August 22, 2008

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

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

Dear Senator Reid and Senator McConnell:

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

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

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

Some of the problematic provisions include:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 6 Still Threatens To Weaken National Security Investigative Tools

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

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

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

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

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

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

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

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

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

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

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

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

Additional Problems

Section 2:

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

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

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

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

Section 4:

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

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

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

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

Section 8:

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

No assurance of obtaining the information:

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

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

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

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

Sincerely,

Michael B. Mukasey
Attorney General

J. M. McConnell
Director of National Intelligence

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

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

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

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