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FREE FLOW OF INFORMATION ACT OF 2013

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Mr. LEAHY, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

ADDITIONAL AND MINORITY VIEWS

[To accompany S. 987]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to which was referred the bill (S. 987), to maintain the free flow of information to the public by providing conditions for the federally compelled disclosure of information by certain persons connected with the news media, having considered the same, reports favorably thereon, with amendment, and recommends that the bill, as amended, do pass.

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I. Purpose of the Free Flow of Information Act of 2013

Senators Schumer and Graham introduced the Free Flow of Information Act, S. 987, to create a *qualified* privilege for journalists to withhold information that they obtain under the promise of confidentiality. This bill strikes a balance between journalists' need to maintain confidentiality in order to preserve the public's right to know about important issues with the necessity of effective law enforcement. The bill provides standards that would govern when a person or organization that is covered by the Act may be compelled to reveal the identity of a confidential source or information that was provided under a promise of confidentiality. These standards would apply to governmental and private entities in both civil and criminal investigations and cases.

Unlike some States that have created an absolute privilege against compelling journalists to turn over protected material, this bill creates a *qualified* privilege. Under this bill, a journalist who possesses information that was provided under the promise of confidentiality might—in certain circumstances—be compelled by a court to produce the source of the information. Those circumstances would depend on whether the litigant's demand for information arises in a civil, criminal, or other context, and whether it relates to an investigation or case implicating national security or classified material.

In certain situations, the Act's protections categorically do not apply, and the journalist will be required to turn over protected information. The Act does *not* apply to information obtained as a result of the journalist's eyewitness observation of an alleged crime, or as a result of alleged criminal conduct by the journalist. The only crime to which this section does not apply is when the communication of the material is itself the alleged criminal conduct. The Act also does not apply when the disclosure of confidential-source information is reasonably necessary to stop, prevent, or mitigate a specific case of death, kidnapping, substantial bodily injury, certain offenses against minors, or incapacitation of critical infrastructure.

Further, the Act contains specific provisions to ensure that law enforcement maintains access to needed national security-related information, an issue that is unique to the Federal Government and not addressed in any state media shield law.

In cases that involve alleged unauthorized disclosures of properly classified information ("leaks"), the Act allows a court to compel the disclosure of confidential-source information where disclosure would assist in preventing or mitigating an act of terrorism or acts that are reasonably likely to cause significant and articulable harm to national security. However, the potential for a subsequent unlawful disclosure of information by the source sought to be identified is not sufficient to establish likely significant and articulable harm to national security. In cases that do not involve a leak of properly classified information, the Act allows the court to compel the disclosure of confidential-source information in order to identify the perpetrator of an act of terrorism or acts that have caused, or are reasonably likely to cause, significant and articulable harm to national security.

II. Background and the Need for the Free Flow of Information Act of 2013

A free press is vital to a healthy democracy, and a journalist's ability to effectively gather information is, in turn, central to a free press. However, there is no Federal statute or consistent body of common law that provides clear rules about when a journalist must disclose his or her confidential source information. The absence of a uniform Federal standard for protecting confidential source information has resulted in a confusing collage of Federal court decisions on the issue and has discouraged informants and whistleblowers from coming forward with important information regarding, for example, corporate wrongdoing or Government fraud, abuse, or mismanagement. The Free Flow of Information Act is needed to clarify the law in this area and to provide clear guidance to courts, journalists, and Federal law enforcement regarding when the disclosure of confidential source information can be compelled.

A. The States' Recognition of the Need for Media Shield Laws

The universal recognition of the need for a media shield law is demonstrated by the fact that 48 States and the District of Columbia recognize protections for the press through their constitutions, legislation, and in common law.[1] Specifically, 39 States plus the District of Columbia have passed a media shield statute in some form, and nine States have recognized a privilege in their state constitutions or common law. While 10 States have created an absolute privilege that protects journalists in all circumstances, many states' shield laws have adopted a balancing test—weighing the interests of law enforcement against the public's interest in the free flow of information.

The widespread need for state media shield statutes sparked commentary as early as 1970, as the seminal case of *Branzburg* v. *Hayes,* ultimately decided in 1972 and discussed in more detail *infra*, made its way through the Federal courts. In *Branzburg,* the United States Supreme Court held that there is no right under the First Amendment to the U.S. Constitution for a journalist to withhold confidential information in a grand jury proceeding. The Court noted, however, that although the Constitution does not require a privilege for journalists in the grand jury context, "Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate." *Branzburg v. Hayes,* 408 U.S. 665, 706 (1972).

After the *Branzburg* decision, the call for state media shield laws issued loudly and was heeded by the majority of States in the decade that followed.[2] As one commentator wrote at the time, "[I]t is important to recognize a qualified privilege for reporters in both criminal and civil cases. It is essential that the First Amendment

[1] *See generally,* Carey Lening & Henry Cohen, *Journalists' Privilege to Withhold Information in Judicial and Other Proceedings: State Shield Statutes,* Congressional Research Service Report for Congress, Mar. 8, 2005.

[2] *See* Paul Marcus, *The Reporter's Privilege: An Analysis of the Common Law,* Branzburg v. Hayes, *and Recent Statutory Developments,* Faculty Publications Paper 569 (1983), available at http://scholarship.law.wm.edu/facpubs/569.

interests of the press in gathering and disseminating information be supported through the privilege avenue."[3]

Today, every State court system except Hawaii[4] and Wyoming is governed by a constitutional, legislative or common law protection for journalists. Collectively, these States have recognized that the press plays a legally enshrined role in maintaining an informed citizenry, and Government intrusion upon the media must be balanced against the values inherent in the unfettered operation of the press. As the State Supreme Court of Florida recognized before that State enacted a legislative protection for journalists, "The First Amendment is clearly implicated when Government moves against a member of the press because of what she has caused to be published."[5]

Drawing from this lengthy history of carefully calibrated state protections for journalists, the Free Flow of Information Act similarly adopts a series of balancing tests in order to address the needs of law enforcement and civil litigants on one hand, and the freedom of the press and the public's right to know, on the other.

B. INCREASE IN FEDERAL SUBPOENAS TO JOURNALISTS AND CONGRESS' RESPONSE IN THE FREE FLOW OF INFORMATION ACT

This bill responds, in part, to an increase in the frequency with which subpoenas are issued to journalists by Federal entities. There is clear evidence that the number of subpoenas continues to grow, despite a lack of consensus on the actual number.

In a September 26, 2007, views letter to the Judiciary Committee, the Department of Justice ("DOJ") stated: "Since 1991, the Department has approved the issuance of subpoenas to reporters seeking confidential source material in only 19 cases."[6] However, there is some doubt as to whether this number is accurate.[7] Assuming for the sake of argument that this number is accurate, it does not fully capture the burgeoning problem of subpoenas to reporters for the following reasons: First, it does not take into account subpoenas from special prosecutors. For example, there were at least 10 subpoenas issued in the Valerie Plame CIA leak case that were not counted among the 19 subpoenas cited by the De-

[3] *See id.* at 4.

[4] The Hawaii legislature passed a media shield law in 2008, but it expired in June 2013.

[5] *Morgan v. State,* 337 So.2d 951, 956 (Fl. Sup. Ct. 1976) (quashing a grand jury subpoena where the investigation involved a grand jury leak, not the investigation of a crime itself).

[6] According to data provided to the Committee by the Department of Justice, the Department has issued "source-related" subpoenas in 12 cases between January 2007 and September 2013. The Department defines "source-related" subpoenas to included subpoenas and court orders (issued pursuant to section 2703(d) of the Electronic Communications Privacy Act) that seek information that could reveal or disclose the identity of a confidential source. According to the Department, the Attorney General has authorized the issuance of subpoenas to members of the news media seeking information about the identify of a source of leaks of law enforcement information, where the news media did not maintain that the individual was a confidential source, on two occasions since 2007. The Attorney General has also authorized the use of a subpoena or 2703(d) court order to identify a person who used, or attempted to use, the news media to threaten the health or safety of a public official on three occasions since 2007, according to the data provide by Department of Justice.

[7] In 2001, the Bush Administration asserted that between 1991 and 2001, the Attorney General authorized 17 subpoenas to the media for confidential source information in criminal cases. See Letter from Daniel J. Bryant, Assistant Attorney General, Department of Justice, to the Hon. Charles E. Grassley, United States Senate, Nov. 28, 2001. This would suggest that only two more had been issued after 2001, although public records reveal that at least 12 reporters were subpoenaed for confidential information between 2001 and 2007.

partment because they were issued by Special Prosecutor Patrick Fitzgerald.[8]

Second, the number provided by the Department of Justice in 2007 does not take into account Federal subpoenas for confidential information in civil cases. Federal courts have recently started compelling journalists to disclose the identities of confidential sources to *civil litigants seeking monetary damages*—a break from a nearly 50-year precedent of not requiring journalists to disclose confidential sources in civil cases to which they are not parties. Recently, journalists have been subpoenaed in high-profile civil cases, such as in the Privacy Act lawsuit against the Government brought by Steven Hatfill as "a person of interest" in the 2001 anthrax investigations, in which at least a dozen subpoenas were issued to reporters, as well as in the Wen Ho Lee Privacy Act lawsuit that resulted in six reporters being subpoenaed.[9]

Indeed, according to one published empirical study, a survey of newsrooms revealed that in 2006 alone, 34 Federal subpoenas were issued for confidential information, with an estimated 21 of these specifically seeking information that would identify a confidential source. Statistical extrapolation of the data in this study suggests that the total number of Federal subpoenas in 2006 for confidential information was likely 67, and that 41 of those sought information that would identify a confidential source.

The Justice Department's statistics also fail to account for the recent increase in Federal subpoenas related to leak investigations. Indeed, the need for the Free Flow of Information Act has never been more pressing than now.

In May 2013, the Associated Press ("AP") learned that the Justice Department had secretly subpoenaed AP call records from April and May 2012, affecting more than 100 journalists and covering more than 20 phone lines, including work, home, and cell phones; bureaus in three different cities (New York City; Hartford, CT; and Washington, DC); and the AP line at the House of Representatives press gallery. Because the AP received no notice before the Justice Department obtained its records, it could not challenge the subpoena in court. As for why negotiations with the AP were not initially pursued, the Department stated generally, "Although the ongoing nature of the investigation prevents us from sharing additional details about this case, there are a number of reasons—depending on the circumstances of a given case—that may lead the Department to refrain from negotiating with a media organization before seeking a subpoena for telephone toll records. For example, through the negotiation process, the potential target (the leaker) could become aware of the investigation, its focus, and its scope, and seek to destroy evidence, create a false narrative as a defense, or otherwise obstruct the investigation."[10]

The investigation was related to the unauthorized disclosure of classified information in violation of the Espionage Act in connection with a May 7, 2012, story by the AP about how the CIA

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[8] *See, e.g.,* Susan Schmidt, "Reporters' Files Subpoenaed," THE WASHINGTON POST, A16, September 10, 2004, *available at* http://www.washingtonpost.com/wp-dyn/articles/A9890-2004Sep9.html.

[9] *See* Rachel Smolkin, "Under Fire," *American Journalism Review,* February/March 2005, *available at* http://www.ajr.org/article.asp?id=3810.

[10] Letter from Principal Deputy Attorney General Peter J. Kadzik to Hon. Bob Goodlatte, June 4, 2013.

thwarted a second attempted underwear bomb plot. According to AP President and CEO Gary Pruitt, "We held that story until the government assured us that the national security concerns had passed. Indeed, the White House was preparing to publicly announce that the bomb plot had been foiled."[11] However, the Justice Department maintains that the publication of the story did grave harm to national security and that the Department had only informed the AP that concerns over the physical safety of the source had been alleviated prior to the publication.

Also in May 2013, it was revealed that the Justice Department had seized the content of Fox News reporter James Rosen's Gmail account in 2010. In obtaining the warrant, the Justice Department had convinced a judge that there was probable cause to believe that Rosen was an "an aider and abettor and/or co-conspirator" to a violation of the Espionage Act. The Justice Department had also subpoenaed Rosen's phone records and State Department security badge access records. These efforts were in support of the prosecution of former State Department official Stephen Jin-Woo Kim, who was charged under the Espionage Act for allegedly sharing with Rosen that North Korea had planned to respond to new UN sanctions with another nuclear test.

James Risen, a book author and New York Times investigative reporter, was subpoenaed three times in the Espionage Act prosecution of former CIA official Jeffrey Sterling, who was accused of being the source for a chapter in Risen's book, "State of War: The Secret History of the CIA and the Bush Administration," about a failed CIA operation against Iran's nuclear program. First, a Federal grand jury issued a subpoena under the Bush Administration, but the grand jury's term expired and Risen was not forced to testify about his source. A second grand jury subpoenaed Risen under the Obama Administration, but the Federal judge presiding over the case granted Risen's motion to quash. Finally, the Federal prosecutor issued a trial subpoena. The judge again quashed the subpoena, but her ruling was overturned in July 2013 by the U.S. Court of Appeals for the Fourth Circuit. Risen's request for a rehearing en banc by the Court of Appeals was denied on October 15, 2013.[12]

At the very least, regardless of whether the Free Flow of Information Act would have affected the final outcome (the production of material from the covered journalist or a third party) in any of these scenarios, the Act would have provided for a predictable balancing test—a test that would be administered by an Article III judge.

In sum, Federal subpoenas for confidential source information come from a number of parties, including the Justice Department and special prosecutors appointed by the Justice Department, as well as civil litigants in Federal courts where Federal judges make determinations on motions to quash such subpoenas. A Federal shield law is needed in order to protect against a return to the late

[11] Statement from Gary Pruitt, President and CEO of The Associated Press, May 14, 2013, available at: http://blog.ap.org/2013/05/13/ap-responds-to-intrusive-doj-seizure-of-journalists-phone-records/.

[12] See *United States v. Sterling,* No. 11–5028, Order, October 15, 2013.

1960s, when subpoenas to reporters had become not only frequent but virtually de rigueur.[13]

C. HOW THE FREE FLOW OF INFORMATION ACT ADDRESSES CURRENT PROBLEMS

In order to provide predictable guidelines in Federal court and curb the use of subpoenas (or other compulsory process) to covered journalists, this bill provides for the following clear rules.

In criminal cases, the bill provides that the party seeking to compel disclosure must first exhaust all reasonable alternative sources of the protected information; that there must be reasonable grounds to believe that a crime has occurred; that there must be reasonable grounds to believe that the information is essential to the investigation, prosecution, or defense of a crime or criminal case (from sources other than the journalist); that the Attorney General must certify that he, or she, has complied with the applicable regulations governing compelled disclosure from journalists; and finally, that the burden is on the covered journalist to show by clear and convincing evidence that forced disclosure of the confidential information would be contrary to the public interest. This language ensures that the court gives full force to the criminal justice system's need for "every man's evidence"[14] while taking account of the press' need to function without undue governmental interference.

In civil cases, the bill provides that disclosure may not be compelled unless the party seeking disclosure first exhausts all reasonable alternative sources of the protected information; that the protected information is essential to the resolution of the case; and that the party seeking disclosure demonstrates that "the interest in compelling disclosure clearly outweighs the public interest in gathering and disseminating the information or news at issue and maintaining the free flow of information." This language ensures that the Act's protections against disclosure in civil litigation are significantly stronger than under the Act's analogous provisions governing criminal cases, and also stronger than the current protections that have been applied by Federal courts on an ad hoc basis.

In cases involving alleged leaks of properly classified information, the bill allows the Government to obtain confidential source material from a covered journalist when it can show by a preponderance of the evidence that the information would "materially assist . . . in preventing or mitigating an act of terrorism or other acts that are reasonably likely to cause significant and articulable harm to national security." Additionally, the potential for a subsequent unlawful disclosure of information by the source sought to be identified is not sufficient to establish likely significant and articulable harm to national security. In any other case that involves national security, the Government may obtain the information if it can show by a preponderance of the evidence that the information would "materially assist in preventing, mitigating, or identifying the perpetrator of an act of terrorism or other acts that

[13] *See, e.g.,* Lucy A. Daglish & Casey Murray, *Déjà Vu All Over Again: How A Generation of Gains in Federal Reporters' Privilege Is Being Reversed,* 29 Univ. Ark. Little Rock L. Rev. 13 (2006) (explaining the history of Federal subpoenas to reporters).

[14] 8 Wigmore, Evidence 2191, 2192, 2285 (McNaughton rev. 1961).

have caused or are reasonably likely to cause significant and articulable harm to national security." If the Government is not able to make these showings in a national security case, the court would be required to apply the balancing test applicable to ordinary criminal cases as set forth in Section 2.

In these cases, a Federal court shall give appropriate deference to a specific factual showing by the Federal government—something courts are accustomed to doing in analogous contexts, such as Freedom of Information Act cases.[15]

These balancing tests—coupled with the exceptions to the privilege that are also created by the bill—give generous berth for the Government to obtain the vital information that it needs in order to protect public safety, as well as for private litigants and criminal defendants to obtain information in appropriate circumstances.[16] At the same time, these provisions prevent journalists from becoming the witnesses of choice in civil and criminal cases.

D. THE CHILLING EFFECT OF THE CURRENT STATE OF THE LAW ON THE FREE PRESS

Current uncertainty—exacerbated by well-publicized cases of reporters being held in contempt of court or turning over information that was subject to a promise of confidentiality—has risked creating a broad chilling effect. As William Safire, conservative columnist for the *New York Times* has explained, "the essence of newsgathering is this: if you don't have sources you trust and who trust you, then you don't have a solid story—and the public suffers for it." Former *Time* magazine Editor Norman Pearlstine, in testimony before the Senate Judiciary Committee, stated that after *Time Magazine* complied with a court order and turned over notes of journalist Matt Cooper, *Time* lost valuable sources "who insisted that they no longer trusted the magazine and that they would no longer cooperate on stories."

More recently, and in light of the increase in Federal subpoenas described above, editors and reporters have noticed a renewed chilling effect that compelled disclosure of confidential sources has had on newsgathering. According to AP Chief Executive and President Gary Pruitt, "some of our long-trusted sources have become nervous and anxious about talking to us—even on stories that aren't about national security." Pruitt went on to say that "[i]n some cases, government employees that we once checked in with

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[15] *See, e.g., Center for Int'l Env. Law v. Office of U.S. Trade Representative,* 718 F.3d 899 (D.C. Cir. 2013). As evidenced by this and other cases, courts can and do routinely make decisions about the Government's national security interest (as in state secrets cases) and classification decisions (as in Freedom of Information Act cases).

[16] Contrary to the assertions made in the "Additional Views," the Free Flow of Information Act will not interfere with legitimate law enforcement or national security investigations. First, the vast majority of the hypothetical and factual scenarios posited in the "Additional Views" did not, and would not, involve protected information obtained from covered journalists. Second, the remaining scenarios discussed in the Additional Views would likely have been capably handled in Section 5 of the Act. Finally, the authors of the Additional Views make internally contradictory arguments against the Act. It cannot be that the need for the bill is minimal because "subpoenas to journalists are rare," and at the same time, argue that the enactment of the bill "would seriously impede important criminal investigations and prosecutions." In fact, as evidenced by the fact that every state except Hawaii and Wyoming has a reporters' privilege in place, criminal enforcement has not historically been hampered by the presence of such a protection. The authors of the Additional Views do not discuss the myriad other tools at the disposal of law enforcement other than subpoenas to journalists who rely on confidential information.

regularly will no longer speak to us by phone and some are reluctant to meet in person."[17]

Historically, the use of subpoenas by the Federal Government has ebbed and flowed such that the use of subpoenas, even when legitimate, has the taint of politicization. As one scholar observed:

> Prior to the late 1960s and early 1970s, there were few cases in which either the government or private parties subpoenaed reporters. In the late 1960s and early 1970s, the government subpoenaed journalists with increased regularity, attributed to the rise of "left wing" groups that were perceived by the government as a threat to American society. Since *Branzburg* [v. *Hayes*], the volume of subpoenas directed at reporters has not subsided; rather, it has markedly increased.[18]

The Free Flow of Information Act would create more certainty for journalists, law enforcement, and confidential sources so that the free flow of information between journalists and their sources—and ultimately the public—is protected from unnecessary interference, and legitimate uses of compelled disclosure are preserved.

As stated in a letter submitted by a broad coalition of media groups to the Committee in support of S. 987: "The press is the public's watchdog charged with uncovering government and corporate abuses. Government surveillance of journalists creates a chilling effect in newsrooms and among potential sources, depriving the American people of important news and public accountability. The only way to limit this government overreach is through passage of a law that lays out clear rules for when the government can obtain information about journalists and their sources."[19]

E. STATUS OF THE CURRENT FEDERAL LAW

The current confusion regarding the scope of a Federal journalists' privilege arose 41 years ago when the Supreme Court decided *Branzburg v. Hayes,* 408 U.S. 665 (1972). In *Branzburg,* the Court held that the press' First Amendment right to publish information does not include a right to keep information secret from a grand

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[17] Lindy Royce-Bartlett, CNN, "Leak probe has chilled sources, AP exec says" (June 19, 2013), http://www.cnn.com/2013/06/19/politics/ap-leak-probe/index.html.

[18] Joel G. Weinberg, "Supporting the First Amendment: A National Reporter's Shield Law," 31 Seton Hall L.J. 149, 162 (2006).

[19] Letter in Support of S.987 (July 26, 2013), signed by A&E Television Networks, LLC; A.H. Belo Corporation; ABC Inc.; Advance Publications, Inc.; Allbritton Communications Co.; American Society of News Editors; Associated Press Media Editors; Association of Alternative Newsmedia; Association of American Publishers, Inc.; Below Corp.; California Newspaper Publishers Association; CBS Corporation; Center for Public Integrity; CNN; Cox Enterprises, Inc.; Cox Media Group; Daily News, LP; Dow Jones & Company, Inc.; E.W. Scripps; First Amendment; First Amendment Coalition of Arizona; First Amendment Project; Forbes Inc.; Fox News Network LLC; Fox Television Stations, Inc.; Fusion; Gannett Co., Inc.; LIN Media; McGraw Hill Financial, Inc.; McGraw-Hill Education; Media Law Resource Center; MP—The Association of Magazine Media; National Association of Broadcasters; National Cable & Television Association; National Geographic Society; National Newspapers Association; National Press Club; National Press Photographers Association; National Writers Union; NBCUniversal; News Corporation; Newspaper Association of America; North Jersey Media Group Incl.; NPR; Online News Association; Pennsylvania NewsMedia Association; POLITICO LLC; Radio Television Digital News Association; Raycom Media, Inc.; Regional Reporters Association; Reporters Committee for Freedom of the Press; Reuters; Society of Professional Journalists; Software and Information Industry Association; Stephens Media; Student Press Law Center; Texas Association of Broadcasters; Texas Press Association; The Associated Press; The Authors Guild; The McClatchy Company; The New York Times Company; The Newspaper Guild-CWA; The Newsweek/Daily Best Company LLC; The Washington Post; Time Inc.; Tribune Company; U.S. News & World Report; USA Today.

jury that is investigating a criminal matter. The Supreme Court also held that the common law did not exempt a reporter from every other citizen's duty to provide information to a grand jury.

The Court reasoned that just as newspapers and journalists are subject to the same laws and restrictions as other citizens, they are likewise subject to the same duty to provide information to a court as other citizens. However, Justice Powell, who joined the 5–4 majority, wrote a separate concurrence in which he explained that the Court's holding was not an invitation for the Government to harass journalists. If a journalist could show that the grand jury investigation was being conducted in bad faith, she could ask the court to quash the subpoena. In the most influential part of his concurrence, Justice Powell indicated that courts might assess such claims on a case-by-case basis by balancing the freedom of the press against the obligation to give testimony relevant to criminal conduct.

In the 41 years since *Branzburg*, the Federal courts have split on the question of when the balancing test set forth in Justice Powell's concurrence creates a qualified privilege for journalists in the Federal system.

With respect to Federal criminal cases, six circuits—the First, Fourth, Fifth, Sixth, Seventh and District of Columbia Circuits (the latter in the context of a grand jury subpoena)—have applied *Branzburg* so as not to allow journalists to invoke the First Amendment to withhold information absent governmental bad faith.[20] Four other circuits—the Second, Third, Ninth, and Eleventh Circuits—recognize a qualified privilege, which requires courts to balance the freedom of the press against the obligation to provide testimony on a case-by-case basis.[21]

With respect to Federal civil cases, 9 of the 12 circuits apply a balancing test when deciding whether journalists must disclose confidential sources.[22] One circuit affords journalists no privilege in

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[20] *In re Special Proceedings*, 373 F.3d 37, 45 (1st Cir. 2004) (finding no privilege for documents prepared without the intent of public dissemination); *McKevitt v. Pallasch*, 339 F.3d 530, 532–33 (7th Cir. 2003) (finding no Federal common law reporter's privilege); *United States v. Smith*, 135 F.3d 963, 968–69 (5th Cir. 1998) (holding that reporters do not enjoy a qualified reporter's privilege protecting non-confidential work product); *In re Shain*, 978 F.2d 850, 852–53 (4th Cir. 1992) (holding that absent evidence of governmental harassment or bad faith, reporters have no testimonial privilege different from any other citizen); *In re Grand Jury Proceedings*, 810 F.2d 580, 584–86 (6th Cir. 1987) (finding no reporter's privilege excusing their testimony before a grand jury); *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141 (D.C. Cir. 2006).

[21] *In re Grand Jury Proceedings*, 5 F.3d 397, 402–03 (9th Cir. 1993) (finding a qualified reporter's privilege protecting grand jury testimony where the investigation is instituted or conducted in bad faith); United *States v. Caparole*, 806 F.2d 1487, 1504 (11th Cir. 1986) (compelling production from reporters only upon proof that the information at issue is highly relevant, necessary for proper presentation of the case, and unavailable from other sources); *United States v. Burke*, 700 F.2d 70, 77 (2d Cir. 1983) (holding that defendants had not satisfied their burden of showing subpoenaed documents were highly material, relevant, necessary to the claim, and unavailable from other sources to overcome the reporter's privilege); *United States v. Cuthbertson*, 630 F.2d 139, 146 (3d Cir. 1980) (extending a qualified reporter's privilege to resource materials and unpublished materials).

[22] *Price v. Time, Inc.*, 416 F.3d 1327 (11th Cir. 2005) (applying a three-part balancing test to determine if information can be compelled from a reporter evaluating relevance, necessity to the case, and availability); *Lee v. Dep't of Justice*, 413 F.3d 53, 60–61 (D.C. Cir. 2005) (finding a Federal reporter's privilege but compelling production because the information sought went "to the heart" of the case and all other sources of the information had been "exhausted"); *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 714 (1st Cir. 1998) (employing a balancing test weighing the effects of disclosure on First Amendment interests and the free flow of information against the interest of the party seeking disclosure of the reporter's information); *LaRouche v. Nat'l Broadcasting Co., Inc.,* 780 F.2d 1134, 1139 (4th Cir. 1986) (adopting a balancing test for determining whether a reporter's privilege will protect a confidential source-reporter relationship); *United States v. Burke*, 700 F.2d 70, 77 (2d Cir. 1983) (drawing no distinction between civil and criminal cases when applying a balancing test to determine reporter's privilege); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 726 (5th Cir. 1980) (applying a three-part test to determine

any context.[23] Two other circuits have yet to decide whether journalists have any privilege in civil cases.

F. DEPARTMENT OF JUSTICE GUIDELINES AND THE FREE FLOW OF INFORMATION ACT

For 43 years, the Department of Justice has had in place its own guidelines for determining when the production of information may be compelled from a journalist.[24] These Guidelines require, *inter alia*, approval of the Attorney General before such material can be compelled; the exhaustion of alternative sources of information; and notice to the journalist when the journalist's records are demanded from a third party. While the Guidelines do not have the force of law, they have informed the Free Flow of Information Act. Contrary to the assertions of the authors of the Additional Views, insofar as these Guidelines have been less than successful, such shortcomings stem not from their being "amorphous," but from the lack of checks-and-balances on their application.

Most notably, the Free Flow of Information Act incorporates the recent changes that were made to the Guidelines in the wake of the outcry over the investigations that involved the Associated Press and Fox News reporter James Rosen.[25] These Guidelines revisions provide, *inter alia*, for a limit on the number of times that the Department can ask a court to delay, by 45-day increments, its obligation to notify a member of the press that the Department of Justice has sought that person's records. The new Guidelines will ensure that only one extension can be granted, thus requiring the Department to notify covered journalists within 90 days. Additionally, the Department's policies regarding the use of legal process to obtain information from, or records of, members of the news media will be revised to make clear that those principles apply to communication records of members of the news media that are stored or maintained by third parties. These changes are reflected in the Free Flow of Information Act as reported by the Committee.

More generally, this Act will not dramatically affect the process that Department of Justice prosecutors must undergo to subpoena a journalist. Currently, prosecutors must seek Attorney General approval for such subpoenas pursuant to the Guidelines, and the Department uses a similar balancing test as that provided in the bill, weighing the importance of the press with the prosecution's need for information, to determine whether to issue a subpoena. This Act removes that decision from an internal Department matter to the Federal courts, ensuring more objectivity and independ-

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the scope of the privilege not to reveal the identity of a confidential source in civil suits addressing relevance, availability, and compelling interest in the information); *Riley v. City of Chester*, 612 F.2d 708, 716 (3d Cir. 1979) (applying a three-part balancing test to determine whether a person seeking disclosure from a journalist has overcome the privilege by showing that the information is material, relevant and necessary to the party's claims or defenses); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 438 (10th Cir. 1977) (applying a balancing test evaluating relevancy, accessibility, and the consequences of granting disclosure against the qualified First Amendment privilege); *Farr v. Pitchess*, 522 F.2d 464, 469 (9th Cir. 1975) (applying a balancing test to determine reporter's privilege weighing First Amendment interests against the interests in disclosure).

[23] *McKevitt v. Pallasch*, 339 F.3d 530, 532–533 (7th Cir. 2003) (finding no Federal reporter's privilege).

[24] The Department of Justice first adopted a policy governing subpoenas to the news media on August 10, 1970. The policy was incorporated into the Code of Federal Regulations (50 C.F.R. 50.10) on Oct. 16, 1973, and updated on Nov. 19, 1980.

[25] Department of Justice Report on Review of News Media Policies (July 12, 2013), *available at* http://www.justice.gov/iso/opa/resources/2202013712162851796893.pdf.

ence in the decision-making process. This Act also removes such decision-making from taking place behind closed doors to the open court room, allowing for more public scrutiny and accountability. There may be times, however, when such decisions have to be made by a Federal court in camera or under seal to protect national security. This Act does not alter the Department's ability to request such protections or a Federal court's ability to make such a decision.

Indeed, Attorney General Eric H. Holder, Jr., wrote a letter in support of the Act that renewed his support of the bill as "strik[ing] a careful balance between safeguarding the freedom of the press and ensuring our nation's security and the safety of the American people."[26] The Attorney General expressed particular support for the expedited judicial review provisions, which ensure that the Department's determinations are afforded speedy external review. These provisions cannot be enacted through guidelines, but rather "require legislative action," and therefore, merit the Department's support for the Act.[27]

III. History of the Bill and Committee Consideration

A. The 109th Congress

Congress has grappled with the question of whether to establish a qualified privilege for journalists through Federal legislation for several years. During the 109th Congress, there were a number of efforts to craft a journalists' privilege bill. On February 9, 2005, Senator Lugar introduced S. 340, the Free Flow of Information Act. On July 18, 2005, Senators Lugar, Dodd, Jeffords, Lautenberg and Nelson (FL) introduced a revised version of the Free Flow of Information Act (S. 1419). Senator Dodd introduced another journalists' privilege bill, S. 369, but later chose to cosponsor S. 1419. The Free Flow of Information Act went through another set of revisions and on May 18, 2006, was introduced as S. 2831 by Senators Lugar, Specter, Dodd, Schumer and Graham.

Although three hearings were held on the Free Flow of Information Act, the Judiciary Committee did not report the bill during the 109th Congress. On July 20, 2005, the Committee held a hearing on "*Reporters' Privilege Legislation: Issues and Implications.*" The following witnesses appeared at the hearing: The Hon. Richard G. Lugar, United States Senator (R–IN); The Hon. Christopher J. Dodd, United States Senator (D–CT); The Hon. Mike Pence, United States Representative (R–IN); Matthew Cooper, White House Correspondent, *Time Magazine Inc.*; Norman Pearlstine, Editor-in-Chief, Time Inc.; William Safire, Political Columnist, New York Times Company; Floyd Abrams, Partner, Cahill, Gordon & Reindel; Lee Levine, Founding Partner, Levine, Sullivan, Koch & Schulz; and Geoffrey R. Stone, Professor of Law, University of Chicago Law School.

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[26] Letter from Attorney General Eric H. Holder, Jr., July 29, 2013; *see also* Letter from Attorney General Eric H. Holder and Director of National Intelligence Dennis C. Blair, November 5, 2009. (See Appendix).

[27] The authors of the "Additional Views" rely exclusively for their support on letters written by members of law enforcement and the intelligence community before the bill was dramatically changed in 2009, and garnered the *support* of law enforcement and the intelligence community. In fact, even before 2008, the Act had earned the support of law enforcement. *See* Letter from 41 State Attorneys General, June 23, 2008 (see Appendix).

On October 1, 2005, the Committee held a hearing entitled, "*Reporters' Privilege Legislation: An Additional Investigation of Issues*." The following witnesses appeared at the hearing: The Hon. Chuck Rosenberg, United States Attorney for the Southern District of Texas; Joseph E. diGenova, Founding Partner, diGenova and Toensing; Steven D. Clymer, Professor of Law, Cornell Law School; Judith Miller, Investigative Reporter and Senior Writer, *The New York Times;* David Westin, President, ABC News; Anne K. Gordon, Managing Editor, *The Philadelphia Inquirer;* and Dale Davenport, Editorial Page Editor, *The Patriot News.*

On September 20, 2006, the Committee held a hearing entitled, "*Reporters' Privilege Legislation: Preserving Effective Federal Law Enforcement*." The following witnesses appeared at the hearing: Bruce A. Baird, Partner, Covington & Burling; Steven D. Clymer, Professor, Cornell Law School; Paul J. McNulty, Deputy Attorney General, United States Department of Justice; Theodore B. Olson, Partner, Gibson, Dunn & Crutcher; and Victor E. Schwartz, Partner, Shook, Hardy & Bacon.

B. THE 110TH CONGRESS

On May 2, 2007, Senator Lugar introduced the Free Flow of Information Act of 2007, S. 1267. The bill had four original cosponsors: Senators Dodd, Graham, Domenici and Landrieu. It was later joined by Senator McCaskill (5/3/2007), Senator Lieberman (5/14/2007), Senator Johnson (6/11/2007), Senator Salazar (6/22/2007), Senator Bayh (9/17/2007), Senator Leahy (9/20/2007) and Senator Specter (9/26/2007). The bill was placed on the agenda for the Judiciary Committee executive business meeting on September 20, 2007. No further action on S. 1267 was taken.

On September 10, 2007, S. 2035, Senator Specter introduced the Free Flow of Information Act of 2007, S. 2035. The bill had two original cosponsors: Senators Schumer and Lugar. It was later joined by Senator Graham (9/25/2007), Senator Dodd (9/26/2007) and Senator Leahy (10/17/2007).

On September 27, 2007, Chairman Leahy placed the bill on the agenda for the Judiciary Committee's executive business meeting. The Committee subsequently favorably reported the bill as amended by a roll call vote of 15–2, with 2 passes. The vote record is as follows:

Tally: 15 Yeas, 2 Nays, 2 Pass

Yeas (15): Leahy (D–VT), Specter (R–PA), Kennedy (D–MA), Hatch (R–UT), Biden (D–DE), Grassley (R–IA), Kohl (D–WI), Feinstein (D–CA), Feingold (D–WI), Graham (R–SC), Schumer (D–NY), Cornyn (R–TX), Durbin (D–IL), Cardin (D–MD), Whitehouse (D–RI)

Nays (2): Kyl (R–AZ) Sessions (R–AL)

Pass (2): Brownback (R–KS), Coburn (R–OK)

C. THE 111TH CONGRESS

On February 13, 2009, Senators Specter, Schumer, Lugar and Graham again introduced the Free Flow of Information Act, S. 448. Other Senators joined as co-sponsors: Senator Kirsten E. Gillibrand (D–NY) (3/23/2009); Senator Claire McCaskill (3/23/2009); Senator Amy Klobuchar (3/30/2009); Senator Patty Murray (D–WA) (3/30/2009) ; Senator Kay Hagan (D–NC) (5/18/2009); Senator Edward E.

Kaufman (11/5/2009); Senator Tom Udall (D–NM) (11/18/2009); Senator Patrick J. Leahy (D–VT) (12/14/2009); Senator Mary Landrieu (D–LA) (2/4/2010); Senator Johnny Isakson (R–GA) (3/4/2010); and Senator Bernard Sanders (I–VT) (3/9/2010).

The bill was first placed on the Judiciary Committee's Executive Calendar on April 23, 2009. After negotiations between the bill's sponsors and the federal law enforcement, intelligence, and defense communities, the bill was modified to further protect the Executive Branch's ability to obtain needed information in certain delineated situations. The changes garnered the support of the Administration. This amended version that resulted was introduced by Senators Schumer and Specter in Committee and adopted by unanimous consent on November 19, 2009 (HEN09B24). The November 19 version superseded two Schumer-Specter amendments that were introduced and adopted at earlier markups.

The Committee subsequently favorably reported the bill as amended on December 10, 2009, by a roll call vote of 14–5. The vote record is as follows:

Tally: 14 Yeas, 5 Nays

Yeas (14): Leahy (D–VT), Kohl (D–WI), Hatch (R–UT), Feinstein (D–CA), Grassley (R–IA), Feingold (D–WI), Schumer (D–NY), Graham (R–SC), Cardin (D–MD), Whitehouse (D–RI), Klobuchar (D–MN), Kaufman (D–DE), Specter (D–PA), Franken (D–MN)

Nays (5): Sessions (R–AL), Durbin (D–IL), Kyl (R–AZ), Cornyn (R–TX), Coburn (R–OK)

D. THE 113TH CONGRESS

On May 16, 2013, Senators Schumer and Graham again introduced the Free Flow of Information Act, S. 987. Other Senators joined as co-sponsors of the bill: Senator Max Baucus (D–MT) (5/21/2013); Senator Michael F. Bennet (D–CO) (5/21/2013); Senator Barbara Boxer (5/21/2013); Senator Maria Cantwell (D–WA) (5/21/2013); Senator Tom Harkin (D–IA) (5/21/2013); Senator Amy Klobuchar (D–MN) (5/21/2013); Senator Patty Murray (D–WA) (5/21/2013); Senator Jon Tester (D–MT) (5/21/2013); Senator Tom Udall (D–NM) (5/21/2013); Senator Johnny Isakson (R–GA) (5/22/2013); Senator Tammy Baldwin (D–WI) (6/3/2013); Senator Richard Blumenthal (D–CT) (6/3/2013); Senator Blunt (R–MO) (6/3/2013); Senator Kirsten E. Gillibrand (D–NY) (6/10/2013); Senator Claire McCaskill (D–MO) (7/17/2013); Senator Christopher A. Coons (D–DE); Senator Mazie K. Hirono (D–HI) (7/25/2013); and Senator Patrick Leahy (D–VT) (9/12/2013).

On July 25, 2013, Chairman Leahy placed the bill on the Judiciary Committee's business agenda. On August 1, 2013, Senator Schumer offered a substitute amendment to the bill (ALB13660) that the Committee adopted by unanimous consent.

On September 12, 2013, the Committee resumed consideration of the bill and Senator Feinstein offered an amendment (ALB13737) that would provide a new definition for "covered journalist" to replace the definition of "covered person" in the bill. The Committee adopted the amendment by a roll call vote. The vote record is as follows:

Tally: 13 Yeas, 5 Nays

Yeas (13): Leahy (D–VT), Feinstein (D–CA), Schumer (D–NY), Durbin (D–IL), Whitehouse (D–RI), Klobuchar (D–MN), Franken

(D–MN), Coons (D–DE), Blumenthal (D–CT), Hirono (D–HI), Grassley (R–IA), Hatch (R–UT), Graham (R–SC)

Nays (5): Sessions (R–AL), Cornyn (R–TX), Lee (R–UT), Cruz (R–TX), Flake (R–AZ)

Senator Sessions offered an amendment (OLL13447) that would establish an exception for leaks of classified information. The Committee rejected the amendment by a roll call vote. The vote record is as follows:

Tally: 6 Yeas, 11 Nays, 1 Present

Yeas (6): Hatch (R–UT), Sessions (R–AL), Cornyn (R–TX), Lee (R–UT), Cruz (R–TX), Flake (R–AZ)

Nays (11): Leahy (D–VT), Schumer (D–NY), Durbin (D–IL), Whitehouse (D–RI), Klobuchar (D–MN), Franken (D–MN), Coons (D–DE), Blumenthal (D–CT) Hirono (D–HI), Grassley (R–IA), Graham (R–SC)

Present (1): Feinstein (D–CA)

Senator Cornyn offered an amendment (ALB13708) that would ensure that all persons or entities that are protected under the Free Press Clause of the First Amendment are covered by the bill's privilege. The Committee rejected the amendment by a roll call vote. The vote record is as follows:

Tally: 4 Yeas, 13 Nays, 1 Pass

Yeas (4): Cornyn (R–TX), Lee (R–UT), Cruz (R–TX), Flake (R–AZ)

Nays (13): Leahy (D–VT), Feinstein (D–CA), Schumer (D–NY), Durbin (D–IL), Whitehouse (D–RI), Klobuchar (D–MN), Franken (D–MN), Coons (D–DE), Blumenthal (D–CT), Hirono (D–HI), Grassley (R–IA), Hatch (R–UT), Graham (R–SC)

Pass (1): Feinstein (D–CA)

Senator Cornyn offered an amendment (ALB13698) that would exempt a Federal employee's disclosure of any nonpublic personal information of a private citizen from the bill's privilege. The Committee rejected the amendment by a roll call vote. The vote record is as follows:

Tally: 7 Yeas, 11 Nays

Yeas (7): Grassley (R–IA), Hatch (R–UT), Sessions (R–AL), Cornyn (R–TX), Lee (R–UT), Cruz (R–TX), Flake (R–AZ)

Nays (11): Leahy (D–VT), Feinstein (D–CA), Schumer (D–NY), Durbin (D–IL), Whitehouse (D–RI), Klobuchar (D–MN), Franken (D–MN), Coons (D–DE), Blumenthal (D–CT), Hirono (D–HI), Graham (R–SC)

Senator Sessions offered an amendment (ALB13683) to ensure the secrecy of grand jury proceedings. The amendment was rejected by a roll call vote. The vote record is as follows:

Tally: 7 Yeas, 11 Nays

Yeas (7): Grassley (R–IA), Hatch (R–UT), Sessions (R–AL), Cornyn (R–TX), Lee (R–UT), Cruz (R–TX) and Flake (R–AZ)

Nays (11): Leahy (D–VT), Feinstein (D–CA), Schumer (D–NY), Durbin (D–IL), Whitehouse (D–RI), Klobuchar (D–MN), Franken (D–MN), Coons (D–DE), Blumenthal (D–CT), Hirono (D–HI), Graham (R–SC)

Senator Cornyn offered an amendment (ALB13701) that would exclude violations of Federal law related to material support of terrorism from the bill's privilege. The Committee rejected the amendment by a roll call vote. The vote record is as follows:

Tally: 7 Yeas, 11 Nays

Yeas (7): Grassley (R–IA), Hatch (R–UT), Sessions (R–AL), Cornyn (R–TX), Lee (R–UT), Cruz (R–TX) and Flake (R–AZ)

Nays (11): Leahy (D–VT), Feinstein (D–CA), Schumer (D–NY), Durbin (D–IL), Whitehouse (D–RI), Klobuchar (D–MN), Franken (D–MN), Coons (D–DE), Blumenthal (D–CT), Hirono (D–HI), Graham (R–SC)

The Committee then voted to report the Free Flow of Information Act of 2013, as amended, favorably to the Senate. The Committee proceeded by roll call vote as follows:

Tally: 13 Yeas, 5 Nays

Yeas (13): Leahy (D–VT), Feinstein (D–CA), Schumer (D–NY), Durbin (D–IL), Whitehouse (D–RI), Klobuchar (D–MN), Franken (D–MN), Coons (D–DE), Blumenthal (D–CT), Hirono (D–HI), Grassley (R–IA), Hatch (R–UT), Graham (R–SC)

Nays (5): Sessions (R–AL), Cornyn (R–TX), Lee (R–UT), Cruz (R–TX) and Flake (R–AZ)

IV. Section-by-Section Summary of the Bill

Section 1. Short title

This bill may be cited as the "Free Flow of Information Act."

Section 2. Compelled Disclosure from Covered Journalists

Generally, this section provides covered journalists (see Section 11(1)) with a qualified privilege when a Federal litigant seeks to compel them to provide confidential source information (see Section 11(7)). The qualified privilege applies differently in criminal and civil cases.

In *both* civil and criminal cases, the court must determine that the party seeking disclosure "has exhausted all reasonable alternative sources (other than a covered journalist) of the protected information." (Section 2(a)(1)). The exhaustion requirement does not apply to information subpoenaed under the exceptions for criminal conduct (Section 3); death, kidnapping, bodily harm, certain offenses against children and harm to critical infrastructure (Section 4); nor to terrorist activity or harm to national security (Section 5).

In criminal matters, Section 2(a)(2)(A) provides that the disclosure of confidential source information can only be compelled if: the Federal entity that is seeking to compel disclosure has reasonable grounds to believe that a crime has occurred, based on information obtained other than from the covered journalist; there are reasonable grounds to believe that the testimony or document sought is essential to the prosecution or the defense,[28] also based on information obtained other than from the covered journalist; the Attorney General certifies that the decision to request compelled disclosure was made in conjunction with the U.S. Department of Justice's Policy With Regard to the Issuance of Subpoenas to Members of the News Media, 28 C.F.R. § 50.10 ("the "DOJ Guidelines");[29] and the covered journalist has not established by clear and convincing evi-

[28] The defendant's right to present a defense and cross-examine evidence that is presented against him or her is enshrined in the Constitution, and in a case in which a defendant seeks to compel production of protected information, nothing in this Act would prevent a court from enforcing the full extent of a defendant's Constitutional rights.

[29] To be amended pursuant to the Justice Department Report on Review of News Media Policies (July 12, 2013).

dence that disclosure of the information would be contrary to the public interest in gathering and disseminating the news at issue and maintaining the free flow of information.

In matters other than criminal matters, Section 2(a)(2)(B) states that the disclosure of confidential source material can only be compelled if: the party seeking to compel disclosure has exhausted all reasonable alternative sources; there are reasonable grounds to believe that the testimony or document sought is essential to the resolution of the matter; and the party seeking to compel disclosure has established that the interest in disclosing the information clearly outweighs the public interest in gathering and disseminating the news, and maintaining the free flow of information.

When a litigant seeks information, he or she should not be able to peruse a journalist's files or demand answers to questions that are outside of the bounds of the information needed for the case at hand. Therefore, the Act places limitations on the content of the information, and, to the extent possible, requires that the information sought be narrowly tailored in purpose, subject matter and period of time in order to avoid compelling peripheral, nonessential, or speculative information (Section 2(b)). There will be times, of course, where such limitation is neither prudent nor practicable, especially in cases involving national security and impending harms. A Federal judge has the ability to make such a determination.

Finally, Section 2(c) provides that, when the Government seeks to obtain the protected information from a third party, rather than submitting the request to the journalist directly, the legal process standards set forth in 18 U.S.C. § 2703 of the Electronic Communications Privacy Act continue to apply. Specifically, 2(c)(1) states that the Act does not preempt the warrant requirement for Government access to certain communications records, including the communications content of a "covered journalist," as set forth in § 2703. Section 2(c)(2) similarly clarifies that the Act does not preempt the requirements and procedures set forth in Federal Rule of Criminal Procedure 41.

Section 3. Exception relating to criminal or tortious conduct

The qualified privilege afforded to covered persons in Section 2 categorically does not apply to any information obtained as a result of the eyewitness observations, or the commission, of alleged criminal or tortious conduct (Section 3(a)). In these cases, the covered journalist will have to provide the information. This exception shall not apply if the alleged criminal or tortious conduct is the act of communicating the information at issue (Section 3(b)). In that case, the standard privilege analysis in Section 2 will apply, subject to Sections 4 and 5 if the confidential information sought from the covered journalist would prevent death, kidnapping, serious bodily injury, an act of terrorism, or harm to national security as specified in those sections.[30]

[30] *Nota bene* that the Privacy Protection Act generally prohibits the Government in a criminal investigation or prosecution from seizing materials from a member of the media (42 U.S.C. 2000aa). However, the Government may do so if there is probable cause to believe that the member of the media has committed a crime by receiving, possessing, or communicating national defense or classified information in violation of the Espionage Act. In contrast, the Free Flow of Information Act permits a covered journalist to challenge a subpoena or other compul-

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Section 4. Exception to prevent death, kidnapping, or substantial bodily harm

The qualified privilege in Section 2 shall not apply to any protected information that is reasonably necessary to stop, prevent, or mitigate a specific case of death, kidnapping, substantial bodily harm, conduct that constitutes a criminal offense that is a specified offense against a minor (as defined by Section 111 of the Adam Walsh Act), or incapacitation or destruction of critical infrastructure. The purpose of this section is to establish that the privilege does not apply to any information a journalist may obtain with regard to serious future and imminent harm. Thus, because prevention of serious and imminent harm is so fundamental to the public interest, a judge need not engage in the usual balancing in such circumstances. In these cases, the qualified privilege is inapplicable.

Section 5. Exception to prevent terrorist activity or harm to national security

Generally, this section provides the framework for Federal courts to use in cases involving leaks of properly classified information, as well as cases involving national security and acts of terrorism.

In a criminal investigation or prosecution of the allegedly unlawful disclosure of properly classified information, Section 2's privilege does not apply if the court finds by a preponderance of the evidence that the protected information would materially assist the Federal Government in preventing or mitigating an act of terrorism or other acts that are reasonably likely to cause significant and articulable harm to national security. (Section 5(a)(2)(A)). The potential for the subsequent unlawful disclosure of information by the source sought to be identified shall not, by itself, be sufficient to demonstrate such harm. (Section 5(d)).

In any other criminal investigation or prosecution, Section 2's privilege does not apply if the court finds by a preponderance of the evidence that the protected information would materially assist the Federal Government in preventing, mitigating, or identifying the perpetrator of an act of terrorist or other acts that have caused or are reasonably likely to cause significant and articulable harm to national security. (Section 5(a)(2)(B)).

This section also provides that a court must give appropriate deference to the Administration's determination of what constitutes harm to national security, based on a "specific factual showing . . . by the head of any executive branch agency or department." (Section 5(b)). As it stands, courts generally accord deference to the Administration's national security determinations, and this bill is intended to preserve that deference when a reviewable specific factual showing is made.

This section also provides that in order to make the showing described above, the Government may not rely exclusively on the risk that further information may be revealed in the future. (Section 5(d)). Rather, additional facts and/or information must be submitted as well. This is to prevent a court from basing an order to

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sory process seeking information that could implicate the confidential sources even if the journalist may have engaged in criminal conduct by "communicating the documents or information at issue." Thus, the Act is intended to preempt the Privacy Protection Act under these circumstances.

compel testimony based only on a speculative assertion about future disclosures or leaks.[31] If the Government is not able to make these showings in a national security case, the court would be required to apply the standards and balancing tests applicable to ordinary criminal cases as set forth in Section 2.

There is no question that the protection of national security is of utmost importance to the United States. Therefore, proper safeguards must be in place to allow the Government to protect and defend the nation. There is also no question that leaks of properly classified information, when they are likely to cause harm to the nation, must be investigated and prosecuted to the full extent of the law. This is why there is a different analytical framework—with heightened burdens for journalists—in Section 5, which covers national security and classified leak-related cases, than in Section 2, which covers run-of-the-mill criminal and civil cases. In order to protect the public's ability to understand the critical policy choices of the Federal Government and avoid a chilling effect on legitimate newsgathering, Section 5 does require the Government to make a credible showing that harm to national security or an act of terrorism is actually at stake. When that showing is made, the information may be obtained; a prosecutor should not, however, be able to hide behind an overbroad and unreasonable claim of harm. The Act allows the Government to obtain needed and important information in every case in which an appropriate and specific showing is made.

Section 6. Compelled disclosure from service providers

In general, the privilege applies to requests for information about a person who is known to be, or reasonably likely to be, a covered person under this Act. The intent of this section is to prevent a litigant from undercutting the Free Flow of Information Act when a covered journalist's records are held by a third party. Therefore, the privilege applies to any requests to any commercial entity that maintains records related to a covered person and any person who transmits information of the customer's choosing by electronic means. A party or a court generally may not compel disclosure of this information unless the covered person has received notice of the request and an opportunity to be heard before a Federal judge.

Section 6(a)(2) provides, however, that in the case of national security letters that are issued under 18 U.S.C. § 2709, the requirements in Section 2 that there are reasonable grounds to believe that a crime has occurred and that the Attorney General has certified compliance with his or her own guidelines do not apply.

Section 6(c) provides that a judge may delay notice and an opportunity to be heard for up to 45 days if the judge determines by clear and convincing evidence that such notice would pose a clear and substantial threat to the integrity of a criminal investigation, would risk grave harm to national security, or would present an imminent risk of death or serious bodily harm. A judge may extend this period by one additional 45-day period based on a new and independent determination of such risk. Section 6(c)(3) defines

[31] Additionally, neither this section of the Act, nor any other section, removes or limits a court's power to hold proceedings in camera, under seal, ex parte or use other methods provided for under the Classified Information Protection Act (CIPA) in order to protect vital national security information during these hearings.

"substantial threat to the integrity of a criminal investigation" as occurring when "the target of the investigation may learn of the investigation and destroy evidence if notice is provided." It is assumed and expected that, logically, this subsection shall apply only to non-public investigations because in public investigations the target would have likely already heard of the investigation and attempted to destroy evidence. Section 6(c)(4) provides that a judge should consider whether notice to the journalist pursuant to a protective order is sufficient to protect the government's interests in lieu of delayed notice to the journalist.

Section 6(e) clarifies that the Act is not intended to preempt the legal process standards in the Electronic Communications Privacy Act (pursuant to Section 2(c)); however, it is intended to preempt the notice and delayed notice provisions of these acts as set forth in 18 U.S.C. § 2703 and § 2705(a).

The requirements under § 2703 and § 2705(a), which govern when the Government seeks communications records from a third-party service provider, include notice provisions that vary based upon the records requested and the legal process used by the government. By contrast, the default requirement in Section 6 of the Act is that, regardless of the type of records requested from a covered service provider or the type of legal process used, the Government must notify the covered journalist account holder that his or her account information is sought from the service provider.

Additionally, § 2703 and § 2705(a) provide that notice to a customer may be delayed for a 90-day period with additional, unlimited extensions of 90-day increments. The Act, however, provides for delayed notice for 45 days plus one additional 45-day increment. Section 6(e) of the Act preempts the delayed notice provisions of § 2703 and § 2705(a).

The Act does not preempt 18 U.S.C. § 2705(b), which permits the Government to obtain a court order commanding a service provider "not to notify any other person of the existence of the warrant, subpoena, or court order" seeking the disclosure of the communications records of the account holder when delayed notice is permitted.

Section 7. Sources and work product produced without promise or agreement of confidentiality

Section 7 provides that the Act does not supersede, dilute, or preclude any law or court decision regarding compelled disclosure of information identifying a non-confidential source (Section 7(1)) or of non-confidential journalism work product.

Section 8. Procedures for review and appeal

This section provides that upon a showing of good cause, a judge may consider *ex parte* submissions; in addition, a judge may find a covered journalist to be in contempt if the person fails to comply with an order compelling disclosure of protected information. This section also provides that a judge shall make a determination under this Act within 30 days of receiving the motion, and appeals shall be interlocutory and expedited.

Section 9. Rule of construction

This section provides that the Act does not preempt defamation claims; modify grand jury secrecy rules or the Privacy Act (5 U.S.C.

§ 552a); create new obligations or modify authorities under the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. § 1801 et seq.); or preclude the voluntary disclosure of information.

Section 10. Audit

This section requires the Inspector General of the Department of Justice to conduct a comprehensive audit under the Act, covering the period beginning on the date of enactment and ending on December 31, 2016. Such audit shall be provided to the Committees on the Judiciary and Intelligence in both the Senate and the House of Representatives, and shall be provided to the Director of National Intelligence for comment.

Section 11. Definitions

(1) *Covered Journalist* is defined in one of three ways:

First, a covered journalist may be a person who is at the time of receiving the subpoena or other legal process, or was at the time of receiving the protected information an employee, independent contractor, or agent of an entity or service that disseminates news or information by means of a newspaper, nonfiction book, wire service, news agency, news website, mobile application or other news or information service, news program, magazine or other periodical, in a variety of formats; or through television or radio broadcast, multichannel video programming, or a variety of broadcast methods. This covered journalist must have had the primary intent to investigate and gather news by enumerated methods, had such intent at the beginning of the newsgathering process, and obtained the news in order to disseminate it.

Second, a covered journalist may be a person who at the inception of the process of gathering the news or information, had the primary intent to investigate and gather news and obtained the news in order to disseminate it by a means listed in the previous definition, and, either had a relationship with an entity or service as outlined in subclause (i)(I)(aa) for a continuous one-year period within the last 20 years or a continuous three-month period within the last five years; had substantially contributed in enumerated ways to a significant number of items within the last five years; or was a college journalist.

Third, a covered journalist may be a person for whom a judge "may exercise discretion [to find] . . . based on specific facts contained in the record" should be protected "in the interest of justice" and if "necessary to protect lawful and legitimate news-gathering activities under the specific circumstances of the case."

Covered journalist does not under any circumstance include a foreign power, foreign terrorist organization, or any entity that is defined or designated by: the Foreign Terrorist Surveillance Act of 1998 (50 U.S.C. § 1801); the Immigration and Nationality Act (8 U.S.C. § 1189(a)); a Specially Designated Global Terrorist by the Department of Treasury under Executive Order 13224 (50 U.S.C. § 1701); 31 C.F.R. 595.311; or the Immigration Nationality Act (8 U.S.C. § 1182(a)(3)(B)(vi)(II); or those who commit or attempt to commit the crimes of terrorism

or providing material support to terrorism, as defined in various parts of Title 18. Aiders and abetters of the aforementioned are also excluded from coverage. In addition, a "covered journalist" does not under any circumstance include someone whose principal function is to publish primary source documents that have been disclosed without authorization.[32] The judiciary discretion under paragraph (B) does not include any authority to make an exception to the exclusions under subparagraph (A)(iii).[33]

(2) *Covered Service Provider* means a telecommunications carrier or information service, an interactive computer service, a remote computing service, an electronic communications service, or any commercial entity that maintains records related to a covered journalist.

(3) *Document* is defined as writings, recordings, and photographs as defined by Rule 1001 of Federal Rules of Evidence (28 U.S.C. App.)

(4) *Federal Entity* is defined as a Federal court, legislative branch, or administrative agency of the Federal Government with the power to issue or enforce a subpoena or other compulsory process.

(5) *Judge of the United States* includes judges of the courts of appeals, district courts, Court of International Trade and any court created by an Act of Congress. The term does not include magistrate judges or grand juries.

(6) *Properly classified information* means information that is classified in accordance with any applicable Executive orders, statutes, or regulations.

(7) *Protected Information* is defined as information identifying a source or any records, contents of communication, documents, or information obtained by a covered person engaged in journalism under the promise or agreement that such information would be confidential.

(8) *Relevant Date* means the date on which the protected information sought was obtained or created by the person asserting protection under this Act.

V. Congressional Budget Office Cost Estimate

The Committee sets forth, with respect to the bill, S. 987, the following estimate and comparison prepared by the Director of the

[32] This carve-out is more than ample to address the issues pertaining to Pvc. Bradley Manning in the "Additional Views."

[33] The authors of the "Additional Views" criticize the definition of "covered journalist" for being too broad, but also for being too narrow and thereby raising First Amendment concerns. In fact, the definition of "covered journalist" draws a clear and administrable line between those who are actual journalists and those who would try to hide behind the cloak of journalism in order to harm our country—a scenario which has never occurred. In addition, the bill does not purport to supplant the full scope of First Amendment protections offered to the press. The First Amendment allows everyone to publish, and journalists cannot be licensed by the government. However, not everyone can refuse to comply with an otherwise valid court order to testify. Other testimonial privileges like the attorney-client or the doctor-patient privileges are easy to apply: anyone who is a licensed attorney or physician cannot be compelled to testify about clients or patients. But because journalists are not licensed, the Free Flow of Information Act must include a definition of who qualifies to invoke the privilege to protect a confidential source. Thus, while every citizen is free to publish pursuant to the First Amendment, the Free Flow of Information Act would delineate who may resist a court order to testify in federal court and who may not. State shield laws also include similar definitions without impeding the right of all state residents to publish, and another federal statute—the Freedom of Information Act (FOIA)—includes a definition of "news media" for purposes of determining who may be granted a fee waiver under the law without undermining the right to publish.

Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

OCTOBER 30, 2013.

Hon. PATRICK J. LEAHY,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 987, the Free Flow of Information Act of 2013.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Martin von Gnechten.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

S. 987—Free Flow of Information Act of 2013

S. 987 would exempt journalists from being compelled to disclose protected information (confidential sources or related records, communications, or documents) unless a court finds that a specified exception applies. Based on information provided by the Department of Justice (DOJ), CBO estimates that implementing the legislation would cost $2 million over the 2014–2017 period, subject to the availability of appropriated funds. Enacting S. 987 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

Under the legislation, journalists could be compelled to disclose protected information when at least one of the following exceptions applies:

- The party seeking protected information has exhausted reasonable alternative sources.
- In criminal investigations or prosecutions, there are reasonable grounds to believe a crime has occurred; the Attorney General has certified that the decision to request compelled disclosure is consistent with federal regulations; the sources or records sought are essential to the investigation, prosecution, or defense; and the journalist has not sufficiently shown that disclosure would be contrary to the public interest.
- The protected information sought is essential to the resolution of the matter, and the public interest in compelling disclosure of the information involved outweighs the public interest in gathering or disseminating news information.
- The protected information was obtained during the alleged criminal conduct of the reporter.
- The information sought is necessary to prevent certain actions, including death and kidnapping, among others.
- The information sought would materially assist the government in preventing or mitigating an act of terrorism or other act that could harm national security.

Under the bill, covered service providers (including telecommunications carriers and Internet service providers) could not be compelled to provide testimony or documents relating to a reporter's phone, email, and computer use, unless one of the above exceptions applies.

S. 987 also would require the DOJ Inspector General to conduct an audit of the effects of the bill's provisions during the period between enactment and December 31, 2016, and to submit a report to the Congress by June 30, 2017.

Under current law, requests to subpoena journalists on matters related to federal cases typically originate within DOJ. Federal prosecutors can request a subpoena of a journalist from a court after an internal review by DOJ. Information from the department indicates that very few subpoena requests seeking confidential-source information are approved each year (there were a total of 12 over the 2007–2013 period) and that it is unlikely that the bill would substantially increase the number of such requests.

Journalists may challenge some subpoenas under current law, and S. 987 would clarify the instances when a journalist would be compelled to produce information or testify. The bill might increase federal attorneys' litigation duties if more subpoenas would be challenged than under current law, but given the small number of potential cases, CBO estimates that any increase in federal spending would be insignificant.

Based on information provided by DOJ, we expect that the department would need to hire about three people to carry out the audits required by S. 987. CBO estimates that it would cost about $500,000 annually over the 2014–2017 period for DOJ to complete the audits and report required by the bill. Such spending would be subject to the availability of appropriated funds.

S. 987 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contact for this estimate is Martin von Gnechten. The estimate was approved by Peter H. Fontaine, Assistant Director for Budget Analysis.

VI. Regulatory Impact Evaluation

In compliance with rule XXVI of the Standing Rules of the Senate, the Committee finds that no significant regulatory impact will result from the enactment of S. 987.

VII. Conclusion

The Free Flow of Information Act establishes a clear, uniform Federal standard for protecting confidential source information that is long overdue. Enacting this legislation will ensure that confidential sources will continue to speak freely and openly to the press and ensure the free flow of information to the American public.

VIII. MINORITY VIEWS

MINORITY VIEWS FROM SENATORS SESSIONS AND CORNYN

OVERVIEW

Introduction

S. 987, the "Free Flow of Information Act of 2013," would dramatically shift the process by which law enforcement goes about compelling disclosure of information from journalists. This bill would seriously impede important criminal investigations and prosecutions, including those dealing with cases of terrorism and harm to the national security.

Members of the law enforcement and intelligence communities have had serious and longstanding concerns with similar legislation introduced in previous Congresses. Not only does the bill passed by the Judiciary Committee fail to address these concerns, but the Senate has not held a hearing on the issue of a journalist's privilege since 2006, failing to provide a forum in which these concerns could be voiced. Nor have members had the opportunity to hear from and pose questions to the intelligence community in a classified setting. As this bill would impose significant limitations upon the ability of federal prosecutors to investigate and prosecute serious crimes, including terrorist attacks, harms to national security, and leaks of classified information, we strongly oppose S. 987.

Any great nation with worldwide interests must be able to conduct secret activities, carry on secure discussions internally and with foreign nations. These needs have not changed and will never change. In the last few years, we have witnessed the proliferation of the most damaging leaks of classified information in our country's history. For example, the media has reported on the existence of so-called terrorist "kill lists," a highly classified network of clandestine CIA prisons in Europe for al-Qaeda captives, and a highly classified memorandum revealing administration misgivings about the prime minister of Iraq—a leak described by one government official as among the most damaging in recent memory. The leak of a highly classified report that the United States had been monitoring a major communications channel used by al-Qaeda leader Ayman al Zawahiri and Nasser al Wuhayshi, the head of the Yemen-based al-Qaeda in the Arabian Peninsula, recently was described by some Obama administration officials as having caused "more immediate damage to American counterterrorism efforts

than the thousands of classified documents disclosed by Edward Snowden, the former National Security Agency contractor."[1]

In 2010, Bradley Manning, an intelligence analyst for the U.S. Army, committed the largest leak of classified information in U.S. history by giving extraordinarily sensitive information, including videos of the July 12, 2007 Baghdad airstrike and the 2009 Granai airstrike in Afghanistan, and hundreds of thousands of U.S. diplomatic cables and army reports, to the website "WikiLeaks." Former State Department spokesman P.J. Crowley stated that Manning's actions "put real lives and real careers at risk."[2]

On June 5, 2013, *The Guardian* published a top secret court order leaked by former NSA and CIA contractor Edward Snowden, revealing critical details about U.S. surveillance programs. According to current and former intelligence officials, suspected terrorists have changed how they communicate and have become more difficult to track as a result, leading to a significant loss of intelligence. Director of National Intelligence ("DNI") James Clapper said that the leaks did "huge, grave damage" to U.S. intelligence gathering efforts. Attorney General Eric Holder said "[t]he national security of the United States has been damaged as a result of those leaks. The safety of the American people who reside in allied nations have been put at risk as a result."[3] As of the date of this printing, the extent of Snowden's crimes is unclear, as new leaks of classified information directly attributable to him continue to appear in the press.

Recently, former FBI bomb technician Donald John Sachtleben pleaded guilty to providing national defense information to the *Associated Press* about the disruption of a terrorist plot by al-Qaeda in the Arabian Peninsula to bring down a civilian airliner headed for the United States.[4] He also disclosed that during the investigation of the plot, authorities uncovered a bomb that was being examined at an FBI lab in Quantico where he sometimes worked. Officials described the disclosure, which came in the middle of a sensitive intelligence operation, as one of the most serious national security leaks in history, and led to the Justice Department's decision to subpoena phone records from the *Associated Press*. According to the FBI, Sachtleben was identified by its investigators as the source of this unlawful disclosure after analysis of the subpoenaed telephone records.

The devastating consequences of such leaks were starkly illustrated when the Libyan Prime Minister, Ali Zeidan, was kidnapped in retaliation for allowing the United States to carry out a special operations raid that captured senior al-Qaeda leader, Nazih Abdul-Hamed al Ruqai, known as Abu Anas al-Libi.[5] The Libyan government had denied any prior knowledge of the raid, but on October

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[1] Lindsay Wise and Adam Baron, *Leaks alerted al Qaida leaders they were being monitored, U.S. officials claim,* McClatchyDC, Sept. 30, 2013.

[2] *Bradley Manning's supporters relieved over verdict* (MSNBC television broadcast, July 31, 2013), available at http://video.msnbc.msn.com/now/52632120#52632120 (last visited Oct. 17, 2013).

[3] *Holder: Leaks damaged U.S. Security,* CNN, June 5, 2012, available at http://www.cnn.com/2013/06/14/world/europe/nsa-leaks/index.html?hpt=hp__t1 (last visited Oct. 17, 2013).

[4] Sari Horwitz, *Former FBI agent to plead guilty in leak to AP,* THE WASHINGTON POST, Sept. 23, 2013.

[5] Marc A. Thiessen, *Kidnapped Libyan prime minister pays the price for an Obama leak,* THE WASHINGTON POST, Oct. 10, 2013.

9, 2013, the *New York Times* reported that "[a]fter months of lobbying by American officials, the Libyans consented 'some time ago' . . . to the United States operations."[6] The article cites "more than half a dozen American diplomatic, military, law enforcement, intelligence and other administration officials" as sources.

This legislation is unnecessary

S. 987 was introduced three days after the *Associated Press* wrote to Attorney General Holder to object to the above-mentioned subpoena, which it described as a "massive and unprecedented intrusion" by the Department of Justice ("DOJ"). Facing mounting criticism from the press, the White House called for this bill to be introduced. Just days later, it was revealed that the Attorney General had approved a warrant application that labeled Fox News' James Rosen an "aider and abettor and/or co-conspirator" under the Espionage Act for soliciting from State Department security analyst Stephen Jin-Woo Kim the disclosure of classified defense information regarding North Korea's response to a U.N. Security Council resolution condemning its nuclear and ballistic missile tests. Some have argued that, given this sequence of events, the administration's motives in calling for this legislation were to divert criticism and placate powerful media interests. Others have argued that the President's support for this bill is a tacit admission that his DOJ is unable to police itself. There is no question that the DOJ guidelines that set forth the procedures for obtaining information from the media are powerfully protective, and indeed, overly prescriptive in many cases. In fact, in response to this criticism, the DOJ tightened the guidelines even further. If they are faithfully adhered to, while ensuring the necessary flexibility to conduct timely and efficient investigations, they effectively ensure that government does not unlawfully or unfairly intrude on the press's right to legitimately report on issues of public controversy.

Regardless, as S. 987's lead co-sponsors have conceded, this bill likely would not have changed the outcome of the *Associated Press* or Rosen matters. Indeed, rather than promoting the purported "free flow of information," so-called "media shield" legislation is, in the words of former National Security Agency ("NSA") and Central Intelligence Agency ("CIA") Director General Michael Hayden, "merely a solution in search of a problem."[7]

The lack of need for such legislation was initially raised in the September 27, 2007 DOJ views letter regarding similar predecessor legislation introduced in the 110th Congress, which states "the Department believes that this legislation would work a dramatic shift in the law with no evidence that such a change is warranted."[8] The letter points out that "[s]ince 1991, the Department has approved

[6] Michael S. Schmidt and Eric Schmitt, *U.S. Officials Say Libya Approved Commando Raids,* THE NEW YORK TIMES, Oct. 9, 2013.

[7] Michael Hayden, *The free flow of secrets,* THE WASHINGTON TIMES, Dec. 10, 2009 ("In my view, and indeed in the view of many in the American intelligence community, this seems to be a solution in search of a problem."). *See also* Testimony of Deputy Attorney Gen. Paul J. McNulty, Reporters' Privilege Legislation: Preserving Effective Federal Law Enforcement, 109th Cong., 2nd Sess. (Sept. 20, 2006) (written statement) (statement of Deputy Attorney Gen. Paul J. McNulty), at 9.

[8] Letter from Brian A. Benczkowski, Principal Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Office of Legislative Affairs, to the Hon. Patrick Leahy, Chairman, U.S. Senate Comm. on the Judiciary, U.S. Senate, at 4 (Sept. 26, 2007) (Appendix I).

the issuance of subpoenas to reporters seeking confidential source information in only 19 cases. The authorizations granted for subpoenas of source information have been linked closely to significant criminal matters that directly affect the public's safety and welfare."[9] The letter continues: "[t]hese numbers demonstrate a *decrease* in the number of cases in which the Department has approved the issuance of subpoenas seeking confidential source information in recent years: of the 19 source-related matters since 1991, only four have been approved since 2001."[10]

In 2008, then-Attorney General Michael Mukasey and then-DNI Michael McConnell submitted a views letter noting that similar predecessor legislation was "unnecessary because all evidence indicates that the free flow of information has continued unabated in the absence of a Federal reporter's privilege."[11] The letter further states that the bill is "unnecessary because, in the more than thirty-five years since the Supreme Court held in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), that there is no First Amendment reporter's privilege to avoid a grand jury subpoena issued in good faith, there has been a dramatic increase in the flow of information available to the public on every conceivable topic through an ever-growing number of outlets."[12]

Judge Mukasey and Mr. McConnell pointed out that supporters of a journalist privilege make "essentially the same arguments the litigants in *Branzburg* made," suggesting that "without a reporter's privilege, journalists' sources will dry up, important news will go unreported, and the country will suffer as a result." Proponents of media shield legislation "often punctuate this cautionary tale about the necessity of a Federal reporter's privilege by emphasizing the critical role played by confidential sources in informing the public about a long line of historic events—from Watergate and the Pentagon Papers to Enron and Abu Ghraib." As Judge Mukasey and Mr. McConnell emphasized, "[t]here can be no doubt those confidential sources came forward even though there was no Federal media shield law in place to provide them with the protection that, if this bill's supporters are to be believed, is essential to ensuring that such stories continue to be reported."[13]

An examination of the facts reveals that subpoenas to journalists are rare. As indicated above, the DOJ approved 19 source-related subpoenas from 1992 to 2006.[14] According to the DOJ, since 2006, it has approved only 12 source-related subpoenas:

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[9] *Id.* at 3.

[10] *Id.* at 4 (emphasis in original).

[11] Letter from Michael B. Mukasey, Att'y Gen., U.S. Dep't of Justice, & J.M. McConnell, Dir. of Nat'l Intelligence, to the Hon. Harry Reid, Majority Leader, U.S. Senate, & the Hon. Mitch McConnell, Minority Leader, U.S. Senate (Apr. 2, 2008), at 1 (Appendix II).

[12] *Id.* at 7.

[13] *Id.* (emphasis in original).

[14] Letter from Brian A. Benczkowski, Principal Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Office of Legislative Affairs, *supra note* 8, at 3 (emphasis added); *see also* n.2 ("In only two of those nineteen matters was the Government seeking to question a reporter under oath to reveal the identity of a confidential source. In one of the two matters, the media member was willing to identify his source in response to the subpoena. In the other matter, the Department withdrew the media subpoenas after it had obtained other evidence concerning the source of the information and that source agreed to plead guilty. Of the nineteen source-related matters since 1991, only four have been approved since 2001. While the nineteen source-related matters referenced above do not include any media subpoenas issued in matters from which the Attorney General was recused, the only recusal matter in which subpoenas were issued involved facts where all four federal judges to review the subpoena—the Chief Judge of the District Court and the three judge panel of the appeals court—found that the facts of the case warranted enforce-

Year	Number of Cases in Which Source-Related Subpoenas Were Approved
2007	1
2008	4
2009	2
2010	3
2011	1
2012	0
2013	1

It should be noted that some supporters of media shield confuse matters by lumping together the DOJ's statistics on subpoenas seeking source-related information with subpoenas that either did not seek confidential source information or were issued by non-DOJ attorneys.[15] If the supporters of such legislation are concerned about an increase in subpoenas from private litigants, they ought to make that argument—and they ought to have data to back it up. But to use subpoenas from non-DOJ attorneys as a justification for severely constraining the ability of federal prosecutors to seek such subpoenas is a *non-sequitur*, especially when there is simply no evidence that the DOJ is approving such subpoenas in anything but a cautious manner. For the purposes of a discussion of the present legislation, the only relevant data are those data that concern federal subpoenas and other compulsory process that seek confidential source information—because, quite simply, that is the only information for which the current legislation would provide a shield.

Previous concerns go unaddressed

Similar predecessor legislation was opposed by a host of executive branch agencies in the 110th and 111th Congresses. Although supporters of S. 987 may argue that, after a change at the Presidential level, these agencies are no longer opposed—which is not at

ment of the subpoena under any version of a qualified privilege, no matter how stringent. *See In re Grand Jury Subpoena, Judith Miller,* 438 F.3d 1141, 1150 (D.C. Cir. 2006). In that same case, it is important to note, the Special Prosecutor adhered to—and was found by the Court to have complied with—the Department's guidelines as set forth at 28 C.F.R. §50.10. *See In re Special Counsel Investigation*, 332 F. Supp.2d 26, 32 (D.D.C. 2004) ("Assuming, *arguendo,* that the DOJ Guidelines [for the issuance of subpoenas to the news media] did vest a right in the movants in these cases, this court holds that the DOJ guidelines are fully satisfied by the facts of this case as presented to the court in the *ex parte* affidavit of Patrick Fitzgerald.")).

[15] *See, e.g.*, American Society of News Editors, *Number of subpoenas issued*, Nov. 2, 2007, *available at* http://asne.org/blog_home.asp?display=661 "761 responding news organizations reported receiving a total of 3,602 subpoenas seeking information or material relating to newsgathering activities in calendar year 2006") (last visited Oct. 17, 2013). For example, a study conducted by Professor RonNell Jones of Brigham Young University Law School simply does not bear the weight that some media shield supporters claim. See RonNell A. Jones, *Avalanche or Undue Alarm? An Empirical Study of Subpoenas Received by the News Media,* 93 Minn. L. Rev. 585 (2008), *available at* http://ssrn.com/abstract=1125500. As an initial matter, the study relies on self-reporting from newspapers and broadcast outlets, and, as such, must assume the accuracy of those outlets' characterizations and descriptions of the subpoenas they received. *Id.* at 622. And regardless of how thorough and accurate the survey that the author of the study conducted, the author still must rely on earlier data in order to provide a point of comparison by which a determination can be made as to whether the number of subpoenas is going up or down. The survey the author uses as this point of comparison is a 2001 survey by the Reporters' Committee on the Freedom of the Press, a survey that the author herself readily admits "did not purport to be scientific or neutral." *Id.* at 621. And even assuming that the reported results are accurate, it is important to note that the author of the study states: "Overall, the data does not reveal an 'avalanche' of subpoenas, and it may well be that journalists in the country are alarmed about the subpoena issue to a greater degree than is warranted by the actual numerical increases." *Id.* at 667.

all clear given that the Committee has yet to hear from any of the heads of these agencies, other than Attorney General Holder—what is relevant is that the *reasons for* the agencies' past and well-founded opposition have not been substantively addressed in the bill passed by the Judiciary Committee.

As noted above, in the fall of 2007, the DOJ issued a letter expressing strong opposition to similar predecessor legislation "because it would impose significant limitations upon—and in some cases would completely eviscerate—the ability of Federal prosecutors to investigate and prosecute serious crimes, while creating significant national security risks."[16]

The next day, the Office of the DNI also issued a letter "strongly opposing" media shield legislation.[17] According to the letter, "press reports on U.S. intelligence activities have been a valuable source of intelligence to our adversaries." Amplifying this point, the DNI letter referred to former Russian military intelligence colonel Stanislav Lunev, who wrote, "I was amazed—and Moscow was very appreciative—at how many times I found very sensitive information in American newspapers. In my view, Americans tend to care more about scooping their competition than about national security, which made my job easier."[18]

In April 2008, then-Attorney General Mukasey and then-DNI McConnell issued the above-mentioned views letter reiterating their strong opposition to similar predecessor legislation.[19] In that letter, Judge Mukasey and Mr. McConnell stated that the legislation is:

> both unwise and unnecessary: unwise because the statutory privilege created by this legislation would work a significant change in existing Federal law with potentially dramatic consequences for our ability to protect the national security and investigate other crimes; and unnecessary because all evidence indicates that the free flow of information has continued unabated in the absence of a Federal reporter's privilege.[20]

Judge Mukasey and Mr. McConnell emphasized that the similar bill "goes far beyond its stated purpose and could severely frustrate the Government's ability to investigate and prosecute those who harm national security."[21] According to them, the most significant deficiencies include:

• "The circumstances where the bill would permit the Government to obtain testimony, documents, and other information from journalists related to national security investigations are far too restrictive. In the vast majority of leak cases, for example, the extraordinary burden placed on the Government could be met, if at

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[16] *See* Letter from Brian A. Benczkowski, Principal Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Office of Legislative Affairs, *supra* note 8, at 4.

[17] Letter from Ronald L. Burgess, Jr., Acting Principal Deputy Dir. of Nat'l Intelligence, Office of the Dir. of Nat'l Intelligence, to the Hon. John D. Rockefeller, Chairman, and the Hon. Christopher S. Bond, Vice Chairman, Senate Select Comm. on Intelligence, U.S. Senate, at 1 (Sep. 27, 2007) (Appendix III).

[18] *Id.* (quoting Stanislav Lunev with Ira Winkler, *Through the Eyes of the Enemy: The Autobiography of Stanislav Lunev* (Regnery Publishing 1998)).

[19] Letter from Michael B. Mukasey, Att'y Gen., U.S. Dep't of Justice, & J.M. McConnell, Dir. of Nat'l Intelligence, *supra* note 11, at 1.

[20] *Id.*

[21] *Id.*

all, only by revealing even more sensitive and classified information."[22]

• "[T]he purported [national security] exception only applies prospectively to prevent acts of terrorism and significant harm to national security. It does not apply to investigations of acts of terrorism and significant harm to national security that have already occurred."[23]

• "The bill cedes to judges the authority to determine what does and does not constitute 'significant and articulable harm to the national security.' It also gives courts the authority to override the national security interest where the court deems that interest insufficiently compelling—even when harm to national security has been established."[24]

• "One need not even be a professional journalist in order to derive protections from this bill. It effectively provides a safe haven for foreign spies and terrorists who engage in some of the trappings of journalism but are not known to be part of designated terrorist organizations or known to be agents of a foreign power—no matter how closely linked they may be to terrorist or other criminal activity."[25]

In an August 2008 letter, sent after the predecessor legislation had been amended in a failed attempt to address some of their concerns, Judge Mukasey and Mr. McConnell wrote:

> [W]e still have several serious concerns, especially with regard to the bill's effect on our ability to protect national security and investigate and prosecute the perpetrators of serious crimes.
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> * * *
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> [T]his bill only encourages and facilitates further degradation of the tools used to protect the nation. We have been joined by the Secretary of Defense, the Secretary of Energy, the Secretary of Homeland Security, the Secretary of the Treasury, and every senior Intelligence Community leader in expressing the belief, based on decades of experience, that, by undermining the investigation and deterrence of unauthorized leaks of national security information to the media, this legislation will gravely damage our ability to protect the Nation's security. This amended version of the bill does not resolve those concerns, or other serious concerns raised in our previous letters. *As a result, if this legislation were presented to the President in its current form, his senior advisors would recommend that he veto the bill.*[26]

As we explain below, *none* of these inadequacies set out by Judge Mukasey and Mr. McConnell have been addressed in the Committee-reported version of S. 987.

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[22] *Id.*
[23] *Id.*
[24] *Id.* at 2.
[25] *Id.*
[26] Letter from Michael B. Mukasey, Att'y Gen., U.S. Dep't of Justice, & J.M. McConnell, Dir. of Nat'l Intelligence, to the Hon. Harry Reid, Majority Leader, U.S. Senate, & the Hon. Mitch McConnell, Minority Leader, U.S. Senate (Aug. 22, 2008), at 1 (emphasis in original) (Appendix IV).

As noted in Judge Mukasey and Mr. McConnell's letter, on January 23, 2008, 12 members of the intelligence community—six of whom continue to serve or previously served in the Obama administration—issued a joint letter expressing their "strong opposition" to the similar predecessor legislation.[27] Signatories to that letter included: (1) Mr. McConnell; (2) General Hayden, then-CIA Director; (3) James R. Clapper, Jr., then-Under Secretary of Defense for Intelligence and current DNI; (4) Robert Mueller, then—and until September 2013—Director of the Federal Bureau of Investigation ("FBI"); (5) Randall M. Fort, then-Assistant Secretary of State for Intelligence and Research; (6) Janice Gardner, then-Assistant Secretary for Intelligence and Analysis at the Department of the Treasury; (7) Charlie Allen, then-Under Secretary for Intelligence and Analysis at the Department of Homeland Security; (8) Lieutenant General Keith Alexander, then-and-current Director of the National Security Agency ("NSA"); (9) Scott Large, then-Director of the National Reconnaissance Office; (10) Lieutenant General Michael Maples, then-Director of the Defense Intelligence Agency; (11) Vice Admiral Robert Murrett, then-Director of the National Geospatial-Intelligence Agency; and (12) Rolf Mowatt-Larssen, then-Director for Intelligence and Counterintelligence at the Department of Energy. They wrote that the legislation "will undermine our ability to protect intelligence sources and methods and could seriously impede national security investigations" and "will impair our ability to collect vital foreign intelligence, including through critical relationships with foreign governments which are grounded in confidence in our ability to protect information from public disclosure."

On March 31, 2008, then-Defense Secretary Robert Gates issued a views letter expressing the Department of Defense's "strong opposition" to the similar predecessor legislation.[28] In the letter, Secretary Gates stated that the Defense Department is "concerned that this bill will undermine our ability to protect national security information and intelligence sources and methods and could seriously impede investigations of unauthorized disclosures." Secretary Gates emphasized that "[d]isclosures of classified information about military operations directly threaten the lives of military members and the success of current and future military operations" as well as "the lives and safety of American citizens and the welfare of the Nation." Secretary Gates concluded that, by providing "a broadly defined class of 'covered persons' with extraordinary legal protections against having to reveal any confidential sources," the bill would "have the unintended consequence of encouraging unauthorized disclosures and increasing our nation's vulnerability to adversaries' counterintelligence efforts to recruit 'covered persons.'"

On April 3, 2008, then-Homeland Security Secretary Michael Chertoff issued a views letter on behalf of the Department of Homeland Security expressing the Department's "strong opposi-

[27] Letter from J.M. McConnell, Dir. of Nat'l Intelligence et al., to the Hon. Harry Reid, Majority Leader, U.S. Senate, & the Hon. Mitch McConnell, Minority Leader, U.S. Senate (Jan. 23, 2008), at 1 (Appendix V).

[28] Letter from Robert Gates, Sec'y of Defense, U.S. Dep't of Defense, to the Hon. Harry Reid, Majority Leader, U.S. Senate (Mar. 31, 2008), at 1 (Appendix VI).

tion" to the legislation.[29] According to the letter, the Department "believes that [the bill] will make the United States both less secure and less free by subverting the enforcement of criminal laws and the Federal Government's investigatory powers." As evidence, Mr. Chertoff, a former federal prosecutor and federal appeals court judge, pointed out that media shield legislation "erects significant evidentiary burdens to obtaining critical information from anyone who can claim to be a journalist, including bloggers, and communications service providers, such as internet service providers." As a result of that significant evidentiary burden, Mr. Chertoff stated that the bill would "delay the collection of critical information and ensure that criminals have opportunities to avoid detection, continue their potentially dangerous operations, and further obfuscate their illegal activities."

Views letters of opposition to the similar predecessor legislation were also submitted by then-Energy Secretary Samuel Bodman[30] and then-Treasury Secretary Henry Paulson.[31]

S. 987 remains substantively the same to the aforementioned legislation that was vigorously opposed by executive branch agencies in the 110th and 111th Congresses. The short letter submitted by Attorney General Holder to Chairman Leahy regarding S. 987 is light on analysis and does not answer the longstanding concerns raised by his predecessor and the intelligence and law enforcement community.[32] As set forth below, these concerns remain unaddressed.

CORE OBJECTIONS TO S. 987

S. 987 places a substantial and unwarranted burden on the Government to obtain information

S. 987 places an extremely heavy burden on a prosecutor or litigator seeking information from a journalist by in effect forcing the government to wage a mini-trial to meet its burden under various tests. In order to do this, federal prosecutors may have to reveal extremely sensitive information, including information that could imperil national security.

Under the bill, in order to obtain confidential source information, the government must generally prove that all reasonable alternative sources have been exhausted, that the testimony or document sought is "essential" to a prosecution, and that nondisclosure would be "contrary to the public interest, taking into account both the public interest in gathering and disseminating the information or news at issue and maintaining the free flow of information and the public interest in compelling disclosure."[33] If a court, correctly or incorrectly, comes to the conclusion that the government still has a potential avenue for further investigation other than disclosure from the journalist, the government has no choice but to un-

[29] Letter from Michael Chertoff, Sec'y of Homeland Security, U.S. Dep't of Homeland Security, to the Hon. Joseph Lieberman, Chairman, Comm. on Homeland Security and Governmental Affairs, U.S. Senate (Apr. 3, 2008) (Appendix VII).

[30] Letter from Samuel W. Bodman, Sec'y of Energy, U.S. Dep't of Energy, to the Hon. Carl Levin, Chairman, Senate Comm. on Armed Services, U.S. Senate & the Hon. Jeff Bingaman, Chairman, Comm. on Nat. Resources, U.S. Senate (Apr. 7, 2008) (Appendix VIII).

[31] Letter from Henry M. Paulson, Jr., Sec'y of the Treasury, U.S. Dep't of the Treasury, to the Hon. Max Baucus, Chairman, Comm. on Finance, U.S. Senate (Apr. 15, 2008) (Appendix IX).

[32] Letter from Eric Holder, Att'y Gen., U.S. Dep't of Justice, to Hon. Patrick J. Leahy, Chairman, Comm. on the Judiciary, U.S. Senate (July 29, 2013).

[33] S. 987, 113th Cong. § 2 (as reported by S. Comm. on the Judiciary, Sept. 12, 2013).

dertake that avenue of investigation. Similarly, if a court decides that the information sought is not "essential" to the government's case, the government cannot go forward. As former United States Attorney Patrick Fitzgerald wrote in 2007 concerning similar predecessor legislation, "[i]n many cases, authorities would face the Catch–22 of being required to prove specific criminal activity—in a hearing before a judge, often resulting in notice to the subjects of investigation or their associates—before they could take the investigative steps to determine whether criminal activity had occurred. In effect, the law would require 'trial before investigation.'"[34]

S. 987 also generally limits the government to using public information or information from a third party to establish the factual predicate for overcoming the journalist's privilege.[35] As noted by Judge Mukasey and Mr. McConnell, "[g]iven that in many cases publication by the [journalist] is the only evidence for seeking source information, this requirement is certain to cause serious practical difficulties in criminal and civil matters."[36]

Also, other than the circumstances enumerated in Sections 4 and 5, the bill makes no provision whatsoever for exigent circumstances that would cause a reasonable person to believe that prompt action was necessary. As the procedure for overcoming the privilege is both burdensome and time-consuming, it is not difficult to envision a scenario wherein the assertion of the privilege could derail a critical, fast-moving investigation. Suppose a journalist publishes a story about an al-Qaeda sleeper cell currently in the United States. The journalist's source is one of the terrorists. The government, trying to learn more about the cell, subpoenas the journalist, the journalist refuses to comply, and the government moves for a disclosure order. No one would dispute that prompt action is necessary in a case like this. However, because the government cannot articulate a specific terrorist act that will be prevented by taking action, a court could determine that the Section 4 and 5 exceptions to the privilege do not apply, and set a hearing to determine whether to order disclosure under Section 2. Even if the government prevails in this scenario, the journalist can appeal, which consumes even more time. All the while, the cell continues to operate freely.

S. 987 will endanger classified information

In order for the government to meet the statute's burdens, it will almost certainly have to disclose sensitive national security information. Although S. 987 exempts certain types of information from its coverage, these exceptions are extremely narrow—in cases relating to alleged criminal or tortious conduct by the journalist; prevention of death, kidnapping, substantial bodily injury, a child sex crime, or destruction of critical infrastructure; and prevention of future terrorist activity or harm to national security.[37]

In order to prove the existence of a valid exception for national security in a classified leak case, the government would likely have

[34] Patrick J. Fitzgerald, *Shield Law Perils . . . Bill Would Wreak Havoc on a System That Isn't Broken,* THE WASHINGTON POST (Oct. 4, 2007).
[35] S. 987, *supra* note 33, at § 2(a)(2).
[36] Letter from Michael B. Mukasey, Att'y Gen., U.S. Dep't of Justice, & J.M. McConnell, Dir. of Nat'l Intelligence, *supra* note 26, at 6.
[37] *Id.* at §§ 3–5.

to contextualize that leak for the court. As a result, Judge Mukasey and Mr. McConnell warned that "the Government will often be required to introduce still more sensitive and classified information, potentially compounding the harm of the initial leak."[38] This is unacceptable, and largely the result of the bill's failure to explicitly set forth guidelines to protect the sensitive national security information with which it deals. As General Hayden wrote regarding similar predecessor legislation, "[t]his new judicial process likely will require the disclosure of even more classified information in order to meet the bill's requirements. Even with such additional disclosure, there is no assurance that a judge, now occupying this new and uncharted role of national security decision-maker, would understand the stakes involved."[39]

Further, S. 987 severely hinders the government's ability to identify the sources of leaked classified information and to investigate past and potential future terrorist attacks. Sources that hide behind journalists' promises of confidentiality in order to perpetrate wrongdoings, such as the leaking of classified information, will receive protection under S. 987. Former Senator Charles Robb and Judge Laurence Silberman, a former member of the Foreign Intelligence Surveillance Court of Review, expressed concerns about the negative impact of unauthorized disclosures of classified information on national security in the report to the President by the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction. According to the Commission's report, "[t]he scope of damage done to our collection capabilities from media disclosures of classified information is well documented. Hundreds of serious press leaks have significantly impaired U.S. capabilities against our hardest targets."[40]

No one would dispute that such disclosures pose a serious threat to national security. However, this bill sets forth special standards that place protecting a leaker's identity ahead of the safety and security of the country. Such special standards are highly inappropriate, as noted by former U.S. Attorney Patrick Fitzgerald with respect to similar predecessor legislation:

> The proposed shield law poses real hazards to national security and law enforcement. The bipartisan Sept. 11 commission and the Robb-Silberman commission on prewar intelligence both found our national security at great risk because of the widespread leaking of classified information. The proposed law would have the unintended but profound effect of handcuffing investigations of such leaks.[41]

It is axiomatic that if Congress protects leakers of classified and other sensitive information by passing S. 987, what will result is more leaks of such information. For example, in his 2008 views letter regarding similar predecessor legislation, then-Secretary of Defense Robert Gates stated that the Defense Department was con-

[38] Letter from Michael B. Mukasey, Att'y Gen., U.S. Dep't of Justice, & J.M. McConnell, Dir. of Nat'l Intelligence, *supra* note 11, at 3.
[39] Hayden, *supra* note 7.
[40] The Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction, Report to the President of the United States, at 381 (Mar. 31, 2005).
[41] Fitzgerald, *supra* note 34.

cerned that a journalist's privilege "will undermine our ability to protect national security information and intelligence sources and methods and could seriously impede investigations of unauthorized disclosures."[42] Secretary Gates rightly emphasized that "[d]isclosures of classified information about military operations directly threaten the lives of military members and the success of current and future military operations" as well as "the lives and safety of American citizens and the welfare of the Nation."[43]

Congress enacted the relevant criminal laws regarding the leaking of classified information precisely to prevent leaks from occurring. But instead of making it easier for investigators and prosecutors to bring to justice those who would imperil our national security, the Committee has endorsed legislation that would do the exact opposite by explicitly protecting leakers of classified information and increasing the burden on those who seek to bring these leakers to justice. The cumulative effect of this burden would cripple the government's ability to identify and prosecute leakers of classified information, and in the process would encourage more leaks that threaten national security.

S. 987 protects an extraordinarily broad class of individuals

Given the strong and unprecedented protections that this bill confers, it is essential to know exactly who will qualify for those protections. Recognizing the inherent difficulty, if not impossibility, of defining "journalist" consistent with the First Amendment, the Committee adopted Senator Feinstein's amendment, which attempted to narrow the definition of "covered journalist" to a person who

> is, or on the relevant date, was, an employee, independent contractor, or agent of an entity or service that disseminates news or information by means of newspaper; nonfiction book; wire service; news agency; news website, mobile application or other news or information service (whether distributed digitally or otherwise); news program; magazine or other periodical, whether in print, electronic, or other format; or through television or radio broadcast, multichannel video programming distributor . . . or motion picture for public showing; with the primary intent to investigate events and procure material in order to disseminate to the public news or information concerning local, national, or international events or other matters of public interest, engages, or as of the relevant date engaged, in the regular gathering, preparation, collection, photographing, recording, writing, editing, reporting or publishing on such matters by conducting interviews; making direct observations of events; or collecting, reviewing, or analyzing original writings, statements, communications, reports, memoranda, records, transcripts, docu-

[42] Letter from Robert Gates, Sec'y of Defense, U.S. Dep't of Defense, *supra* note 28, at 1.

[43] *Id.* "Past investigations into unauthorized disclosures through the media have found that significant details were revealed to our adversaries concerning a wide array of national security matters on different occasions. Some examples include a Department of Defense surveillance platform's capabilities; war plans that could have allowed Saddam Hussein's forces to more effectively position defensive assets; plans to insert Special Operations Forces into a battlefield; and the capabilities of U.S. imaging satellites").

> ments, photographs, recordings, tapes, materials, data, or other information whether in paper, electronic, or other form; had such intent at the inception of the process of gathering the news or information sought; and obtained the news or information sought in order to disseminate the news or information to the public.[44]

This confusing and lengthy definition would nonetheless appear to cover almost anyone, including criminals and other individuals with countless opportunities to leak damaging information without worrying about any sort of consequence. Regardless, this definition inserts yet another factual question into the investigative mini-trials that, under this bill, will replace the use of ordinary and basic law enforcement investigative techniques.

Perhaps most alarming, the protections could apply to media or websites that are linked to terrorists and criminals. The bill purports to exempt agents of foreign powers and designated terrorist organizations from the definition of "covered journalist."[45] However, many terrorist media are neither "designated" terrorist organizations nor other non-covered entities under the bill. It is indisputable that the bill would protect "professional journalists" employed by the Al Jazeera network or the Chinese Communist party's People's Daily or "Russia Today," the Russian-based television network funded and run by the Federal Agency on Press and Mass Communications of the Russian Federation. Thus, all individuals and entities who "gather" or "publish" information about "matters of public interest" but who are not technically designated terrorist organizations, foreign powers, or agents of a foreign power will be entitled to S. 987's protections—no matter how closely tied they may be to terrorists or other criminals. It is not difficult to anticipate the scenarios under which the robust protections of S. 987 would be easily abused by those who wish to harm our safety and national security.[46]

S. 987 could be construed to protect other wrongdoers as well. As noted in its letter in opposition to the bill, the U.S. Chamber of Commerce stated that it is concerned

> with a narrow set of sources who are bad-actors and use the media to illegally disseminate confidential information. When Congress considered a similar bill in 2005, the ombudsman for the San Francisco Chronicle warned that there is "danger of mischief on the part of sources who know they can escape accountability." Evidentiary privileges should not protect individuals who willfully use them to commit and cover up crimes. S. 987 would not only protect these individuals, but by doing so, would embolden their illegal activities.
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> S. 987 would protect people who violate laws that safeguard the confidential information of private individuals,

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[44] S. 987, *supra* note 33, at § 11(l)(A)(i)(I)(aa)–(dd).

[45] *Id.* at § 11(l)(A)(iii).

[46] *See, e.g.,* Gabriel Schoenfeld, *Journalism or Espionage,* NATIONAL JOURNAL, Issue 17 (Fall 2013) ("The Foreign Press Association of New York offers press credentials to anyone who pays its membership fee, describing it 'as the best $100 value in Town.' It is indeed a highly attractive offer if it also comes complete with a fundamental right to assume an alias, communicate with U.S. officials in code or encrypted emails, and solicit secrets from them with impunity").

> businesses, and other entities. This confidential information includes federally protected trade secrets, personal health information, customer or employee data, and information sealed under judicial protective orders, among others. In these circumstances, the public policy decision has been made that this information should not be subject to public disclosure. When protected information is leaked, there is no way to limit the damage of the disclosure. Yet, S. 987 would protect those who violate these laws.
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> S. 987 would also unintentionally undermine other aspects of the First Amendment. Under the bill, information like a group's member or donor list would potentially be unprotected if the information were stolen and leaked to a reporter. This is exacerbated when the definition of reporter is extended to non-traditional news sources that often have a politically motivated agenda. The disclosure of this information would violate the rights of individuals to freely associate and could be used to target and silence those who support disfavored causes. As a result, this bill, which is aimed at protected First Amendment speech, would ultimately undermine those principles by facilitating retaliation against certain speakers.[47]

S. 987 also protects a broad array of individuals in the media, including the journalist's employer and parent company.[48] There is no need for this broad protection, as standard media sourcing rules generally dictate that a source's identity should only be disclosed by a journalist to his or her immediate supervisor.[49]

SECTION-BY-SECTION DISCUSSION OF CONCERNS

Section 2: Compelled disclosure from covered journalists

Subsection (a) of Section 2 lists the conditions for compelled disclosure of protected information. In any federal proceeding or in connection with any issue arising under federal law, a federal entity may not generally compel disclosure of testimony or documents when they relate to protected information possessed by a "covered journalist."[50] However, a court may compel disclosure if it determines that the party seeking to compel production has "exhausted all reasonable alternative sources" of the testimony or documents (other than the covered journalist) and, in criminal cases, that:

- Based on public information or information obtained from a source other than the covered journalist, there are "reasonable grounds to believe a crime has occurred;"

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[47] Letter from R. Bruce Josten, Executive Vice President of Government Affairs, U.S. Chamber of Commerce, to the Hon. Patrick Leahy, Chairman, and the Hon. Chuck Grassley, Ranking Member, Comm. on the Judiciary, U.S. Senate (July 29, 2013) (Appendix X).

[48] S. 987, *supra* note 33, at § 11(l)(A)(ii).

[49] *See* Reuters, *Handbook of Journalism,* available at http://handbook.reuters.com/index.php?title=The_Essentials_ of_Reuters_sourcing (last visited Sept. 25, 2013) (noting that "[r]eporters are expected to disclose their sources, when asked, to their immediate supervisor, whether bureau chief or reporting unit head," and that "the supervisor should not disclose the name of the source [to others] but may discuss the nature, position, access and track record of the source").

[50] S. 987, *supra* note 33, at § 2(a).

- Based on public information or information obtained from a source other than the covered journalist, there are reasonable grounds to believe that the testimony or documents sought are "essential to the investigation or prosecution or to the defense against the prosecution;"
- The Attorney General certifies that the decision to request compelled disclosure was consistent with 28 C.F.R. § 50.10 (in circumstances governed by that rule); and
- The covered journalist has not established by clear and convincing evidence that disclosure of the information would be contrary to the public interest, "taking into account both the public interest in gathering and disseminating the information or news at issue and maintaining the free flow of information." [51]

The bill also requires the subpoena or court order to be "narrowly tailored in purpose, subject matter, and period of time covered so as to avoid compelling disclosure or peripheral, nonessential, or speculative information." [52]

As discussed previously, Section 2 sets an extremely high bar for a prosecutor or litigator to obtain critical information from a journalist by in effect forcing the government to wage a mini-trial to meet its burden under various tests. In order to do this, federal prosecutors may have to reveal extremely sensitive information, including information that could imperil national security. Specifically, the government must prove that the information it seeks is both "essential" to the case and that it has exhausted all reasonable alternatives.[53] These requirements, which are not defined in the bill, put a federal judge in the position of micromanaging a criminal investigation, even those in the early stages when subpoenas are most commonly used to ascertain whether a (or which) federal crime has even been committed. If a court, correctly or incorrectly, concludes that the government has another potential avenue for further investigation besides disclosure from the journalist, the government has no choice but to undertake that avenue of investigation, regardless of the time, expense, and potential for compromise involved. Similarly, if a judge decides that the information sought is not essential to the government's case, the government cannot go forward. Moreover, Section 2 not only erects new barriers against law enforcement, but it also requires the Attorney General to certify that Justice Department policy procedures limiting subpoenas on the press were followed.[54] Notably, apart from generally summarizing Section 2's strictures, Attorney General Holder's letter does not even mention the operational impact of these two requirements.[55]

Fundamentally, Section 2 charges federal judges—who generally lack the training and expertise necessary to weigh the sort of national security considerations often at play—with making the ultimate decisions concerning which investigations are sensitive

[51] *Id.*
[52] *Id.* at § 2(b).
[53] *Id.* at § 2(a)(1).
[54] *Id.* at § 2(a)(2)(iii).
[55] Letter from Eric Holder, Att'y Gen., U.S. Dep't of Justice, *supra* note 32.

enough to get access to a journalist's information.[56] A federal judge is tasked with balancing the public interest in the evidence being gathered with the "public interest in gathering and disseminating the information or news at issue and maintaining the free flow of information."[57] Notably, these terms are nowhere defined in the bill.

Judge Mukasey and Mr. McConnell expressed significant concern with respect to nearly identical language in predecessor legislation: "These amorphous factors will defy consistent or coherent balancing. Indeed, we would submit that the open-ended nature of the bill's balancing tests virtually guarantees that there will be as many different interpretations of its terms as there are Federal judges—with serious consequences not just for law enforcement but for journalists and the public at large."[58] They also emphasized that the "balancing test for a judge in a leak case would rest on the relative import he or she placed on the substance of the published leak, and whether its disclosure, though unlawful, outweighed a demonstrated harm to national security. . . . This . . . would effectively give judges authority to immunize leakers as a perverse reward for divulging classified information that is, in the judge's personal estimation, sufficiently enlightening."[59]

We agree with Judge Mukasey and Mr. McConnell that media shield legislation unwisely "transfers key national security and prosecutorial decision-making authority—including decisions about what does and does not constitute harm to the national security—from the executive branch to the judiciary, and it gives judges virtually limitless discretion to make such determinations by imposing standardless and highly subjective balancing tests that could be used to override national security interests."[60]

We also agree with their sentiment that the "Rule of Construction," "which purports to limit any construction of the Act that would affect the Foreign Intelligence Surveillance Act or the Federal laws or rules relating to grand jury secrecy—is insufficient to preserve the range of authorities on which the Government relies to conduct national security investigations."[61]

Section 3: Exception relating to criminal conduct

Section 3 provides that the general journalists' privilege in Section 2 does not apply to protected information obtained as the result of the journalist's eyewitness observations of alleged criminal conduct, or any alleged criminal conduct committed by a journalist.[62] However, pursuant to Section 3(b), this exception does not

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[56] *See, e.g.,* Testimony of Deputy Att'y Gen. Paul J. McNulty, *supra* note 7 ("It shifts law enforcement decisions from the executive branch to the judiciary. This shift is extraordinarily serious in the national security area where the executive officials have access to the full array of information necessary to make informed and balanced national security judgments. . . . *As numerous judges have recognized, the courts lack the institutional resources and expertise to make those decisions.")* (emphasis added).

[57] S. 987, *supra* note 33, at § 2(a)(2)(A)(iv).

[58] Letter from Michael B. Mukasey, Att'y Gen., U.S. Dep't of Justice, & J.M. McConnell, Dir. of Nat'l Intelligence, *supra* note 11, at 5.

[59] Letter from Michael B. Mukasey, Att'y Gen., U.S. Dep't of Justice, & J.M. McConnell, Dir. of Nat'l Intelligence, *supra* note 26, at 4.

[60] *Id.* at 2.

[61] *Id.*

[62] S. 987, *supra* note 33, at § 3(a).

apply "if the alleged criminal conduct is the act of communicating the documents or information at issue."[63]

Although this section purports to remove some information from the scope of the journalists' privilege, it actually protects information if the crime under investigation is a leak of classified or grand jury information to a journalist. As a result, S. 987 will encourage leakers of classified or grand jury information to get away with clear violations of federal law, so long as the recipient of the information promises to keep the leaker's identity a secret.

The language in Section 3(b) is remarkable, as we have been unable to find another example in federal criminal law where Congress has specified that an individual can seek the protection of a court privilege even if that person has committed a crime in the process.[64] Presumably, then, S. 987 would be the first such court privilege that protects lawbreakers. An individual who leaks classified or grand jury information commits a grievous crime and does not deserve the protection afforded by a journalist's successful assertion of privilege. If leakers of classified or grand jury information are protected under S. 987, we believe that more leaks will result and it will be harder to prosecute them.

Grand jury secrecy is one of the cornerstones of our federal justice system. As the Supreme Court observed in *Pittsburgh Plate Glass Co.* v. *United States,*[65] the secrecy of grand jury proceedings: (1) prevents the accused from escaping before he is indicted or arrested or from tampering with witnesses; (2) prevents disclosure of derogatory information presented to the grand jury against an accused who has not been indicted; (3) encourages complainants and witnesses to come before the grand jury and speak freely without fear of reprisal; and (4) encourages the grand jurors to engage in uninhibited investigation and deliberation by barring disclosure of their votes and comments during the proceedings.

S. 987 protects journalists from having to disclose information to the government, even if the crime under investigation is the leak of grand jury information to a journalist. Specifically, Section 3 states that a journalist engaged in criminal conduct cannot take advantage of the privilege in this bill. However, subsection (b) provides: "This section shall not apply, and, subject to section 4 and 5, section 2 shall apply, if the alleged criminal conduct is the act of communicating the documents or information at issue."[66] Therefore, it would appear that Section 3(b) is intended to provide a privilege whenever the transmission of the information is a crime.

Many grand jury leaks to journalists are made with the goal of exposing an ongoing investigation, often with the intention of derailing it, or simply because the leaker craves attention. Reputations of many innocent Americans have been ruined by leaks of sensitive information that later turned out to be untrue, such as Richard Jewell, who was falsely alleged to be the Olympic Park

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[63] *Id.* at § 3(b).

[64] *See* Seth Leibsohn & Andrew C. McCarthy, *Press That Shield Back,* NATIONAL REVIEW, Oct. 18, 2007 ("With this privilege, the media, unlike the rest of us, can now skirt a core obligation of citizenship: the duty to provide testimony when they witness crimes. Indeed, even if they aid and abet certain crimes, our lawmakers would provide them cover.").

[65] 360 U.S. 395, 405 (1959).

[66] S. 987, *supra* note 33, at § 5.

bomber, and Steven Hatfill, who was falsely alleged to have committed the 2001 anthrax attacks.

Even the bill's lead sponsor has acknowledged the harm that can be caused by grand jury leaks. During the Committee's last hearing on this topic in 2006, Senator Schumer said: "When a person leaks secret grand jury information, that is against the law. Society has made a determination: You leak grand jury information, that is against the law. There is no countervailing issue here because we have made that—and it is routinely done by prosecutors to aid their cases. We have all seen it." He further stated: "Leaking the identity of a covert CIA agent is against the law. There is no justification for a reporter holding information. In cases like these, the harm done by the leak and the need to punish the leaker often far outweighs the need to keep a source confidential." We agree.

Since most grand jury leaks are made to journalists, this bill will effectively override Rule 6(e)(2) of the Federal Rules of Criminal Procedure, which states that matters occurring before a federal grand jury must be kept secret. The majority argues that that the rule of construction in Section 9 that "Nothing in this Act may be construed to . . . modify the requirements of . . . Federal laws or rules relating to grand jury secrecy," protects grand jury secrecy. However, what Section 9 gives with one hand, it takes away with the other, stating: "Except that this Act shall apply in any proceeding and in connection with any issue arising under . . . the Federal laws or rules relating to grand jury secrecy."

In other words, as Judge Mukasey and Mr. McConnell noted regarding identical language, this "does nothing to restrict the application of the bill from sheltering violations of longstanding and important protections for grand jury deliberations. In other words, this privilege can and will be used to protect leakers of grand jury information."[67]

The Committee rejected an amendment by Senator Sessions to exclude federal grand jury information from the privilege by a vote of 7 to 11. The majority argued that the amendment would apply in cases of leaks made in an attempt to expose grand jury corruption and therefore would protect prosecutorial misconduct or grand jury bribery. However, instead of leaking sensitive grand jury information to a reporter, a source has several alternatives to ensure integrity of a trial—a judge, the Department of Justice, defense attorneys.

Notably, Attorney General Holder's letter contains not one mention of this "act of communicating the documents or information" language, which explicitly creates a court privilege for those committing federal crimes.[68]

Section 4: Exception to prevent death, kidnapping, substantial bodily injury, sex offenses against minors, or incapacitation or destruction of critical infrastructure

Section 4 states that the general privilege in Section 2 does not apply to any protected information that is reasonably necessary to stop, prevent, or mitigate a specific case of death, kidnapping, sub-

[67] Letter from Michael B. Mukasey, Att'y Gen., U.S. Dep't of Justice & J.M. McConnell, Dir. of Nat'l Intelligence, *supra* note 26, at 5.

[68] Letter from Eric Holder, Att'y Gen., U.S. Dep't of Justice, *supra* note 32.

stantial bodily harm, child sex crime, or incapacitation or destruction of critical infrastructure.[69] This exception is entirely prospective, as it would protect sources in instances where law enforcement was investigating or solving violent acts or incapacitation or destruction of critical infrastructure that had *already* occurred.

This limitation makes Section 4's so-called exception largely worthless, as most of the investigations that will be implicated by this privilege will naturally concern incidents that have already occurred. As much as we would like to hope that government officials will be able to stop crimes from occurring in the first place, the reality is that most law enforcement work deals with bringing wrongdoers to justice after they have committed a crime, not before. Because of this reality, the exceptions in this bill will apply only to a small subset of cases—those where the attack or crime has not yet occurred. Here is but one real-life example from the Justice Department that illustrates the folly of this approach:

> In 2004, the notorious "BTK Strangler" emerged from years of silence to begin corresponding with media representatives and law enforcement entities in Wichita, Kansas. The killer calling himself "BTK" had terrorized Wichita with a string of violent homicides, but 13 years had elapsed since his last murder. In repeated correspondence, "BTK" described previously nonpublic details of the past murders and provided corroborating evidence such as photographs taken during the crimes. Yet authorities were not able to identify a suspect. "BTK" then sent a computer disk to a television station. The television station turned over the disk to police, and forensic experts were able to extract hidden information from the disk that tied it to a particular computer and user. This enabled law enforcement officers to arrest Dennis Rader, who eventually pled guilty to 10 murders.
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> If the television station had refused to disclose the computer disk, and [media shield legislation] had applied in the case, Rader might never have been apprehended and the families of the murder victims would still be awaiting justice. Because all of the information related to long-past killings, law enforcement would not be able to demonstrate that disclosure was necessary to prevent *imminent death.* Even if it is assumed that a responsible media outlet would voluntarily turn over information related to a serial killer, we cannot expect that criminals will always provide information to *responsible* media, or that a "mainstream" publication will always turn over information related to a less sensational crime.[70]

Excluding the investigation or solving of violent crimes from Section 4 is a serious oversight.

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[69] S. 987, *supra* note 33, at § 4.

[70] Letter from Brian A. Benczkowski, Principal Deputy Assistant Att'y Gen., U.S. Dep't of Justice, to Rep. Lamar Smith, Ranking Member., Comm. on the Judiciary, U.S. House (July 31, 2007) (emphasis in original) (Appendix XI).

Section 5: Exception to prevent terrorist activity or harm to the national security

Section 5 creates two classes of exceptions to Section 2's general privilege. In a criminal investigation or prosecution of the disclosure of "properly classified" information, Section 2 will not apply if a court finds by a preponderance of the evidence that the protected information sought would "materially assist" the federal government in "preventing or mitigating" an act of terrorism or "other acts that have caused or are reasonably likely to cause significant and articulable harm to national security."[71] In any other criminal investigation or prosecution for the leak of classified or otherwise privileged information, Section 2 will not apply if a court finds by a preponderance of the evidence that the information sought would "materially assist" the federal government in "preventing or mitigating," or "identifying the perpetrator" of an act of terrorism or "other acts that have caused or are reasonably likely to cause significant and articulable harm to national security."[72] In making this determination, a court is instructed to give "appropriate deference" to a specific factual showing by the head of any executive branch agency or department concerned.[73]

Section 5 also states that any other investigation or prosecution having to do with the disclosure of classified information is covered by Section 2's general privilege unless it prevents or mitigates a terrorist act or harm to national security. Additionally, Section 5 provides that the potential for additional unlawful disclosure of the protected information by the source, shall not, without an additional factual showing, be sufficient to establish that disclosure of the information would materially assist the federal government in "preventing or mitigating" an act of terrorism.

Although Section 5 provides a limited exception to the journalist privilege for acts of terrorism or "significant and articulable" harm to the national security, this exception is far too narrow. On its face, the classified information exception extends only to potential or future harms to national security—harms that still can be "prevented" or "mitigated." As noted by Judge Mukasey and Mr. McConnell with respect to similar predecessor legislation, this exception "expressly *would not* apply in cases where the Government is investigating serious harms (other than leaks of classified information) that have already occurred, including acts of sabotage and outright attacks on the United States. In such cases, the Government could seek to compel disclosure only as authorized under the more onerous provisions of Section 2."[74]

Even in other cases involving national security, the exception only permits investigation into past events to "identif[y] the perpetrator." It would not apply to investigations of attacks that have already occurred once the perpetrator has been identified. Investigation into the perpetrator's terrorist ties and finances, or to cull together evidence for a future criminal prosecution, would not be covered by the exception. Thus, for instance, Section 5 would not cover

[71] S. 987, *supra* note 33, at § 5(a)(2)(A).
[72] *Id.* at § 5(a)(2)(B).
[73] *Id.* at § 5(b).
[74] Letter from Michael B. Mukasey, Att'y Gen., U.S. Dep't of Justice, & J.M. McConnell, Dir. of Nat'l Intelligence, *supra* note 26, at 3.

investigation into the Fort Hood shooting or the attempted bombing of Northwest Flight 253 on Christmas Day 2009 or the attempted attack on Times Square in 2010, as the perpetrators of these terrorist acts have already been identified.

The inclusion of a materiality requirement and a "significant and articulable harm to national security" standard in Section 5 is also cause for concern. Essentially, the government must show, by a preponderance of the evidence, both that the information sought will be sufficiently significant to influence the outcome of the investigation and that the harm under investigation is itself significant. It is not coincidence that the standard for most investigative authorities—such as a subpoena—is relevance, with only the most intrusive requiring a heightened probable cause standard. This reasoned approach recognizes that in the early stages of an investigation, a higher standard is often incompatible with the facts that can or should be expected to be known about a specific offense when it first comes to light. But S. 987 turns this long-standing and well-tested investigative pyramid on its head by requiring the higher standard of preponderance of the evidence for the use of basic methods that, in turn, are supposed to provide the foundation for an investigation. The significance and scope of a national security threat is often not apparent at the early stages of an investigation and could be impossible to prove. S. 987 would require investigators and prosecutors to conduct a mini-trial to prove the nature of a threat, well before the full picture has become clear. Investigators are supposed to gather information to assess threats, not prove threats in court to get access to information about the same threat. As Judge Mukasey and Mr. McConnell noted with respect to a similar provision in similar predecessor legislation, this provision "transfers to the courts such core determinations as when investigative subpoenas are necessary and what constitutes harm to the national security. Not only is this shift made, but in many cases, the Government will need to make its showing at an early state of investigation. This is precisely backwards."[75]

Further, the "appropriate deference" that courts must show to executive branch agencies is an extremely vague standard and is likely to be interpreted in different ways by different courts. In the fall of 2009, in the USA PATRIOT Act reauthorization context, this Committee voted to reject a similar standard—including the same use of the word "appropriate"—in the context of the nondisclosure of national security letters.[76] S. 987 brings back this meaningless "appropriate deference" language, which the Committee rejected during that debate in favor of a more meaningful "substantial weight" standard.[77]

In addition, Section 5 requires the government to show in most cases involving leaked classified information that the information was "properly classified" and that the leak was "reasonably likely to cause significant and articulable harm to national security."[78] As Judge Mukasey and Mr. McConnell noted with respect to the

[75] Letter from Michael B. Mukasey, Att'y Gen., U.S. Dep't of Justice, & J.M. McConnell, Dir. of Nat'l Intelligence, *supra* note 11, at 5.

[76] S. 1692, 111th Cong. (as reported by S. Comm. on the Judiciary, Oct. 13, 2009).

[77] Executive Business Meeting, S. Comm. on the Judiciary, 111th Cong. (Oct. 1, 2009).

[78] S. 987, *supra* note 33 at § 5(a)(2)(A) (2013).

use of this phrase in similar predecessor legislation, this "raises the troubling prospect of every leak investigation becoming a mini-trial over the propriety of the Government's classification decision."[79] It will "invite litigants and courts to second-guess the classification decision [by intelligence and law enforcement officials] without the benefit of either experience or expertise in—to say nothing of legal responsibility for—matters of national security."[80] During the Committee's last hearing on this topic in 2006, then-Deputy Attorney General Paul McNulty testified regarding the problem with giving judges the authority to determine what is "properly classified":

> I think a significant problem . . . [is] the court also has to make a decision that this information has been properly classified. And that in itself is a big undertaking because it then puts the judge in the position of making—or exercising the kind of judgment that experts in the field have to exercise, which is to know that if this information were to get into the hands of the enemy or do harm to the United States and other aspects of classification.[81]

As one commentator has noted, "[t]he main effect of a shield law would thus be to the [sic] draw the judicial branch into the very heart of foreign-policy decisionmaking, requiring judges to evaluate matters that they lack either the expertise or the experience to assess. As a result, the confusion that now exists among the various federal circuit courts would not be cleared up; it would be deepened."[82]

Moreover, as noted by Judge Mukasey and Mr. McConnell,

> such second-guessing would involve the application of a novel standard that does not even track the standards that are used in national security classifications. Specifically, to persuade a judge to compel disclosure . . . the Government will have to show that the leak caused or will cause "significant and articulable harm" to the national security. This standard has no analogue in the intelligence community. Pursuant to Executive Order 12958, as amended, the Government classifies information at three basic levels: "Confidential," "Secret," and "Top Secret." By definition, those terms apply, respectively, to information the unauthorized disclosure of which reasonably could be expected to cause "damage" (Confidential), "serious damage" (Secret), and "exceptionally grave damage" (Top Secret) to national security. Thus, a leak of properly classified [information] *by definition* constitutes harm to the national security. Particularly with respect to "Confidential" information, however, the harm is arguably less severe than the Government would be required to demonstrate under Section 5. The bill could thus expose large amounts of prop-

[79] Letter from Michael B. Mukasey, Att'y Gen., U.S. Dep't of Justice, & J.M. McConnell, Dir. of Nat'l Intelligence, *supra* note 5, at 3.
[80] Letter from Michael B. Mukasey, Att'y Gen., U.S. Dep't of Justice, & J.M. McConnell, Dir. of Nat'l Intelligence, *supra* note 22, at 3.
[81] Testimony of Deputy Attorney Gen. Paul J. McNulty, *supra* note 7, at 8.
[82] Gabriel Schoenfeld, *Why Journalists Are Not Above the Law,* COMMENTARY MAGAZINE, February 2007.

> erly classified information to unauthorized disclosure while effectively blocking any investigation or prosecution of those who leak such information.

This is not only a major oversight, but also could effectively render null and void the existing classification system without establishing any safeguards in its place.

Finally, it is disconcerting that the fact that the source is likely to leak classified or other sensitive information again is not enough to remove a case from Section 2's general privilege. This means that information that the government cannot tie to a future act of terrorism, or harm to national security, would be covered under the privilege both in the present and in the future. The Committee rejected an amendment by Senator Sessions by a vote of 6 to 11 with Senator Feinstein voting "present,"[83] to exempt from S. 987 any cases concerning classified information. It also rejected by a vote of 7 to 11 an amendment by Senator Cornyn to exempt from S. 987 material support of terrorism cases.

Section 6: Compelled disclosure from communications service providers

Section 6 applies the protections from Sections 2 through 5 to records and other information related to a business transaction between a communications service provider and a journalist.[84] A court seeking disclosure must provide the journalist who is a party to the business transaction notice of the request and subpoena as well as an opportunity to be heard.[85] The notice provision may be delayed for not more than 45 days only if the court determines by clear and convincing evidence that notice would pose a "clear and substantial threat to the integrity of a criminal investigation, would risk grave harm to national security, or would present an imminent risk of death or serious bodily injury."[86] The delayed notification period is limited to one 45-day period and one renewal of the initial 45-day period, if the judge makes a new determination by clear and convincing evidence.[87] This section provides that a "clear and substantial threat to the integrity of a criminal investigation" exists if a judge finds by clear and convincing evidence that the target may learn of the investigation and destroy evidence if notice is provided.[88]

Section 6 also extends the protections of this bill to 18 U.S.C. § 2709, which authorizes the issuance of national security letters ("NSL") for subscriber information, toll billing records information, and electronic communication transactional records. The provisions of Sections 2 through 5 apply to NSL requests for information

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[83] In explaining her vote, Senator Feinstein stated: "[C]lassified information may seem harmless to one person where it may unveil the possibility of a source, the identification of a source, or a method, and if it is classified, it is classified, and there is a prison sentence of up to 10 years. The problem is it is hard to investigate and convict this. So I do not want to make that more difficult. . . . I want to talk to Director [of National Intelligence] Clapper about his recommendation. . . . But there is every reason to believe every one of us really ought to be concerned about leaks." Executive Business Meeting, S. Comm. on the Judiciary, 113th Cong. (Sept. 12, 2013), available at: http://www.judiciary.senate.gov/hearings/hearing.cfm?id=6225bf1b82d2592b6b470bc0d4b52acb (last visited Sept. 30, 2013).

[84] S. 987, *supra* note 33, at § 6(a).

[85] *Id.* at § 6(b).

[86] *Id.* at § 6(c)(1).

[87] *Id.* at § 6(c)(2).

[88] *Id.* at § 6(c)(3).

under § 2709, except that in criminal investigations, the court will have to determine that there are reasonable grounds to believe that a crime has occurred or that the DOJ complied with its regulations in Section 50.10 of title 28, Code of Federal Regulations ("Policy on Issuing Subpoenas to Members of the News Media"), which include the requirement that the government exhausted all reasonable alternative sources. However, the court would still have to determine that: (1) there are reasonable grounds to believe that the information sought is *essential* to the investigation; and (2) the journalist failed to establish by clear and convincing evidence that the disclosure of information identifying his or her source or the information obtained from that source would be contrary to the public interest.[89]

Unless a journalist is given notice and an opportunity to be heard, this section prohibits a judge from compelling: (1) a covered service provider to comply with an NSL or other legal process related to a journalist's account with such service provider, or (2) a journalist to testify or disclose a document. Although subsection (c) allows the government to delay this hearing for up to two 45-day periods, the covered service provider cannot provide the requested documents until it receives a court order or the consent of the journalist.

Section 6 again will force the government to wage a mini-trial to meet its burden, not only to overcome the general privilege set forth in Section 2, but even to delay notice by proving by clear and convincing evidence that notice "would pose a clear and substantial threat to the integrity of a criminal investigation, would risk grave harm to national security, or would present an imminent risk of death or serious bodily injury."[90]

Under current law, notice of a subpoena in general may be delayed for indefinitely renewable 90-day periods. It is unclear why delay in this context should be limited to only one 45-day renewal period. This limitation presents a significant administrative burden on the government, as the information obtained in the first 45 days of an investigation may not produce sufficient evidence to show a "clear and substantial threat" to the integrity of the investigation exists. This could result in federal investigators delaying subpoenaing records in time-sensitive investigations to prevent the target from finding out about the investigation. Additionally, investigations into terrorist recruiting and financing can take years to unravel. Such cases likely involve subpoenaing bank and telephone records. If the government can only delay such notification to covered journalists for a maximum of 90 days, it could easily end or expose the entire investigation. For instance, in May of this year, two Somali men, Omar Mohamed and Kamal Hassan, were convicted of recruiting individuals in Minnesota for the designated terrorist organization al-Shabab. The FBI's investigation lasted four years, which resulted in 18 individuals being charged with material support to al-Shabab. One has to wonder whether the same outcome would have been reached had this bill been law. Moreover, if this bill were to become law, it is not hard to imagine a new ef-

[89] *Id.* at § 6(a)(2).
[90] *Id.* at § 6(c)(1).

fort to require unyielding notification of all subpoenas, regardless of the recipient or type of investigation.

Finally, the definition of "clear and substantial threat to the integrity of a criminal investigation" leaves out several categorical situations that are found under current subpoena authority under Title 18 of the United States Code, including flight, tampering with evidence and intimidation of a potential witness. Limiting the delayed notification to only cases of "destruction of evidence" could seriously hamper law enforcement's ability to delay notification, even when the facts of a particular investigation demand it.

Section 7: Sources and work product produced without promise or agreement of confidentiality

Section 7 states that nothing in S. 987 "shall supersede, dilute, or preclude any law or court decision compelling or not compelling disclosure" of "information identifying a source who provided information without a promise or agreement of confidentiality made by the covered journalist as part of engaging in journalism" or "records, other information, or contents of a communication obtained without a promise or agreement that such records, other information, or contents of a communication would be confidential."[91] Thus, S. 987 appears to protect only confidential communications.

Although Section 7 is presumably intended to limit S. 987 to confidential communications between a source and a journalist, it does not put the burden on the journalist to demonstrate that he or she is acting under a promise of confidentiality. Rather, Section 2 appears to put the government to its high burden without requiring the journalist to demonstrate any such promise or agreement, making the limitation of "protected information" to confidential communications entirely toothless. As the purpose of the privilege set forth in S. 987 is to permit a journalist to protect a confidential source, there is no need for this privilege to exist in instances where the source has waived confidentiality.

Section 8: Procedures for review and appeal

Pursuant to Section 8, upon a showing of good cause, a federal court can receive and consider a submission from the parties *in camera,* under seal, or, "if the court determines it is necessary, *ex parte.*"[92] A court can find the covered journalist in civil or criminal contempt if he or she fails to comply with an order of a federal court compelling disclosure of protected information. "To the extent practicable," a court must make its determination within 30 days after receiving such a motion.[93] All appeals under this section must be "expedite[d] to the greatest extent possible."[94]

Section 8, however, does not prevent a journalist from defying a contempt order, even after a federal court concludes that the government has met the extremely high bar for compelling disclosure. Journalists can continue to invoke the privilege even after the source to which they promised confidentiality has released the journalist from the agreement. In short, S. 987 would impose signifi-

[91] *Id.* at § 7.
[92] *Id.* at § 8(a).
[93] *Id.* at § 8(c).
[94] *Id.* at § 8(d).

cant burdens upon the government while leaving "covered journalists" free to flout the very law that protects them. This is inequitable. If a journalist is going to seek protection under a shield statute, he or she should have to comply with the statute in its entirety: if the court concludes that the government has met its high burden, the information should be turned over.

Also, Section 8 states that "upon a showing of good cause, [a] judge of the United States *may* receive and consider submissions from the parties in camera, under seal, and if the court determines it is necessary, ex parte."[95] It is not sufficient to give unfettered discretion to the court to air sensitive and classified information in public. The 2008 views letter from Judge Mukasey and Mr. McConnell stated that leaving this decision to the court's discretion will require the government to "almost certainly have to reveal additional sensitive and classified information."[96] The lack of a mandatory language (*e.g.,* "upon a showing of good cause . . . [a] judge of the United States *shall* receive and consider submissions from the parties") could leave the government in the untenable situation of having to either expose sensitive or classified information in open court, or drop the case. In other words, even if the government has shown good cause, the court can still tell the government it has to litigate in open court. Supporters of S. 987 have not justified the need for a judge to be able to force the government to expose sensitive information in open court, *even where the government has shown good cause for proceedings to be secret*.

The majority views argue that under the Classified Information Protection Act ("CIPA"), federal district courts have the ability to make some accommodation of the government's interest in non-disclosure. But CIPA only applies to criminal matters,[97] and therefore would not apply in a case involving the subpoena of a journalist, which is a civil proceeding. In civil proceedings, the government must assert the state secrets privilege to protect against the disclosure of classified information. Regardless, CIPA and the state secrets privilege apply to cases involving classified information, but many cases involve sensitive information that is not necessarily classified, *e.g.*, white collar criminal investigations that take years to develop and could be undone if the nature of the investigation is released prematurely; cases involving gangs and organized crime where, if sensitive information were prematurely released, could lead to the intimidation of or physical harm to witnesses.

Section 9: Rule of construction

Section 9 provides that nothing in S. 987 may be construed to preempt any law or claim to defamation, slander or libel; modify the laws regarding grand jury secrecy—"except that this Act shall apply to in any proceeding and in connection with any issue arising under that section or the Federal laws or rules relating to grand jury secrecy"; create new obligations or modifications with respect to Foreign Intelligence Surveillance Act ("FISA"), or preclude vol-

[95] *Id.* at § 8(a) (emphasis added).
[96] Letter from Michael B. Mukasey, Att'y Gen., U.S. Dep't of Justice & J.M. McConnell, Dir. of Nat'l Intelligence, *supra* note 26, at 7.
[97] *See* 18 U.S.C. app. 3, §§ 1, 4.

untary disclosure to a federal entity in a situation that is not governed by S. 987.[98]

This section is mere window-dressing, as it in no way modifies Section 3's proviso that where "the alleged criminal or tortious conduct is the act of communicating the documents or information at issue,"[99] the privilege set forth in Section 2 remains available to the journalist. If there was any doubt on this point, the "Rule of Construction" makes clear that "this Act shall apply in any proceeding and in connection with any issue arising under . . . rules relating to grand jury secrecy."[100]

Further, similar language was criticized by Judge Mukasey and Mr. McConnell in their 2008 views letter:

> First, the provision leaves out key, non-FISA tools that are essential to the protection of the national security. The wire-tapping provisions of Title III [and] pen-register trap-and-trace authority . . . are as important, and in some cases more important, to the Government's ability to investigate those who have caused or would cause harm to our national security (to say nothing of other serious crimes unrelated to the national security). Yet this bill remains silent as to them, leaving one with the distinct impression that this legislation can and will—and indeed is intended to—interfere with the Government's use of those tools in cases where it seeks information provided to a journalist by a confidential source. *Prior to September 11, 2001, it was precisely this type of ambiguity between application of tools available to intelligence and law enforcement that created "the wall"—a series of barriers to information sharing that had serious consequences for our counterterrorism efforts.*
>
> Second, it is unclear that the additional language[101] will in fact protect the Government's ability to use FISA effectively. The goal, we are told, is to ensure that the Government can continue to gather and disseminate intelligence and surveillance information pursuant to a FISA court order. Why not then simply say, "The provisions of this Act shall not apply to the use of the authorities provided for in the Foreign Intelligence Surveillance Act or to any information acquired thereunder"?[102]

Notably, Attorney General Holder's letter does not address how this language, which was deemed woefully inadequate by his predecessor, is now acceptable.[103]

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[98] S. 987, *supra* note 33, at § 9.

[99] *Id.* at § 3(b).

[100] *Id.* at 9(2).

[101] The "additional language" referred to by Judge Mukasey and Mr. McConnell, which was included in similar predecessor legislation in an attempt to address concerns expressed by them and others in the intelligence and law enforcement communities, appears in Section 9 of S. 987 verbatim: "Nothing in this Act may be construed to . . . create new obligations, or affect or modify the authorities or obligations of a Federal entity with respect to the acquisition or dissemination of information pursuant to the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.)."

[102] Letter from Michael B. Mukasey, Att'y Gen., U.S. Dep't of Justice & J.M. McConnell, Dir. of Nat'l Intelligence, *supra* note 26, at 4–5 (emphasis added).

[103] Letter from Eric Holder, Att'y Gen., U.S. Dep't of Justice, *supra* note 32.

Section 11: Definitions

As discussed previously, the definitions of "covered journalist" covers an astonishingly broad class of persons. Although the Committee accepted an amendment introduced by Senators Feinstein and Durbin by a vote of 13 to 5, which purports to narrow that definition, significant concerns remain.

For example, although S. 987 purports to carve out agents of foreign powers and designated terrorist organizations from the definition of "covered journalist," many terrorist media are neither "designated terrorist organizations" nor covered entities under the bill. Thus, all individuals and entities who "gather" or "publish" information about "matters of public interest" but who are not technically designated terrorist organizations, foreign powers, or agents of a foreign power will be entitled to S. 987's protections—no matter how closely linked they may be to terrorists or other criminals.

However, in his 2008 views letter, then-Secretary of Defense Gates warned about a nearly identical exception in similar predecessor legislation: "This would have the unintended consequence of encouraging unauthorized disclosures and increasing our nation's vulnerability to adversaries' counterintelligence efforts to recruit covered persons."[104] Similarly, Judge Mukasey and Mr. McConnell warned that the prohibition on a "designated terrorist organization" from being covered is insufficient and that "individuals seeking to avail themselves of this privilege will be able to do so as long as they can stay one step ahead of the agencies responsible for designating terrorist organizations."[105]

Also, the definition of protected information makes multiple references to the term "journalism," which is not defined in S. 987.

Finally, the definition of "covered journalist" raises serious First Amendment concerns, as discussed in the Additional Views submitted herein by Senators Cornyn, Sessions, Lee, and Cruz.

CONCLUSION

S. 987, the "Free Flow of Information Act of 2013," would dramatically shift the process by which law enforcement goes about compelling disclosure of information from journalists. By establishing a nearly impenetrable privilege at the federal level, it would seriously impede criminal investigations and prosecutions, including those dealing with cases of terrorism and national security.

There is no question that a free press is vital to our democracy. Nevertheless, we must remember that the Constitution also speaks of securing the "blessings of liberty to ourselves and our posterity," insuring "domestic tranquility," and providing "for the common defense." In the face of the most devastating leaks of classified information in our nation's history and a continued struggle to protect ourselves from another terrorist attack, we should not respond to overreaches by the Obama administration with an overbroad piece of legislation that does not even address those transgressions—as the bill's sponsors concede—at the expense of the rule of law and the security of the American people.

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[104] Letter from Robert Gates, Sec'y of Defense, U.S. Dep't of Defense, *supra* note 28, at 1.

[105] Letter from Michael B. Mukasey, Att'y Gen., U.S. Dep't of Justice & J.M. McConnell, Dir. of Nat'l Intelligence, *supra* note 26, at 6.

In their 2008 letter, the heads of the CIA, FBI, NSA, Defense Intelligence Agency, Department of Homeland Security, and the Departments of Defense, State, and Treasury, among others, relayed serious concerns about similar predecessor legislation, many of which are relevant to this bill:

> [T]he bill will undermine our ability to protect intelligence sources and methods and could seriously impede national security investigations . . . The high burden placed on the Government . . . will make it difficult, if not impossible, to investigate harms to the national security and only encourage others to illegally disclose the Nation's sensitive secrets. These problems, in turn, will impair our ability to collect vital foreign intelligence, including through critical relationships with foreign governments which are grounded in confidence in our ability to protect information from public disclosure.
>
> Safeguarding classified information in a free and open society already is a challenge for the intelligence community. We ask that Congress not make that challenge even more daunting.

Now more than ever, in the face of historic breaches of our nation's security, Congress should heed this warning. Before proceeding with this or any similar legislation, we must first determine how it will affect the ability of the United States to keep critical classified and sensitive information from our enemies, and to identify and hold accountable those who willfully jeopardize the security of this nation by leaking classified information.

JEFF SESSIONS.
JOHN CORNYN.

ADDITIONAL MINORITY VIEWS FROM SENATORS CORNYN, SESSIONS, LEE, AND CRUZ

On December 15, 1791, the United States of America ratified the Bill of Rights—the first ten amendments to the U.S. Constitution. The first among them states: "Congress shall make no law . . . abridging the freedom . . . of the press[.]" United States Constitution, amend. I.

The freedom of the press does not discriminate amongst groups or individuals—it applies to all Americans. As the Supreme Court has long recognized, it was not intended to be limited to an organized industry or professional journalistic elite. *See Branzburg v. Hayes*, 408 U.S. 665, 704 (1972) (the "liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods. Freedom of the press is a fundamental personal right[.]"); *Lovell v. Griffin*, 303 U.S. 444, 452 (1938) ("The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.").

The Founders recognized that selectively extending the freedom of the press would require the government to decide who was a journalist worthy of protection and who was not, a form of licensure that was no freedom at all. As Justice White observed in Branzburg, administering a privilege for reporters necessitates defining "those categories of newsmen who qualified for the privilege." 408 U.S. at 704 That inevitably does violence to "the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods." *Id*.

The First Amendment was adopted to prevent—not further—the federal government licensing of media. *See Lovell*, 303 U.S. at 451 (striking an ordinance "that . . . strikes at the very foundation of the freedom of the press by subjecting it to license and censorship. The struggle for the freedom of the press was primarily directed against the power of the licensor.").

But federal government licensing is exactly what the Free Flow of Information Act would create. The bill identifies favored forms of media—"legitimate" press—by granting them a special privilege. That selective grant of privilege is inimical to the First Amendment, which promises all citizens the "freedom of the press." *See Branzburg*, 408 U.S. at 704 ("Freedom of the press is a fundamental *personal* right[.]") (emphasis added). It also threatens the viability of any other form of press. The specially privileged press will gain easier access to news. That will tip the scales against its

competitors and make it beholden to the government for that competitive advantage. A law enacted to protect the press from the state will, in fact, make that press dependent upon the federal government—anything but free.

Proponents of this bill suggest that, because the Constitution does not provide a reporter's privilege, Congress's provision of a limited privilege cannot raise any constitutional concerns. Those proponents misunderstand—and thus run afoul of—the First Amendment. The First Amendment was adopted to prevent press licensure. While it does not create a "reporter's privilege" on its own, it abhors the selective grant of privilege to one medium over another. The American Revolution was stoked by renegade pamphleteers and town criers who used unlicensed presses to overthrow tyranny. Today, "any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer." *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997). If today's town crier or pamphleteer must meet a test set by the federal government to avail themselves of liberty, we have gone less far from tyranny than any of us want to admit.

This bill runs afoul of the First Amendment to the United States Constitution and amounts to *de facto* licensing. It would weaken the newly-illegitimate press, render the specially privileged press supplicant to the federal government and ultimately undermine liberty.

This legislation also raises a number of serious national security concerns, as discussed in the minority views authored by Senator Sessions.

For these reasons, we oppose this bill.

JOHN CORNYN.
JEFF SESSIONS.
MICHAEL S. LEE.
TED CRUZ.

Appendix I

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

September 26, 2007

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
U.S. Senate
Washington, D.C. 20515

Dear Chairman Leahy:

This letter provides the views of the Department of Justice on S. 2035, the "Free Flow of Information Act of 2007" ("FFIA"). The FFIA would provide a "journalist's privilege" to an extremely broad class of "covered person[s]" protecting against not just the disclosure of confidential source information but also testimony or any document possessed by such covered persons relating to protected information. The Department strongly opposes this legislation because it would impose significant limitations upon—and in some cases would completely eviscerate—the ability of federal prosecutors to investigate and prosecute serious crimes, while creating significant national security risks.

The FFIA is the latest of several different proposed "media shield" bills to come before the Congress in recent years, and the Department has made its views on each known both through views letters and in public testimony before congressional committees in both the House of Representatives and the Senate.[1] Many of the objections the Department raised in earlier views letters and in testimony apply to the current bill, and so we commend those earlier

[1] *See, e.g.*, Department of Justice Letter to Rep. Lamar Smith dated September 11, 2007 on H.R. 2102; Department of Justice Letter to Rep. Lamar Smith dated July 31, 2007, on H.R. 2102; Department of Justice Letter to Rep. Lamar Smith dated July 20, 2007, on H.R. 2102; Testimony of Assistant Attorney General Rachel L. Brand, Hearing on "The Free Flow of Information Act of 2007," House Judiciary Comm. (June 14, 2007); Testimony of Deputy Attorney General Paul J. McNulty, Hearing on "Reporters' Privilege Legislation: Preserving Effective Federal Law Enforcement," Senate Judiciary Comm. (Sept. 20, 2006); Department of Justice Letter to Sen. Specter dated June 20, 2006, on S. 2831; Testimony of Principal Deputy Assistant Attorney General Matthew W. Friedrich, Hearing on "Examining the Department of Justice's Investigation of Journalists Who Publish Classified Information: Lessons from the Jack Anderson Case," Senate Judiciary Comm. (June 6, 2006); Statement of United States Attorney for the Southern District of Texas Chuck Rosenberg, Hearing on "S. 1419, the 'Free Flow of Information Act of 2005,'" Senate Judiciary Committee (October 19, 2005); Statement of Deputy Attorney General James B. Comey, Hearing on "Reporters' Privilege Legislation: Issues and Implications of S. 340 and H.R. 581, the Free Flow of Information Act of 2005," Senate Judiciary Comm. (July 20, 2005).

statements of the Department's views to your attention as a supplement to this letter. In this letter, the Department wishes to focus on the following six objections, set out more fully below:

1. The FFIA's definition of a journalist appears to provide protections to a very broad class of individuals and would raise significant obstacles to law enforcement.

2. The FFIA would make it extremely difficult to enforce certain Federal criminal laws, particularly those pertaining to the unauthorized disclosure of classified information, and could seriously impede other national security investigations and prosecutions, including terrorism prosecutions;

3. The FFIA would impinge on a criminal defendant's constitutional right under the Sixth Amendment to subpoena witnesses on his behalf;

4. The FFIA unconstitutionally transfers core Executive branch powers and decision-making to the Judiciary;

5. The FFIA also threatens to limit other judicial powers.

6. The FFIA's provisions for protecting information in the possession of "communications services providers" fail to define the types of "business transactions" to which they apply and could dangerously limit the ability of courts to delay notice of a request.

For all of these reasons and those that follow, the Department strongly opposes The FFIA.

Introduction

As an initial matter, the Department of Justice has long recognized that the media plays a critical role in our society, a role that the Founding Fathers protected in the First Amendment. In recognition of the importance of the news media to our Nation, the Department has, for over 35 years, provided guidance to Federal prosecutors that strictly limits the circumstances in which they may issue subpoenas to members of the press. *See* 28 C.F.R. § 50.10. The exhaustive and rigorous nature of this policy is no accident; it is designed to deter prosecutors from even requesting approval for subpoenas that do not meet the standards set forth in the Department's guidelines. As a result, prosecutors seek to subpoena journalists and media organizations only when it is necessary to obtain important, material evidence that cannot reasonably be obtained through other means.

The effectiveness of this policy, and the seriousness with which it is treated within the Department, contradict the allegations some have made about the Justice Department's alleged

disregard for First Amendment principles. Since 1991, the Department has approved the issuance of subpoenas to reporters seeking confidential source information in only 19 cases.[2] The authorizations granted for subpoenas of source information have been linked closely to significant criminal matters that directly affect the public's safety and welfare.

Moreover, while critics argue that there has been a marked increase in the number of confidential-source subpoenas approved by the Department in recent years, such claims cannot withstand scrutiny, as the following chart makes clear:

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[2] In only two of those nineteen matters was the Government seeking to question a reporter under oath to reveal the identity of a confidential source. In one of the two matters, the media member was willing to identify his source in response to the subpoena. In the other matter, the Department withdrew the media subpoenas after it had obtained other evidence concerning the source of the information and that source agreed to plead guilty. Of the nineteen source-related matters since 1991, only four have been approved since 2001. While the nineteen source-related matters referenced above do not include any media subpoenas issued in matters from which the Attorney General was recused, the only recusal matter in which subpoenas were issued involved facts where all four federal judges to review the subpoena—the Chief Judge of the District Court and the three judge panel of the appeals court—found that the facts of the case warranted enforcement of the subpoena under any version of a qualified privilege, no matter how stringent. *See In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1150 (D.C. Cir. 2006). In that same case, it is important to note, the Special Prosecutor adhered to—and was found by the Court to have complied with—the Department's guidelines as set forth at 28 C.F.R. § 50.10. *See In re Special Counsel Investigation*, 332 F. Supp.2d 26, 32 (D.D.C. 2004) ("Assuming, *arguendo*, that the DOJ Guidelines [for the issuance of subpoenas to the news media] did vest a right in the movants in these cases, this court holds that the DOJ guidelines are fully satisfied by the facts of this case as presented to the court in the *ex parte* affidavit of Patrick Fitzgerald.")

Year	Number of Cases in which Source-Related Subpoenas Were Approved
1992	3
1993	2
1994	0
1995	3
1996	1
1997	3
1998	2
1999	1
2000	0
2001	2
2002	0
2003	0
2004	1
2005	0
2006	1

These numbers demonstrate a *decrease* in the number of cases in which the Department has approved the issuance of subpoenas seeking confidential source information in recent years: of the 19 source-related matters since 1991, only four have been approved since 2001.

In light of this record of restraint, the Department believes that this legislation would work a dramatic shift in the law with no evidence that such a change is warranted. Supporters of this legislation contend that, in the absence of a reporter's privilege, sources and journalists will be chilled, newsgathering will be curtailed, and the public will suffer as a result. Such arguments are not new. Thirty-five years ago, when the Supreme Court considered the issue of a reporter's privilege in the landmark case of *Branzburg v. Hayes*, 408 U.S. 665 (1972), litigants and numerous *amicus* briefs argued that, in the absence of such a privilege, the free flow of news would be diminished. The Court considered and rejected such arguments, finding that "[e]stimates of the inhibiting effect of . . . subpoenas on the willingness of informants to make disclosures to newsmen are widely divergent and to a great extent speculative." *Id.* at 693-94. Given the profusion of information that has become available to the public in the 35 years since *Branzburg*—all of which has come without the intervention of any Federal media shield law—it is difficult to dispute the Court's conclusion. Information now flows far more freely and widely—and on more topics of interest to the public—than at any time in our Nation's history. Allegations made by supporters of this legislation that this free flow of information has been stifled or will diminish in the absence of a statutory privilege are as groundless today as they were 35 years ago. Media shield legislation, as then-Deputy Attorney General Paul McNulty

stated in testimony before the Senate Judiciary Committee in September of last year, is "a solution in search of a problem."

The FFIA's Definition of "Covered Person" Is Extremely Broad

The latest version of the Senate bill would extend a "journalist's" privilege to an unacceptably broad class of "covered person[s]." As the Department has noted with respect to previous media shield bills, the privilege provided by this legislation goes far beyond the limits of any constitutional rights. In *Branzburg v. Hayes*, 408 U.S. 665 (1972), the Supreme Court held that requiring journalists to appear and testify before state or federal grand juries does *not* abridge the freedom of speech and press guaranteed by the First Amendment; and that a journalist's agreement to conceal criminal conduct of his news sources, or evidence thereof, does not give rise to any constitutional testimonial privilege with respect thereto. Under section 8(2) of the bill, a "Covered person" means "a person who is engaged in journalism and includes a supervisor, employer, parent, subsidiary, or affiliate of such person." Section 8(5) of the bill then broadly defines "journalism" to mean "the regular gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing of news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public."[3]

Under this expansive definition, anyone who publicly disseminates any news or information that he has regularly written or gathered on any matter of public interest constitutes a "covered person." Nationality, affiliation, occupation, and profession are irrelevant to this sweeping, worldwide privilege.

For example, a terrorist operative who videotaped messages from Osama bin Laden for dissemination on the internet or on Al Jazeera would clearly be a "covered person" entitled to invoke the bill's privilege, because he would be engaged in recording news or information that concerns international events for dissemination to the public. Similarly, the media arms of designated terrorist organizations, such as *Al-Manar* (the media outlet for Hezbollah) would clearly fall within the class of "covered persons" protected by this legislation. It is no exaggeration to say that this open-ended definition extends to many millions of persons in the United States and abroad—including those who openly wish to do us harm.

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[3] While Section 7 of the FFIA would appear to provide an exception to the privilege for "information identifying a source who provided information without a promise or agreement of confidentiality," the language of that section may be too vague and equivocal to prove effective. Section 7, for example, makes no provision for an exception to the privilege in cases where the source has freed the journalist from an agreement to maintain the source's anonymity. Nor does Section 7 require that the agreement between the journalist and his source be explicit. In the absence of such a requirement, the exception provided by Section 7 is illusory.

We emphasize that the definition of "covered person" contains no exception whatsoever for hostile foreign media or individuals that are either formally or informally associated with or employed by—or in some cases (e.g., *Al Manar*) actually constitute—foreign terrorist organizations or states. Nor do the provisions of Section 5 of the bill, which purport to provide an exception for terrorist activity, effectively address this grave concern. Rather than firmly and clearly excluding such hostile entities from the bill's privilege altogether, section 5 merely provides a narrow and grudging exception from Section 2's privilege that the Government must bear the burden of proving the specific factual elements of "terrorism" or "significant harm to national security" by a preponderance of the evidence to the satisfaction of a federal judge. In addition, for the "significant harm to national security" prong, Section 5 requires the Government to prevail on the entirely subjective and arbitrary question of whether the harm in question outweighs the "public interest in newsgathering." These provisions are entirely inadequate to address the profound national security risks posed by extending the bill's sweeping privilege to an unlimited and unknowable range of terrorist-related media entities that constitute "covered person[s]" under the bill.

Moreover, the bill's definition of "covered person" could also include social networking sites like MySpace.com, which are engaged in the business of "publishing information that concerns local, national, or international events or other matters of public interest for dissemination to the public." Providing such sites with a means to resist subpoenas from law enforcement will impede the investigation of serious crimes. For example, many violent street gangs have taken to using social networking websites such as MySpace to post information about their activities. If a site user were to post photographs showing gang members celebrating a major drug deal, the FFIA could make it difficult for police to obtain information about the completed crime. The user posting the pictures might qualify as a "covered person" by engaging in reporting related to local gangs. In addition, a plain reading of the statute suggests that the social networking site itself would be considered a "covered person" by publishing that reporting.[4] Under either interpretation, law enforcement could face serious hurdles in pursuing the lead, including the possibility that gang members will be alerted to the existence of an ongoing investigation.

In an age where literally millions of persons engage in journalism via weblogs and other internet formats, providing a reasonable and workable definition of who is entitled to invoke a "reporter's privilege" is a very difficult, if not intractable problem. If the definition is broadly worded, as in the current legislation, it will inevitably sweep within its protection hostile foreign entities as well as others whose ability to invoke the privilege would frustrate law enforcement. If, however, the definition is more narrowly tailored, it would be open to almost-certain challenge on First Amendment grounds from individuals or entities denied the privilege.

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[4] As discussed below, MySpace and sites or services like it (including those that "host" terrorist or terrorist-supporting websites) would also qualify as "communications service providers" under Section 8(1) of the bill, thereby entitling them to the protections outlined in Section 6 of the bill.

However the legislation ultimately defines a "covered person," the definition itself will almost certainly be the subject of litigation, further ensuring that important criminal investigations and prosecutions will be delayed. As we stated in our June 20, 2006 views letter, "We question whether a definition that reconciles these conflicting considerations is possible as a practical matter."

The FFIA Would Make It Virtually Impossible To Prosecute "Leak" Cases And Difficult To Prosecute Other Types Of Cases In Certain Circumstances, Including Terrorism Cases

The broad scope of the proposed bill's definition of "covered person" is all the more disturbing in light of the rigorous test that the FFIA requires the government to meet before issuing a subpoena to a covered person. The bill would require the government to demonstrate "by a preponderance of the evidence" that it has (1) "exhausted all reasonable alternative sources (other than the covered person) of the testimony or document"; (2) that the information sought is "essential" to the investigation or prosecution; and (3) "that nondisclosure of the information would be contrary to the public interest."[5] The FFIA imposes an additional burden in cases involving the unauthorized disclosure of classified material, requiring the government to demonstrate—again, "by a preponderance of the evidence"—that the individual who disclosed the classified information had "authorized access to such information" and that the "unauthorized disclosure has caused significant, clear, and articulable harm to the national security."

It is important to note at the outset how dramatic and fundamental a change this legislation would work on existing law and procedure governing the issuance of a subpoena to a member of the news media. Under existing law—specifically, Federal Rule of Criminal Procedure 17—the recipient of a subpoena can move to quash the subpoena, but in order to prevail must make a showing that the subpoena in question is "unreasonable and oppressive." Fed. R. Crim. P. 17(c)(2). That is to say, the burden is on the party seeking to quash the subpoena to demonstrate its unreasonableness or oppressiveness. The proposed bill, however, shifts the burden to the Government, while simultaneously increasing the amount of proof the Government must introduce before a subpoena can issue to a member of the media. This is a radical change: the allocation of the burden, as a legal matter, can have a tremendous effect on the outcome of a proceeding, for it requires the party carrying the burden not only to produce evidence, but to produce it in sufficient quantity and quality in order to carry the day.

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[5] Section 2(a)(2)(A) requires that much of evidence the government uses to meet its burden to compel disclosure in a criminal investigation or prosecution must come from a source "other than a covered person." It is not clear what value this restriction has. Where law enforcement does succeed in meeting the requirements, disclosed documents may indicate that additional documents or information in the possession of the same covered person would be critical to the investigation. Yet this section prohibits law enforcement from using documents from the first disclosure to seek further disclosures. Such a restriction makes no sense and is unnecessary.

The Honorable Patrick Leahy

And the burden here is significant: Requiring the government to demonstrate by a preponderance of the evidence that there are reasonable grounds to believe that a crime has been committed, that the information it seeks from a covered person is essential to the investigation or prosecution of that crime, and that nondisclosure of the information would be contrary to the public interest will in essence require prosecutors to wage a "trial before the investigation" in order to obtain important evidence of serious criminal activity.

The burden this bill would impose on Federal law enforcement in investigations or prosecutions of certain leaks of classified information is especially troubling. In such cases, Section 2(a)(2)(A)(iii) of the proposed bill would apply, and that section saddles the Government with the obligation of going into a federal court and producing evidence of a quantity sufficient to prove "significant, clear, and articulable harm" to our nation's security before issuing a subpoena to a covered person that seeks protected information. In so doing, the bill effectively ratchets up the "preponderance of the evidence" standard articulated in Section 2(a). This creates a perverse result: The bill would actually require the government to make a more substantial showing in certain cases involving harm to the national security than is required in cases involving less serious crimes before issuing a subpoena to a member of the news media.

The heightened requirements of Section 2(a)(2)(A)(iii) apply only in cases where the individual who leaked the classified information had "authorized access to such information." But this is impossible: How can the government or a court know that an individual had authorized access to the classified information in question without knowing who it is that provided the journalist with the classified information in the first place?

The practical impact on leak investigations, moreover, could be enormous. An example illustrates the point. Consider a journalist who publishes a detailed story about covert classified efforts to track the movements of international terrorists. The story also contends—wrongly, as it turns out—that the covert program has monitored some individuals who were mistakenly identified as terrorists. The journalist attributes the information to a confidential source and describes the source as a government insider who intends to resign and relocate outside the United States, taking with him documents detailing the program's operation in order to write a tell-all book that will reveal details about this and numerous other classified government programs.

Despite their best efforts, the Department of Justice and the intelligence community are unable to identity the confidential source through independent means, and the journalist refuses to cooperate voluntarily with the Department. To prevent further harm to national security, the Attorney General—acting in accordance with the Department's longstanding policy with respect to media subpoenas—approves a written request for a narrowly-tailored subpoena that seeks only the identity of the journalist's source. The journalist then challenges the subpoena in court.

Under current law, to prevail on a motion to quash, the journalist would be required to prove the subpoena request was unreasonable and oppressive. Given the circumstances, it is

unlikely the journalist could make such a showing and thus the Department would learn the leaker's identity and apprehend him in time to prevent additional harm to our national security. Under the proposed bill, however, the Department would first be required to provide affirmative proof that the leak "caused significant, clear, and articulable harm" to our national security. While it is possible that such a showing could be made in this scenario, it is equally likely that a court could find that the harm was not yet realized or capable of specification. That finding would be enough to defeat the subpoena, even though the journalist would have done nothing other than file the motion to quash, thereby shifting the burden of proof to the Government. Moreover, even if a court credited the Department's showing of harm, and even if the Government demonstrated a significant harm to national security, the court nevertheless could find that public's interest in learning about the classified program outweighed the Government's interests—a finding that may be grounded on entirely subjective value judgments that the Government would be unable to refute by objective evidence. That finding would defeat the subpoena.

Even if we assume the Government could overcome the very high standard for disclosure contained in the FFIA, doing so in investigations or prosecutions of leaks of classified information will almost always also require the Government to produce still more extremely sensitive and even classified information in order to illustrate the "significant, clear, and articulable" harm to national security. It is thus likely that the legislation could encourage more leaks of classified information—by giving leakers a formidable shield behind which they can hide—while simultaneously discouraging criminal investigations and prosecutions of such leaks—by imposing such an unacceptably high evidentiary burden on the Government that it virtually requires the disclosure of additional sensitive information in order to pursue a leaker of classified information.

The Department's opposition to this legislation is not based solely on the impact to national security investigations. It would be easy for criminals to use S. 2035 to frustrate legitimate law enforcement investigations. For example, a criminal wanting to distribute child pornography could post an "article" that on its face condemned child pornography but in fact contained thousands of images and movie clips that pictured adults sexually molesting children. Section 2 would require an extensive pre-trial hearing, including notifying the very target of the investigation. Such a requirement would effectively prevent a successful investigation.[6]

Similarly, criminal groups run web sites that provide a forum for group members to buy and sell stolen credit card numbers and counterfeit identity documents. Suppose one of these criminal groups created a section on the web site that provides "news" for its members about press releases from law enforcement agencies and changes in criminal laws that affect its members. Would that mean that the criminal group is "regular[ly] . . . publishing" news, and therefore a "covered person?" It appears Section 2 would create huge burdens on a law

[6] As discussed below, Section 6 might also prevent law enforcement from even subpoenaing the service provider to discover who posted the article.

enforcement investigation (such as proving to the court that the information is "essential"), and Section 6 would require notification to the criminals that the government was seeking the identifying data.

It may be argued that responsible media organizations would voluntarily turn over the information in their possession to assist law enforcement in the identification, apprehension, and prosecution of culpable individuals. Even assuming that this would in fact be the case—and the Department is skeptical that it would be the case, for example, in cases involving leaks of classified national security information—relying on the goodwill of news organizations to turn over evidence in cases of serious criminal activity is a very risky proposition. Such a proposition requires us in turn to take it on faith that dangerous and, in some cases, violent criminals will only give evidence and information to "responsible" media outlets (who in turn will voluntarily provide the information to law enforcement), rather than give it to some less reputable entities or individuals who nevertheless would still qualify as "covered persons" under this legislation. To state such a proposition is to refute it.

The FFIA Impermissibly Impairs the Sixth Amendment Rights of Defendants

The Sixth Amendment provides in relevant part that "[i]n all criminal proceedings, the accused shall enjoy the right ... to be confronted with the witnesses against him ... [and] to have compulsory process for obtaining witnesses in his favor." As the Supreme Court has recognized, "[t]his right is a fundamental element of due process of law." *Washington v. Texas*, 388 U.S. 14, 19 (1967). Although this right is not absolute, the Government bears a heavy burden when it seeks to limit it by statute. As the Second Circuit has explained, "[w]hile a defendant's right to call witnesses on his behalf is not absolute, a state's interest in restricting who may be called will be scrutinized closely. In this regard, maximum 'truth gathering,' rather than arbitrary limitation, is the favored goal." *Ronson v. Commissioner of Corrections*, 604 F.2d 176, 178 (2d Cir. 1979) (State court's refusal to allow testimony of psychiatrist to testify in support of prisoner's insanity defense violated Sixth Amendment right to compulsory process.)

The FFIA would violate the Sixth Amendment rights of criminal defendants by imposing impermissibly high standards that must be satisfied before such defendants can obtain testimony, information, and documents that are necessary or helpful to their defense. Under the FFIA, a criminal defendant can only obtain testimony, documents, or information for his defense if he can persuade a court that: (1) he has exhausted all reasonable alternative sources; (2) the testimony or document sought is "essential" to his defense, rather than merely relevant and important; (3) "the nondisclosure of the information would be contrary to the public interest." *See* S. 2035 § 2(a).

The Department believes that the imposition of such burdensome standards goes beyond what is permissible in restricting defendants' Sixth Amendment rights in this context. *See, e.g., United States v. Libby*, 432 F. Supp. 2d 26, 47 (D.D.C., May 26, 2006) ("[T]his Court agrees with the defendant that 'it would be absurd to conclude that a news reporter, who deserves no

special treatment before a grand jury investigating a crime, may nonetheless invoke the First Amendment to stonewall a criminal defendant who has been indicted by that grand jury and seeks evidence to establish his innocence.'"); *United States v. Lindh*, 210 F. Supp. 2d 780, 782 (E.D. Va. 2002) (a defendant's "Sixth Amendment right to prepare and present a full defense to the charges against him is of such paramount importance that it may be outweighed by a First Amendment journalist privilege only where the journalist's testimony is cumulative or otherwise not material.") Even supporters of reporters' privilege legislation have asserted that "[a] defendant's right to a fair trial and ability to defend himself against criminal charges should always outweigh the public interest in newsgathering; thus a balancing test is not appropriate in this context." ACLU Letter to Senate Judiciary Committee, Re: Reporters' Shield Legislation S. 2831, The Free Flow of Information Act of 2006 (June 21, 2006).

The Bill Transfers Core Executive Functions to the Judiciary

One of the most troubling aspects of the proposed legislation is the core structural change it would work on current law-enforcement practice—a change that will severely hamper our ability to investigate and prosecute serious crimes. Under the proposed legislation, before allowing the issuance of a subpoena to the news media in a criminal investigation or prosecution of an unauthorized disclosure of classified information by a person with authorized access to such information, a court must determine "by a preponderance of the evidence" that (1) the information sought is "essential" to the prosecution; (2) the alleged unauthorized disclosure has caused "significant, clear, and articulable harm to the national security," S. 2035 at § 2(a)(2)(A)(iii); and (3) "nondisclosure of the information would be contrary to the public interest" S. 2035 at § 2(a)(3). Moreover, "[t]he content of any testimony or document that is compelled . . . to the extent possible [must be] limited to the purpose of verifying published information or describing any surrounding circumstances relevant to the accuracy of such published information" . . . [and is] narrowly tailored in subject matter and period of time so as to avoid compelling production of peripheral, nonessential, or speculative information." S. 2035 at § 2(b).

By its own terms, then, the FFIA cedes not one, but two core executive functions to the Judiciary. In the first instance, the legislation allows a court to determine what is and is not "essential" to an ongoing criminal investigation or prosecution. Second, the legislation would not only cede to a court the authority to *determine* what does and does not constitute "significant, clear, and articulable harm to the national security," (a core Executive branch function), it also gives courts the authority to *override* the national security interest where the court deems that interest insufficiently compelling—even when harm to the national security has been established. In so doing, the proposed legislation would transfer authority to the Judiciary over law enforcement determinations reserved by the Constitution to the Executive branch.

In the context of confidential investigations and Grand Jury proceedings, determinations regarding what information is "essential" and what constitutes harm to the national security are best made by members of the Executive branch—officials with access to the broad array of

information necessary to protect our national security. As Justice Stewart explained in his concurring opinion in the Pentagon Papers case, "it is the constitutional duty of the Executive—as a matter of sovereign prerogative and not as a matter of law as the courts know law—through the promulgation and enforcement of Executive regulations, to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense." *New York Times Co. v. United States*, 403 U.S. 713, 729-30 (1971) (Stewart, J., concurring).

The Constitution vests the function of evaluating the Government's national security interest in the Executive branch for good reason; the Executive is better situated and better equipped than the Judiciary to make determinations regarding the Nation's security. Judge Wilkinson outlined the reasons why this is the case in his concurring opinion in *United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988):

> Evaluation of the government's [national security] interest . . . would require the Judiciary to draw conclusions about the operation of the most sophisticated electronic systems and the potential effects of their disclosure. An intelligent inquiry of this sort would require access to the most sensitive technical information, and background knowledge of the range of intelligence operations that cannot easily be presented in the single 'case or controversy' to which courts are confined. Even with sufficient information, courts obviously lack the expertise needed for its evaluation. Judges can understand the operation of a subpoena more readily than that of a satellite. In short, questions of national security and foreign affairs are of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Id. at 1082-83 (Wilkinson, J., concurring).

Thus, in our view, the FFIA impermissibly divests the Executive branch of its constitutional obligation to ascertain threats to the national security. The legislation would also transfer these duties and obligations to the Judiciary, which (as demonstrated above) is ill-equipped to make these determinations. This unconstitutional transfer of power will have serious implications in national security cases. For example, if the Department decided, in an exercise of its prosecutorial discretion, to issue a Grand Jury subpoena to a member of the media in connection with an investigation into the unauthorized disclosure of classified information to the media, a member of the Judiciary could effectively shut down the Grand Jury's investigation simply by concluding that upholding the subpoena would not be in the "public interest." *See* S. 2035 at § 2(a)(3). The Department cannot support such an unconstitutional transfer of its Executive branch powers to the Judiciary.

<u>The FFIA Improperly Limits the Power of Judges and Will Impair the Judicial Process</u>

While this bill would impermissibly augment the role played by the Judiciary in the criminal investigative process—especially in cases involving national security—it simultaneously threatens to seriously erode the power of Federal judges to control the proceedings they oversee and enforce their own orders. By its terms, the bill states that "a Federal entity may not compel a covered person to provide testimony or produce any document related to information possessed by such covered person as part of engaging in journalism." S. 2035 § 2(a). The definition for a "Federal entity" includes, *inter alia*, "an entity or employee of the judicial or executive branch." S. 2035 § 8(4).

Thus, under this definitional scheme, a Federal District Court Judge would have to apply the FFIA before determining whether he or she could enforce a Protective Order, "gag" order, or the Grand Jury secrecy requirements set out in Federal Rule of Criminal Procedure 6(e). Under existing law, when a Court learns that sensitive documentary evidence or Grand Jury testimony have been provided to a reporter in violation of either a Court's Protective Order or Rule 6(e), the Court has the authority to compel witnesses—including reporters—to provide documents and testimony in order to determine who violated the Court's Order. Under the terms of the FFIA, however, if the Judge wished a reporter to provide such documents or testimony in an effort to identify a source, the Court would be required to satisfy the requirements of the FFIA. Under most scenarios, a violation of a Protective Order or the Grand Jury secrecy rules would not satisfy the FFIA's requirements that disclosure of the source: (1) be "essential" to the resolution of the matter; (2) be "reasonably necessary to stop, prevent, or mitigate a specific case of death, kidnapping, or substantial bodily harm"; (3) "assist in preventing a specific case of terrorism against the United States," or (4) "assist in preventing a specific case of . . . significant harm to national security that would outweigh the public interest in newsgathering and maintaining a free flow of information to citizens."

In cases where such a showing cannot be made, the court will be unable to require the covered person to divulge the identity of the source who violated the Court's order or rules governing Grand Jury secrecy. Accordingly, the court will be stymied in its efforts to enforce its own orders as well as the rules regarding grand jury secrecy. By so restricting the authority of the judiciary, the FFIA runs directly counter to clearly established Supreme Court precedent. *See Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 796 (1987) ("The ability to punish disobedience to judicial orders is regarded as essential to ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other Branches.")

<u>The Limits on Obtaining Information From Communications Service Providers Are Poorly Defined and Do Not Protect Sensitive Investigations</u>

Section 6 provides that efforts to compel disclosure of information for communications service providers are covered by the same limitations as if the information were sought from a covered person, if the information "relates to a business transaction between a communications service provider and a covered person." The bill does not define what a "business transaction" is in this context, and such a broad term could be interpreted many different ways. For example, it

could be interpreted to cover situations in which a content provider, such as a website, purchases information from a purported journalist. If that is the intent, the website would seem to be covered under the definition of "covered person," making this section unnecessary.

Another interpretation could be that "business transaction" refers to any situation in which a user pays for or otherwise obtains an account, such as purchasing a domain name or creating a website. In that case, the statute would cover any customer records for any covered person. MySpace and sites like it would qualify as "communications service providers" under Section 8(1) of the bill. These types of websites would therefore not be subject to compelled disclosure of information about "business transactions" between the sites and the individual "covered persons" unless law enforcement could overcome the significant legal barriers this bill would erect. Thus, the bill would hamper law enforcement access to the records of thousands of websites and other providers and would require notification to targets with very limited exceptions. This would be a major and unnecessary change from the current state of the law and would inhibit any number of investigations that involve a wide variety of crimes, such as threats, intellectual property violations, and the distribution of child pornography.

In addition, the delayed notice requirements of Section 6 are too narrow in that they do not apply outside of criminal investigations. Rather than amending the section to apply to other situations, such as national security emergencies, the statute could simply use the standards for delayed notification of similar requests made to communications service providers pursuant to the Electronic Communications Privacy Act, 18 U.S.C. § 2705.

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Some proponents of the FFIA have suggested that the bill is little more than a codification of the Department's own guidelines. That view is without foundation. The Department's guidelines preserve the constitutional prerogatives of the Executive branch with respect to key decisions regarding, for example, the kind of evidence that is presented in Grand Jury investigations and what constitutes harm to the national security. The proposed legislation, by contrast, would shift ultimate authority over these and other quintessentially prosecutorial decisions to the Judiciary. Furthermore, the proposed legislation would replace the inherent flexibility of the Department's guidelines, which can be adapted as circumstances require, with a framework that is at once more rigid (by virtue of being codified by statute) and less predictable (by virtue of being subject to the interpretations of many different judges, as opposed to a single Department with a clear track record of carefully balancing the competing interests).

Finally, proponents of the FFIA have asserted that one of the bill's primary purposes is to eliminate divergent application of a reporters' privilege by providing a uniform Federal standard. This contention is without merit. Federal legislation would merely provide a non-constitutional *statutory* standard, or floor, that must be satisfied for the Government, a criminal defendant, or parties in civil litigation to obtain testimony or evidence that is subject to an alleged journalist's privilege in Federal court. The bill does *not* eliminate or prevent the differing *constitutional*

interpretations of the scope and nature of a journalist's privilege in different circuits, particularly in civil cases, which may impose limitations above and beyond the bill's proposed statutory minimum standards. Thus, rather than simplifying the legal standards that must be overcome to obtain information or evidence subjected to a claim of reporter's privilege, the FFIA would compound and complicate them by imposing a complex, subjective statutory standard on top of the various constitutional interpretations that have been promulgated in various circuits.

Thank you for the opportunity to present our views. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Brian A. Benczkowski
Principal Deputy Assistant Attorney General

cc: The Honorable Arlen Specter
Ranking Member

Appendix II

April 2, 2008

The Honorable Harry Reid
Majority Leader
United States Senate
Washington, D.C. 20515

The Honorable Mitch McConnell
Minority Leader
United States Senate
Washington, D.C. 20515

Dear Senator Reid and Senator McConnell:

We write to express our serious concerns about S. 2035, the "Free Flow of Information Act," a bill which we — and our colleagues in the Intelligence Community and in Federal law enforcement — believe is both unwise and unnecessary: unwise because the statutory privilege created by this legislation would work a significant change in existing Federal law with potentially dramatic consequences for our ability to protect the national security and investigate other crimes; and unnecessary because all evidence indicates that the free flow of information has continued unabated in the absence of a Federal reporter's privilege. We acknowledge the important role that the media plays in our society. The scope of this bill, however, goes far beyond its stated purpose and could severely frustrate the Government's ability to investigate and prosecute those who harm national security. *As a result, if this legislation were presented to the President in its current form, his senior advisors would recommend that he veto the bill.* Some of the most problematic provisions include:

- The circumstances where the bill would permit the Government to obtain testimony, documents, and other information from journalists related to national security investigations are far too restrictive. In the vast majority of leak cases, for example, the extraordinary burden placed on the Government could be met, if at all, only by revealing even more sensitive and classified information.

- Inexplicably, the purported national security exception could be read as not covering leaks of classified information. Moreover, the purported exception only applies prospectively to prevent acts of terrorism and significant harm to national security. It does not apply to investigations of acts of terrorism and significant harm to national security that have already occurred.

- The bill cedes to judges the authority to determine what does and does not constitute "significant and articulable harm to the national security." It also gives courts the authority to override the national security interest where the court deems that interest insufficiently compelling—even when harm to national security has been established.

- The bill, apparently inadvertently, implicates critical national security authorities far beyond subpoenas—including authorities under the Foreign Intelligence Surveillance Act —potentially depriving the Government of access to vital intelligence information necessary to protect the Nation.

- One need not even be a professional journalist in order to derive protections from this bill. It effectively provides a safe haven for foreign spies and terrorists who engage in some of the trappings of journalism but are not known to be part of designated terrorist organizations or known to be agents of a foreign power — no matter how closely linked they may be to terrorist or other criminal activity.

In addition to these serious flaws, discussed in detail below, the burdens imposed by this legislation would have consequences beyond the national security context, and could hamper the ability of Federal law enforcement to investigate and prosecute serious crimes like gang violence and child exploitation.[1] We also note that although some amendments to the bill were made in Committee to address our concerns, the bill reported out of the Senate Judiciary Committee on October 22, 2007 remains fatally flawed.

* * *

From a national security perspective, the most problematic provisions are as follows:

Section 2: Would Encourage More Leaks of Classified Information.

Section 2 is the core of this legislation, setting forth the "Conditions for Compelled Disclosure from Covered Persons." It establishes a multipart test the Government must meet — to the satisfaction of the given Federal judge before whom a journalist has chosen to bring his or her claim — before it can compel testimony or evidence from a covered person.

Specifically, section 2 would require the Government to demonstrate "by a preponderance of the evidence" (1) that there are reasonable grounds to believe a crime has occurred; (2) that the Government has "exhausted all reasonable alternative sources (other than a covered person) of the testimony or document" it seeks; (3) that the information the Government seeks is "essential" to the investigation or prosecution; and (4) that nondisclosure of the information would be contrary to "the public interest," taking into account both the need for disclosure and "the public interest in gathering news and maintaining the free flow of

[1]We refer you to earlier views letters from the Department of Justice where these and other non-national security criminal enforcement concerns are addressed.

information." The Government must carry this burden in a proceeding before a Federal judge, having provided notice and an opportunity to be heard to the "covered person" from whom it seeks the information in question. This balancing test, to be applied by different Federal judges across the country, is a recipe for confusion and inconsistency.

The implications of this provision for Federal law enforcement are dramatic—and nowhere are they more dramatic than in cases involving leaks of classified information. For example, section 2 sets forth a heightened evidentiary burden in leak cases, requiring the Government, in addition to satisfying the multifactor test set forth above, to also establish that (1) the leaked information was "properly classified"; (2) the individual who leaked the information had "authorized access to such information"; and (3) the leak in question has caused or will cause "significant and articulable harm to the national security."

The decision to impose a heightened evidentiary standard makes it difficult to avoid drawing an inference that the bill's supporters believe that harming national security is somehow more acceptable or tolerable when done via a leak than when it is done in some other way. We can assure you that this is emphatically not the case — and by imposing additional burdens on investigators and prosecutors charged with identifying and bringing to justice those who improperly disclose classified information, this bill will ensure that we will have more such leaks, and fewer prosecutions of those who do so.

Meanwhile, taken individually, each part of this three-prong test poses serious and potentially fatal problems for Government agents and prosecutors investigating leaks of classified information. Taken together, they could make it virtually impossible for the Government to investigate such leaks. First, by requiring some showing that the leaked information was "properly classified," the bill raises the troubling prospect of every leak investigation becoming a mini-trial over the propriety of the Government's classification decision. Second, the requirement that there be a showing that the leak came from "a person with authorized access to such information" leaves prosecutors in an inescapable bind: How can the Government or the court ever demonstrate that an individual whose identity is unknown nonetheless had "authorized access" to classified information? Third, in order to demonstrate that the leak in question "has caused or will cause significant and articulable harm to national security," the Government will often be required to introduce still more sensitive and classified information, potentially compounding the harm of the initial leak.

The cumulative effect of this evidentiary burden would cripple the Government's ability to identify and prosecute leakers of classified information, and in the process would encourage more leaks that aid our enemies and threaten national security. Indeed, the bill essentially serves as a road map to leaking classified information. In our estimation, this alone renders this bill unacceptable, and we are not alone in this belief. In a letter to Senate Leadership dated January 23, 2008, the Intelligence Community expressed agreement that this bill, if enacted, could seriously undermine our ability to aggressively investigate and, where appropriate, prosecute leaks of classified information that threaten our national security.

Finally, although the discussion about this bill has focused on grand jury subpoenas to reporters, the bill is in no way limited to subpoenas. Instead, by its terms, the bill implicates core national security authorities, including those set forth in the Foreign Intelligence Surveillance Act ("FISA"). While the bill creates a mechanism, discussed below, for the Government to go to court to obtain a subpoena for source information from a journalist protected by the privilege, it includes no such mechanism for the Government to obtain permission to use core investigative tools when the privilege is implicated. This gap would potentially undermine critical tools in the War on Terror, such as FISA and pen register and trap and trace authorities, and in the process deprive the Government of vital information necessary to protect national security.

Section 5: Would Inhibit Our Ability to Investigate and Prosecute Harm to National Security.

Supporters of the bill have taken pains to emphasize that section 5 of the bill provides an exception for cases involving the national security, and that the exception is sufficient to address the national security concerns we and others have expressed about the bill. We respectfully disagree.

On its face, section 5 of the bill provides an exemption from the onerous evidentiary burden set forth in section 2 of the bill in cases where the Government seeks information that a court determines (again by a preponderance of the evidence) "would assist in preventing" either (1) an act of terrorism or (2) "other significant and articulable harm to national security that would outweigh the public interest in newsgathering and maintaining a free flow of information to citizens."

As an initial matter, we find it dismaying that the bill could be read to exclude leaks of classified information — information whose disclosure *by definition* is capable of causing harm to the national security — from the purported national security exception, and instead arguably imposes an even stronger version of section 2's evidentiary burden on prosecutors seeking information about such leaks. This uncertainty will lead to time-consuming litigation over which standard to apply in situations where prospective harm to national security could hang in the balance.

Putting to one side this apparent exclusion of leaks from the bill's national security exception, section 5 of the bill is deficient for a number of other reasons. First, the national security exception only applies prospectively, not to cases involving terrorist acts and other harm to the national security that have already occurred. This bill is geared toward September 10, 2001, but not to September 12, 2001. We strongly disagree with this approach.

Second, rather than a presumption in favor of allowing prosecutors to obtain information that is necessary to prevent "significant and articulable harm to national security," the national security "exception" would still allow a given Federal district court judge, in his or her discretion, to shield disclosure based on the court's own view of what constitutes harm to the

national security, on the one hand, and the public's interest in "newsgathering and maintaining a free flow of information," on the other. These amorphous factors will defy consistent or coherent balancing. Indeed, we would submit that the open-ended nature of the bill's balancing tests virtually guarantees that there will be as many different interpretations of its terms as there are Federal judges — with serious consequences not just for law enforcement but for journalists and the public at large.

Moreover, in so doing, section 5's purported exception is indicative of a broader problem that infects the entire bill: it transfers to the courts such core determinations as when investigative subpoenas are necessary and what constitutes harm to the national security. Not only is this shift made, but in many cases, the Government will need to make its showing at an early stage of investigation. This is precisely backwards. In the context of confidential investigations and Grand Jury proceedings, determinations regarding what information is "essential" and what constitutes harm to the national security are best made by members of the Executive branch — officials with access to the broad array of information necessary to protect our national security. As Justice Stewart explained in his concurring opinion in the Pentagon Papers case, "[I]t is the constitutional duty of the Executive — as a matter of sovereign prerogative and not as a matter of law as the courts know law — through the promulgation of Executive regulations, to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense." *New York Times Co. v. United States*, 403 U.S. 713, 729-30 (1971). Federal judges simply lack the training and expertise necessary to weigh the sort of national security considerations included in this bill. This is by no means a deprecation of the former colleagues of one of the undersigned, but rather a recognition — and one shared by many judges — that the Executive branch is better equipped to make these sensitive determinations.

Third, even assuming that bill's open-ended factors can be balanced, there remains the issue of what evidence a court will require in order to effectively conduct the balancing test. For its part, the Government presumably will be required to provide evidence regarding the impending terrorist attack or harm to the national security, and thus would once again be in the position of having to choose between revealing sensitive information in open court, or abandoning efforts to obtain critical information that could prevent terrorist attacks and other significant threats to national security. Even if the Government makes that choice, and decides to provide the information necessary to conduct the balancing test, what evidence will the court place into the balance on the side of the journalist? Will journalists provide the court with the information sought by prosecutors and, if not, how will the court be able to effectively weigh the competing sides of the balancing test?[2]

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[2]Supporters of the legislation often characterize the bill as a compromise between the interests of law enforcement on the one hand and the interests of the news media on the other. It is clear, on the face of the bill, what compromises law enforcement is being asked to make: The bill would force prosecutors to cede control over core determinations – including determinations regarding what evidence to seek and when and how to go about seeking it – to the court. Less clear, however, are the compromises the legislation would require from journalists. Indeed, the

Finally, the vague and subjective standards in section 5 and elsewhere in the bill are an invitation to litigation over whether certain information sought by the Government falls within section 5 (or one of the other exceptions in the bill) or section 2, and over how to interpret and apply the particular terms of the bill. And yet despite the inevitability of litigation over its terms — and the likelihood that such litigation could involve cases of the utmost importance and urgency — the bill contains no provision for expedited judicial review.[3] The resulting delays could have dire consequences when information is needed to address an immediate threat.

Section 6: Undermines National Security Investigations

Section 6 also has the capacity to wreak havoc on national security and other investigations. This section provides that in the event certain potentially broad categories of information are requested from a communications service provider (broadly defined), notice and an opportunity to be heard must be provided to a covered person. This provision could be inadvertently implicated in a wide range of investigations. For instance, the section is fundamentally incompatible with the Foreign Intelligence Surveillance Act (FISA). The requirements contained in section 6 would make it difficult, if not impossible, to obtain a FISA Court order to conduct electronic surveillance on a foreign power or agent of a foreign power. Moreover, although it does allow for notice to be delayed in certain circumstances, the exception does not extend to national security investigations, and the Government may not obtain the information while notice is delayed. It is therefore a realistic probability that certain national security investigations would be unnecessarily derailed by this provision.

Section 8: Overly Broad Definition of 'Journalism' Can Include Those Linked to Terrorists and Criminals.

This section, which sets forth the definitions of the terms used in the bill, makes clear that the protections set forth in this legislation extend to an astonishingly broad class of "covered persons." Section 8 defines "covered person" to include not just "a person who is engaged in journalism" but also that person's "supervisor, employer, parent company, subsidiary, or affiliate."

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legislation fails to even provide any assurance that, should the Government carry its burden under this legislation and convince a court to order disclosure of the information, the journalist will not simply defy the court and refuse to turn over the information — which is precisely what happens under current law when a journalist refuses to comply with a validly issued grand jury subpoena and, in some cases, a court order.

[3] We also note that the bill provides absolutely no mechanism by which a court could receive and consider classified and other sensitive national security information ex parte and under seal, so as to ensure that such information is not disclosed, resulting in additional harm to the national security.

The bill further defines "journalism" as "the regular gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing of news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public." There is no requirement that an individual be engaged in journalism as a livelihood in order to avail himself of the reporter's privilege this bill would create.

The bill purports to address law enforcement concerns by attempting to carve out agents of foreign powers and designated terrorist organizations from the definition of "covered person." Many terrorist media, however, are neither "designated terrorist organizations" nor covered entities under the bill. Thus, all individuals and entities who "gather" or "publish" information about "matters of public interest" but who are not technically designated terrorist organizations, foreign powers, or agents of a foreign power, will be entitled to the bill's protections — no matter how closely linked they may be to terrorists or other criminals.

* * *

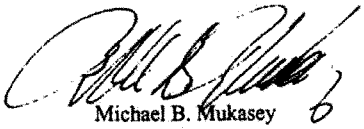
In closing, we reiterate our belief that this bill is both unnecessary and unwise. It is unwise for the reasons that we have laid out above — and for the reasons that we and our colleagues in the intelligence and law enforcement communities have set forth in numerous views letters regarding this and earlier versions of the reporter's shield legislation.

It is unnecessary because, in the more than thirty-five years since the Supreme Court held in *Branzburg v. Hayes*, 408 U.S. 665 (1972), that there is no First Amendment reporter's privilege to avoid a grand jury subpoena issued in good faith, there has been a dramatic increase in the flow of information available to the public on every conceivable topic through an ever-growing number of outlets. More than three decades of experience to the contrary notwithstanding, supporters of a statutory reporter's privilege are now making essentially the same arguments the litigants in *Branzburg* made. Now, as then, we are told that, without a reporter's privilege, journalists' sources will dry up, important news will go unreported, and the country will suffer as a result. Indeed, supporters of this legislation often punctuate this cautionary tale about the necessity of a Federal reporter's privilege by emphasizing the critical role played by confidential sources in informing the public about a long line of historic events — from Watergate and the Pentagon Papers to Enron and Abu Ghraib. There can be no doubt that confidential sources did in fact play a key role in bringing those stories (and countless others) to light. But there likewise can be no doubt that those confidential sources came forward even though *there was no Federal media shield law* in place to provide them with the protection that, if this bill's supporters are to be believed, is essential to ensuring that such stories continue to be reported.

For the reasons set forth above, and others expressed by the Directors of National Intelligence, Central Intelligence Agency, Defense Intelligence Agency, Federal Bureau of Investigation, and others, we strongly urge you to reject the Free Flow of Information Act in its

current form. The Office of Management and Budget has advised us that, from the perspective of the Administration's program, there is no objection to submission of this report.

Sincerely,



Michael B. Mukasey
Attorney General

J. M. McConnell
Director of National Intelligence

cc: The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate

The Honorable Arlen Specter
Ranking Member
Committee on the Judiciary
United States Senate

The Honorable John D. Rockefeller IV
Chairman
Select Committee on Intelligence
United States Senate

The Honorable Christopher S. Bond
Vice Chairman
Select Committee on Intelligence
United States Senate

Appendix III

OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE
PRINCIPAL DEPUTY DIRECTOR OF NATIONAL INTELLIGENCE
(ACTING)
WASHINGTON, DC 20511

SEP 27 2007

The Honorable John D. Rockefeller IV
Chairman
Select Committee on Intelligence
United States Senate
Washington, DC 205 10

The Honorable Christopher S. Bond
Vice Chairman
Select Committee on Intelligence
United States Senate
Washington, DC 205 10

Dear Mr. Chairman and Vice Chairman Bond:

We are joining the Department of Justice (DOJ) in strongly opposing S. 2035 entitled the "Free Flow of Information Act of 2007." Given the DNI's statutory responsibility to protect intelligence sources and methods from unauthorized disclosure, I am particularly concerned that DOJ determined that S. 2035 would make it very difficult to enforce criminal laws involving the unauthorized disclosure of classified information, and could seriously impede other national security investigations and prosecutions, including terrorism prosecutions.

We recognize that the media plays a critical role in our democratic society, a role that is protected in the First Amendment. Indeed, in this area, prosecutions are exceedingly rare. Consequently, we support continuation of the longstanding policy of DOJ to strictly limit the circumstances in which prosecutors may subpoena journalists and media organizations.

We also recognize, however, that the Government must retain the ability to obtain information from the press that would both prevent harm to the United States and its citizens and to identify and bring to justice those who cause such harm. Unfortunately, press reports on U.S. intelligence activities have been a valuable source of intelligence to our adversaries. Former Russian military intelligence colonel Stanislav Lunev wrote:

> I was amazed – and Moscow was very appreciative – at how many times I found very sensitive information in American newspapers. In my view, Americans tend to care more about scooping their competition than about national security, which made my job easier.[1]

[1] Stanislav Lunev, *Through the Eyes of the Enemy* 135 (1998).

Today foreign terrorists are keenly alert to revelations of classified information in the press to understand how we are preventing their attacks. These instances come at a price to our ability to collect vital foreign intelligence and to protect the nation.

The circumstances where S. 2035 would permit the Government to compel the disclosure of the identity of a source are simply much too restrictive. The bill, as drafted, would require prosecutors investigating an unauthorized disclosure of classified information to demonstrate, by a preponderance of the evidence, that the disclosure "has caused significant, clear, and articulable harm to the national security" in order to compel a reporter to identify a source who has leaked classified information. This is an extraordinary burden, and one that can be met only by revealing still more sensitive and even classified information. Moreover, even if the Government can establish that significant, clear, and articulable harm to the national security has occurred, S. 2035 would still allow a Judge to shield the reporter's source by making a finding that the public interest favored nondisclosure of the source. Protecting our national security is too important to be subjected to these standards and burdens.

For these reasons and for the reasons set out in the attached September 26, 2007 letter from DOJ, we urge the Congress to reject this bill. If you have any additional questions on this matter, please contact me or the Director of Legislative Affairs, Kathleen Turner, who can be reached on (202) 201-1698.

Sincerely,

Ronald L. Burgess, Jr.
Lieutenant General, USA

Enclosure

cc: The Honorable Patrick J. Leahy
The Honorable Arlen Specter

Appendix IV

August 22, 2008

The Honorable Harry Reid
Majority Leader
United States Senate
Washington, D.C. 20515

The Honorable Mitch McConnell
Minority Leader
United States Senate
Washington, D.C. 20515

Dear Senator Reid and Senator McConnell:

We write to express our serious concerns with S. 2035, the "Free Flow of Information Act of 2008," introduced by Senator Specter on July 30, 2008. In our letter dated April 2, 2008, we explained the many ways in which the previous version of this legislation would adversely affect the Government's ability to protect our national security. The amended legislation reflects an attempt to address some of our concerns, and we appreciate the effort to craft a mutually agreeable compromise. Regrettably, we still have several serious concerns, especially with regard to the bill's effect on our ability to protect the national security and investigate and prosecute the perpetrators of serious crimes.

We deeply value the essential contributions of a free and vibrant press to our democracy. Nevertheless, our security has been compromised at times by significant unauthorized disclosures of classified information.

We oppose this bill because it will undermine our ability to protect intelligence sources and methods and could seriously impede national security investigations. Indeed, this bill only encourages and facilitates further degradation of the tools used to protect the nation. We have been joined by the Secretary of Defense, the Secretary of Energy, the Secretary of Homeland Security, the Secretary of the Treasury, and every senior Intelligence Community leader in expressing the belief, based on decades of experience, that, by undermining the investigation and deterrence of unauthorized leaks of national security information to the media, this legislation will gravely damage our ability to protect the Nation's security. This amended version of the bill does not resolve those concerns, or other serious concerns raised in our previous letters. *As a result, if this legislation were presented to the President in its current form, his senior advisors would recommend that he veto the bill.*

Some of the problematic provisions include:

- The circumstances in which the bill would permit the Government to obtain information related to national security from a covered person, including leaks of classified information, remain far too restrictive.

- The legislation's exception to prevent "significant and articulable" harm to national security still applies only prospectively; it does not apply to investigations once the harm has occurred. Even in cases involving prospective harm, it could require the Government to disclose further sensitive information with no assurance that all or any classified information would remain protected.

- The legislation transfers key national security and prosecutorial decision-making authority – including decisions about what does and does not constitute harm to the national security – from the executive branch to the judiciary, and it gives judges virtually limitless discretion to make such determinations by imposing standardless and highly subjective balancing tests that could be used to override national security interests.

- There is no mechanism, such as a requirement that the covered person provide the relevant information to the court as a condition to claiming the statutory privilege, to ensure that the Government will be able to obtain the information it seeks when it meets its evidentiary burden.

- The proposed "Rule of Construction" – which purports to limit any construction of the Act that would affect the Foreign Intelligence Surveillance Act or the Federal laws or rules relating to grand jury secrecy – is insufficient to preserve the range of authorities on which the Government relies to conduct national security investigations.

- The legislation would extend its protection to leaks that are publicized by individuals who are not even "journalists" as that concept is normally understood.

Many of these same concerns were addressed in detail in our previous letter, which we incorporate by reference in all respects that remain applicable to the revised legislation.

* * *

From a national security perspective, the most problematic provisions are as follows:

Section 5 Would Inhibit The Government's Ability To Investigate Offenses against the National Security, Including Leaks of Classified Information, and To Prosecute the Perpetrators of Those Offenses

In our previous letter, we objected that that bill appeared to exclude leaks of classified information from the national security exception and inexplicably singled out the leaking of classified information for greater protection from prosecution than other criminal cases. This bill has sought to address those concerns by making clear that investigations of leaks of classified

information are governed by the Section 5 national security exception rather than by the general provisions of Section 2. Despite this clarification, however, persistent problems with Section 5, and some new ones, continue to pose unacceptable obstacles to national security and leak investigations.

Revised Section 5 creates two distinct cases in which the Government can seek to obtain source information: subsection (A) when the information would assist in stopping or preventing significant and articulable harm to national security, and subsection (B) when the information relates to a leak of classified information that has caused or will cause significant and articulable harm to national security. We have substantial concerns with both subsections. By its terms, subsection (A) extends only to potential or future harms to national security—harms that still can be "stopp[ed]" or "prevent[ed]." Thus, this national security exception expressly *would not* apply in cases where the Government is investigating serious harms (other than leaks of classified information) that have already occurred, including acts of sabotage and outright attacks on the United States. In such cases, the Government could seek to compel disclosure only as authorized under the more onerous provisions of Section 2.

Subsection (B) is also problematic. In order to obtain source information as part of a leak investigation, the Government must establish that the leaked information was "properly classified" and that the leak has caused or will cause "significant and articulable harm to the national security." As noted in our previous letter, these provisions invite litigants and courts to second-guess the classification decision without the benefit of either experience or expertise in—to say nothing of legal responsibility for—matters of national security. More troubling is that such second-guessing will involve the application of a novel standard that does not even track the standards that are used in national security classifications. Specifically, to persuade a judge to compel disclosure under subsection (B), the Government will have to show that the leak has caused or will cause "significant and articulable harm" to the national security. This standard has no analogue in the intelligence community. Pursuant to Executive Order 12958, as amended, the Government classifies information at three basic levels: "Confidential," "Secret," and "Top Secret." By definition, those terms apply, respectively, to information the unauthorized disclosure of which reasonably could be expected to cause "damage" (Confidential), "serious damage" (Secret), and "exceptionally grave damage" (Top Secret) to the national security. Thus, a leak of properly classified *by definition* constitutes harm to the national security. Particularly with respect to "Confidential" information, however, the harm is arguably less severe than the Government would be required to demonstrate under Section 5. The bill could thus expose large amounts of properly classified information to unauthorized disclosure while effectively blocking any investigation or prosecution of those who leak such information.

Moreover, setting to one side the novel and onerous requirement for a demonstration of "significant and articulable harm," the bill would still require the Government to reprise for the court and other litigants the decisions relating to how and why the leaking of information has harmed or will harm national security. This is an exercise that will almost certainly entail the revelation of still more sensitive and classified information.

Even assuming the Government could meet its burden of demonstrating the requisite harm, Section 5 still includes a balancing test giving a judge complete discretion to block disclosure. While the balancing test is now arguably less biased in favor of protecting the

disclosure of classified information – to the extent that a judge need only "take into account" the competing interests – the test itself has been slightly, though significantly, changed. In previous versions of this legislation, the "free flow of information" component of the balancing test represented the public interest in protecting source identity as a means of encouraging future sources to come forward and provide information to the press. Under the revised test, however, the national security harm is now weighed against the "public interest in gathering and disseminating *the information or news conveyed*" (emphasis added). Thus the balancing test for a judge in a leak case would rest on the relative import he or she placed on the substance of the published leak, and whether its disclosure, though unlawful, outweighed a demonstrated harm to national security. Gone is any pretense of advancing the ideal of future information flow; this amended exception would effectively give judges authority to immunize leakers as a perverse reward for divulging classified information that is, in the judge's personal estimation, sufficiently enlightening.

While Section 5 has been clarified to cover leaks of classified information, and modified in other respects, it still retains many of the fundamental defects that we addressed in our previous letter, such as the requirements for establishing "proper classification," proving "significant and articulable harm," and balancing the "public interest" in the publication of the leaked information. Moreover, as outlined above, some of the revisions raise new questions and concerns. The net effect does not change our previous assessment that Section 5 threatens to undermine the Government's ability to prevent and investigate threats to national security, especially leaks of classified information. Section 5 is therefore unacceptable.

Section 6 Still Threatens To Weaken National Security Investigative Tools

While revised Section 6 has been improved, it still poses problems. In particular, Section 6 requires that the Government first make an evidentiary showing in order to use certain preliminary investigative tools, such as pen-register trap-and-trace and Title III authorities. But precisely because these tools are often used to gather evidence in the preliminary stages of an investigation, the Government may lack the requisite information to meet the posed evidentiary standard at the time when the Government would normally use them. More troubling, this section gives the court discretion not to compel disclosure even if the Government meets its evidentiary burden.

Section 9 Rules of Construction Are Insufficient To Mitigate the Adverse Impact of the Bill in Critical Areas

On the surface, Section 9 appears to be an attempt to address concerns expressed by us and others with the bill's potential collateral impact in a number of important areas, including FISA. It provides that this legislation will not "create new obligations, or affect or modify the authorities or obligations of a Federal entity with respect to the acquisition or dissemination of information pursuant to the Foreign Intelligence Surveillance Act of 1978." While we welcome the attempt to improve the grave defects of this bill with respect to safeguarding national security, this provision does not go nearly far enough.

First, the provision leaves out key, non-FISA tools that are essential to the protection of the national security. The wire-tapping provisions of Title III, pen-register trap-and-trace

authority, and national security letters – all of these tools are as important, and in some cases more important, to the Government's ability to investigate those who have caused or would cause harm to our national security (to say nothing of other serious crimes unrelated to the national security). Yet this bill remains silent as to them, leaving one with the distinct impression that this legislation can and will – and indeed *is intended to* – interfere with the Government's use of those tools in cases where it seeks information provided to a journalist by a confidential source. Prior to September 11, 2001, it was precisely this type of ambiguity between application of tools available to intelligence and law enforcement that created "the wall" – a series of barriers to information sharing that had serious consequences for our counterterrorism efforts.

Second, it is unclear that the additional language will in fact protect the Government's ability to use FISA effectively. The goal, we are told, is to ensure that the Government can continue to gather and disseminate intelligence and surveillance information pursuant to a FISA court order. Why not then simply say, "The provisions of this Act shall not apply to the use of the authorities provided for in the Foreign Intelligence Surveillance Act or to any information acquired thereunder"?

Section 9 also contains a provision pertaining to grand jury secrecy but does nothing to restrict the application of the bill from sheltering violations of longstanding and important protections for grand jury deliberations. The provision instead makes clear that the legislation "shall apply in any proceeding and in connection with any issue arising under" the law and rules that govern grand jury secrecy; in other words, this privilege can and will be used to protect leakers of grand jury information.

Section 10 Includes an Overly Broad Definition of 'Covered Person'

The revised definitional section would have the effect of affording a broad "journalist" privilege to a potentially limitless class of people. The definition of a "covered person" bears little resemblance to any traditional or commonly understood notions of journalism.[1] Indeed, under this section, essentially anyone who disseminates information of any public interest on a regular basis would qualify for the privilege, and for good measure so too would their "supervisor, employer, parent company, subsidiary, or affiliate."

The carve-outs for agents of a foreign power and members of terrorist organizations effectively require the Government to demonstrate that an individual is a member of a particular group – something that may be difficult to do and in any event will often be disputed. FISA has long recognized this difficulty and requires the Government to have probable cause that an individual is an agent of a foreign power rather than conclusively prove that this is the case.

[1] Supporters of the legislation contend that the bill's definition of a "covered person" draws directly from a well established line of case law beginning with the Second Circuit's holding in *Von Bulow v. Von Bulow*, 811 F.2d 136 (1987). To rely on a 21-year-old precedent handed down years before the dawn of the Internet age to define who is and is not a journalist is to ignore the revolution in media and communications wrought by the World Wide Web. The *Von Bulow* court simply did not have occasion to consider modern circumstances, wherein news is routinely gathered and disseminated by a huge and constantly changing community of bloggers and other amateur publishers. And yet these are the circumstances under which this bill is being considered. Citing *Von Bulow* cannot alter that fact, nor can it change the serious consequences that this bill's definition of "covered person" will have for the Government's efforts to protect the national security and enforce our criminal laws.

Moreover, individuals seeking to avail themselves of this privilege will be able to do so as long as they can stay one step ahead of the agencies responsible for designating terrorist organizations.

Additional Problems

Section 2:

- In order to be compelled, source information must be "essential" to an investigation, prosecution, defense, or resolution of non-criminal matter, meaning that information that is merely "relevant," and even information that is both material and favorable to an accused's defense, would not qualify for the exception. Such a standard would risk infringing on the Sixth Amendment rights of criminal defendants. *See United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982) (standard governing Sixth Amendment right to compulsory process is whether the information or testimony "would have been both material and favorable to his defense").

- In criminal and civil proceedings, the information upon which a party may seek source information must be obtained from a source "other than the covered person." Given that in many cases publication by the covered person is the only evidence for seeking source information, this requirement is certain to cause serious practical difficulties in criminal and civil matters.

- The standard for disclosure has actually been *raised* in cases that do not involve a criminal prosecution or investigation. This would likely have the greatest impact on civil litigation between private parties but could still adversely affect Executive Branch and independent agencies that bring civil enforcement actions, including the SEC, CFTC, and FEC.

- The balancing test has been amended to include yet another completely subjective consideration that can serve as the basis for blocking disclosure: "the public interest in gathering and disseminating the information or news conveyed."

Section 4:

- To satisfy the "terrorism" prong of this exception the Government effectively would have to wage a mini-trial to establish that the information it seeks is reasonably necessary to stop, prevent, mitigate, or identify the perpetrator of an act of terrorism – something that (1) could be nearly impossible in cases where we have less than complete information about future attacks; (2) could be very difficult to do in cases where the attack has already taken place, depending upon how far along a given investigation may be; and (3) in either case, could require the disclosure of additional sensitive or classified information.

- By restricting the exception under section 4(a) only to acts of terrorism as defined in 18 U.S.C. § 2331, that provision fails to include other serious terrorism-related offenses – including the provision of material support to terrorists – that do not fall within the letter of section 2331.

- The "other activities" subsection is purely prospective – the Government could not obtain source information to investigate and prosecute these acts – and omits a wide range of serious crimes, including a number of offenses against children.

- The court still has the discretion not to order disclosure even when the Government meets its burden.

Section 8:

- As discussed above, in order to satisfy its burden under section 4 or 5, the Government will almost certainly have to reveal additional sensitive and classified information. The bill, however, does not contain adequate procedures to protect this information. Rather, *in camera* review is left to the court's discretion and *ex parte* review is permitted only where the court finds it necessary.

No assurance of obtaining the information:

- A fundamental problem underlying this entire legislation is that in the event the Government carries its burden and convinces a court to order disclosure of source information, there is no guarantee the Government will actually get it. So long as a covered person is not required to provide the information being sought to the court as a precondition of eligibility for the privilege, there is nothing to prevent him or her from simply defying the court and refusing to reveal it to the Government. This is precisely what happens under current law when a journalist refuses to comply with a validly issued grand jury subpoena and, in some cases, a court order.

This bill is characterized as a compromise between the Executive's interests in protecting national security and enforcing the law, on the one hand, and the freedom of the press to gather and disseminate news to the public, on the other. For a purported compromise, however, the terms of this bill are decidedly one-sided: The Executive is compelled to cede authority over core determinations such as (1) what does and does not constitute harm to the national security; (2) whether information has been properly classified; and (3) what information is necessary to a national security or criminal investigation. In return for imposing these and other very significant demands upon law enforcement and national security officials, the bill would impose upon the covered persons to whom it would extend its privileges no corresponding obligations. Covered persons are not required to provide evidence to the court detailing who their source is or even to demonstrate that they did, in fact, promise confidentiality to their source. Indeed, covered persons can continue to invoke the privilege even after the source to whom they promised confidentiality has released the journalist from the agreement. In short, the bill would impose significant burdens upon the Government – burdens that will impede our ability to protect the national security and prosecute serious crimes – while leaving "covered persons" free to effectively flout the very law that protects them.

* * *

We appreciate efforts to amend this legislation to address some of the problems outlined in our previous letter. In limited instances those problems have been alleviated. Overall, however, our core concerns about the effects of this legislation in the area of national security, and in other significant respects previously indicated, remain, and as a result this legislation is unacceptable.

For the reasons set forth above, we strongly urge you to reject this latest version of the Free Flow of Information Act. The Office of Management and Budget has advised us that, from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Michael B. Mukasey
Attorney General

J. M. McConnell
Director of National Intelligence

cc: The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate

The Honorable Arlen Specter
Ranking Member
Committee on the Judiciary
United States Senate

The Honorable John D. Rockefeller IV
Chairman
Select Committee on Intelligence
United States Senate

The Honorable Christopher S. Bond
Vice Chairman
Select Committee on Intelligence
United States Senate

Appendix V

JAN 23 2008

The Honorable Harry Reid
Majority Leader
United States Senate
Washington, DC 20510

The Honorable Mitch McConnell
Republican Leader
United States Senate
Washington, DC 20510

Dear Senator Reid and Senator McConnell:

We are writing to add our views to those expressed in the September 26, 2007 letter from the Department of Justice in strong opposition to S. 2035, the "Free Flow of Information Act" and earlier Justice letters strongly opposing its counterpart in the House of Representatives, H.R. 2102. As the Acting Principal Deputy Director of National Intelligence noted in his letters of September 27, 2007, the Intelligence Community is concerned that these bills will undermine our ability to protect intelligence sources and methods and could seriously impede national security investigations.

The Intelligence Community understands the tension that can exist between the public's desire for information and the need to protect national security. Indeed, it is one that we struggle with on a daily basis. However, the high burden placed on the Government by these bills will make it difficult, if not impossible, to investigate harms to the national security and only encourage others to illegally disclose the Nation's sensitive secrets. These problems, in turn, will impair our ability to collect vital foreign intelligence, including through critical relationships with foreign governments which are grounded in confidence in our ability to protect information from public disclosure.

Safeguarding classified information in a free and open society already is a challenge for the Intelligence Community. We ask that Congress not make that challenge

The Honorable Harry Reid and The Honorable Mitch McConnell

even more daunting. For these reasons and those set out by the Department of Justice, we urge you to reject S. 2035 and H.R. 2102, as currently drafted.

Sincerely,

J.M. McConnell
Director of National Intelligence
Intelligence

James R. Clapper, Jr.
Under Secretary of Defense
for Intelligence

Mr. Robert Mueller
Director, FBI

General Michael V. Hayden
Director, CIA

Mr. Randall M. Fort
Assistant Secretary of State,
Intelligence and Research

Ms. Janice Gardner
Assistant Secretary for Intelligence
and Analysis, Treasury

Mr. Charlie Allen
Under Secretary for Intelligence
and Analysis, DHS

LTG Keith Alexander
Director, NSA

Mr. Scott Large
Director, NRO

LTG Michael Maples
Director, DIA

VADM Robert Murrett
Director, NGA

Mr. Rolf Mowatt-Larssen
Director for Intelligence and
Counterintelligence, DOE

Enclosure

Appendix VI

SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

MAR 31 2008

The Honorable Harry Reid
United States Senate
Washington, DC 20510

Dear Senator Reid:

I am writing to add the Department's views to those of the Director of National Intelligence and the Department of Justice in strong opposition to S. 2035, the "Free Flow of Information Act." Consistent with the January 23, 2008, letter from Intelligence Community leaders, we are concerned that this bill will undermine our ability to protect national security information and intelligence sources and methods and could seriously impede investigations of unauthorized disclosures.

The Department is charged with safeguarding classified information in the interest of protecting national security. Past investigations into unauthorized disclosures through the media have found that significant details were revealed to our adversaries concerning a wide array of national security matters on different occasions. Some examples include a Department of Defense surveillance platform's capabilities; war plans that could have allowed Saddam Hussein's forces to more effectively position defensive assets; plans to insert Special Operations Forces into a battlefield; and the capabilities of U.S. imaging satellites.

Disclosures of classified information about military operations directly threaten the lives of military members and the success of current and future military operations. Such disclosures also threaten the lives and safety of American citizens and the welfare of the Nation.

If S. 2035 were to become law, unauthorized disclosures posing a threat to national security, such as those described above, would only multiply. That is because S. 2035 makes investigations of such disclosures extremely difficult to pursue. The bill provides a broadly defined class of "covered persons" with extraordinary legal protections against having to reveal any confidential sources. This would have the unintended consequence of encouraging unauthorized disclosures and increasing our nation's vulnerability to adversaries' counterintelligence efforts to recruit "covered persons."

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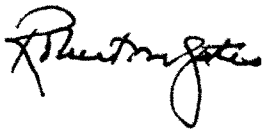
For these reasons and those set out by the Intelligence Community and the Department of Justice, I urge you to reject S. 2035.



cc:
The Honorable Mitch McConnell
Minority Leader

Appendix VII

Secretary
U.S. Department of Homeland Security
Washington, DC 20528

April 3, 2008

The Honorable Joseph I. Lieberman
Chairman
Committee on Homeland Security
and Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Chairman Lieberman:

I am writing to add the views of the Department of Homeland Security (DHS) to those of the Department of Justice, the Director of National Intelligence, and other agencies in strong opposition to S. 2035, the *Free Flow of Information Act of 2007*. DHS believes that S. 2035 will make the United States both less secure and less free by subverting the enforcement of criminal laws and the Federal Government's investigatory powers.

DHS is frequently involved in various investigations of crimes, terrorist activities, and other threats to our homeland. These investigations are integral to our mission, yet the sought-after information is often volatile and available only within a very limited timeframe. The proposed bill erects significant evidentiary burdens to obtaining critical information from anyone who can claim to be a journalist, including bloggers, and communications service providers, such as internet service providers. These roadblocks delay the collection of critical information and ensure that criminals have opportunities to avoid detection, continue their potentially dangerous operations, and further obfuscate their illegal activities.

The Department of Justice has already presented a thorough legal analysis of the problems and dangers of this bill and its companion measure in the U.S. House of Representatives. DHS fully concurs with these views and believes that S. 2035 would be disastrous to the Federal Government's ability to detect, investigate, and ultimately stop criminals, terrorists, and others who want to harm this Nation. Accordingly, I urge you to reject S. 2035, as currently drafted.

The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter. An identical letter has been sent to the Ranking Member of the Senate Committee on Homeland Security and Governmental Affairs, the Senate Majority and Minority leaders, and the Chairman and Ranking Member of the Senate Committee on the Judiciary.

Sincerely,

Michael Chertoff

Appendix VIII

The Secretary of Energy
Washington, DC 20585

April 7, 2008

The Honorable Carl Levin
Chairman
Committee on Armed Services
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

This letter provides the views of the Department of Energy ("DOE") on S. 2035, the "Free Flow of Information Act of 2007" (FFIA), which was reported by the Senate Judiciary Committee in October 2007. I am writing because this bill is of significant concern to DOE, and we request that you and other members of the Armed Services Committee strongly oppose the bill if it is brought up for consideration on the Senate floor.

The FFIA would provide a legal privilege for certain journalists against Federal entities seeking to obtain information that identifies a confidential source or was provided to the journalist under a promise that the information would be kept confidential. DOE joins with the Department of Justice (DOJ), the Department of Defense, the Department of Homeland Security, and other Executive Branch agencies, including the Director of National Intelligence and the other leaders of the Federal Intelligence Community, in opposing the FFIA because its passage would curtail the ability of Federal authorities to contain and prosecute breaches of national security and to protect the citizens of the United States. We concur with the legal analysis contained in the DOJ letter of September 26, 2007, attached hereto, and would like to call special attention to the potential consequences of the FFIA as they relate to DOE's unique role in safeguarding some of our Nation's most important classified material and information. DOE also shares the specific national security concerns expressed by the Federal Intelligence Community in its January 23, 2008, letter, which is attached.

DOE is responsible for maintaining "Restricted Data," defined by the Atomic Energy Act of 1954 to include all data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy. Additionally, through its National Nuclear Security Administration, DOE is an integral part of the United States' efforts to reduce global dangers from weapons of mass destruction through (1) protecting or eliminating weapons and weapons-useable nuclear material or infrastructure, and redirecting excess foreign weapons expertise to civilian enterprises; (2) preventing and reversing the proliferation of weapons of mass destruction; (3) reducing the risk of accidents in nuclear fuel cycle

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facilities worldwide; and (4) enhancing the capability to detect weapons of mass destruction, including nuclear, chemical and biological systems. Simply put, DOE is in possession of some of the Nation's most important and highly sensitive information.

As the Committee is well aware, DOE and its National Laboratories and other facilities have been the locus of several serious security breaches. When these unfortunate situations do occur despite our best efforts to prevent them, it is vital that our investigators and other Federal authorities have access to as much information as possible relating to the breach in order to determine the level of damage that has been caused and to contain any further dissemination of classified information. The FFIA could frustrate these efforts by allowing "covered persons" to avoid revealing the source of a breach and to avoid providing to Federal authorities any testimony or any documents relating to the breach. In fact, the FFIA could make the situation worse: encouraging dissemination of classified information by giving leakers a formidable shield behind which they can hide.

Regardless of who bears responsibility for the occurrence of the initial security breach or loss of classified data, there can be no doubt that once such a breach has occurred, it is in the national security interest of the United States to ascertain how, when, and why the breach or loss occurred, to ascertain and limit the damage caused, and to prevent such breaches or losses in the future. Members of this Committee have made it clear that such remedial steps are a critical priority. However, the FFIA would frustrate these objectives.

The FFIA purports to deal with these issues by providing an exception to the privilege that is created by the FFIA, in order to assist in preventing terrorist activity or significant damage to national security, but we believe this exception would be ineffectual. In order to overcome the privilege, the Government would bear the burden of showing by a preponderance of the evidence that the evidence sought will assist in preventing "an act of terrorism" or "other significant and articulable harm to national security." This is a heavy burden to overcome, the proof of which might in fact depend on the very information that is sought and yet foreclosed, and could require the Government to release yet more protected information in attempting to make its case. Even if the Government is successful in showing that the information would prevent significant damage to national security, judges would have the discretion to block disclosure to the Government if they felt that the "public interest" in maintaining a "free flow of information" would "outweigh" that damage. And even if the Government overcomes all these hurdles, the delay in obtaining the identity of the source and in securing the breach could cement and exacerbate the damage done to the national security interests of the United States.

The Administration and Congress have consistently agreed that one of the gravest threats faced by our Nation is nuclear material or information relating to nuclear material in the possession of global terrorist organizations or hostile regimes. History tells us that when security breaches occur, DOE and other Federal authorities must be able to react quickly and with the benefit of all available information to protect the citizens of this country.

The Office of Management and Budget advises that there is no objection to the submission of this letter to the Committee from the standpoint of the President's program.

In summary, we urge you and the other members of the Committee to oppose this legislation. If you have any additional questions on this matter, please contact me or Ms. Lisa E. Epifani, Assistant Secretary for Congressional and Intergovernmental Affairs, at 202-586-5450.

Sincerely,

Samuel W. Bodman

Enclosures

cc: The Honorable John McCain
Ranking Member, Senate Armed Services Committee

The Honorable Patrick Leahy
Chairman, Senate Judiciary Committee

The Honorable Arlen Specter
Ranking Member, Senate Judiciary Committee

The Honorable Harry Reid
Majority Leader

The Honorable Mitch McConnell
Minority Leader

The Secretary of Energy
Washington, D.C. 20585

April 7, 2008

The Honorable Jeff Bingaman
Chairman
Committee on Energy and Natural Resources
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

This letter provides the views of the Department of Energy (DOE) on S. 2035, the "Free Flow of Information Act of 2007" (FFIA), which was reported by the Senate Judiciary Committee in October 2007. I am writing because this bill is of significant concern to DOE, and we request that you and other members of the Energy and Natural Resources Committee strongly oppose the bill if it is brought up for consideration on the Senate floor.

The FFIA would provide a legal privilege for certain journalists against Federal entities seeking to obtain information that identifies a confidential source or was provided to the journalist under a promise that the information would be kept confidential. DOE joins with the Department of Justice (DOJ), the Department of Defense, the Department of Homeland Security, and other Executive Branch agencies, including the Director of National Intelligence and the other leaders of the Federal Intelligence Community, in opposing the FFIA because its passage would curtail the ability of Federal authorities to contain and prosecute breaches of national security and to protect the citizens of the United States. We concur with the legal analysis contained in the DOJ letter of September 26, 2007, attached hereto, and would like to call special attention to the potential consequences of the FFIA as they relate to DOE's unique role in safeguarding some of our Nation's most important classified material and information. DOE also shares the specific national security concerns expressed by the Federal Intelligence Community in its January 23, 2008, letter, which is attached.

DOE is responsible for maintaining "Restricted Data," defined by the Atomic Energy Act of 1954 to include all data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy. Additionally, through its National Nuclear Security Administration, DOE is an integral part of the United States' efforts to reduce global dangers from weapons of mass destruction through (1) protecting or eliminating weapons and weapons-useable nuclear material or infrastructure and redirecting excess foreign weapons expertise to civilian enterprises; (2) preventing and reversing the proliferation of weapons of mass destruction; (3) reducing the risk of accidents in nuclear fuel cycle

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facilities worldwide; and (4) enhancing the capability to detect weapons of mass destruction, including nuclear, chemical, and biological systems. Simply put, DOE is in possession of some of the Nation's most important and highly sensitive information.

As the Committee is well aware, DOE and its National Laboratories and other facilities have been the locus of several serious security breaches. When these unfortunate situations do occur despite our best efforts to prevent them, it is vital that our investigators and other Federal authorities have access to as much information as possible relating to the breach in order to determine the level of damage that has been caused and to contain any further dissemination of classified information. The FFIA could frustrate these efforts by allowing "covered persons" to avoid revealing the source of a breach and to avoid providing to Federal authorities any testimony or any documents relating to the breach. In fact, the FFIA could make the situation worse: encouraging dissemination of classified information by giving leakers a formidable shield behind which they can hide.

Regardless of who bears responsibility for the occurrence of the initial security breach or loss of classified data, there can be no doubt that once such a breach has occurred, it is in the national security interest of the United States to ascertain how, when, and why the breach or loss occurred, to ascertain and limit the damage caused, and to prevent such breaches or losses in the future. Members of this Committee have made it clear that such remedial steps are a critical priority. However, the FFIA would frustrate these objectives.

The FFIA purports to deal with these issues by providing an exception to the privilege that is created by the FFIA, in order to assist in preventing terrorist activity or significant damage to national security, but we believe this exception would be ineffectual. In order to overcome the privilege, the Government would bear the burden of showing by a preponderance of the evidence that the evidence sought will assist in preventing "an act of terrorism" or "other significant and articulable harm to national security." This is a heavy burden to overcome, the proof of which might in fact depend on the very information that is sought and yet foreclosed, and could require the Government to release yet more protected information in attempting to make its case. Even if the Government is successful in showing that the information would prevent significant damage to national security, judges would have the discretion to block disclosure to the Government if they felt that the "public interest" in maintaining a "free flow of information" would "outweigh" that damage. And even if the Government overcomes all these hurdles, the delay in obtaining the identity of the source and in securing the breach could cement and exacerbate the damage done to the national security interests of the United States.

The Administration and Congress have consistently agreed that one of the gravest threats faced by our Nation is nuclear material or information relating to nuclear material in the possession of global terrorist organizations or hostile regimes. History tells us that when security breaches occur, DOE and other Federal authorities must be able to react quickly and with the benefit of all available information to protect the citizens of this country.

The Office of Management and Budget advises that there is no objection to the submission of this letter to the Committee from the standpoint of the President's program.

In summary, we urge you and the other members of the Committee to oppose this legislation. If you have any additional questions on this matter, please contact me or Ms. Lisa E. Epifani, Assistant Secretary for Congressional and Intergovernmental Affairs, at 202-586-5450.

Sincerely,

Samuel W. Bodman

Enclosures

cc: The Honorable Pete V. Domenici
Ranking Member, Senate Energy and Natural Resources Committee

The Honorable Patrick Leahy
Chairman, Senate Judiciary Committee

The Honorable Arlen Specter
Ranking Member, Senate Judiciary Committee

The Honorable Harry Reid
Majority Leader

The Honorable Mitch McConnell
Minority Leader

Appendix IX

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

SECRETARY OF THE TREASURY

April 15, 2008

The Honorable Max Baucus
Chairman
Committee on Finance
United States Senate
Washington, DC 20510

Dear Chairman Baucus:

This letter provides the views of the Department of the Treasury on S. 2035, "The Free Flow of Information Act of 2007" (FFIA). The Department strongly opposes this proposed legislation, as it would seriously undermine the Treasury Department's programmatic efforts to fight terrorist and other forms of illicit finance, and jeopardize our ability to review foreign investment for national security concerns.

The FFIA proposes to provide a "journalist's privilege" or protection to a broad group of persons against disclosure of confidential source information, including documents or testimony related to the confidential source. We join the Department of Justice in the concerns raised in its letter of September 26, 2007 to the Senate Judiciary Committee, as well as those discussed in the April 2, 2008 letter from the Attorney General and Director of National Intelligence to the Senate Majority and Minority Leaders, which are attached. As evidenced by the two examples discussed below, unauthorized disclosures to the media can cause significant damage to critical Treasury Department programs that protect national security. S. 2035 would make investigations of unauthorized disclosures in the future extremely difficult to pursue, thereby making them more difficult to deter.

Media Leaks Undermined Treasury's Terrorist Finance Tracking Program

Shortly after the September 11, 2001 attacks, as part of an effort to employ all available means to track terrorists and their networks, the Treasury Department initiated the classified Terrorist Finance Tracking Program (TFTP). Under the TFTP, the Treasury Department has issued administrative subpoenas for terrorist-related data to the U.S. operations center of the Society for Worldwide Interbank Financial Telecommunication (SWIFT), which operates a worldwide messaging system used to transmit financial transaction information.

On June 23, 2006, *The New York Times* and two other major U.S. newspapers published articles disclosing the existence of the TFTP. The disclosure of the classified information has adversely affected our national security. From its inception, this classified program has proven valuable by providing unique information that has enabled the U.S. Government to locate and identify terrorist suspects and to map out terrorist networks. For example, the subpoenaed SWIFT information has provided key links in investigations of financiers and charities supporting al

Qaida and other significant terrorist organizations, and has helped locate perpetrators of terrorist attacks.

Though the program has proven to be a valuable tool for tracking terrorist organizations, its value has been diminished by the June 2006 media disclosures. On July 11, 2006, Treasury Under Secretary for Terrorism and Financial Intelligence Stuart Levey testified about the TFTP before the House Financial Services Subcommittee on Oversight and Investigations, describing in his written testimony the exposure of the program as "very damaging" and further attesting: "Despite [their] attempts at secrecy, terrorist facilitators have continued to use the international banking system to send money to one another, even after September 11. This disclosure compromised one of our most valuable programs and will only make our efforts to track terrorist financing -- and to prevent terrorist attacks -- harder. Tracking terrorist money trails is difficult enough without having our sources and methods reported on the front page of newspapers."

It is also important to note that the harm to the TFTP was not offset by any journalistic imperative. Indeed, *The New York Times* public editor, on October 22, 2006, published a self-described "*mea culpa*" editorial in which he stated that he was "off base" in previously supporting the newspapers' decision to publish its June 23, 2006 article. Though describing the decision as a "close call," he concluded: "I don't think the article should have been published." Equally noteworthy is the *Washington Post's* editorial of June 24, 2006, in which the newspaper stated: "[This program] seems like exactly the sort of aggressive tactic the government should be taking in the war on terrorism."

Media Leaks Undermine CFIUS Cases and Processes

The Committee on Foreign Investment in the United States (CFIUS) is the interagency committee established to assist the President in implementing section 721 of the Defense Production Act of 1950 ("section 721"). Section 721 provides the President with authority to review foreign investment transactions voluntarily notified to CFIUS for national security implications. CFIUS reviews such transactions, and may refer them to the President for action. The President has authority to suspend or prohibit any transaction where he determines that there is credible evidence that the foreign interest might take action that threatens to impair the national security, and no other law is adequate or appropriate to address that threat.

CFIUS review depends heavily on the voluntary submission of substantial information by the parties pertaining to their transaction. Regulations require that parties submitting a notice to CFIUS provide detailed information (personal and proprietary) about themselves and the transaction, including their businesses' structures, commercial relationships and affiliations, transactional documents, market share and business plans. In recognition of the sensitivity of this information, section 721 prohibits public disclosure of such documents or information, except in the case of an administrative or judicial action or proceeding, and further exempts such documents and information from disclosure under the Freedom of Information Act.

In recent years, there have been several instances in which pending transactions and their related details have been leaked to and reported by the press. Unlawful media disclosure of information provided to CFIUS risks fundamentally undermining the critical national security review process. Companies could become reluctant to submit their transactions for review. Those that

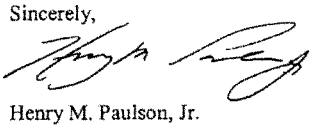
do file may become less forthcoming in the information they provide to CFIUS. Media leaks also undermine the integrity of the interagency deliberative process, chilling the full and open discussion that is essential to CFIUS's decision making.

Breaches of confidentiality could also chill foreign investment. Firms otherwise willing to invest in the United States may become less inclined to do so if submitting to a national security review process risks public exposure of sensitive personal, proprietary, and business information. Also, repeated leaks may make other countries less inclined to provide robust protections for confidential information provided by U.S. companies, putting U.S. companies with international operations at a competitive disadvantage to local companies.

Thank you for considering our concerns. As is evident from the examples above, unauthorized disclosures to the media put at risk effective Treasury Department programs important to the nation's security. S. 2035 would make unauthorized disclosures much harder to investigate and therefore more difficult to deter. For these reasons, we urge you to reject S. 2035 as it is currently drafted.

This letter also has been sent to the Ranking Member of the Senate Finance Committee, the Majority Leader and Minority Leader of the Senate, and the Chairman and Ranking Member of the Senate Banking Committee.

Sincerely,



Henry M. Paulson, Jr.

Enclosures

Appendix X

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

R. BRUCE JOSTEN
EXECUTIVE VICE PRESIDENT
GOVERNMENT AFFAIRS

1615 H STREET, N.W.
WASHINGTON, D.C. 20062-2000
202/463-5310

July 29, 2013

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Chuck Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Leahy and Ranking Member Grassley:

The U.S. Chamber of Commerce, the world's largest business federation representing the interests of more than three million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations, and dedicated to promoting, protecting, and defending America's free enterprise system, opposes S. 987, the "Free Flow of Information Act of 2013," as currently drafted. The legislation would have significant adverse ramifications on the ability of Americans to protect personal and proprietary information. The Chamber urges the Committee to not report this legislation to the full Senate unless and until several important deficiencies in the legislation are addressed.

The Chamber supports a vital and dynamic free press. We fully appreciate that a reporter privilege can be appropriate in many circumstances. Our concerns with the legislation are not with reporters who simply report information from those who choose not to be identified, but with a narrow set of sources who are bad-actors and use the media to illegally disseminate confidential information. When Congress considered a similar bill in 2005, the ombudsman for the *San Francisco Chronicle* warned that there is "danger of mischief on the part of sources who know they can escape accountability." Evidentiary privileges should not protect individuals who willfully use them to commit and cover up crimes. S. 987 would not only protect these individuals, but by doing so, would embolden their illegal activities.

S. 987 would protect people who violate laws that safeguard the confidential information of private individuals, businesses, and other entities. This confidential information includes federally protected trade secrets, personal health information, customer or employee data, and information sealed under judicial protective orders, among others. In these circumstances, the public policy decision has been made that this information should not be subject to public disclosure. When protected information is leaked, there is no way to limit the damage of the disclosure. Yet, S.987 would protect those who violate these laws.

Further, this bill would provide these individuals with a near-absolute privilege. It puts several weights on the scales of justice that need to be removed. For example, the bill would

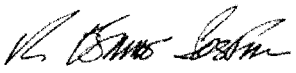
require that the information sought must be "essential to the resolution" of the underlying legal matter, whereas common law reporter privileges in several Courts of Appeal allow litigants access to a reporter's information if the information is relevant to the underlying claim. There has been no finding that this "relevance" standard is insufficient or has been abused. The bill's "essential to the resolution" provision is unnecessarily stringent and dramatically limits a person or business's ability to protect and retrieve confidential information. In addition, the public interest balancing test included in S. 987 should be adjusted to create a neutral, achievable result. As currently drafted, the balancing test is weighted in favor of private interests and creates a confusing standard that would be difficult to apply uniformly. Further, the definition of reporter should not reach non-traditional "journalists" who have interests beyond legitimately gathering and disseminating news.

S. 987 would also unintentionally undermine other aspects of the First Amendment. Under the bill, information like a group's member or donor list would potentially be unprotected if the information were stolen and leaked to a reporter. This is exacerbated when the definition of reporter is extended to non-traditional news sources that often have a politically motivated agenda. The disclosure of this information would violate the rights of individuals to freely associate and could be used to target and silence those who support disfavored causes. As a result, this bill, which is aimed at protecting First Amendment speech, would ultimately undermine those principles by facilitating retaliation against certain speakers.

In the past, when Congress has enacted public-right-to-know legislation, it has always ensured that privacy laws can also be enforced. The Freedom of Information Act (FOIA) exempts from disclosure information protected by law, proprietary or privileged business information, and information that could lead to unwarranted invasions of personal privacy. Similarly, whistleblower laws protect only the reporting of information related to suspected wrongdoing, not the disclosure of all private information. S. 987 should strike this same balance.

The Chamber would welcome the opportunity to work with the sponsors of S. 987 and with the other members of the Committee to address these concerns. However, until the serious concerns raised in this letter can be addressed, the Chamber opposes the "Free Flow of Information Act," as currently drafted.

Sincerely,



R. Bruce Josten

cc: Members of the Senate Committee on the Judiciary

Appendix XI

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

JUL 31 2007

The Honorable Lamar S. Smith
Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Ranking Member Smith:

This letter responds to your request that the Department of Justice provide its views on H.R. 2102, the "Free Flow of Information Act." It is our understanding that a Manager's Amendment to H.R. 2102 will be considered during Full Committee consideration of this legislation. This letter reflects the Department's views toward this revised proposal and expresses the Department's strong opposition to H.R. 2102 and the proposed Manager's Amendment to this legislation.

H.R. 2102 would provide a "journalist's privilege" protecting against not just the disclosure of confidential source information but also "testimony or . . . any document related to information possessed by such covered person[s] as part of engaging in journalism." While the Department appreciates the attempt to address some of our concerns toward the legislation, the bill as amended would still impose significant limitations on the Department's ability to investigate and prosecute serious crimes. Accordingly, the Department continues to strongly oppose this legislation. Our detailed views on the bill, including the Manager's Amendment, follow.

H.R. 2102 is the latest of several different proposed "media shield" bills to come before the Congress in recent years, and the Department has made its views on each known both through views letters and in public testimony before congressional committees in both the House of Representatives and the Senate.[1] Many of the objections the Department raised in earlier

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[1] *See, e.g.*, Testimony of Assistant Attorney General Rachel L. Brand, Hearing on "The Free Flow of Information Act of 2007," House Judiciary Comm. (June 14, 2007); Department of Justice Letter to Sen. Specter dated June 20, 2006, on S. 2831; Testimony of Deputy Attorney General Paul J. McNulty, Hearing on "Reporters' Privilege Legislation: Preserving Effective Federal Law Enforcement," Senate Judiciary Comm. (Sept. 20, 2006); Testimony of Principal Deputy Assistant Attorney General Matthew W. Friedrich, Hearing on "Examining the Department of Justice's Investigation of Journalists Who

views letters and in testimony apply to the current bill, and so we commend those earlier statements of the Department's views to your attention as a supplement to this letter. In addition to the objections previously raised by the Department, H.R. 2102 raises even greater concerns for the following five reasons, set out more fully below:

1. H.R. 2102 would make it virtually impossible to enforce certain Federal criminal laws, particularly those pertaining to the unauthorized disclosure of classified information, and could seriously impede other national security investigations and prosecutions, including terrorism prosecutions;

2. H.R. 2102 would impinge on a criminal defendant's constitutional right under the Sixth Amendment to subpoena witnesses on his behalf;

3. H.R. 2102 unconstitutionally transfers core Executive branch powers and decision-making to the Judiciary;

4. H.R. 2102 also threatens to limit other judicial powers; and

5. H.R. 2102's definition of a journalist still appears to provide protections to a very broad class of individuals—not just the "professional journalists" contemplated by the Manager's Amendment—thus raising significant obstacles to law enforcement. The definition also would be open to legal challenge on First Amendment grounds by the very individuals the Manager's Amendment seeks to exclude from its definition of "covered person."

For all of these reasons and those that follow, the Department strongly opposes H.R. 2102 and the Manager's Amendment that will be offered during its markup consideration before the Judiciary Committee.

Introduction

As an initial matter, the Department of Justice has long recognized that the media plays a critical role in our society, a role that the Founding Fathers protected in the First Amendment. In recognition of the importance of the news media to our Nation, the Department has, for over 35

Publish Classified Information: Lessons from the Jack Anderson Case," Senate Judiciary Comm. (June 6, 2006); Statement of United States Attorney for the Southern District of Texas Chuck Rosenberg, Hearing on "S. 1419, the 'Free Flow of Information Act of 2005,'" Senate Judiciary Committee (October 19, 2005); Statement of Deputy Attorney General James B. Comey, Hearing on "Reporters' Privilege Legislation: Issues and Implications of S. 340 and H.R. 581, the Free Flow of Information Act of 2005," Senate Judiciary Comm. (July 20, 2005).

years, provided guidance to Federal prosecutors that strictly limits the circumstances in which they may issue subpoenas to members of the press. *See* 28 C.F.R. § 50.10. The exhaustive and rigorous nature of this policy is no accident; it is designed to deter prosecutors from even making requests that do not meet the standards set forth in the Department's guidelines. As a result, prosecutors seek to subpoena journalists and media organizations only when it is necessary to obtain important, material evidence that cannot reasonably be obtained through other means.

The effectiveness of this policy, and the seriousness with which it is treated within the Department, contradict the allegations some have made about the Justice Department's alleged disregard for First Amendment principles. Since 1991, the Department has approved the issuance of subpoenas to reporters seeking confidential source information in only 19 cases.[2] The authorizations granted for subpoenas of source information have been linked closely to significant criminal matters that directly affect the public's safety and welfare.

Moreover, while critics argue that there has been a marked increase in the number of confidential-source subpoenas approved by the Department in recent years, such claims cannot withstand scrutiny, as the following chart makes clear:

Year	Number of Cases in which Source-Related Subpoenas Were Approved
1992	3
1993	2
1994	0
1995	3
1996	1
1997	3
1998	2
1999	1
2000	0
2001	2
2002	0
2003	0
2004	1
2005	0
2006	1

[2] In only two of those nineteen matters was the Government seeking to question a reporter under oath to reveal the identity of a confidential source. In one of the two matters, the media member was willing to identify his source in response to the subpoena. In the other matter, the Department withdrew the media subpoenas after it had obtained other evidence concerning the source of the information and that source agreed to plead guilty. Of the nineteen source-related matters since 1991, only four have been approved since 2001. The nineteen source-related matters referenced above do not include any media subpoenas issued by Special Counsels because those requests for media subpoenas are not processed by the Department and, as a result, the Department does not keep records concerning those matters.

These numbers demonstrate a *decrease* in the number of cases in which the Department has approved the issuance of subpoenas seeking confidential source information in recent years: of the 19 source-related matters since 1991, only four have been approved since 2001.

In light of this record of restraint, the Department believes that this legislation would work a dramatic shift in the law with little or no evidence that such a change is warranted. Supporters of the bill contend that, in the absence of a reporter's privilege, sources and journalists will be chilled, newsgathering will be curtailed, and the public will suffer as a result. Such arguments are not new. Thirty-five years ago, when the Supreme Court considered the issue of a reporter's privilege in the landmark case of *Branzburg v. Hayes*, 408 U.S. 665 (1972), litigants and numerous *amicus* briefs argued that, in the absence of such a privilege, the free flow of news would be diminished. The Court considered and rejected such arguments, finding that "[e]stimates of the inhibiting effect of . . . subpoenas on the willingness of informants to make disclosures to newsmen are widely divergent and to a great extent speculative." *Id.* at 693-94. Given the profusion of information that has become available to the public in the 35 years since *Branzburg*, it is difficult to dispute the Court's conclusion. Information now flows more freely – and on more topics of interest to the public – than at any time in our Nation's history. Allegations made by supporters of this legislation that this free flow of information has been stifled or will diminish in the absence of a statutory privilege are no less speculative today than they were 35 years ago. This legislation, as Deputy Attorney General Paul McNulty stated in testimony before the Senate Judiciary Committee in September of last year, is "a solution in search of a problem."

H.R. 2102, and the Proposed Manager's Amendment Would Make It Virtually Impossible To Prosecute "Leak" Cases And Difficult To Prosecute Other Types Of Cases In Certain Circumstances, Including Terrorism Cases

First, it is critical to note that, because the privilege created by H.R. 2102 could only be overcome when disclosure of a source "is necessary to prevent an act of terrorism against the United States or other significant specified harm to national security" or "death or significant bodily harm" "with the objective to prevent such harm," the legislation creates a bar so high that many criminal investigations could not satisfy its requirements. Under the Manager's Amendment, Section 2(a)(3)(A) of the bill would permit disclosure of the identity of a source only when necessary "to prevent an act of terrorism against the United States or other significant specified harm to the National Security." As a result, the Manager's Amendment to H.R. 2102 still provides exceptions to the reporter's privilege only as a *preventative* measure, and not as a means to gather information about any past crime, past harm to national security, or any future harm to the national security that is less than specific. In addition, the amended version of the legislation permits Federal law enforcement to issue a subpoena for confidential source information only to prevent "an act of terrorism *against the United States*." The plain language of the Manager's Amendment thus precludes the issuance of subpoenas for information related to terrorist attacks against allies of the United States.

To demonstrate the significance of the burden H.R. 2102 would impose upon law enforcement, assume that a confidential source told a reporter which terrorist organization was responsible for a particular terrorist attack that occurred that day, so that the group could accept responsibility for the attack. The government would be powerless to compel the reporter to name the source, which would obviously aid the investigation into the group's conspirators, because the attack had already occurred and therefore the investigation would not be "with the objective to prevent such harm." *See* H.R. 2102 at § 2(a)(3)(A). Instead, the investigation would be designed to bring to justice the terrorists who had just attacked our Nation, but H.R. 2102 would thwart that goal by blocking the most logical avenue for investigation by law enforcement. The proposed Manager's Amendment to the legislation does not cure this defect.

Indeed, H.R. 2102 has the anomalous effect of placing a greater burden on the Government in criminal cases—including cases implicating national security—than in cases in which the Government seeks to identify a confidential source who has disclosed a valuable trade secret, personal health information, or nonpublic consumer information. In cases in which the Government sought the identity of a source who had unlawfully disclosed national security-related information, the bill would require the Government to show that disclosure of the source was necessary to prevent an act of terrorism or other significant specified harm to national security. Thus, where damage had already been done to the national security as a result of a leak and publication of classified information, the Government could not obtain the identity of the source. But the Government would not be required to make such a showing in order to obtain the identity of a source who had violated Federal law by disclosing a trade secret. The person who leaks classified war plans, therefore, would still be protected by the privilege if the journalist to whom he leaked the information had already published it, while the person who leaked trade secrets would not. Thus, the evidentiary threshold proposed by H.R. 2102 would create an incentive for "covered persons" to protect themselves and their sources by immediately publishing the leaked information, even if national security would be harmed, because once the harm actually occurs it would be nearly impossible for the Department of Justice to investigate the source of that information.[3]

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[3] It is also worth noting that the bill shifts the burden of proof to the Government, in a manner that is unacceptable to the Department. Under Federal Rule of Criminal Procedure 17, the recipient of a subpoena can now move to quash the subpoena but, in order to prevail, must make a showing that the subpoena in question is "unreasonable and oppressive." Fed. R. Crim. P. 17(c)(2). That is to say, the burden is on the party seeking to quash the subpoena to demonstrate its unreasonableness or oppressiveness. The proposed bill, however, shifts the burden to the Government, while simultaneously increasing the amount of proof the Government must introduce before a subpoena can issue to a member of the media. This is not an insignificant change: the allocation of the burden, as a legal matter, can have a tremendous effect on the outcome of a proceeding, for it requires the party carrying the burden not only to produce evidence, but to produce it in sufficient quantity and quality in order to carry the day.

Even if we assume the Government could overcome the very high standard for disclosure contained in H.R. 2102, doing so in cases involving national security and terrorism will almost always also require the Government to produce extremely sensitive and even classified information. It is thus likely that the legislation could encourage more leaks of classified information—by giving leakers a formidable shield behind which they can hide—while simultaneously discouraging criminal investigations and prosecutions of such leaks—by imposing such an unacceptably high evidentiary burden on the Government that it virtually requires the disclosure of additional sensitive information in order to pursue a leaker of classified information.

Criminal investigations could also be hampered by the requirement of Section 2(a)(3)(B) that disclosure be necessary to prevent imminent death or significant bodily harm with the objective to prevent such death or harm. A real-life example demonstrates how this might arise.

In 2004, the notorious "BTK Strangler" emerged from years of silence to begin corresponding with media representatives and law enforcement entities in Wichita, Kansas. The killer calling himself "BTK" had terrorized Wichita with a string of violent homicides, but 13 years had elapsed since his last murder. In repeated correspondence, "BTK" described previously nonpublic details of the past murders and provided corroborating evidence such as photographs taken during the crimes. Yet authorities were not able to identify a suspect. "BTK" then sent a computer disk to a television station. The television station turned over the disk to police, and forensic experts were able to extract hidden information from the disk that tied it to a particular computer and user.[4] This enabled law enforcement officers to arrest Dennis Rader, who eventually pled guilty to 10 murders.[5]

If the television station had refused to disclose the computer disk, and H.R. 2102 had applied in the case, Rader might never have been apprehended and the families of the murder victims would still be awaiting justice. Because all of the information related to long-past killings, law enforcement would not be able to demonstrate that disclosure was necessary to prevent *imminent death*. Even if it is assumed that a responsible media outlet would voluntarily turn over information related to a serial killer, we cannot expect that criminals will always provide information to *responsible* media, or that a "mainstream" publication will always turn over information related to a less sensational crime. The Manager's Amendment to H.R. 2102 does not address these defects.

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[4] State's Summary of the Evidence, filed August 18, 2005 (Case No. 05CR498, Eighteenth Judicial District, District Court, Sedgwick County, Kansas, Criminal Department) *available at* http://www.sedgwickcounty.org/da/Dennis_Rader/Docs%20filed%20with%20CT/52310812.pdf (last visited July 16, 2007).

[5] Patrick O'Driscoll, *'BTK' Calmly Gives Horrific Details*, USA TODAY, June 28, 2005, at 3A, *available at* 2005 WLNR 10181832.

Finally, the Department notes that H.R. 2102 imposes several additional requirements beyond the extremely high evidentiary hurdles outlined above. The Manager's Amendment, in an apparent attempt to incorporate the language of Federal Rule of Criminal Procedure 17, requires the Government to demonstrate that the subpoena it seeks to issue is not "overbroad, unreasonable or oppressive." H.R. 2102 at § 2(b)(1). It further requires, in effect, that any testimony or information compelled must exclude "nonessential" information -- i.e. the information must be confined to "essential" information. *Id.* 2(b)(2). How those seeking the information would be able to determine whether information they have not seen is "essential" is not evident. Thus, even in cases where the government has demonstrated that disclosure of a source is necessary to prevent an act of terrorism or other significant specified harm, the bill provides putative subpoena recipients another avenue for resisting production—and this is in addition to the catch-all "public interest" provision, that would allow covered persons to quash otherwise valid subpoenas on the grounds that "the public interest in compelling disclosure" does not "outweigh[] the public interest in gathering or disseminating news or information." H.R. 2102 § 2(a)(4).

H.R. 2102 further provides that, "where appropriate," "any document or testimony that is compelled . . . be limited to the purpose of verifying published information." H.R. 2102 § 2(b)(1). This provision of the bill leaves prosecutors in an untenable position. If prosecutors may only seek confidential source information in order to "verify published information," then they may never be able to obtain source information concerning a leak of national security information which has not yet been published in the media. However, if the leaked information has already been published by the media and the damage already done to national security, then prosecutors may be unable to make a showing that "disclosure of the identity of such a source is necessary to prevent an act of terrorism against the United States or other significant specified harm to national security." *See* H.R. 2102 at § 2(a)(3)(A). In other words, H.R. 2102 puts Department of Justice prosecutors in an insolvable dilemma and effectively provides absolute immunity to leakers of sensitive national security information. As a result, a person who unlawfully leaked classified war plans to the media, which were published and resulted in the deaths of hundreds of U.S. soldiers, could not be prosecuted under H.R. 2102 by subpoenaing the reporter for source information simply because the national security harm had already occurred and the subpoena would not be "limited to the purpose of verifying published information." The Manager's Amendment does not address this concern.

Finally, it may be argued that, in some or all of the examples cited above, responsible media organizations would voluntarily turn over the information in their possession to assist law enforcement in the identification, apprehension, and prosecution of culpable individuals. Even assuming that this would in fact be the case—and the Department is skeptical that it would be the case, for example, in cases involving leaks of classified national security information—relying on the goodwill of news organizations to turn over evidence in cases of serious criminal activity is a very risky proposition. For, such a proposition requires us in turn to take it on faith that dangerous and, in some cases, violent criminals will only give evidence and information to

"responsible" media outlets (who in turn will voluntarily provide the information to law enforcement), rather than give it to some less reputable entities or individuals who nevertheless would still qualify as "covered persons" under this legislation. To state such a proposition is to refute it. The Manager's Amendment to the legislation does not overcome these basic concerns.

H.R. 2102 Impermissibly Impairs the Sixth Amendment Rights of Defendants

The Sixth Amendment provides in relevant part that "[i]n all criminal proceedings, the accused shall enjoy the right ... to be confronted with the witnesses against him ... [and] to have compulsory process for obtaining witnesses in his favor." As the Supreme Court has recognized, "[t]his right is a fundamental element of due process of law." *Washington v. Texas*, 388 U.S. 14, 19 (1967). Although this right is not absolute, the Government bears a heavy burden when it seeks to limit it by statute. As the Second Circuit has explained, "[w]hile a defendant's right to call witnesses on his behalf is not absolute, a state's interest in restricting who may be called will be scrutinized closely. In this regard, maximum 'truth gathering,' rather than arbitrary limitation, is the favored goal." *Ronson v. Commissioner of Corrections*, 604 F.2d 176, 178 (2d Cir. 1979) (State court's refusal to allow testimony of psychiatrist to testify in support of prisoner's insanity defense violated Sixth Amendment right to compulsory process.)

H.R. 2102 would violate the Sixth Amendment rights of criminal defendants by imposing impermissibly high standards that must be satisfied before such defendants can obtain testimony, information, and documents that are necessary or helpful to their defense. Under H.R. 2102, a criminal defendant can only obtain testimony, documents, or information for his defense if he can persuade a court that: (1) he has exhausted all reasonable alternative sources; (2) the testimony or document sought is "critical" to his defense, rather than merely relevant and important; (3) the testimony or document is not likely to reveal the identity of a source of information or to include information that could reasonably be expected to lead to the identity of such source; and (4) "the public interest in compelling disclosure outweighs the public interest in gathering or disseminating news or information." *See* H.R. 2102 § 2(a). These burdensome standards go beyond what is permissible in restricting defendants' Sixth Amendment rights in this context. *See, e.g., United States v. Libby*, 432 F. Supp. 2d 26, 47 (D.D.C., May 26, 2006) ("[T]his Court agrees with the defendant that 'it would be absurd to conclude that a news reporter, who deserves no special treatment before a grand jury investigating a crime, may nonetheless invoke the First Amendment to stonewall a criminal defendant who has been indicted by that grand jury and seeks evidence to establish his innocence.'"); *United States v. Lindh*, 210 F. Supp. 2d 780, 782 (E.D. Va. 2002) (a defendant's "Sixth Amendment right to prepare and present a full defense to the charges against him is of such paramount importance that it may be outweighed by a First Amendment journalist privilege only where the journalist's testimony is cumulative or otherwise not material.")

Indeed, one could imagine a scenario in which a criminal defendant had been charged with a crime he did not commit, a murder for example, due to a good-faith misinterpretation of

circumstantial evidence by the prosecution. Due to media coverage of the case, a member of the community realizes that one of his cousins had previously admitted to him that he actually committed the murder, and that an innocent man is now facing trial for a crime he did not commit. In an attempt to rectify the situation, this person decides to notify a member of the media that the authorities have charged an innocent man with the murder, but he insists on confidentiality to avoid implicating his cousin in the crime. The journalist publishes a story that the authorities have charged the wrong person with the crime, but refuses to name the source for this information. Under H.R. 2102, the defendant's lawyer could not compel the journalist to reveal the source because these facts would not meet any of the three elements contained in § 2(a)(3) of the legislation. Likewise, even if the Government agreed to dismiss the charges against the current defendant, based on a completely unsubstantiated media report, the prosecutor would be powerless to compel the journalist to reveal his source because the murder had already occurred and, therefore, as noted above, the subpoena would not satisfy the requirement that "disclosure of the identity of such a source is necessary to prevent imminent death or significant bodily harm with the objective to prevent such death or harm." H.R. 2102 § 2(a)(3)(B).

The Bill Transfers Core Executive Functions to the Judiciary

One of the most troubling aspects of the proposed legislation is the core structural change it would work on current law-enforcement practice—a change that will severely hamper our ability to investigate and prosecute serious crimes, including acts of terrorism and the unauthorized disclosure of classified information. Under the proposed legislation, before allowing the issuance of a subpoena to the news media in a national security-related case for information "that could reasonably be expected to lead to the discovery" of a confidential source, a court must determine "by a preponderance of the evidence" that "disclosure of the identity of such a source is necessary to prevent a terrorist attack or significant specified harm to national security," H.R. 2102 at § 2(a)(3)(a); that "the public interest in compelling disclosure outweighs the public interest in gathering or disseminating news or information," H.R. 2102 at § 2(a)(4); and that "[t] content of any testimony or document that is compelled . . . [is] not . . . overbroad, unreasonable or oppressive and, where appropriate, [is] limited to the purpose of verifying published information or describing any surrounding circumstances relevant to the accuracy of such published information." H.R. 2102 at § 2(b)(1).

By its own terms, then, H.R. 2102 not only cedes to the Judiciary the authority to *determine* what does and does not constitute "significant specified harm to national security" (a classic Executive branch function), it also gives courts the authority to *override* the national security interest where the court deems that interest insufficiently compelling—even when harm to the national security has been established. In so doing, the proposed legislation would transfer authority to the Judiciary over law enforcement determinations reserved by the Constitution to the Executive branch. In the context of confidential investigations and Grand Jury proceedings, determinations regarding the national security interests are best made by members of the

Executive branch—officials with access to the broad array of information necessary to protect our national security. As Justice Stewart explained in his concurring opinion in the Pentagon Papers case, "it is the constitutional duty of the Executive—as a matter of sovereign prerogative and not as a matter of law as the courts know law—through the promulgation and enforcement of Executive regulations, to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense." *New York Times Co. v. United States*, 403 U.S. 713, 729-30 (1971) (Stewart, J., concurring).

The Constitution vests this function in the Executive branch for good reason; the Executive is better situated and better equipped than the Judiciary to make determinations regarding the Nation's security. Judge Wilkinson outlined the reasons why this is the case in his concurring opinion in *United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988):

> Evaluation of the government's [national security] interest . . . would require the Judiciary to draw conclusions about the operation of the most sophisticated electronic systems and the potential effects of their disclosure. An intelligent inquiry of this sort would require access to the most sensitive technical information, and background knowledge of the range of intelligence operations that cannot easily be presented in the single 'case or controversy' to which courts are confined. Even with sufficient information, courts obviously lack the expertise needed for its evaluation. Judges can understand the operation of a subpoena more readily than that of a satellite. In short, questions of national security and foreign affairs are of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Id. at 1082-83 (Wilkinson, J., concurring).

Thus, in our view, H.R. 2102 impermissibly divests the Executive branch of its constitutional obligation to ascertain threats to the national security. *See* H.R. 2102 at § 2(a)(3)(A). The legislation would also transfer these duties and obligations to the Judiciary, which (as demonstrated above) is ill-equipped to make these determinations. This unconstitutional transfer of power will have serious implications in national security cases. For example, if the Department decided, in an exercise of its prosecutorial discretion, to issue a Grand Jury subpoena to a member of the media in connection with an investigation into the unauthorized disclosure of classified information to the media, a member of the Judiciary could effectively shut down the Grand Jury's investigation simply by concluding that upholding the subpoena would not be in the "public interest." *See* H.R. 2102 at § 2(a)(4). The Department cannot support such an unconstitutional transfer of its Executive branch powers to the Judiciary.

<u>H.R. 2102 Improperly Limits the Power of Judges and Will Impair the Judicial Process</u>

While this bill would impermissibly augment the role played by the Judiciary in the criminal investigative process—especially in cases involving national security—it simultaneously threatens to seriously erode the power of Federal judges to control the proceedings they oversee and enforce their own orders. By its terms, the bill states that "a Federal entity may not compel a covered person to provide testimony or produce any document related to information possessed by such covered person as part of engaging in journalism." H.R. 2102 § 2(a). The definition for a "Federal entity" includes, *inter alia*, "an entity or employee of the judicial or executive branch." H.R. 2102 § 4(4).

Thus, under this definitional scheme, a Federal District Court Judge would have to apply H.R. 2102 before determining whether he or she could enforce a Protective Order, "gag" order, or the Grand Jury secrecy requirements set out in Federal Rule of Criminal Procedure 6(e). If, for example, a Court learned that sensitive documentary evidence or Grand Jury testimony had been provided to a reporter in violation of the Court's Protective Order, the Judge would be required to apply H.R. 2102 in a Show Cause hearing, or similar contempt hearing, in order to assess who had violated the Court's Order. If the Judge wished the reporter to testify at the hearing and disclose the reporter's source, the Court would be required to satisfy the requirements of H.R. 2102. Under most scenarios, a violation of a Protective Order or the Grand Jury secrecy rules would not satisfy the § 2(a)(3) requirements that disclosure of the source is necessary to "prevent a terrorist attack or significant specified harm to the national security," "prevent imminent death or significant bodily harm," or identify a person who has disclosed a trade secret, individually identifiable health information, or nonpublic personal information. In cases where such a showing cannot be made, the court will be unable to require the covered person to divulge the identity of the source who violated the Court's order or rules governing Grand Jury secrecy. This legislation thus will severely undermine the Federal judiciary's supervisory powers and its ability to enforce its own Orders and protect the integrity of its proceedings. The Manager's Amendment does nothing to address these concerns.

H.R. 2102's Definition of Covered Persons Remains Problematic

The Manager's Amendment to H.R. 2102 alters the definition of "covered person," restricting the reporter's privilege to "a person who, for financial gain or livelihood, is engaged in journalism" and specifically excluding any person who is a foreign power or agent of a foreign power under the Foreign Intelligence Surveillance Act and any person who is a designated Foreign Terrorist Organization. H.R. 2102 at § 4(2). Section 4(5) of the bill then broadly defines "journalism" to mean "the gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing of news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public." As we have previously noted, the privilege provided by the bill goes far beyond the limits of any constitutional rights. In *Branzburg v. Hayes*, 408 U.S. 665 (1972), the Supreme Court held that requiring journalists to appear and testify before State or Federal grand juries does *not* abridge the freedom of speech and press guaranteed by the First Amendment and that a journalist's

agreement to conceal criminal conduct of his news sources, or evidence thereof, does not give rise to any constitutional testimonial privilege with respect thereto.

While the revised definition of "covered person" provided by the Manager's Amendment seeks to address some of the Department's concerns—most notably by removing the media arms of officially designated terrorist organizations from the class of covered persons and by requiring that a covered person be "engage[d] in journalism for financial gain or livelihood"—these revisions fail to adequately address the Department's concerns, would create significant obstacles for law enforcement, and raise legitimate constitutional concerns about this legislation.

As an initial matter, the provisions of the bill excluding foreign powers or their agents and designated terrorist organizations from the definition of "covered person" do not achieve their intended purpose for the simple reason that there are many terrorist media who are neither "designated terrorist organizations" nor covered entities under the provisions of 50 U.S.C. § 1801 referenced in the bill. Thus, individuals and entities who are engaged in journalism for financial gain but who are not designated terrorist organizations, foreign powers, or agents of a foreign power, will be entitled to the protections accorded by this legislation—no matter how closely linked they may be to terrorist or other criminal activity.

The attempt to limit the scope of the "covered person" definition to those "engage[d] in journalism for financial gain or livelihood" is also inadequate because the Internet enables virtually anyone to be "engage[d] in journalism for financial gain or livelihood." Many blogs or websites run by people who have other jobs and livelihoods also generate advertising revenue. One need not be a full-time journalist in order to derive "a financial gain" from engaging in "the gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing of news or information that concerns local, national, or international events or other matters of public interest"—which is how this bill defines journalism. A simple banner advertisement of the sort that appears on literally thousands of blogs worldwide would likely be sufficient to establish that the individual running the blog was "engaged in journalism for financial gain" under the terms of the act.

Moreover, the bill's definition of covered person still includes social networking sites like MySpace.com, which are clearly engaged in the business of publishing information for financial gain. Providing such sites with a means to resist subpoenas from law enforcement will impede the investigation of serious crimes. For example, many violent street gangs have taken to using social networking websites such as MySpace to post information about their activities. If a site user were to post photographs showing gang members celebrating a major drug deal, H.R. 2102 could make it difficult for police to obtain information about the completed crime. The user posting the pictures might qualify as a "covered person" by engaging in reporting related to local gangs. More importantly, even if the user posting the pictures is not a "covered person," a plain reading of the statute suggests that the social networking site itself would be

considered a "covered person" by publishing that reporting.[6] Under either interpretation, law enforcement could face serious hurdles in pursuing the lead.

Specifically, if law enforcement sought to subpoena the website for information regarding the user posting the photographs, this would qualify as seeking testimony or documents that could reveal the identity of a source of information. Pursuant to proposed § 2(a)(3)(B), law enforcement would have to show that disclosure was necessary to prevent imminent death or significant bodily harm, a standard that probably could not be met—even with evidence of a serious crime in hand – without specific evidence of future violent crimes. Moreover, even if law enforcement could meet that standard, the proceedings necessary to do so would impermissibly impede and inhibit the investigation. Similarly, certain members-only web sites and discussion boards allow subscribers to post statements in which users admit to past acts of pedophilia and state opinions that such behavior should be legalized. If H.R. 2102 were enacted, such web sites would probably constitute "publishers"—especially where users of the website pay a fee for membership privileges—and law enforcement could not subpoena the provider to identify the child molesters unless there were some specific evidence that they were continuing to sexually abuse children.

The range of scenarios outlined above could arise in connection with any material posted on any website, blog, community forum, or similar medium, far removed from traditional forms of journalism. For example, an anonymous blogger's threatening remarks about a Federal judge's ruling, accompanied by the judge's home address, but without a specific threat might fail to reach the level of "imminent" harm. Moreover, a posting on a news website's interactive readers' forum threatening to commit a crime that falls short of "significant bodily harm" would not meet the exceptionally high standard that would allow law enforcement to compel production of information from the news organization.

Even assuming, however, that the Manager's Amendment has successfully restricted the definition of "covered person" to professional journalists only—and it is not at all clear that it has done so—the bill presents an entirely different problem. For if the bill does not extend its protections to bloggers and MySpace users, those same bloggers and MySpace users—when faced with a government subpoena to provide information or identify a source—will almost certainly contend that excluding them from bill's definition of "covered persons" violates their

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[6] MySpace and sites like it would also qualify as "communications service providers" under Section 4 (1) of the bill. Thus, in addition to possibly falling into the definition of "covered persons," these types of websites would not be subject to compelled disclosure of information about "business transactions" between the sites and the individual users as "covered persons" (without law enforcement overcoming significant legal hurdles). Because the term "business transaction" is not defined in the proposed bill, a court might interpret it to cover any situation in which a user pays for an account, such as purchasing a domain name or creating a website.

rights under the First Amendment. Should this bill become law, it is a virtual certainty that such claims will be brought, and at least some of them may be deemed meritorious. As a result, we will once again be faced with a law that provides a very robust—and in some cases, impossible-to-overcome—privilege to an extremely broad class of persons, to the detriment of both effective law enforcement and, ultimately, the safety of the American public.

Defining who is entitled to invoke a "reporter's privilege" is a very difficult, if not intractable, problem. If the definition is broadly worded, it will inevitably be over-inclusive, sweeping within its protection hostile foreign entities as well as other criminal enterprises whose ability to invoke the privilege would frustrate law enforcement. If, however, the definition is more narrowly tailored, it would be open to legitimate challenge on First Amendment grounds from individuals or entities denied the privilege. As we stated in our June 20, 2006 views letter, "[w]e question whether a definition that reconciles these conflicting considerations is possible as a practical matter."

Uniform Standards Purpose

Some proponents of H.R. 2102 have suggested that the bill is little more than a codification of the Department's own guidelines. That view is without foundation. The Department's guidelines preserve the constitutional prerogatives of the Executive branch with respect to key decisions regarding, for example, the kind of evidence that is presented in Grand Jury investigations and what constitutes harm to the national security. The proposed legislation, by contrast, would shift ultimate authority over these and other quintessentially prosecutorial decisions to the Judiciary. Furthermore, the proposed legislation would replace the inherent flexibility of the Department's guidelines, which can be adapted as circumstances require — an especially valuable attribute in a time of war — with a framework that is at once more rigid (by virtue of being codified by statute) and less predictable (by virtue of being subject to the interpretations of many different judges, as opposed to a single Department with a clear track record of carefully balancing the competing interests).

Finally, proponents of H.R. 2102 have asserted that one of the bill's primary purposes is to eliminate divergent application of a reporters' privilege by providing a uniform Federal standard. This contention is without merit. Federal legislation such as H.R. 2102 would merely provide a non-constitutional *statutory* standard, or floor, that must be satisfied for the Government, a criminal defendant, or parties in civil litigation to obtain testimony or evidence that is subject to an alleged journalist's privilege in Federal court. The bill does *not* eliminate or prevent the differing *constitutional* interpretations of the scope and nature of a journalist's privilege in different circuits, particularly in civil cases, which may impose limitations above and beyond the bill's proposed statutory minimum standards. Thus, rather than simplifying the legal standards that must be overcome to obtain information or evidence subjected to a claim of reporter's privilege, H.R. 2102 would compound and complicate them by imposing a complex,

subjective statutory standard on top of the various constitutional interpretations that have been promulgated in various circuits.

Thank you for the opportunity to present our views. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Brian A. Benczkowski
Principal Deputy Assistant Attorney General

cc: The Honorable John Conyers
Chairman

The Honorable Mike Pence
Member

The Honorable Rick Boucher
Member

Appendix XII

Office of the Attorney General

Washington, D.C. 20530

July 29, 2013

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Leahy:

This letter presents the views of the Department of Justice on the substitute amendment (ALB13659) to S.987, the "Free Flow of Information Act of 2013." The Department is pleased that the Senate Judiciary Committee will be considering this bill, which strikes a careful balance between safeguarding the freedom of the press and ensuring our nation's security and the safety of the American people. The Department supports the passage of this media shield legislation, and will continue to work with leaders from both parties to achieve this goal.

Over the past few months, the Department has engaged in a rigorous review of its own internal policies governing investigations and other law enforcement matters that involve journalists, including extensive engagement with news media organizations, First Amendment groups, media industry organizations, and academic experts. As a result of this process, the Department announced that it would make substantial revisions to its policies to strengthen protections for members of the news media, while maintaining the Department's ability to protect the American people by pursuing those who violate their oaths through unlawful disclosures of information.

Notwithstanding the significant modifications the Department intends to make to its policies with respect to investigations involving the news media, certain measures will require legislative action. As provided in the substitute amendment to S. 987, for example, a media shield law could establish a mechanism for advance judicial review of investigative tools such as subpoenas when they involve the news media. The proposed bill establishes an important procedural framework for such judicial review, including by providing for expedited judicial determinations and under seal or ex parte review for good cause. In addition, the definition of "covered person" appropriately identifies individuals and entities engaged in gathering and disseminating public news or similar information.

The Department reiterates its support for this bill, and looks forward to continuing to work with lawmakers to achieve its passage.

Sincerely,

Eric H. Holder, Jr.
Attorney General

Appendix XIII

NOV 0 4 2009

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Leahy:

This letter presents the views of the Administration on the Specter-Schumer substitute amendment (HEN09B24) to S. 448, the "Free Flow of Information Act of 2009." This legislation is the result of a series of productive and cooperative discussions with the sponsors and supporters of the legislation. The Administration supports this substitute amendment and urges that no further amendments be adopted to this carefully crafted compromise.

We appreciate the critical role that the media plays in a free and democratic society. This legislation provides robust judicial protection for journalists' confidential sources, while also enabling the Government to take measures necessary to protect national security and enforce our criminal laws.

There are a number of changes from previous versions of this legislation that address concerns that the Administration has expressed.

In criminal investigations and prosecutions where the Government seeks to compel disclosure, Section 2 of S. 448 as introduced provided that a court would engage in an open-ended analysis weighing the interest in disclosure against the free flow of information. The Specter-Schumer substitute eliminates this open-ended analysis, and replaces it with a more balanced and appropriate process. First, it requires the Attorney General to certify that the request for compelled disclosure was made in a manner consistent with the guidelines in the U.S. Attorney's Manual (USAM). Second, reflecting the fact that the USAM already provides significant protections for the news media from subpoenas that might impair the newsgathering function, the Specter-Schumer substitute provides that when the court balances the interest in compelling disclosure against the interest in the free flow of information, the journalist bears the burden to establish by clear and convincing evidence that disclosure would be contrary to the public interest. (In addition to these two requirements, the substitute amendment retains a number of other elements of Section 2 of S. 448, including the requirements that the Government exhaust all reasonable alternative sources of the protected information, show there are reasonable grounds to believe a crime has occurred, and demonstrate reasonable grounds for believing that the information is essential to the investigation or prosecution.)

Moreover, the Specter-Schumer amendment provides appropriate protection for national security. If disclosure of the information in question would materially assist the Government in preventing, mitigating, or identifying the perpetrator of an act of terrorism or other significant and articulable harm to national security, the Specter-Schumer amendment provides that the balancing test contained in Section 2 of the legislation would not apply and the court would be expected to compel production of the information. The Administration supports the provision in the substitute amendment giving courts the power to determine whether the harm at issue rises to the level of an act of terrorism or other significant and articulable harm to national security, and whether the information sought by the Government would in fact materially assist in preventing, mitigating, or identifying those responsible for such harm, while giving appropriate deference to specific factual submissions by the Government.

This same basic approach would apply in criminal investigations and prosecutions of allegedly unlawful disclosure of properly classified information, where the Government is seeking information to prevent or mitigate an act of terrorism or other significant and articulable harm to national security. If the Government establishes that the information it seeks would materially assist in preventing or mitigating such harm, under the substitute amendment it will face the same conditions and court review as in other national security cases. In other leak cases, the court would have an additional role, employing the balancing test described above for criminal investigations and prosecutions generally.

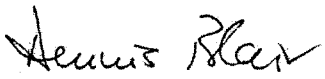
We also appreciate that the substitute addresses a number of other Administration concerns, including:

- permitting the Government to make its submissions in camera and ex parte where necessary;
- excluding from the bill's coverage authorities granted under the Foreign Intelligence Surveillance Act;
- eliminating a provision that contemplates judicial review of individual classification decisions; and
- not requiring the Government to establish that the allegedly unlawful disclosure in question was made by someone who had "authorized access to such information."

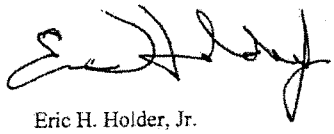
Finally, the definition of a "covered person" protected by this legislation has been much improved. First, the intent and actions necessary for a person to meet this definition are now clearly specified. Second, the definition now includes several important exclusions so that, for example, someone who is or is reasonably believed to be committing or attempting to commit the crime of terrorism or providing material support to a terrorist organization is not a "covered person." At the same time, this definition does not require a covered person to be a salaried employee of, or independent contractor to, a media organization. Over time, we expect that the courts will be able to distinguish persons entitled to the protections afforded by this statute from those who are not.

In conclusion, this legislation is a significant step forward from previous versions. The Administration supports this legislation, and the Office of Management and Budget has advised us that there is no objection to this letter from the perspective of the Administration's program.

Sincerely,



Dennis C. Blair
Director of National Intelligence



Eric H. Holder, Jr.
Attorney General

cc: The Honorable Jeff Sessions

Appendix XIV

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL
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VICE PRESIDENT
ROY COOPER
Attorney General of North Carolina

IMMEDIATE PAST PRESIDENT
LAWRENCE WASDEN
Attorney General of Idaho

June 23, 2008

Via Facsimile

The Honorable Harry Reid
Majority Leader
United States Senate
S-221 Capitol Building
Washington, DC 20510

The Honorable Mitch McConnell
Minority Leader
United States Senate
S-230 Capitol Building
Washington, DC 20510

Dear Senators Reid and McConnell:

We, the undersigned Attorneys General, write to express our support for the Free Flow of Information Act (S. 2035). The proposed legislation would recognize a qualified reporter's privilege, bringing federal law in line with the laws of 49 states and the District of Columbia, which already recognize such a privilege. The Senate Judiciary Committee reported S. 2035 favorably on October 4, 2007, by a vote of 15-4. The House passed a similar reporter's privilege bill, H.R. 2102, by a vote of 398-21.

Justice Brandeis famously referred to the important function the states perform in our federal system as laboratories for democracy, testing policy innovations. *See New State Ice Co. v. Liebmann,* 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Reporter shield laws, which have been adopted – through either legislation or judicial decision – by every state but one,[1] must now be viewed as a policy experiment that has been thoroughly validated through successful implementation at the state level.

[1] Wyoming has yet to address the issue.

The reporter's privilege that is recognized by the laws of 50 United States jurisdictions rests on a determination that an informed citizenry and the preservation of news information sources are vitally important to a free society. By affording some degree of protection against the compelled disclosure of a reporter's confidential sources, these state laws advance a public policy favoring the free flow of information to the public. An overwhelming consensus has developed among the states in support of this public policy, and United States Justice Department guidelines, on which the current legislation is largely modeled, likewise recognize the interest in protecting the news media from civil or criminal compulsory process that might impair the news gathering function. Nevertheless, the federal courts are divided on the existence and scope of a reporter's privilege, producing inconsistency and uncertainty for reporters and the confidential sources upon whom they rely.

By exposing confidences protected under state law to discovery in federal courts, the lack of a corresponding federal reporter's privilege law frustrates the purposes of the state-recognized privileges and undercuts the benefit to the public that the states have sought to bestow through their shield laws. As the states' chief legal officers, Attorneys General have had significant experience with the operation of these state-law privileges; that experience demonstrates that recognition of such a privilege does not unduly impair the task of law enforcement or unnecessarily interfere with the truth-seeking function of the courts. The sponsors of S. 2035 have sensibly sought to strike a reasonable balance between these important interests, as the states have done, and we are confident that the legitimate concerns for national security and law enforcement can be addressed in the court procedures for evaluating a claim of privilege.

We urge you to support the Free Flow of Information Act and to enact legislation harmonizing federal law with state law on this important subject.

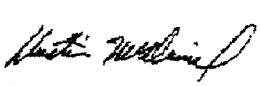
Thank you for your consideration of our views.

Sincerely,

Douglas Gansler
Attorney General of Maryland

Rob McKenna
Attorney General of Washington

Terry Goddard
Attorney General of Arizona



Dustin McDaniel
Attorney General of Arkansas

Edmund G. Brown Jr.
Attorney General of California

John Suthers
Attorney General of Colorado

Richard Blumenthal
Attorney General of Connecticut

Joseph R. Biden III
Attorney General of Delaware

Bill McCollum
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Thurbert E. Baker
Attorney General of Georgia

Alicia G. Limtiaco
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Lisa Madigan
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Tom Miller
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Stephen N. Six
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Jack Conway
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James D. "Buddy" Caldwell
Attorney General of Louisiana

G. Steven Rowe
Attorney General of Maine

Michael Cox
Attorney General of Michigan

Lori Swanson
Attorney General of Minnesota

Jim Hood
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Jeremiah Nixon
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Mike McGrath
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Jon Bruning
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Catherine Cortez Masto
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Gary King
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Andrew Cuomo
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Roy Cooper
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Wayne Stenehjem
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Nancy Hardin Rogers
Attorney General of Ohio

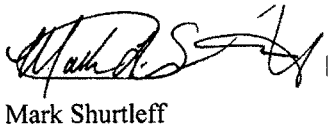
W. A. Drew Edmondson
Attorney General of Oklahoma

Hardy Myers
Attorney General of Oregon

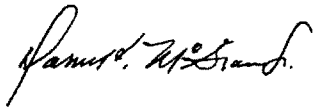
Tom Corbett
Attorney General of Pennsylvania

Henry McMaster
Attorney General of South Carolina

Lawrence E. Long
Attorney General of South Dakota



Mark Shurtleff
Attorney General of Utah



Darrell V. McGraw Jr.
Attorney General of West Virginia

Robert E. Cooper, Jr.
Attorney General of Tennessee

William H. Sorrell
Attorney General of Vermont

Cc: The Honorable Arlen Specter
The Honorable Charles Schumer
The Honorable Patrick Leahy
The Honorable Lindsey Graham
The Honorable Richard Lugar
The Honorable Christopher Dodd
James McPherson, Executive Director, NAAG
Blair Tinkle, General Counsel and Congressional Liaison, NAAG

IX. Changes to Existing Law Made by the Bill, as Reported

The bill makes no changes to existing Federal law.

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