Prepared Statement of Deputy Attorney General Paul J. McNulty
at the Senate Judiciary Committee Concerning
"Reporters' Privilege Legislation:
Preserving Effective Federal Law Enforcement"
September 20, 2006

Washington, D.C.

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.

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