Ladies and gentlemen, it is an honor and a pleasure for me to take part in this conference on The First Amendment in Crisis. I cannot think of a happier place to be in crisis, or a more impressive group of conferees.

I am going to begin with a story that may not at first seem exactly in point. It is about the largest-selling daily newspaper in the world, Rupert Murdoch's British tabloid, The Sun. And what it did to Elton John, a rock singer. I remind you that John was a favorite of Princess Diana's, and sang at her funeral in Westminster Abbey.

On February 25, 1987, The Sun printed a story that began "Elton John is at the center of a shocking drugs and vice scandal involving teen-age 'rent boys, The Sun can reveal today." "Rent boy" is British journalese for male prostitute. The story gave as its source one "Graham X." The next day Graham X was the source for a story saying: "Kinky superstar Elton John loved to snort cocaine through rolled-up $100 bills." Mr. John denied both stories and brought two writs for libel. The next day’s Sun headline was: "You're a Liar, Elton." And so on through another dozen stories over the next months. During this time, we now know, the Sun was paying Graham X--his real name was Stephen Hardy--$400 a week and taking him and his girlfriend to Marbella, a chic seaside resort in Spain for an extended vacation. The last attack on Elton John, published Sept. 28, 1987 was headlined "Mystery of Elton's Silent Dogs." It said Mr. John had had his "vicious Rottweiler dogs" silenced by a "horrific operation." Mr. John sued again: his 17th libel action since the start of the Sun campaign against him.

For some reason, perhaps because the English love dogs, the last of the suits, the one about the non-barking dogs, was scheduled for trial first, on Dec. 12, 1988. It turned out that Mr. John's dogs were not Rottweilers and did bark. It also turned out that Stephen Hardy, alias Graham X, had made up his tales of vice at the Sun's urging. "I’ve never even met Elton John," he said later. "In fact, I hate his music."

The morning of the scheduled trial The Sun carried a two-word headline: "Sorry Elton." The story said that The Sun had settled all the libel actions by paying Mr. John 1 million pounds in damages--about 1.7 million--and about half
as much again in lawyers’ fees. The story said: “We are delighted that The Sun and Elton have become friends again, and we are sorry that we were lied to by a teenager living in a world of fantasy.

What is one to say about behavior like that? I know of only one explanation. Rupert Murdoch is said to make profit of 1 million pounds a week on The Sun.

Now why did I start off with that tale? To remind you that the press is not always a noble hero. Of course there is nothing as vicious or contemptuous of the truth in American newspapers or television or radio or the internet, is there? Not in extremist talk shows? When Ann Coulter says that it would be wonderful if a bomb went off at The New York Times, she’s just kidding, right?

Well, ladies and gentlemen, you do not have to be respectable, much less noble, to enjoy the freedom of speech and press guaranteed by the First Amendment. That is one lesson, a lesson often overlooked, of the first Supreme Court decision protecting the press: Near v. Minnesota, in 1931. Near was Jay M. Near, who put out a weekly paper, The Saturday Press. It could politely be called a scandal sheet. And it was viciously anti-Semitic. The theme it most often sounded was that political leaders in Minnesota were in league with a group of Jewish gangsters and that the police were doing nothing about it. Minnesota had a unique law calling for the suppression of malicious journals, and it was invoked to put Jay Near out of business. The Supreme Court, by a vote of 5 to 4, said the suppression was a prior restraint especially disfavored by the First Amendment. The dissenting opinion, by Justice Butler, had a footnote giving an example of Near’s anti-Jewish diatribes. It is too nauseating to read.

You might think that the public weal suffered no injury by the disappearance of the Saturday Press. Perhaps the late Fred Friendly thought that when he began writing a book about Near v. Minnesota. Friendly—you can see him portrayed by George Clooney in the movie “Good Night, and Good Luck”—went from CBS Television to be vice president of the Ford Foundation. One day he was at lunch there, and he told his companions about the book he was working on. Irving Shapiro, the chairman of the duPont Company and a member of the foundation board, came over from another table. "Are you writing a book about the Near case, Fred?" he asked. "I knew Mr. Near." And he told this story.
Irving Shapiro's father, Sam, owned a dry-cleaning store in St. Paul. One day a group of gangsters came in and demanded that he pay protection money. When he said no, they sprayed acid on the clothes hanging in the store, doing $8,000 worth of damage. Irving, a young boy, watched. The establishment newspapers reported the attack but did not name the gangster mob; and they did not follow up the story. But Jay Near came to the store, talked with Sam Shapiro, published a full story in The Saturday Press and campaigned against the gangsters. They were arrested and prosecuted. So Sam Shapiro did not think that Jay Near’s newspaper was worthless. And neither, incidentally, did Colonel Robert Rutherford McCormick, the splenetic owner of the Chicago Tribune, who noticed the case when no one else did and provided his lawyer to take the case to the Supreme Court and argue it there.

The year of the Near decision, 1931, was the start of what has been an enormous expansion of the reach of the First Amendment. The Supreme Court has interpreted it since then to protect political speech of even a revolutionary character; anything goes, unless it is intended to bring about immediate violence and is likely to do so. Art of all kinds—books, movies, painting—is now protected. The press is almost completely free to bare the secrets of government, and the secrets of the bedroom, without fear of penalty. There is almost no chance that anyone can stop the press from publishing what it wishes, even when the government claims that it will menace national security.

Freedom of expression is broader in this country than in any other, including some countries that we think of as like ourselves. In Britain, for example, the government would almost certainly have gone to court to enjoin publication of stories like those in The New York Times about warrantless wiretapping. And it would have got that injunction. Libel law is stricter than ours. Britain's courts have declined to adopt the rule of New York Times v. Sullivan, and it is not followed in any other country.

Not only do we have more freedom than others. We have more than we had in this country at any time in the past. So why are we talking about "The First Amendment in Crisis"?

In my view, the greatest threat to free discussion of public issues today is not prior restraint but official secrecy. We have the most secretive federal government in American history. After the terrorist attacks of 9/11, AG John Ashcroft ordered thousands of aliens arrested and
detained, for weeks and months. Their names were kept secret, their places of imprisonment withheld even from their families. Just this week we learned that the Bush administration has a large program to reclassify documents that were declassified and have been on open library shelves for years.

But my guess is that the principal concern here is over subpoenas to journalists, requiring them to testify before grand juries in criminal investigations or to testify in discovery or trials in civil cases. The case of Judith Miller is surely on everyone’s mind. She spent 85 days in prison for contempt after refusing to name her sources to a federal prosecutor looking into how the name of Mrs. Valerie Wilson, a covert CIA official, was leaked to the press. Other cases are pending. In one, reporters have refused to answer questions by lawyers for Wen Ho Lee in his civil suit against the government for, as he sees it, smearing him as a spy for China in leaks to the press.

The claim made by Judith Miller, and made generally by the press and its lawyers, is that the First Amendment gives journalists a constitutional privilege against having to testify when they are asked to name confidential sources. The argument is that use of such sources is essential to meaningful journalism, and they will dry up if reporters violate their promise of confidentiality and testify. Now I want to subject that claim to hard-headed scrutiny. The first thing to say is that the claim was squarely rejected by the Supreme Court in 1972--in Branzburg v. Hayes, as you know. Some lower courts have found reasons to immunize journalists despite Branzburg. But the Supreme has never changed its mind, and in my opinion, there is zero chance of the Court's doing so.

Why do I say that? First, because freedom of the press has been protected, historically, almost entirely when a publication is penalized, for example in libel cases, or when there is an attempt at restraint before publication. The Supreme Court has rarely protected the press when it seeks to acquire news. It has done so only in the context of open courtrooms. And the basis of the press privilege claim is that it is needed to acquire news.

Second, there is the question of who is a journalist. In the Branzburg case, Justice White said freedom was just as much for the "lonely pamphleteer" as for the established press. And now we have 27 million lonely pamphleteers, self-nominated journalists publishing their blogs on the Internet. That is the latest estimate of the number of blogs, published last weekend in The Financial Times. Are
they to be protected against subpoenas when they come up with a scoop, as some of them do?

I think the interest of the press in this area has to be balanced against others. The citizen whose life has been ruined by false and damaging stories attributed to unnamed sources should not be left without a remedy. Think of Wen Ho Lee. Or go back to the case in which a constitutional privilege was claimed for the first time. The case was called Garland v. Torre, decided by the U.S. Court of Appeals in New York in 1958.

Garland was Judy Garland. Torre was Marie Torre, a television columnist for The New York Herald-Tribune. She published a column saying that CBS executives had told her they would no longer use Judy Garland on the air because she was too fat and too drunk. Garland sued and demanded the names of the alleged CBS sources. Torre refused to give them, and made the constitutional claim. The Second Circuit rejected it, in an opinion by Potter Stewart, then a Sixth Circuit judge visiting the Second, later a Supreme Court justice. The journalist's claim had to yield, he wrote, to the fundamental right of Americans to seek justice in the courts.

I spoke just now of Marie Torre's alleged sources. Let me describe another case to show why I did. It arose years ago in South Africa, in the time of apartheid. A news magazine called To the Point published an article critical of a black minister named Manas Buthelezi. He spoke publicly of peaceful reform, the article said, but informed sources had told the magazine that in his private circles he called for revolutionary violence. That charge could have had terrible consequences for Buthelezi in apartheid South Africa. He sued, and demanded to know the names of the sources. The editor refused to give them. The courts rejecting a privilege claim, entered judgment with damages for Buthelezi. Thereafter, in a great scandal, it came out that the article had actually been written by the secret police--and planted in To the Point to injure Buthelezi.

Justice Williams J. Brennan Jr., one of the greatest friends that freedom of speech and press have ever had on the Supreme Court, once cautioned the press against crying woe when, usually, it lost a case to the Supreme Court. “This,” he said, “may involve a certain loss of innocence, a certain recognition that the press, like other institutions, must accommodate a variety of important social interests.”

I think that is a fair warning. It does not mean that the press has no reason to worry about having to disclose
confidential sources. It does. I have friends in the business who face that problem right now, and I have every sympathy with them. But I think it unwise to make overbroad claims—constitutional arguments that ignore other interests and that will not succeed. I think it is vital to show that the facts really do threaten acute public interests.

Take the Judith Miller case, for example. It was not an example of the press performing its vital function as a whistle-blower, exposing official wrongs. The wrong in this case was the disclosure of the CIA official’s name in order to get even with her husband, Joseph Wilson for telling us that President Bush’s claim of Iraqi purchase of uranium ore in Africa was false. What is the public interest in protecting the author of that nasty business?

The example that to me really shows the need to protect the press’s use of confidential sources is the reporting in The New York Times about President Bush’s secret order to the National Security Agency to conduct warrantless wiretapping. The stories, by James Risen and Eric Lichtblau, disclosed a presidential action that violated the law. The Justice Department has tried hard—very hard—to defend the legality of his order. But it plainly conflicted with the Foreign Intelligence Surveillance Act, which provides a system of warrants before a special court and which declares that it is the exclusive method for such tapping. The Justice Department argues that a war president has "inherent power" to ignore that law, but that proposition was definitively rejected by the Supreme court 50 years ago in the Steel Seizure Case.

So the Times reports performed a signal public service: the sort of press performance essential to keep this a country of laws, not men. Now the Bush Administration is going all-out to investigate who leaked the facts to The Times. It may subpoena Jim Risen and Eric Lichtblau. If it does, that would present the strongest argument for protection of the reporters and their sources. The balance of interests, that is, would be for protection. How could that balance be struck? Judge David Tatel of the U.S. Court of Appeals for the District of Columbia Circuit suggested that the courts adopt a qualified privilege under a statute giving them the power to define all testimonial privileges. I hope we can discuss this in the panel tomorrow morning.

Ladies and gentlemen, I have to tell you that my views on these matters are affected by something else. I think the worst threat to our constitutional system today— to our freedom—comes not from challenges to the First Amendment,
worrying though they may be, but from a relentless effort to secure unrestrained, unaccountable presidential power. The Bush Administration's lawyers have argued not just that the president can ignore the law and order wiretapping without warrants. They have argued that he can order the use of torture, ignoring treaties and a criminal statute that prohibit it. If he says torture, they say, any attempt to stop him by Congress or treaty would be an unconstitutional interference with his power as commander in chief. They have argued that the president can order the detention of any American citizen suspected of a connection with terrorism: detention forever, in solitary confinement, without a trial and without access to a lawyer.

Those are not abstract arguments. Citizens have been imprisoned, conversations tapped, prisoners tortured. Lest you think that I am speaking loosely, let me give you an example of what has been done to detainees in Guantanamo. I warn you that it will not make pleasant listening.

One detainee at Guantanamo is, Mohamed al-Kahtani. On Aug. 8, 2002, he was moved into an "isolation facility," where he stayed for the next 160 days, his cell continuously flooded with light, his only human contact with interrogators and guards. He was questioned for 18 to 20 hours a day for 48 out of 54 straight days. He was threatened with a menacing dog. He was forced to wear a bra while thong panties were placed upon his head. He was leashed and ordered to perform dog tricks. He was stripped naked in front of women. He was taunted that his sister and mother were whores and that he was gay. Seeing Kahtani after such treatment, FBI agents concluded that he evidenced behavior consistent with extreme psychological trauma: talking to non-existent people, reporting hearing voices, cowering in a corner of his cell covered with a sheet for hours on end.

Under the pressure of those tactics, al-Kahtani named 30 other Guantanamo inmates as terrorists. Each of them remains in prison solely because he listed them; there is no other evidence against them. That leads to another point about the detainees. Two recent studies have found that most of them were not members of al Qaeda. They just happened to be in the wrong place when sweeps for possible terrorists were made. Or they were turned over to the United States by Afghan warlords who were given a large bounty for every such prisoner. 34 detainees have been killed in American prisons in Iraq and Afghanistan, some of them tortured to death. In only 12 of those cases has
anyone been punished, and the longest sentence was 5 months in jail for an Army sergeant who killed an Afghan prisoner. An Army interrogator who smothered an Iraqi general was merely reprimanded.

Two years ago the Supreme Court held that the Guantanamo detainees were entitled to seek writs of habeas corpus, challenging the reasons for their imprisonment, in United States courts. In an effort to stall off judicial examination, the Defense Department installed a system of what it called Combatant Status Review Tribunals. It holds hearings, but the detainee who appears before one has no lawyer, and almost all the evidence is secret. The legal adviser to the tribunals, a Navy judge advocate general, Commander James Crisfield, has said that the tribunals almost entirely rely on "hearsay evidence recorded by unidentified individuals with no firsthand knowledge of the events they describe."

And Congress passed a bill sponsored by Senator Lindsay Graham that strips the courts of jurisdiction to hear habeas corpus cases from Guantanamo. If that statute is upheld by the Supreme Court, it will mean that no court can look into what goes on in Guantanamo.

I have gone a long way from the subject of this conference, ladies and gentlemen; but I do not apologize for that. It is always good to keep things in proportion.

The author of the First Amendment, James Madison, thought its great function was enabling the press to, as he famously put it, "examine public characters and measures." When we talk about the press and the First Amendment today, we should not only point to legal threats to the press but consider how well the press has been performing its high constitutional function. Over the years since the terrorist attacks of 9/11, how well has the established press done in alerting the public to the concentration and abuse of power in the White House? How hard is it working now to report the realities of what is going on in Guantanamo?

After 9/11 there was, I think, what could be called a paralysis of the will. The New York Times and The Washington Post actually apologized to readers for their timid performance in the run-up to the Iraq war--their failure to look more closely at the reasons given for the war, reasons that turned out to be false. Until the NSA wiretapping exposure, I do not think our great newspapers would have won an accolade from James Madison.

Let me end with a quotation from an opinion one of the greatest victories for the press, the Pentagon Papers case. You will remember that the Government tried in 1971 to stop
publication by The Times and then The Washington Post of a secret history of the origins of the Vietnam War.

The Supreme Court rejected the government's argument. In a concurring opinion, Justice Hugo L. Black wrote: "In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy... The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell. In my view, far from deserving condemnation for their courageous reporting, The New York Times, The Washington Post and other newspapers should be commended for serving the purpose that the Founding Fathers saw so clearly. In revealing the workings of government that led to the Vietnam War, the newspapers nobly did precisely that which the Founders hoped and trusted they would do."

That is the vision of the First Amendment in which I believe: a restraint on government and a responsibility on the press.