Judy if she thinks that the public’s right to know was served by misleadingly identifying a source?

MS. MILLER: Well I think the New York Times will have something to say tomorrow about its allegation that I mislead anyone. I did not, and I think that will become clear for those of you who read the paper tomorrow. And I think that there is no indication here that anyone was mislead about a source. There was never a story written by me, that identified Mr. Libby in any way, shape or form to begin with; but secondly, if there had been that attribution would never have flown. It think reporters, especially investigative reporters, take information in a variety of ways and if you’re working in Washington, you agree to hear information with one attribution; but when it comes time to putting their name to it, that’s always, always an issue of debate and discussion and negotiation. One of the things that I was not
permitted to say at the time of this entire controversy was that Mr. Libby had never appeared in any one of my articles as anything other than a senior administration official and that’s the way it would have been. So this charge of misleading through misidentifying a source was completely bogus from the beginning and I’m just very sorry that the paper didn’t explain that, as it will tomorrow.

MR. MORAN: But was it a tactic to get information out of him; to agree to that, or to have a conversation about that?

MS. MILLER: It was a tactic to have a conversation, it was not a commitment to identify him in that way, shape or form. He would never have been identified that way and there has never been, in 28 years of reporting, an allegation that any, any of my sources have been misidentified. And 28 years with the investigative work I’ve done is, I think, what I should have been judged on and given the presumption of innocence on.

MR. MORAN: Fair enough, fair enough. Another question?

FEMALE VOICE: Here.

FEMALE VOICE: [Off mic]

MR. MORAN: Well that kind of goes to Matt’s situation.

MR. COOPER: Yeah, well that was the issue that faced myself and Time Inc. this summer because Time Inc., unlike the New York Times in this CIA leak case, was under subpoena. We
determined that Time Inc. was the owner of my notes. I’d written them on a company computer and it’s the property of Time, as are the emails, which are stamped clearly as the property of the company. And so the company had to make a decision. Norman Pearlstein, as the Head of Time Inc., had to make a decision about whether to comply. After fighting a case through federal district court, through the DC Circuit all the way to the Supreme Court, whether he would comply with the Supreme Court of the United States. And he chose to do so. I disagreed at the time, but I thought it was a very close call. I must say that I think one, it’s the Supreme Court, it’s not some local magistrate; and defying the Supreme Court is a big deal. I mean John Lewis paid the fine at the end of the day, and others got out of the schoolhouse door. The Supreme Court is a big deal. So that, in and of itself, I think, was a compelling argument.

But also, do we really want a world in which corporations engage in civil disobedience. It’s one thing for an individual reporter to, you know, pull a Mandela. Do we really want to live in a world where General Motors says, “You know what, these pollution controls, we don’t believe in them. We’ll pay the fine.” And you know, Norman Pearlstein made his decision. I disagreed with it at the time. I thought on balance, it would have been worth going into civil contempt and sticking it out a bit longer. But I had a great respect for him, and still do, and the way
he made it. And I do think it is much harder for
a corporation to try to engage in civil
disobedience than an individual.

MR. MORAN: An interesting question. We’ll
take one more question, last question. Anybody?
How’s your voice.

MALE VOICE: What do you think about Bob
Novak?

[Laughter]

MR. COOPER: Love him. Well I just think
it’s been one of the strange mysteries of a
mysterious case. What happened to Novak?
Obviously he was the person who outed Valerie
Plame originally and I guess that some day we’ll
know why he never acknowledged what must have
been the case; he clearly must have testified at
this point. For a long time there was a debate
about well, has he testified, was he subpoenaed
or are they saving him for the end? Did he take
the Fifth? But at this point, I don’t think
there can be much doubt he did testify. I don’t
know anyone who thinks he didn’t and I think at
some point, he’ll have to explain why he didn’t
simply say, “Look, yeah I testified.”

MR. MORAN: Judy, you want to take a crack at
Bob Novak?

MS. MILLER: No, I think I’ll second what
Matt has said.

[Laughter]

MR. MORAN: Well it’s been a real pleasure
and a privilege for me to be up here.
Congressman Mike Pence, who is doing this work
and showing what a real conservative looks like
at a time in Washington when sometimes that seems
to be clouded. And then it is certainly a
privilege to be up here with my colleagues who
have put it on the line for what we do. So let’s
give them a real hand.

[Applause]

MS. BARON: Obviously I want to thank our
panel. I think it’s been an incredible evening
so far. And I too want to do a quick thank you
to our Founding Fathers on the occasion of our
25th Anniversary, and to all of you, the MLRC
membership, for your contributions to this
extraordinary collective venture. Started by a
small, but inspired band as an experiment in
sharing information and ideas on First Amendment
media law issues, after 25 years, MLRC remains a
unique platform, not only for information on new
developments, but for harnessing the talent and
energy of this extraordinary vast membership, now
worldwide, towards new and enlightened ideas.

In honor of all of you, we would ask you to
take a T-shirt, those lovely gray things that are
rolled up in the middle of your table as a
centerpiece. Trade them around if you want a
different size than the one you picked up. And
thank you all so very much for coming. Enjoy
your meal.

[END TRANSCRIPT]