April 2, 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 about S. 2035, the "Free Flow of Information Act," a bill which we — and our colleagues in the Intelligence Community and in Federal law enforcement — believe is both unwise and unnecessary: unwise because the statutory privilege created by this legislation would work a significant change in existing Federal law with potentially dramatic consequences for our ability to protect the national security and investigate other crimes; and unnecessary because all evidence indicates that the free flow of information has continued unabated in the absence of a Federal reporter's privilege. We acknowledge the important role that the media plays in our society. The scope of this bill, however, goes far beyond its stated purpose and could severely frustrate the Government's ability to investigate and prosecute those who harm national security. *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 most problematic provisions include:

- The circumstances where the bill would permit the Government to obtain testimony, documents, and other information from journalists related to national security investigations are far too restrictive. In the vast majority of leak cases, for example, the extraordinary burden placed on the Government could be met, if at all, only by revealing even more sensitive and classified information.

- Inexplicably, the purported national security exception could be read as not covering leaks of classified information. Moreover, the purported exception only applies prospectively to prevent acts of terrorism and significant harm to national security. It does not apply to investigations of acts of terrorism and significant harm to national security that have already occurred.

- The bill cedes to judges the authority to determine what does and does not constitute "significant and articulable harm to the national security." It also gives courts the authority to override the national security interest where the court deems that interest insufficiently compelling—even when harm to national security has been established.

- The bill, apparently inadvertently, implicates critical national security authorities far beyond subpoenas—including authorities under the Foreign Intelligence Surveillance Act —potentially depriving the Government of access to vital intelligence information necessary to protect the Nation.

- One need not even be a professional journalist in order to derive protections from this bill. It effectively provides a safe haven for foreign spies and terrorists who engage in some of the trappings of journalism but are not known to be part of designated terrorist organizations or known to be agents of a foreign power — no matter how closely linked they may be to terrorist or other criminal activity.

In addition to these serious flaws, discussed in detail below, the burdens imposed by this legislation would have consequences beyond the national security context, and could hamper the ability of Federal law enforcement to investigate and prosecute serious crimes like gang violence and child exploitation.[1] We also note that although some amendments to the bill were made in Committee to address our concerns, the bill reported out of the Senate Judiciary Committee on October 22, 2007 remains fatally flawed.

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

Section 2: Would Encourage More Leaks of Classified Information.

Section 2 is the core of this legislation, setting forth the "Conditions for Compelled Disclosure from Covered Persons." It establishes a multipart test the Government must meet — to the satisfaction of the given Federal judge before whom a journalist has chosen to bring his or her claim — before it can compel testimony or evidence from a covered person.

Specifically, section 2 would require the Government to demonstrate "by a preponderance of the evidence" (1) that there are reasonable grounds to believe a crime has occurred; (2) that the Government has "exhausted all reasonable alternative sources (other than a covered person) of the testimony or document" it seeks; (3) that the information the Government seeks is "essential" to the investigation or prosecution; and (4) that nondisclosure of the information would be contrary to "the public interest," taking into account both the need for disclosure and "the public interest in gathering news and maintaining the free flow of

[1]We refer you to earlier views letters from the Department of Justice where these and other non-national security criminal enforcement concerns are addressed.

information." The Government must carry this burden in a proceeding before a Federal judge, having provided notice and an opportunity to be heard to the "covered person" from whom it seeks the information in question. This balancing test, to be applied by different Federal judges across the country, is a recipe for confusion and inconsistency.

The implications of this provision for Federal law enforcement are dramatic—and nowhere are they more dramatic than in cases involving leaks of classified information. For example, section 2 sets forth a heightened evidentiary burden in leak cases, requiring the Government, in addition to satisfying the multifactor test set forth above, to also establish that (1) the leaked information was "properly classified"; (2) the individual who leaked the information had "authorized access to such information"; and (3) the leak in question has caused or will cause "significant and articulable harm to the national security."

The decision to impose a heightened evidentiary standard makes it difficult to avoid drawing an inference that the bill's supporters believe that harming national security is somehow more acceptable or tolerable when done via a leak than when it is done in some other way. We can assure you that this is emphatically not the case — and by imposing additional burdens on investigators and prosecutors charged with identifying and bringing to justice those who improperly disclose classified information, this bill will ensure that we will have more such leaks, and fewer prosecutions of those who do so.

Meanwhile, taken individually, each part of this three-prong test poses serious and potentially fatal problems for Government agents and prosecutors investigating leaks of classified information. Taken together, they could make it virtually impossible for the Government to investigate such leaks. First, by requiring some showing that the leaked information was "properly classified," the bill raises the troubling prospect of every leak investigation becoming a mini-trial over the propriety of the Government's classification decision. Second, the requirement that there be a showing that the leak came from "a person with authorized access to such information" leaves prosecutors in an inescapable bind: How can the Government or the court ever demonstrate that an individual whose identity is unknown nonetheless had "authorized access" to classified information? Third, in order to demonstrate that the leak in question "has caused or will cause significant and articulable harm to national security," the Government will often be required to introduce still more sensitive and classified information, potentially compounding the harm of the initial leak.

The cumulative effect of this evidentiary burden would cripple the Government's ability to identify and prosecute leakers of classified information, and in the process would encourage more leaks that aid our enemies and threaten national security. Indeed, the bill essentially serves as a road map to leaking classified information. In our estimation, this alone renders this bill unacceptable, and we are not alone in this belief. In a letter to Senate Leadership dated January 23, 2008, the Intelligence Community expressed agreement that this bill, if enacted, could seriously undermine our ability to aggressively investigate and, where appropriate, prosecute leaks of classified information that threaten our national security.

Finally, although the discussion about this bill has focused on grand jury subpoenas to reporters, the bill is in no way limited to subpoenas. Instead, by its terms, the bill implicates core national security authorities, including those set forth in the Foreign Intelligence Surveillance Act ("FISA"). While the bill creates a mechanism, discussed below, for the Government to go to court to obtain a subpoena for source information from a journalist protected by the privilege, it includes no such mechanism for the Government to obtain permission to use core investigative tools when the privilege is implicated. This gap would potentially undermine critical tools in the War on Terror, such as FISA and pen register and trap and trace authorities, and in the process deprive the Government of vital information necessary to protect national security.

Section 5: Would Inhibit Our Ability to Investigate and Prosecute Harm to National Security.

Supporters of the bill have taken pains to emphasize that section 5 of the bill provides an exception for cases involving the national security, and that the exception is sufficient to address the national security concerns we and others have expressed about the bill. We respectfully disagree.

On its face, section 5 of the bill provides an exemption from the onerous evidentiary burden set forth in section 2 of the bill in cases where the Government seeks information that a court determines (again by a preponderance of the evidence) "would assist in preventing" either (1) an act of terrorism or (2) "other significant and articulable harm to national security that would outweigh the public interest in newsgathering and maintaining a free flow of information to citizens."

As an initial matter, we find it dismaying that the bill could be read to exclude leaks of classified information — information whose disclosure *by definition* is capable of causing harm to the national security — from the purported national security exception, and instead arguably imposes an even stronger version of section 2's evidentiary burden on prosecutors seeking information about such leaks. This uncertainty will lead to time-consuming litigation over which standard to apply in situations where prospective harm to national security could hang in the balance.

Putting to one side this apparent exclusion of leaks from the bill's national security exception, section 5 of the bill is deficient for a number of other reasons. First, the national security exception only applies prospectively, not to cases involving terrorist acts and other harm to the national security that have already occurred. This bill is geared toward September 10, 2001, but not to September 12, 2001. We strongly disagree with this approach.

Second, rather than a presumption in favor of allowing prosecutors to obtain information that is necessary to prevent "significant and articulable harm to national security," the national security "exception" would still allow a given Federal district court judge, in his or her discretion, to shield disclosure based on the court's own view of what constitutes harm to the

national security, on the one hand, and the public's interest in "newsgathering and maintaining a free flow of information," on the other. These amorphous factors will defy consistent or coherent balancing. Indeed, we would submit that the open-ended nature of the bill's balancing tests virtually guarantees that there will be as many different interpretations of its terms as there are Federal judges — with serious consequences not just for law enforcement but for journalists and the public at large.

Moreover, in so doing, section 5's purported exception is indicative of a broader problem that infects the entire bill: it transfers to the courts such core determinations as when investigative subpoenas are necessary and what constitutes harm to the national security. Not only is this shift made, but in many cases, the Government will need to make its showing at an early stage of investigation. This is precisely backwards. In the context of confidential investigations and Grand Jury proceedings, determinations regarding what information is "essential" and what constitutes harm to the national security 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, "[I]t 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 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). Federal judges simply lack the training and expertise necessary to weigh the sort of national security considerations included in this bill. This is by no means a deprecation of the former colleagues of one of the undersigned, but rather a recognition — and one shared by many judges — that the Executive branch is better equipped to make these sensitive determinations.

Third, even assuming that bill's open-ended factors can be balanced, there remains the issue of what evidence a court will require in order to effectively conduct the balancing test. For its part, the Government presumably will be required to provide evidence regarding the impending terrorist attack or harm to the national security, and thus would once again be in the position of having to choose between revealing sensitive information in open court, or abandoning efforts to obtain critical information that could prevent terrorist attacks and other significant threats to national security. Even if the Government makes that choice, and decides to provide the information necessary to conduct the balancing test, what evidence will the court place into the balance on the side of the journalist? Will journalists provide the court with the information sought by prosecutors and, if not, how will the court be able to effectively weigh the competing sides of the balancing test?[2]

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[2]Supporters of the legislation often characterize the bill as a compromise between the interests of law enforcement on the one hand and the interests of the news media on the other. It is clear, on the face of the bill, what compromises law enforcement is being asked to make: The bill would force prosecutors to cede control over core determinations – including determinations regarding what evidence to seek and when and how to go about seeking it – to the court. Less clear, however, are the compromises the legislation would require from journalists. Indeed, the

Finally, the vague and subjective standards in section 5 and elsewhere in the bill are an invitation to litigation over whether certain information sought by the Government falls within section 5 (or one of the other exceptions in the bill) or section 2, and over how to interpret and apply the particular terms of the bill. And yet despite the inevitability of litigation over its terms — and the likelihood that such litigation could involve cases of the utmost importance and urgency — the bill contains no provision for expedited judicial review.[3] The resulting delays could have dire consequences when information is needed to address an immediate threat.

Section 6: Undermines National Security Investigations

Section 6 also has the capacity to wreak havoc on national security and other investigations. This section provides that in the event certain potentially broad categories of information are requested from a communications service provider (broadly defined), notice and an opportunity to be heard must be provided to a covered person. This provision could be inadvertently implicated in a wide range of investigations. For instance, the section is fundamentally incompatible with the Foreign Intelligence Surveillance Act (FISA). The requirements contained in section 6 would make it difficult, if not impossible, to obtain a FISA Court order to conduct electronic surveillance on a foreign power or agent of a foreign power. Moreover, although it does allow for notice to be delayed in certain circumstances, the exception does not extend to national security investigations, and the Government may not obtain the information while notice is delayed. It is therefore a realistic probability that certain national security investigations would be unnecessarily derailed by this provision.

Section 8: Overly Broad Definition of 'Journalism' Can Include Those Linked to Terrorists and Criminals.

This section, which sets forth the definitions of the terms used in the bill, makes clear that the protections set forth in this legislation extend to an astonishingly broad class of "covered persons." Section 8 defines "covered person" to include not just "a person who is engaged in journalism" but also that person's "supervisor, employer, parent company, subsidiary, or affiliate."

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legislation fails to even provide any assurance that, should the Government carry its burden under this legislation and convince a court to order disclosure of the information, the journalist will not simply defy the court and refuse to turn over the information — which 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.

[3] We also note that the bill provides absolutely no mechanism by which a court could receive and consider classified and other sensitive national security information ex parte and under seal, so as to ensure that such information is not disclosed, resulting in additional harm to the national security.

The bill further defines "journalism" as "the regular 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." There is no requirement that an individual be engaged in journalism as a livelihood in order to avail himself of the reporter's privilege this bill would create.

The bill purports to address law enforcement concerns by attempting to carve out agents of foreign powers and designated terrorist organizations from the definition of "covered person." Many terrorist media, however, are neither "designated terrorist organizations" nor covered entities under the bill. Thus, all individuals and entities who "gather" or "publish" information about "matters of public interest" but who are not technically designated terrorist organizations, foreign powers, or agents of a foreign power, will be entitled to the bill's protections — no matter how closely linked they may be to terrorists or other criminals.

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In closing, we reiterate our belief that this bill is both unnecessary and unwise. It is unwise for the reasons that we have laid out above — and for the reasons that we and our colleagues in the intelligence and law enforcement communities have set forth in numerous views letters regarding this and earlier versions of the reporter's shield legislation.

It is unnecessary because, in the more than thirty-five years since the Supreme Court held in *Branzburg v. Hayes*, 408 U.S. 665 (1972), that there is no First Amendment reporter's privilege to avoid a grand jury subpoena issued in good faith, there has been a dramatic increase in the flow of information available to the public on every conceivable topic through an ever-growing number of outlets. More than three decades of experience to the contrary notwithstanding, supporters of a statutory reporter's privilege are now making essentially the same arguments the litigants in *Branzburg* made. Now, as then, we are told that, without a reporter's privilege, journalists' sources will dry up, important news will go unreported, and the country will suffer as a result. Indeed, supporters of this legislation often punctuate this cautionary tale about the necessity of a Federal reporter's privilege by emphasizing the critical role played by confidential sources in informing the public about a long line of historic events — from Watergate and the Pentagon Papers to Enron and Abu Ghraib. There can be no doubt that confidential sources did in fact play a key role in bringing those stories (and countless others) to light. But there likewise can be no doubt that those confidential sources came forward even though *there was no Federal media shield law* in place to provide them with the protection that, if this bill's supporters are to be believed, is essential to ensuring that such stories continue to be reported.

For the reasons set forth above, and others expressed by the Directors of National Intelligence, Central Intelligence Agency, Defense Intelligence Agency, Federal Bureau of Investigation, and others, we strongly urge you to reject the Free Flow of Information Act in its

current form. 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 report.

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