U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

September 26, 2007

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
U.S. Senate
Washington, D.C. 20515

Dear Chairman Leahy:

This letter provides the views of the Department of Justice on S. 2035, the "Free Flow of Information Act of 2007" ("FFIA"). The FFIA would provide a "journalist's privilege" to an extremely broad class of "covered person[s]" protecting against not just the disclosure of confidential source information but also testimony or any document possessed by such covered persons relating to protected information. The Department strongly opposes this legislation because it would impose significant limitations upon—and in some cases would completely eviscerate—the ability of federal prosecutors to investigate and prosecute serious crimes, while creating significant national security risks.

The FFIA 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 views letters and in testimony apply to the current bill, and so we commend those earlier

[1] *See, e.g.*, Department of Justice Letter to Rep. Lamar Smith dated September 11, 2007 on H.R. 2102; Department of Justice Letter to Rep. Lamar Smith dated July 31, 2007, on H.R. 2102; Department of Justice Letter to Rep. Lamar Smith dated July 20, 2007, on H.R. 2102; Testimony of Assistant Attorney General Rachel L. Brand, Hearing on "The Free Flow of Information Act of 2007," House Judiciary Comm. (June 14, 2007); Testimony of Deputy Attorney General Paul J. McNulty, Hearing on "Reporters' Privilege Legislation: Preserving Effective Federal Law Enforcement," Senate Judiciary Comm. (Sept. 20, 2006); Department of Justice Letter to Sen. Specter dated June 20, 2006, on S. 2831; Testimony of Principal Deputy Assistant Attorney General Matthew W. Friedrich, Hearing on "Examining the Department of Justice's Investigation of Journalists Who 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).

statements of the Department's views to your attention as a supplement to this letter. In this letter, the Department wishes to focus on the following six objections, set out more fully below:

1. The FFIA's definition of a journalist appears to provide protections to a very broad class of individuals and would raise significant obstacles to law enforcement.

2. The FFIA would make it extremely difficult 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;

3. The FFIA would impinge on a criminal defendant's constitutional right under the Sixth Amendment to subpoena witnesses on his behalf;

4. The FFIA unconstitutionally transfers core Executive branch powers and decision-making to the Judiciary;

5. The FFIA also threatens to limit other judicial powers.

6. The FFIA's provisions for protecting information in the possession of "communications services providers" fail to define the types of "business transactions" to which they apply and could dangerously limit the ability of courts to delay notice of a request.

For all of these reasons and those that follow, the Department strongly opposes The FFIA.

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 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 requesting approval for subpoenas 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:

[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. While the nineteen source-related matters referenced above do not include any media subpoenas issued in matters from which the Attorney General was recused, the only recusal matter in which subpoenas were issued involved facts where all four federal judges to review the subpoena—the Chief Judge of the District Court and the three judge panel of the appeals court—found that the facts of the case warranted enforcement of the subpoena under any version of a qualified privilege, no matter how stringent. *See In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1150 (D.C. Cir. 2006). In that same case, it is important to note, the Special Prosecutor adhered to—and was found by the Court to have complied with—the Department's guidelines as set forth at 28 C.F.R. § 50.10. *See In re Special Counsel Investigation*, 332 F. Supp.2d 26, 32 (D.D.C. 2004) ("Assuming, *arguendo*, that the DOJ Guidelines [for the issuance of subpoenas to the news media] did vest a right in the movants in these cases, this court holds that the DOJ guidelines are fully satisfied by the facts of this case as presented to the court in the *ex parte* affidavit of Patrick Fitzgerald.")

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

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 no evidence that such a change is warranted. Supporters of this legislation 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*—all of which has come without the intervention of any Federal media shield law—it is difficult to dispute the Court's conclusion. Information now flows far more freely and widely—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 as groundless today as they were 35 years ago. Media shield legislation, as then-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."

The FFIA's Definition of "Covered Person" Is Extremely Broad

The latest version of the Senate bill would extend a "journalist's" privilege to an unacceptably broad class of "covered person[s]." As the Department has noted with respect to previous media shield bills, the privilege provided by this legislation 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. Under section 8(2) of the bill, a "Covered person" means "a person who is engaged in journalism and includes a supervisor, employer, parent, subsidiary, or affiliate of such person." Section 8(5) of the bill then broadly defines "journalism" to mean "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."[3]

Under this expansive definition, anyone who publicly disseminates any news or information that he has regularly written or gathered on any matter of public interest constitutes a "covered person." Nationality, affiliation, occupation, and profession are irrelevant to this sweeping, worldwide privilege.

For example, a terrorist operative who videotaped messages from Osama bin Laden for dissemination on the internet or on Al Jazeera would clearly be a "covered person" entitled to invoke the bill's privilege, because he would be engaged in recording news or information that concerns international events for dissemination to the public. Similarly, the media arms of designated terrorist organizations, such as *Al-Manar* (the media outlet for Hezbollah) would clearly fall within the class of "covered persons" protected by this legislation. It is no exaggeration to say that this open-ended definition extends to many millions of persons in the United States and abroad—including those who openly wish to do us harm.

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[3] While Section 7 of the FFIA would appear to provide an exception to the privilege for "information identifying a source who provided information without a promise or agreement of confidentiality," the language of that section may be too vague and equivocal to prove effective. Section 7, for example, makes no provision for an exception to the privilege in cases where the source has freed the journalist from an agreement to maintain the source's anonymity. Nor does Section 7 require that the agreement between the journalist and his source be explicit. In the absence of such a requirement, the exception provided by Section 7 is illusory.

We emphasize that the definition of "covered person" contains no exception whatsoever for hostile foreign media or individuals that are either formally or informally associated with or employed by—or in some cases (e.g., *Al Manar*) actually constitute—foreign terrorist organizations or states. Nor do the provisions of Section 5 of the bill, which purport to provide an exception for terrorist activity, effectively address this grave concern. Rather than firmly and clearly excluding such hostile entities from the bill's privilege altogether, section 5 merely provides a narrow and grudging exception from Section 2's privilege that the Government must bear the burden of proving the specific factual elements of "terrorism" or "significant harm to national security" by a preponderance of the evidence to the satisfaction of a federal judge. In addition, for the "significant harm to national security" prong, Section 5 requires the Government to prevail on the entirely subjective and arbitrary question of whether the harm in question outweighs the "public interest in newsgathering." These provisions are entirely inadequate to address the profound national security risks posed by extending the bill's sweeping privilege to an unlimited and unknowable range of terrorist-related media entities that constitute "covered person[s]" under the bill.

Moreover, the bill's definition of "covered person" could also include social networking sites like MySpace.com, which are engaged in the business of "publishing information that concerns local, national, or international events or other matters of public interest for dissemination to the public." 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, the FFIA 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. In addition, a plain reading of the statute suggests that the social networking site itself would be considered a "covered person" by publishing that reporting.[4] Under either interpretation, law enforcement could face serious hurdles in pursuing the lead, including the possibility that gang members will be alerted to the existence of an ongoing investigation.

In an age where literally millions of persons engage in journalism via weblogs and other internet formats, providing a reasonable and workable definition of who is entitled to invoke a "reporter's privilege" is a very difficult, if not intractable problem. If the definition is broadly worded, as in the current legislation, it will inevitably sweep within its protection hostile foreign entities as well as others whose ability to invoke the privilege would frustrate law enforcement. If, however, the definition is more narrowly tailored, it would be open to almost-certain challenge on First Amendment grounds from individuals or entities denied the privilege.

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[4] As discussed below, MySpace and sites or services like it (including those that "host" terrorist or terrorist-supporting websites) would also qualify as "communications service providers" under Section 8(1) of the bill, thereby entitling them to the protections outlined in Section 6 of the bill.

However the legislation ultimately defines a "covered person," the definition itself will almost certainly be the subject of litigation, further ensuring that important criminal investigations and prosecutions will be delayed. As we stated in our June 20, 2006 views letter, "We question whether a definition that reconciles these conflicting considerations is possible as a practical matter."

The FFIA Would Make It Virtually Impossible To Prosecute "Leak" Cases And Difficult To Prosecute Other Types Of Cases In Certain Circumstances, Including Terrorism Cases

The broad scope of the proposed bill's definition of "covered person" is all the more disturbing in light of the rigorous test that the FFIA requires the government to meet before issuing a subpoena to a covered person. The bill would require the government to demonstrate "by a preponderance of the evidence" that it has (1) "exhausted all reasonable alternative sources (other than the covered person) of the testimony or document"; (2) that the information sought is "essential" to the investigation or prosecution; and (3) "that nondisclosure of the information would be contrary to the public interest."[5] The FFIA imposes an additional burden in cases involving the unauthorized disclosure of classified material, requiring the government to demonstrate—again, "by a preponderance of the evidence"—that the individual who disclosed the classified information had "authorized access to such information" and that the "unauthorized disclosure has caused significant, clear, and articulable harm to the national security."

It is important to note at the outset how dramatic and fundamental a change this legislation would work on existing law and procedure governing the issuance of a subpoena to a member of the news media. Under existing law—specifically, Federal Rule of Criminal Procedure 17—the recipient of a subpoena can 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 a radical 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.

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[5] Section 2(a)(2)(A) requires that much of evidence the government uses to meet its burden to compel disclosure in a criminal investigation or prosecution must come from a source "other than a covered person." It is not clear what value this restriction has. Where law enforcement does succeed in meeting the requirements, disclosed documents may indicate that additional documents or information in the possession of the same covered person would be critical to the investigation. Yet this section prohibits law enforcement from using documents from the first disclosure to seek further disclosures. Such a restriction makes no sense and is unnecessary.

And the burden here is significant: Requiring the government to demonstrate by a preponderance of the evidence that there are reasonable grounds to believe that a crime has been committed, that the information it seeks from a covered person is essential to the investigation or prosecution of that crime, and that nondisclosure of the information would be contrary to the public interest will in essence require prosecutors to wage a "trial before the investigation" in order to obtain important evidence of serious criminal activity.

The burden this bill would impose on Federal law enforcement in investigations or prosecutions of certain leaks of classified information is especially troubling. In such cases, Section 2(a)(2)(A)(iii) of the proposed bill would apply, and that section saddles the Government with the obligation of going into a federal court and producing evidence of a quantity sufficient to prove "significant, clear, and articulable harm" to our nation's security before issuing a subpoena to a covered person that seeks protected information. In so doing, the bill effectively ratchets up the "preponderance of the evidence" standard articulated in Section 2(a). This creates a perverse result: The bill would actually require the government to make a more substantial showing in certain cases involving harm to the national security than is required in cases involving less serious crimes before issuing a subpoena to a member of the news media.

The heightened requirements of Section 2(a)(2)(A)(iii) apply only in cases where the individual who leaked the classified information had "authorized access to such information." But this is impossible: How can the government or a court know that an individual had authorized access to the classified information in question without knowing who it is that provided the journalist with the classified information in the first place?

The practical impact on leak investigations, moreover, could be enormous. An example illustrates the point. Consider a journalist who publishes a detailed story about covert classified efforts to track the movements of international terrorists. The story also contends—wrongly, as it turns out—that the covert program has monitored some individuals who were mistakenly identified as terrorists. The journalist attributes the information to a confidential source and describes the source as a government insider who intends to resign and relocate outside the United States, taking with him documents detailing the program's operation in order to write a tell-all book that will reveal details about this and numerous other classified government programs.

Despite their best efforts, the Department of Justice and the intelligence community are unable to identity the confidential source through independent means, and the journalist refuses to cooperate voluntarily with the Department. To prevent further harm to national security, the Attorney General—acting in accordance with the Department's longstanding policy with respect to media subpoenas—approves a written request for a narrowly-tailored subpoena that seeks only the identity of the journalist's source. The journalist then challenges the subpoena in court.

Under current law, to prevail on a motion to quash, the journalist would be required to prove the subpoena request was unreasonable and oppressive. Given the circumstances, it is

unlikely the journalist could make such a showing and thus the Department would learn the leaker's identity and apprehend him in time to prevent additional harm to our national security. Under the proposed bill, however, the Department would first be required to provide affirmative proof that the leak "caused significant, clear, and articulable harm" to our national security. While it is possible that such a showing could be made in this scenario, it is equally likely that a court could find that the harm was not yet realized or capable of specification. That finding would be enough to defeat the subpoena, even though the journalist would have done nothing other than file the motion to quash, thereby shifting the burden of proof to the Government. Moreover, even if a court credited the Department's showing of harm, and even if the Government demonstrated a significant harm to national security, the court nevertheless could find that public's interest in learning about the classified program outweighed the Government's interests—a finding that may be grounded on entirely subjective value judgments that the Government would be unable to refute by objective evidence. That finding would defeat the subpoena.

Even if we assume the Government could overcome the very high standard for disclosure contained in the FFIA, doing so in investigations or prosecutions of leaks of classified information will almost always also require the Government to produce still more extremely sensitive and even classified information in order to illustrate the "significant, clear, and articulable" harm to national security. 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.

The Department's opposition to this legislation is not based solely on the impact to national security investigations. It would be easy for criminals to use S. 2035 to frustrate legitimate law enforcement investigations. For example, a criminal wanting to distribute child pornography could post an "article" that on its face condemned child pornography but in fact contained thousands of images and movie clips that pictured adults sexually molesting children. Section 2 would require an extensive pre-trial hearing, including notifying the very target of the investigation. Such a requirement would effectively prevent a successful investigation.[6]

Similarly, criminal groups run web sites that provide a forum for group members to buy and sell stolen credit card numbers and counterfeit identity documents. Suppose one of these criminal groups created a section on the web site that provides "news" for its members about press releases from law enforcement agencies and changes in criminal laws that affect its members. Would that mean that the criminal group is "regular[ly] . . . publishing" news, and therefore a "covered person?" It appears Section 2 would create huge burdens on a law

[6] As discussed below, Section 6 might also prevent law enforcement from even subpoenaing the service provider to discover who posted the article.

enforcement investigation (such as proving to the court that the information is "essential"), and Section 6 would require notification to the criminals that the government was seeking the identifying data.

It may be argued that 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. 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 FFIA 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.)

The FFIA 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 the FFIA, 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 "essential" to his defense, rather than merely relevant and important; (3) "the nondisclosure of the information would be contrary to the public interest." *See* S. 2035 § 2(a).

The Department believes that the imposition of such burdensome standards goes 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.") Even supporters of reporters' privilege legislation have asserted that "[a] defendant's right to a fair trial and ability to defend himself against criminal charges should always outweigh the public interest in newsgathering; thus a balancing test is not appropriate in this context." ACLU Letter to Senate Judiciary Committee, Re: Reporters' Shield Legislation S. 2831, The Free Flow of Information Act of 2006 (June 21, 2006).

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. Under the proposed legislation, before allowing the issuance of a subpoena to the news media in a criminal investigation or prosecution of an unauthorized disclosure of classified information by a person with authorized access to such information, a court must determine "by a preponderance of the evidence" that (1) the information sought is "essential" to the prosecution; (2) the alleged unauthorized disclosure has caused "significant, clear, and articulable harm to the national security," S. 2035 at § 2(a)(2)(A)(iii); and (3) "nondisclosure of the information would be contrary to the public interest" S. 2035 at § 2(a)(3). Moreover, "[t]he content of any testimony or document that is compelled . . . to the extent possible [must be] limited to the purpose of verifying published information or describing any surrounding circumstances relevant to the accuracy of such published information" . . . [and is] narrowly tailored in subject matter and period of time so as to avoid compelling production of peripheral, nonessential, or speculative information." S. 2035 at § 2(b).

By its own terms, then, the FFIA cedes not one, but two core executive functions to the Judiciary. In the first instance, the legislation allows a court to determine what is and is not "essential" to an ongoing criminal investigation or prosecution. Second, the legislation would not only cede to a court the authority to *determine* what does and does not constitute "significant, clear, and articulable harm to the national security," (a core 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 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, "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 the function of evaluating the Government's national security interest 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 bas 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, the FFIA impermissibly divests the Executive branch of its constitutional obligation to ascertain threats to the national security. 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* S. 2035 at § 2(a)(3). The Department cannot support such an unconstitutional transfer of its Executive branch powers to the Judiciary.

<u>The FFIA Improperly Limits the Power of Judges and Will Impair the Judicial Process</u>

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." S. 2035 § 2(a). The definition for a "Federal entity" includes, *inter alia*, "an entity or employee of the judicial or executive branch." S. 2035 § 8(4).

Thus, under this definitional scheme, a Federal District Court Judge would have to apply the FFIA 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). Under existing law, when a Court learns that sensitive documentary evidence or Grand Jury testimony have been provided to a reporter in violation of either a Court's Protective Order or Rule 6(e), the Court has the authority to compel witnesses—including reporters—to provide documents and testimony in order to determine who violated the Court's Order. Under the terms of the FFIA, however, if the Judge wished a reporter to provide such documents or testimony in an effort to identify a source, the Court would be required to satisfy the requirements of the FFIA. Under most scenarios, a violation of a Protective Order or the Grand Jury secrecy rules would not satisfy the FFIA's requirements that disclosure of the source: (1) be "essential" to the resolution of the matter; (2) be "reasonably necessary to stop, prevent, or mitigate a specific case of death, kidnapping, or substantial bodily harm"; (3) "assist in preventing a specific case of terrorism against the United States," or (4) "assist in preventing a specific case of . . . significant harm to national security that would outweigh the public interest in newsgathering and maintaining a free flow of information to citizens."

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. Accordingly, the court will be stymied in its efforts to enforce its own orders as well as the rules regarding grand jury secrecy. By so restricting the authority of the judiciary, the FFIA runs directly counter to clearly established Supreme Court precedent. *See Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 796 (1987) ("The ability to punish disobedience to judicial orders is regarded as essential to ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other Branches.")

<u>The Limits on Obtaining Information From Communications Service Providers Are Poorly Defined and Do Not Protect Sensitive Investigations</u>

Section 6 provides that efforts to compel disclosure of information for communications service providers are covered by the same limitations as if the information were sought from a covered person, if the information "relates to a business transaction between a communications service provider and a covered person." The bill does not define what a "business transaction" is in this context, and such a broad term could be interpreted many different ways. For example, it

could be interpreted to cover situations in which a content provider, such as a website, purchases information from a purported journalist. If that is the intent, the website would seem to be covered under the definition of "covered person," making this section unnecessary.

Another interpretation could be that "business transaction" refers to any situation in which a user pays for or otherwise obtains an account, such as purchasing a domain name or creating a website. In that case, the statute would cover any customer records for any covered person. MySpace and sites like it would qualify as "communications service providers" under Section 8(1) of the bill. These types of websites would therefore not be subject to compelled disclosure of information about "business transactions" between the sites and the individual "covered persons" unless law enforcement could overcome the significant legal barriers this bill would erect. Thus, the bill would hamper law enforcement access to the records of thousands of websites and other providers and would require notification to targets with very limited exceptions. This would be a major and unnecessary change from the current state of the law and would inhibit any number of investigations that involve a wide variety of crimes, such as threats, intellectual property violations, and the distribution of child pornography.

In addition, the delayed notice requirements of Section 6 are too narrow in that they do not apply outside of criminal investigations. Rather than amending the section to apply to other situations, such as national security emergencies, the statute could simply use the standards for delayed notification of similar requests made to communications service providers pursuant to the Electronic Communications Privacy Act, 18 U.S.C. § 2705.

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Some proponents of the FFIA 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, 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 the FFIA 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 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, the FFIA 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 Arlen Specter
Ranking Member