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# REPORTERS' PRIVILEGE LEGISLATION: PRESERVING EFFECTIVE FEDERAL LAW ENFORCEMENT

## HEARING

BEFORE THE

## COMMITTEE ON THE JUDICIARY
## UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

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# REPORTERS' PRIVILEGE LEGISLATION: PRESERVING EFFECTIVE FEDERAL LAW ENFORCEMENT

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**WEDNESDAY, SEPTEMBER 20, 2006**

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
*Washington, DC.*

The Committee met, pursuant to notice, at 9:33 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Arlen Specter, Chairman of the Committee, presiding.

Present: Senators Specter, Kyl, Brownback, and Schumer.

## OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Chairman SPECTER. Good morning, ladies and gentlemen. The Senate Judiciary Committee will now proceed with our hearing on reporters' privilege.

This issue arises from legislation introduced by Senator Lugar in the U.S. Senate and by Congressman Pence in the House. It has been modified and introduced under the caption of the Lugar-Specter bill in the Senate. We have had three hearings on the issue and have had testimony from some 21 witnesses. Our concern here is on public information. These issues always start with Jefferson, who said, "I would prefer to have newspapers without government than government without newspapers."

The noted columnist William Safire had the essence of the issue on a hearing before this Committee: "The essence of news gathering 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 from it."

The motivation to move ahead in this area comes from a couple of directions. One direction is that there is a deep split among the circuits. The First, Fourth, Fifth, Sixth, and Seventh do not allow journalists to withhold information absent governmental bad faith. Four other circuits—Second, Third, Ninth, and Eleventh—recognize a qualified privilege which requires courts to balance freedom of the press against the obligation to provide testimony on a case-by-case basis.

That split is important to rectify or to have some governing law, and we are very much concerned about the Judith Miller issue on being jailed for some 85 days. Where you have a national security interest, there is a reason to proceed and perhaps hold someone in contempt. I say "perhaps" because it is a very strong remedy.

I visited Judith Miller in the detention center in Virginia, and as I have said in this hearing room before, I wondered why the investigation proceeded after it was apparent that there was no national security interest. It is one thing to pursue an investigation on a national security interest and to incarcerate even a reporter. It is quite another if you are investigating perjury and obstruction of justice.

Those are serious matters. I was a prosecutor myself and know the importance of stopping perjury and stopping obstruction of justice. But it reaches a different level on incarceration of a reporter and on the issue of national security. That is perhaps the exceptional situation, and I say "perhaps" because it is a very heavy remedy.

We have talked to the distinguished Deputy Attorney General about this matter informally. The Department of Justice is very concerned about whether it will hamper their activities on national security cases or in criminal prosecutions, and we decided to have an extra hearing today to see if we can find a way to modify the legislation, if we deem that appropriate with the wisdom of the distinguished panel we have here today.

So that brings us to you, Mr. Deputy Attorney General, an outstanding record as a prosecutor and doing an outstanding job, in my opinion, in the Department of Justice.

Parenthetically, we were pleased to confirm the Assistant Attorney General for the Criminal Division, Ms. Fisher, yesterday in a very, very unusual proceeding.

I have been joined by my distinguished colleague, Senator Kyl, to whom I yield at this point for an opening statement.

Senator KYL. Well, Mr. Chairman, it might surprise some that I would rather hear from the witnesses, and I am sure you would, too. So I will forego an opening statement except to say thank you for holding this hearing. And I especially thank all of the witnesses who are here to give us their advice and counsel.

Chairman SPECTER. We are going to have to stick pretty close to the time limits because a vote is scheduled at 11 o'clock, and our experience has been that if you break for a vote, hardly anybody comes back. That might not be too big a difference in the crowd of Senators we have now, so we will see how it goes. But I would like to finish by 11, 11:15, if we can.

Mr. McNulty, the floor is yours.

## STATEMENT OF PAUL J. MCNULTY, DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. MCNULTY. Thank you, Mr. Chairman, Senator Kyl. Among the benefits of serving in the Department of Justice leadership are the memorable experiences of testifying before the Senate Judiciary Committee, and this is my second memorable experience in 8 days. And so I am ready to give somebody else a chance.

Chairman SPECTER. Are you free next week, by the way?

[Laughter.]

Mr. MCNULTY. But what brings us here today again is another challenging issue. Challenging issues invariably require the balancing of important interests, and today's topic is a clear example of that. We are duty bound at the Department of Justice to conduct

diligent and thorough investigations and, in doing so, to protect civil liberties, including the First Amendment right of free speech.

As a Nation, we are fully capable of both protecting our security and preserving the media's right to engage in robust reporting on controversial issues. Security and freedom are not mutually exclusive or, as Justice Goldberg famously observed, the Constitution "is not a suicide pact."

The Department of Justice has developed a strong record in striking the right balance. At the heart of today's discussions is the concern for our National security. An individual who leaks classified national defense information to the press commits a crime. Leaking classified information reflects a profound breach of trust.

The consequences of leaking can be particularly grave. Leaks lay bare aspects of our National defense and risk arming terrorists with information needed to avoid detection in their plotting against our Nation.

Some see leakers as nothing more than whistleblowers who are caught in a dilemma between, on the one hand, allowing what they believe may be unlawful or questionable activity to continue within the Government and, on the other hand, an inability to disclose the information without committing a crime. These so-called whistleblowers, the argument runs, escape the dilemma by turning to the media and receiving a promise of confidentiality from a journalist.

This dilemma is a false one. It incorrectly assumes that the media is an individual's only outlet. That is not true. The Intelligence Community Whistleblower Act of 1998 was an effort by Congress to address this very issue. Congress established mechanisms through which members of the intelligence community could voice concerns while ensuring that classified information would remain secure.

With these mechanisms in place, it is a mistake to dub an individual who leaks classified information as a whistleblower. A leaker commits a crime. A whistleblower, by contrast, follows the legal course of disclosure enacted into law by Congress.

Upon learning of a leak of classified information to the media, our primary focus, as the Attorney General has stressed, is on identifying and prosecuting the leaker, not a journalist who may have published the leaked information. This focus is reflected in the Department's guidelines for the issuance of subpoenas to the media. Those guidelines ensure that subpoenas seeking confidential source information from journalists are issued only as a last resort.

In the past 15 years, we have requested source information from the media in less than 20 cases. The Department of Justice's record then is one of restraint. We have diligently investigated leaks while protecting the media's right to report broadly on issues of public controversy.

Only in extraordinarily rare circumstances—less than 20 cases in 15 years—has the Department determined that the interests of justice warranted compelling information implicating sources from a journalist. During this entire time, moreover, and indeed ever since the Department adopted its guidelines in 1973, the media has not missed a beat. It has continued to use confidential sources and to engage in robust reporting on issues of extraordinary importance to our communities and Nation.

Against this history, I respectfully suggest that the Free Flow of Information Act of 2006 is a solution in search of a problem.

Now, I see my time is about up.

Chairman SPECTER. That is all right. You may proceed,

Mr. McNulty.

Mr. MCNULTY. Almost finished, Mr. Chairman. Just a couple more pages. In my remaining time, I wanted to highlight some of the bill's most serious flaws.

First and foremost, by making it far more difficult to seek source information from a reporter in those infrequent circumstances when it proves necessary, the bill sends the wrong message to leakers. It may encourage their unlawful and dangerous behavior.

Second, the bill 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. The bill undermines this constitutional responsibility and separation of powers by thrusting courts into the altogether unfamiliar territory of having to weigh national security interests against the public's interest in receiving certain news. As numerous judges have recognized, the courts lack the institutional resources and expertise to make those decisions.

The bill goes even further, though. In imposing the burden of proof on the government, it places a thumb on the scale in favor of the reporters' privilege and tips the balance against executive branch judgments about the nature and scope of damage or potential damage to our Nation's security.

Section 5 of the bill is problematic for reasons of a different variety. The Sixth Amendment entitles criminal defendants to compel witnesses to appear in court and testify. Section 5, however, would permit defendants to access a class of witnesses only if, "based on an alternative source," they are able to show that the witness had information relevant to a successful trial defense. The Sixth Amendment imposes no such "alternative source" requirement. Nor does the Sixth Amendment, unlike the proposed bill, require a court to balance criminal defendants' constitutional rights against the public interest in news gathering and in maintaining the free flow of information. Such a balancing requirement in this context is entirely out of place.

For these reasons and the others contained in my written statement, Mr. Chairman and Senator Kyl, the Department of Justice firmly opposes the proposed bill, though we recognize the clear and well-intended purpose of its sponsors and supporters. And, Mr. Chairman, I also appreciate the efforts that you have made personally, and your staff, to try to address some of the concerns we have raised and the changes that have been made in the legislation. But we still hold these positions even with those efforts.

So thank you for the opportunity to testify here, and I look forward to discussing this with you.

[The prepared statement of Mr. McNulty appears as a submission for the record.]

Chairman SPECTER. Well, thank you, Mr. McNulty.

Starting the 5-minute rounds now, at the outset I disagree with you that it is a solution in search of a problem. When you have got

a split in the circuits and you have got the Judith Miller case, my view is it is something we ought to address legislatively.

You have said or it has been noted that the legislation is modeled after the guidelines of the Department of Justice, what you already use. Can you give me a case illustratively where the standards in the pending legislation would differ from what the Department of Justice now does to prejudice the Department?

Mr. MCNULTY. You are looking for a specific case where we have issued or an opinion has been issued—

Chairman SPECTER. Well, I am looking for the difference, and instead of asking you to comment on the differences between the two—and perhaps you cannot give it on the spur of the moment. But I would like you to address that in concrete terms. What kind of a case illustratively would prejudice the Department by this legislation that would not hurt the Department by using your guidelines?

Mr. MCNULTY. I think, Mr. Chairman, the heart of that question or our response to that question goes to the national security area, and in that I would say just a couple things.

By setting the standard the way in which the provision relating to national security does concerning the need for the Government—the burden is on the Government now, the burden of proving significant harm and through clear and articulable facts. So it is preponderance of the evidence, but it is clear and articulable harm that has to be proven. We are put into a very difficult situation, and I can think of a number of hypotheticals where that standard creates real problems for us. For example—

Chairman SPECTER. Let me interrupt and move it along because I have a couple more questions. If you want to supplement, do so in writing.

You have the contempt citation of Judith Miller. Had the Lugar-Specter bill been in effect, I think she would not have gone to jail. Would she have gone to jail by a proper application of the Department of Justice guidelines?

Mr. MCNULTY. I really do not know how to respond to that because that would require me to know all of the circumstances and facts involved in that investigation which would lead to our application of our guidelines to say that we have exhausted all the other methods to obtain the information.

Chairman SPECTER. Well, may I ask you to make that inquiry?

Mr. MCNULTY. Well, the problem is—I would be happy to do whatever the Chairman wants, but here is my problem. I am recused of the investigation being conducted by Pat Fitzgerald, and for me to get the information necessary to make a decision about whether or not the Judith Miller case—

Chairman SPECTER. Can you delegate that? You have a personal recusal?

Mr. MCNULTY. Well, it is the leadership recusal. The AG is recused, I am recused. It is a Special Counsel investigation. Now, Dave Margolis in my office is the person who oversees or has supervisory control over the Special Counsel.

Chairman SPECTER. Well, I would like an answer to that question from the Department of Justice. We are considering oversight at the right time as to what the Special Prosecutor has done. But

that bears directly on this legislation. This legislation was, as I said earlier, motivated significantly by the Miller incarceration and the circuit split. So I would like the Department to know the Department has continuing responsibility for what Mr. Fitzgerald is doing.

Mr. MCNULTY. Yes.

Chairman SPECTER. The Department has the authority to discharge him, for example, if the circumstances are appropriate. So I would like whoever is not personally recused to give us a response.

Mr. MCNULTY. I will take it back to the Department.

Chairman SPECTER. OK. You say—and I am concerned about this, too—that the courts' lack ability to weigh national security interests, and there is a fair amount of judicial discussion of that dealing with the President's inherent authority, which we have in the surveillance legislation. But I was at the Judicial Conference yesterday talking to D.C. circuit judges who have to weigh classified information on habeas corpus, and the President has agreed to the electronic surveillance bill where the court is going to weigh it.

Doesn't that show that the courts do have the capacity to weigh national security matters?

Mr. MCNULTY. Well, I mean, courts do look at national security issues in certain ways, but this one presents, I think, an impossible task for the court because it requires the court to know so much about the significance of a harm and be able to say that this disclosure, which might, by the way, involve some tactic or some effort by the Government that is controversial and a matter of public discussion, and a judge is going to look at that, every different judge looking at it in a different way, and say that that outweighs this harm.

Now, the harm will have to be understood in the context of all of the facts and aspects of harm that are going on. A responsibility that constitutionally has been committed to the executive branch, and courts have observed that repeatedly. That would be a very big undertaking.

Chairman SPECTER. Thank you, Mr. McNulty.

Senator Kyl?

Senator KYL. Thank you, Mr. Chairman.

Let me pursue that same course because I think while there are a lot of issues relating to the legislation, the one that probably is of most national importance and the one that raises the most questions in my mind is the exception for national security interest, primarily Section 9.

The Chairman began to get into an area of inquiry that I wanted to pursue as well, and that is, what kind of standards there would be to evaluate whether or not the Government had met its burden here. The language, for example, "outweigh the public interest in news gathering and maintaining a free flow of information to citizens," how would a court look at this? Is there a body of law? Is there some kind of a test? How would you define whether you have satisfied the "public interest in news gathering" test or "public interest in maintaining a free flow of information to citizens"?

Mr. MCNULTY. Senator, I think it would be highly subjective. I think each judge would have to make that kind of judgment on his

or her own about this balance. And the problem is the judge would do that knowing something of the harm—that is, the intelligence community would try to muster all of its information in some ex parte proceeding and present that as best as possible. But by the very definition of the Act, it is going to limit some of that information. And even doing it—and this is one interesting point—even by going into court and making this showing of significant harm, we are potentially signaling to our enemy who may be involved in that story that we believe that this disclosure is a significant harm. And perhaps we have tried, for national security interests, to downplay the disclosure or to in any way limit the damage from the disclosure. But now by going after the source information, we are saying that yes, indeed, we have enough evidence here to convince this judge that a significant harm to national security has happened.

Senator KYL. And by the very nature of the effort here, it is not something that can be kept secret or classified because the whole point is to weigh the harm versus the other general interest—

Mr. MCNULTY. Certainly that exercise would be public. The information provided would be in camera.

Senator KYL. The "significant harm to national security" is what we are talking about. That is the exact language. Do you have a sense of what would have to be established in order to demonstrate the harm is significant? In other words—let me put it conversely—what harm to national security is not significant?

Mr. MCNULTY. Well, that is right. I think that the term is going to mean different things to different folks. Some judges I think will say that, "I believe if it involved national security, I am going to err on the side of agreeing with the Government in terms of the significance." Other judges will be much different about that and will want to see very specific information about that.

Another problem is that a disclosure sometimes can occur that reveals something that may actually be partially known or suspected, but it is related to other programs that have not been disclosed. And now the concern of the Government is if we do not get to the source of that information, we run the risk of those other programs being exposed. And so now the significant harm is just a bit extended. It is not about that disclosure, but about that person's access to information where the harm could be much greater.

Now, will a judge see that as clearly outweighing the interest of the public for the information? It is hard to say.

Senator KYL. What comes to my mind is the disclosure of the national surveillance activity, as it has come to be known, and immediately following the public disclosure were the calls for the Government to answer the question: What other programs do you have that are like that? Or are there any other programs that are like that?

Is that a matter of concern?

Mr. MCNULTY. That is right. I think that is the kind of widening circle effect that this can have.

Senator KYL. One of the provisions here talks about, in subsection (a)(2), "unauthorized disclosure of properly classified information." What does that mean?

Mr. MCNULTY. I am sorry. This is in section—

Senator KYL. It is subsection (a)(2). It is part of general Section 9. The (a)(2) exception, the Act will provide no privilege "against disclosure of information...in a criminal investigation or prosecution of an unauthorized disclosure of properly classified information..."

Mr. MCNULTY. Oh, right. This also is, I think, a significant problem with the bill because now 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.

So the judge is now saying, "I am not sure I even buy that you have classified this properly and, therefore, everything that follows is I do not think that the disclosure of it is a problem."

Senator KYL. Just a quick followup, Mr. Chairman. So you don't read that as narrowly as just a procedural limitation but, rather, the substantive judgment of whether it was appropriate to classify the information in the first instance?

Mr. MCNULTY. That is how I read it. I certainly defer to the authors and supporters if I am missing something there.

Senator KYL. It does not say one way or the other.

Mr. MCNULTY. That is how I see it. And I want to quickly just say and make sure there is no misunderstanding here, and I will have to repeat myself. When we are talking about the risks here on the national security front, the Government's interest is to find the leaker. And I know that, because this is such a sensitive subject, by talking about those concerns there in the bill, it is easy to jump to the next conclusion, which is, oh, OK, so every time there is a leak of something that is highly sensitive, you want to go after the reporter. And the answer is no. We want to go after the leaker, and that is why this authority has been sparingly used, less than 20 times in 15 years. But it is about whether or not we will ever have that ability if we believe that that is our last recourse in being able to get the information.

Chairman SPECTER. Thank you, Senator Kyl.

Senator Schumer?

Senator SCHUMER. Thank you, Mr. Chairman. First, I would ask unanimous consent that Senator Leahy's statement be made a part of the record.

Chairman SPECTER. Without objection, it will be placed in the record.

## STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator SCHUMER. Thank you, Mr. Chairman. I want to thank you for holding the hearing and thank Deputy Attorney

General McNulty for coming by.

I believe that—and I think everyone agrees—the press has a vital role to play in our country in providing people with information. A free and independent press is just as important as a fair and independent judiciary, and the freedom is enshrined in our Constitution with good reason. It is exemplified every day by brave

and intrepid men who make up the most vibrant and effective press community in the world.

To be sure, the threats to a free press come from many quarters, not just the Government. If you pick up a newspaper this morning, you will be shocked to see that a respected international company, Hewlett-Packard—it is here in the New York Times here—looked into infiltrating newsrooms to identify leakers of confidential corporate information. So this problem is everywhere, and it is probably going to get greater, not less, as we depend on information more and more and more in our society.

So there certainly is a need to protect press independence. In order for the media to do their job, we know it is important for them to use confidential sources. In many cases, there is no problem in protecting confidential sources. When Government officials are acting as whistleblowers, as a confidential source in the Government says the agency has doctored a study, or when the Government is hiding important information whose disclosure will not harm national security in any way—in those cases I think every one of us would want the reporter to be able to get the information and have it out, unless we want to change the whole fabric as to the way this Government has been going for over 200 years.

But in other cases, the leak itself is per se a violation of law, and that is the problem I had with the broader bill that was introduced. Not all leaks are OK, which is what the broader bill 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.

The Plame case is another one. 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.

So we have a balancing test here. How do you draw the line? And I think the bill that Senator Specter has drawn up and I have cosponsored recognizes there must be a balance. It recognizes we have to preserve a free press but ensure that criminals are brought to justice. It recognizes that not all disclosures by Government officials to members of the press are equal. That is the fundamental wisdom of the bill. And you have extremes on both sides saying the press is right all the time, it should always be protected, and then the press is never right, it should not be.

We certainly want to protect a whistleblower. We certainly want, if someone at the FDA sees that tests are being short-circuited and goes to the higher-ups and they say, "Go away," that they be able to go to the press and expose it. On the other hand, when something is publicly prohibited by statute from being made public, it is a different story. When there is an overriding public interest against disclosure, which there is not in the typical whistleblower case, the press must bend to the needs of law enforcement.

One of the problems, of course, is that the government has a self-interest in overclassifying things, and not just in national security. You could make a hypothetical argument that some Government

official would say everything we do is classified. So we have to be mindful of that as well, and you pointed out, Mr. Deputy Attorney General, someone has to make that determination. I would argue a judge is often better at making that determination despite his or her lack of familiarity than the self-interested Government is in case after case after case.

So the legislation does seek that balance. It is not an easy balance, but I think this legislation, unlike the previous bill, it is better to have it than not to have it, and that is why I am supporting it. But I want to make two other points, and then I will conclude.

First, I was struck by a statement in Mr. McNulty's written testimony. You say, "There is no virtue in leaking. It reflects a profound breach of public trust and is wrong and criminal." I understand that point of view, but many leaks outside of the national security context have been good for America. Movies extol leakers. Books do. Our society does. Every President has. So I think that statement goes quite overboard, and I was wondering if you meant it only in the national security context.

Second, I worry that this administration has engaged in a pattern of selective outrage. I worry that the administration employs a double standard when it comes to leaks and the harm to our National security. Congressman Delahunt and I sent a detailed letter to Attorney General Gonzales and John Negroponte on July 18th, pointing out case after case where it was clearly classified information that was leaked, and we did not hear a peep from the Government because it seemed to serve their interests to have that information out, and then others where everyone was on their high horse condemning the leak.

So a review of the record, at least our review, leaves the impression that the administration is unconcerned about leaks of classified information to certain media sources, particularly when the revelation may have provided a political advantage to the administration, and that ultimately is destructive of the values that you seek to assert in your testimony.

Well, I received a response from Mr. Negroponte. He said—

Chairman SPECTER. Senator Schumer, how much longer do you need?

Senator SCHUMER. About 30 seconds, Mr. Chairman.

Chairman SPECTER. We are looking at an 11 o'clock vote, and I had said—

Senator SCHUMER. About 30 seconds.

Chairman SPECTER [continuing]. Earlier we would have to stay within the time limits.

Senator SCHUMER. I need about 30 seconds.

Chairman SPECTER. Fine.

Senator SCHUMER. I did not receive a response from the Justice Department, even though Negroponte said, "Questions regarding the number of referrals and the status of any associated investigation have been referred to the Department of Justice, which is best able to determine the information that can be provided in these matters."

So I am asking you, am I going to get a reply to my letter?

Mr. MCNULTY. I will check it out.

Senator SCHUMER. Fine. Please, would you get back to me?

Mr. MCNULTY. Yes.

Senator SCHUMER. This is an important issue. It relates to this legislation. We deserve a response. It was a very careful and well-thought-out letter.

Mr. MCNULTY. OK.

Senator SCHUMER. OK, fine.

Let me conclude by saying just as we have to balance liberty and security, we need to balance a free and independent press against the needs of law enforcement, and I think this legislation comes as close as one can to striking that balance.

I yield.

Chairman SPECTER. There is no question pending, Mr. McNulty, but would you like to answer.

Mr. MCNULTY. Sixty seconds. I know we are moving along fast.

I wanted to say first my statement's language was not properly qualified. I apologize for that, because my intention here is to talk about the unlawful leaking. "Leaking" is a general term, and it is best to use it in a qualified way. And I am referring here to where it is a violation of law. I certainly understand your point about the fact that disclosing information generally can be certainly not a violation of law and, therefore, can be of some help, or whatever, depending upon the circumstances.

Just one other quick point, and that is, I really appreciate, Senator Schumer, your acknowledgment of the fact that there is an area where it is unlawful to disclose information, whether it is classified or it is grand jury. My concern about this bill is that no matter what side of the debate you are on here, you have to say that it is going to make it harder for the Government to get this information. That is sort of the point of it, that we have to go to court. We have the burden, and we have to convince the judge that this interest and this need outweighs the public right to know and gather information from the media and so forth. And that alone, I think, sends a troubling message to the unlawful disclosure of information because it says that now it is just that much harder for the Government to ever find me if the Government is going to try to do it. There is a greater burden, there are more obstacles, and I think it could encourage that process rather than discourage it.

Chairman SPECTER. Thank you, Mr. McNulty.

We are going to be pursuing this legislation, Mr. McNulty, and we will continue to work with you to see if we can find an accommodation. I understand your position today, and we wanted to have this hearing, as I said earlier, to have a public discussion of the position of the Department of Justice. And we want to see if we cannot accommodate your interest, but I think it is highly likely—and, of course, I cannot speak for the Congress, only for myself. But I think it is likely we will be proceeding with the legislation.

Mr. MCNULTY. Senator, Mr. Chairman, I would like to submit for the record an answer to a question I did not get, which is to respond to the former Solicitor General on his concerns about the case law and the split among the circuits. You raised it in your opening statement.

Chairman SPECTER. You want to respond to a question you did not get?

[Laughter.]

Mr. MCNULTY. Because I think it is important for the record to have the Justice Department's view on that subject, since the former Solicitor General is a distinguished person and I want to make sure that we have responded to that issue in particular. And it is just to say that I think that this issue of what the First Amendment protects will still be in the circuits even after this legislation is passed. I think that reporters would still take that issue up, and you could have a disparity. You will shift the disparity, if there is one, in the circuits— and I believe as a practical matter, that disparity has proved to be a significant issue. But you will shift it to the district court where you will have now all the Federal judges with their different way of making this balance, and you will end up with some weird things about how in some places in the country it is easier to disclose this to the press, other places it is not because of the way judges operate. And so I think that the problem is not fixed, if there is one, in terms of uniformity, by shifting this to the courts.

Mr. Chairman, thanks for letting me say that.

Chairman SPECTER. OK. Thank you very much, Mr. McNulty. Thank you for coming in.

Senator KYL. Mr. Chairman, I was hoping to have a second round of questioning. We will never have a more qualified witness than Mr. McNulty here.

Chairman SPECTER. You may proceed.

Senator KYL. I would appreciate that very much. I will continue to be very brief.

Chairman SPECTER. You may proceed.

Senator KYL. But I want to focus again on Section 9, on the national security exception, because I think this is where we really have to pay attention.

One of the definitions is with respect to acts of terrorism against the United States. That is where you can have an exception to the privilege. And I am wondering whether, Mr. McNulty, there are situations in which we might want to act and situations where the potential act of terrorism is against Canada or the United Kingdom or Mexico or some other country. Why just an act of terrorism, in other words, against the United States? And, also, could you envision circumstances in which the issue would be preparation of an act of terrorism rather than an act itself?

Mr. MCNULTY. The limitation to the United States did strike me as being a potential concern here because we are in such close alliance with Canada and the U.K., for example, in terms of threat. And the recent attack planning that went on in the U.K. this summer I think illustrates what you could get into here in terms of trying to convince a judge that this raises significant harm in the United States. But that is a potential problem.

Senator KYL. There is another definitional issue here, and I am just perplexed. Maybe I should address this more to the authors. But it applies, the words are, "by a person with authorized access," and I am wondering what sense it makes for the bill to say that there is no privilege in a criminal investigation of unauthorized disclosure of information by a person with authorized access, but you could have a privilege when a person with unauthorized access dis-

closes the information. Is that a situation that, in your view, could occur? And would it pose a problem?

Mr. MCNULTY. Absolutely. The ultimate harm here is the disclosure of the information, so the chain of control may not be the deciding factor. And it could very well be that the individual who had access was not authorized to have it, but found the information anyway or went after it in some fashion, acting as an agent in some fashion.

So I think it could create probably an unintended consequence.

Senator KYL. Even a staff assistant that obviously was not cleared—

Mr. MCNULTY. Right.

Senator KYL. OK. Just quickly moving on, in the definition section, Section 3, "attorney for the United States," it appears to me that—and it is or any "other officer or employee of the United States in the executive branch. . .with the authority to obtain a subpoena or other compulsory process." Wouldn't this provision include JAG officers? And if that is the case, could this negatively impact military tribunals or terror trials by limiting what Government attorneys can compel? Wouldn't it be worth considering a JAG exception, for example, to the rule?

Mr. MCNULTY. Yes, I think the language is broad enough to include military attorneys because it refers to an employee of the United States generally in the executive branch. So that means then that some of the circumstances where this could come up with be—and this may be more of an issue down the road, an unusual situation involving a military investigation and prosecution, and they raise some question about the court of jurisdiction there, too, as well.

Senator KYL. Given the fact that we are considering how to do these military tribunals and so on, it seems to me that that is an important issue that we should look at.

Let me just ask finally, to try to keep within the time here, there was one thing that struck me as odd outside of this National security exception, and I would like to get your comment on it. In Section 7, it says, "If the alleged criminal or tortious conduct is the act of communicating the documents or information at issue, this section shall not apply." In other words, there is a privilege.

Is there a rationale, in your view? Why should a journalist have a privilege when the act of communicating the documents or information to the journalist is a criminal act? What is the rationale for that, in your view? I guess the question from your point of view of a prosecutor, what issues would that raise?

Mr. MCNULTY. Well, that is a complicated question. It raises the question of in what way does the violation of criminal law occur with the disclosure itself, and I concede that that is one of the trickier subjects here in this.

The argument could be made on the side of those supporting the bill that the disclosures, generally speaking, would violate—in all aspects could violate the law and, therefore, that would swallow up the privilege itself. But then you have that issue that Senator Schumer raised as well, that you do not want to protect illegal activity.

So it becomes a difficult matter to navigate in this legislation.

Senator KYL. I appreciate it.

Mr. Chairman, in view of your time constraints, I would simply submit some additional questions for the record to

Mr. McNulty, and thank you.

Chairman SPECTER. Fine. Thank you very much, Senator Kyl.

Thank you very much, Mr. McNulty.

Mr. MCNULTY. Thank you, Mr. Chairman.

Chairman SPECTER. We now turn to our second panel: Honorable Theodore Olson, Professor Steven Clymer, Mr. Bruce Baird, and Mr. Victor Schwartz.

Our first witness is Theodore Olson, partner in the Washington law office of Gibson, Dunn & Crutcher, where he co-chairs the Appellate and Constitutional Law Group. Prior to joining the firm, Mr. Olson served as Solicitor General. He was involved in high-profile cases involving *Hamdi* v. *Rumsfeld* and *Rumsfeld* v. *Padilla*; headed the Office of Legal Counsel as an Assistant Attorney General during the Reagan administration, argued 43 cases in the Supreme Court; bachelor's degree from the University of the Pacific and a law degree from the University of California.

Thank you for joining us again, Mr. Olson, and we look forward to your testimony.

**STATEMENT OF THEODORE B. OLSON, PARTNER, GIBSON, DUNN & CRUTCHER LLP, WASHINGTON, D.C.**

Mr. OLSON. Thank you, Chairman Specter, Senator Kyl. It is a privilege to be here before this Committee to testify concerning a matter that is important to the ability of citizens to monitor the activities of and to exercise a democratic restraint on their Government. One of the most vital functions of our free and independent press is to function as a watchdog on behalf of the people—working to uncover stories that would otherwise go untold. Journalists in pursuit of such stories often must obtain information from individuals who, for fear of retribution or retaliation, are unwilling to be publicly identified.

Naturally, these stories sting. Uncovering corporate malfeasance, environmental pollution, official corruption, or governmental abuse of power quite often exposes powerful, influential interests. The response often is a lawsuit, a leak investigation, and full-throated efforts to find and tarnish the sources of the information. And subpoenas to the reporters who uncovered these facts, these uncomfortable facts, are often the weapons of first resort.

Recognizing the need for some protection for journalists and their sources, 49 States and the District of Columbia have laws providing some measure of protection to reporters from subpoenas. Numerous Federal courts already grant similar protections, some based upon the First Amendment and others on Federal common law. And as you have observed, Mr. Chairman, the circuit courts differ. You mentioned the circuits that provide some measure of a privilege and some that do not. Some of them provide protections in criminal cases, some only in civil cases. So the Federal law is a hodgepodge. How can this make any sense in Federal courts? This lack of uniformity creates intolerable uncertainty regarding when a meaningful assurance of confidentiality can be made.

This uncertainty renders many existing privilege provisions in the States ineffective. Reporters cannot foresee where and when they may be summoned into court for questions regarding a particular story, and their editors, publishers, and lawyers are similarly hamstrung by the confusion and can provide little help.

This proposed legislation does not work a dramatic expansion of the reporters' privilege or a realignment of public policy, and it may not please everyone. That is usually the case with legislation. But it is a long overdue recognition that the privilege should be recognized and in Federal courts should be uniform, and to the extent, consistent with the privileges provided by State courts, those differences should be eliminated. This Act regularizes the rules, and it merely requires, among other things, that a party seeking information from a journalist in a criminal or civil case be able to demonstrate the need for that information, that it is real, that it cannot be gleaned from another source, and that nondisclosure would be contrary to the public interest.

Concerns over national security and law enforcement have been properly addressed and fairly balanced. Naturally, the Department of Justice does not want its judgments second-guessed by judges, and I have the greatest respect for the United States Attorneys and the Department officials making these decisions, including General Gonzales and Deputy Attorney General Paul McNulty. But we do not recoil from judicial oversight of these types of decisions when it comes to attorney-client or physician-patient privileges or search warrants or FISA warrants. And there is no reason we should reject it when it comes to a journalist's source of communications.

Bear in mind that 39 State Attorneys General, not bashful about protecting law enforcement prerogatives, have supported recognition in a brief filed in the Supreme Court in the Valerie Plame case. Indeed, they say that the absence of a Federal shield law undermines the State law policy decisions underlying those provisions.

Now, reasonable minds can disagree on the value of anonymity granted for one story or another, even on the concept of a reporter's privilege itself. But there should be no disagreement that uniform rules are better than a hodgepodge of a Federal system that leaves all parties in a state of confusion.

I have been on both sides of this. I have been in the Justice Department for 7 years in two different administrations, and I respect the interests and integrity of the law enforcement officials. But for another 30 years or so, I have been a lawyer representing journalists, reporters, broadcasters, and publishers, and it is extremely difficult to tell those persons, who are a valuable component of our constitutional system, what the law is. I do not see an objection to a Federal law that attempts to regularize the system and affect the common law policies that are already in existence in many States and reflected in the Department of Justice's voluntarily adopted guidelines.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Olson appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Mr. Olson.

Our next witness is Professor Steven Clymer, Cornell Law School, he began his legal career investigating police corruption as an Assistant District Attorney in Philadelphia—somewhat after my time, Mr. Clymer. Why didn't you apply earlier?

[Laughter.]

Mr. CLYMER. I did not have my law degree then.

Chairman SPECTER. Had been an Assistant U.S. Attorney in the Central District of California, involved in the high-profile Federal prosecution of L.A. police officers charged in the beating of Rodney King; now teaches criminal procedure, evidence, and counterterrorism; undergraduate and law degrees from Cornell.

Thank you for joining us, and we look forward to your testimony.

**STATEMENT OF STEVEN D. CLYMER, PROFESSOR, CORNELL LAW SCHOOL, ITHACA, NEW YORK**

Mr. CLYMER. Thanks for having me here today, Mr. Chairman.

Chairman SPECTER. When were you an Assistant D.A. in Philadelphia?

Mr. CLYMER. I started there in 1983 and I left in 1986.

Chairman SPECTER. Was there much police corruption, police brutality in 1983?

Mr. CLYMER. Yes, there was a fair amount then.

Chairman SPECTER. And the D.A.'s office investigated it?

Mr. CLYMER. Yes. Successfully, I might add.

Chairman SPECTER. Aside from my tenure, they did not do too much of that. Of course, they did not have Commissioner Rizzo to deal with. Times change. Nobody remembers Commissioner Rizzo. Anybody remember Mayor Rizzo?

This comes out of my time, Professor Clymer, not yours.

[Laughter.]

Chairman SPECTER. You may proceed.

Mr. CLYMER. Thank you. Thank you for having me here. I would just like to make a couple of points and then answer any questions that you may have.

First, I want to address the question about why there is a need for this legislation now, and I guess that boils down to the question of whether the present law in its present form is an impediment to the free flow of information. And, quite frankly, I think that is a hard case to make. The principal example I will give are the recent high-profile leaks about the NSA wiretapping program and the leak about the CIA detention of al Qaeda operatives overseas.

Those two leaks of highly classified information came in the face of widespread news coverage of the jailing of Judith Miller—newspaper coverage that made very clear that there was little or no Federal protection for anonymous sources.

That suggests to me that people who are inclined to make leaks of that kind of information are going to make leaks whether or not there is Federal protection for anonymous sources. The people who made those leaks had to have known that if the reporters in those cases were subpoenaed, they could be compelled to testify about the identity of their sources. Yet they chose, nonetheless, to make those leaks.

What are the other arguments we get for the need for this law now? Well, there is an argument that is made by the media often

that there are more subpoenas now to reporters than there ever have been before. I haven't seen statistics, but let's assume for the sake of argument that is true, that now there are more subpoenas than they have been in the past. One thing is clear. Those subpoenas are not coming from the Department of Justice, which issues on average less than one subpoena to the media for source information every year. That would suggest that any law that this body passes ought to exempt the Department of Justice, which seems to do a very good job of policing itself in this area.

The third argument that is made for the legislation is the need for uniformity, and I think there are powerful claims that uniformity across the Federal system is better than a lack of uniformity. However, the proposed legislation will not accomplish that uniformity. As the Deputy Attorney General said, this legislation has a very subjective, open-ended, and unstructured balancing test that individual district court judges are going to apply on a case-by-case basis. It is a balancing test that I believe is virtually unworkable because it requires district judges to predict in individual cases what disclosure of source information in that case will have on the future flow of information to reporters.

With all respect to Federal judges—and they are due an enormous amount of respect—I do not believe they are competent to make that determination. And what that balancing test will boil down to on a case-by-case basis are the subjective, idiosyncratic views of individual Federal court judges. And so you will not get uniformity as a result of this proposed legislation. You will get greater disuniformity than we have today.

Let's suppose I am wrong about that. Let's suppose there is now a need for some legislation to increase the flow of information to the news media. Will this legislation accomplish that objective? I think the answer is clearly no. The most important point in time for the flow of information is when an anonymous source calls a reporter and seeks an assurance of confidentiality. If the reporter cannot give a certain assurance, the source may not disclose the information, and the complaint about the present state of the law is there is no certain assurance that a reporter can honestly give to a source. This legislation does not change that one iota. This legislation is subject to eight or nine separate exceptions and a series of subjective balancing tests, depending on which exception applies.

At the time the reporter talks to the source, it will not be clear which one of those exceptions and which one of those balancing tests may apply down the road. It depends on who subpoenas the information, whether it is a civil or criminal proceeding, the type of case it becomes, and who makes the request. The balancing test itself is entirely unpredictable. So even if this legislation were to become law tomorrow, that reporter talking to that source could not give any assurance of confidentiality.

The third and final question, I suppose, is this: Could I do any better? Because it is easy to criticize. It is certainly harder to offer solutions. And so I will offer just in passing two possible ways that I think you could have a more definite, more certain piece of legislation that would go to where the problems actually are.

One possibility is to exempt entirely any disclosures that are in and of themselves illegal: leaks of classified information, leaks of

grand jury information, leaks of wiretap information, leaks of tax return information—all of which would violate and clearly violate Federal law. Simply make them outside the realm of the privilege.

I have got a different proposal, but I see my time is up, so if there is a question, I will answer about that proposal as well.

[The prepared statement of Mr. Clymer appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Professor Clymer.

We now turn to Mr. Victor Schwartz, partner in the Washington firm Shook, Hardy & Bacon, where he chairs the firm's Public Policy Group; former Dean of the University of Cincinnati College of Law; serves as general counsel to the American Tort Reform Association, and had previously chaired the Department of Commerce's Interagency Task Force on Insurance and Accident Compensation; a graduate of Boston University and Columbia Law School.

Thank you for again appearing as a witness before this Committee, Mr. Schwartz, and the floor is yours.

**STATEMENT OF VICTOR E. SCHWARTZ, PARTNER, SHOOK, HARDY & BACON LLP, WASHINGTON, D.C.**

Mr. SCHWARTZ. Thank you, Mr. Chairman and Senator Kyl. It is a privilege to be here today, especially on this panel. The National Law Journal called me the other week and said there are four lawyers in this town that charge more per hour than I do, and two of them are on this panel.

[Laughter.]

Mr. SCHWARTZ. So I thought that is definitely an honor.

Chairman SPECTER. Is there some aspersion on the other panelist?

Mr. SCHWARTZ. No. I am looking up to them, and I am sure the professor would be in the same league.

I have the privilege of testifying on behalf of NAM, which is the largest industrial trade association in the country, and we would submit a letter for the record, which includes other associations that generally concur in my thoughts today. And, Mr. Chairman, I know that you and your staff have worked hard to create a fair and balanced bill on the subject of the reporter privilege. But the purpose is to guarantee the free flow of information to the public through a free and active check on Government. And you emphasized this in your opening remarks—Government and the media.

There has and will be serious debate about that, but my purpose today is outside of the perimeter of that debate. I would like to talk about how the bill, perhaps inadvertently, affects private litigation. The bill interfaces with the law of evidence, and I did teach that for over 15 years. And my first article was about the Federal Rules of Evidence, and it had a very interesting history that is relevant here today.

When the Federal Rules of Evidence were sent up to the Congress, they did something that is almost unique in the history of this body. They struck the part that dealt with privileges, and the Senate Judiciary Committee was clear that this is a topic in private litigation that should be left to the Judiciary. The Committee report said, "Our actions today in rejecting having specific privileges in private litigation outline should be understood as reflecting

the view that a privilege based on confidential relationship and other privileges should be determined on a case-by-case basis." And they set forth a general rule, 501, that all lawyers who practice in the Federal courts are familiar with. In essence, the House Judiciary Committee Chair said the same exact thing.

Congress's judgment I think was correct, especially in the context of private litigation, and you know that virtually the entire Rules of Evidence, Mr. Chairman, are based on finding the truth—the hearsay rule, evidence dealing with experts. There is only one area where the Federal rules put something at a higher value than truth, and that is privilege. And in private litigation, this is high-stakes poker and requires careful individual consideration in the private litigation context.

In that regard, I think the bill is overly broad because its shield would rise up against all leaks—and others have discussed this—whether they are legitimate or illegal. For example, leaking a trade secret or leaking something protected under HIPAA would be given the same protection as a whistleblower, which should be protected.

The Free Flow of Information Act could provide free flow of information that should not really flow—trade secrets, health files, and other areas of privacy. There should be no safe harbor for areas where the source has violated law.

We just saw recently there was a leak where somebody who worked for Coca-Cola gave information over to Pepsi-Cola. Pepsi-Cola did the honorable thing and returned it. But if this information had been given to a reporter, a blogger, boom, everybody could go out and make Coke in their garage, and that would not be a very good outcome.

People who are breaking the law should not be protected by simply handing information over to a reporter in the private litigation context. The people who have done this should be prosecuted, and impediments should not be put in the way.

It is also true in private litigation. As the Chairman, who has extensive experience in litigation, knows, discovery is a difficult process, Senator Kyl, and you know this, too. If when I am handing over documents in discovery I realize that this material can be put in the hands of a reporter and these is no way to get any information about the illegal leaker, that is going to slow down the discovery even more.

The great writers on evidence who I studied—and I am sure the Chairman remembers—Charles McCormick, who was also

Secretary of the Navy; a great scholar on evidence, John Wigmore—all agree that privileges in the private context should not be absolute, these include priest-penitent, lawyer-client, or reporter. This system in the private litigation area has worked well. We have entrusted the judges. They have not always done it perfectly, but they know how to do it.

I thank you for the time you have given me today.

[The prepared statement of Mr. Schwartz appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Mr. Schwartz.

Without objection, the statement from Senator Kohl will be made a part of the record.

And we now turn to our final witness on the panel, Mr. Bruce Baird, senior partner in the Washington law office of Covington & Burling, where he specializes in white-collar defense and securities information. Mr. Baird had been an Assistant U.S. Attorney in Manhattan, handled high-profile, complex cases involving Michael Milken, Drexel Burnham Lambert; and from 1981 to 1986, he was the lead prosecutor heading a 5-year investigation into the Colombo crime family; bachelor's degree from Cornell and a law degree from the New York University School of Law.

Mr. Baird, we appreciate your being with us and look forward to your testimony.

**STATEMENT OF BRUCE A. BAIRD, PARTNER, COVINGTON & BURLING LLP, WASHINGTON, D.C.**

Mr. BAIRD. Thank you, Mr. Chairman and Senator Kyl. I will be brief.

I think from a prosecutor's perspective and from a defense perspective, I have some experience on both sides. I have had some high-profile cases in which I would have given my right arm to be able to go to reporters and say, "Give me your sources." But it is a value that I think we all share that resulted in the Department of Justice guidelines and that results in prosecutors not being able to do that unless there is a really good reason.

There was a New York Post reporter who had the Colombo organized crime family dead to rights before we did, but I could not get that information. There were Wall Street Journal reporters who knew more about Michael Milken than we did, and we could not get that information. But we managed to prosecute those cases.

There are, as we all know, many investigative techniques. Subpoenaing reporters for their sources is not the only way to prosecute a case. There has been some talk here about, you know, the requirement to avoid shielding people from these prosecutions or shielding people from the clutches of the Government. That does not happen just because you do not get information from a source. You undertake other investigative techniques.

So from a prosecutor's perspective, I think the bill does no more than codify the Department of Justice's existing policy. The one difference, as, Mr. Chairman, you remarked and as the Deputy Attorney General remarks, is that judges are now involved. That is true. Judges are involved, but, of course, judges are involved in many respects in this situation and in many others. We rely on judges to make very complicated decisions about balancing tests. We require that in many areas of law. We require it every day. Judges decide whether prejudice outweighs probative value, a very subjective test.

I recall a judge who taught himself patent law and electrical engineering to decide a case, wrote a 300-page opinion full of circuit diagrams.

That is the sort of thing that this Committee knows better than anyone else. You put judges on the bench who have that ability, and I do not really understand the argument that judges are incapable of deciding these questions.

So I think from a prosecutor's perspective, this bill will help. It will make the law more uniform. It will make prosecutors more

able in an appropriate case to go to a court and seek a reporter's sources, and the judge will have something to hang his hat on, will have a bill, will have text, will not be left with vague First Amendment arguments about which people differ.

From the defense perspective, the bill is also an improvement. There is explicit recognition of a criminal defendant's potential need for this information and for the needs of a party in civil or administrative litigation. And, of course, it is applicable to all Federal agencies, as, Mr. Chairman, you remarked, and not just the Department of Justice.

So, in the end, I do not think this is an issue that should divide the Department of Justice and other prosecutors from defense counsel. Information is not always desired by the same people. As Mr. Schwartz said, sometimes private litigants want the information. Sometimes the Department of Justice wants the information. There should be a test, there should be judges administering the test, and I think this bill draws a line which is appropriate. You know, as was said, you cannot make everyone happy. There can be interpretation, much easier with a statute than with a constitutional bill. And so I think this bill in the end will improve the state of the law and will give both sides, both people who want the information in an appropriate case and the press, which does not want this information revealed in an inappropriate case, standards to go on.

I want to particularly remark with respect to the Deputy Attorney General's statement that the Department of Justice has a great record in the last 15 years, I think they do. But my memory goes back 30, and there was a time when Attorneys General and Deputy Attorneys General thought they knew better than anyone else what the law should be and were indicted and cast out of office for it.

Having judges decide these questions is something that goes deep in the fabric of this country and is the most appropriate way to deal with the issue.

Thank you.

[The prepared statement of Mr. Baird appears as a submission for the record.]

Chairman SPECTER. Thank you, Mr. Baird.

Mr. Baird, you have had extensive experience in the Department of Justice, but not, at least according to the resume I have seen here, in the national security field. Do you think your observations that the Department of Justice would not be prejudiced apply as well in the national security field?

Mr. BAIRD. Well, you are right, Mr. Chairman. I am not an expert in the national security field. I see, though, that the bill has exceptions in the national security area, and the only thing I understood the Department of Justice to say in response is that they did not want judges to make the decisions; they wanted to make the decisions themselves. And it seems to me judges have made decisions, as I think Mr. Olson mentioned, in the FISA context, in many other national security-related contexts. It has not been my experience, either on the defense or the prosecution side, that judges are incapable of making hard decisions using balancing tests. Quite the reverse.

Chairman SPECTER. Mr. Schwartz, there are some 49 States and the District of Columbia which afford some privilege to reporters. Are the interests of your clients prejudiced in those States?

Mr. SCHWARTZ. In some of them. There was a situation in California—and it is not a client of mine—where a company was told that they ought to polygraph their employees as an alternative source to seeking things from a reporter. They were not a client. And I do not think that is a very reasonable rule. It is an overly broad privilege.

Most of the rules are fine. They have three factors: Is it relevant—

Chairman SPECTER. Well, you have to cope with reporters' privilege almost everywhere in the United States. Are you getting along?

Mr. SCHWARTZ. Well, things would be more difficult if this was added to the mix because States might copy it. They tend to do that. And there is something in the mix of this standard that I really have not seen elsewhere, and it is beyond the three normal parts. You usually have relevancy. Is it relevant? Is there a reasonable alternative source? If there is, you are supposed to seek it. And how central is it to the case?

But in addition here, in the private sector area there is a Department of Justice guideline which has really nothing to do with private litigation where a judge has to weigh public interest against public interest. And we do not face that anywhere, as far as I know, and that is one of the reasons I am here today. It is an additional barrier that is just not in standard evidence law or anyplace. It may be relevant and important with governmental things, the things that other witnesses are testifying about today. But it certainly not in the private sector—

Chairman SPECTER. Mr. Schwartz, I am going to have to move on.

Mr. SCHWARTZ. OK, sure.

Chairman SPECTER. Professor Clymer, do you think the incarceration of Judith Miller was appropriate?

Mr. CLYMER. I do not know enough facts to answer that question, but what I would say about this is that I think that is the wrong question to ask. And the reason I think it is the wrong question to ask is because the issue before this body is not should we give special privileges to reporters so that they can disobey lawful court orders. The question we should ask is: Will this piece of legislation increase the flow of information to the public through the news media?

If we are going to privilege reporters, it is not because we are concerned about someone, a professional like Judith Miller, having to go to jail. It is because we are concerned whether that is going to have an effect on the flow of information.

So although I can certainly sympathize with Judith Miller, a professional trying to do her job, having to go to jail, she went to jail for failing to comply with a lawful court order. And the real question is: If we change the law to allow her not to go to jail, not have to comply with a court order, is that going to increase the flow of information to the public? And I think the answer ultimately is no.

Chairman SPECTER. Well, up until your answer, I thought it was a pretty good question to ask.

[Laughter.]

Chairman SPECTER. But maybe I am wrong.

Mr. Olson, on a matter of oversight, would this bill have resulted in a different result in the Judith Miller incarceration?

Mr. OLSON. I think it may have, because as we are learning now through reports in the newspapers with respect to when that information was given to journalists and the memory of the journalists seemed to all differ from one another, and when the special prosecutor or whatever name is given to Mr.—

Chairman SPECTER. My time is almost up, and I want to put one more question to you. You have had extensive experience in the Department of Justice, and I have asked the Deputy Attorney General to respond to that question by somebody who was not recused. What are the parameters for discharging a special prosecutor? Whereas, in this case we have it fairly well established that there was no national security issue involved, and it has even been suggested that there was no crime involved, we have had some independent counsel cases which have gone on for a decade. What are the parameters for evaluating the special prosecutor's conduct, say, in the Miller matter and in the investigation generally, which has led to the prosecution of Lewis Libby?

Mr. OLSON. Well, that would be a very long answer. I think that if you do that oversight, you are going—

Chairman SPECTER. There is no time limit on the answer, just on the question.

Mr. OLSON. If you do that oversight, you are going—in the first place, this appointment was not under the independent counsel statute. This appointment of Mr. Fitzgerald was under the inherent authority by the Attorney General, which is set forth in a statute to delegate any of the functions in the Department of Justice to anybody that the Attorney General wants to do. So the Attorney General here has the power to dismiss and remove this special prosecutor at his pleasure.

Chairman SPECTER. Would cause be required?

Mr. OLSON. Not as I understand the decision by the Attorney General to do this delegation in the first place. I think it is under a statute, 28 U.S.C. 505 or something like that, that allows the Attorney General to delegate any of the authority in the Department of Justice to any other person in the Department of Justice. So I do not think cause would be required. It is a political problem that, you know, if there is going to be a dismissal.

But to get back to your question, it would seem to me you might start with the concept of when the appointment was made and how much collectively was known with respect to what was the nature of the crime. I think you asked in your question something about whether or not the remainder of the prosecution at that interval was necessary to determine whether or not national security was implicated, whether a covert agent fitting the standard of that particular statute was involved, and whether—and you made the point in your earlier question. It is one thing to subpoena reporters with respect to national security concerns. It is another when it is the whole range of other crimes in the Federal statutes. And those are

things that this statute would address by requiring some concentration on the need for it, the importance of the information from the reporter, whether the need for the information from the reporter would outweigh the public interest that is embodied in the First Amendment and so forth. So that would be a relevant question, but I think that there would be a lot of other things that you would want to ask as well.

Chairman SPECTER. Thank you very much, Mr. Olson.

Senator Kyl?

Senator KYL. Thank you, Mr. Chairman.

Mr. Olson, let me ask you, would you agree or stipulate that Paul McNulty is a knowledgeable and honest and expert public servant on the matters to which he testified today?

Mr. OLSON. Absolutely. I have the greatest respect for Paul McNulty.

Senator KYL. I knew you did and that you would. It seems to me there is a direct contradiction between what you say and what he says. In your statement you say, "The Act does not compromise national security or burden law enforcement efforts." In view of his testimony to the contrary, can you really make that broad a statement?

Mr. OLSON. Well, I believe that a lot of attention has been given to that issue, and I think you pointed this out in your questions—or maybe Senator Schumer did, between the earlier version of this statute, which was the subject of testimony last year, and there were questions—I was here for that testimony and—

Senator KYL. Forget about that. My earlier questions to him were all from the current version of the statute.

Mr. OLSON. Yes.

Senator KYL. Which elicited a response from him that there were indeed problems.

Mr. OLSON. I respectfully disagree. I think that the issues have been addressed in Section 9. What I think Mr. McNulty did not acknowledge is that there is going to be judicial analysis of this process, anyway. The Department standards do not require the Department to go to a judge. But what is going to happen is the reporter is going to decline to respond to the subpoena. He is going to make a motion to quash. There is a going to be a motion before a judge to hold the reporter in contempt for not responding to the subpoena, and it is going to be before a judge. So a judge is going to be considering these questions: whether there is a common law privilege, whether there are First Amendment implications. And the Department is going to say it is a national security case and it is very important.

And so I think Mr. McNulty is incorrect, respectfully, because I think these matters are going to be before a judge anyway. And judges do consider national security considerations when they deal with search warrants, under Title III and FISA.

Senator KYL. You know our time constraints here.

Mr. OLSON. Yes.

Senator KYL. This statute, I think you would have to concede, would make it more difficult, though, given the fact that it statutorily establishes a privilege beyond the current common law privilege, or I gather there is no need for it.

Mr. OLSON. Well, I am not sure that it does. As the Chairman pointed out, there are four or five circuits that recognize some level of common law privilege. There are several circuits that do not.

Senator KYL. So you are not sure that this goes beyond the currently recognized privilege.

Mr. OLSON. Well, the problem, as I pointed out, is there is a hodgepodge and it is not clear what the standards are. The Supreme Court ultimately would have the power to determine that there were a common law privilege. We urged the Supreme Court to take the case in—the Wen Ho Lee case on behalf of a reporter, Pierre Thomas. It may be that the Supreme Court might recognize a common law privilege, and then the question is: Should it all be decided by judges, or should the Congress of the United States exercise its judgment as to the standards? And I think the case is strong that Congress should—

Senator KYL. Let me ask you, Professor Clymer, the third or fourth point that you made, Professor, was that there are so many—and it follows directly what Mr. Olson just said. The legislation is subject to so many tests and exceptions that a reporter cannot guarantee the privilege to the source at the time he makes it.

Would you expand on that a little bit and explain why in your view that renders this a difficult privilege to implement?

Mr. CLYMER. The problem is this: The benefits from the privilege have to occur when the conversation occurs between the reporter and the source, because if the objective of the legislation is to increase the free flow of information, that is when the information flows. And what the source, if he is reluctant to give the information, wants is a guarantee or an assurance that his identity will remain confidential.

Under present law, clearly, you cannot make that assurance. But under this legislation, you cannot make that assurance either because you do not know at the time you have that conversation which exception may apply, who is going to ask for the information, whether it will be in Federal or State court, or what a judge is going to do under one of these open-ended, unstructured balancing tests that are in this legislation.

And, by the way, I think it is worth pointing out that these balancing tests do not appear in the Federal regulations that DOJ follows. They do not appear in the standard common law tests. These balancing tests that are in this legislation are, to my knowledge, brand new. I have not seen them elsewhere.

And so this creates another layer of uncertainty so the reporter cannot give the sorts of assurances. So what we get from this legislation is all the costs—additional litigation, loss of the truth—without the benefits because the reporter still cannot give certain guarantees of confidentiality.

Senator KYL. Thank you very much. With no more time here, I will turn it back.

Chairman SPECTER. Do you want to proceed with another question or two, Senator?

Senator KYL. Well, why don't I do this. I had two or three questions of Mr. Olson, one of Mr. Schwartz, and I think one more of Mr. Clymer. So what I will do is submit those for the record.

Chairman SPECTER. OK. Thank you very much, Senator Kyl.

Senator Brownback?

**STATEMENT OF HON. SAM BROWNBACK, A U.S. SENATOR FROM THE STATE OF KANSAS**

Senator BROWNBACK. Thank you, Mr. Chairman. I apologize for not being here at the outset or hearing the testimony of the witnesses. I was in another hearing and presiding earlier. Thank you, though, for holding the hearing, and it is an important hearing.

I want to step back on this because there seems to me to be a troubling confluence of things that are happening right now, and we are trying to address the things that—a lot of the things that I am concerned about do not seem like we are addressing here. We have got these security leaks that are taking place, and in my estimation, in this war on terrorism probably our most valuable tool is information, is our ability to gather information. And we need this in this war on terrorism.

I used to chair the Immigration Subcommittee, and one of the things that shocked me was the number of legal entries we have got a year into the United States. We have nearly 250 million legal entries a year into the United States. And somebody—probably several people in that group seek to do us harm. But it is not like finding a needle in a haystack. This is a needle in a hay field. We have got to be able to really get some information, lawfully, legally, and in ways that the American public support it. And yet what we are seeing is more national security leaks taking place.

And then recently—and I do not know that this ties into it, but it really strikes me as odd that in the Judith Miller case we have people being pursued for some period of time, her going to jail, and then somebody here 3 years later holds his hand up and says, "Well, OK, yes, I am the one that did this." And I know the gentleman that said that, and this just really strikes me as odd taking place at this point in time.

I appreciate the panelists and their thoughtfulness in putting forward their testimony, but my question to you is: Given that atmosphere and our need to maintain security in the United States today in a lawful fashion, a fashion that the public supports, are there things that we should be doing to further penalize leakers of national security information, to say, you know, OK, reporters should be able to have access to legitimate knowledge? But if somebody is putting out national security information, there needs to be a legitimate penalty with this, a significant penalty with this, if this is wrong to put out.

This is a learned panel, and this is not what you came here to testify about, but I am sure you have thought about this angle of it as well. Would anybody care to comment about that?

Mr. CLYMER. Can I make two observations, Senator?

Senator BROWNBACK. Yes.

Mr. CLYMER. One is that I think this legislation, at least in some cases, will do exactly the opposite of what you suggest. In other words, it will immunize people who make those sorts of leaks, be-

cause it will require, in order to do an investigation of those people, that the Department of Justice has to satisfy certain requirements that a judge may determine for one reason or another are not satisfied, thereby preventing access to information that will result in prosecution of that sort of person. So I guess that is the first observation to make because I think that in some respects this legislation goes exactly in the opposite direction of what you are talking about.

The second observation is I think your concerns are legitimate, but I think they should be expanded. There are leaks of nonclassified information that could be extremely harmful to law enforcement in a variety of ways that are not as strongly addressed in this legislation as leaks of classified information. And it seems to me that what would be a better approach would be to have any privilege not applicable whatsoever if the disclosure of the information itself constitutes a Federal crime, be it classified information, grand jury information, or other sorts of information the disclosure of which violates Federal criminal law.

Senator BROWNBACK. And the disclosure of which by the individual leaking and the newspaper entity that discloses it?

Mr. CLYMER. Well, I do not think you have to reach the conclusion that the newspaper itself is engaged in criminal activity, as long as the disclosure to the newspaper is a violation of the law. I think Congress has made determination that that is something that is very serious and we should not effectively immunize people who do that by foreclosing any effective investigation of the crime.

Mr. BAIRD. Senator, I agree with the last statement on penalties. You could create legislation with more penalties. But I disagree with the statement that this legislation immunizes leakers. I think as a former prosecutor, there are many ways to investigate crime, and the first resort is never to go to a reporter and ask for sources. These are crimes—I agree with you, Senator, that these are serious crimes and they should be investigated, and they can be investigated. There are many ways to investigate them beyond asking a reporter for his sources.

Senator BROWNBACK. Thank you.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Senator Brownback.

Senator Kyl has asked that I include in the record a letter dated June 21, 2006, from Bruce Josten of the Chamber of Commerce to me and a letter from a group of trade associations dated today, September 20th, to Senator Leahy and myself, and they will be included in the record.

We thank you very much for coming in, gentlemen. Staff has advised me, on an unrelated matter, that Mr. Schwartz has a good imitation of me.

Mr. SCHWARTZ. [Imitating Chairman Specter] I don't think I can do that here, Senator. That would just be wrong.

Chairman SPECTER. Well, I have to agree with you about that. [Laughter.]

Chairman SPECTER. We are concluded.

[Whereupon, at 11:02 a.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

# QUESTIONS AND ANSWERS

COVINGTON & BURLING LLP

1201 PENNSYLVANIA AVENUE NW
WASHINGTON, DC 20004-2401
TEL 202.662.6000
FAX 202.662.6291
WWW.COV.COM

WASHINGTON
NEW YORK
SAN FRANCISCO
LONDON
BRUSSELS

BRUCE A. BAIRD
TEL 202.662.5122
FAX 202.778.5122
BBAIRD@COV.COM

November 16, 2006

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510-6275

Attention: Barr Huefner

Dear Mr. Chairman:

This responds to your letter of October 12, 2006 enclosing questions from Senator Kennedy relating to my testimony at the Committee's hearing on September 26, 2006 entitled "Reporters' Privilege Legislation: Preserving Effective Federal Law Enforcement."

I have identified the answers below to correspond to the questions posed by Senator Kennedy.

1. A. Based on my experience, I believe the language of the bill is sufficient to establish the existence of a reporters' privilege. The existence of a privilege does not automatically protect a communication from disclosure. Whether a particular reporter is entitled to the privilege will depend on the case. This privilege, like any other, must be raised explicitly and claimed specifically with respect to particular facts, and the reporter must carry the burden of demonstrating that each statutory element giving rise to the privilege is present.

B. Under the legislation, a reporter meeting the definition of "journalist" would establish confidentiality so that the privilege applies when production of confidential information from, or information identifying, a source is sought to be obtained, by testifying or otherwise offering evidence establishing that a promise of confidentiality relating to the information has been made. Only communications subject to such a promise of confidentiality would be covered by the privilege.

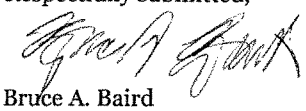
C. In my view, the legislation does contain sufficient safeguards to avoid abuse of the privilege. These safeguards, which differ depending on whether the information is sought in a criminal or civil context, are found in subsection (b), titled "Disclosure," in Sections 4, 5 and 6 of the May 18, 2006 version of the legislation, as well as in Sections 7, 8 and 9. Indeed, the legislation is unusually specific in limiting the scope of the privilege to avoid potential abuse.

2. A. I believe Mr. Schwartz is entirely incorrect that creation of a statutory reporters' privilege with appropriate exceptions will create an incentive or roadmap for law violators. There are many ways to investigate and prove violations of corporate espionage and privacy laws. These are thefts of information that typically are investigated through interviews and document reviews relating to the location from which the theft of information occurred. These same techniques have been found sufficient to investigate other types of theft that do not involve reporters. In my judgment, creation of a statutory privilege with appropriate exceptions that tracks the way in which most courts have handled reporters' source information in the absence of legislation will have no effect on incentives for those who leak trade secrets and violate privacy laws.

* * *

I appreciate the Committee's willingness to hear my testimony and consider these answers to Senator Kennedy's questions. Please let me know if I can answer any further questions.

Respectfully submitted,



Bruce A. Baird

jb

November 17, 2006

The Honorable Arlen Specter
United States Senate
Chairman, Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510
Attention: Barr Huefner

Re: Response to Questions of Senators Jon Kyl and Edward Kennedy Regarding Proposed Federal Reporters' Shield Legislation

Dear Senator Specter:

I am writing in response to your letter to me dated October 12, 2006 asking that I respond in writing to questions that Senators Jon Kyl and Edward Kennedy posed after the September 20, 2006 hearing regarding "Reporters' Privilege Legislation: Preserving Effective Federal Law Enforcement" and S. 2831. I have set out the questions in boldface below. My answers follow each question. As you requested, I am sending an electronic copy of this response to Barr_Huefner@judiciary.senate.gov.

**Questions From Senator Jon Kyl**

**Section 3**

**1. What problems could arise from using a FISA definition to define persons who should not receive the privilege?**

Under FISA, an "agent of a foreign power" is a person who, through clandestine intelligence gathering activities, international terrorism, or otherwise, poses a threat to the national security of the United States, or is an employee or agent of a foreign nation. FISA permits the use of electronic surveillance, physical searches, and other techniques to obtain from such persons information relevant or necessary for purposes of shaping foreign policy or safeguarding national security. For FISA to be effective, two kinds of secrecy are necessary.

First, the government's determination that a person is an agent of a foreign power and its investigation of that person must remain secret. Otherwise, the person will take steps to evade or frustrate surveillance, flee the country, tamper with evidence, etc. Accordingly, the government does not notify people who are determined to be agents of foreign powers. FISA permits the government to keep FISA applications and orders

secret and to conduct electronic surveillance and physical searches without giving notice to the target of such investigation.

Second, the underlying evidence that the government uses to determine who is an agent of a foreign power, such as confidential source information, signals intelligence, and the like, must remain secret to safeguard sources and methods of information collection.

Use of the "agent of a foreign power" definition as a requirement for an exception to a statutory federal journalist's privilege could undermine both of those kinds of secrecy. In order to take advantage of the exception, the government would be required to assert in court that a particular journalist who had asserted the privilege was an agent of a foreign power. This would alert the journalist to his status and thus preclude effective covert investigation.

In addition, to establish that such an "agent of a foreign power" exception was applicable, the government presumably would have to present evidence to demonstrate to the court that the privilege-asserting journalist was indeed an agent of a foreign power. This would threaten the secrecy of the government's sources and methods of information gathering. Even if the government were permitted to make an *ex parte, in camera* showing of the evidence that supported a determination that a journalist was an agent of a foreign power, or make use of some other type of CIPA-like protection for its underlying evidence, those solutions would not address the first problem. Even if the government could keep its underlying evidence secret, it nonetheless would be forced to reveal its determination that a journalist was an agent of a foreign power as defined in FISA.

By requiring such disclosure, the proposed legislation would put the government between a rock and a hard place: requiring that it either disclose to the actual or potential target of a FISA investigation that the government considered him to be an agent of a foreign power, or forgo a claim that the journalist's privilege is inapplicable.

By way of example, suppose that the proposed journalists' privilege, including the FISA-based exception, were to become law. Suppose further that the government had information from confidential sources that a foreign journalist residing in the United States was secretly supplying information to Hezbollah or another foreign terrorist organization, causing the government to conclude that the journalist was an "agent of a foreign power." This determination likely would cause the government to either initiate FISA electronic surveillance or contemplate doing so. Suppose that the journalist then published a story based on a leak of classified information, a grand jury issued a subpoena demanding the journalist's testimony about the source of the leak, and the journalist asserted the journalists' privilege. If forced to claim that the journalist was an

"agent of a foreign power" in order to overcome the claim of privilege (as the proposed legislation requires), the government would have to reveal to the journalist that he is a potential target for FISA surveillance or searches. This could frustrate FISA-based investigation.

As I pointed out in my testimony, there are other ways of creating a similar exception to a federal statutory journalist's privilege without jeopardizing potential or actual FISA investigations. As my prepared testimony noted:

> A better approach might be to tie the carve-out to the designation of a journalist or media outlet as a "Specially Designated Global Terrorist" [SDGT] under Executive Order 13224, and perhaps include non-designated media outlets that are associated with designated SDGTs. The President, the Secretary of the Treasury, the Secretary of State, and the Attorney General are involved in the process by which persons and entities are designated as SDGTs based on their status as or affiliations with terrorist organizations and terrorists. Because SDGT designations are made public, and can be based on undisclosed classified evidence, use of SDGT status or association with an SDGT as the trigger for the carve-out will not jeopardize classified information or otherwise imperil national security.

**Section 4**

2. **What is the result, in sections 4(a), 5(a), and 6(a), of the language "may not compel a journalist, *any person who employs or has an independent contract with a journalist*" in the Act? Does this language extend the privilege to such an extent that an evidentiary privilege will exist for people that have no connection to newsgathering? How could this privilege be limited so that it would apply to investigative reporters only?**

From the context, the italicized language appears designed to safeguard employers of journalists and media outlets that have independent contracts with journalists from being compelled to disclose source information that the proposed legislation would preclude being compelled directly from journalists themselves. For example, a media outlet that either employs or has hired a journalist on contract to write a story may have access to information identifying the journalist's source, such as rough notes, telephone records, or the like. If the italicized language were not in the statute, the government or a civil litigant could compel production of the source information from the medial outlet even if the journalist had a valid claim of privilege.

If that was the intent of inclusion of such language, it may be that the language is

overbroad because it appears to include anyone who has an independent contract of any sort with a journalist, such as a person who the journalist hires on contract to clean his swimming pool. This potential overbreadth will not be likely to "extend the privilege to such an extent that an evidentiary privilege will exist for people that have no connection to newsgathering," however. This is because the language that follows the potentially overbroad passage makes clear that the privilege extends only to:

> (1) information identifying a source who provided information under a promise or agreement of confidentiality made by the journalist while acting in a professional newsgathering capacity; or (2) any records, communication data, documents, or information that the journalist obtained or created while acting in a professional newsgathering capacity and upon a promise or agreement that such records, communication data, documents, or information would be confidential.

This limiting language would seem to ensure that the privilege would not be extended to people who have no connection to newsgathering.

**3. What unintended consequences could result from the fact that this bill makes it more difficult for prosecutors to pierce the media privilege than it does for civil litigants?**

One could envision a criminal case in which a criminal defendant would be able to satisfy the requirements of Section 5(b) of the proposed legislation, thereby enabling the defendant to have a court compel a journalist, under threat of incarceration, to disclose to the defendant source information. In the same case, the prosecutor may be unable to compel the journalist to disclose information. This is because prosecutor would not only have to satisfy the same requirements that apply to the defendant, but also the additional requirement in Section 4(b) that the information sought "is critical to the investigation or prosecution, particularly with respect to directly establishing guilt or innocence." (Criminal defendants need show only that the information sought "is *relevant* [not critical] to the question of guilt or innocence." ) Similarly, under the proposed legislation, federal prosecutors, but not criminal defendants, would be obligated, to the extent possible, to limit subpoenas to journalists to "verification of published information" and "surrounding circumstances relating to the accuracy of the published information." It certainly is possible that the same journalist source information could be available to a defendant but inaccessible to the prosecution.

Similarly, if there was related civil litigation, in order to overcome a claim of the journalists' privilege, the civil litigants would have to establish only that the evidence sought "is critical to the successful completion of the civil action," without the added hurdle that applies to criminal prosecutors of showing "particularly with respect to

directly establishing guilt or innocence." Once again, this may make journalist source information available to civil litigants but not criminal prosecutors.

**4. In Section 4, the Act provides that the reporter's privilege can be pierced if "a crime has occurred." If a co-conspirator was caught before committing the underlying offense of the conspiracy, might this bill prevent a prosecutor from compelling a reporter to reveal information to prevent the underlying crime that has not yet occurred?**

I am not sure that I understand the question. This requirement in Section 4(b) apparently would be satisfied by the commission of the crime of conspiracy, even of the underlying substantive crime that is the object of the conspiracy has not yet occurred. It would not apply if the effort to compel the journalist to reveal source information preceded the commission of any crime, including an attempt or conspiracy.

**5. Sections 4, 5, and 6 allow information to be compelled only if it is "critical." What is a possible problem with determining whether information can be compelled based upon whether the information is "critical"? What is a better standard to use, and why would it be better?**

"Critical" in this context likely means highly probative. In the context of Section 4(b), it would require that federal prosecutors seeking to compel journalist testimony in a grand jury investigation reveal the role that the testimony would play and its importance in the overall investigation in order to satisfy the "critical" requirement. This would entrench on prosecutors' ability to conduct an investigation and result in judicial second-guessing of investigative strategy.

Given the resources involved in seeking to compel journalists to testify, it is unlikely that federal prosecutors will do so unless the information they seek is critical to their investigations or prosecutions. As a result, it is not clear that the requirement is necessary.

**6. The free flow of information is at issue in this bill. Why does the bill distinguish between published and unpublished material? Is this distinction relevant to the free flow of information?**

To my knowledge, the only section of the proposed legislation that draws this distinction is Section 4(b)(2), which imposes on prosecutors seeking to compel a journalist to reveal source information a requirement that "to the extent possible, the subpoena — (A) avoids requiring production of a large volume of unpublished material; and (B) is limited to — (I) the verification of published information; and (ii) surrounding circumstances relating to the accuracy of the published information." This requirement

makes little or no sense in the present legislation. A previous version of the proposed bill, S.1419, set out two different types of journalists' privileges, one for non-source information (such as video out-takes) and one for source information. The more recent proposal, S. 2831, contains a single privilege for source information. The above-quoted requirement from Section 4(b) of S. 2831 might be appropriate to a journalists' privilege regarding non-source information but appears misplaced in a privilege, like that set out in S. 2831, that purports to protect only source information.

**7. Exigent circumstances can arise in a criminal investigation requiring prosecutors to secure evidence before it is destroyed by a co-conspirator. Should an exigency exception apply to section four so that investigators can secure evidence that could be destroyed?**

It is true that the destruction of evidence is a concern in many federal criminal investigations. It is not clear, however, that the inclusion of an exigency exception would remedy the problems that the proposed legislation creates in this regard. There are two reasons why the inclusion of an exigency exception would likely be ineffective as a means of avoiding the destruction of evidence. First, once the privilege is in place, such an exception would require that the prosecution prove the existence of exigent circumstances to a court. The government will not always have sufficient evidence to do so even in cases in which there is a danger of evidence destruction. Second, the need to have a hearing to determine whether there is exigency will provide those inclined to destroy evidence ample time to do so.

**Section 5**

**8. Although a journalist would not want to release *materials* that could reveal the identity of his source, isn't it important, at least in the context of a criminal defendant, that defendants have access to any exculpatory *materials*? Should the presumption be that a criminal defendant *must* get such materials, but that the judge could redact them so that a source would not be revealed?**

This proposed solution would not work. Access to the source will likely be essential. There are at least two problems here. First, there may be no independent "materials." Instead, there may be only a news story that quotes exculpatory information as having come from an anonymous source. Without access to the source, the criminal defendant would have nothing useful other than an inadmissible hearsay newspaper account. Access to the source may also provide additional exculpatory information. Second, even if there were some exculpatory "material" other than the newspaper account, the source might be necessary for the admission of the material in a court proceeding.

**9. The rights of criminal defendants are encompassed in a body of 6th Amendment law. Section 5 subjugates a criminal defendant's right to prove his innocence to the free flow of information. Do the provisions in section 5 of the Act conflict with 6th Amendment protections?**

Subsection 5(b) imposes requirements that could infringe on a criminal defendant's constitutional rights, which possibly could include the Sixth Amendment right to compulsory process but more likely would involve the Fifth Amendment right to due process of law. Specifically, the requirement that a criminal defendant demonstrate that "nondisclosure of the information would be contrary to the public interest" [Section 5(b)(4)] is problematic. It could be applied to deny a defendant exculpatory information that could cause a jury to acquit based on a determination that disclosure would impair the future flow of information to journalists. Under such circumstances, operation of the proposed privilege could deny a criminal defendant a fair trial and thus be unconstitutional.

Section 7

**10. Section 7 provides no privilege against a journalist's eyewitness observations *but only if* "a court determines by a preponderance of the evidence that the party seeking to compel disclosure by a preponderance of the evidence that the party seeking to compel disclosure under this section has exhausted reasonable efforts to obtain the information from alternative sources." It seems that this section is not limited to journalists that are engaged in newsgathering activities, but rather that it applies to the journalist merely because of his status as a journalist. How is the free flow of information furthered by mandating that journalists who are direct witnesses to a crime cannot be compelled until all other sources have been reasonably exhausted when there is no newsgathering rationale behind this restriction? What implications does this have on law enforcement?**

Your question identifies a valid concern. Section 7 confers special privileges to journalists even if the information sought is not source information and even if the journalist is not engaged in newsgathering when he learns of the sought information. The section seems to impose burdens on law enforcement efforts to obtain cooperation from journalists in situations that have nothing to do with confidential sources.

**11. Section 7 describes situations when a privilege will not apply. The last sentence of Section 7 states, "If the alleged criminal or tortuous (typo in the Act) conduct is the act of communicating the document or information at issue, this section shall not apply, and a party seeking the information must do so under sections 1 through 6 or sections 8 through 10 of this**

**Act." Therefore, the language "this section shall not apply" actually means that a privilege does apply if the "alleged criminal or tortious conduct is the act of communicating the document or information at issue." It seems that this language would mean that a tortious or criminal theft of the information would not preclude the journalist from claiming the privilege. Would a journalist still receive a privilege to conceal his source if that source stole classified information from the government? What problems could this bill cause by sanctioning the "free flow of information" even at the cost of national security secrets?**

The quoted language appears designed to ensure that a privilege (beyond the Section 7 requirement that the party seeking the information exhaust reasonable efforts to obtain the information from alternative sources) applies if the "alleged criminal or tortious conduct [witnessed or committed by the journalist] is the act of communicating the document or information at issue." The objective likely is to safeguard journalists who receive and publish information the disclosure of which may be criminal (such as classified or grand jury information).

The last sentence of Section 7 apparently applies without regard to how the person who makes the disclosure to the journalist obtained the information in the first place. Thus, it would seem to apply to sources who had legal access to information leaked to a journalist as well as to sources that obtained the information illegally, such as by theft. Applying the privilege in such instances could make it much more difficult, if not impossible, for the government to identify a person responsible for illegally disclosing information and determine the nature of the security problem, for example, whether there was a theft of information or a breach of confidence by a person entrusted with such information. By impairing that investigative endeavor, the privilege will make it harder for the government to prevent future illegal disclosures by the same source, perhaps at the cost of national security.

**Section 8**

**12. Should this bill contain an exception to prevent property crimes? An internet virus could destroy billions of dollar worth of property and ultimately lead to great suffering. Is this scenario worth an exception?**

It would be reasonable to conclude that the prevention of such an outcome outweighs societal interest in protection of journalists' sources from disclosure. But, adding yet another exception to a statutory privilege that already is riddled with exceptions further exacerbates the problem that I identified in my testimony. For a privilege to effectively promote the free flow of information to journalists by enabling them to assure confidentiality to potential sources, it must be an absolute or near absolute privilege.

The proposed privilege is qualified by numerous exceptions, denying journalists the ability to make such assurances. Thus, it imposes significant costs – the loss of reliable and probative evidence in criminal and civil cases – without conferring benefits.

**Section 9**

**13. There are many procedural hurdles to obtaining the Section 9 exception to the media privilege, but there are few procedural hurdles to obtaining the exceptions in Section 8. Should national security be an exception within Section 8 instead of its own complicated section? What implications might the additional procedural barriers in Section 9 have?**

The proposed amended version of Section 9 establishes three exceptions to the proposed journalists' privilege: (a) one that applies if disclosure of source information would "assist in preventing . . . an act of terrorism against the United States"; and (b) another that applies if disclosure of source information would "assist in preventing . . . significant specified harm to the national security"; and (c) one that would apply in a criminal investigation or prosecutions of an "unauthorized disclosure of properly classified information by a person with authorized access to such information." The second two exceptions involve balancing tests requiring that courts determine whether "significant specified harm to the national security . . . would outweigh the public interest in newsgathering and maintaining a free flow of information to citizens" and whether "unauthorized disclosure has significantly harmed the national security in a way that is clear and articulable and the harm caused by the unauthorized disclosure of such information outweighs the value to the public of the disclosed information." These and the other procedural barriers in Section 9 will cause inconsistent application of the exceptions based on subjective and unguided determinations by individual federal judges.

**14. It seems that this provision would prevent the United States from sharing information that could prevent a terrorist attack in Canada, the United Kingdom, or any other country. Why is the executive limited to compelling information to prevent a terror attack only against the United States?**

This limitation appears in the amended version of S. 2831. The legislation does not prohibit information sharing. It limits the government's ability to obtain the information in the first instance. I do not see any good reason for the proposed limitation.

**15. Section 9 contains two exceptions to the journalist's privilege. The first exception allows the government to pierce the reporter's privilege to discover information that could prevent a terrorist attack. The term "preventing" could be interpreted very narrowly, effectively precluding the**

**government from getting information unless the attack was imminent. Could the language "preventing an act of terrorism against the United States" be interpreted by a judge in a manner that would preclude piercing the privilege to apprehend terrorists that are merely planning or preparing for an act of terrorism?**

All of the terms and requirements in the proposed legislation, many of which are vague, are subject to judicial interpretation.

**16. Under the current version of the Act, would a journalist still receive a privilege to conceal his source if that source stole classified information from the government?**

Yes. In fact, one of the exceptions in Section 9, that contained in Section 9(a)(2), seems to permit the government to overcome the privilege only if the leaker has "authorized access" to illegally leaked information, rendering the exception inapplicable if a person steals and then leaks classified information.

**17. Why should acts of illegality not be protected with this privilege?**

I do not understand this question.

**18. What implications does ambiguous language in the bill like "properly classified" raise? The term could be interpreted in at least two ways. First, "properly" could mean that the proper procedures were followed to classify the information. Second, "properly" could mean the policy decision to classify the information could be revisited by a judge that does not agree that the information should be classified. In light of this ambiguity and the implications if a judge were to interpret this word as described in the second example above, should this word be removed from the bill?**

Under either interpretation, the bill would require judicial scrutiny of the internal operations of the executive branch and is therefore problematic. (Of course, the interpretation permitting inquiry into the policy decision to classify is more problematic.) Because of the vagueness of the term and the danger of judicial overreaching, it would be advisable to remove the word "properly" in the several places that it appears.

**19. Judges decide issues based upon the evidence in front of them. How would judges know what influence disclosure in a particular instance would have on the general free flow of information? What factual information would each side present to allow judges to make such a determination?**

This question highlights a fundamental problem with the proposed legislation. Sections 4(b)(5); 5(b)(4); 6(b)(5); and 9(a)(1) and all require judicial assessments of the impact that court-ordered disclosure of source information in an individual case will have on the future flow of information to the news media and then to the public. Federal judges are not qualified to make such predictions. It is not clear how a judge will be able to determine the extent to which an individual disclosure order will become known to potential sources of future news stories who would demand confidentiality in exchange for information, how it will affect those sources, whether they will recall it when they are deciding whether to make a disclosure, and the effect that it will have on the promises that journalists are willing to make to such sources. Because the determination mandated by the proposed legislation requires predictions about future conduct of sources, it is not clear what factual information litigants could present to assist courts in this determination.

**20. In Section 9(a)(2) the Act would provide "no privilege ... against disclosure of information... by a person with authorized access to such information...." Would this clause provide a privilege for someone who was not authorized to access the information? If so, would this clause actually allow and encourage some people to disclose national security information?**

The clause apparently would make the availability of the privilege hinge on the identity of the target of the criminal investigation or prosecution. Specifically, if the person under investigation had "authorized access" to the improperly leaked information, an exception to the privilege could apply. But, if the person did not have authorized access, the exception could not apply. In either event, the journalist to whom the leak was made would be able to assert the privilege, not the person who had access to and leaked the information.

Note, however, that this exception is problematic in that it often will be unclear who leaked the information and thus whether the leaker had "authorized access." Thus, it will not be clear whether this exception applies at all. In other words, it will often be the case that the information needed to determine if this exception applies – the identity of the leaker – will be the same information that is unavailable unless and until the journalist is compelled to disclose the identity of his source.

**21. How would this bill interact with the powers of the executive?**

As noted above, and in my prepared testimony, several requirements in the proposed legislation would involve the courts in Executive Branch decision-making and grand jury investigations.

**Section 10**

**22. The reporter and his source only get the benefits of the privilege if the source's information was given in exchange for the reporter's promise of confidentiality. Is there a danger that sources will begin to request this promise, even when it is not strictly necessary to encourage them to reveal their information? Further, could this "promise seeking" dilute the value of the promise and unnecessarily extend the privilege?**

There is no cost to the source to demand a promise of confidentiality and, under the legislation, little or no reason for a journalist not to agree to confidentiality. Thus, it seems likely that a federal journalists' privilege will result in more source requests for confidentiality. It is also worth noting that several recent high-profile cases, like the Miller and Taricani incidents, involved journalists who claimed that a source had demanded confidentiality, when, in fact, the sources either denied making such a demand or claimed to have later waived any confidentiality. Thus, there may be reason to be concerned that the proposed legislation will cause some journalists to claim that a source demanded or still insists on confidentiality when the source has not requested such confidentiality or no longer insists on it.

**General Questions**

**23. What provisions of this bill could be unconstitutional?**

As noted above, by permitting courts to deny criminal defendants access to exculpatory information based on a determination that their need for such is outweighed by "the public interest in newsgathering and in maintaining the free flow of information," Section 5(b) risks violating the constitution. The inclusion in the amended version of the proposed legislation the clause permitting courts to consider "the defendant's constitutional rights"as a factor does not remedy this problem. The defendant's constitutional rights should trump considerations of the public interest in the free flow of information, not simply be one of several factors to be considered.

**24. During the hearing you touched upon two recommendations you had to improve the bill. Please elaborate on those suggestions.**

The present legislation is hopelessly complex. It will not improve the flow of information because it does not enable journalists to give any sort of meaningful assurances to sources who wish to remain anonymous. Instead, it will deny grand juries, prosecutors, courts, criminal defendants, and civil litigants access to probative and reliable information without any resulting benefit other than to confer special rights to journalists.

Nor would an absolute or near absolute privilege, like the one embodied in the predecessor legislation, S. 1419, make sense. The cost in terms of suppressed evidence is simply too great. What is necessary is a simpler privilege that does not impose the same costs.

One possibility is to enact a qualified privilege that does not apply at all to federal grand jury subpoenas and subpoenas issued at the request of the Department of Justice [DOJ]. When there is a request to issue one of these subpoenas (which I will refer to collectively as "DOJ subpoenas") to the news media, even if the subpoena does not demand source information, DOJ employs a rigorous internal review process set out in the Code of Federal Regulations. DOJ subpoenas to the media for source information are very rare (apparently about one per year) and there is no evidence that DOJ has used subpoenas to harass or punish journalists. Simply put, DOJ seems to have limited its use of media subpoenas to situations in which there is good reason to issue them. In fact, DOJ has an interest in exercising self-restraint in this area. If it fails to properly police its own prosecutors, it is likely to trigger a backlash in the form of a broad statutory journalists' privilege. In addition, most of the concerns about the costs of a journalists' privilege – that it will impair law enforcement and threaten national security – would evaporate if the privilege did not apply to DOJ subpoenas.

In contrast, subpoenas from criminal defendants and civil litigants are not subject to any regulation, oversight, or restraint. It is such subpoenas that are more likely to threaten to curtail the free flow of information.

Another possibility is to have a privilege that does not protect at all any disclosures that in and of themselves violate federal law. It seems anomalous for Congress to identify conduct as illegal – such as the disclosure of classified information or grand jury matters – but at the same time enact legislation that makes it difficult, if not impossible, to properly investigate and prosecute violations of those laws.

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**Questions from Senator Edward Kennedy:**

**In your testimony, you expressed concerns that in establishing that a person or entity is a "foreign power" or an "agent of a foreign power", the government may be forced to reveal classified information. You pointed out that this result may be avoided by designating the person or entity as a "Specially Designated Global Terrorist".**

> **A. Can you please explain, in detail, why you would have a concern despite existing mechanisms in place to avoid revealing classified information in a court proceeding under seal or under the Classified**

**Information Procedures Act (18 U.S.C. App) without designating the party as a "Specially Designated Global Terrorist"?**

**B. Isn't there a greater risk for legal uncertainty if Congress does not follow well-established definitions contained in our national security laws?**

Under FISA, an "agent of a foreign power" is a person who, through clandestine intelligence gathering activities, international terrorism, or otherwise, poses a threat to the national security of the United States, or is an employee or agent of a foreign nation. FISA permits the use of electronic surveillance, physical searches, and other techniques to obtain from such persons information relevant or necessary for purposes of shaping foreign policy or safeguarding national security. For FISA to be effective, two kinds of secrecy are necessary. First, the government's identification of a person as an agent of a foreign power and its investigation of that person must remain secret. Otherwise, the person will take steps to evade or frustrate surveillance, flee the country, tamper with evidence, etc. Accordingly, FISA permits the government to keep FISA applications and orders secret and to conduct electronic surveillance and physical searches without giving notice to the target of such investigation. Second, the evidence that the government uses to determine who is an agent of a foreign power, such as confidential source information, signals intelligence, and the like, must remain secret to safeguard sources and methods of information collection.

Use of the "agent of a foreign power" definition as a requirement for an exception to a statutory federal journalist's privilege could undermine both of those kinds of secrecy. In order to take advantage of the exception, the government would be required to assert in court and thus reveal that a particular journalist who had asserted the privilege was an agent of a foreign power. This would preclude effective covert investigation of such a person. In addition, to establish that such an "agent of a foreign power" exception was applicable, the government presumably would have to present evidence in court to demonstrate that the privilege-asserting journalist was indeed an agent of a foreign power, thereby threatening the secrecy of the government's sources and methods of information gathering. Even if the government were permitted to make an *ex parte, in camera* showing of the evidence that supported a determination that a journalist was an agent of a foreign power, or make use of some other type of CIPA-like protection for its underlying evidence, this would not address the problem that the proposed exception would force the government to reveal its determination that a journalist was an agent of a foreign power as defined in FISA.

By requiring the government to disclose a person's status as an agent of a foreign power within the FISA definition in order to overcome q claim of a journalist's privilege, the proposed legislation would put the government between a rock and a hard place:

requiring that it either disclose to the actual or potential target of a FISA search that the government considers him to be an agent of a foreign power, thereby undermining possible FISA investigation, or forgo a claim that the journalist's privilege is inapplicable.

By way of example, suppose that the proposed journalists' privilege, including the FISA-based exception, were to become law. Suppose further that the government had information from confidential sources that a foreign journalist residing in the United States was secretly supplying information to Hezbollah or another foreign terrorist organization, causing the government to conclude that the journalist was an "agent of a foreign power." This determination likely would cause the government to either initiate FISA electronic surveillance or contemplate doing so. Suppose that the journalist then publishes a story based on a leak of classified information. A grand jury issues a subpoena demanding the journalist's testimony about the source of the leak and the journalist asserts the journalists' privilege. If the government has to assert and then demonstrate that the journalist is an "agent of a foreign power" in order to overcome the claim of privilege (as the proposed legislation requires), it will reveal to the journalist that he is a potential target for FISA surveillance or searches and may have to disclose its sources to prove to a court that the exception applies. Alerting the journalist to the government's belief that he is an agent of a foreign power could frustrate FISA-based investigation; disclosing sources in court could jeopardize their safety and undermine their effectiveness.

As I pointed out in my testimony, there are other ways of creating a similar exception to a federal statutory journalist's privilege without jeopardizing potential or actual FISA investigations. As my prepared testimony noted:

> A better approach might be to tie the carve-out to the designation of a journalist or media outlet as a "Specially Designated Global Terrorist" [SDGT] under Executive Order 13224, and perhaps include non-designated media outlets that are associated with designated SDGTs. The President, the Secretary of the Treasury, the Secretary of State, and the Attorney General are involved in the process by which persons and entities are designated as SDGTs based on their status as or affiliations with terrorist organizations and terrorists. Because SDGT designations are made public, and can be based on undisclosed classified evidence, use of SDGT status or association with an SDGT as the trigger for the carve-out will not jeopardize classified information or otherwise imperil national security.

The SDGT definition is well-established in our national security law and avoids the above-described problems with use of the FISA-based definition.

Please feel free to contact me if you have any other questions.

Very truly yours,

Steven D. Clymer
Professor of Law
Cornell Law School

**U.S. Department of Justice**

Office of Legislative Affairs

Office of the Assistant Attorney General

*Washington, D.C. 20530*

March 21, 2007

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

Dear Mr. Chairman:

Please find enclosed responses to questions arising from the September 20, 2006, appearance before the Committee of Deputy Attorney General Paul J. McNulty. The subject of the hearing was "Reporters' Shield Legislation: Preserving Effective Federal Law Enforcement." We hope that the information is helpful to the Committee.

Please do not hesitate to call upon us if we may be of additional assistance. 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,

Richard A. Hertling
Acting Assistant Attorney General

cc: The Honorable Arlen Specter
Ranking Minority Member

**Before the Committee on the Judiciary**
**United States Senate**

**"Reporters' Privilege Legislation: Preserving Effective Federal Law Enforcement"**
**September 20, 2006**

**Responses of Paul J. McNulty**
**Deputy Attorney General**

**Responses to Questions From Senator Kyl:**

1. *In the Act, "the term 'attorney for the United States' means the Attorney General, any United States Attorney, Department of Justice prosecutor, special prosecutor, or other officer or employee of the United States in the executive branch of Government or any independent regulatory agency with the authority to obtain a subpoena or other compulsory process." Would 'attorney for the United States' include JAG officers? If so, how could this Act negatively impact military tribunals and terror trials? Should an exception exist for terror trials?*

**Answer:** The term "attorney for the United States," as defined in Section 3(1), encompasses any "officer or employee of the United States in the Executive branch of Government or any independent regulatory agency with the authority to obtain a subpoena or other compulsory process." JAG officers are officers of the United States with authority to obtain subpoenas or other compulsory process and, thus, would appear to constitute "attorney[s] for the United States" under the proposed legislation. *See, e.g.*, 10 U.S.C. § 846 (explaining that "trial counsel, the defense counsel, and the court martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe"); *see also* Rules for Courts Martial (RCM) 701 and 703.

The bill could negatively affect military tribunals and terror trials in several ways. First, because courts martial and other military tribunals do not themselves have authority to prosecute a civilian's noncompliance with their subpoenas as a contempt of court, they must refer such noncompliance cases to the appropriate U.S. Attorney's Office for prosecution in a Federal District Court. *See* 10 U.S.C. § 847. When applied to such a Federal court proceeding, the expansive journalist's privilege created by the bill would pose a substantial obstacle to such enforcement actions and, thus, have a severe negative impact on the referring military tribunals by undercutting their ability to make effective use of compulsory process to obtain relevant testimony and evidence from covered journalists.

The extent of the bill's *direct* impact on courts martial, military commissions, and other military tribunals will depend to a large extent upon whether such tribunals are deemed "Federal court[s]" within the meaning of Sections 4 through 6 of the bill. The prohibitions and restrictions in those sections apply only to compulsory process issued by

"Federal courts," but that term is not defined in the bill. Although the above-noted military tribunals are not Article III courts, it is not clear whether the term "Federal courts" as used in the bill is intended to apply only to Article III courts. To the extent that military tribunals would be deemed Federal courts for purposes of the proposed legislation, the bill would negatively impact such tribunals by restricting the ability of both the prosecution and the defense to obtain testimony or the production of evidence from covered journalists who may have knowledge or evidence critical to a case. As but one example, a reporter may have confidentially obtained information that is relevant to the prosecution of an enemy combatant before a military commission or of a soldier before a General Court Martial. The bill's extensive restrictions upon the Government's or the defense's ability to compel testimony or evidence from the journalist witness would have an adverse impact on a military tribunal's ability to obtain relevant evidence that may be critical to a fair determination of guilt or innocence. The same concerns will apply to "terror trials" to the extent that they are conducted by courts or tribunals that constitute "Federal courts" within the meaning of the bill.

Because the Department does not believe there is justification for any reporter's privilege bill, we are reluctant to endorse particular exceptions, which might imply that a bill with appropriate exceptions is acceptable. In the event that S. 2831 were to be enacted, however, we do not believe it should apply in any situation where the purported journalist's privilege would impose unwarranted obstacles to critical law enforcement or national security objectives, including in the context of trials involving terrorism.

2. *Is there a way to further broaden the list of entities that should not receive the privilege, such as criminal organizations? Are there any publicly available lists that contain this information?*

**Answer:** The Department assumes that, in referring to the "list of entities" that should not receive the privilege, the question refers to a possible expansion of the existing proposed language to exempt from the definition of journalist "any person who is a 'foreign power' or the 'agent of a foreign power' under section 101 of Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801)." In the event S. 2831 were enacted, the Department believes that the category of entities excluded because they engage in activities adverse to national security or law enforcement, and thus could improperly exploit a journalist's privilege against United States interests, should be substantially expanded. We are not aware of any specific list or lists that would satisfactorily encompass all properly excludable entities. At a minimum, however, persons or entities that fall within categories such as the following should be excluded from any protections or privileges provided by S. 2831, even if they otherwise satisfy the definition of "journalist": Foreign Terrorist Organization (*see* 8 U.S.C. § 1189; 31 C.F.R. pt. 597); Specially Designated Global Terrorist (31 C.F.R. § 594.310); Specially Designated Terrorist (31 C.F.R. § 595.311); Terrorism Exclusion List (*see* 69 Fed. Reg. 23,555 (Apr. 29, 2004)); List of Parties Excluded from Federal Procurement and Nonprocurement Programs (maintained by GSA pursuant to Executive Orders 12549 and 12869). A number of media entities whose reporters, stringers, and cameramen would

otherwise qualify for protection under the bill are presently included on such lists, including the Lebanese Media Group ("LMB"), Al-Manar (Hezbollah satellite television network), and Al-Nour (Hezbollah radio network).

3. *In Section 4, the Act provides that the reporter's privilege can be pierced if "a crime* has occurred." *If a co-conspirator was caught before committing the underlying offense of the conspiracy, might this bill prevent a prosecutor from compelling a reporter to reveal information* to prevent *the underlying crime from occurring?*

**Answer:** Congress has made conspiracy a crime in numerous provisions of the Federal Criminal Code. *See, e.g.*, 18 U.S.C. §§ 793(g) (espionage statute); 1951 (Hobbs Act), 2339A (material support to terrorists); 21 U.S.C. § 846 (narcotics). The crime of conspiracy is committed, and thus has occurred, when two persons enter into the proscribed unlawful agreement and, as many statutes require, an overt act is undertaken to further the agreed-upon unlawful objective.

The Section 4 language at issue closely tracks the Department's own guidelines for the issuance of compulsory process to members of the news media, set forth at 28 C.F.R. § 50.10. This similarity between the proposed legislation and the Department's guidelines has led some supporters of S. 2831 to suggest that the bill is no more than a codification of the Department's guidelines. Nothing could be further from the truth.

The Department's guidelines strike an appropriate balance between the public's interest in the free dissemination of ideas and information with the public's interest in effective law enforcement and the fair administration of justice. The guidelines do so while preserving 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. By contrast, the proposed legislation would shift final authority over these and other quintessentially prosecutorial decisions to the judiciary.

To make matters worse, S. 2831 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) and less predictable (by virtue of being subject to the interpretations of literally hundreds of Federal judges).

The Department has a clear track record of carefully balancing the competing interests of the news media and the public's interest in fair and effective law enforcement. The proposed legislation would upset that balance with serious and negative consequences for law enforcement.

4. *Sections 4, 5, and 6 allow information to be compelled only if it is "critical." What is a possible problem with determining whether information can be compelled based upon whether the information is "critical"? What is a better standard to use, and why would it be better?*

**Answer:** The bill's requirement that the information sought be "critical" to an investigation or prosecution is problematic, not only because of the imprecision of the term but also because, under the proposed legislation, it is a judge and not a prosecutor who ultimately will make the determination about the "criticality" of the information sought. The proposed legislation thus confers upon the judiciary the authority to second guess determinations – including determinations about what evidence is "critical" to an ongoing criminal investigation or prosecution – that rightfully are vested in the Executive branch. At the very least, the bill thrusts the judiciary into decisions that require extensive knowledge of detailed and nuanced national security matters.

Moreover, the bill places the burden upon prosecutors to prove, by a "preponderance of the evidence," that the information they seek is critical – which would be a dramatic departure from the well-established law governing grand jury subpoenas. Under existing law, an individual wishing to challenge a subpoena bears the burden of proving that the request for particular evidence is unreasonable or oppressive. The bill, by contrast, saddles the Government with the obligation of going into Federal court and producing evidence of a quantity sufficient to prove that the information sought is "critical." An effective assessment of whether relevant information is "critical," moreover, often cannot be made at the early stages of an investigation or proceeding. Thus, the bill not only shifts authority over traditional prosecutorial decisions to the judiciary, but also places a thumb on the scale in favor of a reporter's privilege.

The Department strongly opposes the transfer to the judiciary of this prosecutorial decision-making authority traditionally vested in the executive. The problem with the bill, therefore, is structural, and in the Department's view cannot be cured by the adoption of different or better standards.

5. *Exigent circumstances can arise in a criminal investigation requiring prosecutors to secure evidence before it is destroyed by a co-conspirator. Should an exigency exception apply to section 4 so that investigators can secure evidence before it is destroyed?*

**Answer:** While the absence of an exigency exception is certainly troubling, the addition of such an exception would not cure the structural defects in the proposed legislation outlined above. Specifically, under the proposed legislation, determinations rightfully vested in the Executive – including determinations about what evidence is "critical" to an ongoing criminal investigation or prosecution and what constitutes harm to the national security – would be transferred to the judiciary. Worse still, under S. 2831, the government will bear the burden of establishing its need for the information it seeks – a dramatic departure from

existing law, which requires the party resisting a subpoena to prove that the subpoena is unreasonable and oppressive.

One of the hallmarks of the Department's own policies governing the issuance of compulsory process to the media, *see* 28 C.F.R. § 50.10, is the flexibility afforded the Department in times of extreme emergency. The proposed legislation, however, would vitiate that flexibility by shifting final authority over core executive and prosecutorial decisions to the judiciary, and by forcing the government to bear a heavy burden of proof in order to obtain information that is essential to the investigation and prosecution of serious crimes.

6. *The rights of criminal defendants are encompassed in a body of Sixth Amendment law. Section 5 would subjugate a criminal defendant's right to prove his innocence to the free flow of information. Do the provisions in Section 5 of the Act conflict with Sixth Amendment protections?*

**Answer:** The restrictions that section 5 would impose upon a criminal defendant's right to obtain compulsory process conflict with the Sixth Amendment.

Before a criminal defendant can obtain testimony or evidence for his defense from a covered journalist under Section 5, he must demonstrate to a court that (1) there are reasonable grounds to believe, *based on an alternative source*, that the information sought is relevant to the determination of guilt, innocence, or sentencing; (2) the defendant has exhausted reasonable alternative sources of the information; (3) the information sought is essential, and not merely "peripheral"; and (4) nondisclosure of the information would be contrary to the public interest, under a balancing formula set forth in the bill.

Although a defendant's Sixth Amendment rights are not absolute, the government bears a heavy burden when it seeks to limit them by statute. *See Ronson v. Commissioner of Correction*, 604 F.2d 176, 178 (2d Cir. 1979). The detailed standards that must be satisfied under Section 5 before a defendant can obtain the information he needs for his defense are substantially more demanding than the minimal limitations that courts have held are compatible with Sixth Amendment rights. *See, e.g, United States v. Criden*, 633 F.2d 346, 358-59 (3d Cir. 1980) (requiring the challenging party to show only that he had tried and failed to obtain the information from alternative sources and that the information was "crucial to the claim"; privilege claim rejected and testimony compelled). As one court recently described the proper balance to be struck between the journalist's privilege and a defendant's Sixth Amendment rights: 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*." *United States v. Lindh*, 210 F.Supp.2d 780, 782 (E.D. Va. 2002) (emphasis added).

Thus, Sixth Amendment rights may not properly be denied merely because a defendant cannot prove to a court that the information he seeks is "essential"; that the relevance of the information sought is based on grounds provided solely by an "alternative source"; or that nondisclosure of that information "would be contrary to the public interest," taking into account "the public interest in newsgathering and maintaining the free flow of information," as required by the bill. Because Section 5, in fact, imposes such excessive requirements, it conflicts with the Sixth Amendment rights of defendants.

7. *The bill provides that there is no privilege against information "reasonably necessary to* stop, prevent, or mitigate" *a* specific *case of death, kidnapping, or substantial bodily harm. Is a* general *or random threat of death less worthy of police protection? Why shouldn't law enforcement be able to get information to* apprehend *a person suspected of having committed death, kidnapping, or substantial bodily harm?*

**Answer:** The bill's requirement that the government demonstrate that the information sought is "reasonably necessary to stop, prevent, or mitigate" a "specific" case of death, kidnapping, or substantial bodily harm – a requirement that is echoed in Section 9's requirement that the government show a "clear and articulable" harm to the national security – imposes a significantly higher burden upon the government than exists under current case law, and vests final authority over such determinations in the hands of the judiciary rather than the Executive branch. In so doing, the bill would severely impair the flexibility of the Executive branch in enforcing Federal law, both by imposing rigid mandatory standards in lieu of existing voluntary ones, and by applying its restrictions on the use of compulsory process more broadly than the existing Department policies.

In attempting to prevent the crimes identified in Section 8 – death, kidnapping, and substantial bodily harm – law enforcement officials often must take action in response to general and random threats. Indeed, by the time a threat becomes "specific," it may be too late for law enforcement officials to disrupt it. The use of the word "specific" in the text of the proposal could result in serious consequences if it remains and is interpreted in the manner suggested by the question.

The Department believes that law enforcement should not be precluded from obtaining information from a journalist in order to apprehend a person suspected of having committed death, kidnapping, or substantial bodily harm. The government conceivably could obtain such information under Section 4, but only if a court finds that it has satisfied numerous conditions and that the disclosure of the information serves the public interest. The government should not be restricted by a journalist's privilege in obtaining information that is reasonably necessary to apprehend perpetrators of these serious crimes.

Regardless of the language used in Section 8, it remains the view of the Department that existing case law and Department policy have reached appropriate balance between the paramount public interest in preventing and prosecuting serious crimes and the media's right to gather and report the news. The proposed legislation would upset this balance with

dramatic results for law enforcement and, consequently, the safety of the American people. For these reasons, the Department continues to oppose the proposed legislation.

8. *Section 7 provides no privilege against a journalist's eyewitness observations but only if "a court determines by a preponderance of the evidence that the party seeking to compel disclosure under this section has exhausted reasonable efforts to obtain the information from alternative sources." It seems that this section is not limited to journalists that are engaged in newsgathering activities, but rather that it applies to the journalist merely because of his status as a journalist. How is the free flow of information furthered by mandating that journalists who are direct witnesses to a crime cannot be compelled until all other sources have been reasonably exhausted when there is no newsgathering rationale behind this restriction? What implications does this have on law enforcement?*

**Answer:** According to the Department's interpretation of Section 7, journalists would be exempt from providing eyewitness observations of criminal conduct only in cases in which the journalist was acting in a professional newsgathering capacity and the information would identify a source who provided information under a promise or agreement of confidentiality, or the information sought was provided pursuant to a confidentiality agreement. Therefore, if a journalist witnessed a hit-and-run accident while walking to lunch or on assignment, the privilege would not apply because the journalist's eyewitness observation of that particular criminal conduct would not identify a source or violate a confidentiality agreement obtained while acting in a professional capacity.

Nonetheless, Section 7 would impose unacceptable restrictions upon the government's ability to enforce the laws and protect national security. Particularly concerning is the fact that the exception from the privilege for crimes witnessed by journalists does not apply "[i]f the alleged criminal or tortuous [sic] conduct is the act of communicating the documents or information at issue." Therefore, if the crime or tort at issue were the disclosure of information to the journalist (e.g., an unlawful leak of classified information to a reporter), the privilege would attach and the journalist would not have to disclose his or her source unless the government satisfied the requirements of Section 4. This exception would virtually immunize a journalist from performing the civic duty of serving as a witness to a crime that other citizens would be required to perform. Even the more highly recognized and protected attorney-client privilege does not apply when the attorney participates in the crime. This exception for "disclosure" crimes would especially hinder investigations of leaks of classified information and, in fact, may encourage such leaks to occur.

9. *Section 7 describes situations when a privilege will not apply. The last sentence of Section 7 states, "If the alleged criminal or tortuous [sic] conduct is the act of communicating the document or information at issue, this section* shall not apply, *and a party seeking the information must do so under sections 1 through 6 or sections 8 through 10 of this Act." Therefore, the language "this section shall not apply"*

*actually means that a privilege does apply if the "alleged criminal or tortious conduct is the act of communicating the document or information at issue." It seems that this language would mean that a tortious criminal theft of the information would not preclude the journalist from claiming the privilege. Would a journalist still receive a privilege to conceal his source if that source stole classified information from the government? What problems could this bill cause by sanctioning the "free flow of information" even at the cost of national security secrets?*

**Answer:** The Department agrees that the proposed legislation, by its terms, appears to provide a privilege to the reporter in instances in which the alleged crime being investigated is "the act of communicating the documents or information at issue." Thus, in any criminal investigation into a leak of classified information to a covered journalist, the government would be required to make a showing sufficient to overcome the reporter's privilege conferred by the bill.

The showing that the bill requires the government to make in order to overcome the reporter's privilege is excessive – even in a case involving a leak of classified information. Under Section 9, for example, a court must determine "by a preponderance of the evidence" that "an unauthorized disclosure [of classified information] has significantly harmed the national security in a way that is clear and articulable" and that such harm "outweighs the value to the public of the disclosed information."

The bill thus not only transfers to the judiciary the authority to second-guess the Executive branch's determinations regarding what does and does not harm the national security, it also empowers courts to find that a reporter's promise to conceal a source's identity can override national security interests, even when harm to national security is conceded. In so doing, Section 9 would force Federal judges to make very difficult decisions about the national security implications of a particular leak. While the members of the judiciary are talented and skilled, they lack the expertise and information to make such determinations, and requiring them to do so would necessarily immerse judges into nuanced considerations of national security matters. These considerations would be occurring in environments in which time is of the essence and national security threats are constantly changing.

In addition to these structural problems, the proposed legislation could seriously compromise national security by allowing those with access to the most sensitive classified information to hide behind the reporter's privilege and leak with virtual impunity. Judge Wilkinson identified the problem almost 20 years ago in his concurring opinion in *United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988), in which he noted that according reporters a privilege against disclosing confidential sources "would install every government worker with access to classified information as a veritable satrap. Vital decisions and expensive programs set in motion by elected representatives would be subject to summary derailment at the pleasure of one disgruntled employee." *Id.* at 1083. The bill's practical effects would be no different, and the potential harm it poses to national security is enormous.

*10. Should the bill contain an exception to prevent property crimes? An internet virus could destroy billions of dollars of property and ultimately lead to great suffering. Is this scenario worth an exception?*

**Answer:** The bill's failure to provide a property crimes exception is a glaring omission. As the question indicates, certain property crimes – including property crimes committed by terrorist groups both foreign and domestic – could result in massive financial harm and human suffering, and still may not meet the stringent requirements set forth in the bill for overcoming a reporter's privilege. Yet while the absence of an exception for property crimes is certainly troubling, the Department does not believe that the addition of such an exception would cure the structural defects of the proposed bill.

*11. There are many procedural hurdles to obtaining the Section 9 exception to the media privilege, but there are few procedural hurdles to obtaining the exceptions in Section 8. Should national security be an exception within Section 8 instead of its own complicated section? What implications might the additional procedural barriers in Section 9 have?*

**Answer:** The Department believes that the structural defects inherent in S. 2831, as set forth in detail above, are so serious that they could not be cured merely by inserting a national security exception into Section 8. As explained above, S. 2831 would shift to the Federal judiciary key decisions that traditionally have been reserved to the Executive branch. Moreover, S. 2831 would replace the inherent flexibility of the Department's media subpoena guidelines with a more rigid statutory structure. These deficiencies, in the Department's view, cannot be cured by subsuming the national security exception in Section 9 into the general exceptions set forth in Section 8.

*12. It seems that Section 9 would prevent the United States from sharing information that could prevent a terrorist attack in Canada, the United Kingdom, or any other country. Why is the executive limited to compelling information to prevent a terror attack only against the United States?*

**Answer:** The Department finds problematic S. 2831's apparent limitation of the national security exception in Section 9 to cases in which disclosure of information would assist in preventing an act of terrorism against the United States only, as opposed to acts of terrorism against other countries. In the ongoing war on terror, threats are not restricted to any particular nation. Indeed, the Untied States regularly works closely with our allies on an array of counter terrorism activities, and the Department opposes provisions that could constrain our ability to share information with those allies concerning a potential or actual act of terrorism.

*13. Section 9 contains two exceptions to the journalist's privilege. The first exception allows the government to pierce the reporter's privilege to discover information that*

*could prevent a terrorist attack. The term "preventing" could be interpreted very narrowly, effectively precluding the government from getting information unless the attack was imminent. Could the language "preventing an act of terrorism against the United States be interpreted by a judge in a manner that would preclude piercing the privilege to apprehend terrorists that are merely planning or preparing for an act of terrorism?*

**Answer:** Although we believe that the better reading of this provision would permit piercing the reporter's privilege to apprehend terrorists who are planning or preparing for an act of terrorism, we agree that the term could be susceptible to other interpretations. We emphasize that the potential for ambiguity in interpreting this provision is just one among many problematic aspects of S. 2831. The bill significantly increases the burden that the government must meet to obtain certain information from members of the news media, thereby impairing the Department's ability to investigate and prosecute serious crimes. The Department opposes the bill, apart from the other reasons stated, on the basis of the structural concerns explained above.

14. *What implications does ambiguous language in the bill like "properly classified" raise? The term could be interpreted in at least two ways. First, "properly" could mean that the proper procedures were followed to classify the information. Second, "properly" could mean the policy decision to classify the information could be revisited by a judge that does not agree that the information should be classified. In light of this ambiguity and the implications if a judge were to interpret this word as described in the second example above, should this word be removed from the bill.*

**Answer:** Section 9's reference to "properly classified" information is troublesome for the reasons of imprecision suggested in the question. As the question states, the language could arguably be read to authorize the judiciary to determine whether information in fact was "properly" classified under the principles governing such decisions. The potential for second-guessing or judicial override infringes upon the authority vested in the President by Article II of the Constitution. *See generally Department of Navy v. Egan*, 484 U.S. 518, 527 (1988) (acknowledging the compelling nature of the President's constitutional authority to classify and control access to information bearing on the national security). The Department believes that such decisions are best made within the Executive branch.

15. *If another situation were to arise similar to the London Bomb Plot, are the requirements of "notice and an opportunity to be heard" reasonable without an exigency exception?*

**Answer:** The process contemplated by the proposed legislation – in which the reporter must be afforded notice and an opportunity to be heard, and a court makes the final determination about what constitutes harm to the national security – will undermine law enforcement's ability to move quickly against terrorist plots like the London bomb plot. An exigency

exception would certainly be an improvement; however, the addition of such an exception will not solve the larger structural problems with the bill.

The example I provided in my written testimony to the Committee underscores these flaws. In that hypothetical, a journalist publishes a detailed story about a classified covert effort to track the movements of international terrorists, and attributes the information to a confidential source. The source is described as a government insider who is concerned about the program because it has, in his view, encroached on the privacy rights of certain individuals by erroneously identifying them as terrorists. The story further reveals that the government insider is so disgruntled that he intends to resign and relocate outside the United States, taking with him classified documents detailing this and other classified programs.

In such a case, time is clearly of the essence, and under current Department policy, the Attorney General can quickly approve a subpoena. Even if the journalist resisted the subpoena in court, he or she would be required, under current law, to show that the subpoena was unreasonable and oppressive – a very high standard, indeed, and one the journalist is unlikely to meet under these circumstances.

Under the proposed legislation, however, if the reporter resisted the subpoena in court, *the Department* would bear the burden of providing affirmative proof that the leak damaged the national security. Even if the Department made such a showing, under the proposed legislation a court could still determine that the public's interest in learning about the covert program outweighed the government's interest in identifying the leaker, and quash the subpoena on that basis.

While the obstacles that S. 2831 places in the path of law enforcement are perhaps more apparent in cases involving exigent circumstances, they are not limited to such cases. Accordingly, it remains the Department's view that merely providing for an exception to the privilege in such circumstances would be insufficient to remedy the flaws of S. 2831.

*16. Should the executive have the ability to get information regarding threats to our country, such as terrorist information generally, and not just "an act of terrorism"?*

**Answer:** The Executive branch should be permitted to use all tools consistent with the Constitution and laws of this country to collect information about threats to our country. The Department believes that its current policies and controlling case law properly balance the public's interest in preventing and prosecuting terrorist activity and the public's interest in the gathering and reporting of news by the media. As set forth in more detail above, S. 2831 would make it significantly more difficult for the government to obtain information about threats to our national security than under current laws and policies, which have served us well in the past, and such a change is not warranted. As I stressed in my written and oral testimony, the Department has very rarely authorized subpoenas to members of the news media; our record is one of restraint, and we turn to the media for source information only after carefully applying our guidelines and only as a measure of last resort.

*17. Judges decide issues based upon the evidence in front of them. How would judges know what influence disclosure in a particular instance would have on the general free flow of information? What factual information would each side present to allow judges to make such a determination?*

**Answer:** Under Sections 4, 5, 6, and 9 of the bill, in order to compel the disclosure of information from a journalist, a court must find by a preponderance of the evidence, *inter alia*, that "nondisclosure of the information would be contrary to the public interest . . . taking into account . . . the public interest . . . in maintaining the free flow of information." In other words, the party seeking disclosure of the information – the government – has an obligation to provide evidence that the disclosure is in the public interest. At the same time, however, there is no corresponding factual inquiry that a court could conduct to ascertain the empirical impact that a particular disclosure of information would have on the "free flow of information." Judges will therefore have little choice but to base their decisions on their own subjective sensibilities and predilections, not evidence. Thus, even if the government is able to provide overwhelming evidence that disclosure of information would be in the public interest to thwart a terrorist attack, a judge would still have discretion to decide that the disclosure does not outweigh the potentially adverse impact it may have on the free flow of information. Moreover, the unpredictability that would arise from having a judge speculate about the result of a disclosure on the "free flow of information" will result in inconsistent judgments and undermine one of the purported justifications for this bill – the perceived need for uniform application of the journalist privilege. Accordingly, and in addition to our other structural objections, the Department opposes the judicial balancing test mandated by S. 2831.

*18. What does "harm national security in a clear and articulable way" mean? Does this clause mean that the free flow of information trumps all other interests except concrete proof of a massive national security crisis?*

**Answer:** The ambiguity in Section 9's requirement that the government show a "clear and articulable" harm to the national security as a prerequisite to pierce the reporter's privilege could lead to the troublesome interpretation suggested in the question. This requirement – like the requirement in Section 8 that the information sought be "reasonably necessary to stop, prevent, or mitigate" a "specific" case of death, kidnapping, or substantial bodily harm – imposes a significantly higher burden upon the government than does current case law and the Department's own policies.

As I stressed in my testimony, as well as in the above answers, the Department's guidelines for the issuance of compulsory process to members of the news media strike a workable and appropriate balance between the public's interest in the free dissemination of ideas and information and its interest in effective law enforcement and the fair administration of justice. Section 9, and indeed the bill as a whole, would replace these guidelines, which

have worked well in the past, with a system that is both more rigid and less predictable. We oppose such a change.

*19. Leaked information could harm national security years after its theft. How would a judge be able to determine what information can be leaked without harming national security?*

**Answer:** As the Department has repeatedly stressed, one of the fundamental defects of S. 2831 is that it could be construed to give the judiciary the authority to make determinations that traditionally have been vested in the Executive branch – including what information should be classified because its disclosure could harm the national security. *See Department of Navy v. Egan*, 484 U.S. 518, 527 (1988). In the Department's view, judgments about what disclosures would harm the national security are best and most efficiently handled within the Executive branch, which has extensive and nuanced knowledge about, and experience with, our broader national security strategy and the details of particular classified programs. Judge Wilkinson stressed this same point in his concurring opinion in the *Morison* case. *See United States v. Morison*, 844 F.2d 1057, 1083 (4th Cir. 1988) (Wilkinson, J., concurring). The Department's current guidelines and the case law in this area preserve the Executive's key role in such determinations.

*20. What is "specific harm"? What degree of specificity would be required before the government's interest outweighs the privilege?*

**Answer:** As the question indicates, Section 9 of the proposed legislation would require the government to demonstrate that the information sought would "assist in preventing (A) an act of terrorism against the United States, or (B) significant specified harm to the national security that would outweigh the public interest in newsgathering," in order to overcome the reporter's privilege. This provision is replete with problems and the difficulty of determining what constitutes specific harm to the national security is but one example.

More problematic than the imprecision of the term "specific harm" – or the difficulty of determining the quantum of proof needed to overcome the privilege – is the fact that the proposed legislation vests final authority over these determinations in the judiciary rather than the Executive. In doing so, S. 2831 would contravene not only long-established custom and practice, but also the Constitution itself, which reserves to the Executive, and not to the Judiciary, determinations regarding the nature and degree of harm to the 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 security." *New York Times Co. v. United States*, 403 U.S. 713, 729-30 (Stewart, J., concurring).

21. *Does the lack of a blanket exigency exception to this bill concern the DOJ? What provision does this bill make for emergency situations when the government does not have time to engage in a lengthy court procedure?*

**Answer:** As stated above in our answer to Question 5, the absence of an exigency exception or some other means of handling emergency situations marks a grave deficiency with the bill and is extremely troubling to the Department. The Department's concerns run deeper, however, and we do not believe that the addition of an exigency exception would cure the structural defects described above and in my written and oral testimony. Accordingly, the Department continues to strongly oppose the bill in its entirety.

22. *In Section 9(a)(2) the Act would provide "no privilege ... against disclosure of information...by a person with authorized access to such information...." Would this clause provide a privilege for someone who was not authorized to access the information? If so, would this clause actually allow and encourage some people to disclose national security information?*

**Answer:** The Department agrees that Section 9(a)(2) would appear to apply in cases in which classified information was disclosed by a person without authorized access to that information. Drafting the bill in this manner implicitly encourages leaking of classified information by conferring post-disclosure protection upon an individual without authorized access to the information at issue. Indeed, under this formulation it is conceivable that an official with authorized access to classified information could intentionally provide such information to someone without authorized access. That person, in turn, could disclose the unauthorized information to a journalist and enjoy the full protection of the privilege. Of course, Section 9(a)(2) is defective in another practical way. It seems inconceivable that a court could determine whether a source had authorized access to classified information -- and thus is protected from having his or her identity revealed -- without first knowing the source's identity.

In addition to these defects, Section 9's "national security" exception places impermissible burdens on the constitutional responsibilities of the President and the Executive branch. For the government to obtain information under Section 9, a court must determine by a preponderance of the evidence that the leak has "significantly harmed the national security in a way that is clear and articulable and the harm caused by the unauthorized disclosure of such information outweighs the value to the public of the disclosed information." The Department strongly believes, and courts have agreed, that the judiciary is ill-equipped to make judgments concerning national security determinations made by the Executive branch. *See Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) ("[T]he very nature of executive decisions as to foreign policy is political, not judicial. . . .They are decisions 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."); *see also United States v. Morison*, 844 F.2d 1057, 1083 (4th Cir. 1988) (Wilkinson, J., concurring).

Moreover, and as stressed above, requiring the government to demonstrate "clear and articulable" harm to the national security poses difficult problems of proof, as the information needed to make such a showing may be highly sensitive or classified and thus not appropriate for disclosure in court.

23. *What suggestions would you make to fix the bill? Please feel free to include comments or observations you think are relevant for Congress to consider.*

**Answer:** The Department strongly opposes S. 2831. We have detailed our concerns in our letter of June 20, 2006, and in the testimony of at least three Department officials, including myself. Our structural objections to the bill, which I have explained at length in my testimony and in my answers above, leave the Department unable to propose any potential "fixes" to the bill. Put differently, the Department objects to S. 2831 in its entirety and does not believe that modifications, whether along the lines suggested in particular questions or otherwise, would be sufficient to cure the bill's structural deficiencies.

**Responses to Questions from Senator Leahy:**

1. *The Justice Department has argued repeatedly that no reporters' shield legislation is necessary because the Department has exercised restraint in seeking confidential source information from journalists. However, the Department's own figures appear to belie that assertion. During the hearing, you testified that in the past 15 years, the Attorney General has approved "only approximately 13" requests for media subpoenas that implicated source information. But, in November 2001, in response to inquiries by Senator Grassley, the Department wrote that from January 1, 1991, to September 6, 2001, the Department authorized at least 88 subpoenas to members of the news media, of which 17 sought information involving a reporter's confidential source. Moreover, this figure apparently did not include subpoenas issued by special prosecutors, or subpoenas issued post-9/11 – such as the subpoenas issued to reporters in connection with the Valerie Plame leak investigation, or the Barry Bonds/BALCO leak investigation.*

    A. *How do you explain the apparent discrepancy in the Department's statistics?*

**Answer:** The written statement I submitted to the Committee contained an error as to the number of source-related subpoenas the Attorney General has approved since 1991. My oral statement at the hearing that the Attorney General has approved "less than 20" source-related subpoenas since 1991 corrected the written statement. In fact, our records show that the Attorney General approved issuance of subpoenas for information implicating source information to members of the media in approximately 19 matters since 1991. Of those 19, 17 were listed in the November 2001 letter to Senator Grassley. The remaining two matters include the BALCO case in the Northern District of California in 2006 and an investigation

of the unlawful funding of terrorism in the Northern District of Illinois in 2004. These numbers do not include subpoenas issued by the special counsel in the Valerie Plame investigation.

*B. Please state how many requests for media subpoenas the Attorney General has approved since 2001, and state how many of these requests implicated confidential source information.*

**Answer:** Since September 6, 2001, the end date for the period covered in the letter to Senator Grassley that you reference, the Attorney General has authorized the issuance of subpoenas to members of the media in approximately 55 matters. He has done so in approximately 65 matters since January 2001. Two of the matters implicated source information, as detailed in A above.

*2. In your written testimony, you stated that the Department's guidelines for dealing with the media are "flexible" and "can be adapted as circumstances require," while the proposed reporters' shield legislation is "more rigid." Yet, the proposed legislation is modeled on the Department's own internal guidelines. Are there any substantive ways in which the reporters' shield bill deviates from the Department's guidelines? If so, please explain these deviations.*

**Answer:** There are numerous ways in which S. 2831 would differ substantively and critically from the Department's guidelines. The guidelines are a set of agency policies and principles, unenforceable by their own terms, *see* 28 C.F.R. § 50.10(n), and amendable by the Attorney General as need and circumstances may require. *See In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1152 (D.C. Cir. 2006) (explaining that the guidelines "exist to guide the Department's exercise of its discretion" and "create no enforceable right"). They may be promptly and conclusively applied by the Attorney General subject to the requirements of other Executive branch prerogatives, such as national security. Most of their substantive provisions are cast in *precatory* rather than mandatory terms (i.e., "should" rather than "shall"). *See id.* § 50.10(f)(1)-(6). In sharp contrast, the proposed legislation would impose permanent, binding, and inflexible statutory requirements enforceable by the differing interpretations of hundreds of Federal district and appellate judges, and disagreements regarding the legislation's application would be subject to complex, costly, and time-consuming litigation.

Whereas the guidelines impose no restrictions upon a criminal defendant's right to obtain relevant testimony and evidence from journalists, S. 2831 does impose such restrictions, raising serious potential conflicts with the Sixth Amendment. In addition, whereas the guidelines are inapplicable to civil litigation between private parties (e.g., libel actions), S. 2831 is applicable to such private civil actions. Furthermore, the guidelines currently apply only to *attorneys of the Department of Justice*, whereas S. 2831 would apply far more expansively to any Executive branch officer of the United States who has authority to obtain compulsory process.

Other substantive differences also exist and warrant emphasis. S. 2831 prohibits compelled disclosure of covered information unless the Government can persuade a court that "nondisclosure of the information would be contrary to the public interest." The guidelines contain no such prohibition. They merely include the general principle to strike a "proper balance" between the public interest in the free dissemination of information and the public's interest in effective law enforcement. Section 4(b)(2) of the proposed legislation prohibits compelled disclosure unless the Government can demonstrate to a court that "the attorney for the United States has *exhausted* reasonable alternative sources of the information." The guidelines contain no such prohibition. They merely provide that "[t]he government should have unsuccessfully attempted to obtain the information from alternative nonmedia sources."

In short, the Department firmly opposes the view that enactment of S. 2831 would simply mark a codification of the Department's own guidelines.

3. *Last week, two journalists for the* San Francisco Chronicle *were sentenced to 18 months in jail for refusing to reveal their confidential sources to federal prosecutors in the Barry Bonds/BALCO investigation. It is undisputed that the reporting by these investigative journalists served the public interest, by exposing the prevalence of steroid use among major league baseball players. It is also undisputed that, in reporting this story, neither journalist violated the law. Unless the sentence is overturned on appeal, these journalists could spend more time in jail than the individual(s) who actually leaked the information about the investigation to the press in the this case. Given this, please explain the public interest that is being served by the jailing of these investigative journalists.*

**Answer:** I would like to emphasize, at the outset, that the Department recognizes that journalists play a vital role in our society by investigating and reporting the news, which is why the Department's own policy governing the issuance of compulsory process to the news media, set forth at 28 C.F.R § 50.10, seeks to "balanc[e] the concern that the Department of Justice has for the work of the news media and the Department's obligation to the fair administration of justice."

Important though the work of the news media is, no less an authority than the United States Supreme Court has held that there is "no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial." *Branzburg v. Hayes*, 408 U.S. 665, 690-91 (1972).

When the Department takes the rare step of issuing a grand jury subpoena to a reporter, we have one goal in mind: to obtain information in the reporter's possession that is

critical to the investigation of serious crimes. Let me also stress another point. The seriousness of leaks of grand jury information cannot be overstated. All individuals who testify before or otherwise participate in the grand jury rely on the secrecy of the grand jury's deliberations. Breaches of that secrecy – in the form of unlawful leaks of grand jury information – seriously imperil the grand jury's ability to investigate and uncover crime, and the Department treats such breaches with extraordinary seriousness.

If a reporter decides to defy both a lawfully issued grand jury subpoena and a subsequent court order to testify, and ends up in jail on a charge of contempt, that is not the Department's goal or desire. Our only goal in these situations is to investigate and prosecute a very serious crime – a public interest that the Supreme Court has held overrides even the substantial interest of the news media in gathering and reporting the news.

Because the Department of Justice takes the decision to issue grand jury subpoenas to members of the news media very seriously – and takes such an investigative step only rarely – we also continuously evaluate whether the subpoenas we issue to the news media are still necessary to the fair administration of justice. For the reasons set out below, the Department has withdrawn the subpoenas issued to the San Francisco Chronicle reporters.

The criminal investigation in which the subpoenas were issued to Messrs. Fainaru-Wada and Williams was an important one. The investigation into the unlawful disclosure of Grand Jury transcripts arose from the underlying prosecution of several defendants associated with the Bay Area Laboratory Cooperative ("BALCO"), captioned *United States* v. *Conte, et al.* In the underlying criminal prosecution, the Department of Justice prosecutors handling the matter produced copies of the Grand Jury transcripts at issue as part of their discovery obligations. As you know, the Grand Jury testimony in that matter was extremely sensitive. Thereafter, transcripts of this testimony were unlawfully disclosed to Messrs. Fainaru-Wada and Williams and verbatim quotes from those Grand Jury transcripts were published in the San Francisco Chronicle. It is also critical to note that, in June 2004, the Department of Justice was ordered by the federal judge presiding over the *Conte* case, the Honorable Susan Illston, to conduct an investigation into the unlawful disclosure of those transcripts. The Department complied with Judge Illston's Order and initiated an investigation into this matter.

All of the parties who had received copies of the transcripts submitted Declarations to the Court in which they swore, subject to the penalties of perjury, that they had not improperly disclosed the Grand Jury transcripts. Thus, while the unlawful disclosure of the Grand Jury transcripts constituted, *inter alia*, criminal contempt, in violation of Title 18, United States Code, Section 401(3), it was also clear at the time the investigation was initiated that numerous other crimes had likely been committed, including, but not limited to, perjury, obstruction of justice, and making false declarations before a Court, in violation of Title 18, United States Code, Sections 1621(2), 1512, and 1623(a). Indeed, in its opinion upholding the validity of the subpoenas to the Chronicle reporters, the District Court noted that the information sought was "central to the determination of whether the leaker(s) may or

may not have committed perjury, may or may not have sought to obstruct justice, may or may not have violated Federal Rule of Criminal Procedure 6(e), and may or may not have violated the provisions of the Protective Order." *In re Grand Jury Subpoenas*, 438 F. Supp. 2d 1111, 1118 (N.D. Cal.).

Because this criminal investigation concerned the unlawful disclosure of Grand Jury transcripts, I further note that the United States Supreme Court has consistently emphasized the importance of Grand Jury secrecy to the fair administration of justice. For example, in *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211 (1979), the Supreme Court

> noted several distinct interests served by safeguarding the confidentiality of grand jury proceedings. First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.

*Douglas Oil Co.*, 441 U.S. at 218-219. In later cases, the Supreme Court has again echoed that "[g]rand jury secrecy ... is 'as important for the protection of the innocent as for the pursuit of the guilty' ... [and] [b]oth Congress and this Court have consistently stood ready to defend it against unwarranted intrusion." *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418, 424 (1983) (citations omitted).

After the Department exhausted all avenues of investigation and the Grand Jury subpoenas were issued to Messrs. Fainaru-Wada and Williams, a confidential informant came forward and identified attorney Troy Ellerman, who previously represented one of the defendants in the *Conte* case, as the individual who leaked the Grand Jury transcripts to Messrs. Fainaru-Wada and Williams. As you may know, on February 15, 2007, Mr. Ellerman pled guilty to two counts of contempt of court, one count of obstruction of justice, and one count of filing a false declaration with a federal court. All four counts are felonies which relate directly to the fair administration of justice. Pursuant to the terms of the plea agreement, Mr. Ellerman faces up to two years in prison for these offenses.

On the same day Mr. Ellerman entered his guilty plea, the Department also withdrew the Grand Jury subpoenas that had been previously served on Messrs. Fainaru-Wada and Williams. The withdrawal of those subpoenas means that the United States Court of Appeals for the Ninth Circuit will not have to consider the District Court's decision upholding the subpoenas at issue and that Messrs. Fainaru-Wada and Williams no longer face the prospect of contempt of court and possible imprisonment.

The Department has conducted this investigation in a manner that we believe is consistent with our Constitutional obligations, the interests of justice, the Department's guidelines concerning the issuance of Grand Jury subpoenas to the media, and our responsibilities to the Court and the public. Our decision to issue the Grand Jury subpoenas at issue was upheld by the District Court. In a leak investigation, like this one, the Department continuously evaluates whether the information sought by the media subpoena is necessary to the full and fair resolution of the criminal investigation and is willing to withdraw the subpoena, as we did in this case, when it is no longer necessary to the fair administration of justice.

4. *According to press reports, the* San Francisco Chronicle *journalists involved in the Barry Bonds/BALCO investigation will go to jail rather than reveal their confidential sources. As a result, it appears that the Department may never obtain this information from these reporters.*

   A. *How many man hours and investigative resources did the Department use to pursue the reporters involved in this leak investigation?*

   B. *What, if any, other investigative steps did the Department undertake to determine the identity of the leaker in this case?*

**Answer:** As an initial matter, I would dispute the assertion that the Department "pursue[d] the reporters involved in this leak investigation." In this investigation, like all cases involving the leak of confidential grand jury information, the Department's primary goal throughout was to identify and prosecute the leaker, not the journalists who received the leaked information. Furthermore, the issuance of compulsory process to the journalists in this case – as in all such cases – was subject to the Department's policy set forth at 28 C.F.R. § 50.10. As part of that policy, the prosecutors in this case were required to demonstrate that they had "unsuccessfully attempted to obtain the information from alternative nonmedia sources." 28 C.F.R. § 50.10 (f)(3). At the time the subpoena was issued to the *Chronicle* reporters, all persons with potential access to the transcripts had submitted sworn declarations to the court denying any involvement in or knowledge of the dissemination of the transcripts, and there was no known nonmedia source who had firsthand knowledge of the leaker's identity (other than the leaker himself). It was only well after the subpoena had issued that a confidential informant came forward claiming knowledge of the leaker's identity. Upon learning this information, the Department took immediate action that, as noted above, culminated in the identification and prosecution of Troy Ellerman and the withdrawal of the subpoenas to the *Chronicle* reporters.

Finally, it should be emphasized anew that the Department takes crimes such as this very seriously, devoting the resources necessary to investigate thoroughly and, where appropriate, initiate prosecution.

**Response to Question From Senator Kennedy:**

1. *Please respond to the testimony of these two witnesses on whether the bill would provide uniformity and standards for federal court rulings on cases involving journalists trying to protect a confidential source.*

**Answer:** The proposed legislation would not provide uniform standards governing Federal court cases involving the assertion of a journalist's privilege.

S. 2831 provides only a non-constitutional statutory standard that must be satisfied, *at a minimum*, in order for the Government, a criminal defendant, or parties in civil litigation to obtain testimony or evidence subject to a claimed journalist's privilege in Federal court proceedings. It does nothing, however, to prevent Federal courts in different circuits from imposing *more exacting standards*, and adopting *broader* definitions of a journalist's privilege, where their interpretations purport to be based upon the constitutional requirements of the First Amendment. *See generally McKevitt v. Pallasch*, 339 F.3d 530, 532 (7th Cir. 2003) (summarizing cases applying a First Amendment reporter's privilege "though they do not agree on its scope").

Thus, Federal courts will remain free to issue opinions framing and applying divergent interpretations of a *constitutional* journalist's privilege, notwithstanding anything in the proposed legislation. In other words, although S. 2831 will provide a minimum "floor" of statutory protection for the particular category of journalists it covers, it provides no "ceiling" whatsoever upon expansive and diverse constitutional interpretations that have been and will be issued in the different Federal circuits. This fact is conceded by supporters of the proposed legislation. *See* Reporters Committee for Freedom of the Press, The Free Flow of Information Act of 2006 ("By its very terms, this bill does not eliminate any of the existing protections defined by courts or state legislatures for confidential or non-confidential sources or materials.") (available at http://www.rcfp.org/shields_and_subpoenas/specter.html).

S. 2831's inability to establish uniform standards is illustrated by considering the very basic issue of defining the class of journalists who would be covered by the privilege. Although the proposed legislation attempts to provide a uniform definition of covered "journalists," that definition will not be binding upon courts applying a journalist's privilege *based upon the First Amendment*. A statute cannot restrict the scope of a constitutional right. Federal courts have articulated widely divergent interpretations of the persons and entities entitled to invoke a journalist's privilege based upon the First Amendment. *See, e.g., In re Madden*, 151 F.3d 125, 130 (3d Cir. 1998) (holding that "individuals are journalists when engaged in investigative reporting, gathering news, and have the intent at the beginning of the news-gathering process to disseminate this information to the public"); *Shoen v. Shoen*, 5 F.3d 1289, 1293 (9th Cir. 1993) (book author held covered by constitutional journalist's privilege); *von Bulow v. von Bulow*, 811 F.2d 136, 144-45 (2d Cir. 1987) (broadly interpreting scope of constitutional journalist's privilege to extend to those "not traditionally

associated with the institutionalized press," including "lecturers, political pollsters, novelists, academic researchers, and dramatists"); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 436-37 (10th Cir. 1977) (fact that film maker was not a salaried newspaper reporter did not deprive him of right to invoke journalist's privilege). In short, S. 2831 will not even provide uniformity or consistency for the Department in making the threshold determination as to whether a person constitutes a journalist who may invoke some form of legally recognized privilege, let alone in applying the widely divergent applications and limitations of such a constitutional privilege. *See generally McKevitt*, 339 F.3d at 532.

Moreover, even the minimum statutory standards that are established by the proposed legislation are riddled with subjective and malleable provisions that will inevitably result in divergent judicial interpretations. As but one example, courts in different Federal circuits can be expected to differ widely in determining whether nondisclosure of information sought by the government will be "contrary to the public interest" under the entirely nebulous formula provided under Section 4(b)(5) of the bill.

GIBSON, DUNN & CRUTCHER LLP
LAWYERS
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INCLUDING PROFESSIONAL CORPORATIONS

1050 Connecticut Avenue, N.W. Washington, D.C. 20036-5306
(202) 955-8500
www.gibsondunn.com

TOlson@gibsondunn.com

November 17, 2006

Direct Dial
(202) 955-8668
Fax No.
(202) 530-9575

Client No.
G 44444-00861

VIA E-MAIL AND FIRST CLASS MAIL

Mr. Barr Huefner
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

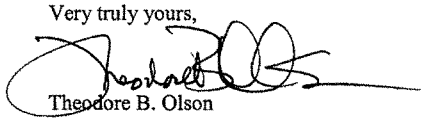
Dear Mr. Huefner:

It was my pleasure to appear before the Senate Judiciary Committee to testify in favor of the Free Flow of Information Act of 2006.

In response to Chairman Specter's request, enclosed please find my written answers to the additional questions posed by Committee members.

Please contact me if I can be of further service.

Very truly yours,



Theodore B. Olson

TBO/tdl
Enclosure(s)

100114659_1.DOC

*Reporters' Privilege Legislation: Preserving Effective Federal Law Enforcement*
September 26, 2006

**RESPONSE OF THEODORE B. OLSON TO ADDITIONAL QUESTIONS FROM MEMBERS OF THE SENATE JUDICIARY COMMITTEE**

1. Based on your experience, do you think that the language of the bill is sufficient to establish that a reporter is entitled to the privilege?

   The text of the Free Flow of Information Act of 2006 clearly establishes that reporters are entitled to a privilege against disclosure of their confidential sources or of material given to them in confidence. And it plainly prohibits federal courts from compelling journalists to testify unless certain conditions are met.

   The Act applies to any "journalist," which is defined as an individual engaged in journalistic activity "for financial gain or livelihood" who is employed by or a contractor of a "professional medium or agency" that processes or researches "news or information intended for dissemination to the public." These limitations ensure that the privilege applies to reporters while avoiding the chance that it could be claimed by those who are not legitimate newsgatherers.

2. How would a reporter establish confidentiality so that the privilege applies? Would every communication, regardless of the source, be subject to the privilege?

   The Free Flow of Information Act of 2006 protects journalists from being forced to disclose the identity of a source "who provided information under a promise or agreement of confidentiality made by the journalist while acting in a professional capacity." It also protects the substance of any communications—any "records, communication data, documents, or information the journalist obtained or created"—when that material was provided to the journalist "upon a promise or agreement that [it] would be confidential."

   Under the text of the Act, establishing confidentiality requires a promise or agreement by the reporter to the source that the reporter will not reveal the source's identity. There are no specific requirements for the form of that promise or agreement. As the Act makes clear, it does not preclude compelling a journalist to produce "information identifying a source who provided information ***without*** a promise or agreement of confidentiality" (emphasis added), and it does not protect documents or information obtained by reporters without a promise that the material would be confidential.

   Not every communication, regardless of the source, would be covered by the privilege. Instead, only those communications governed by a "promise or agreement" of confidentiality would fall within the scope of the privilege.

3. Does the legislation contain sufficient safeguards to avoid potential abuse of such a privilege?

The legislation contains multiple safeguards that guard against abuse of the privilege while still providing sufficient clarity and uniformity so that reporters, their sources, and the courts can benefit from a clearer picture of the governing law. Importantly, this bill provides an express exception for information that would assist in preventing an act of terrorism or that would prevent harm to national security interests. Reporters would not be protected against disclosure of such information or of information relating to the unauthorized disclosure of classified national security information. These national security provisions are a central part of this legislation, and I believe they will protect our security while ensuring reporters' ability to cover stories on these important topics. The bill also contains exceptions for reporters who are eyewitnesses to crimes or who themselves commit criminal or tortious conduct.

4. Please respond to th[e] testimony on the potential impact of the legislation on private litigation.

The Act treats subpoenas in civil litigation in largely the same manner as subpoenas of reporters for information in criminal cases. A civil litigant who seeks to compel disclosure from a reporter must establish by a preponderance of the evidence that, among other things, the information is "critical to the successful completion" of the case, that the party has "exhausted reasonable alternative sources of the information," and that nondisclosure would be "contrary to the public interest."

While some testimony before the Committee criticized the legislation as striking the balance too heavily in the reporter's favor, I believe it firmly establishes the privilege while still giving appropriate recognition to the interests of private litigants It is important to understand that the Act does not create an absolute privilege for reporters in civil cases. Instead, it allows the court to consider the relative interests at stake in the particular dispute. This type of balancing test is similar to the tests already employed in many state and federal courts, and will not excessively burden private litigation.

**Senator Sam Brownback**
**Reporters' Privilege**
**September 20, 2006**

**Questions for Professor Schwartz**
**Answers by Victor E. Schwartz**

**General Questions**

*What differences are there between the proposed reporter's privilege and the other privileges? What are the implications of the differences?*

**ANS: The proposed reporter's privilege in S.2831 encompasses several issues. As is true, with all privileges, they work against the fundamental goal of most of the rules of evidence – to help the trier of fact to find the truth. However, traditional privileges, such as client-lawyer, or parishioner-clergy, exist to keep substantive information provided by a client or parishioner confidential. The reporter's privilege is exactly the opposite – it exposes confidential information to the public. For that reason, a privilege based on exposing information without its source should be construed more narrowly than traditional privileges. It should only apply to the extent necessary to advance when a clearly defined public interest out-weighs an individual right to privacy and the trier-of-fact's need to know the truth.**

**In addition, unlike traditional privileges, the reporter's privilege, as set forth in S.2831, does not have appropriate exemptions that exist in traditional privileges. For example, there is a crime-fraud exception to a lawyer-client privilege. A client cannot block information as privileged when it was given to a lawyer in anticipation of the client committing a crime. There is also an "imminent harm" exception to the patient's psychotherapist privilege that proceeds along similar lines, where the patient may make a threat to hurt another person in the future. Under the**

**reporter's privilege, there should be an exception for all trade secret or otherwise proprietary or personal information that was illegally or improperly purloined by the "source." For example, if the source disclosed proprietary information of a new drug that was still in Stage 2 or 3 of its process (pre-patent), and that information was illegally obtained, the privilege should not apply.**

**Finally, the privilege set forth in S.2831 contains a barrier that does not exist in private privileges. It balances public interest in seeking a subpoena for information against the public interest in having information available to the public. The balance of "public versus public," which may be relevant with respect to the application of its privilege in the context of media exposure of government secrets, has no relevancy in a trade secret, civil litigation, or private interest context. In fact, it is meaningless with respect to information gathered in the context of private litigation. Again, because a reporter's privilege shields the truth from the jury or finder of fact, it should be narrowly drawn to account for these concerns.**

*Would this law resolve the lack of uniformity between federal courts? If not, why not?*

ANS: **Unfortunately, this law would not resolve the lack of uniformity between or among federal courts. First, the privilege contains many new words and concepts that would take years to construe. Consider the requirement that "to the extent possible, the subpoena" must be "limited to the verification of published information." In trade secret cases, the issue is not about verifying the accuracy of published information; a business would have no interest in verifying the accuracy of published trade secrets. Some courts may decide that the phrase "to the extent**

**possible" is meant to be limiting and would preclude a business from enforcing a subpoena to identify a person who illegally stole a trade secret. Others may determine that in these cases, it is not "possible" to limit the law in that way and would allow such a case to proceed. There are other such examples in the bill, thereby making it is very easy to perceive that there would be new and perhaps greater differentiation among the Circuits in interpreting the words of this privilege. Currently, most of the Circuits use one form or another of balancing tests that are traditional. These privileges use traditional wording. The new, untested and untried words contained in this privilege will be a fodder for difference and more litigation.**

**Second, the federal privilege is unlikely to be applied when federal courts are operating in diversity jurisdiction. In such instances, the federal courts have followed state evidentiary privilege rules, which vary as the states vary. This new rule could not mandate its application in diversity jurisdiction without running afoul of the fundamental principles of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by Act of Congress, the law to be applied in any case is the law of the State."). Obviously, the application of a privilege would be strongly outcome-determinative; for that reason, it would be regarded as substantive under *Erie*. This is the path that federal courts traditionally have followed, and would continue to follow under this law.**

*The reporter and his source only get the benefits of the privilege if the source's information was given in exchange for the reporter's promise of confidentiality. Is there a danger that sources will begin to request this promise, even when it is not strictly necessary to encourage them to reveal their information? Further, will this*

*"promise seeking" dilute the value of the promise and unnecessarily extend the privilege?*

**ANS: Your premise is correct. There is a significant danger that all reporter sources, especially those who have been engaging in illegal activity (*e.g.*, divulging a health record) would request a reporter's promise of confidentiality. This "promise-seeking" would dilute the value of the promise and broaden the privilege into zones where it would be totally inappropriate (*e.g.*, illegal activity by the source in disclosing trade secrets, proprietary information, or personal information). Further, it could interfere with prosecutorial discretion, which is a very useful legal construct, especially when given in order to obtain information that would lead to the ability to prosecute a crime that is or was a greater threat to society at large. Journalists should not be given this power by proxy through the granting of a reporter's privilege just because he or she may have promised confidentiality. This is especially true when the issue is private property illicitly obtained.**

**Section 6**

*In the civil context, companies want to prevent the publication of trade secrets. In light of this interest, what is the purpose of limiting the evidence that can be compelled only to "published materials"? Why would the volume of material matter? Should the facts and circumstances of the individual case determine what should be disclosed?*

**ANS: There is no logical or public policy purpose to limiting evidence that can be compelled to "published materials." Further, the volume of the material should be irrelevant. The application of the privilege should focus on its application against the need for a fact finder determining the truth in litigation and the need of the person harmed by the disclosure to know the truth (*e.g.*, employer needing to**

**know who disclosed an employee's health records). The "published materials" language appears to have been taken from the Department of Justice Guidelines, 28 C.F.R. § 50.10 (2005), and while it may be an appropriate guideline for Department lawyers as to when they may seek a subpoena, it does not translate to the private sector. As discussed earlier, in trade secret litigation, the issue is not about verifying the accuracy of published information, but in identifying the person who illegally stole and/or leaked protected information.**

*The free flow of information is the issue of this bill. Why does the bill distinguish between published and unpublished material? Is this distinction relevant to the flow of information?*

**ANS: It is difficult to discern why the bill distinguishes between published and unpublished material. This distinction would not appear relevant if the goal is the free flow of information. As I understand it, the point in time that this bill seeks to influence is the discussion between the reporter and the leaker, when no editorial decisions have been made as to which information will or will not be published. Legal import should not be given to editorial decisions down the road as to which information makes it into a story and which is left on the proverbial cutting room floor. Also, this distinction is not relevant to the offense. The offense is the obtaining and/or leaking of protected information, regardless of whether it is published. A judge should have the authority to have such material returned to the rightful owner, order disclosure of how it was obtained, and enjoin anyone with access to the illicitly obtained information from using it.**

**As for why this criteria is in the bill, the only explanation that I could give is that it appears, like much of the language in Section 6, to be taken from the Department of**

**Justice Guidelines, 28 C.F.R. § 50.10 (2005). It may be an appropriate guideline for Department attorneys to only seek subpoenas about published information, but those guidelines do not make sense when applied in the private sector.**

*Sections 4, 5, and 6 all allow information to be compelled only if it is "critical." What is a possible problem with determining whether information can be compelled based upon whether the information is "critical"? What is a better standard to use, and why is it better?*

**ANS: The term "critical to the successful completion of a trial" came out of Department of Justice regulations. See 28 C.F.R. § 50.10 (2005). It is a standard that may be appropriate in the context of balancing the public's right to know against the government's right to keep a secret. It is not a term that has been utilized by any federal court in the context of private litigation. Those courts look at whether information is relevant to a claim or defense. By way of contrast to the term "critical to the successful completion...," the term "relevant" is a known concept in evidence law. It can be readily interpreted by judges by looking at precedent. Of equal importance is the fact that the issue of a reporter privilege often arises at the beginning of a case or even before the case goes to trial. At that point in time, it may be impossible to know which information is or is not "critical to the successful completion of a trial."**

*In Section 6, the public's "right to know" what the private litigants are doing could affect the outcome of a subpoena to compel information from a journalist, even where only the rights of the parties are at stake?*

**The criteria dealing with the public's "right to know" should be irrelevant when only the rights of private parties are at stake. What is the public's "right to know" the trade secret of a popular soft drink? What is the public's "right to know" about**

**an individual health record within a corporation or a private person's financial records? There is none. The balancing in those situations are between the need for a party hurt by the disclosure to find the source who illegally leaked it against the need for the reporter to have a shield.**

*What is the purpose of 6(b)(3) (this provision is mirrored in Sections 4 and 5)? Does this language merely emphasize the relevance standard already required by 6(b)(1)?*

**ANS: Provision 6(b)(1), regardless whether the standard is "relevant" or "critical," would appear to incorporate the concepts in 6(b)(3), which states that the subpoena may not seek "peripheral, nonessential, or speculative information."**

*What suggestions would you make to fix the bill? Please feel free to include comments or observations you think are relevant for Congress to consider.*

**ANS: First, there has been no showing in any of the hearings with which we are familiar that the current Federal Rule of Evidence 501 does not perform its job in addressing a reporter's privilege in private litigation. Most of the Federal Circuits have developed a reporter's privilege, and there has been no showing that any particular privilege developed by a Federal Circuit has not worked reasonably well. All of the examples showing possible flaws with the current system either on the surface or below deal with the battle between the public's right to know and either the government's right to keep matters secret or the efforts of Department of Justice officials to subpoena information as part of criminal investigations. If a reporter's privilege is to be provided for private sector interests, it should use traditional balancing tests that have permeated the traditional laws of evidence, namely, the**

**need for jurors or private individuals hurt by disclosures to know the truth, against the need for a reporter to keep a matter secret. If the bill that goes forward encompasses private litigation, it is imperative to exclude from the scope of the privilege any information where the source illegally obtained the information. If this is not done, the privilege will work against both carefully crafted federal and state rules of law protecting privacy, proprietary information, trade secrets, the law of contracts, or other strong public policy measures.**

# SUBMISSIONS FOR THE RECORD

September 20, 2006

The Honorable Arlen Specter
The Honorable Patrick Leahy
United States Senate
Washington, D.C. 20510

Dear Senators Specter and Leahy:

The undersigned business associations are writing about the impact that S. 2831, the Free Flow of Information Act, could have on the ability of businesses to protect valuable trade secrets, personnel files and other types of proprietary information that rightly should be kept confidential.

It is our hope that the bill would not protect those who unlawfully or unethically divulge private information that is itself protected by federal or state laws and judicial orders. This includes, for example, disclosing information protected by the Uniform Trade Secret Act and the Health Insurance Portability and Accountability Act (HIPAA). It has long been the policy of this country that sources who steal and leak information protected by federal or state laws or judicial orders should be prosecuted or fined, not protected.

When the confidential information exposed is a trade secret, from the secret recipe of a drink to pre-patent innovations, an entire business or product line can be undermined. In these situations, the privilege is not protecting the public's "right to know." It is protecting wrongdoing. It is for this reason that an explicit exemption for trade secrets and other types of legitimately proprietary information has been included in the Freedom of Information Act, one of the most important "public right to know" statutes in this country's history.

As the Committee on the Judiciary studies the ramifications of S. 2831, please keep in mind the effects that any legislation shielding sources who engage in illegal or unethical conduct could have on the private sector and the importance that Congress has historically placed on protecting confidential and proprietary information. Please let us know if we can assist the Committee in its deliberations on this issue. We stand ready to work with you and the Committee to craft legislation that accounts for these concerns.

Sincerely,

American Beverage Association
Association for Competitive Technology
Chamber of Commerce of the United States
Food Products Association
Grocery Manufacturers Association
National Association of Manufacturers
Rubber Manufacturers Association

**DRAFT**

Senate Committee on the Judiciary

The Free Flow of Information Act

September 20, 2006

Testimony of Bruce A. Baird

Partner, Covington & Burling LLP

Mr. Chairman and Members of the Committee:

Thank you for inviting me to appear before you today to present testimony on the Free Flow of Information Act, which would codify and standardize a limited privilege covering reporters' sources that has already been recognized in one form or another in the great majority of state and federal courts.

I am a partner in the firm of Covington & Burling, LLP., where I practice white-collar criminal defense and S.E.C. and other regulatory enforcement law. In that capacity, I both defend individuals and companies in grand jury, S.E.C. and other regulatory investigations and trials, and perform internal investigations into possible wrongdoing on behalf of companies and their Boards of Directors. Earlier in my career, I was a Special Assistant to the Deputy Attorney General of the United States, and spent nine years as an Assistant United States Attorney for the Southern District of New York, where I served in the organized crime unit, and as Deputy Chief of the Criminal Division, Chief of the Narcotics Unit, and Chief of the Securities and Commodities Frauds Task Force. My organized crime work included a long investigation and eight-month

trial of the leadership of the Colombo Organized Crime Family. My securities fraud prosecutions included those of Drexel Burnham Lambert and Michael Milken.

My firm represents the Newspaper Association of America in connection with this legislation although I have not been involved in that work. I do not represent them here today and my testimony is my own.

From the perspective I bring to bear, that of a long-time former prosecutor and a present member of the defense bar, the legislation being considered should not adversely affect either the prosecution or defense of criminal and regulatory cases.

From a prosecutor's perspective, the bill does no more than codify the Department of Justice's policy regarding issuances of subpoenas to members of the news media codified at 50 U.S.C. § 50.10. These guidelines have been in force since I was a prosecutor in the 1980's. The bill will in fact aid prosecutors in understanding the concrete rules in an area now governed by inconsistent judicial interpretations sometimes couched in vague and broad First Amendment terms. The bill itself has words and phrases that will have to be interpreted, but over time, as with any statute, the law in this area will settle and become more consistent. It can also be changed if it proves unworkable in one or another respect. The situation now, with uncertain courts and media appeals to First Amendment absolutes, is far less certain and sometimes hostile to appropriate

efforts by prosecutors to get information under the many judicial variations of the governing balancing test.

During the Wall Street securities investigations of the late 1980s, which I directed in the Southern District of New York, the Wall Street Journal had two terrific reporters who time after time managed to find information through their sources that were beyond anything the government had uncovered. These were big cases – the Wall Street Journal had written stories regarding the cases against Michael Milken and Drexel Burnham Lambert, and a dozen other cases.

The evidence in the Wall Street Journal stories was important, but a look at the Department of Justice Guidelines made clear we should not make an effort to issue subpoenas. That did not stop us from successfully investigating the cases.

From the defense perspective, the bill is also an improvement. For one thing, there is explicit separate recognition of a criminal defendant's potential need in an appropriate case to obtain information from the press. There is also recognition of the similar needs of a party to a civil or administrative enforcement action. Of course, the standards are high for obtaining information, but they are no higher than the standard actually applied in federal courts today and in fact the very existence of a statute may improve a defendant's ability to raise the issue in an appropriate case.

In addition, from the defense perspective, the bill substitutes a statute applicable to all federal agencies and special prosecutors for an internal regulation applicable to Department of Justice prosecutors only.

In the end, this is not an issue that should divide prosecutors and defense counsel. The need for information may sometimes be on one side and sometimes on the other. There should be broad agreement on the need for protection of a vigorous press that looks high and low for information and in so doing benefits all of us. There should also be agreement that a bill with a careful balancing test calibrated for different situations and with appropriate exceptions is a vast improvement over the inconsistent efforts of the federal courts to follow Branzburg v. Hayes.

**Testimony**
***United States Senate Committee on the Judiciary***
**"Reporters' Privilege Legislation: Preserving Effective Federal Law Enforcement"**
**S. 2831 – The "Free Flow of Information Act of 2006"**
**September 20, 2006**

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**Testimony of Steven D. Clymer**
**Professor of Law, Cornell Law School**
**On the Proposed Journalists' Privilege Legislation**
**Before the United States Senate Committee on the Judiciary**
**September 20, 2006**

Mr. Chairman and Members of the Committee: Thank you for inviting me to appear before you today to testify about a proposed statutory "journalists' privilege" in federal trials and proceedings. I am a Professor of Law at Cornell Law School, where I teach courses on Evidence, Criminal Procedure, Terrorism and the Law, and Criminal Law. I also have been an Assistant District Attorney in Philadelphia and a federal prosecutor in both California and New York. Most recently, during a leave of absence from Cornell, I served as the Chief of the Criminal Division of the United States Attorney's Office in Los Angeles. I left full-time service with the Department of Justice [DOJ] on June 17, 2005. I now work part-time as a federal prosecutor, on a single case. The opinions that I express are my own and should not be attributed to DOJ.

The "Free Flow of Information Act of 2006" attempts to strike a balance between two interests that are fundamental in a free society: (a) the dissemination of accurate information, including information about government operations, to the public through the news media; and (b) the truth-seeking function of federal grand juries, federal courts, and federal administrative proceedings. Although that objective is a worthy one, the proposed legislation fails to accomplish its stated goal of "guarantee[ing] the free flow of information to the public through a free and active press." Unfortunately, it nonetheless imposes considerable costs on "effective law enforcement and the fair administration of justice."

My observations fall into two categories. First, I offer the general view that the proposed legislation is unlikely to have its desired effect of persuading reluctant sources to divulge newsworthy information to journalists. The legislation sets out a privilege qualified by at least eight exceptions, some of which apply only upon satisfaction of multiple requirements and involve the application of a subjective and unstructured balancing test. Although, if enacted, this legislation would offer lawyers, judges, and law professors much to ponder and discuss, for reluctant sources deciding whether to leak information to the news media, it would provide more confusion than clarity or assurance. Confusion would not be the only byproduct. The legislation also would result in the loss of reliable, probative evidence in criminal, civil, and administrative proceedings; delay investigations; and encumber courts with additional litigation.

Second, I identify several concerns about specific features of the proposed legislation.

**1. It is Unlikely That the Proposed "Free Flow of Information Act of 2006" Will Appreciably Increase the Flow of Information to the Public**

When assessing the proposed legislation, it is critical to understand that the benefit, if any, of a journalists' privilege accrues at a different time than the costs. The desired benefit – the increased flow of information to the news media and the public – occurs, if at all, when a source who desires anonymity seeks an assurance from a journalist that a court will not or cannot compel the journalist to reveal the source's identity. For the privilege to result in an increased flow of information, it must enable journalists to honestly provide guarantees of anonymity that are sufficient to persuade a significant number of otherwise unwilling sources to leak information.

The costs come later, when federal grand juries, federal courts, federal prosecutors, criminal defendants, civil litigants, and administrative bodies are denied access to reliable and probative evidence that may have a bearing on indictment, guilt, innocence, sentencing, or liability. This loss of evidence is a direct result of the restrictions imposed on federal courts' ability to compel journalists to provide such information. Significantly, even if the proposed legislation fails to encourage more disclosures, it still will impose costs by suppressing the truth.

The view that the proposed legislation will increase the flow of information to the news media is premised on two claims. First, there is the claim that the law in its present state – in which some federal courts and many states recognize a "journalists' privilege" of some sort – deters sources from providing information because they fear that a federal court later will compel the journalist to whom they made disclosure (or the journalist's employer) to identify them. Second, there is the claim that the proposed legislation, if it were to become law, would remove that deterrent and prompt a significant number of reluctant sources to make disclosures.

Both of these claims merit scrutiny. As to the first claim, it bears mention that even without a federal statutory journalists' privilege, many sources provide information, including classified information, to journalists. For example, there have been recent and prominent leaks to the news media on sensitive topics such as the National Security Agency's [NSA] warrantless wiretapping program and the Central Intelligence Agency's [CIA] overseas detention and interrogation of al Qaeda operatives. Significantly, these leaks occurred in the face of widespread news coverage of the jailing of former New York Times reporter Judith Miller, coverage that made clear that there is little or no federal protection of the anonymity of news sources. Those who were involved in the NSA and CIA leaks had to have been aware that federal law usually does not permit journalists to conceal their sources from federal grand juries and courts, and that the journalists to whom they leaked the classified information could be compelled to identify their sources. Despite that, they leaked the information.

Information flows to journalists despite the absence of a federal statutory journalists' privilege because sources correctly perceive that there is only a very small risk that the government or a private litigant will seek and a court will compel disclosure of their identity, or because they have reasons for making disclosure that outweigh perceived risks. In addition, some journalists may promise sources that they will disobey a court order compelling them to testify and go to jail rather

than disclose a source. If a prospective source believes such an assurance, the existence or non-existence of a federal shield law may not affect the decision to leak information.

To be sure, however, there likely are journalists who are unwilling to disobey a court order and sources who are unwilling to disclose information without a guarantee of confidentiality. A true measure of the proposed legislation is its effect when a source who requires such a guarantee contacts a journalist who will provide it only if the law safeguards him from being compelled to disclosure his source.

This leads to examination of the second claim: that the proposed legislation will result in an increase in the flow of information to the public through the news media. That claim does not withstand scrutiny. As things now stand, without a federal statutory journalists' privilege, a journalist (who is unwilling to disobey a court order) cannot assure confidentiality. He can, however, tell a potential source that: (a) it is not common for journalists to receive subpoenas for source information; (b) if a DOJ attorney seeks to learn the source's identity, the request will be subject to rigorous internal DOJ scrutiny detailed in federal regulations, scrutiny that rarely results in approval of a subpoena for source information; (c) if the journalist is subpoenaed, there sometimes are ways to resolve subpoenas without revealing sources; (d) if the journalist is subpoenaed, the subpoena cannot be resolved, and the litigation is in state court, the journalist may have a privilege to refuse to disclose the source's identity, depending on the specifics of the law that applies in the state in which the litigation occurs; and (e) if the litigation is in federal court, the journalist may or may not be compelled to disclose the source's identity, depending on the specifics of the law that applies in the federal circuit in which the litigation occurs and whether the subpoena was issued in a criminal or a civil case. In the event that the source asks for additional details, and if the journalist knows details, the journalist can explain the potentially applicable state shield law and federal decisional law. Ultimately, however, with so many variables at issue, the journalist cannot truthfully provide the source with a clear-cut assurance that a court will not compel disclosure or a meaningful estimate of the probability of court-ordered disclosure of the source's identity.

The proposed legislation does nothing to eliminate that uncertainty. Instead, it creates a privilege subject to multiple possible exceptions. Different rules apply when government attorneys seek disclosure in criminal investigations and proceedings [Section 4(b)]; when criminal defendants seek disclosure [Section 5(b)]; when litigants in civil or administrative actions seek disclosure [Section 6(b)]; when journalists participate in criminal or tortious conduct [Section 7(A)]; when journalists witness criminal conduct [Section 7(B)]; when disclosure is "reasonably necessary" to prevent death, kidnaping, or serious bodily injury [Section 8]; when disclosure "would assist in preventing" an act of terrorism or specified harm to national security [Section 9(a)(1)]; and when the source reveals "properly classified information" to which he had "authorized access" [Section 9(a)(2)]. The exceptions apply only upon satisfaction of various requirements and, in some cases, only if a court determines that "nondisclosure of the information [about the source's identity] would be contrary to the public interest, taking into account both the public interest in compelling disclosure and the public interest in newsgathering and maintaining the free flow of information to citizens."

At the moment of truth – when the source seeks an assurance of anonymity – it will not be clear

which exception or exceptions, if any, may ultimately apply. For example, in the case of a source deciding whether to leak classified information, it is possible, depending on circumstances, that a court later will apply one or more of the exceptions contained in Sections 4(b), 5(b), 6(b), 9(a)(1), and 9(a)(2),[1] all of which contain different requirements. It will be impossible to predict in advance what legal test will apply if the journalist is subpoenaed, much less whether a court will order disclosure. If the proposed legislation were to become law, no journalist could honestly guarantee confidentiality unless he was willing to disobey a court order to disclose a source's identity and go to jail.[2] At most, the legislation would enable journalists to tell reluctant sources that if a subpoena is issued, and if the subpoena involves a federal matter, and if the subpoena is not resolved without litigation, the new federal law makes it marginally less likely that the reporter will be compelled to testify than it was before the new law. *The bottom line is this: If journalists understand the proposed legislation and are honest with their sources about it, they cannot offer the sort of robust guarantees of confidentiality that likely are necessary to cause an appreciable increase in disclosures of newsworthy information.*

Although benefits from the legislation in the form of greater information flow are speculative and unlikely, the costs are tangible and unavoidable. The statutory privilege will deny federal grand juries access to probative evidence that bears on decisions whether to indict; jeopardize criminal prosecutions by foreclosing prosecutors from discovering and presenting in court crucial incriminating evidence; impair criminal defendants from gaining access to evidence that may exculpate them; and deny civil litigants information that they otherwise could discover and prove. Even in cases in which those seeking access to the truth are able to satisfy a court that one of the exceptions to the proposed privilege applies, that effort will require litigation, delay, and the expenditure of considerable resources.

Unfortunately, any effort to increase the certainty of journalists' guarantees to sources would require the elimination of exceptions, thus resulting in the loss of even more probative evidence and increasing the costs of the proposed legislation. Ultimately, the price that must be paid for an effective privilege – meaning one that has few or no qualifications and thus will provide real assurance to reluctant sources when they decide whether to leak information – likely is too high for the federal criminal and civil justice systems to bear.

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[1] Indeed, Section 7 of the Act provides that Sections 1 through 6 and 8 through 10 apply to illegal disclosures of documents and information.

[2] Section 10 of the proposed legislation renders the statutory privilege inapplicable unless there is a "promise or agreement of confidentiality made by the journalist." This section apparently is intended to avoid conferring a privilege when there no assurance of confidentiality has been given. As noted in the text, however, if the legislation were passed, a journalist who was honest with a source could at best offer only a qualified promise or agreement of confidentiality. (This issue is discussed later in the text.) Because, under the proposed legislation , it would cost the journalist nothing to make such a promise, journalists likely would provide such assurances even if the source might be persuaded to provide information without a promise.

**2. The Proposed "Free Flow of Information Act of 2006" Imposes Requirements on Federal Prosecutors in Criminal Matters That Do Not Apply to Civil Litigants or Criminal Defendants**

A comparison of the various exceptions to the proposed privilege reveals that Section 4(b), which applies to government attorneys seeking source information "in any criminal investigation or prosecution," imposes more rigorous requirements than Section 5(b),which applies to requests by criminal defendants, and Section 6(b), which applies to requests in civil or administrative actions. For example, only government attorneys in criminal matters must demonstrate, among other things, that the information sought "is *critical* to the investigation or prosecution, *particularly with respect to directly establishing guilt or innocence*." Criminal defendants need show only that the information sought "is *relevant* [not critical] to the question of guilt or innocence." Civil litigants need establish only that the evidence sought "is critical to the successful completion of the civil action," without the added hurdle of "particularly with respect to directly establishing guilt or innocence." Similarly, under the proposed legislation, federal prosecutors, but not criminal defendants, must, to the extent possible, limit subpoenas to journalists to "verification of published information" and "surrounding circumstances relating to the accuracy of the published information." One apparent feature of the higher burden on criminal prosecutors is that they, unlike other litigants, are not entitled to judicial compulsion to obtain source information if it constitutes or will reveal only circumstantial evidence, specifically, evidence that does not "directly establish[ ] guilt or innocence."[3]

One can imagine a situation in which a journalist has one or more sources of information about events that later result in both criminal and civil litigation. Under the proposed legislation, it is possible that a court would compel the journalist to reveal source information to a criminal defendant who needs it to exonerate himself and to a civil litigant who needs it to prove his case, but, at the same time, refuse to compel the same journalist to reveal the same source information to a grand jury or prosecutor, despite their need for it as part of a criminal investigation or prosecution.

Although there may be unique constitutional concerns with limiting criminal defendants' access to source information, it is difficult to justify legislation making it more difficult for federal prosecutors to obtain information than criminal defendants and civil litigants. If anything, federal prosecutors should be subject to fewer, if any, constraints on their efforts to obtain source information. First, federal prosecutors seek such information as part of their obligation to enforce federal criminal law, an objective more important to public welfare than a civil litigant's personal lawsuit. Second, unlike criminal defendants and private civil litigants, federal prosecutors must comply with rigorous

[3] If the words "particularly with respect to directly establishing guilt or innocence," which appear only in the Section 4(b) exception, are meant to limit federal prosecutors and grand juries to direct evidence of guilt or innocence, as opposed to circumstantial evidence, the limitation is contrary to judicial understanding of the two forms of evidence and present federal practice. Federal courts do not distinguish between the probative value of direct and circumstantial evidence. *See, e.g., United States v. Ramirez-Rodriquez*, 552 F.2d 883, 884 (9th Cir. 1977). Indeed, some federal courts instruct jurors that the two forms of evidence merit equal treatment during deliberations. *See, e.g.*, Ninth Circuit Model Jury Instruction 1.6 ("The law permits you to give equal weight to both [direct and circumstantial evidence], but it is for you to decide how much weight to give to any evidence.").

internal Department of Justice regulations set out in 28 C.F.R. §50.10 before seeking access to source information from journalists. Third, DOJ has a powerful institutional interest in carefully limiting its issuance of subpoenas to journalists because abuses could trigger legislation restricting DOJ's discretion in that area. In contrast, neither criminal defendants nor private civil litigants are subject to the regulations or any centralized oversight of their decisions to seek source information from journalists. Nor are they "repeat players" who are constrained by concerns about the long-term effects of overly aggressive use of subpoenas to members of the news media.

### 3. The Section 4(b) Exception Requires Disclosure of Sensitive Investigative Information and Involves Courts in Prosecutorial Decision-Making

The proposed exception for source information by government attorneys in criminal investigations and prosecutions in Section 4(b) requires federal courts to make determinations that "the information sought is critical to the investigation or prosecution"; the government "has exhausted reasonable alternative sources of information"; and that "nondisclosure of the information would be contrary to the public interest." The exception further provides that the journalist (or communications service provider) be given "notice and an opportunity to be heard" on the applicability of the exception. In addition, by implication, the proposed legislation requires that prosecutors turn over to subpoenaed journalists the information necessary to persuade courts that the above-described requirements are satisfied.[4]

The Section 4(b) exception thus would force the government to reveal to both the court and the subpoenaed journalist or media outlet evidence demonstrating the significance of the source information to the overall investigative strategy or prosecution, the nature and extent of the prosecution's other evidence, the investigative steps that it has taken relative to the desired source information, and the overall scope and importance of its prosecution. Such disclosures of law enforcement sensitive information could jeopardize ongoing investigations and prosecutions and are contrary to federal laws requiring the secrecy of investigative information such as matters occurring before grand juries, non-consensual interceptions of communications, and tax-related information.

In addition, Section 4(b) empowers federal courts to scrutinize government investigative strategy and second-guess prosecutorial judgments about the need for source information or the role of such information in the overall investigation. It is by no means clear that courts have the competence or constitutional authority to engage in those endeavors.

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[4] Section 9 provides for *ex parte* and *in camera* judicial review only in connection with the Section 9(a) exception involving leaks that threaten national security interests, thereby suggesting that no similar procedures are available under Section 4(b).

**4. The Balancing Tests in Sections 4(b)(5), 5(b)(4), 6(b)(5), and 9(a)(2) Are Subjective and Beyond the Expertise of Federal Courts**

Sections 4(b)(5), 5(b)(4), 6(b)(5), and 9(a)(2) of the proposed legislation all require that courts conduct so-called "balancing tests" when deciding whether an exception to the statutory privilege applies. In Sections 4, 5 and 6, the test requires that a court determine whether "nondisclosure of the [source] information would be contrary to the public interest, taking into account both the public interest in compelling disclosure and the public interest in newsgathering and maintaining a free flow of information to citizens."[5]

By mandating judicial consideration of "the public interest in newsgathering and maintaining a free flow of information to citizens," this test appears to require that federal courts assess the general effect that an order requiring a journalist to disclosure a source's identity will have on future newsgathering. It is not clear how a federal judge would have access to sufficient information to intelligently make such an assessment, at least absent full hearings involving, among others, media experts and various confidential media sources, all of whom could provide their views on the likely impact of a single federal court's disclosure order on future source and journalist behavior. Although federal courts certainly are competent to assess the effect in the case before them of the admission or exclusion of evidence, they have no special insight into or expertise about the impact that a disclosure order will have on future newsgathering. In short, this test calls for a policy determination – one that is within the expertise of Congress – not a judicial determination.

Similarly, in cases involving disclosure of classified information, Section 9(a)(2) requires that a federal court determine whether the "unauthorized disclosure has significantly harmed national security in a way that is clear and articulable and the harm caused by the unauthorized disclosure of such information outweighs the value to the public of the disclosed information." Such a determination may require the government to disclose to the court large amounts of related classified information so that the court will have a full understanding of all of the national security implications and concerns triggered by the unauthorized leak of classified information. Even if a federal court were fully informed in this way, it is by no means clear that they have the expertise or constitutional authority to balance threats to national security against the benefits of disclosure. Such national security matters are the responsibility of the Executive Branch .

Supporters of legislation creating a journalists' privilege often make a collateral argument – that a federal journalists' privilege statute will promote more uniform treatment across the federal system. Although federal Courts of Appeal have reached differing conclusions about the existence and scope of a journalists' privilege, it is unlikely that the proposed legislation will promote uniformity. Most notably, the balancing tests provides no real guidance to federal courts and invite

[5] It is worth noting application of the balancing test in Section 5(b) could, in some cases, result in violations of criminal defendants' due process rights to exculpatory and mitigating evidence. The Section 5(b) exception appears to permit a federal court to deny a criminal defendant access to such evidence, no matter how relevant and probative, if the court decides that the public interest in newsgathering outweighs the public interest in disclosure of the source information.

idiosyncratic decisions based on the subjective predilections of individual federal judges.

### 5. The "Foreign Power" and "Agent of a Foreign Power" Carve-Out From the Definition of "Journalist" is Problematic

In an apparent response to DOJ concerns that media outlets related to terrorist organizations would be privileged under the proposed legislation, an amendment provides that the term journalist "shall not include any person who is a 'foreign power' or 'agent of a foreign power'" under the Foreign Intelligence Surveillance Act of 1978 [FISA]. Although well intentioned, this carve-out is problematic.

When the government seeks to prove that a person or entity is a "foreign power" or an "agent of a foreign power," it typically does so using classified evidence as part of an application to the FISA court for an order for FISA electronic surveillance or physical searches. If the government wants to employ such surveillance and searches, it strives to keep secret from the target of the FISA coverage that it is under investigation. If, as the amendment provides, the government were required to allege and prove "foreign power" or "agent of a foreign power" status to a court in order to avoid application of the journalists' privilege, it may be forced to reveal classified information or tip its hand to a FISA target.

A better approach might be to tie the carve-out to the designation of a journalist or media outlet as a "Specially Designated Global Terrorist" [SDGT] under Executive Order 13224, and perhaps include non-designated media outlets that are associated with designated SDGTs. The President, the Secretary of the Treasury, the Secretary of State, and the Attorney General are involved in the process by which persons and entities are designated as SDGTs based on their status as or affiliations with terrorist organizations and terrorists. Because SDGT designations are made public, and can be based on undisclosed classified evidence, use of SDGT status or association with an SDGT as the trigger for the carve-out will not jeopardize classified information or otherwise imperil national security.

### 6. The Section 10 Requirement of a Promise or Agreement of Confidentiality is Problematic

Section 10 conditions application of the journalists' privilege on "a promise or agreement of confidentiality made by a journalist." It is unclear what this condition requires. Under the proposed legislation, a journalist cannot honestly provide a blanket "promise or agreement of confidentiality" to a source because of the numerous exceptions to the legislation (unless, of course, the journalist is prepared to ignore a court's order to disclosure source information and go to jail). Thus, Section 10 cannot mean that application of the journalist's privilege is dependent on the making of an unqualified promise or agreement. A more plausible interpretation is that the privilege is triggered only by a promise or agreement of confidentiality *absent a court order requiring disclosure*. If so, the legislation should state this explicitly.

An additional difficulty arises because Section 10 is silent on the issue of waiver. In several recent

high profile cases, including the Judith Miller incident, despite journalists' claims to the contrary, sources of information claimed that they either never requested confidentiality or later waived it.[6] Those cases reveal that it should not be left to journalists to decide whether the privilege applies or whether a source has waived confidentiality. As is the case with other privileges, such as the attorney-client privilege, a court, not a journalist, should determine the validity of an assertion of the privilege and whether a source has waived confidentiality. Any legislation should so provide.

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[6] As I described in earlier testimony:

In Providence, Rhode Island, despite a court order, WJAR-TV reporter Jim Taricani refused to disclose the identity of a source who had given him an FBI videotape showing a government official accepting a bribe. After Taricani had been convicted of criminal contempt, his source came forward and claimed that he never had asked Taricani to keep his identity secret. Taricani disputes that claim. . . . New York Times reporter Judith Miller refused to comply with a court order requiring her to testify in a federal grand jury about a source. After she had been held in contempt and spent 85 days in federal custody, she claimed that her source finally had given her permission to reveal his identity. But, both the source and his lawyer provided a different version of events, claiming that they had communicated such approval to her attorney a year earlier.

Herb Kohl

**STATEMENT OF SENATOR HERB KOHL**
**"Reporters' Privilege Legislation: Preserving Effective Federal Law Enforcement"**
**September 20, 2006**

Thank you Chairman Specter for holding today's hearing.

We need a federal "reporter's shield" law. Though forty-nine states including Wisconsin recognize a shield law, there is no comparable federal statute. Unfortunately, reporters are increasingly being subject to subpoenas ordering them to give up their sources in federal court. Though justified in some instances, we would do well to set the rules of game with a federal law instead of relying upon court decisions and non-enforceable Department of Justice guidelines.

A free and vibrant press is essential to an open society and is a cornerstone of our democracy. Government abuse and corporate fraud would often go unreported without the use of confidential sources. Sources will not reveal volatile information if they stood a strong chance of being exposed – exposure that could cost them their job or even worse. If the press is to serve as a legitimate check against government and corporate wrongdoing, we must ensure their right to confidential sources.

Granting reporters this privilege is hardly revolutionary. Similar confidential communications between spouses, attorneys and clients, and doctors and patients are protected where we determine that the value of keeping those conversations private outweighs society's right to know. Of course, there are exceptions to the rule and this privilege is not absolute. Mr. Chairman, your bill is careful to protect law enforcement's legitimate need to discover the identity of a source where national security is threatened or in circumstances where a terrible harm could be prevented.

Like so many laws we enact, we must strike the right balance with this legislation and I am confident that we will. With that, we look forward to our witnesses' testimony. Thank you Mr. Chairman.

**Statement of Senator Patrick Leahy,**
**Ranking Member, Judiciary Committee**
**Hearing on "Reporters' Privilege Legislation:**
**Preserving Effective Federal Law Enforcement"**
**September 20, 2006**

Today is the fourth hearing this Committee has held on reporters' shield legislation and related matters. More than a dozen journalists and First Amendment experts have come before this Committee to share their views on these matters. We have also heard from a number of current and former prosecutors. Colleagues in both houses of Congress and from both parties have weighed in during this debate. A lot of hard work has gone into this important bipartisan legislation. Yet a minority of the majority of this Committee is still holding it up. I hope today that they will tell us why, and that it will be a better explanation than simply following the orders of the Bush-Cheney Administration, which opposes the bill.

Last week, this Committee was rushed by the Republican leadership into reporting an entirely partisan and deeply flawed bill that would give the Administration unprecedented power to snoop on ordinary Americans without even having to obtain a warrant after the fact. In contrast to last week's effort to gut FISA, the bill before us today would make it easier for ordinary Americans to find out what their Government is doing, by enabling reporters to continue to gather information from confidential sources without fear that keeping their promises of confidentiality will land them in jail for contempt.

While reporter shield legislation has been sitting dormant in this do-nothing Congress, with bipartisan support, the Administration has subpoenaed dozens of reporters.
In the last year, half a dozen journalists have been jailed or fined for protecting their sources. Of course, we have no idea how many potential whistleblowers and other confidential sources have been silenced, and how many investigative journalists have failed to cover important stories, by the fear that journalists will be unable to protect their sources. And the American people may never know what important information they might have told us.

Investigative journalism is vitally important to our democracy. My father was a Vermont printer, and he taught me the importance of the First Amendment's guarantee of a free press. That guarantee is essential to democracy because it protects investigative journalism.

The Framers did not guarantee a free press to protect the kind of propaganda the Bush-Cheney Administration has repeatedly resorted to when it has paid so-called journalists to present fake news supporting its party line about its education policies, its prescription drug program, and the situation in Iraq. Nor did the Framers guarantee a free press to protect the kind of journalism that functions as a medieval court scribe in conveying without examination the daily presidential talking points. Government propagandists and

court scribes do not need the protection of the First Amendment because the Government looks after its own messengers.

But investigative journalism is the essence of the First Amendment. Investigative journalism is how whistleblowers, skeptics and dissenters get out the facts that they know to the public.
And it is how the public obtains the facts that may contradict and expose the Government's official line. Investigative journalism using confidential sources blew the lid off of Watergate. More recently, investigative journalism based on confidential sources has been critical in exposing to scrutiny many of the current Administration's appalling blunders in Iraq, in New Orleans, and elsewhere. Investigative journalism has uncovered profound incompetence and financial irregularities in the Administration's Coalition Provisional Authority in Iraq; cronyism and bureaucratic infighting in its dysfunctional Department of Homeland Security; brutality and betrayals of fundamental American values at Abu Ghraib and secret prisons scattered around the world; and appalling corruption among members of Congress, for which two House Republicans have pleaded guilty.

What investigative journalism tells us is often not welcome news – think of the pictures at Abu Ghraib. But it is precisely the news that the people of a democracy need to make informed choices and hold those in power accountable. No Government – whatever its ideological hue – can be trusted to tell the people about its blunders as well as its successes. That is why I have long championed the Freedom of Information Act, which forces the Government to disclose sometimes embarrassing information, and introduced legislation with Senator Cornyn to strengthen it. And that is why the present bill is needed to protect whistleblowers and other confidential informants so that information the Government might prefer to hide can emerge.

As for the Justice Department's stated concerns about the bill, the current version of the bill amply addresses them. As a former prosecutor myself, I fully agree that criminal wrongdoing must be punished. In a democracy, the rule of law must bind all of us equally. Good intentions should not excuse overzealous private investigators from stealing Government information illegally in a way that compromises Americans' security, any more than they should not excuse overzealous Government investigators from stealing private information illegally in a way that compromises Americans' privacy. But the legislation before us strikes a reasonable balance between safeguarding our free press and ensuring our ability to solve crimes.

And by providing substantial, although not absolute, protections to confidential sources, it also furthers important law enforcement objectives by encouraging whistleblowing that can bring to light fraud and abuse that might otherwise go unreported and unprosecuted.
I am once again dismayed at the inability of the Bush-Cheney Administration to appreciate the value of whistleblowers to law enforcement and to the broader public interest. Instead of welcoming the valuable information that whistleblowers can provide, the Administration has repeatedly harassed and disparaged those who have told the public

the truth. Its opposition to this bill only serves to demonstrate its eagerness to threaten journalists in order to get to confidential whistleblowers, in order to keep embarrassing information hidden. This Administration's allergy to fact-based accountability is itself the strongest proof of why this bill is needed.

The Administration is also quite wrong in suggesting that there is anything novel or radical about the bill. More than 30 states have enacted statutes granting some form of privilege to journalists, and this bill builds upon their analysis and experience in balancing the competing interests at issue. It also builds on the Justice Department's own internal guidelines for issuing subpoenas to members of the news media.

There is, of course, nothing at all novel about protecting important interests of confidentiality even in the context of criminal litigation. Federal and state courts routinely honor confidentiality between doctors and patients and lawyers and clients. Communications between whistleblowers and investigative journalists that were secured by promises of confidentiality are also important, and have no less need for the promise of confidentiality to be honored.

As I have already mentioned, the bill before us is a bipartisan bill. Therefore, while I condemn the stalling of the Bush-Cheney Administration and its allies, I want to acknowledge the Senators on both sides of the aisle who have worked hard to develop the balanced, bipartisan legislation before us. I will continue working together with them to bring this bill to a vote of the full Senate and getting it promptly signed into law, before further damage is done to investigative journalism.
It should be but one element in a series of broader efforts to push back against the efforts of the Bush-Cheney Administration to bully and threaten everyone – be they whistleblowers, journalists, members of Congress or ordinary Americans – who attempts to hold it to account. But this bill will be an important first step, if we can move a genuinely bipartisan bill forward in this Congress and get past the stalling tactics of the Administration and its allies.

# Department of Justice

STATEMENT OF

PAUL J. MCNULTY
DEPUTY ATTORNEY GENERAL
DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

"REPORTERS' PRIVILEGE LEGISLATION:
PRESERVING EFFECTIVE FEDERAL LAW ENFORCEMENT"

PRESENTED

SEPTEMBER 20, 2006

**Testimony of**
**Deputy Attorney General Paul J. McNulty**
**Senate Judiciary Committee**
**"Reporters' Privilege Legislation:**
**Preserving Effective Federal Law Enforcement"**
**September 20, 2006**

Chairman Specter, Senator Leahy, and Members of the Committee, thank you for the opportunity to appear today to discuss S. 2831, the "Free Flow of Information Act of 2006," and unauthorized disclosures of classified information by the media. While others at the Department of Justice previously have testified on these matters, this is my first opportunity to talk with you about them. The issues are weighty, and I commend the careful attention you are giving them.

Let me begin with these facts and observations, upon which we should all agree. The Department of Justice shoulders the important obligation of enforcing the law and ensuring the public safety against foreign and domestic threats. We also are duty bound to administer justice with fairness. Our work requires a constant balancing of interests.

A determination to commence prosecution requires a careful assessment of all facts and circumstances. Our guidepost, as stated in the United States Attorneys' Manual, is whether the "fundamental interests of society require the application of the criminal laws to a particular set of circumstances," recognizing that any decision to bring charges "entails profound consequences" for all affected persons. U.S. Attorneys' Manual § 9.27.001. In all instances, the Department's attorneys represent and must protect the public's interest in the fair and balanced administration of justice.

How we conduct investigations is no less important. We owe crime victims, those suspected of committing crimes, and the public the duty of conducting diligent and thorough investigations. Our search is for the truth, and our record shows that our approach has reflected measured and careful judgments. Overreaching does not serve justice, and the Department's men and women understand and respect that principle.

Our measured approach manifests itself in the daily administration of justice around the country. Our attorneys, for example, take great care to ensure that grand jury investigations are both full and fair. Indeed, the very institution of the grand jury—consisting as it does of ordinary citizens—provides an added layer of balance to our investigations. To be sure, though, a grand jury operates with a broad and time-honored mandate: to search broadly for the truth and enlist everyone with potentially useful information in that search. As the Supreme Court has explained, the "investigative power of the grand jury is necessarily broad if its public responsibility is to be adequately discharged." Branzburg v. Hayes, 408 U.S. 665, 700 (1972).

In our investigations and prosecutions we always respect civil liberties, including the First Amendment rights of citizens and the media. Since the Founding era, journalists have contributed invaluably to our public discourse. Every schoolchild learns of the importance of Thomas Paine's contention, penned as it was in a revolutionary-era pamphlet, that "common sense" compelled a separation from England and the establishment of a new nation. More modern examples abound. Indeed, it is difficult, if not impossible, to read any newspaper or Internet news site and not find commentary on issues of enormous importance to our communities and nation. The Department of Justice fully respects and is committed to

protecting the media's right to comment, however favorably or critically, upon the course of government and the actions of public officials.

Striking the right balance today between vigorously investigating and prosecuting crime and protecting civil liberties presents unique challenges. Our nation is engaged in a war on terror, and the Department's highest priority is to prevent another attack. Our prevention efforts must be tailored to the nature of the enemy we face—extremists constantly searching for ways to penetrate our communities and inflict death and destruction upon our people. Secrecy and surprise are cornerstones of our enemy's approach. Our response must follow suit. Our counterterrorism arsenal must include secrecy among its weapons. To publish the full contours of our prevention efforts would provide our enemy with unacceptable opportunities. Certain information must be kept classified and outside the public domain.

In making this point, the Department fully appreciates that there is not unity of opinion as to how America should conduct its war on terror. We are fighting a new kind of war that regularly presents new kinds of challenges, and Americans rightly are asking new kinds of questions. This debate is healthy and welcomed.

But our public dialogue, in which journalists play an essential role, cannot be permitted to itself breach our nation's security. In this regard, the media bears the important responsibility of striking the proper balance in its reporting—to keep Americans informed and to comment broadly without arming our enemy or risking danger to our troops, communities, or nation. The Department appreciates the care with which the media has undertaken this responsibility.

My larger point is that our Constitution permits the proper balance to be struck. As a nation, we are fully capable of both protecting our security and preserving the media's right to engage in robust reporting on controversial issues. Security and free speech are not mutually exclusive. Or, as Justice Goldberg famously observed, the Constitution is "not a suicide pact." Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963).

The Department of Justice has developed a strong record in striking the right balance. I want to describe that record by explaining how we investigate leaks of classified information. Let me emphasize at the outset the seriousness of the problem posed by the unauthorized disclosure of classified information. An individual who leaks classified national defense information commits a crime. To talk about such leaks, then, is to talk about criminal conduct. There is no virtue in leaking; it reflects a profound breach of public trust and is wrong and criminal.

The consequences of leaking are extraordinarily grave. Leaks lay bare aspects of our national defense; they provide a window into steps we are taking to secure our country; they risk arming terrorists with precisely the information needed to avoid detection in plotting an attack upon our troops or communities; in short, they expose and damage our nation. These concerns and realities have been echoed by the President and Members of Congress in both the House and the Senate, including Members of this Committee.

Some skeptics have tried to paint those who unlawfully leak classified information to the press as whistleblowers caught in an intractable dilemma between, on the one hand, allowing what they believe may be unlawful activity to continue within the Government and, on the other hand, unlawfully disseminating information to someone with no authority to receive it. These so-called whistleblowers, the argument runs, escape the dilemma by conditioning a disclosure of classified information upon a journalist's promise of confidentiality.

This dilemma is a false one. It incorrectly assumes that the media is an individual's only outlet. Not so. Congress took care to ensure that no Government employee faces such a dilemma by enacting the Intelligence Community Whistleblower Act of 1998. That statute established mechanisms through which members of the intelligence community could voice concerns while ensuring that classified information would remain secure. In the first instance, the statute directs individuals to relay their concerns to their agency's Inspector General. Employees who are dissatisfied with their Inspector General's response are then authorized to bring their concerns to an appropriate committee of Congress in its oversight capacity.

With these mechanisms in place, it is a mistake to dub an individual who leaks classified information a whistleblower. A leaker commits a crime; a whistleblower, by contrast, follows the legal course of disclosure enacted into law by Congress. The difference is significant and should not be not be lost on the Committee.

Upon learning of a leak of classified information to the media, our primary focus is on identifying and prosecuting the leaker, not the reporter or media organization who received the

leaked information. This focus is reflected in the Department's guidelines for the issuance of subpoenas and other compulsory process to the media. Codified at 28 C.F.R. § 50.10, the guidelines demonstrate how seriously the Department takes any investigative or prosecutorial decision that implicates members of the news media. This policy, by its terms, seeks to "balanc[e] the concern that the Department of Justice has for the work of the news media and the Department's obligation to the fair administration of justice." 28 C.F.R. § 50.10.

The details are important. The guidelines provide that "[a]ll reasonable attempts should be made to obtain information from alternative sources before considering issuing a subpoena to a member of the news media." Id. § 50.10(b). They also call for undertaking negotiations with the media before resorting to a subpoena. Even then the prosecutor should do so only if there are "reasonable grounds to believe, based on information obtained from nonmedia sources, that a crime has occurred, and that the information sought is essential to a successful investigation—particularly with reference to directly establishing guilt or innocence." Id. § 50.10(f)(1).

This process ordinarily plays out across multiple levels within the Department of Justice. A prosecutor seeking confidential source information from a journalist must justify the request in writing. If the request receives approval from a United States Attorney, it then comes to Washington for careful vetting within our Criminal Division, Office of Public Affairs, the Office of the Deputy Attorney General, and, ultimately, the Office of the Attorney General. The Attorney General's approval is mandatory in all cases in which cooperation fails with a particular journalist.

This exhaustive and rigorous process is undertaken for a reason—to enable close scrutiny by career prosecutors and to ensure that subpoenas seeking confidential source information from journalists are issued only as a matter of last resort. In the past 15 years, the Attorney General has approved only approximately 13 requests for media subpoenas that implicated source information. This record reflects restraint: we have recognized the media's right and obligation to report broadly on issues of public controversy and, absent extraordinary circumstances, have committed to shielding the media from all forms of compulsory process. The Department of Justice will steadfastly continue to strike this same balanced approach in our investigations.

Our approach fully complies with the law. While the Supreme Court repeatedly has stressed the importance of the media's role in our society, it also has decisively declared that the media is not exempt from the general obligation—shared by all citizens—to provide evidence to grand juries investigating crimes. The seminal case is Branzburg v. Hayes, 408 U.S. 665 (1972). The Supreme Court in Branzburg held that journalists had no First Amendment right to refuse to comply with a subpoena and provide testimony to a grand jury regarding information received from a confidential source. See id. at 690-91. The Court's message was plain: "[W]e cannot accept the argument that the public interest in possible future news about crime from undisclosed, unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future." Id. at 695. Other courts have reinforced this conclusion. See, e.g., In re Grand Jury Subpoena, Judith Miller, 438 F.3d 1141, 1146-48 (D.C. Cir. 2006); New York Times v. Gonzales, No. 05-2639, 2006 WL 2130645, at *11-12 (2d Cir. Aug. 1, 2006).

No aspect of the legal landscape or the Department's guidelines has inhibited the media from robustly reporting and commenting on controversial issues. To the contrary, journalists have time and again proven themselves more than able to gather information and disseminate news and commentary on the most controversial matters of the day. Only in extraordinarily rare circumstances—approximately 13 cases in 15 years—has the Department determined that the interests of justice warranted compelling information implicating sources from a journalist. We have struck the right balance and will continue to do so in the future.

I want to turn now to S. 2831, the "Free Flow of Information Act of 2006." The Department of Justice firmly opposes the bill. In recent months, at least three Department officials have provided statements or offered testimony on the proposed legislation, and on June 20 of this year we detailed our objections in a views letter. I do not intend to rehash all of the points made in our letter or prior testimony. Allow me instead to focus on the bill's most serious deficiencies and to address the practical consequences that would befall the administration of justice and criminal defendants if the bill became law.

As an initial matter, proponents of the bill contend that it is a necessary response to certain recent high-profile cases in which the Department's actions have purportedly signaled a newfound eagerness to stop journalists from reporting of leaks. The contention is misguided. The Department has not changed its policy or approach to investigating leaks. We continue to follow the same guidelines and processes that have resulted in the issuance of subpoenas implicating source information in only approximately 13 cases in the last 15 years. We continue

to regard journalists as a source of last resort. There is not one shred of evidence supporting the notion that the Department of Justice is out to get the media.

Nor is there anything but conjecture to support the contention that journalists are writing in fear. Indeed, the argument parallels the same ones presented to, and rejected by, the Supreme Court in Branzburg in 1972. The Supreme Court dismissed as "speculative" the assertion that reporting would be chilled by requiring journalists to provide confidential source information to a grand jury. Branzburg, 408 U.S. at 694. If the critics in Branzburg were to be believed, we would have seen a marked decline in press freedoms in the ensuing years. Of course, the opposite has occurred. We live in an age in which news and critical commentary is everywhere--in print, over airwaves, and throughout the Internet. The proponents of the bill have not proven their case; they have failed to demonstrate that the Department of Justice has sought to compel confidential source information from journalists more aggressively or in greater numbers than it has in the past. The proposed bill is a solution in search of a problem.

Let there also be no doubt about the ramifications the bill would have on the administration of justice. The bill would work a dramatic change in current practice and severely hamper our ability to investigate and prosecute serious crimes, including acts of terrorism.

Under Section 9 of S. 2831, a court must determine "by a preponderance of the evidence" that "an unauthorized disclosure has significantly harmed the national security in a way that is clear and articulable" and that such harm "outweighs the value to the public of the disclosed information." By its terms, then, the bill not only transfers to the judiciary the authority to

second-guess the Executive's determinations regarding what does and does not harm the national security, it also licenses courts to find that a reporter's promise to conceal a source's identity can override national security interests, even when harm to national security is conceded. The only necessary finding is that the public interest was sufficiently strong to justify disclosure of the classified information.

The Department of Justice is particularly concerned about Section 9 and its transfer of authority to make national security determinations to the federal judiciary. The bill would force federal judges into making extremely difficult decisions about the national security implications of a particular leak—decisions that would require extensive and nuanced knowledge about our larger national security strategy, the details of classified programs, and the ground-level impact of certain information being disseminated to the public. The process would require the submission of ample evidence and consume inordinate amounts of time, which we rarely can afford to lose when confronted with the dynamics that define national security challenges today. Perhaps Judge Wilkinson put these concerns best 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).

Section 9 of the bill would thrust the judiciary into law enforcement matters reserved by the Constitution to the Executive branch. Within the context of confidential investigations and secret grand jury proceedings, determinations regarding the national security interests are best made by members of the Executive branch—officials with broad access to the full scope 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).

Let me be clear about what is at stake in Section 9. Under existing law, an individual wishing to challenge a subpoena bears the burden of proving that the request for particular evidence is unreasonable or oppressive. The proposed bill, by contrast, saddles the Government with the obligation of going into a federal court and producing evidence of a quantity sufficient to prove clear and articulable harm to our nation's security. In addition to infringing upon constitutionally-conferred executive authority, the bill goes a step further and makes matters all the worse: it places a thumb on the scale in favor of the reporter's privilege. The Government cannot obtain confidential source information unless it first proves that the harm to our national

security would outweigh the public's interest in maintaining the free flow of leaked information. Our national security is too important to be subjected to these standards and burdens.

Section 9, in short, would reflect bad policy and make bad law. The practical impact, moreover, could be enormous. To provide a simple example, consider a journalist who publishes a detailed story about covert classified efforts to track the movements of international terrorists. The story also contends that aspects of the covert program have encroached on privacy interests of certain individuals by mistakenly identifying them as terrorists. The journalist attributes the information to a confidential source and describes the source as a government insider who is so concerned about the program that he intends to resign and relocate outside the United States, taking with him documents detailing the program's operation.

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 quickly approves a narrowly-tailored subpoena that seeks only the identity of the journalist's source. The journalist believes the public has a right to know about the covert program and the potential privacy problems and thus 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 damaged 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, the court nevertheless could find that public's interest in learning about the alleged privacy violations outweighed the Government's interests. That finding would defeat the subpoena.

This example is both realistic and revealing. It proves that the proposed legislation would impose significant and potentially crippling burdens on federal law enforcement in cases directly affecting our national security. Given the Department's record of restraint in compelling confidential source information from journalists, the bill would inflict unjustifiable harm upon a proven approach to effective law enforcement.

Section 9 is by no means the only provision of S. 2831 with serious deficiencies. The bill is deficient in the simplest of dimensions. Take, for example, the definition of "journalist" in Section 3. It includes only journalists who work for financial gain and thereby discriminates against individuals who, for no money, contribute a story to a local newspaper. This deficiency leaves the bill wide open to serious constitutional challenge on the ground that it unjustifiably discriminates against categories of speakers.

Section 5 of the bill raises grave constitutional concerns of an altogether different variety. The Sixth Amendment entitles defendants to compel witnesses to appear in court and testify. Section 5, however, would permit defendants to access such a witness only if, "based on an alternative source," they are able to show that the witness had information relevant to a successful trial defense. The Sixth Amendment imposes no such "alternative source" requirement. Section 5 is egregiously defective in a more basic way. It requires a court to balance criminal defendant's "constitutional rights" against the "public interest in newsgathering and in maintaining the free flow of information." Such a balancing requirement is indefensible; individuals facing grave criminal penalties, say, for example, a life sentence, should not have their "constitutional rights"—indeed, their liberty—thwarted by the interest of "newsgathering."

Other points warrant emphasis. Some supporters of S. 2831 have suggested that the bill is no more than a codification of the Department's own guidelines. That view is badly mistaken. 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).

I have also heard it suggested that the Department's concerns are overblown because many states have enacted workable media shield laws. Such analogies are entirely misplaced. An individual state's decision to provide a reporter with protection against a subpoena from a prosecutor investigating crimes under state law, serious though those crimes may be, says little about the virtues of providing journalists with such protections at the federal level. The Federal Government, unlike state and local governments, is uniquely responsible for providing for the national defense, working with our international partners to prevent acts of terrorism, and investigating crimes with expansive national and international ramifications, such as terrorism, espionage, and leaks of classified information.

In closing, I wish to end where I began. The issues before the Committee are of enormous significance. They require each of us to acknowledge the necessity of balancing important interests and then to focus on the Department of Justice's record in striking that balance. That record, as I have explained, is one of success and restraint. We seek to work cooperatively with the media, and only rarely has the Department determined that the interests of justice warranted seeking to compel a journalist to reveal information obtained from a confidential source. The rarity of those occasions reflects the Department's commitment to respecting the media's important role within our society. The media has been and will remain a source of last resort in our investigations.

Against the backdrop of the Department's record and the lack of any evidence showing that our approach has meaningfully chilled robust reporting by the media, I respectfully urge the

Committee not to support S. 2831. The bill would significantly weaken the Department of Justice's ability to obtain information of critical importance to protecting our nation's security, inject the federal judiciary to an extraordinary degree into affairs reserved by the Constitution for decision within the Executive branch, and, at bottom, encourage the leaking of classified information.

Thank you again for the opportunity to testify, and I look forward to answering the Committee's questions.

Theodore B. Olson
© September 20, 2006

**Senate Committee on the Judiciary**

**Reporters' Privilege Legislation:**
**Preserving Effective Federal Law Enforcement**

**September 20, 2006**

**Testimony of Theodore B. Olson**

Good morning, Chairman Specter, ranking Member Leahy, and Members of the Committee.

Thank you for the opportunity to appear before the Committee to testify about an issue that has important implications not just for reporters and the press, but is particularly critical to the ability of citizens to monitor the activities of, and to exercise a democratic check on, their government. One of the most vital functions of our free and independent press is to function as a watchdog on behalf of the people—working to uncover stories that would otherwise go untold. Journalists in pursuit of such stories often must obtain information from individuals who are unwilling to, or cannot, be publicly identified. Those journalists—often reporting on high-profile legal and political controversies—cannot function effectively without offering some measure of confidentiality to their sources.

In recognition of the importance of preserving this confidentiality, forty-nine States and the District of Columbia have laws protecting reporters from subpoenas in certain circumstances. Numerous federal courts grant similar protections, and

the Justice Department has internal standards preserving confidentiality for journalists and their sources. Yet there is no uniform protection in federal law. Thus reporters may be shielded if they are subpoenaed in state court, but not protected at all if the identical subpoena is issued by certain federal courts.

The Free Flow of Information Act of 2006 provides such federal protection. It builds on the patchwork of standards developed by many federal courts, replacing it not with an absolute "reporter's privilege" but with a requirement, among other things, that a party seeking information from a journalist be able to demonstrate that the need for that information is real and that the information is not available from other sources.

The Act is modeled in large part on the Justice Department guidelines, which were in place when I served as Solicitor General of the United States from 2001 to 2004, and during my time as Assistant Attorney General for the Office of Legal Counsel from 1981 to 1984.[1] Like those guidelines, the Act does not hamper law enforcement. It does not pose a threat to matters involving classified information or national security. In fact, it contains a specific provision for such

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[1] Although I am a former government official and current member of the President's Privacy and Civil Liberties Oversight Board, I am appearing in my personal capacity and not on behalf of any client. The views that I express are solely my own and do not necessarily represent the views of any other person or entity.

highly sensitive situations. Nor does it give reporters any special privilege beyond those already afforded other types of communications, such as those between lawyer and client, where confidentiality furthers broad social goals. Instead, it simply extends to federal courts the nearly unanimous determination by the States that forcing journalists to disclose the identity of their confidential sources is often likely to do more damage than provide any concrete benefit to the public welfare.

## I.
## PROTECTING CONFIDENTIAL SOURCES IS ESSENTIAL TO A FREE AND VIBRANT PRESS AND TO JOURNALISTS' ABILITY TO PERFORM THE FUNCTION THAT THE CONSTITUTION EXPLICITLY SANCTIONS.

Confidential sources are critical to reporting on matters of public importance and thus are vital to self-governance. When reporting on sensitive subjects, particularly misconduct or excesses by government officials, journalists often have no choice but to seek information from individuals who would be at great risk of retaliation or embarrassment if their identities were disclosed; many sources with important information simply will not speak to reporters unless they are granted anonymity. This process may be imperfect, but we have learned through Watergate and other incidents that a robust and inquisitive press is a potent check against abusive governmental power. The press often cannot perform this service without being able to promise confidentiality to some sources.

In reporting these stories, journalists act as surrogates for all of us. They explore the places that are inaccessible to the public as a whole—shedding light on vital information in locations where it otherwise would be kept secret, from corporate boardrooms to medical facilities to the halls of government. The Supreme Court has repeatedly recognized the important role of the press in obtaining and communicating information to the public. That role, the Court has held, is part of our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). The press is "a mighty catalyst in awakening public interest in governmental affairs," *Estes v. Texas*, 381 U.S. 532, 539 (1965), and it "was protected so that it could bare the secrets of government and inform the people." *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring). The news media fulfills an "important role" in our democracy, serving "as a powerful antidote to any abuses of power by government officials as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were elected to serve." *Mills v. Alabama*, 384 U.S. 214, 219 (1966).

Our history and judicial decisions teach that the compelled disclosure of reporters' confidential sources endangers their ability to perform these constitutionally-protected functions. And that, in turn, inhibits the flow of

information concerning public matters that is vital to an informed citizenry and a healthy democracy. The Court has recognized "the timidity and self-censorship which may result from allowing the media to be punished for publishing truthful information." *Florida Star v. B.J.F.*, 491 U.S. 524, 535 (1989) (internal quotation omitted). Lower courts have been even more explicit:

> The interrelationship between newsgathering, news dissemination and the need for a journalist to protect his or her source is too apparent to require belaboring. A journalist's inability to protect the confidentiality of sources . . . will seriously erode the essential role played by the press in the dissemination of information and matters of interest and concern for the public.

*Riley v. Chester*, 612 F.2d 708, 714 (3d Cir. 1979) (citations omitted).

And that is exactly what is happening here. Reporters are increasingly being subpoenaed and held in contempt for declining to reveal their confidential sources. In grand jury investigations—from the Valerie Plame imbroglio to the use of steroids by professional baseball players—federal prosecutors round up the reporters, haul them before a court, and threaten them with heavy fines and jail sentences if they don't reveal names and details concerning their sources. Even in civil litigation, such as the Wen Ho Lee case, private plaintiffs now subpoena reporters in an effort to gain information that will help them win their claims for money damages.

These compulsory proceedings undermine reporters' ability to get their stories, creating an obvious chilling effect. Under these circumstances, journalists cannot in good faith promise confidentiality to their sources, and they cannot establish the mutual trust that is key to cultivating a relationship with those who wish to speak. Worse, as discussed in detail below, reporters, editors, publishers and their lawyers cannot with assurance articulate the rules governing confidentiality because legal standards are hopelessly muddled. Fearing the consequences of exposure, sources withdraw. They decline to serve as background sources—even for routine news stories, where their knowledge and experience help reporters understand complex topics and disseminate information to the public. And they certainly will not talk when the stakes are high—when they know that reporters could be forced to disclose to the very government they are investigating the names of persons providing them with the information that government wishes to conceal. Important and even lifesaving stories go untold.

This need not occur. Reporters should not be (and do not expect to be) above the law—categorically and in all cases protected from disclosing any confidential information, no matter the circumstances or need. But they should be afforded some protection so that they can perform their vital role in this free and open society in ensuring the uninhibited flow of information and exposing fraud,

dishonesty and improper conduct without being threatened after the fact with imprisonment.

## II.
## THE FREE FLOW OF INFORMATION ACT PROVIDES A MUCH-NEEDED, UNIFORM FEDERAL STANDARD THAT EFFECTIVELY BALANCES CONFIDENTIALITY WITH INTERESTS FAVORING DISCLOSURE IN SOME CASES.

The concept of a reporter's privilege is not new. Indeed, forty-nine States and the District of Columbia already recognize some sort of reporter's shield, as do many federal courts. Additionally, the Justice Department has guidelines concerning when it can seek to force reporters to respond to subpoenas, although its guidelines are not judicially enforceable. The Free Flow of Information Act of 2006 does not work a dramatic expansion of the reporter's privilege or a realignment of public policy. Instead, it is long overdue precisely because the privilege is already in place and the decisions underlying such a policy have already been made by key officials. The unsettled state of federal law has a chilling effect on speech and the dissemination of important information to the public. The Act regularizes the rules for reporters, their sources, publishers, broadcasters, and judges—harmonizing the various federal standards and providing consistency on which journalists and their sources can rely.

Protecting the confidentiality of certain communications is well-recognized within the law, and the Act does not grant reporters any special license beyond the

common-sense protections we already give to certain professionals and individuals. Laws already recognize the competing values of confidentiality and the collection of evidence; privileges are accorded to spousal communications, and communications between doctors and patients, or attorneys and clients. These privileges protect—and encourage—communications and relationships that are valuable to society as a whole, and they do so despite the inability to obtain evidence in some cases. The same principles apply to communications between journalists and vulnerable, sensitive sources. In many cases, the public will be better served by a reporter's having access to the information from a protected source than having no information at all.

In the 34 years since the Supreme Court's decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972), many federal courts of appeals have recognized some form of reporter's privilege, "though they do not agree on its scope." *McKevitt v. Pallasch*, 339 F.3d 530, 532 (7th Cir. 2003).[2] For example, the Third Circuit has recognized a common-law privilege in civil cases, *see Riley v. City of Chester*, 612 F.2d 708,

[2] Courts have granted protection to reporters in varying degrees. *See, e.g.*, *In re Madden*, 151 F.3d 125, 128-29 (3d Cir. 1998); *United States v. Smith*, 135 F.3d 963, 971 (5th Cir. 1998); *Shoen v. Shoen*, 5 F.3d 1289, 1292-93 (9th Cir. 1993); *In re Shain*, 978 F.2d 850, 852 (4th Cir. 1992); *United States v. LaRouche Campaign*, 841 F.2d 1176, 1181–82 (1st Cir. 1988); *von Bulow v. von Bulow*, 811 F.2d 136, 142 (2d Cir. 1987); *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986); *Zerill v. Smith*, 656 F.2d 705, 712 (D.C. Cir. 1981); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 438–39 (10th Cir. 1977).

715 (3d Cir. 1979), as well as in criminal trials. *See United States v. Cuthbertson*, 630 F.2d 139, 146 (3d Cir. 1980). The Fourth Circuit has held that the First Amendment provides a reporter's privilege in civil cases but not in criminal cases. *See LaRouche v. Nat'l Broad. Co.*, 780 F.2d 1134, 1139 (4th Cir. 1986). This lack of uniformity creates intolerable uncertainty regarding when a meaningful promise of confidentiality may be made. For example, a reporter in Raleigh, North Carolina could be forced to reveal a source's identity in federal court when the same reporter in Harrisburg, Pennsylvania would be protected under federal law—even when *both* North Carolina and Pennsylvania's state laws would shield that reporter in the respective state courts. *See* N.C. GEN. STAT. § 8-53.11; 42 PA. CONS. STAT. § 5942(a). No one benefits from this bewildering array of federal standards, which frustrates the public interest in effective newsgathering and leaves reporters and sources wondering whether a promise of confidentiality is simply the first step down the inevitable path toward disclosure or the jailhouse doors.

Reporters already enjoy protection in most States and in some federal contexts, but the confusion illustrated above renders many provisions ineffective. Reporters cannot foresee where or when they may be summoned into court for questioning regarding a particular story. They therefore cannot guarantee confidentiality with assurance that their promise will be honored. The Free Flow of Information Act does not create an entirely new, substantive privilege, but it

establishes a clear federal rule, which is essential where reporters and sources are making difficult determinations about whether to put themselves at risk by promising confidentiality or providing certain information. The Act also does not give reporters an absolute privilege to resist disclosing their sources. Instead, it requires, among other things, that a party seeking information from a journalist in a criminal or civil case be able to demonstrate that the need for that information is real, that it cannot be gleaned from another source, and that nondisclosure would be contrary to the public interest. The Act does not give the same privilege to reporters who themselves witness crimes or are engaged in criminal or tortious conduct, nor to reporters who possess information that is necessary to prevent death or serious bodily harm. And it treats differently those matters involving classified information and national security, as discussed in Part III, below.

Reasonable minds can disagree on the value of anonymity granted for one story or another—or even on the concept of a reporter's privilege. But there should be no disagreement that uniform rules are better than a hodgepodge federal system that leaves all parties in a state of confusion when a source requests anonymity or when a confidentially-sourced story is published. The underlying policy has now received near-unanimous adoption by the States, and congressional action is necessary to remove the remaining inconsistencies, which are largely jurisdictional, not substantive, but have created intense and unnecessary confusion.

## III.
## THE ACT DOES NOT COMPROMISE NATIONAL SECURITY OR BURDEN LAW ENFORCEMENT EFFORTS.

Contrary to what its opponents may claim, the Free Flow of Information Act does not compromise national security. It contains an express national security exception in addition to the general balancing test described above. Nor does the Act hamper law enforcement since it largely mirrors decades-old Justice Department guidelines, and it provides a privilege already recognized by nearly every State. Indeed, far from compromising national security or law enforcement interests, the Act promotes them—standardizing the rules of the game, and allowing reporters to subject government programs and actions to proper scrutiny while ensuring that important information cannot be withheld solely on the grounds of privilege.

Certainly, no issue deserves more attention from our elected representatives than ensuring that the American people are defended from terrorist enemies and other security threats, and any reporter's privilege must take national security interests into account. The Act in Section 9 addresses two principal national security concerns: reporters who possess information necessary to government officials in the interest of national security, and the investigation of leaks that have caused significant harm. It does not protect journalists who possess information that would assist in preventing an act of terrorism, or where harm to national

security would "outweigh the public interest in newsgathering" if the information were not disclosed. And the law does not shield reporters where a court determines that a leak has caused "clear and articulable" harm to national security that outweighs the value of the information disclosed. These provisions strike a proper balance. They protect reporters whose stories address critical topics such as public corruption, homeland security and intelligence gathering, but lower the threshold for overcoming that protection where reporters possess vital information that the public interest demands be disclosed.

Similarly important are the interests of federal law enforcement officials in protecting citizens from crime and discovering evidence once a crime has occurred. Based, as it is, in large part on Justice Department guidelines that have been in place without amendment since 1980, *see* 28 C.F.R. § 50.10, the Act does not burden law enforcement. The Department's guidelines bar subpoenaing a journalist in a criminal investigation unless the information sought is "essential," and require officials to "strike the proper balance between the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice." § 50.10(f)(1), (a). They provide "protection for the news media from forms of compulsory process, whether civil or criminal, which might impair the news gathering function," and make plain that "the prosecutorial power of the government should

not be used in such a way that it impairs a reporter's responsibility to cover as broadly as possible controversial public issues." § 50.10 Such strong language has been the voluntarily-adopted standard governing the Department's practices for more than a quarter century, and there is no basis for believing that codifying those standards will harm the Department or other federal law enforcement efforts. The Act simply extends comparable protections to civil matters between private parties, where any interest in compelling journalists to testify is substantially reduced.

Additionally compelling is the fact that all but one State already operate under judicially enforceable shield laws, and officials in a majority of those States support a federal privilege. Thirty-five state attorneys general—the chief law enforcement officers of their respective States and the District of Columbia—endorsed the recognition of a uniform federal privilege in the Judith Miller case. Far from expressing concern about the effect of shield laws on law enforcement or judicial proceedings, they argued that the lack of a federal counterpart to the state laws "corrode[s] the protection the States have conferred upon their citizens and newsgatherers," creating a situation that "is little better than no privilege at all." Brief for the State of Oklahoma et al. as Amici Curiae Supporting Petitioners, at 7, *Miller v. United States*, *cert. denied* 125 S. Ct. 2977 (2005) (No. 04-1507), 2005 WL 1317523 (quotation omitted). The attorneys general expressed support for a privilege based on their States' shield laws, which "share a common purpose: to

assure that the public enjoys a free flow of information and that journalists who gather and report the news to the public can do so in a free and unfettered atmosphere. The shield laws also rest on the uniform determination by the States that, in most cases, compelling newsgatherers to disclose confidential information is contrary to the public interest." *Id.* at 2. The policies supporting the state laws apply with equal force here, and the need for federal action is even greater considering the current state of affairs, which "allows journalists to be imprisoned for engaging in the same conduct that these State privileges encourage and protect." *Id.*

* * *

I would like to thank the Committee for the opportunity to testify today. I look forward to answering any questions members of the Committee may have.

**TESTIMONY OF**

**VICTOR E. SCHWARTZ**
**SHOOK, HARDY & BACON LLP**

**ON BEHALF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS**

**BEFORE THE**

**THE SENATE JUDICIARY COMMITTEE**
**UNITED STATES SENATE**

**SEPTEMBER 20, 2006**

Good morning, Chairman Specter, and Members of the Committee. Thank you for your kind invitation to testify today about the merits of codifying a reporter privilege. I am testifying today on behalf of the National Association of Manufacturers. The NAM is the nation's largest industrial trade association representing small and large manufacturers, in every industrial sector, and in all 50 states. Through its direct membership and affiliate organizations — the Council of Manufacturing Associations, the Employer Association Group and the State Associations Group — the NAM represents more than one hundred thousand manufacturers. The views stated today are based on my experience in business litigation and in teaching evidence law.

In S. 2831, the "Free Flow of Information Act," Congress is considering codifying a broad media shield privilege stating that a federal entity may not compel a reporter to testify or produce any document in any proceeding or in connection with any issue arising in federal courts, regardless of whether the basis for the claim arises under federal or state law.[1] The focus of my testimony will be on the impact that S. 2831 could have on the ability of businesses to

[1] S. 2831 109th Cong. (2006).

protect valuable trade secrets, personnel files and other types of proprietary information that rightly should be kept confidential. It will not focus on matters that fall under the stated purpose of the bill: "to guarantee the free flow of information to the public through a free and active press as the most effective check upon *government* abuse, while protecting the right of the public to effective law enforcement and the fair administration of justice."[2] These matters have First Amendment and other very different public policy overtones than the private sector concerns that I will address.

In short, it is my belief that any reporter privilege should include reasonable checks and balances so that courts can protect journalists when appropriate, but supersede that protection when other values outweigh the benefit of such a special protection.

## I. EVIDENTIARY PRIVILEGES IN AMERICAN JURISPRUDENCE

### A. Purpose of Evidentiary Privileges

Reporter privileges are "personal" privileges. Personal evidentiary privileges deny plaintiffs and defendants the ability to use truthful information that may be crucial to their legal claims and defenses. Consequently, Congress and the courts have long recognized that personal privileges should be rare and narrow. The Supreme Court of the United States has held that "exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth."[3] Rather, the Court found that "there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional."[4]

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2 *Id.* (emphasis added).

3 U.S. v. Nixon, 418 U.S. 683, 710 (1974) (rejecting absolute presidential privilege).

4 Jaffee v. Redmond, 518 U.S. 1, 9 (1996).

Traditional evidentiary privileges protect information shared in the context of a special relationship. WIGMORE ON EVIDENCE, America's leading authority on the rules of evidence, explains that "the mere fact that a communication was made in express confidence . . . does not create a privilege. . . . [A] confidential communication to a clerk, to a trustee, to a commercial agency, to a banker, to a journalist, or to any other person, not holding one of the specific relations hereafter considered, is not privileged from disclosure."[5]

Also, virtually no personal privileges are absolute; the United States Supreme Court has held that even the privileges rooted in the Constitution must give way sometimes to the need to know the truth. Not even lawyers, doctors, or priests have absolute protection. The attorney-client privilege, perhaps the most important of traditional privileges, can be negated if a court determines that an attorney-client communication has been used to further a crime. Doctors and priests may reveal information if the person is planning imminent physical harm to others.

Well-respected evidence scholar Charles T. McCormick acknowledged the central role that judges have in assuring that privileges are not abused: "If the trial judge is permitted a lee-way, he can prevent those disclosures of marital or professional secrets which needlessly shock our feelings of delicacy, but at the same time he can override these minor amenities when it appears necessary in order to secure the facts essential to do justice in the case before him."[6]

**B. Congress Has Specifically Declined to Codify Evidentiary Privileges**

In 1975, when the Federal Rules of Evidence were adopted, the Judicial Federal Rules Advisory Committee (FRAC) proposed that Congress codify traditional, generally accepted privileges. The FRAC draft included nine personal evidentiary privileges, including attorney-

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5 Mooney v. Sheriff of N.Y. County, 199 N.E. 415 (N.Y. 1936) (quoting 5 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2286).

6 Charles T. McCormick, *The Scope of Privilege in the Law of Evidence*, 16 TEX. L. REV. 447, 469-70 (1938).

client, therapist-patient, husband-wife, clergy-penitent, and trade secrets, among a few others. It did not include a reporter privilege.

In a most unusual action, Congress rejected FRAC's proposal to codify the traditional privileges,[7] stating in Rule 501 that privileges "shall be governed by the principles of common law" and developed under the judicial system "in light of reason and experience."[8] The Senate Report on this matter issued in 1974 states:

> "[O]ur actions should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case-by-case basis."[9]

The Chairman of the House Judiciary Subcommittee on Criminal Justice at the time noted with favor that, with regard to a reporter privilege, Rule 501

> "permits the courts to develop a privilege for newspaper people on a case-by-case basis. The language cannot be interpreted as a congressional expression in favor of having no such privilege, nor can the conference action be interpreted as denying to newspeople any protection they may have from state newsperson's privilege laws."[10]

The Supreme Court of the United States fully recognized what Congress had done. The Court has stated:

> In rejecting the proposed rules and enacting 501, Congress manifested an affirmative intention not to freeze the law of privilege. Its purpose rather was to provide the courts with the flexibility to develop the rules of privilege on a case-by-case basis and to leave the door open to change.[11]

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7 Congress has almost always deferred to the Federal Rules Enabling Act, 28 U.S.C. § 2071, which was enacted in 1938: "The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States District Courts . . . and courts of appeal." Under a law enacted in 1988, Congress must vote within seven months of the judicial introduction of a new privilege to change the rule. 28 U.S.C. § 2074 (1988).

8 FED. R. EVID. 501 (1975).

9 S. Rep. 93-1277, reprinted in 1974, U.S.C.C.A.N.

10 120 Cong. Rec. H 12253 (Dec. 18, 1974).

11 Trammel v. United States, 445 U.S. 40, 47 (1980).

### C. The Reporter Privilege Under S. 2831 Differs from Traditional Privileges

S. 2831, which would codify a reporter privilege in federal courts, would create a privilege with significant differences from the other traditional privileges. For example:

- Traditional privileges exist to keep information *confidential* after the privileged communication. A reporter privilege exists to *expose* information.[12]
- Traditional privileges are balanced with meaningful public policy-based exceptions. This bill provides for a near absolute privilege with regard to source information.
- "Clergymen, doctors, and lawyers – all holders of common law privilege – are especially trained and certified."[13] There is no corresponding qualification to hold a privilege under this bill, reporter or otherwise.
- Traditional privileges rest with the person who conveys the information, not the professional. A reporter privilege rests with a reporter, not a source.[14]

## II. CURRENT STATUS OF FEDERAL AND STATE REPORTER PRIVILEGES

### A. Most Federal Circuits Have Recognized a Common Law Reporter Privilege; All Use Meaningful Balancing Tests

Currently, most federal circuits have accepted that a reporter may have qualified common law immunity from answering subpoenas about source information. These circuits have implemented meaningful balancing tests so that judges can weigh a reporter privilege against the rights of the parties who are seeking justice in the courts.

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12 Branzburg v. Hayes, 408 U.S. 665, 726 n.2 (1972) (Stewart, J., dissenting).

13 Robert Zelnick, *Journalists and Confidential Sources,* 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 541, 551 (2005).

14 *See, e.g.*, Tofani v. State, 465 A.2d 413 (Md. 1983).

Several circuits, including the Fourth, Fifth, Ninth, Tenth, Eleventh, and D.C. Circuits, employ a defined balancing test. These tests generally assess whether (1) the information is relevant to the case; (2) the information can be reasonably obtained by alternative means; and (3) there is a legitimate interest in the information.[15]

Other circuits use a more general balancing approach. As the First Circuit held, "[n]ot all information as to sources is equally deserving of confidentiality," and a "fact-sensitive approach" is appropriate to assess "the shifting weights of the competing interests."[16] The Second, Third, Sixth, and Eighth Circuits follow this same non-formulaic approach.[17] The Seventh Circuit's test is whether enforcing a subpoena against a reporter is reasonable under the circumstances.[18]

These courts acknowledge, as Justice Powell wrote in his concurring opinion in the landmark case *Branzburg v. Hayes*, that any reporter privilege "should be judged on its facts by

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15 *See* LaRouche v. Nat'l Broad. Co., 780 F.2d 1134, 1139 (4th Cir. 1986); In re Bruce Selcraig, 705 F.2d 789, 792 (5th Cir. 1983); U.S. v. Caporale, 806 F.2d 1487, 1504 (11th Cir. 1986); Carey v. Hume, 492 F.2d 631, 633 (D.C. Cir. 1974); Zerilli v. Smith, 656 F.2d 705, 712-14 (D.C. Cir. 1981); Shoen v. Shoen, 5 F.3d 1289, 1296 (9th Cir. 1993) (The burden on the party is to demonstrate "a sufficiently compelling need for the journalists' materials to overcome the privilege. At minimum, this requires a showing that the information sought is not obtainable from another source."); Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 437 (10th Cir. 1977) (adding a fourth factor for the type of controversy).

16 Bruno & Stillman v. Globe Newspaper Co., 633 F.2d 583, 595, 597 (1st Cir. 1980).

17 Baker v. F&F Inv., 470 F.2d 778, 783-85 (2nd Cir. 1972) (upholding a qualified privilege for confidential journalist materials in civil litigation by distinguishing *Branzburg* as applying only to criminal matters) (*cert. denied,* 411 U.S. 966); Riley v. City of Chester, 612 F.2d 708, 715 (3d Cir. 1979) (holding that "journalists possess a qualified privilege not to divulge confidential sources" in both civil and criminal matters); *U.S. v. Cuthbertson*, 630 F.2d 139, 147-48 (3d Cir. 1980) ("Because the privilege is qualified, there may be countervailing interests that will require it to yield in a particular case, and the district court must balance the defendant's need for the material against the interests underlying the privilege to make this determination.") (*cert. denied*, 449 U.S. 1126 (1981)); In re Grand Jury Proceedings Storer Communications, Inc., 810 F.2d 580, 586 (6th Cir. 1987); Cervantes v. Time, Inc., 464 F.2d 986, 993 (8th Cir. 1972) (establishing a balancing test, but stating that courts should not "routinely grant motions seeking compulsory disclosure of anonymous news sources") (*cert. denied*, 409 U.S. 1125 (1973)).

18 McKevitt v. Pallasch, 339 F.3d 530 (7th Cir. 2003).

the striking of a proper balance between freedom of press and the obligation of all citizens to give relevant testimony with respect to criminal conduct."[19]

**B. S. 2831 Would Not Bring National Uniformity**

Reporter privileges among the states, which are not affected by this legislation, vary widely. For example, states differ on whether reporter immunity applies differently to civil and criminal cases; whether it applies differently if the reporter is a witness or party to the case; and whether it applies to confidential and non-confidential material in the same way. Many states specifically exempt libel and defamation suits from the reporter privilege.[20] In addition, while a minority of states offer the type of broad immunity at issue in the federal bills, most states adhere to some form of meaningful balancing test, either under statutory or common law.

Currently, thirty-two states and the District of Columbia have reporter immunity statutes for when reporters must comply with a subpoena for source identity. Among those states, Colorado, Florida, Illinois, New Mexico, North Carolina, South Carolina, and Tennessee apply a three-part test similar to the one followed by some of the federal circuits.[21] Statutes in Alaska, Louisiana, and North Dakota use a more general miscarriage of justice standard.[22]

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19 Branzburg v. Hayes, 408 U.S. 665, 710 (1972) (Justice Powell *concurring*).

20 *See, e.g.*, News-Journal Corp. v. Carson, 741 So. 2d 572, 575-76 (Fla. Dist. Ct. App. 1999); LA. REV. STAT. ANN. § 45:1454 (West 2004) (shifting burden to reporter in cases of defamation); MINN. STAT. §§ 595.021-025 (2005) (privilege does not apply in defamation action where the person seeking disclosure can demonstrate that the identity of the source will lead to relevant evidence on the issue of actual malice).

21 The test is generally whether the information (1) is material and relevant to the controversy for which the testimony or production is sought; (2) cannot be reasonably obtained by alternative means; and (3) is necessary to the proper preparation or presentation of the case of a party seeking the information. *See, e.g.*, FLA. STAT. ANN. § 90.5015 (West 2006); COLO. REV. STAT. ANN. § 13-90-119 (West 2006); *see also* 735 ILL. COMP. STAT. ANN. 5/8-901 to –909 (West 2006); N.M. STAT. ANN. § 38-6-7 (Michie 2006)(disclosure must be necessary to "prevent justice"); N.C. GEN. STAT. ANN. § 8-53.11 (2006); S.C. CODE ANN. § 19-11-100 (Law Co-Op. Supp. 2004); TENN. CODE ANN. § 24-1-208 (West's 2006).

22 *See, e.g.*, LA. REV. STAT. ANN. § 45:1453 (West 2004) (requiring judge to weigh the public interest of source disclosure against upholding the privilege); N.D. CENT. CODE § 31-01-06.2 (Matthew Bender 2004) (miscarriage of justice); ALASKA STAT. §§ 09.25.300-390 (Matthew Bender 2004) (miscarriage of justice).

Other states follow completely different approaches. For example, in California, there is no privilege, but an immunity from contempt of court.[23] Thus, other sanctions are not precluded, and a reporter may not use the shield to avoid taking the stand. And, in Ohio, a reporter can only be required to identify a source that gave factual information (not rumor or innuendo) for which the source had first-hand knowledge.[24] States also differ as to whether there must be an understanding of confidentiality with the source.[25]

Of the remaining states, seventeen have a common law reporter privilege. Twelve of them allow some form of protection for sources, including Hawaii, Idaho, Kansas, Massachusetts, Maine, Missouri, South Dakota, Vermont, Washington, West Virginia, and Wisconsin.[26] Iowa protects information, not sources. Wyoming has no reporter privilege.

## III. ADVERSE UNINTENDED CONSEQUENCES OF OVERLY BROAD REPORTER PRIVILEGES

Case law and, more importantly, life experiences have shown that there are significant adverse consequences when courts cannot provide any checks or balances in applying a reporter privilege in private sector disputes. Cases typically involve businesses, public figures, and those concerned about individual privacy. In these situations, there are no government First Amendment overtones.

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23 In re Willon, 55 Cal. Rptr. 2d 245, 253 (Cal. Ct. App. 1996).

24 Svoboda v. Clear Channel Communications, Inc., 805 N.E.2d 559, 566 (Ohio Ct. App. 2004) (*appeal dismissed*, 817 N.E.2d 104, 2004-Ohio-5723 (Ohio 2004)).

25 Compare Ulrich v. Coast Dental Serv., Inc., 739 So. 2d 142, 143 (Fla. Dist. Ct. App. 1999) with DEL. CODE ANN. TIT. 10 §4322 (2004).

26 Goldfield v. Post Publ'g Co., 4 Med. L. Rptr. 1167 (Conn. Super. Ct. 1978); In re Goodfader, 367 P.2d 472 (Haw. 1961); Marks v. Vehlow, 671 P.2d 473 (Idaho 1983); State v. Sandstrom, 581 P.2d 218 (Kan. 1978); In re John Doe Grand Jury Investigation, 574 N.E.2d 373 (Mass. 1991); State v. Ely, 954 S.W.2d 650 (Mo. Ct. App. 1997); Hopewell v. Midcontinent Broad. Corp., 538 N.W.2d 780 (S.D. 1995); State v. St. Peter, 315 A.2d 254 (Vt. 1974); Senear v. Daily J. Am., 618 P.2d 536 (Wash. Ct. App. 1980); State v. Ranson, 488 S.E.2d 5 (W. Va. 1997); Kurzynski v. Spaeth, 538 N.W.2d 554 (Wis. Ct. App. 1995).

### A. Protecting Illegally Obtained Information

Of most concern is that this bill would create an environment where a person's reasonable expectation of privacy could be violated without repercussion. This could occur even where Congress has enacted laws to require that the information be kept confidential, such as with medical records, tax returns, and intellectual property. When such information is stolen and leaked to a reporter, actual facts do not support the notion that the privilege is protecting the public's "right to know."

Geoffrey Stone, a professor at the University of Chicago Law School who favors a qualified reporter privilege, explained to the members of the Senate Committee on the Judiciary that "when the act of disclosure is itself unlawful, the law has already determined that the public interest cuts against disclosure."[27] Professor Stone drew parallels to the attorney-client privilege, which does not allow a person to consult a lawyer in order to commit the perfect murder. He also showed that the doctor-patient privilege does not allow someone to plot insurance fraud. "A rule that excluded all unlawful disclosures from the scope of the journalist-source privilege," he testified, "would be consistent with other privileges."[28]

An episode involving Representative (and now House Majority Leader) John Boehner offers a good illustration. A cell phone conversation Mr. Boehner had with then-Speaker Newt Gingrich was illegally recorded by private citizens and ultimately given to a Florida newspaper. "[L]ogic suggests," as the trial judge in the Boehner case wrote, "that a criminal cannot launder the stains off illegally obtained property simply by giving it to someone else, when that other

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[27] Senate Committee on the Judiciary, Reporter's Shield Legislation, Oct. 19, 2005, available at 2005 WL 1686970 (Testimony of Geoffrey Stone, Professor, University of Chicago Law School).

[28] *Id.*

person is aware of its origins."[29] Indeed, the Supreme Court of the United States foreshadowed this issue in *Branzburg*: "Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news."[30]

Other examples of privacy laws that could be violated with near impunity if S. 2831 were enacted include judicial protective orders, the Health Insurance Portability and Accountability Act ("HIPAA"), and the Uniform Trade Secrets Act, among many others. Earlier this year, Apple Computer was engaged in litigation over leaks of its trade secrets. The case was decided under California's very broad law, and Apple was not permitted to access the records of the blogger who posted the stolen trade secrets. Sources who steal and leak information from the private sector that is protected by federal or state laws or judicial orders should be prosecuted or fined, not protected by a reporter privilege. This conduct is completely different from whistle-blowing, which deserves protection.

The Freedom of Information Act, a fundamental weapon to promote the free flow of information, recognizes this distinction. It specifically does not apply at all to "trade secrets and commercial or financial information obtained from a person and privileged or confidential,"[31] or "personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[32]

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29 Boehner v. McDermott, 1998 WL 436897, *4 (D.D.C. July 23, 1998), *rev'd and remanded*, 191 F.3d 463 (D.C. Cir. 1999), *vacated and remanded*, 532 U.S. 1050 (2001), *remanded* 22 Fed. Appx. 16 (D.C. Cir. 2001).

30 *Id.* at 691-92.

31 *5 U.S.C. (a), §552 (F)(b)(4).*

32 *5 U.S.C. (a), §552 (F)(b)(6).*

Additionally, there is concern that by legitimizing the illegal activity of leaking trade secrets and other types of proprietary and personal information, Congress would be creating an incentive, even a roadmap, for people to engage in corporate espionage or invasion of an individual's privacy, and avoid legitimate, needed prosecutions.

**B. Blocking Defamation Suits by Public Figures**

Courts also have recognized that reporter privileges, unless they offer reasonable exceptions, would make it nearly impossible for public figures, such as elected officials, athletes, and Hollywood personalities, to succeed in defamation suits.

In suits brought by such public figures, plaintiffs must demonstrate actual malice, which requires clear and convincing evidence that the reporter had specific knowledge of falsity or recklessly disregarded the truth. [33] Proof is generally offered by showing that no reliable source existed, that the source was fabricated, that the reporter misrepresented the actual source, or that the reporter's reliance upon the source was reckless.

As the D.C. Circuit held, knowing the source's identity is the "logical, initial element of proof"; when a reporter is a party to the suit, "successful assertion of the privilege will effectively shield him from liability."[34] The Fifth Circuit concurred, stating that "[t]he only way that the [plaintiff] can establish malice and prove his case is to show that [the defendant] knew the story was false or that it was reckless to rely on the informant. In order to do that, he must know the informant's identity." [35]

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[33] *See* RESTATEMENT (SECOND) OF TORTS § 580 (1977). When plaintiff is a private person, the tort offers a remedy for injuries that result of the dissemination of false information. While there is no defined duty of care specific to the journalism, the Restatement states that the plaintiff must show that the reporter did not act in accordance with the skill normally possessed by members of the profession. *See id.* at cmt. g.

[34] Care v. Hume, 492 F.2d 631, 634, 637-38 (D.C. Cir. 1974).

[35] Miller v. Transam. Press, Inc., 621 F.2d 721, 726-27 (5th Cir. 1980).

## V. CONCLUSION

I hope that the Committee finds it helpful to have some light placed on an area of potential unintended consequences of this bill that have nothing to do with its clearly stated purpose or issues involving the First Amendment restraints on the power of government. Judges have handled the issue of privilege in purely private litigation well. Congress has respected the judicial branch's ability to balance the need for stability and to accommodate change in this important area. On behalf of the thousands of both large and small businesses, I suggest that this well-earned respect continue.

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

June 21, 2006

The Honorable Arlen Specter
United States Senate
Washington, D.C. 20510

Dear Senator Specter:

On behalf of the U.S. Chamber of Commerce, the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region, I am writing to express our opposition to S. 2831, the "Free Flow of Information Act" as it is currently drafted and to urge you to vote against this legislation in its current form.

The Chamber supports a vital and dynamic fourth estate. In fact, our concerns are not with reporters who legitimately report newsworthy information from sources, but with bad-actors who illegally disseminate confidential information who would be protected from exposure and liability under the current draft of the bill. We do not believe that this was the intent of the drafters of this legislation.

On its face, S. 2831 establishes a media/reporter privilege that would in most instances prevent parties involved in both criminal ***and civil litigation*** from being able to obtain information from a "reporter" who received or published confidential information. In its current form, S. 2831 may allow confidential information (including trade secrets and information ordered to be sealed by the courts) to be leaked to reporters by those with access to the information without there being any way in which to limit the damaging effects of such a disclosure or to discover the identity of the wrongdoer.

Unfortunately, this would limit the ability of companies to reasonably defend themselves from those who have purposefully and illegally leaked trade secrets, intellectual property and other types of protected and/or proprietary information. While a reporter's privilege is entirely appropriate in some circumstances, it should be subject to a reasonable balancing test along the lines of the tests enunciated by the federal courts. For example, the Fourth, Fifth, Ninth, Tenth, Eleventh and D.C. Circuit Courts of Appeal allow litigants to receive access to information held by reporters if the information is relevant to the litigation; it cannot be reasonably obtained by other means; and if there is a legitimate interest in the disclosure. Other circuits use somewhat different balancing approaches, but still do not allow for the excessive level of protection afforded by S. 2831.

It is also important to note that the elements of the balancing tests currently contained in S. 2831 and the associated "clear and convincing evidence" burden of proof will not work in the context of civil litigation. They would effectively make the privilege exceptionally difficult, if not virtually impossible, to breach. Furthermore, the privileges provided to other professions

(including attorneys, doctors and clergy) are not nearly as expansive and virtually absolute as the protections for reporters proposed in S. 2831; nor do attempts to breach those other privileges receive such a high burden of proof in most circumstances.

An additional critical flaw in the legislation is that the definition of the term "covered person" (i.e., a reporter) is drafted in such a way to drastically increase the scope of the legislation. Under S. 2831, someone could leak confidential and proprietary information to selected non-traditional journalists who have interests beyond the legitimate gathering and dissemination of news.

We would welcome the opportunity to continue working with the sponsors of S. 2831 and with the other members of the Committee. However, until the serious concerns raised in this letter can be adequately addressed, we must urge you to oppose the current version of the Free Flow of Information Act.

Sincerely,

R. Bruce Josten

○