

**Testimony of Roger C. Vann  
on behalf of the  
American Civil Liberties Union of Connecticut  
on  
Raised House Bill 5212: An Act Concerning Freedom of the Press**

March 10, 2006

Good Morning Senator McDonald, Representative Lawlor and members of the Judiciary Committee:

The American Civil Liberties Union of Connecticut is pleased that the General Assembly is considering Raised House Bill 5212: An Act Concerning Freedom of the Press. **We strongly support the enactment of appropriate legislation in this area. However, we believe that the proposed bill should be amended in two key respects before it is passed.**

The ACLU believes that Connecticut ought to join the majority of states that have enacted statutes providing some degree of legal protection for the confidential sources and unpublished materials of journalists and researchers. Such protection should be afforded not because journalists are a privileged class deserving of some special exemption from the law -- they are not -- but because such protection serves the society's interest in obtaining information about newsworthy matters. It does so by assuring people who have knowledge of those matters - - a journalist's "sources" -- that if they bring their information to the news media on a confidential basis, the government will respect that confidence. Thus, while it is the journalist who is directly protected by a "news media privilege," the underlying protection is for the source, whose confidentiality would otherwise depend upon a journalist's willingness to go to jail rather than obey a court order. And the ultimate beneficiary is the public, which will obtain important news that would otherwise go unreported.

In this sense, the news media privilege is analogous to the well-established attorney-client, physician-patient and minister-penitent privileges, where it is the lawyer, the doctor or the minister who cannot be compelled to testify, but it is the client's, patient's or penitent's confidences that are thereby protected. Society has long recognized that without such privileges, people could not freely discuss their legal problems with their attorneys, their medical problems with their doctors, and their moral problems with their ministers. Because it is in the general interest that such consultations should occur, society is willing to pay the price of protecting the content of those discussions from compulsory disclosure. By the same token, because it is in the general interest that the news media should obtain and disseminate information that would not be disclosed without an assurance of confidentiality to the source, society should be willing to pay the price of protecting the identity of those sources from compulsory disclosure.

On the other hand, we cannot ignore society's legitimate and important interest in obtaining truthful and complete information in court trials and other proceedings. The United States Constitution specifically recognizes this interest, as it applies to a person charged with a crime, when it provides, in the Sixth Amendment, that "the accused shall enjoy the right . . . to

have compulsory process for obtaining witnesses in his favor.” Of course the right to subpoena a witness would be worthless if the witness could not be compelled to testify about what he or she knew, and a defendant could be wrongly convicted and sent to prison if an evidentiary privilege prevented the truth from coming out. That would be an injustice not only to the defendant but also to society as a whole, which has a strong interest in avoiding the conviction of innocent people.

While the right of a criminal defendant to compel exculpatory testimony is perhaps the most dramatic example of where an evidentiary privilege can conflict with important rights, the same situation can arise in other contexts. When government agencies are conducting legitimate investigations of crimes or corruption, it is in society’s interest that the truth be told, and it is certainly desirable that the litigants in civil cases -- both plaintiffs and defendants -- should be able to bring out the facts and establish the truth in court, so that their cases can be justly decided.

Moreover, even apart from the question of fairness to the parties, judicial, administrative, and legislative proceedings are themselves an important avenue through which the “free flow of information” to the public is maintained, as the news media have often reminded us when insisting -- quite properly -- on their right of access to such proceedings.

Thus, in establishing a news media privilege, the legislature must balance the society’s interest in the free flow of information through the news media that such a privilege will protect, on the one hand, against the society’s interest in obtaining the full disclosure of relevant information in judicial, legislative and administrative proceedings, on the other hand.

Bearing these conflicting interests in mind, the ACLU believes that House Bill 5212, as introduced, should be amended in two key respects so as to strike the appropriate balance.

### **The privilege should protect the identity of only confidential sources**

Section 2 of House Bill 5212 prohibits any “judicial, executive, legislative or other body...” from compelling the news media to testify concerning or to produce or otherwise disclose any information or the identity of the source of information it gathers *whether or not the source has been promised confidentiality*. We do not see any justification for protecting the identity of a source who has not sought such protection.

As we understand it, the justification for protecting the identity of certain sources is that a significant amount of important news cannot be obtained except by promising the source that his identity will be kept secret. A news media privilege law provides assurance to journalists and their sources that the government will respect such promises, within the limits established by the statute. But when a source does not require a promise of confidentiality to come forward with information, and is willing to speak “on the record,” knowing that his name may be published or broadcast as the source of the news he supplied, there is simply no justification for treating the source’s identity as a secret. In order for a particular communication to be protected under the attorney-client, physician-patient, minister-penitent, or even husband-wife privileges, it is

required that the communication have been made *in a confidential manner and with an expectation of confidentiality*. We see no reason why the news media privilege should extend more broadly.

This is not to say that a promise of confidentiality must be in writing or otherwise formalized. An assurance of secrecy should be honored whether it is explicit or implicit, just as a lawyer's client or a doctor's patient does not have to begin a consultation by saying "I am speaking to you in confidence" in order to trigger the relevant privilege. But just as courts can properly decide whether a communication with a lawyer or a physician was or was not privileged, they can decide whether a reporter's source was or was not acting under an assurance or understanding of confidentiality.

**Criminal defendants should have access to non-confidential materials as a matter of course, and to confidential materials (including the identity of sources) upon a showing of need.**

House Bill 5212 makes no distinction between the right of a criminal defendant to compel testimony from a journalist and the right of any other person to do so. In our view, this gives insufficient weight to a defendant's Sixth Amendment rights and to the importance our society properly attaches to a person's ability to defend himself when accused of a crime.

In accordance with the Sixth Amendment right of "the accused...to have compulsory process for obtaining witnesses in his favor," we believe that a criminal defendant should be able to subpoena testimony and evidence from a journalist with respect to material that was not obtained under confidential circumstances (subdivision (2) of section 2) in the same way that he can subpoena testimony and evidence from any other person.

Further, House Bill 5212 does not allow a criminal defendant to compel the disclosure of *confidential* information gathered by the news media under any circumstances. We believe a criminal defendant should be able to subpoena such testimony and evidence (including the identity of confidential sources) after he has demonstrated that the information is critical to his defense and cannot be obtained elsewhere.

**In summary, the ACLU would urge passage of House Bill 5212 after it is amended in the following two respects:**

- **To provide that the identity of only confidential sources is protected; and**
- **To provide that criminal defendants can obtain non-confidential information as a matter of course, and can obtain confidential information, including the identity of confidential sources, upon a showing of need.**