U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

JUL 31 2007

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

Dear Ranking Member Smith:

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

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

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

---

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

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

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

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

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

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

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

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

Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

The Bill Transfers Core Executive Functions to the Judiciary

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

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

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

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

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

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

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

H.R. 2102 Improperly Limits the Power of Judges and Will Impair the Judicial Process

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

Uniform Standards Purpose

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

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

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

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

Sincerely,

Brian A. Benczkowski
Principal Deputy Assistant Attorney General

cc: The Honorable John Conyers
Chairman

The Honorable Mike Pence
Member

The Honorable Rick Boucher
Member