U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

June 20, 2006

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on S. 2831, the "Free Flow of Information Act of 2006." S. 2831 would create a "journalist's privilege" to be asserted in a number of circumstances by a covered journalist or "communication service provider" against the compelled disclosure of either a source who provided information under a promise or agreement of confidentiality, or of information obtained while acting in a professional capacity. The Department opposes this legislation because it would subordinate the constitutional and law enforcement responsibilities of the Executive branch — as well as the constitutional rights of criminal defendants — to a privilege favoring selected segments of the media that is not constitutionally required.

Constitutional Concerns

The leading authority on the constitutional status of a journalist's privilege is *Branzburg v. Hayes*, 408 U.S. 665 (1972), which rejected arguments asserting the privilege on First Amendment grounds in the grand jury context. A recent Federal court of appeals decision on the issue, *In re Grand Jury, Judith Miller*, 438 F.3d 1141 (D.C. Cir. 2006), dismissed arguments questioning the force of *Branzburg*'s holding and applied *Branzburg* to reject the assertion of a First Amendment journalist's privilege. While some Federal courts have recognized a First Amendment-based journalist's privilege in civil cases — where the Government's law enforcement responsibilities are not directly affected, *see Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981) — the privilege proposed in the bill would extend to criminal proceedings, including grand jury investigations, and to the national security context.

In addition, the bill's definitions of privileged "journalist[s]" and "communication service provider[s]" do not exclude the agents and media outlets of hostile foreign entities, and therefore extend protection to these agents against the law enforcement efforts of the United States. For example, the definitions appear to encompass entities such as *Al-Manar* and its

reporters and cameramen. *Al-Manar* is the media outlet and television station of the terrorist organization Hezbollah. *Al-Manar* was placed on the Terrorist Exclusion List by the State Department in 2005 and more recently was designated a specially designated global terrorist by the Treasury Department pursuant to Executive Order 13224.

Because the broad privilege established by the bill is not grounded on a constitutional right, we object to any provision that subordinates to the privilege recognized constitutional imperatives, such as Presidential responsibilities under Article II and a defendant's rights under the Sixth Amendment.

President's Authority to Control Classified Information

Section 7 of the bill would permit disclosure where the information or record in question was obtained by the journalist as a result of his eyewitness observation of criminal conduct or the committing of criminal or tortious conduct by the journalist himself. There is an "exception to the exception," providing: "This section does not apply if the alleged criminal or tortious conduct is the act of communicating the documents or information at issue." As we understand it, this latter provision appears to apply to eyewitness or perpetrator information concerning a criminal disclosure of classified national security information, including, for example, the provision of such information to a journalist for an entity such as *Al-Manar*. Therefore, its effect would be to extend the protection of the privilege to this criminal disclosure of classified national security information. This provision could interfere with the President's constitutional authority to control classified national security information. *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).

National Security and Law Enforcement Responsibilities of the Executive Branch

Section 9(a)(1) of the bill would permit the Executive branch to obtain a journalist's testimony and information involving source identification only if the Government could demonstrate to a court, by "clear and convincing evidence," that the disclosure is "necessary to prevent an act of terrorism or to prevent significant and actual harm to the national security" *and only if* "the value of the information that would be disclosed clearly outweighs the harm to the public interest and the free flow of information that would be caused by compelling the disclosure." Similarly exacting standards are required to bypass the privilege under section 9(a)(2) in criminal prosecutions or investigations of unauthorized disclosure of classified information by a Federal employee. The conditions this provision requires the Government to satisfy in order to obtain information critical to national security place impermissible burdens on

the constitutional responsibilities of the President and the Executive branch.[1] *See generally Haig v. Agee*, 453 U.S. 280, 307 (1981) (stressing that "It 'is obvious and unarguable' that no governmental interest is more compelling than the security of the Nation" in rejecting former CIA agent's claim that passport revocation violated First Amendment rights).

Sixth Amendment

Under subsection 5(b) of the bill, defendants could obtain a journalist's testimony or evidence only if they proved to a court by clear and convincing evidence that, *inter alia*, the information sought was (1) "directly relevant" to guilt or innocence or to a "critical" sentencing fact; (2) "essential"; and (3) non-"peripheral"; and that failure to provide the information sought "would be contrary to the public interest." Thus, a defendant who established that the information or testimony sought was essential information that was directly relevant to innocence still could not obtain it if he could not also persuade a court, by clear and convincing evidence, that nondisclosure of the information would be "contrary to the public interest." This provision is inconsistent with the requirements of the Sixth Amendment.

The Sixth Amendment provides in relevant part: "In all criminal proceedings, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . [and] to have compulsory process for obtaining witnesses in his favor." As the Supreme Court has recognized, "This right is a fundamental element of due process of law." *Washington v. Texas*, 388 U.S. 14, 19 (1967). Although this right is not absolute, the government bears a heavy burden when it seeks to limit it by statute. As the Second Circuit has explained: "While a defendant's right to call witnesses on his behalf is not absolute, a state's interest in restricting who may be called will be scrutinized closely. In this regard, maximum 'truth gathering,' rather than arbitrary limitation, is the favored goal." *Ronson v. Commissioner of Correction*, 604 F.2d

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[1] In *Branzburg*, the Supreme Court described the relative weight to be accorded to law enforcement and national security interests in conflict with an asserted journalist's privilege:

> Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in this process. On the records now before us, we perceive 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.

408 U.S. at 690.

176, 178 (2d Cir. 1979) (State court's refusal to call psychiatrist to testify in support of prisoner's insanity defense violated Sixth Amendment right to compulsory process).

The conditions of subsection 5(b) exceed the standards imposed by courts that have given considerable deference to a reporter's privilege, based upon their view that the privilege is constitutionally required. *See, e.g., In re Shain*, 978 F.2d 850 (4th Cir. 1992) (reporter's privilege against compelled testimony in a criminal case rejected in the absence of government harassment or bad faith); *United States v. Criden*, 633 F.2d 346, 358-59 (3d Cir. 1980) (constitutional reporter's privilege can be overcome if the movant "demonstrates" and "persuades the court" that the information could not be obtained from other sources and such information is "crucial to the claim"; privilege claim rejected and testimony compelled). A district court recently described the balance to be struck between a constitutionally based 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). Last month, the United States District Court for the District of Columbia held that a defendant's Sixth Amendment right to obtain relevant and admissible evidence for his criminal trial could not be subordinated to an asserted reporter's privilege. *See United States v. Libby*, 2006 WL 1453084 (D.D.C., May 26, 2006).

Based upon the continuing validity of *Branzburg* and ensuing opinions such as *Miller*, we conclude that the reporter's privilege described in the bill is not required by the First Amendment. Moreover, on the contrary assumption that the asserted privilege has some constitutional underpinning, the bill's current subordination of criminal defendants' Sixth Amendment rights to the privilege is unsustainable.

Other Concerns

Section 3

The bill's critical definition of "journalist" may be challenged legitimately as both overinclusive and underinclusive. It is overinclusive because, as indicated above, it includes hostile foreign entities as well as a wide-ranging category of entities whose ability to invoke the privilege would present obstacles to efficient law enforcement. However, from the standpoint of free speech principles, the definition could also be considered underinclusive because its discrimination between those who write and disseminate news for financial gain and pursuant to an employment or contractual relationship, on the one hand (the protected segment); and those who do so on an uncompensated or unaffiliated basis, on the other (the unprotected segment), is not rationally related to the purpose of the bill. We question whether a definition that effectively reconciles these conflicting considerations is possible as a practical matter.

We also recommend that section 3 define a "promise or agreement of confidentiality" to mean an assurance of confidentiality granted only upon a journalist's reasonable belief that the assurance is essential to gather news that is of significant public interest and for which reasonable alternative sources do not exist. This definition should exclude an assurance given to a source where the journalist has reasonable cause to believe (1) that the disclosure of the information is itself a crime; or (2) that the information being disclosed will place individuals in significant risk of serious bodily injury or will pose a significant risk to national security if not provided to law enforcement or other proper authorities without further delay.

Section 4

Section 4 of the bill ("Compelled Disclosure at the Request of Attorneys for the United States in Criminal Proceedings") would require the Department of Justice to demonstrate to a court "clear and convincing evidence" of a number of factors before it could compel disclosure in Federal criminal proceedings. Initially, we note that there is no evidence that the Department of Justice has abused its subpoena power to obtain source information. Indeed, since 1991, only 4.9% of the media subpoena requests that the Department's Criminal Division has processed were for source information, and only 12 such subpoenas have been issued in the last 14 years.

Additionally, the "clear and convincing" standard is a challenging one to meet, more rigorous than a "preponderance of the evidence," though less rigorous than "beyond a reasonable doubt." *See, e.g., Addington v. Texas*, 441 U.S. 418, 431-32 (noting that the clear and convincing evidence standard is a "middle level of burden of proof"). The bill would make source information more difficult to obtain than, for example, evidence of governmental misconduct sought to be protected by the deliberative process privilege. *See United States v. Lake County Bd. of Com'rs*, 233 F.R.D. 523, 526 (N.D. Ind. 2005) (explaining that the deliberative process privilege can be overcome by a "sufficient showing of a particularized need to outweigh the reasons for confidentiality").

This standard might severely restrict our ability to gain access to the information. It would require the Department to establish that there were reasonable grounds, based upon information from an alternative, independent source, to believe that a crime had occurred. If knowledge of the crime came from only a single source, we might not be able to compel disclosure.

Section 4 also severely conflicts with statutory, court-imposed, and operationally essential protections for sensitive grand jury and other criminal investigative information, by replacing confidential internal Department of Justice reviews of investigative background information (*i.e.*, the Attorney General's guidelines for the use of compulsory process against the news media) with public adversarial judicial proceedings.

Section 4 explicitly should permit compelled disclosure where the source waives the privilege.

We also note that paragraph 4(b)(2) of the bill would require that the Government demonstrate to a court, by clear and convincing evidence "to the extent possible, that the subpoena avoids requiring production of a large volume of unpublished material and is limited to the verification of published information and surrounding circumstances relating to the accuracy of the published information." Depending on how courts applied this provision, it could induce individuals to use journalists to shield documents from production.

Further, paragraph 4(b)(3) would require the Government to give reasonable and timely notice of its demand for documents. While this generally may not be problematic, the provision makes no allowance for exigent circumstances making such notice unworkable.

Finally, we note that subsection 4(a) of the bill states that it applies to "a journalist, any person who employs or has an independent contract with a journalist, or a communication service provider." However the exception provided in section 4(b) omits "communication service provider." This may be a drafting oversight.

Section 5

The provision in section 5 of the bill governing disclosure at the request of a criminal defendant is notably more lenient in favor of disclosure than that in section 4 governing disclosure at the request of attorneys for the United States in criminal proceedings. Specifically, section 5 omits two criteria applicable to requests by Government attorneys. If the intent is to balance the interests of the criminal justice system against the public interest in a privilege against disclosure, we believe that whatever standard is to apply should apply both to defendants and to the attorneys for the Government.

Section 6

Section 6 would create a privilege in civil litigation for journalists to refuse to divulge confidential sources, except upon a showing by a "clear and convincing evidence" standard of certain factors listed in subsection 6(b) of the bill. The statutory criteria for the civil privilege in section 6 of the bill ("Civil Litigation") appear to have been modeled in large part on the criteria contained in the Attorney General's guidelines for the use of compulsory process against the news media. *Cf.* 28 C.F.R. § 50.10(f)(2)-(4) and (6) with D.R. 850, § 6(b)(1)-(2) and (4)-(6). However, there are several potentially important differences, all of which are troubling.

First, the administration of the Attorney General's guidelines is not subject to judicial review, leaving the application of these criteria to the considered judgment and expertise of the Attorney General himself. By contrast, under section 6, the criteria would be applied by the

courts, and the Attorney General's judgment about, for example, the need for the information would receive no deference. We see no reason to displace the Attorney General's judgment with that of the judiciary in this fashion.

Second, section 6 would require the district court to find that all of the designated criteria were established by "clear and convincing evidence." That evidentiary standard compounds our first concern by placing an unduly heavy burden of justification on the Government.

Third, even after all of the criteria that derive from the Attorney General's guidelines were met, section 6 would require an additional showing — again, under the "clear and convincing evidence" standard — that "nondisclosure of the information would be contrary to the public interest, taking into account both the public interest in compelling disclosure and the public interest in newsgathering." *See* §6(b)(3). This public-interest criterion is not found in the Attorney General's guidelines because the existing criteria are designed to limit the use of compulsory process to cases where the public interest so demands. Adding an additional public-interest hurdle is at best superfluous and at worst harmful, since it could lead a court to deny disclosure even when the information was essential to the successful completion of the case and the information could not be obtained from other sources. Indeed, the breadth of the criterion might authorize courts to act upon undisclosed and potentially irrelevant factors (as opposed to the more specific considerations set forth in the Attorney General's guidelines).

Fourth, it is unclear whether the exception for cases in which the journalist is an eyewitness or a participant in criminal or tortious conduct, *see* § 7, actually would limit the scope of the privilege in section 6. The section 6 privilege is confined to the identity of confidential sources and the contents of confidential information, and it is hard to imagine how that kind of information would be at issue when a journalist was being asked to testify about what he himself saw or did.

Fifth, the exception for prevention of death or substantial bodily harm (*see* § 8) would require a showing that death or harm was otherwise "reasonably certain" to result. "Reasonable certainty" seems an extraordinarily and unduly demanding standard for the prospective loss of life or prospective serious injury.

The foregoing discussion relates to the application of section 6 to civil litigation involving the Federal government. The statutory privilege also would apply to civil suits between private parties. We note that most Federal courts have recognized a qualified common law reporter's privilege in civil cases, *see, e.g., Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981), and it is not obvious that the common law privilege has proven inadequate to protect legitimate newsgathering interests.

Section 7

Section 7 of the bill ("Exception for Journalist's Eyewitness Observations or Participation in Criminal or Tortious Conduct") would create an exception from the shield for crimes witnessed by the journalist. According to this section, the exception "does not apply if the alleged criminal or tortious conduct is the act of communicating the documents or information at issue." Therefore, if the crime at issue was the disclosure of the information to the journalist, then the shield would attach and the journalist would not have to disclose the source unless the Government satisfied the requirements of section 4 ("Compelled Disclosure at the Request of Attorneys for the United States in Criminal Proceedings").

This provision would virtually immunize a journalist from performing the civic duty that every other citizen is required to perform: serving as a witness to crime. Further, by excepting "disclosure" crimes, the provision would permit the journalist to participate intentionally in a violation of the criminal laws of the United States — indeed, as the recipient of the disclosure, to cause the crime to occur — with impunity. Even the more highly recognized and protected attorney-client privilege does not apply where the attorney participates in crime. We note specifically that this provision would hinder investigations of leaks of classified information.

Section 8

Section 8 of the bill ("Exception to Prevent Death or Substantial Bodily Injury") provides that a journalist has no privilege against disclosure to the extent the information is "reasonably necessary to stop or prevent reasonably certain (i) death or (ii) substantial bodily harm". We believe that the standard of "reasonably certain" death or substantial bodily harm is unreasonably difficult to meet.[2] We also believe that the exception should apply not only to information necessary to prevent death or bodily harm, but to prevent property damage as well.

Thank you for the opportunity to present our views. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us

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[2]We recognize that this is the standard used in Rule 1.6 of the ABA Model Rules of Professional Conduct.

that from the perspective of the Administration's program, there is no objection to submission of this letter and enactment of this legislation would not be in accord with the President's program.

Sincerely,

William E. Moschella

William E. Moschella
Assistant Attorney General

cc: The Honorable Patrick J. Leahy
Ranking Minority Member