TOM DAVIS, VIRGINIA,
CHAIRMAN

DAN BURTON, INDIANA
CHRISTOPHER SHAYS, CONNECTICUT
ILEANA ROS-LEHTINEN, FLORIDA
JOHN M. McHUGH, NEW YORK
JOHN L. MICA, FLORIDA
MARK E. SOUDER, INDIANA
STEVEN C. LATOURETTE, OHIO
DOUG OSE, CALIFORNIA
RON LEWIS, KENTUCKY
JO ANN DAVIS, VIRGINIA
TODD RUSSELL PLATTS, PENNSYLVANIA
CHRIS CANNON, UTAH
ADAM H. PUTNAM, FLORIDA
EDWARD L. SCHROCK, VIRGINIA
JOHN J. DUNCAN, JR., TENNESSEE
NATHAN DEAL, GEORGIA
CANDICE MILLER, MICHIGAN
TIM MURPHY, PENNSYLVANIA
MICHAEL R. TURNER, OHIO
JOHN R. CARTER, TEXAS
MARSHA BLACKBURN, TENNESSEE
PATRICK J. TIBERI, OHIO
KATHERINE HARRIS, FLORIDA

ONE HUNDRED EIGHTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6143

MAJORITY (202) 225–5074
FACSIMILE (202) 225–3974
MINORITY (202) 225–5051
TTY (202) 225–6852

www.house.gov/reform

HENRY A. WAXMAN, CALIFORNIA,
RANKING MINORITY MEMBER

TOM LANTOS, CALIFORNIA
MAJOR R. OWENS, NEW YORK
EDOLPHUS TOWNS, NEW YORK
PAUL E. KANJORSKI, PENNSYLVANIA
CAROLYN B. MALONEY, NEW YORK
ELIJAH E. CUMMINGS, MARYLAND
DENNIS J. KUCINICH, OHIO
DANNY K. DAVIS, ILLINOIS
JOHN F. TIERNEY, MASSACHUSETTS
WM. LACY CLAY, MISSOURI
DIANE E. WATSON, CALIFORNIA
STEPHEN F. LYNCH, MASSACHUSETTS
CHRIS VAN HOLLEN, MARYLAND
LINDA T. SANCHEZ, CALIFORNIA
C.A. DUTCH RUPPERSBERGER, MARYLAND
ELEANOR HOLMES NORTON, DISTRICT OF COLUMBIA
JIM COOPER, TENNESSEE
BETTY McCOLLUM, MINNESOTA

BERNARD SANDERS, VERMONT,
INDEPENDENT

August 30, 2004

The Honorable Alberto R. Gonzales
Counsel to the President
The White House
Washington, DC 20500

Dear Mr. Gonzales:

We are writing to forward to you a Congressional Research Service ("CRS") report that may be relevant to the cooperation of White House staff with the criminal investigation now being conducted by Special Counsel Patrick Fitzgerald into the alleged disclosure to journalist Robert Novak that Valerie Plame was a CIA covert operative. At the beginning of the investigation, President Bush asked the White House staff to cooperate with the investigation. We appreciate President Bush's willingness to encourage such cooperation and his own interest in a thorough investigation.

It is our understanding from news reports that the Department of Justice requested that certain White House staff execute waivers of any confidentiality of conversations with journalists regarding the subject of the criminal investigation.[1] According to those same reports, some White House staff declined to sign the requested waivers.[2] On February 10, 2004, Reps. Waxman and Conyers wrote to President Bush urging him to encourage White House officials to sign the waivers. In particular, the members urged the President to block White House employees who refused to sign the waivers from continued access to classified information.[3] Subsequently, we asked CRS to analyze any potential legal consequences for the Justice Department's criminal investigation if the White House took this step or other actions to encourage signing of the waivers.

---

[1] *Bush Aides Testify in Leak Probe,* Washington Post (Feb. 10, 2004) (noting that the waivers requested that "no member of the news media assert any privilege or refuse to answer any questions from federal law enforcement authorities on my behalf or for my benefit"); *Top Bush Aide Is Questioned in CIA Leak,* New York Times (Feb. 10, 2004).

[2] *Id.*

[3] Letter from Rep. Henry A. Waxman and Rep. John Conyers, Jr., to President George W. Bush (Feb. 10, 2004).

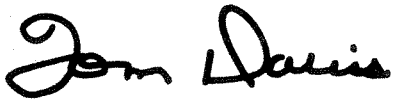
The value of these waivers to the investigation appears to be considerable, as is underscored by the recent decision by *Time* magazine journalist Matthew Cooper to discuss with Justice Department investigators his conversations with I. Lewis "Scooter" Libby, chief of staff to the Vice President. According to the *Washington Post*, *Time* Managing Editor Jim Kelly said that Cooper "would have gone to jail if Libby didn't waive his right to confidentiality."[4]

As you can see in the attached CRS memorandum, CRS examined whether White House efforts to urge signing of the waivers would raise Fifth Amendment or other privilege concerns. CRS has concluded that any concerns about whether these White House actions would raise issues relating to the journalist's privilege or the privilege against self-incrimination appear to be "unfounded." With respect to a journalist's privilege, CRS determined: "[T]he question of whether the release forms were executed voluntarily or under compulsion appears to be of no consequence," because the journalist privilege "can only be waived by the journalist."

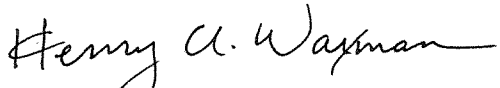
Regarding the issue of self-incrimination, the CRS analysis found that White House efforts to encourage the signing of the confidentiality waivers would not raise Fifth Amendment issues. According to CRS, "the general nature of the form or release — specific in neither time, place, person, nor subject matter" would "render them nontestimonial, and thus beyond the cover of the Fifth Amendment." CRS also said the Fifth Amendment would not apply because "the Government would not be relying upon the 'truth telling' or disclosures of the White House employees when they executed the release forms to lead investigators to the incriminating evidence."

We are forwarding the CRS analysis for your consideration of the legal effect of further White House actions to ensure that White House staff cooperate with the Justice Department investigation by signing waivers requested by investigators.

Sincerely,



Tom Davis
Chairman



Henry A. Waxman
Ranking Minority Member

Enclosure

---

[4] *Journalist Testifies in CIA Case; Contempt Charges against Time Reporter Are Dropped,* Washington Post (Aug. 25, 2004).

Congressional Research Service

Memorandum April 30, 2004

TO: House Committee on Government Reform

[redacted]

FROM: American Law Division

SUBJECT: Legal Consequences of Efforts to Induce White House Staff to Waive "Newsman's Source" Protection in Connection with an Investigation on the Disclosure of an Individual's CIA Affiliation

This is in response to your request for an analysis of the legal consequences – if any – for a criminal investigation into the press disclosure of an individual's CIA affiliation if the President, White Counsel, or other White House staff (1) urged White House employees to sign press confidentiality waivers; (2) informed White House employees that did not sign the waivers that they would lose their access to classified information; or (3) required White House employees to sign such waivers as a condition of their continued employment at the White House.

The Intelligence Identities Protection Act outlaws the disclosure of the identity of undercover intelligence officers, agents, informants, and sources under some circumstances, 50 U.S.C. 421-426. On July 14, 2003, Robert Novak, in a *Chicago Sun* newspaper column citing "two senior administration officials," named a particular individual as a CIA operative. The CIA is reported to have requested an investigation which the Justice Department subsequently initiated, *Los Angeles Times*, A1 (Oct. 1, 2003). Thereafter, press accounts indicated that "Federal investigators plan[ned] to ask White House officials to release journalists from any pledge of confidentiality given during discussions about [a] CIA operative," and further that "several aides . . . will be asked to sign a one-page form giving permission for journalists to describe any such conversations to investigators, even if the journalists promised not to reveal the source." The President "wants his aides to cooperate fully, and the official said that will result in tremendous pressure on them to sign a form," *The Washington Post*, A9 (Jan. 3, 2004).

At first glance, this might appear to raise issues relating to journalist's privilege and to the privilege against self-incrimination. Upon closer examination, however, these concerns seem unfounded. The journalist's privilege, if any, belongs to the journalist; the question of whether a source has voluntarily or involuntarily executed a release is irrelevant. The Fifth

More specifically, the availability of a journalist's privilege, even for the journalists, under these circumstances is at best unclear. The uncertainty flows from the Supreme Court's treatment of the privilege issue in *Branzburg v. Hayes*, 408 U.S. 665 (1972), and the response of Congress and the lower courts following *Branzburg*.

Branzburg involved the question of whether journalists enjoy a First Amendment privilege to withhold the identity of their sources from an inquiring grand jury. The opinion for the Court answers with a sweeping and resounding – "no."[1] One of the five members of the majority, however, appended a concurrence which adds – "at least not in this case."[2]

In the years that followed, some of the circuits have recognized a qualified journalist's privilege in criminal cases;[3] others have refused to do so;[4] and still others, like the District of Columbia Circuit, have recognized a qualified privilege in civil cases, but have left the issue of the privilege's vitality in criminal cases unresolved.[5]

Moreover on the heels of *Branzburg*, Congress enacted federal rules of evidence, Pub.L. 93-595, 88 Stat. 1926 (1975), after rejecting specific privilege rules contained in the version of the rules forwarded to it by the Supreme Court as part of the process for amending court rules, *see*, *Federal Rules of Evidence*, 34 L.Ed.2d lxv (1972). Instead under Rule 501 of the Federal Rules of Evidence in effect since 1975, questions of privilege that arise in cases within the courts' federal question jurisdiction are governed by the "principles of common law as they may be interpreted by the courts of the United States in the light of reason and

---

[1] "We are asked to create another [privilege] by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do. . . . Thus, we cannot seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it," 480 U.S. at 690, 692.

[2] "I add this brief statement to emphasize what seems to me to be the limited nature of the Court's holding. The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights. . . .The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions," 480 U.S. at 709, 710 (Powell, J. concurring).

[3] *United States v. LaRouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988); *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986); *United States v. Burke*, 700 F.2d 70, 77-78 (2d Cir. 1983); *United States v. Cuthbertson*, 630 F.2d 139 F.2d 139, 147 (3d Cir. 1980).

[4] *In re Grand Jury Proceedings*, 810 F.2d 580, 583-86 (6th Cir. 1987); *In re Shain*, 978 F.2d 850, 852 (4th Cir. 1992); *In re Grand Jury Proceedings*, 5 F.3d 397, 402-3 (9th Cir. 1993); *United States v. Smith*, 135 F.3d 963, 968-69 (5th Cir. 1998); *cf.*, *McKevitt v. Pallasch*, 339 F.3d 530, 531-33 (7th Cir. 2003).

[5] *Zerilli v. Smith*, 656 F.2d 705, 712 (D.C.Cir. 1981); *Clyburn v. News World Comm., Inc.*, 903 F.2d 29, 35 (D.C.Cir. 1990); *but see*, *Lee v. U.S.DoJ*, 287 F.Supp.2d 15, 23 (D.D.C. 2003)("the Court has some doubt that a truly worthy First Amendment interest resides in protecting the identity of government personnel who disclose to the press information that the Privacy Act says they may not reveal").

experience," unless otherwise provided for by the Constitution, Act of Congress, or rule of the Court.[6]

Where the privilege is recognized, it belongs to the journalist and not to the source; therefore it can only be waived by the journalist.[7] Thus if the federal courts in the District of Columbia were willing to recognize the privilege in the context of a criminal investigation, execution of confidentiality release forms by the "two senior administration officials" whether located in the White House or elsewhere would be insufficient to waive the privilege. As a result, the question of whether of the release forms were executed voluntarily or under compulsion appears to be of no consequence.

With regard to self-incrimination, the Fifth Amendment declares that, "No person . . . shall be compelled in any criminal case to be a witness against himself, U.S.Const. Amend. V. A public employee may be discharged for invoking the Fifth Amendment in the course of an investigation into the performance of the employee's official duties, *Gardner v. Broderick*, 392 U.S. 273, 278 (1968). On the other hand, a public employee who speaks only under the threat of discharge has been compelled to speak in a manner that renders any incriminating statements inadmissible in the employee's subsequent criminal prosecution, *Garrity v. New Jersey*, 385 U.S. 493, 498-500 (1967).

Yet, these principles are unlikely to come into play in the case at hand, because in all probability the Fifth Amendment may not be interposed to prevent compulsory execution of the forms at issue here. The facts seem somewhat analogous to those in *United States v. Doe*, 487 U.S. 201 (1988). There the target of a grand jury investigation was under court order to execute consent forms authorizing foreign banks to disclose records relating to any transactions involving the target. The Court noted that the Fifth Amendment "privilege protects a person only against being incriminated by his own compelled testimonial communications. The execution of the consent directive at issue in this case obviously would be compelled, and we may assume that its execution would have an incriminating effect. The question on which this case turns is whether the act of executing the form is a testimonial communication," 487 U.S. at 207 (citations and internal quotation marks omitted).

The test of a testimonial communication the Court drew from Wigmore: "Unless some attempt is made to secure a communication –written, oral or otherwise–upon which reliance is to be placed as involving [the accused's] consciousness of the facts and the operations of his mind in expressing it, the demand made upon him is not a testimonial one," 487 U.S. at 211, quoting, 8 WIGMORE ON EVIDENCE §2265 (1961 ed.). And so without offense to the Fifth Amendment, "a suspect may be compelled to furnish a blood sample; to provide a

---

[6] For purposes of federal recognition, "the existence of a consensus among the States indicates that 'reason and experience' support recognition of [a previously unrecognized] privilege, *Jaffee v. Redmond*, 518 U.S. 1, 13 (1996)(recognizing a psychotherapist-patient privilege in the face of a split among the circuits). At the time of *Branzburg*, 17 states had some form of journalist privilege law, 408 U.S. 689 n.27; now at least 33 recognize the privilege in some form either statutorily or judicially, Elrod, *Protecting Journalists From Compelled Disclosure: A Proposal for a Federal Statute*, 7 NEW YORK UNIVERSITY JOURNAL OF LEGISLATION & PUBLIC POLICY 115, 125 N.61 (2003-2004).

[7] *United States v. Cuthbertson*, 630 F.2d at 147; *L.A. Mem. Coliseum Comm. v. NFL*, 89 F.R.D. 489, 494 (C.D.Cal. 1981).

handwriting exemplar or a voice exemplar; to stand in a lineup; and to wear particular clothing," incriminating though such activities may be, 487 U.S. at 210.[8]

In *Doe*, and presumably in the case of the confidentiality releases here, the general nature of the form or release–specific in neither time, place, person, nor subject matter–proved sufficient to render them nontestimonial,[9] and thus beyond the cover of the Fifth Amendment.

Even if the confidentiality release forms were specific as to the subject matter, journalist, and other specifics known to investigators beforehand from sources other than those executing the forms, they are beyond the Fifth Amendment's protection. In such instances, the Government would not be relying upon the "truth-telling" or disclosures of the White House employees when they executed the release forms to lead investigators to the incriminating evidence.[10]

Charles Doyle
Senior Specialist
7-6006

---

[8] Citing *Schmerber v. California*, 384 U.S. 757, 765 (1966); *Gilbert v. California*, 388 U.S. 263, 266-67 (1967); *United States v. Dionisio*, 410 U.S. 1, 7 (1973); *United States v. Wade*, 388 U.S. 218, 221-22 (1967); and *Holt v. United States*, 218 U.S. 245, 252-53 (1910), respectively.

[9] 487 U.S. at 215-16 (citations and accompanying quotation marks omitted) ("The consent directive itself is not 'testimonial.' It is carefully drafted not to make reference to a specific account, but only to speak in the hypothetical. Thus, the form does not acknowledge that an account in a foreign financial institution is in existence or that it is controlled by petitioner. Nor does the form indicate whether documents or any other information relating to petitioner are present at the foreign bank, assuming that such an account does exist. The form does not even identify the relevant bank. Although the executed form allows the Government access to a potential source of evidence, the directive itself does not point the Government toward hidden accounts or otherwise provide information that will assist the prosecution in uncovering evidence. The Government must locate that evidence by the independent labor of its officers. As in *Fisher*, the Government is not relying upon the 'truth-telling' of Doe's directive to show the existence of, or his control over, foreign bank account records. Given the consent directive's phraseology, petitioner's compelled act of executing the form has no testimonial significance either. By signing the form, Doe makes no statement, explicit or implicit, regarding the existence of a foreign bank account or his control over any such account ").

[10] The investigators' independent knowledge in this case sets it apart from *United States v. Hubbell*, 530 U.S. 27 (2000), where the suspect's compelled disclosures lead investigators to a treasure trove of incriminating evidence of which they were completely unaware and which they might otherwise never have discovered.